IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

MARK ANTHONY GUTHRIE, Plaintiff, v. PHH MORTGAGE CORPORATION f/k/a OCWEN LOAN SERVICING, LLC d/b/a PHH MORTGAGE SERVICES, TRANS UNION, LLC, EQUIFAX, INC., EQUIFAX INFORMATION SERVICES, LLC, AND EXPERIAN INFORMATION SOLUTIONS, INC. Defendants.	**Civil Action No. 7:20-CV-00043-BO**

MEMORANDUM IN SUPPORT OF PHH MORTGAGE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Defendant PHH Mortgage Corporation[1] ("Defendant" or "PHH"), by counsel, submits this Memorandum in Support of its Motion for Summary Judgment.

I. INTRODUCTION

PHH is entitled to summary judgment on all claims asserted by Plaintiff Mark Guthrie ("Plaintiff") because Plaintiff either lacks standing, has failed to state a claim upon which relief can be granted, or because there is no genuine dispute of material fact and PHH is entitled to judgment as a matter of law. A chart summarizing the grounds for awarding summary judgment in PHH's favor for each count of the Complaint is below:

[1] PHH Mortgage Corporation is the successor by merger to Ocwen Loan Servicing, LLC ("Ocwen"). As PHH existed prior to its merger with Ocwen, Plaintiff's designation of "f/k/a" (i.e., formerly known as) is incorrect.

Laches	• Many of Plaintiff's Claims should be barred by the Applicable Statutes of Limitations under the Equitable Doctrine of Laches.
Obligations under the Mortgage and with Respect to the Property	• PHH is entitled to summary judgment on many of Plaintiff's claims because they are premised on a misunderstanding of his obligations with respect to the mortgage and property.
Count 1: North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA")	• PHH is entitled to summary judgment on Plaintiff's North Carolina Unfair and Deceptive Trade Practices Act claim (Count I) because it is precluded by the North Carolina Debt Collection Act.
Count 2: North Carolina Debt Collection Act ("NCDCA")	• PHH is entitled to summary judgment on Plaintiff's NCDCA claim to the extent it is premised on attempts to collect a debt discharged through Bankruptcy because it is preempted by the Bankruptcy Code. • PHH is entitled to summary judgment on Plaintiff's NCDCA claim to the extent it is based on credit reporting activities because it is preempted by the FCRA. • PHH is entitled to summary judgment because the undisputed record shows its communications with Plaintiff were proper. • PHH is entitled to summary judgment because the undisputed record shows Plaintiff has not suffered damages as a result of the alleged violations of the NCDCA. • Summary judgment should be entered in PHH's favor as to Plaintiff's NCDCA claim because PHH's actions are – at minimum – the result of a *bona fide* error.
Count 3: North Carolina Collection Agency Act ("NCCAA")	• PHH is entitled to summary judgment on Plaintiff's North Carolina Collection Agency Act (Count III) because PHH is not a "collection agency" under the statute.
Count 4: Fair Credit Reporting Act ("FCRA")	• The undisputed record demonstrates there was no negligent violation of the FCRA.

	○ PHH is entitled to summary judgment with respect to the alleged dispute to Equifax in 2019 because the undisputed record shows that PHH was never notified of that dispute. ○ The undisputed record demonstrates PHH conducted a reasonable investigation into Plaintiff's credit disputes alleged in the Complaint that were actually received. ○ The undisputed record demonstrates that Plaintiff did not suffer actual damages as a result of PHH's alleged FCRA violation(s). • The undisputed record is devoid of any evidence to support a willful violation of the FCRA. • PHH is entitled to summary judgment because Plaintiff's claim is premised on a disputed legal issue, not factual inaccuracy.
Count 5: Telephone Consumer Protection Act ("TCPA")	• PHH is entitled to summary judgment on Plaintiff's TCPA claim because there is no evidence it used a random or sequential number generator.
Count 6: Real Estate Settlement Procedures Act ("RESPA")	• Plaintiff's RESPA claim fails because the correspondence he relies on to support his claim does not constitute a Qualified Written Request. • The undisputed record demonstrates Plaintiff has not suffered any damages *resulting from* any alleged violations of RESPA. • The record is devoid of any facts to support a "pattern or practice" violation. • Statutory damages are capped at $2,000.
Count 7: Fair Debt Collection Practices Act ("FDCPA")	• PHH is entitled to summary judgment because neither Ocwen nor PHH are "debt collectors" under the FDCPA because they are "creditors" as defined by the statute. • To the extent the Court finds that OLS or PHH is a "debt collector," Plaintiff's claim fails because it is preempted by the Bankruptcy Code.

	• PHH is entitled to summary judgment because the undisputed record demonstrates there was no violation of the FDCPA. • PHH is entitled to summary judgment because its actions are protected by the *bona fide* error defense.
Counts 8/9: Intentional Infliction of Emotional Distress ("IIED") and Negligent Infliction of Emotional Distress ("NIED")	• Plaintiff's IIED and NIED claims are preempted by the FCRA to the extent they are premised on credit reporting activities. • Plaintiff's claims are preempted by the Bankruptcy Code to the extent they are premised on alleged attempts to collect a discharged debt. • PHH is entitled to summary judgment on Plaintiff's IIED and NIED claims because the undisputed record demonstrates he has not suffered the type of severe emotional distress required to sustain such claims. • PHH is entitled to summary judgment on Plaintiff's IIED claim because the record is devoid of conduct to sustain such a claim. • PHH is entitled to summary judgment on Plaintiff's IIED claim because the undisputed facts demonstrate PHH did not intend for its actions to cause severe emotional distress, or have a knowledge of a likelihood that they would.
Count 10: Negligence	• Plaintiff's negligence claim fails because he has failed to allege a legitimate duty of care owed by PHH. • Plaintiff's negligence claim is preempted by the FCRA or otherwise fails to state a claim for relief. • Plaintiff's negligence claim is preempted by the Bankruptcy Code to the extent it is premised on alleged attempts to collect a discharged debt.

II. BACKGROUND

Plaintiff filed this lawsuit in the Superior Court for Onslow County, North Carolina, and it was commenced on January 31, 2020. The case was subsequently removed to this Court on March 6, 2020. The Parties have engaged in substantial litigation, including discovery and motions practice. There are numerous pending motions before the Court, including a pending Motion for Judgment on the Pleadings (ECF No. 61), Motion to Stay (ECF No. 65), and Motion for Protective Order (ECF No. 63) before the Court. Notwithstanding, in order to comply with the current deadlines in the Court's Amended Scheduling Order, PHH is filing its Motion for Summary Judgment along with a Statement of Undisputed Material Facts and Appendix of Evidence.

III. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure requires summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *German v. Bekins Van Lines, Inc.*, No. 3:29-cv-00558-FDW, 2020 WL 6263169, at *1 (W.D.N.C. Oct. 23, 2020) (quoting Fed. R. Civ. P. 56(a)). "The movant has the 'initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Whitehead v. Honeycutt*, No. 1:18-cv-00196-FDW, 2019 WL 6312431, at *2 (W.D.N.C. 2019) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted)). After a moving party meets this burden, the burden shifts to the non-moving party to "set forth specific facts showing" a genuine issue for trial and cannot "rely upon mere allegations or denials of allegations in his pleadings to defeat a motion for summary judgment." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 322 n.3, 324). "Thus, to withstand a motion for summary

judgment, the non-moving party must proffer competent evidence sufficient to reveal the existence of a genuine issue of material fact." *German*, 2020 WL 6263169 (citing Fed. R. Civ. P. 56(e)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246-47 (1986)). Further, "[m]ere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006) (citing *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)).

PHH, as the moving party, can satisfy its burden for summary judgment by noting that Plaintiff does not have evidence to necessary elements of his claims. *Celotex Corp.*, 477 U.S. at 325. That is, "the moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence" by which the nonmovant can prevail at trial. *Cray Communs., Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393 (4th Cir. 1994) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720, at 10 (2d ed. Supp.1994)); *see also Celotex Corp.*, 477 U.S. at 332 ("Rule 56 mandates summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

IV. ARGUMENT

A. Many of Plaintiff's Claims should be barred by the Applicable Statutes of Limitation under the Equitable Doctrine of Laches.

Plaintiff's claims in this case concern allegedly wrongful conduct dating back as far as 2013 – eight years ago. However, based on his active-duty status in the United States Marine Corps, he relies upon the Servicemembers Civil Relief Act ("SCRA") to toll the statutes of

limitation applicable to his claims.[2] Plaintiff's claims that would otherwise be time-barred by the applicable statutes of limitation should nonetheless be barred by the equitable doctrine of laches. Indeed, rather than diligently pursue his claims, Plaintiff inexplicably sat on his hands, causing evidence to spoil with time, while at the same time he intentionally encouraged conduct he claims is unlawful that he claims caused him severe emotional distress to continue in the hopes of generating a greater monetary windfall for himself through litigation. Equity demands that Plaintiff be barred from using the SCRA to mask his lack of diligence and bad faith actions in an attempt to profit after years of complacency.

Although the SCRA tolls statutes of limitation during a servicemember's time in active duty, their claims may otherwise be barred by the equitable doctrine of laches. *See Heejoon Chung v. U.S. Bank, N.A.*, 250 F. Supp. 3d 658, 674 (D. Haw. 2017) ("The SCRA does not prevent laches from barring a servicemember's claims, as laches is a limitation on stale claims entirely independent of any applicable statutes of limitations."); *Deering v. United States*, 223 Ct. Cl. 342, 349 (1980) ("In sum, we hold that a blanket exception to laches for active-duty military personnel cannot be read into the Act. As an equitable defense, laches will be applied after courts weigh all factors involved in each individual case, to be sure that injustice does not result to either party. Indeed, it is the blanket exemption from laches urged by plaintiff that will result in repeated inequity to the public."). "Laches is an 'equitable doctrine' that can bar a request for relief. Laches requires a defendant to prove two elements: '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' 'The first element of laches, lack of diligence, is satisfied where a plaintiff has unreasonably delayed in pursuing his

[2] Pursuant to the SCRA, "the period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court." 50 U.S.C.§ 3936(a).

claim.'" *Dmarcian, Inc. v. Dmarcian Europe BV*, 2021 WL 2144915, at *15 (W.D.N.C. 2021) (citations omitted). With regards to the second element, "[p]rejudice can take the form of either economic or evidentiary prejudice. 'Evidentiary, or "defense" prejudice, may arise by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts.' Economic prejudice arises when 'a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.' Courts 'look for a *change* in the economic position of the alleged infringer during the period of delay.'" *LendingTree, LLC v. Zillow, Inc.*, 2014 WL 1309305, at *8-9 (W.D.N.C. 2014) (citations omitted).

In this case, Plaintiff has clearly and intentionally sat on his rights to the detriment of PHH, and its predecessor in interest, OLS. First, Plaintiff failed to show reasonable diligence in prosecuting his claims. Unlike the plaintiff in *Dmarcian, Inc.*, who "filed this action well within the statute of limitations", *Dmarcian, Inc.*, 2021 WL 2144915 at *16, at least a part of every claim Plaintiff has brought in this case – save for his FCRA and RESPA claims – would be barred by the statute of limitations applicable to those claims. Specifically, the following chart illustrates the applicable time limitations:

Cause of Action	**Applicable Statute of Limitation (Source)**	**Statute of Limitation Applied to Plaintiff's Claim**
UDTPA	Four years (N.C. Gen. Stat. § 75-16.2)	Claims accruing before January 31, 2016 are time barred
NCDCA	Four years (N.C. Gen. Stat. § 75-16.2)	Claims accruing before January 31, 2016 are time barred
NCCAA	Three years (N.C. Gen. Stat. § 1-52(2))	Claims accruing before January 31, 2017 are time barred

FCRA	The earlier of two years after discovering violation or five years after the date of the violation (15 U.S.C. § 1681p)	Not applicable because alleged violations occurred within two years of filing Complaint
TCPA	Four years (28 U.S.C. § 1658(a))	Claims accruing before January 31, 2016 are time barred
RESPA	Three years (12 U.S.C. § 2614)	Not applicable because alleged violations occurred within three years of filing Complaint
FDCPA	One year (15 U.S.C. § 1692k)	Claims accruing before January 31, 2019 are time barred
IIED/NIED	Three years (N.C. Gen. Stat. § 1-52(2))	Claims accruing before January 31, 2017 are time barred
Negligence	Three years (N.C. Gen. Stat. § 1-52(2))	Claims accruing before January 31, 2017 are time barred

The undisputed facts in this case demonstrate that Plaintiff was fully aware of his potential claims and simply chose not to pursue them. *See* SUMF ¶¶ 13, 21, 29, 36, 44, 88-89. Instead of making any legitimate effort to effectuate the surrender of his home, *see id.* ¶¶ 27, 48, Plaintiff spent most of his time encouraging Defendant's employees to keep contacting him so he could obtain more money through a lawsuit or upgrade to a new truck. *Id.* at ¶¶ 36, 44, 88-89. Thus, the evidence clearly demonstrates Plaintiff's failure to show reasonable diligence in prosecuting his claims.

The failure of Plaintiff to prosecute his claims with reasonable diligence has served to severely prejudice PHH both from an evidentiary and economic perspective. From an evidentiary perspective, Plaintiff's claims are largely based on interactions and events that happened many years in the past. This is particularly problematic as it relates to Plaintiff's alleged damages – namely, for emotional distress – which are based entirely on his own self-serving testimony being

offered years after the fact and in the context of his professed plan to rack up monetary damages to recover through litigation. *See id*. at ¶¶ 82-84; *see also id*. ¶¶ 36, 44, 88-89. Moreover, Plaintiff has admitted that relevant information and documents such as his handwritten notes taken contemporaneously during calls with OLS or PHH have since been lost or destroyed. *See* SUMF ¶ 19. Thus, PHH has undoubtedly suffered evidentiary prejudice due to Plaintiff's lack of diligence in pursuing his claims. *See LendingTree, LLC*, 2014 WL 1309305, at *8.

Further, PHH has suffered from economic prejudice due to Plaintiff's intentional delay. Not only has PHH undergone a substantial merger since the time Plaintiff's alleged claims originally accrued, *see* Compl. at Ex. 1, demonstrating a change in the economic position of the alleged infringer, *see LendingTree, LLC*, 2014 WL 1309305, at *9, but Plaintiff also intentionally allowed and encouraged his perceived damages to multiply with the goal of monetary retribution. SUMF ¶¶ 36, 44, 88-89. Thus, PHH's economic prejudice is not merely a potential but very much realized. To allow Plaintiff to pursue claims that are nearly an old where he has expressed a clear intent simply to obtain a monetary windfall would be patently unjust. It is this type of injustice that the doctrine of laches is meant to prevent.

Accordingly, because of the Plaintiff's lack of diligence, his intentional failure to mitigate damages, and the resulting prejudice to Defendant, the Court should apply the equitable doctrine of laches and bar Plaintiff's claims to the extent they would otherwise be barred by the applicable statutes of limitation.

