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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

NO. CIV. S 04-0778 MCE KJM

AMENDED MEMORANDUM AND ORDER

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

1 ("Plaintiffs") sued various California state officials (Attorney
2 General Bill Lockyer, Department of Insurance Commissioner John
3 Garamendi, Commissioner of the Department of Corporations William
4 P. Wood, and Commissioner of the Department of Financial
5 Institutions Howard Gould)(collectively, "Defendants") on the
6 ground that the affiliate sharing provisions of California's
7 Financial Information Privacy Act, commonly referred to as SB1,
8 ("SB1") are preempted by federal law. This Court granted
9 Defendant's motion for summary judgement. On appeal, the Ninth
10 Circuit reversed holding that federal law does partially preempt
11 SB1 and instructed this Court to ascertain the scope of that
12 preemption. Specifically, this Court is to decide whether any
13 part of SB1's affiliate sharing provision survives preemption
14 and, if so, can that surviving portion be severed from the
15 remainder of SB1. For the reasons set forth below, this Court
16 finds that SB1's affiliate sharing provision does not survive
17 preemption and, even if some limited applications could be saved,
18 they cannot be severed from the remainder of the statute.

19 20 **BACKGROUND**

21
22 This case involves the convergence of the Fair Credit
23 Reporting Act ("FCRA"), as amended by the Fair and Accurate
24 Credit Transactions Act of 2003("FACTA"), Title V of the Gramm
25 Leach Bliley Act ("GLBA") and California's SB1. These four
26 legislative enactments generally seek to govern the treatment of
27 personal information albeit to varying degrees. In FCRA, FACTA
28 and GLBA, Congress created a statutory framework that seeks to

1 strike a balance between providing citizens affordable financial
2 services while protecting them against invasions of privacy and
3 the misuse of personal information. Through SB1, the California
4 Legislature is seeking to accord the citizens of California with
5 more stringent protections than those afforded under the federal
6 scheme which has given rise to this litigation.¹

7
8 **STANDARD**
9

10 Plaintiffs have styled their motion as one for declaratory
11 relief. The operation of the Declaratory Judgment Act is
12 procedural only. Skelly Oil Co. v. Phillips Petroleum Co., 339
13 U.S. 667, 671, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)(citations and
14 quotations omitted). Generally, declaratory judgment actions are
15 justiciable if "there is a substantial controversy, between
16 parties having adverse legal interests, of sufficient immediacy
17 and reality to warrant the issuance of a declaratory judgment."
18 Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270,
19 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941). Declaratory relief is
20 appropriate when, as here, (1) the judgment will serve a useful
21 purpose in clarifying and settling the legal relations in issue,
22 and (2) the judgment will terminate and afford relief from the
23 uncertainty, insecurity, and controversy giving rise to the
24 proceeding. Eureka Federal Sav. & Loan Asso. v. American
25 Casualty Co., 873 F.2d 229, 231 (9th Cir., 1989)(citations and

26
27 ¹While the additional protections of SB1 extend to both
28 affiliate sharing of information as well as third party
information sharing, only the affiliate sharing provisions are at
issue here.

1 quotations omitted).

2 Plaintiffs are also seeking injunctive relief against
3 enforcement of SBI's affiliate sharing provisions. In ruling on
4 a request for injunctive relief, the trial court considers the
5 irreparable injury to the moving party and the inadequacy of
6 legal remedy for such injury. See Weinberger v. Romero-Barcelo,
7 456 U.S. 305, 312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d 91 (1982).
8 When seeking a preliminary injunction, a party must demonstrate
9 either (1) a combination of probable success on the merits and
10 the possibility of irreparable injury if relief is not granted;
11 or (2) the existence of serious questions going to the merits
12 combined with a balancing of hardships tipping sharply in favor
13 of the moving party. Int'l Jensen, Inc. v. Metrosound U.S.A., 4
14 F.3d 819, 822 (9th Cir., 1993). The standard for a permanent
15 injunction is essentially the same as for a preliminary
16 injunction with the exception that the plaintiff must show actual
17 success on the merits rather than a mere likelihood of success.
18 See Amoco Production Co. et. al. v. Village of Gambeel et. al.,
19 480 U.S. 531, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). When
20 Actual success on the merits is shown, however, the inquiry is
21 over and a party is entitled to relief as a matter of law
22 irrespective of the amount of irreparable injury which may be
23 shown. Sierra Club v. Penfold, 857 F.2d 1307, 1318 n.16 (9th
24 Cir., 1988).

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1 California free to govern the sharing of that information among
2 affiliates. This Court disagrees.

