IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appeal No. 06-17226

JOHN C. GORMAN,

Plaintiff/Appellant,

v.

MBNA AMERICA BANK, N.A.,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
HON. JAMES WARE, Presiding
NO. CV-04-04507-JW

APPELLANT'S OPPOSITION TO MBNA'S PETITION FOR REHEARING OR REHEARING EN BANC

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Appellant John C. Gorman ("Gorman") submits that MBNA's petition for rehearing or rehearing in en banc should be denied.

INTRODUCTION

This appeal raises issues under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq., and Cal. Civ. Code § 1785.25. Gorman alleges that MBNA failed to properly "verify and correct" contested information that -- to this day -- adversely affects his ability to obtain credit.

Congress enacted the FCRA to promote "efficiency in the Nation's banking system and to protect consumer privacy." TRW, Inc. v. Andrews, 534 U.S. 19, 23 (2001). The FCRA establishes the responsibilities and rights of consumers, furnishers, credit reporting agencies, and users of credit information and "creates a federal remedy against a credit reporting agency that fails to follow 'reasonable procedures to assure maximum possible accuracy' of the information contained in a consumer's credit report." Crabill v. Trans Union, L.L.C., 259 F.3d 662, 663 (7th Cir. 2001)(emphasis added). As a consumer-protection statute, the FCRA must liberally construed. Guimond v. Trans Union Credit Information Co., 45 F.3d 1329 (9th Cir. 1995).[1]

It order to carry out Congress' objective, it is essential that the "re-investigation" mandated by § 1681s-2(b) be

[1] Notwithstanding Congress' intent, credit reports are notoriously rife with defamatory credit entries. A 2004 survey found that 79% of credit reports contain errors, with 25% containing mistakes serious enough to result in denial of credit. National Association of State PIRGs, Mistakes Do Happen: A Look At Errors in Consumer Credit Reports (June 2004) http://www.uspirg.org/home/reports/report-archives/financial-privacy-security, at pp. 11, 13. A 2000 survey found that more than 50% of credit reports contain inaccuracies that are could result in either denial or a higher cost of credit. Consumer Reports, Credit Reports: How Do Potential Lenders See You? (July 2000) http://www.accessmylibrary.com/coms2/summary_0286-28070197_ITM, at pp. 52-53.

conducted in a manner that is thorough and "reasonable": "It would make little sense to conclude that, in creating a system intended to give consumers a means to dispute -- and, ultimately, correct -- inaccurate information on their credit reports, Congress used the term 'investigation' to include superficial, unreasonable inquiries by creditors." Johnson v. MBNA America Bank, N.A., 357 F.3d 426, 431-432 (4th Cir. 2004).

STATEMENT OF THE CASE

On September 22, 2004, Gorman sued MBNA for libel, intentional and negligent violations of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), and violation of Cal. Civ. Code § 1785.25. (E.R. 1).

On May 1, 2006, MBNA moved for summary judgment. (E.R. 143). Its motion was supported by a single declaration of an MBNA "compliance officer" that sets forth MBNA's version of the pertinent events and conclusorily attested that MBNA followed its "established procedures" for investigating customer disputes. Significantly, these "established procedures" appear to be limited to nothing more than "reviewing the [MBNA] account notes" and "verifying that the name, address, date of birth and social security number" of the person lodging the dispute match with MBNA's files. (E.R. 174-181). Gorman filed pleadings and evidence showing that MBNA ignored information within its internal notes and records and arguing that the adequacy of MBNA's re-investigation efforts presented disputed issues of material fact. (E.R. 511-637). Among other things, MBNA never explained why its "investigation" disregarded an August 2003 internal note in which one of its managers had flagged Gorman's

account as being the subject of a "dispute." (E.R. 590). Further, MBNA never asked any of CRAs to which Gorman had complained for copies of the actual complaint forms so that MBNA could better understand the basis for Gorman's dispute. (E.R. 576). The district court granted the summary judgment motion.

On January 12, 2009, this Honorable Court affirmed in part and reversed in part the summary judgment as to the FCRA claim, upheld summary judgment as to the libel claim, and reversed dismissal of the Cal. Civ. Code § 1785.25 claim. As to the FCRA claim, summary judgment was affirmed as to the reasonableness of MBNA's investigation of Gorman's dispute but reversed as to the question of MBNA's compliance with its obligation under with 15 USC § 1681s-2(a)(3) to report Gorman's account as "disputed."

