No. 13-

IN THE

# Supreme Court of the United States

JAMES WILSON DABNEY,

*Petitioner,*

*v.*

TD BANK, N.A.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2006), bars enforcement of all state private rights of action against persons who furnish false information to consumer reporting agencies.

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James Wilson Dabney hereby petitions for a writ of certiorari to review the final judgment of the Superior Court of New Jersey, Appellate Division, in this action.

## OPINIONS BELOW

The Supreme Court of New Jersey denied review of the judgment below in an unreported order reproduced in Appendix A. The opinion of the Superior Court, Appellate Division is unreported and is reproduced in Appendix B. The final judgment of the Superior Court is reproduced in Appendix C. The opinion of the Superior Court on respondent's motion to dismiss petitioner's complaint is unreported and is reproduced in Appendix D. Petitioner's complaint in this action is reproduced in Appendix E.

## JURISDICTION

The Superior Court of New Jersey, Appellate Division entered final judgment on January 8, 2013. Petitioner timely filed both a notice of appeal and a petition for certification to the Supreme Court of New Jersey. The Supreme Court of New Jersey denied certification and dismissed petitioner's appeal in an order entered June 7, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). Respondent claims a privilege or immunity under a federal statute, 15 U.S.C. § 1681t.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the Constitution provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .

15 U.S.C. § 1681h(e) provides:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g,

1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681s-2 provides in part:

(a)(1)(A) A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

15 U.S.C. § 1681t provides in part:

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State —

(1) with respect to any subject matter regulated under—

. . . .

(F) section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).

## STATEMENT OF THE CASE

This case raises a question of broad and general importance: whether the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (the "FCRA"), is rightly interpreted as providing for "*total* preemption" (Pet. App. 17a; emphasis added) of *all* state private rights of action against persons who furnish false information to consumer reporting agencies. The answer to this question affects the rights of millions of Americans who have individual credit histories.

Federal circuit courts, state appellate courts, and federal district courts have provided sharply conflicting answers to the question presented here. The decision below refers to existing law as "the 'disarray' that litters the decisional landscape." Pet. App. 17a (quoting *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1166 (9th Cir. 2009)), *cert. denied sub nom. FIA Card Servs., N.A. v. Gorman*, 131 S. Ct. 71 (2010)). The decision below also refers to the FCRA as an "arcane statute" (Pet. App. 17a) that includes "contorted and sometimes opaque language" (*id.*) and creates a "preemption puzzle" (*id.* at 15a) with "esoteric strictures." *Id.* at 10a (quoting *Burrell v. DFS Servs., LLC*., 753 F. Supp. 2d 438, 440 (D.N.J. 2010)).

State defamation law has long and traditionally responded to attacks on personal reputation, including attacks in the form of false statements about a person's credit history. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 752-53, 760-63 (1985) (affirming Vermont Supreme Court judgment sustaining award of compensatory and punitive damages for libel arising from false credit report).

In 1996, the FCRA was amended to prescribe, for the first time, a federal law prohibition against the furnishing of false information to consumer reporting agencies. 15 U.S.C. § 1681s-2(a)(1)(A) currently provides: "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is

inaccurate." The FCRA does not, however, provide any private right of action for conduct that violates § 1681s-2(a).

Concurrently with the enactment of § 1681s-2(a) quoted above, the FCRA was further amended to provide: "No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s–2 of this title, . . . except that this paragraph shall not apply . . . with respect to" two state statutes. 15 U.S.C. § 1681t(b)(1)(F). The two cited state statutes, Cal. Civ. Code § 1785.25(a) and Mass. Gen. Laws ch. 93, § 54A(a), prohibit the furnishing of false information to consumer reporting agencies in terms which parallel those of § 1681s-2(a).

At issue here is whether 15 U.S.C. § 1681t(b)(1)(F) leaves States free to provide private remedies to enforce violations of state law prohibitions that parallel those prescribed in § 1681s-2(a). The Ninth Circuit has held that "the plain language of" § 1681t(b)(1)(F) "does not apply to private rights of action." *Gorman*, 584 F.3d at 1173. The court reasoned that private rights of action do not themselves "impose" any "requirements" or "prohibitions" within the meaning of § 1681t(b)(1)(F), but "merely provide a vehicle" by which "consumers can ensure that furnishers are complying with the obligations Congress specifically meant to impose." *Id.* at 1171-72. *Gorman* reversed a district court decision which had held that California state law prohibiting the furnishing of false information to consumer reporting agencies "could only be enforced by federal or state officials." *Id*. at 1170, *rev'g* 370 F. Supp. 2d 1005 (N.D. Cal. 2005). *See also id.* at 1173 & n.35.

In direct conflict with *Gorman*, the Second and Seventh Circuits hold that § 1681t(b)(1)(F) bars enforcement of any and all private rights of action that arise from the furnishing of false information to a consumer reporting agency. According to these circuits, § 1681(b)(1)(F) was added to the FCRA in 1996 in order to implement a "decision that administrative action rather than litigation is the right way to deal with false reports to credit agencies." *Purcell v. Bank of Am*., 659 F.3d 622, 626 (7th Cir. 2011). *Accord Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 48 (2d Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 2113 (2012) (quoting

*Purcell*, 659 F.3d at 625). On this view, which the decision below aptly characterized as a "total preemption approach" (Pet. App. 17a), an injured consumer in petitioner's position is said to have no right to relief, under *any* law, for illegal conduct that the FCRA and State law both prohibit in parallel.

The meaning of the statutory language, "laws . . . *with respect to* . . . subject matter regulated under . . . section 1681s-2," 15 U.S.C. § 1681t(b)(1)(F) (emphasis added), has also sharply divided lower federal and state courts. *Macpherson* and *Purcell* held that this language encompassed, not just laws targeted at the subject matter regulated by § 1681s-2, but also general common law duties not to defame. 665 F.3d at 47; 659 F.3d at 625-26. In direct conflict with these decisions the Pennsylvania Superior Court – an appellate court having statewide jurisdiction -- has held that § 1681t(b)(1)(F) does not preempt that State's general common law duty not to defame. *See Dietz v. Chase Home Finance, LLC*, 41 A.3d 882, 886-89 (Pa. Super. 2012). Rather, in Pennsylvania, a person who furnishes false information to a consumer reporting agency is subject to suit for common law defamation but may, in appropriate circumstances, invoke the qualified immunity defense that 15 U.S.C. § 1681h(e) prescribes. *Id*. at 889. *Dietz* noted that the scope of FCRA preemption of state law had "vexed district courts nationwide" and generated "[t]hree different approaches." *Id*. at 886-87 (quoting *Sites v. Nationstar Mtge. LLC*, 646 F. Supp. 2d 699, 706 (M.D. Pa. 2009) and *Manno v. Am. Gen. Fin.* Co., 439 F. Supp. 2d 418, 425-26 (E.D. Pa. 2006)).

The California Supreme Court has also interpreted the statutory language, "laws . . . *with respect to* . . . subject matter regulated under . . . section 1681s-2," 15 U.S.C. § 1681t(b)(1)(F) (emphasis added), in a matter that directly conflicts with, or is in deep tension with, the interpretation of that language that *Macpherson* and *Purcell* adopted. In *Brown v. Mortensen*, 253 P.3d 522 (Cal.), *cert. denied*, 132 S. Ct. 847 (2011), the court held that § 1681t(b)(1)(F) did not preempt a California state law claim that arose from the furnishing of confidential medical information to a consumer reporting agency. *Id*. at 529-34. Focusing on the statute's text, *Brown* held that "[t]he 'subject matter regulated' under

section 1681s-2 is ambiguous because the level of generality at which one is to characterize that subject matter is unclear, and thus, so is the domain expressly preempted by section 1681t(b)(1)(F)." *Id.* at 528. In support of its interpretation, the California Supreme Court cited multiple precedents of this Court and district court decisions holding – as *Dietz* did – that common law defamation claims were not rightly characterized as laws "with respect to" credit reporting and, as such, were literally outside the preemptive reach of § 1681t(b)(1)(F). *Id*. (citing *Dornhecker v. Ameritech Corp*., 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000) and *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d 517, 521-22 (N.D. Tex. 2003)).

This case, which involves a facial challenge to the sufficiency of a state court complaint for common law defamation, illustrates the practical importance of the question presented and provides a good vehicle for deciding that question. The facts alleged in petitioner's complaint would clearly entitle him to relief in California, Pennsylania, and numerous other jurisdictions, but were held in the decision below to be totally barred by § 1681t(b)(1)(F).

**Petitioner's Complaint for Defamation**

Petitioner commenced this action in New Jersey state court on May 7, 2010. A copy of petitioner's complaint is reproduced in Pet. App. 30a-41a. The complaint named two defendants, Total Relocation Services, LLC ("TRS") and respondent TD Bank, N.A. ("TDNA"), and asserted two distinct claims, one against TRS for negligence and breach of contract and one against respondent for defamation.

Following a bench trial petitioner recovered a judgment in his favor on his claim against TRS (Pet. App. 19a-21a); that claim is not at issue here. This petition is concerned solely with petitioner's claim against respondent TDNA for defamation under New Jersey common law. Pet. App. 35a-

40a. The facts giving rise to that claim, as they appear on the face of the complaint,[1] are straightforward.

According to the complaint, in July 2009, respondent sent petitioner a letter demanding payment of $1,500 on account of a transaction dated June 30, 2009 (the "June 30 Transaction"). Pet. App. 37a ¶ 25. At the time of the June 2009 Transaction, petitioner and respondent were not parties to any credit agreement. *Id*. ¶ 26. In fact, in April 2009, petitioner had explicitly rejected a solicitation to establish a credit relationship with respondent. *Id*. at 35a-36a & ¶¶ 20-23.

Petitioner promptly notified respondent that the June 30 Transaction was unauthorized and disputed.[2] The complaint

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[1] In the procedural posture of this case (*i.e.*, dismissal for alleged failure to state a claim upon which relief can be granted), the allegations of petitioner's complaint must be taken as true and read "indulgently." Pet. App. 4a, 8a. Under New Jersey law, "[a] court may not dismiss a complaint for failure to state a claim under Rule 4:6-2(e) unless the pleadings are lacking even a suggestion of a cause of action." Pet. App. 8a.

[2] Although the merits of petitioner's billing dispute with respondent are not before the Court, the dispute arose from an apparent attempt by defendant TRS to avoid paying for floor damage that TRS had caused during a move of household goods in November 2008. TRS had initially agreed to and did pay for this damage by way of a credit to an account that petitioner had maintained at the time with a New Jersey based institution named Commerce Bank (Pet. App. 33a ¶ 10), some of whose assets were later acquired by respondent. *Id.* at 37a ¶ 26.

