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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Steven L. Cairns, et al.,

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No. CIV 04-1840-PHX-SMM

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Plaintiffs,

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**MEMORANDUM OF DECISION AND
ORDER ON MOTION FOR SUMMARY
JUDGMENT**

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v.

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GMAC Mortgage Corporation, a
Pennsylvania corporation, et al.,

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Defendants.

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Pending before the Court is the Motion for Summary Judgment (Doc. 94) filed by Defendant Equifax Information Services LLC ("Defendant"), pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs have brought claims against Defendant alleging violations of the Fair Credit and Reporting Act, 15 U.S.C. §1681. The parties have had the opportunity to submit evidence and briefing, and the Court would not find oral argument helpful in resolving this matter. Accordingly, the Court finds the pending motion for summary judgment suitable for decision without oral argument.¹ After considering the written arguments of the parties, the Court makes the following rulings.

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¹See LRCiv 56.2; LRCiv 7.2(f); Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 728-29 (9th Cir. 1991) ("When a party has an adequate opportunity to provide the trial court with evidence and a memorandum of law, there is no prejudice" when oral arguments are not held on motions for summary judgment.)

1 **BACKGROUND**

2 On March 10, 2003, Plaintiffs filed chapter 7 bankruptcy. At the time, they lived in
3 Arizona and owned a home in Washington State for which a first mortgage was held by
4 PCFS. Upon filing for bankruptcy, which included the PCFS debt, the Plaintiffs abandoned
5 the home in Washington State. During the bankruptcy, and prior to discharge, PCFS sold or
6 transferred the Plaintiffs' mortgage to GMAC mortgage. On July 2, 2003, the mortgage was
7 discharged in the Plaintiffs' bankruptcy. On July 15, 2003, Mr. Cairns obtained a copy of his
8 "credit report" from Defendant Equifax. The report correctly showed the PCFS tradeline,
9 and noted that it was included in the bankruptcy. Likewise, an August 19, 2003 Equifax
10 report correctly showed only the PCFS tradeline as included in the bankruptcy.²

11 In or around mid June 2004, approximately one year subsequent to the bankruptcy,
12 the Plaintiffs were denied credit during an attempt to purchase a used vehicle. Plaintiffs
13 understood that the reason for the denial was a report of a foreclosure on their credit
14 report(s). On June 29, 2004, the Plaintiffs contacted Equifax and explained that the PCFS
15 account and the GMAC account were in fact the same debt, and the GMAC had therefore
16 been included in and discharged by their 2003 bankruptcy. Thereafter, Equifax updated Ms.
17 Cairns' report to show that the GMAC account was included in the bankruptcy; however, Mr.
18 Cairns' report was already showing the GMAC account as included in the bankruptcy.

19 Plaintiffs allege that over the period of just a few months, Equifax changed the
20 reporting of GMAC's tradeline on the Cairns' Equifax credit reports from including
21 bankruptcy to 180 days past due and a foreclosure. Equifax also allegedly changed its
22 reporting of the PCFS tradeline, the predecessor to GMAC and the original holder of the
23 debt, from included in bankruptcy to 120 days past due. Further, Plaintiffs allege that these
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25 ²See 11 U.S.C. § 541(defining property included in bankruptcy estate). The term "included
26 in bankruptcy" refers to the property included in the bankruptcy estate at the time the bankruptcy
27 was filed.

1 changes were made despite the fact that Equifax had in its possession documents from the
2 Cairns which showed the debt included in their Chapter 7 bankruptcy filed in March 2003.

3 **STANDARD OF REVIEW**

4 A court must grant summary judgment if the pleadings and supporting documents,
5 viewed in the light most favorable to the nonmoving party, “show that there is no genuine
6 issue as to any material fact and that the moving party is entitled to judgment as a matter of
7 law.” FED. R. CIV. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
8 Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive
9 law determines which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248
10 (1986); see also Jesinger, 24 F.3d at 1130. “Only disputes over facts that might affect the
11 outcome of the suit under the governing law will properly preclude the entry of summary
12 judgment.” Anderson, 477 U.S. at 248. The dispute must also be genuine, that is, the
13 evidence must be “such that a reasonable jury could return a verdict for the nonmoving
14 party.” Id.; see Jesinger, 24 F.3d at 1130.

