No. 22-87

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GIA SESSA, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

TRANS UNION, LLC,
Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (NO. 7:19-CV-9914)

REBECCA E. KUEHN
(Counsel of Record)
JENNIFER L. SARVADI
HUDSON COOK, LLP
1909 K Street, NW, 4th Floor
Washington, DC 20006
(202) 715-2008
rkuehn@hudco.com
jsarvadi@hudco.com

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), the Consumer Data Industry Association states that is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of CDIA's stock.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* represent that all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* represent that no party or party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Further, no person other than *amici* and their non-party members contributed money that was intended to fund the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

The Consumer Data Industry Association respectfully submits this brief in support of Appellee Trans Union, LLC's ("Trans Union") opposition to Appellant Gia Sessa's ("Sessa") appeal of the decision of the trial court to grant summary judgment in favor of Trans Union.

STATEMENT OF INTEREST OF *AMICUS CURAE*

The Consumer Data Industry Association ("CDIA") is a trade association representing consumer reporting agencies ("CRAs"), including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition, expanding consumers' access to financial and other products suited to their unique needs.

CDIA is interested in the outcome of this appeal because CDIA's members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, which governs the collection, use, maintenance, and dissemination of consumer report information, and this case seeks to determine the scope of certain obligations of CRAs thereunder.

CDIA members process over 50 million updates to consumer report information each day.[2] Thus, the issues raised in this appeal addressing the scope of a CRA's responsibilities under the FCRA have implications reaching far beyond the parties in this case. To date, all circuit courts that have decided the question of whether CRAs have a duty under the FCRA to determine the legal rights of parties to a contract between a furnisher (i.e., a creditor) and the consumer, have affirmatively answered in the negative.[3]

A ruling by this Court in favor of Sessa's argument that a CRA must essentially adjudicate the scope of the parties' legal obligations on an account, or must otherwise construe the terms of a disputed contract in order to determine their legal effect, would be the first of its kind – and for good reason, because the FCRA does not impose this obligation on a CRA. CDIA has been involved in the consumer reporting industry for more than a century and is therefore uniquely qualified to assist this Court in understanding the impact of the positions advocated by the parties and the implications of those on the greater credit reporting ecosystem.

SUMMARY OF THE ARGUMENT

Consumer reporting agencies take their work to assure the accuracy of information seriously, and structure their businesses around compliance with the

[2] *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day").
[3] *See* n.27, *infra*.

Fair Credit Reporting Act.[4] The FCRA governs the rights and responsibilities of all stakeholders in the consumer reporting process; namely, furnishers, CRAs, users and consumers.

To assure the accuracy of information entering into the consumer reporting ecosystem, the FCRA's implementing regulation affirmatively requires furnishers to report account information accurately and with integrity. 12 C.F.R. §1022.42(a), 16 C.F.R. § 6603. CRAs have a legal duty to maintain "reasonable procedures to assure maximum possible accuracy of the information" they include in consumer reports under section 1681e(b). This section of the FCRA generally requires CRAs to adopt policies and procedures related to data collection, data quality control, and how to correctly match information to the proper consumer. These "reasonable procedures" work together to assure maximum possible accuracy of consumer reports.

Consumer reporting agencies' abilities to assure accurate information is not limitless, however. CRAs' procedures are focused on assuring that information is factually accurate - meaning they are not the proper party to adjudicate legal claims or disputes between parties to a contract. Where the furnisher and consumer do not agree on a contract's validity or its terms and legal effect, the law does not require a CRA to adjudicate the case and declare the legal rights of the parties.

[4] 15 U.S.C. § 1681 *et seq.* and its implementing regulations, including the Furnisher Rule, 74 Fed. Reg. 31484; 86 Fed. Reg. 51819 (together, "FCRA").

In a series of cases going back nearly fifteen years, courts have barred plaintiffs from pursuing a "collateral attack" on the legitimacy of contracts under the guise of bringing a claim against the CRA for a violation of the FCRA. *See, e.g.*, *DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008), and *Denan v. Trans Union LLC*, 959 F.3d 290, 294 (7th Cir. 2020). This is so because "[o]nly a court can fully and finally resolve the legal question of a loan's validity." *Denan,* 959 F.3d at 295. The collateral attack doctrine has been held to bar claims that require other types of legal determinations, such as challenges as to whom a debt is properly owed. *See Chuluunbat v. Experian Info. Sols., Inc.*, 4 F.4th 562 (7th Cir. 2021). Conversely, where questions of fact are presented to a CRA that do not require it to make any legal determinations, the CRA is bound and competent to decide the issue, and a failure to do so could form the basis of an FCRA claim (typically, under section 1681i(a) related to reinvestigation of a consumer's dispute).

The policy behind the collateral attack doctrine is that the FCRA does not impose liability on a CRA for errors that it can neither identify nor resolve. Courts grappling with the question of whether the alleged inaccuracy can be a basis for liability under the FCRA have drawn a distinction between "factual" inaccuracies and "legal" ones. *DeAndrade*, 523 F.3d at 68.

(in response to a dispute by a consumer who alleged she was not liable under a debt instrument, the court explained "[t]his is not a factual inaccuracy that could

have been uncovered by a [CRA's] reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA.").