Several months later, TRS attempted to retract its payment by presenting respondent with a "stale, false, and spurious" instrument. Pet. App. 34a ¶ 14. Respondent processed this instrument "in error and without authorization." Pet. App. 40a ¶ 37. Eventually, as noted in the text, petitioner recovered a judgment against TRS for the floor damage following a bench trial. Pet. App. 19a-20a.

alleges that as of and prior to June 30, 2009, respondent had "actual notice and knowledge that [petitioner] denied having any credit card account with [respondent] . . . and that any transfer of funds that TDNA may have made on June 30, 2009, was erroneous and unauthorized by [petitioner]." Pet. App. 38a at ¶ 28.

This case thus started out as a routine credit card billing dispute: respondent contended that the June 30 Transaction was authorized; petitioner contended that the June 30 Transaction was unauthorized. That dispute plainly could, and should, have been resolved by judicial, arbitral, or other lawful dispute resolution mechanisms. Respondent, however, chose instead to take the law into its own hands.

Commencing in or about August 2009, agents of respondent explicitly told petitioner that respondent would take steps to damage petitioner's credit standing if he did not voluntarily pay respondent $1,500. Pet. App. 40a ¶ 39. Respondent is alleged to have made this threat "willfully, maliciously, in bad faith, and with specific intent to coerce and pressure [petitioner] to indemnify [respondent] for an erroneous payment that [respondent] had made in error and without authorization." Pet. App. 39a-40a.

When petitioner stood his ground, respondent proceeded to make good on its threat. Starting not later than October 2009, respondent began reporting to credit rating agencies that petitioner had a credit agreement with respondent (he did not), that petitioner had borrowed money from respondent (he had not), and that petitioner had defaulted in repaying a loan debt owed to respondent (he had not). Pet. App. 38a-39a ¶¶ 30-36. Threatening to damage a person's credit is an extremely coercive, extra-legal means of seeking to collect a debt. Respondent is alleged to have acted with actual malice and full knowledge that its actions would cause economic damage to petitioner. Pet. App. 40a ¶ 38. Respondent is further alleged to have caused actual damage to petitioner's credit standing and reputation. Pet. App. 40a¶ 32.

**Respondent's Motion to Dismiss**

Respondent did not answer petitioner's complaint or deny any of its factual allegations, but filed a motion to dismiss the defamation claim for alleged failure to state a claim on which

relief can be granted. Respondent took the position that, no matter how unlawful, willful, or malicious its conduct may have been, 15 U.S.C. § 1681t(b)(1)(F) bars the States from providing any private right of action against persons who furnish false information to consumer reporting agencies.

During oral argument the trial court aptly described the extreme nature of respondent's position:

> He's saying you can't sue, as a matter of law, for malicious, willful defamation on a credit report . . . [O]nce I issue this decision one of you is going to appeal me and we are going to have some clear guidance from the Appellate Division . . . . I have a feeling that whatever they write may even go up further, even if they're unanimous in their Appellate Division decision. Because if you're saying that we don't have a case on this, which both of you seem to agree on, I'm in trouble.

Motion Hearing Tr. 13-15, December 3, 2010.

**The Trial Court Decision**

On December 3, 2010, the trial court dismissed petitioner's defamation claim against respondent for alleged failure to state a claim on which relief could be granted. Notwithstanding that the complaint stated all of the elements of a claim for defamation under New Jersey law, the trial court concluded that: "The language of 15 U.S.C. § 1681t(b)(1)(F) is unambiguous in eliminating all state causes of action against furnishers of information." Pet. App. 28a.

**The Appellate Division Decision**

Petitioner timely appealed to the Appellate Division of the New Jersey Superior Court. Petitioner noted that, contrary to what the trial court's opinion had said, the text of § 1681t(b)(1)(F) expressly *does not* preempt "all state causes of action against furnishers of information." To the contrary, the statute expressly *preserves* from preemption two state statutes which prohibit the furnishing of false information to

consumer reporting agencies in terms which parallel those that the FCRA itself prescribes in 15 U.S.C. § 1681s-2(a).[3] In light of this express *non-preemption* of *specific* state laws and applicable principles of statutory construction, petitioner argued that the general common law duty not to defame was not rightly deemed a law "*with respect to*" subject matter regulated by 15 U.S.C. § 1681s-2 and was, thus, outside the scope of § 1681t(b)(1)(F). *Cf. Altria Group, Inc v. Good,* 555 U.S. 70, 82-84 (2008) (statutory text similar to § 1681t(b)(1)(F) held not to preempt enforcement of general state law "duty not to deceive" as distinct from "targeted regulations.").

This reading of § 1681t(b)(1)(F) was reinforced, petitioner argued, by 15 U.S.C. § 1681h(e), which has long imposed a specific limit on suits for "defamation . . . against . . any person who furnishes information to a consumer reporting agency." Section 1681h(e) provides a qualified *immunity* to persons who furnish information to consumer reporting agencies and clearly assumes that such state tort suits are permitted. Section 1681h(e) was retained and broadened by the same statute, the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), which added § 1681t(b)(1)(F) to the FCRA's preemption provisions. *See id*. § 2408(e)(4), 110 Stat. at 3009-439. If it were true, as the trial court had stated, that § 1681t(b)(1)(F) "eliminat[ed] all state causes of action against furnishers of information" (Pet. App. 28a), then § 1681h(e) would have no office to perform and Congress's amendment of that provision in 1996 was meaningless.

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[3] Cal. Civ. Code § 1785.25(a) provides in part: "A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Mass. Gen. Laws ch. 93, § 54A(a) provides in part: "No person may provide information to a consumer reporting agency if such person knows or has reasonable cause to believe such information is not accurate or complete."

Further, petitioner argued, it was not reasonable to interpret 15 U.S.C. § 1681t(b)(1)(F) as providing for irrational discrimination among different States' residents, expressly *preserving* the rights of California and *Massachusetts* residents while simultaneously *abrogating* the corresponding rights of every other State's residents. Such an interpretation would be in deep tension with the "'fundamantal principle of *equal* sovereignty among the States.'" *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (emphasis in original) (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)),

Notwithstanding these arguments, the Appellate Division concluded that § 1681t(b)(1)(F) "precludes *all* state statutory or common law causes of action that would impose any 'requirement or prohibition' on the furnishers of credit." Pet. App. 14a (emphasis added). The court rejected the *Gorman* view that a private right of action for conduct that violates *parallel* federal and state requirements does not itself "impose" any "requirement" or "prohibition" within the proper meaning of § 1681t(b)(1)(F). The court stated (Pet. App. 17a):

> Having canvassed the vast array of judicial opinions dealing with FCRA preemption, we conclude that the straight forward total preemption approach of these courts of appeal is most faithful to Congress's purpose in having a national system for credit reporting. We eschew other methodologies that require unnecessary and unwarranted legalistic gymnastics to parse the contorted and sometimes opaque language of the FCRA. To engage in an endless semantic misadventure just brings more complexity to an already arcane statute. We do not wish to contribute to the 'disarray' that litters the decisional landscape. *See Gorman*, 584 F.3d at 1166. We elect to follow *Macpherson* and *Purcell* not because they are easy, but because they are correct.

Under the decision below and the Second and Seventh Circuit precedent that the decision below follows, an injured consumer in petitioner's position is said to have no right to relief, under *any* law, for intentionally tortious conduct that

15 U.S.C. § 1681s-2(a) and state law both prohibit in parallel.

When confronted with similar preemption arguments in past cases, this Court has repeatedly observed: "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1781 (2013) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Yet that is what the decision below, the Second Circuit, and the Seventh Circuit have all held that § 1681t(b)(1)(F) does.

**The New Jersey Supreme Court's Decision**

Petitioner timely filed both a notice of appeal and a petition for certification with the Supreme Court of New Jersey. Perhaps in recognition that the issue raised by petitioner was one of federal law, the Supreme Court of New Jersey declined to review the Appellate Division's decision. Pet. App. 1a-2a.

## REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case for several reasons.

First, the question presented is one on which federal Courts of Appeals and state appellate courts have provided sharply conflicting answers. As matters currently stand, whether an injured consumer can obtain redress against a person who furnishes false information to a consumer reporting agency is entirely dependent on the happenstance of where the injured plaintiff resides or sues. In California, Pennsylania, and Massachusetts state courts; in federal district courts located in the Ninth Circuit; and in some federal district courts located in the First, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, § 1681t(b)(1)(F) is held *not* to bar enforcement of State private rights of action like the one asserted by petitioner here. In New Jersey state courts, in federal district courts located within the Second and Seventh Circuits, and in some district courts located in other Circuits, the opposite is true. Part I, *infra*.

Second, the interpretation of § 1681t(b)(1)(F) that the Second and Seventh Circuits have adopted, which the decision

below followed, is not grounded in applicable precedents of this Court. The so-called "total preemption approach" (Pet. App. 17a) fails to consider the full text of 15 U.S.C. § 1681t and makes no sense in the context of the statute's express non-preemption of California and Massachusetts statutes which prohibit the furnishing of false information to consumer reporting agencies. Section 1681t(b)(1)(F) is not reasonably interpreted as providing for irrational discrimination among different States' residents. *Cf. Shelby County*, 133 S. Ct. at 2622 (quoting *Northwest Austin*, 557 U.S. at 203) (noting "the fundamental principle of equal sovereignty" among the States.). The text of § 1681t(b)(1)(F) readily lends itself to an interpretation that permits all, not just some, States to protect "the strong and legitimate state interest in compensating private individuals for injury to reputation." *Gertz v. Welch*, 418 U.S. 323, 348 (1974). *Cf. Altria*, 555 U.S. at 82-84 (holding that language similar to § 1681t(b)(1)(F) did not preempt enforcement of a general state law "duty not to deceive" as distinct from "targeted regulations"). Part II, *infra*.

Third, the question presented is important and merits this Court's attention. Millions of Americans have individual credit histories and are subject to the type of injury and extralegal coercion complained of by petitioner here. Often, an individual injured consumer will lack the financial ability to litigate the issue past the trial court stage. The FCRA itself recognizes the importance of accuracy in credit reporting and prohibits the type of conduct that respondent is alleged to have engaged in here. The question presented has generated a "vast array of judicial opinions" (Pet. App. 17a) and critical academic commentary. By any reasonable measure, the scope of States' constitutional authority to compensate individuals for injury to reputation is an important question that merits this Court's review. Part III, *infra*.

Fourth, this case is a good vehicle for resolving the question presented. Petitioner's claim against respondent was dismissed for alleged failure to state a claim upon which relief can be granted. In this procedural posture the Court need only look to the face of petitioner's complaint in order to determine if it states a claim that 15 U.S.C. § 1681t(b)(1)(F) permits to be enforced. Part IV, *infra*.

