No. 13-308

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

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether petitioner has demonstrated "compelling reasons" for this Court to grant *certiorari* to review a decision of an intermediate state appellate court which affirmed the dismissal of appellant's complaint that purported to allege common law defamation on the ground that the claim is preempted in its entirety by §1681t(b)(1)(F) of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2006), as amended, because it is related to the responsibilities of respondent TD Bank, N.A. as regulated by §1681s-2 of the statute.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner James Wilson Dabney ("Petitioner") is an individual who at all relevant times maintained a certain credit card account with Commerce Bank, N.A. and its successor in interest, Respondent TD Bank, N.A. Petitioner is an attorney at law, admitted to practice before this Court, who served as co-counsel of record and argued this case before the Superior Court of New Jersey, Appellate Division, which issued the January 8, 2013 decision which is the subject of the pending Petition for a Writ of *Certiorari*. (Pet. App. B, 3a-18a).

Respondent

Respondent TD Bank, N.A. ("TD Bank") is a national banking association which became the successor in interest to Commerce Bank. TD Bank is a "furnisher" of credit information to credit reporting agencies under §1681s 2 of the Fair Credit Reporting Act, as amended, 15 U.S.C. §§1681 – 1681x.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

TD Bank is a wholly-owned subsidiary of TD Bank US Holding Company, a Delaware corporation, which in turn is a wholly-owned subsidiary of TD US P&C Holdings ULC, an Alberta, Canada, unlimited liability company, which in turn is a wholly-owned subsidiary of The Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD."

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PRELIMINARY STATEMENT

Respondent TD Bank submits this brief in opposition to the Petition for a Writ of *Certiorari* seeking review of the January 8, 2013 Order and Opinion (the "Appellate Division Decision") of the Appellate Division of the Superior Court of New Jersey (the "Appellate Division"), an intermediate state appeals court. The Appellate Division Decision affirmed an order dated December 3, 2010 and the final judgment dated March 12, 2012 (collectively "Trial Court Judgment") dismissing one-count of a complaint purporting to allege a common law defamation cause of action against TD Bank. Both courts held that the claim is preempted in its entirety by §1681t(b)(1)(F) of the Fair Credit Reporting Act, 15 U.S.C.§§1681-1681x(2006), as amended (the "FCRA").

The Appellate Division relied on the Supremacy Clause of the United States Constitution, the pertinent language of the FCRA itself, Congressional intent in implementing the FCRA, and precedents of this Court. In an unpublished decision (which is not precedential), the Appellate Division followed decisions of two United States Courts of Appeals for two different circuits, both of which are in harmony with each other, *MacPherson v. JPMorgan Chase,* 665 *F.3d*. 45 (2d Cir. 2011), *cert. denied*, 132 *S. Ct.* 2113 (2012) and *Purcell v. Bank of America*, 659 *F.3d* 622 (7th Cir. 2011), the only reported decisions by Circuit Courts to directly confront the issue of "preemption" under §1681t(b)(1)(F).

On June 7, 2013, the Supreme Court of the State of New Jersey denied the Petition for Certification by the Petitioner.

The Petition should be denied because Petitioner has not met the burden under Supreme Court Rule 10 of demonstrating "compelling reasons" why the Court should exercise its judicial discretion to grant the Writ.

STATUTES AND RULES INVOLVED

15 USC § 1681s-2(c)

> 15 USC § 1681s-2(c) Limitation on liability. Except as provided in section 621(c)(1)(B) [15 USCS § 1681s(c)(1)(B)], sections 616 and 617 [15 USCS §§ 168n, 1681o] do not apply to any violations of—
>
> (1) subsection (a) of this section, including any regulations issued thereunder
>
> * * * *

15 USC § 1681s-2(d)

> 15 USC § 1681s-2(d) Limitation on enforcement. The provisions of law described in paragraphs (1) through (3) of subsection (c) (other than with respect to the exception described in paragraph (2) of subsection (c)) shall be enforced exclusively as provided under section 621 [15 USCS § 1681s] by the Federal agencies and officials and the State officials identified in section 621 [15 USCS § 1681s].

§ 1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this *title [15 USCS §§ 1681* et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

* * * *

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

§ 1681o. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this *title [15 USCS §§ 1681* et seq.] with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

COUNTER-STATEMENT OF THE CASE

This case involves an attempt by Petitioner to circumvent the preemption provisions of §1681t(b)(1)(F) of the FCRA, as amended, pertaining to a "furnisher" of credit information to credit reporting agencies. By the 1996 amendments to the FCRA, Congress carefully crafted a national unified credit reporting system to include the regulation of "providers" such as TD Bank, through §1681s-2, and gave exclusive enforcement of the reporting aspect to certain federal and state officials. See §1681s-2(a), (c), and (d).

Petitioner's case against TD Bank ignores the FCRA entirely and is based on complex and vague allegations of malicious defamation by TD Bank. (App. 33a-37a). The trial court and the Appellate Division distilled the allegations in the complaint as a mere claim against TD Bank based on and related to its obligations under §1681s-2(a), and concluded that such allegations brought the claim within the clear and unambiguous preemption language in §1681t(b)(1)(F) of the FCRA, as amended. Hence, the Appellate Division affirmed the dismissal of the complaint. The simplified facts are aptly summarized by the Appellate Division in its Decision. (App. 4a-7a).

