UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CONSUMER DATA INDUSTRY ASSOCIATION,	§	
	§	**No. 1:19-CV-00876-RP**
Plaintiff,	§	
v.	§	
STATE OF TEXAS THROUGH KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS,	§	
Defendant.	§	

CONSUMER DATA INDUSTRY ASSOCIATION'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, Consumer Data Industry Association ("CDIA"), submits the following Response to Defendant's Motion to Dismiss CDIA's Complaint, and states as follows:

SUMMARY OF THE ARGUMENT

CDIA seeks an order of this Court preventing the State of Texas ("State") from enforcing a newly enacted state law that is preempted by the Fair Credit Reporting Act ("FCRA").[1] CDIA has standing as an association whose members are currently subject to the State's new legal requirements, and who are subject to both enforcement by the Attorney General and subject to private party litigation for alleged non-compliance. The new law, codified at Tex. Bus. & Com. Code § 20.05(a)(5) ("§20.05"), is preempted by the FCRA, which established a national credit reporting system to assure the accuracy, integrity and reliability of the consumer report information that is essential to meet the "needs of commerce" and promoting the "efficiency of the banking

[1] 15 U.S.C. §§ 1681 *et seq.*

system".[2] To ensure the uniformity of the credit reporting system, Congress chose to provide for express federal preemption of state laws that interfere with the system. As explained more fully below, Congress preempted the field of consumer report content and thus state laws that attempt to regulate information that is contained in consumer reports, like § 20.05, are preempted.

STANDARD OF REVIEW

When standing is challenged on the pleadings under FED. R. CIV. P. 12(b)(1), the court must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff.[3] Further, when considering a motion to dismiss under FED. R. CIV. P. 12(b)(6), the complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff.[4]

CDIA's Complaint establishes facts sufficient to overcome the Attorney General's motion to dismiss. If, however, this Court finds additional facts are required, CDIA requests leave to amend its Complaint.

ARGUMENT

I. CDIA has Standing to Bring this Case on Behalf of its Members.[5]

CDIA is an international trade association, founded in 1906, and headquartered in Washington, DC. It is the largest trade association of its kind in the world. CDIA's membership

[2] 15 U.S.C. § 1681 (Congressional findings and statement of purpose).
[3] *Ass'n of Am. Phys. and Surgeons, Inc. v. Tex. Med. Bd.*, at 550, *quoting Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).
[4] *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citing *Sloan v. Sharp*, 157 F.3d 980, 982 (5th Cir.1998)).
[5] At the beginning of Defendant's Motion to Dismiss, it states that it brings its Motion to Dismiss "because the Attorney General is not a proper party," but does not mention the argument raised in the body of its Motion—Plaintiff's standing. Defendant's Motion to Dismiss at 1. Defendant does not mention the standing of the Attorney General in the body of its Motion. Therefore, it can only be assumed that Defendant did not intend to assert this argument. However, should the Court wish for Plaintiff to address same, Defendant will be happy to do address the issue.

includes more than 200 consumer credit reporting agencies ("CRAs") and other specialized CRAs operating in the United States and throughout the world. Its members include the three nationwide CRAs, Equifax, Experian and Trans Union, as well as other CRAs that furnish information concerning Texas consumers to consumer report users who have "permissible purposes" under the FCRA to receive such information. 15 U.S.C. § 1681b.

CDIA's mission is to promote the interests of the consumer reporting industry, including its CRA members' interest in: (i) the uniformity of federal regulation in areas in which the FCRA preempts state law; and (ii) the lawful furnishing of accurate consumer report information to users with a permissible purpose to obtain such information. In this role, CDIA also represents the interests of its CRA members before every state legislature.

The Attorney General appears to challenge CDIA's standing based solely on an alleged failure to demonstrate that it, or its members, have suffered or will suffer sufficient injury-in-fact to state a claim for declaratory relief.[6] As noted above, however, this Court must take as true all well-pleaded facts, together with all reasonable inferences therefrom, in ruling on the Defendant's Motion to Dismiss. "[W]hen standing is challenged on the basis of the pleadings," we must "accept as true all material allegations of the complaint and ... construe the complaint in favor of the complaining party." *Ass'n of Am. Phys. and Surgeons, Inc. v. Tex. Med. Bd.*, at 550, *quoting Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (citations and internal quotation omitted). Taking the facts and inferences as true, CDIA has clearly established that it has standing to maintain this action.

