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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1248

MARK ANTHONY GUTHRIE,

Plaintiff – Appellant,

v.

PHH MORTGAGE CORPORATION,

Defendant – Appellee,

and

TRANS UNION, LLC; EQUIFAX, INC.; EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.,

Defendants.

ELECTRONIC PRIVACY INFORMATION CENTER; THE NATIONAL CONSUMER LAW CENTER,

Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Terrence W. Boyle, District Judge. (7:20-cv-00043-BO)

Argued: May 4, 2023 Decided: August 18, 2023

Before DIAZ, Chief Judge, and WYNN and QUATTLEBAUM, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Quattlebaum wrote the opinion, in which Chief Judge Diaz joined and Judge Wynn wrote an opinion concurring in part and dissenting in part.

ARGUED: Matthew William Buckmiller, BUCKMILLER, BOYETTE & FROST, PLLC, Raleigh, North Carolina, for Appellant. John Curtis Lynch, TROUTMAN PEPPER HAMILTON SANDERS LLP, Virginia Beach, Virginia, for Appellee. **ON BRIEF:** Blake Boyette, BUCKMILLER, BOYETTE & FROST, PLLC, Raleigh, North Carolina, for Appellant. Ethan G. Ostroff, Carter R. Nichols, Virginia Beach, Virginia, Elizabeth Holt Andrews, TROUTMAN PEPPER HAMILTON SANDERS LLP, Raleigh, North Carolina, for Appellee. Megan Iorio, Christopher Frascella, ELECTRONIC PRIVACY INFORMATION CENTER, Washington, D.C., for Amici Curiae.

QUATTLEBAUM, Circuit Judge:

Mark Anthony Guthrie appeals the district court's grant of summary judgment to PHH Mortgage Corporation on numerous federal and state law claims. A complicated set of facts underlies these claims—complicated enough to make an excellent hypothetical for a law school exam. For our purposes though, this appeal can be boiled down to two issues. First, does the Bankruptcy Code preempt state law causes of action for a creditor's improper collection efforts related to debt that has been discharged in bankruptcy? Second, are there genuine disputes of material fact with respect to Guthrie's federal and state claims?

I.

Guthrie filed for Chapter 13 bankruptcy and was granted a discharge order in 2016. PHH, for its part, holds an interest in a property for which Guthrie's personal liability was discharged in the bankruptcy proceeding. Guthrie sued PHH[1] for improper collection attempts on the discharged debt, as well as misreporting his credit status. We begin by summarizing Guthrie's bankruptcy proceedings and the subsequent district court proceedings.

A.

In 2009, Guthrie and his then-wife, Tonia, took out a loan to purchase a home (the "Property") in Jacksonville, North Carolina. Guthrie and Tonia subsequently separated and, eventually, divorced.

[1] Guthrie also sued TransUnion, Equifax and Experian, but he resolved his claims against those parties out of court and voluntarily dismissed them from the case.

Following the separation, in April 2011, Guthrie filed for Chapter 13 bankruptcy. Both Guthrie and Tonia's names are listed on the deed for the Property, and Tonia's name remains on the loan. But Tonia did not and has not ever filed for bankruptcy.

In August 2011, after the divorce, the United States Bankruptcy Court for the Eastern District of North Carolina entered an order confirming Guthrie's Chapter 13 Bankruptcy Plan. Under the plan, Guthrie had to make 60 monthly payments of $1,825 and would continue living at the Property with his and Tonia's two children.

But in January 2013, Guthrie—a Marine Corps officer and pilot—and his children relocated from the Property to base housing. In connection with that relocation, Guthrie moved the bankruptcy court to allow surrender of the Property and modification of the Plan. The court granted the motion, which also reduced his overall repayment obligations to 21 monthly payments of $1,825 followed by 39 monthly payments of $825.

In May 2016, after Guthrie had made all plan repayments, the bankruptcy court issued an order that discharged Guthrie's obligations for the debt. Discharging an obligation is bankruptcy-speak for ruling Guthrie had no further obligation for the debt. 11 U.S.C. § 1328. His bankruptcy case was closed in August 2016.

The discharge order left an unusual situation concerning the Property and the debt on it. Because PHH did not foreclose on the Property after Guthrie surrendered it in 2013, both Guthrie and Tonia's names remained on the deed. Guthrie—one joint

owner—had received a bankruptcy discharge order on the debt. Tonia—the other joint owner—was still obligated on the debt, never having filed for bankruptcy.

B.

Following a long chain of assignments, in May 2013, PHH obtained its interest in the Property.[2] Guthrie sued PHH in 2020, asserting two general categories of improper actions regarding the debt—(1) improperly contacting him and attempting to collect the debt and (2) misreporting of his credit status.[3]

Guthrie alleges that, beginning around November 2013, PHH "began harassing [him] by placing collection telephone calls to [him] in connection with the Loan on a weekly basis," an average of 1 to 3 times per week, persisting through January 2016. J.A. 729. He says that he repeatedly asked PHH to stop contacting him and informed its employees that he was no longer liable on the loan. According to Guthrie, he told them to "contact his ex-wife for payment." J.A. 701.

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[2] The original loan was an adjustable rate note that Guthrie and Tonia took out with Gateway Funding Diversified Mortgage Services L.P. In November 2011, Gateway assigned its interest in the Property to GMAC Mortgage, LLC. Then, in May 2013, GMAC assigned its interest in the Property to Ocwen Loan Servicing. Finally, Ocwen merged with PHH in January 2019. For simplicity, we refer to Ocwen as PHH throughout, given that PHH and Ocwen are the same entity for purposes of Guthrie's lawsuit.

[3] Guthrie sued in North Carolina state court. PHH removed the action to the United States District Court for the Eastern District of North Carolina.

Guthrie enlisted the help of his bankruptcy attorney, who sent PHH "at least two separate warning letters" in 2014, stating that PHH could not collect or attempt to collect amounts owed on the loan from Guthrie. J.A. 702. PHH responded, acknowledging that Guthrie was represented by counsel and stated that "all communications including verbal, mail, and email" to Guthrie would cease and would instead be forwarded directly to Guthrie's attorney. J.A. 757. Despite this, Guthrie alleges that PHH continued to contact him directly until 2020.

In May 2016, the bankruptcy court sent the discharge order to PHH. When a debt is discharged, the bankruptcy court enters a discharge injunction that prevents creditors from seeking to obtain payment on that debt. 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title [] operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]"). As the discharge order explained, "[c]reditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the [discharged] debt personally." J.A. 760. It also explained that "[c]reditors who violate th[e] order can be required to pay debtors damages and attorney's fees." J.A. 760.

Despite the discharge injunction, Guthrie alleges that PHH continued to contact him about the loan through telephone calls and mail. Guthrie also alleges that PHH misreported his credit status by reporting that, despite the discharge, he remained liable on the loan, was in default under the terms of

the loan and was more than 120 days delinquent on the loan. He alleges that PHH's actions caused physical, emotional and professional damages, as well as prevented him from obtaining favorable credit.

Guthrie brought ten claims against PHH based on these actions for violations of various state and federal laws. Following discovery, the parties filed cross-motions for summary judgment on all claims. The district court granted PHH's motion in full and denied Guthrie's.

Guthrie timely appealed but addressed just five of his claims. [4] Three are state law claims—negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED") and violation of the North Carolina Debt Collection Act ("NCDCA"). Two are federal—violations of the Fair Credit Reporting Act ("FCRA") and the Telephone Consumer Protection Act ("TCPA").[5]

Guthrie's appeal primarily involves three holdings by the district court. First, the court held that, to the extent they were premised on improper debt collection attempts, the Bankruptcy Code preempted Guthrie's NIED, IIED and his NCDCA claims (collectively, "state law claims").[6] Second, it held that, to the extent

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[4] We have jurisdiction under 28 U.S.C. § 1291.

[5] Guthrie also sued under common law negligence, North Carolina's Unfair and Deceptive Trade Practices Act and Collection Agency Act and the federal Real Estate Settlement Procedures Act and Fair Debt Collection Practices Act. He does not appeal summary judgment on those claims.

[6] It also held that, to the extent Guthrie's state law claims were premised on misreporting his credit status, the FCRA preempted his claims. Guthrie does not appeal this holding.

it was not otherwise preempted, there was no genuine dispute of material fact as to Guthrie's NCDCA claim.[7] Finally, it held there was no genuine dispute of material fact as to his FCRA and TCPA claims.

II.

We begin by addressing preemption[8] before turning to whether Guthrie has established a genuine dispute of material fact on his NCDCA, FCRA and TCPA claims.

A.

The Supremacy Clause of the Constitution dictates that "the Laws of the United States" are "the supreme Law of the Land." U.S. Const. art. VI. Practically speaking, this means that federal law preempts—or bars—claims under state law that either interfere with or are contrary to federal law. *S. Blasting Servs., Inc. v. Wilkes Cnty.*, 288 F.3d 584, 589 (4th Cir. 2002).

But we must not presume federal law preempts state law. In fact, any analysis of preemption begins "with the basic assumption that Congress did not intend to displace state law." *Id.* (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). This assumption can be overcome in one of three ways. First, Congress may explicitly state an intention to preempt certain state laws. *Id.* at 590. This is called express preemption. Second, "federal law [may] so thoroughly occup[y] a legislative field as to make

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[7] The district court did not address the merits of Guthrie's NIED and IIED claims.

[8] We review whether state law is preempted by federal law de novo. *Decohen v. Cap. One, N.A.*, 703 F.3d 216, 222 (4th Cir. 2012).

reasonable the inference that Congress left no room for the States to supplement it." *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). This is called field preemption. Finally, "compliance with both federal and state regulations [may be] a physical impossibility," which creates "direct conflict" preemption. *Id.* (quoting *Hillsborough Cnty. v. Automated Med. Lab'ys., Inc.*, 471 U.S. 707, 713 (1985)). Similarly, "state law [may] stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which is known as "obstacle preemption." *Id.* Direct conflict preemption and obstacle preemption fall under the broader category of conflict preemption.

Guthrie's state law claims that remain on appeal sound in consumer protection and stem from alleged improper contact and collection attempts. Adopting PHH's arguments, the district court held that, because these claims "require[d] proof of violation of the discharge injunction," they were preempted. J.A. 1606. It reasoned that, for any improper debt collection contact that "would not be wrongful absent the existence of [the discharge injunction] imposed by the Bankruptcy Code," Guthrie is limited to the Code's remedies. J.A. 1607. Those remedies, the district court explained, were not expressly provided for in the Bankruptcy Code. But a bankruptcy court may exercise its power under 11 U.S.C. § 105 "to hold a creditor in civil contempt, and impose contempt sanctions, for violating the discharge injunction." J.A. 1606 (quoting *In re Williams*, 612 B.R. 682, 690 (Bankr. M.D.N.C. 2020)).

The district court did not specify under which theory of preemption—express, field or conflict—it based its

decision. Express preemption does not apply, as the Bankruptcy Code provisions pertaining to chapter 13 bankruptcy and discharge injunctions do not include language preempting related state law. 11 U.S.C. §§ 524, 1301–1330. And, on appeal, PHH explicitly waived any argument about field preemption. That leaves conflict preemption as the only potential viable theory. Thus, we are left with the following question: does conflict preemption bar Guthrie's state law claims for improper debt collection attempts, which hinge on PHH's violation of the discharge injunction?

Recall that conflict preemption has two subsets—direct conflict preemption and obstacle preemption. Under direct conflict preemption, we ask whether compliance with federal and state laws is impossible. *S. Blasting Servs., Inc.*, 288 F.3d at 591. The answer to that question is easy—it is not. A creditor can comply with both the discharge injunction and the state law on which Guthrie's claims are based by not seeking to improperly collect debts discharged in bankruptcy. So, direct conflict preemption does not apply.

Under obstacle preemption, we ask whether Guthrie's state law claims "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Bankruptcy Code. *Id.* at 590. While trickier, the answer to the obstacle preemption question is also no.

1.