Generally, the complaint consists of a hodgepodge of vague and complex allegations, which are mixed with allegations not pertinent to a defamation claim. For

example, the pleading is replete with *innuendo* and other allegations sounding in breach of contract and unfair debt collection practices. (App. 35a-40a).

The complaint and Petition are also misleading and evasive because of misstatements and omissions of pertinent facts, as well as documents. For example, the complaint itself refers to a written credit card agreement with Commerce Bank but, as the Appellate Division commented in its decision, it was not appended to the complaint. (App. 5a, n. 1, 35a (¶18)). There are also references in the complaint to other pertinent documents which Petitioner did not include in the Appendix to the Petition but which might have provided greater certainty to the vaguely alleged facts and dates.[1]

Collectively the complaint, the Appendix, and the Petition are incomplete. Consistent with this, while the "Statement of the Case" in the Petition quotes from the transcript of the hearing on the motion to dismiss before the trial court, Petitioner did not include the transcript in the Appendix. (Pet. 9).

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1. For example, the complaint also refers to a December 24, 2008 e-mail concerning a settlement of the dispute with Total Relocation Services, LLC ("TRS"), as well as and related communications (App. 33a, ¶10); an April 16, 2009 letter from the same concerning the settlement and a proposed release which petitioner refused to sign (App. 33a, ¶11); an undertaking by Petitioner to pay $1,500 to Commerce Bank if it were transferred to TRS (App. 33a, ¶12-14); a July 2009 letter from TD Bank demanding payment of the $1,500 (App. 33a, ¶25); and various Default Reports furnished by TD Bank to CRAs indicating that petitioner "was in default under some extant credit agreement" between petitioner and TD Bank (App. 33a, ¶¶30-37).

One of the main factual issues involves a credit in February 2009 of $1,500 to Petitioner's credit card account with TD Bank, successor in interest to Commerce Bank. This represented a purported settlement of a dispute between Petitioner and TRS, a co-defendant in the case below and a moving company which Petitioner claims damaged the floor of an apartment into which furniture and household goods were being delivered. (App. 34a (¶11)). Petitioner had authorized a charge for the services on November 20, 2008 to his credit card account and alleges that he made a claim against TRS the following month. (App. 33a (¶¶8-9)). The settlement appears to have collapsed when Petitioner refused to sign and return a "release" to TRS. (App. 34a (¶11)). Accordingly, the credit was reversed on or about June 30, 2009. (App. 34a-35a (¶14)).

Both the Petition and the complaint claim that there was no relationship between TD Bank, N.A. and Petitioner whatsoever and that the reversal on or about June 30, 2009 was in an unauthorized account with TD Bank, N.A.; and that an unauthorized "purchase" transaction in the amount of $1,500 was charged to Petitioner. The Petition ignores any reference to the previous credit but argues, deceptively, that the reversal of that entry on June 30, 2009, was from a new transaction, in a new account which was unauthorized. (Pet. 7-8). This is demonstrably and knowingly false, contradicts facts gleaned from the complaint, and is disingenuous.[2] The complaint states that

2. The complaint incorrectly describes TD Bank, N.A. as a separate entity from the "TD Bank," which Petitioner states was a "d/b/a" for Commerce Bank and implies that a different entity "TD Bank, N.A." did not become involved until this unauthorized account was opened. (Pet. 7-8; App. 33a-37a, ¶¶ 9-25).

on or about June 30, 2009, TRS prevailed on Commerce Bank to debit Petitioner's credit card account for the $1,500 and transfer that amount to "a TRS-controlled account." (App. 34a-35a, ¶ 14).

Petitioner's Appendix omits Exhibits 1 and 2 to the complaint, consisting of a form letter dated April 2009 from TD Bank to Petitioner and his reply letter to TD Bank dated April 21, 2009. (App. 30a-41a, 35-36a, ¶¶ 20 and 23). Both letters are included in Respondent's Appendix (R. App. 1a-6a; 7a-8a). Together, they demonstrate there was an existing relationship between TD Bank and Petitioner prior to July 2009. The April 2009 form letter to Petitioner stated, in pertinent part, that if Petitioner were to "opt-out" of the credit card agreement with TD Bank, by not accepting the proposed new terms, the account would close but "the terms of [his] existing agreement will continue to apply to the outstanding balance." (R. App. 1a-6a). That is, it would survive the closure of the account. Petitioner's April 21, 2009 letter to TD Bank declined the new terms, effectively prohibiting further use of the card. (R. App. 7a-8a; 6a). But it did not forgive any prior existing obligation. (R. App. 6a).

Petitioner alluded to his knowledge of this earlier obligation in a letter dated August 31, 2009 (R. App. 9a-11a), feigning he did not really know there was a relationship:

> "To the extent that the purported "purchase" transaction listed in the attached statement relates to that earlier disputed charge, it is rejected now as it was previously." (R. App. 10a).

This letter was part of the record in Petitioner's interlocutory motion for leave to appeal to the Appellate Division, but also was not included in the Petitioner's Appendix.