## I. THERE IS A CIRCUIT SPLIT, A STATE-CIRCUIT SPLIT, AND A STATE-STATE SPLIT ON THE QUESTION PRESENTED.

As noted above, the question presented by this petition has generated a clear split of authority with respect to (i) what *kinds* of State law duties are preempted by § 1681t(b)(1)(F), and (ii) whether the statute bars enforcement of *all* state private rights of action against persons who furnish false information to consumer reporting agencies.

The Ninth Circuit has held that § 1681t(b)(1)(F) does not apply to Cal. Civ. Code § 1785.25(g), which provides a private right of action against persons who furnish false information to consumer reporting agencies. *See Gorman*, 584 F.3d at 1170-73, To provide a private remedy for conduct that the FCRA itself prohibits, the Ninth Circuit held, was not to "impose" a "requirement" or "prohibition" on furnishers of information or to create "a patchwork of confusing obligations with which a furnisher must struggle to comply," but was merely to "allow for additional avenues through which consumers can ensure that furnishers are complying with the obligations Congress specifically meant to impose." *Id*. at 1172. *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005) ("Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."). Under *Gorman,* a California resident in petitioner's position would clearly be entitled to sue for the injuries complained of here.

The Superior Court of Pennsylvania, in accord with a large number of district court decisions,[4] has similarly held

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[4] *See, e.g., Baker v. Gen. Elec. Capital Corp*., 819 F. Supp. 2d 1332, 1334-38 (M.D. Ga. 2011) (FCRA did not preempt common law libel claim); *Meisel v. USA Shade & Fabric Structures Inc*., 795 F. Supp. 2d 481, 489-91 (N.D. Tex. 2011) (FCRA did not preempt common law libel claim); *Ori v. Fifth Third Bank*, 674 F. Supp. 2d 1095, 1098-99 (E.D. Wis. 2009) (FCRA did not preempt common law libel claim); *Sites v. Nationstar Mortgage LLC*, 646 F. Supp. 2d 699, 708-09 (M.D. Pa. 2009) (FCRA did not preempt

**Footnote continued**

that § 1681t(b)(1)(F) does not apply to the general common law duty not to defame. *Dietz v. Chase Home Finance, LLC*, 41 A.3d 882, 886-89 (Pa. Super. 2012). In Pennsylvania,

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common law libel claim); *Marcum v. G.L.A. Collection Co*., 646 F. Supp. 2d 870, 873-74 (E.D. Ky. 2008) (FCRA did not preempt common law defamation claim); *Saint Torrance v. Firstar*, 529 F. Supp. 2d 836, 841-44 (S.D. Ohio 2007) (FCRA did not preempt common law defamation claim); *Davis v. Trans Union, LLC*, 526 F. Supp. 2d 577, 589 (W.D.N.C. 2007) (FCRA did not preempt common law defamation claim); *Wolfe v. MBNA Am. Bank*, 485 F. Supp. 2d 874, 887-88 (W.D. Tenn. 2007) (FCRA did not preempt common law defamation claim); *Manno v. Am. Gen. Fin. Co*., 439 F. Supp. 2d 418, 429-31 (E.D. Pa. 2006) (FCRA did not preempt common law defamation claim); *Beuster v. Equifax Information Servs.*, 435 F. Supp. 2d 471, 474-49 (D. Md. 2006) (FCRA did not preempt common law defamation claim); *Barnhill v. Bank of Am., N.A.*, 378 F. Supp. 2d 696, 703-05 (D.S.C. 2005) (FCRA did not preempt common law libel claim); *Jordan v. Trans Union LLC*, 377 F. Supp. 2d 1307, 1308-09 (N.D. Ga. 2004) (FCRA did not preempt common law defamation claim); *Johnson v. Citimortgage, Inc*., 351 F. Supp. 2d 1368, 1372-78 (N.D. Ga. 2004) (FCRA did not preempt common law defamation claim); *McCloud v. Homeside Lending*, 309 F. Supp. 2d 1335, 1340-42, 1344 (N.D. Ala. 2004) (FCRA did not preempt common law defamation action); *Jeffrey v. Trans Union LLC*, 273 F. Supp. 2d 725, 726-28 (E.D. Va. 2003) (FCRA did not preempt common law defamation action); *Gordon v. Greenpoint Credit*, 266 F. Supp. 2d 1007, 1012-13 (S.D. Iowa 2003) (FCRA did not preempt common law defamation claim); *Yutesler v. Sears Roebuck & Co*., 263 F. Supp. 2d 1209, 1210-1212 (D. Minn. 2003) (FCRA did not preempt common law defamation action); *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d 517, 520-22 (N.D. Tex. 2003) (FCRA did not preempt common law defamation action); *Dornhecker v. Ameritech Corp*., 99 F. Supp. 2d 918, 930-31 (N.D. Ill. 2000) (FCRA did not preempt common law defamation action.)

when a claim for defamation arises from the furnishing of false information to a consumer reporting agency, the furnisher may invoke the qualified immunity defense that 15 U.S.C. § 1681h(e) prescribes, but is fully liable for statements made with malice or willful intent to injure a consumer. 41 A.3d at 889. Under *Dietz*, a Pennsylvania resident in petitioner's position would clearly be entitled to sue for the injuries complained of here.

In *Brown v. Mortensen*, 253 P.3d 522 (Cal.), *cert. denied*, 132 S. Ct. 847 (2011), the California Supreme Court held that § 1681t(b)(1)(F) should be narrowly construed and, as so construed, did not apply to a state law right of action for wrongfully furnishing medical information to a consumer reporting agency. *Brown* noted that "[t]he total preemption approach" is "but one of three approaches the federal courts have taken." *Id*. at 529. The court cited *Carlson v. Trans Union, LLC*, 259 F. Supp. 2d 517, 521-22 (N.D. Tex. 2003), and *Dornhecker v. Ameritech Corp*., 99 F. Supp. 2d 918, 930-31 (N.D. Ill. 2000), as illustrating how § 1681t(b)(1)(F) can plausibly be read as not barring enforcement of the common law duty not to defame. 253 P.3d at 528. Under *Brown*, a California resident in petitioner's position would clearly be entitled to sue in a California state court for the injuries complained of here.

In upholding private rights of action against persons who wrongfully or unlawfully furnished information to consumer reporting agencies, *Gorman, Dietz,* and *Brown* stand in direct conflict with the decision below and with the Second and Seventh Circuit precedent that the decision below follows. *See* Pet App. 17a ("We elect to follow *Macpherson* and *Purcell*, not because they are easy, but because they are correct."). *Gorman, Dietz,* and *Brown* are also in deep tension with, if they do not directly conflict with, the Fourth Circuit's decision in *Ross v. FDIC,* 625 F.3d 808 (4th Cir. 2010), *cert. denied,* 131 S. Ct. 2991 (2011), which held a state law claim preempted merely because it arose from a creditor having allegedly furnished false information to a consumer reporting agency. *Id*. at 813. *Ross* noted but declined to address whether a different outcome would be warranted if a creditor acted with malice, as is alleged here. *Id*. at 814 n.*.

As matters currently stand, (i) residents of California have *broad rights* to sue persons who furnish false information to consumer reporting agencies, both in California state court and in federal district courts located in the Ninth Circuit; (ii) residents of Massachusetts either have *broad rights* (under the *Gorman* reasoning) or *no rights* (under the *Macpherson* and *Purcell* reasoning) to sue persons who furnish false information to consumer reporting agencies,[5] (iii) residents of Pennsylvania have *common law* rights to sue persons who furnish false information to consumer reporting agencies in Pennsylvania *state courts* and in certain federal district courts, but potentially *no rights* in certain other federal district courts located in Pennsylvania;[6] (iv) in some federal district courts located in the First, Third, Fifth, Sixth, Eighth, and Eleventh Circuits, consumers have various *narrow rights* to sue persons who furnish false information to consumer reporting agencies (see note 4 *supra*); (v) in federal district courts located in the Second and Seventh Circuits, consumers currently have *no rights* to sue persons who furnish false information to consumer reporting agencies; (vi) in federal district courts located in the Fourth Circuit, consumers have either *narrow rights* (under some existing district court decisions, *see* note 4 *supra*) or *no rights* (under the *Ross* dictum, 625 F.3d at 814 n.*) to sue persons who furnish false information to consumer reporting agencies; and (vii) now in New Jersey, consumers are said to have *no rights* to

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[5] *See Catanzaro v. Experian Info. Sys., Inc*., 671 F. Supp. 2d 256, 261 (D. Mass. 2009) (holding, consistently with *Gorman,* that § 1681t(b)(1)(F) does not bar private enforcement of Mass. Gen. Laws ch. 93, § 54A(a)).

[6] *Compare Jaramillo v. Experian Info. Solutions, Inc.,* 155 F. Supp. 2d 356 (E.D. Pa.2001) (no rights)*, recons. granted in part,* No. 00–CV–5876, 2001 WL 1762626 (June 20, 2001) *with Sites v. Nationstar Mortgage LLC*, 646 F. Supp. 2d 699, 709-10 (M.D. Pa. 2009) (expressly rejecting *Jaramillo* and upholding narrow rights to sue).

sue persons who furnish false information to consumer reporting agencies, including even in cases where, as here, a defendant is alleged to have acted with actual malice as part of an extra-legal attempt to collect a disputed debt. Pet. App. 14a, 17a.

In view of the foregoing, it is easy to understand why the court below characterized existing precedent as "the 'disarray' that litters the decisional landscape." Pet. App. 17a (quoting *Gorman*, 584 F.3d at 1166). Section 1681t(b)(1)(F) has been on the books since 1996. It has generated enormous amounts of costly litigation. Given that claims like petitioner's will often be brought in state courts, there is no prospect for resolving the existing conflict of lower court decisions in any reasonable time frame except by decision of this Court.

## II. THE DECISION BELOW CONFLICTS WITH, OR IS IN DEEP TENSION WITH, APPLICABLE PRECEDENTS OF THIS COURT.

The FCRA was originally enacted in 1970, *see* Pub. L. No. 91-508, §§ 601-622, 84 Stat. 1114, 1127-36 (1970), and has been amended on a number of occasions since then. The current text of the FCRA, as amended, is found today in 15 U.S.C. §§ 1681-1681x (2006).

In its original form, the FCRA did not purport to regulate the conduct of persons who furnished information to consumer reporting agencies. The statute expressly assumed, to the contrary, that persons who furnished false information to consumer reporting agencies were subject to State law tort remedies for "defamation." 15 U.S.C. § 1681h(e) (1970). The original FCRA placed but one narrow limit on such State law defamation remedies, to wit: if a defamation suit was "based on information disclosed pursuant to" one of the mandatory disclosure obligations of the FCRA, *id*., liability was limited to cases where the "false information [was] furnished with malice or willful intent to injure such consumer." *Id*. The original FCRA did not otherwise bar enforcement of State defamation law as applied to persons who furnished false information to consumer reporting agencies.