3 For information sharing to be preempted under FCRA, the
4 information must satisfy two conditions. First, it must fall
5 within the scope of information governed by FCRA. Specifically,
6 it must concern a consumer's "credit worthiness, credit standing,
7 credit capacity, character, general reputation, personal
8 characteristics, or mode of living." Id. Second, the
9 information must be for an FCRA authorized purpose. To
10 constitute an authorized purpose under FCRA, the information must
11 be "used, expect to be used, or collected for the purpose of
12 establishing eligibility for credit or insurance, employment, or
13 [other authorized purposes.] Id. The definition of information
14 under FCRA is a two pronged inquiry that encompasses both the
15 scope of information that is governed under FCRA as well as the
16 purpose for which that information is to be collected, used or
17 expected to be used. Information that does not meet both the
18 scope and purpose prongs of information as defined under FCRA is
19 not federally protected.

20 Defendants concede that virtually all information regarding
21 a consumer falls within the scope prong of information as defined
22 under FCRA. Defendants' axial argument, however, is that a vast
23 sea of information exists that does not meet the purpose prong of
24 information as defined under FCRA, and therefore, is subject to
25 SB1. For example, Defendants argue that if information is
26 collected by a financial institution solely to ascertain whether
27 an individual is likely to purchase a product, that information
28 is not subject to FCRA regulation.

1 Plaintiffs argue, however, that it would be virtually
2 impossible to ascertain in advance whether or not information
3 collected and shared by a financial institution would satisfy an
4 FCRA authorized purpose. Plaintiffs contend that parsing what
5 information meets the purpose prong of information as defined by
6 FCRA versus that which does not would cast a cloud of uncertainty
7 over the preemption that Congress has decreed in the FCRA. This
8 Court agrees.

9 A financial institution may gather and share information
10 with its affiliates believing in good faith that it is not
11 required to comply with SB1 because the information will be used
12 for an FCRA authorized purpose. If, in fact, the information is
13 not so used, the financial institution would have acted in
14 violation of SB1 exposing it to the penalties thereunder.² This
15 creates the untenable situation of forcing California financial
16 institutions to either risk violation of SB1 or comply therewith
17 whether or not the information is for an FCRA authorized purpose.

18 Further, the same information could be gathered for both
19 FCRA authorized and unauthorized purposes. Imposing SB1's
20 requirements on the collection or use of this dual purpose
21 information necessarily violates FCRA's preemption clause because
22 California would be imposing a requirement with respect to the
23 exchange of information among affiliates as expressly prohibited
24 by FCRA. See 15 U.S.C. § 1681t(b)(2).

25 While in theory it seems financial institutions could

26
27 ²The only certain way to avoid violating SB1 when sharing
28 information with affiliates, would be to comply with SB1's notice
and opt out requirements whether or not the information appears
prospectively to be federally protected.

1 delineate in advance what information enjoys federal protection
2 and which does not, in practice any such delineation would simply
3 be conjecture. Accordingly, this Court finds that no portion of
4 SB1's affiliate sharing provision survives.

5
6 **2. Severance**

7
8 Although we find that no portion of SB1's affiliate sharing
9 provision survives, we reach the issue of severability as a
10 distinct ground of preemption. As an initial matter, the parties
11 agree and this Court concurs that whether a state statute may be
12 reformed or construed in a manner that preserves its
13 constitutionality is a question of state, and not federal, law.
14 Kopp v. Fair Pol. Practices Com., 11 Cal. 4th 607; 905 P.2d 1248;
15 47 Cal. Rptr. 2d 108 (Cal. Sup. Ct., 1995).

16 Defendants argue that this Court has the authority to sever
17 only those applications of SB1 that are unconstitutional while
18 retaining those applications that are not. Essentially,
19 Defendants are seeking to have this Court reform or rewrite SB1
20 to save it from constitutional infirmity. In support of their
21 position, Defendants rely on Kopp wherein the California Supreme
22 Court rejected the view that "a court lacks authority to rewrite
23 a statute in order to preserve its constitutionality or that the
24 separation of powers doctrine ... invariably precludes such
25 judicial rewriting." 11 Cal. 4th at 615.