Clearly, the $1,500 debit related to the earlier transaction and was not a new transaction. It concerned a provisional credit given to Petitioner as a result of a putative settlement of a claim not involving any property of Petitioner, but a potential claim of a third party. (*See* Trial Court Judgment, App.21A, ¶3). In the Appellate Division Decision, the court explicitly recognized this falsehood by stating "[w]ithout saying so directly, Dabney's allegation related to the same $1,500 that was at stake in his dispute with TRS." (App. 6a-7a).

Finally, the Petition incorrectly states that the "complaint stated all of the elements of a claim for defamation under New Jersey law." (Pet. 9). In fact, the complaint clearly fails to state one of the required elements that must be proved in a cause of action alleging defamation in New Jersey, *viz.,* that the publication of the false and defamatory statement was "unprivileged." (App. 30a-41a).

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides without ambiguity that review on a writ of *certiorari* is not a matter of right but of judicial discretion and will be granted only in those limited circumstances in which a petitioner establishes compelling reasons. Petitioner fails to demonstrate any such compelling reason for this Court to address the Appellate Division Decision for which the New Jersey

Supreme Court has denied his Petition for Certification. Rule 10 also states in pertinent part: "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law."

A. There Is No Genuine Conflict Under Rule 10 Concerning The FCRA Preemption

Petitioner wrongly submits that there are direct conflicts between decisions of federal and state courts over the interpretation and application of §1681t(b)(1)(F) and its perceived tension with §1681h(e) of the FCRA. There is no such conflict. Indeed, *MacPherson v. JPMorgan Chase,* 665 *F.3d*. 45 (2d Cir. 2011), *cert. denied*, 132 *S. Ct.* 2113 (2012) and *Purcell v. Bank of America*, 659 *F.3d* 622 (7th Cir. 2011) are directly on point and are in accord with each other. See, *Purcell,* 659 F. 3d at 625-626. In support of his position, Petitioner relies on three cases, *Gorman v. Wolpoff Abramson, LLP*, 584 F. 3d 1147 (9th Cir. 2009), *cert. denied subnom*; *FIA Card Services, N.A. v. Gorman*, 131 S. Ct. 71 (2010); *Brown v. Mortensen*, 253 P. 3d 522 (Cal.), *cert. denied*, 132 S. Ct. 847 (2011); and *Dietz v. Chase Home Finance, LLC*, 41 A. 3d 882 (Pa. Super. 2012), which are inapposite, distinguishable, or *dictum.*

In *Gorman*, Petitioner fails to disclose that the Court of Appeals for the Ninth Circuit commented that it was not deciding the preemption issue. 584 F. 3d at 1167. In affirming summary judgment dismissing a common law defamation claim, the Ninth Circuit held that "even if Gorman could bring a state law libel claim under §1681h(e), and such a claim were not preempted by §1681t(b)(1)(F), he has not introduced sufficient evidence to survive summary

judgment on this claim." *Id.* at 1167. Thus, even though the Court addresses preemption, it is *dictum*. Moreover, a recent decision since *Gorman, Miller v. Bank of America*, 858 F. Supp. 2d 1118, 1124 (S.D. Cal. 2012) confirms that district court cases in the Ninth Circuit tend to interpret §1681t(b)(1)(F) as a total preemption provision.

Brown, 253 P. 3d 522 (Cal.) *cert. denied*, 132 S. Ct. 847 (2011), decided by the California Supreme Court, did not involve a claim based on false "credit" information to credit reporting agencies ("CRAs"). Rather, it involved the disclosure of confidential, private "medical information" about the debtor to CRAs. *Brown,* thus, turned on the interplay between HIPAA, 42 U.S.C. § 1320d, *et seq.*, and the FCRA as they pertain to the handling of private medical information, and California's Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq.*, and the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.1, *et seq.*

In *Brown* the California court held that, unlike here, the claims did not have as their "*gravamen*" issues involving the "accuracy" or "credit dispute resolution." Thus, it did not involve the same subject matter as §1681s-2. 253 P.3d at 535. And this court denied *certiorari*, 132 S. Ct. 847 (2011). *A fortiori*, any discussion of preemption is *dictum* as it concerns this case, especially when measured against the on point *Purcell* and *Macpherson* decisions.

Petitioner's reliance on *Dietz v. Chase Home Finance, LLC*, 41 A. 3d 882 (2012), is similarly misplaced because it is not in direct conflict with the Appellate Division Decision, *Macpherson* or *Purcell*. There, mortgagors sued a mortgage company based on claims that it erroneously

sent them a foreclosure notice and notified CRAs about an alleged delinquency, but there was no allegation of malice (or willful intent to injure). Notably, a Pennsylvania intermediate appellate court affirmed the dismissal based on preemption without a ruling on §§1681(h)(e) and 1681t(b)(1)(F). Though the appellate court discussed §§1681(h)(e) and 1681t(b)(1)(F) it held that under any of the theories of preemption the case was properly dismissed, because of the absence of a defamation claim based on malice. Thus, this decision, too, is *dictum*.

