BILL LOCKYER
Attorney General of the State of California
ALBERT NORMAN SHELDEN
Acting Senior Assistant Attorney General
SUSAN E. HENRICHSEN, Bar No. 66174
Supervising Deputy Attorney General
CATHERINE Z. YSRAEL, Bar No. 162498
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
110 West "A" Street, Suite 1100
San Diego, California 92101
Telephone: (619) 645-2080
Fax: (619) 645-2062

ROBYN C. SMITH, Bar No. 165446
MICHELE R. VAN GELDEREN, Bar No. 171931
Deputy Attorneys General
300 S. Spring Street, Suite 5 North
Los Angeles, California 90013
Telephone: (213) 897-6027
Fax: (213) 897-4951

Attorneys for Defendants
BILL LOCKYER, in his official capacity as Attorney General of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California

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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER 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.

INTRODUCTION

Defendants Bill Lockyer and John Garamendi ("Defendants") and Plaintiffs do not disagree regarding what is at issue in this case. The only issue before this Court, which is dispositive of both Plaintiffs' motion for summary judgment and Defendants' motion to dismiss, is the following: Did Congress, in enacting the 1996 amendments to the Fair Credit Reporting Act ("FCRA"), intend that the FCRA's preemption provision regarding information sharing among affiliates would apply to *all* affiliate-sharing in any and all circumstances, or, as is more reasonable, did it intend that this preemption provision would apply only to the subject matter of the FCRA: credit reporting?

As Defendants discuss in their motion to dismiss ("Motion" or "Def. Motion") and in their opposition to Plaintiffs' motion for summary judgment ("MSJ Opposition" or "MSJ Oppos."), the State of California rightfully exercised its police power to protect the State's consumers when it enacted the California Financial Information Privacy Act, California Financial Code sections 4050-4060 ("SB1"). In enacting SB1 to safeguard consumers' financial privacy, the State was not acting in a vacuum. Rather, SB1 is in keeping with the regulatory framework that Congress established in 1999 with the Gramm-Leach-Bliley Act ("GLBA").

Plaintiffs, however, contend that the FCRA preempts SB1. They cite the FCRA preemption provision, which provides that no state can impose requirements under state law regarding the "exchange of information among persons affiliated by common ownership or common corporate control," with the exception of a Vermont credit reporting statute that was in existence at the time of the 1996 amendment. 15 U.S.C. § 1681t(b)(2). Plaintiffs thus contend that the FCRA, which regulates credit reports, expressly preempts the portion of SB1 that regulates information sharing among affiliates, even in non-credit reporting situations.

In their opposition to Defendants' motion to dismiss, Plaintiffs ignore the strong presumption against preemption that protects state consumer protection statutes like SB1. They also distort the purpose and scope of the FCRA and the 1996 amendments to that Act; they support their argument, not with evidence of congressional intent, but with their own testimony before Congress and the opinion of the legislative committee's lawyer.

Plaintiffs also attempt to muddy the waters of the congressional record regarding the 1996 amendments to the FCRA by introducing statements of legislators made during the 2003 debate on the Fair and Accurate Credit Transactions ("FACT") Act. The opinions of legislators in 2003 are irrelevant to determining the intent of Congress in 1996. Moreover, the FACT Act did not substantively amend the preemption provision at issue here; the 2003 amendment simply made that provision permanent by deleting the sunset clause it added in 1996. Also, contrary to Plaintiffs' suggestion, the FACT Act does nothing to regulate the sharing of information among affiliates. It simply adds a provision to protect consumers from *marketing solicitations* that use such shared information. It would indeed be perverse to interpret congressional action protecting consumers from telemarketers and junk mail as a license to lessen consumers' protection in the distinct area of financial privacy.

Plaintiffs also miscast Defendants' argument concerning the impact of the GLBA savings clause, only to destroy the straw man that they create. Finally, they rely heavily on a now-vacated district court opinion, which has no value as precedent and is not persuasive.

