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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. MATTHEW J. PLATKIN, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY, Defendant.	Civil Action No. 3:19-cv-19054-GC-TJB

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiff Consumer Data Industry Association ("CDIA") submits this Reply in Support of its Motion for Summary Judgment to address certain arguments raised in the Opposition Brief of defendant State of New Jersey ("State"), pursuant to this Court's scheduling orders dated May 3, 2021, July 14, 2021, and its orders of December 16, 2021, February 16, 2022, March 1, 2022, March 15, 2022, and April 1, 2022,, and in accordance with Federal Rule of Civil Procedure ("Fed. R. Civ. P") 56 and the Local Civil Rules for the District of New Jersey ("LCR").[1]

ARGUMENT

CDIA's Complaint seeks a declaration that the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.* ("FCRA"), preempts New Jersey's 2019 amendments to N.J.S.A. §56:11-34(e) ("Revised 56:11-34"). Specifically, Revised 56:11-34 requires nationwide consumer reporting agencies ("NCRAs") to provide file disclosures to consumers, upon request, in at least eleven languages other than English, or as many as may be determined in the discretion of the Director of the

[1] The Court's briefing schedule permits the parties to reply on the cross-motions for summary judgment, an exception to this Court's Local Rules. *See* Civ. Rule 7.1 (h) (not permitting reply briefs on cross-motions except with leave of court). Many of the points raised by the State in its Brief in Opposition to Plaintiff's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c) ("State's Opposition Brief") are addressed in CDIA's Memorandum of Law in Opposition to the defendant's Motion for Summary Judgment, and in the interests of judicial economy, CDIA is limiting its reply to new matters or arguments raised by the State in its Opposition Brief.

Division of Consumer Affairs (the "Director"), in contrast to file disclosures under the FCRA, provided in English.

I. REVISED 56:11-34 REQUIRES THAT FILE DISCLOSURES BE MADE IN AT LEAST ELEVEN LANGUAGES OTHER THAN ENGLISH, IN CONFLICT WITH THE FCRA.

In its Opposition, the State again attempts to rewrite the plain language of Revised 56:11-34 by recharacterizing the New Jersey statute as requiring a separate *translation* in addition to a consumer's file disclosure (*see, e.g.*, State's Opposition Br. at 2), as opposed to focusing on the requirement that the consumer's file disclosure be provided in at least eleven languages. Revised 56:11-34 provides in relevant part as follows:

> [A] reporting agency that compiles and maintains files on consumers on a nationwide basis shall make the information subject to disclosure pursuant to this section available to a consumer upon the consumer's request in Spanish or any other language that the Director of the Division of Consumer Affairs determines is the first language of a significant number of consumers in the State.

N.J.S.A. §56:11-34(e), and Statement of Material Facts Not in Dispute ("SOF") [ECF No. 42-3, ¶¶ 10-11] (emphasis added).

The State argues that Revised 56:11-34 does not affect the conduct required under the FCRA because Revised 56:11-34 requires the NCRAs to provide something else in addition to the federal file disclosures. That, however, is not what the statute says. A straightforward reading of Revised 56:11-34 makes clear that the statute requires that the NCRAs "make the information subject to disclosure"

pursuant to the FCRA available "real time" to consumers in not just one but at least eleven different languages "upon the consumer's request," *i.e.*, in Spanish or any other language required by the State's Director. N.J.S.A. §56:11-34(e) (emphasis added). It does not contemplate a second copy of a file disclosure *after* the initial disclosure. *Id.*[2]

Further, even if Revised 56:11-34 can be read as requiring an after-the-fact translation of the original file disclosure, Revised 56:11-34 does govern the same conduct that is governed by sections 1681c-1 and 1681j(a) – and in particular, it does regulate the form and content of the disclosures to be provided. Revised 56:11-34 clearly regulates the NCRAs' mandated conduct on a proscribed matter, in a different, non-uniform manner, and is therefore preempted under § 1681t(b)(5).

[2] *Amicus Curiae* National Consumer Law Center ("NCLC") similarly treats Revised 56:11-34 as requiring a translation, as opposed to requiring the disclosure to be made in Spanish or any other language required by the director. See Brief of *Amicus Curiae* NCLC in Support of Defendant's Motion for Summary Judgment (Amicus Br.) at 2, 5. *Amicus* also conflates the requirement to provide a file disclosure – which requires that a CRA "clearly and accurately disclose to the consumer [a]ll information in the consumer's file at the time of the request . . . ." 15 U.S.C. §1681g(a)(1) -- with a voluntary service through which some CRAs provide a translated *credit report* in Spanish. See *Amicus* Br. at 10-13. Although the material cited by *Amicus Curiae* is not part of the record of this case, the fact that a CRA voluntarily provides a translated credit report does not establish that a CRA has the ability to provide file disclosures in at least eleven different languages. *See, e.g.*, CDIA Opposition Brief, at 31-32 (discussing translation issues with languages other than Spanish).