The issue in this case is even more attenuated, as this is not a case where a consumer notified the CRA that she believed information being reported about her was wrong. In fact, Sessa never filed a dispute or even spoke with anyone at Trans Union about her account.[5] Instead, Sessa argues that Trans Union *should have known* there was an error in the reporting of her account based on some level of routine or systematic review of the information provided by her creditor because the financial agreement is a "sham" under federal law, and the information furnished by her creditor was not consistent with what terms she believes to be typical in a "standard auto lease," SA24, or with what she believes her financing agreement, in particular, requires. SA7, n.3. Where a dispute exists between two parties to a contract over their legal rights and obligations arising thereunder, a CRA is not required to be, nor should it be, the legal arbiter of that dispute. Thus, the district court properly held that Sessa failed to state a cognizable claim against Trans Union for failing to maintain reasonable procedures as required by section 1681e(b).

[5] *See* Plaintiff's Local Civil Rule 56.1(b) Counter-Statement of Controverted Material Facts in Opposition to Trans Union LLC's Statement of Material Facts, Dkt. 126 ("Plaintiff's Statement of Facts"), ¶¶ 61 and 62.

ARGUMENT

CRAs are committed to assuring the accuracy of information in the reports they provide, adopting policies and procedures to oversee the data that they receive and report. Section 1681e(b) requires that CRAs adopt "reasonable procedures to assure maximum possible accuracy of the information" contained in consumer reports. This requirement applies to the procedures used by a CRA to intake, maintain, and match data to consumers in preparing reports.

Therefore, and notwithstanding the dicta surrounding the district court's holding below, this case raises the question as to whether section 1681e(b) imposes a duty on CRAs to make a legal determination as to the legal validity of, and/or the rights and responsibilities under, a consumer's contract with her lender in the absence of receiving any dispute from the consumer challenging the information. The district court did not have to reach the question of whether Trans Union had adopted reasonable procedures required by section 1681e(b) because it correctly found that the alleged inaccuracy regarding the financing agreement was, "at its core 'a contractual dispute,' . . . and one not before this Court," SA24, which required a "legal interpretation of the loan's terms and their application to the statutes in question." SA25.

Because a CRA does not have a duty under the FCRA to adjudicate a legal dispute about parties' rights and obligations to the underlying contract, Trans Union

could not have been liable for Sessa's claim under section 1681e(b), and summary judgment was appropriate. This Court should affirm that CRAs are not obligated to make such legal determinations and affirm the ruling of the district court.

I. The FCRA Allocates Responsibilities to Different Parties in the Consumer Reporting System.

Enacted in 1970, the FCRA governs the collection, assembly, and use of consumer report information and provides the framework for our nation's credit reporting system. Its purposes are twofold: (1) to protect consumers by preventing the misuse of their sensitive personal information and improving the accuracy of consumer report information; and (2) to promote the efficiency of the nation's banking and consumer credit systems.[6] All CRAs must adhere to the FCRA, regardless of size or location.

A. Roles in the Consumer Reporting System.

In enacting the FCRA, Congress recognized the consumer reporting industry to be valuable to the nation's economy, finding that CRAs "have assumed a vital role in assembling and evaluating consumer credit and other information on

[6] *See* Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, 2011 WL 3020575, at 1 (July 2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf ("40 Years Report").

consumers." 15 U.S.C. § 1681(a)(3). The FCRA "seeks to balance the needs of consumers and businesses" with respect to consumer privacy and permitted use of consumer information. S. Rep. No. 209, 103rd Cong., 2d Sess. (1993).

The FCRA regulates the practices of the three principal groups involved in this ecosystem: (1) consumer reporting agencies, often referred to as "CRAs" or "credit bureaus"; (2) furnishers of consumer report information to the CRAs (such as lenders that have accounts with consumers); and (3) users of consumer reports (such as credit grantors, insurance companies, and employers, that make eligibility decisions about consumers). CRAs collect and compile consumer information supplied by furnishers to use in creating consumer reports.

The credit reporting system is built on the fundamental principle that the reports are as accurate as reasonably possible, while acknowledging that perfection is not the standard. As the FTC has acknowledged, "[section 1681e(b)] does not require error free consumer reports."[7] The Seventh Circuit agreed, stating, "[t]hus, the FCRA does not require unfailing accuracy from consumer reporting agencies. Instead, it requires a consumer reporting agency to follow 'reasonable procedures to assure maximum possible accuracy' when it prepares a consumer report." *Denan*, 959 F.3d at 294 (*quoting* 15 U.S.C. § 1681e(b)). These procedures do not extend to

[7] FTC, Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,804, 18,820 (1990).

a requirement that the CRA interpret the legal terms of the underlying financial instrument itself.

B. Accuracy Requirements Under the FCRA.

To ensure that the credit reporting system appropriately balances the needs of consumers and businesses, the FCRA allocates different responsibilities to CRAs and furnishers with respect to ensuring the accuracy of information in consumer reports. For their part, CRAs must maintain "reasonable procedures to assure maximum possible accuracy" of the information they provide in consumer reports. 15 U.S.C. § 1681e(b).

