No. 06-17226

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. GORMAN,
Appellant-Plaintiff,
v.
WOLPOFF & ABRAMSON, LLP,
Defendant,

MBNA AMERICA BANK, N.A.,
Appellee-Defendants.

Appeal From the United States District Court for the
Northern District of California, San Jose Division
Hon. James Ware, Presiding
CV 04-04507-JW

Consumer Data Industry's Association's Motion for One-Day Extension of Time Due to CM/ECF Technical Errors to File its Application for Leave to File its Brief of *Amicus Curiae* and Supporting Brief

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Prospective *amicus curiae*, Consumer Data Industry Association ("CDIA"), pursuant to Fed. R. App. Proc. 29(e) and 9th Cir. R. 29-2(e), moves this Court to grant it a one-day extension of time to file its Application for Leave to File its Brief of *Amicus Curiae* in Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc* together with its supporting brief. In support of this motion, CDIA states as follows:

1. Pursuant to 9th Cir. R. 29-2, CDIA was required to file its Application for Leave to File its Brief of *Amicus Curiae* in Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc* on March 9, 2009.

2. To meet the Court's electronic filing requirements, counsel for CDIA registered with the Court and, on March 5, 2009, obtained notice that his ECF Filing Status was Active and that counsel was authorized to file electronically.

3. On March 9, 2009, counsel for CDIA completed the Application and supporting Brief. Using Microsoft WORD, CDIA converted its Application and Brief into Adobe PDF documents for electronic filing.

4. On the evening of March 9, 2009, CDIA counsel repeatedly attempted to file the Application and Brief electronically through the Court's CM/ECF system. Counsel was unable to complete the filing. Although the Case

Number was correctly entered and the left menu item ("Prospective Amici and Intervenors") and right menu item ("Submit Brief and File Amicus or Intervenor Motion Together") were checked, the screen would not advance when the "Continue" button was clicked.

5. As a consequence, CDIA was unable to file its Application and Brief within the required time.

6. On Tuesday morning, March 10, 2009, counsel for CDIA restarted his computer and again accessed the Court's CM/ECF system. Counsel entered the Case Number, selected the proper menu items and clicked the "Continue" button. On this occasion, the screen advanced to permit the electronic filing of the documents.

7. So that the Application and Brief would reflect the actual date of filing, rather than the date of attempted – but unsuccessful – filing, counsel for CDIA re-printed the Application and Brief in Adobe PDF to reflect filing on March 10, 2009.

8. Because CDIA's inability to file its Application for Leave to File its Brief of *Amicus Curiae* in Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc* together with its supporting briefs was not due to CDIA's delay, but rather due to technical issues the cause of which remain unclear to counsel and because CDIA successfully filed its brief as soon

as possible the next calendar day, CDIA seeks the Court's leave to file its Application and Brief on March 10, 2009, one day beyond the March 9, 2009 due date.

WHEREFORE, the Consumer Data Industry Association prays for an order granting CDIA a one-day extension of time file its Application for Leave to File its Brief of *Amicus Curiae* in Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Bank* together with its supporting brief.

