No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BANKERS ASSOCIATION,
THE FINANCIAL SERVICES ROUNDTABLE, and
CONSUMER BANKERS ASSOCIATION,

Plaintiffs-Appellants,

v.

BILL LOCKYER, in his official capacity as Attorney General of California,
HOWARD GOULD, in his official capacity as Commissioner of
the Department of Financial Institutions of the State of California,
WILLIAM P. WOOD, in his official capacity as Commissioner
of the Department of Corporations of the State of California, and
JOHN GARAMENDI, in his official capacity as Commissioner
of the Department of Insurance of the State of California,

Defendants-Appellees.

On Appeal From the Final Judgment and Denial of Injunction of the
United States District Court for the Eastern District of California
Case No. S-04-0778 MCE KJM

EXCERPTS OF RECORD

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

versus

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

CIV.S- 04-0778 MCE KJM

Civil Action No._____

COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

1. This complaint seeks declaratory and injunctive relief to protect the federal rights of Plaintiffs' members, under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(2), and the Supremacy Clause of the United States Constitution, U.S. Const. art. VI. In this action, Plaintiffs seek injunctive and declaratory relief based on the FCRA that will allow financial institutions to use and share information with their affiliates, notwithstanding the requirements and prohibitions in the recently enacted California Financial Information Privacy Act, Cal. Fin. Code Division 1.2, § 4050 *et seq.* (popularly known as "SB1," after the Senate Bill which it enacted, Exhibit A hereto).

2. SB1 was signed into law on August 27, 2003 and went into "effect" on January 1, 2004, but does not become "operative" until July 1, 2004. It imposes requirements upon and prohibits financial institutions from sharing, disclosing and using information about their customers among affiliates, contrary to the express preemption clause of the FCRA.

Jurisdiction and Venue

3. This action is brought under the Supremacy Clause of the United States Constitution, the FCRA, and 42 U.S.C. § 1983. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 & 2202.

4. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) & (2) because Defendant Lockyer resides in this district, while the other Defendants reside in California, and the events and omissions giving rise to this case occurred in this district.

Intradistrict Assignment

5. Pursuant to Local Rule 3-120(b), this action should be assigned to the Sacramento division of this Court because the actions that give rise to this case occurred, and Defendant Lockyer resides, in Sacramento.

The Parties

6. Plaintiff American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members in each of the fifty states and the District of Columbia and includes banks of all sizes and types – money center, regional and community banks, national and state chartered banks, independent and holding company owned banks, commercial and savings banks. ABA member banks hold approximately 95% of the domestic assets of the banking industry in the United States. The Association frequently appears in litigation as a party where the issues raised in a case are of widespread importance and concern to the industry. The ABA is authorized by its members to pursue their common interests in operating on a nationwide basis, including in California, through their affiliates, including mortgage, securities, and insurance subsidiaries, and in doing so, sharing information relating to their California customers. Among other things, the ABA is authorized to advocate on behalf of its members regarding legislation affecting the common interests of its members, and to bring suit when appropriate in the common interests of its members. As a representative of its members, the ABA has associational standing to sue on their behalf. *See American Bankers Ass'n v. Lockyer*, 239 F. Supp.2d 1000 (E.D. Cal. 2002).

7. The Financial Services Roundtable ("Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies account directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs. The Roundtable is authorized by its members to pursue their common interests in operating on a nationwide basis, including in California, through their affiliates, including banking, mortgage, securities, and insurance affiliates, and in doing so, sharing information relating to their California customers. Among other things, the Roundtable is authorized to advocate on behalf of its members regarding legislation affecting the common interests of its members, and to bring suit when appropriate in the common interests of its members. As a representative of its members, the Roundtable has associational standing to sue on their behalf.

8. The Consumer Bankers Association ("CBA") member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. CBA is authorized by its members to pursue their common interests in operating on a nationwide basis, including in California, through their affiliates, including banking, mortgage, securities, and insurance affiliates, and in doing so, sharing information relating to their California customers. Among other things, CBA is authorized to advocate on behalf of its members regarding legislation affecting the common interests of its members, and to bring suit when appropriate in the common interests of its members. As a representative of its members, CBA has associational standing to sue on their behalf.

9. Defendant Bill Lockyer is Attorney General of the State of California. As such, he is the state official charged by the statute with enforcing SB1's requirements, § 4057(e)(1). Defendant Lockyer also is charged with enforcement of SB1 through actions he can bring in the name of the People of California under state law. *E.g.*, Cal. Bus. & Prof. Code § 17200 *et seq.*

10. Defendant Howard Gould is Commissioner of the Department of Financial Institutions of the State of California. As such, he is the state official charged by SB1 with enforcing its requirements against banks. SB1 § 4057(e)(2)(A). Moreover, under the California Financial Code §§ 1912, 1913 & 1917, he is empowered to order banks doing business in California, including Plaintiffs' members, to comply with SB1, and can seek court enforcement of those orders.

11. Defendant John Garamendi is Commissioner of the Department of Insurance of the State of California. As such, he is the state official charged by SB1 with enforcing its requirements against insurance agents and underwriters. SB1 § 4057(e)(2)(B).

12. Defendant William P. Wood is Commissioner of the Department of Corporations of the State of California. As such, he is the state official charged by SB1 with enforcing its requirements against mortgage lenders and investment advisors, brokers and dealers. SB1 § 4057(e)(2)(C).

The Fair Credit Reporting Act

13. The FCRA, 15 U.S.C. § 1681 *et seq.*, defines the rights and obligations of financial institutions, such as Plaintiffs' members, that receive, use, collect or exchange information regarding the creditworthiness of consumers and certain other consumer characteristics. The FCRA expressly authorizes such financial institutions to exchange information with their affiliates regarding their experiences with their customers. For example, the FCRA allows financial institutions to share information with affiliates, which they have derived from their dealings with their customers – so-called "experience information" – including information relating to those customers' "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681m(b)(1).

14. The FCRA expressly preempts state or local laws to the extent they apply to the sharing and use by affiliates of customer information. It provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2).

Supremacy Clause of the United States Constitution

15. Article VI of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . .

shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

SB1

16. When it becomes operative on July 1, 2004, SB1 will apply to all "financial institutions" "doing business in th[e] state [of California]," §4052(c), with "consumers," defined as "individual resident[s] of th[e] state" to the extent they use financial products for their individual family or household needs, § 4052(f). Plaintiffs' members do business in California with California residents and are subject to SB1 insofar as they serve California customers.

17. SB1 provides that a "financial institution shall not disclose to, or share a consumer's nonpublic personal information with, an affiliate unless the financial institution has clearly and conspicuously notified the consumer annually in writing . . . that the nonpublic personal information may be disclosed to an affiliate of the financial institution and the consumer has not directed that the nonpublic personal information not be disclosed." § 4053(b)(1). Moreover, a "consumer shall be provided a reasonable opportunity prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed," § 4053(d)(3), or 45 days for customers (such as new customers) who have not received an annual notice, *id.* The imposition of such notice and customer option to direct non-disclosure ("opt-out") constitutes a requirement or prohibition within the meaning of the FCRA express preemption clause which provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . . ." 15 U.S.C. § 1681t(b)(2).

18. SB1 exempts from its restrictions and prohibitions the sharing of nonpublic personal information between a financial institution and an affiliate within the "same line of business." § 4053(c). The statute defines "same line of business" as either banking, insurance, or securities. Thus, for example, banks can disclose marketing information to their affiliated credit card bank or mortgage affiliate without restriction, but their other affiliates can receive

customer information from the banks only if SB1's notice and opt-out requirements are satisfied.

19. "'Nonpublic personal information' means personally identifiable financial information (1) provided by a consumer to a financial institution [such as the customer's name and address], (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution." § 4052(a). "[P]ersonally identifiable financial information" includes "[t]he fact that a consumer is or has been a consumer of a financial institution or has obtained a financial product or service from a financial institution." § 4052(b).

20. SB1 imposes extensive requirements on the form and content of the notices financial institutions must annually send to their customers to inform them of their right to opt-out. § 4053(d).

21. A financial institution that negligently discloses nonpublic personal information in violation of the SB1 is subject to a civil penalty of $2,500 per individual violation, capped at $500,000 if the negligent violation results in the release of such information for more than one individual. Knowing and willful violations are $2,500 per individual violation, but there is no cap on the financial institution's liability. § 4057(a).

The Effect Of SB1

22. SB1 would impose requirements upon and prohibit customer information sharing with financial institution affiliates.

23. SB1 prevents financial institutions from sharing customer information with affiliates that are not in the same line of business for 45 days at the outset of a relationship, and thereafter permanently if a customer opts out. SB1 would thereby impose requirements upon or prohibit financial institutions from selling, soliciting, or cross marketing their own products and services to persons who are customers of affiliates that are not in the same line of business as those financial institutions.

24. After Congress deregulated the financial services industry in 1999 with the enactment of the Gramm-Leach-Bliley Act, many of Plaintiffs' members, at significant costs, established and maintain for their respective organizations a centralized database and processing system that they and their affiliates use to carry on their operations in the most efficient way possible. They use these integrated systems and share customer information to sell, solicit and cross-market financial products and services to their own and to affiliates' customers. For example, an insurance-affiliate of a bank may use a list of new mortgage customers of the bank, or of the bank's mortgage lending subsidiary, to solicit new homeowner's insurance customers. A securities affiliate of a bank may solicit customers with large savings deposits at the bank for securities products that will generate a higher return for the customer. A credit card affiliate may solicit new bank customers for a credit card or a debit card. Through these related (and often commonly branded) but legally distinct affiliates, financial institutions and their affiliates offer a full range of financial products and services to their collective customers bases.

25. SB1 would accordingly impose requirements upon or prohibit Plaintiffs' members' insurance, securities and other non-banking affiliates from selling, soliciting or cross-marketing their products and services to the customers of their affiliated banks.

Claim for Relief

Count I – Declaratory and Injunctive Relief:

FCRA Preemption of SB1

26. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 to 25 of this Complaint as though fully set forth herein.

27. As to all customers for a "reasonable" time period and thereafter as to customers who opt-out of affiliate information sharing under SB1, the statute would prohibit financial institutions from sharing customer information with affiliates in other lines of business for cross-marketing of their respective products and services as they have done for years in compliance with FCRA and other federal laws.

28. The FCRA expressly preempts SB1 as it applies to information sharing between financial institutions and all of their affiliates, whether or not they are in the same line of business. The FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control . . .," except for one specified Vermont statute in effect on September 30, 1996. 15 U.S.C. § 1681t(b)(2). The district court in *Bank of America, N.A. v. City of Daly City*, 279 F. Supp.2d 1118 (N.D. Cal. 2003), *appealed on other grounds*, 9th Cir. 03-16682, held that the FCRA preempts local and state laws that impose requirements and prohibitions on financial institutions' sharing of customer information with their affiliates: "Congress chose to . . . expressly preempt[] State laws that impose a requirement or prohibition on information-sharing among affiliates." 279 F. Supp.2d at 1124.

29. SB1 imposes "requirement[s] and prohibition[s] . . . with respect to the exchange of information among [financial institutions] affiliated by common ownership or common corporate control" by, *inter alia*, providing for the requirement of a separate notice, a 45 day prohibition on the sharing or use by financial institutions' affiliates that are not in the same line of business of any customer information for new customers, and a permanent prohibition for all customers who "opt out" of such sharing, thereby interfering with Plaintiffs' members' common information systems with their affiliates that they use to provide integrated products and services to their customers.

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a judgment declaring that SB1, the California Financial Information Privacy Act (Cal. Fin. Code Div. 1.2, § 4050 *et seq.*), is null and void and unenforceable, insofar as it applies to the exchange of information among financial institutions and their affiliates, because SB1 is expressly preempted by the Fair Credit Reporting Act and therefore violates Article VI of the United States Constitution;

B. Enter a permanent injunction, Plaintiffs' members having no adequate remedy at law and suffering irreparable injury as a result of SB1 enjoining Defendants, as well as any other person acting in the name of the State of California, or of the People of the State of California, from enforcing or taking any action to enforce SB1 against Plaintiffs' members as this law applies to Plaintiffs' members' sharing of customer information with their respective affiliates, including enforcement against Plaintiffs' members for failure to provide notices under SB1 to California customers concerning such sharing;

C. Should Plaintiffs so move, enter a preliminary injunction pending final resolution of this action, Plaintiffs' members having no adequate remedy at law and suffering irreparable injury as a result of these unconstitutional California statutes, enjoining Defendants, as well as any other person acting in the name of the State of California, or of the People of the State of California, from enforcing or taking any action to enforce SB1 against Plaintiffs' members, pending further order of this Court; and

D. Grant Plaintiffs and/or Plaintiffs' members such other and further relief, including costs, as the Court deems just and proper.

April 19, 2004

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

EXHIBIT A

Senate Bill No. 1

CHAPTER 241

An act to add Division 1.2 (commencing with Section 4050) to the Financial Code, relating to financial privacy.

[Approved by Governor August 27, 2003. Filed with Secretary of State August 28, 2003.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1, Speier. Financial institutions: nonpublic personal information.

Existing law provides for the regulation of banks, savings associations, credit unions, and industrial loan companies by the Department of Financial Institutions and by certain federal agencies. Existing federal law, the Gramm-Leach-Bliley Act, requires financial institutions to provide a notice to consumers relative to the use by the financial institution of nonpublic personal information, and in that regard authorizes consumers to direct that the information not be shared with nonaffiliated third parties.

This bill would enact the California Financial Information Privacy Act, which would require a financial institution, as defined, to provide a specified written form to a consumer relative to the sharing of the consumer's nonpublic personal information, as defined. The bill would generally allow a consumer to direct the financial institution to not share the nonpublic personal information with affiliated companies or with nonaffiliated financial companies with which the financial institution has contracted to provide financial products and services, but would not restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries or in certain other cases if both entities are regulated by the same functional regulator and are engaged in the same line of business, among other requirements. The bill would require the permission of the consumer before the financial institution could share the nonpublic personal information with other nonaffiliated companies. The bill would provide that a financial institution is not required to provide this written form to its consumers if the financial institution does not disclose any nonpublic personal information to any nonaffiliated 3rd party or to any affiliate.

This bill would provide that a financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or service because the consumer has not provided the necessary

consent that would authorize the financial institution to disclose or share nonpublic personal information. The bill would require a financial institution to comply with the consumer's request regarding nonpublic personal information within 45 days of receipt of the request.

This bill would provide that a financial institution may disclose nonpublic personal information to an affiliate or a nonaffiliated 3rd party in order for it to perform certain services on behalf of the financial institution if specified requirements are met. The bill would provide other exceptions from its provisions applicable to particular situations.

This bill would provide that nonpublic personal information may be released in order to identify or locate missing children, witnesses, criminals and fugitives, parties to lawsuits, and missing heirs and that it would not change existing law regarding access by law enforcement agencies to information held by financial institutions.

This bill would also provide for disclosure of nonpublic personal information under various other specified circumstances.

This bill would provide that enactment of these provisions preempts all local agency ordinances and regulations relating to this subject.

This bill would enact other related provisions.

This bill would also provide various civil penalties for negligent, or knowing and willful violations of these provisions. The bill would become operative on July 1, 2004.

The people of the State of California do enact as follows:

SECTION 1. Division 1.2 (commencing with Section 4050) is added to the Financial Code, to read:

DIVISION 1.2. CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT

4050. This division shall be known and may be cited as the California Financial Information Privacy Act.

4051. (a) The Legislature intends for financial institutions to provide their consumers notice and meaningful choice about how consumers' nonpublic personal information is shared or sold by their financial institutions.

(b) It is the intent of the Legislature in enacting the California Financial Information Privacy Act to afford persons greater privacy protections than those provided in Public Law 106-102, the federal Gramm-Leach-Bliley Act, and that this division be interpreted to be consistent with that purpose.

4051.5. (a) The Legislature finds and declares all of the following:

(1) The California Constitution protects the privacy of California citizens from unwarranted intrusions into their private and personal lives.