In 1996, the FCRA was amended in three ways relevant to this case. First, the original FCRA limit on State law defamation suits, 15 U.S.C. § 1681h(e), was retained and ex-

panded to include defamation suits that were "based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action." Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2408(e)(4), 110 Stat. 3009, 3009-439 (1996) (the "1996 Act").[7]

Second, the FCRA was amended to prescribe, for the first time, a federal law duty to refrain from furnishing false information to consumer reporting agencies. *See* 1996 Act § 2413, 110 Stat. 3009, 3009-447. Current 15 U.S.C. § 1681s-2(a) provides in part: "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate."

Third, the FCRA was amended to preempt *certain* State laws, to wit: "laws of any State *with respect to* the collection, distribution, or use of any information on consumers." 1996 Act, § 2419, 110 Stat. 3009, 3009-453 (emphasis added). Understanding the scope of § 1681t(b)(1)(F) requires consideration of its full text and the "savings" provision, § 1681t(a), to which § 1681t(b)(1)(F) is an exception.

Current 15 U.S.C. § 1681t provides in part (emphasis added):

(a) In general

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[7] The *Macpherson* and *Purcell* decisions both rest heavily on a glaring historical error, to wit: "Section 1681h(e) was enacted in 1970." *Macpherson*, 665 F.3d at 48 (quoting *Purcell*, 659 F.3d at 625). *Purcell* invoked what it called a "*norm* that courts do not read *old statutes* to defeat the operation of *newer ones,"* 659 F.3d at 626 (emphasis added), referring to § 1681t(b)(1)(F) as supposedly "newer" and "later-enacted" than § 1681h(e). *Id*. In fact, as noted in the text, *current* § 1681h(e) was enacted in 1996, not 1970, and indeed was amended by the *very same statute* that enacted § 1681t(b)(1)(F).

> *Except as provided in subsections (b) and (c) of this section*, this subchapter *does not annul*, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with *the laws of any State with respect to the collection, distribution, or use of any information on consumers*, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.
>
> (b) General exceptions
>
> No requirement or prohibition may be imposed under *the laws of any State* -
>
> (1) *with respect to* any subject matter regulated under-
>
> . . . .
>
> (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, *except that this paragraph shall not apply*-
>
> (i) with respect to section 54A (a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).

As shown above, 15 U.S.C. § 1681t(b) is drafted as an exception to a "savings" provision which refers to "the laws of any State with respect to the collection, distribution, or use of any information on consumers." 15 U.S.C. § 1681t(a). The statute can thus be read as preempting only the *types* of State laws that the statute refers to, namely, "laws . . . with respect to the collection, distribution, or use of any information on consumers" and "laws . . . for the prevention or mitigation of identity theft," as distinguished from general duties not to deceive or defame. This reading accords with the remainder of the statute's text.

Section 1681t(b)(1)(F) states that it "shall not apply . . . with respect to" Cal. Civ. Code § 1785.25(a) as it existed on September 30, 1996. That California statute provides in part:

"A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Section 1681t(b)(1)(F) thus specifically *does not* preempt a California law whose terms parallel the fault-based standard of liability prescribed in 15 U.S.C. § 1681s-2(a).

Section 1681t(b)(1)(F) also states that it "shall not apply . . . with respect to Mass. Gen. Laws ch. 93, § 54A(a) as it existed on September 30, 1996." That Massachusetts statute provides in part: "No person may provide information to a consumer reporting agency if such person knows or has reasonable cause to believe such information is not accurate or complete." Here again, § 1681t(b)(1)(F) specifically *does not* preempt a Massachusetts law whose terms parallel the fault-based standard of liability prescribed in 15 U.S.C. § 1681s-2(a).

The two state statutes exempted from the operation of § 1681t(b)(1)(F) fall within the category of laws defined by the phrase, "laws . . . with respect to the collection, distribution, or use of any information on consumers." 15 U.S.C. § 1681t(a). Those laws would thus have been preempted in the absence of an exemption in § 1681t(b)(1)(F). *See Brown*, 253 P.3d at 533 & n.14.

In contrast, as many courts have held, a general duty not to defame is not necessarily or appropriately characterized as a "law . . . with respect to the collection, distribution, or use of any information on consumers," 15 U.S.C. § 1681t(a), and thus would not necessarily have needed the type of statutory exception to preemption that § 1681t(b)(1)(F) provided for the excepted state statutes. *Cf. Altria*, 555 U.S. at 82-84 (language similar to § 1681t(b)(1)(F) held not to preempt enforcement of a general state law "duty not to deceive" as distinct from "targeted regulations."); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 500-01 (1996) ("general state common law requirements" were not developed "with respect to" medical devices and their generality left them outside the category of "requirements" that a federal statute barred States from imposing).

Courts which have embraced the so-called "total preemption approach" (Pet. App. 17a), including the decision below and the Second and Seventh Circuits, uniformly fail to consider the FCRA's express *non-preemption* of state statutes whose prohibitions parallel those prescribed by 15 U.S.C. § 1681s-2(a), Section 1681t(b)(1)(F) is not sensibly read as an irrationally discriminatory statute, preserving the rights of California and Massachusetts residents while destroying the corresponding rights of every other States' residents. *Cf. Shelby County*, 133 S. Ct. at 2622 (noting "the fundamental principle of equal sovereignty" among the States) (quoting *Northwest Austin*, 557 U.S. at 203).

Rather, as many courts have held, the common law not to defame, like the common law duty not to deceive held not preempted in *Altria*, is not a *type of* law that § 1681t(b)(1)(F) expressly preempts; and so long as a state law duty *parallels* the requirements of the FCRA (as do, for example, the state statutes that § 1681t(b)(1)(F) excepts from its reach), state private rights of action do not "impose inconsistent or conflicting obligations on furnishers of information" but "instead allow for additional avenues through which consumers can ensure that furnishers are complying the obligations Congress specifically meant to impose." *Gorman*, 584 F.3d at 1172.

Multiple lines of this Court's preemption precedents point in this direction. In general, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria*, 555 U.S. at 77 (quoting *Bates*, 544 U.S. at 449). Neither the decision below, nor the circuit precedent it follows, cites *Altria* or *Bates.*

"Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 89 (1990) (quoting *California v. ARC Am. Corp*., 490 U.S. 93, 105 (1989)). Neither the decision below, nor the circuit precedent it follows, cites *English* or *ARC*.

"It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Dan's City*, 133 S. Ct. at 1781

(quoting *Silkwood*, 464 U.S. at 251. *Accord Medtronic*, 518 U.S. at 487 (plurality opinion). Neither the decision below, nor the circuit precedent it follows, cites *Dan's City, Medtronic*, or *Silkwood*.

"The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments." *Greenmoss,* 472 U.S. at 757-58 (citations and quotations omitted). Neither the decision below, nor the circuit precedent it follows, cites *Greenmoss*.

"Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Yet according to the decision below and the circuit precedent that it follows, § 1681t(b)(1)(F) effected a wholesale abrogation of consumer rights to long available forms of redress for defamation and made nonsense of Congress's concurrent amendment of § 1681h(e).

When this Court's precedents are applied to the whole of the relevant text of 15 U.S.C. § 1681t, it is evident that there exists a "plausible" reading of it that permits enforcement of at least *some* State private rights of action against persons who furnish false information to consumer reporting agencies, as the weight of persuasive authority holds. The decision below fails to cite or apply controlling preemption precedents of this Court, just as the *Macpherson* and *Purcell* decisions do not. This failure is an important additional reason for granting review.

## III. THE ISSUE IS IMPORTANT AND MERITS THIS COURT'S ATTENTION

The question presented by this petition affects the rights of millions of Americans. Every consumer in the United States who has every disputed a credit card bill, or who has confronted an attempt to collect a disputed debt, is at risk of the same type of extra-legal coercion and injury that petitioner alleges he suffered at respondent's hands in this case.

The importance of the question presented is reflected in the sheer numerosity of the decisions cited in Part I, *supra*. The cited decisions are but a small subset of existing cases in which § 1681t(b)(1)(F) has been asserted as a purported de-

fense to liability for defamation or other torts arising from the furnishing of false information to consumer reporting agencies, with highly variable results. The cited decisions in turn cite dozens of other decisions in which the question presented here has arisen and been answered differently by different lower courts. The cited decisions also show that the question presented here often arises in cases where the plaintiff is an individual and may lack the resources necessary to litigate the preemption issue past the trial court stage.

The importance of the question presented is also reflected in its appearance in scholarly commentary. *See* Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act: Federal Preemption, Injunctive Relief, and the Need to Return Remedies for Common Law Defamation to the States*, 14 Duq, Bus. L.J. 165 (2012) (criticizing existing precedent interpreting the FCRA as unduly limiting State authority to remedy defamation); Mark H. Tyson, *State Law Furnisher Liability Claims and the FCRA – The State of Confusion*, 63 Consumer Fin. L. Q. Rep. 19 (2009) (describing "confusion" in existing precedent interpreting the preemption provisions of the FCRA); Elizabeth C. De Armond, *Frothy Chaos: Modern Data Warehousing and Old Fashioned Defamation,* 41 Val. U. L. Rev. 1061 (2007) (criticizing existing precedent interpreting the FCRA as unduly limiting State authority to remedy defamation).

The importance of the question presented is also demonstrated by this Court's previous grants of *certiorari* in cases involving the FCRA. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *TRW Inc. v. Andrews*, 534 U.S. 19 (2001). In *Safeco* and *Andrews*, the Court granted *certiorari* merely to construe the scope of federal remedial provisions in a statute affecting millions of American consumers, namely, the FCRA. Here, in addition to a need to intepret "contorted and sometimes opaque language" (Pet. App. 17a), this case involves the Supremacy Clause of the Constitution and the basic authority of States to remedy personal injuries in a field States have long and traditionally occupied.

"Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). "A state should not lightly be required to abandon it, 'for, as Mr. Justice Stewart has re-

minded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.'" *Greenmoss*, 472 U.S. at 757-58 (citations omitted).

As the law currently stands in many (but not all) regions of the country, purported creditors in respondent's position are said to be literally above the law when it comes to furnishing false information to consumer reporting agencies – as this case dramatically illustrates. Respondent here is alleged to have used an explicit threat of defamation, followed by actual defamation, as extra-legal means of seeking to collect a doubtful and disputed debt that purportedly was owed to respondent itself. Respondent is alleged to have done these things "willfully, maliciously, in bad faith, and with specific intent to coerce and pressure" the petitioner. Pet. App. 39a-40a ¶ 37.