Dated: March 10, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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s/ James Chareq
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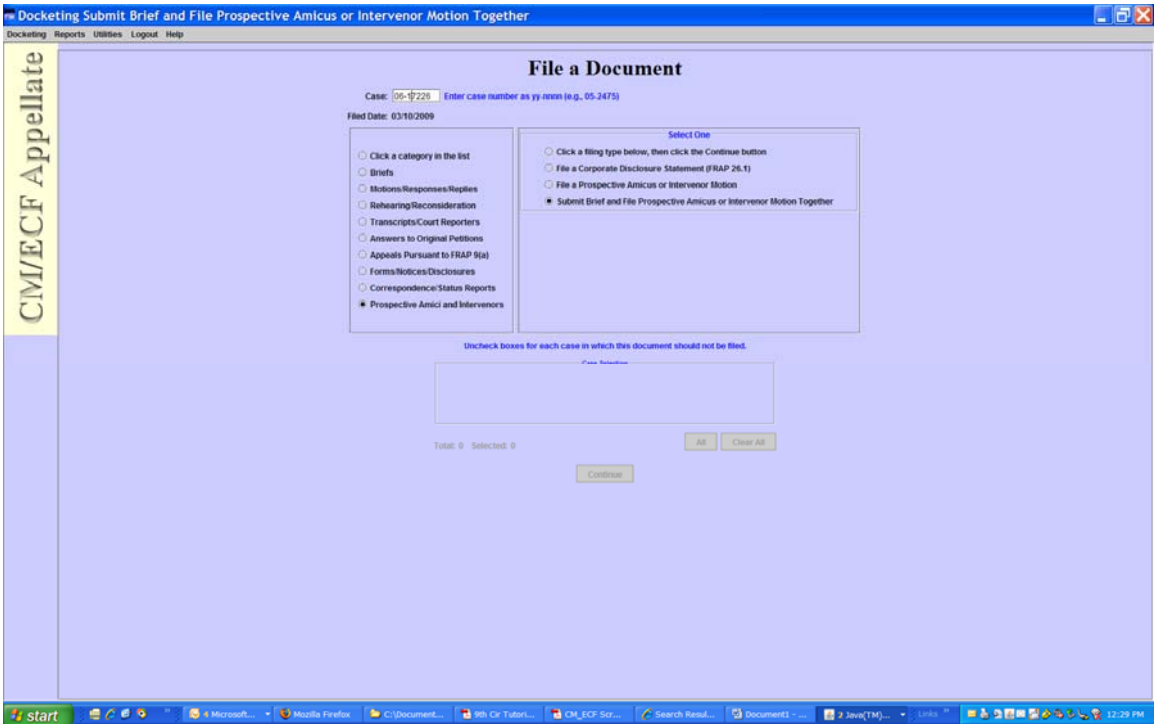
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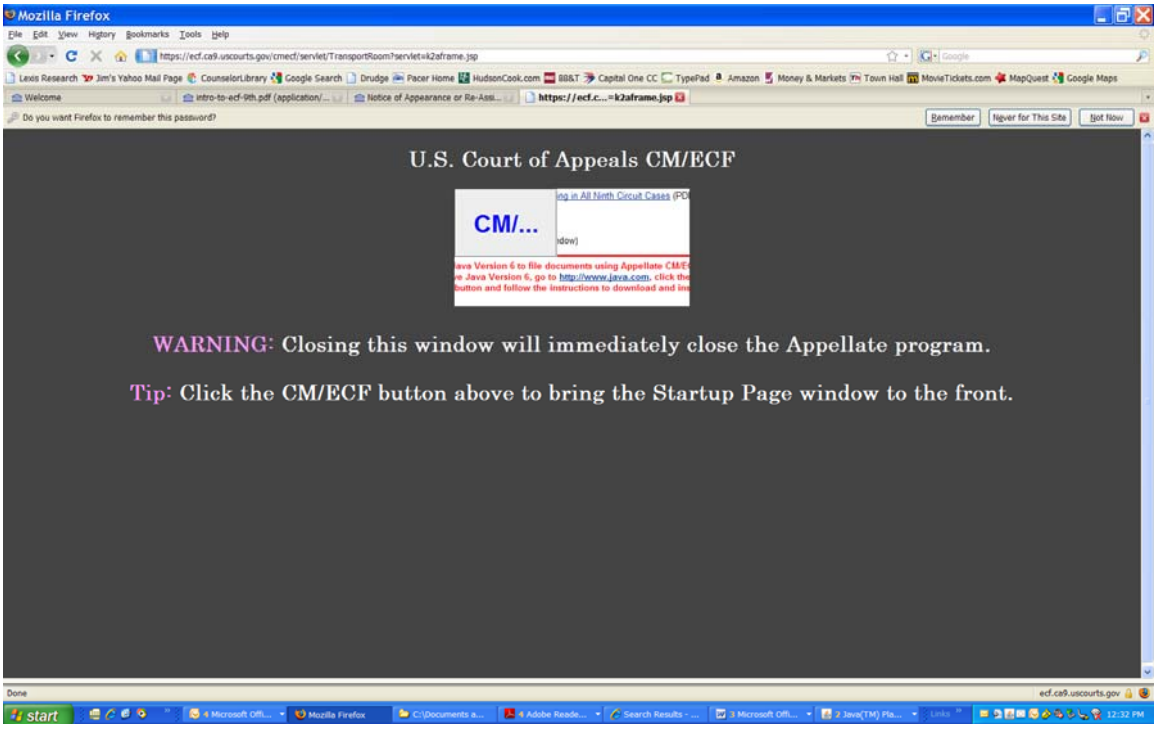
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Consumer Data Industry Association's Application for Leave to File its Brief of *Amicus Curiae* in Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc*

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The Consumer Data Industry Association ("CDIA"), pursuant to Fed. R. App. P. 29(b) and 9th Cir. R. 29-2, applies to this Court for leave to file its brief of *amicus curiae* in support of Appellee-Defendant MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc*. In support of this Application, CDIA states as follows:

1. The panel's decision involves novel interpretations of complex legal issues.

2. The panel holds that a narrow exception to the preemption of any subject matter relating to an information furnisher's obligations under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(1)(F), may be judicially expanded to permit private lawsuits where the FCRA expressly prohibits such lawsuits. 15 U.S.C. §§ 1681s-2(a)(1), 1681s-2(c)&(d).

3. The panel also holds that a consumer who disputes the accuracy or completeness of his consumer report information through a consumer reporting agency ("CRA") may bring a private lawsuit against the furnisher of that information if the furnisher fails to correct the information following an investigation triggered by the consumer's dispute to a CRA. This, too, is contrary to the express prohibition against such lawsuits found in the FCRA. 15 U.S.C. §§ 1681s-2(a)(2), 1681s-2(c)&(d).