(2) Federal banking legislation, known as the Gramm-Leach-Bliley Act, which breaks down restrictions on affiliation among different types of financial institutions, increases the likelihood that the personal financial information of California residents will be widely shared among, between, and within companies.

(3) The policies intended to protect financial privacy imposed by the Gramm-Leach-Bliley Act are inadequate to meet the privacy concerns of California residents.

(4) Because of the limitations of these federal policies, the Gramm-Leach-Bliley Act explicitly permits states to enact privacy protections that are stronger than those provided in federal law.

(b) It is the intent of the Legislature in enacting this division:

(1) To ensure that Californians have the ability to control the disclosure of what the Gramm-Leach-Bliley Act calls nonpublic personal information.

(2) To achieve that control for California consumers by requiring that financial institutions that want to share information with third parties and unrelated companies seek and acquire the affirmative consent of California consumers prior to sharing the information.

(3) To further achieve that control for California consumers by providing consumers with the ability to prevent the sharing of financial information among affiliated companies through a simple opt-out mechanism via a clear and understandable notice provided to the consumer.

(4) To provide, to the maximum extent possible, consistent with the purposes cited above, a level playing field among types and sizes of businesses consistent with the objective of providing consumers control over their nonpublic personal information, including providing that those financial institutions with limited affiliate relationships may enter into agreements with other financial institutions as provided in this division, and providing that the different business models of differing financial institutions are treated in ways that provide consistent consumer control over information-sharing practices.

(5) To adopt to the maximum extent feasible, consistent with the purposes cited above, definitions consistent with federal law, so that in particular there is no change in the ability of businesses to carry out normal processes of commerce for transactions voluntarily entered into by consumers

4052. For the purposes of this division:

(a) "Nonpublic personal information" means personally identifiable financial information (1) provided by a consumer to a financial institution, (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution. Nonpublic personal information does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from (1) federal, state, or local government records, (2) widely distributed media, or (3) disclosures to the general public that are required to be made by federal, state, or local law. Nonpublic personal information shall include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived using any nonpublic personal information other than publicly available information, but shall not include any list, description, or other grouping of consumers, and publicly available information pertaining to them, that is derived without using any nonpublic personal information

(b) "Personally identifiable financial information" means information (1) that a consumer provides to a financial institution to obtain a product or service from the financial institution, (2) about a consumer resulting from any transaction involving a product or service between the financial institution and a consumer, or (3) that the financial institution otherwise obtains about a consumer in connection with providing a product or service to that consumer. Any personally identifiable information is financial if it was obtained by a financial institution in connection with providing a financial product or service to a consumer. Personally identifiable financial information includes all of the following:

(1) Information a consumer provides to a financial institution on an application to obtain a loan, credit card, or other financial product or service.

(2) Account balance information, payment history, overdraft history, and credit or debit card purchase information.

(3) The fact that an individual is or has been a consumer of a financial institution or has obtained a financial product or service from a financial institution.

(4) Any information about a financial institution's consumer if it is disclosed in a manner that indicates that the individual is or has been the financial institution's consumer.

(5) Any information that a consumer provides to a financial institution or that a financial institution or its agent otherwise obtains in connection with collecting on a loan or servicing a loan.

(6) Any personally identifiable financial information collected through an Internet cookie or an information collecting device from a Web server.

(7) Information from a consumer report.

(c) "Financial institution" means any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 of the United States Code and doing business in this state. An institution that is not significantly engaged in financial activities is not a financial institution. The term "financial institution" does not include any institution that is primarily engaged in providing hardware, software, or interactive services, provided that it does not act as a debt collector, as defined in 15 U.S.C. Sec. 1692a, or engage in activities for which the institution is required to acquire a charter, license, or registration from a state or federal governmental banking, insurance, or securities agency. The term "financial institution" does not include the Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. Sec. 2001 et seq.), provided that the entity does not sell or transfer nonpublic personal information to an affiliate or a nonaffiliated third party. The term "financial institution" does not include institutions chartered by Congress specifically to engage in a proposed or actual securitization, secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer, as long as those institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party. The term "financial institution" does not include any provider of professional services, or any wholly owned affiliate thereof, that is prohibited by rules of professional ethics and applicable law from voluntarily disclosing confidential client information without the consent of the client. The term "financial institution" does not include any person licensed as a dealer under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code that enters into contracts for the installment sale or lease of motor vehicles pursuant to the requirements of Chapter 2B (commencing with Section 2981) or 2D (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of the Civil Code and assigns substantially all of those contracts to financial institutions within 30 days.

(d) "Affiliate" means any entity that controls, is controlled by, or is under common control with, another entity, but does not include a joint employee of the entity and the affiliate. A franchisor, including any affiliate thereof, shall be deemed an affiliate of the franchisee for purposes of this division.

(e) "Nonaffiliated third party" means any entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of that institution and a third party.

(f) "Consumer" means an individual resident of this state, or that individual's legal representative, who obtains or has obtained from a financial institution a financial product or service to be used primarily for personal, family, or household purposes. For purposes of this division, an individual resident of this state is someone whose last known mailing address, other than an Armed Forces Post Office or Fleet Post Office address, as shown in the records of the financial institution, is located in this state. For purposes of this division, an individual is not a consumer of a financial institution solely because he or she is (1) a participant or beneficiary of an employee benefit plan that a financial institution administers or sponsors, or for which the financial institution acts as a trustee, insurer, or fiduciary, (2) covered under a group or blanket insurance policy or group annuity contract issued by the financial institution, (3) a beneficiary in a workers' compensation plan, (4) a beneficiary of a trust for which the financial institution is a trustee, or (5) a person who has designated the financial institution as trustee for a trust, provided that the financial institution provides all required notices and rights required by this division to the plan sponsor, group or blanket insurance policyholder, or group annuity contractholder.

(g) "Control" means (1) ownership or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, acting through one or more persons, (2) control in any manner over the election of a majority of the directors, or of individuals exercising similar functions, or (3) the power to exercise, directly or indirectly, a controlling influence over the management or policies of a company. However, for purposes of the application of the definition of control as it relates to credit unions, a credit union has a controlling influence over the management or policies of a credit union service organization (CUSO), as that term is defined by state or federal law or regulation, if the CUSO is at least 67 percent owned by credit unions. For purposes of the application of the definition of control to a financial institution subject to regulation by the United States Securities and Exchange Commission, a person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company is presumed to control the company, and a person who does not own more than 25 percent of the voting securities of a company is presumed not to control the company, and a presumption regarding control may be rebutted by evidence, but in the case of an investment company, the presumption shall continue until the

United States Securities and Exchange Commission makes a decision to the contrary according to the procedures described in Section 2(a)(9) of the federal Investment Company Act of 1940.

(h) "Necessary to effect, administer, or enforce" means the following:

(1) The disclosure is required, or is a usual, appropriate, or acceptable method to carry out the transaction or the product or service business of which the transaction is a part, and record or service or maintain the consumer's account in the ordinary course of providing the financial service or financial product, or to administer or service benefits or claims relating to the transaction or the product or service business of which it is a part, and includes the following:

(A) Providing the consumer or the consumer's agent or broker with a confirmation, statement, or other record of the transaction, or information on the status or value of the financial service or financial product.

(B) The accrual or recognition of incentives, discounts, or bonuses associated with the transaction or communications to eligible existing consumers of the financial institution regarding the availability of those incentives, discounts, and bonuses that are provided by the financial institution or another party.

(C) In the case of a financial institution that has issued a credit account bearing the name of a company primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales, the financial institution providing the retailer with nonpublic personal information as follows:

(i) Providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with the names and addresses of the consumers in whose name the account is held and a record of the purchases made using the credit account from a business establishment, including a Web site or catalog, bearing the brand name of the retailer.

(ii) Where the credit account can only be used for transactions with the retailer or affiliates of that retailer that are also primarily engaged in retail sales, providing the retailer, or licensees or contractors of the retailer that provide products or services in the name of the retailer and under a contract with the retailer, with nonpublic personal information concerning the credit account, in connection with the offering or provision of the products or services of the retailer and those licensees or contractors.

(2) The disclosure is required or is one of the lawful or appropriate methods to enforce the rights of the financial institution or of other

persons engaged in carrying out the financial transaction or providing the product or service.

(3) The disclosure is required, or is a usual, appropriate, or acceptable method for insurance underwriting or the placement of insurance products by licensed agents and brokers with authorized insurance companies at the consumer's request, for reinsurance, stop loss insurance, or excess loss insurance purposes, or for any of the following purposes as they relate to a consumer's insurance:

(A) Account administration.

(B) Reporting, investigating, or preventing fraud or material misrepresentation.

(C) Processing premium payments.

(D) Processing insurance claims.

(E) Administering insurance benefits, including utilization review activities.

(F) Participating in research projects.

(G) As otherwise required or specifically permitted by federal or state law.

(4) The disclosure is required, or is a usual, appropriate, or acceptable method, in connection with the following:

(A) The authorization, settlement, billing, processing, clearing, transferring, reconciling, or collection of amounts charged, debited, or otherwise paid using a debit, credit or other payment card, check, or account number, or by other payment means.

(B) The transfer of receivables, accounts, or interests therein.

(C) The audit of debit, credit, or other payment information.

(5) The disclosure is required in a transaction covered by the federal Real Estate Settlement Procedures Act (12 U.S.C. Sec. 2601 et seq.) in order to offer settlement services prior to the close of escrow (as those services are defined in 12 U.S.C. Sec. 2602), provided that (A) the nonpublic personal information is disclosed for the sole purpose of offering those settlement services and (B) the nonpublic personal information disclosed is limited to that necessary to enable the financial institution to offer those settlement services in that transaction.

(i) "Financial product or service" means any product or service that a financial holding company could offer by engaging in an activity that is financial in nature or incidental to a financial activity under subsection (k) of Section 1843 of Title 12 of the United States Code (the United States Bank Holding Company Act of 1956). Financial service includes a financial institution's evaluation or brokerage of information that the financial institution collects in connection with a request or an application from a consumer for a financial product or service.

(j) "Clear and conspicuous" means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information contained in the notice.

(k) "Widely distributed media" means media available to the general public and includes a telephone book, a television or radio program, a newspaper, or a Web site that is available to the general public on an unrestricted basis.

4052.5. Except as provided in Sections 4053, 4054.6, and 4056, a financial institution shall not sell, share, transfer, or otherwise disclose nonpublic personal information to or with any nonaffiliated third parties without the explicit prior consent of the consumer to whom the nonpublic personal information relates.

4053. (a) (1) A financial institution shall not disclose to, or share a consumer's nonpublic personal information with, any nonaffiliated third party as prohibited by Section 4052.5, unless the financial institution has obtained a consent acknowledgment from the consumer that complies with paragraph (2) that authorizes the financial institution to disclose or share the nonpublic personal information. Nothing in this section shall prohibit or otherwise apply to the disclosure of nonpublic personal information as allowed in Section 4056. A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has not provided consent pursuant to this subdivision and Section 4052.5 to authorize the financial institution to disclose or share nonpublic personal information pertaining to him or her with any nonaffiliated third party Nothing in this section shall prohibit a financial institution from denying a consumer a financial product or service if the financial institution could not provide the product or service to a consumer without the consent to disclose the consumer's nonpublic personal information required by this subdivision and Section 4052.5, and the consumer has failed to provide consent. A financial institution shall not be liable for failing to offer products and services to a consumer solely because that consumer has failed to provide consent pursuant to this subdivision and Section 4052.5 and the financial institution could not offer the product or service without the consent to disclose the consumer's nonpublic personal information required by this subdivision and Section 4052.5, and the consumer has failed to provide consent. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice.

(2) A financial institution shall utilize a form, statement, or writing to obtain consent to disclose nonpublic personal information to nonaffiliated third parties as required by Section 4052.5 and this

subdivision. The form, statement, or writing shall meet all of the following criteria:

(A) The form, statement, or writing is a separate document, not attached to any other document.

(B) The form, statement, or writing is dated and signed by the consumer

(C) The form, statement, or writing clearly and conspicuously discloses that by signing, the consumer is consenting to the disclosure to nonaffiliated third parties of nonpublic personal information pertaining to the consumer.

(D) The form, statement, or writing clearly and conspicuously discloses (i) that the consent will remain in effect until revoked or modified by the consumer; (ii) that the consumer may revoke the consent at any time; and (iii) the procedure for the consumer to revoke consent.

(E) The form, statement, or writing clearly and conspicuously informs the consumer that (i) the financial institution will maintain the document or a true and correct copy; (ii) the consumer is entitled to a copy of the document upon request; and (iii) the consumer may want to make a copy of the document for the consumer's records.

(b) (1) A financial institution shall not disclose to, or share a consumer's nonpublic personal information with, an affiliate unless the financial institution has clearly and conspicuously notified the consumer annually in writing pursuant to subdivision (d) that the nonpublic personal information may be disclosed to an affiliate of the financial institution and the consumer has not directed that the nonpublic personal information not be disclosed. A financial institution does not disclose information to, or share information with, its affiliate merely because information is maintained in common information systems or databases, and employees of the financial institution and its affiliate have access to those common information systems or databases, or a consumer accesses a Web site jointly operated or maintained under a common name by or on behalf of the financial institution and its affiliate, provided that where a consumer has exercised his or her right to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an affiliate except as permitted by this division.

(2) Subdivision (a) shall not prohibit the release of nonpublic personal information by a financial institution with whom the consumer has a relationship to a nonaffiliated financial institution for purposes of jointly offering a financial product or financial service pursuant to a written agreement with the financial institution that receives the nonpublic personal information provided that all of the following requirements are met:

(A) The financial product or service offered is a product or service of, and is provided by, at least one of the financial institutions that is a party to the written agreement.

(B) The financial product or service is jointly offered, endorsed, or sponsored, and clearly and conspicuously identifies for the consumer the financial institutions that disclose and receive the disclosed nonpublic personal information.

(C) The written agreement provides that the financial institution that receives that nonpublic personal information is required to maintain the confidentiality of the information and is prohibited from disclosing or using the information other than to carry out the joint offering or servicing of a financial product or financial service that is the subject of the written agreement.

(D) The financial institution that releases the nonpublic personal information has complied with subdivision (d) and the consumer has not directed that the nonpublic personal information not be disclosed.

(E) Notwithstanding this section, until January 1, 2005, a financial institution may disclose nonpublic personal information to a nonaffiliated financial institution pursuant to a preexisting contract with the nonaffiliated financial institution, for purposes of offering a financial product or financial service, if that contract was entered into on or before January 1, 2004. Beginning on January 1, 2005, no nonpublic personal information may be disclosed pursuant to that contract unless all the requirements of this subdivision are met.

(3) Nothing in this subdivision shall prohibit a financial institution from disclosing or sharing nonpublic personal information as otherwise specifically permitted by this division.

(4) A financial institution shall not discriminate against or deny an otherwise qualified consumer a financial product or a financial service because the consumer has directed pursuant to this subdivision that nonpublic personal information pertaining to him or her not be disclosed. A financial institution shall not be required to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) where the consumer has directed that nonpublic personal information not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed pursuant to this subdivision. A financial institution shall not be liable for failing to offer or provide products or services offered through affiliated entities or jointly with nonaffiliated financial institutions pursuant to paragraph (2) solely because the consumer has directed that nonpublic personal information

not be disclosed pursuant to this subdivision and the financial institution could not offer or provide the products or services to the consumer without disclosure of the consumer's nonpublic personal information that the consumer has directed not be disclosed to affiliates pursuant to this subdivision. Nothing in this section is intended to prohibit a financial institution from offering incentives or discounts to elicit a specific response to the notice set forth in this division. Nothing in this section shall prohibit the disclosure of nonpublic personal information allowed by Section 4056.

(5) The financial institution may, at its option, choose instead to comply with the requirements of subdivision (a).