Finally, Petitioner also relies on nineteen U.S. district court cases which he states are "in accord" with *Dietz*. (Pet. 14-15, n.4). Remarkably, Petitioner fails to either acknowledge or to disclose that each such case preceded the October 3, 2011 decision in *Purcell.* As set forth in Point B, below, cases decided after *Purcell* and *Macpherson,* demonstrate a widespread judicial adoption of the very preemption on which the Appellate Division Decision is premised. *See* Point B below.

B. Recent United States District Court Decisions Are Generally In Accord In Adopting The Total Preemption Theory Urged By Purcell and Macpherson

This Court denied *certiorari* in *Macpherson v. JPMorgan Chase*, 132 S. Ct. 2113, 182 L. Ed. 2d 870 (2012), a case on all fours with this case. Since then, there have been no significant legal developments to cause this Court to revisit the issues and render a different disposition at this time. This is a reason in itself to deny the Petition.

Rather, since *Purcell* there has been a "crystallization of consensus" in a host of unreported district courts in several Circuits, adopting the reasoning and holdings of *Purcell* and *Macpherson* that §1681t(b)(1)(F) preempts all state laws, including common law. (App. 15a). To date, district courts from not less than six Circuits have followed *Purcell* and *Macpherson*, a factor ignored in the Petition.

Of the 29 cases which cited *Macpherson,* 16 of them adopted the reasoning of total preemption, and 9 others favorably cited to *Macpherson.*[3] A similar review of the 42

3. *See*, e.g. *Crawford v. Duncan*, 2013 U.S. Dist. LEXIS 48368 (E.D.N.Y. Mar. 25, 2013) (Bank's motion to dismiss granted holding that FCRA, to the exclusion of state law, controls the duties of parties furnishing information to credit agencies); *Shieh v.Chase Bank USA, N.A.*, 2012 U.S. Dist. LEXIS 93956 (E.D.N.Y. July 6, 2012) (Holding the 2nd Circuit squarely held that 1681t(b)(1)(F) preempts all state law claims, whether common law or statutory, that concern the duties of furnishers of information to credit agencies); *Sprayregen v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 101910 (D. Vt. July 23, 2012) (FCRA creates broad preemption of state law claims); *Markovskaya v. Am. Home Mortg. Servicing, Inc.*, 867 F. Supp. 2d 340, 344 (E.D.N.Y. 2012) (2nd Circuit has clearly held that state law claims such as defamation of credit are preempted by the FCRA); *Campbell v. Bank of N.Y. Trust Co., N.A.*, 2012 U.S. Dist. LEXIS 100595 (S.D.N.Y. May 8, 2012) (FCRA preempts common law slander of credit claim); *Lindley v. Am. Home Mortg. Servicing Inc.*, 2012 U.S. Dist. LEXIS 165588 (M.D. Tenn. Nov. 20, 2012) (Plain language of FCRA bars claims for defamation); *Young v. LVNV Funding, Inc.*, 2012 U.S. Dist. LEXIS 162350 (E.D. Mo. Nov. 14, 2012) (Finding *Macpherson* persuasive and determining that emotional distress claims asserted were preempted by FCRA); *Cathcart v. Am. Express*, 2012 U.S. Dist. LEXIS 152982 (E.D. Mo. Oct. 23, 2012)(Holding no conflict between 1681t(b)(1)(F) and 1681h(e)); *Ilodianya v. Capital One Bank USA NA*, 853 F. Supp. 2d 772,

cases which cited *Purcell* showed that 18 decisions directly followed *Purcell*, and 21 favorably cited to it. Thirteen (13) cases directly followed both *Purcell* and *Macpherson*. Five (5) additional cases followed *Purcell*.[4] The cases following

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775 (E.D. Ark. 2012) (Holding *Macpherson* and *Purcell* are well reasoned and persuasive, and accordingly dismissed defamation and intentional infliction of emotional distress claims); *Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 2993 (N.D. Cal. Jan. 3, 2013) (noting that 1681t(b)(1)(F) contains a broad sweeping preemption); *El-Aheidab v. Citibank (S.D.), N.A.*, 2012 U.S. Dist. LEXIS 19038 (N.D. Cal. Feb. 15, 2012) (Noting that the FCRA contains a comprehensive preemption scheme and dismissed negligence claim); *Barnett v. JP Morgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 89398 (N.D. Ala. June 26, 2013) (court agrees with *Macpherson* and *Purcell* view); *Alston v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 33860 (D. Md. Mar. 12, 2013) (criticizing, but primarily focused on FDCPA issues and inapposite to question presented); *Pachecano v. JPMorgan Chase Bank Nat'l Ass'n*, 2013 U.S. Dist. LEXIS 121139 (W.D. Tex. Aug. 26, 2013) (Among conflicting authorities noted in discussion of approaches to analysis); *Floyd v. Wells Fargo Home Mortg. Co.*, 848 F. Supp. 2d 635, 643 (E.D. La. 2012) (reference to unsettled nature in interpretation of statute); *Brown v. Wal-Mart Stores, Inc.*, 507 Fed. Appx. 543, 548 (6th Cir. Tenn. 2012) (inapposite to the matter at hand).