Rather than refute Defendants' arguments with binding legal precedent and relevant legislative history, Plaintiffs' primary strategy is to attempt to convince the Court to examine the FCRA preemption clause in isolation. While plausible on the surface, Plaintiffs' proposed interpretation of the FCRA's preemption clause is undermined through application of the traditional principles of statutory construction, which require words to be examined in context to determine their role in the statutory scheme in which Congress intended it to function. When the express preemption clause is examined in this manner -- as the law requires -- it can be seen that Congress did not intend that the FCRA would preempt financial privacy laws like SB1. Plaintiffs certainly cannot prove, as they are required to do, that Congress clearly intended the FCRA to supersede SB1.

Accordingly, Defendants request that the Court grant their Motion and dismiss the complaint without leave to amend.

ARGUMENT

I. THE LAW OF PREEMPTION ESTABLISHES A STRONG PRESUMPTION THAT SB1 IS NOT PREEMPTED.

As noted in Defendants' Motion, consumer protection statutes such as SB1 are within the states' historic police powers. Defendants cite well-established Supreme Court precedent governing the preemption analysis required here. In accordance with the principles of federalism, these cases make clear that the party arguing for preemption must demonstrate that it was the clear and manifest intention of Congress to supersede state law, particularly where, as here, the State is exercising its historic police power to protect consumers. See Def. Motion, at 9-12; see also MSJ Oppos., at 7-12

In their opposition, Plaintiffs do not dispute these principles, nor do they contest their application here. Plaintiffs also provide no such evidence that Congress, in enacting the preemption provision in 1996, intended to preempt state financial privacy laws that are unrelated to credit reporting. Instead, Plaintiffs advocate a myopic approach in interpreting this preemption clause, demanding that the Court focus solely on isolated words within the clause, rather than considering the words of the entire statute as well as the scope and purpose of the FCRA's regulatory scheme as a whole. As is discussed in Defendants' Motion, in their MSJ Opposition and below, this strained reading flies in the face of well-settled principles of statutory construction, which require a holistic analysis of the statutory scheme at issue. Def. Motion, at 15-17; MSJ Oppos., at 7-12.

II. THE FCRA DOES NOT PREEMPT SB1.

A. The FCRA and its Preemption Provision Regulate Only the Use and Dissemination of Consumer Reports.

As discussed in Plaintiffs' Motion, 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). Information that does not constitute a consumer report is not governed by the FCRA – 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); Def. Motion, at 12-13.

Indeed, Section 1681 of the FCRA, which sets forth congressional findings and the statement of purpose for the statute, confirm that the FCRA's predominant purpose is to ensure the accuracy and fairness of credit reporting:

> (a) **Accuracy and fairness of credit reporting**
> The Congress makes the following findings:
> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
> (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a). As this provision demonstrates, Congress's overriding purpose in enacting the FCRA was to regulate the use and dissemination of consumer reports.

This interpretation is evident from an examination of legislators' statements in 1996, when the preemption provision was added to the FCRA. In committee reports, Congress made clear that it intended to clarify that the sharing of information among affiliated companies would not be considered a "consumer report" and, as such, would not be subject either to the FCRA or to state consumer reporting laws. There is no evidence whatsoever in the legislative history of the FCRA -- and Plaintiffs cite none -- suggesting that Congress intended to preempt state laws other than consumer reporting laws. See Def. Motion, at 12-15.

In their opposition, Plaintiffs ignore most of the legal authorities that Defendants cite and they do not address the legislative history presented in Defendants' Motion. Rather, Plaintiffs argue primarily that the Court should focus only on the specific words within the preemption provision, without viewing it in the context of the FCRA and without regard to congressional intent. Plaintiffs' Opposition, at 6-7.

1. Plaintiffs' Cited Legal Authority Does Not Support Their Proposed Method of Statutory Construction.

To support their argument that "plain meaning" analysis demands nothing more than an isolated reading of statutory phrases, Plaintiffs cite *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

Plaintiffs' Opposition, at 7. In *Sprietsma*, however, the Court did not endorse, nor did it conduct, such a superficial analysis. In holding that the express preemption of state "law" in the Federal Boat Safety Act ("FBSA") did not include common law claims against a boat manufacturer, the Court engaged in the type of analysis that the Defendants urge here; the Court considered the disputed word in the context of the provision in which it appeared and as it fit within the statutory scheme as Congress intended it to operate.