B. PHH is Entitled to Summary Judgment on Many of Plaintiff's Claims because they are Premised on a Misunderstanding of his Obligations with respect to the Mortgage and Property.

Many of Plaintiff's claims, including his UDTPA, NCDCA, NCCAA, FDCPA, IIED/NIED, and negligence claims are premised on the argument that, because Plaintiff had

surrendered the Property in his Bankruptcy Case and a Discharge Order was entered, that OLS and PHH had absolutely no reason or right to contact him. Indeed, Plaintiff appears to be under the impression that the Bankruptcy Court's Order granting the Motion to Allow Surrender completely erased his connection to the Property and relationship with OLS/PHH. That is incorrect.

The Bankruptcy Court for the Western District of North Carolina's explanation of the practical effect of surrendering property in a Chapter 13 Bankruptcy is directly on point in this case:

> *Section 1325(a)(5)(C) does not serve to pass ownership of the Residence to a lender; nor does it require the lender to foreclose its mortgage*. While "surrender" is not a defined term in the [Bankruptcy] Code, it has a well defined meaning. "Surrender" has been described as the relinquishment of all rights in property, including the right to possess the collateral . . . Although "surrender" envisions a debtor relinquishing his or her rights in the collateral, there is no corresponding requirement that the lender to anything with the property . . . *While the creditor's failure to foreclose might leave the debtors with continued liabilities, these are by-products of property ownership*. Although debtors prefer to walk away from the property, their desire does not justify shifting these burdens to the lender.

In re Rose, 512 B.R. 790, 793-794 (W.D.N.C. Bankr. 2014) (internal citations omitted) (emphasis added).

What *Rose* makes clear is that, while surrendering property that secures a debt may satisfy the secured claim that is part of a debtor's Bankruptcy plan, the act of surrendering does not automatically convey title or even require the creditor to accept ownership of the Property. *See id*. Unless and until the creditor forecloses on the property, or ownership is transferred through some other means (with the creditor's consent), the debtor remains responsible for the "by-products of property ownership," such as the obligation to maintain insurance, pay property taxes, and maintain the property in accordance with local laws. *Id*. at 794. Similarly, the Bankruptcy Code does not grant the Bankruptcy Court power to "alter the substantive rights of the parties." *Id*. at 795 (citing *In re Landbank Equity Corp.*, 973 F.2d 265, 271 (4th Cir. 1992). To that end, nothing

in the Bankruptcy Code or in Plaintiff's Chapter 13 Bankruptcy – including the Discharge Order – changed the fact that he is a borrower under the Loan. While the Bankruptcy Code may protect Plaintiff from the collection of discharged debts (i.e., his personal liability on the Note), that is not synonymous with eliminating his contractual relationship with OLS/PHH or relieving him of obligations associated with ownership of the Property that arise post-discharge (e.g., paying taxes and insurance).

In this case, title to the Property was never transferred to OLS or PHH. *See* SUMF ¶¶ 1, 28, 49. Plaintiff never made any attempt to convey the property to OLS or PHH. *Id*. Instead, he merely abandoned the Property after the Bankruptcy Court entered an Order allowing for surrender, and at the same time, unilaterally decided to abandon his responsibilities as an owner of the Property. Due to Plaintiff's – and Tonia Guthrie's – failure to maintain hazard insurance, pay property taxes, or maintain the Property, OLS and subsequently PHH incurred significant post-petition costs paying for those obligations, which were not discharged in Plaintiff's Bankruptcy case. Even if Plaintiff's personal obligation to pay the debt established under the Note was discharged, he is still responsible for the post-petition and ongoing costs of property ownership that OLS and PHH have incurred. *See* Feezer Decl., Ex. G, at Sec. 4 ¶ 3("Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument . . ."); *see also id*. at Secs. 5 ¶¶ 4-5; 6 ¶ 9. Thus, OLS and PHH had and still have a legitimate reason to contact Plaintiff and to inform him of the post-petition amounts he owes for taxes, insurance, and maintenance of the Property. Plaintiff's apparent belief that his Chapter 13 Bankruptcy eliminated all connection to the Property and responsibilities under the Deed of Trust is simply incorrect.

C. PHH is Entitled to Summary Judgment on Plaintiff's North Carolina Unfair and Deceptive Trade Practices Act Claim (Count I) because it is Precluded by the NCDCA.

PHH is entitled to summary judgment on Plaintiff's North Carolina UDTPA claim as a matter of law because all of the conduct alleged in the Complaint concerns debt collection, which is governed by the NCDCA.[3]

The preclusion of Plaintiff's UDTPA claim is apparent in the plain language of the NCDCA: "[t]he specific and general provisions of this Article *shall exclusively* constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article." N.C. Gen. Stat. § 75-56 (emphasis added). Indeed, where a plaintiff alleges violations of the UDTPA based upon debt collection activity, the claims are precluded because the NCDCA "supplants the UDTPA" in the debt collection context. *Self v. Nationstar Mortg., LLC*, No. 2:19-cv-3-D, 2019 U.S. Dist. LEXIS 165305, at *15 (E.D.N.C. Sept. 26, 2019). "If the abusive conduct alleged pertains only to debt collection, the NCDCA provides a claimant's exclusive remedy. Claims can only be asserted under the UDTPA if there is some abusive conduct alleged to have occurred outside the realm of debt collection." *DIRECTV, Inc. v.* Cephas, 294 F. Supp. 2d 760, 765 (M.D.N.C. 2003); *see also Williams v. Pegasus Residential, LLC*, Case No. 1:18-cv-1030, 2019 U.S. Dist. LEXIS 154899, at *5-8 (M.D.N.C. May 3, 2019); *Batten v. Pannatte, LLC (In re Batten*) Nos. 18-00256-5-DMW, 18-00061-5-DMW, 2019 Bankr. LEXIS 536, at *15 (Bankr. E.D.N.C. Feb. 22, 2019).

In this case, Plaintiff's UDTPA claim is premised entirely on PHH's alleged attempts to collect money from him pursuant to the Loan. *See* Compl. ¶ 193, A-H (ECF No. 1-1). Plaintiff

[3] Plaintiff conceded in his Response in Opposition to Defendant's Motion for Judgment on the Pleadings that he has not pled a UDTPA claim arising outside the context of debt collection. *See* Resp. Opp. Mot. J. Pleadings, at 31 (ECF No. 68).

argues these efforts violated the UDTPA because his personal liability under the Loan had been discharged as a result of his Chapter 13 Bankruptcy. *Id*. at A-B. There is no alleged conduct that falls outside the context of PHH's alleged attempts to collect money from Plaintiff, or that is otherwise actionable under the UDTPA.[4] As a result, there are no allegations "outside the realm of debt collection" to support a claim under the UDTPA. *See DIRECTV*, 294 F. Supp. 2d at 765.

Accordingly, because all of the alleged violations of the UDTPA in this case concern debt collection, Plaintiff's claims are precluded by the NCDCA, and PHH is entitled to summary judgment on the UDTPA claim.

D. PHH is Entitled to Summary Judgment on Plaintiff's North Carolina Debt Collection Act Claim (Count II) for Multiple Reasons.

1. PHH is entitled to summary judgment on Plaintiff's NCDCA claim to the extent it is premised on attempts to collect a debt discharged through Bankruptcy because it is preempted by the Bankruptcy Code.

PHH is entitled to summary judgment on Plaintiff's NCDCA claim because, to the extent it is premised on attempts to collect a debt discharged through Bankruptcy, it is preempted by the Bankruptcy Code.

Plaintiff alleges that PHH violated the NCDCA, for example, by (i) "[r]epeatedly misrepresenting the character and legal status of the Loan," (ii) "[a]ttempting to collect from Plaintiff amounts allegedly owed in connection with the Loan, when the same were not actually owed by Plaintiff," and (iii) "[f]alsely representing to Plaintiff that amounts allegedly owed in connection with the Loan would be increased by the addition of attorneys' fees, collection fees,

[4] To the extent Plaintiff may argue that the transmission of inaccurate credit information or verification of the same falls "outside the realm of debt collection," that argument does not salvage his UDTPA claim because the FCRA preempts the UDTPA with respect to credit reporting. *See Ross v. Wash. Mut. Bank.*, 566 F. Supp. 2d 468, 476 (E.D.N.C. 2008) ("[S]ection 1681t(b)(1)(F) preempts plaintiff's UDTPA claim under section 75-1.1. . . .").

and other fees, services or charges, none of which PHH was legally entitled to assess against, or collect from, Plaintiff." Pl.'s Compl. ¶ 211(A), (D), (G) (ECF No. 1-1). All of Plaintiff's claims are premised on Plaintiff's contention that "[t]he Discharge [entered in his Chapter 13 Bankruptcy] relieved, and discharged, Plaintiff from any legal obligation to make any further payments on the Loan." *Id*. at ¶ 62. In other words, the alleged violations in the Complaint depend on Plaintiff's contention that he was relieved of his personal obligations under the Loan as a result of the Bankruptcy Discharge.[5] For this reason, Plaintiff's NCDCA claim is preempted by the Bankruptcy Code.

By way of background, there are two specific provisions of the Bankruptcy Code that govern the collection of debts during and after a Bankruptcy. First is the Automatic Stay under 11 U.S.C. § 362, which generally prohibits collection of debts during the pendency of a Bankruptcy. *See* 11 U.S.C. § 362. Second is the Discharge Injunction under 11 U.S.C. § 524, which prohibits the collection of debts that have been discharged through Bankruptcy. The Bankruptcy Code provides a private right of action for violations of the Automatic Stay, but not the Discharge Injunction. *See Williams v. CitiFinancial Servicing, LLC (In re Williams)*, 612 B.R. 682, 690 (M.D.N.C. Bankr. 2020).

[5] While Plaintiff's claims are explicitly premised on his personal obligation under the Loan being extinguished by the Discharge in his Chapter 13 Bankruptcy, there are factual allegations in his Complaint which detail conduct that occurred prior to the Discharge Order being entered on May 18, 2016. *See* Compl. ¶ 48 (alleging collection calls began in November 2013). To the extent Plaintiff alleges the pre-discharge conduct violates the NCDCA, such a claim would necessarily be premised on a violation of the Automatic Stay and/or that the Surrender Order relieved him of any obligations under the Loan. In either case, the claims would still be preempted because "where debtors call upon state and federal non-bankruptcy laws to supplement their remedies against creditors for violations of the Bankruptcy code, many courts have found such non-bankruptcy remedies to be preempted by the Code's own enforcement provisions." *See In re Gaitor*, 2015 Bankr. LEXIS 2545, at *7-9 (collecting cases).

The Fourth Circuit has recognized two basic types of preemption: conflict preemption and field preemption. *See, e.g., Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1304 (4th Cir. 1992). Conflict preemption concerns whether state law conflicts with federal law, while field preemption concerns whether Congress intended to supplant state authority in a particular field. *Id*. "Courts applying the law of preemption to debtors' efforts to remedy violations of the discharge injunction have generally found non-bankruptcy causes of action to be preempted, at least to the extent the non-bankruptcy cause of action depends on proof of the discharge violation." *Gaitor v. U.S. Bank N.A. (In re Gaitor)*, Case No. 13-80530, Adv. Pro. No. 14-09059, 2015 Bankr. LEXIS 2545, at *8-9 (M.D.N.C. Bankr. July 31, 2015) (holding that adversary plaintiff's NCDCA claim was preempted by the Bankruptcy Code). This is because "§ 524 does not accord the Debtor with a private right of action for a violation of the discharge injunction, [and] it would be improper for the court to recognize one based on State law." *Johnston v. Telecheck Servs., Inc. (In re Johnston)*, 362 B.R. 730, 739 (Bankr. N.D. W. Va. 2007); *see In re Gaitor*, 2015 Bankr. LEXIS 2545, at *15 ("Although the Plaintiff may feel that the remedy afforded to him under § 524 is insufficient, that is the remedy Congress provided; this Court may not rewrite the Bankruptcy Code to allow additional recovery."); *see also Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 447 (1st Cir. 2000) ("the broad enforcement power under the Bankruptcy Code preempts virtually all alternative mechanisms for remedying violations of the Code."); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (holding that there is "no need to protect debtors who are already under the protection of the bankruptcy court" or to supplement the remedies provided under the Bankruptcy Code); *Lovegrove v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 112768, at *16 (W.D. Va. Aug. 26, 2015), *aff'd on other grounds by*, 666 Fed. App'x 308 (4th Cir. 2016) (holding that plaintiff's claim under the FDCPA was preempted by the Bankruptcy Code because

"to allow Lovegrove to assert a private right of action under the FDCPA for Ocwen's actions would circumvent the purpose of the discharge injunction."); *Waters v. McCleod Loris Seacoast Hosp. (In re Waters)*, 2020 Bankr. LEXIS 650 at *6-7 (D.S.C. Feb. 13, 2020).

Plaintiff's claim under the NCDCA is identical to those in cases where courts have applied preemption. *See In re Gaitor*, 2015 Bankr. LEXIS 2545, at *8-9; *In re Johnston*, 362 B.R. at 739; *see also Lovegrove*, 2015 U.S. Dist. LEXIS 112768, at *16. The Bankruptcy Code's Discharge Injunction provides the exclusive remedy for debts discharged in Bankruptcy. *Id*. Thus, accepting the allegations in the Complaint as true that attempts to collect from him on the Loan following his Bankruptcy were erroneous because his personal liability had been discharged, the remedy for said collection attempts – if any – lies in the Bankruptcy Code.

Accordingly, because Plaintiff's claim under the NCDCA is premised entirely on attempts to collect a debt he argues was discharged through Bankruptcy, those claims are preempted by the Bankruptcy Code and PHH is entitled to summary judgment as a matter of law.

2. PHH is entitled to summary judgment on Plaintiff's NCDCA claim to the extent it is based on credit reporting activities because it is preempted by the FCRA.[6]

Plaintiff also alleges that PHH violated the NCDCA by (i) "[u]sing and/or threatening to use illegal means to cause harm to the reputation of Plaintiff, including the continued false representations to the CRA Defendants that Plaintiff remained liable for, and in default under, the Loan," and (ii) "[f]alsely representing to the CRAs, including Experian, Equifax, and TransUnion, that Plaintiff had not paid or had willfully refused to make payments owed under the Loan, which

[6] Plaintiff has already conceded the issue of whether the FCRA preempts his claims based on credit reporting because he failed to address the issue in his Opposition to the Motion for Judgment on the Pleadings. *See* Reply in Supp. Mot. J. Pleadings, at 2 (ECF No. 73).

in [sic] Plaintiff was under no such obligation." Compl. ¶ 211, B-C. These alleged violations are preempted by the FCRA.

The FCRA specifically provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies. . . ." 15 U.S.C. § 1681t(b)(1)(F). Courts have explicitly recognized such preemption. *See Ross v. Wash. Mut. Bank*, 566 F. Supp. 2d 468, 476 (E.D.N.C. 2008) ("[S]ection 1681t(b)(1)(F) preempts plaintiff's UDTPA claim under section 75-1.1 for providing false loan information to CRAs.")[7]; *Madden v. Experian Info Solutions, Inc. et al.*, Case No. 5:12-cv-00162, 2014 U.S. Dist. LEXIS 133597, at *12-13 (W.D.N.C. Sept. 23, 2014) (holding that NCDCA claim related to credit reporting was preempted by the FCRA).