(c) Nothing in this division shall restrict or prohibit the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiaries; among financial institutions that are each wholly owned by the same financial institution; among financial institutions that are wholly owned by the same holding company, or among the insurance and management entities of a single insurance holding company system consisting of one or more reciprocal insurance exchanges which has a single corporation or its wholly owned subsidiaries providing management services to the reciprocal insurance exchanges, provided that in each case all of the following requirements are met:

(1) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are regulated by the same functional regulator; provided, however, that for purposes of this subdivision, financial institutions regulated by the Office of the Comptroller of the Currency, Office of Thrift Supervision, National Credit Union Administration, or a state regulator of depository institutions shall be deemed to be regulated by the same functional regulator; financial institutions regulated by the Securities and Exchange Commission, the United States Department of Labor, or a state securities regulator shall be deemed to be regulated by the same functional regulator; and insurers admitted in this state to transact insurance and licensed to write insurance policies shall be deemed to be in compliance with this paragraph.

(2) The financial institution disclosing the nonpublic personal information and the financial institution receiving it are both principally engaged in the same line of business. For purposes of this subdivision, "same line of business" shall be one and only one of the following:

(A) Insurance.

(B) Banking.

(C) Securities.

(3) The financial institution disclosing the nonpublic personal information and the financial institution receiving it share a common brand, excluding a brand consisting solely of a graphic element or symbol, within their trademark, service mark, or trade name, which is used to identify the source of the products and services provided.

A wholly owned subsidiary shall include a subsidiary wholly owned directly or wholly owned indirectly in a chain of wholly owned subsidiaries.

Nothing in this subdivision shall permit the disclosure by a financial institution of medical record information, as defined in subdivision (q) of Section 791.02 of the Insurance Code, except in compliance with the requirements of this division, including the requirements set forth in subdivisions (a) and (b).

(d) (1) A financial institution shall be conclusively presumed to have satisfied the notice requirements of subdivision (b) if it uses the form set forth in this subdivision. The form set forth in this subdivision or a form that complies with subparagraphs (A) to (L), inclusive, of this paragraph shall be sent by the financial institution to the consumer so that the consumer may make a decision and provide direction to the financial institution regarding the sharing of his or her nonpublic personal information. If a financial institution does not use the form set forth in this subdivision, the financial institution shall use a form that meets all of the following requirements:

(A) The form uses the same title ("IMPORTANT PRIVACY CHOICES FOR CONSUMERS") and the headers, if applicable, as follows: "Restrict Information Sharing With Companies We Own Or Control (Affiliates)" and "Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And Services."

(B) The titles and headers in the form are clearly and conspicuously displayed, and no text in the form is smaller than 10-point type.

(C) The form is a separate document, except as provided by subparagraph (D) of paragraph (2), and Sections 4054 and 4058.7.

(D) The choice or choices pursuant to subdivision (b) and Section 4054.6, if applicable, provided in the form are stated separately and may be selected by checking a box.

(E) The form is designed to call attention to the nature and significance of the information in the document.

(F) The form presents information in clear and concise sentences, paragraphs, and sections.

(G) The form uses short explanatory sentences (an average of 15-20 words) or bullet lists whenever possible.

(H) The form avoids multiple negatives, legal terminology, and highly technical terminology whenever possible.

(I) The form avoids explanations that are imprecise and readily subject to different interpretations.

(J) The form achieves a minimum Flesch reading ease score of 50, as defined in Section 2689.4(a)(7) of Title 10 of the California Code of Regulations, in effect on March 24, 2003, except that the information in the form included to comply with subparagraph (A) shall not be included in the calculation of the Flesch reading ease score, and the information used to describe the choice or choices pursuant to subparagraph (D) shall score no lower than the information describing the comparable choice or choices set forth in the form in this subdivision.

(K) The form provides wide margins, ample line spacing and uses boldface or italics for key words.

(L) The form is not more than one page.

(2) (A) None of the instructional items appearing in brackets in the form set forth in this subdivision shall appear in the form provided to the consumer, as those items are for explanation purposes only. If a financial institution does not disclose or share nonpublic personal information as described in a header of the form, the financial institution may omit the applicable header or headers, and the accompanying information and box, in the form it provides pursuant to this subdivision. The form with those omissions shall be conclusively presumed to satisfy the notice requirements of this subdivision.

Important Privacy Choices for Consumers

You have the right to control whether we share some of your personal information. Please read the following information carefully before you make your choices below.

Your Rights

You have the following rights to restrict the sharing of personal and financial information with our affiliates (companies we own or control) and outside companies that we do business with. Nothing in this form prohibits the sharing of information necessary for us to follow the law, as permitted by law, or to give you the best service on your accounts with us. This includes sending you information about some other products or services.

Your Choices

Restrict Information Sharing With Companies We Own or Control (Affiliates): Unless you say "No," we may share personal and financial information about you with our affiliated companies.

(_) NO, please do not share personal and financial information with your affiliated companies.

Restrict Information Sharing With Other Companies We Do Business With To Provide Financial Products And Services: Unless you say "No," we may share personal and financial information about you with outside companies we contract with to provide financial products and services to you.

(_) NO, please do not share personal and financial information with outside companies you contract with to provide financial products and services.

Time Sensitive Reply

You may make your privacy choice(s) at any time. Your choice(s) marked here will remain unless you state otherwise. However, if we do not hear from you we may share some of your information with affiliated companies and other companies with whom we have contracts to provide products and services.

Name: _____

Account or Policy Number(s): _____ [to be filled in by consumer]

Signature: _____

To exercise your choices do [one of] the following:
(1) Fill out, sign and send back this form to us using the envelope provided (you may want to make a copy for your records). [#1 is mandatory]
(2) Call the toll-free number (800) xxx-xxxx or (xxx) xxx-xxxx. [optional]
(3) Reply electronically by contacting us through the following internet option: xxxxx.com) [optional]

(B) If a financial institution uses a form other than that set forth in this subdivision, the financial institution may submit that form to its functional regulator for approval, and for forms filed with the Office of Privacy Protection prior to July 1, 2007, that approval shall constitute a rebuttable presumption that the form complies with this section.

(C) A financial institution shall not be in violation of this subdivision solely because it includes in the form one or more brief examples or explanations of the purpose or purposes, or context, within which information will be shared, as long as those examples meet the clarity and readability standards set forth in paragraph (1).

(D) The outside of the envelope in which the form is sent to the consumer shall clearly state in 16-point boldface type "IMPORTANT PRIVACY CHOICES," except that a financial institution sending the form to a consumer in the same envelope as a bill, account statement, or application requested by the consumer does not have to include the wording "IMPORTANT PRIVACY CHOICES" on that envelope. The form shall be sent in any of the following ways:

(i) With a bill, other statement of account, or application requested by the consumer, in which case the information required by Title V of the Gramm-Leach-Bliley Act may also be included in the same envelope

(ii) As a separate notice or with the information required by Title V of the Gramm-Leach-Bliley Act, and including only information related to privacy.

(iii) With any other mailing, in which case it shall be the first page of the mailing.

(E) If a financial institution uses a form other than that set forth in this subdivision, that form shall be filed with the Office of Privacy Protection within 30 days after it is first used.

(3) The consumer shall be provided a reasonable opportunity prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed. A consumer may direct at any time that his or her nonpublic personal information not be disclosed. A financial institution shall comply with a consumer's directions concerning the sharing of his or her nonpublic personal information within 45 days of receipt by the financial institution. When a consumer directs that nonpublic personal information not be disclosed, that direction is in effect until otherwise stated by the consumer. A financial institution that has not provided a consumer with annual notice pursuant to subdivision (b) shall provide the consumer with a form that meets the requirements of this subdivision, and shall allow 45 days to lapse from the date of providing the form in person or the postmark or other postal

verification of mailing before disclosing nonpublic personal information pertaining to the consumer.

Nothing in this subdivision shall prohibit the disclosure of nonpublic personal information as allowed by subdivision (c) or Section 4056.

(4) A financial institution may elect to comply with the requirements of subdivision (a) with respect to disclosure of nonpublic personal information to an affiliate or with respect to nonpublic personal information disclosed pursuant to paragraph (2) of subdivision (b), or subdivision (c) of Section 4054.6.

(5) If a financial institution does not have a continuing relationship with a consumer other than the initial transaction in which the product or service is provided, no annual disclosure requirement exists pursuant to this section as long as the financial institution provides the consumer with the form required by this section at the time of the initial transaction. As used in this section, "annually" means at least once in any period of 12 consecutive months during which that relationship exists. The financial institution may define the 12-consecutive-month period, but shall apply it to the consumer on a consistent basis. If, for example, a financial institution defines the 12-consecutive-month period as a calendar year and provides the annual notice to the consumer once in each calendar year, it complies with the requirement to send the notice annually.

(6) A financial institution with assets in excess of twenty-five million dollars ($25,000,000) shall include a self-addressed first class business reply return envelope with the notice. A financial institution with assets of up to and including twenty-five million dollars ($25,000,000) shall include a self-addressed return envelope with the notice. In lieu of the first class business reply return envelope required by this paragraph, a financial institution may offer a self-addressed return envelope with the notice and at least two alternative cost-free means for consumers to communicate their privacy choices, such as calling a toll-free number, sending a facsimile to a toll-free telephone number, or using electronic means. A financial institution shall clearly and conspicuously disclose in the form required by this subdivision the information necessary to direct the consumer on how to communicate his or her choices, including the toll-free or facsimile number or Web site address that may be used, if those means of communication are offered by the financial institution.

(7) A financial institution may provide a joint notice from it and one or more of its affiliates or other financial institutions, as identified in the notice, so long as the notice is accurate with respect to the financial institution and the affiliates and other financial institutions.

(e) Nothing in this division shall prohibit a financial institution from marketing its own products and services or the products and services of

affiliates or nonaffiliated third parties to customers of the financial institution as long as (1) nonpublic personal information is not disclosed in connection with the delivery of the applicable marketing materials to those customers except as permitted by Section 4056 and (2) in cases in which the applicable nonaffiliated third party may extrapolate nonpublic personal information about the consumer responding to those marketing materials, the applicable nonaffiliated third party has signed a contract with the financial institution under the terms of which (A) the nonaffiliated third party is prohibited from using that information for any purpose other than the purpose for which it was provided, as set forth in the contract, and (B) the financial institution has the right by audit, inspections, or other means to verify the nonaffiliated third party's compliance with that contract.

4053.5. Except as otherwise provided in this division, an entity that receives nonpublic personal information from a financial institution under this division shall not disclose this information to any other entity, unless the disclosure would be lawful if made directly to the other entity by the financial institution. An entity that receives nonpublic personal information pursuant to any exception set forth in Section 4056 shall not use or disclose the information except in the ordinary course of business to carry out the activity covered by the exception under which the information was received.

4054. (a) Nothing in this division shall require a financial institution to provide a written notice to a consumer pursuant to Section 4053 if the financial institution does not disclose nonpublic personal information to any nonaffiliated third party or to any affiliate, except as allowed in this division.

(b) A notice provided to a member of a household pursuant to Section 4053 shall be considered notice to all members of that household unless that household contains another individual who also has a separate account with the financial institution.

(c) (1) The requirement to send a written notice to a consumer may be fulfilled by electronic means if the following requirements are met:

(A) The notice, and the manner in which it is sent, meets all of the requirements for notices that are required by law to be in writing, as set forth in Section 101 of the federal Electronic Signatures in Global and National Commerce Act.

(B) All other requirements applicable to the notice, as set forth in this division, are met, including, but not limited to, requirements concerning content, timing, form, and delivery. An electronic notice sent pursuant to this section is not required to include a return envelope.

(C) The notice is delivered to the consumer in a form the consumer may keep.

(2) A notice that is made available to a consumer, and is not delivered to the consumer, does not satisfy the requirements of paragraph (1).

(3) Any electronic consumer reply to an electronic notice sent pursuant to this division is effective. A person that electronically sends a notice required by this division to a consumer may not by contract, or otherwise, eliminate the effectiveness of the consumer's electronic reply.

(4) This division modifies the provisions of Section 101 of the federal Electronic Signatures in Global and National Commerce Act. However, it does not modify, limit, or supersede the provisions of subsection (c), (d), (e), (f), or (h) of Section 101 of the federal Electronic Signatures in Global and National Commerce Act, nor does it authorize electronic delivery of any notice of the type described in subsection (b) of Section 103 of that federal act.

4054.6. (a) When a financial institution and an organization or business entity that is not a financial institution ("affinity partner") have an agreement to issue a credit card in the name of the affinity partner ("affinity card"), the financial institution shall be permitted to disclose to the affinity partner in whose name the card is issued only the following information pertaining to the financial institution's customers who are in receipt of the affinity card: (1) name, address, telephone number, and electronic mail address and (2) record of purchases made using the affinity card in a business establishment, including a Web site, bearing the brand name of the affinity partner.

(b) When a financial institution and an affinity partner have an agreement to issue a financial product or service, other than a credit card, on behalf of the affinity partner ("affinity financial product or service"), the financial institution shall be permitted to disclose to the affinity partner only the following information pertaining to the financial institution's customers who obtained the affinity financial product or service: name, address, telephone number, and electronic mail address.

(c) The disclosures specified in subdivisions (a) and (b) shall be permitted only if the following requirements are met:

(1) The financial institution has provided the consumer a notice meeting the requirements of subdivision (d) of Section 4053, and the consumer has not directed that nonpublic personal information not be disclosed. A response to a notice meeting the requirements of subdivision (d) directing the financial institution to not disclose nonpublic personal information to a nonaffiliated financial institution shall be deemed a direction to the financial institution to not disclose nonpublic personal information to an affinity partner, unless the form containing the notice provides the consumer with a separate choice for disclosure to affinity partners.

(2) The financial institution has a contractual agreement with the affinity partner that requires the affinity partner to maintain the confidentiality of the nonpublic personal information and prohibits affinity partners from using the information for any purposes other than verifying membership, verifying the consumer's contact information, or offering the affinity partner's own products or services to the consumer.

(3) The customer list is not disclosed in any way that reveals or permits extrapolation of any additional nonpublic personal information about any customer on the list.

(4) If the affinity partner sends any message to any electronic mail addresses obtained pursuant to this section, the message shall include at least both of the following:

(A) The identity of the sender of the message.

(B) A cost-free means for the recipient to notify the sender not to electronically mail any further message to the recipient.

(d) Nothing in this section shall prohibit the disclosure of nonpublic personal information pursuant to Section 4056.

(e) This section does not apply to credit cards issued in the name of an entity primarily engaged in retail sales or a name proprietary to a company primarily engaged in retail sales.

4056. (a) This division shall not apply to information that is not personally identifiable to a particular person.

(b) Notwithstanding Sections 4052.5, 4053, 4054, and 4054.6, a financial institution may release nonpublic personal information under the following circumstances:

(1) The nonpublic personal information is necessary to effect, administer, or enforce a transaction requested or authorized by the consumer, or in connection with servicing or processing a financial product or service requested or authorized by the consumer, or in connection with maintaining or servicing the consumer's account with the financial institution, or with another entity as part of a private label credit card program or other extension of credit on behalf of that entity, or in connection with a proposed or actual securitization or secondary market sale, including sales of servicing rights, or similar transactions related to a transaction of the consumer.

(2) The nonpublic personal information is released with the consent of or at the direction of the consumer.

(3) The nonpublic personal information is:

(A) Released to protect the confidentiality or security of the financial institution's records pertaining to the consumer, the service or product, or the transaction therein.

(B) Released to protect against or prevent actual or potential fraud, identity theft, unauthorized transactions, claims, or other liability.

(C) Released for required institutional risk control, or for resolving customer disputes or inquiries

(D) Released to persons holding a legal or beneficial interest relating to the consumer, including for purposes of debt collection.

(E) Released to persons acting in a fiduciary or representative capacity on behalf of the consumer.

(4) The nonpublic personal information is released to provide information to insurance rate advisory organizations, guaranty funds or agencies, applicable rating agencies of the financial institution, persons assessing the institution's compliance with industry standards, and the institution's attorneys, accountants, and auditors

(5) The nonpublic personal information is released to the extent specifically required or specifically permitted under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. Sec. 3401 et seq.), to law enforcement agencies, including a federal functional regulator, the Secretary of the Treasury with respect to subchapter II of Chapter 53 of Title 31, and Chapter 2 of Title I of Public Law 91-508 (12 U.S.C. Secs. 1951-1959), the California Department of Insurance or other state insurance regulators, or the Federal Trade Commission, and self-regulatory organizations, or for an investigation on a matter related to public safety.

