CASE NOS. 17-15807 & 17-16000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ZABRISKIE; KRISTIN ZABRISKIE,

Plaintiffs-Appellees,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. CV-13-02260-PHX-SRB

BRIEF OF *AMICUS CURIAE* UC BERKELEY CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Center for Consumer Law and Economic Justice at the UC Berkeley School of Law works to ensure safe, equal, and fair access to the marketplace.[1] Through research, advocacy, policy, and teaching, the Center acts to create a society where economic security and opportunity are available to all. The Center has an abiding interest in the clarity, predictability, and underlying fairness of consumer protection laws. The question whether businesses – including Fannie Mae – that operate automated consumer information systems are subject to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., directly influences the future financial security of consumers in this Circuit and nationwide, as well as their access to remedies when that security is improperly infringed.

Through this brief, the Center hopes to highlight for the Court the current lack of clarity around the issue in this Circuit and elsewhere, the potential negative ramifications of letting the *Zabriskie* panel decision stand, and the exceptional importance for future cases of resolving the question of the FCRA's application to Fannie Mae and other providers of automated consumer information systems.

[1] The parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or person other than *amici* and their members, contributed money to the preparation or submission of this brief.

INTRODUCTION AND RULE 35 STATEMENT

The split panel decision in this case follows a split panel decision from this Court on the same issue, with the opposite outcome, just two years ago. *McCalmont v. Fed. Nat'l Mortg. Ass'n,* 677 F. App'x 331 (9th Cir. 2017). Though the *McCalmont* decision was unpublished, the 2-1 vote in that case, mirroring the vote by the panel here, leaves this Circuit in the unenviable position of projecting a 3-3 judicial tie on the question whether Fannie Mae – and other providers of digital services handling consumer credit information – should be subject to the Fair Credit Reporting Act. Review of the issue by the full Court could do a great deal to establish uniformity and to resolve an important question of law. Fed. R. App. P., Rules 29, 35; Ninth Cir. Rules, Rule 29-2.

The impact of the uncertainty in this Court's decisions extends well beyond the tension between the panel opinion and *McCalmont*, and past even the boundaries of this Circuit. Courts throughout this Circuit, and around the nation, are looking to this Court for leadership on this issue. *See, e.g., Banneck v. Fed. Nat'l Mortg. Ass'n*, No. 3:17-cv-04657-WHO, 2018 WL 2287656 (N.D. Cal. May 18, 2018) (relying on *Zabriskie* panel holding to dismiss class action); *Dunnigan v. Fed. Home Loan Mortg. Corp.*, 184 F. Supp. 3d 726, 735-36 (D. Minn. 2016) (noting split between district court decisions in *Zabriskie* and *McCalmont*). Consumers, and businesses that handle credit information, are also looking to this

Court for guidance. Yet the split panel decision in *Zabriskie* does not and cannot provide the requisite clarity and authority. As one summary of the decision puts it: "So, for the moment, Fannie Mae is not a CRA in the Ninth Circuit. Given the potentially significant effects of an error in the [Desktop Underwriter] report and the divided opinion in *Zabriskie*, it is reasonable to expect that this will not be the last or only decision addressing the question of whether Fannie Mae acts as a CRA in licensing DU to lenders." Womble Bond Dickinson, *Take a Load Off, Fannie*, JDSUPRA (Jan. 14, 2019), https://www.jdsupra.com/legalnews/take-a-load-off-fannie-ninth-circuit-14263/. Unless and until the full Court speaks on the issue, the prevailing sense of confusion and lack of resolution – rather than uniformity – will remain.