Neither our court nor our sister circuits has addressed this issue,[9] and district and bankruptcy

[9] Some of our sister circuits have addressed preemption in analogous contexts. For example, in *Pertuso v. Ford Motor Credit*

courts that have done so are split.[10] So we turn to the basic principles of obstacle preemption. "Determining whether a state law 'stands as an obstacle' to federal law is a two-step process. First, we determine Congress's 'significant objectives' in passing the federal law. We then turn to whether the state law stands 'as an obstacle to the accomplishment of a significant federal regulatory objective.'" *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 599 (4th Cir. 2017) (quoting *Williamson v. Mazda Motor of Am.*,

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Co., 233 F.3d 417, 426 (6th Cir. 2000), the Sixth Circuit held that the automatic stay provisions of the Bankruptcy Code preempted state law claims that presupposed violations of those same provisions. The Sixth Circuit relied on both obstacle and field preemption in reaching that conclusion. *Id.* at 426. However, the automatic stay is in place during a bankruptcy proceeding, while the discharge injunction is entered after it has been closed. As such, we do not find *Pertuso* persuasive. And the First Circuit has held that state claims for unjust enrichment involving a discharge injunction are preempted based on field preemption. *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 447 (1st Cir. 2000). But because PHH waived that issue, we do not address it here.

[10] For example, in *In re Waggett*, No. 09-4152-8-SWH, 2015 WL 1384087 (Bankr. E.D.N.C. Mar. 23, 2015), the bankruptcy court held that state law consumer protection claims based on efforts taken after the close of the bankruptcy case to collect debts covered by the bankruptcy discharge were not preempted. It reasoned that "[t]here is little risk that allowing the state law claims to go forward will disrupt the uniform application of the bankruptcy laws or contravene congressional purpose." *Id.* at *8. In contrast, in *In re Johnston*, 362 B.R. 730, 737 (Bankr. N.D.W. Va. 2007), the bankruptcy court held that "state law causes of action that would allow a debtor to collect damages for a violation of the discharge injunction are foreclosed by the remedies provided" in the Bankruptcy Code.

Inc., 562 U.S. 323, 330 (2011)) (cleaned up), *aff'd*, 139 S. Ct. 1894 (2019).

As to the federal objectives, the Supreme Court has explained that "[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (citation omitted).

However, the Bankruptcy Code is not "focused on the unadulterated pursuit of the debtor's interest." *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 675 (2023). Instead, it "balances multiple, often competing interests." *Id.* Namely, it also seeks to protect creditors by providing equitable distribution of a debtor's assets, limiting what debts are dischargeable and providing a "prompt and effectual administration and settlement of the debtor's estate." *Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015) (quoting *Katchen v. Landy*, 382 U.S. 323, 328 (1966)). And related to the goal of prompt and effectual administration, the Bankruptcy Code "centralize[s] disputes over the debtor's assets and obligations in one forum [to] protect[] both debtors and creditors from piecemeal litigation and conflicting judgments." *Id.* In other words, "ease and centrality of administration are [] foundational characteristics of bankruptcy law." *Id.*

Considering those objectives, Guthrie's state law claims create no obstacle to providing him with a fresh start. The claims, if successful, provide remedies for violating the discharge injunction—perhaps the central Bankruptcy Code feature allowing debtors a fresh start.

But as the Supreme Court has told us, the Bankruptcy Code is not solely to benefit debtors. The objectives pertaining to creditors must also be considered. Even so, it is not clear to us how allowing a debtor to pursue state-law remedies for violation of the discharge injunction stands as an obstacle to those objectives. Permitting Guthrie's state law claims would not result in the inequitable distribution of his assets, would not increase the debts that are dischargeable and would not slow down or negatively affect the administration or settlement of his estate.

Perhaps the best argument that Guthrie's claims conflict with the purpose of the Bankruptcy Code is that they create "piecemeal litigation" and detract from the "centrality of administration" of bankruptcy law. However, Guthrie's claims are almost exclusively based on events which took place after the bankruptcy case was closed. And they are not inconsistent with, nor do they have any impact on, any order issued during the case. So, we cannot see how they detract from the ease or centrality with which the federal bankruptcy system operates.

Another potential argument in favor of obstacle preemption is that allowing Guthrie's state law claims would upset the balance the Bankruptcy Code struck as to the rights of debtors and creditors by allowing only contempt of court relief for violating the discharge injunction. And to be sure, comprehensive federal statutory or regulatory schemes may signal a balance of interests that preempts state law claims providing additional relief.

For example, in *Columbia Venture, LLC v. Dewberry & Davis, LLC*, we held that the National Flood Insurance Act ("NFIA") obstacle preempts claims

against independent contractors hired by the Federal Emergency Management Agency ("FEMA"). 604 F.3d 824, 832 (4th Cir. 2010). FEMA hired Dewberry & Davis as an independent contractor to help remap the flood zones where Columbia Venture owned a large parcel of property. *Id.* at 827. Dewberry & Davis designated a large portion of Columbia Venture's property as part of a floodway, greatly reducing the value of the property. *Id.* Columbia Venture sued Dewberry & Davis for professional malpractice, among other state law claims.

In holding that such state law claims were obstacle preempted by the NFIA, we explained that Congress passed the NFIA to make federally subsidized flood insurance available where private insurers were unwilling to offer insurance. *Id.* at 830. Critically, the NFIA lays out a comprehensive scheme for challenging FEMA flood-map determinations—a scheme that expressly limits both the grounds for appeal and the relief available. *Id.* at 831. Based on that scheme and the legislative history surrounding it, we reasoned that the NFIA's primary purpose was to "strike a balance between protecting property owners' right to appeal flood elevation determinations and the government's interest in minimizing the costs inherent in updating flood maps in order to provide flood insurance." *Id.* at 831. Thus, we held that allowing Columbia Venture's state law claims to go forward presented an obstacle to this balance.

At first blush, it might seem like we have a similar situation here. Guthrie's state law claims overlap closely with claims for violations of the Bankruptcy Code's discharge injunction. And the Code limits the relief available for such violations to contempt of court

sanctions. But while *Columbia Venture* involved a comprehensive federal scheme for challenging flood map determinations, the Code's treatment of violations of the discharge injunction is scant at best. As the district court noted, there is no express provision addressing such violations. And while § 105 allows for contempt of court relief, it simply permits a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Since § 105(a) is neither specific to discharge injunction violations nor comprehensive, it is not the type of Congressionally designed balance that implicates obstacle preemption.[11]

This case is closer to *College Loan Corp. v. SLM Corp.,* 396 F.3d 588 (4th Cir. 2005). There, we explained that the Higher Education Act ("HEA") did

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[11] Even a more comprehensive remedial scheme may not guarantee obstacle preemption. In *Anderson v. Sara Lee Corp.*, we explained that "the mere existence of a federal regulatory or enforcement scheme—even if the scheme is an appreciably detailed one—does not by itself imply preemption of state remedies." 508 F.3d 181, 193 (4th Cir. 2007) (cleaned up). While we held that the Fair Labor Standards Act ("FLSA") preempted state contract and tort claims for FLSA violations, we focused on the exclusivity of the FLSA's remedial scheme. *Id.* at 182. We concluded that "Congress manifested a desire to exclusively define the private remedies available to redress violations of the [FLSA's] terms [because] the FLSA mandates that the commencement of an action by the Secretary of Labor terminates an employee's own right of action." *Id.* at 194. And we explained that this was a "special feature of the FLSA's enforcement scheme [which] would be rendered superfluous if workers were able to circumvent that scheme while pursuing their FLSA rights." *Id.* The Bankruptcy Code contains no such special features manifesting Congress's desire for exclusivity.

not preempt state law claims for breach of contract and tortious interference, even though those state law claims "rel[ied] in part on violations of the HEA or its regulations." *Id.* at 598–99.

The HEA created the Federal Family Education Loan Program ("FFELP"), which authorized consolidation loans. *Id.* at 590. College Loan Corporation sued Sallie Mae for breach of contract and tortious interference under state law, alleging violations of the FFELP regulations surrounding consolidation loans. *Id.* at 593. Sallie Mae moved to dismiss the claims, arguing that College Loan Corporation was impermissibly using its state claims to assert a private right of action not provided by the HEA. *Id.*

Rather than focusing directly on Sallie Mae's private-cause-of-action argument, the district court turned to the related issue of preemption, finding "the HEA impliedly preempts any state law action that utilizes the HEA to satisfy an element of the state law claim." *Id.* It concluded that allowing the state law claims to go forward would pose an obstacle to Congress's objectives in enacting the HEA, which provided a "comprehensive administrative enforcement" scheme but not a private cause of action. *Id.* at 595–97.

We reversed, noting that the district court failed to explain "how the[] [statutory purposes of the HEA] would be compromised by a lender, such as College Loan, pursuing breach of contract or tort claims." *Id.* at 597. We concluded that neither the "existence of comprehensive federal regulations" nor the Secretary of Education's exclusive enforcement power over the HEA was sufficient to establish obstacle preemption.

Id. at 598. We explained that "courts have generally authorized state tort claims to be pursued in areas where the federal government has regulated, even when such claims are in some manner premised on violations of federal regulations." *Id.* at 598–99. And we rejected the argument that the plaintiff's state law claims were "an impermissible effort to assert private rights of action" under a federal statute. *Id.* at 593. We explained that "the Supreme Court (and this Court as well) has recognized that the availability of a state law claim is even *more* important in an area where no federal private right of action exists." *Id.* at 599.

True, unlike in *College Loan Corp.*, the Bankruptcy Code provides remedies for violating the discharge injunction. While there is not a private cause of action for violating the injunction, a bankruptcy court may, under § 105, impose contempt of court sanctions. Admittedly, Guthrie's state law claims provide greater remedies than those available under the Bankruptcy Code for the same conduct. Even so, we see no reason why the mere fact that state law claims provide broader remedies than federal law means the state claims are preempted. Unlike in *Columbia Venture*, there are not indications that Congress sought to limit remedies to facilitate a certain public-policy outcome. Rather, the remedies Guthrie seeks further one of the primary goals of the Bankruptcy Code and the discharge injunction—a fresh start for debtors. And, as described above, they do not obstruct any other significant federal objective of the Bankruptcy Code.

2.

PHH argues that another congressional purpose is revealed in article I, section 8, clause 4 of the Constitution—which provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." This Bankruptcy Clause, PHH argues, reflects that one Congressional purpose for the Bankruptcy Code must be uniformity. PHH says allowing each state's laws to be used to enforce a bankruptcy discharge stands as an obstacle to this constitutionally supported congressional purpose.

But this clause is not about ensuring uniformity in state laws whenever they happen to intersect with bankruptcy. It is about empowering Congress to enact bankruptcy laws and ensuring that federal bankruptcy laws themselves do not vary impermissibly from state to state. *See Siegel v. Fitzgerald,* 142 S. Ct. 1770, 1781 (2022) (describing the uniformity clause as a limitation on Congress's ability to enact bankruptcy laws that vary from state to state).

The Supreme Court has explained that state laws "on the subject of bankruptcies are suspended" if they conflict with federal bankruptcy law. *Butner v. United States*, 440 U.S. 48, 54 n.9 (1979). But the Court has also emphasized that preemption depends on an actual conflict, and not all state-levels differences frustrate the Constitution's uniformity principle. Congress even may structure bankruptcy law to incorporate those differences:

> Notwithstanding this requirement as to uniformity, the bankruptcy acts of Congress

> may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the states.

Id. (citation omitted). Following the Supreme Court's guidance, the existence of the uniformity clause does not mean that Guthrie's state law claims contravene the purpose and intent of either article I, section 8, clause 4 of the Constitution or the Bankruptcy Code.

In sum, Guthrie's state law claims—which require, in part, proof that PHH violated a discharge injunction issued under the Bankruptcy Code—do not create an obstacle to the goals of the Bankruptcy Code. States are separate sovereigns that should have the freedom, at least generally, to create causes of action as they see fit. While preemption limits this freedom, we do not presume preemption. And we likewise should not "seek[] out conflicts between state and federal regulation where none clearly exists." *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990). Here there is no conflict. Thus, Guthrie's state law claims are not preempted.[12]

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[12] Our colleague in dissent would affirm the district court on preemption. While we appreciate his thoughtful opinion, it would

B.

Having determined that conflict preemption does not bar Guthrie's state law claims, we next must determine whether Guthrie established a genuine dispute of material fact to survive summary judgment on his NCDCA, FCRA and TCPA claims. [13] We review a district court's grant of summary judgment de novo. *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021). A court may only grant summary judgment if there are no genuine disputes as to any material fact. *Id.* A fact is material if "proof of its existence or non-existence" would impact the outcome under the applicable law. *Id.* And a dispute is genuine if "the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Id.* We note that a court cannot base a grant of summary judgment merely on the belief "that the movant will prevail if the action is tried on the merits." *Id.* Rather, the standard requires the court to conclude that "the evidence could not permit a reasonable jury to return a favorable verdict" to the nonmovant. *Id.*

1.

