No. 16-15707

In the United States Court of Appeals for the Ninth Circuit

GINNY ABEYTA,
Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A., ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the District of Nevada, 2:15-cv-02320

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER LAW CENTER AS AMICI CURIAE IN SUPPORT OF APPELLANT GINNY ABEYTA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for amici curiae certifies that both the National Association of Consumer Bankruptcy Attorneys and the National Consumer Law Center are nongovernmental corporate entities; they have no parent corporations and no stock.

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INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and larger community on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on bankruptcy issues affecting its members and their clients. The National Consumer Law Center is a public interest, non-profit legal organization incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers.

This case is of vital interest to NCLC and NACBA. One of the fundamental purposes of bankruptcy is to pave the way to a “fresh start” for consumer debtors who have found themselves in intractable financial distress. In furtherance of that goal, as well as similar goals embedded in consumer protection laws such as the Fair Credit Reporting Act, creditors are held to strict reporting guidelines. Where, as in this case, creditors report misleading, albeit technically accurate, information of a post-bankruptcy delinquency, the consequences to the debtor are serious, negatively impacting her access to employment, licensure and housing and ultimately denying her the fresh start she has earned through successful completion of her chapter 13 plan.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than amici contributed money to fund this brief.

CONSENT

The parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

At issue for the Appellant are several matters, namely 1) whether Ms. Abeyta's Second Amended Complaint sufficiently alleges that Bank of America reported credit information that was inaccurate or misleading for purposes of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 et. seq, 2) whether a reasonable jury could find Bank of America in violation of FCRA due to its failure to adhere to guidance from the Federal Trade Commission ("FTC") and industry standards set forth by the Consumer Data Industry Association's ("CDIA") Metro 2® Format, and 3) whether the district court erred in its sua sponte dismissal of Ms. Abeyta's claims against Wells Fargo and SSSCU. [E.R. 012-018].

Amici focuses solely on the merits of the first two issues as they pertain to the case against Bank of America. The District Court erred in ruling that Ms. Abeyta's claim against Bank of America failed because the credit information reported by the bank was technically accurate. In fact, the information reported by Bank of America was misleading and thus inaccurate. Following successful completion of Ms. Abeyta's chapter 13 case, Bank of America reported a delinquency date that post-dated the filing of Ms. Abeyta's bankruptcy petition, which it failed to correct, following the reinvestigation. [E.R. 062-078]. In so doing, Bank of America failed to conform to industry standards set forth by the CDIA's Metro 2® Format, which provides meticulously structured guidelines for credit reporting

throughout the industry. The District Court erred in dismissing Ms. Abeyta's complaint based upon the "patent accuracy" of the bank's reporting, in spite of a long line of precedential cases ruling that technically accurate but misleading reporting may be deemed inaccurate if it can be expected to adversely affect a consumer's credit standing.

The District Court erred in failing to give any weight to the Federal Trade Commission's interpretation of the FCRA, despite the fact that the FTC was the primary agency charged with enforcing the FCRA for over 40 years, in accordance with Congress's express intent. The FTC has consistently interpreted accuracy requirements of section 1681e(b) to require that bankruptcies be reported in a certain way. The District Court's ruling suggests that whether a consumer is a debtor in bankruptcy and performing under a proposed or confirmed chapter 13 plan is irrelevant to the reporting of a debt's delinquency status, despite clear statements to the contrary by the FTC.

Finally, the District Court's ruling is contrary to the public policy concerns embedded in both the Bankruptcy Code and the FCRA. The bankruptcy process is designed to give debtors a fresh start and an opportunity to rebuild their financial credibility. The FCRA was crafted in order to protect consumers from having inaccurate information disseminated about their credit standing. Ms. Abeyta voluntarily sought relief under chapter 13 in order to do just that, and she complied with all of

the terms of her repayment plan. Her resulting "fresh start" depended, in part, on her creditors meeting their responsibility to accurately report the state of their transactions with her.

If courts do not hold furnishers, like Bank of America, accountable for neglecting to comply with clear industry standards in the reporting of consumer debt, the purpose of both the bankruptcy system and the FCRA is severely undermined. The District Court's ruling creates a perilous precedent that would allow creditors to legally report all consumer debts as delinquent throughout the pendency and even beyond the completion of a chapter 13 bankruptcy. Such a ruling would empower creditors to report delinquencies on the underlying debt even if that same consumer were in compliance with all of the payment terms under the chapter 13 plan. Consumers would thus exit the bankruptcy with black marks upon their credit scores unrelated to the bankruptcy itself, in essence robbing the debtor of their right, under the Bankruptcy Code, to a fresh start.

Negative credit reports have the potential to do more than hamper a debtor's ability to obtain credit. Adverse credit reports can serve as a barrier to access for professional licensure, employment and housing. Given the social power wielded by such reports, the reporting agencies and the creditors that populate their information databases should be held to the strictest of standards. To allow inaccuracies on a grand scale threatens to upend the consumer protections that underpin both the

Bankruptcy Code and the FCRA. For these reasons, the ruling of the District Court must be reversed.

