No. 19-1519

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOSEPH W. DENAN, ET AL.,
Plaintiffs-Appellants,

v.

TRANSUNION, LLC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CIVIL ACTION NO. 1:18-CV-05027

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE TRANSUNION, LLC AND IN SUPPORT OF AFFIRMANCE

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The undersigned counsel provides the following statement in compliance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

   Consumer Data Industry Association.

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   Hudson Cook, LLP

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   a. Identify all its parent corporations, if any:

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   b. List any publicly held company that owns 10% or more of the party's stock:

      N/A

/s/ Allen Hand Denson
Allen Hand Denson

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1519

Short Caption: Joseph W. Denan, et. al., v. Transunion, LLC

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None

Attorney's Signature: s/ Allen Hand Denson Date: 9/3/2019

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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None

Attorney's Signature: s/ Rebecca E. Kuehn Date: 9/3/2019

Attorney's Printed Name: Rebecca E. Kuehn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1519

Short Caption: Joseph W. Denan, et. al., v. Transunion, LLC

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None

Attorney's Signature: s/ Jennifer Leigh Sarvadi Date: 9/3/2019

Attorney's Printed Name: Jennifer Leigh Sarvadi

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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STATEMENT OF INTEREST OF AMICUS CURAE

Both Appellants and Appellees consent to the filing of this amicus brief by Consumer Data Industry Association ("CDIA").

CDIA is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

CDIA is interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), which governs the collection, use, maintenance, and dissemination of consumer report information and this case seeks to determine the scope of certain obligations of CRAs thereunder. 15 U.S.C. § 1681 *et seq.* CDIA members process over 50 million updates to consumer report information each day.[1] CDIA's members' interest in this appeal is significant because this Court's ruling has

[1] *See, e.g.*, Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System,* at 3 (noting that the three national CRAs "each maintain credit files on over 200,000,000 adults and receive information from approximately 10,000 furnishers of data") (Dec. 2012), *available at* http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf; *see also Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day"); Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (Credit Research Center, Working Paper No. 67, 2003) (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month, and over 200 million individual credit files.") *available at* http://faculty.msb.edu/prog/CRC/pdf/WP67.pdf.

implications far beyond the parties in this case. A ruling by this Court in favor of Plaintiffs-Appellants' argument that a consumer reporting agency ("CRA") must adjudicate the validity of an account, which the FCRA does not require and which numerous courts have declined to so rule, has serious implications for all CRAs that maintain consumer data. As discussed more fully below, CRAs are neither prepared to adjudicate the validity of accounts, nor does the structure of the FCRA permit them sufficient resources to do so. Because CDIA has been involved in the consumer reporting industry for more than a century, CDIA is uniquely qualified to assist this Court in understanding the impact of the positions advocated by the parties and the implications of those on the greater credit reporting ecosystem.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

CDIA files this brief in support of Defendant-Appellee in opposition to Appellants-Plaintiffs' appeal of the decision of the trial court to grant judgment on the pleadings in favor of Defendant-Appellee. CDIA respectfully submits this brief to demonstrate the impact of this Court's decision on the nationwide credit reporting system and the careful balance of responsibilities struck by Congress in the federal Fair Credit Reporting Act.

Plaintiffs-Appellants attempt to create obligations on CRAs that do not exist today. The FCRA was carefully crafted – and has been amended over time – to allocate the various responsibilities with regard to consumer report information among those best suited to uphold them. In particular, CRAs are charged with maintaining "reasonable procedures to assure

maximum possible accuracy" of the information they include in a particular consumer report. 15 U.S.C. § 1681e(b). To that end, CRAs have developed procedures regarding the intake, maintenance, and publication of the data they hold on consumers. Furnishers, which are persons who provide information to the CRAs about the consumers and their accounts, are charged with reporting such information with "accuracy" and "integrity" in that the information provided to CRAs must accurately reflect the liability of each consumer with respect to the account reported. *See* 12 C.F.R. § 1022.42. Finally, consumers have the right to dispute the accuracy or completeness of consumer report information, and the FCRA requires the CRA to forward the dispute to the furnisher to evaluate its merits. *See* 15 U.S.C. § 1681i. No provision of the FCRA places the CRA into the role of adjudicator of the legality or enforceability of any account, whether part of a reinvestigation of a dispute or otherwise.