CRAs' procedures to assure maximum possible accuracy include policies and procedures regarding the collection, validation, maintenance, matching to consumers, and reporting of information they collect about consumers consistent with the law. Each of the nationwide CRAs are reported to maintain over 1.3 billion active trade lines,[8] most of which are furnished by financial institutions.[9] CRAs establish standardized data reporting formats for the type of information furnishers

[8] A "trade line" refers to account information provided by furnishers to CRAs for the inclusion in a consumer report.

[9] *See* Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit* (Dec. 2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

provide on an account, as well as instructions to educate users on how that information appears in reports so the users may interpret the data accurately. CRAs use advanced technologies to validate data they receive and to identify inconsistencies in that data. CRAs study trends in furnishing, in other forms of data collection, in disputes, and across their data sets to identify areas of risk of inaccuracy as well as to develop knowledge useful in the marketplace. Many CRAs are implementing various levels of machine learning to validate their data and processes and to improve the overall accuracy of consumer reports. All these tools form the basis of a CRA's reasonable procedures to assure the maximum possible accuracy of consumer report information consistent with section 1681e(b) of the FCRA (the "reasonable procedures requirement").[10]

Furnishers play a key role in ensuring maximum possible accuracy of information contained within consumer reports. Congress amended the FCRA to specifically improve the accuracy of information contained in consumer reports by imposing new obligations on furnishers of information and requiring federal agencies to issue regulations regarding the accuracy and integrity of information

[10] *See* Statement of Peggy Twohig, Assistant Dir., Office of Supervisions Policy, Supervision Enforcement and Fair Lending Division, Bureau of Consumer Financial Protection, S. Comm. on Banking, Housing and Urban Affairs "An Overview of Credit Bureaus and the Fair Credit Reporting Act" (July 12, 2018), at 6 (providing overview of additional steps CRAs take to ensure maximum possible accuracy, https://www.banking.senate.gov/imo/media/doc/Twohig%20Testimony%207-12-18.pdf.

furnished to CRAs pursuant to the Fair and Accurate Credit Transaction Act.[11] These regulations, known as the Furnisher Rule, were published by the FTC jointly with other federal agencies.[12] Pursuant to these regulations, furnishers are required to maintain written policies and procedures regarding the "accuracy and integrity" of the information they furnish to CRAs. 12 C.F.R. § 1022.42. The Furnisher Rule establishes that the furnisher bears the responsibility to determine the nature and amount of a consumer's obligation. Under the Furnisher Rule, to furnish information with "accuracy" means that:

> [T]he information that a furnisher provides to a consumer reporting agency about an account or other relationship with the consumer correctly: (1) Reflects the terms of and liability for the account or other relationship; (2) Reflects the consumer's performance and other conduct with respect to the account or other relationship; and (3) Identifies the appropriate consumer.

12 C.F.R. § 1022.41(a).

Further, reporting information with "integrity" requires, among other elements, that the information that a furnisher provides to a CRA is (1) "furnished in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report;" and (2) "substantiated by the

[11] Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 ("FACT Act").

[12] 74 Fed. Reg. 31484. Pursuant to the Dodd-Frank Act, the Furnisher Rule transferred to the CFPB, and the CFPB adopted the FTC's Furnisher Rule nearly unchanged in 2021. 86 Fed. Reg. 51819.

furnisher's records at the time it is furnished." 12 C.F.R. § 1022.41(e). Subpart (1) is referred to as the "form and manner provision" by the FTC, the purpose of which was to reduce errors in reports and assist the CRAs in matching data to consumers:

> [T]he Agencies are adopting the form and manner provision as part of the definition of ''integrity'' to address omissions and data transmission and similar errors that may lead to information being incorrectly reflected on a credit report. This provision contemplates, for example, that information will be furnished in a form and manner that would permit a CRA to accept data regarding a consumer and link it appropriately to the consumer.

74 Fed. Reg. 31490.

In adopting these definitions of accuracy and integrity in the Furnisher Rule, the FTC made clear that these requirements are unique to furnishers' responsibilities in furnishing information to CRAs, and do not define or modify the word "accuracy" found under other provisions of the FCRA. The Statement of Basis and Purpose provides:

> [D]efining the term "accuracy" will assist furnishers in establishing the required reasonable policies and procedures while reducing uncertainty about their appropriate scope and content. In addition, the definition provides clear direction to consumers and furnishers regarding which issues can be disputed directly with a furnisher under [section 1022.43] of the final rules. For these reasons the Agencies believe, and many commenters agreed, that the term ''accuracy'' should be defined for the purposes of the rules and guidelines implementing section 312 of the FACT Act. <u>Using this definition in [section 1022.43] of the rules, however, does not cause it to apply for purposes of any other provision of the FCRA or other provisions of the Agencies' rules</u>.

74 Fed. Reg. 31488 (emphasis added). Further, the FTC explained:

> The definitions [of accuracy and integrity] do not impose stand-alone obligations on furnishers but guide and inform the duties otherwise imposed on furnishers under the regulations. The Agencies' promulgation of the definitions of the terms ''accuracy'' and ''integrity'' in [section 1022.41] of the final regulations does not mean that they intend to use the same definitions in any other context.