I. INTRODUCTION AND STATUTORY FRAMEWORK

A. FAIR CREDIT REPORTING ACT

Congress enacted the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. 1681–1681x, in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 127 S. Ct. 2201, 2205 (2007). Accordingly, a purpose of the FCRA is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer…." *Id*. 1681(a). To that end, Congress gave consumers the right to dispute the accuracy of information in credit reports and to require CRAs to conduct a "reasonable reinvestigation" into the accuracy of a report. *Id*. 1681i(a)(1)(A). Furthermore, the FCRA requires the entity that provided the information to the CRA, often called the "furnisher," to participate in that process by conducting its own investigation. *Id.* 1681s-2(b).

This Court does not require factual inaccuracy for liability under section 1681s-2(b) against a ***furnisher***; it has held that factual inaccuracy is necessary for a claim against a ***CRA*** under section 1681i(a). There are good reasons to distinguish

between furnishers and the CRA on this point. As this Court noted in *Carvalho*, furnishers have a very different relationship to disputed information than a CRA, in that a furnisher "stands in a far better position to make a thorough investigation of a disputed debt than the CRA does on reinvestigation." *Carvalho v. Equifax. Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010).

More importantly, this Court in *Carvalho* and other cases has clearly held that technical accuracy is not sufficient to constitute accuracy under the FCRA. A report can be "inaccurate" if it is either "patently inaccurate" or "because it is mis-leading to such an extent that it can be expected to adversely affect credit deci-sions." *Id*., citing *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009). Thus, inquiry should never stop at technical accuracy, as it did here in the District Court.

B. CONSUMER DATA INDUSTRY AND METRO 2®

The Consumer Data Industry Association ("CDIA") is an international credit reporting trade association that has developed uniform reporting standards ap-proved by the three major nationwide credit reporting agencies (CRAs) and ac-cepted and used by major creditors and debt collectors. U.S. CONSUMER FINANCE PROTECTION BUREAU, "Key Dimensions and Processes in the U.S. Credit Reporting System," December 2012, at pp. 3, 39-40 (hereafter "CFPB

WHITE PAPER").[1] CDIA's "Metro 2® Format" is a standard electronic data reporting system the CRAs use to promote uniform and consistent credit reporting data. *Id.* at 14-17; *see also* Consumer Data Industry Association (CDIA) "Metro 2® Information."[2] Metro 2® has been designed so that information vital to the preparation of accurate consumer reports is defined in a manner to facilitate the routine provision of accurate and complete information.

While such standards are not per se legally binding, they cannot be ignored in a manner which undermines the accuracy of the information provided. *See* NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING § 6.4.2.5 (8th ed. 2013) (discussion of legal impact of Metro 2® reporting format)). Moreover, guidelines issued by the CFPB encourage the use of a standard data reporting format. 12 C.F.R. Pt. 1022, Appx. E, III(b).

The courts may consider the use, non-use, or misuse of Metro 2® in determining FCRA compliance and whether information reported is accurate, complete, or misleading. *Dreher v. Experian Info. Solutions, Inc.,* 2013 WL 2389878, at *7

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[1] Available at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system/ [as of July 15, 2015].

[2] Available at http://www.cdiaonline.org/Metro2/content.cfm?ItemNumber=854 [as of July 15, 2015].

(E.D. Va. May 30, 2013). Metro 2® reporting standards designate a series of reporting requirements triggered by bankruptcy filings and provide detailed instruction as to how credit reports should be notated at every stage of the bankruptcy proceedings.

For Chapter 13 filings, Metro 2® directs CRAs to flag reports beginning with the month that the bankruptcy petition is filed. Different codes are to be used at every phase of the bankruptcy process. Once all the payments have been made by the Chapter 13 debtor according to the plan and discharge has been entered, Metro 2® requires the CRAs to report: 1) the account status at the time of the petition, 2) the payment history, 3) a current balance of zero 4) a currently monthly payment due of zero, and 5) an amount past due of zero. 2015 Metro 2® Manual at 6-22 9 [See Addendum A]. Bank of America did none of these things, and neglected to update its reporting to Equifax even after the reinvestigation was completed.

C. CHAPTER 13 BANKRUPTCY

This case involves a chapter 13 filing by Ms. Abeyta . The Bankruptcy Code provides several avenues for people and entities weighed down by debt to repay their creditors to the extent they are able, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. Chapter 13 is a debt-restructuring program available to certain debtors with steady income. 11 U.S.C.

109(e).

Cases filed under chapter 13 provide for repayment of debts from the debtors' future earnings. Because chapter 13 is often less disruptive to debtors and can provide greater benefits to creditors, Congress has long sought to encourage debtors to take advantage of that option. Chapter 13 cases are completely voluntary. *See* 11 U.S.C. 303 (limiting involuntary bankruptcy cases to chapters 7 and 11 "only"). Creditors are typically paid pursuant to a plan proposed by the debtor, which generally extends over a period of three to five years.