(6) The nonpublic personal information is released in connection with a proposed or actual sale, merger, transfer, or exchange of all or a portion of a business or operating unit if the disclosure of nonpublic personal information concerns solely consumers of the business or unit.

(7) The nonpublic personal information is released to comply with federal, state, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, administrative, or regulatory investigation or subpoena or summons by federal, state, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law.

(8) When a financial institution is reporting a known or suspected instance of elder or dependent adult financial abuse or is cooperating with a local adult protective services agency investigation of known or suspected elder or dependent adult financial abuse pursuant to Article 3 (commencing with Section 15630) of Chapter 11 of Part 3 of Division 9 of the Welfare and Institutions Code.

(9) The nonpublic personal information is released to an affiliate or a nonaffiliated third party in order for the affiliate or nonaffiliated third party to perform business or professional services, such as printing, mailing services, data processing or analysis, or customer surveys, on

behalf of the financial institution, provided that all of the following requirements are met:

(A) The services to be performed by the affiliate or nonaffiliated third party could lawfully be performed by the financial institution

(B) There is a written contract between the affiliate or nonaffiliated third party and the financial institution that prohibits the affiliate or nonaffiliated third party, as the case may be, from disclosing or using the nonpublic personal information other than to carry out the purpose for which the financial institution disclosed the information, as set forth in the written contract.

(C) The nonpublic personal information provided to the affiliate or nonaffiliated third party is limited to that which is necessary for the affiliate or nonaffiliated third party to perform the services contracted for on behalf of the financial institution.

(D) The financial institution does not receive any payment from or through the affiliate or nonaffiliated third party in connection with, or as a result of, the release of the nonpublic personal information.

(10) The nonpublic personal information is released to identify or locate missing and abducted children, witnesses, criminals and fugitives, parties to lawsuits, parents delinquent in child support payments, organ and bone marrow donors, pension fund beneficiaries, and missing heirs.

(11) The nonpublic personal information is released to a real estate appraiser licensed or certified by the state for submission to central data repositories such as the California Market Data Cooperative, and the nonpublic personal information is compiled strictly to complete other real estate appraisals and is not used for any other purpose.

(12) The nonpublic personal information is released as required by Title III of the federal United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act; P.L. 107-56).

(13) The nonpublic personal information is released either to a consumer reporting agency pursuant to the Fair Credit Reporting Act (15 U.S.C. Sec 1681 et seq.) or from a consumer report reported by a consumer reporting agency.

(14) The nonpublic personal information is released in connection with a written agreement between a consumer and a broker-dealer registered under the Securities Exchange Act of 1934 or an investment adviser registered under the Investment Advisers Act of 1940 to provide investment management services, portfolio advisory services, or financial planning, and the nonpublic personal information is released for the sole purpose of providing the products and services covered by that agreement.

(c) Nothing in this division is intended to change existing law relating to access by law enforcement agencies to information held by financial institutions.

4056.5. (a) The provisions of this division do not apply to any person or entity that meets the requirements of paragraph (1) or (2) below. However, when nonpublic personal information is being or will be shared by a person or entity meeting the requirements of paragraph (1) or (2) with an affiliate or nonaffiliated third party, this division shall apply.

(1) The person or entity is licensed in one or both of the following categories and is acting within the scope of the respective license or certificate:

(A) As an insurance producer, licensed pursuant to Chapter 5 (commencing with Section 1621), Chapter 6 (commencing with Section 1760), or Chapter 8 (commencing with Section 1831) of Division 1 of the Insurance Code, as a registered investment adviser pursuant to Chapter 3 (commencing with Section 25230) of Part 3 of Division 1 of Title 4 of the Corporations Code, or as an investment adviser pursuant to Section 202(a)(11) of the federal Investment Advisers Act of 1940.

(B) Is licensed to sell securities by the National Association of Securities Dealers (NASD).

(2) The person or entity meets the requirements in paragraph (1) and has a written contractual agreement with another person or entity described in paragraph (1) and the contract clearly and explicitly includes the following:

(A) The rights and obligations between the licensees arising out of the business relationship relating to insurance or securities transactions.

(B) An explicit limitation on the use of nonpublic personal information about a consumer to transactions authorized by the contract and permitted pursuant to this division.

(C) A requirement that transactions specified in the contract fall within the scope of activities permitted by the licenses of the parties.

(b) The restrictions on disclosure and use of nonpublic personal information, and the requirement for notification and disclosure provided in this division, shall not limit the ability of insurance producers and brokers to respond to written or electronic, including telephone, requests from consumers seeking price quotes on insurance products and services or to obtain competitive quotes to renew an existing insurance contract, provided that any nonpublic personal information disclosed pursuant to this subdivision shall not be used or disclosed except in the ordinary course of business in order to obtain those quotes.

(c) (1) The disclosure or sharing of nonpublic personal information from an insurer, as defined in Section 23 of the Insurance Code, or its affiliates to an exclusive agent, defined for purposes of this division as a licensed agent or broker pursuant to Chapter 5 (commencing with Section 1621) of Part 2 of Division 1 of the Insurance Code whose contractual or employment relationship requires that the agent offer only the insurer's policies for sale or financial products or services that meet the requirements of paragraph (2) of subdivision (b) of Section 4053 and are authorized by the insurer, or whose contractual or employment relationship with an insurer gives the insurer the right of first refusal for all policies of insurance by the agent, and who may not share nonpublic personal information with any insurer other than the insurer with whom the agent has a contractual or employment relationship as described above, is not a violation of this division, provided that the agent may not disclose nonpublic personal information to any party except as permitted by this division. An insurer or its affiliates do not disclose or share nonpublic personal information with exclusive agents merely because information is maintained in common information systems or databases, and exclusive agents of the insurer or its affiliates have access to those common information systems or databases, provided that where a consumer has exercised his or her rights to prohibit disclosure pursuant to this division, nonpublic personal information is not further disclosed or used by an exclusive agent except as permitted by this division.

(2) Nothing in this subdivision is intended to affect the sharing of information allowed in subdivision (a) or subdivision (b).

4057. (a) An entity that negligently discloses or shares nonpublic personal information in violation of this division shall be liable, irrespective of the amount of damages suffered by the consumer as a result of that violation, for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per violation. However, if the disclosure or sharing results in the release of nonpublic personal information of more than one individual, the total civil penalty awarded pursuant to this subdivision shall not exceed five hundred thousand dollars ($500,000).

(b) An entity that knowingly and willfully obtains, discloses, shares, or uses nonpublic personal information in violation of this division shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per individual violation, irrespective of the amount of damages suffered by the consumer as a result of that violation.

(c) In determining the penalty to be assessed pursuant to a violation of this division, the court shall take into account the following factors:

(1) The total assets and net worth of the violating entity.

(2) The nature and seriousness of the violation.

(3) The persistence of the violation, including any attempts to correct the situation leading to the violation.

(4) The length of time over which the violation occurred.

(5) The number of times the entity has violated this division.

(6) The harm caused to consumers by the violation.

(7) The level of proceeds derived from the violation.

(8) The impact of possible penalties on the overall fiscal solvency of the violating entity.

(d) In the event a violation of this division results in the identity theft of a consumer, as defined by Section 530.5 of the Penal Code, the civil penalties set forth in this section shall be doubled.

(e) The civil penalties provided for in this section shall be exclusively assessed and recovered in a civil action brought in the name of the people of the State of California in any court of competent jurisdiction by any of the following:

(1) The Attorney General.

(2) The functional regulator with jurisdiction over regulation of the financial institution as follows:

(A) In the case of banks, savings associations, credit unions, commercial lending companies, and bank holding companies, by the Department of Financial Institutions or the appropriate federal authority; (B) in the case of any person engaged in the business of insurance, by the Department of Insurance; (C) in the case of any investment broker or dealer, investment company, investment advisor, residential mortgage lender or finance lender, by the Department of Corporations; and (D) in the case of a financial institution not subject to the jurisdiction of any functional regulator listed under subparagraphs (A) to (C), inclusive, above, by the Attorney General.

4058. Nothing in this division shall be construed as altering or annulling the authority of any department or agency of the state to regulate any financial institution subject to its jurisdiction.

4058.5. This division shall preempt and be exclusive of all local agency ordinances and regulations relating to the use and sharing of nonpublic personal information by financial institutions. This section shall apply both prospectively and retroactively.

4058.7. Nothing in this division shall prevent an insurer, as defined in Section 23 of the Insurance Code, from combining the form required by subdivision (d) of Section 4053 with the form required pursuant to Article 6.6 (commencing with Section 791) of Chapter 1 of Part 2 of Division 1 of the Insurance Code and state regulations implementing the provisions of that article, provided that the combined form meets the requirements contained in paragraph (1) of subdivision (d) of Section 4053.

4059. The provisions of this division shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this division shall not be affected thereby.

4060. This division shall become operative on July 1, 2004.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

versus

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Civil Action No. S-04-0778 MCE KJM

DECLARATION OF KAREN M. ALNES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

I, Karen M. Alnes, do hereby declare and say:

1. I am Senior Vice President of Privacy Policies of Wells Fargo Bank, N.A. ("Wells Fargo Bank"). I have been employed by Wells Fargo Bank, its affiliates, and predecessor entities since 1978. My duties at Wells Fargo Bank include planning and execution of the Bank's nationwide information-sharing and solicitation preferences policies. This includes development and execution of the consumer disclosure required under the Gramm-Leach-Bliley Act (GLBA) and Fair Credit Reporting Act (FCRA) for Wells Fargo Bank and its affiliates. The statements in this Declaration are based on my personal knowledge, on a review of the records of Wells Fargo Bank and its affiliates, and on information provided at my request by persons within the company as to the matters within their areas of responsibility, and they are true and correct.

2. Wells Fargo is a member of the American Bankers Association, The Financial Services Roundtable, and the Consumer Bankers Association. Like many of the other banks that are members of these trade associations, Wells Fargo Bank has many affiliates across different business lines in the financial services industry with which it operates to provide products and services to the bank's customers. For example, Wells Fargo Bank's affiliates include insurance and securities affiliates who offer bank customers products that the bank does not directly offer. These affiliates are organized as separate legal entities not only for efficiency and economy, but sometimes also due to federal statutory and regulatory requirements focusing on the safety and soundness that, for instance, require securities affiliates to be subsidiaries or affiliates of a bank. Given my knowledge of the industry, the corporate affiliate structure, and customer information sharing practices of Wells Fargo Bank are similar to its competitors, many of whom are also members of the aforementioned trade associations.

3. Wells Fargo Bank exchanges with its affiliates in different business lines for marketing purposes, information, such as names and addresses, regarding its and its affiliates' customers who reside in California, as well as elsewhere in the United States. Without the exchange of this and other information, it would be difficult or impossible for the affiliates to market their products and services to their most prospective customers – persons who are customers of the bank. Moreover, without such information sharing, the bank would be unable

to meet its customers' expectations for integrated offerings of financial products and services across different lines of business.

4. Both the bank and its affiliates would be irreparably harmed if they could no longer exchange information with affiliates that are in different business lines regarding their California customers. Moreover, if Wells Fargo Bank were required to send a separate notice to California customers regarding its affiliate-sharing practices pursuant to the recently enacted California Financial Information Privacy Act, the Bank would incur more than a de minimis expense.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of May, 2004.

Karen M. Alnes

Karen M. Alnes

VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Deputy Commissioner
KIMBERLY L. GAUTHIER (CA BAR NO. 186012)
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION, Plaintiffs, vs. BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California, Defendants.	Civil Action No. CIV.S-04-0778 MCE KJM **ANSWER TO COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION**

Defendant WILLIAM P. WOOD, in his official capacity as Commissioner of the California Department of Corporations and Defendant HOWARD GOULD, in his official capacity as

Commissioner of the Department of Financial Institutions of the State of California (hereinafter "Defendants") answer the complaint for declaratory relief, preliminary injunction and permanent injunction ("complaint") and admit, deny, and allege as follows:

With regard to the individually numbered paragraphs of the complaint, Defendants answer as follows:

1. Defendants admit that this complaint seeks declaratory and injunctive relief pursuant to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(2), and the Supremacy Clause of the United States Constitution, U.S. Const. Art VI. Defendants lack information and belief sufficient to answer the remaining allegations contained in paragraph 1 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

2. Defendants admit that SB1 was signed into law on August 27, 2003 and went into "effect" on January 1, 2004, but does not become "operative" until July 1, 2004. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 2 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

3. Defendants admit that Plaintiffs allege that they have brought this action under the Supremacy Clause of the United States Constitution, the FCRA and 42 U.S.C. § 1983. Defendants deny each and every remaining allegation contained in paragraph 3 of the complaint.

4. Defendants WOOD and GOULD admit that they reside in California. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 4 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

5. Defendants lack information and belief sufficient to answer the allegations in paragraph 5 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

6. Defendants lack information and belief sufficient to answer the allegations in paragraph 6 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

7. Defendants lack information and belief sufficient to answer the allegations in paragraph 7 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

8. Defendants lack information and belief sufficient to answer the allegations in paragraph 8 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

9. Defendants admit that Bill Lockyer is Attorney General of the State of California. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 9 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

10. Defendants admit that HOWARD GOULD is Commissioner of the Department of Financial Institutions of the State of California. Defendants further admit that Defendant GOULD is one of the state officials charged with enforcing SB1 against banks, industrial banks, savings associations, credit unions, money transmitters, commercial lending companies and bank holding companies. Defendants deny each and every remaining allegation contained in paragraph 10 of the complaint.

11. Defendants admit that JOHN GARAMENDI is Commissioner of the Department of Insurance of the State of California. Defendants further admit that Defendant GARAMENDI is one of the state officials charged with enforcing SB1 against any person engaged in the business of insurance. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 11 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

12. Defendants admit that WILLIAM P. WOOD is Commissioner of the Department of Corporations of the State of California. Defendants further admit that Defendant WOOD is one of the state officials charged with enforcing SB1 against any investment broker or dealer, investment company, investment advisor, residential mortgage lender or finance lender. Defendants deny each and every remaining allegation contained in paragraph 12 of the complaint.

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13. Defendants lack information and belief sufficient to answer the allegations in paragraph 13 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

14. Defendants deny each and every allegation contained in paragraph 14 of the complaint.

15. Defendants admit the quotation of Article VI of the United States Constitution, as set forth in paragraph 15 of the complaint is accurate.

16. Defendants admit the allegations contained in the first sentence of paragraph 16 of the complaint. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 16 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

17. Defendants admit the quotation of subdivision (b)(1) of Financial Code section 4053 in the first sentence of paragraph 17 of the complaint is accurate. In answering the allegations in the second sentence of paragraph 17, Defendants admit that subdivision (d)(3) of Financial Code section 4053 provides in pertinent part that a "consumer shall be provided a reasonable opportunity prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed." Defendants lack information and belief sufficient to answer the remaining allegations in the second sentence of paragraph 17, and basing their denials thereon, deny each and every allegation contained therein. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 17 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained therein.

18. Defendants admit that SB1 exempts from its provisions the sharing of nonpublic personal information between a financial institution and its wholly owned financial institution subsidiary within the "same line of business." Defendants further admit that subdivision (c) of Financial Code section 4053 defines "same line of business" for financial institutions and their wholly owned financial institution subsidiaries to mean banking, insurance or securities. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 18 of the complaint, and basing their denials thereon, deny each and every remaining allegation contained

therein.

19. Defendants admit the quotation of subdivision (a) of Financial Code section 4052 in the first sentence of paragraph 19 of the complaint is accurate. In answering the allegations in the second sentence of paragraph 19, Defendants admit that subdivision (b) of Financial Code section 4052 provides that "personally identifiable information" includes, among other things, "the fact that a consumer is or has been a consumer of a financial institution or has obtained a financial product or service from a financial institution."

20. Defendants admit that SB1, at subdivision (d) of Financial Code section 4053, imposes requirements on the form and content of the notices financial institutions must send to their customers "to inform them of their right (sic) to opt-out." Defendants deny each and every remaining allegation contained in paragraph 20 of the complaint.

