

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

David Perrill, Gregory Perrill, and all others  
similarly situated,

Plaintiffs,

v.

Equifax Information Services, LLC,

Defendant.

Case No.: 1:14-cv-00612-SS

PLAINTIFFS' RESPONSE TO  
EQUIFAX'S MOTION TO DISMISS

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## I. INTRODUCTION

*Spokeo v. Robins*, 136 S. Ct. 1540 (2016), reaffirms that violations of a statute protecting against intangible harm can constitute concrete injury sufficient to confer Article III standing without the need to show any further harm. *Id.* at 1549. Plaintiffs contend that Equifax willfully violated the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.*, in two ways. A willfulness finding on either liability claim renders Equifax liable for statutory damages.

Congress enacted the FCRA to protect consumer privacy by limiting the use of consumer reports to certain permissible purposes. In doing so, Congress elevated the common law right of privacy to the status of legally cognizable injuries with respect to consumer reports. Equifax's illegal sale of plaintiffs' information to the Comptroller is the core harm that the FCRA was intended to prevent. Plaintiffs have standing because they suffered injury when Equifax violated their privacy by furnishing their reports to a user that lacked a permissible purpose to receive them. Equifax's Rule 12(b)(1) motion should be denied because plaintiffs have Article III standing.

In its Rule 12(b)(6) motion, Equifax argues that plaintiffs' allegations are insufficient to show that Equifax willfully violated the FCRA. In *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), the Supreme Court held that "willful" violations include both reckless and knowing violations and the test is whether defendant "ran a risk of violating the law substantially greater than the risk associated with a reading [of the FCRA] that was merely careless." *Id.* at 57-59, 69.

In its Rule 12(b)(6) motion, Equifax focuses solely on the permissible purpose provided by §1681b(a)(3)(A). That permissible purpose is limited to a user that "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished." In its motion, Equifax asserts that it reasonably interpreted that subsection to allow the Texas Comptroller to use consumer reports to collect delinquent taxes. But its argument flies in the face of the 2008 letter Equifax sent to its collections customers warning them not to use consumer reports to collect debts that do not arise from "a 'credit transaction' in which a consumer has participated directly and voluntarily." FAC ¶ 15. Equifax knew using consumer reports to collect delinquent taxes entailed a high degree of risk of violating the FCRA because statutory

amendments and recent court decisions had clarified this area of the FCRA. It was well aware that it was prohibited from selling consumer reports to a tax collection agency to collect taxes.

Furthermore, Equifax's Rule 12(b)(6) motion addresses only one of plaintiffs' willfulness claims. Plaintiffs' other claim is that Equifax willfully violated FCRA's procedural requirements that were designed to insure that consumer reports are used only for permissible purposes. These procedures are set out in §1681b and §1681e(a). Equifax completely ignored them and, as a result, it violated plaintiffs' privacy by furnishing their reports to the Comptroller. Even if Equifax's misreading of the permissible purpose section was just negligent, not willful, its willful violation of these procedures led to plaintiffs' injury, which entitles them to statutory damages.

## II. FACTS

Equifax is a consumer reporting agency (CRA). FAC ¶ 5. In 1988 it agreed to incorporate CSC Credit Services' consumer data files into Equifax's consumer reporting system. FAC ¶ 13. From that point on, Equifax furnished all the consumer reports for both companies from its reporting system. *Id.* Equifax's Exhibit A confirms this. (Doc. 111-1, p. 2).

In 1993, the Federal Trade Commission, which then enforced and administered the FCRA, issued its Official Staff Commentary. 16 CFR §600 app. (1993). The FTC explained that a tax collection agency does not have a generalized permissible purpose to obtain a consumer report to collect a delinquent tax account because §1681b(a)(3)(A) applies to the collection of *credit accounts* only. FAC ¶ 14. There were a series of court decisions in 2007 concerning the use of credit reports to collect debts that were unrelated to credit. Those decisions prompted Equifax to send a letter to its collections customers. FAC ¶ 15. In its letter, Equifax cited those legal authorities and warned its customers not to use consumer reports to collect debts that did not arise out of a credit transaction in which the consumer participated directly and voluntarily. *Id.* It said its customers needed consumer consent or a court order before they could obtain a consumer report to collect a debt that did not arise out of a consumer's credit-related account. *Id.*

In 2009, the Texas Comptroller of Public Accounts (Comptroller) issued an invitation for bids for credit reporting services. FAC ¶ 17. The Comptroller's invitation said it would use the

reports to collect delinquent taxes. *Id.* CSC’s contract with the Comptroller reiterated that the Comptroller would use the reports to collect taxes. *Id.* The contract identified the Comptroller as a “non-credit granting government agency.” *Id.*; Equifax’s Ex. A, Doc. 111-1, page 2, para. 1(ii). Equifax began furnishing the Comptroller with reports from its system soon after that. FAC ¶ 18.