Gorman sought rehearing on February 24, 2009. MBNA filed for rehearing or rehearing in banc on February 25, 2009, raising three issues: (1) whether the ruling finding that Cal. Cal. Code § 1785.25 claim is not preempted was error?; (2) whether 15 U.S.C. § 1681s-2(b)(1)(D) can be violated if a furnisher fails to report that information is disputed by a consumer?; and (3) whether plaintiff produced sufficient evidence of causation?

On March 17, 2009, this Honorable Court requested opposition to MBNA's petition and several amicus briefs.

ARGUMENT

I. CAL. CIV. CODE § 1785.25 IS NOT PREEMPTED BY THE FCRA

MBNA had a full opportunity to brief this issue in connection with the original appeal; there is no basis for rehearing.

MBNA's argument that this Honorable Court should avoid

upsetting existing law as set forth in a handful of district court cases (virtually all of which, other than those authored by Judge Ware, are unpublished) turns jurisprudence on its head. It is for district courts to adhere to appellate precedent, not the other way around. Further, the California Court of Appeal has recently adopted this Panel's ruling. Sanai v. Saltz, 170 Cal. App. 4th 746 (2009).[2]

Any preemption analysis must begin with the principle that there is a strong presumption against federal preemption. The Supreme Court has consistently emphasized that "when addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008)(emphasis added).

Section 1785.25 is part of the California Consumer Credit Reporting Agencies Act ("CCRAA"), a 1975 statute designed to "require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for ... information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." Cal. Civ. Code § 1785.1(c). Section 1785.25(a) recites that a "person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the

[2] Sanai rejected the contrary result in Liceaga v. Debt Recovery Solutions, LLC, 169 Cal. App. 4th 901 (2009), petition for review pending (No. S170308), a case that was decided without the benefit of the decision issued by this Panel.

person knows or should know the information is incomplete or inaccurate." Section 1785.25(g) provides a private remedy for a violation: "A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with these provisions." Cal. Civ. Code § 1785.31 codifies the remedies available to a consumer whose credit has been damaged by a violation of § 1785.25(a).

Congress added language to the FCRA in 1996 to clarify that it did not intend to amend or alter existing legal rights established by state law except for those that are fundamentally "inconsistent" with federal law:

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

15 U.S.C. § 1681t(a).

The fact that a state statute is "different" than the FCRA does not mean that it is "inconsistent." If a credit furnisher can comply with both laws, there is no inconsistency and no preemption.

Highly significantly, in the next subsection of 15 U.S.C. § 1681t, Congress included a provision that expressly preserved Cal. Civ. Code § 1785.25(a). 15 U.S.C. § 1681t(b)(1)(F)(ii) recites that the preemptive effect of § 1681s-2 of the FCRA

"relating to the responsibilities of persons who furnish information to consumer reporting agencies" does not apply "with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996)." Nothing in the legislative history of the 1996 FCRA amendments suggests that in preserving § 1785.25(a), Congress intended to sub silento strip California residents of the remedies set forth in § 1785.31 or limit its enforcement to governmental officials. Congress indisputably voted not to preempt § 1785.25(a) -- and thereby presumably concluded that furnishers of credit information should be required to comply with both the FCRA and § 1785.25(a).

In Credit Data of Arizona, Inc. v. State of Arizona, 602 F.2d 195, 197 (9th Cir. 1979), this Circuit held that in light of inclusion of language reciting that § 1681t was not intended to alter, affect, or exempt any person from the obligation to comply with state law, it is clear that Congress did not intend to entirely preempt the right to seek recourse under state law.