Furthermore, the impact of this case – whether or not it is reheard *en banc* – will extend beyond the question whether Fannie Mae is itself subject to the FCRA; the decision will influence whether *any* creator of automated credit reporting systems can be held responsible for errors in its system and the harms those errors may cause. The panel decision here conflicts not only with *McCalmont* but also with a string of decisions by this Court holding that a company may *not* readily disclaim responsibility for its decisions through the expedient of automating its decision-making system. *See FTC v. Neovi*, 604 F.3d 1150 (9th Cir. 2010) (check-creating website held liable for checks created with its system); *In re Reynoso*, 477

F.3d 1117 (9th Cir. 2007) (online document preparation company that provided forms to consumers held liable as a bankruptcy preparer); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*) (roommate-finding website found responsible for its own discriminatory categories); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376 (1973) (same for newspaper). Yet the panel majority here found that employing an automated system could in fact shield a business from responsibility for its actions. That conflict with Circuit precedent underscores the importance of the full court's deciding, and bringing uniformity to, the exceptionally important questions at the heart of this case.

ARGUMENT

I. *EN BANC* REVIEW IS REQUIRED TO RESOLVE THE FUNCTIONAL SPLIT IN THIS CIRCUIT ABOUT WHETHER FANNIE MAE IS A CONSUMER REPORTING AGENCY UNDER THE FCRA.

En banc review is needed to establish clarity and uniformity on a crucial question of law. Just two years ago in *McCalmont*, a panel of this Court held, albeit in an unpublished decision, that Fannie Mae qualifies as a consumer reporting agency under the FCRA, 667 F. App'x at 331-32 – precisely the opposite of the panel majority's holding in *Zabriskie*. Faced with a fact pattern nearly identical to the present case, the panel in *McCalmont* split 2-1 on the issue whether Fannie

Mae's automated underwriting system "assembles, reviews, assesses, and evaluates" consumer information in a way that would bring it under the scope of the FCRA. *Id.* (citing 15 U.S.C. § 1681a(f)). The majority found that the McCalmonts had plausibly alleged that Fannie Mae "evaluates the consumer credit information" in order to compile it for the purpose of "communicat[ing] information" to third parties. *Id.* at 332-33.

As the dissent in the present case explained, Op. 18-21, the *McCalmont* majority was unpersuaded by Fannie Mae's arguments that the statute intended to exclude Government Sponsored Enterprises (GSEs) like Fannie Mae and Freddie Mac from liability. Fannie Mae pointed to a subsection of the statute that excluded GSEs from the general definition of "person" for the purposes of that subsection, arguing that GSEs were intended to be excluded from the requirements of the FCRA more generally. *See* 15 U.S.C. § 1681g(g)(1)(B)(ii); *McCalmont*, 667 F. App'x at 332. However, the *McCalmont* majority chose to read that subsection "in context," highlighting that it focused on the requirements for GSEs and private companies alike to make certain mandatory disclosures to consumers about the way their credit information is compiled.[2] *Id*. Further, the panel rejected the

[2] The *McCalmont* panel was correct to read the statute in context. Nowhere in the act is there any indication that Congress intended GSEs to be exempt from the FCRA. Indeed, legislative history surrounding the addition of section 1681g(g) in 2003 suggests the contrary. *See H.R. 2856—Fair Credit Full Disclosure Act:*

argument that Fannie Mae's licensing agreement shielded the GSE from the statute, finding that Fannie Mae was a consumer reporting agency "as a matter of law based on the language of 15 U.S.C. § 1681a(d)(1)." *McCalmont*, 667 F. App'x at 332. The holding in *McCalmont*, though unpublished, has influenced subsequent cases in this Circuit. *E.g.*, Op. 18-21 (Lasnik, J., dissenting); *Banneck*, 2018 WL 2287656 at *7 ("The Ninth Circuit has subsequently confirmed that a complaint's allegations were sufficient to "raise the reasonable inference that Fannie Mae 'regularly engages ... in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties,' and therefore qualifies as a 'consumer reporting agency' under 15 U.S.C. § 1681a(f).").

But *McCalmont* was not a unanimous decision. Judge Bea's dissent departed from the majority on both the legal holding that Fannie Mae is a consumer reporting agency and the inference that Fannie Mae failed to comply with

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Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services, 106th Cong. 38 (2000) (statement of committee chair, Rep. Marge Roukema) (noting that Fannie Mae represents "an enormous element of the marketplace"); *H.R. 2622—Fair and Accurate Credit Transactions Act of 2003: Hearing Before the Committee on Financial Services*, 108th Cong. 29 (2003) (remarks of Treasury Secretary John Snow) (stating that with regard to effective oversight of GSEs, a regulatory scheme must include "transparency, disclosure, and as with all regulators, the ability to hold the attention of the regulatee, to bring sanctions for conduct that poses risks to the system, to the financial system").