The Court began by examining the word "law" in the context of the preemption clause "because a word is known by the company it keeps . . . ." *Id.* at 63. The Court also examined the preemption provision's operation as part of the statutory scheme; for example, the FBSA's savings clause provided that compliance with the provisions of the FBSA "does not relieve a person from liability at common law or under State law." *Id.* at 63, quoting 46 U.S.C. § 4311(g). This savings clause buttressed the conclusion that common law claims are not preempted because "the savings clause assumes that there are some significant number of common-law liability cases to save . . . ." *Id.* at 64. Finally, the Court looked at the operation of the preemption provision within the statutory scheme and concluded that the Court's interpretation comported with congressional intent. *Id.* at 64 ("[i]t would have been perfectly rational for Congress not to pre-empt common-law claims, which -- unlike most administrative and legislative regulations -- necessarily perform an important remedial role in compensating accident victims.") Thus, only by engaging in this careful analysis could the Court discern the "plain meaning" of the word "law." The resulting interpretation of the preemption clause was narrower than the "plain meaning" of the disputed words would suggest if they were read in isolation.

The *Sprietsma* Court relied, in turn, on *CSX Transportation v. Easterwood*, 507 U.S. 658 (1992). The Court in *CSX* held that the Federal Rail Safety Act ("FRSA") and regulations promulgated pursuant to the FRSA preempted state claims based on the train's speed, but not claims based on the absence of proper warning devices. In that case, like in *Sprietsma*, the Court examined the federal statutory scheme and regulations at issue as a whole, rather than focusing on particular words in isolation. *See, e.g., CSX*, 507 U.S. at 674 (provisions governing speed limits must be "[u]nderstood in the context of the overall structure of the regulations . . . .").

Applying these principles here, as discussed above, in Defendants' Motion and MSJ Opposition, the FCRA should be construed as regulating only the domain of credit reporting. Viewing the preemption provision against the backdrop of the FCRA's regulatory scheme as a whole, this provision must be interpreted to supersede only state credit reporting laws that regulate affiliate sharing of information within the context of credit reporting. All other types of affiliate information sharing are not within the scope of the FCRA, and thus cannot be preempted by the FCRA.

2. Plaintiffs Present No Legislative History That Supports Their Interpretation of the FCRA Or Its Preemption Clause.

Rather than addressing the legislative history regarding the 1996 amendments to the FCRA and its predecessor bills that Defendants cite in their motion to dismiss, Plaintiffs instead cite to a 1998 article written by an attorney who worked for the House Committee on Banking and Financial Services at the time of the 1996 amendments. See Plaintiffs' Opposition, at 11:21-27. This article, written by someone who was *not* a member of Congress, and written several years after the 1996 amendments were enacted, cannot be considered in determining Congress' intent in enacting the preemption provision at issue. Cf. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979) (`[subsequent] [l]egislative observations . . . are in no sense part of the legislative history.' 'It is the intent of Congress that enacted [the section] . . . that controls.'") Mr. Seidel's comments cannot be viewed, even in the most favorable light, as observations by a legislator. Accordingly, his post hoc opinion about Congress's intent should be disregarded.

Plaintiffs also quote at length from their own testimony before Congress. Plaintiffs' Opposition, at 11:10-20. The statements of the banking industry, of course, are not evidence of the intent of the legislators themselves. Moreover, as Defendants discuss in their MSJ Opposition, even if Plaintiffs' testimony were probative of Congressional intent, it would support the statutory construction that Defendants propose. Plaintiffs wanted 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. MSJ Oppos., at 3-7. It is just these concerns that Congress made clear it was addressing with its 1996 amendments. Def. Motion, at 13-15; MSJ Oppos., at 3-7.

B. Omission of the Phrase "Credit Report" From the Preemption Clause Does Not Demonstrate that the Preemption Clause Extends Beyond State Laws Regulating Credit Reporting.