The FTC has similarly articulated its view of the narrow scope of FCRA pre-emption at 16 C.F.R., pt. 600, appendix § 622, ¶ 1 (1995): "State law is pre-empted by the FCRA only when compliance with inconsistent state law would result in violation of the FCRA." Congress has acquiesced in the FTC's interpretation for the past 14 years. As the agency charged with enforcement of the FCRA, the FTC's position should be entitled to great deference. As decreed in Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th 548, 577 (1995), "California is not foreclosed from enacting greater protections for consumers

injured by the activities of [credit] reporting agencies." Cisneros held that a consumer injured by false information furnished by a credit furnisher is entitled to proceed with claims for violation of Cal. Civ. Code §§ 1785.1 and other state law claims. In 1996, Congress went even further with respect to § 1785.25, codifying that the FCRA's preemption provisions "shall not apply ... (ii) with respect to section 1785.25(a) of the California Civil Code." 15 U.S.C. § 1681t(b)(1)(F)(ii). Section 1681t(b)(1)(F)(ii) was thus enacted with the specific intent to exclude Cal. Civ. Code § 1785.25(a) from preemption.

Judge Ware dismissed Gorman's § 1785.25 claim based on his belief that while § 1785.25 was preserved, the remedy provisions of § 1785.31 should be deemed preempted. Gorman v. Wolpoff & Abramson, LLP, 370 F. Supp. 2d 1005, 1111 (N.D. Cal. 2005). In reaching this result, Judge Ware relied upon Lin v. Universal Card Services Corp., 238 F. Supp. 2d 1147 (N.D. Cal. 2002), a case authored by Judge Ware himself.

As recognized by this Panel, Lin and its progeny would render 15 U.S.C. § 1681t(b)(1)(F)(ii) meaningless. Courts should not presume that Congress enacted a statute without a purpose. Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. 2002). The district court's reasoning that California residents have a right that cannot be enforced is patently illogical. Angel v. Bullington, 330 U.S. 183, 209 (1947)(a "right without a remedy is no right at all.") It is illogical to conclude that Congress went to the trouble of exempting Cal. Civ. Code § 1785.25(a), yet intended to strip away the ability of consumers to obtain redress for violation.

TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001)("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. 2002)("We cannot suppose that Congress made an amendment without a purpose.")

The FCRA was initially passed in 1970 based upon a congressional finding that "[i]naccurate 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." 15 U.S.C. § 1681(a)(1). The FCRA was crafted to protect consumers. Guimond v. Trans Union Credit Information Co., 5 F.3d 1329, 1333 (9th Cir. 1995). The original 1970 statute, however, regulated only credit reporting agencies and left regulation of the "furnishers" of inaccurate credit information to state law. The FCRA was amended in 1996 to create rules for persons who furnish information to credit reporting agencies, at which time a related preemption provision was added at 15 U.S.C. § 1681t(b)(1)(F). Included in this preemption provision was the "savings clause" exempting § 1785.25 and a similar Massachusetts statute. 15 U.S.C. § 1681t(b)(1)(F)(ii).

There was a six year battle in Congress over whether and how to amend the FCRA. Various bills were considered, including several that would have completely preempted state law. These bills were not enacted. It was only after several members of Congress spoke of their anti-preemption sentiment and the

legislation was ultimately re-worked to eliminate preemption of California and Massachusetts statutes that the 1996 amendments finally passed.[3]

MBNA's argument that California law is fundamentally "inconsistent" with federal law was rejected by this Panel, which correctly noted that § 1785.31 is not even subject to the FCRA preemption provision because it is not a "requirement or prohibition." The plain language of the § 1785.31 remedy provisions do not "require" or "prohibit" anything -- they simply provide a remedy for violation of the exempted California statue. If Congress had wanted to preempt state law "remedies," it easily could have used that word rather than the narrower "requirements and prohibitions." The bottom line is that Congress did not take any steps to preempt state law "remedies."

Section 1785.31 is in fact a "remedy" provision; it does not require credit furnishers to engage in conduct that is "inconsistent" with or "in violation of" the obligations found in the FCRA. The fact that the remedies provided to consumers by the California Legislature may be somewhat different than those provided by the FCRA does not mean that § 1785.31 of the California statute is preempted.

