

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
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6  
7 August Term, 2008  
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9 (Argued: September 11, 2009 Decided: October 5, 2009  
10 Amended: October 14, 2009)  
11

12 Docket No. 08-5317-cv  
13  
14

15 PREMIUM MORTGAGE CORP., on behalf of itself and all others  
16 similarly situated,  
17

18 *Plaintiff-Appellant,*  
19

20 -v.-  
21

22 EQUIFAX, INC., a Georgia corporation, TRANS UNION LLC, a  
23 Delaware limited liability company, EXPERIAN INFORMATION  
24 SOLUTIONS, INC., an Ohio corporation, and EQUIFAX INFORMATION  
25 SERVICES, LLC, a Georgia limited liability company,  
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27 *Defendants-Appellees,*  
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29 CREDIT PLUS, INC., a Maryland corporation, individually and as  
30 a Representative of similarly situated defendants,  
31

32 *Defendant.*  
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39 Before:  
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1 PARKER and WESLEY, *Circuit Judges*, and RESTANI,\* *Judge*.

2  
3 Appeal from an order of the United States District  
4 Court for the Northern District of New York (Telesca, *J.*),  
5 entered on September 30, 2008, dismissing all claims against  
6 Equifax, Inc., Trans Union LLC, Experian Information  
7 Solutions, Inc., and Equifax Information Services, LLC.

8  
9 AFFIRMED.

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12  
13 LOUIS B. CRISTO, *Trevett Lenweaver & Salzer P.C.*,  
14 *Rochester, New York, for Plaintiff-Appellant.*

15  
16 MEIR FEDER, *Jones Day, New York, New York*  
17 *(Christopher R. Lipsett and David Sapir*  
18 *Lesser, Wilmer Cutler Pickering Hale & Dorr*  
19 *LLP, New York, New York, David Cooper and*  
20 *Victoria Dorfman, Jones Day, New York, New*  
21 *York, Craig E. Bertschi and Cindy D. Hanson,*  
22 *Kilpatrick Stockton LLP, Atlanta, Georgia, on*  
23 *the brief), for Defendants-Appellees.*

24  
25 JAMES CHAREQ, *Hudson Cook, LLP, Washington, DC, for*  
26 *Amicus Curiae Consumer Data Industry*  
27 *Association.*

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31 PER CURIAM:

32 Plaintiff Premium Mortgage Corp. commenced this  
33 putative class action on behalf of itself and similarly  
34 situated mortgage lenders, bringing nine state-law claims  
35 against several consumer credit reporting agencies –

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\* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

1 defendants Equifax Inc., Trans Union LLC, Experian  
2 Information Solutions, Inc., and Equifax Information  
3 Services, LLC (collectively, the "Credit Bureau defendants")  
4 – and Credit Plus, Inc. ("Credit Plus"), an intermediate  
5 "reseller" of consumer credit information. The United  
6 States District Court for the Northern District of New York  
7 (Telesca, J.), dismissed plaintiff's claims against the  
8 Credit Bureau defendants on preemption grounds, and granted  
9 plaintiff permission to file this partial appeal pursuant to  
10 Rule 54(b) of the Federal Rules of Civil Procedure.<sup>1</sup>

### 11 **Background**

12 Plaintiff's claims relate to defendants' sale of  
13 mortgage "trigger leads" to third-party lenders. Trigger  
14 leads are generated during the process by which mortgage  
15 brokers such as plaintiff evaluate consumer loan  
16 applications; according to plaintiff, these "leads" indicate  
17 that, "within the past 24 to 48 hours, a particular  
18 individual [has] expressed a desire to [a] mortgage bank" to  
19 obtain a loan. In order to assess an applicant's

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<sup>1</sup> Credit Plus did not join the Credit Bureau defendants' motion to dismiss, it is not a party to this appeal, and plaintiff's claims against it remain pending in the district court.

1 creditworthiness after receiving a loan application,  
2 plaintiff purchases an aggregated credit report from an  
3 intermediate reseller of consumer credit information, such  
4 as Credit Plus. The reseller, in turn, purchases individual  
5 credit reports from each of the Credit Bureau defendants and  
6 bundles the information for use by plaintiff.