74 Fed. Reg. 31487 (emphasis added). Thus, the FTC clearly intended to impose a specific obligation on furnishers to properly identify the identity of the consumer to an account and to accurately report the liability owed by that consumer on the account, but it did not intend to extend those responsibilities to CRAs as part of section 1681e(b) responsibilities, or otherwise.

As the Seventh Circuit explained, "neither the FCRA nor its implementing regulations impose a comparable duty upon consumer reporting agencies, much less a duty to determine the legality of a disputed debt." *Denan*, 959 F.3d at 295. The court explained:

> [Plaintiffs' claims fail because they] attempt to graft responsibilities of data furnishers and tribunals onto a consumer reporting agency. Only furnishers are tasked with accurately reporting liability. … And it makes sense that furnishers shoulder this burden: they assumed the risk and bear the loss of unpaid debt, so they are in a better position to determine the legal validity of a debt. *See Brill v. TransUnion LLC*, 838 F.3d 919, 921 (7th Cir. 2016) (affirming dismissal of suit challenging the accuracy of credit report because the creditor car lessor, not a consumer reporting agency, "was in a better position to determine the validity of its own lease"); *see also Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1156 (9th Cir. 2009) (explaining "the furnisher of credit information stands in a far better position to make a thorough investigation of a disputed debt than the [consumer reporting agency]").

Id. Other amici summarily dismiss the fact that furnishers are in the better position to determine the validity of their own accounts, stating that "[w]hether or not this is true, it is not a persuasive reason to categorically exempt CRAs from reasonable-procedures liability for so-called legal inaccuracies."[13] CDIA disagrees, as did Sessa's expert, Evan D. Hendricks, in his testimony below: "it is the furnisher (i.e. Hudson Valley) that actually knows the terms and liability of accounts about which it furnishes information because it has the direct relationship with the consumer."[14] As explained more fully below, it is not a matter of an exemption from liability so much as the simple fact that the FCRA recognizes the parties' roles and responsibilities with respect to the information differ, and it does not require a CRA to undertake the adjudication of legal disputes between a furnisher and a consumer.

Finally, the right of a consumer to dispute inaccurate information is an important component of ensuring accuracy: the FCRA "promotes accuracy by creating a self-help mechanism that empowers consumers to obtain copies of their reports and dispute erroneous or incomplete information."[15] Under the FCRA, consumers have the right to challenge information they believe to be incorrect with

---

[13] Amicus Brief of Federal Trade Commission and Consumer Financial Protection Bureau ("Agency Amici"), at 22.
[14] Plaintiff's Statement of Facts, Dkt. 126, ¶ 33.
[15] *See* Prepared Statement of Fed. Trade Comm'n, *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information, Before the H. Comm. on Financial Services*, at 4 (June 19, 2007), https://archives-financialservices.house.gov/hearing110/htparnes061907.pdf.

the furnisher of information (referred to as a "direct dispute"), and also with CRAs that maintain and report that data (referred to as an "indirect dispute," because the challenge is first presented to the CRA).

When a consumer disputes information with a CRA, the CRA must "review and consider all relevant information submitted by the consumer"[16] in its reinvestigation, and must also "promptly provide to the [furnisher] all relevant information regarding the dispute that is received by the agency from the consumer…."[17] After the CRA concludes its reinvestigation, which usually includes receiving information provided back by the furnisher, the CRA notifies the consumer of the results. 15 U.S.C. § 1681i(a)(6). If the consumer does not agree with the outcome of the dispute, the consumer is permitted to file a "brief statement setting forth the nature of the dispute,"[18] which is provided with every future consumer report the CRA provides that contains the disputed information. 15 U.S.C. § 1681i(c). In this way, users receive a report with the disputed information together with the consumer's version of the accuracy of that information.

Here, however, Sessa never filed a dispute with Trans Union to identify that she took issue with the reported account information.[19] Thus, Trans Union was never

[16] 15 U.S.C. § 1681i(a)(4).
[17] 15 U.S.C. § 1681i(a)(2)(B).
[18] 15 U.S.C. § 1681i(b).
[19] Plaintiff's Statement of Facts, Dkt. 126, ¶¶ 61 and 62.

asked to review and consider whether the information that Hudson Valley Federal Credit Union ("HVFCU") provided about Sessa's automobile financing was correct, and, any duties that would have arisen in connection with the reinvestigation of a dispute, were not triggered. Therefore, Trans Union could only be liable under the FCRA it the alleged inaccuracy was one that it (i) could have identified in the absence of a dispute, and (ii) if the error was of the kind and nature that it reasonably could have resolved. As the facts of the case demonstrate, the answer to both questions was no.

II. Appellant Failed to Establish an "Inaccuracy" for the Purpose of Stating a Claim Under Section 1681e(b) of the FCRA.

Circuit courts that have examined the issue of whether a CRA should determine the legal rights of a party to an agreement have consistently found that a CRA may be reasonably expected to identify and investigate factual inaccuracies, but that, even if a CRA could identify a legal inaccuracy, such a legal determination is one best left to the courts.[20] These cases demonstrate why Sessa's claim below could not proceed.