4. *Morgan v. HSBC Mortg. Servs.*, 930 F. Supp. 2d 833 (E.D. Ky. 2013)(directly follows Purcell, plaintiff's claims dismissed); *Schneider v. Regions Bank*, 2012 U.S. Dist. LEXIS 119144 (S.D. Ill. Aug. 23, 2012) (Based on Purcell, the Court concluded that Plaintiffs' claims are preempted by the FCRA); *Huber v. Trans Union, LLC*, 2012 U.S. Dist. LEXIS 103566 (S.D. Ind. July 25, 2012) (Court dismissed intentional infliction of emotional distress claim based on Purcell); *Todd v. Chase Bank USA, N.A.*, 2012 U.S. Dist. LEXIS 17494 (N.D. Ill. Feb. 13, 2012) (state law claims because they are preempted by section 1681t(b) of the FCRA); *Jackson v. Countrywide Home Loans, Inc.*, 2012 U.S. Dist.

Purcell and *Macpherson* encompass courts from at least 6 of the 12 United States Circuits.

This trend is a sufficient reason, in itself, for this Court to deny the Petition in its discretion.

C. The Complaint Does Not Allege a Proper Claim For Defamation

The Petition also should be denied because the complaint does not state a viable claim under New Jersey law, which is clear from the wording of the complaint, giving the Petitioner the full benefit of an "indulgent" reading of same, as he claims he is due in footnote 1 at p. 7 of his Petition.

To establish a claim for defamation, in addition to damages, a plaintiff must prove: (1) that a defendant made a false and defamatory statement concerning the plaintiff; (2) that an unprivileged statement was communicated to another person; and (3) that defendant acted negligently or with actual malice. [emphasis supplied]. *See DeAngelis v. Hill, 180 N.J. 1 (2004)*, citing *Restatement (Second) of Torts, supra, § 558*. *See also*, the Appellate Division Decision at 8a-9a, citing *G. D. v. Kenny*, 205 N.J. 275, 292-93 (2011).

Since Petitioner's complaint does not allege that the communication to a third person was "unprivileged," the underlying complaint is not viable as it stands, and a review by this Court would constitute an "advisory opinion."

LEXIS 29994 (M.D. Ala. Mar. 7, 2012) (Plaintiff's defamation claim dismissed as it is preempted by the FCRA).

D. The New Jersey Appellate Division Correctly Decided the Appeal And Did Not Misapply Precedents Of This Court

Petitioner argues that the Appellate Division Decision demonstrates a misapplication of precedents of this Court. [5] To the contrary, the Appellate Division Decision faithfully adhered to the language of the statute, Congressional intent in passing the statute, and relevant decisions of this Court, as did *Purcell* and *Macpherson*. Thus, the Appellate Division correctly and accurately held that the allegations in the complaint fell squarely within the clear, preemptive language of §1681t(b)(1)(F) because the *gravamen* of the claim was the alleged false and defamatory information furnished by TD Bank to CRAs.

The Appellate Division reached its conclusion after carefully analyzing the facts (App. 4a-7a); the FCRA and its legislative history (App. 10a-13a); pertinent case law, including Supreme Court decisions and the two recent decisions by United States Courts of Appeals (App. 9a, 15a, 17a, 18a); and by utilizing established principles of statutory construction:

> 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

5. In any case, Supreme Court Rule 10 provides in pertinent part that a "petition for a writ of certiorari is rarely granted when the asserted error consists of….the misapplication of a properly stated rule of law.

> 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)). (App. 9a).
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> * * * *
>
> 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." *Cippollone 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). (App. 18a).

The Appellate Division also relied on the dispositive authority of *Macpherson* and *Purcell* for interpreting the statutory construction of §1681t(b). In *Purcell*, Chief Judge Frank H. Easterbrook of the Seventh Circuit held that §1681t(b)(1)(F) preempted state common law claims. Judge Easterbrook specifically relied on *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and on the more recent Supreme Court decision of *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011), in

reasoning that the word "laws" in §1681t(b) encompasses state common law to the same extent that it does state statutory law. *Purcell*, 659 F. 3d at 624.

The Appellate Division also followed the Seventh Circuit in harmonizing what could have been perceived as friction between §1681h(e) and §1681t(b)(1)(F). Chief Judge Frank H. Easterbrook of the Seventh Circuit had held that there was no conflict between the two sections:

> "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."

Thus, there is not now, nor was there at the time the Appellate Division Decision was entered, any tension between §§1681h(e) and 1681t(b)(1)(F) as this was resolved by *Purcell* and then *Macpherson*, both decided in 2011. Indeed, even before the Circuit Court decisions, in *Burrell v. DFS Services LLC*, 753 *F. Supp.* 2d 438, 444-451 (D.N.J. 2010), an earlier case from a district court in the Third Circuit, Senior Judge Dickinson R. Debevoise, reasoned that §1681h(e) has no application to a "furnisher." In granting and later affirming TD Bank's motion to dismiss, both the trial court and the Appellate Division relied upon Senior Judge Debevoise's scholarly and detailed analysis of the relevant portions of the FCRA in *Burrell*. *Id.* at 440, 449-451.