15 A principal purpose of summary judgment is “to isolate and dispose of factually
16 unsupported claims.” Celotex, 477 U.S. at 323-24. Summary judgment is appropriate
17 against a party who “fails to make a showing sufficient to establish the existence of an
18 element essential to that party's case, and on which that party will bear the burden of proof
19 at trial.” Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.
20 1994). The moving party need not disprove matters on which the opponent has the burden
21 of proof at trial. See Celotex, 477 U.S. at 323-24. The party opposing summary judgment
22 need not produce evidence “in a form that would be admissible at trial in order to avoid
23 summary judgment.” Id. at 324. However, the nonmovant “may not rest upon the mere
24 allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing
25 that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); see Matsushita Elec. Indus. Co.,
26 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986); Brinson v. Linda Rose Joint
27 Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

1 **DISCUSSION**

2 Equifax is a national consumer credit reporting agency that assembles and produces
3 credit reports for use by its clients in evaluating the potential credit risk of consumers. As
4 a consumer reporting agency, Equifax is governed by the Fair Credit Reporting Act, 15
5 U.S.C. § 1681, et seq. ("FCRA"). The FCRA was enacted to protect consumers from the
6 transmission of inaccurate information about them. Kates v. Croker Nat'l Bank, 776 F.2d
7 1396, 1397 (9th Cir. 1985). It was the product of congressional concern over abuses in the
8 credit reporting industry. Guimond v. Trans Union Credit Information Co., 45 F.3d 1329,
9 1332 (9th Cir. 1995). The FCRA has a legislative history steeped in evidence of
10 congressional intent to protect consumers from the transmission of inaccurate information.
11 Id. Its contributors sought to create legislation to establish accurate, relevant, and current
12 reporting practices. Id.

13 **A. Violation of 15 U.S.C. § 1681**

14 **1. What Constitutes a Credit Report Under the Fair Credit Reporting Act**

15 Section 1681a(d)(1) provides relevant definitions for interpreting and applying FCRA.

16 It reads in pertinent part:

17 (1) In general.

18 The term "consumer report" means any written, oral, or other communication
19 of any information by a consumer reporting agency bearing on a consumer's
20 credit worthiness [FN1], credit standing, credit capacity, character, general
21 reputation, personal characteristics, or mode of living which is used or
22 expected to be used or collected in whole or in part for the purpose of serving
23 as a factor in establishing the consumer's eligibility for—

24 (A) credit or insurance to be used primarily for personal, family, or household
25 purposes;

26 (B) employment purposes; or

27 (C) any other purpose authorized under section 1681b of this title.

28 15 U.S.C.A. § 1681a.

Equifax avers that Plaintiffs have no claim under FCRA because they have failed to show
that the GMAC account appeared on a "credit report". They continue, "[a] credit report does

1 not include a credit file disclosure or copy that the Cairns may have received for their own
2 use, but is one that is used for credit granting purposes or some other purpose delineated by
3 the FCRA." (Doc. 95). The Court notes that Equifax failed to cite any authority supporting
4 this assertion. Further, the Court finds that, in viewing the facts in the light most favorable
5 to the nonmoving party, Plaintiffs have sufficiently alleged that they used or intended to use
6 the reports they received by Equifax in whole, or in part, for the purpose of serving as a
7 factor in establishing their eligibility for credit for personal, family, or household
8 purposes. Accordingly, Plaintiffs have established, for the purpose of surviving summary
9 judgment, that the reports received may fall within the purview of 15 U.S.C.A. § 1681a.

10 Next, Equifax argued that in order to establish a claim under 15 U.S.C.A. § 1681e(b),
11 Plaintiffs must present evidence that a creditor or third party learned of the inaccurate
12 derogatory information contained in the reports. However, in Guimond, the Ninth Circuit
13 held that a denial of credit is not a prerequisite to recovery under the FCRA. Guimond v.
14 Trans Union Credit Information Co., 45 F.3d at 1333 (finding that a failure to comply with
15 § 1681e(b) is actionable even absent a denial of credit. Further concluding that the district
16 court erred in finding that any liability under § 1681e(b) was predicated, as a matter of law,
17 on the occurrence of some event-denial of credit or transmission of the report to third parties-
18 resulting from the compilation and retention of erroneous information). Accordingly, the
19 Court concludes that despite Defendant's assertion otherwise, the fact that Plaintiffs did not
20 present evidence that the reports were given to third parties does not preclude Plaintiff from
21 surviving summary judgment.