[6] CDIA brings this suit solely on behalf of its members through associational standing. *See Ass'n of Am. Phys. & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (an association has standing to pursue claims as a representative of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) nether the claim nor the relief requested requires the participation of individual members of the association in the lawsuit) *citing Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

To establish Article III standing, the plaintiff must establish "as an irreducible minimum an injury in fact; that is there must be some 'threatened or actual injury resulting from the putatively illegal action…'" *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 394 (1988) citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (internal citations omitted). "That requirement is met [where] the law is aimed directly at [the] plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* In this case, while CDIA's members do not face criminal prosecution, they would be subject to an investigation and civil enforcement action should the Attorney General suspect noncompliance with Texas law, including a claim for civil penalties, attorney's fees and other remedies available to the Attorney General.

Notably, the Supreme Court went on to explain that the "pre-enforcement nature" of the suit did not mean the plaintiffs lacked standing; noting "[the] State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Id.* at 643. The Supreme Court again reaffirmed this view of injury with respect to challenges to state laws in 2014.

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. *See Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights") . . Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158-159 (2014) (emphasis added). Here, the Attorney General has made clear that when and how he may choose to enforce Texas law is a

matter of his own discretion, which is outside the knowledge of CDIA's members, and he provided no assurance that he would not exercise that discretion. *See* Motion, p. 8. As such, CDIA members have sufficiently alleged the threat of injury to establish standing in this case.

The cases cited by the Attorney General in support of his argument that CDIA's members lack standing are neither controlling nor illustrative here. Relying on *Clapper v. Amnesty Int'l USA, et al*, the Attorney General argues that CDIA's member concerns over an enforcement action are merely speculative and insufficient to establish standing. 568 U.S. 398 (2013). *Clapper*, however, is not on point. The case does not even consider the question of whether a state agency's right to enforce a state law established standing for a person, or an association's members. *Id.* In fact, *Clapper* was brought by a group of individuals who were themselves *not the target of pending or potential investigation by one or more federal investigatory agencies,* but instead were persons who feared that "there [was] an objectively reasonable likelihood that their communications [would] be acquired under [the law permitting the recording of overseas communications] at some point in the future." *Id.* at 405. The plaintiffs in *Clapper* were "attorneys and human rights, labor, legal and media organizations" who believed "that some of the people with whom they exchange foreign intelligence information [were] likely targets of surveillance" under the law. *Id*. (emphasis added). Such attenuated speculation was deemed insufficient to establish standing under Article III. In contrast, it is undisputed that CDIA members are subject to enforcement by this Defendant's Attorney General for alleged violations of Texas law, including § 20.05.

The Attorney General further argues that CDIA members lack standing because their alleged injuries amount to nothing more than "generalized grievances" that are insufficiently concrete to establish standing, citing *Lujan v. Federal Wildlife Ass'n*; however, again, the *Lujan* case is not remotely instructive here. 504 U.S. 555 (1992). Plaintiffs in the *Lujan* case sought

judicial review of an agency action that they alleged would lead to the extinction of certain animals, the enjoyment of which they would then be deprived in one fashion or another. *Id*. at 564. The Supreme Court held that the individual's potential "harm" that they had come to the property to view these animals in the past and would 'someday' return to view the animals again, was insufficient to establish actual harm. *Id*. To the contrary, CDIA members face the real and imminent question of whether § 20.05 applies to their business as it is in effect today, and for which violations they face real and substantial threatened harm.

