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

NO. 5:12-CV-389-FL

ASHLEY OWENS and NINA OWENS, Plaintiffs, v. DIXIE MOTOR COMPANY, JANET PIERCE, ANTWAND CHERRY, and WESTERN SURETY CO., Defendants.	)	SEALED ORDER[1]

This matter comes before the court on defendant Western Surety Company's ("Western") motion for summary judgment (DE 70), defendant Janet Pierce's ("Pierce") motion for partial summary judgment (DE 72), and Defendant Dixie Motor Company's ("Dixie Motor") motion for summary judgment (DE 80). Upon extensive briefing, and with benefit of hearing, the issues raised are ripe for ruling. For reasons stated below, the court GRANTS IN PART and DENIES IN PART defendant Pierce's motion, GRANTS IN PART and DENIES IN PART defendant Dixie Motor's motion, and DENIES defendant Western's motion.

[1] Plaintiffs shall make redactions on the face of this order, now sealed, striking through any language which should not be revealed on the public docket, and provide to defendants their proposed version, within seven days from date of entry of this order. If defendants determine upon their review that other or different information should or should not be the subject of redaction, it shall address the matter with plaintiffs within seven days thereafter. Not later than twenty-one (21) days from date of entry of this order, the parties jointly shall file on the public docket a copy of this order with any necessary redactions, in consideration of the public's right to access to the public's records as well as any protective order and orders on motions to seal.

STATEMENT OF THE CASE

Plaintiffs Nina Owens and Ashley Owens, who are mother and daughter (Nina Owens is Ashley Owens's mother), commenced this action by complaint filed June 28, 2012. Their claims variously arise out of inadvertent mailing in fall 2011 by Pierce, Dixie Motor's finance manager, of sensitive credit information and personal identifiers pertaining to plaintiffs, originated as a part of Ashley Owens's attempt to obtain financing for a motor vehicle purchase, to Antwand Cherry ("Cherry'), a North Carolina inmate. Cherry, also known as "Mickey Mouse," was alleged then to be serving a sentence for "opium trafficking"at Nash Correction Institution. He was a Facebook "friend" of Pierce, with whom, plaintiffs complain, Pierce was engaged in some sort of social relationship.

Plaintiffs assert a myriad of claims stemming from the circumstances of these disclosures. As against Dixie Motor, claims include violation of the North Carolina Identity Theft Protection Act ("ITPA") N.C. Gen. Stat. §§ 75-60 *et seq*. (count one); violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDPTA") N.C. Gen. Stat. §§ 75-1.1 *et seq*.(count five); negligence per se for failure to comply with the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.*(count six); and breach of express and implied contractual duties (count seven).

As against Dixie Motor and Pierce, plaintiffs' claims include three counts of negligent and willful violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*., asserting that they wrongfully procured plaintiff Nina Owens's consumer report,[2] in violation of 15 U.S.C. § 1681b(f) (count two); improperly used the consumer report of plaintiff Ashley Owens, in violation of 15 U.S.C. § 1681b(f) (count three); and failed to properly dispose of the information in plaintiffs'

[2] The FCRA uses the term "consumer report" which term the court will adopt here in referring to plaintiffs' credit reports.

consumer reports, in violation of 15 U.S.C. § 1681w and 16 C.F.R. §§ 682.1 *et seq.* (count four). Plaintiffs further allege a claim of infliction of emotional distress against defendants Dixie Motor and Pierce (count eight).

As against defendant Western, plaintiffs seek to assert liability of surety where it provided defendant Dixie Motor with a motor vehicle surety bond (count nine). Plaintiffs allege that it is liable to plaintiff Nina Owens for certain alleged acts and omissions.[3]

Defendant Western filed a motion to dismiss plaintiff Nina Owens's claim against it for liability of surety, asserting that plaintiff Nina Owens was not a purchaser for purposes of N.C. Gen. Stat. § 20-288(e), as required for recovery under the statute (DE 27). Defendant Pierce, together with defendant Dixie Motor, also filed a motion to dismiss plaintiffs' claims for punitive damages on various state law claims filed against them (DE 29). Both of these motions were denied by order entered July 11, 2013. Defendants' answers then were made and the instant motions followed.