4. In deciding whether to grant MBNA's petition, the Court will be called up to consider the careful balance struck by Congress when it amended the FCRA in 1996. In striking that balance, Congress sought to incentivize information furnishers to *voluntarily* participate in the consumer reporting process. Without voluntary furnisher participation, CRAs cannot produce the accurate and complete consumer reports that are relied upon by virtually every creditor, insurer, employer, landlord or other consumer-oriented business in the United States.

5. The Court will also be called upon to evaluate the relationship between the narrow subsection of California law, Cal. Civ. Code § 1785.25(a), that Congress excepted from the FCRA's subject matter preemption. Specifically, the Court must determine whether permitting the private enforcement of California's furnisher accuracy and completeness requirements frustrates the Congressional objective of ensuring a nationally uniform enforcement regime with respect to a furnisher's obligation to refrain from providing information that the furnish knows, or has reasonable cause to believe, is inaccurate or incomplete.

6. In assessing the intent of Congress, as expressed in the language of the FCRA, the Court will consider whether the panel's decision disrupting the FCRA's nationally uniform enforcement regime furthers or hinders the

Congressional objectives of promoting the efficiency of the banking system, meeting the needs of commerce and ensuring that consumers are treated fairly and impartially and with respect for the consumers' right to privacy. 15 U.S.C. § 1681(a).

7. CDIA is uniquely qualified to assist the Court in considering the complex issues raised by the panel's novel interpretations.[1]

8. CDIA is an international trade association whose membership includes over 300 consumer credit and other specialized CRAs operating in the United States and throughout the world. CDIA is the largest trade association of its kind in the world.

9. In its more than 100-year existence, CDIA has worked with the U.S. Congress and with State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the efforts that led to the enactment of the FCRA in 1970 and every subsequent amendment, including the 1996 amendments that added the furnisher responsibility provisions and preemption provisions that are the subject of this appeal.

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[1] CDIA has filed amicus briefs in numerous federal courts of appeals and with the United States Supreme Court in appeals involving the Fair Credit Reporting Act. *See, e.g., Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 127 S.Ct. 2201 (2007); *Trans Union, LLC v. Federal Trade Commission*, 536 U.S. 915, 122 S.Ct. 2386 (2002).

10. CDIA's brief of *amicus curiae* will assist the Court in considering the consumer reporting industry's understanding of a furnisher's responsibilities when responding to notices of dispute received through CRAs.

11. In addition, CDIA's brief will explain the essential role played by tens-of-thousands of information furnishers in the provision of the consumer data that CRAs rely upon to produce more than 1.5 billion consumer reports each year. Because that furnisher participation is entirely voluntary, CDIA can provide insight concerning the impact of the panel's decision subjecting furnishers to private lawsuits for the provision of inaccurate or incomplete information – whether those lawsuits are based on the furnisher's initial provision of consumer information or the furnisher's alleged failure to correct previously furnished information following an investigation triggered by a consumer dispute received through a CRA.

12. CDIA believes that its decades-long central role in the consumer reporting industry and participation in the process leading to the FCRA's 1970 enactment and the amendments adding the furnisher provisions that are at the heart of appellant Gorman's claim allows CDIA to offer the Court a unique perspective available from no other source.

WHEREFORE, *amicus curiae*, Consumer Data Industry Association prays for leave to file its brief in support of appellee MBNA's Petition for Rehearing and Rehearing *en banc*.

Dated: March 10, 2009 Respectfully submitted,

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Consumer Data Industry Association's Amicus Brief In Support of MBNA America Bank, N.A.'s Petition for Rehearing and Rehearing *En Banc*

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Identity, Interest and Authority of *Amicus Curiae*

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. CDIA is the largest trade association of its kind in the world. Its membership includes more than 300 consumer credit and other specialized consumer reporting agencies ("CRAs") operating in the United States and throughout the world.

In its more than 100-year existence, CDIA has worked with the U.S. Congress and with State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and every subsequent amendment, including the 1996 amendments[1] that added the furnisher responsibility provisions and preemption provisions that are the subject of this appeal.

CDIA's members' business depends upon the willingness of furnishers to voluntarily provide their consumer transaction data to CRAs. Impediments to this voluntary system threaten the integrity and value of the consumer report information CRAs provide to creditors and other users of consumer report information. For that reason, CDIA is vitally interested in the outcome of this

[1] *See,* The Consumer Credit Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 428 (1996).

appeal because this Court will decide: (i) whether the FCRA's nationally uniform regime for the enforcement of a furnisher's accuracy and completeness responsibilities will be preserved by giving effect to the FCRA's plain language; and (ii) whether the FCRA's clear preemption of private rights of action against furnishers based on the alleged inaccuracy or incompleteness of the information they provide to CRAs will survive the panel's effort re-write the FCRA.