The contention made by MBNA and the amicus concerning a

[3] Pub. L. No. 104-208, §2491, 110 Stat. 3009-452 (1996)(final omnibus bill that was passed included the carve-out for California and Massachusetts laws); see, e.g., 141 Cong. Rec. S5419-01, S5450 (1995)(statement of Sen. Bryan)("I would like to put everyone on notice that I feel very strongly that we should not preempt States' rights in the area of liability .... Certain members of the business community have and will continue to push to preempt this area of State law, but I will fight such efforts and will have to reconsider the merits of the bill, should I lose on this issue."); 140 Cong. Rec. H9797-05, H9810 (1994)(statement of Rep. Kennedy); 14 140 Cong. Rec. H9797-05, H9815 (1994)(statement of Rep. Castle). Amicus National Association of Screening Agencies quotes only selected extracts of legislative history at pages 9-10 of its brief, ignoring the remarks of the numerous legislators who disagreed with the credit industry's position.

need for nationwide "uniformity" lacks merit. MBNA and its credit industry brethren rather hysterically urge that dire consequences will follow unless the § 1785.25 preemption ruling is rescinded. Any such policy arguments appropriately should be addressed to Congress, as it was Congress that decided to include the "carve-out" for § 1785.25.

The Supreme Court has noted in an analogous context that when Congress passes legislation that preserves state law, policy arguments about the need for uniformity do not justify judicial re-writing of the existing legislation. UNUM Insurance Company Of America v. Ward, 526 U.S. 358, 376n.9 (1999)(non-uniform state regulations "are the inevitable result of the congressional decision [in ERISA's Savings Clause] to save local insurance regulation"). Similarly, the Supreme Court has noted that "uniformity" arguments are frequently exaggerated by parties seeking to insulate themselves from state laws:

> Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding .... We have been pointed to no evidence that such tort suits led to a 'crazy quilt' of [Federal Insecticide Fungicide Rodenticide Act] standards or otherwise created any real hardship for manufacturers or for EPA.

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 450 (2005).

There is no credible basis to conclude that allowing California consumers to seek redress for inaccurate credit reporting will unduly impair the credit reporting industry. Further, there is no reason to believe that a significant portion of credit furnishers will, as certain amicus contend, stop providing credit information altogether. Plaintiff has not seen any news articles since the issuance of the Gorman decision

suggesting that Trans Union, Equifax, or Experian are about to go out of business. Nor did any CRAs cease doing business between 1996 and 2002 (the period between the adoption of the 1996 FCRA amendments and when the Lin decision was published).

There is no benefit to the nation's banking system in having creditors that are not careful about what they report -- or how they go about re-investigating consumer complaints -- continuing to submit erroneous, misleading, and defamatory account data about consumers. The nation's banking system would be far better off without the inclusion of data submitted by credit providers who do not wish to undertake appropriate measures to ensure that the information they are furnishing is being "fairly and accurately" reported. 15 U.S.C. § 1681(a)(2)("The banking system is dependent upon fair and accurate credit reporting.")

Finally, the argument of certain amici suggesting that giving effect to § 1785.25 stands as an "obstacle" to the congressional intent underlying the FCRA is specious. The primary objective of the FCRA is to ensure that consumers are not harmed by defamatory credit information. Giving effect to §§ 1785.25 and 1785.31 serves to promote Congress' primary objective, not undermine it.

II. MBNA'S FAILURE TO REPORT THAT THE ADVERSE CREDIT INFORMATION ABOUT GORMAN WAS DISPUTED

MBNA argues at page 14-17 of its petition that the Panel erred in holding that furnishers of information may be found liable for violating 15 U.S.C. § 1681s-2(b)(1)(D) by failing to report that adverse information is disputed. Yet the arguments

currently being advanced by MBNA were quite properly rejected by this Honorable Court. Gorman v. Wolpoff & Abramson, LLP, 552 F.3d 1008, 1021-1024. Further, MBNA's petition once again ignores Regulation Z, which prohibits a credit card issuer from reporting a disputed credit card charge as delinquent unless it also "reports that the amount or account is in dispute." 12 C.F.R. § 226.13(g)(4).

MBNA was clearly put on notice that Gorman disputed the Four Peaks charges. (E.R. 194-97, 202). Even its internal records reflected that the account needed to be reported as "disputed," as a memo from August 18, 2003 confirmed that "Manager rvwed and agreed with listing as dispute." (E.R. 590)(emphasis added). Yet when MBNA received the CRA dispute forms, it consistently failed to change the reporting of the account status to reflect the existence of Gorman's dispute.

MBNA's position below was that it did not report Gorman's "dispute" because the dispute had not been "resolved in his favor." (Answering Brief at 26). Yet MBNA failed to cite authority suggesting that a furnisher is only obligated to report disputes that it has resolved in the consumer's favor. MBNA appears to have dropped this argument and instead now argues that no private right of action exists to redress a furnisher's non-reporting of a dispute. This new argument should not even be considered on rehearing. In any event, MBNA's position lacks merit.