As set out in more detail below, courts that have examined whether a CRA must determine the legal validity of an account in order for the information to be deemed sufficiently accurate to report have answered in the negative. Courts regularly prohibit such "collateral attacks" against the underlying loan's validity, and decline to hold CRAs liable under the FCRA, s*ee, e.g.*, *Carvalho v. Equifax Information Services LLC*, 629 F.3d 876, 892 (9th Cir. 2010), *DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008), and the cases relied upon by Plaintiffs-Appellants do not lead to a different result.

There are good reasons why a CRA is not required to adjudicate the legal validity of a loan or other account. In addition to the fact that it is the furnishers who are in the best position to know the facts and circumstances surrounding the making of the loan and not the CRAs, the inquiry required to make such a determination is a complex and inherently legal one. It involves complex questions of law, which must be applied to specific facts related to the making of the loan, and the

legal standing and capacities of the parties thereto, together with other equitable factors that might weigh in favor of one party or the other. Add to the mix unsettled questions of law, such as the status of "tribal lenders" and state law requirements regarding licensure, and this becomes extremely complicated and time consuming, quite unlikely to be resolved within the FCRA's required 30-day window for dispute handling. *See* 15 U.S.C. § 1681i(a)(1)(B). This undertaking is inherently the province and duty of the courts, and not CRAs.

Finally, although it may sound easy to simply "questionable" data from the CRAs' databases, this could amount to throwing the baby out with the bathwater. As an initial matter, regulators have expressed concern with simply deleting items in response to a dispute.[2] Moreover, removing data without awaiting a judicial adjudication of the parties' interests would be premature, depriving creditors of knowledge of a consumer's current obligations, and potentially depriving consumers from the reporting of positive payment histories many have worked hard to build. The FCRA does not require CRAs to adjudicate claims such as the one at issue here, and this Court should decline impose such a requirement. The ruling of the District Court below should be affirmed.

ARGUMENT

I. The Fair Credit Reporting Act Allocates Responsibilities to Different Parties in the Consumer Reporting System.

Enacted in 1970, the Fair Credit Reporting Act—or FCRA—governs the collection, assembly, and use of consumer report information and provides the framework for our nation's

[2] *See* CFPB Bulletin 2014-01, at 2 (stating that "furnishers should not assume that simply deleting that item will generally constitute a reasonable investigation."), *available at* https://files.consumerfinance.gov/f/201402_cfpb_bulletin_fair-credit-reporting-act.pdf; *see also Wharram v. Credit Services, Inc.*, No. 02-CV-4853(MJD/JGL), 2004 WL 1052970, at *2 (D. Minn. Mar. 12, 2004) (finding that "[d]eleting the entire tradeline did not assure the maximum possible accuracy of information relating to [the consumer] because it failed to convey the positive credit history [the consumer] established with Wells Fargo prior to the instant dispute").

credit reporting system. Its purposes are (1) to protect consumers by preventing the misuse of their sensitive personal information and improving the accuracy of consumer report information; and (2) to promote the efficiency of the nation's banking and consumer credit systems. *See 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575 (F.T.C. July 2011), at 1, *at* https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf. All CRAs must adhere to the FCRA, regardless of size or location.

A. Roles in the Consumer Reporting System.

In enacting the FCRA, Congress recognized the value of the consumer reporting industry, finding that CRAs "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3). The FCRA "seeks to balance the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 209, 103rd Cong., 2d Sess. (1993). The United States has developed a uniquely robust and mature credit reporting system that is vital to the economy. 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting.").

The FCRA regulates the practices of the three principal groups involved in the credit reporting system: (1) consumer reporting agencies, often referred to as "credit bureaus"; (2) furnishers of consumer report information to the CRAs (such as lenders that have accounts with consumers); and (3) users of consumer reports. CRAs collect and compile consumer information, supplied by furnishers, into consumer reports and provide them to authorized users – for example, credit grantors, insurance companies, and employers – that make eligibility decisions about those consumers. Information included in consumer reports typically includes the

consumer's credit history and payment patterns, as well as demographic, identifying, and sometimes public record information (e.g., judgments, and bankruptcies). The reports help businesses by enabling them to predict the risk of future nonpayment, default, or other adverse events.

