No. 19-15791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT SUSTRIK AND SHARON BARNUM,
Plaintiffs-Appellants,
v.

EQUIFAX INFORMATION SERVICES LLC,
Defendant-Appellee.

BRIEF OF AMICUS CURIAE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF APPELLEE EQUIFAX INFORMATION SERVICES LLC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (NO. 2:16-CV-2866-RFB-NJK)

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CORPORATE DISCLOSURE STATEMENT

The Consumer Data Industry Association ("CDIA") is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of CDIA's stock.[1]

Dated: March 6, 2020

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[1] Fed. R. App. P. 26.1(a), 29(a)(4)(A).

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STATEMENT OF INTEREST OF AMICUS CURIAE

CDIA is a trade association representing consumer reporting agencies ("CRAs") 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 vitally 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. *See* 15 U.S.C. §§ 1681 *et seq.* With limited regulatory guidance in interpreting the FCRA, CRAs often face private litigation based on novel theories of liability.

Because CDIA has been involved in the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and users are all subject to potential claims under the FCRA's class action provisions, CDIA is uniquely qualified to assist this Court as it considers this appeal, and has authority

to file this brief under Circuit Rule 29-2(a) because all parties have consented to its filing.

ARGUMENT

The district court properly applied the legal pleading standard established in *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010), and this Court should reject the Appellants' request to limit or modify that standard. This Court should also decline to create by judicial order new obligations of consumer reporting agencies ("CRAs") that do not exist in, or serve the purposes of, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"). In light of the structure and purpose of the FCRA, which balance the interests of consumers and the needs of users of consumer reports, the *Carvalho* rule that a plaintiff must establish an inaccuracy in order to recover damages against a CRA under Section 1681i is inherently reasonable. Further, the FCRA does not require a CRA to guarantee or otherwise ensure receipt of reinvestigation results, or any other materials required to be sent by CRAs, and this Court should not say that it does.

I. The Consumer Reporting System and the FCRA.

Congress recognized that the consumer reporting industry is vital to the U.S. economy, and in enacting the FCRA, found that the "banking system is dependent upon fair and accurate credit reporting." *See* 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting"); 15 U.S.C.

§ 1681(a)(2) (finding that the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation). The FCRA's requirements govern all aspects of credit reporting, an industry that has changed significantly since the statute's original passage. *See* Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, p. 7 (Dec. 2012), *available at* https://www.consumerfinance.gov/data-research/research-reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system/ (describing the changes to the consumer reporting industry) ("Key Dimensions Report").

The FCRA is a "less-than-pellucid" statute, setting forth a number of responsibilities on CRAs and other participants and containing no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007). 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.

Each year, CDIA member CRAs furnish more than 1.5 billion consumer reports to such users, including creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions not only with regard to the extension of credit, but also in hiring potential employees, evaluating the backgrounds of potential tenants, as well as to provide information to law enforcement to locate individuals suspected of criminal activity. *See TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001); *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004). Information in consumer reports contributes to the soundness, safety, and efficiency of the insurance, banking, finance, retail credit, housing, and law enforcement systems in the United States.

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers. Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 8-9 (2004), *available at* https://www.ftc.gov/reports/under-section-318-319-fair-accurate-credit-transaction-act-2003. The files contain 1.3 billion credit accounts or other tradelines (an industry term for accounts that are included in a credit report) that include billions of items of information the CRAs receive from over ten thousand furnishers on a monthly basis. Key Dimensions Report, p. 3. Because credit reports are compiled over the course of years, based on information

obtained from different types of furnishers, and updated on a periodic basis, insurers, creditors, landlords, employers, and others who have "permissible purposes" can obtain a detailed picture of the risk (e.g., default risk, risk of a covered loss, etc.) presented by a particular consumer. 15 U.S.C. § 1681b(a).

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). One significant component of accuracy of the consumer reporting system is the ability of consumers to dispute information maintained by a CRA about them. Pursuant to section 1681i, consumers may submit to the CRA a dispute, noting particular information that the CRA maintains about the consumer is inaccurate or incomplete. The CRA will reinvestigate the information, together with the information submitted by the consumer in support of their dispute, and will make changes to the information it maintains accordingly. 15 U.S.C. § 1681i. Finally, the FCRA directs the CRA to send the consumer the results of its reinvestigation. *Id.*

Fundamentally, these reinvestigation procedures, together with other provisions of the FCRA, are designed to protect consumers from the dissemination of inaccurate information to third parties. CRAs receive millions of disputes per year from consumers across the country, not all of them meritorious. *See* Key Dimensions Report, p. 4 (noting that in 2011, the nationwide CRAs received 8

million contacts from consumers resulting in 32-38 million disputed items on consumers' credit files).