STATEMENT OF FACTS

On November 6, 2007, plaintiff Nina Owens purchased an automobile from defendant Dixie Motor. Dixie Motor is a North Carolina licensed motor vehicle dealer. In connection with this purchase, plaintiff Nina Owens provided defendant Dixie Motor with certain personal information so that Dixie Motor could prepare some documents, including one entitled "Buyer's Order and Invoice," and another entitled "Applicant's Credit Statement." These documents contained information such as plaintiff Nina Owens's home address, date of birth, social security number, phone number, insurance agent, insurance company, employment information, monthly mortgage

[3] Plaintiffs also brought a claim for intrusion into seclusion against defendant Antwand Cherry on which he has defaulted. Additionally, plaintiff Nina Owens brought a claim against Equifax Information Services, LLC, for violations of the FCRA, but has since filed a stipulation of dismissal dismissing her claims against Equifax Information Services, LLC.

payment, and related. Plaintiff Nina Owens continued for a time to bring her motor vehicle to defendant Dixie Motor for maintenance.

In October 2011, plaintiff Ashley Owens considered purchasing a motor vehicle from defendant Dixie Motor. As part of the financing process, Ashley Owens filled out a credit application disclosing, among other things, her name, date of birth, address, social security number, phone number, and more. At this time, defendant Pierce was defendant Dixie Motor's finance manager. With plaintiff Ashley Owens's permission, and as part of the financing process, defendant Pierce obtained plaintiff Ashley Owens's consumer credit report. The date of inquiry listed on the report is October 31, 2011.

On October 31, 2011, plaintiff Ashley Owens and her fiancé, Lamont Cradle ("Cradle"), met with defendant Pierce. Defendant Pierce was not, however, able to arrange for financing for plaintiff Ashley Owens. Owens left the premises.

At some time near to October 31, 2011, defendant Pierce filled out a credit application in plaintiff Nina Owens's name. Certain information on this application is inconsistent with the information plaintiff Nina Owens provided in connection with her 2007 vehicle purchase. Defendant Pierce also obtained plaintiff Nina Owens's consumer credit report. The date of inquiry listed on this report is November 1, 2011.

Details surrounding when and how defendant Pierce created the credit application in plaintiff Nina Owens's name are disputed. According to defendant Pierce, she obtained plaintiff Nina Owens's financial information and permission to obtain her consumer report over the telephone. Defendant Pierce testified that while plaintiff Ashley Owens was in her office, Owens called plaintiff Nina Owens on her cell phone. Defendant Pierce asserts that she then spoke with plaintiff

Nina Owens on plaintiff Ashley Owens's cell phone and plaintiff Nina Owens agreed to co-sign for plaintiff Ashley Owens on a motor vehicle loan. Defendant Pierce testified that later that day she called plaintiff Nina Owens back from her office phone line regarding certain questions.

Plaintiff Nina Owens, on the other hand, denies ever speaking with defendant Pierce at this time. She states that the credit application was prepared without her consent and input, and that she never agreed to defendant Pierce obtaining her consumer credit report. Plaintiff Ashley Owens and Cradle also deny that defendant Pierce spoke with plaintiff Nina Owens when they met with defendant Pierce.

Also disputed is whether defendant Pierce was aware at this time of the fact that plaintiff Nina Owens had previously purchased a car from defendant Dixie Motor. Defendant Pierce denies knowing this. Plaintiff Ashley Owens asserts that she told defendant Pierce that plaintiff Nina Owens had purchased a car from defendant Dixie Motor.

At some point after these events, defendant Pierce sent some of the documents from plaintiff Ashley Owens's attempt to purchase a vehicle from defendant Dixie Motor, including plaintiffs' consumer credit reports and credit application forms containing plaintiffs' information, to her friend, defendant Cherry. Defendant Pierce had put together some papers for defendant Cherry, laid them on her desk, and accidentally picked up plaintiffs' information, which also was on her desk, together with the papers for defendant Cherry. She unintentionally put all of these documents into an envelope that she mailed to Cherry at his prison address.