Plaintiffs allege that Equifax violated the procedures that Congress mandated so CRAs would not furnish reports for impermissible purposes. Section 1681b requires CRAs to know the new customer’s permissible purpose before they furnish reports. Section 1681e(a) requires CRAs to have reasonable procedures to limit the furnishing of reports to permissible purposes, to properly vet new customers, and to stop selling reports whenever there is reason to believe the reports are being used impermissibly.

When Equifax began furnishing consumer reports to the Comptroller, it had no information at all about the Comptroller’s intended use of the information. FAC ¶ 19. It had none of the contract documents between CSC and the Comptroller. *Id.* It had not communicated with the Comptroller. *Id.* It had not required the Comptroller to certify its permissible purposes. *Id.* It had not made any effort to verify the Comptroller’s use of the consumer reports. *Id.* From 2009 through 2012, Equifax furnished consumer reports to the Comptroller in complete ignorance of its use of the reports, FAC ¶ 20.

Equifax bought CSC’s credit reporting assets at the end of 2012. FAC ¶ 21. CSC then delivered its files on the Comptroller to Equifax in early 2013. *Id.* Subsequently, Equifax sent the Comptroller two “audit requests.” *Id.* Equifax’s audit requests asked the Comptroller to explain its permissible purpose and to provide supporting documents. FAC ¶ 23. In its responses, the Comptroller said it was using the reports to collect taxes. *Id.* The Comptroller’s supporting documents showed it was pulling credit reports on individuals who were employees, officers or directors of businesses that owed taxes. *Id.* None of the documents suggested that any of the individuals had applied for credit, employment, insurance or any other transaction that would give the Comptroller a permissible purpose under the FCRA. *Id.* Equifax continued to furnish consumer reports to the Comptroller after it received the Comptroller’s audit responses. FAC ¶ 24. These

two “audit requests” and the Comptroller’s responses are the only communications Equifax has ever had with the Comptroller concerning its use of consumer reports. FAC ¶ 22.

Equifax sold plaintiffs’ reports to the Comptroller in July 2013. FAC ¶ 25. They sued in December 2013. Equifax continues to furnish credit reports to the Comptroller. FAC ¶ 25 & 26.

### **III. EQUIFAX’S RULE 12(b)(1) MOTION SHOULD BE DENIED**

#### **A. Applicable Legal Standard**

Because the First Amended Complaint is the entire record, the Court assumes the truth of the allegations in deciding the motion. *Crane v. Johnson*, 783 F.3d 244, 250-51 (5th Cir. 2015).

#### **B. Concreteness As Explained in *Spokeo***

*Spokeo* reiterates that a plaintiff has Article III standing if he/she has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. 136 S. Ct. at 1547. *Spokeo* focused on injury in fact, which is also the focus here. “To establish injury in fact a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” 136 S. Ct. at 1548, citation omitted. For an injury to be “particularized” it must affect plaintiff in a personal and individual way. *Id.* An injury in fact must be “concrete” in addition to being particularized.

Intangible injuries are often concrete. 136 U.S. at 1549. “In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Id.* Courts should “consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* Congress’ judgment is “instructive and important” because “Congress is well positioned to identify intangible harms that meet minimum Article III requirements.” *Id.* “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” *Id.* quoting Justice Kennedy’s concurring opinion in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992). *Spokeo* holds that

Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. 136 S. Ct. at 1549.

### **C. Plaintiffs Have Article III Standing**

The Supreme Court’s analytical framework in *Spokeo* compels the conclusion that the unauthorized disclosure of plaintiffs’ credit reports constitutes injury in fact and that plaintiffs have stated willfulness claims for both (i) Equifax’s illegal disclosure of their reports and (ii) Equifax’s procedural violations that resulted in the unauthorized disclosure of their consumer reports.

#### **1. The FCRA’s Protection for Consumer Reports Bears A Close Relationship to Common Law Privacy Protection**

Samuel D. Warren and Louis D. Brandeis summarized the law of privacy in their landmark law review article, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). That led legislatures and courts to bolster privacy protection.<sup>1</sup> Dean Prosser identified four distinct invasion of privacy torts that had evolved by 1960. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960). He dubbed one of them “public disclosure of embarrassing private facts about the plaintiff.” *Id.* at 389. It was renamed “public disclosure of private facts” in §652B of Restatement of Torts (Second) (1977).<sup>2</sup>

Congress enacted the FCRA against this background of privacy law. Congress struck a balance in the FCRA between the consumer’s right to privacy and the need for credit information in commerce. The FCRA’s privacy protection for consumer reports bears “a close relationship” to the tort of public disclosure of private facts. *Spokeo* acknowledges that Congress can “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.” Thus, the fact that the FCRA’s statutory claim is not exactly the same as the common law tort is irrelevant. The focus is on the type of harm that provides the standing, not the specific

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<sup>1</sup> Benjamin E. Bratman, *Brandeis and Warren’s “The Right to Privacy” and the Birth of the Right to Privacy*, 69 Tenn. L. Rev. 623, 638-651 (2002), traces many of the court decisions and legislative actions that advanced the law of privacy.

<sup>2</sup> The Supreme Court has said “both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.” *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 763 (1989).

elements of the tort. The FCRA’s protection of consumer privacy in credit reports is merely a modernization of U.S. tort law.