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be more persuasive to us were we considering field preemption. But as already noted, PHH expressly disavowed field preemption and our decision today does not address the merits of that issue. Further, Guthrie disclaims any reliance on violations of the automatic stay, so we do not address whether such claims are preempted by the Bankruptcy Code.

[13] Because the district court made no determination as to the merits of Guthrie's NIED and IIED claims, we need not determine whether he has established a genuine dispute of material fact and remand these claims for further proceedings consistent with this opinion.

Beginning with his NCDCA claim, the Act prohibits debt collectors from engaging in certain practices. N.C. Gen. Stat. §§ 75-50 to -56. Guthrie alleges that PHH violated this statute primarily by misrepresenting that he owed a debt when the debt had been discharged, in violation of § 75-54(4), which prohibits debt collectors from "falsely representing the creditor's rights." He also contends PHH violated the statute by contacting him directly after his attorney told PHH that he was represented by counsel, in violation of § 75-55(3), which prohibits debt collectors from "[c]ommunicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer."

In holding that—to the extent his claims were not otherwise preempted—there was no dispute of material fact, the district court found critical the fact that Guthrie remained on the deed to the Property. It noted that "surrender of property in bankruptcy 'does not serve to pass ownership of the residence to a lender; nor does it require the lender to foreclose its mortgage.'" J.A. 1608 (citing *In re Rose*, 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014)). And because Guthrie and his former wife's names remained on the deed, the court noted that they were required "to maintain hazard insurance, pay taxes on the [P]roperty, and pay for maintenance and preservation of the Property." J.A.1609. Further, the district court pointed out that all letters sent to Guthrie "disclaimed any attempt to collect on a debt discharged in bankruptcy." J.A. 1609.

Based on those facts, the court held "it was not unconscionable or improper for [PHH] to contact [Guthrie], especially as all written communication contained a disclaimer that, if the debt had been discharged in bankruptcy, the contact was for informational purposes only." J.A. 1609. Also, relying on our unpublished decision in *Lovegrove v. Ocwen Home Loans Servicing, L.L.C.*, 666 F. App'x 308 (4th Cir. 2016), it reasoned that including such disclaimer language in correspondence means that the correspondence is not considered an attempt to collect a debt. And the district court reasoned that the NCDCA did not prevent PHH from contacting Guthrie to try to reach his ex-wife Tonia, who had not filed for bankruptcy protection. Thus, the court determined, as a matter of law, that PHH's contacts with Guthrie did not violate the NCDCA.

We agree that the facts on which the district court relied support PHH's defenses. But that does not mean there are no genuine disputes of material fact as to the NCDCA claim. Take PHH's phone calls to Guthrie. Guthrie states that each time PHH called, it sought to collect the full amount of the loan from him, even if the caller also mentioned Tonia. And while the record contains but a few transcripts of those calls, none contain disclaimer language. Likewise, those same transcripts reveal that even when the caller stated he was attempting to reach Mark and Tonia Guthrie, once the caller confirmed he was speaking to Mark Guthrie, he explained he was calling about a loan balance that appears to be the full amount of the loan. We must construe the evidence in the light most favorable to Guthrie. And when we do that, a reasonable jury could conclude that PHH was attempting to collect a debt in a manner that violates

§ 75-54 by misrepresenting its right to collect the debt from Guthrie.

Guthrie also submitted evidence that on March 13, 2014, after receiving correspondence from his attorney, PHH recognized that he was represented by an attorney.

In fact, based on its knowledge that Guthrie was represented by counsel, PHH stated that "all communications including, verbal, mail, and email will be stopped. All correspondence, including monthly account statements, will be forwarded directly to your attorney." J.A. 757. Despite that, Guthrie proffered evidence that PHH called Guthrie directly after the March 2014 letter about the debt on the Property. Construing the evidence in the light most favorable to Guthrie, a reasonable jury could conclude that PHH violated § 75-55(3). As such, Guthrie has established a genuine dispute of material fact that PHH violated that provision of the NCDCA.[14]

2.

We next turn to Guthrie's FCRA claims. The FCRA imposes liability on "furnishers of information" for failing to reasonably investigate consumer disputes. 15 U.S.C. § 1681s-2. When a consumer initiates a dispute with a credit reporting agency, the credit reporting agency must notify the furnisher and the furnisher, in turn, must:

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[14] Mortgage statements with the disclaimer sent to Guthrie after March 2014 would likely be considered "a statement of account used in the normal course of business" and thus not give rise to a NCDCA violation under § 75-55(3). *See* J.A. 775–979.

> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
>
> (C) report the results of the investigation to the consumer reporting agency;
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
>
> (i) modify that item of information;
>
> (ii) delete that item of information; or
>
> (iii) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1).

The "FCRA imposes liability for negligent noncompliance with the Act, and it allows for enhanced penalties for willful violations." *Dalton v. Cap. Ass'd Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001). For negligent violations of this requirement, a

consumer is entitled to "any actual damages sustained . . . as a result of the [information furnisher's] failure[.]" 15 U.S.C. § 1681o(a)(1). For willful violations, a consumer may also seek punitive damages and, instead of actual damages, may seek statutorily defined damages between $100 and $1,000 per violation. *Id.* § 1681n(a).

Guthrie's complaint alleges both negligent and willful violations of the FCRA. The district court determined there was no genuine dispute of material fact for either basis of liability. With respect to his negligent violation claim, the district court ruled that Guthrie failed to demonstrate actual damages traceable to any failure on the part of PHH. And with respect to his willful violation claim, the district court ruled that nothing in the record could "support a reasonable juror in concluding [PHH] knowingly and intentionally acted in conscious disregard of [Guthrie's] rights." J.A. 1615.

a.

In ruling on Guthrie's negligence claim, the district court divided Guthrie's alleged actual damages into three general categories: (i) denials of credit, (ii) emotional and medical damages, and (iii) professional damages. All three represent actionable damages under the FCRA. *Sloane v. Equifax Info. Servs., LLC,* 510 F.3d 495, 500 (4th Cir. 2007) ("Actual damages [under the FCRA] may include not only economic damages, but also damages for humiliation and mental distress."). But the district court held either that Guthrie failed to prove the existence of these damages or that he failed to prove the damages were attributable to PHH's actions. We address each of these categories.

i.

In his complaint, Guthrie alleged a violation of the FCRA based on PHH's alleged failure to reasonably respond to disputes submitted to credit reporting agencies TransUnion, Experian and Equifax in early 2019. And he alleged two credit denials that occurred due to those failures—one from SunTrust and one from Navy Federal. Despite that, the district court found that Guthrie's credit denials did not result from any failure on PHH's part to reasonably investigate a credit dispute.

We agree with the district court's dismissal of the claims related to the disputes submitted to Experian and Equifax.[15] But there exists a genuine dispute of material fact as to Guthrie's dispute submitted to TransUnion. In granting summary judgment, the district court relied on PHH's representative testimony that PHH responded to Guthrie's dispute to TransUnion by reporting his discharged loan was current with $0 past due. And it is true that this response appears to have fixed the incorrect reporting issue for some of the later months of 2018. But Guthrie introduced evidence that PHH's response to his dispute did not rectify all major errors in his credit report. Following PHH's response, his credit report continued to show a delinquent balance from May

[15] The court dismissed the claim regarding Equifax because the record reflected that PHH never received notice of Guthrie's dispute filed with Equifax. Because PHH did not receive notice of this dispute, there was no requirement that it conduct a reasonable investigation. And as to the Experian dispute, the district court found that Guthrie's credit denials occurred before PHH responded to the dispute and, as such, could not have occurred due to PHH's actions.

2016 to August 2018. And since he had complied with his obligations under the bankruptcy plan, he had no delinquent status at that time. Guthrie also introduced evidence that SunTrust Bank denied his application for credit for the following reasons: "[s]erious delinquency," "[l]ength of time since account not paid as agreed," "[p]roportion of loan balances to loan amounts is too high," and "[a]mount past due on accounts." J.A. 1004.

PHH's evidence did not clearly establish that its response addressed any errors in past delinquency. While it may have responded to inaccuracies in Guthrie's credit report as to whether he was currently delinquent, the FCRA requires creditors to also determine whether information they have provided in the past is inaccurate. *Saunders v. Branch Banking & Tr. Co. of VA*, 526 F.3d 142, 148 (4th Cir. 2008). And a credit report is inaccurate if it "provides information in such a manner as to create a materially misleading impression." *Id.* Construing this evidence in the light most favorable to Guthrie, a reasonable jury could conclude that PHH failed to appropriately respond to errors showing a delinquent balance for prior reporting periods. Thus, Guthrie created a genuine dispute of material fact as to whether this failure led to Guthrie's credit denial from SunTrust.[16]

[16] As part of its summary-judgment pleadings, PHH submitted what appears to be a database entry capturing correspondence between TransUnion and PHH regarding Guthrie's 2019 dispute. *See* J.A. 357. While this largely inscrutable document appears to support the testimony of PHH's representative, the parties have not explained or contextualized the document, and it is unclear if the district court relied on it. At this stage, we are

Guthrie also appeals the district court's order granting summary judgment on his FCRA claims based on credit disputes initiated in 2015 and 2018. He argues he provided evidence of those disputes during discovery. The district court held that Guthrie could not "identify additional disputes" to base his FCRA claim on at the summary judgment stage without amending his complaint. J.A. 1612.

Guthrie argues that under the standard of notice pleading, he need only provide a "short and plain statement" of his claim. Fed. R. Civ. P. 8. And it is true that it would have been sufficient for Guthrie to state in his complaint that he had initiated credit disputes, without providing detailed information on when those disputes occurred. However, "although notice pleading does not require a plaintiff to plead particulars, 'if a plaintiff chooses to do so, and they show that he has no claim, then he is out of luck.'" *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998); *E.E.O.C. v. Browning Ferris, Inc.*, 225 F.3d 653 (4th Cir. 2000) (unpublished table decision). Guthrie does not argue that he moved to amend his complaint. And without doing that, we find no error in the district court's order granting summary judgment on the 2015 and 2018 credit disputes.

ii.

The district court next rejected Guthrie's alleged emotional and medical damages, explaining that he relied "only on his own affidavit to establish the existence of his emotional damages" and provided no evidence from a medical provider that his physical or

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unwilling to say, as a matter of law, that PHH's response was not the cause of Guthrie's SunTrust denial.

mental symptoms were caused or exacerbated by PHH's actions. J.A. 1613–14. While the district court noted that Guthrie's own testimony could support damages for emotional distress, it held that his "conclusory and vague statements regarding his emotional state are insufficient at [the summary judgment] stage of the proceeding." J.A. 1614.

The district court correctly noted that to support damages for emotional distress, a plaintiff must "reasonably and sufficiently explain the circumstances of the injury and not resort to mere conclusory statements." *Sloane*, 510 F.3d at 503 (cleaned up). Stated differently, the testimony must "sufficiently articulate true demonstrable emotional distress." *Id.* (cleaned up).

To illustrate this requirement, we describe two cases. In *Sloane*, we found the following evidence to be "substantial, if not overwhelming, objective evidence support[ing] an emotional distress award" in the FCRA context. *Id.* at 504. The plaintiff (1) provided "an objective and inherently reasonable 'factual context' for her resulting claims of emotional distress," (2) "offered 'sufficiently articulated' descriptions of her protracted anxiety through detailed testimony of specific events and the humiliation and anger she experienced," (3) "provided evidence that the distress was apparent to others," (4) provided "substantial trial evidence attest[ing] to the direct 'nexus'" between defendant's violations and her distress, (5) her emotional distress "manifested itself in terms of physical symptoms, particularly insomnia," and (6) she provided evidence that the stress impacted her marriage. *Id.* at 503.

In contrast, in *Doe v. Chao,* 306 F.3d 170 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004), we reached a different result. There, the plaintiff offered testimony that as a result of the defendant's conduct, he felt "greatly concerned and worried" and was "torn to pieces." *Id*. at 181. But he conceded he did not seek any medical or psychological treatment or medication. *Id*. He likewise offered no testimony about any impact of the defendant's conduct on his behavior or physical consequences of defendant's conduct. *Id*. We held this evidence failed to create a genuine dispute of material fact as to emotional distress damages. *Id*.