CDIA's decades-long central role in the consumer reporting industry, and participation in the process leading to the FCRA's 1970 enactment and amendments, allows CDIA to provide the Court with a unique perspective on the consumer reporting industry's understanding of furnisher responsibilities under the FCRA, the availability of private rights of action against furnishers, and the preemption provisions at issue in this appeal. CDIA can also assist the Court as it considers the impact of the panel's decision, if uncorrected, on the furnishers of consumer data who provide the essential information to CRAs that is used to produce the consumer reports used by millions of businesses in the United States.

Because CDIA has not obtained the consent of all parties to the filing of its *amicus* brief, CDIA has applied for leave to file its brief.[2]

[2] *See*, Fed. R. App. P. 29(a).

Argument

CDIA agrees with, and joins in, the arguments of MBNA as they relate to the panel's errant holding that Gorman's claims are not preempted or prohibited by the FCRA's plain language. Given the nationwide impact of the panel's decision, CDIA addresses two matters not addressed by MBNA in its petition: (i) the preemption analysis in light of the FCRA's requirement, under 15 U.S.C. § 1681s-2(a)(2), that furnishers update and correct previously furnished information; and (ii) the harmful impact of the panel's decision on consumers, CRAs and the users of consumer reports.

I. The panel's decision threatens the furnisher incentives that Congress developed to encourage the voluntary provision of the consumer information that is essential to the consumer reporting system.

The FCRA is the product of nearly 40 years of careful legislative development. It has been amended numerous times and now comprises 31 sections and over 23,000 words. Yet, its fundamental objectives remain unchanged. The FCRA was enacted to promote the efficiency of the banking system, meet the needs of commerce, and ensure that CRAs act "with fairness, impartiality, and respect for the consumer's right to privacy."[3] These objectives continue to guide the operations of each CRA. But the FCRA's objectives cannot be met solely through CRA diligence.

[3] 15 U.S.C. § 1681(a).

The consumer reporting system is dependent, in the first instance, on those businesses that provide information about consumers to the CRAs – the furnishers. Their participation in the consumer reporting system is *entirely voluntary*. No federal or state law *requires* any creditor, insurer, employer, landlord or other business to furnish the information resulting from its consumer transactions to any CRA; yet all users of consumer report information seek the most accurate and complete information to inform their individualized assessments of the risk presented by a particular consumer.[4]

If the panel's decision is not corrected, furnishers will, out of concern about private lawsuits, stop voluntarily furnishing consumer information to CRAs. Consumer reports produced from this reduced file information will be less accurate, less complete and, therefore less predictive. The report user's resulting uncertainty concerning a consumer will lead to delays in decision-making and increased costs as users struggle to obtain more complete information from other sources. These costs will be passed along to the consumer who must wait for a decision concerning his application for credit, insurance, employment, housing or other benefits.

In drafting the FCRA, Congress recognized the essential role played by information furnishers. To encourage their voluntary participation in the

[4] *See*, 15 U.S.C. § 1681b.

consumer reporting process, Congress imposed *no statutory duties* on furnishers for the first 26 years following the FCRA's enactment. In 1996, Congress amended the FCRA to define a narrow set of furnisher responsibilities,[5] some of which may be enforced through private consumer lawsuits under the FCRA.[6] Importantly, even with these amendments, Congress continued to insulate furnishers from *all private causes of action* relating to the alleged inaccuracy or incompleteness of any information furnished to the CRAs.

To further the FCRA's accuracy and completeness objectives, Congress added a dispute mechanism allowing consumers to challenge the accuracy and completeness of their furnisher-provided information through the CRAs and requiring furnishers to respond to those challenges through the same CRAs.[7] Congress also authorized governmental agencies, including the Federal Trade Commission ("FTC"),[8] and the States' attorneys general, to bring enforcement actions against furnishers, obtain injunctive relief, and recover civil penalties of

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[5] *See*, 15 U.S.C. § 1681s-2 (added by Pub. L. No. 104-208, 110 Stat. 428 (1996).
[6] *See*, 15 USC § 1681s-2(b).
[7] 15 U.S.C. §§ 1681i(a)(2), 1681s-2(b).
[8] *See*, Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 19-20 (2004) (*hereinafter* "FTC 2003 Report to Congress") (accuracy and completeness enforcement actions resulting in multi-million dollar settlements) available at <http://www.ftc.gov/reports/facta/041209factarpt.pdf>.

up to $2,500 per violation,[9] and damages of up to $1,000,[10] if an existing injunction was violated.[11] Any furnisher "who knows or has reasonable cause to believe" that the information it furnishes to CRAs is inaccurate or incomplete subjects itself to such enforcement actions.[12]

Under the FCRA's uniform enforcement regime, furnishers voluntarily participate in the consumer reporting system because they are confident that governmental authorities will not pursue frivolous inaccuracy and incompleteness claims against them and because the FCRA insulates them from *private* lawsuits alleging the inaccurate or incomplete furnishing of information to CRAs. Now, nearly 40 years after the FCRA was enacted, over 30,000 furnishers voluntarily provide billions of pieces of information on consumers each month to CRAs that maintain files on over 200,000 million consumers and provide more than 1.5 billion consumer reports each year to consumer report users.[13]