As noted above, the FCRA is not a strict liability statute, and the mere fact that a technical violation can be alleged is not per se grounds for liability against a CRA, particularly when the principal purposes of the FCRA are not implicated. Chief among those purposes is that the FCRA – and section 1681i in particular -- "sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016); *see also Guimond v. Trans Union Credit Info. Co.,* 45 F.3d 1329, 1333 (9th Cir. 1995). For this reason, courts have acted as gatekeepers by recognizing that where a plaintiff alleges a violation of an FCRA procedure aimed at preventing inaccuracies, such as section 1681i, an inaccuracy is an indispensable substantive element of such a claim.

II. <u>This Circuit Properly Recognizes that a Plaintiff Must Plead an Inaccuracy of Information to State a Viable Claim of a Violation of Section 1681i.</u>

In this Circuit, in order to proceed on a claim against a CRA for a violation of section 1681i, a plaintiff must first plead that the CRA's file contains an item of information that is inaccurate or incomplete, which information the plaintiff disputed, a rule that has been in place for decades undisturbed. *Carvalho*, 629 F.3d at 892. Contrary to Plaintiffs' argument, that rule applies without regard to which

of the procedural requirements of section 1681i was allegedly violated.

In *Carvalho*, the plaintiff alleged a similar notice or disclosure violation as the case at bar, namely that the CRAs violated the California Consumer Credit Reporting Agencies Act ("CCRA") by failing to send the plaintiff a description of the procedures the CRA followed in conducting a reinvestigation of plaintiff's dispute and by failing to conduct a reasonable reinvestigation. *Id.* at 888; *see* California Consumer Credit Reporting Agencies Act, Cal. Civ. Code §§ 1785.1 *et seq*. The district court dismissed both claims on the basis that the plaintiff failed to plead that the credit report was "patently incorrect or materially misleading," a necessary element for either claim's survival. *Carvalho*, 629 F.3d at 891.

In determining whether the CCRA required the plaintiff to plead an inaccuracy in the report, this Court analyzed the question under the parallel FCRA requirement – the very one at issue in this case, section 1681i. Citing *DeAndrade v. Trans Union, LLC*, and *Dennis v. BEH-1, LLC*, the *Carvalho* court found that "[a]lthough the FCRA's reinvestigation provision, 15 U.S.C. § 1681i, does not on its face require that an actual inaccuracy exist for a plaintiff to state a claim, many courts, including our own, have imposed such a requirement," and that a plaintiff filing suit under 1681i must make a prima facie showing of an inaccuracy. *Id.* at 890. This Circuit found that such an "inaccuracy requirement comports with the purpose of the FCRA, which is 'to protect consumers from the transmission of

inaccurate information about them.'" *Id.* If there is no inaccurate information, a consumer would not be harmed with that information being shared with a third party.

The courts have taken a similar approach with respect to other provisions of the FCRA. The Fifth Circuit's opinion in *Washington v. CSC Credit Services* illustrates this point. *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263 (5th Cir. 2000). Faced with a suit alleging a failure to maintain reasonable procedures to verify the permissible purpose of persons requesting consumer reports under section 1681e(a), the court refused to impose liability where there was no evidence that the alleged failure to maintain such procedures harmed the plaintiffs. *Id.* at 267. The plaintiffs argued that, regardless of whether the disclosure was permissible under the FCRA, they were entitled to relief because the defendants did not have reasonable procedures in place to prevent improper disclosures. *Id.* at 266-67. Notably, the plaintiffs did not allege that they suffered any harm as a result of the defendant's unreasonable procedures, or that the disclosures at issue were improper under the FCRA. The entire basis for the plaintiffs' claim for damages was that the defendants' *procedures* were inadequate.