21. Defendants admit that subdivision (a) of Financial Code section 4057 provides that an entity that negligently discloses or shares nonpublic personal information in violation of SB1 is subject to a civil penalty of $2,500 per violation, not to exceed $500,000 if the negligent violation results in the release of such information for more than one individual. Defendants further admit that pursuant to subsection (b) of Financial Code section 4057 an entity that knowingly and willfully obtains, discloses, shares or uses nonpublic information is liable for $2,500 per individual violation and this section does not provide for a cap on the civil penalties that may be assessed.

22. Defendants admit that SB1 would impose requirements upon customer information sharing with financial institution affiliates. Defendants deny the remaining allegations in paragraph 22 of the complaint.

23. Defendants admit that SB1 prevents financial institutions from sharing nonpublic personal customer information with affiliates for 45 days at the outset of a relationship, and thereafter permanently if a customer opts out. Defendants further admit that SB1 imposes requirements upon financial institutions and their selling, soliciting or cross-marketing of their own products and services to persons who are customers of affiliates of those financial institutions. Defendants lack information and belief sufficient to answer the remaining allegations in paragraph 23 of the complaint, and basing their denials thereon, deny each and every remaining allegation

contained therein.

24. Defendants lack information and belief sufficient to answer the allegations in paragraph 24 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

25. Defendants lack information and belief sufficient to answer the allegations in paragraph 25 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

26. Answering paragraph 26 of the complaint, Defendants repeat their answers to paragraphs 1-25 of the complaint above as if each was fully set forth herein.

27. Defendants lack information and belief sufficient to answer the allegations in paragraph 27 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

28. Defendants deny the allegations in the first sentence of paragraph 28 of the complaint. Defendants admit the quotation of the FCRA, 15 U.S.C. § 1681t(b)(2), in the second sentence of paragraph 28 of the complaint is accurate. Defendants lack information and belief sufficient to answer the allegations in the third sentence of paragraph 28 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

29. Defendants lack information and belief sufficient to answer the allegations in paragraph 29 of the complaint, and basing their denials thereon, deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiffs' complaint, Defendants allege as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to state a cause of action-All claims for relief)

1. Plaintiffs' complaint fails to state facts sufficient to constitute claims upon which relief can be granted, and specifically, to the extent it is brought under 42 U.S.C. § 1983, fails to allege facts sufficient to constitute a cause of action or claims upon which relief can be granted and

does not support a claim for attorney's fees. *White Mountain Apache Tribe v. Williams* (1985) 810 F. 2d 844.

SECOND AFFIRMATIVE DEFENSE

(Sovereign immunity-All claims for relief)

2. Plaintiffs' complaint is barred by sovereign immunity under the Eleventh Amendment of the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

(Constitutional Mandate-All claims for relief)

3. Pursuant to Article III, section 3.5(c) of the California Constitution, Defendants are prohibited from declaring a statute unenforceable, or refusing to enforce a statute, on the basis that the statute(s) is unconstitutional or that federal law or federal regulations prohibit the enforcement of such statute(s) unless an appellate court has made a determination that such statute(s) is unconstitutional or enforcement is prohibited by federal law or federal regulations.

FOURTH AFFIRMATIVE DEFENSE

(Uncertainty-All claims for relief)

4. The complaint is uncertain, vague, ambiguous, improper and unintelligible.

FIFTH AFFIRMATIVE DEFENSE

(Right to apply other affirmative defenses reserved-All claims for relief)

5. Because the complaint only alleges conclusions of fact and law, these answering Defendants cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

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WHEREFORE, Defendants pray for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by virtue of their complaint herein;

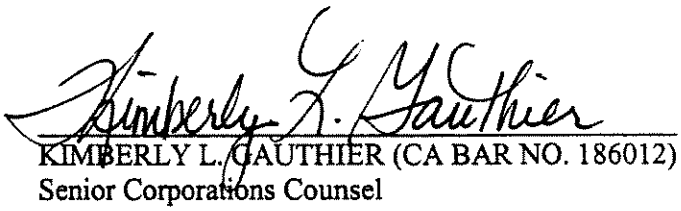
2. That the Court dismiss Plaintiffs' complaint for Declaratory Relief, Preliminary Injunction, and Permanent Injunction with prejudice;

3. For reasonable attorneys fees and costs of suit; and

4. For such other and further relief as this Court deems just and proper.

Dated: May 11, 2004

VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Deputy Commissioner



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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, **HOWARD GOULD**, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, **WILLIAM P. WOOD**, in his official capacity as Commissioner of the Department of Corporations of the State of California, and **JOHN GARAMENDI**, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Case: CIV. S-04-0778 MCE KJM

DEFENDANTS BILL LOCKYER'S AND JOHN GARAMENDI'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Filed concurrently with:
1) Memorandum of Points and Authorities; and
2) Appendix of Legislative and Non-Federal Authorities

Date:	June 14, 2004
Time:	9 a.m.
Courtroom:	3
Judge:	Honorable Morrison C. England, Jr.

NOTICE IS HEREBY GIVEN THAT on June 14, 2004, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-entitled court located at 501 "I" Street, Sacramento, CA 95814, defendants Bill Lockyer, Attorney General of the State of California, and John Garamendi, Commissioner of the California Department of Insurance, will and hereby do move this court for an order dismissing plaintiffs' complaint without leave to amend pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that Plaintiffs' first and only claim for declaratory and injunctive relief fails to state a claim upon which relief can be granted because the Fair Credit Reporting Act, 15 U.S.C. § 1681t(b)(2), does not preempt the California Financial Information Privacy Act, California Financial Code sections 4050-4059.

This motion is based on this notice, the memorandum of points and authorities, all papers and pleadings on file herein, such other matters as may be presented at or before the hearing on this motion or prior to the Court's decision, and all matters of which the Court may take judicial notice.

Dated: May 13, 2004

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, **HOWARD GOULD**, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, **WILLIAM P. WOOD**, in his official capacity as Commissioner of the Department of Corporations of the State of California, and **JOHN GARAMENDI**, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Case: CIV. S-04-0778 MCE KJM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS BILL LOCKYER'S AND JOHN GARAMENDI'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date:	June 14, 2004
Time:	9 a.m.
Courtroom:	3
Judge:	Honorable Morrison C. England, Jr.

Compare Cal. Fin. Code § 4052, *with* 15 U.S.C. § 6809. In addition, SB1 contains all of the GLBA's exemptions. *Compare* Cal. Fin. Code § 4056, *with* 15 U.S.C. § 6802(e).

SB1 requires that banks, insurance companies and securities firms obtain a consumer's express consent before disclosing his or her information to any nonaffiliated third party, and provide consumers with an opportunity to opt out of disclosures to affiliates, except those in the same line of business. Cal. Fin. Code §§ 4052.5, 4053(a) - (c). Certain specified disclosures are exempt from these requirements. These include disclosures necessary to effect, administer or enforce a transaction authorized or requested by the consumer; for law enforcement purposes or to respond to process; or to detect or prevent fraud. Cal. Fin. Code § 4056(b)(1), (3). Contrary to Plaintiffs' assertion (Complaint ¶ 2, p. 2), SB1 does not prohibit the disclosure of personal financial information to affiliates. Instead, it allows the information to be shared with affiliates unless the customer directs to the contrary by affirmatively opting out. Cal. Fin. Code § 4053(b)(1).

B. PLAINTIFFS ALLEGE THAT THE FAIR CREDIT REPORTING ACT PREEMPTS THE PROTECTIONS PROVIDED BY CALIFORNIA'S STATE FINANCIAL PRIVACY LAW.

The Fair Credit Reporting Act, as its name suggests, is intended to protect consumers from unfair or inaccurate credit reporting.[4/] Plaintiffs, however, attempt to use this inapplicable statute to erode the consumer privacy protections permitted by the GLBA and provided by SB1. Specifically, Plaintiffs claim that the FCRA expressly preempts the affiliate-sharing provisions of SB1.

The FCRA places restrictions and obligations on consumer reporting agencies, the entities that create and distribute consumer reports, as well as on those that furnish information for, and

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4. Although "credit reporting" is in the title of the FCRA and is a commonly used term, the FCRA deals with more than "credit" in the sense that a "consumer report" is defined as a communication, bearing on specified characteristics, that is used or expected to be used as a factor in establishing the consumer's eligibility for insurance or employment, as well as credit. 15 U.S.C. § 1681a(d).

presumption against pre-emption -- narrowly construe the precise language of [the statute at issue] and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted." *Cipollone*, 505 U.S. at 523. In analyzing whether or not federal law expressly preempts state law, the courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of [the federal law provision]." *Id.* at 518. See also *Sink v. Aden Enter.*, 352 F.3d 1197, 1200 (9th Cir. 2003) ("The language of a statute must be interpreted in its context to effectuate legislative intent.")

The Supreme Court has confirmed that taking the literal meaning of a provision within a statute out of context may fly in the face of Congress's intent in passing the statute. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the court reversed the Fourth Circuit's dismissal of a retaliation claim brought by a former employee pursuant to Title VII of the Civil Rights Act of 1964. The statute made it unlawful for an employer to discriminate "against any of his employees or applicants for employment" in retaliation for using or assisting others in using the protections of Title VII. The employer alleged -- and the Fourth Circuit agreed -- that only *current* employees could utilize Title VII. *Id.* at 339. The Supreme Court reversed, holding that the retaliation provision within Title VII must be analyzed in the context of the statute as a whole. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Thus, even though the language of the retaliation provision "at first blush" appeared limited to those having an existing employment relationship with the employer, such a reading did not comport with the context of the statute as a whole. *Id.* Accordingly, even though Congress *could* have specifically identified both former and current employees, instead of referring only to "employees," the fact that Congress chose not to do so did not mean that Congress intended the statute to apply to current employees only. *Id.* at 342. In sum, it was only through examination of the statutory scheme as a whole that the provision at issue could be interpreted.

The same principle applies here. The fact that Congress did not expressly specify that the FCRA affiliate-sharing preemption provision is limited to state laws regulating consumer reporting does not compel the conclusion that *all* state laws touching upon information-sharing among affiliates, in any circumstance, are preempted. Rather, basic principles of statutory interpretation require that the language of a statute be considered in the context of the statute as a whole, and that the operation of a given provision of a statute be determined by reference to the scope of the entire statute. *Exxon Mobil Corp. v. EPA*, 217 F.3d at 1249; *Richards v. U.S.*, 369 U.S. 1, 11 (1962).

D. CONGRESS HAS EXPRESSLY PROVIDED THAT MORE PROTECTIVE STATE FINANCIAL PRIVACY LAWS ARE NOT PREEMPTED.

1. The GLBA Savings Clause Preserves States' Rights.

Any doubt about the permissibility of a state law that protects financial privacy by regulating the sharing of personal financial information among affiliates was removed by the passage of the GLBA. Efforts by states to further the protection of consumers' financial privacy are governed by section 507 of the Act, which explicitly permits such undertakings:

> (a) **In general.** This subchapter and the amendments made to this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.
>
> (b) **Greater protection under State law.** For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter, as determined by the Federal Trade Commission, after consultation with the agency or authority with jurisdiction under section 6805(a) of this title of either the person that initiated the complaint or that is the subject of the complaint, on its own motion or upon the petition of any interested party.

15 U.S.C. § 6807.

A statute must be construed to give effect to each of its provisions. *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (it is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Boise Cascade Corp. v. EPA*, 942 F.2d

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION Plaintiffs, vs. BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California. Defendants.	Civil Action No. CIV.S-04-0778 MCE KJM MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT Date: June 14, 2004 Time: 9:00 a.m. Location: Courtroom 3 **Hearing Requested** [15 Minutes Each Side]

Plaintiffs' arguments that SB1 is preempted by the FCRA are without merit. The FCRA was initially passed in 1970 and was effective at the time that Congress drafted and passed the GLBA. The purpose of the FCRA is to regulate "consumer reporting agencies" and the dissemination and distribution of "credit reports" and consumer information used to compile credit reports. 15 U.S.C. § 1681; *Guimond v. Trans Union Credit Union Infor. Co.*, 45 F.3d 1329 (9th Cir. 1995). The preemption provision in the FCRA relied on by plaintiffs is limited to preemption of state FCRA laws that prohibit or restrict the sharing of credit reports among affiliates. SB1 does not regulate the sharing of credit reports by affiliates. SB1 regulates the sharing of information by financial institutions and affiliates and third party nonaffiliates, as expressly authorized by the GLBA.

ARGUMENT

I. STANDARDS FOR OBTAINING SUMMARY JUDGMENT

The factual issues are uncontroverted, thus leaving this case a question of law as evidenced by the Commissioners' Response to Plaintiffs' Statement of Undisputed Facts and the Commissioners' own Statement of Undisputed Facts in Support of Motion for Summary Judgment filed herewith. As such, there are no genuine issues as to any material facts in this action, and as will be fully demonstrated below, the Commissioners are entitled to judgment as a matter of law.

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment should be granted when a party fails to show a genuine issue as to a material fact that the party bears the burden of proof of at trial, and judgment is appropriate against that party as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Summary judgment is appropriate where the case presents a pure question of law, such as here, and where there is no dispute as to the historical facts of the case. *Edwards v. Aguillard,* 482 U.S. 578 (1987). In *Edwards,* the Supreme Court affirmed the grant of summary judgment brought to challenge the constitutionality of the Louisiana Creation Act, even though the defendants argued

on by plaintiffs, which was scheduled to sunset on January 1, 2004. However, the 2003 amendments made no changes to the language of the preemption provision as set forth in 15 U.S.C. § 1681t(b)(2) and, accordingly, did not expand its scope beyond the scope of the FCRA itself as set forth above.

IV. PLAINTIFFS' ASSERTION OF JURISDICTION UNDER 42 U.S.C. § 1983 IS NOT WARRANTED

Plaintiffs' allegation that the Commissioners violated their constitutional rights and therefore have a cause of action under 42 U.S.C. section 1983 also fails. To prevail in a 42 U.S.C. section 1983 action, the plaintiff must plead and prove that a proper defendant: (1) acted under color of state law, and (2) deprived plaintiffs of rights secured by the Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). As a matter of law, there is no violation of plaintiffs' constitutional rights. Moreover, section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Therefore, plaintiffs' assertion of jurisdiction pursuant to 42 U.S.C. section 1983 is without merit as plaintiffs cannot maintain a cause of action under 42 U.S.C. section 1983. Accordingly, summary judgment in favor of the Commissioners on this issue is appropriate.

V. ANY INJUNCTIVE RELIEF GRANTED SHOULD BE SPECIFIC AS TO ITS COVERAGE.

Without conceding the foregoing arguments, if this Court were to find preemption of SB1 appropriate, the Commissioners respectfully request that the declaratory relief, order, judgment and/or injunction issued by this Court be entered and effective as to all "financial institutions" as that term is defined in Fin. Code § 4052(c)[5] and who are subject to the FCRA, including but not limited to, the members of the named parties to this action. The Commissioners make this request in the

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[5] Fin. Code section 4052(c) defines a financial institution as "any institution the business of which is engaging in financial activities as described in Section 1843(k) of Title 12 of the United States Code and doing business in this state." Title 12 U.S.C. Section 1843(k), in turn, describes those activities that are financial in nature to include "lending, exchanging, transferring, investing for others, or safeguarding money or securities, insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing in any State."

interests of judicial economy and in an effort to avoid duplicative litigation by multiple parties who are similarly situated to the named plaintiffs in this action.

While the Court's order or judgment is generally limited and binding only upon the named parties to the litigation, a more expansive order or judgment is not without precedential authority. In *American Bankers Association v. Lockyer,* 239 F.Supp.2d 1000 (E.D. Cal. 2002), the trial court considered this very issue. At issue in that case was the validity of a state statute that required certain language and information to be placed on billing statements provided by credit card issuers and the preemption of that statue by the Home Owners' Loan Act, the National Bank Act and the Federal Credit Union Act. *Id.* at 1020. Arguments by the defendants to the contrary, the Court found that because the statute at issue was preempted and thus inapplicable to all federally chartered credit card issuers, the Court's ruling, by its very nature, affected the rights of parties beyond the named plaintiffs in the action. *Id.* at 1021. The Court went on to state:

> "The practical result of an injunction limited to plaintiffs would be to require federal lenders not a party to this action to bring individual actions for injunctive relief. This would not only result in a waste of judicial resources, but is unnecessary in light of the cases permitting general injunctions in the preemption context."