In this matter, Ms. Abeyta elected to file under Chapter 13, which she did on June 20, 2010, in the District of Nevada. Docket No. 10-21503-BTB. [E.R. 065]. Between the filing of the petition in June, 2010, and the discharge in April, 2014, Ms. Abeyta made payments under the terms of the bankruptcy plan to her chapter 13 trustee. [E.R. 067-068]. In turn, the chapter 13 trustee disbursed those payments to creditors as specified in Ms. Abeyta's chapter 13 plan. One obligation of her creditors, including Bank of America, was to ensure accurate credit reporting of debts included in the bankruptcy. In this case Bank of America did not fulfill its obligation. [E.R. 070]. Its failure to do so undermined the spirit and purpose of both chapter 13 filings and the FCRA.

II. DISCUSSION

A. The FCRA Must Work in Tandem With the Bankruptcy Code in Order to Ensure Debtors a "Fresh Start"

With a primary goal of giving the debtor a fresh start, a bankruptcy filing relies on all participants within the debt restructuring system to play their respective parts. In chapter 13 cases, the debtor is obligated to make monthly payments under the plan to a chapter 13 trustee. In turn, the chapter 13 trustee remits funds to creditors as specified in the plan. The creditors, bound by the terms of the bankruptcy stay, are required to suspend all efforts at collecting outstanding debts. 11 U.S.C. 362. Additionally, under the terms of the FCRA, the consumer reporting agencies to whom furnishers provide information are required to adopt reasonable procedures to ensure the accuracy of reports on the consumer's credit. The chemistry of this system requires each element to perform as expected; the failure of any one of them threatens the debtor's fresh start.

Unfortunately, creditors frequently fail to provide accurate reporting during bankruptcies, neglecting to update accounts and judgments which they know to have been discharged. *See Acosta v. Trans Union*, 243 F.R.D. 377, 391 n.3 (C.D. Cal. May 31, 2007) (bankruptcy lawyer's survey of approximately 900 clients found that 64% of Trans Union reports and 66% of Equifax reports erroneously list one or more discharged debts as due and owing); *White v. Trans Union*, 462 F.

Supp. 2d 1079, 1082 (C.D. Cal. 2006).

Accurate credit reporting is a vital component in any debtor's ability to make a fresh start. Creditors, employers, insurers, landlords and other entities rely heavily on credit reports in making determinations of whether to extend credit, employment, housing or insurance to consumers. Maintaining financial credibility following a bankruptcy is essential for debtors hoping to start with a clean slate. Creditors and the CRAs alike thus wield a tremendous amount of power in helping to shape the financial futures of consumers. The purpose of a chapter 13 reorganization can be dramatically diluted by misreported information on a credit report.

B. Bank of America Failed to Comply with Industry Standards set forth by the CDIA through Metro 2®

Furnisher reporting of an account that has been included in bankruptcy is governed by the coding standards within the Metro 2® reporting format. Per Metro 2®, once a chapter 13 bankruptcy has been completed and a discharge entered (as was case in *Abeyta*), balances on all accounts should be zeroed out. Specifically, the *current balance, scheduled monthly payment amount* and *amount past due* must all be listed as zero. Once this reporting has been completed, Metro 2® provides that reporting for the account should be discontinued. 2015 Metro 2® Manual at 6-22.

In October 2014, a full six months following the discharge, Ms. Abeyta obtained an updated credit report, an ordinary practice in the wake of a bankruptcy

discharge. [E.R. 067]. On the October, 2014, report, Bank of America inaccurately reported that her account was "past due" for July, 2010. The debt was coded "4" indicating that the account was 120-149 days past due. [E.R. 067]. Bank of America also reported that Ms. Abeyta was in "major delinquency" in August, 2010. [E.R. 068].

On December 11, 2014, Ms. Abeyta made a formal request for reinvestigation by Equifax. [E.R. 068]. On April 22, 2015, a full year following the bankruptcy discharge, Equifax provided a report virtually identical to the first inaccurate report and indicating that the report contained information that "may be considered negative" [E.R. 069-070]. The April 22, 2015, report again indicated that Ms. Abeyta's account with Bank of America was in "major delinquency" as of August, 2010. [E.R. 070]. All of this misinformation had been "verified" by Bank of America.

The District Court was dismissive of industry standards, because they are not legally binding. However, noncompliance with the standards set forth by Metro 2® causes inaccuracy because it is the "common language" of credit reporting.

> [I]f (furnishers) in that industry are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that they speak the same language, and that important data be reported in categories about which there is genuine common understanding and agreement. Likewise, if [the CRA] is to "insure maximum possible accuracy" in the transmittal of that data through its reports, it may be required to make sure that

> the criteria defining categories are made explicit and are communicated to all who participate.