Plaintiffs argue that the FCRA preemption provision at issue here (§ 1681t(b)(2)) extends to *all* information sharing among affiliates, regardless of its context. Plaintiffs point out that other preemption provisions in the FCRA contain the words "consumer reports" yet the affiliate-sharing provision does not. Plaintiffs' Opposition, at 9-10, comparing 15 U.S.C. § 1681t(b)(1) with § 1681t(b)(2)

As Defendants discussed in their MSJ Opposition, however, Sections 1681t(b)(1) and 1681t(b)(2) cannot be compared in this manner because they are not parallel. The subsections of Section 1681t(b)(1) use the phrase "consumer reports" to describe other substantive provisions in the FCRA that actually regulate consumer reports. In contrast, the FCRA does not regulate affiliate information sharing, and so there is no other provision to which Section 1681t(b)(2) could refer.

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 references within these preemption provisions are possible because the FCRA regulates subject matter such as prescreening of consumer reports, duties of users of consumer reports, and content of consumer reports, respectively. In contrast, Congress could not have included such references in the affiliate-sharing preemption provision for the simple reason that the FCRA does not regulate information sharing among affiliates. Consequently, the absence of that phrase in the affiliate-sharing preemption provision results from the limited scope of the FCRA itself. It does not suggest that Congress intended to expand the scope of that sole preemption provision beyond the context of consumer reporting.

Moreover, Defendants previously addressed this argument in their MSJ Opposition, in response to identical arguments raised by Plaintiffs in their motion for summary judgment. See Plaintiffs' Memorandum in Support of Motion for Summary Judgment, at 7; Def. MSJ Oppos., at 12-15. As

Defendants previously explained, the "negative pregnant argument" set forth in *Russello v. United States*, 464 U.S. 16 (1983), is appropriate only in limited circumstances, and cannot be mechanically applied. See Def. MSJ Oppos., at 12-15.

C. <u>The 1996 Amendments Confirm That Congress Intended to Exclude Information Shared by Affiliates From the Ambit of the FCRA</u>.

Viewing the preemption provision against the backdrop of the FCRA's regulatory scheme as a whole, 15 U.S.C. § 1681t(b)(2), which provides that no state laws may be imposed "with respect to the exchange of information among persons affiliated by common ownership or common corporate control," with the exception of a pre-existing Vermont credit reporting statute, should be interpreted to exclude only state *credit reporting* laws that regulate affiliate sharing of information as a credit report. 15 U.S.C. § 1681t(b)(2). The specific reference to a Vermont credit reporting statute (excluding it from this prohibition) demonstrates that the prohibition was designed to apply only to state credit reporting laws.

Consequently, all *other* types of affiliate information sharing are not within the scope of the FCRA or state credit reporting laws; this is made abundantly clear by the 1996 amendments to the definition of a credit report, which *excludes* from its definition – and thus excludes from regulation by the FCRA and any corresponding state credit reporting laws – 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).

With these amendments, Congress ensured that information sharing among affiliates would not be subject to regulation as a credit report either through the FCRA (because such information was excluded from the definition of credit report) or through any state credit reporting laws (because the preemption provision prohibits any state laws that regulate such information as a credit report). These amendments, when viewed together, demonstrate that information sharing by affiliates was not to be construed as a consumer report and therefore fell outside the scope of the FCRA. Because such sharing is outside the scope of the FCRA, state financial privacy laws – which do not regulate credit reports or credit reporting agencies – are not preempted by the FCRA's preemption provision.

Plaintiffs contend that Congress's 1996 amendments that address information sharing among affiliates confirm "Congress' intent in the preemption clause to authorize the exchange of the type of experience information among affiliates at issue in this case." Plaintiffs' Opposition, at 10:10-12. In fact, quite the opposite is true. Congress's 1996 amendments were designed to exclude affiliate information sharing from regulation by the FCRA and any corresponding state credit reporting laws. See 15 U.S.C. § 1681a(d)(2)(A)(ii); 15 U.S.C. §1681a(d)(2)(A)(iii); 15 U.S.C. § 1681m(b)(2); and 15 U.S.C. § 1681t(b)(2).