7 The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §  
8 1381 *et seq.* requires a mortgage broker seeking to purchase  
9 a credit report to disclose the reason for its purchase. As  
10 relevant in this case, plaintiff's requests for consumer  
11 credit reports are motivated by the fact that a consumer  
12 recently applied for a loan. The disclosure of this  
13 information to the reseller, and ultimately to the Credit  
14 Bureau defendants, generates a trigger lead.

15 The crux of this dispute is plaintiff's challenge to  
16 defendants' practice of permitting other lenders to purchase  
17 "pre-screened" consumer reports, see 15 U.S.C. § 1681b(c),  
18 (e), that, in essence, contain trigger leads. According to  
19 plaintiff, these trigger leads constitute its "proprietary  
20 customer information" because "such information is not  
21 readily known in the industry and it cannot be obtained  
22 except through extraordinary effort . . . ." However, the

1 prescreened reports in question use the information conveyed  
2 by a trigger lead as a screening criterion in order to  
3 generate a list of consumers who are in the market for  
4 mortgages and other loan facilities. The lenders purchasing  
5 these lists then compete with plaintiff and similarly  
6 situated mortgage brokers by offering terms on loans to the  
7 customers.

8 Based on these allegations, plaintiff brought nine  
9 state-law claims, including misappropriation of trade  
10 secrets, fraud, unfair competition, tortious interference  
11 "with contractual or prospective business relations," breach  
12 of contract "of which class members were intended  
13 beneficiaries," and unjust enrichment. The Credit Bureau  
14 defendants moved to dismiss plaintiff's claims against them,  
15 arguing that the claims are preempted by the FCRA, and,  
16 alternatively, that the allegations in the Amended Class  
17 Action Complaint (the "complaint") fail to state a claim.  
18 Judge Telesca granted the motion and held that the FCRA  
19 expressly preempts each of plaintiff's claims against the  
20 Credit Bureau defendants. Plaintiff appeals.

### 21 **Discussion**

22 We review *de novo* a district court's application of

1   preemption principles.  See, e.g., *Drake v. Lab. Corp. of*  
2   *Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006).  “When  
3   addressing questions of express or implied pre-emption, we  
4   begin our analysis with the assumption that the historic  
5   police powers of the States are not to be superseded by the  
6   Federal Act unless that was the clear and manifest purpose  
7   of Congress.”  *Altria Group, Inc. v. Good*, 129 S. Ct. 538,  
8   543 (2008) (internal quotation omitted).  However, “[s]ince  
9   the existence of preemption turns on Congress’s intent, we  
10  are to ‘begin as we do in any exercise of statutory  
11  construction[,] with the text of the provision in question,  
12  and move on, as need be, to the structure and purpose of the  
13  Act in which it occurs.’”  *McNally v. Port Auth. of N.Y. &*  
14  *N.J.*, 414 F.3d 352, 371 (2d Cir. 2005) (quoting *N.Y. State*  
15  *Conference of Blue Cross & Blue Shield Plans v. Travelers*  
16  *Ins. Co.*, 514 U.S. 645, 655 (1995)).

17         Applying these standards, we affirm Judge Telesca’s  
18  conclusion with respect to the bulk of plaintiff’s state  
19  common-law claims.  The operative provision of the FCRA for  
20  the purpose of this analysis is 15 U.S.C. § 1681t(b)(1)(A),  
21  which states:  “[N]o requirement or prohibition may be

1 imposed under the laws of any State . . . with respect to  
2 *any subject matter* regulated under . . . subsection (c) or  
3 (e) of section 1681b of this title, *relating to* the  
4 prescreening of consumer reports . . . .” *Id.* §  
5 1681t(b)(1)(A) (emphases added).<sup>2</sup>