II. THE FIRST CIRCUIT'S OPINION IN *CDIA V. FREY* DOES NOT CHANGE THE CONCLUSION THAT CONGRESS INTENDED THAT THE FCRA BROADLY PREEMPTS STATE LAWS LIKE REVISED 56:11-34.

As CDIA has fully briefed, the forms of preemption at issue in this case involve conflict preemption and conduct preemption under the FCRA. Congress chose to preempt state laws that are "inconsistent with" the FCRA, or which attempt to regulate specific subject matters and specific regulated conduct in order to avoid a "patchwork of conflicting regulations." *Ross v. FDIC*, 625 F.3d. 808, 812-813 (4th Cir. 2010) (citations omitted). And that is precisely what Revised 56:11-34 has accomplished – the beginning of a slippery slope of a non-uniform "patchwork of conflicting regulations."

The State argues that a recent decision of the First Circuit involving CDIA's challenge to certain Maine laws under the "subject matter" preemption provisions of the FCRA, *Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1 (1st Cir. 2022). In *Frey*, a panel of the First Circuit held that 15 U.S.C. § 1681t(b)(1)(E) did not preempt all state laws that "concerned" the subject matter of consumer report content, but – contrary to the State's characterization -- did not go so far as to hold that the state law must rise to the level of outright conflict with the FCRA provision in order to be preempted. At most, the deciding panel of First Circuit held that the phrase "relating to information contained in consumer reports" from 1681t(b)(1)(E) does not mean all information in reports, but instead preempts only that which is expressly

regulated within section 1681c. *Id. at* 10-11. The panel remanded the case for further briefing and consideration by the district court as to whether the information Maine's laws regulate would fall within one of the enumerated provisions. *See id*. at 24.

Although CDIA believes that the First Circuit panel's reading is overly narrow given the statutory history, the intent behind the FCRA, and the clear preference for a national reporting standard,[3] the holding in *Frey* does not change the outcome here. The preemption analysis in this case does not turn on a descriptive phrase – "relating to the information in consumer reports" – to describe what the particular section covers; instead, Congress itemized the "specific provisions" of the FCRA that fall within conduct preemption – particularly, section 1681i(a), which incorporates the regulations promulgated by the Federal Trade Commission ("FTC").

As addressed at length in CDIA's prior briefs herein, it is clear that what is intended to be preempted by the FCRA is the "what" and the "how" these disclosures must be provided – which includes the language in which these disclosures should be made. The FCRA's conduct preemption provision, 15 U.S.C. § 1681t(b)(5), provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the conduct required by the specific provisions of" the FCRA, including §§1681c-1 and 1681j(a). These two FCRA sections proscribe

[3] CDIA has filed a petition seeking rehearing en banc before the First Circuit. *See* Petition for Rehearing En Banc, *Consumer Data Indus Ass'n v. Frey*, No. 20-2064 (1st Cir., filed March 10, 2022).

requirements, i.e., they govern the NCRA's conduct, when providing annual file disclosures to consumers including "what, how, and how often" they must be provided. In particular, §1681c-1 requires the NCRAs to "provide to the consumer (affected by possible identity theft) *all disclosures required to be made under section 609*, without charge to the consumer, within three business days…" 15 U.S.C. §1681c-1 (emphasis added). Section 1681j(a) further governs the NCRAs' conduct by prohibiting the charging of any fees – the NCRAs must "make *all disclosures pursuant to section 609"* available for free once per year online through the centralized source. 15 U.S.C. §1681j(a) (emphasis added). Both statutes require the NCRAs to do something; namely, to provide "*all disclosures required by"* §1681g, not some other form of a disclosure, not different information, and not a second copy of the file disclosure – just *the* file disclosure required under §1681g.

III. THE FACT THAT THE FTC SPECIFICALLY CONSIDERED THE ISSUE OF SPANISH LANGUAGE DISCLOSURES DEMONSTRATES THAT REVISED 56:11-34 IS INCONSISTENT WITH THE FCRA AND THEREFORE PREEMPTED.

The FCRA specifically requires that the NCRAs provide a complete copy of their "file" to the consumer upon request – and defines what information constitutes "file" information. 15 U.S.C. §1681g(a). Important for the analysis here, Congress directed the FTC to adopt regulations related to these free annual file disclosures, the FTC considered whether to require the file disclosures to be translated into

Spanish or other languages, and the FTC declined to do so. 69 Fed. Reg. 35,468 at 35,476 (June 24, 2004).