Cassara v. DAC Services, Inc., 276 F.3d 1210, 1225 (10th Cir. 2002). Moreover, guidelines issued by the CFPB encourage the use of a standard data reporting format, recommending that furnishers should be: "Using standard data reporting formats and standard procedures for compiling and furnishing data, where feasible, such as the electronic transmission of information about consumers to consumer reporting agencies." 12 C.F.R. Pt. 1022, Appx. E, III(b). Furnishers are also encouraged to delete, update, and correct their records in order to avoid furnishing inaccurate investigations and to conduct reasonable investigations of disputes. 12 C.F.R. Pt. 1022, Appx. E, III(h),(i). Because precise records are so critical in a bankruptcy proceeding, the reporting of a discharged debt as outstanding or owing may be interpreted as an attempt by creditors to continue collection of an otherwise unenforceable debt. *See Carriere v. Proponent Fed. Credit Union*, 2004 WL 1638250, *8 (W.D. La. July 12, 2004); *Johnson v. First S. Fin. Serv*. (*In re* Johnson), 2010 WL 3909226, *1 (Bankr. N.D. Ala. Sept. 30, 2010); *In re* Helmes, 336 B.R. 105, 107-08 (Bankr. E.D. Va. 2005); *In re* Smith, 2005 WL 3447645, *2 (Bankr. N.D. Iowa Dec. 12, 2005); *In re* Goodfellow, 298 B.R. 358, 362 (Bankr. N.D. Iowa 2003).

C. Bank of America Failed to Comply with its Duty to Conduct a "Reasonable Reinvestigation" Under 1681-s-2(b)

The District Court concluded that Ms. Abeyta's claim failed because the law does not prevent the mere reporting of debts following a bankruptcy, and as such, there was no inaccuracy and no liability, citing *Carvalho*. The court oversimplified the significance of *Carvalho* in excusing Bank of America, claiming that the technical accuracy of the reports made Ms. Abeyta's claim untenable. *Carvalho* is not analogous here and the technical accuracy of Bank of America's reporting does not excuse it from liability under the statute.

In *Carvalho*, plaintiff conceded that she owed a $118 debt to a medical provider for services rendered to her. Carvalho had deliberately declined to pay the medical provider, contending that the balance should have been paid by her medical insurance provider. The *Carvalho* court found that plaintiff was using the reinvestigation provision of section 1681i against the consumer reporting agency to attack the legal validity of a debt. The listing of the debt itself was not inaccurate so any claim by Carvalho that the debt was falsely reported would necessarily fail. Furthermore, as discussed above, *Carvalho* specifically concerned the reinvestigation standards imposed on CRAs, not furnishers.

In stark contrast, there is no legal dispute over the status of Ms. Abeyta's debt; all parties acknowledge that her debts were subject to the chapter 13 plan. She is not using the FCRA dispute process to attack the validity of the underlying

debt to Bank of America but to dispute the post-petition reporting of the debt. Bank of America had an obligation not to furnish information relating to Ms. Abeyta after it had "been notified by the consumer…that specific information [was] inaccurate, and…the information [was,] in fact, inaccurate." 15 U.S.C. 1681-s-2(a)(B). After receiving such notice, Bank of America was required by section 1681-s-2(b) to rigorously review the information contained in the report and modify, delete or block any inaccurate information. Bank of America did none of those things.

The District Court claimed that the "date of major delinquency" of August, 2010, as reported by Bank of America in April 2015, was not inaccurate since, as of August, 2010, "a" debt was in fact owed by Ms. Abeyta to Bank of America. [E.R. 012-018]. This posture stretches logic far too thin because it ignores the existence of the chapter 13 bankruptcy plan under which Ms. Abeyta was making compliant payments. It was in October, 2014, that Bank of America first reported this information. By the time it re-reported the same information in April, 2015, it had already been notified by Ms. Abeyta of a dispute. [E.R. 068-070]. Moreover, in the later report, Equifax acknowledged that the report "may be considered negative" and that the August, 2010, delinquency had been verified by Bank of America, despite the fact that Ms. Abeyta made all payments required by her chapter 13 plan. [E.R. 068-070].

D. The District Court Erred in Dismissing Based on a de facto "Technical Accuracy" Standard

A vast majority of courts hold that a report may be actionable under the FCRA if it is potentially misleading even though it may be literally or technically accurate.

As the Third Circuit has noted, "the distinction between 'accuracy' and 'maximum possible accuracy' is not nearly as subtle as may at first appear, it is in fact quite dramatic." *Cortez v. Trans Union, L.L.C.*, 617 F.3d 688, 709 (3d Cir. 2010). Thus, a consumer report is inaccurate not just for a blatant error, but also if it is potentially misleading. *Gorman*, 584 F.3d at 1147. As the Fourth Circuit stated, "a technical truth… can be as misleading as an outright untruth where it paints a misleading picture." *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415 (4th Cir. 2001).

While not explicitly stating that it was hewing to a standard of technical accuracy, the District Court in fact relied upon such a standard in dismissing Ms. Abeyta's case. Its holding that Bank of America's reporting was not inaccurate based on the continuing existence of the debt, which had been delinquent, relies on a technical accuracy – yes, the debt did exist and had been delinquent under the terms of the contract between the parties. But simply reporting those facts by themself, with nothing more, ignores or leaves out very critical information, i.e., the existence of a chapter 13 bankruptcy case, the existence of a debt adjustment

plan, the fact that Ms. Abeyta made payments in compliance with the plan, and that Ms. Abeyta ultimately completed her plan and received a discharge. These are all facts that Bank of America's reporting contradicted or ignored, in contravention of the industry Metro 2® reporting standards designed to ensure creditors properly reflect these facts when a chapter 13 case exists.