**2. Congress Determined That Unauthorized Disclosure Of A Consumer Report Constitutes Concrete Injury**

*Spokeo* acknowledged that Congress “is well positioned to identify intangible harms that meet minimum Article III requirements.” The Supreme Court has acknowledged that “Congress enacted the FCRA...to protect consumer privacy.” *Safeco v. Burr*, 551 U.S. 47, 52 (2007); *TRW v. Andrews*, 534 U.S. 19, 23 (2001). When it enacted the FCRA, Congress said the Act was intended to protect consumers’ right to privacy in consumer reports. It prefaced the FCRA with its finding that “[t]here is a need to insure that credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and *a respect for the individual right to privacy.*” §1681(a)(4), emphasis added. The bill sponsor, Senator Proxmire, said it would protect the consumer’s “right to be free of unwarranted invasions of his personal privacy.” *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the S. Comm. on Banking and Currency*, 91st Cong. 2 (1969) (emphasis added). Senator Goodell testified that it is “imperative that access to [consumer report] information be limited..., and that the rights of an individual to his privacy not be violated.” *Id.* at 12. The Nixon Administration supported the bill and said “consumer protection against invasion of his privacy” is a central purpose of the FCRA. *Id.* at 12.

**3. Congress Required CRAs To Follow Procedures To Prevent The Unauthorized Disclosure Of Consumer Reports**

*Spokeo* holds that in determining concreteness, it is ““instructive and important”” to consider “Congress’ connection of procedural requirements to the prevention of a substantive harm.” 136 S. Ct. at 1555 (J. Ginsburg dissenting, quoting from the majority opinion at 1549). In the FCRA, Congress identified a substantive harm — the improper disclosure of consumer reports — and created mandatory procedures to prevent that harm from occurring.

A CRA is prohibited from furnishing any reports unless it has reason to believe the prospective user intends to use the reports for a permissible purpose. §1681b. CRAs are required

to follow specific procedures to vet their customers and they are prohibited from furnishing reports if they have reasonable grounds for believing the reports are being used impermissibly. §1681e(a). Equifax ignored these requirements, FAC ¶¶ 19-24, 37-38, and thus it violated plaintiffs' privacy by furnishing their consumer reports to the Comptroller. FAC ¶¶ 39-40. The harm has already occurred because their private information has been disclosed to the Comptroller.

**4. The Supreme Court And Several Circuits Have Concluded That The Unauthorized Disclosure Of Personal Information In Violation Of A Federal Statute Constitutes Concrete Injury.**

Many statutes besides the FCRA protect the confidentiality of consumer information. Cases from the Supreme Court and several Circuits confirm that disclosure of personal information in violation of those statutes is injury in fact.

*Maracich v. Spears*, 133 S. Ct. 2191 (2013) was a class action under the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. §§2721-2725, for impermissible disclosure of the plaintiffs' driving record information. The defendants were lawyers who had wanted to find clients who could sue South Carolina car dealers for charging illegal fees. The lawyers had asked the DMV for personal information of consumers who had recently bought cars in that area. The lawyers used that personal information to solicit the car buyers to become their clients in lawsuits against the car dealers. Instead, the recipients of the letters sued the lawyers for getting their information by violating the DPPA. The defendant lawyers claimed that they were authorized to obtain the plaintiffs' information pursuant to one of DPPA's permissible purpose sections.

The Supreme Court did not even discuss the plaintiffs' Article III standing in *Maracich*. Instead it went straight to the merits of the case, i.e., the proper construction of the DPPA's permissible purpose section. Plaintiffs' only injury was the unauthorized disclosure of their information. They did not allege pecuniary loss, emotional distress, or instances of identity theft.

A federal court cannot proceed to the merits until it is sure it has jurisdiction to hear the case. "Federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S.

428, 434 (2011). “Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), citations omitted. The Supreme Court must have concluded that the *Maracich* plaintiffs had Article III standing. *Maracich* compels the conclusion that the Perrills have standing.

Other courts agree. The Video Privacy Protection Act (VPPA), 18 U.S.C. §2710, prohibits the disclosure of personally identifying information relating to viewers' consumption of video-related services. In a recent post-*Spokeo* VPPA case, plaintiffs alleged that defendant had improperly disclosed their information, but did not allege pecuniary loss, identity theft or other damage. The Third Circuit concluded that plaintiffs had standing:

While perhaps “intangible,” the harm is also concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information. Insofar as *Spokeo* directs us to consider whether an alleged injury-in-fact “has traditionally been regarded as providing a basis for a lawsuit,” *Google [In re Google Inc. Cookie Placement Consumer Privacy Litig.]*, 806 F.3d 125 (3d Cir. 2015)] noted that Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private.

Accordingly, we conclude that the plaintiffs have alleged facts which, if true, are sufficient to establish Article III standing.