CDIA's Complaint, taken together with reasonable inferences taken therefrom, and taken as true for the purpose of this Motion, demonstrate that CDIA's members will suffer imminent legal and actual harm to satisfy Article III standing requirements. In particular, CDIA has alleged, and the Attorney General apparently concedes, that CRAs conducting business in Texas are required to comply with §20.05. *See* Motion, p.3. CDIA has further alleged that:

(i) the FCRA permits CRAs to include medical collection account information in consumer reports so long as the information complies with FCRA rules; *see* Comp. ¶ 12;

(ii) its members must "reject all medical collection reporting in a broad class of medical services…in order to comply with Texas law;" *see* Comp. ¶ 16(c);

(iii) section 20.05 excludes otherwise reportable information from being included in consumer reports where the FCRA expressly permits the inclusion of such information; Comp. ¶ 18;

(iv) its members do not have to comply with § 20.05 because it is preempted by 15 U.S.C. § 1681t; see Comp.¶ 11; and

(v) the Attorney General has enforcement authority with regard to §20.05, to include "injunctive relief and civil penalties in the amount of $2,000 per violation (each day is counted as a separate violation) plus attorney general expenses, court costs, investigative costs and attorney fees. *See* Tex. Bus. & Com. Code §§ 20.09 – 20.11"; *see* Comp. ¶ 27.[7]

While the Complaint does not allege all facts detailing the precise manner in which member CRAs will be forced to comply with Texas law, CDIA has alleged and/or this Court may draw the reasonable inference that member CRAs would be required to take some number of steps in order to come into compliance with this law (i.e., prevent information from appearing in consumer reports that they currently have the right to report today) and avoid an enforcement action. This is sufficient to establish threatened injury. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 394 (1988). These efforts could reasonably be inferred to include expending time, personnel and other resources to establish and implement a program to potentially reject data that may be furnished by one or more account holders from being accepted on a future basis (which the account holders are legally permitted to furnish to the CRAs); identify the data that each of them already maintain and determine whether each set of data must be excluded; notify its users that the data, while present in reports on other consumers across the country, will no longer be reportable in Texas; alternatively, require users to change their inquiry processes so that the CRAs may each determine whether there is an exemption that would permit them to produce the report under

[7] Notably, the Attorney General suggests in its opening section of the Motion that he is not a proper party to this suit; however, nowhere in the remaining Motion is that contention asserted again. Rather, the Attorney General appears to concede that his office has the power to undertake an investigation related to alleged violations of this law – "CDIA has no knowledge of how the Attorney General determines what cases to pursue under the Business & Commerce Code, and "can only speculate" that they might be subject to an enforcement action under § 20.05(a)(5)." Motion, p. 8. In fact, this assertion makes CDIA's concern that an enforcement action could be 'imminently' brought by the Attorney General's office even more plausible.

section §20.05; among other steps.[8] Thus, in this way, the injury to CDIA members is "concrete." The injury is "imminent" as the statute is currently in effect, and were the law not preempted, immediate steps must be undertaken to come into compliance as quickly as possible or face potential enforcement action from the Attorney General.

The interests CDIA seeks to protect in this action are central to CDIA's mission and the business of CDIA's member CRAs will suffer irreparable harm if forced to comply with a state law that is preempted by the FCRA and which regulates the content of the CRAs' files about consumers and the content of any consumer reports produced from those files. This Court should find that CDIA has asserted sufficient facts to establish associational standing and permit this case to proceed.

II. The Fair Credit Reporting Act Preempts §20.05(a)(5).

A. The FCRA's National Uniform Approach to Consumer Reporting and Its Preemptive Effect.

The FCRA reflects a careful congressional balancing of the "needs of commerce" and the "efficiency of the banking system" with the need to protect the privacy interests of consumers related to the information about them provided by CRAs. *See* 15 U.S.C. § 1681. To promote this efficiency objective, and to preserve a nationally-uniform regulatory approach to the content of consumer reports, Congress imposed upon all CRAs, wherever located, the obligation to "follow reasonable procedures to assure maximum possible accuracy of the information" CRAs include

[8] While these specific activities are not articulated in the Complaint, they are inferences reasonably drawn from the Complaint; they are activities related to the removal/suppression of data from future Texas reports. If, however, the Court determines that these inferences are not reasonable, CDIA requests leave to submit either an amended Complaint or evidence in support of its Complaint. A plaintiff facing a FRCP 12(b)(1) challenge bears the burden of proving subject matter jurisdiction exists and a court may consider factual evidence to rule on the motion. *See Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996). Alternatively, CDIA would request leave to amend the Complaint to allege additional facts to establish standing.

in consumer reports about an individual, and specifically defined certain information that CRAs may and may not include in consumer reports. 15 U.S.C. § 1681e(b) and 15 U.S.C. § 1681c(a), respectively. Additionally, Congress preempted a variety of state laws that would disrupt the uniformity created by this national structure. 15 U.S.C. § 1681t(b).