The evidence offered by Guthrie is much more like the evidence presented in *Sloane* than that presented in *Doe*. While it is true that Guthrie has not provided corroborating evidence from medical professionals for his alleged anxiety resulting from PHH's actions, Guthrie has alleged more than "conclusory statements" about his emotional distress. He testified that he began having chest pains in 2018 and has been to the emergency room several times. He specified symptoms he attributes to PHH's conduct—high blood pressure, a general feeling of being on edge, being overly worrisome, having an elevated heart rate, experiencing a lack of sleep and waking up in the middle of the night gasping for air. *Id.* He also testified that he is seeing a psychologist. *Id.* He attributes his anxiety and stress to PHH's collection attempts and testified that he is not allowed to fly at his job based on his anxiety diagnosis. *Id.*

While perhaps not as "overwhelming" as the evidence in *Sloane*, we find that Guthrie has asserted more than "conclusory statements" and has sufficiently articulated demonstrable emotional

distress. And he has presented an "objective and inherently reasonable 'factual context' for [his] resulting claims of emotional distress." *Sloane*, 510 F.3d at 504. In sum, there exists a genuine dispute of material fact for the jury on the issue of emotional distress.

iii.

The district court also ruled that Guthrie failed to establish professional damages attributable to PHH. Guthrie's alleged professional damages related to his Top Secret/Sensitive Compartmented Information (TS/SCI) security clearance required for his job. J.A. 588. In May 2019, a government contractor conducted a routine scan of Guthrie's credit reports and discovered delinquent debt owed to PHH from a TransUnion credit report. As a result, in November 2019, the Department of Defense requested information about the delinquency from Guthrie within 30 days. Guthrie alleges that he did not receive the request for information until early January 2020 because it was sent to his prior duty station rather than his current duty station.

The Department of Defense paused Guthrie's security clearance on January 17, 2020, when it issued a "No Determination Made" adjudication as to his delinquent account. J.A. 599. As a result, Guthrie testified that his "job duties were ground to a virtual halt." J.A. 742. On February 5, 2020, shortly after Guthrie filed his complaint, his security clearance was reinstated.

The district court held that the record did not support that "the information [Guthrie's employer] inquired about" was related to credit disputes. J.A.

1614. But the record shows that the delinquent debt owed to PHH, which was found on a TransUnion credit report, caused the investigation into Guthrie's security clearance.

Further, the district court also reasoned that Guthrie "did not lose his security clearance, [] received no demotion or discipline, and his pay was not docked" because of the investigation. J.A. 1614. True. But his security clearance was paused, preventing him from performing his job duties.[17] And Guthrie alleges professional embarrassment because of having to explain why he was unable to participate in his job duties while his clearance was paused, which qualifies as actionable damages under the FCRA. *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 239 (4th Cir. 2009) ("Actual damages [under the FCRA] may include . . . damages for humiliation and mental distress."). While a jury might reject this argument, it is nonetheless a cognizable damage category under the FCRA. Thus, there is a genuine dispute of material fact as to Guthrie's professional damages.

b.

Turning to Guthrie's claim for a willful violation, the district court ruled that to succeed on such a claim, Guthrie was required to show that PHH "knowingly and intentionally committed an act in conscious disregard" of his rights. J.A. 1614. (citing *Dalton*, 257

[17] PHH argued below that if Guthrie had responded to the request for information within the requested 30-day period, his clearance may not have been paused. Maybe so. But there was not conclusive evidence on this point. And since the investigation occurred due to an outstanding PHH loan balance, there is still a genuine dispute of material fact on this point.

F.3d at 418). While noting that summary judgment is typically not appropriate on whether a defendant acted with a particular state of mind, the court nonetheless held that nothing in the record supported that PHH acted with a knowing and intentional disregard of Guthrie's rights.

But in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), the Supreme Court clarified that a defendant can also willfully violate the FCRA by acting with "reckless disregard" of its statutory duty. *Id.* at 71. And we find that the record—considering Guthrie's repeated attempts to inform PHH of his bankruptcy rights and years-long effort to correct his credit reports through formal disputes—establishes a genuine dispute of material fact as to whether PHH acted with reckless disregard of its duty.

In sum, Guthrie has established a genuine dispute of material fact as to both his claims for a negligent violation of the FCRA and a willful violation of the FCRA.

3.

Lastly, we affirm the district court's holding that there exists no genuine dispute of material fact with respect to Guthrie's TCPA claim.

The TCPA governs the usage of "automatic telephone dialing system[s]." 47 U.S.C § 227. The Supreme Court has clarified that, "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity to either store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021).

Guthrie's sole evidence that PHH used an automatic telephone dialing system to contact him comes from his own testimony, in which he states that two callers from PHH told him they used an "auto dialer" to reach him. However, in response, a PHH representative testified that "PHH never used a random or sequential number generator to generate and then dial a telephone number when calling Plaintiff or any other individual in connection with the Loan." J.A. 1638. And the evidence offered by Guthrie failed to create a genuine issue of material fact that references to "auto dialer" referred to an "automatic telephone dialing system."

Guthrie has provided no evidence that PHH used an "automatic telephone dialing system" as defined in the TCPA. So, even construing the evidence in his favor, a reasonable jury could not conclude that PHH violated the TCPA. Thus, we affirm the district court's summary judgment on this claim.

III.

As explained above, we hold that the Bankruptcy Code does not preempt Guthrie's state law claims arising from alleged improper collection attempts of a discharged debt. We also hold that Guthrie has established a genuine dispute of material fact with respect to his NCDCA and FCRA claims. However, he has failed to establish a genuine dispute of material fact with respect to his TCPA claim. As such, the district court's order granting summary judgment to PHH is

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

WYNN, Circuit Judge, concurring in part and dissenting in part:

In my view, Mark Guthrie's remaining state-law claims, to the extent they are premised on a violation of the automatic stay or discharge injunction issued by the bankruptcy court, are preempted by the Bankruptcy Code. While it is true that we do not lightly infer preemption, Majority Op. at 8, 18, several aspects of the Code establish that it was Congress's intent to preempt these types of claims. *See Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 (4th Cir. 2007) (noting that congressional purpose is the "ultimate touchstone" of preemption analysis (citation omitted)).[1]

One is the comprehensive and particularly federal nature of bankruptcy law. The Constitution grants Congress the express power to enact "uniform Laws on the subject of Bankruptcies." U.S. Const. art. I, § 8, cl. 4. And it has. "Congress has wielded [its bankruptcy] power by creating comprehensive regulations on the subject and by vesting exclusive jurisdiction over bankruptcy matters in the federal district courts." *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 425 (6th Cir. 2000) (citing 28 U.S.C. § 1334(a)). The Bankruptcy Code is incredibly detailed, "provid[ing] a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001) (per curiam). In these enactments, Congress has attempted to balance the

[1] Like the parties and the majority opinion, Majority Op. at 9–10, I analyze this issue through the lens of conflict preemption.

competing aims of giving the debtor a "fresh start" while protecting creditors' rights to repayment. *Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015).

Two provisions of the Code are relevant here: those governing the automatic stay and the discharge injunction. After Guthrie filed his Chapter 13 bankruptcy petition, all claims against his assets were automatically stayed pending resolution of the bankruptcy proceeding. *See* 11 U.S.C. § 362(a). Then, Guthrie having complied with the terms his Chapter 13 plan, the bankruptcy court entered a discharge order relieving Guthrie of personal liability on the discharged debts and preventing his creditors from any attempt to collect on such debts. *See id.* § 524(a).

Now, Guthrie seeks to use state law to remedy a supposed violation of that discharge injunction. Although we have not addressed the question, our sister circuits appear to be unanimous in holding that state-law claims alleging violations of the *automatic-stay* provision of the Code are preempted. *See E. Equip.*, 236 F.3d at 121 (2d Cir.) ("Courts that have examined this issue have held that the federal Bankruptcy Code preempts any state law claims for a violation of the automatic stay Any relief for a violation of the stay must be sought in the Bankruptcy Court."); *Pertuso*, 233 F.3d at 425–26 (6th Cir.); *MSR Expl., Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 911 (9th Cir. 1996).[2]

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[2] The majority does not expressly address whether state-law claims alleging violations of the automatic stay are preempted, although it is possible its analysis may be different in that case. *See* Majority Op. at 11 n.9. Although the parties have focused primarily on the question of preemption and the discharge injunction, Guthrie's complaint alleges violations that occurred

I see no reason why state-law claims alleging violations of a discharge injunction should be treated differently. As one leading bankruptcy authority has stated, the discharge injunction is "broad," prohibiting "not only legal proceedings, but also *any* other acts to collect a discharged debt as a personal liability of the debtor." 4 Collier on Bankruptcy ¶ 524.02 (Richard Levin & Henry J. Summer eds., 16th ed.) (emphasis added). As with any injunction, a bankruptcy court enjoys the usual contempt authority to remedy a violation. *See id.* ("[T]he discharge injunction is the equivalent of a court order. Therefore, a violation of the injunction may be sanctioned as contempt of court."); *In re Walters*, 868 F.2d 665, 669 (4th Cir. 1989) (explaining that bankruptcy court "has authority to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code," including contempt); *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 445 (1st Cir. 2000) (observing that bankruptcy courts "have appropriately used their statutory contempt power to order monetary relief . . . when creditors have engaged in conduct that violates" the discharge injunction), *amended on denial of reh'g* (Dec. 15, 2000). Indeed, a contempt proceeding is the "normal sanction" for violations of the discharge injunction. Collier, *supra*, at ¶ 524.02.

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during the automatic stay as well, and at oral argument Guthrie's counsel refused to limit the allegations to just post-discharge conduct by PHH, saying he complained of "both" pre- and post-discharge conduct. Oral Arg. at 1:15–1:25, available at https://www.ca4.uscourts.gov/OAarchive/mp3/22-1248-20230504.mp3. For the reasons given, I would find Guthrie's state-law claims, to the extent they are premised on a violation of either the automatic stay or discharge injunction, preempted.

This wasn't always the case. Before 1970, a bankruptcy court's discharge order merely provided the debtor with an affirmative defense if he was later sued by the holder of a discharged debt. The apparent practice was for a creditor to sue in state court to collect on a discharged debt, and if the debtor, relying on the discharge, failed to respond, a default judgment was entered against him. *See Cox v. Zale Del., Inc.*, 239 F.3d 910, 915 (7th Cir. 2001); Collier, *supra*, at ¶ 524.LH (tracing this history).

But in 1970, Congress amended the Code to enjoin any such collection attempts. *See* An Act to Amend the Bankruptcy Act, Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970) (codified as amended at 11 U.S.C. § 524(a)). The change was debtor-protecting, a goal it advanced by actively prohibiting *any* attempt to collect on a discharged debt and by funneling disputes over discharges back into the bankruptcy courts. In other words, Congress chose to give the discharge order the force of an injunction, replete with the traditional contempt remedy. This choice, I believe, is highly instructive as to congressional intent on the available remedies for violations of the discharge order.

The majority argues that because Guthrie's bankruptcy case has been closed since 2016, his state-law claims will not present any great obstacle to the orderly administration of the underlying bankruptcy proceeding. *See* Majority Op. at 13. But although a bankruptcy case may be closed, that does not mean it is closed for good, and the Code envisions situations in which there can be a dispute post-discharge. For example, a bankruptcy proceeding can be reopened, *see* 11 U.S.C. § 350(b); a debtor can elect to make

voluntary payments even on a discharged debt, *see id.* § 524(f); *In re Boyd*, 562 B.R. 324, 329 (Bankr. W.D. Va. 2016) (in contempt proceeding sanctioning creditor's violation of discharge injunction, holding that debtor may not recover certain mortgage payments voluntarily made post-discharge); and there can be a dispute over whether a particular debt was even discharged, *see, e.g.*, *In re Johnston*, No. 05-6288, 2007 WL 3166941, at *3–7 (Bankr. N.D. W. Va. Oct. 25, 2007) (in contempt proceeding alleging violation of discharge injunction, analyzing whether creditor received notice of a discharged debt).