It is Congress' careful balancing of furnisher incentives, consumer rights and governmental enforcement authority that has led to the development of the

[9] 15 U.S.C. §§ 1681s-2(c), 1681s; 15 U.S.C. § 45.
[10] 15 U.S.C. § 1681s(c)(1).
[11] 15 U.S.C. § 1681s(c)(5).
[12] 15 U.S.C. §§ 1681s-2(a)(1)(A), 1681s-2(c)&(d).
[13] *See*, FTC, 2003 Report to Congress at 8-9.

most accurate, complete and efficient consumer reporting system in the world – a system now threatened by the panel's errant decision.

II. The panel's decision ignores Congress' carefully crafted, nationally uniform approach to enforcing the FCRA's furnisher responsibilities, undermines the FCRA's fundamental objectives and threatens the efficiency of the nation's consumer credit system.

A. Private rights of action to enforce CCRAA § 1785.25(a) are inconsistent with the FCRA's nationally uniform regime for enforcing furnisher responsibilities and are, therefore, preempted by FCRA § 1681t(a).

In recognition of Congress' attempt to incentivize furnishers to voluntarily provide consumer information to CRAs, the panel concedes that the FCRA prohibits *any* private claim to enforce the furnisher's accuracy and completeness duties found in FCRA § 1681s-2(a).[14] The panel nonetheless holds that a California consumer may privately enforce an essentially identical furnisher responsibility found in the CCRAA (*see* comparative table below).

FCRA § 1681s-2(a)(1)(A)
A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.
Cal. Civ. Code § 1785.25(a)
A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.

[14] *Gorman v. Wolpoff & Abramson, LLP*, No. 06-17226 slip op. at 308 (9th Cir. Feb. 12, 2009) published at 552 F.3d 1008 (9th Cir. 2009).

The panel reaches this conclusion despite recognizing the fatal inconsistency in its own reasoning:

> The only *real inconsistency* arises between the *private* enforcement of California and Massachusetts statutes *and § 1681s-2(c) and (d), which prohibit private enforcement* of the obligations under § 1681s-2(a).[15]

According to the panel, this "inconsistency ... does not offend the purported goal of uniformity of credit reporting obligations."[16]

To be clear, the panel reaches the contradictory conclusion that permitting a private lawsuit by a California consumer for a furnisher's alleged inaccurate or incomplete information furnishing does *not* offend the FCRA's national uniformity objective even though *no other State* permits such a claim and the FCRA expressly prohibits such private lawsuits. The panel is incorrect and its decision is contrary to the reasoned decisions of those courts that considered the same issue before the panel's decision.[17]

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[15] *Gorman*, No. 06-17226 slip op. at 308 (emphasis added).
[16] *Id.*
[17] *See, e.g., Lin v. Universal Card Servs. Corp.*, 238 F.Supp.2d 1147, 1152 (N.D.Cal. 2002) ("Provisions contained in the CCRAA that stand in conflict with the FCRA were, however, preempted.... These provisions [§ 1785.25(g) and § 1785.31] were not excepted from preemption, however, because they are *in* consistent [sic] with the enforcement scheme of Congress under § 1681s-2(d), in matters relating to furnishers of consumer credit information.").

FCRA § 1681t(a) preempts *any state law* that is "inconsistent with *any* provision" of the FCRA.[18] FCRA § 1681s-2(c)(1)&(d) prohibits the private enforcement of a furnisher's accuracy and completeness responsibilities and the furnisher's duty to correct any previously furnished information that is determined to be inaccurate or incomplete.[19] The private enforcement of the same responsibilities under the CCRAA necessarily stands as an obstacle to the FCRA's nationally uniform furnisher enforcement regime and is, therefore, preempted by FCRA § 1681t(a).[20]

Moreover, the FCRA's exclusive administrative enforcement of the furnisher accuracy and completeness responsibilities furthers – as the panel's decision does not – Congress' objective of incentivizing furnisher participation in the consumer reporting process by ensuring a nationally uniform enforcement regime that protects furnishers from a multitude of consumer claims alleging the furnishing of inaccurate or incomplete information to CRAs. The panel's decision obstructs the achievement of this Congressional objective.

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[18] 15 U.S.C. § 1681t(a).
[19] 15 USC § 1681s-2(a)(1)&(2).
[20] S. Rep. No. 104-185 at 55 (1994) ("By preempting state and local provisions relating to the subject matter regulated by these provisions of the FCRA, [§ 1681t] establishes the FCRA as the national uniform standard in these areas.").

B. Private rights of action under CCRAA §§ 1785.25(g) and 1785.31 to enforce the furnisher's accuracy and completeness responsibilities identified in CCRAA § 1785.25(a) are preempted by FCRA § 1681t(b)(1)(F).