22 **2. Reasonableness of Procedures Pursuant to 15 U.S.C. § 1681e(b)**

23 "Whenever a consumer reporting agency prepares a consumer report it shall follow
24 reasonable procedures to assure maximum possible accuracy of the information concerning
25 the individual about whom the report relates." Guimond v. Trans Union Credit Information
26 Co., 45 F.3d at 1333. It is clear that liability under § 1681e(b) is predicated on the
27 reasonableness of the credit report agency's procedures in obtaining credit information. Id.

1 (citing Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir.1991);
2 Bryant v. TRW, Inc., 689 F.2d 72, 77 (6th Cir.1982); Thompson v. San Antonio Retail
3 Merchants Ass'n, 682 F.2d 509, 513 (5th Cir.1982); Ladner v. Equifax Credit Information
4 Services, 828 F.Supp. 427, 430 (S.D.Miss.1993); Boothe v. TRW Credit Data, 768 F.Supp.
5 434, 437 (S.D.N.Y.1991).

6 For a consumer to establish a prima facie violation of 15 U.S.C. § 1681e, he or she
7 must "present evidence tending to show that a credit reporting agency prepared a credit report
8 containing inaccurate information." Guimond v. Trans Union Credit Information Co., 45
9 F.3d at 1333 (citing Cahlin, 936 F.2d at 1156). If he fails to satisfy this initial burden, the
10 consumer, as a matter of law, has not established a violation of section 1681e(b), and a court
11 need not inquire further as to the reasonableness of the procedures adopted by the credit
12 reporting agency. Id.³ As the Ninth Circuit has continuously recognized, because these
13 cases are often fact driven, it is appropriate that the determination of reasonableness be
14 reserved for a jury in the overwhelming majority of cases. Id. Thus, prior to sending a
15 section § 1681e(b) claim to the jury, a credit reporting agency can usually prevail **only** if a
16 court finds, as a matter of law, that a credit report was accurate. Id. (emphasis added).

17 An inquiry into the reasonableness of the procedures utilized by Equifax in acquiring
18 information must focus on whether its procedures used in preparing the Cairns' reports were
19 sufficiently reasonable to assure maximum accuracy. Id. Equifax argues that "it is
20 undisputed that Equifax maintains reasonable procedures both to assure maximum possible
21 accuracy of its credit files and to perform reinvestigations." (Doc. 101). Clearly, from the
22 assertions made in this case, this issue is far from undisputed. Furthermore, Plaintiffs have
23 provided the Court with a plethora of evidence indicating the presence of a dispute regarding
24 the accuracy of the reports and the reasonableness of Equifax's procedures. In general, the

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26 ³ As Equifax correctly points out, FCRA does not make reporting agencies strictly liable for
27 all inaccuracies. The agency can avoid liability if it establishes that an inaccurate report was
28 generated notwithstanding the employment of reasonable investigatory procedures.

1 evidence reflects that Equifax reported the joint account of Mr. and Mrs. Cairns under both
2 GMAC and PCFS tradelines, as (1) included in bankruptcy, (2) not included in bankruptcy,
3 (3) 120-180 days delinquent (post-bankruptcy), and (4) in foreclosure. (Doc. 101-102). The
4 following is a more specific summary of the evidence presented by Plaintiffs:

5 On July 15, 2003, Mr. Cairns obtained a credit report from Equifax which showed
6 only the PCFS tradeline and correctly noted its inclusion in bankruptcy. (Plaintiffs' Exhibit
7 C). Likewise, an August 19, 2003, Equifax credit report showed only the PCFS tradeline and
8 correctly noted its inclusion in bankruptcy. (Plaintiffs' Exhibit D). In approximately June
9 of 2004, the Plaintiffs attempted to purchase a truck however, they were denied credit. It is
10 their understanding that a foreclosure on their credit report was the reason for the denial.
11 (Plaintiffs' Exhibit B). Consequently, the Cairns contacted Equifax to explain that the GMAC
12 and the PCFS tradelines were in fact the same debt, which had been included in and
13 discharged by their Chapter 7 bankruptcy. (SOF ¶17). Shortly thereafter, Equifax sent Mr.
14 Cairns notice of the results of its investigation dated July 7, 2004. The report showed that
15 the GMAC account was reporting as included in bankruptcy, with no mention of foreclosure.
16 However, the report also erroneously reported a "Date of Major Delinquency" of May 2004.
17 (Plaintiffs' Exhibit E). Equifax separately sent Ms. Cairns notice of the results of its
18 investigation dated July 7, 2004, showing that the GMAC account was currently being noted
19 as included in bankruptcy. However, Equifax also reported in Ms. Cairns' July 7, 2004 credit
20 report that the GMAC account was 120-149 days past due for October, November, and
21 December 2003, and January and February 2004. (Plaintiff's Exhibit F). On July 12, 2004,
22 Ms. Cairns called Equifax and disputed the derogatory payment history on the GMAC
23 tradeline. Consequently, Equifax deleted the payment history and sent Ms. Cairns a copy of
24 its investigation results dated July 12, 2004 which showed that the payment history had been
25 deleted. (SOF ¶18). Ms. Cairns thereafter received a complete Equifax credit report dated
26 July 19, 2004. The report showed a tradeline reported by GMAC and a separate tradeline
27 reported by PCFS for the identical mortgage debt. However, unlike the previous reports of

1 June and August 2003, this report did not reflect that the PCFS tradeline was included in
2 bankruptcy, rather it showed the PCFS tradeline as a current account with a status of "Over
3 120 Days Past Due". It also reported a derogatory payment history from April 2002 through
4 June 2003. (Plaintiff's Exhibit G). Mr. Cairns also received a report dated July 19, 2004.
5 This report reflected the GMAC tradeline had been changed to show it as included in
6 bankruptcy. It also showed the PCFS account reporting as included in bankruptcy, as well
7 as having a derogatory payment history from April 2002 through March 2003. (Plaintiff's
8 Exhibit I). Ms. Cairns received the next investigation results from Equifax dated July 29,
9 2004. This report showed that the PCFS account had been updated to show a current status
10 of "Pays as Agreed" and "Defaulted Loan" and "Claim Filed Against Guarantor", but did not
11 mention inclusion in bankruptcy. It also showed a delinquent payment history from April
12 2002 through June 2002. (Plaintiff's Exhibit H). In response to a call Mr. Cairns placed on
13 July 13, 2004, to Equifax to dispute the GMAC tradeline, Equifax sent Mr. Cairns a report
14 of its reinvestigation dated August 11, 2004. The report showed that Equifax was reporting
15 the GMAC tradeline with a balance owing of \$59,459, an amount past due of \$18,923, and
16 a current status of "Over 120 Days Past Due". The report also reflected that Equifax was
17 reporting a delinquent payment history for July, August, and September 2003 of "180 or
18 More Days Past Due" and October 2003 through April 2004 as a "Foreclosure". The report
19 also stated that "Equifax has verified that this item has been reported accurately". (Plaintiffs'
20 Exhibit J).

21 Plaintiffs contend that these errors pose numerous problems for Defendant. First, the
22 evidence reflects that Equifax's system has permitted the reporting of an account as included
23 in a bankruptcy filed in March 2003, while at the same time reporting a post-bankruptcy
24 delinquent payment. Second, Equifax's system has reported the same joint account as being
25 in two different statuses, e.g. Mr. Cairns' report shows the PCFS account as included in
26 bankruptcy, whereas Ms Cairns' report shows a current owed amount with the notations of
27 "Defaulted" and "Claim filed Against Guarantor". Finally, the evidence raises a genuine
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1 issue as to the reasonableness of the process by which Equifax verifies its information.
2 Determining whether the inconsistencies constitute evidence of the employment of
3 unreasonable procedures for preventing inaccuracies is a question of fact and therefore is not
4 for this Court to decide. Such a decision would put this Court in the role of the fact finder
5 and, absent any authority stating otherwise, this question is reserved for the jury. "Questions
6 regarding the reasonableness of procedures adopted by credit reporting agencies to ensure
7 maximum accuracy in its reports, and questions as to whether the agency actually followed
8 such procedures will generally be decided by jury in the overwhelming majority of cases
9 under FCRA." Guimond v. Trans Union Credit Information Co., 45 F.3d at 1333. Therefore,
10 the determination as to whether Equifax's procedures for preparing a customer's file are
11 reasonably designed to prevent inaccuracies pursuant to 15 U.S.C. § 1681e(b) and whether
12 the agency followed its procedures is reserved for the jury. Summary judgment is hereby
13 **DENIED** as to 15 U.S.C. § 1681e(b).