"reasonable procedures to assure maximum possible accuracy." 667 F. App'x at 333 (Bea, J., dissenting). Concerned that the majority's holding would "convert" many lenders into "credit reporting agencies" within the scope of the FCRA, Judge Bea offered a starkly different reading of the FCRA. *Id*.

The panel majority in the present case took an approach in line with Judge Bea's, Op. 10-12; the dissent aligned with the *McCalmont* majority opinion. Op. 18-21. In doing so, the *Zabriskie* panel split on almost every material question. The majority held that Fannie Mae is not a consumer reporting agency under the FCRA; the dissent, by contrast, found that GSEs are "persons" for the purpose of the statute. Op. 7, 17. The dissent reasoned that an entity must be responsible for the findings of its propriety software; the majority held that "what Fannie Mae *actually* does" should control. Op. 23, 10. The two opinions grapple not with a factual dispute, but with a legal debate that has potentially far-reaching consequences for the scope of responsibilities of GSEs and private corporations alike. Unfortunately, the opinions in the *Zabriskie* panel decision, especially given the presence of the *McCalmont* decision, provide insufficient guidance going forward to lower courts, to handlers of consumer information, and to consumers themselves.

II. BECAUSE DISTRICT COURTS AND HANDLERS OF CONSUMER INFORMATION LOOK TO THIS CIRCUIT FOR GUIDANCE, THIS CASE WILL IMPACT JUDICIAL DECISIONS AND INDUSTRY CONDUCT NATIONWIDE.

Nationally, courts have split on material questions that determine whether the FCRA should apply to GSEs. For example, although the panel majority considered it "commonsense" that "the FCRA applies only to an entity that assembles or evaluates with the intent of providing a consumer report to third parties," Op. 8, other courts have found the landscape less clear. One district court determined that information a lender received from Fannie Mae and Freddie Mac's automated underwriting services constituted a "consumer report" subject to the FCRA without reaching the issue of whether Fannie Mae acted as a "consumer reporting agency". *Crane v. Am. Home Mortg. Corp.*, No. Civ.A.03-5784, 2004 WL 1529165, at *4 (E.D. Pa. Jul. 7, 2004) ("The Complaint sets forth sufficient facts . . . that the information AHM obtained from Fannie Mae and Freddie Mac constituted 'consumer reports' as defined by 15 U.S.C. § 1681a(d)."). Another district court found that Fannie Mae was not a credit reporting agency, but nevertheless determined that provisions of the FCRA do apply to GSEs. *Bracken v. Fannie Mae Consumer Resource Center Inc.*, 2014 WL 5527837 *3 (D.S.C. Oct. 31, 2014) (holding that Fannie Mae did not constitute a consumer reporting agency, but that "non-consumer reporting agencies can avail themselves to Section 1681b(a)" of the FCRA).

Further, courts nationwide are relying on decisions of courts in this Circuit to address whether and how to apply the FCRA to Fannie Mae and Freddie Mac. In *Dunnigan v. Federal Home Loan Mortgage Corporation*, for instance, a district court in Minnesota looked to the discrepancy between the district court's opinions in *Zabriskie* and *McCalmont* when determining whether or not Freddie Mac is a CRA. 184 F. Supp. at 735-36 (allowing "discovery related to Freddie Mac's status, or lack thereof, as a CRA"). That court considered both decisions persuasive enough to create a genuine question about Freddie Mac's legal status under the FCRA and denied a motion to dismiss at that stage. *Id.* Irrespective of the fact that the *McCalmont* decision is unpublished, the question of how GSEs fit into the FCRA's regulatory scheme is one that will persist nationally and about which the Ninth Circuit is poised to provide definitive guidance.