At some point around the end of 2011, defendant Cherry called plaintiffs' home from his prison. Defendant Cherry recited Ashley Owens's name to her, and other identifying information about her. He informed Owens that defendant Pierce had sent him her information.

Plaintiffs informed defendants Pierce and Dixie Motor about these telephone calls. Plaintiffs also contacted the police. Defendant Pierce informed Dixie Motor's general manager, Karen Taintor ("Taintor"), of the incident. Defendant Cherry returned plaintiffs' information to defendant Pierce.

During the police investigation of the matter, defendant Pierce told police that plaintiff Ashley Owens had bad credit so as to show that she did not intend to fraudulently use plaintiff Ashley Owens's information. Defendant Pierce had a small side credit repair business working with "people that have past due credit"and "talk[ing] them through how to clean their credit up." This business gave her some familiarity with credit laws. She also knew from reading Equifax brochures she was given by defendant Dixie Motor that she was not allowed to speak about the content of a customer's credit report. Defendant Pierce was not given any other training on material following credit reporting laws. Defendant Pierce was not given any information or training by defendant Dixie Motor on the consequences of a security breach for customers. However, she knew from her previous work that it was important to keep customer's information secure so as to avoid potential identity theft.

When defendant Pierce was first hired by defendant Dixie Motor, Taintor verbally explained to her Dixie Motor's policies and how defendant Pierce was expected to perform her job. Taintor observed defendant Pierce during customers' finance applications processes early on in defendant Pierce's employment, but defendant Pierce was not supervised in such meetings for purposes of evaluating her work thereafter. After defendant Pierce's initial ninety (90) day probationary period, defendant Dixie Motor did not conduct any performance reviews of defendant Pierce.

Defendant Dixie Motor had a privacy policy stating that it maintained "physical, electronic, and procedural safeguards" to protect customer information "in a manner consistent with applicable

federal and state regulations." Other than a computer risk assessment regarding the use of computers and passwords, defendant Dixie Motor did not have written guidelines for protecting customer information. Defendant Dixie Motor was not aware of the FTC "Safeguards Rule" requirement to maintain such written guidelines.

Defendant Dixie Motor had defendant Pierce store rejected finance application documents in a locked file cabinet in her office. These documents were to be moved to another locked file cabinet in the main office no later than by the end of the year. Defendant Pierce would typically move these rejected applications to locked storage in the main office monthly. It was not expressed to her that she should do this monthly, only that it be done by the end of the year. When defendant Pierce moved these files, there was no process in place for her to ensure none of the files were missing. Defendant Dixie Motor also did not have a policy in place for helping a customer deal with a security breach. Defendant Dixie Motor had never had a prior incident involving a breach of customer security.

Both plaintiffs have testified that they are not aware of anyone using their personal information or accessing their accounts as a result of this incident. However, plaintiffs and their family and friends have testified as to emotional distress resulting from this incident.

COURT'S DISCUSSION

A. Standard of Review

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986) (holding that a factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is

sufficient evidence for a reasonable jury to find for the non-moving party). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate with specific evidence that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Summary judgment is not a vehicle for the court to weigh the evidence and determine the truth of the matter, but to determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247-48. Accordingly, the court must examine the materiality and the genuineness of the alleged fact issues in ruling on this motion. Id. at 248-49.

B. Analysis of Defendant Pierce's Motion

Any person who willfully violates any requirement imposed under the FCRA with respect to any consumer is liable to that consumer for actual or statutory damages, as well as punitive damages. 15 U.S.C. § 1681n.[4] Similarly, a person may incur liability for actual damages for their

[4] 15 U.S.C. § 1681n provides, in relevant part, that:
"(a) In general
Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--
(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

negligent violations of the FCRA. 15 U.S.C. § 1681o.[5] Defendant Pierce moves for summary judgment as to the second count of plaintiffs' complaint. This count alleges a claim against defendant Pierce – as well as defendant Dixie Motor – under 15 U.S.C. §§ 1681n and 1681o, for wrongful procurement of Nina Owens's consumer report in violation of 15 U.S.C. § 1681b(f). Defendant Pierce also moves for summary judgment as to plaintiffs' claims for punitive damages under the FCRA.