Plaintiff alleges that PHH violated the NCDCA by illegally harming his reputation through "continued false representations to the CRA Defendants" and "[f]alsely representing to the CRAs . . . that Plaintiff had not paid or had willfully refused to make payments owed under the Loan." Compl. ¶ 211, B-C. In other words, Plaintiff claims PHH violated the NCDCA by allegedly reporting false information to the CRAs. PHH's obligations with respect to credit reporting, and Plaintiff's ability to seek relief for alleged harmed caused by credit reporting, are defined by Section 1681s-2 of the FCRA.[8] As a result, because such "subject matter [is] regulated under . . .

[7] While the NCDCA supplants the UDTPA for the purposes of claims related to debt collection, the NCDCA is still part of the UDTPA. That is to say, the fact that *Ross* specifically dealt with a claim alleged under the general provisions of the UDTPA rather than the specific provisions of the NCDCA is of no consequence – the FCRA preempts both to the extent alleged violations concern the reporting of credit information to consumer reporting agencies ("CRAs").

[8] Notably, there is no private right of action against a data furnisher for affirmative acts of reporting false information. *See* 15 U.S.C. § 1681s-2(c). Rather, individuals only have a private right of

section 1681s-2" of the FCRA, any state law claim regarding the same is preempted. 15 U.S.C. § 1681t(b)(1)(F); *Ross*, 566 F. Supp. 2d at 476; *Madden*, 2014 U.S. Dist. LEXIS 133597, at *12-13.

Accordingly, because Plaintiff alleges violations of the NCDCA based on credit reporting to the CRAs which is exclusively regulated by the FCRA, Plaintiff's claim is preempted and PHH is entitled to summary judgment as a matter of law.

3. PHH is entitled to summary judgment because the undisputed record shows its communications with Plaintiff were proper.

As discussed above, the bulk of Plaintiff's NCDCA claim is premised on the argument that because his personal obligation under the Loan had been discharged through Bankruptcy, any contact with him about the Loan was an illegal attempt to collect the debt, thereby violating the NCDCA. *See* Compl. ¶ 211. However, even accepting Plaintiff's contention that he successfully surrendered the Property and obtained a discharge in the Bankruptcy Case, his overarching theory of liability erroneously misinterprets his relationship with the Loan.

Plaintiff is presently and always has been one of two borrowers on the Loan. Even assuming that his personal obligation under the Loan was discharged through Bankruptcy, that discharge does not remove his name from the Deed of Trust. *See In re Rose*, 512 B.R. at 793-795 (explaining that title to a property does not automatically transfer upon surrender, and ownership obligations remain even after discharge). Importantly, a Bankruptcy discharge does not relieve Plaintiff from ongoing obligations associated with property ownership, such as taxes, insurance, and property maintenance. *See supra* Sec. B. While he is a borrower on the Deed of Trust, he is still obligated to maintain hazard insurance, pay taxes on, and for maintenance of the Property. Feezer Decl., Ex. G, at Secs. 4 ¶ 3; 5 ¶¶ 4-5; 6 ¶ 9. Those property ownership obligations are not

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action under Section 1681s-2(b), which lays out obligations concerning responses to credit disputes received from the CRAs. *Id.*

and cannot be discharged by the Bankruptcy Court. To that end, any communication – or portion thereof – that related to amounts due for insurance, taxes, or other maintenance on the property were not attempts to collect a discharged debt. Given that PHH had a legitimate reason to contact Plaintiff regarding the Property, the record is devoid of any evidence that OLS or PHH engaged in wrongful conduct. Simply put, the mere act of contacting Plaintiff is not wrongful or actionable under the NCDCA based on the undisputed record in this case.

Additionally, the co-borrower – Tonia Guthrie – was not a debtor in or otherwise involved in Plaintiff's Bankruptcy Case, and she has never been removed from the Loan. *See* SUMF ¶¶ 12, 16, 27, 30, 48. OLS and PHH serviced the Loan in accordance with their policies and procedures, whereby all written communications regarding the account included conspicuous disclaimers informing Plaintiff that if he was involved in active Bankruptcy or if his personal obligation under the Note had been discharged, the communications were for informational purposes only. *Id*. at ¶¶ 14, 17, 24, 30. Telephone calls made to Plaintiff's telephone number were made in an effort to reach either borrower on the Loan, not him in particular. *Id*. at ¶¶ 17, 43. OLS and PHH's policy was to provide a similar bankruptcy disclaimer that appeared on written communication in its verbal communications if it reached a borrower who was involved in active Bankruptcy or had received a discharge. *Id*. at ¶¶ 14-15, 17, 41, 43. In other words, based on Plaintiff's continuing obligations under the Deed of Trust – namely, his obligation to pay taxes, insurance, and to costs related to the maintenance and preservation of the Property – PHH had a legitimate basis to include him on correspondence regarding the Loan and provided him clear disclaimers explaining it was not seeking to collect any amounts that he had been relieved of through his Bankruptcy Case.

Accordingly, because undisputed facts show that Plaintiff had ongoing obligations under the Deed of Trust and PHH provided disclaimers informing that it was not seeking to collect any

amounts that had been discharged through Bankruptcy, Plaintiff's NCDCA claim fails and PHH is entitled to summary judgment.

4. PHH is entitled to summary judgment because the undisputed record shows Plaintiff has not suffered damages as a result of the alleged violations of the NCDCA.

PHH is entitled to summary judgment on any remaining violations of the NCDCA alleged by Plaintiff because the undisputed record demonstrates he has not suffered any damages *as a result of* the purported violations. Specifically, Plaintiff's remaining allegations under the NCDCA include, (i) "[f]ailing to disclose, in all communications with Plaintiff, that the communications remitted by PHH were communications from a debt collector, the purpose of which was to collect a debt," and (ii) "[c]ommunicating with Plaintiff when PHH had been notified by the undersigned that the undersigned represents Plaintiff." Compl. ¶ 211, E-F.[9] However, the record is devoid of any facts demonstrating he suffered damages as a result of these particular violations. Given that the remainder of the alleged violations are preempted by either the Bankruptcy Code or the FCRA, or do not fall under the NCDCA because PHH's actions were not an attempt to collect a debt, the absence of facts showing damages for these purported violations is fatal to the remainder of Plaintiff's NCDCA claim.

"The NCDCA prohibits debt collectors from engaging in unfair debt collection practices, including the use of threats, coercion, harassment, unreasonable publications of the consumer's

[9] The Complaint seemingly asserts violations based on "[e]mploying the aforementioned collection methods and procedures, with the explicit knowledge that such conduct was in violation of the provisions of applicable North Carolina law;" and "[u]ndertaking actions which PHH knew, or should have known, offend the well-established public policy of the State of North Carolina, state law, and which were otherwise immoral, oppressive, unscrupulous, deceptive and substantially injurious to consumers, such as Plaintiff." Compl. ¶ 211, H-I. However, these conclusory statements are characterizations of Plaintiff's factual allegations and do not constitute independent violations of the NCDCA.

debt, deceptive representations to the consumer, or other unconscionable means." *Ross v. F.D.I.C.*, 625 F.3d 808, 817 (4th Cir. 2010) (citing N.C. Gen. Stat. §§ 75-50 to 75-56). "In addition to proving conduct prohibited under the NCDCA, an NCDCA plaintiff must also meet the three generalized requirements for all NCUDTPA claims: (1) an unfair act (2) in or affecting commerce (3) ***proximately causing injury***." *Id.* (quoting *Davis Lake Cmty. Ass'n v. Feldmann*, 530 S.E.2d 865, 868 (N.C. App. 2000)) (emphasis added) (internal quotation marks omitted). Actual damages sufficient to support a claim for under the NCDCA requires more than a plaintiff's "own conclusory statements concerning emotional distress." *Id.* at 818. Claims of "emotional distress" are "fraught with vagueness and speculation" and "easily susceptible to fictitious and trivial claims." *Id.* at 818 (quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996)). "And this is precisely why conclusory statements that the plaintiff suffered emotional distress do not support an award of compensatory damages." *Id.* (quoting *Price*, 93 F.3d at 1254).

Plaintiff claims that as a result of PHH's alleged violations of the NCDCA he suffered "substantial damages" including impairment to credit worthiness, denial of credit, severe emotional distress, medical damages and physical paid, reputational and professional harm, and "other pecuniary losses, expenses, costs and damages." *See* Compl. ¶ 219. However, this broad category of damages that Plaintiff alleges across all his claims in this lawsuit have no causal connection to the allegations that PHH failed to disclose it was a debt collector or communicated with him after it knew he was represented by counsel. Indeed, as a matter of simple logic, the alleged damages concerning his credit worthiness, denials of credit, and reputational harm could not be casually related to or proximately caused by direct communications between PHH and Plaintiff. That leaves simply the alleged "severe and debilitating emotional distress" and "medical damages and physical pain and suffering." *See id*. But the record is devoid of any evidence –

besides Plaintiff's self-serving testimony – demonstrating that he actually suffered any emotional distress or the timing of such, let alone how these purported damages were proximately caused by PHH communicating with him after notice of attorney representation or failing to disclose that communications were from a debt collector. The absence of evidence showing he suffered damages *proximately caused* by the alleged violations is fatal to the remainder of Plaintiff's NCDCA claim.

Accordingly, because Plaintiff's self-serving testimony regarding emotional distress, medical damages, and pain and suffering are unsupported by any evidence in the record demonstrating they existed, when they began, or were proximately caused by the only actionable allegations he raises under the NCDCA, his claim fails and PHH is entitled to summary judgment.

5. Summary judgment should be entered in PHH's favor as to Plaintiff's NCDCA claim because PHH's actions are – at minimum – the result of a bona fide error.

This Court should consider PHH's actions to be shielded from liability under the NCDCA as being the result of a *bona fide* error.

A debt collector that violates the FDCPA as a result of a *bona fide* error is shielded from liability. *See Alston v. Central Credit Services, Inc.*, Case No. DKC 12-2711, 2013 WL 4543364, at *4-5 (D. Md. Aug. 26, 2013) (granting summary judgment in favor of defendant under the bona fide error defense). Given that North Carolina courts interpreting the NCDCA will refer to the FDCPA as the federal parallel to the state statute, the *bona fide* error defense available under the FDCPA is equally available under the NCDCA. *See Suarez v. Camden Property Trust*, 2020 WL 5371916, at *4 (E.D.N.C. 2020) ("North Carolina courts look to decisions analyzing the FDCPA when interpreting the NCDCA."); *Redmond v. Green Treen Servicing, LLC*, 941 F.Supp.2d 694, 698 (E.D.N.C. 2013) ("In addition to the plain language of these definitions, the North Carolina Court of Appeals has looked to the similarly constructed Fair Debt Collection Practices Act

(FDCPA) in construing this state statute."); *see also Waddell v. U.S. Bank National Association*, 395 F.Supp.3d 676, 682 (E.D.N.C. 2019) ("In interpreting parallel NCDCA provisions, North Carolina courts look to decisions interpreting the FDCPA as persuasive authority.); *Suarez v. Camden Property Trust*, 2019 WL 3423427, at *3 n.1 (E.D.N.C. 2019) ("Courts applying North Carolina law have looked to the FDCPA to construe analogous provisions in the NCDCA.").

In this case and as discussed at length below, PHH's actions were – at minimum – the unintentional result of a *bona fide* error notwithstanding its policies and procedures in place to avoid such an error. SUMF ¶ ¶¶ 14-15, 17, 41, 43; *see infra* Section I(4). Specifically, PHH included a conspicuous bankruptcy disclaimer in all written correspondence addressed to both borrowers on the Loan indicating that any communications received by a borrower who had been discharged in bankruptcy were not an attempt to collect a debt. *See* SUMF ¶¶ 14, 24, 41. Moreover, because Plaintiff never informed PHH of his divorce, or that co-borrower Tonia Guthrie could not be reached by calls directed to Plaintiff's telephone number, PHH had no way of knowing that the contact information it had for both borrowers was in fact only Plaintiff's contact information and not also information for how to contact Tonia Guthrie. *See id.* at ¶¶ 25-26, 46-47. Thus, the written and verbal communications by PHH seeking contact with both Plaintiff *and* Tonia Guthrie were at most the result of a *bona fide* error. Therefore, PHH's actions should be considered the result of *bona fide* error and shielded from liability under the NCDCA, entitling PHH to summary judgment. *See Alston*, 2013 WL 4543364, at *4-5.

E. PHH is Entitled to Summary Judgment on Plaintiff's North Carolina Collection Agency Act (Count III) because PHH is not a "Collection Agency" under the Statute.

Plaintiff pleads in the alternative to his NCDCA claim that PHH violated the NCCAA. However, the record is devoid of any evidence demonstrating that PHH (or OLS before it) is a

"collection agency" as that term is defined by the statute. As a result, PHH is entitled to summary judgment on Plaintiff's NCCAA claim.

Under the NCCAA, a "collection agency" is defined as an entity that solicits delinquent debts from multiple entities that are owed those debts, or attempts to enforce or assert those claims. *See* N.C. Gen. Stat. § 58-70-15(a). However, the NCCAA explicitly exempts from the definition of a "collection entity" certain entities: "[b]anks, trust companies, or bank owned, controlled or related firms" and "[c]orporations or associations engaged in accounting, bookkeeping, or data processing services where a primary component of such services is the rendering of statements of accounts and bookkeeping services for creditors." *See id*. at § 58-70-15(c)(2)-(2a). State and Federal courts in North Carolina interpreting the NCCAA have consistently held that loan servicers do not meet the definition of "collection agency." *See Williams v. HomeEq. Servicing Corp.*, 646 S.E.2d 381, 388-89 (N.C. Ct. App. 2007) (affirming trial court's dismissal of NCCAA claim on the basis that defendant was a loan servicer that was exempt from the definition of "collection agency."); *see also Koepplinger v. Seterus, Inc.*, Case No. 1:17-cv-995, 2020 U.S. Dist. LEXIS 75143, at *44-45 (M.D.N.C. Apr. 29, 2020) (declining to apply NCCAA to loan servicer); *Hacker v. Wells Fargo Bank, N.A.*, Case No. 4:15-cv-163, 2016 U.S. Dist. LEXIS 135503, at *17 (E.D.N.C., Sept. 30, 2016) (holding that loan servicers fell under the accounting, bookkeeping, or data processing services exception under the NCCAA and dismissing the claim).

In this case, there is no evidence in the record to show that OLS or PHH "directly or indirectly engaged in soliciting, from more than one person, delinquent claims of any kind owed or due or asserted to be owed or due the solicited person" or are "directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims." N.C. Gen. Stat. § 58-70-15(a). Instead, the record demonstrates that OLS and then PHH were the owners and servicers of Plaintiff's Loan.