The Appellate Division considered this interpretation as consistent with the Congressional intent in drafting the preemption provisions of §1681t(b)(1)(F). (App. 14a-16a). The Appellate Division also correctly rejected Petitioner's

claim that "preemption" should not be enforced on the ground that consumers are without a private right of action under §1681s-2(a). It held that by limiting enforcement of §1681s-2(a) violations exclusively to certain state and federal officials pursuant to §§1681s-2(c) and 1681s-2(d)) "it can be inferred that Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the information furnished." (App. 13a). The court noted that a private right of action exists to sue for violations of §1681s-2 pursuant to §1681s-2(b) under the appropriate circumstances, i.e., after notice to a CRA with an opportunity for the furnisher to investigate and correct the information. (App. 13a, n.6). *See Nelson v. Chase Manhattan Mortgage Corp.*, 282 F. 3d 1057, 1060 (9th Cir. 2002).[6]

Thus, the Appellate Division remained faithful to the principles of this Court and the Supremacy Clause of the United States Constitution. It gave due deference to the Congressional purpose in implementing the FCRA, *viz.*, "protecting the banking system from inaccuracy, promoting the equitable use of consumer credit information, and ensuring fairness and accuracy within the credit reporting system." (App. 10a).

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6. Notably, the Appellate Division also correctly held that §1681s-2(b) is inapplicable here because Petitioner "never asserted that he lodged a grievance or commenced a dispute with a consumer reporting agency about the accuracy of TD Bank's reports." (App. 13a, n.6 & n.7).

E. The Issue For Which Petitioner Seeks Review Lacks Substantial National Importance

Petitioner posits that he presents an issue that is "important" and "merits this Court's attention" because "[m]illions of Americans" are subject to "the type of injury and extra-legal coercion complained of by Petitioner here," and that the "scope of States' constitutional authority to compensate individuals for injury to reputation is an important question that merits this Court's review." (Pet. 13).

But, this case presents no such issue. Rather, all that is at stake are narrow allegations unique to this Petitioner, a litigious attorney who did not avail himself of the rights and remedies under the FCRA. It is clear that the relevant facts here are so unique and personal to Petitioner that a review based on this case would involve the Court in a very complex and intricate set of facts that might only apply to a few people, with little or no national importance.

Petitioner's reliance on the "sheer numerosity of the decisions" he cites in Point I of the Petition proves nothing. As set forth in greater detail above, the nineteen cases he cited in Footnote 4 on pp. 14-15 were decided before *Purcell*, a fact which Petitioner failed to disclose to the Court. (Pet. 23).

Finally, the Appellate Division Decision is unpublished and, therefore, non-precedential. Hence, Petitioner's argument does not present a compelling reason for granting *certiorari*.

F. This Is Not An Ideal Case For The Supreme Court To Review

Petitioner next suggests that "this case is a "good vehicle" for resolving the preemption issue because the Court need only look to the "face of Petitioner's complaint to determine whether it stated a claim which §1681t(b)(1)(F) "permits." (Pet. 25-26). To the contrary this case is decidedly not an ideal case for review. Both the Petition and the complaint are vague, incomplete, confusing, mysterious, self-contradictory, distinctly unique and misleading as described in greater detail in the Counter-Statement of the Case above.

The FCRA is a comprehensive statute designed to balance the interests of consumers, CRAs, users of information, and "furnishers" of information alike. Here, the Petitioner, an attorney, has ignored the FCRA completely and is atypical of the average consumer. Specifically, Petitioner failed to report the dispute to a CRA and avail himself of the protections and remedies in the statute.

As a practical matter, the Appellate Division Decision, as well the *Macpherson* and *Purcell* decisions are consistent with the federal credit reporting system and the Congressional intent to have an efficient and balanced system and a uniform credit reporting system. Were this Court to consider contradicting the "total preemption" theory of the *Macpherson* and *Purcell* decisions, such a result would present a disincentive for "furnishers" to voluntarily participate in the credit reporting system, because they would face unlimited risk from a disgruntled consumer dissatisfied with the information furnished to

CRAs. This is precisely the result that Congress intended to avoid when it enacted the preemption provisions in §1681t(b)(1)(F). It could also expose "furnishers" to different risks in any number of the fifty (50) states, since there would be no uniformity. It follows that this would materially undermine the structure of the federal credit reporting system which the Congress so carefully and painstakingly designed. It could adversely affect the quantity, quality and accuracy of the information for credit reporting agencies and users, particularly at this difficult time in our nation's economic history.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, for all the foregoing reasons Respondent TD Bank, N.A. respectfully requests that the Petition be denied in its entirety and that this Court grant such other relief as it deems just and proper.

DATED: Roseland, New Jersey
November 8, 2013

Respectfully submitted,

William T. Marshall, Jr.
Counsel of Record
Zeichner Ellman & Krause LLP
103 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 618-9100
wmarshall@zeklaw.com

Counsel for Respondent

APPENDIX

APPENDIX — CERTAIN CORRESPONDENCE BETWEEN TD BANK AND JAMES W. DABNEY

April 2009 Letter

TD Bank
America's Most Convenient Bank

IMPORTANT NEWS.
Your Commerce Bank Visa Platinum Card will change to the **TD Easy Rewards™ Platinum Visa Card in June.**

JAMES W. DABNEY
376 KNOLLWOOD RD
RIDGEWOOD, NJ 07450-4815

April 2009

Dear JAMES W. DABNEY,

At TD Bank, America's Most Convenient Bank, we're committed to keeping you informed of any changes that might affect you. Today, we're writing to let you know that we are upgrading your Commerce Bank Visa Platinum credit card ending in 3098 to the TD Easy Rewards Platinum Visa card in June.