The credit reporting system is built on the fundamental principle that the reports are as accurate as reasonably possible (while acknowledging that perfection is not the standard). In the case at bar, Plaintiffs-Appellants conflate the FCRA principles of "accuracy" with the legal validity or enforceability of the account itself. In doing so, Plaintiffs attempt to upend the carefully balanced system and turn it on its head.

B. Accuracy Under the FCRA.

To ensure that the credit reporting system appropriately balances the needs of consumers and businesses, the FCRA allocates different responsibilities to CRAs and to furnishers with respect to ensuring accuracy of information in consumer reports. First, with respect to CRAs, CRAs must maintain "reasonable procedures to assure maximum possible accuracy," of the information they provide in consumer reports. 15 U.S.C. § 1681e(b). Additionally, if a consumer disputes the completeness or accuracy of an item of information, the CRA must conduct a "reasonable reinvestigation" of the dispute. 15 U.S.C. § 1681i.

CRAs' procedures to assure maximum possible accuracy include policies and procedures regarding the collection, validation, maintenance and reporting of information they collect about consumers. Each of the nationwide consumer reporting agencies are reported to maintain over 1.3 billion active trade lines, most of which are furnished by financial institutions.[3] A "trade line" refers to account information provided by furnishers to CRAs for the inclusion in a consumer

[3] *See* Consumer Financial Protection Bureau's Key Dimensions Report, dated December 2012, *available at* https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

report. CRAs establish standardized data reporting formats for the type of information furnishers provide on an account, as well as instructions to educate users on how that information appears in reports so the users may interpret the data accurately. CRAs use advanced technologies to validate data they receive and to identify inconsistences in that data. CRAs study trends in furnishing, in other forms of data collection, in disputes, and across their data sets to identify areas of risk of inaccuracy as well as to develop knowledge useful in the marketplace. Many CRAs are implementing various levels of machine learning to validate their data and processes and to improve the overall accuracy of consumer reports. All of these tools form the basis of a CRA's reasonable procedures to assure the maximum possible accuracy of consumer report information.[4]

Second, the right of a consumer to dispute inaccurate information is an important component of accuracy – the FCRA "promotes accuracy by creating a self-help mechanism that empowers consumers to obtain copies of their reports and dispute erroneous or incomplete information."[5] In adopting the FCRA, and establishing dispute procedures, Congress recognized that notwithstanding reasonable procedures for *maximum possible accuracy*, errors in a report may

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[4] *See Statement of Peggy Twohig, Assistant Director, Office of Supervisions Policy, Supervision Enforcement and Fair Lending Division, Bureau of Consumer Financial Protection, Senate Committee on Banking, Housing and Urban Affairs "An Overview of Credit Bureaus and the Fair Credit Reporting Act"* (July 12, 2018), at 6 (providing overview of additional steps CRAs take to ensure maximum possible accuracy, *available at* https://www.banking.senate.gov/imo/media/doc/Twohig%20Testimony%207-12-18.pdf.

[5] *See Prepared Statement of Federal Trade Commission, on Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information, Before the House Committee on Financial Services, June 19, 2007*, at. p. 4, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-credit-reports-consumers-ability-dispute-and-change/070619credittestimony.pdf; *see also Report to Congress Under Section 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, 2004 WL 2930802, at *8 (F.T.C. Dec. 1, 2004), *available at* https://www.ftc.gov/sites/default/files/documents/reports/under-section-318-and-319-fair-and-accurate-credit-transaction-act-2003/041209factarpt.pdf ("In guaranteeing consumers access to their own credit reports and creating the dispute process, Congress recognized that consumers have a critical role in ensuring the accuracy of credit reports.").

still occur. Therefore, consumers have the right to not only challenge information reported about them by submitting disputes with the furnisher (referred to as a "direct dispute"), but also with the CRAs that maintain and report that data. And file disputes, they do. In fact, nationwide CRAs received over 8 million contacts from consumers in 2011 to initiate disputes, resulting in over 30 million disputed items.[6]