E. Question Of Whether Information Is Materially Misleading Is One For Finder Of Fact

The question of whether information is "materially misleading" is one for the finder of fact. In *Seamans v. Temple Univ*., 744 F.3d 853 (3d Cir. 2014), the court concluded that whether technically accurate information reported under the FCRA is misleading to an extent it can be expected to have an adverse effect is generally a jury question. *Id.* at 865. In determining the genuineness of an issue, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Id.* at 860, citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). S*ee also Fishback v. HSBC Retail Serv. Inc*., 944 F. Supp. 2d 1098, 1111 (D. N.M. 2013); *Valentine v. First Advantage SafeRent, Inc.* (*Valentine II*), 2009 WL 4349694, *8 (C.D. Cal. Nov. 23, 2009) ("[w]hether an omission was 'misleading'. . . . and thus is an 'inaccuracy,' is generally a question for the jury").

In evaluating furnisher liability under section 1681s-2(b), the *Gorman* court noted that a furnisher may not be liable on the merits for merely failing to note that a debt is disputed. Instead, "[t]he consumer *must still convince* the finder of fact that the omission of the dispute was misleading in such a way and to such an extent that [it] can be expected to have an adverse effect….It is the failure to report a *bona fide* dispute, a dispute that could materially alter how the reported debt is understood, that gives rise to a furnisher's liability under section 1681s-2(b)." *Gorman*, 584 F.3d at 1164 (emphasis added, internal quotation omitted). Whether the dispute was reasonable is a question for the jury. Determining whether Bank of America's reporting was materially misleading is a decision to be made by the finder of fact. It could not possibly be evaluated on a motion to dismiss.

F. The District Court Erred in Failing to Give any Weight to the Authority of the Federal Trade Commission

From its enactment in 1970 until the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Act, the primary agency that enforced and interpreted the FCRA was the Federal Trade Commission ("FTC"). Even after passage of the Dodd-Frank Act, Congress continued to authorize the FTC to enforce FCRA compliance for many of the CRAs, furnishers and others entities regulated by that Act. 15 U.S.C. 1681s(a)(1).

For decades, a key interpretative guidance document for the FCRA was the

FTC's Staff Commentary. In July, 2011, in order to update the Commentary (which was issued in 1990) and in response to the Dodd-Frank Act's grant of new FCRA authorities to the Consumer Financial Protection Bureau ("CFPB"), the FTC rescinded the Commentary and issued a summary of FTC Staff Interpretations of the FCRA to assist the CFPB and guide CRAs in complying with their FCRA obligations. Federal Trade Commission, "40 Years of Experience with the Fair Credit Reporting Act; An FTC Staff Report with Summary of Interpretations." ("2011 Summary of FTC Staff Interpretations").[3]

In general, based on these 40 years of experience, courts have looked to the FTC, not other agencies, for guidance in interpreting the FCRA. *Dreher v. Experian Info. Solutions, Inc.*, 71 F. Supp. 3d 572, 580 (E.D. Va. 2014). While the FTC guidelines are not binding regulations subject to *Chevron* deference, many courts have accorded persuasive weight to them, as they are interpretations made by the federal agency with the primary enforcement jurisdiction of the FCRA for over four decades. *See, e.g.*, *Farmer v. Phillips Agency, Inc.*, 285 F.R.D. 688, 696 n.12 (N.D. Ga. Sept. 20, 2012) (prior FTC Staff Commentary was not binding, but court

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[3] https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf

found it instructive); *Massey v. On-Site Manager, Inc.*, 285 F.R.D. 239 (E.D. N.Y. 2012) (court not required to accept prior FTC Staff Commentary as a binding interpretation of law, but required to give it due deference); *Davis v. Equifax Info. Serv., LLC*, 346 F. Supp. 2d 1164, 1172 (N.D. Ala. 2004) (relying on Commentary); *In re* Miller, 335 B.R. 335, 347 n.7 (Bankr. E.D. Pa. 2005) (court may "defer to the FTC's interpretations of the act on issues not expressly addresses [sic] by Congress").

In both the former FTC Staff Commentary and the 2011 Summary of FTC Staff Interpretations, the FTC interpreted the FCRA requirement that CRAs follow "reasonable procedures to assure maximum possible accuracy," 15 U.S.C. 1681e(b), as requiring CRAs to report a zero balance to reflect that a consumer is no longer liable for debt discharged under a bankruptcy filing. Former FTC Staff Commentary, 16 C.F.R. Part 600, app, 607 item 6; 2011 Summary of FTC Staff Interpretations at 67. In particular, the FTC has stated: "A consumer report may include an account that was discharged in bankruptcy (as well as the bankruptcy itself), as long as it reports a zero balance to reflect the fact that the consumer is no longer liable for the discharged debt." *Id.* at 68. Furthermore, an account discharged in bankruptcy should not have any delinquencies reported after the discharge. *See Montgomery v. PNC Bank*, 2012 WL 3670650, *3 (N.D. Cal. Aug. 24, 2012) (where plaintiff alleged that no delinquencies should have been reported on

a debt after it was discharged through bankruptcy, defendant "has offered no authority which would suggest that this position is incorrect as a matter of law"); *see also Venugopal v. Citibank*, 2013 WL 1365992 (N.D. Cal. Apr. 3, 2013) (debtor stated FCRA claim for creditor's reporting of outstanding debt after discharge, even though another section showed "0" balance).