1. Plaintiffs' Claims Against Defendant Pierce in Count Two

Defendant Pierce first claims that she is entitled to summary judgment as to count two of Plaintiffs' complaint, asserting wrongful procurement of plaintiff Nina Owens's consumer report. 15 U.S.C. § 1681b(f) provides, in relevant part, that a person "shall not . . . obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section." Thus "a violation of the FCRA occurs when . . . a user either willfully or negligently obtains a consumer's [consumer] report without a permissible purpose . . . ." Cappetta v. GC Servs. Ltd. P'ship, 654 F. Supp. 2d 453, 461 (E.D. Va. 2009). The permissible purposes for obtaining a consumer report are set forth in 15 U.S.C. § 1681b. It is permissible to obtain a non-applicant's credit report only if the non-applicant has authorized the release of the report or the transaction consists of a firm offer of credit or insurance. 15 U.S.C. §

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(2) such amount of punitive damages as the court may allow; and
(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

[5] 15 U.S.C. § 1681o provides, in relevant part that
"(a) In general
Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--
(1) any actual damages sustained by the consumer as a result of the failure; and
(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

1681b(c)(1).

Defendant Pierce first asserts that plaintiffs cannot produce sufficient evidence to show that if she improperly obtained the report, she did so with the specified culpable mental state, that is, either willfully, see 15 U.S.C. § 1681n, or negligently, see 15 U.S.C. § 1681o. Thus, to avoid summary judgment, plaintiffs must show that there is a genuine issue of material fact that defendant Pierce was at least negligent in allegedly wrongfully obtaining plaintiff Nina Owens' consumer report. The court is mindful that "summary judgment is seldom appropriate on whether a party possessed a particular state of mind." Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 418 (4th Cir. 2001).

Here, defendant Pierce points to her deposition testimony that she obtained plaintiff Nina Owens credit information by cell phone when plaintiff Ashley Owens came into her office on or about October 31, 2011, and that plaintiff Nina Owens agreed to co-sign a car loan for plaintiff Ashley Owens's. Pierce Dep. 42. Defendant Pierce notes that this is evidence that she believed she had permission to procure plaintiff Nina Owens's consumer report. Indeed, defendant Pierce testified that during that purported phone conversation plaintiff Nina Owens gave defendant Pierce permission to look at her consumer report. Id. at 44. Defendant Pierce contends that plaintiffs have set forth no evidence which would contradict this evidence as to her mental state.

Plaintiffs hotly dispute whether Nina Owens agreed to co-sign for her daughter, gave defendant Pierce permission to look at her consumer report, and even whether she even spoke with defendant Pierce prior to December 2011. See Nina Owens Dep. 37; Nina Owens Aff. ¶¶ 13-19; Ashley Owens Dep. 138; Ashley Owens Aff. ¶¶ 15-16; Lamont Cradle Aff. ¶¶ 13-16. While this information does not go directly to defendant Pierce's mental state, a reasonable jury could quite

easily infer from this evidence that defendant Pierce did not believe she had permission to procure plaintiff Nina Owens's consumer report. Thus, plaintiffs have demonstrated the existence of a genuine issue of material fact with respect to whether defendant Pierce acted with the requisite culpable mental state.

Defendant Pierce next argues that plaintiff Nina Owens has failed to present evidence which would entitle her to damages from any wrongful procurement of her consumer report. Defendant Pierce notes that plaintiff Nina Owens has presented no evidence that her credit was affected, that she has lost any ability to rent a home, or obtain employment. Defendant Pierce further notes that plaintiff Nina Owens has no knowledge of anyone having used her social security number, or accessed any of her savings accounts or loans. Nina Owens Dep. 66-68.

"Actual damages [under the FCRA] may include economic damages, as well as damages for humiliation and mental distress." Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 239 (4th Cir. 2009). The Fourth Circuit has, however, warned that claims for emotional distress are "easily susceptible to fictitious and trivial claims." Price v. City of Charlotte, N.C., 93 F.3d 1241, 1250 (4th Cir. 1996). Thus, while "a plaintiff's testimony can provide sufficient evidence to support an emotional distress award, we have required a plaintiff to reasonably and sufficiently explain the circumstances of [the] injury and not resort to mere conclusory statements." Sloane v. Equifax Info. Servs., LLC, 510 F.3d 495, 503 (4th Cir. 2007) (quotations omitted).