The FCRA provides for multiple forms of preemption of state law under 15 U.S.C. § 1681t. First, FCRA § 1681t(a) preempts any state law that is "*inconsistent with any provision*" of the FCRA. This "conflict preemption" rule codifies the longstanding approach to conflict preemption taken by the courts, in which state law is preempted when there is outright or actual conflict between federal and state law, or where compliance with both federal and state law is physically impossible. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

With respect to state laws touching on the contents of consumer reports, FCRA § 1681t(b)(1) expressly provides for even broader preemption, namely, that no requirement or prohibition may be imposed by any state *with respect to any subject matter* specified in the enumerated subsections of FCRA § 1681t(b)(1).[9] This is referred to as the FCRA's "subject matter preemption." Relevant here, the FCRA mandates that:

> No requirement or prohibition may be imposed under the laws of <u>any</u> State
> (1) with respect to <u>any subject matter</u> regulated under . . .
> (E) section 1681c of this title, <u>relating to information contained in consumer reports,</u> except that this subparagraph shall not apply to any State law in effect on September 30, 1996[.]

15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

The subject matter preemption enumerated in FCRA § 1681t(b)(1) is broad and explicit, the result of which has been preemption of state laws that attempt to regulate that which the FCRA expressly regulates. By way of example, a Colorado law that attempted to prevent CRAs from

[9] An additional form of preemption is referred to as "conduct preemption" and is found at Section 625(b)(5), but not applicable here.

including certain negative information (i.e. criminal records) about consumers in consumer reports was held to be expressly preempted by the FCRA. *Simon v. DirecTV, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D. Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010). In *Simon*, the court held that Section 1681(b)(1) preempted Colorado law because "records of convictions of crime which antedate the report by more than seven years" may be disclosed under FCRA § 1681c(a)(5). *Id*. at *4. Note that the express language of the FCRA § 1681c(a)(2) requires that criminal records that do not result in a conviction are subject to a seven year reporting period, and 1681c(a)(5) provides that "any other adverse item of information, other than records of conviction of crimes" must be removed from reports if older than seven years. Thus, the clear result is that all conviction records, and any other criminal records less than seven years old, may be included by the CRA in a consumer report. The District Court held the Colorado law limiting the reporting of conviction records to seven years was preempted because Colorado's prohibition and FCRA § 1681c(a)(5) "concern[ed] the same subject matter," namely, "the type of information that can be legally disclosed in consumer reports." *Id*. at *4.

Courts have ruled that other state laws are expressly preempted by §1681t(b)(1). In a prior case against the Attorney General of Minnesota, CDIA argued successfully that Minnesota's law prohibiting the sale of a mortgage trigger list was preempted by § 1681t(b)(1)(A), which preempts state laws that attempt to regulate reports used for prescreening (the extension of firm offers of credit to consumers). *CDIA v. Swanson*, 2007 WL 2219389 (D. Minn. 2007).

In a hearing for interim relief, the court agreed and held that CDIA had a "very strong likelihood of prevailing on the merits" of its subject matter preemption argument because:

> The preemptive reach of the FCRA is both broad and explicit: Section 1681t(b)(1)(A) preempts any state law that imposes a prohibition or requirement

with respect to "any *subject matter regulated by*" § 1681b(c).

Because the "subject matter" regulated by the state law was "unquestionably regulated" by the FCRA, the court held that neither "Minnesota nor any other state may prohibit or regulate" what the FCRA permits. *Id*. at *4. As the court observed:

> It appears that Congress and the Minnesota legislature have different views about how to best regulate the activity of credit bureaus. By virtue of the Supremacy Clause of the United States Constitution, U.S. Const. Art. IV, cl. 2, and the FCRA's express-preemption provision, 15 U.S.C. § 1681t, Congress's views on the subject must prevail.

Id. at *9.