If an individual in petitioner's position has no remedy for injuries sustained as a result of the type of illegal and extortionate conduct alleged here, self-styled creditors like like this respondent will have no reason to comply with existing laws prohibiting such conduct, including the FCRA itself.

Only this Court can bring finality and uniformity in deciding on the proper application of the FCRA to the existence of basic individual and consumer rights. The split decisions demonstrate that there is hardly a nuanced or material variation of argument still to be adjudicated that could meaningfully inform this Court's consideration.

## IV. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The procedural posture of this case makes it an ideal vehicle for resolving the question presented. Petitioner's defamation claim against respondent was dismissed for alleged failure to state a claim on which relief can be granted. There is, thus, no disputed issue of fact, but only the pure legal question whether the facts pleaded on the face of petititoner's complaint (Pet. App. 30a-41a), taken as true, state a claim that the FCRA permits to be enforced by a New Jersey state court.

The decision below rests entirely on the defense of federal preemption that respondent interposed. No suggestion is made, or could be made, that petitioner's defamation claim against respondent was in any way deficient as a matter of New Jersey state law.

Petitioner seeks declaratory and injunctive relief to clear his name and monetary relief for past completed harms. There is no prospect of this case becoming moot based on intervening or subsequent developments.

## CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — ORDER DENYING PETITION FOR CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY, FILED JUNE 7, 2013**

SUPREME COURT OF NEW JERSEY

C-807 September Term 2012

072131

JAMES W. DABNEY,

*Plaintiff-Petitioner*,

v.

TOTAL RELOCATION SERVICES, LLC,

*Defendant*,

and

T.D. BANK, N.A.,

*Defendant-Respondent*.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-003794-11 having been submitted to this Court, and the Court having considered the same;

*Appendix A*

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 4th day of June, 2013.

/s/_____

CLERK OF THE SUPREME COURT

**APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED JANUARY 8, 2013**

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

DOCKET NO. A-3794-11T1

JAMES W. DABNEY,

*Plaintiff-Appellant,*

v.

TOTAL RELOCATION SERVICES, LLC,

*Defendant,*

and

T.D. BANK, N.A.,

*Defendant-Respondent.*

Argued December 18, 2012 - Decided January 8, 2013

Before Judges Yannotti, Harris, and Hoffman.

On appeal from the Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-4749-10.

*Appendix B*

PER CURIAM

Proceeding pro se, plaintiff James W. Dabney appeals from the December 3, 2010 order that dismissed, pursuant to Rule 4:6-2(e), his defamation cause of action against defendant T.D. Bank, N.A. on the ground that the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. §§1681 to 1681x, entirely preempts his intentional tort claim. We affirm.

I.

Because the defamation action was dismissed for failure to state a claim upon which relief can be granted, we "review [Dabney's] factual allegations indulgently." *Cornett v. Johnson & Johnson*, 211 N.J. 362, 388 (2012). "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989), and our analysis is conducted de novo, following the same standard employed by the motion court. *Scheidt v. DRS Techs., Inc.*, 424 N.J. Super. 188, 193 (App. Div. 2012).

A.

These are the relevant facts, gleaned from Dabney's complaint. In November 2008, Dabney hired co-defendant Total Relocation Services, LLC (TRS) to move furniture and household goods from one apartment (on 87th Street) to another (on Barrow Street) in New York City, and to his residence in Ridgewood, New Jersey. Dabney alleged

that during the move, TRS damaged the "then-new pine floor" of the Barrow Street apartment.

Notwithstanding the damage, Dabney paid for the moving services with his credit card issued by Commerce Bank.[1] He provided his credit card information to TRS, which completed the transaction. Later, after receiving a written estimate of $1500 to repair the damaged floor, Dabney notified Commerce Bank that he was disputing TRS's bill in that amount.

After an exchange of email communications with TRS, it was agreed that TRS would absorb the $1500 for the floor damage. In February 2009, Commerce Bank credited Dabney's credit card account in the amount of $1500. Thereafter, in April 2009, TRS's president asked Dabney to sign a general release, but Dabney would not agree to the proposed language of the instrument, rendering the settlement incomplete.

On June 30, 2009, TRS prevailed upon Commerce Bank to debit Dabney's credit card account for the $1500 and transfer that amount to "a TRS-controlled account." Commerce Bank advised Dabney of its action, informing him that the previous credit to his account had been removed, and instead a debit of $1500 would be applied. Dabney challenged the debit and did not pay the bank the contested $1500.

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1. Dabney asserted that his credit card relationship with Commerce Bank began in 2002, and was memorialized in a written credit card agreement, which was not appended to the complaint.

While these events were happening, a separate series of events occurred. In April 2009, TD Bank,[2] apparently as successor to Commerce Bank, sent Dabney a letter informing him that the terms and conditions of the 2002 credit card agreement would be "radically changed." The letter provided a mechanism for Dabney to "opt-out of the changes," which would close the account, but "the terms of [his] existing agreement will continue to apply to the outstanding balance." On April 21, 2009, Dabney sent a letter to TD Bank informing it that he did not accept the new terms, but requested that the bank "reconsider and withdraw the threat," otherwise he would be "forced to review [his] entire relationship with the bank."

In May 2009, the credit card arrangement that had existed between Commerce Bank and Dabney was extinguished. According to the complaint, "subsequent to May 9, 2009, Commerce Bank d/b/a 'TD Bank' reported to credit rating agencies that [Dabney's] COMMERCE BANK credit card accounts were 'closed by customer.'"

In July 2009, Dabney received a demand from defendant TD Bank, N.A. for the payment of $1500, which

2. Dabney makes a distinction between defendant TD Bank, N.A. and an entity — perhaps only a trade name — known as "TD Bank." Dabney's complaint alleges that deceptive practices were at the root of the similarity of names, but they are not directly relevant to the issues in this appeal. We further note that Dabney's appellate briefs repeatedly refer to TD Bank, N.A. as "TD Bank Delaware." We cannot account for this nomenclature notwithstanding Dabney's attempt to explain found in a footnote in his reply brief.

was the result of the "transaction dated June 30, 2009, in which [TD Bank, N.A.] had purportedly transferred monies to a third-party on the basis of some purported instrument, draft, or document that referred to [the] number of [Dabney's] former COMMERCE BANK credit card account." Without saying so directly, Dabney's allegation related to the same $1500 that was at stake in his dispute with TRS.

Dabney denied ever having a credit card account with TD Bank, N.A. He claimed that his Commerce Bank credit card arrangement had been terminated in May 2009, at least one month before TD Bank, N.A. asserted that monies were due it. He alleged that TD Bank, N.A. "began making reports to credit rating agencies that [Dabney] purportedly was in default under some extant credit agreement between [Dabney] and [TD Bank, N.A.] (the Default Reports)." He averred further that "[t]he Default Reports were false, misleading, and defamatory of [Dabney]."

B.

On May 7, 2010, Dabney filed a two-count complaint against TRS for negligence, breach of contract, and unjust enrichment, and against TD Bank, N.A. for defamation. On October 14, 2010, TD Bank, N.A. moved to dismiss the complaint, arguing that Dabney's "common law claim . . . is preempted by federal law." After hearing oral argument on December 3, 2010, the motion judge issued a six-page written opinion agreeing that the FCRA "eliminated all state causes of action against furnishers

of information and [Dabney's] claims against [TD Bank, N.A.] for defamation arise directly from [TD Bank, N.A.'s] furnishing information to credit reporting agencies." The motion judge left Dabney's claims against TRS untouched.

On January 3, 2011, Dabney filed a motion for leave to appeal, which was denied in February 2011.

The case then proceeded to a bench trial against TRS. On March 8, 2012, the trial court entered a final judgment finding TRS liable to Dabney for $1500 in compensatory damages. This appeal followed.

II.

A.

A court may not dismiss a complaint for failure to state a claim under Rule 4:6-2(e) unless the pleadings are lacking even a suggestion of a cause of action. *NAACP of Camden Cnty. East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 443 (App. Div. 2011); *see also Printing Mart-Morristown, supra*, 116 N.J. at 746 ("[T]he test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts.").

A prima facie case of defamation requires a plaintiff to establish, in addition to damages, the following three essential facts: "(1) that defendant[] made a false and defamatory statement concerning [plaintiff]; (2) that the statement was communicated to another person (and not

privileged); and (3) that defendant[] acted negligently or with actual malice." *G.D. v. Kenny*, 205 N.J. 275, 292-93 (2011). "A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person's reputation by lowering the community's estimation of him or by deterring others from wanting to associate or deal with him." *Id.* at 293 (citations omitted).

B.

A fundamental principle of the Constitution is that Congress has the power to preempt state law. *See Arizona v. United States*, __ U.S. __, __, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351, 368 (2012). The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because Dabney's defamation cause of action arose in the context of T.D. Bank, N.A.'s furnishing information to consumer reporting agencies, preemption jurisprudence is implicated, which requires an examination of the purpose of the statutory scheme, "'the ultimate touch-stone' in every pre[]emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700, 716 (1996) (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 223, 11 L. Ed. 2d 179, 184 (1963)).

*Appendix B*

C.

In 1970, Congress enacted the FCRA[3] with several purposes, including that of protecting the banking system from inaccuracy, promoting the equitable use of consumer credit information, and ensuring fairness and accuracy within the credit reporting system. *See Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 900 (10th Cir. 2012). Together with the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1692 to 1692p, "the FCRA is the source of most consumer credit rights in the United States." *Ibid.* Among the means to achieve these aims, the FCRA imposes certain duties on the sources — such as TD Bank, N.A.[4] — that provide credit information to consumer reporting agencies. *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009).

The FCRA created "esoteric strictures" for the collection, communication, and use of consumer information for business purposes. *Burrell v. DFS Servs., LLC*, 753 F. Supp. 2d 438, 440 (D.N.J. 2010). Through the FCRA, Congress elected to establish a system of "uniform requirements regulating the use, collection and sharing of consumer credit information." *Roybal v. Equifax*, 405 F.

3. One court has described the FCRA as "not merely a 'complex statutory scheme,' but one that has been said to contain 'almost incomprehensibly complex provisions.'" *Narog v. Certegy Check Servs., Inc.*, 759 F. Supp. 2d 1189, 1194 (N.D. Cal. 2011) (citation omitted).

4. Under the FCRA, TD Bank N.A. acted as a furnisher in this case. That is, it "furnishe[d] information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report." 12 C.F.R. §41.41(c).