A CRA must employ reasonable procedures to keep its file current on past-due accounts, which could include requiring furnishers to notify the CRA when a previously past-due account has been paid or discharged in bankruptcy. Where a CRA neglects to reconcile obviously inconsistent information, i.e., an entry in the consumer's file of a public record bankruptcy establishing that the consumer's debts were discharged with a trade line still showing the past-due status of the account, such inconsistency could be found to violate the requirement to follow reasonable procedures under section 1681e(b). *See White v. Trans Union, LLC,*. 462 F. Supp. 2d 1079, 1082 (C.D. Cal. 2006).

The District Court noted just that when citing to *White*, before summarily dismissing the FTC's guidelines and failing to give them any weight. Despite technically not compelling judicial deference, the commentary is "…a guideline intended to clarify how the Commission will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history." 16 C.F.R. Pt. 600 app., para. 1. By declining to give any weight to the authority of the FTC and its

interpretations of the FCRA, the court completely discounted any effect that bankruptcy has on the delinquent status of an account. According to the District Court, creditors are entitled to treat the delinquency status of a debt included in a chapter 13 repayment plan the same as if no repayment plan existed. The logic of ignoring the effect of bankruptcy could just as easily be extended to the delinquency status of debts after completion of a chapter 13 repayment plan and discharge. Such reasoning, however, discredits the import of the entire system of credit reporting.

G. By Continuing to Generate Erroneous Credit Reports, a Furnisher May Be Liable Under Bankruptcy Code for Violation of the Stay or Discharge Injunction.

Absent a consumer dispute, there is no private cause of action against furnishers for reporting inaccurate information or failing to maintain procedures for accuracy. The section of the FCRA that would require a furnisher to accurately report and update accounts discharged in bankruptcy, section 1681s-2(a), lacks any practical remedy. 15 U.S.C. 1681s-2(c) (no private right of action for violations of 15 U.S.C. 1681s-2(a)). *See, e.g.*, *Davis v. Farm Bureau Bank*, 2008 WL 1924247, *3 (W.D. Tex. Apr. 20, 2008) (creditor's failure to update accounts to reflect that debts had been discharged in bankruptcy not actionable without a dispute sent to CRA). Unlike the CRAs, a furnisher can be held accountable only after the dispute process is completed. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002).

However, once the consumer disputes the status of the account, the creditor is in a far different position. At that point, the creditor may be liable under the Bankruptcy Code for violation of the discharge injunction if it fails to update the account to show the debt as discharged in bankruptcy. *In re* Smith, 2012 WL 566246, *3 (Bankr. W.D. Tex. Feb. 21, 2012) (creditor's refusal to correct inaccurate post-bankruptcy reporting, despite settlement of adversary proceeding, along with debt collection letters, could state claim for violation of the discharge injunction); *Russell v. Chase Bank* (*In re* Russell), 378 B.R. 735, 743 (Bankr. E.D. N.Y. 2007) (creditor's refusal to correct and update information after consumer sent dispute to both creditor and CRAs stated claim for violation of discharge injunction); *Torres v. Chase Bank* (*In re* Torres), 367 B.R. 478, 486 (Bankr. S.D. N.Y. 2007) (creditor could be liable for violation of discharge injunction for failure to honor debtor's request to correct status of account to reflect discharge). The creditor may also be liable under section 1681s-2(b) of the FCRA.

Here, the District Court's ruling essentially ignored the existence of the bankruptcy case and the chapter 13 plan. In August, 2010, Ms. Abeyta was current on all of her obligations under her proposed chapter 13 plan. Still, in 2014, Bank of America reported August, 2010, as a "date of major delinquency." Under industry standards this date should have been no later than the date of the filing of the petition in June, 2010. As reported, the August, 2010, "date of major delinquen-

cy" suggested that Ms. Abeyta was not paying in conformance with her chapter 13 plan, when in fact she was current on her obligations. When notified that Ms. Abeyta disputed that reporting status, Bank of America simply verified the misinformation provided in its first inaccurate report. [E.R. 068-070].

Failing to make payments under a chapter 13 plan can lead to a dismissal of the bankruptcy case. 11 U.S.C. 1307(c)(4). That did not happen here, because Ms. Abeyta made all her payments under her bankruptcy plan. Bank of America's credit reporting would suggest otherwise. In order to provide reporting information during the pendency of a bankruptcy that conforms to the requirements of the FCRA, a furnisher must look to the timing of the bankruptcy petition and the terms of the bankruptcy plan. If Bank of America did that, it was not apparent in Equifax's reports. [E.R. 069-070].