In this case, plaintiff Nina Owens has produced her own affidavit, as well as affidavits of family and friends, averring that plaintiff has suffered emotional distress arising from defendant Pierce's alleged wrongful procurement of her report and the resulting subsequent distribution thereof. See, e.g., Nina Owens Aff. ¶¶ 47-50, 53 (describing how this incident has caused fear,

anxiety, depression, and sleeplessness); Richard Owens Aff. ¶¶ 6-9 (affidavit from plaintiff Nina Owens's father asserting that after this incident, she has "acted very nervous and seems stressed out" and will frequently ask him to come to his house if she gets home late or strangers are nearby to ensure her safety); Oressa Moore Aff. ¶ 6-11 (noting that plaintiff Nina Owens has cried about the incident several times, tends to stay at home much more than before the incident, and has gone from being "really outgoing" to quiet and depressed); Denise Thomas Aff. ¶¶ 6-13 (describing how plaintiff Nina Owens has become more hesitant and reclusive, and seems depressed and afraid to take phone calls). Accordingly, plaintiff has put forward sufficient evidence of damages sufficient to raise a genuine issue of material fact as to her entitlement thereto.[6]

2. Plaintiffs' Claims for Punitive Damages Against Defendant Pierce Under the FCRA

Defendant Pierce next moves for summary judgment on plaintiffs' claims for punitive damages under the FCRA. Under the FCRA, a plaintiff may recover "such amount of punitive damages as the court may allow" for a defendant's willful violations. 15 U.S.C. § 1681n(a)(2); Robinson, 560 F.3d at 241 n.3. The Supreme Court has explained that in the context of the FCRA, willful acts need not be knowing, but include those acts taken in "reckless disregard of statutory duty." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57-58 (2007). The Court further defined a reckless violation as one which entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known." Id. at 68 (quotations omitted). The Court went on to discuss the risk of harm as "substantially greater than that which is necessary to make [the] conduct

[6] The court further notes that "[a]ctual damages are not a statutory prerequisite to an award of punitive damages under the [FCRA]." Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967, 972 (4th Cir. 1987). As discussed below, there are genuine issues of material fact regarding plaintiff's entitlement to punitive damages. Accordingly, even had plaintiff Nina Owens failed to put forward sufficient evidence of her entitlement to actual damages, this would not be fatal to her claims for damages under count two.

negligent" and "a known or obvious risk that was so great as to make it highly probably that harm would follow." Id. at 69 (quotations omitted). Defendant Pierce argues that plaintiffs have failed to present any evidence that would demonstrate that any violations of the FCRA she allegedly committed were willful.

Plaintiffs have asserted three claims under the FCRA against defendant Pierce in counts two, three, and four of their complaint. As discussed above, as to count two plaintiffs have put forward evidence that defendant Pierce knowingly obtained defendant Nina Owens's consumer report without her permission. Based on this evidence, a reasonable jury could conclude that defendant Pierce willfully violated 15 U.S.C. § 1681b(f). With respect to count three, wherein plaintiffs claim that defendant Pierce used plaintiff Ashley Owens's consumer report for an impermissible purpose, plaintiffs have put forward evidence that defendant Pierce told a police officer that plaintiff Ashley Owens had bad credit so as to show that plaintiff Ashley Owens would not have been "a candidate that [defendant Pierce] would have used to have done fraud, if that was my intentions [sic]." Pierce Dep 79. Such conduct would be intentional, and therefore plaintiffs have provided evidence that defendant Pierce willfully violated 15 U.S.C. § 1681b(f).

Finally, in count four, plaintiffs characterize as reckless defendant Pierce's actions (1) in leaving plaintiffs' consumer reports on her disk in her office, rather than placing them in a locked cabinet, and (2) in mailing her letter to defendant Cherry without first checking that she had not intermingled customer documents with the letter. Such actions do not rise to the level of recklessness. Rather, although careless, they do not entail a risk of harm "substantially greater than that which is necessary to make [the] conduct negligent" or make it "highly probable that harm would follow." Safeco, 551 U.S. at 69. Accordingly, defendant Pierce's motion for summary

judgment as to plaintiffs' claims for punitive damages under the FCRA is denied in part as to counts two and three, and granted in part as to count four.