*In re Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782 at \*7–8 (3d Cir. June 27, 2016), footnotes omitted. The Seventh Circuit reached the same conclusion in a pre-*Spokeo* VPPA case. “By alleging that Redbox disclosed their personal information in violation of the VPPA, Sterk and Chung have met their burden of demonstrating that they suffered an injury in fact that success in this suit would redress.” *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014). Two district courts reached the same conclusion in post-*Spokeo* FCRA decisions. *Thomas v. FTS USA, LLC, et al.*, 2016 WL 3653878, at \*10 (E.D. Va. June 30, 2016); *Hawkins v. S2Verify*, 2016 WL 3999458, at \*5 (N.D. Cal. July 26, 2016).

## **5. The Cases Cited By Equifax Are Inapposite**

Citing numerous cases at pages 7-10, Equifax argues that plaintiffs do not have standing because they have not alleged that their information has been used for identity theft or similar misdeeds. In making this argument, Equifax skips over the analysis that *Spokeo* requires. It fails

to address the relationship between the FCRA's protection for consumer reports and the tort of public disclosure of private information. And it completely ignores the fact that Congress identified the improper disclosure of consumer reports as a concrete harm and elevated it to the status of legally cognizable injury.

The cases it cites do not support its argument. Most of them are data breach cases that had no claim that involved a federal statute similar to the FCRA.<sup>3</sup> The typical data breach case is against a corporation or hospital that that has been victimized by computer hackers. The hackers may have taken some consumer information, but that is often unknown. The plaintiffs are worried that their information will be used for identity theft or similar crimes. The court in *Khan* analyzed the data breach cases in considerable detail and explained standing in those cases turns on whether the plaintiffs have alleged facts showing that the hackers have actually used the stolen information. *Khan*, 2016 WL 2946165, at \*3-\*5.

This case is different from the data breach cases because it is based upon the FCRA, a statute in which Congress has expressly identified the unauthorized disclosure of one's consumer report as injury in fact and has provided a remedy for a violation of the Act.<sup>4</sup>

Equifax also cites *Smith v. Ohio State Univ.*, 2016 WL 3182675 (S.D. Ohio June 8, 2016), which did involve an FCRA claim. The FCRA claim in *Smith* was not for the unlawful disclosure of the plaintiffs' consumer reports. Rather, it was for the University's technical violation of the FCRA's requirements for a written notice. If an employer wants to pull a credit report on a job applicant, it must first give the applicant a written notice. That notice must consist *solely* of the disclosure that the employer is going to obtain a consumer report on the applicant.

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<sup>3</sup> *Khan v. Children's Nat'l Health Sys.*, 2016 WL 2946165 (D. Md. May 19, 2016); *In re Zappos.com, Inc.* 108 F. Supp. 949 (D. Nev. 2015); *In Re: SuperValu, Inc.*, 2016 WL 81792 (D. Minn. Jan. 7, 2016); *Reilly v. Ceriodian Corp.*, 664 F.3d 38 (3d Cir. 2011); *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).

<sup>4</sup> Equifax cites one data breach case in which there was an FCRA claim but that claim was dismissed because there was a "breach in causation caused by opportunistic third parties." *Peters v. St. Joseph Serv. Corp.*, 74 F.Supp.3d 847, 857 (S.D. Tex. 2015).

§1681b(b)(2)A)(ii). The University had included in its written notice “extraneous information such as a liability release,” *id.* at \*1, but the district court found that there was no resulting injury to plaintiffs. The case did not involve a violation of the plaintiffs’ privacy.

**6. The Doctrine Of Standing Is Served By Honoring Congress’ Judgment That Unauthorized Disclosure Of A Credit Report Is Concrete Injury**

The concept of standing prevents the judicial branch from usurping the power of the political branches. *Spokeo*, 136 S.Ct. at 1547. The doctrine of Article III standing “confines the federal courts to a properly judicial role.” *Id.*, citation omitted. By vindicating consumers’ rights to the privacy of their credit reports as Congress intended, the Court respects the role of the political branches; it does not tread on it. This Court should honor Congress’ judgment, not override it.

**IV. EQUIFAX’S RULE 12(b)(6) MOTION SHOULD BE DENIED**

**A. Applicable Legal Standard**

On a Rule 12(b)(6) motion, the court takes the factual allegations as true and resolves any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff. *Fernandez–Montes v. Allied Pilots Ass’n* 987 F.2d 278, 284 (5th Cir.1993). It may consider the pleadings and attachments, plus documents that are submitted with the motion to dismiss if the complaint refers to those documents and they are central to plaintiff’s claim. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir.2000).

**B. Liability Standard Under *Safeco***

Plaintiffs allege that Equifax willfully violated §1681b and §1681e(a). In *Safeco* the Supreme Court held that willful violations of the FCRA include reckless violations as well as knowing and intentional violations. *Safeco*, 551 U.S. at 59–60. Recklessness is “action entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known.’ ” *Id.* at 68. The test is whether defendant “ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” *Id.* at 69.