Id. at 1022.

Moreover, the Ninth Circuit Court of Appeals has similarly found that such an order or injunction "is not necessarily made over-broad by extending the benefit or protection to persons other than prevailing parties in the lawsuit." *Bresgal v. Brock,* 843 F.2d 1163, 1170 (9th Cir. 1987); *see also Bank of America v. City and County of San Francisco,* 309 F.3d 551,556 (9th Cir. 2002), *cert. denied,* 123 S.Ct. 2220 (2003) (affirming the issuance of a permanent injunction prohibiting the defendant cities from enforcing the ordinances at issue without reference to the parties to whom the injunction applied).

Further, the Commissioners respectfully request this Court craft an order which is specific as to those Sections and Subsections of the Financial Code, if any, that are preempted. The [Proposed] Final Judgment and Permanent Injunction submitted by plaintiffs at paragraph 1 provides for a

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

BILL LOCKYER in his official capacity as the Attorney General of the State of California, **HOWARD GOULD**, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, **WILLIAM P. WOOD**, in his official capacity as Commissioner of the Department of Corporations of the State of California and **JOHN GARAMENDI**, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Case: CIV. S-04-0778 MCE KJM

DEFENDANTS BILL LOCKYER'S AND JOHN GARAMENDI'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filed concurrently with:
(1) Defendants' Memorandum of Points and Authorities
(2) Appendix of Legislative and Other Authorities

Date of Submission: June 14, 2004
Courtroom: 3
Judge: Honorable Morrison E. England, Jr.

Defendants Bill Lockyer, in his official capacity as Attorney General of the State of California, and John Garamendi, in his official capacity as Commissioner of the Department of Insurance of the State of California, submit the following response in opposition to the Statement of Undisputed Facts submitted by plaintiffs American Bankers Association, the Financial Services Roundtable and Consumer Bankers Association (collectively "Plaintiffs") in support of their Motion for Summary Judgment:

Fact No. 1	**Response to Fact No. 1**
Plaintiffs are three associations of financial institutions that represent the interests of their members in this litigation. Compl. ¶¶ 6, 7, 8.	Undisputed.
Fact No. 2	**Response to Fact No. 2**
Plaintiffs' members include financial services companies that do business in California in conjunction with affiliates in different lines of business, and, in doing so, share California customer information with those affiliates. Compl.¶¶ 6, 7, 8, 24. Alnes Decl. ¶¶2, 3.	Undisputed.
Fact No. 3	**Response to Fact No. 3**
Plaintiffs' members described in paragraph 2 and their affiliates would be harmed if (1) they were required to develop and send the separate notice to their California customers regarding their affiliate-sharing practices required by the California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2 § 4050 *et seq.*, and (2)	Disputed but non-material with respect to the lone issue raised by Plaintiffs' Motion: whether the Fair Credit Reporting Act expressly preempts SB1. However, Defendants do not dispute that, if the Court does find that SB1 is expressly preempted by

if such customers opted out of such sharing and denied these Plaintiffs' members the right to share information with their affiliates for marketing purposes. Alnes Decl. ¶¶ 3, 4.	15 U.S.C. § 1681t(d)(2), Defendants have met their burden of establishing injury, but only for purposes of determining whether a permanent injunction is appropriate and limited only to Plaintiffs' Motion for Summary Judgment.
Fact No. 4 Defendants are state officials charged with enforcement of the California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2, § 4050 *et seq.*, Compl. ¶¶ 9, 10, 11, 12.	**Response to Fact No. 4** Undisputed.

May 28, 2004

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMERS BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

NO. CIV. S 04-0778 MCE KJM

MEMORANDUM AND ORDER

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Plaintiffs American Bankers Association, The Financial Services Roundtable, and Consumers Bankers Association

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("Plaintiffs") have sued various California state officials (Attorney General Bill Lockyer, Department of Insurance Commissioner John Garamendi, Commissioner of the Department of Corporations William P. Wood, and Commissioner of the Department of Financial Institutions Howard Gould) in an attempt to prevent certain provisions of California law dealing with the dissemination of personal financial information from taking effect. Defendants Lockyer and Garamendi now move to dismiss Plaintiff's complaint for failing to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs have concurrently moved for summary judgment, arguing that the California law in question is expressly preempted by federal statute. Defendants Gould and Wood, in response, have filed a cross-motion for summary judgment on essentially the same grounds as the aforementioned Motion to Dismiss filed on behalf of Defendants Lockyer and Garamendi. Because all parties agree that this matter hinges on a legal question of preemption with no disputed factual contentions,[2] the Court elects to treat Lockyer and Garamendi's request for

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[1]Unless otherwise noted, all references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

[2]As pointed out in Plaintiffs' Opposition to Defendant Wood and Gould's Cross-Motion for Summary Judgment (p. 1, n. 1), Plaintiffs do not dispute the undisputed facts proffered by Wood and Gould in support of said motion, and Wood and Gould, in turn, do not dispute Plaintiffs' factual assertions, agreeing that the facts here are uncontroverted, "thus leaving this case a question of law." (Wood and Gould's Opposition to Plaintiff's Motion for Summary Judgment, 5:12-15). In addition, Defendants Lockyer and Garamendi concede that the same disputed legal issues are dispositive of both Plaintiffs' Motion for Summary Judgment and their Motion to Dismiss. (See Defendants' Reply memorandum, p. 1).

dismissal as a Motion for Summary Judgment under Rule 56, and will resolve the matter by way of cross motions for summary judgment. For the reasons set forth below, the Court determines that Plaintiffs' lawsuit is legally untenable and accordingly grants summary judgment in favor of the Defendants.

BACKGROUND

In 2003, California enacted the California Financial Information Privacy Act, which becomes operative on July 1, 2004 as California Financial Code sections 4050-4059. Known popularly as "SB1" after the Senate Bill which introduced the legislation, SB1 imposes certain restrictions on the dissemination of personal financial information both between affiliated business institutions and as to non-affiliated third parties.

In requiring that consumers be given control over the transmittal of such financial information, either through "opt-out" provisions in the case of affiliated institutions or express consent for disclosure to non-affiliates, SBI affords greater privacy protection than federal legislation. Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 ("GLBA"), expresses congressional will that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customer's nonpublic personal information." 15 U.S.C. § 6801(a). The GLBA requires every financial institution to provide, at least annually, a clear and conspicuous disclosure of its policies and practices regarding the disclosure of customers'

personal information to both affiliates and to non-affiliated third parties. 15 U.S.C. § 6803(a)(1). With respect to non-affiliate disclosure, the GLBA requires that consumers be afforded the opportunity to direct that their personal information not be disclosed.

Because § 6807(b) of the GLBA expressly allows states to enact consumer protection statutes providing greater privacy protection, California contends that its passage of SB1 was proper. GLBA's savings clause in that regard provides as follows:

> (b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter....

Plaintiffs' complaint, on the other hand, seeks to invalidate SB1 by arguing that its provisions are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), and that consequently SB1 violates the Supremacy Clause of the United States Constitution. Although the stated purpose of the FCRA is to protect consumers from unfair or inaccurate credit reporting, rather than information sharing more generally, Plaintiffs seize on a preemption provision within the statute that they argue prohibits state regulation of any information sharing between affiliates:

> "No requirement or prohibition may be imposed under the laws of any State-
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> ....
>
> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with

> respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996).....

15 U.S.C. § 1681t(b)(2).

Plaintiffs further seek injunctive relief to prevent SB1 from becoming operative on July 1, 2004.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Summary judgment is appropriate where, as here, a case hinges solely on questions of law. *See* Edwards v. Aguillard, 482 U.S. 578, 595-96 (1987).

ANALYSIS

In arguing that SB1 is expressly preempted by federal law, Plaintiffs have to show either that Congress has explicitly defined the extent to which its enactments displace state law (English v. Gen. Elect. Co., 496 U.S. 72, 78-79 (1990)), or alternatively that in the absence of such explicit language it

can nonetheless be inferred that preemption should occur because federal regulation on the subject is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (citation omitted.). Bank of America v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002). In determining whether federal law preempts state law, this Court's task is to "ascertain the intent of Congress. Id. at 557-58. Indeed, congressional purpose is the "ultimate touchstone" of preemption analysis. Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 668 (9th Cir. 2003), citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

In addition, because the provisions of SB1 relate to consumer protection vis-a-vis personal financial information (so as to prevent unfair business practices), the subject matter of the legislation extends to the state's historic police powers. See Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989). This triggers a heightened presumption against preemption. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (In analyzing whether or not federal law expressly preempts state law, courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations," thereby requiring a "narrow reading" of the federal law provision); Cal. v. ARC Am. Corp. 490 U.S. at 101 ("appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States..."); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an

intention to preempt is required in this area.").

With these guidelines in mind we now turn to the federal statutory scheme claimed by Plaintiffs to preempt SB1. The stated purpose and scope of the Fair Credit Reporting Act, as set forth in the first section entitled "Congressional findings and statement of purpose," is to regulate consumer reporting agencies and ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681. To that end, the FCRA monitors the compilation, dissemination and use of "consumer reports," a term defined as including any communication by a consumer reporting agency of information bearing on specified characteristics used or expected to be used or collected in whole or part as a factor in determining a consumer's eligiblility for credit, insurance, employment, or other specifically enumerated permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA defines a consumer reporting agency as "any person which... regularly engages in... the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties..." 15 U.S.C. § 1681a(f).

Information not constituting a "consumer report" is not governed by the FCRA. *See, e.g.*, Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n, 145 F.Supp.2d 6, 17 (D.D.C. 2001)("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.'"), *aff'd*, Trans Union LLC v. Fed. Trade Comm'n, 295 F.3d 42 (D.C. Cir. 2002). As noted by the Seventh Circuit in Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988),

> "not all reports containing information on a consumer are "consumer reports." To constitute a "consumer report," the information contained in the report must have been "used or expected to be used or collected in whole or in part" for one of the purposes set out in the FCRA."

864 F.2d at 449.

The Ippolito court goes on to unequivocally conclude, on the basis of pertinent legislative history, that the FCRA does not apply to reports collected for "business, commercial or professional purposes" that do not fall within the purview of the FCRA as a "consumer report." Id. at 452.

In addition, the provisions of the FCRA itself make this distinction. The definition of a "consumer report" subject to the FCRA was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681(d)(2)(A)(ii). By excluding such information from the definition of a "consumer report," Congress made it clear that such information was not subject to the FCRA's requirements, which are not intended to regulate the simple sharing of information between affiliates.

The FCRA preemption provision upon which Plaintiffs premise their argument in this case must necessarily be viewed in the context of the statutory framework as a whole, especially since, as discussed above, in a preemption case like this one the preempting statute must be read both narrowly and with a

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presumption against finding preemption."[3] While Section 1681t(b)(2) does indicate on its face that "no requirement or prohibition may be imposed under the laws of any State... with respect to the exchange of information among persons affiliated by common ownership or common corporate control," it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), quoting Davis v. Mich. Dept of Treasury, 489 U.S. 803, 809 (1989); Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1249 ("in interpreting the intent of Congress it is essential to consider the statute as a whole.").

To interpret the FCRA preemption provision as preventing any state regulation of information sharing between affiliates, as argued by Plaintiffs, ignores the fact that the FCRA expressly removed such information from the purview of the FCRA in Section

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[3]Although Plaintiffs urge the Court to focus solely on the "plain language" of the FCRA preemption statute, in isolation, the Supreme Court has recognized in a case involving statutory interpretation that "the meaning of words depends on their context." Shell Oil Co., v. Iowa Department of Revenue, 488 U.S. 19, 25 (1988). Shell Oil goes on to quote Judge Learned Hand's apt remark in this regard: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used...'" Id. at 25, fn. 6 (citations omitted). Moreover, and even more specifically for purposes of the present case, in Medtronic v. Lohr, 518 U.S. 470, 485, the Supreme Court reiterated that while the analysis of the scope of [a] preemption statute begins with its text, the court's interpretation "does not occur in a textual vacuum." Also relevant is "the structure and purpose of the statute as a whole," as revealed by congressional purpose. Id. at 486. *See also* Dept. of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 343-44 (1994).

1681a(d)(2)(A)(ii).[4] It makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so. Instead, the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of consumer reports among affiliates.[5] This comports with the stated purpose of the FCRA as regulating consumer reporting agencies to ensure the accuracy and fairness of credit reports. 15 U.S.C. § 1681. Contrary to the position espoused by Plaintiffs, the FCRA preemption provision does not broadly preempt all state laws regulating information sharing by affiliates, whatever the purpose or context.

Examination of Title V of the Gramm-Leach-Bliley Act of 1999, which sets forth basic privacy protections that must be provided to consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case. The GBLA applies to information sharing by both affiliate organizations and non-affiliated third

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[4]In addition, the fact that the FCRA preemption statute specifically excludes a pre-existing Vermont credit reporting statute supports the proposition that the FRCA statute was not intended to preempt information sharing in non-credit reporting situations, since otherwise there would have been no need to reference the Vermont statute.

[5]Plaintiffs argue that because other preemption provisions of the FCRA, unlike Section 1681t(b)(2), do specifically reference consumer reports (see, for example, Section 1681t(b)(1)), Section 1681t(b)(2) must necessarily be read more broadly. That argument fails, however, simply because the FCRA does not regulate affiliate information sharing.

parties. With regard to affiliates, the GLBA requires that financial institutions disclose their policies and practices regarding the disclosure of customers' personal information. 15 U.S.C. § 6801(a)(1).[6] While the same requirement also applies to non-affiliates, at Section 6801(b) the GLBA further requires that financial institutions give consumers the ability to direct that information not be provided to non-affiliates at all.

Significantly, the GLBA also contains a savings clause preserving the ability of states to afford more protection against dissemination of financial information than that specifically mandated by the GLBA itself. 15 U.S.C. § 6807 provides that a "state statute... is not inconsistent with the provisions of this subchapter if the protection such statute... affords is greater than the protection provided under this subchapter."

While the language of Section 6807 is clear in permitting states to enact stricter financial privacy laws like SB1, examination of the legislative history further confirms Congress' intent to allow more rigorous state regulation. The Conference Report for GLBA, which provides reliable evidence of congressional intent because it "represents the final statement of the terms agreed to by both houses" (Northwest Forest Res.

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[6]While the Northern District's decision in Bank of America v. City of Daly City, 279 F.Supp.2d 1118 (N.D. Cal. 2003) has been vacated by the Ninth Circuit and consequently lacks precedential authority (Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991), its reasoning is faulty in any event. In finding the GLBA inapplicable, Daly City incorrectly determined that the GLBA does not regulate affiliate information sharing. This Court finds that the GLBA, unlike the FCRA, does in fact encompass general sharing of consumer information between affiliates.

Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996), confirms that "[o]n privacy, States can continue to enact legislation of a higher standard that the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4. 1999). Senator Sarbanes, who authored the state law savings clause that ultimately became Section 6807, explained as follows:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate.

145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999)(statement of Sen. Sarbanes).[7]

Consequently it is clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA.[8] This permits state law like SB1, and weighs heavily against the preemption argument

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[7]As summarized in the Points and Authorities in Support of Defendants Lockyer's and Garamendi's Motion to Dismiss (at 19:6-18), members of the House of Representatives interpreted the GLBA state-law savings clause in the same way. Representative LaFalce, the Ranking Member of the House Banking & Financial Services Committee, for example, stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. I, 1999)(statement of Rep. La Falce).

[8]While Plaintiffs contend that the savings clause of Section 6807 is limited only to Title V of the GLBA (given the statutory reference to "this subchapter"), that argument is of no real moment since the FCRA preemption clause is inapplicable to the subject matter presently before the Court in any event. Hence the cases cited by Plaintiffs for the proposition that a savings clause expressly limited to one act does not apply to other statutes (*see, e.g.*, United States v. Locke, 529 U.S. 89, 106 (2000)) are inapplicable. In addition, as indicated above, the legislative intent in permitting states to enact more protective privacy regulations appears clear.

advanced by Plaintiffs. *See* Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1254.