C. Analysis of Defendant Dixie Motors's Motion

1. FCRA Claims

As discussed above, any person who willfully violates any requirement imposed under the FCRA with respect to any consumer is liable to that consumer for actual or statutory damages, as well as punitive damages. See 15 U.S.C. § 1681n. Similarly, a person may incur liability for actual damages for their negligent violations of the FCRA. See 15 U.S.C. § 1681o. As noted above, plaintiffs allege that defendant Dixie Motor: (1) wrongfully procured plaintiff Nina Owens's consumer report, in violation of 15 U.S.C. § 1681b(f); (2) impermissibly used plaintiff Ashley Owens's consumer report, also in violation of 15 U.S.C. § 1681b(f); and (3) failed to properly dispose of plaintiffs' consumer information under 15 U.S.C. § 1681w and 16 C.F.R. §§ 682.1 *et seq*. Defendant Dixie Motor contends that it is entitled to summary judgment on all of plaintiffs' FCRA claims, because (1) plaintiff has failed to proffer sufficient evidence of damages; (2) it cannot be held directly liable for the FCRA violations alleged by plaintiffs where it did not act willfully or negligently; (3) it cannot be held vicariously liable for the FCRA violations alleged by plaintiffs.

a. Evidence of Damages

First, defendant Dixie Motor asserts that plaintiffs have put forward no evidence actual damages resulting from the alleged violations. Defendant Dixie Motor argues that plaintiffs have not proffered evidence of emotional distress sufficient to survive summary judgment, and that plaintiffs have put forward no evidence of other damages. As discussed in section B.1., *supra*, a plaintiff may recover damages for emotional distress under the FCRA, and plaintiff Nina Owens has

proffered sufficient evidence to create a genuine issue of material fact as to such damages.

Similarly, plaintiffs have proffered testimony that as a result of this incident plaintiff Ashley Owens has nightmares, cries frequently, appears stressed, often feels depressed, has difficulty sleeping, has become defensive with other people, and has experienced problems with her menstrual cycle. See Ashley Owens Aff. ¶¶ 50-59 (DE 93); Lamont Cradle Aff. ¶¶ 28-34 (DE 93-2); Tonae Jones Aff. (DE 93-3); Kimberly Owens Aff. (DE 93-6); Kelly Wilson Aff. (DE 93-7). Accordingly there is a genuine issue of material fact as to damages suffered by plaintiffs as a result of emotional distress. See Robinson, 560 F.3d at 241 (evidence that plaintiff suffered from sleeplessness, headaches, upset stomach, was distraught, that her physical appearance, demeanor, and interactions with family and friends changed, and that she would sometimes cry and scream as a result of her ongoing difficulties with defendant, created a sufficient basis for a reasonable jury to conclude defendant's conduct resulted in plaintiff's damages).

b. Direct Liability

Second, defendant Dixie Motor maintains that it cannot be held directly liable for the FCRA violations alleged by plaintiffs. The court first considers whether defendant Dixie Motor may be held directly liable for the violations of 15 U.S.C. § 1681b(f) alleged in counts two and three. Pursuant to § 1681b(f), a "person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section." Furthermore, where a report is initially obtained for a permissible purpose, but the user of the report goes on to use that report for other impermissible purposes, such conduct violates § 1681b(f). See, e.g., Lukens v. Dunphy Nissan, Inc., No. Civ.A. 03-767, 2004 WL 1661220, at *3 n.2 (E.D. Pa. July 26, 2004); Chester v. Purvis, 260 F. Supp. 2d 711, 718 (S.D.

Ind. 2003) ("[A]n individual may neither obtain nor use a consumer credit report for any purposes unrelated to the list of enumerated purposes . . . ."); Castro v. Union Nissan, Inc., No. 01 C 4996, 2002 WL 1466810, at *3 (N.D. Ill. July 8, 2002) ("[A] person or entity that uses or obtains a consumer's credit report for an improper purpose may be found civilly liable to that consumer.").