The District Court held that, as of August, 2010, 1) Ms. Abeyta did in fact owe a debt to Bank of America, and 2) that debt was in major delinquency. [E.R. 016] In allowing the dismissal, the court is opening the door to all furnishers to declare all debts delinquent throughout the pendency and, indeed, following the discharge of a chapter 13 bankruptcy. Chapter 13 repayment plans typically span a three to five year period. This ruling permits furnishers to report delinquencies on the underlying consumer debt, despite that same consumer's conformity with the terms of a chapter 13 plan.

At the very least, Bank of America should have been liable under 1681s-2(b) for its failure to correct its reporting to Equifax after Ms. Abeyta had lodged her formal dispute. Some bankruptcy courts have in fact urged debtors to use the FCRA dispute process instead of seeking relief in bankruptcy. *See Bruno v. First USA Bank* (*In re* Bruno), 356 B.R. 89, 92 (Bankr. W.D. N.Y. 2006) (advising debtors to order their credit reports and send FCRA disputes to ensure that accounts reflect that they have been discharged in bankruptcy); *Norman v. Applied Card Sys.* (*In re* Norman), 2006 WL 2818814, *1 (Bankr. M.D. Ala. Sept. 29, 2006) (expressing displeasure that debtor did not send dispute under FCRA before seeking relief from bankruptcy court, but not dismissing case). Other courts have held that either alternative is open to the debtor. *In re* Haynes, 2015 WL 862061, *2-3 (S.D. N.Y. March 2, 2015) (allegation that credit reporting violated discharge injunction could be resolved without considering FCRA and thus bankruptcy court could consider matter); *In re* Luedtke, 2008 WL 2952530, *5 (Bankr. E.D. Wis. July 31, 2008); *In re* Potes, 336 B.R. 731, 733 (Bankr. E.D. Va. 2005) (debtor could either seek to re-open bankruptcy case or file a dispute under the FCRA to remedy improper reporting in alleged attempt to collect discharged debt).

With a bankruptcy injunction in place, Bank of America would not be entitled to collect further payments from the debtor under the terms of the original loan. Bank of America's reporting also suggests that it was entitled to collect on

those original obligations from Ms. Abeyta, which would not be true during the pendency of the bankruptcy case without relief from the automatic stay.

H. The District Court's Ruling Contravenes Public Policy Concerns in the Bankruptcy Code and the FCRA

The purpose of the FCRA is to protect consumers from abuses in credit reporting. The congressional statement of purpose is codified in section 1681, which acknowledges that "consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers" 15 U.S.C. 1681(a)(3). By its very definitions, the statute anticipates the consequence of credit reporting upon a consumer's financial reputation: "[T]here is a need to insure that consumer reporting agencies exercise their *grave* responsibilities with fairness, impartiality and a respect for the consumer's right to privacy" 15 U.S.C. 1681(a)(4) (emphasis added).

In fact, the FCRA was "the product of congressional concern over abuses in the credit reporting industry," *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995), designed not simply to create structure within financial industry but as a prophylactic for consumers. The District Court's decision contravenes public policy as well as the legislative intent behind section 1681, which is expressly designed to protect consumers from the dissemination of inaccurate information about them. *See Kates v. Crocker National Bank,* 776 F.2d 1396, 1397 (9th Cir. 1985) ("The purpose of the Fair Credit Reporting Act, 15 U.S.C. Sec.

1681 et seq., is to protect consumers from the transmission of inaccurate information about them.”).

The failure by furnishers and reporting agencies to update debts discharged in bankruptcy can cause significant hardship for consumers. The effect of a bankruptcy on a consumer’s credit score is, of course, initially devastating. However, it is a static event and, all other things being equal, a consumer’s credit score will continue to improve each day that passes post-discharge. Failure to properly report the discharge of debts hampers that improvement. Another consequence of the failure to accurately report the status of a debt that has been discharged, as noted by one bankruptcy court, is:

> [A] credit report entry that reflects a past due account is treated differently by prospective creditors in evaluating credit applications than an entry that reflects a debt that has been discharged in bankruptcy. The essential difference is that a discharged debt represents a historical fact, that the prospective borrower filed bankruptcy in the past and was relieved from the obligation. Nothing is now due. A past due debt represents a delinquent but legally enforceable obligation that must be resolved.

In re Helmes, 336 B.R. 105 (Bankr. E.D. Va. 2005).

In Ms. Abeyta’s case, the bankruptcy should have become a “historical fact” upon the date of discharge in April, 2014. It did not. There was nothing “static” about the bankruptcy for Ms. Abeyta, despite the fact that the bankruptcy court had discharged her of her obligations an entire year earlier. For a prospective creditor, it would appear that she had an ongoing monthly obligation, and the August delin-

quency date might indicate that she had neglected to comply with the terms of the chapter 13 repayment scheme.

The significance of credit reporting to the consumer goes far beyond the potential for adverse credit decisions. With increasing frequency, credit reports are used to evaluate a consumer's right to obtain employment, housing and even professional licensure. These reports rely on accurate reporting by numerous furnishers. While problematic as a concept and despite the inherent margin for error in such a broad undertaking, these reports have been elevated in social status to function as a referendum on a consumer's integrity.