Important Information about your new TD Easy Rewards Card.

Your new TD Easy Rewards card will include changes to the terms of your card agreement.

- New rates and fees beginning with your June statement – The terms of your TD Easy Rewards card will include new rates, as well as fees for any late payments or charges that exceed your credit limit. *The new terms are summarized on the back of this letter.*

- New Personal Credit Card Agreement – For your convenience, the enclosed agreement highlights the differences in terms. Also enclosed is your new Visa Benefits Guide, which replaces your current benefits guide. Please read these documents and keep for your records.

- You have the right to opt-out of (not accept) the new terms. Please see the instructions on the back of this letter regarding how to opt-out.

- Later in June, you'll receive your new TD Easy Rewards card in the mail. Please activate and begin using your new card at that time. You can continue using your current Commerce credit card until your new card arrives.

New credit card. Easy transition.

To help make the transition as easy as possible for you, we're keeping a few features of your account exactly the same:

- Your primary card number will not change. Any additional users will receive their own credit card account number, which will allow you to track purchases separately.

- Your payment due date remains unchanged.

- You can continue making payments your way – by mail, by phone, online, or in a TD Bank store.

A new rewards program makes it easy to enjoy your rewards.

The TD Easy Rewards card offers a great new rewards program.[1] Turn everday purchases into your favorite rewards – quickly and easily. Beginning on June 5, you'll earn Easy Rewards points every time you use it. *(Please see the enclosed insert for details.)*

If you have any questions about your new TD Easy Rewards card, please call 1-888-480-5036 or visit www.tdbank.com. We'd be glad to assist you with this transition.

As always, we remain committed to providing legendary customer service from Maine to Florida. We appreciate your business and look forward to continuing to serve your banking needs as we Build The Better Bank: TD Bank, America's Most Convenient Bank.

Sincerely,

/s/_____
Tom Mellish
Senior Vice President, Credit Card Division

Appendix

NOTICE OF CHANGE IN TERMS TO YOUR CREDIT CARD AGREEMENT

Please carefully read the Summary of New Terms below. The changes described will take effect as of the first day of the billing cycle ending on or after June 5, 2009 ("effective date"). The changes will apply to existing and future balances and your account will be subject to the enclosed Personal Credit Card Agreement ("Agreement") as of the effective date.

SUMMARY OF NEW TERMS:

Changes to APRs and Fees

- Your Annual Percentage Rate (APR) for Purchases and Balances Transfers will be a Variable Rate of Prime plus 10.99% margin, which is 14.24% as of March 20, 2009.

- Your APR for Cash Advances will be a Variable Rate of Prime plus 19.99% margin, which is 23.24% as of March 20, 2009.

- A new Penalty APR will apply if any required Minimum Payment is more than 30 days past due and will be a Variable Rate of Prime plus 23.99% margin, which is 27.24% as of March 20, 2009.

- The following new penalty fees will apply to your account: Late Payment Fee of $39, Overlimit Fee of $39, Returned Payment Fee of $39.

- The following new transaction fees will apply to your account: Balance Transfer and Cash Advance Fee of 3% (minimum $10) of the balance transfer or cash advance amount, Foreign Transaction Fee of 3% of the transaction amount.

Changes to Calculation of Balances, Finance Charges, and Payments

- Periodic finance charges will not be calculated using a daily periodic rate instead of a monthly periodic rate obtained by dividing the applicable APR by 365 and rounding up at the sixth place after the decimal point. For example the daily periodic rate for an APR of 14.24% would be 0.039014%.

- The minimum Finance Charge will be $1.00.

- Finance Charges on Cash Advances will apply as of the transaction date when you receive the Cash Advance.

- Any unpaid Finance Charges and fees will be included in the average daily balance that is used to calculate finance charges.

- The minimum payment due for each month will be the greater of: 2% of the New Balance, $15, or 1% of the New Balance plus periodic Finance Charges plus current transaction or penalty fees.

Governing Law

- Your agreement will be governed by federal law and to the extent that federal law does not apply, the laws of the State of Delaware will apply including the rate of interest and fees.

RIGHT TO OPT-OUT

In order to opt-out of (not accept) the changes described in this summary:

- We must receive a letter by May 30, 2009 telling us that you do not accept the changes. Write to us at: TD Card Services, P.O. Box 84037, Columbus, GA 31908-4037.

- Any authorized use of the card on or after the effective date of these changes will mean that you have accepted the changes and the new agreement.

If you choose to opt-out of the changes:

- Your account will be closed and the terms of your existing agreement will continue to apply to the oustanding balance.

- You may no longer use your card.

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1. Points accrued with Visa Extras will remain on your account and can be redeemed until they expire (36 months from date of accrual to expiration). You will no longer accrue Visa Extra points after June 4, 2009.