Supp. 2d 1177, 1181 (E.D. Cal. 2005). In order to maintain this homogeny, Congress included express preemption provisions in the FCRA relating to various aspects of consumer credit reporting. Those pertinent to this appeal are found in 15 U.S.C.A. §§1681t(b)(1)(F) and 1681h(e).

One area Congress chose to preempt is the regulation of furnishers of credit information. This preemption, however, did not exist until 1996. Before that, § 1681h(e)[5] controlled:

> Except as provided in sections 616 and 617 [15 U.S.C.A. §§ 1681n and 1681o], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [15 U.S.C.A. §§ 1681g, 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report[,] except as to false information furnished with malice or willful intent to injure such consumer.
>
> [15 U.S.C.A. § 1681h(e).]

5. We are aware that § 1681h(e) — originally enacted in 1970 — was amended in 1996. We set forth its current version because that is the language we must apply in this appeal.

*Appendix B*

In 1996, Congress amended the FCRA with the Consumer Credit Reporting Reform Act (CCRRA). *Ross v. Federal Deposit Ins. Corp.*, 625 F.3d 808, 813 (4th Cir. 2010), *cert. denied*, __ U.S. __, 131 S. Ct. 2991, 180 L. Ed. 2d 824 (2011). Section 1681t(b)(1)(F) was a part of the amendment, and provides:

> No requirement or prohibition may be imposed under the laws of any State . . .
>
> > (1) with respect to any subject matter regulated under
> >
> > > . . . .
> > >
> > > (F) section 623 [15 U.S.C.A. §1681s-2], relating to the responsibilities of persons who furnish information to consumer reporting agencies . . . .

[15 U.S.C.A. § 1681t(b)(1)(F).]

At the same time, Congress added § 1681s-2 to the FCRA, which outlines the obligations of furnishers of credit information to consumer reporting agencies. *Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011). Section 1681s-2(a) prohibits furnishers from providing information known or believed to be inaccurate, and it includes the duty to correct any errors in reporting and update the information furnished to credit reporting agencies. Section 1681s-2(b) outlines furnishers' duties

to investigate the completeness or accuracy of any information they provide to credit reporting agencies, but only "[a]fter receiving notice pursuant to section 611(a)(2) [15 U.S.C.A. §1681i(a)(2)] of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency."[6] 15 U.S.C.A. §1681s-2(b)(1).

Pursuant to §§ 1681s-2(c) and 1681s-2(d), the enforcement of § 1681s-2(a) violations is limited exclusively to certain state and federal officials. *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 11 (D. Mass. 2004). It can be inferred from the structure of the statute that Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished. Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies.

Dabney's complaint plainly implicates § 1681s-2(a).[7] TD Bank, N.A. is accused of "making reports to credit

---

6. A private cause of action against a furnisher of information does not arise until a consumer reporting agency provides proper notice of a dispute. *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 615-16 (6th Cir. 2012). Directly contacting the furnisher of credit information does not actuate the furnisher's obligation to investigate a complaint. *See Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002).

7. Because Dabney never asserted that he lodged a grievance or commenced a dispute with a consumer reporting agency about the accuracy of TD Bank N.A.'s reports, section 1681s-2(b) is inapplicable.

rating agencies that [Dabney] purportedly was in default under some extant credit agreement." Dabney describes such reporting as "false, misleading, and defamatory." Although he does not use the statutory term "consumer reporting agency," Dabney's reference to a "credit rating agency" is its equivalent.[8] *See Burrell, supra*, 753 F. Supp. 2d at 441 n.2 ("[T]he function of such entities is more accurately described by the common term, 'credit rating agencies'").

On its face, § 1681t(b)(1)(F) precludes all state statutory or common law causes of action that would impose any "requirement or prohibition" on the furnishers of credit. Because Dabney's defamation claim is based on alleged injury arising purely from the reporting of credit information by a furnisher of credit, it is preempted.

However, that still leaves the language of § 1681h(e) intact and unaddressed. Notwithstanding the broad language of § 1681t(b)(1)(F), Dabney maintains that § 1681h(e) amounts to an explicit authorization of certain state common law tort claims that are based on "false information furnished with malice or willful intent to injure." Numerous courts have analyzed § 1681h(e)

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8. A consumer reporting agency is defined as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part 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, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C.A. § 1681a(f).

alongside § 1681t(b)(1)(F), only to recognize the grim difficulties in reconciling their language. *See, e.g., Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 427-28 (S.D.N.Y. 2010) (observing that "[d]istrict courts have long struggled to reconcile an apparent conflict between the two preemption provisions"). One court described the decisional law that emerged as "a decade of confusion." *Islam v. Option One Mortg. Corp.*, 432 F. Supp. 2d 181, 190 (D. Mass. 2006). Lately, however, a sufficient crystallization of consensus has emerged in several federal courts of appeal that squarely point in the direction taken by the Law Division: § 1681t(b)(1)(F) trumps § 1681h(e).[9]

The Second Circuit has expressly solved FCRA's preemption puzzle by interpreting § 1681t(b)(1)(F) as creating a broad preemption, barring all state law claims, regardless of whether or not the state law claims are based on malice or willfulness. *See Macpherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 47-48 (2d Cir. 2011), *cert. denied*, __ U.S. __, 132 S. Ct. 2113, 182 L. Ed. 2d 870 (2012). The court of appeals reasoned as follows:

> Section 1681h(e) preempts some state claims that could arise out of reports to credit agencies; § 1681t(b)(1)(F) simply preempts more of these claims. Put differently, the operative language in § 1681h(e) provides only that the provision

9. Although the Third Circuit has yet to weigh in on the issue, one district judge recently concluded that a plaintiff's state law claims for intentional infliction of emotional distress, defamation, and the tort of negligence were preempted by the FCRA. *Burrell, supra*, 753 F. Supp. 2d at 451.

> does not preempt a certain narrow class of state law claims; it does not prevent the later-enacted § 1681t(b)(1)(F) from accomplishing a more broadly-sweeping preemption.
>
> [*Ibid.* (internal quotations omitted).]

This approach is consistent with Congressional intent — the maintenance of a uniform set of duties across all furnishers of credit information — as well as being in alignment with the Seventh Circuit's views:

> Section 1681h(e) does not create a right to recover for willfully false reports; it just says that a particular paragraph does not preempt claims of that stripe. Section 1681h(e) was enacted in 1970. Twenty-six years later, in 1996, Congress added § 1681t(b)(1)(F) to the United States Code. The same legislation also added § 1681s-2. The extra federal remedy in § 1681s-2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges. Reading the earlier statute, § 1681h(e), to defeat the later enacted system in § 1681s-2 and § 1681t(b)(1)(F), would contradict fundamental norms of statutory interpretation.
>
> [*Purcell, supra*, 659 F.3d at 625.]

Having canvassed the vast array of judicial opinions dealing with FCRA preemption, we conclude that the straight forward total preemption approach of these courts of appeal is most faithful to Congress's purpose in having a national system for credit reporting. We eschew other methodologies that require unnecessary and unwarranted legalistic gymnastics to parse the contorted and sometimes opaque language of the FCRA. To engage in an endless semantic misadventure just brings more complexity to an already arcane statute. We do not wish to contribute to the "disarray" that litters the decisional landscape. *See Gorman*, 584 F.3d at 1166. We elect to follow *Macpherson* and *Purcell* not because they are easy, but because they are correct. *See Ilodianya v. Capital One Bank USA NA*, 853 F. Supp. 2d 772, 775 (E.D. Ark. 2012) (declaring that "*Purcell* and *Macpherson* are well reasoned and persuasive").

We also reject Dabney's argument that Congress made a preemption distinction between state statutory and common law claims. *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106-07 (2d Cir. 2009) (stating that "[p]laintiff's distinction between statutory and common-law claims under this section of the FCRA's express preemption provision is . . . unpersuasive" and holding that the word "laws" in § 1681t(b) encompasses state statutory and common law claims). "Common law claims, by their nature, refine the contours of liability over time. And, with each state ruling on its own common law claims, national furnishers would likely be subject to inconsistent obligations in the various states." *Cosmas v. Am. Express Centurion Bank*, 757 F. Supp. 2d 489,

501 (D.N.J. 2010). If such a crazy-quilt came to be, the congressional goal of ensuring consistent, accurate collection and dissemination of credit information would be compromised. *Ibid.*

In like vein, we find unpersuasive the argument that New Jersey can provide a defamation remedy for conduct that fails to conform to § 1681t(b)(1)(F)'s "requirement." "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 112 S. Ct. 2608, 2620, 120 L. Ed. 2d 407, 426 (1992) (plurality opinion); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24, 128 S. Ct. 999, 1007-08, 169 L. Ed. 2d 892, 902-03 (2008).

In summary, the federal credit reporting system implemented by Congress requires that Dabney's state intentional tort claim must yield to the FCRA under the Supremacy Clause. Therefore, his common-law claim of defamation was properly dismissed. It is not for this court to remake the balance struck by Congress, or to introduce limitations on Congressional policy where no limitation has been written by the national legislature.

Affirmed.

## APPENDIX C — FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, LAW DIVISION, FILED MARCH 8, 2012

FINAL JUDGMENT, FILED MARCH 8, 2012

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SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY: LAW DIVISION

DOCKET NO. L-4749-10

Civil Action

JAMES W. DABNEY,

*Plaintiff,*

v.

TOTAL RELOCATION SERVICES LLC
and TD BANK, N.A.,

*Defendants.*

*Appendix C*

## FINAL JUDGMENT

**THIS MATTER** having come on for trial before the Court, sitting without a jury, on plaintiff's claim against defendant Total Relocation Services LLC; and the Court having heard live testimony and received exhibits that the parties presented on February 21 and 22, 2012; and the Court having found that Total Relocation Services LLC caused damage to the floor of the ground floor apartment at real property commonly known as 48 Barrow Street, New York, New York 10014 (the "Damaged Premises"); and the Court having further found that Total Relocation Services LLC is liable to pay the plaintiff $1,500.00 in compensatory damages; and it appearing that plaintiff's Second Claim for Relief against defendant TD Bank, N.A. was dismissed by prior Order of the Court dated December 3, 2010, and for the reasons more fully set forth by the Court on the record,

IT IS on this 8 day of March 2012

ORDERED as follows:

1. Final Judgment is hereby entered in favor of plaintiff James W. Dabney and against defendant Total Relocation Services LLC.

2. Defendant Total Relocation Services LLC is liable to plaintiff James W. Dabney for damages in the amount of $1,500.00.

3. Plaintiff James W. Dabney shall indemnify & hold harmless defendant Total Relocation Services LLC in the event that the owner of the Damaged Premises or any interested party makes claim against Total Relocation Services LLC for the floor damage at issue in this case.