The injury to a consumer who cannot obtain financing for a new vehicle because of a poor credit score may seem relatively small. But what of the consumer whose credit score adversely impacts their ability to gain employment or housing? Credit reports lack nuance. Using a complex algorithm, they reduce a consumer's character to a number, with sweeping consequences. As the Ninth Circuit put it, CRAs "traffic in the reputations of ordinary people" and thus have a huge responsibility to train employees to "understand the legal significance of the documents they rely on." *Dennis v. BEH-1,* 520 F.3d 1066, 1071 (9th Cir. 2008).

Bank of America's "verified" information makes it appear as though Ms. Abeyta is still not paying the balance on a debt which she no longer has a legal obligation to pay. "[A] consumer's failure to pay a debt that is not really due 'does not

reflect financial irresponsibility.'" *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009), quoting *Saunders v. Branch Banking & Trust Co. of Va.,* 526 F.3d 142, 150 (4th Cir. 2008). Yet, financial irresponsibility is precisely what is communicated when furnishers and reporting agencies disseminate inaccurate information.

CONCLUSION

To resolve the issues on this appeal, this Court must rule that the District Court erred in granting Bank of America's motion to dismiss. The question of whether information is materially misleading is generally one for the finder of fact. The District Court's decision was rendered without consideration of the interplay between the Bankruptcy Code and the FCRA, as well as the legislative intent behind the FCRA. The District Court erred in failing to give any weight to the FTC in its ruling. The dismissal of Ms. Abeyta's claims against Appellees for failing to adhere to the industry standards set forth in Metro 2 was clear error. For these reasons, the ruling of the District Court should be reversed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(3) because it contains 6,876 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM A

28. Questions: Accounts included in Bankruptcy Chapter 13:

(a) How should an account be reported when all borrowers associated to the account filed Bankruptcy Chapter 13?

Answer: Report the account according to the following guidelines:

	All Borrowers Filed Bankruptcy Chapter 13
Month BK Filed	• CII = D (Petition for Chapter 13 Bankruptcy) • Account Status = status at time of petition • Payment History = first character based on previous month's Account Status, plus prior history • Current Balance = outstanding balance amount • Scheduled Monthly Payment Amount = contractual monthly payment amount • Amount Past Due = dependent on status • Date of Account Information = current month's date **Note: Authorized Users (ECOA Code 3) on accounts included in a bankruptcy petition should either be terminated (ECOA Code T) or deleted (ECOA Code Z) from the account because they are not contractually liable for payments.**
Months Between Petition Filed & BK Resolution (Confirmed Plan, BK Dismissed, Withdrawn)	• CII = Blank (previous value reported is retained) or CII = D • Account Status = status at time of petition • Payment History = increment first position with value 'D' (plus history reported prior to BK filing) • Current Balance = outstanding balance amount • Scheduled Monthly Payment Amount = contractual monthly payment amount • Amount Past Due = dependent on status • Date of Account Information = current month's date
BK Chapter 13 Converted to BK Chapter 7	• CII = A (Petition for Chapter 7 Bankruptcy) or E (Discharged through Bankruptcy Chapter 7), as applicable **Note: With the reporting of the BK Chapter 7 indicator, continue updating the account by following FAQ 27(a).**

FAQ 28(a) continued on next page

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FAQ 28(a) (continued)

	All Borrowers Filed Bankruptcy Chapter 13
Plan Confirmed	• CII = Blank (previous value reported is retained) or CII = D • Account Status = status at time of petition • Payment History = increment with value 'D' (plus prior months' history) • Current Balance = Chapter 13 plan balance[1], which should decline as payments are made • Amount Past Due = Zero • Terms Duration & Terms Frequency = report changed values, if applicable • Scheduled Monthly Payment Amount = Chapter 13 plan payment amount • Date of Account Information = current month's date
Plan Completed – All payments made according to plan – no further obligation	• CII = H (Discharged/completed through BK Chapter 13) • Account Status = status at time of petition • Payment History = increment first position with value 'D' (plus prior months' history) • Current Balance = Zero • Scheduled Monthly Payment Amount = Zero • Amount Past Due = Zero • Date of Account Information = current month's date **Note: After reporting CII 'H' for all Filers, discontinue reporting the account.**
Plan Completed – All payments made according to plan – consumer continues to make payments on Secured Debt (example: mortgage)	• CII = Q (Removal value) • Account Status = status that applies • Payment History = first month, increment first position with value 'D'; in subsequent months, increment based on prior month's status • Current Balance = Outstanding balance amount • Scheduled Monthly Payment Amount = updated contractual monthly payment amount • Amount Past Due = dependent on status • Date of Account Information = current month's date
BK Dismissed or Withdrawn	• CII = applicable dismissed or withdrawn value (L or P) • Account information as it applies going forward

[1] If the Chapter 13 plan balance amount is not clearly communicated to the lender, the lender should consult with internal Legal to determine what amount to report in the Current Balance field. If the lender (e.g., unsecured creditor) does not receive a confirmed amount from the Bankruptcy court, report the outstanding balance.

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