Appendix

4/21/2009 Letter

376 KNOLLWOOD ROAD
RIDGEWOOD, NEW JERSEY 07450

April 21, 2009

Mr. Tom Mellish
Senior Vice President
TD Bank, Credit Card Division
P.O. Box 2580
Cherry Hill, NJ 08034

RE: *Commerce Bank Visa Platinum Card*

Dear Mr. Mellish:

I was extremely disappointed to receive your letters dated April 2009, informing me of proposed changes in the terms of my Commerce Bank Visa Platinum Credit Card agreements with the bank.

Please be advised that I do not accept the proposed changes to the agreements. I most sincerely hope that the bank will reconsider its position.

You will appreciate that Commerce Bank enjoyed the following and reputation that it did, in very large measure, precisely because Commerce Bank refrained from engaging in the types of lending practices that are heralded in your April 2009 letters.

The words abusive, predatory, and unfair never described the lending practices of Commerce Bank. Those words do, in my view, very accurately describe the "new penalty fees" and other "NEW TERMS" that are outlined in your April 2009 letters.

Your letters threaten to close my accounts if I do not accept the proposed new terms. I most sincerely hope that the bank will reconsider and withdraw the threat. Should the bank carry through on its stated threat, I will be forced to review my entire relationship with the bank.

Very truly yours,

/s/_____
James W. Dabney

cc: TD Card Services, P.O. Box 84037 Columbus, Georgia 31908-4037

Appendix

8/31/2009 Letter

376 KNOLLWOOD ROAD
RIDGEWOOD, NEW JERSEY 07450

TD Bank, N.A.
P.O. Box 84037
Columbus, GA 31908-4037

RE: *TD Bank, N.A. Visa A/C 9625*

Ladies and Gentlemen:

This letter will record that I deny and dispute the "purchase" dated June 30, 2009, that is listed in the attached.

Your attention is respectfully drawn to the following:

1. I do not currently have, and I do not consider that I ever have had, any Visa account with TD Bank, N.A., an entity purportedly headquartered in Delaware. In April 2009, I received a highly deceptive solicitation from a Delaware-based bank with that name, and rejected it.

2. I formerly had a Visa credit account with Commerce Bank of Cherry Hill, New Jersey ("Commerce Bank"). My Visa account with Commerce Bank was terminated on or about May 9, 2009.

3. Prior to May 9, 2009, Commerce Bank had credited my former Visa account with them for an improper

charge in the amount of $1,500.00. I provided extensive correspondence to Commerce Bank in connection with that improper charge. To the extent that the purported "purchase" transaction listed in the attached statement relates to that earlier disputed charge, it is rejected now as it was previously. At all events, the purported June 30 "purchase" transaction reflected in the attached statement is non-existent, and is hereby rejected.

Very truly yours,

/s/_____
James W. Dabney

Appendix

FOLDOUT

8/31/2009 Letter Attachment

[redacted]

EASY REWARDS

Account Summary for Period June 30, 2009 - July 27, 2009

Minimum Payment	$42.00	Previous Balance	$0.00
Due Date	Aug 21, 2009	Payments and Credits	- 0.00
Total Credit Limit	$0.00	Purchases and Other Charges	+ 1,500.00
Total Available Credit	$0.00	Cash Transactions	+ 0.00
Credit Limit for Cash	$0.00	FINANCE CHARGES	+ 0.00
Available Credit for Cash	$0.00	New Balance	$1,500.00

Questions? Call us:
Customer Service: 1-888-561-8861
Visit us on the web at
WWW.TDCARDSERVICES.COM

Transactions

Activity Date	Post Date	Reference Number	Description	Amount
Card Number [redacted] 9625				
Jun 30	Jun 30	05570030	PURCHASE	1,500.00

Rewards Summary

Previous Points Reward Balance	0
Points Earned This Period	0
Current Points Reward Balance	0

Finance Charge Summary

Number of Days in Billing Cycle: 28

	Corresponding Annual Percentage Rate	Monthly Periodic Rate	Average Daily Balance	Periodic FINANCE CHARGES
PURCHASES	7.24%	0.603333%	$0.00	$0.00
CASH	11.24%	0.936666%	$0.00	$0.00

ANNUAL PERCENTAGE RATE: 0.00%
Includes Cash Advance, Payment Service, Stop Payment, Rate Reduction Fees, Transfer Fee and International Transaction Fee, if applicable.
The Periodic Rate may vary.

Please make check or money order payable to: TD Bank, N.A.
Please include your account number on your check. Detach and return bottom portion with your payment.

Your Account Number [redacted] 9625
Your Total Balance $1,500.00
Minimum Payment Due $42.00
Payment Must Be Received By Aug 21, 2009

TD BANK, N.A.
PO BOX 84037
COLUMBUS GA 31908-4037

TD BANK, N.A.
PO BOX 23072
COLUMBUS GA 31902-3072

Please Enter Amount of Payment Enclosed.

JAMES W DABNEY
378 KNOLLWOOD RD
RIDGEWOOD NJ 07450-4815

☐ Check here for any address changes and indicate any changes on the reverse.

[redacted]9625 000042000 001500003

REDACTED