When a consumer notifies the CRA that she disputes certain information in a consumer report, a series of FCRA-mandated procedures are commenced that comprise the "reasonable investigation" required by law. First, the CRA must provide a notice to the furnisher that provided the information within 5 business days after receiving the dispute. 15 U.S.C. § 1681i(a)(2)(A). Upon receipt of a dispute, the furnisher is required to conduct an investigation of the disputed information and review all relevant information in connection with that dispute. 15 U.S.C. § 1681s-2(b). The nationwide CRAs communicate dispute information to furnishers largely through a system called e-OSCAR, in which the CRAs provide the furnishers with all relevant information received from the consumer. The furnisher must complete their investigation within thirty days after the CRA received the dispute, and if the investigation finds that information was inaccurate, the furnisher must notify each CRA to which it provided the disputed information. *Id.* In general, the CRA then provides the results of the reinvestigation to the consumer within 30 days of receipt of a dispute (with some exceptions where additional information may be required). 15 U.S.C. § 1681i(a)(6). If the furnisher does not verify the information or provide an update in a timely fashion, the CRA must promptly delete the information from its file on the consumer or modify that item of information, as appropriate. 15 U.S.C. § 1681i(a)(1)(A).

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[6] *See* Consumer Financial Protection Bureau's Key Dimensions Report, dated December 2012, *available at* https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

Third, and in addition to their role in the dispute process, furnishers play an increasingly important role under the FCRA in ensuring maximum possible accuracy. Congress amended the FCRA in 1996 through the Consumer Credit Reporting Reform Act of 1996[7] and furnishers were, for the first time, expressly required to follow certain rules regarding their furnishing activities in the then-newly adopted Section 623 (15 U.S.C. § 1681s-2). The responsibilities of furnishers further expanded in 2003. Congress passed the Fair and Accurate Credit Transaction Act ("FACT Act,") which amended the FCRA to further improve the accuracy of consumer reports, by requiring federal agencies to issue regulations and guidelines for furnishers regarding the accuracy and integrity of information furnished to CRAs, and regarding the dispute handling procedures furnishers must follow. *See, e.g., 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575 (F.T.C. July 2011), at p. 3, *available at* https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf. These regulations, known as the Furnisher Rule, were published July 1, 2009. 74 Fed. Reg. 31484 (July 1, 2009).

Pursuant to these regulations, furnishers must maintain written policies and procedures regarding the "accuracy and integrity" of the information they furnish to CRAs. 12 C.F.R. § 1022.42. The Furnisher Rule makes clear that the responsibility to determine the nature and amount of a consumer's obligation rests with the furnisher, and not with the CRA. 12 C.F.R. Part 1022. First, under the Furnisher Rule, "accuracy" is defined as "information that a furnisher provides to a [CRA] about an account or other relationship with the consumer correctly: (1) reflects the terms of and liability for the account or other relationship; (2) reflects the consumer's

[7] Title II, Subtitle D, Chapter 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. 104-208, Sept. 30, 1996).

performance and other conduct with respect to the account or other relationship; and (3) identifies the appropriate consumer."[8] 12 C.F.R. § 1022.42(a). Thus, it is the responsibility of the furnisher to determine whether a particular consumer is liable with respect to a particular account. Further, reporting information with "integrity" means, among other elements, that the "information that a furnisher provides to a [CRA] about an account or other relationship with the consumer: (1) is substantiated by the furnisher's records at the time it is furnished…" 12 C.F.R. § 1022.42(e). Thus, a furnisher must provide an accurate account description of the nature of the account and the proper relationship between the consumer and the account to the CRA, both of which must match that which is included in the furnisher's own records at the time it provides the data.

II. Consumer Reporting Agencies Do Not Adjudicate the Validity of Accounts.

It is undisputed that Mr. Denan borrowed the money in question and then ceased repaying it, and that the loans were never forgiven by Mr. Denan's lenders nor declared invalid by any court. Plaintiffs-Appellants nonetheless contend that Trans Union should have determined for itself that the loans were invalid, and reported Mr. Denan's credit history to potential future creditors as if those loans did not exist. This misconstrues both the meaning of accuracy and the role of CRAs under FCRA.