In its decision, the panel had difficulty accepting the *breadth* of preemption provided by Congress under FCRA § 1681t(b)(1)(F) when it used the most all-encompassing language available to it - "any," "with respect to any," and "relating to" – as well as the *narrowness* of the exception to preemption Congress provided for when it identified only CCRAA *sub*section 1785.25(a), rather than all of section 1785.25, as being saved from preemption.[21]

FCRA § 1681s-2 regulates both the furnisher's duty to furnish accurate and complete information to the CRAs and who may enforce those duties. The FCRA's plain language preempts *any* state law "respecting" the furnisher's accuracy responsibilities (*i.e.*, a subject matter regulated under § 1681s-2(a)) and "relating" to the furnisher's responsibilities (*i.e.*, the duty, under § 1681s-2(a)(1)(A), to furnish accurate and complete information and, under § 1681s-2(a)(2), to correct previously furnished information that is determined to be inaccurate or incomplete).[22] The FCRA provides only for two specifically-defined narrow exceptions to the FCRA's broad subject matter preemption.[23]

[21] 15 USC § 1681t(b)(1)(F).
[22] 15 U.S.C. § 1681t(b).
[23] 15 USC § 1681t(b)(1)(F).

The CCRAA's enforcement provisions, CCRAA §§ 1785.25(g) and 1785.31, provide for private rights of action by consumers to enforce a furnisher's accuracy and completeness responsibilities. These state law enforcement provisions necessarily "relate" to the accuracy and completeness subject matter regulated by FCRA § 1681s-2 and are, therefore, preempted by the FCRA's plain language and no California consumer may privately enforce CCRAA § 1785.25(a) against a furnisher. Again, this is not a novel conclusion; rather, it is the holding of every court that considered the issue prior to the panel's decision.[24] How could the panel hold otherwise? The road to the panel's conclusion is a bumpy one.

The panel reasons that, although the FCRA does not *actually* save CCRAA subsection 1785.25(g) and section 1785.31 from preemption, the FCRA does not need to because subsection 1785.25(g) imposes no "requirement or prohibition" – the seemingly "magic words" found at the beginning of the

[24] *Roybal v. Equifax*, 405 F.Supp.2d 1177, 1181 n.5 (E.D.Cal. 2005); *accord*, *Howard v. Blue Ridge Bank*, 371 F.Supp.2d 1139, 1144 (N.D.Cal. 2005); *Lin v. Universal Card Services Corp.*, 238 F.Supp.2d 1147, 1152 (N.D.Cal. 2002); *Buraye v. Equifax, et al.*, 2008 U.S. Dist. LEXIS 80732 *21-22 (C.D.Cal. 2008; *Drew v. Equifax Info. Servs.*, 2007 U.S. Dist. LEXIS 53157 *13-14 (N.D.Cal. 2007); *Hogan v. PMI Mortgage Ins. Co.*, 2006 U.S. Dist. LEXIS 32179 *35-36 (N.D.Cal. 2006); *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, 200 U.S. Dist. LEXIS 19847 *8 (N.D.Cal. 2000); *Liceaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 908 (2008), *rehearing denied*, (Jan. 20, 2000), *petition for review filed*, No. S170308 (Cal. Feb. 6, 2009).

FCRA's subject matter preemption provision upon which the panel built its errant holding. Rather, according to the panel, subsection 1785.25(g) and section 1785.31 merely provide "for additional avenues through which consumers can ensure compliance with the obligations Congress specifically meant to impose"[25] – that is, they are the panel's discovered California *alternative* to the enforcement regime that Congress defined as the *exclusive* means by which all of the FCRA § 1681s-2 furnisher responsibilities may be enforced.[26]

For the panel, the fact that Congress expressly saved CCRAA *sub*section 1785.25(a) from preemption while *not even mentioning* subsection 1785.25(g) or section 1785.31 is of no importance. According to the panel, the "plain language" of the FCRA's preemption provision does not apply to these state enforcement provisions.[27] Oddly, the panel concludes that the same Congress that *specifically identified* CCRAA *sub*section 1785.25(a) as being saved from

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[25] *Gorman*, No. 06-17226 slip op. at 308. Subsection 1785.25(g) does impose "requirements" upon furnishers. Under subsection 1785.25(g), a furnisher *is liable* for the failure to comply with any part of section 1785.25 *"unless the furnisher establishes by a preponderance of the evidence*, that at the time of the failure to comply ..., the furnisher maintained reasonable procedures to comply with those provisions." Cal. Civ. Code § 1785.25(g) (emphasis added). To avoid liability, the furnisher is required to establish certain facts by a preponderance of the evidence. This requirement relates to the subject matter (*i.e.*, furnisher responsibilities) regulated by FCRA § 1681s-2.

[26] 15 USC § 1681s-2(c)(1)&(d).