The duty of a credit furnisher upon receipt of a consumer dispute notification form from a CRA is to conduct a careful and thorough re-investigation, then correct any mistakes in the

manner in which the account is being reported. A failure to do so -- including a failure to note that a consumer's account is the subject of a dispute -- violates the FCRA. This Panel recognized that:

> Gorman does have a private right of action, however, to challenge MBNA's subsequent failure to so notify the CRAs after receiving notice of Gorman's dispute under § 1681s-2(b). In addition to requiring that a furnisher conduct a reasonable investigation of a consumer dispute, § 1681s-2(b) also requires a creditor, upon receiving notice of such dispute, to both report the results of the investigation and, "if the investigation finds that the information is incomplete or inaccurate, report those results" to the CRAs. § 1681s-2(b)(1)(C), (D). Gorman argues that MBNA's reporting of the Four Peaks charge and delinquency, without a notation that the debt was disputed, was an "incomplete or inaccurate" entry on his credit file that MBNA failed to correct after its investigation. As this claim alleges that obligations imposed under § 1681s-2(b) were violated, it is available to private individuals.

Gorman, supra, 552 F.3d at 1022.

The Panel's ruling relies upon Saunders v. Branch Banking & Trust Company of Virginia, 526 F.3d 142, 148 (4th Cir. 2008), which similarly concluded that a private right of action exists under § 1681s-2(b) based on a furnisher's failure to report negative account information as "disputed":

> The FCRA requires furnishers to determine whether the information that they previously reported to a CRA is "incomplete or inaccurate." § 1681s-2(b)(1)(D) (emphasis added). In so mandating, Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading. Courts have held that a credit report is not accurate under FCRA if it provides information in such a manner as to create a materially misleading impression.

Saunders rejected the defendant credit furnisher's contention that Congress had exempted furnishers of information from private liability by placing the initial obligation to

report "disputes" in subsection (a): "No court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have already reported the information accurately under § 1681s-2(a)." Id. at 149-50. Thus, where there is evidence that the furnisher is aware that the negative account information it is reporting is subject to a bona fide dispute, the existence of the dispute must be reported to the CRAs. Id. at 150.

This Panel also cited Dalton v. Capital Associated Industries, Inc., 257 F.3d 409, 415-16 (4th Cir. 2001), for the proposition that a consumer's failure to pay a debt that is disputed "does not reflect financial irresponsibility" and that failure to report the existence of a dispute can render the information being reported sufficiently misleading so as qualify as "incomplete or inaccurate" within the meaning of the FCRA. 552 F.3d at 1023.

The same conclusion was reached in Alexander v. Moore & Associates, Inc., 553 F. Supp. 948, 954 (D. Haw. 1982)(summary judgment granted based on a finding that the defendants had violated the FCRA by not attaching a statement of dispute to the file of the plaintiff consumer)(recognizing that if negative account information is "relevant to a consumer's fiscal responsibility and for that reason included in a consumer report, a dispute of such information tending to negate a conclusion of financial irresponsibility is likewise relevant").

MBNA posits at page 17 of its petition that the Saunders court was "misled" by a "concession" made by the defendant that

the same standards of accuracy apply to a furnisher as apply to a CRA. The Fourth Circuit was not in any way "misled." After carefully reviewing the applicable law and precedent, it concluded that CRAs cannot provide accurate information consistent with § 1681e unless furnishers are likewise expected to carefully "reinvestigate" and correct any inaccurate or incomplete reporting of customer accounts:

> Both § 1681e and § 1681s-2 serve the same purpose: ensuring accuracy in consumer credit reporting. A CRA can best fulfill its obligation to report accurately under § 1681e if it receives accurate information from a furnisher under § 1681s-2.