The court, in rejecting plaintiffs' claims, explained that the connection between the alleged violation of the FCRA (failure to maintain reasonable procedures) and any alleged damages was too attenuated: "[T]he actionable harm the FCRA envisions is improper disclosure, not the mere *risk* of improper disclosure

that arises when 'reasonable procedures' are not followed and disclosures are made." *Id.* at 267 (emphasis in original). The court explained that "Congress identified actual injuries—including breaches of 'confidentiality' and '[im]proper utilization'—which only occur if there is an improper disclosure, suggesting that a general claim of improper procedures is by itself inadequate." *Id.* Absent resulting harm, a plaintiff has no cause of action for improper procedures. Further, the court refused to accept the plaintiffs' argument that the plain language of the damages provisions of the FCRA (sections 1681o and 1681n) permit damages without any requirement of harm.[2]

Appellants' attempt to distinguish this case from *Carvalho*, on the ground that *Carvalho* purportedly did not address a claimed violation of section 1681i notice procedures, lacks merit for two reasons. First, *Carvalho* did include a prompt-notice claim, and this Court disposed of all of the plaintiff's claims (necessarily including

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[2] Prior to the Fifth Circuit's decision in *Washington*, at least two district courts had applied the same rule, and refused to find a cause of action where the consumer could only allege that the defendant had insufficient procedures, with no resulting harm. *Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056 (C.D. Cal. 1998), *aff'd in part, rev'd in part sub nom. Andrews v. TRW Inc.*, 225 F.3d 1063 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001); *Middlebrooks v. Retail Credit Co.*, 416 F. Supp. 1013 (N.D. Ga. 1976). Following *Washington*, courts in a number of circuits adopted the interpretation of actionable harm in *Washington*. *See, e.g., Wantz v. Experian Info. Sols.*, 386 F.3d 829 (7th Cir. 2004), *abrogated by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833 (5th Cir. 2004); *Villagran v. Freeway Ford, Ltd.*, 525 F. Supp. 2d 819, 834 (S.D. Tex. 2007) ("[A] plaintiff must show injury to have standing to assert a claim under the FCRA based on improper disclosure and use of credit information.").

that one) for failure to allege a cognizable inaccuracy. Second, even if that were not been the case, the rationale of *Carvalho* clearly applies here. The Court held that the inaccuracy requirement follows from "the purpose of the FCRA, which is 'to protect consumers from the transmission of inaccurate information about them.'" *Carvalho*, 629 F.3d at 890. As the Supreme Court observed in *Spokeo*, the harm Congress sought to prevent does not occur when a CRA "fails to provide [a] required notice," but the information at issue is "entirely accurate." *Spokeo*, 136 S. Ct. at 1550.

In short, this Court and others have clearly held that alleged violations of the procedures required by section 1681i provide no basis for a damages lawsuit in the absence of an allegation of inaccuracy. The absence of any alleged inaccuracy in this case is fatal to Plaintiffs' claims.

The rationale behind these decisions is well-founded in light of the fact that a CRA is held not to a standard of perfection, but one of reasonableness. It is undisputed that a CRA is required to reinvestigate a consumer's dispute so long as the dispute is not frivolous, regardless of whether the consumer was actually correct when she lodged her dispute. But at issue here is the question whether a CRA should be held liable for monetary damages to a private plaintiff for how the CRA handles a reinvestigation when the consumer's information was accurate. The requirement of a prima facie showing of inaccuracy to sustain a claim under section 1681i

supports the underlying principles behind the reinvestigation requirements, which is to assure accuracy of the information contained within consumer reports. Therefore, requiring an inaccuracy to be alleged as an element of a claim under section 1681i is consistent with the balancing of interests the FCRA undertakes in its effort to protect consumers from harm.

III. <u>The FCRA Does Not Require that a CRA Ensure Receipt of the Notice Under Section 1681i.</u>

In essence, what Appellees seek is a ruling that the FCRA imposes a requirement on CRAs that does not exist – one to effectively ensure that the consumer *actually receives* the reinvestigation results the CRA has sent to the consumer. There is no such requirement in the FCRA, or in any case interpreting the FCRA in its nearly fifty-year history.

In fact, the FCRA requires only that a CRA provide notice to the consumer of the results of the reinvestigation "by mail or, if authorized by the consumer for that purpose, by other means available to the agency." 15 U.S.C. § 1681i(a)(6). It does not require a CRA to ensure that the consumer *receives* the results. Nor does it require that a CRA maintain, for an indefinite period, records memorializing each individual notice and report that is mailed. Thus, the CRA's duties are discharged by maintaining reasonable procedures to mail the results (or other delivery per the consumer's request as available to the CRA).