14 **B. 15 U.S.C. §1681i**

15 The Court now turns to the Plaintiffs' allegation that Defendant violated 15 U.S.C.
16 §1681i. To establish a right of relief under §1681i, a Plaintiff must demonstrate the
17 following: (1) they notified Equifax directly of a disputed item on the credit file; (2) Equifax
18 failed to reinvestigate free of charge and either record the current status of the disputed
19 information or delete the item from the file, as required by §1681i(a)(5), within the 30-day
20 period; (3) Equifax's failure to comply with the statute was negligent; and (4) Equifax's
21 failure caused the Plaintiffs' injuries. 15 USC. §1681i(a)(1)(A); Acton v. Bank One Corp.,
22 293 F.Supp.2d 1092, 1098 (D.Az. 2003).

23 Defendant asserts that by contacting GMAC regarding Mr. Cairns' dispute, it has
24 complied with the statutory obligations regarding reinvestigation, without having to go
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1 beyond the original source of the information.⁴ However, various United States Courts of
2 Appeals have found this limited attempt unsatisfactory. See Henson v. CSC Credit Servs.,
3 29 F.3d 280, 286-87 (7th Cir.1994); Stevenson v. TRW Inc., 987 F.2d 288, 293 (5th
4 Cir.1993); and Cushman v. Trans Union Corp., 115 F.3d 220, 224 -225 (Third Cir. 1997).
5 In Henson, a state court judgment docket erroneously stated that an outstanding judgment
6 had been entered against the plaintiff. Based on this information, two credit reporting
7 agencies included erroneous information on their consumer reports regarding the plaintiff.
8 See Henson, 29 F.3d at 282-83. Consequently, the plaintiff sued the credit reporting agencies
9 pursuant to both § 1681e(b) and § 1681i. See id. at 284, 286. The Seventh Circuit upheld the
10 district court's dismissal of the § 1681e(b) claim and reversed the district court's dismissal
11 of the § 1681i claim, distinguishing between the obligations imposed by the two sections of
12 the statute, explaining:

13
14 A credit reporting agency that has been notified of potentially
15 inaccurate information in a consumer's credit report is in a very
16 different position than one who has no such notice.... [A] credit
17 reporting agency may *initially* rely on public court documents, because
18 to require otherwise would be burdensome and inefficient. *However,*
19 *such exclusive reliance may not be justified once the credit reporting*
20 *agency receives notice that the consumer disputes information*
21 *contained in his credit report.* When a credit reporting agency receives
22 such notice, it can target its resources in a more efficient manner and
23 conduct a more thorough investigation.

19 Id. at 285-87 (emphasis added).

20 Similarly, in Stevenson, 987 F.2d at 293, inaccurate information appeared on credit
21 report. See id. The credit reporting agency sent written forms to the credit granting agencies
22 that had originally supplied information concerning the consumer, and relied on those credit
23 grantors to make the conclusive determination of whether the information was accurate. See
24 id. at 293. The Fifth Circuit held this to be insufficient to satisfy the statutory obligations.

26
27 ⁴Defendant also argues that subsequent to Ms. Cairns' complaints, Equifax updated the
28 account pursuant to its established procedure.

1 It explained: “In a reinvestigation of the accuracy of credit reports [pursuant to § 1681i(a)
2], a credit bureau must bear some responsibility for evaluating the accuracy of information
3 obtained from subscribers.” Id. (citing Swoager v. Credit Bureau of Greater St. Petersburg,
4 608 F.Supp. 972, 976 (M.D.Fla.1985)). Further, it noted that the plain language of the statute
5 unequivocally places the burden of reinvestigation on the consumer reporting agency. See
6 Stevenson, 987 F.2d at 293. The FCRA is a clear manifestation of Congress's intent that
7 consumer reporting agencies, having the opportunity to reap profits through the collection
8 and dissemination of credit information, bear “grave responsibilities” to ensure the accuracy
9 of that information. 15 U.S.C. § 1681(a)(4). Consequently, the “grave responsibilit[y]”
10 imposed by § 1681i(a) must necessarily consist of something more than parroting
11 information received from the original sources. Therefore, a “reinvestigation” that merely
12 shifts the burden back to the consumer and the credit grantor cannot fulfill the obligations
13 set forth under the statute. Cushman v. Trans Union Corp., 115 F.3d 220, 224 -225 (Third
14 Cir. 1997)(citing Stevenson, 987 F.2d at 293). Moreover, the Court finds it telling that
15 Defendant's interpretation of § 1681i(a) would require it only to replicate the efforts it must
16 undertake in order to comply with § 1681e(b), however, such a reading would render the two
17 sections largely duplicative of each other. Considering the importance of statutory
18 interpretation, the Court is hesitant to accept an interpretation that would render statutory
19 language superfluous.