6 Plaintiff’s allegations “relate[] to the prescreening  
7 of consumer reports.” *Id.* As plaintiff acknowledges,  
8 third-party lenders obtain trigger leads from the Credit  
9 Bureau defendants by purchasing prescreened consumer  
10 reports. *See id.* § 1681b(c), (e). Trigger leads are simply  
11 one of the constituent parts of these “consumer report[s].”  
12 *Id.* § 1681a(d)(1). Consequently, plaintiff’s claims fall  
13 within § 1681a(d)(1), irrespective of whether the  
14 allegations in the complaint focus more narrowly on the  
15 resulting uses of the trigger lead information obtained  
16 through this practice. Therefore, there is no merit to  
17 plaintiff’s argument that its claims are not preempted  
18 because the trigger leads themselves are not “consumer  
19 reports” under the FCRA.

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<sup>2</sup> Because Judge Telesca’s analysis was based on § 1681t(b)(1)(A), any perceived tension between 15 U.S.C. § 1681h(e) and § 1681t(b)(1)(F), *see, e.g., Prakash v. Homecomings Fin.*, No. 05 Civ. 2895, 2006 WL 2570900, at \*5-7 (E.D.N.Y. Sept. 5, 2006), is of no moment in this appeal.

1 Plaintiff's distinction between statutory and common-  
2 law claims under this section of the FCRA's express  
3 preemption provision is likewise unpersuasive. "The phrase  
4 '[n]o requirement or prohibition' sweeps broadly and  
5 suggests no distinction between positive enactments and  
6 common law; to the contrary, those words easily encompass  
7 obligations that take the form of common-law rules."  
8 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)  
9 (plurality opinion); see also *Riegel v. Medtronic, Inc.*, 128  
10 S. Ct. 999, 1007-08 (2008). The complaint makes clear that  
11 plaintiff's common-law claims are predicated on the  
12 existence of a duty – allegedly owed by defendants to  
13 mortgage brokers such as plaintiff – to keep confidential  
14 the fact that a consumer has recently applied for a  
15 mortgage. The terms used by Congress in § 1681t(b)(1)(A)  
16 require that such an obligation must yield to the FCRA under  
17 the Supremacy Clause. Therefore, plaintiff's common-law  
18 claims for misappropriation of trade secrets, unfair  
19 competition, and unjust enrichment were properly dismissed.

20 Relying on *Cipollone*, plaintiff argues that its sixth  
21 and seventh causes of action (for breach of contract and



1 tortious interference with contract, respectively) are not  
2 preempted because they are "based, in whole or in part, upon  
3 contractual obligations." See *Cipollone*, 505 U.S. at 526  
4 (plurality opinion) ("[A] common-law remedy for a  
5 contractual commitment voluntarily undertaken should not be  
6 regarded as a 'requirement . . . imposed under State law' .  
7 . . ." (emphasis omitted)); but see *id.* at 551 (Scalia, J.,  
8 concurring in the judgment in part and dissenting in part)  
9 ("When liability attaches to a particular promise or  
10 representation, it attaches *by law*"). Similarly, plaintiff  
11 asserts that its fraud claim evades preemption under *Good*  
12 and *Cipollone* because the claim, in plaintiff's view, is  
13 based on a "more general duty not to make fraudulent  
14 statements." *Good*, 129 S. Ct. at 549; see also *Cipollone*,  
15 505 U.S. at 529 (plurality opinion). However, in their  
16 motion to dismiss and again in this appeal, the Credit  
17 Bureau defendants also argue that plaintiff's claims are  
18 inadequately pleaded. For the reasons discussed below, we  
19 agree. Therefore, we decline to reach plaintiff's  
20 preemption argument as to these causes of action and affirm  
21 the decision below on this properly preserved alternative

1 ground. See, eg., *Palmer v. Occidental Chem. Corp.*, 356  
2 F.3d 235, 236 (2d Cir. 2004).