As discussed above, for example, and as Plaintiffs concede (see Plaintiffs' Oppos., at 10:13-21), information sharing by affiliates was excluded from the definition of consumer report, thus exempting such sharing from regulation by the FCRA. See 15 U.S.C. § 1681a(d)(2)(A). Similarly, as Plaintiffs concede (see Plaintiffs' Oppos., at 10:22-28), Congress excluded from 15 U.S.C. § 1681(m)(b)'s requirements with respect to adverse action any information provided by an affiliate that relates "solely as to transactions or experiences between the consumer and the person furnishing the information." 15 U.S.C. § 1681m(b)(2)(C)(i)(I) and (ii).

These exclusions demonstrate that Congress did not intend that the FCRA would regulate information sharing by affiliates. Having ensured, with these provisions, that such information was outside the scope of the FCRA, Congress then sought to ensure that such information sharing could not be regulated by state credit reporting laws, by enacting the preemption provision at issue here. As Defendants previously discuss, the fact that Congress has removed affiliate information sharing from the purview of the FCRA and state credit reporting laws does not mean that such information is forever free of any type of regulation. A statute's preemptive force extends only to the subject matter of the statute, and no further. Accordingly, the State of California was free to enact financial privacy laws regulating affiliate information sharing, as contemplated by the GLBA, provided that such laws did not regulate this sharing as a credit report.

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

Plaintiffs' reliance on the Fair and Accurate Credit Transactions ("FACT") Act is equally misguided. As discussed in Defendants' MSJ Opposition, the enactment of the FACT Act, as well as

any legislators' statements made at the time, are not relevant to SB1 and do not change Congress's intent in enacting the preemption provision in 1996. MSJ Oppos., at 16-20.

With respect to affiliate information sharing, the FACT Act: (1) deleted the sunset clause of the FCRA preemption provision; and (2) inserted a new provision within the FCRA (§ 624, codified at 15 U.S.C. § 1681s-3) that regulates solicitation of consumers using information shared among affiliates.

Regarding the FCRA preemption provision, as discussed in Defendants' MSJ Opposition, the FACT Act did not substantively alter that provision. Rather, it simply made that provision permanent. Def. MSJ Opposition at 15-20. Moreover, even if the preemption provision were relevant to SBI, the sunset clause was not; that clause applied only to statutes enacted after January 1, 2004. SB1 was enacted before that date. MSJ Oppos., at 15-16.

Regarding the enactment of Section 624 addressing marketing solicitation, that section provides in pertinent part:

> (a) Special rule for solicitation for purposes of marketing
> (1) Notice
> Any person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 1681a(d)(2)(A) of this title, may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless –
>
> > (A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and
> > (B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person.

18 U.S.C. § 1681s-3(a).

Plaintiffs sweepingly contend that this section evidences Congress's intent to preempt the affiliate-sharing requirements of SB1, arguing that "Congress amended the FCRA to impose uniform federal regulations upon affiliate information sharing." Plaintiffs' Opposition, p. 8:9-10, citing FACT Act § 624. This provision, however, does not establish uniform standards for affiliate information sharing. In fact, it does not regulate affiliate information sharing at all. Rather, as Defendants discuss in their MSJ Opposition, it regulates the *solicitation of customers for marketing purposes* using information shared by affiliates by giving consumers the opportunity to opt out of receiving such marketing solicitations. MSJ Oppos., at 16-17. Section 1681s-3 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)). Thus, the FACT Act does not regulate affiliate information sharing any more than the do-not-call rule regulates the substance of telemarketers' scripts or the FCRA regulates the terms on which lenders may offer credit to consumers.

Nor is the legislative history Plaintiffs cite regarding the FACT Act relevant to the issue before the Court, for the reasons set forth in Defendants' MSJ Opposition. MSJ Oppos., at 17-20. As Defendants previously discussed, doomsday comments by Senators Feinstein and Boxer regarding the consequences if Congress did not pass their amendment establishing a uniform national opt-out standard, similar to SB1, are of limited value in ascertaining legislative intent. 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. 612, 639-640 (1967).