Plaintiff alleges in count two that defendant Dixie Motor violated 15 U.S.C. § 1681b(f) when defendant Pierce obtained plaintiff Nina Owens's consumer report, allegedly without her consent. Plaintiff alleges in count three that defendant Dixie Motor violated § 1681b(f) when defendant Pierce sent plaintiff Ashley Owens's consumer report to defendant Cherry, and told law enforcement plaintiff Ashley Owens has bad credit. The FCRA does not authorize reports to be obtained or used in this manner. See 15 U.S.C. § 1681b.

It is undisputed, however, that it was defendant Pierce, rather than defendant Dixie Motor itself, who obtained plaintiff Nina Owens's report and who used plaintiff Ashley Owens's report. Plaintiff argues that defendant Dixie Motor may nevertheless be held directly liable under the FCRA if it was negligent or willful in allowing employee misconduct (in this case the purported misconduct by defendant Pierce) to occur. Plaintiffs are incorrect.

In Ausherman v. Bank of America Corp., 352 F.3d 896 (2003), the Fourth Circuit considered a similar claim. In Ausherman, the plaintiffs contended that defendant – a user of credit reports – was liable under 15 U.S.C. § 1681o "for negligently failing to implement and maintain procedures to prevent violations of the [FCRA]" where plaintiffs' credit reports appeared to have been wrongfully obtained by defendant.[7] Id. at 900. The Fourth Circuit rejected this claim, noting that

[7] There was some dispute in Ausherman as to whether or not defendant actually accessed or obtained plaintiffs' consumer reports. There was, however, evidence suggesting defendant obtained these reports where it was undisputed, that defendant had been invoiced for these reports by TransUnion, a credit reporting agency.

plaintiffs failed to show any requirement that a user of credit reports have in place procedures to prevent violations of the FCRA. Id. at 901. In this case also, plaintiffs assert that defendant Dixie Motor is directly liable for the FCRA violation alleged in count two "because its inadequate supervision and lax standards allowed [defendant] Pierce to improperly access credit reports." Resp. Opp'n to Def. Dixie Motors's Mot. Summ. J. 12. Similarly plaintiffs assert defendant Dixie Motor is directly liable for the FCRA violation alleged in count three as proper policies would have prevented defendant Pierce from improperly using plaintiff Ashley Owens's credit report. Such arguments are foreclosed by Ausherman.

Plaintiffs cite the Fourth Circuit's opinion in Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987), for the proposition that inadequate supervision or policies can create direct liable for employers under the FCRA when their employees improperly obtain or use consumer reports. Yohay, however, does not establish any such proposition. In that case, while the Fourth Circuit discussed the defendant employer's lax policies, see id. at 969, 973, the court upheld the jury's verdict that the defendant employer was directly liable for willfully violating the FCRA based upon evidence that the bank's manager willfully partook in the FCRA violation at issue. Id. at 972. By contrast, plaintiffs have not introduced such evidence of direct action by defendant Dixie Motor here. Therefore, there is no genuine issue of material fact that defendant Dixie Motor is not directly liable for the violations of the FCRA alleged in counts two and three.

The court next considers whether defendant Dixie Motor may be held directly liable for the violation of 15 U.S.C. § 1681w and 16 C.F.R. §§ 682.1 *et seq.* alleged in count four. 15 U.S.C. § 1681w, instructs various agencies to "issue final regulations requiring any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived

from consumer reports for a business purpose to properly dispose of any such information or compilation."

As relevant here, 15 U.S.C. § 1681w is implemented by 16 C.F.R. §§ 682.1 *et seq*. 16 C.F.R. § 682.1 defines disposal, in relevant part, as "[t]he discarding or abandonment of consumer information." In 16 C.F.R. § 682.3, the regulation requires that "[a]ny person who maintains or otherwise possesses consumer information for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal." 16 C.F.R. § 682.3. The section goes on to provide as an example of a reasonable measure a policy requiring the "burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practicably be read or reconstructed." Id.; see also 15 U.S.C. §§ 1681n, 1681o (providing causes of action for the willful or negligent violations of any requirement imposed under the FCRA).