Plaintiffs attempt to portray the GLBA as inapplicable because of a preemption clause recognizing the FCRA. That argument fails. Although Title V of the GLBA does recogize that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act," (15 U.S.C. § 6806), as demonstrated above the FCRA does not apply to general sharing of information by financial institutions with either affiliates or third party nonaffiliates.[9] Consequently Section 6806 was intended only to preserve the FCRA's specific consumer protections with respect to consumer reporting, and does not operate to limit the GLBA's explicit preservation, at Section 6807, of states' rights to enact more stringent financial privacy laws.

CONCLUSION

The Court finds that the provisions of SB1 are not preempted by the FCRA, whose overriding purpose is to regulate the use and dissemination of consumer reports. Instead, limitations on the sharing of personal financial information between financial institutions in non-credit reporting situations are specifically

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[9]Similarly, Plaintiffs' reliance on the Fair and Accurate Credit Transactions ("FACT") Act, which amended certain provisions of the FCRA in 2003, is also misplaced. While the FACT Act does impose restrictions on consumer solicitations for marketing purposes (at 15 U.S.C. § 1681s-3), it does not purport to regulate, like the GLBA, affiliate information sharing in general and does not evince any congressional intent to do so.

contemplated by the provisions of the GLBA, which allows states to enact more stringent privacy regulations in that regard, therefore permitting state laws like SB1. Plaintiffs' claim that SB1 must be invalidated consequently fails. Because Plaintiffs' entire lawsuit is premised on that contention, summary judgment on behalf of the Defendants is hereby granted.

IT IS SO ORDERED.

DATED: JUN 30 2004

MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

AMERICAN BANKERS
ASSOCIATION, et al.

v. CASE NUMBER: CIV S-04-778 MCE KJM

BILLY LOCKYER, et al.

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JUNE 30, 2004.

Jack L. Wagner,
Clerk of the Court

ENTERED: June 30, 2004

by: _____
N. Cannarozzi, Deputy Clerk

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

versus

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Civil Action No. S-04-0778 MCE KJM

PLAINTIFFS' NOTICE OF APPEAL

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that American Bankers Association, The Financial Services Roundtable, and Consumer Bankers Association, Plaintiffs in the above named case,

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hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment of this Court entered on June 30, 2004, pursuant to the Court's memorandum and order of June 30, 2004.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

July 1, 2004

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMERS BANKERS ASSOCIATION,

Plaintiffs,

v.

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

NO. CIV. S 04-0778 MCE KJM

AMENDED MEMORANDUM AND ORDER

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Plaintiffs American Bankers Association, The Financial Services Roundtable, and Consumers Bankers Association

("Plaintiffs") have sued various California state officials (Attorney General Bill Lockyer, Department of Insurance Commissioner John Garamendi, Commissioner of the Department of Corporations William P. Wood, and Commissioner of the Department of Financial Institutions Howard Gould) in an attempt to prevent certain provisions of California law dealing with the dissemination of personal financial information from taking effect. Defendants Lockyer and Garamendi now move to dismiss Plaintiff's complaint for failing to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs have concurrently moved for summary judgment, arguing that the California law in question is expressly preempted by federal statute. Defendants Gould and Wood, in response, have filed a cross-motion for summary judgment on essentially the same grounds as the aforementioned Motion to Dismiss filed on behalf of Defendants Lockyer and Garamendi. Because all parties agree that this matter hinges on a legal question of preemption with no disputed factual contentions,[2] the Court elects to treat Lockyer and Garamendi's request for

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[1]Unless otherwise noted, all references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

[2]As pointed out in Plaintiffs' Opposition to Defendant Wood and Gould's Cross-Motion for Summary Judgment (p. 1, n. 1), Plaintiffs do not dispute the undisputed facts proffered by Wood and Gould in support of said motion, and Wood and Gould, in turn, do not dispute Plaintiffs' factual assertions, agreeing that the facts here are uncontroverted, "thus leaving this case a question of law." (Wood and Gould's Opposition to Plaintiff's Motion for Summary Judgment, 5:12-15). In addition, Defendants Lockyer and Garamendi concede that the same disputed legal issues are dispositive of both Plaintiffs' Motion for Summary Judgment and their Motion to Dismiss. (See Defendants' Reply memorandum, p. 1).

dismissal as a Motion for Summary Judgment under Rule 56, and will resolve the matter by way of cross motions for summary judgment. For the reasons set forth below, the Court determines that Plaintiffs' lawsuit is legally untenable and accordingly grants summary judgment in favor of the Defendants.[3]

BACKGROUND

In 2003, California enacted the California Financial Information Privacy Act, which becomes operative on July 1, 2004 as California Financial Code sections 4050-4059. Known popularly as "SB1" after the Senate Bill which introduced the legislation, SB1 imposes certain restrictions on the dissemination of personal financial information both between affiliated business institutions and as to non-affiliated third parties.

In requiring that consumers be given control over the transmittal of such financial information, either through "opt-out" provisions in the case of affiliated institutions or express consent for disclosure to non-affiliates, SBI affords greater privacy protection than federal legislation. Title V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801-6809 ("GLBA"), expresses congressional will that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality

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[3]This Amended Memorandum and Order supersedes the Memorandum and Order filed June 30, 2004 in this matter. The minor modifications contained in this amended version do not change the substance of the Court's original order (for purposes of emphasis and clarification, footnotes 4 and 5 have been added to the amended order, and footnote 12 has been modified accordingly).

of those customers' nonpublic personal information." 15 U.S.C. § 6801(a). The GLBA requires every financial institution to provide, at least annually, a clear and conspicuous disclosure of its policies and practices regarding the disclosure of customers' personal information to both affiliates and to non-affiliated third parties. 15 U.S.C. § 6803(a)(1). With respect to non-affiliate disclosure, the GLBA requires that consumers be afforded the opportunity to direct that their personal information not be disclosed.

Because § 6807(b) of the GLBA expressly allows states to enact consumer protection statutes providing greater privacy protection, California contends that its passage of SB1 was proper. GLBA's savings clause in that regard provides as follows:

> (b) Greater protection under State law. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter....

Plaintiffs' complaint, on the other hand, seeks to invalidate SB1 by arguing that its provisions are expressly preempted by the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x ("FCRA"), and that consequently SB1 violates the Supremacy Clause of the United States Constitution. Although the stated purpose of the FCRA is to protect consumers from unfair or inaccurate credit reporting, rather than information sharing more generally, Plaintiffs seize on a preemption provision within the statute that they argue prohibits state regulation of any information sharing between affiliates:

> "No requirement or prohibition may be imposed under the laws of any State-
>
> ....
>
> (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996).....

15 U.S.C. § 1681t(b)(2).

Plaintiffs further seek injunctive relief to prevent SB1 from becoming operative on July 1, 2004.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Summary judgment is appropriate where, as here, a case hinges solely on questions of law. *See* Edwards v. Aguillard, 482 U.S. 578, 595-96 (1987).

ANALYSIS

In arguing that SB1 is expressly preempted by federal law,

Plaintiffs have to show either that Congress has explicitly defined the extent to which its enactments displace state law (English v. Gen. Elect. Co., 496 U.S. 72, 78-79 (1990)), or alternatively that in the absence of such explicit language it can nonetheless be inferred that preemption should occur because federal regulation on the subject is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (citation omitted.). Bank of America v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002). In determining whether federal law preempts state law, this Court's task is to "ascertain the intent of Congress." Id. at 557-58. Indeed, congressional purpose is the "ultimate touchstone" of preemption analysis. Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 668 (9th Cir. 2003), citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

In addition, because the provisions of SB1 relate to consumer protection vis-a-vis personal financial information (so as to prevent unfair business practices), the subject matter of the legislation extends to the state's historic police powers. *See* Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989). This triggers a heightened presumption against preemption. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (In analyzing whether or not federal law expressly preempts state law, courts "must construe [the federal law] provisions in light of the presumption against the pre-emption of state police power regulations," thereby requiring a "narrow reading" of the federal law provision); Cal. v. ARC Am. Corp. 490 U.S. at 101 ("appellees must overcome the presumption against finding pre-

emption of state law in areas traditionally regulated by the States..."); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

With these guidelines in mind we now turn to the federal statutory scheme claimed by Plaintiffs to preempt SB1. The stated purpose and scope of the Fair Credit Reporting Act, as set forth in the first section entitled "Congressional findings and statement of purpose," is to regulate consumer reporting agencies and ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681.[4] To that end, the FCRA monitors the compilation, dissemination and use of "consumer reports," a term defined as including any communication by a consumer reporting agency of information bearing on specified characteristics used or expected

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[4]The following specific findings were made in Section 1681 with respect to the FCRA:

> "(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> (4) <u>There 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</u>. (emphasis added)

to be used or collected in whole or part as a factor in determining a consumer's eligibility for credit, insurance, employment, or other specifically enumerated permissible purposes. 15 U.S.C. § 1681a(d)(1). The FCRA defines a consumer reporting agency as "any person which... regularly engages in... the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties..." 15 U.S.C. § 1681a(f).

Information not constituting a "consumer report" is not governed by the FCRA. *See, e.g.*, Individual Reference Serv. Group, Inc. v. Fed. Trade Comm'n, 145 F.Supp.2d 6, 17 (D.D.C. 2001)("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.'"), *aff'd*, Trans Union LLC v. Fed. Trade Comm'n, 295 F.3d 42 (D.C. Cir. 2002). As noted by the Seventh Circuit in Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988),

> "not all report containing information on a consumer are "consumer reports." To constitute a "consumer report," the information contained in the report must have been "used or expected to be used or collected in whole or in part" for one of the purposes set out in the FCRA."

864 F.2d at 449.

The Ippolito court goes on to unequivocally conclude, on the basis of pertinent legislative history, that the FCRA does not apply to reports collected for "business, commercial or professional purposes" that do not fall within the purview of the FCRA as a "consumer report." Id. at 452.

In addition, the provisions of the FCRA itself make this distinction. The definition of a "consumer report" subject to

the FCRA was amended in 1996 to exclude communication among affiliates of any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681(d)(2)(A)(ii). By excluding such information from the definition of a "consumer report," Congress made it clear that such information was not subject to the FCRA's requirements, which are not intended to regulate the simple sharing of information between affiliates for commercial purposes.[5]

The FCRA preemption provision upon which Plaintiffs premise their argument in this case must necessarily be viewed in the context of the statutory framework as a whole, especially since, as discussed above, in a preemption case like this one, the preempting statute must be read both narrowly and with a

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[5]As discussed above, the stated purpose of the FCRA is to promote fair and accurate credit reporting. *See* 15 U.S.C. § 1681(a). Unfair and/or inaccurate credit reporting may have an immediate and detrimental report on a consumer's ability to obtain and/or extend credit, to obtain more favorable credit terms, or to obtain employment. The Court has been unable to locate any reference in the FCRA, or in the subsequently enacted Fair and Accurate Credit Transactions ("FACT") Act (which amended certain provisions of the FCRA in 2003), to support Plaintiffs' theory that either or both of those pieces of legislation had the purpose of promoting Plaintiffs' commercial revenue through general sharing of personal information.

presumption against finding preemption.[6] While Section 1681t(b)(2) does indicate on its face that "no requirement or prohibition may be imposed under the laws of any State... with respect to the exchange of information among persons affiliated by common ownership or common corporate control," it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), quoting Davis v. Mich. Dept of Treasury, 489 U.S. 803, 809 (1989); Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1249 ("in interpreting the intent of Congress it is essential to consider the statute as a whole.").

To interpret the FCRA preemption provision as preventing any state regulation of information sharing between affiliates, as argued by Plaintiffs, ignores the fact that the FCRA expressly removed such information from the purview of the FCRA in Section

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[6]Although Plaintiffs urge the Court to focus solely on the "plain language" of the FCRA preemption statute, in isolation, the Supreme Court has recognized in a case involving statutory interpretation that "the meaning of words depends on their context." Shell Oil Co., v. Iowa Department of Revenue, 488 U.S. 19, 25 (1988). Shell Oil goes on to quote Judge Learned Hand's apt remark in this regard: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other but all in their aggregate take their purport from the setting in which they are used...'" Id. at 25, fn. 6 (citations omitted). Moreover, and even more specifically for purposes of the present case, in Medtronic v. Lohr, 518 U.S. 470, 485, the Supreme Court reiterated that while the analysis of the scope of [a] preemption statute begins with its text, the court's interpretation "does not occur in a textual vacuum." Also relevant is "the structure and purpose of the statute as a whole," as revealed by congressional purpose. Id. at 486. *See also* Dept. of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 343-44 (1994).

1681a(d)(2)(A)(ii).[7] It makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so. Instead, the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of consumer reports among affiliates.[8] This comports with the stated purpose of the FCRA as regulating consumer reporting agencies to ensure the accuracy and fairness of credit reports. 15 U.S.C. § 1681. Contrary to the position espoused by Plaintiffs, the FCRA preemption provision does not broadly preempt all state laws regulating information sharing by affiliates, whatever the purpose or context.

Examination of Title V of the Gramm-Leach-Bliley Act of 1999, which sets forth basic privacy protections that must be provided to consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case. The GBLA applies to information sharing by both affiliate organizations and non-affiliated third

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[7]In addition, the fact that the FCRA preemption statute specifically excludes a pre-existing Vermont credit reporting statute supports the proposition that the FRCA statute was not intended to preempt information sharing in non-credit reporting situations, since otherwise there would have been no need to reference the Vermont statute.

[8]Plaintiffs argue that because other preemption provisions of the FCRA, unlike Section 1681t(b)(2), do specifically reference consumer reports (see, for example, Section 1681t(b)(1)), Section 1681t(b)(2) must necessarily be read more broadly. That argument fails, however, simply because the FCRA does not regulate affiliate information sharing.

parties. With regard to affiliates, the GLBA requires that financial institutions disclose their policies and practices regarding the disclosure of customers' personal information. 15 U.S.C. § 6801(a)(1).[9] While the same requirement also applies to non-affiliates, at Section 6801(b) the GLBA further requires that financial institutions give consumers the ability to direct that information not be provided to non-affiliates at all.

Significantly, the GLBA also contains a savings clause preserving the ability of states to afford more protection against dissemination of financial information than that specifically mandated by the GLBA itself. 15 U.S.C. § 6807 provides that a "state statute... is not inconsistent with the provisions of this subchapter if the protection such statute... affords is greater than the protection provided under this subchapter."

While the language of Section 6807 is clear in permitting states to enact stricter financial privacy laws like SB1, examination of the legislative history further confirms Congress' intent to allow more rigorous state regulation. The Conference Report for the GLBA, which provides reliable evidence of congressional intent because it "represents the final statement of the terms agreed to by both houses" (Northwest Forest Res.

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[9]While the Northern District's decision in Bank of America v. City of Daly City, 279 F.Supp.2d 1118 (N.D. Cal. 2003) has been vacated by the Ninth Circuit and consequently lacks precedential authority (Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991), its reasoning is faulty in any event. In finding the GLBA inapplicable, Daly City incorrectly determined that the GLBA does not regulate affiliate information sharing. This Court finds that the GLBA, unlike the FCRA, does in fact encompass general sharing of consumer information between affiliates.

Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996)), confirms that "[o]n privacy, States can continue to enact legislation of a higher standard than the Federal standard." 145 Cong. Rec. S13913, at S13915 (Nov. 4. 1999). Senator Sarbanes, who authored the state law savings clause that ultimately became Section 6807, explained as follows:

> [W]e were able to include in the conference report an amendment that I proposed which ensures that the Federal Government will not preempt stronger State financial privacy laws that exist now or may be enacted in the future. As a result, States will be free to enact stronger privacy safeguards if they deem it appropriate.