Clarifying now whether Fannie Mae can be held responsible for harms caused by the Desktop Underwriter's errors will not only prevent further confusion on this topic, but will help courts in this Circuit and elsewhere when similar issues are raised. Because Fannie Mae is such a significant player in the industry, questions regularly arise about its responsibilities under the FCRA – even beyond the provisions raised directly in *Zabriskie*. *See, e.g.*, *Crane*, 2004 WL 1529165 (addressing whether information obtained from DU constituted a "credit report). With a thorough analysis of the issue that reflects the determination of the Court of

Appeals as a whole, this Court can eliminate unnecessary litigation and provide clarity and uniformity on the issue within the Circuit and nationwide.

III. THE RULE ADOPTED BY THE PANEL MAJORITY CONFLICTS WITH THIS COURT'S PREVIOUS DECISIONS REGARDING RESPONSIBILITY FOR AUTOMATED SYSTEMS AND LEAVES CONSUMERS WITHOUT A REMEDY FOR CLEAR VIOLATIONS OF THE FCRA.

The rule adopted by the panel majority conflicts with prior decisions of this Court squarely placing responsibility for harm caused by automated systems on the designers and proprietors of those systems. *See, e.g.*, *Neovi*, 604 F.3d at 1155-56 (holding liable the creator of a website that allowed users to create and send checks); *Fair Housing Council*, 521 F.3d at 1169 (finding roommate-location website liable for the discriminatory categories it generated). This Court has repeatedly rebuffed businesses' attempts to disclaim liability for automated systems, because deciding otherwise would leave consumers without a remedy for conduct that has violated the FCRA. *See Neovi*, 604 F.3d at 1155 (rejecting defendant's argument that it should not be held liable because all it had done was write and manage the software, and thereby avoiding "the absurd result that although checks have been created and delivered, no one is doing the creating or the delivering").

Although it is true that the FCRA does not explicitly address the role of proprietary algorithms as part of the consumer reporting process, the statute "is

undeniably a remedial statute that must be read in a liberal manner in order to effectuate the congressional intent underlying it," *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010), and that was designed to establish and uphold consumer protection standards in a world that contains automated underwriting systems like the Desktop Underwriter. *See, e.g.*, 15 U.S.C. § 1681g(g)(1)(B). The panel majority's opinion does not provide a workable standard going forward, for Fannie Mae or for other entities involved in the consumer credit industry. Automated underwriting systems are not going away, and neither are their errors. *See, e.g.*, Ben Lane, *Wells Fargo Reveals Software Error Led to Hundreds of Faulty Foreclosures*, HOUSING WIRE (Nov. 6, 2018), https://www.housingwire.com/articles/47324-wells-fargo-reveals-software-error-led-to-hundreds-of-faulty-foreclosures.

If this Court were to let stand the determination that a proprietary algorithm is not the responsibility of its owner, any financial institution that creates an automated underwriting system could avoid responsibility under the FCRA for even the most poorly designed and error-prone consumer data processing – in direct contradiction to the Court's precedent on responsibility for automated systems. In cases like those of the McCalmonts and the Zabriskies, lenders rely on Fannie Mae's software to provide consumer credit history and information on which they can base their decision to approve or deny a mortgage. Fannie Mae has

argued in these cases that the lenders were "assembling" the consumer credit information by using the DU software. *See, e.g.*, *Zabriskie*, Op. 9-10. But lenders do not have the ability to correct errors in Fannie Mae's proprietary software that they are merely licensing. It would be exceedingly difficult for lenders nationwide to "ensure maximum possible accuracy," 15 U.S.C. § 1681e(b), of a system they did not design and have no ability to improve. Requiring lenders to be responsible for errors in DU makes little practical sense and makes recovery under the FCRA all but impossible for consumers.

Moreover, the panel majority's opinion, if it stands, will discourage precisely the conduct that the FCRA was enacted to ensure: responsibility and accuracy in credit reporting. Companies increasingly rely on automated systems to do the work previously done by human employees—in this case, assembling and interpreting consumer credit information. The panel majority effectively removes responsibility for these systems from the supplier and proprietor of the technology and shifts the burden to the inquiring lender. *See* Op. 7 ("Fannie Mae does not assemble or evaluate consumer information. DU is merely a tool for lenders to do so."). The majority's interpretation creates an endless loop where no one can be held responsible under the FCRA: anyone requesting consumer credit information is also then the assembler of the credit information. Such a standard would encourage companies to outsource their operations to automated programs for

which the companies cannot effectively be held legally responsible, removing the incentive for system proprietors to ensure that their programs are accurate.