A. Courts Regularly Bar Collateral Attacks on Account Validity.

Plaintiffs-Appellants conflate a determination of accuracy with a determination of validity and seek to impermissibly force CRAs to become mini-courts of law. Courts that have examined

[8] Plaintiffs-Appellants reference the definition of "accuracy" from the Furnisher Rule in their brief, but fail to make clear the source of the definition, or that this definition applies to the obligations of furnishers, not CRAs. The brief suggests that this "accuracy" obligation to report "the terms of and liability for" is a responsibility imposed on the CRA, which has no direct knowledge or information about the account other than that which is shared by the furnisher.

the question raised by Plaintiffs-Appellants have declined to impose this obligation on CRAs, effectively prohibiting what have been termed "collateral attacks" against account validity.

The First Circuit applied the collateral attack concept to bar an FCRA claim where the consumer challenged the legal validity of a mortgage through an accuracy challenge. *DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008). In *DeAndrade*, the consumer alleged that the mortgage was legally deficient, and unenforceable, but the creditor continued to report the account, believing it to have been ratified by the consumer. The First Circuit found that there was no inaccuracy in the information reported by the CRA, and it would not entertain a lawsuit against the CRA to attack the underlying contract between the parties. *Id.* The court stated that:

> whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA.... In essence, DeAndrade has crossed the line between alleging a factual deficiency that Trans Union was obliged to investigate pursuant to the FCRA and launching an impermissible collateral attack against a lender by bringing an FCRA claim against a consumer reporting agency.

Id. at 69.

The Ninth Circuit, enforcing the prohibition against collateral attacks, makes clear that the FCRA reinvestigation rules do not require a CRA to sit in judgment over a legal dispute. "A CRA is not required as part of its reinvestigation duties to provide a legal opinion on the merits. Indeed, determining whether the consumer has a valid defense 'is a question for a court to resolve in a suit against the [creditor,] not a job imposed upon consumer reporting agencies by the FCRA.'" *Carvalho v. Equifax Information Services LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (where consumer sued CRAs over the reporting of a medical bill because she believed her insurance company should have paid the health care provider) (quoting *DeAndrade*, 523 F.3d at 68). The court held that no FCRA claim could stand against the CRAs for the inclusion of the information

stating "[r]reinvestigation claims are not the proper vehicle for collaterally attacking the legal validity of consumer debts." *Id.*

The Tenth Circuit, following the reasoning of *DeAndrade* and *Carvalho,* held that "a reasonable investigation ... does not require CRAs to resolve legal disputes about the validity of the underlying debts they report" where the plaintiff challenged the reporting of a tax lien by the CRA. *Wright v. Experian Information Systems, Inc.* 805 F. 3d 1232, 1242 (10th Cir. 2015). In *Wright,* the plaintiff argued that 'reasonable procedures' required the CRA determine the validity of the reported tax lien, including hiring and training employees to understand and "American tax law." *Id*. at 1243-44. After analyzing *DeAndrade* and *Carvalho*, the court held that "Mr. Wright's argument would require the CRAs to do more than a reasonable reinvestigation requires. ... Mr. Wright insists the CRAs must go further and determine the validity of the tax lien. As the foregoing cases demonstrate, that question is a matter he should take up with the IRS." *Id*. Thus, even if Plaintiffs-Appellant's claim here was a "reasonable procedures" claim under §1681i(a), and not an accuracy claim under §1681e(b), the district court properly dismissed the claim as a prohibited collateral attack on the validity of the loan, and this Court should affirm.