The last scenario is especially illustrative. Imagine a situation in which a creditor attempted to collect on a debt that the creditor did not realize was discharged in Guthrie's bankruptcy, and Guthrie filed the same action alleging a violation of the North Carolina Debt Collection Act. Adjudication of that claim in a North Carolina state court would undoubtedly stand as an obstacle to what we have referred to as "a principal purpose" of the Code: "centraliz[ing] disputes over the debtor's assets and obligations in one forum." *Moses*, 781 F.3d at 72; *see MSR Expl.*, 74 F.3d at 914 (noting that "disputes over discharge" brought as state tort claims "might gravely affect the already complicated processes of the bankruptcy court").

Here, Guthrie's remaining state-law claims are expressly premised on PHH's alleged failure to acknowledge the effect of his discharge. For example, he complains of PHH's "refusal or inability to acknowledge that the Discharge excused [him] from paying any amount in connection with the Loan" and

of PHH's "continued refusal to recognize the legal effect of the Discharge." J.A. 59, 61.[3]

Such claims clearly "presuppose" a violation of the Bankruptcy Code. *Pertuso*, 233 F.3d at 426. That is, as the district court correctly observed, PHH's actions are only allegedly unlawful under state law *because of* the discharge—but for the discharge, PHH would be entitled to attempt to collect on its debt via the calls and letters that Guthrie says are unlawful.

This is important, because to resolve such claims, a state court would necessarily have to wade into the underlying bankruptcy proceeding, including determining which debts were discharged. That may be straightforward in this case, but it may not be in others. In any event, I do not believe Congress—concerned as it was under the Code with centralizing a debtor's bankruptcy into a single, federal forum—would wish for state courts to adjudicate such matters. Accordingly, in a case like this where the debtor seeks to enforce his discharge injunction via state-law claims, I believe the state claims are preempted and the proper remedy is a contempt proceeding in the bankruptcy court.

Indeed, Guthrie enjoyed the protections and benefits of the bankruptcy system, including the discharge of his debts and a court-issued injunction barring his creditors from attempting to collect on those debts. To the extent he now believes that PHH has violated that injunction by attempting to unlawfully collect on discharged debts, he is not without recourse. His remedy is a contempt

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[3] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

proceeding in the same court that oversaw his bankruptcy, where he would be eligible for traditional damages and attorneys' fees. *See* J.A. 135 (Guthrie's discharge order stating "[c]reditors who violate this order can be required to pay debtor[']s damages and attorney's fees").

A contempt remedy has the practical advantage of "placing responsibility for enforcing the discharge order in the court that issued it," *Cox*, 239 F.3d at 916, and keeps state courts from wading into potentially thorny issues of bankruptcy law. More importantly, this approach reflects Congress's intent that a contempt proceeding be the sole remedy for violations of the discharge injunction. Permitting state-law causes of action to redress purported violations of the injunction would "undermine the uniformity the Code endeavors to preserve" and "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pertuso*, 233 F.3d at 426 (cleaned up).

Accordingly, because I believe that Guthrie's state-law claims, to the extent they are premised on a violation of the automatic stay or discharge injunction, are preempted by the Bankruptcy Code, I respectfully dissent as to those parts of the majority opinion holding otherwise.[4]

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[4] I concur in the remainder of the opinion, including the majority's holding that there is a genuine dispute of material fact to survive summary judgment as to Guthrie's North Carolina Debt Collection Act claim (to the extent it is not preempted) and federal Fair Credit Reporting Act claim, but that there is no genuine dispute and the district court properly granted PHH summary judgment on Guthrie's federal Telephone Consumer Protection Act claim.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA SOUTHERN DIVISION
No. 7:20-CV-43-BO

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., LLC; EQUIFAX INFORMATION SERVICES, LLC; and EXPERIAN INFORMATION SOLUTIONS, INC., Defendants.	)	ORDER

This cause comes before the Court on cross-motions for summary judgment, defendant's motion for protective order, motions to seal, and motions to strike. The appropriate responses and replies have been filed, or the time for doing so has expired, and the matters are each ripe for ruling.

BACKGROUND

Plaintiff filed this action in Onslow County Superior Court alleging claims arising out of the alleged improper servicing and credit reporting of plaintiff's mortgage loan secured by real property in Jacksonville, North Carolina. Plaintiff's complaint includes claims under, *inter alia,* the federal Fair

Credit Reporting Act, Real Estate Settlement Procedures Act, and Fair Debt Collection Practices Act. The complaint was removed on the basis of this Court's federal question jurisdiction. [DE 1], PHH Mortgage is the only remaining defendant in this action.

The following facts are undisputed unless otherwise indicated. On August 21, 2009, plaintiff and his now-former wife Tonia Guthrie bought a house at 401 Joy Court in Jacksonville, North Carolina (Property) for $190,126.00. To finance their purchase, the Gurthries executed an adjustable rate note (Note). Repayment of the Note was secured by a lien and encumbrance on the Property through the filing of a Deed of Trust (Deed of Trust) (the Note, Deed of Trust and related documents referred to collectively herein as the Loan). The Loan was subsequently assigned to GMAC Mortgage, LLC. On April 21, 2011, plaintiff filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Eastern District of North Carolina. Plaintiff's wife was not included in plaintiffs bankruptcy case and she did not otherwise file for bankruptcy. Prior to plaintiff's bankruptcy filing plaintiff and Tonia Guthrie had separated; Mrs. Guthrie had relocated to Mississippi and plaintiff remained in the Property with their two minor children.

On June 14, 2011, a divorce decree was filed in Jones County, Mississippi for plaintiff and Tonia Guthrie. During plaintiff's bankruptcy case, GMAC filed a proof of claim for pre-petition arrearages and ongoing obligations under the Loan. Plaintiff's amended motion for confirmation of plan listed a Mississippi address for Tonia Guthrie. On August 16,

2011, the bankruptcy court entered a confirmation order confirming plaintiff's Chapter 13 Plan. The confirmed Chapter 13 Plan provided that plaintiff would resume making the regular contractual monthly installment payments on the Loan and would cure any prepetition arrearage owed to GMAC over the life of the Chapter 13 Plan.

On January 2, 2013, plaintiff filed a motion to allow surrender of real property and modification of Chapter 13 Plan in his bankruptcy case. On or about January 22, 2013, plaintiff and his minor children moved out of the Property and relocated to base housing on MCAS New River. The motion to allow surrender was granted by the bankruptcy court on February 7, 2013. The order allowing surrender of real property and modification of Chapter 13 plan held as follows: plaintiff's real property and home located at 401 Joy Court in Jacksonville was surrendered and plaintiff's Chapter 13 plan was modified to provide for twenty-one monthly payments of $1,825.00 each followed by thirty-nine monthly payments of $825.00 each. [DE 102] Pl. App'x at 28. On February 16, 2013, GMAC transferred servicing of the Loan to Ocwen Loan Servicing (OLS) and on March 15, 2013, GMAC filed a transfer of its claim in the bankruptcy case to OLS. The Loan was assigned to OLS on May 13, 2013. OLS and PHH subsequently merged and the servicing of the Loan was transferred to defendant PHH Mortgage Corporation (PHH or

defendant) on February 1, 2019, and on May 14, 2019, the Loan was assigned to PHH.[1]

On March 25, 2014, OLS sent a letter to plaintiffs bankruptcy attorney about the property and Loan. The letter indicated that OLS's records reflected that plaintiff was one of two mortgagers on the account, and so although OLS's records reflected plaintiffs intent to surrender his interest in the property through bankruptcy, OLS would follow normal default procedures. *See* [DE 85 p. 171] Feezer Decl. Ex. I. The letter included a disclaimer regarding bankruptcy which stated, among other things, that the letter was not an attempt to collect either a pre-petition, post-petition, or discharged debt; that if the bankruptcy case was still active no action would be taken in willful violation of the automatic bankruptcy stay; and if the borrower had received an order of discharge in bankruptcy any action taken by OLS was for the sole purpose of protecting its lien interest in the underlying mortgaged property. *Id.*

The nature and extent of OLS's communications going forward are the subject of dispute. Plaintiff does not dispute that he alleged to have kept contemporaneous notes of the conversations he had with OLS/PHH Mortgage agents but he lost or destroyed those notes. Defendant contends that it continued to contact the co-borrowers on the Loan, plaintiff and Tonia Guthrie, at the single address it had on record, but plaintiff disputes this, indicating that defendant also sent letters to other addresses.

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[1] Because the transfer of the Loan and its servicing between OLS and PHH does not impact the Court's analysis, the Court at times identifies these parties as OLS, PHH, or defendant.

The parties also dispute the number and nature of phone calls that plaintiff received about the Loan. For example, plaintiff contends, and defendant disputes, that beginning in November 2013 he received one to three calls from defendant per week and that these calls persisted until January 2016. Defendant contends that when it did call it attempted to speak with either plaintiff or his former wife, and if the borrower actually reached was involved in bankruptcy or had received a discharge, defendant would, pursuant to its policies and procedures, inform that person that the call was for informational purposes and was not an attempt to collect the loan. Plaintiff also called defendant attempting to have collection activities and negative credit reporting stopped. Plaintiff threatened to sue defendant if he received more letters.

On May 18, 2016, after plaintiff had successfully completed all of the payments required under his Chapter 13 Plan as modified by the surrender order, a discharge order pursuant to 11 U.S.C. § 1328(a) was entered in plaintiff's bankruptcy case and the bankruptcy case was closed on August 22, 2016. No attempt was made through OLS to remove Tonia Guthrie from the Loan and plaintiff's name remained on the title to the property while the Loan was serviced by OLS. Defendant continued to send to communications about the Loan to plaintiff and Tonia Guthrie at the address on file, and plaintiff contends letters were sent to other addresses as well.

Plaintiff contends that following the discharge and between June 2016 and January 2019 defendant continued to seek payment on the Loan from plaintiff through periodic monthly mortgage statements,

phone calls, and demand letters. Defendant disputes that it was seeking payment from plaintiff for any amounts discharged in bankruptcy, again stating that it engaged in normal collection effects with respect to Tonia Guthrie and that all written correspondence included conspicuous disclaimers that if the Loan was in active bankruptcy or had been discharged the correspondence was for informational purposes only.

In June and July 2017, plaintiff received mortgage account statements from defendant. Both statements included an "Important notice" which reflected that the communication was from a debt collector and that if the debt was in active bankruptcy or had been discharged through bankruptcy the communication was provided for informational purposes only with regard to defendant's secured lien on the referenced property. See [DE 102] Pl. App. at 40, 44.

On July 17, 2017, plaintiff called OLS and informed them he had been denied credit because of OLS's failure to update its records and that he would sue defendant if it did not update its records. The parties disagree as to whether additional telephone conversations took place between plaintiff and defendant after June 2017. On September 14, 2018, Onslow County, where the property is located, was deemed a part of a natural disaster area as a result of Hurricane Florence.

Beginning in 2019, defendant was notified of a credit dispute submitted by plaintiff to consumer reporting agencies Trans Union and Experian. Plaintiff sought and obtained loans and credit between 2017 and 2020 and was denied credit three times during this period. In 2019, plaintiff was denied a mortgage loan by Navy Federal Credit Union and

car loans by PNC Bank and Sun Trust Bank. He obtained an auto loan in April 2019 from Ally Financial and a mortgage loan as well as a personal loan from U.S. Bank in 2020. Plaintiff also obtained a car loan from Navy Federal Credit Union in July 2020.

Plaintiff is a commissioned officer in the United States Marine Corps and a trained tiltrotor pilot. As part of his duties, plaintiff secured and maintained top-secret security clearance. In November 2019, the Department of Defense Central Adjudication Facility sent a request for information to plaintiff seeking information about the Loan which was referenced as delinquent in a Trans Union credit report dated May 30, 2019. [DE 84-8]. Plaintiff disputes the date that he received the request for information, but on January 17, 2020, plaintiff received a "no determination made" adjudication for his security clearance eligibility, which had the effect of pausing plaintiff's security clearance. The request for information sought a response within thirty days, and a response from plaintiff was not sent until January 23, 2020, or sixty-six days after the request for information was sent. The pause on plaintiff's security clearance was lifted on February 5, 2020. Plaintiff was not demoted and was not docked pay as a result of the request for information or the nineteen-day pause in his security clearance; plaintiff also agrees that his security clearance would not have been paused had he responded to the request for information within the time provided. Plaintiff was subsequently promoted from the rank of Major to Lieutenant Colonel.