20 Plaintiffs contend that Equifax failed to conduct a reasonable review of the documents
21 it received from Plaintiffs or consider the prior history of GMAC and PCFS on the accounts,
22 resulting in Equifax's failure to realize that the account was previously included in the
23 bankruptcy, and that the information it received was inconsistent considering the Cairns'
24 account history. Considering the evidence of record, the Court finds that Plaintiffs have
25 provided the Court with sufficient evidence to raise a genuine issue as to whether Equifax
26 performed an adequate reinvestigate under 15 U.S.C. § 1681i, regarding the disputes raised
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1 by Plaintiffs pertaining to the GMAC and PCFS tradelines. Therefore, Summary Judgment
2 is hereby **DENIED** as to 15 U.S.C. § 1681i.

3 **C. Damages Under the FCRA**

4 Plaintiffs contend that as a result and proximate cause of Defendant's actions,
5 Plaintiffs have suffered and continue to suffer damages including, but not limited to,
6 emotional distress, mental anguish, loss of sleep, physical illness, frustration, injury to
7 reputation, humiliation, embarrassment, and loss of opportunity.

8 **1. Actual or Statutory**

9 The FCRA provides for compensation in the form of actual damages and attorneys'
10 fees if a consumer reporting agency negligently fails to comply with any provision of FCRA.
11 15 U.S.C. §1681o. Furthermore, where a reporting agency's noncompliance with any
12 provision of FCRA is found to be willful, in lieu of actual damages, Section §1681n provides
13 for statutory damages and compensation for attorneys' fees. Under the same section, a
14 consumer may also recover punitive damages for willful noncompliance. 15 U.S.C. §1681n.⁵

15 As the Plaintiffs correctly articulated, the Ninth Circuit has previously recognized that
16 damages may flow from a consumer being deterred from exercising his or her right to apply
17 for credit as a result of inaccurate reporting until the erroneous information is deleted.

18
19 ⁵Any person who willfully fails to comply with any requirement imposed under this
20 subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum
of--

- 21 **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less
22 than \$100 and not more than \$1,000; or
23 **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretenses
or knowingly without a permissible purpose, actual damages sustained by the consumer as a result
24 of the failure or \$1,000, whichever is greater;
25 **(2)** such amount of punitive damages as the court may allow; and
26 **(3)** in the case of any successful action to enforce any liability under this section, the costs of the
action together with reasonable attorney's fees as determined by the court.

27 15 U.S.C. § 1681n

1 Guimond v. Trans Union Credit Information Co., 45 F.3d at 1332 -1333. In other words,
2 actual damages need not be pecuniary in nature. In many cases, the term "actual damages"
3 has been interpreted to include recovery for emotional distress and humiliation. Id. (See
4 Johnson v. Department of Treasury, I.R.S., 700 F.2d 971, 984 (5th Cir.1983) (mental anguish
5 included as an element of recovery in FCRA claims); Thompson v. San Antonio Retail
6 Merchants Ass'n, 682 F.2d 509, 514 (5th Cir.1982); Millstone v. O'Hanlon Reports, Inc., 528
7 F.2d 829, 834-35 (8th Cir.1976); Bryant v. TRW, Inc., 487 F.Supp. 1234, 1240
8 (E.D.Mich.1980), aff'd, 689 F.2d 72 (6th Cir.1982); Jones v. Credit Bureau of Huntington,
9 Inc., 184 W.Va. 112, 117, 399 S.E.2d 694 (1990).