[20] *Batterman v. BR Carroll Glenridge, LLC*, 829 F. App'x 478, 481 (11th Cir. 2020) (finding plaintiff's theory of inaccuracy was actually "a contractual dispute" to be resolved by a court and not a CRA) (per curiam); *Humphrey v. Trans Union LLC*, 759 F. App'x 484, 488 (7th Cir. 2019) (adopting reasoning of First Circuit and ruling that a consumer may not use the FCRA "to collaterally attack the validity of a debt by challenging a CRA's reinvestigation procedure"); *Wright v. Experian Info. Sols.,*

A. Courts Regularly Bar Collateral Attacks Challenging the Legal Liability of Parties to Contracts.

Sessa urges this Court to ignore well-settled authority that the FCRA does not require that CRAs act as mini courts of law and settle disputes between a furnisher and a consumer. For nearly fifteen years, courts have declined to impose such an obligation on CRAs, uniformly prohibiting "collateral attacks" against account validity couched as FCRA claims.

The First Circuit first applied the collateral attack doctrine to bar an FCRA claim where the consumer challenged the legal validity of a debt instrument in a

---

Inc., 805 F.3d 1232, 1242 (10th Cir. 2015) (providing that FCRA's reinvestigation provisions "do[] not require CRAs to resolve legal disputes about the validity of the underlying debts they report"); *Okocha v. Trans Union LLC*, 488 F. App'x 535, 536 (2d Cir. 2012) (affirming "well-reasoned order," including holding that plaintiff's theory of inaccuracy "is a collateral legal attack on the validity of the debt … not a factual inaccuracy") (unpublished); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 891 (9th Cir. 2010) (explaining that "courts have been loath to allow consumers to mount collateral attacks on the legal validity of their debts" in the guise of FCRA claims against CRAs because "CRAs are ill equipped to adjudicate contract disputes," and agreeing that such claims are improper); *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008) (finding plaintiff "crossed the line between alleging a factual deficiency that Trans Union was obliged to investigate pursuant to the FCRA and launching an impermissible collateral attack against a lender by bringing an FCRA claim against a [CRA]"); *Saunders v. Branch Banking and Tr. Co. of VA*, 526 F.3d 142, 150 (4th Cir. 2008) (noting that "[c]laims brought against CRAs based on a legal dispute of an underlying debt raise concerns about 'collateral attacks' because the creditor is not a party to the suit, while claims against furnishers … do not raise this consideration because the furnisher is the creditor on the underlying debt").

dispute filed with the CRA. *See DeAndrade v. Trans Union LLC*, 523 F.3d 61 (1st Cir. 2008). In that case, after verifying the reported information in response to an initial dispute, the plaintiff's creditor continued to report the account to the CRA, believing the contract to have been ratified by the consumer's conduct in accepting the goods and making payments on the account. *Id.* The plaintiff sued the creditor and mailed a copy of the lawsuit to the CRA, demanding the CRA stop reporting the debt. *Id.* at 64. The CRA followed its normal dispute reinvestigation procedure, but ultimately did not delete or modify the account. *Id.*

The First Circuit found that there was no "inaccuracy" reflected in the information reported by the CRA for the purpose of stating an FCRA claim under §1681i(a), holding that the plaintiff could not collaterally attack the validity of the underlying debt instrument between the parties using the FCRA dispute process. *Id.* at 64-65. The court stated:

> Whether the mortgage is valid turns on questions that can only be resolved by a court of law, such as whether DeAndrade ratified the loan. This is not a factual inaccuracy that could have been uncovered by a reasonable reinvestigation, but rather a legal issue that a credit agency such as Trans Union is neither qualified nor obligated to resolve under the FCRA. ... In essence, DeAndrade has crossed the line between alleging a factual deficiency that Trans Union was obliged to investigate pursuant to the FCRA and launching an impermissible collateral attack against a lender by bringing an FCRA claim against a consumer reporting agency.

Id. at 68 (emphasis added). Therefore, the collateral attack doctrine does not bar a complaint because CRAs should be "exempt" from liability as a policy matter (as

argued by the FTC and CFPB in their amicus brief, Agency Amici, at 29); rather, it is because the question of the legal validity of a contract requires a legal determination that only a court of law should undertake. Thus, the *DeAndrade* court distinguished those inaccuracies that are rightly within the CRA's bailiwick as "factual," versus "legal" inaccuracies, which are not. 523 F.3d at 68.

The Ninth Circuit, relying on *DeAndrade*, also held that the FCRA reinvestigation rules of §1681i do not require a CRA to sit in judgment over a legal dispute.

> A CRA is not required as part of its reinvestigation duties to provide a legal opinion on the merits. Indeed, determining whether the consumer has a valid defense [to enforcement of a debt instrument] "is a question for a court to resolve in a suit against the [creditor,] not a job imposed upon consumer reporting agencies by the FCRA."

Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 892 (9th Cir. 2010) (quoting *DeAndrade*, 523 F.3d at 68). Where the consumer alleged that the furnisher incorrectly reported an account balance as due where she claimed to have a defense to the underlying debt (that her insurer was obligated to pay the medical bill), the Ninth Circuit held that no FCRA claim could stand against the CRA for reporting the information, stating that "[r]einvestigation claims are not the proper vehicle for collaterally attacking the legal validity of consumer debts." *Id.* As the court in *Carvalho* explained:

> The proper recourse for the consumer, therefore, was to resolve the issue in a suit against the creditor; "[i]f a court had ruled the mortgage

> invalid and Trans Union had continued to report it as a valid debt, *then* [the consumer] would have grounds for a potential FCRA claim."