Moreover, statements made in 2003 regarding the meaning of the FCRA's preemption provision cannot be used to illustrate a prior Congress's intent in passing the 1996 amendments that added the preemption provision to the FCRA. See e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979) ('[l]egislative observations . . . are in no sense part of the legislative history.' 'It is the intent of Congress that enacted [the section] . . . that controls.'" (citations omitted).) See MSJ Oppos., at 18.

IV. PLAINTIFFS DISTORT DEFENDANTS' DISCUSSION OF THE GLBA SAVINGS CLAUSE.

Plaintiffs' primary argument in their opposition is essentially a straw man that Plaintiffs create in order to knock down. Specifically, Plaintiffs allege that Defendants' "principal legal argument" is that the GLBA's savings clause trumps other federal statutes. Plaintiffs' Opposition, at 2-6. Plaintiffs, however, misconstrue Defendants' discussion of the GLBA and its state-law savings clause. Contrary to Plaintiffs' argument, Defendants do *not* contend that the GLBA savings clause permits states to avoid preemption by the FCRA. Rather, Defendants simply contend that financial privacy laws such as

SB1 are not within the scope of the FCRA because they do not address credit reporting, but that such laws are fully within the scope of the GLBA. Thus, it is the GLBA's savings clauses that govern whether SB1 is preempted by federal law.[1/]

As Defendants discuss in their MSJ Opposition, a statute extends only as far as the subject matter it regulates. MSJ Oppos., at 7-12. Accordingly, the preemption clause within the FCRA is limited to the subject matter of the FCRA, which is the use and dissemination of credit reports. As a result, its preemption provision has no preemptive effect on SB1, which is a financial privacy law, subject to the historic presumption against preemption afforded to consumer protection statutes.

Defendants do not suggest that the GLBA modifies, limits or supersedes the FCRA. Indeed, the FCRA exclusion clause within the GLBA, which Defendants discuss in their moving papers, confirms that the GLBA was not intended to modify the provisions of the FCRA, particularly as they address exemptions from the definition of credit reporting. Def. Motion, at 20-21.

Plaintiffs cite the GLBA's legislative history to support their reading that the GLBA savings clause is limited to the subject matter of the GLBA. Plaintiffs' Oppos., at 5-6. Defendants, however, do not argue otherwise. The legislative history provided by Plaintiffs regarding the GLBA is thus irrelevant to resolving the issues before this Court.

V. THE NOW-VACATED *DALY CITY* DECISION IS NEITHER PROBATIVE NOR OF ANY PRECEDENTIAL VALUE.

Throughout their opposition, 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. They even cite that decision in their complaint. That decision is, of course, not binding on this Court. More importantly, the Ninth Circuit vacated the judgment in that case shortly after Plaintiffs filed their motion for summary judgment. [Appendix in Support of Def. MSJ

---

1. Indeed, as Defendants discuss in their Motion, the GLBA specifically regulates affiliate sharing, because it 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). See Def. Motion, at 22:12-23.

Oppos., 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).

Plaintiffs attempt to sidestep this, by emphasizing that the *Daly City* decision was vacated on other grounds. As the Ninth Circuit has explained, a decision that has been vacated -- even if vacated on other grounds -- is of *no precedential value*:

> The Authority's reliance on Hutchison is also not well taken for another reason. The Supreme Court expressly vacated the Hutchison decision . . . Although the Authority contends that the decision was "vacated on other grounds," we find that contention curious. A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever.

Durning, 950 F.2d at 1424 n. 2, citing *O'Connor v. Donaldson*, 422 U.S. 563, 578 n. 2 (1975).

Furthermore, even if that decision retained precedential value, it should not be followed for the reasons discussed in Defendants' Motion, at 21-23, and in their MSJ Opposition, at 20-21.

CONCLUSION

As Defendants have previously discussed, 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.

Dated: June 4, 2004

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
ALBERT NORMAN SHELDEN ,
Acting Senior Assistant Attorney General
SUSAN HENRICHSEN,
Supervising Deputy Attorney General
ROBYN C. SMITH,
MICHELE VAN GELDEREN,

By _____
CATHERINE Z. YSRAEL,
Deputy Attorney General

Attorneys for Defendants
BILL LOCKYER, in his official capacity as

Attorney General of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California