3 In New York, the elements of a claim for tortious  
4 interference with a contract include, *inter alia*, "the  
5 existence of a valid contract between the plaintiff and a  
6 third party," and an "intentional procurement of the third-  
7 party's breach of the contract without justification . . .  
8 ." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413,  
9 424, 668 N.E.2d 1370, 1375 (N.Y. 1996).<sup>3</sup> "Tortious  
10 interference with prospective economic relations requires an  
11 allegation that plaintiff would have entered into an  
12 economic relationship but for the defendant's wrongful  
13 conduct." *Vigoda v. DCA Prods. Plus Inc.*, 741 N.Y.S.2d 20,  
14 23 (1st Dep't 2002).

15 The complaint fails to sufficiently plead these  
16 elements. Plaintiff has not identified the legal basis for  
17 the Credit Bureau defendants' alleged "duty and obligation

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<sup>3</sup> Although we need not resolve the application of the relevant preemption reasoning in *Cipollone*, which related to a claim for "breach of an express warranty," 505 U.S. at 525, we note in passing that a claim for "tortious interference with contract" is, as its name indicates, a tort that encompasses interfering with an existing contract. Such a claim – not based on a breach of any contract – would appear to impose a state-law "requirement," 15 U.S.C. § 1681t(b)(1)(A), under *Cipollone* because the plaintiff seeks not to enforce a set of mutual promises between private parties but rather to sanction an act by a non-party that allegedly impaired those promises.

1 to maintain the confidentiality" of trigger leads, and there  
2 are no allegations in the complaint capable of supporting a  
3 reasonable inference that any Credit Bureau defendant "acted  
4 with the *sole purpose* of harming the plaintiff or used  
5 dishonest, unfair, or improper means," *Nadel v. Play-By-Play*  
6 *& Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000)  
7 (emphasis added). Plaintiff's allegations of tortious  
8 interference with *prospective* business relations are even  
9 more attenuated. Therefore, the allegations in support of  
10 plaintiff's sixth cause of action are insufficient as a  
11 matter of law.

12 Plaintiff's seventh cause of action is also defective.  
13 A non-party to a contract governed by New York law lacks  
14 standing to enforce the agreement in the absence of terms  
15 that "clearly evidence[] an intent to permit enforcement by  
16 the third party" in question. *Fourth Ocean Putnam Corp. v.*  
17 *Interstate Wrecking Co.*, 66 N.Y.2d 38, 45, 485 N.E.2d 208  
18 (1985). The complaint presents only conclusory allegations  
19 as to this element, and we find them facially implausible.

20 Finally, plaintiff's fraud claim is also inadequately  
21 pleaded. The elements of fraud under New York law are: "[1]

1 a misrepresentation or a material omission of fact which was  
2 false and known to be false by defendant, [2] made for the  
3 purpose of inducing the other party to rely upon it, [3]  
4 justifiable reliance of the other party on the  
5 misrepresentation or material omission, and [4] injury.”  
6 *Lama Holding*, 88 N.Y. 2d at 421. In a federal diversity  
7 action, such a claim must be pleaded with particularity.  
8 See Fed. R. Civ. P. 9(b). Plaintiff failed to identify  
9 misrepresentations or material omissions by any Credit  
10 Bureau defendant, and the complaint provides no basis to  
11 support an inference of justifiable reliance. “Allegations  
12 that are conclusory or unsupported by factual assertions are  
13 insufficient.” *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493  
14 F.3d 87, 99 (2d Cir. 2007). Therefore, we affirm the  
15 dismissal of plaintiff’s fraud claim because it is  
16 inadequately pleaded.

17 Plaintiff’s fourth, sixth, and seventh causes of action  
18 present little more than “unadorned, the-defendant[s]-  
19 unlawfully-harmed-me accusation[s].” *Ashcroft v. Iqbal*, 129  
20 S. Ct. 1937, 1949 (2009). These allegations are  
21 insufficient to state a claim upon which relief may be

1 granted. Therefore, we affirm the dismissal of plaintiff's  
2 fourth, sixth, and seventh causes of action on this  
3 alternative ground.

4 **Conclusion**

5 The Court has reviewed plaintiff's remaining arguments  
6 and finds them to be without merit. Accordingly, the  
7 district court's order of September 30, 2008 is hereby  
8 AFFIRMED.