Plaintiff was diagnosed with gastroesophageal reflux disease (GERD) in 2006. While deployed to Kuwait from October 2016 to April 2017, plaintiff resumed taking medicine to treat the issue and the medicine relieved his symptoms. There is no evidence in the record which reflects that a medical professional has opined that plaintiffs GERD is a result of or was exacerbated by the alleged acts or omissions of defendant. Plaintiff did not object to defendant's statement that he has also never been diagnosed with a physical or mental condition which was experienced by plaintiff as a result of the alleged acts or omissions of defendant, including anxiety. However, in his own affidavit, plaintiff indicates that he is seeing a psychologist who has diagnosed him with generalized anxiety disorder and that as a result plaintiff is currently ineligible to fly. [DE 102] Pl. App'x at 18; Guthrie Aff. ¶ 110. Plaintiff also states that his anxiety has caused him to have high blood pressure, a general feeling of being on edge and jumpy, to be overly worrisome, and to wake up gasping for air. *Id.* ¶ 109.

On or about December 16, 2019, plaintiff, through counsel, sent a letter to defendant entitled *Qualified Written Request, Notice of Error, Notice of Disputed Information and Requests for Information pursuant to the Real Estate Settlement Procedures Act and Chapter 45 of the North Carolina General Statutes.* Defendant received the letter on December 23, 2019. Defendant responded to the letter on December 24, 2019, in which it acknowledged receipt of the letter and stated it would respond within thirty business days. On December 30, 2019, defendant sent plaintiff a pay-off statement. Counsel for plaintiff then sent a second letter to defendant, *Second Notification that*

Borrower is Represented by Counsel; Instruction to Cease Communicating Directly with Borrower in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. On January 16, 2020, plaintiff received another monthly mortgage statement.

DISCUSSION

I. Motions to seal.

At the outset, the Court DIRECTS the Clerk of Court to UNSEAL the following docket entries: DE 97, 98, 99, 100, 101, 102-106. Plaintiff filed these documents as proposed sealed documents, advising defendant to file a motion to seal if it desires the documents to remain under seal. [DE 107], Defendant has not filed such a motion as to these documents, and the Court thus finds no basis on which to maintain their sealed status. Accordingly, the Clerk shall unseal the documents cited this order so that they are available on the public docket.

Defendant has filed motions to seal the following specific documents or exhibits as they contain confidential financial information contained in plaintiffs credit report and confidential business and proprietary documents: DE 85 & DE 86 & DE 69. In the absence of opposition, and as defendant has sufficiently demonstrated in its briefing that the privacy interests in the documents cited outweigh the right of public access, and defendant has further sought to seal only specific documents rather than entire memoranda, the motions [DE 76 & 87] are GRANTED. *See In re Knight Pub. Co.,* 743 F.2d 231, 235 (4th Cir. 1984).

As provided in the motion at [DE 76], only portions of Exhibit 14 to plaintiff's response to defendant's

motion for summary judgment have been requested to be sealed, despite plaintiff having filed his memorandum and all exhibits to his memorandum at DE 76 under seal. The Clerk shall unseal DE 69 with the exception of DE 69-14, which shall remain under seal and for which defendant has filed a redacted version at DE 76-2.

II. Motion for protective order.

The motion for protective order is DENIED AS MOOT in light of the Court's ruling on summary judgment.

III. Motions to strike.

Plaintiff's motion to strike portions of defendant's errata sheet is granted.

Rule 30(e) of the Federal Rules of Civil Procedure provides that a deponent is permitted to sign a statement listing any changes to the form or substance of his deposition and the reasons for making the changes. Fed. R. Civ. P. 30(e)(1). "A change in 'form' would include correcting a typographical error or a spelling error. A change in 'substance' would include the substantive correction of a court reporter's transcription (i.e., the witness answers 'No,' but the court reporter records 'Yes'). *William L. Thorp Revocable Tr. v. Ameritas Inv. Corp.*, 57 F. Supp. 3d 508, 518 (E.D.N.C. 2014). The Rule "does not permit a party to make changes that substantively contradict or modify [a] sworn deposition." *Id.* at 518.

The changes identified by plaintiff are more than typographical or substantive. The Court will therefore GRANT his motion to strike. [DE 79].

Defendant has also filed a motion to strike, seeking to strike portions of plaintiff's opposing statement of material facts that do not comply with Local Civil Rule 56.1(a)(2). The Court has considered the motion in light of the relevant standard, *see, e.g.*, *Morrisroe v. Goldsboro Mill. Co.,* 884 F. Supp. 192, 194 (E.D.N.C. 1994), and declines to strike the material cited by defendant. The Court discerns no prejudice in plaintiff's inclusion of an opposing statement of material fact in his response to defendant's statement of material facts, in particular because plaintiff has filed his own motion for summary judgment which he has supported by citing to the same relevant facts. Defendant's motion [DE 117] is therefore DENIED.

IV. Motions for summary judgment.

A motion for summary judgment may not be granted unless there are no genuine issues of material fact for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If that burden has been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986). In determining whether a genuine issue of material fact exists for trial, a trial court views the evidence and the inferences in the light most favorable to the nonmoving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007). However, "[t]he mere existence of a scintilla of evidence" in support of the nonmoving party's position is not sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,*

477 U.S. 242, 252 (1986). "A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. . . . and [a] fact is material if it might affect the outcome of the suit under the governing law." *Libertarian Party of Virginia v. Judd,* 718 F.3d 308, 313 (4th Cir. 2013) (internal quotations and citations omitted). Speculative or conclusory allegations will not suffice. *Thompson v. Potomac Elec. Power Co.,* 312 F.3d 645, 649 (4th Cir. 2002).

When deciding cross-motions for summary judgment, a court considers each motion separately and resolves all factual disputes and competing inferences in the light most favorable to the opposing party. *Rossignol v. Voorhaar,* 316 F.3d 516, 523 (4th Cir. 2003). The court must ask "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251.

A. Defendant's motion for summary judgment.

Defendant seeks summary judgment in its favor on each of plaintiff's claims.

Claims arising under North Carolina law

Summary judgment in defendant's favor is appropriate on plaintiff's claims brought under North Carolina law as they are either precluded by state law, preempted by federal law, or plaintiff has otherwise failed to create a genuine issue of material fact sufficient to survive summary judgment.[2]

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[2] Plaintiff's opposition brief incorporates by reference its argument made in opposition to defendant's motion for judgment on the pleadings in which he contends that defendant has waived

(1) North Carolina Unfair and Deceptive Trade Practices Act.

The North Carolina Debt Collection Act, N.C. Gen. Stat. § 75-56, expressly provides that the "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." In other words, where a plaintiff alleges violations of the Unfair and Deceptive Trade Practices Act (UDTPA) based upon debt collection activity, such claims are precluded because the N.C. Debt Collection Act "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. Sep. 26, 2019) (internal quotation and citation omitted). Plaintiff's allegations that support his UDTPA claim arise solely from defendant's alleged attempts to collect from plaintiff on the Loan. Indeed, plaintiff agrees that the N.C. Debt Collection Act is the exclusive act to recover for unfair and deceptive trade practices regarding debt

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the issue of preemption by the Bankruptcy Code for failing to plead it as an affirmative defense in its answer. See [DE 68]. However, it is "well established that an affirmative defense is not waived absent unfair surprise or prejudice." *Patten Grading & Paving, Inc. v. Skanska United States Bldg., Inc.*, 380 F.3d 200, 209 (4th Cir. 2004). Thus, to the extent preemption by the Bankruptcy Code does not concern the Court's subject matter jurisdiction, an issue which may be raised at any time, the Court discerns no, and plaintiff fails to demonstrate any, unfair surprise or prejudice in defendant raising the issue of preemption for the first time in its motion for judgment on the pleadings or in a subsequently filed motion for summary judgment.

collection. Defendant is entitled to summary judgment on this claim.

(2) North Carolina Debt Collection Act.

Defendant is also entitled to summary judgment on plaintiff's N.C. Debt Collection Act claim as, to the extent it is premised on attempts to collect a debt discharged through bankruptcy, it is preempted by the Bankruptcy Code. Plaintiff alleges as the basis of each claim that he was discharged from any legal obligation to make further payments on the Loan pursuant to the Chapter 13 bankruptcy discharge. The Bankruptcy Code, specifically 11 U.S.C. §§ 362 and 364, governs the collection of debts during and after bankruptcy.

> The bankruptcy system affords debtors protection from creditors' collection efforts through two related, but sequentially separated provisions. The automatic stay under § 362(a) shields debtors for the duration of a bankruptcy case until entry of discharge or dismissal. Once a discharge is entered, the automatic stay terminates and a discharge injunction takes effect to prevent creditors' efforts to collect on debts that were discharged. A discharge in bankruptcy, "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor ..." While a violation of the discharge injunction does not provide an express remedy akin to § 362(k) for violations of the automatic stay, § 105 allows a bankruptcy court to hold a creditor in civil

> contempt, and impose contempt sanctions, for violating the discharge injunction.

In re Williams, 612 B.R. 682, 690 (Bankr. M.D.N.C. 2020) (internal citations omitted). Several courts that have considered the issue have concluded that the Bankruptcy Code preempts state law claims which require proof of violation of the discharge injunction. *See Gaitor v. U.S. Bank. N.A. (In re Gaitor),* Nos. 13-80530, 14-09059, 2015 Bankr. LEXIS 2545, at *8 (Bankr. M.D.N.C. July 31, 2015); *see also Johnston v. Telecheck Servs. (In re Johnston),* 362 B.R. 730, 737 (Bankr. N.D.W. Va. 2007) ("state law causes of action that would allow a debtor to collect damages for a violation of the discharge injunction are foreclosed by the remedies provided by § 524 of the Bankruptcy Code"); *but see Barnhill v. FirstPoint, Inc.,* No. l:15-CV-892, 2017 WL 2178439, at *5 (M.D.N.C. May 17, 2017); *In re Waggett,* No. 09-4152-8-SWH, 2015 WL 13 84087, at *8 (Bankr. E.D.N.C. Mar. 23, 2015). The Court further finds *Waggett,* on which plaintiff relies, distinguishable. In *Waggett,* the court found that plaintiff's North Carolina state law claims were not preempted because they were "premised on other grounds than just a violation of the discharge injunction" and the complaint did "not even mention the words 'discharge' or 'discharge injunction.'" *In re Waggett,* 2015 WL 1384087, at *8. Here, plaintiff's allegations are expressly premised on defendant's alleged failure to acknowledge the effect of the discharge in bankruptcy. Moreover, the conduct of which plaintiff complains, "would not be wrongful absent the existence of the automatic stay [or discharge injunction] imposed by the Bankruptcy Code." *In re Waters,* No. AP 19-80090-JW, 2020 WL 1884191, at *3 (Bankr. D.S.C. Feb. 13, 2020). Having

considered the relevant case law, the Court is persuaded that this plaintiff's N.C. Debt Collections Act claim is preempted by the Bankruptcy Code to the extent it is premised on a violation of the automatic stay or discharge injunction.

Plaintiff's N.C. Debt Collections Act claim is also preempted by the Fair Credit Reporting Act (FCRA) to the extent it is based on credit reporting activities. The FCRA expressly provides that "No 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). Defendant's obligations with respect to credit reporting, which are the basis of plaintiff's claims relating to defendant's alleged "continued false representations" to consumer reporting agencies, are defined by Section 1681s-2 of the FCRA. In his response to defendant's motion plaintiff does not address defendant's arguments regarding FCRA preemption and points the Court to no statutory provision or case law which would suggest his N.C. Debt Collection Act claim based upon defendant's credit reporting is not preempted. Accordingly, the Court concludes that plaintiff's N.C. Debt Collections Act claim premised on defendant's credit reporting activity is preempted by the FCRA. *See, e.g., Ross v. F.D.I.C.*, 625 F.3d 808, 817 (4th Cir. 2010); *Madden v. Experian Info. Sols., Inc.,* No. 5:12-CV- 00162, 2014 U.S. Dist. LEXIS 133597, at *13 (W.D.N.C. Sep. 23, 2014).

To the extent it is not otherwise preempted, plaintiff's N.C. Debt Collection Act claim is premised

on two alleged violations: failing to disclose in all communications from PHH that the communications were from a debt collector for the purpose of collecting a debt and communicating with plaintiff after defendant had been notified that counsel represented plaintiff. [DE 1-1¶ 211 E, F].