Saunders, supra, 526 at 148 (4th Cir. 2008).[4]

Saunders rejected the position now being urged by MBNA:

> This argument ignores the interplay of § 1681s-2(a) and § 1681s-2(b). The first subsection, § 1681s-2(a), provides that furnishers have a general duty to provide accurate and complete information; the next subsection, § 1681s-2(b), imposes an obligation to review the previously disclosed information and report whether it was "incomplete or inaccurate" upon receipt of a notice of dispute from a CRA. The second subsection thus requires furnishers to review their prior report for accuracy and completeness; it does not set forth specific requirements as to what information must be reported, because these requirements have already been set forth in the first subsection. No court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have already reported the information accurately under § 1681s-2(a).

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[4] Cf., Dennis v. BEH-1, LLC, 504 F.3d 892 (9th Cir. 2007), which reversed summary judgment for a CRA and sua sponte entered summary judgment for the plaintiff consumer based upon evidence that the CRA had failed to discover and correct inaccuracies appearing in his credit report, even though such mistakes could have been avoided by carefully reading the contents of an available court file. In finding a FCRA violation, this Honorable Court stressed the importance of having "a company that traffics in the reputations of ordinary people ... train its employees to understand the legal significance of the documents they rely on." Id. at 897. This same logic applies with equal force to credit furnishers. In the case at bar, MBNA could have easily ascertained that even the merchant ultimately agreed with Gorman that the goods were defective and that Gorman had validly notified MBNA that he disputed such charges.

> In addition to its misreading of § 1681s-2, BB&T also relies on a handful of district court opinions which suggest that reporting a debt without reporting a dispute to the debt is never inaccurate as a matter of law. To the extent these cases depend upon such reasoning, we find that position plainly inconsistent with the statutory text and longstanding precedent discussed above, including Dalton.

Id. at 149-50 (emphasis added).

In Johnson v. MBNA America Bank, NA, 357 F.3d 426, 430-31 (4th Cir. 2004), MBNA unsuccessfully undertook to advance a very similar argument to the effect that § 1681s-2(b)(1)(A) -- requiring furnishers of credit information to "conduct an investigation" regarding disputed information -- supposedly imposes a lesser duty on furnishers than on CRAs because Congress had only utilized the adjective "reasonable" in describing the type of investigation that must be conducted by a CRA. Based on this discrepancy, MBNA argued that furnishers only have "a minimal duty" to "briefly review their records to determine whether the disputed information is correct," in contrast to CRAs, who are expected to conduct "reasonable" review. Johnson flatly rejected MBNA's position:

> [T]he plain meaning of 'investigation' clearly requires some degree of careful inquiry by creditors. Further, § 1681s-2(b)(1)(A) uses the term 'investigation' in the context of articulating a creditor's duties in the consumer dispute process outlined by the FCRA. It would make little sense to conclude that, in creating a system intended to give consumers a means to dispute -- and, ultimately, correct -- inaccurate information on their credit reports, Congress used the term 'investigation' to include superficial, unreasonable inquiries by creditors.

Not surprisingly, this Panel concurred with Johnson:

> MBNA does not tell us why Congress would mandate shoddy or superficial furnisher investigations, not calculated to resolve or to explain the actual

> disagreement or to aid in the CRA's "reasonable reinvestigation." Indeed, as the statute recognizes, the furnisher of credit information stands in a far better position to make a thorough investigation of a disputed debt than the CRA does on reinvestigation. With respect to the accuracy of disputed information, the CRA is a third party, lacking any direct relationship with the consumer, and its responsibility is to reinvestigate" a matter once already investigated in the first place § 1681i(a)(1)(emphasis added). It would therefore make little sense to impose a more rigorous requirement on the CRAs than the furnishers. Instead, the more sensible conclusion is that, if anything, the "reasonable" qualifier attached to a CRA's duty to reinvestigate limits its obligations on account of its third-party status and the fact that it is repeating a task already completed once.

Gorman, supra, 552 F.3d at 1016-1017 (emphasis added).

MBNA's argument that there was no need for MBNA to report the existence of Gorman's dispute because the CRAs already knew that Gorman disputed the manner in which his account was being reported is not persuasive. A CRA has a statutory obligation to determine what information is contained in the furnisher's files. Upon receipt of a consumer complaint, the CRA contacts the credit furnisher and requests that it re-investigate the accuracy of the information being reported and, if need be, correct any inaccuracies or omissions. 15 U.S.C. §§ 1681s-2(b)(1)(A), 1681s-2(b)(1)(C), and 1681s-2(b)(1)(D).