There are a number of other provisions in the FCRA that require a CRA to

provide some documentation to the consumer, none of which require the CRA to confirm or guarantee delivery. *See, e.g.,* 15 U.S.C. § 1681k (notice required related to the public record information in employment reports), § 1681h (consumer file disclosures), and §§ 1681g(c)(2) and (d)(2) (requiring a CRA to provide a copy of the Summary of Consumer Rights and Summary of Consumer Identity Theft Rights). For example, 15 U.S.C. § 1681k (section 613) requires the CRA to send notice to the consumer where adverse matters of public record are included in a report for employment purposes (unless the CRA maintains strict procedures to assure that the records are complete and up to date). The statute provides the CRA shall "at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the [CRA], . . ." *Id.* The statute is intended to provide the consumer with prompt notice that information that might adversely affect their employment application has been sent to the potential employer so that the consumer may dispute the matter with the CRA or provide explanatory information to the employer prior to the employment decision. In its report titled "*40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*" (July 2011) (the "40 Years Report"), the FTC staff noted that the CRA"s obligation to "notify" the consumer is discharged when the CRA mails the notice to the consumer: "A CRA may use first class mail or other reasonable means

to notify consumers that it is providing public record information for employment purposes under subsection (a)(1)." 40 Years Report, p. 81, *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. The FTC staff recognized that using first class mail is a "reasonable means" of giving notice to consumers. Thus, a CRA discharges its responsibility to provide the required notice by mailing such notice to the consumer.

The FCRA also imposes requirements on users of consumer reports to provide various notices to consumers and, where it has done so, such notices are deemed to be provided at mailing. For example, section 1681d requires a person requesting an investigative consumer report to first provide a written disclosure to the consumer about whom the report is requested. It states "…such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer…" 15 U.S.C. § 1681d(a)(1)); *see also* 40 Years Report, p. 63 (reaffirming that "[the] notice must be in writing and mailed or otherwise delivered to the consumer"). Thus, "mailing" the notice equals "delivery" under this section of the FCRA as well.

Notably, where Congress intends to impose additional protections to help assure notice that certain FCRA notices are received, Congress has previously required that the user follow special measures, such as requiring that notice be sent to the consumer via certified or registered mail. In a prior version of section 1681b

of the FCRA, Congress previously required child support authorities that wanted to obtain a consumer report to provide notice to the consumer about whom a report would be requested by "certified or registered mail." *See* 15 U.S.C. §§ 1681b(a)(4) & (5), revised December 4, 2015. The FTC staff noted in its 40 Years Report that prior section 604(a)(4)(C) "requires only that the child support authority notify the report subject (usually a non-custodial parent who owes child support) by certified or registered mail. It does not require the agency to procure a signed receipt or to follow any additional procedures, such as service of process that would be required to bring a lawsuit." *Id.*, p. 49. Clearly, if Congress had intended that a CRA ensure receipt of the reinvestigation results, or any other notice, it could have required the CRA to use certified or registered mail. It did not. Thus, the CRA's obligation to provide notice or other documents is discharged by mailing.

In the case at bar, Appellee has demonstrated that it has reasonable procedures to assure that its results are mailed to consumers and does so utilizing automated systems with oversight of the process.[3] *See* Appellee's Brief, pp. 7-11. Leveraging a third party to fulfill the mailing of such notices is not uncommon in the industry, and is not an unreasonable procedure. CRAs, like financial institutions, regularly mail significant amounts of paper each and every day. Federal regulators have

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[3] Appellants' sole proof of any failure on the part of Appellee to comply with section 1681i appears to be their testimony that they did not receive the results of the reinvestigation. *See* Appellee's Brief, p. 12 (citing R. at 5).

recognized for years that such institutions regularly engage service providers to outsource various functions. *See* the Consumer Financial Protection Bureau's Compliance Bulletin and Policy Guidance; 2016-02, Service Providers dated October 31, 2016 ("[t]he CFPB recognizes that the use of service providers is often an appropriate business decision for supervised banks and nonbanks."), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf, p. 2.

Notwithstanding the more than 1 billion reports prepared by CRAs annually, and the plethora of litigation alleging violations of the FCRA, CDIA can find no record of any court that has attempted to impose a requirement that a CRA guarantee delivery or confirm receipt of notices or other papers that it sends to a consumer, and this Court should not be the first to do so.

CONCLUSION

For the foregoing reasons, as well as the reasons cited in the Appellee's brief, the Court should affirm the district court's judgment.

Dated: March 6, 2020 HUDSON COOK, LLP

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