[27] *Id.*

subject matter preemption *chose to omit* any reference to *sub*section 1785.25(g) or section 1785.31 because Congress believed it "plain[ly]" clear that subsection 1785.25(g) and section 1785.31 were *not* preempted.[28]

To accept the panel's reasoning then, one must conclude that 7 years after subsection 1785.25(a) was saved from FCRA preemption by the 1996 amendments, when Congress substantially amended the FCRA in 2003, Congress did not amend the FCRA to clarify the scope of preemption under FCRA § 1681t(b)(1)(F) despite knowing that every court to have considered the question up to that time had concluded that the FCRA *did, in fact, preempt private lawsuits* under the California law.[29] Those Massachusetts courts that have considered the same issue with respect to the nearly identical Massachusetts law that was also saved from preemption have reached similar conclusions.[30]

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[28] *Gorman*, No. 06-17226 slip op. at 306.

[29] *See, supra*, n. 24; *see also, Liceaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 910, 86 Cal.Rptr.3d 876, 882 (Cal.App. 2008) ("it is noteworthy that Congress has not chosen to dispute this viewpoint [that private claims to enforce CCRAA § 1785.25(a) are preempted]. In 2003, one year after the U.S. District Court rendered its reported decision in [*Lin*], Congress made substantial modifications to FCRA. Had it felt *Lin* to be wrongly decided and intended California to maintain the right to bring private consumer actions, a simple amendment would have so provided.").

[30] *See, e.g., Leet v. Cellco Partnership*, 480 F.Supp.2d 422, 433 (D.Mass. 2007), *reconsideration denied*, 2007 U.S. Dist. LEXIS 82869 (D.Mass. 2007); *accord, Islam v. Option One Mort. Corp.*, 432 F.Supp.2d 181, 189 (D.Mass. 2006);

The panel, apparently, did not believe that Congress would save a state law from preemption but leave no *private* method of enforcing the law.[31] The panel's dissatisfaction with the "administrative-enforcement" versus "private-enforcement" balance struck by Congress to achieve a nationally uniform FCRA enforcement regime cannot justify the panel's re-writing of federal law. Moreover, Congress did not, as the panel suggests, preserve a state law that cannot be enforced.[32] Rather, the language of CCRAA § 1785.25(a) so closely mirrors that of FCRA § 1681s-2(a)(1)(A), that the administrative enforcement of FCRA § 1681s-2(a) would also promote the furnisher accuracy and completeness objectives found in CCRAA § 1785.25(a).[33] This administrative enforcement furthers – as the panel's created private right of action does not –

Gibbs v. SLM Corp., 336 F.Supp.2d 1, 13 (D.Mass. 2004); *Dawe v. Capital One Bank*, 2007 U.S. Dist. LEXIS 82870 *4-5 (D.Mass. 2007).

[31] *Gorman*, No. 06-17226 slip op. at 308-09.

[32] The CCRAA § 1785.25(a) accuracy requirement may also be enforced by the California Attorney General under state law. *See*, Cal. Bus. & Prof. Code §§ 17200, 17204, 17206.

[33] Contrary to the panel's understanding, *Gorman*, No. 06-17226 slip op. at 308 and n. 33, when Congress exempted CCRAA § 1785.25(a) from subject matter preemption, FCRA § 1681s-2(a) imposed a materially different obligation on furnishers than did CCRAA § 1785.25(a). *See* 15 U.S.C. § 1681s-2(a)(1)(A) (1996) (prohibiting furnishing of information that furnisher "knows or consciously avoids knowing" is inaccurate). It was only later, in 2003, that Congress amended FCRA § 1681s-2(a)(1)(A) to substantially track the language of CCRAA § 1785.25(a). That amendment permitted the CCRAA's stricter prohibition to withstand federal preemption. However, by not exempting CCRAA §§ 1785.25(g) and 1785.31, Congress ensured that violations of section 1785.25(a) could be enforced not by consumers but by state officials.

Congress' objective of providing for a nationally uniform means of enforcing a furnisher's accuracy and completeness responsibilities that could incentivize continued furnisher participation in the consumer reporting process.

III. The FCRA prohibits private rights of action under FCRA § 1681s-2(b) for a furnisher's alleged failure to correct inaccurate or incomplete information following an investigation prompted by a notice of dispute received through a CRA.

The panel incorrectly holds that a consumer may sue a furnisher under FCRA § 1681s-2(b) for allegedly furnishing inaccurate or incomplete information to a CRA when: (i) the consumer has previously disputed furnished information directly to the furnisher; (ii) the furnisher did not include the notice of dispute when it initially furnished the consumer's information to a CRA; and (iii) the furnisher does not correct the omission following a consumer dispute received through a CRA.[34] Because the panel's decision discovers a private right of action *under the FCRA* for the furnishing of inaccurate or incomplete information where none exists, the decision will lead to the filing of similar claims in every state.