10 Accordingly, Plaintiffs must establish that they suffered emotional damages as a result
11 of Equifax's alleged failure to comply with FCRA. The Court has previously determined that
12 whether there has been a violation of FCRA is a question of fact for the jury. Therefore, the
13 question of damages, which rests on whether a violation of FCRA has occurred, will also be
14 reserved for the jury.

15 **2. The Ninth Circuit's Standard for Proving Punitive Damages under the**
16 **FCRA**

17 Defendant argues that it is entitled to summary judgment as to Plaintiffs' punitive
18 damages claim because Plaintiffs are unable to establish that Defendant acted with the
19 requisite intent to substantiate such a claim.

20 In determining the state of mind necessary to establish punitive damages under FCRA,
21 the Ninth Circuit considered and adopted the Third Circuit's definition of "willfully," as that
22 term is employed in FCRA. They concluded that a company is liable for a willful violation
23 of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the
24 rights of others." Reynolds v. Hartford Financial Services Group, Inc., 435 F.3d 1081, 1085
25 (9th Cir. 2006) (citing Cushman v. Trans Union Corp., 115 F.3d 220, 226 (3d Cir.1997)
26 (quoting Philbin v. Trans Union Corp., 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like
27

1 the Third Circuit, the Ninth Circuit held that conscious disregard means “either knowing that
2 policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or
3 in reckless disregard of whether the policy contravened those rights.” Cushman v. Trans
4 Union Corp., 115 F.3d at 227.

5 Plaintiffs contend that (1) Equifax had no system in place to assure the maximum
6 possible accuracy of Plaintiffs' credit reports (2) Equifax's failed to conduct adequate
7 independent re-investigation, and (3) Defendant disregarded the requirements of the FCRA.
8 Defendant contends that the evidence is simply insufficient to sustain an award of punitive
9 damages in that there is no evidence in the record to illustrate that Defendant consciously
10 disregarded Plaintiffs' rights. Further, it contends that its investigative procedures, as well as
11 its re-investigations comport with the requirements of FCRA, thereby proving a lack of any
12 willful intent to injure Plaintiffs. Plaintiffs assert that Equifax had no system in place to
13 assure the maximum possible accuracy of credit reporting and, moreover, failed to consider
14 anything beyond the basic idea of reliability of sources in its reinvestigation procedures,
15 thereby disregarding the clear requirements of the FCRA. Accordingly, Plaintiffs contend
16 that the issue of willfulness and punitive damages should be reserved for the jury. The Court
17 agrees.

18 Earlier, the Court found that there were material issues as to whether Equifax's alleged
19 conduct was reasonable under FCRA. As to punitive damages, the Court no longer looks
20 merely at reasonableness for the standard of conduct. The standard now is whether Equifax's
21 alleged conduct rose to the level of willfulness or reckless disregard. It is clear that the
22 evidence is conflicting. Consequently, it is the Court's decision that in this case, like in the
23 overwhelming number of cases in which state of mind is dispositive, the issue of punitive
24 damages is best left for the trier of fact to determine.

25 **CONCLUSION**

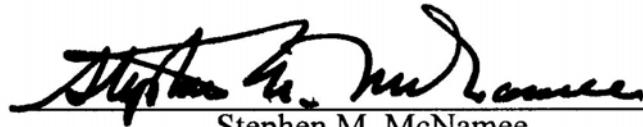
26 Accordingly,

1 **IT IS ORDERED** that Defendant Equifax's Motion for Summary Judgment (Doc.
2 94)is hereby **DENIED in full**.

3 **IT IS FURTHER ORDERED** that the attorneys for each party who will be
4 responsible for trial of the lawsuit shall **APPEAR** and **PARTICIPATE** in a Final Pretrial
5 Conference on May 16th, at 4p.m. in courtroom # 605 on the sixth floor of the United
6 States Courthouse, 401 West Washington Street, Phoenix, Arizona. Because the Final
7 Pretrial Conference is held for the benefit of all parties, and further because the presence
8 of all parties will facilitate frank discussion of the pertinent issues in the lawsuit, **each**
9 **party, or a representative with binding settlement authority if the party is an entity,**
10 shall attend the Final Pretrial Conference. At the Final Pretrial Conference, the Court
11 shall set a firm trial date.

12 **DATED this 5th day of March, 2007.**

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Stephen M. McNamee
United States District Judge