To succeed on a N.C. Debt Collections Act claim, plaintiff must first satisfy the threshold showing required - that the obligation owed was a debt, that the person owing the obligation is a consumer, and that the obligation is attempting to be collected by a debt collector. *Waddell v. U.S. Bank Nat'l Ass'n,* 395 F. Supp. 3d 676, 682 (E.D.N.C. 2019). If he can do so, he must then show that the actions of defendant were unfair or deceptive. "In the context of debt collection, these acts include the use of threats, coercion, harassment, unreasonable publications of the consumer's debt, deceptive representations, and unconscionable means." *Davis Lake Cmty. Ass'n, Inc. v. Feldmann,* 138 N.C. App. 292, 296 (2000).

Importantly, the surrender of property in bankruptcy "does not serve to pass ownership of the Residence to a lender; nor does it require the lender to foreclose its mortgage." *In re Rose,* 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014) (citing 11 U.S.C. § 1325(a)(5)(C)). In other words, despite plaintiff's surrender of the property in bankruptcy, his name remained on the Deed of Trust, and it is undisputed that his now-former wife remained on the Loan. As plaintiff was still an owner of the Property, it was not unconscionable or improper for defendant to contact plaintiff, especially as all written communications contained a disclaimer that, if the debt had been discharged in bankruptcy, the contact was for

informational purposes only. As discussed below, in a case applying the federal Fair Debt Collection Practices Act, which North Carolina courts look to when analyzing their own N.C. Debt Collection Act, the Fourth Circuit has held that the language included in the correspondence to plaintiff which disclaimed any attempt to collect on a debt discharged in bankruptcy amounted to the correspondence *not* being considered an attempt to collect a debt. *Lovegrove v. Ocwen Home Loans Servicing, LLC.,* 666 F. App'x 308, 311 (4th Cir. 2016).

It is undisputed that plaintiff remained on the Deed of Trust and that he made no attempt to remove himself from the Title to the Property. It is further undisputed that the Deed of Trust required the Guthries to maintain hazard insurance, pay taxes on the property, and pay for maintenance and preservation of the Property. Accordingly, as to the two remaining ways that plaintiff contends defendant violated the N.C. Debt Collections Act, the Court holds that he has failed to create a genuine issue of material fact as to whether defendant violated the Act on these grounds.

(3) North Carolina Collection Agency Act.

In the alternative to his N.C. Debt Collection Act claim, plaintiff alleges that defendant violated the North Carolina Collection Agency Act. The N.C. Collection Agency Act applies to collection agencies, which it defines as "a person 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 and all persons directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims." N.C. Gen.

Stat. § 58-70-15. The statute provides that a collection agency does not include, among other things, banks or bank owned, controlled or related firms or "Corporations 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." *Id.* § 58-70-15(c)(2);(2a). Loan servicers, such as defendant, have been held to fall under the exemption to the definition of a collection agency. *See, e.g., Williams v. HomEq Servicing Corp.,* 184 N.C. App. 413, 424 (2007); *Hacker v. Wells Fargo Bank, N.A.,* No. 4:15-CV-163-BR, 2016 U.S. Dist. LEXIS 135503, at *17 (E.D.N.C. Sep. 30, 2016). Although plaintiff argues that he has demonstrated by his affidavit that defendant is a collection agency, plaintiffs subjective contentions do not demonstrate that defendant meets the statutory definition of a collection agency. Defendant is entitled to summary judgment in its favor on this claim.

(4) Remaining state law claims.

Plaintiff has also alleged claims for intentional and negligent infliction of emotional distress and negligence under North Carolina law. As with several of his North Carolina statutory-based claims, these claims are preempted by the Bankruptcy Code and the FCRA.

The Bankruptcy Code preempts plaintiff's emotional distress and negligence claims to the extent they are premised on alleged attempts to collect on a discharged debt. *See In re Johnston,* 362 B.R. at 739; *In re Gaitor,* 2015 Bankr. LEXIS 2545, at *15. The FCRA preempts these claims insofar as they are based on defendant's credit reporting conduct. *See* 15 U.S.C.

§ 1681t(b)(1)(F). Accordingly, these claims are preempted in their entirety.

Plaintiff has also failed to create a genuine issue of material fact on his negligence claim. A claim for negligence under North Carolina law requires a plaintiff to demonstrate that "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Parker v. Town of Erwin,* 243 N.C. App. 84, 110 (2015) (quoting *Bostic Packaging, Inc. v. City of Monroe,* 149 N.C. App. 825, 830 (2002)). Plaintiff has failed to allege or create a genuine issue of fact as to any duty owed to plaintiff by defendant. Additionally, to the extent plaintiff attempts to show that defendant negligently violated a statute, such a claim is recognized under North Carolina law only "for violations of public safety statutes." *Self,* 2019 U.S. Dist. LEXIS 165305, at *20-21.

Defendant is therefore entitled to summary judgment in its favor on these claims as well. *Claims arising under federal law*

(1) Fair Credit Reporting Act (FCRA).

In his complaint, plaintiff identifies three instances where he notified a consumer reporting agency (CRA) of inaccurate and false information on a consumer report concerning the Loan: a dispute to Trans Union in late 2018 or early 2019, a dispute to Experian in April 2019, and a dispute to Equifax in April or May 2019. Compl. ¶¶ 107, 111, 114-15. Plaintiff brings a claim for negligent violation of the FCRA alleging defendant failed to adequately investigate the

disputes under 15 U.S.C. § 1681s-2(b). Plaintiff also alleges that PHH willfully failed to comply with the FCRA, entitling him to appropriate statutory and punitive damages. *Id.* § 1681n.

(i) Negligent violation of the FCRA. The FCRA requires furnishers of credit information, such as defendant, to take certain actions after receiving notice of a dispute: conduct an investigation, review the relevant information provided by the CRA, report the results of the investigation to the CRA, and if the investigation finds incomplete or inaccurate information, report those results to all other CRAs to which the information was provided. 15 U.S.C. § 1681s2(b)(A)-(D). To succeed on a claim for negligent violation of the FCRA, a plaintiff must show that (1) he notified the CRA of the disputed information; (2) that the CRAs notified the defendant of the dispute, and (3) that after receiving notice the defendant failed to investigate the dispute and modify any inaccurate information. *Davenport v. Sallie Mae, Inc.,* 124 F. Supp. 3d 574, 581 (D. Md. 2015).

As to the 2019 Equifax dispute, the record does not support that defendant received notice of that dispute from Equifax, which is a prerequisite to trigger investigation obligations under the FCRA. Feezer Decl. ¶ 64. In opposition, plaintiff argues only that he initiated a dispute with Equifax and that he was informed by Equifax that the information concerning the Loan was accurate. Guthrie Aff. ¶ 59-60. But that is insufficient to show or create a genuine issue of material fact as to whether defendant received notice of plaintiffs dispute to Equifax. Accordingly, defendant is entitled to summary judgment as to plaintiff's FCRA claim based upon his 2019 dispute to

Equifax. Moreover, to the extent plaintiff's opposition to the motion for summary judgment attempts to identify additional disputes to CRAs on which his FCRA claim is based, such an attempt fails at this stage of the proceeding and absent any request to amend his complaint.

Thus, the Court considers whether summary judgment is appropriate on plaintiff's FCRA claim arising from plaintiffs dispute to Trans Union in late 2018 or early 2019 and dispute to Experian in April 2019. While it is true that whether a particular investigation by a furnisher of credit information was reasonable is typically a question for a jury, summary judgment is appropriate if the plaintiff cannot demonstrate that he has suffered actual damages as a result of the actions of the defendant. *Davenport,* 124 F. Supp. 3d at 581; *see also Primrose v. Castle Branch,* No. 7:14-CV-235-D, 2017 U.S. Dist. LEXIS 51, at *15 (E.D.N.C. Jan. 3, 2017). That is the case here.

Certainly, plaintiff cannot rely on any alleged damages which arose prior to defendant's alleged failure to reasonably investigate his dispute. *Davenport,* 124 F. Supp. at 582. Plaintiff cannot therefore rely on the mortgage loan denial from Navy Federal Credit Union in January 2019. That denial was based on credit information collected by the credit union on January 9, 2019. [DE 84-4]. It is undisputed that defendant did not respond to the Trans Union dispute until January 28, 2019, or to the Experian dispute until May 6, 2019. Accordingly, Navy Federal Credit Union's denial of credit cannot have been based on defendant's investigation. The same is true for PNC Bank's April 2019 denial of a car loan to plaintiff,

which was based on information obtained from Experian. [DE 84-5].

Plaintiff was also denied credit for a car loan from Sun Trust Bank in April 2019, which was based in whole or in part on information from Trans Union. [DE 84-6]. The reasons listed by Sun Trust for the denial were serious delinquency, length of time since account not paid as agreed, proportion of loan balances to loan amounts too high, and amount past due on accounts. *Id.*

Defendant contends that while it had responded to Trans Union's report of a dispute by plaintiff prior to this denial of credit, the information provided by defendant cannot have been the information that Sun Trust relied on because in response to plaintiff's dispute defendant informed Trans Union that the Loan account was current, with $0 past due, and had been affected by a natural disaster. In short, the basis for Sun Trust's denial of credit could not have been based on defendant's investigation and response to plaintiff's dispute because the grounds for Sun Trust's denial are different from what was reflected in defendant's response.

Plaintiff has also failed to create a genuine issue of material fact as to whether any other damages were suffered as a result of any alleged FCRA violations by defendant. The summary judgment record does not support that plaintiff has created a genuine issue of fact as to any emotional damages he contends to have suffered. Plaintiff relies only on his own affidavit to establish the existence of his emotional damages and does not dispute that no medical provider has opined that his GERD is a result of or was exacerbated by the alleged acts or omissions of defendant or that he has

never been diagnosed with a physical or mental condition which was experienced as a result of the alleged acts or omissions of defendant, including anxiety. While plaintiff's own testimony can support damages for emotional distress, plaintiff's conclusory and vague statements regarding his emotional state are insufficient at this stage of the proceeding. *Sloane v. Equifax Info. Servs., LLC,* 510 F.3d 495, 503 (4th Cir. 2007). Plaintiff offers no corroborating evidence, either in the form or professional or lay statements, nor does his affidavit provide "sufficiently articulated descriptions" of his distress or the nexus between defendant's alleged violations of the FCRA and his distress. *Id.*

The same is true for plaintiff's alleged professional damages. Importantly, to create a sufficient nexus between any alleged violation of the FCRA and plaintiff's security clearance status, plaintiff must be able to show that the information the Department of Defense inquired about related to the two credit disputes at issue in this claim. The record demonstrates that plaintiff cannot make that connection. Moreover, the record reflects that plaintiff did not lose his security clearance, he received no demotion or discipline, and his pay was not docked.

Accordingly, summary judgment is appropriate in defendant's favor on plaintiff's claim for negligent violation of the FCRA.

(ii) Willful violation of the FCRA. Plaintiff further alleges that defendant willfully failed to comply with the FCRA based upon all of the violations outlined in the complaint. Compl. ¶ 258. To succeed on such a claim, a plaintiff must show that the defendant

"knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Dalton v. Cap. Associated Indus., Inc.,* 257 F.3d 409, 418 (4th Cir. 2001) (internal quotation and citation omitted).

In its motion for summary judgment, defendant contends that there is no evidence which would demonstrate that defendant acted knowingly or in reckless disregard of the FCRA's requirements and that the undisputed evidence shows that defendant maintained relevant policies and procedures to ensure compliance with the FCRA and that it followed those policies and procedures in this case. Feezer Decl. ¶¶ 62-63.

Recognizing that summary judgment is typically not appropriate on whether a party acted with a particular state of mind, *Dalton*, 257 F.3d at 418, there is nothing in this record that would support a reasonable juror in concluding that defendant knowingly and intentionally acted in conscious disregard of plaintiff's rights. To that end, plaintiff's response to defendant's motion for summary judgment on this issue consists only of his argument that the issue should go to a jury. This is insufficient to rebut defendant's request for summary judgment. Defendant is entitled to summary judgment on this claim.

(2) Telephone Consumer Protection Act (TCPA).

Plaintiff alleges that defendant violated that TCPA, 47 U.S.C. § 227, by making calls to plaintiff over a period of years using an automated telephone dialing system as that term is defined by the Act. 47 U.S.C. § 227(a); Compl. ¶¶ 262-267. "To qualify as an

'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook, Inc. v. Duguid,* 141 S. Ct. 1163, 1167 (2021).