/s/
HON. JOHN J. LANGAN, JR., J.S.C.

## APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY, DATED DECEMBER 3, 2010

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-4749-10

Civil Action

JAMES W. DABNEY,

*Plaintiff,*

vs.

TOTAL RELOCATION SERVICES LLC
and T.D. BANK N.A.,

*Defendants.*

### OPINION

**THIS MATTER** comes before the Court pursuant to a Motion to Dismiss, filed by the Defendant, T.D. Bank, N.A., pursuant to R. 4:6-2(e). Oral argument was heard before this Court on December 3, 2010.

*Appendix D*

## *FACTUAL BACKGROUND*

This matter arises out Defendant's alleged defamation of Plaintiff, James W. Dabney, ("Dabney") regarding a delinquent credit card payment. Dabney and Commerce Bank entered into a credit card agreement in approximately 2002 ("2002 Agreement"). Plaintiff's Complaint alleges that he contracted with Total Relocation Services ("TRS") to provide moving services. Plaintiff asserts that during the course of the move, TRS negligently rolled a piano across a new wood floor, damaging the floor. Plaintiff further asserts that TRS demanded additional payment for "storage" or else accept delivery of the goods at approximately 3:00 a.m. due to the length of time it required to move the items. Plaintiff verbally objected to the charge, but provided TRS with a Commerce Bank credit card number over the phone. Plaintiff received and provided TRS with a written estimate of $1,500 for repairing the damage done to the floor. At some point in 2008, Commerce Bank was merged into TD Bank and thereafter operated under the name "TD Bank." Plaintiff also notified Commerce Bank, now doing business as TD Bank, that the TRS moving charges on his Commerce Bank credit card were disputed to the extent of $1,500.

On or about December 24, 2008, TRS purportedly notified Plaintiff that it would pay the $1,500 estimate for the floor repairs. Plaintiff then forwarded the letter to Commerce Bank d/b/a TD Bank. In or about February 2009, Commerce Bank d/b/a/ TD Bank credited Plaintiff's account and informed Plaintiff that his billing dispute with TRS had been resolved in Plaintiff's favor. On or

about April 16, 2009, Plaintiff received a letter from TRS's President, Christopher Marzo, indicating that he wanted a signed release as TRS agreed to pay for the damage to the floor, or else TRS would ask the credit card company for its assistance. Plaintiff declined to sign the release because he claimed it encompassed subject matters far beyond the damaged floor. Plaintiff alleges that a document was presented to Defendant by TRS that purported to represent an undertaking by Plaintiff to pay Commerce Bank $1,500 if Commerce Bank transferred that sum (i.e., $1,500) to an account controlled by TRS. On or about June 30, 2009, Plaintiff claims Defendant made said transfer ("June 2009 transfer").

In mid-April 2009, Plaintiff received a letter from Defendant stating that Plaintiff would cease to receive services under the 2002 Agreement he had with Commerce Bank unless he agreed to new terms. Plaintiff then sent correspondence rejecting said terms. Plaintiff asserts that the 2002 Agreement was unilaterally terminated by Commerce Bank d/b/a TD Bank on or about May 9, 2009 resulting in the closing of his credit card account. Subsequent to May 9, 2009, Commerce Bank d/b/a TD Bank reported to credit rating agencies that Plaintiff's Commerce Bank credit card account was closed by the consumer.[1]

In or about July 2009, Plaintiff received correspondence from Defendant demanding payment of $1,500 of the June

1. Plaintiff had a second credit card account with Commerce Bank that was also closed at that time, but is not subject to this dispute.

2009 transfer. Plaintiff asserts that: (1) he never had any direct contractual, account, or other relationship with Defendant; (2) Commerce Bank d/b/a TD Bank had actual notice and knowledge that the 2002 Agreement was terminated; and (3) Plaintiff canceled and revoked any authority to make payments on instruments, drafts, or documents that purported to be drawn on the Commerce Bank credit accounts. Plaintiff denied and disputed the June 2009 Transfer as erroneous and unauthorized. Thereafter, Plaintiff claims that Defendant falsely reported to one or more credit reporting rating agencies that Plaintiff purportedly was a credit card customer of Defendant. Plaintiff asserts that Defendant began making false, misleading, and defamatory reports to credit rating agencies, not later than October 2009, that Plaintiff was in default on the $1,500 credit card outstanding obligation. Plaintiff further claims that Defendant threatened him and committed willful defamation, specifically claiming that agents of Defendant told Plaintiff that TD Bank would take steps to damage Mr. Dabnet's credit if he did not pay the $1,500. Plaintiff filed a Complaint against TRS and TD Bank, N.A. on or about May 6, 2010 asserting a claim of defamation by TD Bank.

This instant Motion to Dismiss was filed by Defendant on or about November 4, 2010. Defendant argues that Plaintiff's claim for relief against Defendant for defamation is preempted by the Federal Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.* Conversely, Plaintiff argues that the FCRA is not applicable to the alleged conduct here, but even assuming the FCRA was applicable, there is no preemption due to 15 U.S.C. §1681h(e).

*Appendix D*

***MOTION TO DISMISS STANDARD***

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. N.J. R. 4:6-2(e); *see Pressler*, *Current N.J. Court Rules*, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989)). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. *See NCP Litigation Trust v. KPMG, LLP,* 187 N.J. 353, 365 (2006); *Banco Popular No. America v. Gandi*, 184 N.J. 161, 165-66 (2005); *Fazilat v. Feldstein,* 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." *Printing Mart,* 116 N.J. at 746. However, when the complaint states no basis for relief, dismissal of the complaint is appropriate. *Energy Receive v. Dept. of Env. Protection*, 320 N.J. Super. 59 (App. Div. 1999).

***DECISION***

Congress provided that the purpose of the FCRA was to

> require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information

> in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.

15 U.S.C. §1681. The Act also provides general exceptions, specifically that "[n]o requirement or prohibition may be imposed under the laws of any State—with respect to any subject matter regulated under—section 623 [15 U.S.C. § 1681s-2] relating to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. §1681t(b)(1)(F). This Court has determined that this section is applicable to the instant motion, as Defendant furnishes information to consumer reporting agencies, and therefore any state law cause of action, including defamation, is expressly preempted by the language of 15 U.S.C. §1681t(b)(1)(F).

Plaintiff argues that not only does the FCRA not preempt all state common law defamation claims, but expressly provides that state common law defamation actions may supplement the consumer-protective provisions of the FCRA in certain cases, including Plaintiff's case, Section 610(e) of the FCRA provides

> Except as provided in sections 616 and 617 [15 USCS §§ 1681n and 1681o], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person

> who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [15 USCS § 1681g, 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report[,] *except as to false information furnished with malice or willful intent to injure such consumer.*

15 U.S.C. §1681h(e). (emphasis added):

This Court has determined that 15 U.S.C. §1681h(e) does not provide an exception for Plaintiff to maintain a state law cause of action of defamation against Defendant. The language of 15 U.S.C. §1681t(b)(1)(F) is clear and unambiguous in eliminating all state causes of action against furnishers of information and Plaintiff's claims against Defendant for defamation arise directly from Defendant furnishing information to consumer reporting agencies. This Court finds that TD Bank, as the successor credit card issuer, was merely reporting that the $1,500 disputed obligation claimed by TRS against Dabney was unpaid. Such conduct is therefore preempted by 15 U.S.C. §1681t(b)(1)(F). *See Burrell v. DFS Services, LLC*, No. 10-2706, 2010 WL 4926704 at *12 (D.N.J. Dec. 7, 2010) (stating that the language of 15 U.S.C. §1681t(b)(1)(F) "leaves no room for state law claims against furnishers of information...regardless of whether those claims are couched in common law or state statutory obligations.")

For the aforementioned reasons, this Court holds that Defendant's Motion to Dismiss is hereby **GRANTED.**

Nothing in this opinion shall preclude the continuation of the direct cause of action against Defendant TRS.

/s/_____
HON. ROBERT C. WILSON

## APPENDIX E — COMPLAINT OF THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, LAW DIVISION, FILED MAY 7, 2010

COMPLAINT, FILED MAY 7, 2010

Complaint, 5/7/2010

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SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY: LAW DIVISION

DOCKET NO. L-4749-10

Civil Action

JAMES W. DABNEY,

*Plaintiff,*

v.

TOTAL RELOCATION SERVICES LLC
and TD BANK N.A.,

*Defendants.*

*Appendix E*

## COMPLAINT

Plaintiff James Wilson Dabney, by his attorneys, for his Complaint in this action alleges:

### FIRST CLAIM FOR RELIEF

1. Plaintiff is an individual resident of the State of New Jersey, residing at 376 Knollwood Road, Ridgewood, New Jersey.

2. In November 2008, plaintiff and defendant Total Relocation Services LLC ("TRS") entered into a contract under which TRS undertook (i) to pack up and move household goods out of an apartment located at 247 West 87th Street, New York, New York (the "87th Street Apartment"), (ii) to deliver certain of the goods to an apartment located at 48 Barrow Street, New York, New York (the "Barrow Street Apartment"); and (iii) to deliver the remainder of the goods to plaintiff's residence at 376 Knollwood Road, Ridgewood, New Jersey. TRS led plaintiff to believe that it could and would complete this moving work in a single day.

3. At approximately 8:00 a.m. on or about November 20, 2008, TRS arrived at the 87th Street Apartment with a crew of just four men. TRS did not complete the pack up and removal of the household goods at 87th Street Apartment until approximately ten hours later, at about 6:00 p.m. on November 20.

4. During the ensuing delivery of goods at the Barrow Street Apartment, TRS claimed not to have equipment that supposedly was needed to move an upright piano from the sidewalk into the Barrow Street Apartment; however, the TRS personnel said that if the plaintiff substantially "tipped" them, they would carry the piano in through one of the apartment windows despite the claimed lack of equipment.

5. Under threat of non-delivery and substantial additional delay, plaintiff went to an ATM machine and withdrew cash with which to pay "tips" to the TRS personnel. Plaintiff paid at least $400 in "tips" to the TRS crew, following which the TRS crew carried the subject upright piano from the sidewalk through a window into the Barrow Street Apartment.

6. Once the piano was inside the Barrow Street Apartment, TRS personnel did not place the piano on a dolly for movement to its final location. Instead, TRS negligently rolled the piano over the then-new pine floor of the apartment. The piano wheels left deep ruts in the apartment living room floor, which ruts could not be repaired except by taking up and replacing the affected floorboards and refinishing the floor.

7. TRS did not complete delivery of goods to the Barrow Street Apartment until very late in the evening on November 20. At that point TRS told plaintiff that he would have to pay "storage" charges to TRS, over and above the agreed moving price, or else accept delivery of goods at the 376 Knollwood Road location at approximately 3:00 a.m. on November 21, 2008.