See SUMF ¶¶ 11, 39. PHH and OLS owning and servicing of the Loan falls squarely within the statute's exception for companies like mortgage servicers. *See* N.C. Gen. Stat. § 58-70-15(c)(2)-(2a); *see also HomeEq. Servicing Corp.*, 646 S.E.2d at 388; *Koepplinger*, 2020 U.S. Dist. LEXIS 75143, at *44-45; *Hacker*, 2016 U.S. Dist. LEXIS 135503, at *17.

Accordingly, because the undisputed record is devoid of any factual allegations to establish PHH (or OLS before it) is a "collection agency" under the NCCAA and instead affirmatively demonstrates both entities are explicitly exempt from that definition, Plaintiff's NCCAA claim fails and PHH is entitled to summary judgment.

F. PHH is Entitled to Summary Judgment on Plaintiff's Fair Credit Reporting Act Claim (Count IV) for Multiple Reasons.

1. The undisputed record demonstrates there was no negligent violation of the FCRA.

a. PHH is entitled to summary judgment with respect to the alleged dispute to Equifax in 2019 because the undisputed record shows that PHH was never notified of that dispute.

Plaintiff's FCRA claim with respect to his alleged dispute through Equifax fails because the undisputed record demonstrates that PHH never received notice of that dispute.

Under 15 U.S.C. 1681s-2(b), a furnisher's duty to investigate does not arise until a CRA notifies the furnisher of a dispute. *Mavilla v. Absolute Collection Serv.*, Case No. 5:10-cv-412, 2013 U.S. LEXIS 3925, at *17 (E.D.N.C. Jan. 10, 2013), *aff'd*, 539 Fed. App'x 202 (4th Cir. 2013). When a CRA receives a dispute, it must – in relevant part – "notify[] the information's furnisher of the dispute within five (5) days of receiving the dispute." *Id.* (citing 15 U.S.C. § 1681i(a)(2)(A). "Only after this notice requirement is met does a consumer plaintiff have standing to bring a claim under subsection (b) against a furnisher that failed ***after proper notice by the CRA*** to make a timely reinvestigation, report and correction." *Id.* at *19 (emphasis added); *see also Young v. Equifax*

Credit Info. Servs., Inc., 294 F.3d 631, 639 (5th Cir. 2002) (holding that where the plaintiff "points to no evidence tending to prove that [the furnisher] received notice of a dispute from [the CRA] within five days, as is required to trigger [the furnisher's] duties under Section 1681s-2(b)," they have failed to establish an essential element of an FCRA claim). Direct notification of the dispute from the plaintiff to the data furnisher is insufficient to trigger the furnisher's obligations under 1681s-2(b). *See Rich v. Stern & Assocs., P.A.*, Case No. 3:15-cv-451, U.S. Dist. LEXIS 113021, at *3-4 (W.D.N.C. Aug. 24, 2016); *see also Craighead v. Nissan Motor Acceptance Corp.*, Case No. 1:10-cv-981, 2010 U.S. Dist. LEXIS 132123, at *4 (E.D. Va. Dec. 14, 2010), *aff'd*, 425 F. App'x 197 (4th Cir. 2011) ("notice by a consumer directly to the furnisher of the information does not trigger the furnisher's duties under section 1681s-2(b).").

Plaintiff alleges that he disputed information contained in his Equifax credit report in April or May of 2019. *See* Compl. ¶¶ 114-115. The undisputed facts establish PHH did not receive notice from Equifax of any dispute made by Plaintiff in 2019. *See* SUMF ¶ 38. As the record is devoid of any evidence showing the alleged Equifax dispute was forwarded to PHH, PHH's obligations under the FCRA were not triggered with respect to the Equifax dispute.

Accordingly, because no dispute was received from Equifax, Plaintiff's FCRA claim with respect to that dispute fails and PHH is entitled to summary judgment.

b. The undisputed record demonstrates PHH conducted a reasonable investigation into Plaintiff's credit disputes alleged in the Complaint that were actually received.

With respect to the two disputes alleged in the Complaint that were actually received, the undisputed record demonstrates that PHH complied with its requirements under the FCRA.

With respect to data furnishers, upon proper receipt of a credit dispute from a CRA, the furnisher must (1) conduct an investigation into the disputed information, (2) review all relevant

information provided by the CRA, (3) report the results of the investigation to the CRA, and (4) if the investigation finds that the information is incomplete or inaccurate, report the results to the other CRAs to which it had furnished the information. *See* 15 U.S.C. § 1681s-2(b). The FCRA "does not provide relief on the basis of an investigation culminating in an unfavorable conclusion," but rather, only on the basis of a failure to perform a reasonable investigation. *See Perry v. PNC Bank, N.A.*, Case No. 5:15-cv-206, 2015 U.S. Dist. LEXIS 136926, at *16-17 (E.D.N.C. Oct. 7, 2015).

In this case, Plaintiff offers only conclusory allegations that "PHH has failed to adequately investigate Plaintiff's disputes and alter its reporting to the CRA Defendants." Compl. ¶ 254. Plaintiff did not plead any facts regarding why or how any investigation conducted by PHH was unreasonable. The undisputed record is devoid of any facts showing that OLS or PHH failed to comply with their obligations under the FCRA. Summary judgment is appropriate if the undisputed evidence establishes the reasonableness of the furnisher's procedures and plaintiff has failed to develop evidence tending to prove the investigation was unreasonable. *See Davenport v. Sallie Mae, Inc.*, 124 F. Supp. 3d 574, 581 (D. Md. 2015).

OLS maintained, and PHH maintains, reasonable policies and procedures to ensure compliance with the FCRA. *See* Feezer Decl. ¶ 62. Employees handling the investigation and response into credit disputes are trained in accordance with those policies and procedures, and are expected to follow them. *Id*. at ¶ 63. The policies and procedures require that any employee investigating a credit dispute received by a CRA look into the disputed information, review all relevant information provided by the CRA, report the results of the investigation to the CRA, and communicate any information found to inaccurate or incomplete to the other CRAs to whom the information was reported. *Id*. at ¶ 62. These policies and procedures were followed in this case by

the persons who responded to the two Automated Credit Dispute Verifications ("ACDVs") received from CRAs.

With respect to Plaintiff's TransUnion dispute, responded to on January 28, 2019, OLS investigated the disputed information and properly responded that the Loan was affected by a natural disaster. *See* SUMF ¶ 33. There were no documents included with the dispute other than the narrative provided by Trans Union on the dispute sent to OLS. *Id*. In addition to notating that the account was affected by a natural disaster on the ACDV response, the Loan was reported by OLS as current with $0 past due. *Id*. The record is devoid of any evidence that the Loan was not affected by a natural disaster or that it was inaccurate to report it as such.

With respect to Plaintiff's Experian dispute, PHH investigated and responded to it on May 6, 2019. *See id.* at ¶ 37. There were no documents provided with the dispute. *Id*. The narrative provided by Experian on the dispute sent to PHH stated "this loan was included in bankruptcy and discharged via bankruptcy court in February 2013 . . ." *Id*. PHH investigated this disputed information and determined that there was no Bankruptcy discharge in February 2013. *Id*. To that end, PHH satisfied its obligations under the FCRA.

Ultimately, reasonableness isn't determined by the outcome, it is determined by the investigatory process. *See Perry*, 2015 U.S. Dist. LEXIS 136926, at *16-17. The undisputed record demonstrates that OLS and PHH investigated the disputes, considered information provided by the CRAs and information in its own records regarding the Account and the Bankruptcy Case, and responded based on its investigation into the disputed information. *See* SUMF ¶¶ 33, 37. Moreover, OLS and PHH did so in accordance with their policies and procedures. *Id.*

Accordingly, because the undisputed record established that OLS and PHH maintained proper and reasonable policies and procedures and there is no evidence showing that either OLS

or PHH did not conduct the required investigation into the two credit disputes it received, Plaintiff's FCRA claim fails and PHH is entitled to summary judgment.

c. The undisputed record demonstrates that Plaintiff did not suffer actual damages as a result of PHH's alleged negligent violation(s) of the FCRA.

Even if the Court were to conclude that there was not a reasonable investigation, PHH is still entitled to summary judgment on Plaintiff's claim for a negligent violation of the FCRA because the undisputed evidence shows he did not suffer actual damages *as a result of* PHH's alleged FCRA violation(s).

"It is not enough . . . to show that a defendant violated § 1681s-2(b) to survive summary judgment. A failure to establish damages would still warrant summary judgment in favor of the defendant." *Davenport*, 124 F. Supp. 3d at 581 (citations omitted). Thus, to survive summary judgment, the record must tend to show Plaintiff suffered actual damages *as a result of* the alleged FCRA violations. *See Primrose v. Castle Branch*, Case No. 7:14-cv-235, 2017 U.S. Dist. LEXIS 51, at *21 (E.D.N.C. Jan. 3, 2017). This means, for example, a plaintiff cannot recover for damages that allegedly arose *before* any alleged violation of the FCRA occurred. *See Mavilla*, 2013 U.S. Dist. LEXIS 3925, at *26-27 (holding that plaintiffs claim failed because alleged credit denial occurred before the data furnishers duty to respond to their credit dispute arose); *see also Davenport*, 124 F. Supp. 3d at 582 ("[Plaintiff] cannot recover for harms that occurred prior to the violation, i.e., prior to [Defendant's] failure to conduct a reasonable investigation upon receipt of the disputes . . . ."). The Fourth Circuit has warned that claims for emotional distress are "easily susceptible to fictitious and trivial claims." *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1250 (4th Cir. 1996). Thus, Fourth Circuit requires plaintiffs to "reasonably and sufficiently explain the circumstances of [the] injury and not resort to mere conclusory statements." *Sloane v. Equifax*

Info. Servs., LLC, 510 F.3d 495, 503 (4th Cir. 2007). In this case, the undisputed evidence demonstrates that Plaintiff did not suffer damages *as a result of* the alleged FCRA violations.

i. Plaintiff's credit denials could not have been a result of the responses to the credit disputes at issue in this case.

None of the three credit denials that Plaintiff received in 2019 could have been caused by the responses to the credit disputes alleged in this case. To that end, the undisputed evidence demonstrates that the alleged violations of the FCRA did not cause Plaintiff damages in the form of credit denials.

With respect to Plaintiff's mortgage loan denial from Navy Federal Credit Union ("Navy Federal") in January 2019, the denial letter from Navy Federal states that it obtained information used to make its decision on January 9, 2019. *See* SUMF ¶ 59. OLS did not respond to the TransUnion credit dispute until January 28, 2019, nineteen days after Navy Federal obtained information on January 9, 2019. *Id.* at ¶ 33. PHH did not respond to the Experian credit dispute until May 6, 2019, almost four months after Navy Federal obtained information on January 9, 2019. *Id.* at ¶ 37. Thus, it is impossible that the responses to the alleged credit disputes in this case (i.e., the source of a potential FCRA violation) were the proximate cause of the Navy Federal denial because they had not occurred when Navy Federal reviewed Plaintiff's credit information to make its decision.

Regarding PNC Bank's April 2019 denial of a car loan, the denial letter from PNC indicates that it based its decision on information obtained from Experian. *Id.* at ¶ 60. PHH did not respond to the Experian credit dispute until May 6, 2019, the month after PNC Bank obtained information. *Id*. at ¶ 37. Thus, it is impossible that any FCRA violation that might have flowed from the investigation and response to the Experian credit dispute could have caused the April 2019 credit denial from PNC because the Experian dispute had not even been received yet by PHH.

Plaintiff's final credit denial was for a car loan from SunTrust Bank in April 2019. The SunTrust denial letter indicated that it used information obtained from Trans Union on April 18, 2019.[10] *See* SUMF ¶ 61. The reasons given for the denial were (i) a serious delinquency, (ii) the length of time since account not paid as agreed, (iii) the proportion of loan balances to loan amounts, and (iv) the amount past due on accounts. *Id*. The SunTrust denial letter did not indicate what specific accounts it was referring to as part of its reason for denying Plaintiff's credit application. *Id*. While OLS's response to the Trans Union credit dispute at issue was before the SunTrust denial, the information provided in response to TransUnion demonstrates that it could not have been the information SunTrust purportedly relied upon. Indeed, OLS's response to the TransUnion credit dispute was that the account was current, with $0 past due, and affected by a natural disaster. *See id*. at ¶ 33. To that end, the investigation and response to the Trans Union credit dispute (i.e., the only potential source of an FCRA violation) could not have been the cause of the SunTrust credit denial because the reasons for denial stated by SunTrust were different from OLS's response to the TransUnion credit dispute. Indeed, an account that was reported as current with a no amount past due could not be the source of a "serious delinquency," an account that was "not paid as agreed," or an "amount past due on accounts." As a result, the undisputed evidence demonstrates that OLS's investigation and response to the Trans Union credit dispute was not the cause of the SunTrust credit denial.

[10] With respect to Plaintiff's Experian dispute, PHH investigated and responded to it on May 6, 2019, eighteen (18) days after SunTrust obtained information on April 18, 2019 from a different CRA (Trans Union). *See id.* at ¶ ___. In addition to this information used by SunTrust not coming from Experian, PHH's ACDV response to Experian also came after SunTrust obtained information on April 18, 2019. As a result, the undisputed evidence demonstrates that PHH's investigation and response to the Experian credit dispute was not the cause of the SunTrust credit denial.

The non-impact of the responses to the credit disputes is also demonstrated by the fact that Plaintiff was able to obtain a car loan from Ally in April 2019 as part of the same search for financing where his PNC Bank and SunTrust Bank applications were denied. *See* SUMF ¶ 62. There is no evidence in the record to show that the credit terms he received from Ally were less advantageous than the terms he would have obtained from SunTrust or PNC Bank. To that end, even if the responses to the credit disputes were part of the reason for Plaintiff's denials – which is not supported by the evidence as described above – Plaintiff did not ultimately suffer any damages because he was able to obtain financing for a vehicle in April 2019.

ii. There is no evidence that Plaintiff suffered any other damages *as a result of* the alleged FCRA violations.

The undisputed record contains no evidence demonstrating that Plaintiff suffered any other damages – emotional, professional, or otherwise – *as a result of* the alleged FCRA violations. "The Fourth Circuit has held that a plaintiff's testimony, standing alone may support an award of compensatory damages for emotional distress. However, such testimony 'must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated.' The plaintiff's testimony may not rely on 'conclusory statements that the plaintiff suffered emotional distress' nor can the testimony consist of 'the mere fact that the plaintiff was wronged.' Additionally, the plaintiff's testimony 'must indicate with specificity "how [the plaintiff's] alleged distress manifested itself."' The plaintiff's testimony must also 'show a causal connection between the violation and her emotional distress.'" *E.E.O.C. v. Carter Behavior Health Services, Inc.*, 2011 WL 5325485, at *6 (E.D.N.C. 2011) (citations omitted). Moreover, "a 'self-serving opinion that cannot, absent objective corroboration,' create a genuine issue of fact, does not survive summary judgment." *Reid v. Hospira, Inc.*, 2010 WL 5173210, at *6 (E.D.N.C. 2010) (citing *Willis v. Town of Marshal, North Carolina*, 275 Fed. App'x. 227, 235 (4th Cir. 2008)).