As many businesses shift toward automated systems, having a definitive and predictable standard will be crucial for both maintaining compliance and rendering consistent and effective adjudicatory decisions. That, indeed, has been the longstanding rule in this Circuit. *See Neovi*, 604 F.3d 1150 ; *Fair Housing Council*, 521 F.3d 1157; *In re Reynoso*, 477 F.3d 1117. The panel majority's opinion, however, breaks that rule, creating a lack of uniformity in the Court's decisions. The panel opinion relies on a "tool" analogy, Op. 8 ("when a person uses a tool to perform an act, the person is engaging in the act; the tool's maker is not"), that does not accurately reflect the reality of the mortgage underwriting system. While third-party lenders are the ones inputting consumer information into the DU system, Fannie Mae is responsible for the way that information is transformed into a prediction whether the GSE will guarantee the hypothetical loan.

Lenders may find Fannie Mae's contention that it does not assemble consumer information through DU bizarre. *See* Tim Lucas, *Lenders May Never Again Ask You For Pay Stubs, W-2s, Or Bank Statements*, THE MORTGAGE REPORTS (Jun. 20, 2017) ("In an effort to streamline the application process, mortgage giant Fannie Mae has rolled out a new program that allows lenders to 'skip' the collection of most borrower documents"), https://themortgagereports.

com/29419/mortgage-lending-goes-online-no-pay-stubs-w2s-bank-statements. And there is now notable confusion in the industry about who bears the responsibility for errors generated by automated underwriting systems. *See* Scott Olson, *Underwriting Predictability Is the Elephant in the Room*, SCOTSMAN GUIDE (May 2018), https://www.scotsmanguide.com/Residential/Articles/2018/05/Underwriting-Predictability-Is-the-Elephant-in-the-Room/. Given that Fannie Mae and Freddie Mac's automated systems are considered integral to the mortgage industry, the question of error management reaches far beyond the facts of the Zabriskies' case. *See, e.g.*, Kelsey Ramirez, *Fannie, Freddie Dual AUS Transforms Mortgage Industry*, HOUSING WIRE (Jun. 21, 2018) ("The new one-click dual AUS submissions for Fannie Mae and Freddie Mac loans is just over two months old, and its already beginning to transform the mortgage industry."), https://www.housingwire.com/articles/43746-fannie-freddie-dual-aus-transforms-mortgage-industry.

A thorough and definitive analysis by this Court would be timely and of particular use. That analysis will note that, while lenders may input information into the automated systems, Fannie Mae retains complete proprietary control over its software. As the panel dissent observed, unlike a traditional tool manufacturer that breaks ties with its creation after manufacture, Fannie Mae remains intimately involved in the decision to approve and to guarantee potential consumer

mortgages. *See* Op. 23 ("To the extent DU can be analogized to a mechanical tool such as a laser measurer, it would be as if Fannie Mae allowed licensees to purchase access to measurements obtained with the tool, but did the measuring itself"). In other words, the circumstances of this case provide no reason for this Court to break from its long-standing rule that automating a system does not alter responsibility for the system's effects.

CONCLUSION

In order to establish uniformity in its decisions, and to resolve a question of exceptional importance, this Court should rehear the present case *en banc*.

Dated: March 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29 and 32 and Ninth Circuit Rule 29-2. The brief has been prepared in 14-point Times New Roman font, and according to the word processing software employed contains 3,389 words.

/s/ Seth E. Mermin
Seth E. Mermin

CERTIFICATE OF SERVICE

I certify that on March 11, 2019, I electronically filed the foregoing brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the Court's ECF system, which will serve notice of the filing on all users registered in this case.

/s/ Vanessa Buffington
Vanessa Buffington