The *Safeco* Court used three factors to determine whether the defendants' interpretation of the Act was objectively reasonable.<sup>5</sup> It considered whether the Act's text provides clear guidance or is instead "less-than-pellucid." 551 U.S. at 70. It considered whether defendants' interpretation of the statutory language "had a 'foundation in the statutory text.'" 551 U.S. at 69–70. And it considered whether there was guidance on the issue from a court of appeals or the FTC. *Id.*

**C. Plaintiffs' Allegations Show That Equifax Ran A High Risk Of Violating The FCRA By Furnishing Reports To The Comptroller To Collect Taxes**

The gist of Equifax's argument is that its violation cannot be willful because there isn't a case directly on point. It protests that "no court has ever held that the FCRA prohibits consumer reporting agencies from furnishing reports to taxing authorities for use in tax collection." Equifax's brief, page 12.

That is not the standard for liability that the Supreme Court set in *Safeco*, and no court has ever ruled that way. The applicable test is whether Equifax "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. The cases since *Safeco* hold that when a CRA violates provisions of the FCRA that are clear and unambiguous, the courts will not hesitate to find willfulness. *Cortez v. Trans Union, LLC*, 617 F.3d 688, 722 (3d Cir. 2010); *Dreher v. Experian Info. Sols., Inc.*, 71 F. Supp. 3d 572, 580 (E.D. Va. 2014); *Hawkins, supra* at \*3.

The factors considered by the Supreme Court in *Safeco*, plus Equifax's warning letter, prove that Equifax ran a high risk of violating the FCRA by furnishing reports to the Comptroller for use in collecting taxes.

**1. Equifax's Letter Proves It Knew The High Was Risk**

Equifax's 2008 letter to collections customers told them not to use consumer reports to collect debts unless the collection activity was "in connection with a 'credit transaction' in which the consumer has participated directly and voluntarily." That letter is undeniable proof that Equifax knew there was a high degree of risk of violating the FCRA by furnishing reports for the

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<sup>5</sup> See *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 251–52 (3d Cir. 2012).

Comptroller to use to collect taxes. Taxes are not credit transactions in which the consumer has participated directly and voluntarily.

Equifax tries to dismiss its letter as immaterial and argues that the letter shows only Equifax's subjective intent. Equifax's brief, p. 19. Not so. The letter is proof that Equifax appreciated the high degree of risk that was involved here. No CRA would warn its customers not to use its consumer reports unless it discerned a substantial risk of violating the FCRA.

## **2. The Statutory Language Gave Equifax Clear Guidance**

*Safeco* first asks if the relevant text provides clear guidance or is less-than-pellucid. Equifax quotes part of §1681b(a)(3)(A) but does not attempt to explain what is ambiguous about it. Subsection §1681b(a)(3)(A) provides as follows:

(a) Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

\*\*\*

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer;

To fall within this permissible purpose, the user must intend to use the report in connection with a *credit transaction that involves the consumer* whose report is requested. And the transaction must involve either the *extension of credit to, or the review or collection of an account of the consumer*. Congress' use of "and" requires that both conditions must be met.

"Credit" is a defined term. §1681a(r)(5). The FCRA incorporates by reference the Equal Credit Opportunity Act's definition of credit. It means "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. §1691a(d).

Tax obligations are not "credit" transactions because taxpayers do not have a "right" to defer payment of their taxes. The Comptroller does not grant credit. As its contract with CSC says, the Comptroller is "a non-credit granting government agency." Doc. 111-1, p. 2 of 9.

### 3. Equifax Fails to Offer Any Interpretation of the Statutory Text

Next the Court should consider whether the defendants' interpretation has a "foundation in the statutory text." 551 U.S. at 69–70. The Court cannot do this because Equifax has not offered any interpretation of the text of §1681b(a)(3)(A). The statutory language limits the permissible purpose to "credit transactions" "involving the consumer" on whom the report is furnished. Equifax does not explain how §1681b(a)(3)(A) can be interpreted to authorize the Comptroller to use consumer reports to collect taxes. Nor can Equifax explain how this provision allows the Comptroller to get confidential financial information on people who work for the businesses that owe taxes. Equifax does not discuss the statutory text.

As a substitute for analyzing the statutory language, Equifax relies upon brief quotes from numerous cases. It claims that these cases support its argument that the collection of any debt is a permissible purpose "*regardless of the type of debt involved.*" Equifax's brief, p. 12, emphasis by Equifax. Equifax's brief quotes are out of context, divorced from the facts of the cases and presented in a misleading manner. All of Equifax's cases involved debts that arose out of consumers' credit accounts.<sup>6</sup>

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<sup>6</sup> *Norman v. Northland Grp. Inc.*, 495 F. App'x 425, 426–27 (5th Cir. 2012) [Plaintiff's account with GE Money Bank had been placed for collection with Northland, which pulled his credit report]; *Eaton v. Plaza Recovery, Inc.*, No. CIV.A. H-12-3043, 2014 WL 2207865, at \*1 (S.D. Tex. May 28, 2014) [Plaintiff's account with Department Store National Bank had been placed for collection]; *Brailey v. F.H. Cann & Associates, Inc.*, No. CIV. 6:14-0754, 2014 WL 7639909, at \*2 (W.D. La. Dec. 5, 2014) ["the credit pull was in furtherance of Cann's efforts to collect a past due balance on a credit transaction..."]; *Davis v. Schwab*, No. 4:12-CV-740-A, 2013 WL 704332, at \*3 (N.D. Tex. Feb. 26, 2013) [defendants had a permissible purpose because they were reviewing "an alleged medical debt owed by plaintiff."]; *Bourdier v. Dermatology & Aesthetic Inst., L.L.C.*, No. CIV.A. 011-237-BAJ, 2011 WL 4345215, at \*3 (M.D. La. Sept. 15, 2011) ["plaintiff had a credit account with defendant..."]