The record reflects that defendant did not use a random or sequential number generator to store or produce plaintiffs cell phone number before contacting him. In opposition to the instant motion, plaintiff states that defendant told him during phone calls that they were using an auto-dialer when calling him. Plaintiff has not proffered evidence which would tend to show that an "auto dialer" is a device with the capacity to store or produce a telephone number using a random sequential number generator. Rather, the only evidence in the record is that plaintiff was contacted specifically because of his relationship with defendant, not as a result of random contact. *See* Feezer Decl. ¶¶ 70-71. Defendant is entitled to summary judgment in its favor on this claim.

(3) Real Estate Settlement Procedures Act (RESPA).

Plaintiff alleges that defendant violated RESPA by failing to respond to a Qualified Written Request (QWR) sent to defendant on December 16, 2019, and received by defendant on December 20, 2019.

> RESPA requires the servicer of a federally related mortgage loan to acknowledge receipt of a QWR within five business days of receipt. Thereafter, within thirty business days, the servicer must: (1) make corrections to the borrower's account; (2) after conducting an investigation, provide a written explanation

> stating the reasons the servicer believes the account is correct; or (3) conduct an investigation and provide the information requested by the borrower or an explanation of why the information is unavailable. In the event a servicer fails to comply with this requirement, RESPA authorizes a plaintiff to recover actual damages "as a result of" the servicer's failure.

Barr v. Flagstar Bank, FSB, 303 F. Supp. 3d 400, 417 (D. Md. 2018) (internal citations omitted); *see also* 12 U.S.C. § 2605(e). A QWR is defined as written correspondence that enables the loan servicer to identify the borrower and includes a statement of the reasons the borrower believes the account is in error or contains sufficient detail regarding other information the borrower seeks. 12 U.S.C. § 2605(e)(1)(B). To qualify as a QWR, the correspondence must relate to servicing; "correspondence regarding the validity of a loan does not relate to servicing." *Barr* 303 F. Supp. 3d at 418.

Despite the fact that the correspondence is identified as a QWR, Compl. Ex. 16, the letter is, at bottom, a challenge to the validity of the Loan and not correspondence relating to the servicing of the Loan. *Ward v. Sec. Atl. Mortg. Elec. Registration Sys., Inc.,* 858 F. Supp. 2d 561, 574 (E.D.N.C. 2012). Indeed, the letter states that plaintiff is asserting that defendant has erred in "[a]ssessing, collecting, or attempting to collect fees, expenses, costs, attorneys' fees, or other charges from [plaintiff] which are neither authorized under applicable law or pursuant to the terms of the Deed of Trust, the Note, and *the Discharge* [in bankruptcy] . . .." Compl. Ex. 16 (emphasis added).

Moreover, plaintiff has failed to create a genuine issue of material fact as to whether he has suffered damages as a result of any alleged RESPA violation. He must show that he suffered actual damages to prevail on his RESPA claim, *see Self,* 2019 U.S. Dist. LEXIS 165305, at *24, and nothing in the record would tend to show that any failure on defendant's part in responding to the letter, assuming it is properly considered at QWR, resulted in damage to plaintiff. Indeed, plaintiff initiated this lawsuit prior to the expiration of the statutory period within which defendant was required to respond. Plaintiff has further failed to create a genuine issue of material fact as to whether defendant engaged in a pattern or practice of RESPA violations.

(4) Fair Debt Collection Practices Act (FDCPA).

Plaintiff alleges that defendant violated the FDCPA by, *inter alia,* falsely representing the character, amount, and legal status of the Loan in attempts to collect a debt; communicating credit information concerning plaintiff and the Loan to CRAs which defendant knew or should have known was false; by failing to communicate to CRAs that the debt was disputed; by failing to disclose that communications to plaintiff were from a debt collector in an attempt to collect a debt; by placing telephone calls with the intent to annoy, harass, and/or abuse plaintiff; and by failing to communicate with plaintiff's counsel after defendant knew plaintiff was represented by counsel. Compl. ¶¶ 301-316.

The FDCPA was enacted in part to "eliminate abusive debt collection practices by debt collectors" and regulate debt collection practices. 15 U.S.C. § 1692(e). To prevail on a FDCPA claim, a plaintiff

must show that "(1) he was the object of collection activity arising from a consumer debt as defined by the FDCPA, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant engaged in an act or omission prohibited by the FDCPA." *Johnson v. BAC Home Loans Servicing,* 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011). Whether a communication is an attempt to collect a debt "is a commonsense inquiry that evaluates the nature of the parties' relationship, the objective purpose and context of the communication, and whether the communication includes a demand for payment." *In re Dubois,* 834 F.3d 522, 527 (4th Cir. 2016) (internal alterations, quotations, and citation omitted).

Plaintiff does not specifically dispute defendant's contention that during the time periods relevant to the complaint, defendant, as either OLS or PHH, was the owner of the Loan, and was therefore a creditor not a debt collector under the FDCPA. 15 U.S.C. §§ 1692a(6); (4). As a creditor, defendant's conduct in relation to the Loan is not regulated by the FDCPA. *Henson v. Santander Consumer USA, Inc.,* 817 F.3d 131, 134, 137 (4th Cir. 2016).

Even if defendant were properly considered to be a debt collector for purposes of the FDCPA, plaintiff has failed to create a genuine issue of material fact as to whether defendant's actions violated the FDCPA. In his brief, plaintiff fails to cite specific evidence in the record which would tend to show that defendant is liable for any specific violations of the FDCPA. Additionally, in a similar case, the Fourth Circuit has held that a letter sent by OLS that included disclaimers regarding bankruptcy similar to those included in the letters to plaintiff were not an attempt

to collect a debt for purposes of the FDCPA. *Lovegrove,* 666 F. App'x at 311 ("the communications were for informational purposes only, were non-threatening in nature, and contained clear and unequivocal disclaimers to establish that they were not in connection with the collection of a debt under Lovegrove's circumstances."). "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." *Mavilla v. Absolute Collection Serv.,* No. 5:1 O-CV-412-F, 2013 U.S. Dist. LEXIS 3925, at *39 (E.D.N.C. Jan. 10, 2013). The Court determines that defendant is entitled to summary judgment in its favor on this claim.[3]

B. Plaintiff's motion for partial summary judgment.

Plaintiff seeks summary judgment in his favor as to liability on certain claims, specifically his claim for violation of the N.C. Debt Collection Act, or violation of the UDTPA; or violation of the N.C. Collection Agency Act.

As discussed above, even viewing the facts in the light most favorable to plaintiff when considering defendant's motion for summary judgment, defendant has demonstrated that summary judgment in its favor is appropriate on each of these claims. Plaintiff's motion is therefore appropriately denied.

CONCLUSION

Accordingly, for the foregoing reasons, defendant's motions to seal [DE 87, 76] are GRANTED; defendant's motion for protective order [DE 63] is

[3] In light of the foregoing, the Court declines to address defendant's laches argument.

DENIED AS MOOT; defendant's motion for summary judgment [DE 81] is GRANTED; defendant's motion to strike [DE 117] is DENIED; plaintiff's motion to strike [DE 79] is GRANTED; and plaintiff's motion for summary judgment [DE 99] is DENIED.

After the expiration of the period described below, the Clerk is DIRECTED to UNSEAL the following docket entries: DE 97, 98, 99, 100, 101, 102-106. The Clerk shall further UNSEAL DE 69 with the exception of DE 69-14, which shall remain under seal and for which defendant has filed a redacted version at DE 76-2.

The parties shall have five (5) days from the date of entry of this order to request that any document unsealed by entry of this order should, in fact, remain sealed. Should no party request that any of the foregoing documents remain under seal, the Clerk shall unseal the foregoing documents without further order of the Court.

As defendant's motion for summary judgment in its favor on all of plaintiff's claims has been granted, the Clerk is DIRECTED to enter judgment accordingly and close the case.

SO ORDERED, this 4 day of March 2022.

/s/ Terrence Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

Appendix C

United States Bankruptcy Court
Eastern District of North Carolina
New Bern Division

Debtor 1	Mark Anthony Guthrie First Name Middle Name Last Name	Social Security number or ITIN [redacted] EIN _ _- _ _ _ _ _ _ _
Debtor 2 (Spouse, If filing)	_____ First Name Middle Name Last Name	Social Security number or ITIN _ _ _ _ EIN _ _- _ _ _ _ _ _ _
Case number	**11-03134-8-DMW**	

Order of Discharge **12/15**

IT IS ORDERED: A discharge under 11 U.S.C. § 1328(a) is granted to:

Mark Anthony Guthrie

5/8/16

By the court: David M. Warren
United States Bankruptcy Judge

Explanation of Bankruptcy Discharge in a Chapter 13 Case

This order does not close or dismiss the case.

Creditors cannot collect discharged debts
This order means that no one may make any attempt to collect a discharged debt

Most debts are discharged
Most debts are covered by the discharge, but not all. Generally, a discharge removes the debtors' personal liability for debts

from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily. 11 U.S.C. § 524(f).

provided for by the chapter 13 plan.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

Some debts are not discharged

Examples of debts that are not discharged are:

- debts that are domestic support obligations;
- debts for most student loans;
- debts for certain types of taxes specified in 11 U.S.C. §§ 507(a)(8)(C), 523(a)(1)(B), or 523(a)(1)(C) to the extent not paid in full under the plan;

For more information, see page 2

- debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;
- debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- some debts which the debtors did not properly list;
- debts provided for under 11 U.S.C. § 1322(b)(5) and on which the last payment or other transfer is due after the date on which the final payment under the plan was due;
- debts for certain consumer purchases made after the bankruptcy case was filed if obtaining the trustee's prior approval of incurring the debt was practicable but was not obtained;
- debts for restitution, or damages, awarded in a civil action against the debtor as a result of malicious or willful injury by the debtor that caused personal injury to an individual or the death of an individual; and
- debts for death or personal injury caused by operating a vehicle while intoxicated.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

This information is only a general summary of a chapter 13 discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.

Appendix D

FILED: September 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1248
(7:20-cv-00043-BO)

MARK ANTHONY GUTHRIE

Plaintiff - Appellant

v.

PHH MORTGAGE CORPORATION

Defendant – Appellee

and

TRANS UNION, LLC; EQUIFAX, INC.; EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC.

Defendants

ELECTRONIC PRIVACY INFORMATION CENTER; THE NATIONAL CONSUMER LAW CENTER

Amici Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under

Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Diaz, Judge Wynn, and Judge Quattlebaum.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix E

1. 11 U.S.C. § 524(a) provides:

Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not

discharge of the debt based on such community claim is waived.

2. 11 U.S.C. § 105(a) provides:

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

3. The North Carolina Debt Collection Act, N.C. Gen. Stat. §§ 75-50 *et seq.*, provides in pertinent part:

§ 75-54. Deceptive representation.

No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

(2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt, unless the communication is made to a third-party pursuant to G.S. 75-53 for the purpose of obtaining location information about the debtor.

(3) Falsely representing that the debt collector has in his possession information or something of value for the consumer.

(4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.

(5) Using or distributing or selling any written communication which simulates or is falsely

represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.

(6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.

(7) Falsely representing the status or true nature of the services rendered by the debt collector or his business.

(8) Communicating with the consumer in violation of the provisions of G.S. 62-159.1(a), 153A-277(b1), or 160A-314(b1).

§ 75-55. Unconscionable means.

No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

(2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or

charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge. Nothing in this section shall be construed to prohibit the collection of filing fees, service of process fees, or other court costs actually incurred. The collection of such fees is not a violation of this Article or of Article 15 of Chapter 53 of the General Statutes.

(3) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.

(4) Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim.

§ 75-56. Application.

(a) The 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.

(b) Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action in an amount equal to the sum of (i) any actual damage sustained by such person as a result of such failure and (ii) civil penalties the court may allow, but not less than five

hundred dollars ($500.00) nor greater than four thousand dollars ($4,000) for each violation.

(c) The remedies provided by this section shall be cumulative and in addition to remedies otherwise available. Any punitive damages assessed against a debt collector shall not be reduced by the amount of the civil penalty assessed against such debt collector pursuant to subsection (d) of this section.

(d) Notwithstanding the provisions of G.S. 75-15.2 and G.S. 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of four thousand dollars ($4,000) shall not be imposed.

(e) The clear proceeds of civil penalties imposed in actions instituted by the Attorney General shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.