26 This precise argument was raised in another federal court
27 where the court explained that "...a federal court, which derives
28 its power from the federal Constitution and is bound by

1 principles of federalism, has no power by virtue of California's
2 separation of powers doctrine, or otherwise, to rewrite a state
3 statute, even to save it from unconstitutionality." California
4 Prolife Council PAC v. Scully, 989 F. Supp. 1282, 1301 (D. Cal.,
5 1998). In fact, the Ninth Circuit has flatly declared that it is
6 "not within the province of [a federal] court to 'rewrite' [a
7 state law] to cure its substantial constitutional infirmities."
8 Tucker v. State of Calif. Dept. of Education, 97 F.3d 1204, 1217
9 (9th Cir., 1996).³ The Supreme Court has likewise adhered to
10 this general principle. See e.g. Am. Booksellers Assn., 484 U.S.
11 383, 387; 108 S. Ct. 636; 98 L. Ed. 2d 782 (1988)(stating in the
12 First Amendment context that "we will not rewrite a state law to
13 conform it to constitutional requirements"); see also Blount v.
14 Rizzi, 400 U.S. 410, 419, 27 L. Ed. 2d 498, 91 S. Ct. 423 (1971)
15 (declaring that "it is for Congress, not this Court, to rewrite
16 the statute").

17 Although eliminating unconstitutional conditions is not
18 necessarily the same as adding new language, the Supreme Court
19 has voiced a similar note of caution about eliminating
20 unconstitutional conditions when a federal court reviews state
21

22 ³A number of other circuits have followed this same
23 reasoning. See Eubanks v. Wilkinson, 937 F.2d 1118, 1126 (6th
24 Cir., 1991)(federal courts "must take the state statute or
25 municipal ordinance as written and cannot find the statute or
26 ordinance constitutional on the basis of a limiting construction
27 supplied by it rather than a state court.); see also Hill v. City
28 of Houston, 789 F.2d 1103, 1112 (5th Cir.)("[A] federal court may
not itself provide a limiting construction of legislation that is
not so readily susceptible"), aff'd 482 U.S. 451, 96 L. Ed. 2d
398, 107 S. Ct. 2502 (1987); see also Erznoznik v. City of
Jacksonville, 422 U.S. 205, 216, 45 L. Ed. 2d 125, 95 S. Ct. 2268
(1975) (narrowing construction only permitted if the language is
"easily susceptible of a narrowing construction").

1 statutes. See, e.g., Welsh v. United States, 398 U.S. 333, 363
2 n. 15, 26 L. Ed. 2d 308, 90 S. Ct. 1792 (1970)(noting the Court's
3 more limited discretion "to extend a policy for the States even
4 as a constitutional remedy").

5 Both parties concede that the only means of severing the
6 unconstitutional portion of SB1 would be to accord a narrow
7 construction to the term "nonpublic personal information" by
8 striking those applications that are unconstitutional.

9 Defendants are necessarily asking this Court to "dissect an
10 unconstitutional measure and reframe a valid one out of it by
11 inserting limitations it does not contain. This is legislative
12 work beyond the power and function of the court." Hill v.

13 Wallace, 259 U.S. 44, 70, 66 L. Ed. 822, 42 S. Ct. 453 (1922).

14 Even were any part of SB1's affiliate sharing provision spared
15 from constitutional infirmity, this Court lacks the power to
16 rewrite SB1 to excise those applications that are
17 unconstitutional.

18 The Court wishes to stress that the vast majority of
19 protections afforded by SB1 remain untouched by today's decision.
20 For example, the affirmative consent, or opt-in, requirement for
21 sharing nonpublic personal information with non-affiliated third
22 parties remains intact. Similarly, consumers' retain the right
23 to preclude, or opt-out, of information sharing between joint
24 marketers. Moreover, while SB1's affiliate sharing provision is
25 unenforceable due to constitutional infirmity, the FCRA continues
26 to provide consumers with the right to opt-out of most affiliate
27 sharing. In sum, the FCRA and those provisions of SB1 which
28 survive will continue to provide consumers with the protections

1 intended by Congress and the California Legislature.

2
3 **CONCLUSION**

4
5 The Court finds that a judgment in favor of Plaintiffs will
6 serve a useful purpose in clarifying and settling the scope of
7 FCRA preemption as it relates to SB1 and will terminate and
8 afford relief from the uncertainty, insecurity, and controversy
9 giving rise to this action. Accordingly, declaratory judgment is
10 appropriate and final judgement in favor of Plaintiffs is
11 therefore entered. In addition, the Court finds that Plaintiffs
12 have established actual success on the merits and are entitled to
13 injunctive relief as a matter of law. Defendants are hereby
14 permanently enjoined from enforcing SB1's affiliate sharing
15 provisions as codified in California Financial Code section
16 4053(b)(1) to the extent they are preempted by 15 U.S.C. section
17 1681t(b)(2).

18
19 IT IS SO ORDERED.

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21 DATED: October 5, 2005

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24 _____
25 MORRISON C. ENGLAND, JR.
26 UNITED STATES DISTRICT JUDGE
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