The cases cited in Equifax's footnote 6 do not support its argument either. *Duncan v. Handmaker*, 149 F.3d 424, 427 (6th Cir. 1998), held that "[b]asic principles of statutory construction prevent us from interpreting § 1681b(3)(E) in a fashion that allows a party to obtain a consumer report for a purpose only tangentially related to the extension of credit." The unpublished *Lusk v. TRW, Inc.*, 173 F.3d 429 (6th Cir. 1999), holds that a collection agency may pull a consumer report to collect the money the consumer owes for damage to his former apartment. *Hasbun v. Cty of L.A.*, 323 F.3d 801 (9 Cir. 2003), is properly understood as holding that "a judgment creditor is authorized under the statute to obtain a credit report in connection with collection efforts." *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 676 (9th Cir. 2010). *Phillips v.*

#### **4. Equifax Had Authoritative Guidance on the Limits Of The Permissible Purpose In §1681b(a)(3)(A)**

Unlike the defendants in *Safeco*, Equifax had plenty of guidance on the scope of the permissible purpose set out in §1681b(a)(3)(A).

The Federal Trade Commission issued its Official Staff Commentary in 1993. 16 CFR §600 app. (1993). Addressing this particular provision, the FTC advised that “a tax collection agency has no general permissible purpose to obtain a consumer report to collect delinquent tax accounts, because this subsection applies only to collection of ‘credit’ accounts.” While the FTC’s guidance on the FCRA is not entitled to *Chevron* deference,<sup>7</sup> it should be given considerable weight unless it conflicts with the statutory language.<sup>8</sup>

Equifax urges the Court to discount this guidance because it was rescinded in July 2011. The FTC’s 1993 Commentary was replaced with “40 Years of Experience with the Fair Credit Reporting Act, An FTC Staff Report With Summary of Interpretations,” FTC, July 2011, available at the FTC website. As revised, the FTC’s commentary advises that:

E. Tax obligations. A tax collection agency does not have a permissible purpose to obtain a consumer report to collect delinquent tax accounts because this section applies only to “credit” accounts. However, if a consumer taxpayer entered an agreement with a tax collection agency to pay taxes, that agreement may create a debtor-creditor relationship, thereby giving the agency a permissible purpose to obtain a consumer report on that consumer.

No court has ever disagreed with the FTC’s conclusion that a tax collection agency does not have a permissible purpose to use consumer reports to collect taxes.

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*Grendahl*, 312 F.3d 357, 360 (8th Cir. 2002), was an impermissible use case against a woman who pulled the credit report to check on her daughter’s boyfriend. *Dumas v. City of Chi*, 234 F.3d 1272 (7th Cir. 2000), involved the use of a credit report to collect an unpaid utility bill, i.e., a credit account. *Schaefer v. CBS Collections, Inc.*, 2012 WL 2128005, at \*4 (E.D. Wash. June 12, 2012) held that the FCRA claims were time-barred and did not reach the merits of the FCRA claim.

<sup>7</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>8</sup> Contrary to Equifax’s footnote 8, plaintiffs did not suggest that the FTC Commentary is entitled to *Chevron* deference. Plaintiffs said that it “should be given considerable weight unless it conflicts with the statutory language or Congressional intent,” citing *Estiverne v. Sak’s Fifth Ave.*, 9 F.3d 1171, 1173 (5th Cir. 1993). FAC ¶ 14. *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 493 n. 1 (5th Cir. 2004), which Equifax cites, says this Circuit “consider[s] the FTC staff commentary...insofar as it is persuasive.”

Equifax had guidance from several court cases. It cited those cases in the warning letter it sent to its collections customers in 2008. Equifax has identified two of them in its motion: *Miller v. Trans Union, LLC*, No. 06 C 2883, 2007 WL 641559 (N.D. Ill. Feb. 28, 2007) and *McReady v. Linebarger Goggan Blair & Sampson, LLP*, Slip Op., No. 06 C 4884 (N.D. Ill. Aug. 15, 2007). See Equifax’s brief, p. 15. Equifax identifies *Pintos* as the third decision that sparked its warning letter, but it has cited the wrong *Pintos* opinion. The *Pintos* opinion that Equifax identified in its 2008 letter was the 2007 opinion, *Pintos v. Pac. Creditors Ass’n*, 504 F.3d 792 (9th Cir. 2007).