8. Plaintiff voiced objection to TRS's demand for a "storage" charge in the circumstances but, very late in the evening on November 20, plaintiff reluctantly provided TRS with a COMMERCE BANK credit card number over the telephone, which TRS subsequently used to complete its "sale" of so-called "storage" services to plaintiff and, on information and belief, to obtain money from a third-party. TRS subsequently delivered the remaining goods to 376 Knollwood Road on the following day, November 21.

9. Subsequent to November 21, 2008, plaintiff received and provided TRS with a written estimate of $1,500 for repairing the damage to the floor of the Barrow Street Apartment that TRS had caused. Plaintiff timely notified Commerce Bank, a New Jersey-based bank that was then doing business as "TD Bank", that TRS's moving charges, which also had been billed to a COMMERCE BANK credit card account, were disputed to the extent of $1500.00.

10. On or about December 24, 2008, TRS's President, one Christopher Marzo, sent an e-mail communication to plaintiff that stated in part, "After my inspection, I agree to pay your 1500.00 estimate to the floor." Plaintiff forwarded copies of this communication and related correspondence to Commerce Bank d/b/a TD Bank. Subsequently, in or about February 2009, Commerce Bank d/b/a TD Bank credited plaintiff's COMMERCE BANK credit card account and informed plaintiff that his billing dispute with TRS had been resolved in plaintiff's favor.

11. On or about April 16, 2009, plaintiff received an email communication from TRS's President, Mr. Marzo, which stated in part: "As a professional I agreed to pay for the damage to the floor. I would like to have my signed release sent to my office. Otherwise, I will ask the credit card company to help me settle this moving forward." The "release" that TRS requested would have encompassed subject matters far beyond the damaged floor. Plaintiff declined to provide TRS with the requested "release."

12. On information and belief, subsequent to May 9, 2009, TRS caused to be presented to defendant TD Bank, N.A. ("TDNA") an instrument, draft, or document that purported to represent an undertaking by plaintiff to pay Commerce Bank $1,500 if Commerce Bank transferred that sum to an account controlled by TRS, and that purported to instruct Commerce Bank to transfer monies to an account controlled by TRS.

13. On information and belief, at the time of the time of the events referred to in paragraph 12, TRS knew that plaintiff was not indebted to TRS for $1,500 and TRS further knew that as of not later than December 24, 2008, plaintiff had revoked any authority of Commerce Bank d/b/a "TD Bank" to pay at least the $1,500 disputed portion of TRS's moving charges.

14. On information and belief, on or about June 30, 2009, TRS induced TDNA to transfer $1500 (net of interchange fees) to a TRS-controlled account on the basis of a stale, false, and spurious document that purported to evidence an undertaking by plaintiff to pay $1,500 to

Commerce Bank if the latter paid this amount (net of interchange fees) to TRS.

15. TRS is in possession of monies that, in law and in equity, rightly belong to the plaintiff.

16. Defendant TRS is liable to plaintiff for negligence, breach of contract, and unjust enrichment.

**SECOND CLAIM FOR RELIEF**

17. Paragraphs 1-16, above, are re-alleged and incorporated by reference as if set forth in full.

18. For approximately seven (7) years prior to May 2009, plaintiff and a New Jersey-based entity formerly known as Commerce Bank were parties to a written credit card agreement (the "2002 Credit Agreement").

19. On information and belief, defendant TDNA is a federally-charted banking corporation that maintains its principal place of business in Cherry Hill, New Jersey. On information and belief, defendant TDNA uses the TD BANK name and trade dress under license from The Toronto-Dominion Bank ("TorontoDominion").

20. In or about mid-April 2009, plaintiff received a letter written on "TD BANK" letterhead (the "April 2009 Letter") in which an unidentified corporate entity (believed to be Commerce Bank, then doing business as "TD Bank") informed plaintiff that he would cease to receive services under the 2002 Credit Agreement unless

plaintiff agreed to accept radically changed contract terms. A copy of the April 2009 Letter is annexed hereto as Exhibit 1.

21. On information and belief, the April 2009 Letter was written in such a way as to conceal a plan and intent to terminate plaintiff's existing relationship with Commerce Bank, then doing business as "TD Bank", and to attempt to deceive plaintiff into establishing an entirely new contract with defendant TDNA and into stipulating, falsely, that TDNA purportedly was "located" in Delaware and as such purportedly was privileged to charge "interest" at rates that no New Jersey-based banking institution could legally charge.

22. At the time plaintiff received the April 2009 Letter, Commerce Bank d/b/a "TD Bank" stood ready to extend plaintiff approximately $40,000 in credit under two COMMERCE BANK credit card accounts, which were then fully current and in good standing. The sender of April 2009 Letter (believed to be Commerce Bank d/b/a "TD Bank") indicated that plaintiff would be offered the same credit limits if he accepted the new terms that were proposed in the April 2009 Letter.

23. By letter dated April 21, 2009, plaintiff informed the sender of the April 2009 Letter (believed to be Commerce Bank d/b/a "TD Bank") that plaintiff did not accept the terms that were proposed in the April 2009 Letter. A copy of plaintiff's letter dated April 21, 2009, is annexed hereto as Exhibit 2.

24. On or about May 9, 2009, the 2002 Credit Agreement was unilaterally terminated by Commerce Bank d/b/a "TD Bank". On information and belief, Commerce Bank d/b/a "TD Bank" unilaterally terminated the 2002 Credit Agreement because Commerce Bank d/b/a "TD Bank", an entity whose New Jersey location could not be effectively concealed, was exiting from the credit card business. On information and belief, subsequent to May 9, 2009, Commerce Bank d/b/a "TD Bank" reported to credit rating agencies that plaintiff's COMMERCE BANK credit card accounts were "closed by consumer."

25. In or about July 2009, plaintiff received a letter from defendant TDNA that demanded payment of $1,500.00 (the "July 2009 Demand") on account of a transaction dated June 30, 2009, in which TDNA had purportedly transferred monies to a third-party on the basis of some purported instrument, draft, or document that referred to number of plaintiff's former COMMERCE BANK credit card account.

26. On information and belief, plaintiff has never had any contractual, account, or other relationship with defendant TDNA. On information and belief, defendant TDNA is an assignee of assets that were formerly owned by Commerce Bank d/b/a "TD Bank" and a licensee of the service mark TD BANK. On information and belief, defendant TDNA's corporate name is designed and intended to mislead consumers into believing, falsely, that TDNA is the same institution as whatever legal entity provides banking services through retail branches in New Jersey.

27. As of and prior to June 30, 2009, TDNA and its predecessor, Commerce Bank d/b/a TD Bank, had actual notice and knowledge that the 2002 Credit Agreement was terminated, and that plaintiff had cancelled and revoked any authority to make payments on instruments, drafts, or documents that purported to be drawn on the COMMERCE BANK credit accounts that were terminated by not later than May 9, 2009.

28. As of and prior to July 31, 2009, TDNA and its predecessor, Commerce Bank d/b/a TD Bank, had actual notice and knowledge that plaintiff denied having any credit card account with TDNA, that the July 2009 Demand was denied and disputed by plaintiff, and that any transfer of funds that TDNA may have made on June 30, 2009, was erroneous and unauthorized by plaintiff.

29. On information and belief, subsequent to May 9, 2009, defendant TDNA falsely reported to one or more third-parties, including credit rating agencies, that plaintiff purportedly was a credit card customer of TDNA and had two extant credit card accounts with TDNA. In truth and in fact, plaintiff never had any account relationship with defendant TDNA and at all events, any such relationship was terminated by not later than May 9, 2009.

30. Commencing at a time currently unknown to plaintiff, but not later than October 2009, TDNA began making reports to credit rating agencies that plaintiff purportedly was in default under some extant credit agreement between plaintiff and TDNA (the "Default Reports").

31. The Default Reports were false, misleading, and defamatory of the plaintiff.

32. Defendant TDNA made and published the Default Reports with actual knowledge of their falsity or with reckless disregard for the Default Reports' truth or falsity.

33. On information and belief, the Default Reports falsely stated or implied that plaintiff had an existing credit card agreement with TDNA in June 2009, when in truth and in fact, no such agreement or accounts existed in June 2009.

34. On information and belief, the Default Reports falsely stated or implied that plaintiff had authorized TDNA to make a payment on his behalf in June 2009, when in truth and in fact, no such authorization existed in June 2009.

35. On information and belief, the Default Reports falsely stated or implied that plaintiff purportedly was delinquent in paying undisputed or acknowledged indebtedness to TDNA, when in truth and in fact, there was no such delinquency and TDNA had actual notice and knowledge that the July 2009 Demand was denied and disputed.

36. TDNA made Default Reports with actual knowledge that the purported indebtedness referred to therein was denied and disputed by plaintiff.

37. On information and belief, TDNA made the Default Reports willfully, maliciously, in bad faith, and

with specific intent to coerce and pressure the plaintiff to indemnify TD Bank for an erroneous payment that TD Bank had made in error and without authorization.

38. Rather than use appropriate judicial or legal means for resolving any legitimate dispute that TDNA may have had with plaintiff, defendant TDNA resorted to self-help, in particular, threatened and then actual, willful defamation of the plaintiff. Defendant TDNA's defamation of plaintiff has been committed knowingly, willfully, in bad faith, and with full knowledge that TDNA's actions would cause economic damage to the plaintiff.

39. From time to time since approximately August 2009, agents of defendant TDNA have explicitly told plaintiff that TDNA would take steps to damage plaintiff's credit standing if plaintiff did not voluntarily not pay TDNA $1,500 in response to the July 2009 Demand.

32. On information and belief, the Default Reports have caused damage to plaintiff's credit standing and reputation.

33. The conduct of TDNA constitutes defamation under New Jersey state law.

**WHEREFORE**, plaintiff prays that the Court:

(a) Declare, adjudge, and decree that defendant TD Bank is liable to plaintiff for defamation;

(b) Declare, adjudge, and decree that defendant TRS is liable to plaintiff for negligence, breach of contract, and unjust enrichment;

(c) Award compensatory damages against both defendants as provided by law;

(d) Award punitive damages against defendant TDNA as provided by law;

(e) Award prejudgment interest as provided by law;

(f) Award plaintiff his costs, disbursements, and attorneys' fees as provided by law; and

(g) Grant such other relief as this Court deems just and equitable.

**PASHMAN STEIN**
A Professional Corporation
Attorneys for Plaintiff
**James W. Dabney**

DATE: May 4, 2010

By: _____
LOUIS PASHMAN

*JURY DEMAND*

Plaintiff demands trial by jury of all issues as to which there is a right to trial by jury.