With respect to emotional damages, Plaintiff has made generalized and non-issue specific allegations of severe emotional distress, anxiety, and exacerbated medical issues. But the record is devoid of any evidence to corroborate his self-serving and conclusory claims. Indeed, those around Plaintiff never noticed any change in his mood or personality, contradicting his self-serving claims in this case. *See* SUMF ¶¶ 85-86. Plaintiff never sought treatment for any emotional distress or any other mental condition. *Id*. at ¶ 84. And the only link between Plaintiff's pre-existing medical condition (i.e., GERD) and the alleged violations of the FCRA is Plaintiff's own self-serving and non-medical opinion. *Id*. at ¶¶ 80-83. Indeed, Plaintiff has never spoken to a medical provider about the conduct he alleges against PHH, or how such conduct was causing him any sort of distress – emotional or otherwise. *Id*. at ¶¶ 82-83.

With respect to professional damages, Plaintiff seemingly claims that he suffered a loss of his security clearance and was in jeopardy of not receiving a promotion at work. Of course, there is no evidence linking these allegations to the alleged violations of the FCRA. And in fact, the record proves the allegations themselves are not true. Plaintiff never lost his security clearance. *See id.* at ¶ 75. Rather, Plaintiff's security clearance was put on hold because he failed to provide information to the Department of Defense ("DOD") within the timeframe required by the DOD. *See id*. at ¶¶ 72, 77. Had Plaintiff timely provided the information he later did when it was required, his security clearance would never have been paused. *Id*. at ¶ 77. Moreover, there is no evidence in the record regarding where that information in the Request for Information sent by the DOD came from other than that was from a "commercial source." *See id*. at ¶ 69. This lack of evidence means that Plaintiff cannot, as a matter of law, show that the information the DOD inquired about was information that came from either of the two credit disputes that are at issue in this case, or even that the information came from a CRA at all. In other words, even if Plaintiff

could get past the fact that it was the delay in responding to the Request for Information and not the presence of the debt that caused his security clearance to be paused, he has no evidence to show that the debt the DOD was inquiring about was present because of a violation of the FCRA. Without a causal connection between the *pause* in his security clearance and the alleged FCRA violation, he cannot show that he suffered any professional damage as a result of those alleged violations.

Notwithstanding the above, even if Plaintiff could show a causal link between the alleged FCRA violations and the pause to his security clearance, there is no evidence that he suffered any damages in the nineteen (19) days in which it was paused. *See* SUMF ¶ 76. Plaintiff was not demoted, was not docked pay, and did not suffer any other type of discipline or retribution as a result of the pause to his security clearance. *See id*. And while his Complaint alleges that PHH's actions put him at risk of not receiving a promotion, Plaintiff was promoted from Major to Lieutenant Colonel. *See id*. at ¶ 78. And there is no evidence in the record that his promotion was delayed or otherwise jeopardized by any of the conduct he alleges against PHH.

Accordingly, because the undisputed facts demonstrate that Plaintiff did not suffer any damages *as a result of* the alleged FCRA violations, his claim fails and PHH is entitled to summary judgment.

2. The undisputed record is devoid of any evidence to support a willful violation of the FCRA.

Plaintiff's claim that PHH committed a willful violation of the FCRA entitling him to punitive damages is unsupported by any evidence in the record.

To maintain a claim for a willful violation of the FCRA, the Plaintiff must show facts demonstrating that "the furnisher knowingly and intentionally committed an act in conscious disregard for the rights of others." *Mavilla*, 2013 U.S. Dist. LEXIS 3925, at *21. A violation is

"willful" for the purposes of the FCRA if a defendant violates the terms of the Act with knowledge or reckless disregard for the statute's requirements. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 71 (2007). Cursory allegations unsupported by evidence that a defendant willfully violated the FCRA are insufficient. *See Cheney v. CFT Auto Inv'rs, LLC*, Case No. 7:18-cv-211, 2019 U.S. Dist. LEXIS 44683, at *4 (E.D.N.C. Mar. 19, 2019) (dismissing willfulness claim where complaint only contain cursory allegation reciting element of the statute) (Boyle, J.).

In this case, Plaintiff's Complaint only contains a single cursory allegation that "[a]ll of Defendants' violations of the FCRA outlined herein constituted willful noncompliance." Compl. ¶ 258. He alleges no facts as to how PHH willfully violated the statute. Indeed, as discussed above, the Complaint is devoid of any factual allegations regarding PHH's alleged violation of the FCRA, either negligent or willful. "[T]his cursory recitation of the elements of the statute . . . without additional factual allegations does not enable the Court to reasonably infer that defendant is liable for the alleged violation." *See Cheney*, 2019 U.S. Dist. LEXIS 44683, at *4. Plaintiff has similarly failed to develop any evidence in discovery demonstrating that OLS or PHH knowingly or in reckless disregard of the FCRA's requirements. Indeed, the undisputed evidence shows that OLS and PHH maintained policies and procedures to ensure compliance with the FCRA. *See* Feezer Decl. ¶¶ 62-63. The record also demonstrates that, in accordance with those policies and procedures, OLS and PHH investigated the credit disputes received from the CRAs, considered the relevant information provided by the CRAs, and reported the results of the investigation. *Id*. Even if the Court were to determine that the responses were inaccurate – or that the investigation was unreasonable and therefore negligent – that does not equate to a willful violation of the statute.

Accordingly, because the undisputed factual record contains no evidence demonstrating that OLS or PHH violated the FCRA knowingly or with reckless disregard for the statute's

requirements, Plaintiff's claim for a willful violation fails and PHH is entitled to summary judgment.

3. PHH is entitled to summary judgment because Plaintiff's claim is premised on a disputed legal issue, not factual inaccuracy.

Plaintiff's FCRA claim ultimately fails because at its core, the dispute he alleges was over a legal, not factual, issue. Such legal disputes are insufficient to maintain a claim for a violation of the FCRA.

"A number of courts have found that in § 1681s-2(b)(1) actions against furnishers, like in actions against CRAs, a plaintiff's allegations of inaccurate reporting must dispute facts underlying the reporting rather than present legal defenses to paying the debt at issue." *Perry v. Toyota Motor Credit Corp.*, Case No. 1:18-cv-34, 2019 U.S. Dist. LEXIS 12125, at *19-20 (W.D. Va. Jan. 25, 2019) (*citing Chiang v. Verizon New England, Inc.*, 595 F.3d 26, 37-38 (1st Cir. 2010); *Alston v. Wells Fargo Home Mortg.*, Case No. TDC-13-3147, 2016 U.S. Dist. LEXIS 24147, at *9-10 (D. Md. Feb. 26, 2016); *Dauster v. Household Credit Servs., Inc.*, 396 F. Supp. 2d 663, 664 (E.D. Va. 2005)). "The FCRA is not meant as a route for debtors to challenge the legal validity of their debts, even against their creditors." *Id*. at 20.

In this case, Plaintiff's disputes to the CRA are premised on the same dispute that underlies this entire case: his contention that he is no longer personally liable for the Loan as a result of the Discharge in his Chapter 13 Bankruptcy. *See* Compl. ¶ 102 (alleging CRAs continued to report he remained liable for the Loan following the Discharge). But "the proper resolution of a legal challenge to a debt is likely not the kind of error that a furnisher could discover when following the FCRA's requirement that it review all information provided by the CRA during its investigation of the dispute. . . This is not likely the kind of inaccuracy that information from a CRA could resolve." *Toyota Motor Credit*, 2019 U.S. Dist. LEXIS 12125, at *20-21 (dismissing

FCRA claim based on disputes arising out of reporting following plaintiff's Chapter 7 Bankruptcy). The same logic applies here, and the Court should follow those that have found similar legal disputes insufficient to maintain a claim under the FCRA. *See, e.g., Wilson v. Suntrust Bank, Inc.*, No. 2:20-CV-20, 2021 U.S. Dist. LEXIS 115096, at *10-11 (S.D. Ga. Apr. 9, 2021) ("The dispute at the heart of this action is thus one of interpretation of the Contract: was Plaintiff contractually obligated to continue making monthly payments on his loan after his insurance company paid two lump sums to Defendant? The answer to this question is clearly one of legal interpretation and not one of factual accuracy.").

Accordingly, because Plaintiff's alleged disputes are legal rather than factual, his claim under the FCRA fails and PHH is entitled to summary judgment.

G. PHH is Entitled to Summary Judgment on Plaintiff's Telephone Consumer Protection Act Claim (Count V).

PHH is entitled to summary judgment on Plaintiff's TCPA claim because there is no evidence in the record showing that PHH used an "automatic telephone dialing system" ("ATDS") as that term is defined by the TCPA as interpreted by the Supreme Court of the United States. *See Facebook, Inc. v. Duguid*, No. 19-511, 2021 WL 1215717, 141 S.Ct. 193 (Apr. 1, 2021). Specifically, there is no evidence showing that PHH used a random or sequential number generator to produce or store and then dial Plaintiff's telephone number. Instead, the undisputed facts demonstrate that PHH did not use an ATDS.

Generally, to prevail on a claim under the TCPA a plaintiff must prove that PHH (1) made telephone calls to the Plaintiff's cell phone; (2) without the Plaintiff's prior express consent; and (3) using an automatic telephone dialing system. *See* 47 U.S.C. § 227(b)(1)(A). The definition of what constitutes an ATDS was a widely contested issue that led to a split among the Circuit Courts of Appeals and eventually before the Supreme Court. On April 1, 2021, the Supreme Court of the

United States issued its opinion in *Facebook, Inc. v. Duguid*, which specifically addressed that type of phone system constitutes an ATDS. The Court, in a unanimous decision, held that equipment "**must use** a random or sequential number generator" to qualify as an ATDS. *Facebook*, No. 19-511, 2021 WL 1215717, at *5 (emphasis added). In so doing, the Court rejected the argument that a telephone system that automatically dials stored numbers is an ATDS under the TCPA. *See id.*

In this case, the undisputed facts demonstrate that neither OLS or PHH used a random or sequential number generator to store or produce and then dial Plaintiff's cell phone number. *See* SUMF ¶¶ 12, 42. OLS and PHH did not randomly or sequentially generate numbers until they happened to find Plaintiff on the other end of the line. Plaintiff was contacted specifically because of his contractual relationship with PHH. *Id.* ¶¶ 17, 43. And where a plaintiff is "a targeted recipient" of calls, "it is not reasonable to infer that the [calls] were sent with equipment 'using a random or sequential number generator.'" *Snow v. Gen. Elec. Co.*, No. 5:18-cv-0511, 2019 WL 2500407, at *4 (E.D.N.C. June 14, 2019). And indeed, there are no facts in the record from which it could be reasonably inferred that a random or sequential number generator was used.[11]

Accordingly, because the undisputed facts show that OLS and PHH did not use an ATDS and there is no evidence to suggest that their telephone systems even have the ability to function as an ATDS, PHH is entitled to summary judgment on Plaintiff's TCPA claim.

H. PHH is Entitled to Summary Judgment on Plaintiff's Real Estate Settlement Procedures Act Claim (Count VI) for Multiple Reasons.

1. Plaintiff's RESPA claim fails because the correspondence he relies on to support his claim does not constitute a Qualified Written Request.

[11] Moreover, while the Supreme Court's decision in *Facebook* makes clear that actual *use* of a random or sequential number generator is required, there is no evidence in the record that OLS or PHH's phone systems even have the ability (i.e., capacity) to randomly or sequentially generate telephone numbers.

Plaintiff claims that PHH violated RESPA by failing to respond to a Qualified Written Request ("QWR") he sent on or about December 16, 2019, and that it was received by PHH on December 20, 2019. *See* Compl. ¶¶ 167, 169. The December 16, 2019 letter was in fact received on December 23, 2020, and a fair reading of the letter demonstrates that it is not a QWR at all. *See* SUMF ¶ 50; *see also* Compl., Ex. 16.

Correspondence that disputes the validity of a debt or challenges the recipient's authority to collect on the debt does not constituted a valid QWR. *See Ward v. Sec. Atl. Mortg. Elec. Registration Sys.*, 858 F. Supp. 2d 561, 574 (E.D.N.C. 2012) (holding that the correspondence at issue was not a valid QWR because "[a] fair reading of this document, however, leads the court to conclude that it served as a communication challenging the validity of the loan and not a communication relating to the servicing of the loan as defined by statute."); *see also IAR Family Trust v. Suntrust Mortg., Inc.*, Case No. 3:13-cv-418, 2014 U.S. Dist. LEXIS 51256, at *10 (W.D.N.C. Apr. 14, 2014) (dismissing RESPA claim because correspondence challenging the validity of the debt was not a valid QWR); *Minson v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 75605, at *13014 (D. Md. May 29, 2013) (finding that "the document did not constitute a valid QWR, and Defendant cannot be liable under RESPA for failing to respond fully," because "the thrust of the request is to challenge Defendant's authority 'to proceed with collection activities'"). Even where the same correspondence does request some information that could be understood to refer to servicing, that will not salvage the plaintiff's claim where the request is made as part of the overall challenge to the validity of the debt. *See Crump v. PNC Fin. Servs. Grp.*, Case No. 3:18-cv-160, 2018 U.S. Dist. LEXIS 168852, at *10 (W.D.N.C. Oct. 1, 2018).

In this case, a fair reading of the correspondence that Plaintiff asserts constitutes a QWR demonstrates that the correspondence is nothing more than a recitation of his position that he is

not liable under the Loan and PHH has no right to collect money from him. *See* Compl., Ex. 16. For example, after providing a detailed history of Plaintiff's journey through Bankruptcy, the letter states "Borrower is asserting that PHH has made or continues to make the following errors in connection with its servicing of the Loan: a. Assessing, collecting, or attempting to collect fees, expenses, costs, attorneys' fees, or other charges from Borrower which are neither authorized under applicable law, or pursuant to the terms of the Deed of Trust, the Note, and the Discharge. . . ." *Id*., at p. 5. In other words, while purporting to be an alleged servicing error, what Plaintiff is really saying is that PHH has no right to service (i.e., collect money on) the Loan at all. The numerous documents requested (e.g., the entire "servicing file," servicing agreements, itemized statement of the Loan, etc.) are similarly "made in concordance of Plaintiff's stated purposes of challenging the validity of the loan." *Crump,* 2018 U.S. Dist. LEXIS 168852, at *10. This type of correspondence is precisely the kind this Court has held *does not* qualify as a QWR. *See Ward*, 858 F. Supp. 2d at 574.

Accordingly, because the correspondence directed to PHH was nothing more than a challenge to the validity of the debt and PHH's ability to collect that debt, it does not constitute a QWR under RESPA. PHH is entitled to summary judgment on Plaintiff's RESPA claim.

2. The undisputed record demonstrates Plaintiff has not suffered any damages *resulting from* any alleged violations of RESPA.

Even if the Court were to conclude that Plaintiff's December 16, 2019 letter constituted a QWR under RESPA, his claim nonetheless fails because he has not and cannot allege damages *resulting from* any alleged violation of this statute.