On the specific question of whether a law violation in the underlying transaction renders the transaction void or voidable, courts have held that an FCRA claim still may not stand. *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt*, P.C., No. 08-CV-4208, 2012 U.S. Dist. LEXIS 43280, at *15-16 (E.D.N.Y. Mar. 28, 2012) ("The apparent violation of the local or state law regarding licensing cannot state a plausible FCRA violation."). Further, courts have rejected similar attempts in a variety of other contexts as well. *See, e.g., Rosco v. Equifax Info. Servs.*, No. 2:15cv325, 2016 U.S. Dist. LEXIS 83927, at *7-9 (E.D. Wash. June 28, 2016) (rejecting a claim against a CRA based on the theory that the loan application supporting the permissible purpose was procured by

fraud); *Ludditt-Poehl v. Capital One Auto Fin., Inc.*, No. 4:06cv888, 2007 U.S. Dist. LEXIS 61444, at *7 (E.D. Mo. Aug. 21, 2007) ("The Court further finds that it is not required to engage in an analysis of whether the mailer constitutes a valid 'offer' under common law. The issue before the Court is whether the mailer falls within the parameters of a 'firm offer of credit' as defined by the FCRA."); *Swift v. First USA Bank*, No. 98 C 8238, 1999 U.S. Dist. LEXIS 16192, at *10 (N.D. Ill. Sept. 30, 1999) ("Merely because First USA chose an allegedly improper means of conveying the credit offer to Swift does not mean that it failed to extend a firm offer of credit in compliance with the FCRA.").

Plaintiffs-Appellants argue that other courts "have correctly looked to both the law and the facts to determine whether information on credit reports is accurate" and urge this court – not to do that for itself – but to require a CRA to do so. *See* Opening Brief of Plaintiffs-Appellants, p. 28. Among others, Plaintiffs-Appellants discuss the facts in *Groff v. Wells Fargo Home Mortg. Inc*., a case in which a lender furnisher (not a CRA) was sued for allegedly providing inaccurate information about the nature of the relationship between the creditor and the consumer following a bankruptcy discharge. 108 F. Supp. 3d 537, 540 (E.D. Mich. 2015). In that case, the court analyzed the facts related to the relationship of the parties, analyzed other case law, and applied that law to reach its conclusion that the lender was correct – precisely the type of a legal adjudication that *a court of law should undertake. Groff* is entirely consistent with CDIA's position that such analysis is the province and duty of the courts. It is not the role of a CRA.

Henson v. CSC Credit Services, 29 F.3d 280 (7th Cir. 2005), is similarly unhelpful to their argument at bar. There, the issue was two-fold: one, whether a CRA is liable under 1681e(b) for reporting inaccurate information that it obtained from a court record that was later shown to be incorrect (the "accuracy" claim); and second, whether the consumer put the CRA on sufficient

notice that to require the CRA to review the underlying court record and determine whether the purported judgment noted in the Judgment Docket actually existed (the "reasonable procedures" claim).

With respect to the accuracy claim, the court expressly held that "as a matter of law, a credit reporting agency is not liable under [section 1681e(b) of] the FCRA for reporting inaccurate information obtained from a court's Judgment Docket, absent prior notice from the consumer that the information may be inaccurate." *Id.* at 285. Thus, the CRA had no obligation to question the correctness of the Judgment Docket and was entitled to rely upon it, prior to the time it received receiving a dispute from the consumer.

As to the "reasonable procedures" claim – whether the CRA had an obligation to reinvestigate the consumer's dispute beyond the Judgment Docket to determine if the clerk noted the judgment correctly – it was referred to the lower court for further development of the record to see if the consumer's dispute fairly put the CRA on notice of the nature of the dispute. *Id*. at 287 ("On remand, the Hensons will have the burden of showing that they brought the alleged error in Greg's credit report to Trans Union's attention."). Further, even if the consumer put the CRA on notice of the error, the inquiry was not to end there. The Court of Appeals then instructed the trial court to "balance the cost of verifying the accuracy of the source versus the possible harm inaccurately reported information may cause the consumer" in determining whether the CRA had an obligation to conduct further research into whether the judgment was properly recorded (i.e., whether the CRA's reinvestigation procedures were reasonable). *Id.* Thus, the district court in the present case below correctly read *Henson's* second issue for what it really is – a question of what procedure the CRA should have followed upon receipt of the dispute by the Hensons.[9]

[9] Moreover, despite what is suggested on brief, the Court expressly chose not to answer the question about 'misleading' information: "[w]e do not decide whether a credit reporting agency may be liable for