It is significant from the standpoint of a potential credit provider whether the consumer timely disputed the validity of the claimed debt with the original credit provider. Normal credit information can appear on a person's credit report for up to seven years. A person who timely disputed credit card charges when they were first posted to his or her account is a much different person from someone who does nothing, then much

later demands that negative information on his or her credit report be removed. A person who acts promptly is presumably someone who acts responsibly and cares about protecting his or her good credit rating. Someone who makes no attempt to contact the original credit furnisher is far more likely to be an irresponsible person who is concocting a pretext in an effort to have negative credit information removed. For example, in the case at bar, Gorman had 60 days under Regulation Z to dispute the validity of the Four Peaks charges; consistent with federal law, Gorman timely notified MBNA of the factual basis for his dispute. Indeed, Four Peaks eventually acknowledged to MBNA that the goods that had been provided to Gorman were defective, yet MBNA blithely refused to remove the charges and continued to negatively report Gorman's account.

Additionally, there is a key difference in how credit scores are determined if the original furnisher reports an account as being the subject of a dispute, as opposed to how they are calculated if a consumer submits a "consumer statement." Where the furnisher reports that the consumer account is the subject of a dispute, the CRA does not include the negative account in calculating the consumer's credit score:

> Nor do we find persuasive BB&T's contention that a furnisher's reporting of an ongoing dispute of a debt is superfluous once a consumer has filed a dispute with any CRA. Among other things, when a furnisher reports a dispute, its report confirms that the consumer has actually contacted the furnisher and explained that the consumer believes he does not owe the debt.... For instance, when a furnisher responds to a dispute verification form and relates an ongoing dispute, Trans Union records the dispute in the credit report and does not include the derogatory information in assessing the credit score.

> In sum, given the evidence before it, the jury could reasonably conclude that BB&T's decision to report the debt without any mention of a dispute was "misleading in such a way and to such an extent that it can be expected to have an adverse effect."

Saunders, supra, 526 F.3d at 150.

As aptly held in Saunders and by this Panel, MBNA had an obligation under § 1681s-2(b)(1)(D) to accurately report information about Gorman's account and avoid misleading omissions. While MBNA's investigation did not necessarily need to reach a "correct" result, it had a duty to notify the CRAs that Gorman's account was the subject of a dispute. The Panel's ruling that Gorman has a private right of action based upon the failure to report the debt as "disputed" should not be disturbed.

III. CAUSATION

MBNA urges that there is no evidence that its failure to report the existence of a dispute caused harm because "a consumer may file a brief statement" with a CRA "setting forth the nature of dispute" under § 1681i. This argument was not raised below nor is it discussed in the district court's opinion as a basis for summary judgment; it should not be considered for the first time now. In any event, MBNA's argument fails.

First, it is essential to keep in mind that a plaintiff is not required to present evidence of causation to defeat summary judgment, as causation is presumed to exist where a plaintiff shows that he or she has been denied credit based on an adverse credit report. Philbin v. Trans Union Corp., 101 F.3d 957, 968-69 (3d Cir. 1996)("Courts have recognized that where a decision-making process implicates a wide range of considerations, all of which factor into the ultimate decision, it is inappropriate to

saddle a plaintiff with the burden of proving that one of those factors was the cause of the decision.")(reversing summary judgment); Lendino v. Trans Union Credit Information Co., 970 F.2d 1110, 1111-13 (2d Cir. 1992).

Second, a "consumer statement" is an abbreviated form that does not allow the consumer to meaningfully set forth the nature of his or her dispute or provide documents that support the merits of his or her position. Such detailed submissions can only be made when a consumer deals with a furnisher directly.

Third, Gorman has submitted evidence confirming that MBNA is adversely reporting his account without any notation that the account was "disputed." (ER 750, 76-67). As discussed above, where a furnisher reports that negative information being reported about a consumer account is the subject of a dispute, the CRAs does not include the negative account in calculating the consumer's credit score. Saunders, supra, 526 F.3d 142, 150 (4th Cir. 2008). Further, a consumer who undertakes to dispute information about a debt when it was originally incurred stands in a different position than someone who first complains about the reporting of his or her credit information at a later date.

CONCLUSION

Appellant Gorman respectfully requests that MBNA's petition be denied.

GORMAN & MILLER, P.C.

By: /s/
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