In order to prevail on a claim under RESPA, plaintiff must prove that he suffered actual damages a result of the alleged violation(s). *See Self v. Nationstar Mortg., LLC*, No. 2:19-cv-3-D, 2019 U.S. Dist. LEXIS 165305, at *24-25 (E.D.N.C. Sept. 26, 2019) (granting motion to dismiss

where Plaintiff did not plausible allege actual damages resulting from purported RESPA violation). The undisputed facts in this case demonstrate that Plaintiff did not and/or could not suffer damages *as a result of* the alleged RESPA violations.

To begin with, Plaintiff cannot claim damages based on any alleged failure by PHH to investigate and respond to his purported QWR because he filed his lawsuit prior to the expiration of the 30-day window for PHH to do so. Under 12 U.S.C. § 2605(e)(2), PHH had "30 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request" to conduct and investigation, make correction (if necessary), and respond to the inquiry. *See* 12 U.S.C. § 2605(e)(2). Although there appears to be a dispute over when the purported QWR was received, the dispute is not material because, even using Plaintiff's allegation that the purported QWR was received on December 20, 2019, that would make the deadline for PHH to complete its investigation and respond to the inquiry February 6, 2020.[12] Plaintiff originally filed his lawsuit in state court on January 30, 2020 – seven (7) days before PHH's response to his purported QWR was due. As a matter of simple logic, Plaintiff could not have suffered damages as a result of PHH failing to respond to his purported QWR because PHH was not required to do so yet.[13] To that end, Plaintiff's RESPA claim alleging a failure to investigate and respond to his purported QWR fails as a matter of law, and PHH is entitled to summary judgment.

[12] There are forty-eight days between December 20, 2019 and February 6, 2020. Eighteen (18) of those days are public holidays, Saturdays, and Sundays.

[13] Even if his claim was defeated as a simple matter of timing, Plaintiff has still failed to allege any actual damages resulting from the erroneous claim that PHH failed to respond within the time required. As a result, his claim fails on that basis as well. *See Self*, U.S. Dist. LEXIS 165305, at *24-25.

Beyond the erroneous allegation that PHH failed to respond to the purported QWR in the time required by the statute, Plaintiff also alleges that PHH failed to provide an acknowledgement of the correspondence within five (5) days of receipt or provide him with information regarding the owner of the Note within ten (10) days. *See* Compl. ¶¶ 285, 288. Correspondence acknowledging Plaintiff's purported QWR was sent on December 24, 2020. *See* SUMF ¶ 51. Regardless of whether Plaintiff's receipt date (December 20) or PHH's (December 23) is used, the acknowledgement was sent within the five (5) business days required by the statute. *See id*. PHH acknowledges that information regarding the owner of the Note was not sent within ten (10) business days. That information was sent in PHH's substantive response to Plaintiff's correspondence, along with the other information requested, on January 31, 2020. *See* SUMF ¶ 53. However, Plaintiff's claim still fails because there is no evidence in the record demonstrating that Plaintiff suffered damages resulting from this purported failure to provide information about the Note holder within ten (10) days. Without evidence of actual damages resulting from this technical violation – having to do solely with timing – Plaintiff's RESPA claim fails and PHH is entitled to summary judgment. *See Self*, U.S. Dist. LEXIS 165305, at *24-25.

3. The record is devoid of any facts to support a "pattern or practice" violation.

As explained above, Plaintiff has not suffered any actual damages as a result of the alleged RESPA violations. This alone defeats his claim and means that he cannot recover statutory damages for an alleged "pattern and practice." *See Robinson v. Nationstar Mortgage LLC*, 2019 WL 4261696, at *9 (D. Md. 2019) ("Notably, although a borrower may recover up to $2,000 in statutory damages upon a showing of a 'pattern or practice of non-compliance with the requirements' of Regulation X, 12 U.S.C. [Sec.] 2605(f)(1)(B), a borrower cannot recover these additional damages 'without first recovering actual damages.'"). But even assuming Plaintiff

could show actual damages as a result of a violation, there is no evidence in the record to support Plaintiff's allegation of a "pattern or practice" of non-compliance under RESPA, and PHH is entitled to summary judgment as a result.

Courts in the Fourth Circuit have held that plaintiffs cannot state a claim for a "pattern or practice" violations, thereby entitling them to statutory damages, by alleging a single violation. *See Nash v. PNC Bank, N.A.*, Case No. TDC-16-2910, 2017 U.S. Dist. LEXIS 60697, at *22-23 (D. Md. Apr. 20, 2017) (holding that a single deficient letter does not establish a "pattern or practice" of non-compliance); *Galante v. Ocwen Loan Servicing, LLC*, No. ELH-13-1939, 2014 U.S. Dist. LEXIS 98049, at *34 (D. Md. July 18, 2014) (holding that plaintiffs failed to "identify any actionable pattern or practice" where the complaint alleged a single instance of noncompliance). Courts outside the Fourth Circuit have held that, to establish a pattern and practice, the alleged violations must be a part of "the company's standard operating procedure – the regular rather than the unusual practice." *Wirtz v. Specialized Loan Servicing, LLC*, 886 F.3d 713, 720 (8th Cir. 2018); *see also Gorbaty v. Wells Fargo Bank, N.A.*, No. 10-CV-3291, 2012 WL 1372260, at *5 (E.D.N.Y. April 18, 2012) (finding that "pattern or practice" means a standard or routine way of doing things, and that alleging four examples of RESPA violations does not qualify as a standard or routine way of doing things.). And that there must be some evidence of "coordination." *See Perron on behalf of Jackson v. J.P. Morgan Chase Bank, N.A.*, 845 F.3d 852, 858 (7th Cir. 2017). Most importantly, courts have rejected that a failure to respond to one QWR (which did not actually occur in this case, but is the basis of Plaintiff's RESPA claim) is not sufficient to state a claim for a "pattern and practice" violation. *See Garvey v. Am. Home Mortg. Servicing, Inc.*, No. CV-09-973-PHX-DGC, 2009 U.S. Dist. LEXIS 82548, at *4 (D. Ariz. Aug. 31, 2009) (holding that alleged failure to respond to a QWR is insufficient to show a pattern and

practice violation); *see also In re Tomasevic*, 273 B.R. 682, 686 (Bankr. M.D. Fla. 2002); *McLean v. GMAC Mortg. Corp.*, 595 F. Supp. 2d 1360, 1365 (S.D. Fla. 2009) (failure to respond to two QWRs was "insufficient to support a pattern or practice of noncompliance as required by section 2605(f)"); *In re Maxwell*, 281 B.R. 101, 123 (Bankr. D. Mass. 2002) (same)

In this case, Plaintiff alleges a single instance where he sent a purported QWR. As explained above, the bulk of his claim is erroneous as a matter of law because he filed this lawsuit prior to the expiration of PHH's time to investigate and respond to the purported QWR. Nonetheless, his claim is premised on the failure to respond to the purported QWR or to provide information requested within the regulatory deadlines. He has not claimed that the purported QWR was responded to but there was a violation nonetheless because of the investigation and response. As a result, in order to show a "pattern and practice" of non-compliance, Plaintiff would have to come forward with evidence that PHH's standard operating procedure is not to respond to QWRs or that it never provides requested information within the timeframes set out in the applicable regulations. Setting aside that this argument would be largely based on the same legal error that defeats his claim to begin with (i.e., the miscalculation of time allowed for a response), there is no evidence in the record of a pattern of failing to respond to QWRs or provide requested information. As a result, because there is no evidence to establish a pattern and practice violation of RESPA, Plaintiff's claim fails and PHH is entitled to summary judgment.

4. Statutory damages are capped at $2,000.

Under his RESPA claim, Plaintiff seeks "statutory damages in an amount equal to TWO-THOUSAND DOLLARS AND 0/100 ($2,000) *for each separate violation* of the RESPA." Compl. ¶ 297.

As a matter of law, to the extent Plaintiff's Complaint can even be read to allege multiple violations, Plaintiff is not entitled to $2,000 for each alleged violation. Rather, RESPA caps statutory damages at a **total** of $2,000 regardless of the number of violations:

> (f) Damages and costs. Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:
>
> > (1) Individuals. In the case of any action by an individual, an amount equal to the sum of –
> >
> > > (A) any actual damages to the borrower as a result of the failure; and
> > >
> > > (B) any additional damages, as the court may allow, ***in the case of pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000***.

12 U.S.C. § 2605(f) (emphasis added).

A plain reading of this language demonstrates that while an individual is entitled to *actual damages* for each failure, *statutory damages*, "in the case of a pattern or practice of noncompliance" are limited to "an amount not to exceed $2,000." *See id*. at (f)(1)(B). Indeed, if Congress had intended $2,000 in statutory damages for each violation, it would not have inserted the "pattern or practice" language, nor would it have expressly stated statutory damages are limited to "an amount ***not to exceed*** $2,000." *Id*. (emphasis added).

Courts in the Fourth Circuit have acknowledged the clear statutory test of RESPA, finding that it "authorizes statutory damages ***of up to $2,000*** if a Plaintiff can show a pattern or practice of violating RESPA." *See, e.g.*, *Polanco v. HSBC Bank USA Nat'l Ass'n*, 2019 U.S. Dist. LEXIS 104745, *27 (W.D.N.C. June 21, 2019) (emphasis added). Other courts throughout the country have directly addressed and rejected the position asserted by Plaintiff that the statutory damages are available on a *per violation* basis. *See, e.g.*, *Ploog v. HomeSide Lending, Inc*., 209 F.Supp.2d 863, 869 (N.D. Ill. 2002). In *Ploog*, the court considered whether the statute's plain, unambiguous

language permitted a statutory damages per violation, or a total cap regardless of the number of individual violations.[14] In addressing the "for each such failure" language in the introductory paragraph, the court concluded that this language meant a borrower is entitled to only "***actual*** damages for each violation of the act." *Id*. (emphasis added). Thus, the court concluded that "a plaintiff can recover actual damages for each violation of the act and statutory damages no greater than $1,000 by proving a pattern or practice of noncompliance." *Id.* Other courts have reached the same conclusions. *See, e.g., Katz v. The Dime Savings Bank,* 992 F. Supp. 250, 257 (W.D.N.Y. 1997) (holding that RESPA statutory damages are capped at $1,000 not available on a "per violation" basis).

Accordingly, the proper interpretation of Section 2605(f) limits statutory damages to $2,000, regardless of the number of RESPA violations, and any statutory damages Plaintiff seeks under RESPA are so limited.

I. PHH is Entitled to Summary Judgment on Plaintiff's Fair Debt Collection Practices Act Claim (Count VII) for Multiple Reasons.

1. PHH is entitled to summary judgment because neither Ocwen nor PHH are "debt collectors" under the FDCPA because they are "creditors" as defined by the statute.

Plaintiff's FDCPA claim fails because neither OLS nor PHH were "debt collectors" as that term is defined by this statute. Plaintiff's sole contention that OLS and PHH were "debt collectors" is that when OLS and PHH "obtained the rights to collect, or attempt to collect, sums owed in connection with the Loan, the same was in default." *See* Compl. ¶¶ 302-304 (citing 15 U.S.C. § 1692a(6)). This analysis is legally erroneous, as explained by the Fourth Circuit.

[14] At the time of the *Ploog* decision, the statutory damages under RESPA were capped at $1,000 rather than the current cap of $2,000.

Civil liability under the FDCPA is limited to "debt collectors." *See* 15 U.S.C. § 1692k. A "debt collector" is "(1) a person whose principal purpose is to collect debts; (2) a person who regularly collects debts owed to another; or (3) a person who collects its own debts, using a name other than its own as if it were a debt collector." *Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 136 (4th Cir. 2016), *aff'd by*, 137 S. Ct. 1718 (2017). As explained by the Fourth Circuit, "the overall structure of § 1692a(6) makes clear that when assessing whether a person qualifies as a 'debt collect,' we must first determine whether the person satisfies one of the statutory definitions given in the main text of § 1692a(6) before considering whether that person falls into one of the exclusions contained in subsections § 1692a(6)(A)-(F). ***If the person does not satisfy one of the definitions in the main text, the exclusions . . . do not come into play***. *Id*. (emphasis added). This inquiry is dependent, however, on the facts proven in the record. *See id*. (in the context of a motion to dismiss, observing that plaintiff had not alleged any facts to suggest the defendant was a "debt collector" under two of the three definitions in the main text of § 1692a(6) and therefore finding those definitions could not apply).

Plaintiff does not have any evidence in the record that OLS or PHH satisfies any of the definitions of a "debt collector" contained in the main text of § 1692a(6). This alone is fatal to his claim.[15] But beyond the lack of sufficient facts to establish that OLS or PHH were debt collectors, the undisputed facts demonstrate that OLS and PHH were "creditors" to whom the FDCPA does not apply. Plaintiff's Loan was assigned to OLS on May 13, 2013. *See* SUMF ¶ 11. The Deed of Trust was subsequently assigned from OLS to PHH. *See id*. at ¶ 39. As a result, at all times

[15]Plaintiff's sole allegation is that the debt was in default at the time Ocwen and PHH obtain the right to collect it. *See* Compl. ¶¶ 302-304. However, as the *Henson* Court explained, the exclusion upon which Plaintiff relies "does not define 'debt collector,' but rather identifies a class of persons excluded from the definition of 'debt collector.'" *Henson*, 817 F.3d at 138.

relevant to the allegations in the Complaint, either Ocwen or PHH were the owners of the Loan, and therefore were "creditors" rather than "debt collectors" under the FDCPA. *See Henson*, 817 F.3d at 138 (holding that defendant was a "creditor" under the FDCPA and not a "debt collector" because its "collections efforts were pursued for its own account, as the loans were then owed to it.").

Under the binding precedent of *Henson*, and in light of the allegations in the Complaint – or lack thereof – and the undisputed evidence in the record, OLS and PHH were "creditors" under the FDCPA and not "debt collectors." As a result, the FDCPA is inapplicable to any of the conduct alleged against OLS and/or PHH, and Plaintiff's claim fails as a matter of law. Accordingly, PHH is entitled to summary judgment as to Plaintiff's FDCPA claim.

2. To the extent the Court finds that OLS or PHH is a "debt collector," Plaintiff's FDCPA claim fails because it is preempted by the Bankruptcy Code.

Even if the Court finds that OLS and/or PHH was a "debt collector" under the FDCPA, Plaintiff's claim still fails because it is premised on collection of a debt allegedly discharged through Bankruptcy and, thus, is preempted by the Bankruptcy Code. Plaintiff alleges, for example, that PHH violated the FDCPA by (i) sending written correspondence attempting to collect on the Loan that misrepresented the character and legal status of the Loan; (ii) attempting to collect on the Loan through falsely representing the character, amount, or legal status of the debt; (iii) attempting to collect on the Loan through communicating or threatening to communicate credit information it knew or should have known to be false and failing to report the debt as disputed; (iv) failing to disclose that one or more communications was from a debt collector while attempting to collect on the Loan; (v) placing harassing telephone calls in an attempt to collect the debt; (vi) continued attempting to collect the debt after Plaintiff asked PHH to stop; (vii) falsely representing that Plaintiff was liable for the Loan while attempting to collect; and (viii)

communicating with him directly in an attempt to collect on the loan after it knew he was represented by counsel. *See* Compl. ¶¶ 305-314.