145 Cong. Rec. 213788, at S13789 (Nov. 3, 1999)(statement of Sen. Sarbanes).[10]

Consequently it is clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA.[11] This permits state law like SB1, and weighs heavily against the preemption argument

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[10]As summarized in the Points and Authorities in Support of Defendants Lockyer's and Garamendi's Motion to Dismiss (at 19:6-18), members of the House of Representatives interpreted the GLBA state-law savings clause in the same way. Representative LaFalce, the Ranking Member of the House Banking & Financial Services Committee, for example, stated that "the conference report totally safeguards stronger state consumer protection laws in the privacy area." 145 Cong. Rec. E2308, at E2310 (Nov. 8, 1999)(statement of Rep. La Falce).

[11]While Plaintiffs contend that the savings clause of Section 6807 is limited only to Title V of the GLBA (given the statutory reference to "this subchapter"), that argument is of no real moment since the FCRA preemption clause is inapplicable to the subject matter presently before the Court in any event. Hence the cases cited by Plaintiffs for the proposition that a savings clause expressly limited to one act does not apply to other statutes (*see, e.g.*, United States v. Locke, 529 U.S. 89, 106 (2000)) are inapplicable. In addition, as indicated above, the legislative intent in permitting states to enact more protective privacy regulations appears clear.

advanced by Plaintiffs. *See* Exxon Mobil Corp. v. U.S. EPA, 217 F.3d at 1254.

Plaintiffs attempt to portray the GLBA as inapplicable because of a preemption clause recognizing the FCRA. That argument fails. Although Title V of the GLBA does recognize that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act," (15 U.S.C. § 6806), as demonstrated above the FCRA does not apply to general sharing of information by financial institutions with either affiliates[12] or third party nonaffiliates. Consequently Section 6806 was intended only to preserve the FCRA's specific consumer protections with respect to consumer reporting, and does not operate to limit the GLBA's explicit preservation, at Section 6807, of states' rights to enact more stringent financial privacy laws.

CONCLUSION

The Court finds that the provisions of SB1 are not preempted by the FCRA, whose overriding purpose is to regulate the use and dissemination of consumer reports. Instead, limitations on the sharing of personal financial information between financial institutions in non-credit reporting situations are specifically contemplated by the provisions of the GLBA, which allows states

[12]Similarly, Plaintiffs' reliance on the FACT Act in this regard is also misplaced. While the FACT Act does impose restrictions on consumer solicitations for marketing purposes (at 15 U.S.C. § 1681s-3), it does not purport to regulate, like the GLBA, affiliate information sharing in general and does not evince any congressional intent to do so.

to enact more stringent privacy regulations in that regard, therefore permitting state laws like SB1. Plaintiffs' claim that SB1 must be invalidated consequently fails. Because Plaintiffs' entire lawsuit is premised on that contention, summary judgment on behalf of the Defendants is hereby granted.

IT IS SO ORDERED.

DATED: JULY 8, 2004

MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AMENDED JUDGMENT IN A CIVIL CASE

AMERICAN BANKERS ASSOCIATION, et. al.,

Plaintiffs,

v. CASE NUMBER: CIV S-04-0778 MCE KJM

BILL LOCKER, et .al.,

Defendants.

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 9, 2004.

Jack L. Wagner,
Clerk of the Court

ENTERED: July 9, 2004

by: M. Krueger
M. Krueger, Deputy Clerk

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, and CONSUMER BANKERS ASSOCIATION,

Plaintiffs,

versus

BILL LOCKYER, in his official capacity as Attorney General of California, HOWARD GOULD, in his official capacity as Commissioner of the Department of Financial Institutions of the State of California, WILLIAM P. WOOD, in his official capacity as Commissioner of the Department of Corporations of the State of California, and JOHN GARAMENDI, in his official capacity as Commissioner of the Department of Insurance of the State of California,

Defendants.

Civil Action No. S-04-0778 MCE KJM

Ninth Circuit Docket No. 04-16334

PLAINTIFFS' AMENDED NOTICE OF APPEAL

PLAINTIFFS' AMENDED NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 4, notice is hereby given that American Bankers Association, The Financial Services Roundtable, and Consumer Bankers Association, Plaintiffs

in the above named case, hereby amend their appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment of this Court entered on June 30, 2004, pursuant to this Court's memorandum and order of June 30, 2004, to include this Court's sua sponte entry of a final Amended Judgment on July 9, 2004, and this Court's sua sponte amended memorandum and order also entered on July 9, 2004.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

July 13, 2004

TERMED APPEAL
REFER

U.S. District Court
EASTERN DISTRICT OF CALIFORNIA (Sacramento)

CIVIL DOCKET FOR CASE #: 04-CV-778

American Bankers, et al v. Lockyer, et al Filed: 04/19/04
Assigned to: Judge Morrison C England, Jr
Referred to: Magistrate Judge Kimberly J Mueller
Demand: $0,000 Nature of Suit: 430
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

AMERICAN BANKERS ASSOCIATION plaintiff	E Edward Bruce PRO HAC VICE [COR LD NTC] Stuart C Stock 12027785384 PRO HAC VICE [COR LD NTC] Keith A Noreika 12027785497 PRO HAC VICE [COR LD NTC] Covington and Burling 1201 Pennsylvania Avenue N W Washington, DC 20004-7566 202-662-6000 Richard Allen Jones [COR LD NTC] Covington and Burling One Front Street 35th Floor San Francisco, CA 94111 415-591-6000
- THE FINANCIAL SERVICES ROUNDTABLE plaintiff	E Edward Bruce (See above) [COR LD NTC] Stuart C Stock (See above) [COR LD NTC] Keith A Noreika (See above) [COR LD NTC] Richard Allen Jones (See above)

[COR LD NTC]

CONSUMER BANKERS ASSOCIATION
plaintiff

E Edward Bruce
(See above)
[COR LD NTC]

Richard Allen Jones
(See above)
[COR LD NTC]

v.

BILL LOCKYER, Attorney General of CA
defendant

Catherine Z Ysrael
[COR LD NTC]
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HOWARD GOULD, Commission of the Department of Financial Institutions of the State of California
defendant

Kimberly Louise Gauthier
19164456985
[COR LD NTC]
State of California Department of Corporations
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916-445-7719

WILLIAM P WOOD
defendant

Kimberly Louise Gauthier
(See above)
[COR LD NTC]

JOHN GARAMENDI

Catherine Z Ysrael

TERMED APPEA
REFER

defendant	(See above) [COR LD NTC]
	Robyn Cerny Smith (See above) [COR LD NTC]

4/19/04	1	COMPLAINT for declaratory relief, fee status paid, receipt # 7586, assigned to Judge Morrison C. England Jr referred to Magistrate Judge Kimberly J. Mueller (hk) [Entry date 04/20/04]
4/19/04	2	CORPORATE DISCLOSURE STATEMENT by plaintiffs (hk) [Entry date 04/20/04]
4/19/04	3	STATUS ORDER by Judge Morrison C. England Jr informing the parties on the procedure to follow in pursuing this action (hk) [Entry date 04/20/04]
4/22/04	--	LODGED pro hac vice for E. Bruce by plaintiff American Bankers (hk) [Entry date 04/23/04]
4/22/04	--	LODGED pro hac vice for C. Stock by plaintiff American Bankers (hk) [Entry date 04/23/04]
4/22/04	--	LODGED pro hac vice for A. Noreika by plaintiff American Bankers (hk) [Entry date 04/23/04]
4/26/04	4	ORDER by Judge Morrison C England Jr: Pro Hace Vice Application GRANTED attorney Keith A Noreika allowed to appear pro hac vice for plaintiffs American Bankers and Financial Services (cc: all counsel) (mm1)
4/26/04	5	APPLICATION AND ORDER FOR PRO HAC VICE by Judge Morrison C. England Jr ORDERING attorney Stuart C Stock allowed to appear pro hac vice for pltfs American Bankers and Financial Services (cc: all counsel) (pw)
4/26/04	6	APPLICATION AND ORDER FOR PRO HAC VICE by Judge Morrison C. England Jr ORDERING attorney E Edward Bruce allowed to appear pro hac vice for plaintiffs (cc: all counsel) (pw)
5/10/04	7	NOTICE OF MOTION AND MOTION for summary judgment by plaintiff American Bankers motion TO BE HEARD by Judge Morrison C. England Jr; Motion Hearing Set For June 14, 2004 (hk) [Entry date 05/11/04]
5/10/04	8	MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff American Bankers in SUPPORT of motion for summary judgment by plaintiff American Bankers [7-1] (hk) [Entry date 05/11/04]
5/10/04	9	DECLARATION of Karen M. Alnes in support of motion [7-1] (hk) [Entry date 05/11/04]
5/10/04	10	DECLARATION of Keith A. Noreika in support of motion [7-1] (hk) [Entry date 05/11/04]
5/10/04	11	STATEMENT by plaintiffs of undisputed facts (hk) [Entry date 05/11/04]
5/10/04	--	LODGED final judgment by plaintiff (hk)

[Entry date 05/11/04]

5/10/04	12	PROOF OF SERVICE by plaintiff of [0-0], [11-1], [10-1], [9-1], [8-1], [7-1] (hk) [Entry date 05/11/04]
5/10/04	13	RETURN OF SERVICE executed upon defendant Bill Lockyer, defendant Howard Gould, defendant William P Wood, defendant John Garamendi on 4/21/04 (hk) [Entry date 05/11/04]
5/11/04	14	ANSWER by defendant Howard Gould, defendant William P Wood to complaint [1-1] (hk) [Entry date 05/12/04]
5/14/04	15	NOTICE OF MOTION AND MOTION to dismiss by dfts Bill Lockyer and John Garamendi; motion TO BE HEARD by Judge Morrison C. England Jr; Motion Hearing Set For 9:00 06/14/04 (nac) [Entry date 05/17/04]
5/14/04	16	MEMORANDUM OF POINTS AND AUTHORITIES by dfts Bill Lockyer and John Garamendi in SUPPORT of motion to dismiss by dfts Bill Lockyer and John Garamendi [15-1] (nac) [Entry date 05/17/04]
5/14/04	17	APPENDIX of legislative and non-federal authorities by dfts Bill Lockyer and John Garamendi in support of motion to dismiss [15-1] (nac) [Entry date 05/17/04]
5/25/04	23	NOTICE OF MOTION AND MOTION for cross-summary judgment by dfts Howard Gould, William P Wood or in the alternative for partial summary judgment by dfts Howard Gould, William P Wood motion TO BE HEARD by Judge Morrison C. England Jr ; Motion Hearing Set For June 14, 2004 at 9:00 am (hk) [Entry date 06/01/04]
5/28/04	19	APPENDIX by plaintiff American Bankers regarding [18-1] (hk) [Entry date 06/01/04]
5/28/04	20	RESPONSE by Howard Gould, William P Wood to motion for summary judgment by plaintiff American Bankers [7-1] (hk) [Entry date 06/01/04]
5/28/04	21	APPENDIX by Howard Gould, William P Wood to response to motion for summary judgment [20-1] (hk) [Entry date 06/01/04]
5/28/04	22	RESPONSE by Howard Gould, William P Wood to statement of undisputed facts [11-1] (hk) [Entry date 06/01/04]
5/28/04	24	STATEMENT by Howard Gould, William P Wood of undisputed facts in support of [23-1], in support of [23-2] (hk) [Entry date 06/01/04]
5/28/04	--	LODGED order re summary judgment by defendant Howard Gould, defendant William P Wood (hk) [Entry date 06/01/04]

5/28/04	25	PROOF OF SERVICE by defendant Howard Gould, defendant William P Wood of [0-0], [24-1], [22-1], [21-1], [20-1] (hk) [Entry date 06/01/04]
5/28/04	18	RESPONSE by plaintiff American Bankers to motion to dismiss by dfts Bill Lockyer and John Garamendi [15-1] (hk) [Entry date 06/02/04]
6/1/04	26	RESPONSE by defendant Bill Lockyer, defendant John Garamendi to motion for summary judgment by plaintiff American Bankers [7-1] (hk) [Entry date 06/02/04]
6/1/04	27	RESPONSE by defendants Bill Lockyer and John Garamendi to statement of undisputed facts [11-1] (hk) [Entry date 06/02/04]
6/1/04	28	APPENDIX by dfts Bill Lockyer, John Garamendi (hk) [Entry date 06/02/04]
6/1/04	29	MINUTE ORDER motion for cross-summary judgment by dfts Howard Gould, William P Wood [23-1] HEARING RESET FOR 9:00 6/28/04, motion for partial summary judgment by dfts Howard Gould, William P Wood [23-2] HEARING RESET FOR 9:00 6/28/04, motion to dismiss by dfts Bill Lockyer and John Garamendi [15-1] HEARING RESET FOR 9:00 6/28/04, motion for summary judgment by plaintiff American Bankers [7-1] HEARING RESET FOR 9:00 6/28/04 (cc: all counsel) (hk) [Entry date 06/02/04]
6/7/04	30	REPLY to response to motion to dismiss by dfts Bill Lockyer and John Garamendi [15-1] (hk) [Entry date 06/08/04]
6/10/04	31	OPPOSITION by pltfs to motion for cross-summary judgment by dfts Howard Gould, William P Wood [23-1], to motion for partial summary judgment by dfts Howard Gould, William P Wood [23-2]; AND... (nac) [Entry date 06/14/04]
6/10/04	31	...REPLY to response to motion for summary judgment by pltfs [7-1] (nac) [Entry date 06/14/04] [Edit date 06/14/04]
6/15/04	32	JOINT Status Report by plaintiffs, defendants (mm1) [Entry date 06/16/04]
6/21/04	33	REPLY to response to motion for cross-summary judgment by dfts Howard Gould, William P Wood [23-1], motion for partial summary judgment by dfts Howard Gould, William P Wood [23-2] (hk) [Entry date 06/22/04]
6/28/04	34	MINUTES before Judge Morrison C England Jr: Motion to Dismiss by dfts Bill Lockyer and John Garamendi [15-1] SUBMITTED; Motion for Summary Judgment by plaintiff American Bankers [7-1] SUBMITTED - C/R Diane Shepard (mm1) [Entry date 06/29/04]

6/30/04	35	ORDER by Judge Morrison C. England Jr ORDERING summary judgment on behalf of the dfts [23-1], [15-1] GRANTED CASE DISMISSED (cc: all counsel) (nac)
6/30/04	36	JUDGMENT entered pursuant to the court order issued this date by Judge Morrison C. England Jr (cc: all counsel) (nac)
7/1/04	37	NOTICE OF APPEAL by plaintiffs from District Court decision re Judgment [36-1] (fee status PAID receipt# 205 6819); forms given (mm1) [Entry date 07/02/04]
7/1/04	38	CERTIFICATE OF SERVICE by pltfs of Notice of Appeal [37-1] (mm1) [Entry date 07/02/04]
7/2/04	39	MAILED case information/docket fee payment notice, copy of Notice of Appeal and appealed 6/30/04 judgment [36-1] to 9th Circuit Court of Appeals, copy of appeal and docket sheet to all parties (mm1)
7/9/04	40	AMENDED MEMORANDUM AND ORDER by Judge Morrison C. England Jr ORDERING summary judgment on behalf of the defendants is hereby GRANTED (cc: all counsel) (mdk)
7/9/04	41	AMENDED JUDGMENT is hereby entered in accordance with the amended court order by Judge Morrison C. England Jr [40-1] (cc: all counsel) (mdk)
7/9/04	42	TRANSCRIPT DESIGNATION and Ordering Form for dates 6/28/04re appeal [37-1] (hk) [Entry date 07/12/04]
7/12/04	--	NOTIFICATION by 9th Circuit of Appellate Docket Number 04-16334 (hk)
7/13/04	43	AMENDED NOTICE OF APPEAL by plaintifffrom District Court decision re judgment [41-1] (fee status not paid) (hk) [Entry date 07/14/04]
7/16/04	44	MAILED case information/docket fee payment notice, copy of Notice of Appeal and appealed 7/9/04 judgment [41-1] to 9th Circuit Court of Appeals, copy of appeal and docket sheet to all parties (hk)

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the Excerpts of Record to be served this 2nd day of August, 2004 as follows:

By Federal Express, next business day delivery

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