Finally, the alleged inaccuracy in *Henson* was a straightforward factual issue wholly unlike the claims in *DeAndrade, Carvalho*, and this case, that CRAs are required to adjudicate the validity of a loan. In *Henson*, the potential heighted inquiry would merely have required the CRA to pull the publicly available file and review the order itself. It did not require the confidential records of a furnisher, a legal analysis of applicable law, a weighing of the facts, or any application of law to fact. The CRA would not be second-guessing the court's or any other person's decision. Here, Plaintiffs-Appellants suggest that a CRA must look behind the data reported by furnishers and come to legal conclusions about the enforceability and validity of hundreds, if not thousands, of accounts – weighing applicable law and applying them to facts in the hands of the furnishers. As discussed more fully below, the FCRA does not require CRAs to supplant the judicial process and adjudicate such questions. This Court should not require it of them either.

B. The FCRA Does Not Require CRAs to Adjudicate the Validity of Any Particular Account.

The FCRA is devoid of any provision requiring a CRA to make a legal determination regarding the legal effect or collectability of any consumer account reported by a furnisher. As described above, that determination is reserved solely for the furnisher; the person in the best position to evaluate the consumer's claim of invalidity. If the parties disagree, the dispute should be submitted to a court of law. Interpreting the FCRA otherwise would lead to absurd results.

As a practical matter, such an obligation would be impossible to meet – there are innumerable laws, rules, or other legal requirements imposed on businesses, and no CRA could possibly verify that each furnisher of information was in compliance with all of them. Considering only the question of proper licensing for lenders, for example, a CRA would have to undertake

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reporting "technically accurate" but misleading information. The district court mistakenly applied the *Koropoulos* court's balancing test, because the information contained in Greg's credit report was not "technically accurate." *Id.*, fn. 4.

several costly and difficult steps. First, the CRA would have to ascertain whether a license was required in each state in which the lender made loans. That determination could depend on several factors, including the type of lender, the types of loans it was making, whether the lender had any licenses, the language of the loan agreements, and the meaning of the language of the specific state laws. Second, depending on the type of lender and license, as well as other factors, the CRA would have to determine what state interest rate limits, if any, might apply in each state. Third, to ascertain whether the lender was violating those state interest rate limits, the CRA would have to know all of the different rates the lender was actually charging for each type of loan in each state and compare them to the applicable rate limit. And, it would have to stay abreast of all of the rates each lender was charging in each state as they changed over time, not to mention obtain a law license to come to such legal conclusions.

The FCRA does not place the CRA into the role of judge or jury for good reason. Setting aside the Constitutional implications, the balance struck by Congress was based on the recognition that it is the furnishers who are in the best position to know whether the information they have accurately reflects the consumer's obligations with respect to the account, and whether the furnisher has a right to recover sums due on the account. The dispute process clearly reflects this as the CRA must forward the dispute to the furnisher, and the furnisher must analyze the consumer's dispute. No underlying contract documents or testimony are returned to the CRA, nor does the FCRA contemplate such a review by the CRA. Even if technologically feasible, the dispute processes would grind to a halt because the collection of data, review by a CRA, research, communication between all interested parties, and other work needed to truly adjudicate the claim would take far longer than the permitted 30 days under Section 1681i.

C. Consumer Reporting Agencies' inability to adjudicate validity is heightened where there are unsettled questions of law.

The case at bar presents a perfect example of why CRAs are incapable of adjudicating validity. The tribal lending model is not *per se* illegal as Plaintiffs-Appellants suggest. Rather, the law is unsettled, and courts have upheld tribal internet loans in different contexts. But to make those determinations, courts have engaged in a complicated fact-based analysis that CRAs cannot (and should not) complete.

The core of Plaintiffs-Appellants' position is that internet loans made by arms of Native American tribes are invalid and unenforceable. Plaintiffs-Appellants' Brief at 4-5. And because they are unenforceable, TransUnion should not have reported any balance owed for the Plaintiffs-Appellants. *Id.* This is a gross oversimplification of the law and ignores the complicated analysis that courts have applied to uphold the very model that Plaintiffs-Appellants claim to be so legally dubious.