Id. at 891-892, quoting *DeAndrade*, 523 F.3d at 68.

In 2020, the Seventh Circuit followed this line of cases and barred plaintiffs' claims under both the reinvestigation requirements of section 1681i(a) and the reasonable procedures requirements of section1681e(b), holding that neither provision of the FCRA requires a CRA "determine the legality of a disputed debt." *Denan*, 959 F.3d at 295. In *Denan*, the plaintiffs were borrowers under various loan agreements issued by tribal lenders. *Id.* at 292. The plaintiffs sued the CRA for a violation of section 1681e(b) of the FCRA in reporting the account information because such loans were allegedly "void *ab initio*" under state law, making the loans "void and uncollectible." *Id.* at 293.[21] The plaintiffs argued that the CRA "knew or recklessly ignored" that the loans were legally unenforceable and, as a result, the CRA should have known that any loan data furnished by those lenders would be inherently inaccurate because the debt was uncollectible as a matter of law. *Id.*[22]

---

[21] On the specific question of whether a law violation in the underlying transaction renders the transaction void or voidable, other courts have held that an FCRA claim still may not stand. *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt*, P.C., No. 08-CV-4208, 2012 U.S. Dist. LEXIS 43280, at *15-16 (E.D.N.Y. Mar. 28, 2012) ("The apparent violation of the local or state law regarding licensing cannot state a plausible FCRA violation.").

[22] The plaintiffs cited enforcement actions against tribal lenders challenging the validity of such loans as proof of the CRA's willful disregard of the invalidity of the loans. *Denan*, 959 F.3d at 292. However, courts have upheld the validity of such

The court held that the plaintiffs failed to identify an "inaccuracy" sufficient to state a claim under both provisions of the FCRA, in part, noting the differences between the responsibilities of CRAs and those of furnishers. "Accuracy" for furnishers, however, means information that "correctly … [r]eflects ... liability for the account." *Denan*, 959 F.3d at 295, citing 12 C.F.R. § 1022.41(a). "Neither the FCRA nor its implementing regulations impose a comparable duty upon consumer reporting agencies, much less a duty to determine the legality of a disputed debt." *Id.* After finding that the consumers' complaint raised legal issues, the court recognized that the FCRA did not require a CRA to resolve them, concluding "[o]nly a court can fully and finally resolve the legal question of a loan's validity." *Id.* (internal citations omitted).

Most recently, the Seventh Circuit explained its reasoning in *Denan*, and the rationale behind the collateral attack doctrine, in *Chuluunbat v. Experian Info. Sols., Inc.*, 4 F.4th 562 (7th Cir. 2021). In *Chuluunbat*, the plaintiffs alleged that the creditors who were furnishing data about them were not the true owners of the debt instruments, and therefore, the CRA violated the FCRA in reporting the account information and in failing to reasonably reinvestigate their disputes. *Id.* at 565-66.

---

loans, depending upon the terms of the agreement and the power of the tribe to engage in the conduct. *See, e.g., Williams v. Big Picture Loans*, 929 F.3d 170, 176 (4th Cir. 2019) (arm of tribe making internet loans from reservation to non-Indian citizens was entitled to tribal immunity). Thus, the loans were not *per se* void.

Similar to Sessa in this case, the plaintiffs therein argued that the question was a "straightforward factual injury" and that "all the [CRAs needed] to ascertain is whether a purchase and sale agreement for each of the plaintiffs' debts exists." *Id.* at 567.

Remarking that while "a clear line has not been drawn between legal and factual inaccuracies in the FCRA context," the Seventh Circuit noted that existing case law does provide "helpful guideposts," citing *Denan* and *DeAndrade* as "paradigmatic example[s] of a legal dispute." *Id.* The court explained "[CRAs] were not required to determine that the debt was invalid as a matter of law because '[o]nly a court can fully and finally resolve the legal question of a loan's validity,' and therefore, '*no reinvestigation by Trans Union could have uncovered an inaccuracy in [the plaintiff's] credit report.*'" *Id.* (citations omitted) (emphasis added). Comparing those legal determinations to factual inaccuracies, such as the amount owed (under an undisputed debt) or the due date of payment, the court explained "[t]hese questions do not require the consumer reporting agencies to make any legal determinations about the facts or legal judgments. A legal question may also be resolved as a matter of fact if a tribunal – such as a court or arbitrator – has adjudicated the matter." *Id.* at 568 (citations omitted). However, because the "investigation into whether the creditors were assigned the debts involves more than just determining if an assignment agreement exists [but also] involves interpreting

the legal validity of any assignment agreement," the *Chuluunbat* court concluded the alleged error was a legal inaccuracy "outside the competency of a [CRA]." *Id.* Therefore, such an inaccuracy cannot be a basis of an FCRA claim. *Id.*

The Agency Amici cite to the consolidated cases in *Chuluunbat* for the proposition that the legal-factual distinction is difficult to draw, stating, "[i]t is telling that four courts considering the same set of facts were unable to resolve whether a consumer report that misidentifies the owner of a debt is factually or legally inaccurate."[23] While it is true that some district courts held that the question presented was a mixed question of law and fact, while another found it to be a pure legal question, all district courts ultimately reached the exact same conclusion – that the question was not one to be decided by a CRA. *Chuluunbat*, 4 F.4th at 566.