All of these alleged violations are premised on a violation of the Discharge Injunction because Plaintiff asserts that this personal liability under the Loan was extinguished through his Chapter 13 Bankruptcy.[16] *See* Compl. ¶ 62. That is to say, the above conduct alleged would not be wrongful if there was no Discharge Order because that is the sole basis Plaintiff alleges PHH was not entitled to collect the amounts owed under the Loan or that its representations about the loan were false or misleading. The relief Plaintiff seeks here is in conflict with the Bankruptcy Code because the Discharge Injunction – for which there is no private right of action – provides the sole remedy through the Bankruptcy Court's contempt power to remedy efforts to collect a debt discharged in Bankruptcy. *See Lovegrove*, 2015 U.S. Dist. LEXIS 112768, at *16-20 (explaining conflict between FDCPA claims and Bankruptcy Code and collecting cases).

Accordingly, because the alleged violations listed above are premised on the discharge of Plaintiff's personal obligation under the Loan as a result of his Bankruptcy, his FDCPA claim is preempted by the Bankruptcy Code and PHH is entitled to summary judgment.

3. PHH is entitled to summary judgment because the undisputed record demonstrates there was no violation of the FDCPA.

Even if the Court concludes that OLS and/or PHH were "debt collectors" under the FDCPA, PHH is still entitled to summary judgment because none of its actions violated the law. Like his NCDCA claim, Plaintiff's FDCPA claim is largely premised on the erroneous belief that the Bankruptcy Court Order allowing surrender and/or the Discharge Injunction completely

[16] Again, Plaintiff's claims are seemingly premised on his personal liability under the Loan being extinguished by the Discharge Order in his Chapter 13 Bankruptcy. However, to the extent he is claiming violations of the FDCPA prior to the entry of the Discharge Order, those claims are similarly preempted by the Bankruptcy Code for the reasons explained earlier in this brief.

eliminated any connection he had to the Property and severed his contractual relationship with OLS/PHH. Again, Plaintiff is incorrect.

Plaintiff is one of two borrowers on the Loan. Even assuming that his personal obligation under the Loan was discharged through his Bankruptcy Case, that discharge does not remove his name from the Deed of Trust. *See In re Rose*, 512 B.R. at 793-795 (explaining that title to a property does not automatically transfer upon surrender, and ownership obligations remain even after discharge). Indeed, he is still a borrower on the Loan. As explained above, a Bankruptcy discharge does not relieve Plaintiff from post-discharge obligations associated with property ownership, such as taxes, insurance, and property maintenance. *See supra* Sec. B. While he is a borrower on the Deed of Trust, he is still obligated to maintain hazard insurance and pay property taxes. *See* Feezer Decl., Ex. G. He is also responsible for maintenance of the Property. *Id*. Those property ownership obligations are not and cannot be discharged by the Bankruptcy Court. *See In re Rose*, 512 B.R. at 794-796. To that end, any communication – or portion thereof – that related to amounts due for insurance, taxes, or other maintenance on the property were not attempts to collect a discharged debt. Instead, they were lawful communications regarding amounts owed by Plaintiff. Given that PHH had a legitimate reason to contact Plaintiff regarding the Property, the record is devoid of any evidence that OLS or PHH engaged in wrongful conduct. Simply put, the mere act of contacting Plaintiff is not wrongful or actionable under the FDCPA based on the undisputed record in this case. *See Mavilla v. Absolute Collection Serv.*, Case No. 5:10-cv-412, 2013 U.S. Dist. LEXIS 3925, at *39 (E.D.N.C. Jan. 10, 2013) ("It is not a violation of the FDCPA for a debt collector to seek payment of an alleged debt by making telephone calls and writing letters that do not violate the law.").

Additionally, the co-borrower – Tonia Guthrie – was not a debtor in the Bankruptcy Case and has never been removed from the Loan. *See* SUMF ¶ 27, 48. OLS and PHH serviced the Loan in accordance with their policies and procedures, whereby all written communications regarding the account included conspicuous disclaimers informing Plaintiff that if he was involved in active Bankruptcy or if his personal obligation under the Note had been discharged, the communications were for informational purposes only. *Id*. at ¶¶ 14, 17, 24, 30, 41. Telephone calls made to Plaintiff's telephone number were made in an effort to reach either borrower on the Loan, not him in particular. *Id*. at ¶¶ 17, 43. OLS and PHH's policy was to provide a similar bankruptcy disclaimer that appeared on written communication in its verbal communications if it reached a borrower who was involved in active Bankruptcy or had received a discharge. *Id*. In other words, based on Plaintiff's continuing obligations under the Deed of Trust – including his obligation to pay taxes and insurance – PHH had a legitimate basis to include him on correspondence regarding the Loan and provided clear disclaimers explaining it was not seeking to collect any amounts that he had been relieved of through Bankruptcy.

Accordingly, because the undisputed facts demonstrate that OLS and PHH had a legitimate basis to contact Plaintiff regarding certain amounts owed on the Account and provided conspicuous disclaimers informing him that the correspondence sent to both borrowers was not an attempt to collect a debt that had been discharged in Bankruptcy, Plaintiff's FDCPA claim fails and PHH is entitled to summary judgment.

4. PHH is entitled to summary judgment because its actions are protected by the *bona fide* error defense.

Plaintiff alleges that OLS or PHH violated FDCPA §§ 1692c(a)(2), 1692c(c), 1692d(5), 1692e(2), 1692e(8), and 1692e(10) by virtue of the communications with Plaintiff. *See* Compl. ¶¶

306-16. However, even if the communications to Plaintiff constitute violations of the FDCPA,[17] such communications are protected by the FDCPA's *bona fide* error defense. The FDCPA "excludes from liability violations that were the result of bona fide errors." *Russell v. Absolute Collection Servs.*, 763 F.3d 385, 389 (4th Cir. 2014) (citing 15 U.S.C. § 1692k(c)). "To qualify for the bona-fide-error defense, a defendant is required to show, by a preponderance of the evidence, that (1) it unintentionally violated the FDCPA; (2) the violation resulted from a bona fide error; and (3) it maintained procedures reasonably adapted to avoid the violation." *Id.*

i. It is undisputed that any FDCPA violation by PHH was unintentional.

"The starting point for proving the bona fide error defense is proving that the violation was unintentional." *Christopher v. RJM Acquisitions LLC*, No. CV-13-02274-PHX-JAT, 2015 U.S. Dist. LEXIS 12452, at *14 (D. Ariz. Feb. 3, 2015) (citing 15 U.S.C. § 1692k(c)). To satisfy such "first prong, the bona fide error defense requires only the negation of specific intent to violate the FDCPA." *Rose v. Roach*, No. 6:12-cv-00061, 2013 U.S. Dist. LEXIS 53120, at *10 (W.D. Va. Apr. 12, 2013) (citing *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006)).

In this case, each correspondence received by Plaintiff contained a disclaimer informing him that "if the debt . . . has been discharged through bankruptcy, this communication is purely provided to you for informational purposes only with regard to our secured lien on the above referenced property. It is not intended as an attempt to collect a debt from you personally." *See* SUMF ¶¶ 14, 17, 24, 30, 41. Further, these communications were intended to reach both to Plaintiff *and* Tonia Guthrie, the co-borrower on the Loan, as evidenced by PHH asking for Tonia

[17] PHH does not concede that it violated the FDCPA and need not do so in order to raise the *bona fide* error defense. *See Beasley v. Red Rock Fin. Servs., LLC*, 2015 U.S. Dist. LEXIS 129572, at *2 (E.D. Va. Sept. 25, 2015) ("Defendants are not required to concede they violated the Fair Debt Collection Practices Act in order to later raise the bona fide error affirmative defense.").

by phone, *id.* ¶¶ 17, 43, and addressing communications both to Tonia and to Plaintiff. *Id.* ¶¶ 14, 24, 41. Moreover, PHH had no information on the status of Plaintiff and co-obligor's relationship, specifically that their relationship had ended. *Id.* at ¶ 4; *see also id*. at ¶¶ 25-26, 46-47. Thus, no reasonable jury could conclude that PHH *intended* to violate the FDCPA by initiating communications with Plaintiff that not only included disclaimers pertaining to bankruptcy but were intended to reach both Plaintiff *and* Tonia Guthrie.

ii. Any mistake by PHH regarding Plaintiff's Loan was made in good faith.

For the same reason, OLS and PHH's conclusion that any communications were being properly directed, "even if that determination were an 'error,' [] was bona fide. 'That is, if made, it was an error made in good faith; a genuine mistake, as opposed to a contrived mistake.'" *Krawczyk v. Centurion Capital Corp.*, No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204, at *34 (N.D. Ill. Feb. 18, 2009) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 538 (7th Cir. 2005)). OLS and PHH were "relying on the business records received from [GMAC and then OLS], which [OLS and then PHH] integrated into [their] own records and relied upon in [their] daily operations." *Id*. Certainly, PHH "was aware of the penalties for [violating the FDCPA], therefore its reliance on the records provides another assurance of reliability." *Id.* at *34-35. Accordingly, no reasonable jury could conclude that OLS or PHH relied on their records in bad faith when their communications intended for both Plaintiff *and* Tonia Guthrie were received by Plaintiff.

iii. PHH maintains procedures reasonably adapted to avoid the alleged FDCPA violations.

In order to satisfy the third prong of the *bona fide* error defense, PHH must satisfy, by a preponderance of the evidence, the following "two-step test: first, [that] the [defendant] 'maintained'— *i.e.*, actually employed or implemented—procedures to avoid errors; and second,

[that] the procedures were 'reasonably adapted' to avoid the specific error at issue." *Johnson*, 443 F.3d at 729 (citations omitted). "In order to establish the *bona fide* error defense, a [defendant] is not required to prove that it had procedures in place to guard against the unknown or *potential* errors of others–instead, the [defendant] has to take prompt steps to correct any errors *once it received notice*." *Alston v. Central Credit Services, Inc.*, 2013 WL 4543364, at *4 (D. Md. 2013) (citing *In re Creditrust Corp.*, 283 B.R. 826, 832 (Bankr. D. Md. 2002)).

Here, OLS maintained and PHH maintains specific procedures related to communications initiated with borrowers whose loans may have been discharged in bankruptcy. *See* SUMF ¶¶ 14-15. In accordance with those procedures, OLS/PHH generated for "[c]ustomers who are discharged through bankruptcy . . . billing statements with updated bankruptcy verbiage to remain complaint with necessary bankruptcy laws and disclosures." Feezer Decl. ¶ 42. Specifically, this verbiage, also known as a "mini-miranda" states "[t]his communication is from a debt collector attempting to collect a debt' any information obtained will be used for that purpose. If the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt." *Id.* This verbiage is also included in communications for purposes of complying with the FDCPA. *Id.* Additionally, for a borrower who has gone bankruptcy but has not had their name removed from the loan, OLS/PHH instructed its representatives that "[t]he borrower needs to re-finance. If he/she insists and refuses to re-finance, he/she could put it in writing and send a request to [OLS/PHH]." *Id.* ¶ 47. However, Plaintiff never stated that he wished to have his name or the co-borrower's name removed from the Loan and/or account. *See* SUMF ¶¶ 28, 48, 49. Plaintiff merely insisted that he was no longer liable on the Loan.

In this case, OLS and PHH both included the appropriate "mini-miranda" in all written correspondence to Plaintiff indicating that it was not attempting or intending to collect a debt from Plaintiff if the debt was discharged in bankruptcy. *Id.* at ¶¶ 13-15, 24, 30. Thus, OLS and PHH did not falsely represent the character, amount, and legal status of the loan, nor did OLS or PHH use false representations and/or deceptive means in an attempt to collect a debt. Further, by virtue of these "mini-miranda" disclosures, OLS and PHH included the disclosures as required by the statute. Additionally, OLS and PHH maintained procedures by which Plaintiff could have his or the co-borrower's name removed from the account after properly effectuating the surrender of his property, notwithstanding Plaintiff's failure to inquire about such procedures. Feezer Decl. ¶ 42. Further, Plaintiff made no attempts to inform OLS or PHH that the co-borrower could not be reached at his address or phone number. SUMF at ¶¶ 25-26, 46-47. Thus, even if Plaintiff requested that OLS or PHH cease communicating with him, any communications made in an attempt to reach the co-borrower that inadvertently reached Plaintiff were the result of *bona fide* error.

Accordingly, because the undisputed facts demonstrate that any FDCPA violation by OLS or PHH was unintentional and in good faith, and occurred despite OLS/PHH's policies and procedures reasonably adapted to avoid the alleged FDCPA violation, PHH is entitled to summary judgment.

J. PHH is Entitled to Summary Judgment on Plaintiff's Intentional Infliction of Emotional Distress (Count VIII) and Negligent Infliction of Emotional Distress (Count IX) Claims for Multiple Reasons.

1. Plaintiff's IIED and NIED claims are preempted by the FCRA to the extent they are premised on credit reporting activities.

Plaintiff's IIED and NIED claims are preempted by the FCRA to the extent they seek recovery based on acts related to credit reporting.

Plaintiff's IIED claim specifically alleges that PHH committed those torts by "refus[ing] to: . . . (D) [c]ease reporting false, inaccurate, and erroneous information concerning the Loan to the CRA Defendants, notwithstanding PHH's actual knowledge that the same information was grossly inaccurate and misleading . . . ." Compl. ¶ 322(D).[18] Any IIED or NIED claim premised on such an allegation is preempted by the FCRA. Specifically, the FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies. . . ." 15 U.S.C. § 1681t(b)(1)(F); A data furnisher's obligations under the FCRA are specifically set forth in 15 U.S.C. § 1681s-2. Thus, any claim with respect to those obligations must be brought – if otherwise possible – under the FCRA. Plaintiff's attempt to premise his IIED (and/or NIED) claim on allegedly false or inaccurate credit reporting is a back-door attempt to circumvent the requirements of the FCRA, as well as the lack of a private right of action against data furnishers for the affirmative act of reporting information. This is explicitly proscribed by the FCRA and Plaintiff's IIED and NIED claims fail as a result.

Accordingly, because the FCRA explicitly preempts any state law claims premised on a violation of the data furnisher's duties that are regulated under 15 U.S.C. § 1681s-2, Plaintiff's IIED and NIED are preempted by the FCRA and PHH is entitled to summary judgment.

2. Plaintiff's claims are preempted by the Bankruptcy Code to the extent they are premised on alleged attempts to collect a discharged debt.

[18] This allegation appears under Plaintiff's claim for IIED and is seemingly incorporated by reference into his claim for NIED. *See* Compl. ¶¶ 322(D), 336.