Native American tribes are "domestic dependent nations" that have "inherent sovereign authority over their members and territories" and as such have *tribal immunity* from state laws. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Tribal immunity also applies to arms of a tribe that engage in commerce using tribally created entities. *See Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmyt. Of the Bishop Colony*, 538 U.S. 701, 704, 705 n.1 (2003). This includes commerce and conduct that occurs off-reservation. *See Id.*; *Kowa Tribe of Okla v. Mfg. Tech, Inc.*, 523 U.S. 751 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts…were made on or off a reservation."); *Williams v. Big Picture Loans*, 929 F.3d 170, 176 (4th Cir. 2019) (arm of tribe making internet loans from reservation to non-Indian citizens was entitled to tribal immunity). As applied here, if Plain Green

is a true "arm of the tribe" state licensing laws are inapplicable and Plain Green's loans are valid and enforceable. *See Big Picture Loans, LLC*, 929 F.3d at 177, 185.

But the analysis to determine whether tribal immunity applies to a particular entity is a complicated one. The Fourth Circuit's decision in *Williams v. Big Picture Loans, LLC* presents a case where tribal immunity was upheld in an identical scenario. 929 F.3d at 185. There, the Fourth Circuit conducted a nuanced analysis that required heavy factual development of the following factors: "(1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity and the entities' connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." 929 F.3d 170, 177.

Working through these factors requires nuance and careful balancing. It took several years and a federal court of appeals to determine the validity of the contracts in the *Big Picture Loans* case – and the result in any event was that the loans were valid and enforceable. Plaintiffs-Appellants expect TransUnion to accomplish the same within thirty days of receiving a dispute or, alternatively, before it ever accepts a tribal lender or arm of a tribe as a client. But CRAs cannot apply nor reasonably be expected to adjudicate complex and sensitive tribal rights at the drop of a hat. That expertise is the province of the courts, with due notice and opportunity to be heard to all parties, not an extra-judicial CRA.

III. The FCRA Does Not Require The Omission of Credit Accounts Because of the Mere Possibility a Court Could Later Declare the Loans Unenforceable.

Other amici have suggested that the CRAs need not adjudicate such claims on a case by case basis. Instead, they argue, the loans at issue here were obviously illegal and uncollectable because of the 'common knowledge' that these lenders were likely acting illegally, and did not

maintain licenses, etc. Thus, they argue, Trans Union should have removed all of the accounts based on that fact alone. *See* Brief of *Amicus Curiae*, Doc. No. 20-2, p. 3. However, as was demonstrated by the *Williams v. Big Picture* case, the mere existence of a lawsuit or investigation does not mean that a loan will be determined to be invalid or a lender to be acting illegally. Further, if a tribal lender is operating appropriately, they may not need to be licensed in any particular state. Removing data about existing consumer obligations – and thereby depriving potential creditors of relevant knowledge about the consumer's potential liabilities – would be entirely premature prior to a ruling by a court that the loans were illegal or unenforceable, whether due to licensing requirements or otherwise.

Such an approach could also negatively impact consumers. If CRAs simply delete account information from the payday lending industry because it is disfavored by some, the credit history of those consumers who are continuing to make monthly or bi-monthly payments will be skewed. Such consumers would be deprived of the positive effect on their credit standing that they might otherwise obtain from a record of their timely payments. And, to the extent that depriving creditors of information about payday loans would increase lending risk, it could lead those creditors to restrict the availability of credit to high-risk borrowers, or to lend on less favorable terms. That potential result would not be good for anyone in the credit reporting system.

CONCLUSION

For all these reasons, the Consumer Data Industry Association urges this Court to affirm the decision of the District Court, and refrain from creating a new obligation on consumer reporting agencies to adjudicate legal matters they are unprepared to handle.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 29, I certify as follows:

1. The foregoing amicus brief complies with the type-volume Circuit Rule 29 because this brief contains 5702 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 365 version 1907, the word processing system used to prepare the brief, in 12-point font in Times New Roman font.

/s/ Allen Hand Denson
Allen Hand Denson

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I certify that on the 3rd day of September, 2019, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all counsel of record.

/s/Allen Hand Denson
Allen Hand Denson