The State cites to *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), for the argument that the fact that the FTC did not adopt a regulation requiring that file disclosures be translated into other languages should not be viewed as "the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." The State's reliance on *Sprietsma* is misplaced.

The law at issue in *Sprietsma* was Section 5 of the Federal Boat Safety Act ("FBSA"). The FBSA provides that the Transportation Secretary "may" issue regulations establishing "minimum safety standards for recreational vessels and associated equipment," and requiring the installation or use of such equipment. 46 U.S.C. § 4302(a). At the time, the Secretary had delegated to the Coast Guard authority to carry out its FBSA duties. *See* 49 CFR § 1.46(n)(1) (1997). The Coast Guard had issued a host of regulations over the years relating to specific equipment, such as personal flotation devices and visual distress signals, but to date, it decided to "take no regulatory action" with respect propeller guards. *See* 537 U.S. at 67-68.

The basis for the preemption argument in *Sprietsma* was the FBSA's specific preemption clause (46 U.S.C. § 4306):

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Under this preemption provision, a state cannot establish a law or regulation purporting to impose a "performance or other safety standard" requirement for a piece of boating equipment where there is an existing federal regulation, unless the state's regulation is identical to the federal regulation. The *Sprietsma* court held, however, that where the Secretary (or its designee, the Coast Guard) had not adopted a regulation establishing a "performance or other safety standard" for a particular piece of equipment, the state law was not preempted. 537 U.S. at 59-60.

Here, the language and scope of the preemption provisions at issue under the FCRA are very different from the preemption provision under the FSBA. The FBSA only acts to preempt state law if a regulation addressing the particular piece of equipment had been promulgated and did not preempt any "requirement or prohibition . . . with respect to the conduct required" under the law. Here, the FTC was specifically directed to enact regulations governing the manner in which NCRAs would prepare and deliver file disclosures under FCRA section 1681i(a).

Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 ("FACT Act"), §211(d). The Act specifically directed the FTC to consider the concerns of both consumers and industry in proscribing these rules, including consideration of the "significant demands that may be placed on [CRAs] in providing such consumer reports" and the "appropriate means to ensure that [CRAs] can satisfactorily meet those demands." *Id.*

The FTC did just that. In its final rule notice, as the State points out, the FTC explained that it had "carefully considered" comments suggesting, but ultimately decided against, requiring by rule that "centralized source" (i.e., AnnualCreditReport.com) materials be provided in additional languages other than English. 69 Fed. Reg. 35,468 at 35,476. The FTC said, while it was declining to impose what it determined to be a "significant additional burden" on the NCRAs at that time, it took a different approach to addressing the needs of consumers with limited English proficiency by providing education and outreach in Spanish:

> The Commission, however, intends to provide education and outreach to consumers concerning the final rule in Spanish -- the language most commonly mentioned by commenters on this issue -- and encourages other stakeholders in the centralized source, including the nationwide consumer reporting agencies, to do the same.

Id. at 35,476.[4] And so, unlike in *Spreitsma*, where the Coast Guard "[did] not convey an authoritative message of a federal policy against propeller guards" when deciding to not regulate in that space, the FTC not only issued rules in the relevant space but provided a contemporaneous explanation of its reasoning against certain regulatory requirements. *Sprietsma*, 537 U.S. at 52; *cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (agency's decision not to adopt a particular regulation contributed to a finding of conflict preemption where the agency took the subsequent step of adopting an alternate federal standard governing the issue with which, the Court found, the state rule would be inconsistent). The FCRA and its implementing regulations only require the NCRA to provide file disclosures in English, and a state law requiring NCRAs to provide file disclosures in multiple languages clearly seeks to regulate the conduct required by the FCRA and its implementing regulations.

[4] The FTC issued versions of the summary of consumer rights and the summary of identity theft rights in Spanish. These Spanish-language summaries are available on the CFPB's website at https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/fair-credit-reporting-act/model-forms-and-disclosures/?_gl=1*1el3cva*_ga*MzM1MjUyMzkuMTYzMjMyNTE5NQ..*_ga_DBYJL30CHS*MTY1MDI0MDY4Mi4xNTUuMS4xNjUwMjQwNjkwLjA.

CONCLUSION

For the foregoing reasons, the Consumer Data Industry Association respectfully requests that this Court grant judgment in favor of CDIA on its Motion for Summary Judgment.

Dated: April 18, 2022

Respectfully submitted,

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