*Miller*, *McReady* and *Pintos* all recognized that the FCRA has been clarified by the Fair and Accurate Credit Transactions Act, which added definitions to the FCRA for “credit” and “creditor.” *Miller* and *McReady* discussed the importance of these new definitions. In *Pintos* the Ninth Circuit followed the logic of *Miller* and *McReady* and held that “[b]y defining credit as a ‘right ... to defer payment,’ FACTA indicates that a §1681b(a)(3)(A) ‘credit transaction’ is a transaction in which the consumer directly participates and voluntarily seeks credit.” 504 F.3d at 798. The Seventh Circuit had reached the same conclusion in *Stergiopoulos & Ivelisse Castro v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1047 (7th Cir. 2005) [“An entity may rely on subparagraph [§1681b(a)] (3)(A) only if the consumer initiates the transaction. \*\*\* [T]here must be a direct link between a consumer's search for credit and the bank's credit report request.”]

The Ninth Circuit withdrew its 2007 *Pintos* opinion because it had relied upon the definition of “credit” that was added after the facts in *Pintos* had occurred.<sup>9</sup> In the superseding opinion, *Pintos v. Pac. Creditors Ass’n*, 565 F.3d 1106 (9th Cir. 2009), the Court held that “[t]o qualify under § 1681b(a), the ‘credit transaction’ must both (1) be ‘a credit transaction involving the consumer on whom the information is to be furnished’ and (2) involve ‘the extension of credit to, or review or collection of an account of, the consumer.’” *Id.* at 1112. Mrs. Pintos, whose car

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<sup>9</sup> *Rodriguez v. Experian*, 2016 WL 3976564 (W.D. Wash. July 25, 2016), explains that the final *Pintos* opinion did not discuss the term “credit” because “the events ... in *Pintos* occurred in 2002 – two years before the FACTA definition of “credit” went into effect.” *Id.* at \*4

had been towed involuntarily, was not “a participant in the typical transaction where an extension of credit is requested.” *Id.* at 1113.

Equifax argues that plaintiffs’ reliance on *Pintos* is misplaced because there was a dissent from the panel opinion and dissent from the denial of *en banc* review. *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 672 (9th Cir. 2010). The fact that some judges dissented does not detract from the guidance *Pintos* provides. The dissenters lost. The Supreme Court denied *certiorari*. *Pintos* is binding precedent in the Ninth Circuit and no Circuit has disagreed with it. No district court has disagreed with it either.

Equifax asserts that *Pintos* is “at odds” with numerous other cases that hold, “without qualification, that debt collection is a permissible purpose under 1681b(a)(3)(A).” Equifax’s brief, p. 16. Equifax asserts that these cases support that statement: *Safeco*, 551 U.S. at 70; *Hammer v. Sam’s E., Inc.*, 754 F.3d 492, 502 (8th Cir. 2014); *Levine v. World Fin. Network Nat. Bank*, 554 F.3d 1314, 1318 (11th Cir. 2009); and *Landrum v. Harris Cty. Emergency Corps*, 122 F. Supp. 3d 617, 626 (S.D. Tex. 2015). None of those cases support Equifax’s statement. *Safeco* focused on the insurance companies’ failure to send adverse action notices. *Hammer* involved the truncation requirements for credit card receipts. *Levine* considered whether a creditor may pull a credit report when the account has been closed. *Landrum* dealt with the legality of the background check authorization form. None of these cases addressed the issue for which Equifax cites them.

Equifax urges this Court to conclude that the Ninth Circuit got it wrong and thus dismiss this case. Even if this Court were to agree with the *Pintos* dissent, Equifax’s motion should be denied. The *Pintos* dissent disagreed only with the panel’s conclusion that the transaction must have been initiated by the consumer voluntarily. But the dissent did not disagree with the panel’s first opinion that considered the meaning of a “credit transaction” as clarified by the definitions FACTA added in 2003. Taxes that are owed to “a non-credit granting government agency” (Doc. 111-1, p. 2) do not constitute a “credit transaction” and thus §1681b(a)(3)(A) does not authorize Equifax to sell consumer reports to the Comptroller for that use.

## **5. Equifax's Tax Lien Argument Lacks Merit**

Citing the FTC's 1993 guidance concerning "a tax lien having the same effect as a judgment," Equifax argues that it was authorized to sell consumer reports to the Comptroller because a statutory tax lien automatically attaches to the assets of delinquent taxpayers in Texas. Equifax's brief, p. 15. The argument fails for several reasons. First, the FTC changed its guidance in 2011 when it issued its report "*40 Years of Experience with the Fair Credit Reporting Act.*" The FTC deleted its tax lien discussion (the new guidance is quoted *infra* p. 14), probably because *Miller* and *McReady* had pointed out that the FTC's tax lien theory had no foundation in the statutory language. Second, Equifax's tax lien argument disregards the FTC's qualification that the tax lien had to have "*the same effect as a judgment.*" In order for a Texas tax lien to have the same effect as a judgment, the Comptroller must record a tax lien notice and then bring (and win) a lawsuit to determine the validity of the lien. Tex. Tax Code Ann. §113.106 (West). A Texas tax lien does not have the same effect as a judgment until it has been adjudicated and judgment has been entered for the Comptroller. *Id.*

This case does not involve any consumers against whom the Comptroller has obtained a judgment, or even filed a tax lien notice. The Comptroller never filed a tax lien notice or obtained a judgment against either plaintiff, FAC ¶ 14, and the class is defined to exclude all such persons. FAC ¶ 27. Consequently, the case does not involve any person against whom the Comptroller has a tax lien having the same effect as a judgment.