The FCRA specifically prohibits any private lawsuit: (i) to recover for a furnisher's failure to include a notice of the consumer's direct dispute in the information furnished to a CRA; or (ii) to recover for a furnisher's failure to correct information previously furnished to a CRA to include the notice of

[34] *Gorman*, No. 06-17226 slip op. at 292-93.

dispute after determining that the furnished information is incomplete or inaccurate.[35]

Although the panel concedes that a consumer has no private right of action against a furnisher for the failure to include a notice of the consumer's direct dispute in the information furnished to a CRA, the panel incorrectly limits that reasoning to the information *initially* furnished to the CRA.[36] Thereafter, despite the language of FCRA § 1681s-2(c)(1)&(d) – referring to § 1681s-2(a) - the panel holds that a consumer *has* a private right of action under § 1681s-2(b) for the furnisher's failure to correct *previously* furnished inaccurate information.[37] The panel finds this claim in the furnisher's FCRA § 1681s-2(b) duty to investigate a consumer dispute received through a CRA and to report the results of that investigation to the CRA.[38]

According to the panel:

> [A] furnisher does not report "incomplete or inaccurate" information within the meaning of § 1681s-2(b) simply by failing to report a *meritless* dispute, because reporting an actual debt without noting that it is disputed is unlikely to be materially misleading. It is the *failure to report a bona fide dispute ... that gives rise to a furnisher's liability* under § 1681s-2(b).[39]

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[35] 15 U.S.C. § 1681s-2(c)(1)&(d).
[36] *Gorman*, No. 06-17226 slip op. at 293.
[37] *Id.* at 1022.
[38] *Id.*
[39] *Id.* (emphasis added).

The panel, in effect, holds the furnisher to a standard found nowhere in the FCRA. According to the panel, the furnisher who receives a dispute through a CRA must determine whether the dispute is meritorious or bona fide. If the dispute is meritorious or bona fide, the furnisher must correct the information furnished to the CRA or be liable *to the consumer in a private cause of action* brought under FCRA § 1681s-2(b) for the alleged failure to "report the results of the investigation." If, however, the furnisher determines that the dispute is meritless, the panel concludes that the furnisher is not liable to the consumer.[40]

The panel's decision holds the furnisher liable to the consumer under FCRA § 1681s-2(b) if the furnisher's investigation, following a notice of dispute, *inaccurately* determines that the dispute is meritless or not bona fide. No such private cause of action is permitted under section 1681s-2(b). A furnisher is liable to the consumer under section 1681s-2(b) only if the furnisher fails to conduct a reasonable investigation – the accuracy or completeness of the information furnished to the CRAs following the investigation - is not a basis upon which a consumer may sue a furnisher.[41]

FCRA § 1681s-2(a)(1)(A) prohibits furnishers from furnishing information to a CRA that is known to be inaccurate or that the furnisher has reasonable

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[40] *Id.* at 1023.

[41] 15 U.S.C. § 1681s-2(c)&(d). Despite its ultimate holding, the panel appears to agree. *See, Gorman*, No. 06-17226 slip op. at 288.

cause to believe is inaccurate. Subsection 1681s-2(a)(2) requires the correction of any *previously* furnished information to a CRA that the furnisher determines is inaccurate or incomplete. The form Notice to Furnishers of Information prepared by the FTC pursuant to § 1681e(d)(2)[42] makes clear that the furnisher's duty under FCRA § 1681s-2(a)(2) to correct or supplement *previously furnished information* applies *any time* a furnisher determines that such information is inaccurate or incomplete.[43] Such a determination may come from the furnisher's independent review of its previously furnished information, or in response to a consumer's direct dispute to the furnisher *or a dispute received through a CRA*. Regardless of the cause of the furnisher's determination that previously furnished information is inaccurate or incomplete, the furnisher's duty to correct the information is found only in FCRA § 1681s-2(a)(2). The FCRA makes clear that consumers have no private right of action to enforce any part of subsection 1681s-2(a). The panel may not read FCRA § 1681s-2(b) to create a private right of action that the FCRA expressly prohibits.

Left uncorrected, the panel's attempt to re-write the FCRA will give rise to lawsuits in every jurisdiction that will discourage furnishers from continuing to voluntarily furnish consumer transaction information the CRAs. Consumer reports will, as a consequence, become less complete, less accurate and less

[42] 15 U.S.C. § 1681e(d)(2).
[43] 16 C.F.R. Pt. 698, App. G, Notice of Furnisher Responsibilities.

predictive of a consumer's potential risk. This, in turn, will harm consumers by undermining the efficiency of the consumer reporting system and increasing the costs of those creditors, insurers, landlords, employers and other businesses who rely on consumer reports for their decision-making. The result will be increased delays and transaction costs that will be passed on to consumers. The panel's decision must be corrected to avoid this consumer harm.

Conclusion

For the foregoing reasons, CDIA respectfully requests that MBNA's Petition for Rehearing and Rehearing *En Banc* be granted.

Dated: March 10, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief, exclusive of those materials referred to in FRAP 32, contains 4,182 words.

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s/ James Chareq
James Chareq

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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