Subject matter preemption pursuant to § 1681t(b)(1) has also been applied to prohibit the prosecution of various claims under state law, where the subject matter of the claim is regulated by the FCRA. Referring to subject matter preemption as an "absolute immunity provision," the Middle District of Alabama dismissed a plaintiff's lawsuit, finding it preempted by § 1681t(b)(1)(F). *Sigler v. RBC Bank*, 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010) (internal citations omitted). In *Sigler*, the plaintiff's lawsuit against RBC Bank was dismissed because the plaintiff alleged that RBC engaged in tortious conduct when the bank furnished information to a consumer reporting agency; however, § 1681t(b)(F) provides that "[no] requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under . . . (F) section 623 [§1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies…" Thus, plaintiff's claim was preempted. *Id*.

Additionally, the Second Circuit Court of Appeals invalidated a claim under New York tort law where the plaintiff sought damages from a CRA related to sale of lists of consumers who may be interested in receiving certain offers of credit. *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009). The Second Circuit held that the FCRA preempted the state tort claims

under FCRA § 1681t(b)(1)(A) because the specific information at issue was consumer report information compiled and sold by CRAs. FCRA § 1681t(b)(1)(A) preempts all requirements or prohibitions imposed "with respect to any subject matter regulated under subsection (c) or (e) of FCRA § 1681b, relating to the prescreening of consumer reports." *Id.* at. 106. The Second Circuit found that the allegations all "relate[d] to the prescreening of consumer reports," and therefore the claim was preempted by the FCRA. *Premium Mortgage*, 583 F.3d at 106-07; *see also Consumer Data Industry Ass'n v. Swanson*, 2007 WL 2219389 at *4 (D. Minn. 2007) (analyzing preemptive effect of § 1681t(b)(1)(A) on state law regulating the sale of mortgage-trigger lists). *See also Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 427-29 (S.D.N.Y. 2010) (holding that the plaintiffs' wrongful foreclosure claim was within the subject matter regulated by § 1681s-2, and therefore preempted); *Cosmas v. American Exp. Centurion Bank*, 757 F. Supp. 2d 489, 499–500 (D.N.J. 2010) (same).

Without acknowledging any of the cases finding that the FCRA preempts state law, or interpreting § 1681c, the Attorney General cites to *Altria Group v. Good*, for the general proposition that preemption statutes generally should be given a "fair but narrow reading." Motion, p. 13 (citing *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008)). *Altria Group* is not instructive here as the Attorney General can cite to no case where that standard has been applied to determine the scope of the FCRA's preemptive effect. Additionally, reliance on *Altria Group* is misplaced because the Supreme Court found that the defendant manufacturer owed a duty of care to the plaintiffs independent of the statute at issue. In reaching the conclusion that the Federal Cigarette Labeling and Advertising Act (which preempts requirements or prohibitions that were "based on smoking and health") did not preempt the claim, the Supreme Court found that the cigarette manufacturer had a general duty not to deceive consumers that arose under the law, and that the

duty was not "based on" smoking and health. *Id*. at 78-79. In contrast, the duties owed by consumer reporting agencies with respect to consumer reports are governed expressly by the FCRA, and courts have consistently interpreted the preemptive effect of the FCRA to be broad and explicit. This Court should do so as well.

B. Congress Permits the Inclusion of Medical Information in Consumer Reports in Section 1681c.

As explained above, the FCRA expressly preempts any state law that attempts to prohibit or restrict the subject matter of Section 1681c, namely, the content of consumer reports. Section 1681c includes requirements related to the information which must be included in a consumer report, such as certain bankruptcy information, and notations relating to account closure and disputes, 15 U.S.C. §§ 1681c subparts (d), (e), and (f), as well as that information which may not be included, such as adverse information older than 7 years. 15 U.S.C. § 1681c(a)(5). As a general matter, because the subject matter of Section 1681c is the content of consumer reports, any state law that seeks to govern the content of consumer reports is preempted. *See e.g. Simon v. DirecTv, infra.*

Importantly here, Congress has considered, and has already spoken on, the question of whether and what types of medical debt information may be included in consumer reports. In exercising its judgment, Congress expressly chose to prohibit only certain types of information related to consumer medical debt from being reported and permitted the remainder to be included in consumer reports. There are two relevant provisions. First, under FCRA § 1681c(a)(6), a CRA may not include in a consumer report:

> The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless –
>
> (A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific

> provider or the nature of such services, products, or devices to a person other than the consumer; or
>
> (B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

The second key FCRA provision on medical information in consumer reports was added by Congress just over a year ago as part of the Economic Growth, Regulatory Relief, and Consumer Protection Act, resulting in the adoption of Section 1681c(a)(8). FCRA § 1681c(a)(8) prohibits the nationwide CRAs (all three of which are members of CDIA) from reporting:

> any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

Thus, Congress has considered more than once the question of whether and what types of medical information may be included in consumer reports, choosing only to prohibit very specific information, and enumerating those restrictions in Section 1681c. Taking together the clear Congressional intent that the content of consumer report information must be free from state interference, as evidenced by Section 1681t(b)(1)(5), and the recent Congressional directive permitting the inclusion of certain medical information debt in Section 1681c – it is clear that Texas law is preempted here.

To determine if a state law is preempted by the FCRA's subject matter preemption provision, the question is not whether the state law operates in the exact same way as a provision under § 1681c, but whether the state law's subject matter concerns the subject matter of § 1681c. Here, § 20.05(a)(5) concerns the inclusion of medical information in a consumer report, which is reflected expressly within Section 1681c. Congress has specifically spoken on whether and how

medical information may be included in consumer reports, and Texas may not state otherwise. Therefore, § 20.05(a)(5) is preempted by the FCRA.

C. Reference to Medical Information in Other Sections of the FCRA Have No Effect on the Preemption Set forth in § 1681t(b)(5).

Finally, the Attorney General argues that the structure of the FCRA undermines CDIA's argument because there are other places where medical information is mentioned. Because medical account information is mentioned elsewhere, he argues, § 1681t(b)(1) does not preempt §20.05(a)(5). In fact, however, reference to other sections related to medical account information have no impact on the preemptive effect of §1681t(b)(E).

The Attorney General correctly notes that §1681b(g) concerns consumer reports that contain medical information; however, this provision must be reviewed in context to understand its relevance and meaning. Note that § 1681b is titled "Permissible purposes of consumer reports," and enumerates the circumstances under which a CRA is permitted to provide a consumer report to a user who requests it. The reasons a user may request a report are referred to as a "permissible purpose," and include common uses such as in connection with an extension of credit, insurance, or for employment purposes. 15 U.S.C. § 1681b(3)(A), (C), and (B) respectively. Section 1681b(a)(3) expressly enumerates each of these circumstances under which a user has the right to request a consumer report – all without requiring a written consent of the consumer.[10]

Section 1681b(g) prohibits a CRA from providing a consumer report that contains medical information that reveals a consumer's medical condition unless the user requesting the report obtains the consumer's express consent to receive the medical information (or other exceptions apply):

[10] Note that if the user obtains the written instruction of the consumer pursuant to §1681b(a)(2), a CRA may provide a report.

> Protection of Medical Information
>
> (1) *Limitation on consumer reporting agencies*. A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 605(a)(6)) about a consumer, unless –
>
> (A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;
>
> (B) if furnished for employment purposes or in connection with a credit transaction –
>
> (i) the information to be furnished is relevant to process or effect the employment or credit transaction; and
>
> (ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or
>
> (C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 605(a)(6).

Section 1681b(g) does not regulate in any way the content of the consumer report, except to refer back to § 1681c's content rules. Its placement within the overall FCRA structure is consistent with its meaning – as imposing a condition on the CRA to assure that the user has the correct "permissible purpose" to obtain the report, and in no way diminishes the effect of the content rules of § 1681c, or the preemptive effect of 15 U.S.C. § 1681t(b)(5).

CONCLUSION

For the foregoing reasons, CDIA respectfully submits that it has alleged sufficient facts to establish that it has standing to bring this action on behalf of its members, and further has demonstrated that Texas Bus. Code § 20.05(a)(5) is preempted by the Fair Credit Reporting Act. CDIA respectfully requests that this Court enter an order denying the Defendant's Motion to Dismiss.

October 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of October, 2019, a true and correct copy of the foregoing document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Edward D. Burbach
Edward D. ("Ed") Burbach