## **6. Equifax's Qualified Immunity Argument Lacks Merit**

Equifax's suggestion that qualified immunity cases apply here is wrong. *Safeco* contains a "cf" citation to *Saucier v. Katz*, 533 U.S. 194 (2001), a qualified immunity case, but that citation means that *Saucier* provides an analogy. The rule for willfulness liability under the FCRA is whether defendant "ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69.

Equifax cites *Mullenix v. Luna*, 136 S.Ct. 305 (2015), a qualified immunity case involving a police officer who shot a dangerous fugitive in a high-speed chase. As noted above, the test for

qualified immunity is inapplicable. In its footnote 11, Equifax cites some cases brought under 14 U.S.C. §1983 in which private entities claimed qualified immunity because they worked for government agencies, but they are inapposite too. This is not an action under §1983. The doctrine of qualified immunity is inapplicable to FCRA cases. Equifax was not acting as an agent of the State of Texas. It was a vendor that sold credit reports to the Comptroller. Likewise, *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016) bears no similarity to this case.

**D. Equifax Willfully Violated The FCRA’s Procedural Requirements**

In *Spokeo*, the Supreme Court acknowledged that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” 136 S. Ct. at 1549, citing *Lujan*, 504 U.S. at 580. Congress did this in the FCRA and created a cause of action for consumers when their privacy is invaded as a result of a CRA’s failure to comply with the mandatory procedures to protect the confidentiality of consumer reports.

Congress prefaced the FCRA with this statement:

*It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this chapter.*

§1681(b), emphasis added.

Congress provided a remedy for consumers who suffer injury as a result of a CRA’s violation of its obligations under the FCRA. That remedy covers all violations of the FCRA. “Any person who willfully fails to comply with *any requirement imposed under this subchapter* with respect to any consumer is liable to that consumer” for statutory damages. §1681n(a), italics added.

Equifax’s Rule 12(b)(6) motion ignores plaintiffs’ claim for its willful violation of the FCRA’s procedural requirements. §1681b and §1681e(a). It is clear that Equifax willfully violated those requirements. The text of those sections provides “clear guidance;” those sections are unlike the “less-than-pellucid” text that was considered in *Safeco*. Section 1681b requires a CRA to have “reason to believe” its customer has a permissible purpose before it can furnish reports. Section 1681e(a) requires a CRA to vet its new customers before it furnishes reports. New customers must

identify themselves and certify their permissible purposes and then the CRA must make a reasonable effort to verify the customer's identity and permissible purpose. The CRA must cease furnishing reports if it has "reasonable grounds for believing" the reports are being used impermissibly.

Equifax has not offered any interpretation of this statutory text that would allow it to ignore these procedural requirements.

Equifax had authoritative guidance about these obligations. *Pintos* held that:

Section 1681e requires more from a credit reporting agency than merely obtaining a subscriber's general promise to obey the law. After prospective subscribers "certify the purposes for which [credit] information is sought, and certify that the information will be used for no other purpose," the reporting agency must make "a reasonable effort" to verify the certifications and may not furnish reports if "reasonable grounds" exist to believe that reports will be used impermissibly. 15 U.S.C. § 1681e(a). Under the plain terms of § 1681e(a), a subscriber's certification cannot absolve the reporting agency of its independent obligation to verify the certification and determine that no reasonable grounds exist for suspecting impermissible use.

*Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 677 (9th Cir. 2010).

In sum, there is no dispute that Equifax willfully violated the procedural requirements of §1681b and §1681e(a). Having made the determination that the unauthorized disclosure of consumer reports is concrete injury that satisfies Article III, Congress made these procedures mandatory so CRAs would protect the confidentiality of consumer reports. This case fits precisely into that category of cases identified in *Spokeo* where the willful violation of the procedural right, coupled with the harm that was identified by Congress, constitutes a willful violation and entitles each plaintiff to an award of statutory damages.

Thus, even if Equifax convinced the trier of fact that it was only negligent, not willful, in misreading §1681b(a)(3)(A), Equifax would still be liable for willfully violating the FCRA. It willfully violated the procedural requirements that were designed to protect the privacy of consumer reports. As a result of Equifax's willful violation of those procedural requirements, plaintiffs suffered harm through the unlawful disclosure of their consumer reports.

## V. CONCLUSION

Plaintiffs respectfully submit that Equifax's motion should be denied and the case should be restored to the Court's trial calendar.

Dated: June 1, 2016

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## CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I electronically filed a true and correct copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record.

By: /s/ Andrew J Ogilvie  
Andrew J Ogilvie