As with many of Plaintiff's claims, to the extent his IIED and NIED claims are premised on attempts to collect a debt that was allegedly discharged as a result of his Chapter 13 Bankruptcy, those claims are preempted by the Bankruptcy Code.[19] Specifically, Plaintiff alleges that PHH refused to stop placing collection calls, update its records to reflect he was no longer personally liable for the Loan as a result of the Discharge Order, and failed to cease communication with him regarding the Loan. *See* Compl. ¶ 322. Such claims premised on a violation of the Discharge Injunction are preempted by the Bankruptcy Code. *See In re Johnston*, 362 B.R. at 739; *In re Gaitor*, 2015 Bankr. LEXIS 2545, at *15.

Accordingly, because Plaintiff bases his IIED and NIED claims (at least in part) on attempts to collect a debt he alleges was discharged through his Chapter 13 Bankruptcy, those claims are preempted by the Bankruptcy Code and PHH is entitled to summary judgment as a result.

3. PHH is entitled to summary judgment on Plaintiff's IIED and NIED claims because the undisputed record demonstrates he has not suffered the type of severe emotional distress required to sustain such claims.

Plaintiff's claims for IIED and NIED fail because the undisputed facts demonstrate he has not suffered from the type of severe emotional distress required to maintain a claim for those torts. To sustain a claim for IIED or NIED, Plaintiff must show "severe emotional distress, which has been defined as 'any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.'"

[19] Again, Plaintiff's claims are premised on his personal liability under the Loan being extinguished by the Discharge Order in his Chapter 13 Bankruptcy. However, to the extent he is asserting claims for IIED and NIED prior to the entry of the Discharge Order, those claims are similarly preempted by the Bankruptcy Code for the reasons explained earlier in this brief. *See supra* Note ___.

Horne v. Cumberland Cty. Hosp. Sys., Inc., 746 S.E.2d 13, 19-20 (N.C. Ct. App. 2013) (citation omitted); *see also Holloway v. Wachovia Bank & Trust Co., N.A.* 452 S.E.2d 233, 242-243 (N.C. 1994). While "[a]n actual diagnosis by a medical professional is not required to assert severe emotional distress," a plaintiff must "at least forecast some evidence show ***severe and disabling psychological problems***." *Russ v. Causey*, 732 F. Supp. 2d 589, 606 (E.D.N.C. 2010) (*quoting Fox-Kirk v. Hannon*, S.E.2d 346, 352 (N.C. Ct. App. 2001)) (emphasis added).

In this case, there is no evidence that Plaintiff has suffered "severe and disabling psychological problems" of any kind, let alone as a result of the conduct alleged against PHH. Indeed, there is no evidence that any of the emotional distress he has alleged interfered with his functional ability – the absence of such evidence is fatal to his claim. *See Jones v. Campbell University*, 2020 WL 2772765, at *3 (E.D.N.C. 2020) (denying IIED claim in part because "plaintiff's own evidence demonstrates that his conditions did not interfere with his functional ability") (Boyle, J.)

Plaintiff has made only generalized and non-issue specific allegations of severe emotional distress, anxiety, and exacerbated medical issues. But the record is devoid of any evidence to corroborate his self-serving and conclusory claims. Those around Plaintiff never noticed any change in his mood or personality. *See* SUMF ¶¶ 85-86. Plaintiff never sought treatment for any emotional distress or any other mental condition. *Id*. at ¶¶ 82-84. And the only link between Plaintiff's pre-existing medical condition (i.e., GERD) and the alleged violations of the FCRA is Plaintiff's own self-serving and non-medical opinion. *Id*. at ¶ 80-84. Indeed, Plaintiff has never spoken to a medical provider about the conduct he alleges against PHH, or how such conduct was causing him any sort of distress – emotional or otherwise. *See id*. at ¶ 83. Moreover, there is no

evidence in the record that any of Plaintiff's alleged emotional distress interfered with this functional ability. *See id*. at ¶ 87.

Accordingly, because there is no evidence in the record demonstrating that Plaintiff suffered severe and disabling psychological problems, Plaintiff's IIED and NIED claims fail and PHH is entitled to summary judgment.

4. PHH is entitled to summary judgment on Plaintiff's IIED claim because the record is devoid of conduct to sustain such a claim.

Plaintiff's claim for IIED fails because there is no evidence in the record of any extreme and outrageous conduct required to sustain such a claim.

In North Carolina, to prevail on an IIED claim, plaintiff must show "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Holleman v. Aiken*, 668 S.E.2d 579, 590 (N.C. Ct. App. 2008). IIED claims require conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *See Guthrie v. Conroy*, 567 S.E.2d 403, 408-409 (N.C. Ct. App. 2002). "The determination of whether the conduct alleged was intentional and was extreme and outrageous enough to support such an action is a question of law for the trial judge." *Lenins v. K-Mart Corp.*, 391 S.E.2d 843, 848 (N.C. Ct. App. 1990).

In this case, Plaintiff's IIED claim is not based on the nature of PHH's conduct, but rather the subject matter. Indeed, the Complaint specifically sets forth actions (most of which are preempted by the Bankruptcy Code or FCRA as explained above) that merely amount to attempts to collect a debt Plaintiff alleges he is not liable for. *See* Compl. ¶ 322. There is no evidence in the record of "extreme and outrageous" methods of attempt to collect said debt. And the undisputed facts demonstrate that none of OLS or PHH's conduct was "so outrageous in character, and so

extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *See Guthrie*, 567 S.E.2d at 408-409. Indeed, OLS and PHH's conduct consisted of sending ordinary mortgage account documents (e.g., monthly statements) and placing phone calls in an attempt to reach the borrowers on the Loan. *See* SUMF ¶¶ 17, 43. There is no evidence that OLS or PHH engaged in any conduct that deviated from ordinary loan servicing activities. Such conduct cannot reasonably be considered "extreme and outrageous" simply because of the existence of a Discharge Order that extinguishes personal liability where the nature of the conduct does not otherwise change. *See Newsom v. Branch Banking & Trust Co.*, Case No. 4:18-cv-112, 2019 U.S. Dist. LEXIS 13979, at *29 (E.D.N.C. Jan. 9, 2019) (holding that carrying out a legal remedy, such as foreclosure, "does not amount to conduct which could be considered outrageous, extreme, or intolerable.").

Accordingly, because the undisputed facts demonstrate neither OLS or PHH engaged in "extreme and outrageous" conduct, Plaintiff's IIED claim fails and PHH is entitled to judgment as a matter of law.

5. PHH is entitled to summary judgment on Plaintiff's IIED claim because the undisputed facts demonstrate PHH did not intend for its actions to cause severe emotional distress, or have a knowledge of a likelihood that they would.

Plaintiff's IIED claim also fails because there is no evidence in the record to prove that OLS or PHH intended to cause him severe emotional distress, or otherwise had knowledge suggesting a reckless indifference to the likelihood of causing "an emotionally distressful impact." *Gebremedhm v. Whole Foods Market Group, Inc.*, 2005 WL 8159246, *8 (E.D.N.C. 2005).

As discussed at length above, OLS and PHH serviced the Loan according to their policies and procedures for a loan with two borrowers where only one was involved in a Chapter 13 Bankruptcy. *See* SUMF ¶¶ 12-16. Correspondence addressed to both borrowers included

disclaimers informing that OLS and PHH were not seeking to collect a discharged debt. *Id*. at ¶¶ 14-15, 24, 41. Phone calls were made looking for both borrowers. *Id*. at ¶¶ 17, 43. And there are amounts due in connection with the Plaintiff's ownership of the Property that he is responsible for. Nothing about OLS or PHH's ordinary servicing activities were intended to cause distress. Nor could it reasonable be said that such activities demonstrate a reckless indifference to the likelihood of causing severe emotional distress.

Accordingly, because the undisputed evidence demonstrates there was no intent to cause severe emotional distress or knowledge of a likelihood that such severe emotional distress would occur, Plaintiff's IIED claim fails and PHH is entitled to summary judgment.

K. PHH is Entitled to Summary Judgment on Plaintiff's Negligence Claim (Count X) for Multiple Reasons.

1. Plaintiff's negligence claim fails because he has failed to allege a legitimate duty of care owed by PHH.

Plaintiff's negligence claim fails because a loan servicer does not owe any duty of care outside the contractual relationship between the parties, if any. Plaintiff has failed to allege any duty of care arising from a contractual relationship with PHH, or breach thereof, and thus, his claim fails as a matter of law.

To maintain a claim for negligence, "a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Ashville City Bd. of Educ.*, 626 S.E.2d 263, 267 (N.C. 2006). When a claim for negligence has been asserted, the Court must first determine – as a matter of law – whether the defendant owes a duty of care to the plaintiff. *See id*. The North Carolina Court of Appeals has held that "[a] duty of care, supporting a negligence claim, may arise out of a contractual relationship. For this reason, this Court has acknowledged that a lender has a duty to perform those responsibilities specified in a loan agreement, ***but has declined***

to impose any duty beyond those expressly provided for in the agreement." *Wagner v. Branch Banking & Trust Co.*, 2006 N.C. App. LEXIS 1877, at *5 (N.C. App. Ct. Sept. 5, 2006), *aff'd by*, 634 S.E.2d 273 (N.C. App. Ct. 2006) (citations omitted); *Hacker*, 2016 U.S. Dist. LEXIS 135503, at *19 ("Plaintiff does not point to what terms of the operative agreements created a duty on the part of any defendant, and without some specific reference, the court will not reason one into the parties' agreements or assume a duty existed."). As a result, absent some contractual relationship and specific provision allegedly breached, this Court has not recognized a general duty of care owed by lenders or servicers. *See Hacker*, 2016 U.S. Dist. LEXIS 135503, at *21.

Plaintiff has alleged that PHH "owed Plaintiff a duty of ordinary care, to act as reasonably prudent mortgage servicers . . . would in the same or similar circumstances." Compl. ¶ 343. The North Carolina Court of Appeals and other courts interpreting North Carolina law have declined to recognize a generalized duty of care that does not arise from a contractual relationship. *See Wagner*, 2006 N.C. App. LEXIS 1877, at *5; *Hacker*, 2016 U.S. Dist. LEXIS 135503, at *19. There is no alleged contract between OLS or PHH and Plaintiff, or duties arising therefrom, that were Plaintiff alleges were breached in this case. Instead, Plaintiff has merely alleged various actions that are either preempted by the FCRA or the Bankruptcy Code, alleged violations of federal statutes,[20] or other events surrounding the servicing of his Loan but which are not tied to

[20] Although he does not call out specific statutes, Plaintiff's negligence claim includes allegations that PHH "[f]ail[ed] to conduct a reasonable investigation into Plaintiff's multiple notices" or "[f]ailed to respond to Plaintiff's requests for information," which are seemingly references to PHH's obligations under the FCRA and/or RESPA. In addition to the general failure to plead any contractual obligation giving rise to his claim and the issue of preemption, these allegations similarly fail to state a claim because "North Carolina law only recognizes negligence *per se* claims for violations of public safety statutes." *Self v. Nationstar Mortg. LLC*, Case No. 2:19-cv-3-D, 2019 U.S. Dist. LEXIS 165305, at *20-21 (E.D.N.C. Sept. 26, 2019) (dismissing negligence claim predicated on violations of RESPA, TILA, the NCDCA or the UDTPA).

any contractual obligations. As a result, his claim for negligence fails as a matter of law because there is no cognizable duty of care pleaded in the Complaint, and no evidence of such in the record.

Accordingly, because Plaintiff has failed to identify any contractual provision upon which a duty of care arose and was subsequently breached, his negligence claim fails as a matter of law and PHH is entitled to summary judgment.

2. Plaintiff's negligence claim is preempted by the FCRA or otherwise fails to state a claim for relief.

Plaintiff's negligence claim fails to the extent the conduct alleged is preempted by the FCRA. Specifically, Plaintiff alleges that PHH breached its duty of care by "[f]ailing to update [its] records to reflect the true state of facts surrounding Plaintiff, the Bankruptcy Case, the Discharge, and the Loan," and "[f]ailing to conduct a reasonable investigation into Plaintiff's multiple notices that the continued attempts to collect the Loan from him were in error . . . ." Compl. ¶344. State law statutory and tort claims against data furnishers related to credit reporting and the obligations set forth under the FCRA are preempted, including claims for negligence. *See* 15 U.S.C. § 1681t(b)(1)(F). Moreover, a claim that a defendant has negligently violated a statute is a claim for negligence *per se*, and "North Carolina law only recognizes negligence *per se* claims for violations of public safety statutes." *Self v. Nationstar Mortg. LLC*, Case No. 2:19-CV-3-D, 2019 U.S. Dist. LEXIS 165305, at *20-21 (E.D.N.C. Sept. 26, 2019).

Accordingly, because his negligence claim based on conduct related to credit reporting is expressly preempted by the FCRA and otherwise unrecognized under North Carolina law, Plaintiff's negligence claim fails as a matter of law and PHH is entitled to summary judgment.

3. Plaintiff's negligence claim is preempted by the Bankruptcy Code to the extent it is premised on alleged attempts to collect a discharged debt.

Finally, to the extent Plaintiff's negligence claim is premised on PHH's attempts to collect on the Loan after he claims his obligations were discharged, those claims are preempted by the Bankruptcy Code.[21] For example, Plaintiff alleges that PHH breached a duty of care by "[f]ailing to properly account for the effect of the Discharge on Plaintiff's liability under the Loan, and attempting to collect a debt for which Plaintiff was not liable." Compl. ¶ 344(A). Such claims premised on a violation of the Discharge Injunction are preempted by the Bankruptcy Code. *See In re Johnston*, 362 B.R. at 739; *In re Gaitor*, 2015 Bankr. LEXIS 2545, at *15.

Accordingly, because his claim is premised on collection of a debt he alleges was discharged through Bankruptcy, Plaintiff's negligence claim is preempted by the Bankruptcy Code and PHH is entitled to summary judgment.

V. CONCLUSION

Based on the foregoing reasons, PHH respectfully requests the Court grant its Motion for Summary Judgment, enter summary judgment in favor of PHH and against Plaintiff, and grant such further relief the Court deems just.

Respectfully submitted, this 29th day of July, 2021.

By: */s/ Ethan G. Ostroff*

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[21] Again, Plaintiff's claims are seemingly premised on his personal liability under the Loan being extinguished by the Discharge Order in his Chapter 13 Bankruptcy. However, to the extent he is asserting a negligence claim for conduct prior to the entry of the Discharge Order, that claim is similarly preempted by the Bankruptcy Code for the reasons explained earlier in this brief.

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LOCAL RULE 7.2(f)(3) CERTIFICATE

This Memorandum in Support does not comply with Local Rule 7.2(f)(3)(A)'s 8400 word limit. Defendant has filed a Motion for Leave to Exceed the Page and Word Limit. This Memorandum in Support presently contains 21,358 words excluding the case caption, signature blocks, and certificates.

/s/ Ethan G. Ostroff
Ethan G. Ostroff

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant PHH Mortgage Corporation hereby certifies that on July 29, 2021, the foregoing Memorandum in Support of Defendant's Motion for Summary Judgment was filed using the Court's CM/ECF electronic filing system which will forward copies to all counsel of record.

/s/ Ethan G. Ostroff
Ethan G. Ostroff