B. Appellant Failed to Demonstrate Evidence to Support a Finding That Trans Union Could Identify an "Inaccuracy" That Could Form the Basis of a Claim Under Section 1681e(b) of the FCRA.

Just like the plaintiffs in *Denan* and *DeAndrade*, Sessa argued below that her financing agreement was a "sham" agreement in violation of TILA, which would render it legally void and unenforceable. Determining whether the financing agreement's terms constituted a violation of federal law, as alleged, or was otherwise invalid, is indisputably a task for the courts, not a CRA.

[23] Agency Amici Brief, at 29.

Even assuming Sessa has since abandoned her argument that the financing agreement was a "sham" in violation of federal law,[24] her remaining theory of liability was that Trans Union should have uncovered the inaccuracy, in part, because "[b]asic knowledge of auto leasing should have prompted Trans Union to question whether the information it reported about [her] lease was accurate."[25] Sessa argues on brief, without cites to the record, that "[t]he record evidence made clear what we all know—that consumer auto leases simply do not include balloon payments at all, let alone one nearly 100 times the size of the monthly payment." However, as explained by Trans Union in its brief on appeal,[26] and as conceded by Sessa and each of her experts below, auto leases can include balloon payments.[27] In fact, Sessa's expert admitted that the standard reporting format utilized by Trans Union and its furnishers, including HVFCU, provide for balloon payments to be reported on lease accounts.[28] Thus, similar to the situation in *Denan*, where the mere fact that the loan was made by a tribal lender did not render it per se unenforceable

[24] In her brief on appeal, Sessa did not renew her argument that the transaction was a "sham" in violation of federal law, possibly because challenging the validity and enforceability of the transaction would bring her claims directly within *Denan* and *DeAndrade*. However, Sessa continues to maintain that the reported information conflicts with the actual terms of her financing agreement.
[25] Appellant's Brief, p. 22.
[26] *See* Appellee's Brief, p. 14, n.1 and p. 45, n.11.
[27] *See* Plaintiff's Statement of Facts, Dkt. 126, ¶¶ 14, 23, and 15.
[28] Plaintiff's Statement of Facts, Dkt. 126, ¶ 41.

(and therefore, not reportable), the mere existence of a balloon payment reflected on a "lease" account would not render the information *per se* inaccurate.

Notably, on brief, Sessa represents that "all parties agree that Trans Union's credit report did not accurately reflect the terms of Ms. Sessa's auto lease—and that is also clear from the lease itself."[29] However, Sessa cites no support in the record for this statement, and Trans Union does not appear to agree with that representation.[30] What is undisputed, however, is that HVFCU continued to report Sessa's account with a balloon payment for over a year - well into the pendency of the litigation below.[31] Sessa began contacting the dealer and HVFCU about the allegedly erroneous account reporting in December of 2018, when she believed that her "Lease transaction had gone awry" and she tried to "untangle what had occurred"

[29] Appellant's Brief, p. 48.

[30] *See* Appellee's Brief, p. 14, n.1, explaining that Sessa's hearsay statements in her Declaration is contradicted by her sworn deposition testimony, and the account statements produced in discovery that showed the "same loan balance that Hudson Valley reported to Trans Union." *See also id.* p. 45, n.11

[31] The Complaint was filed on October 25, 2019, Dkt. 1. Sessa indicates she first received notice of Trans Union's reporting in December of 2018, after which she contacted HVFCU and others regarding the reporting of a balloon payment. *See* Declaration of Gia Sessa, offered in opposition to Defendant's Motion for Summary Judgment, Dkt. 124, ¶¶ 6, 10-14. *See also* Plaintiff's Statement of Facts, Dkt. 126 ¶ 49, wherein Plaintiff admitted that the "Balloon Payment Information was on Plaintiff's file [from] (November 1, 2018 to, at the latest, May 11, 2020)…".

with the dealer and her creditor.[32] Notwithstanding the concerns she shared with the credit union, HVFCU continued to report the account with the balloon payment.[33]

Sessa conceded below that determining whether the agreement contained a balloon payment would have at least required Trans Union to review the financing agreement,[34] which she did not provide to Trans Union prior to filing her lawsuit.[35] Moreover, her own expert witness, Evan Hendricks, admitted that "*the FCRA does not require Trans Union to receive and review the lease contract before reporting data about a lease,"* and that when a furnisher sends consumer data to a CRA "like Trans Union, the CRA does not receive the actual contract documents that determine the consumer's liability or other terms of the account (i.e., Plaintiff's lease)."[36] Instead, Hendricks testified, "it is the furnisher (i.e. Hudson Valley) that actually knows the terms and liability of accounts about which it furnishes information because it has the direct relationship with the consumer."[37]

Therefore, since HVFCU "actually knows the terms and liability of accounts…because it has the direct relationship with the consumer" and it continued to furnish information about Sessa's account even after her objection, for the purpose

[32] Declaration of Gia Sessa, Dkt. 124, ¶¶ 6, 9-13, 21.
[33] Plaintiff's Statement of Facts, Dkt. 126, ¶ 49.
[34] Plaintiff's Statement of Facts, Dkt. 126, ¶ 61, *see also* ¶ 62 response "Plaintiff did not dispute the inaccurate tradeline directly with Trans Union."
[35] Plaintiff's Statement of Facts, Dkt. 126, ¶ 6.
[36] Plaintiff's Statement of Facts, Dkt. 126, ¶¶ 32, 34 (emphasis added).
[37] Plaintiff's Statement of Facts, Dkt. 126, ¶ 33 (emphasis added).

of determining whether these facts could state an 'inaccuracy' for the purpose of FCRA liability, the reasonable inference is that HVFCU maintained that a balloon payment was owed; the parties disputed the obligations under the contact; and the FCRA did not require Trans Union to resolve that dispute.

Moreover, the actual outcome of the ultimate legal review is irrelevant to the question of whether Trans Union was required under the FCRA to conduct it. As the district court below explained:

> It may be the case that the terms of the lease contradict the data HVFCU furnished—though, to be clear, the Court is in no way opining on this question. But Plaintiff cannot reframe this purportedly "implausible interpretation[]" as a matter of fact. (Pl.'s Mem. 9.) This is at its core "a contractual dispute," *Batterman*, 829 F. App'x at 481, and one not before this Court.

SA24.

Finally, even in cases where the question presented to the CRA is a mixed question of law and fact, the result is the same – there can be no liability under the FCRA because it is not for the CRA to resolve the dispute. Sessa[38] and the Agency Amici[39] rely on *Cornock v. Trans Union LLC*, 638 F. Supp. 2d 158 (D. N.H. 2009), to argue that the collateral attack doctrine fails in practice because the distinction between legal and factual inaccuracies is "frustrating" and "unworkable." Respectfully, while the district court in *Cornock* did describe the exercise as

[38] Appellant's Brief, p. 43.
[39] Agency Brief, p. 25.

"frustrating" and "often unworkable," that text was mere dicta, and certainly not persuasive, given that the court ultimately found that the plaintiff failed to establish an inaccuracy in the report that could be the basis for a reinvestigation claim under §1681i(a). *Id.* The *Cornock* district court concluded that the mortgage validity question raised in *DeAndrade* was a mixed question of law and fact, and that *DeAndrade* therefore stands for the proposition that an item of information is only inaccurate for the purpose of a §1681i(a) claim if the CRA "could have uncovered the inaccuracy 'if it had reasonably reinvestigated the matter.'" *Id.* at 164. Applying that standard, the *Cornock* court found that the CRA would not have been able to identify an inaccuracy even if it had undertaken the plaintiff's preferred investigation strategy (such as reviewing the contract and hiring a handwriting expert to review the signature on the contract) because the original account agreement could not be found, and the creditor relied on a ratification theory of liability. *Id.* The CRA could not have adjudicated whether the creditor was entitled to its ratification theory of liability against the consumer.[40] Thus, the district court held the case could not proceed. *Id.*

In this way, the *Cornock* is yet another example of the principles the Seventh Circuit tackled in *Chuluunbat* and *Denan,* all of which underscore CDIA's point –

[40] Only after a year's worth of litigation did a court of law hold that the creditor's theory was invalid, finding Cornock was not obligated on the account. *Cornock,* 638 F. Supp. 2d at 164-65.

where the parties to the transaction do not agree on the legal responsibilities arising under their contract, such as may be the case with Sessa and her creditor here, a CRA is not able to uncover any "inaccuracy" even employing reasonable procedures to assure maximum possible accuracy, nor would the CRA be competent to make the legal determination necessary to resolve it. Thus, it cannot be a basis for liability under section 1681e(b) of the FCRA.

CONCLUSION

For the foregoing reasons, *amicus* Consumer Data Industry Association urges this Court to adopt the collateral attack doctrine and affirm that the Fair Credit Reporting Act does not require consumer reporting agencies to resolve contractual disputes between a consumer and her creditor that require a legal determination, which is best left to the courts.

Dated: August 4, 2022

HUDSON COOK, LLP

/s/ Rebecca E. Kuehn

Rebecca E. Kuehn
Jennifer L. Sarvadi
1909 K Street, N.W., 4th Floor
Washington, D.C. 20006
(202) 715-2002
rkuehn@hudco.com

Counsel for Amicus Curiae
Consumer Data Industry Association

CERTIFICATION OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document listed in Fed. R. App. 32(f), this document contains 7,350 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word in 14-point font, Times New Roman.

Dated: August 4, 2022

By: */s/ Rebecca E. Kuehn*
Rebecca E. Kuehn

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2022, I electronically filed the foregoing Brief of Amicus Curiae Consumer Data Industry Association in Opposition to Plaintiff-Appellant's Appeal with the clerk of this Court using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

HUDSON COOK, LLP

By */s/ Rebecca E. Kuehn*

Counsel for Amicus Curiae
Consumer Data Industry Association