Here, plaintiffs have proffered some evidence to the effect that defendant Dixie Motor did not have reasonable policies in place to safeguard the customer information they held, thereby allowing defendant Pierce to improperly dispose of plaintiffs' information by mailing it to defendant Cherry. There is, however, no evidence regarding defendant Dixie Motor's policies *with respect to disposal*, only their policies, or lack thereof, with respect to safeguarding information it its possession. Thus, plaintiffs have presented no evidence that defendant Dixie Motor's policies and procedures regarding the manner in which consumer information should be disposed of violated the FCRA, or caused them any harm. Therefore defendant Dixie Motor cannot be held directly liable on count four.

c. Vicarious Liability

Third, defendant Dixie Motor argues that it cannot be held vicariously liable under the FCRA for the actions of defendant Pierce in counts two, three, and four. The FCRA is silent as to the existence and scope of vicarious liability. The Fourth Circuit, however, has held that employers may be held vicariously liable for their employees violations of the FCRA. See Yohay 827 F.2d at 972-73 (stating that defendant could be held vicariously liable for the FCRA violations of its agent under either a theory of actual authority, or apparent authority).

Plaintiffs in this case argue that defendant Dixie Motor should be held vicariously liable for the actions of defendant Pierce. An employer can be held vicariously liable for the actions of their employees under various situations. First, an employer may be held liable for its employee's acts if the employer authorized such conduct, either expressly or implicitly ("actual authority"). In re Atl. Fin. Mgmt., Inc., 784 F.2d 29, 31 (1st Cir. 1986).[8] An employer may also be liable under the *respondeat superior* rule, in which an employer is liable for acts committed by an employee if the employee acts (1) in furtherance of his or her employer's business, and (2) within the scope of his or her employment. Harris v. United States, 718 F.2d 654, 656 (4th Cir. 1983). A third form of vicarious liability is apparent authority, under which an employer is liable to a third party for the acts of an employee with respect to that third party, when the employee exercises a power they do not have, if the third party "could reasonably interpret acts or omissions of the [employer] as indicating that the [employee] has authority to act on behalf of the [employer]." Metco Prods., Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989).

[8] When considering the imposition of vicarious liability under the FCRA, courts look to the federal common law of agency, rather than state agency law. See, e.g., Del Amora v. Metro Ford Sales and Serv., Inc., 206 F. Supp. 2d 947, 951 (N.D. Ill. 2002).

A closely related and similar doctrine to apparent authority is what has been called the "aided-in-the-agency- relation" doctrine.[9] Sometimes conflated with apparent authority, the Supreme Court has explained the subtle difference between situations when the aided-in-the-agency-relation rule applies, and when apparent authority analysis applies:

> As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power. . . . When a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the . . . aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 759-60 (1998). Under the aided in-the-agency-relation rule, an employer may be held liable for the torts of an employee if the employee "was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2)(d). Because "most workplace tortfeasors are aided in accomplishing their tortious objective by the exists of the agency relation" through proximity "[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself." Ellerth, 524 U.S. at 760.

In this case, defendant Dixie Motor has failed to show that there is no genuine issue of material fact that it cannot be held vicariously liable for the alleged acts of defendant Pierce. With respect to the allegations in count two that defendant Pierce wrongfully procured the credit report of plaintiff Nina Owens, defendant Dixie Motor has failed to show that *respondeat superior* liability would not apply. Not only is there evidence that defendant Pierce obtained plaintiff Nina Owens's consumer report without her consent, Nina Owens Dep. 37; Nina Owens Aff. ¶ 18, but there is also evidence that defendant Pierce obtained this consumer report in an effort to obtain financing for

[9] Indeed, in the Restatement (Second) of Agency, both the apparent authority and the aided-in-the-agency-relation doctrine are described in the same sub-bullet. See Restatement (Second) of Agency § 219(2)(d).

plaintiff Ashley Owens so that plaintiff Ashley Owens could purchase a car from defendant Dixie Motor. See Pierce Dep. 42-43. Defendant Pierce's actions in attempting to obtain financing for plaintiff Ashley Owens so that plaintiff Ashley Owens could purchase a car from defendant Dixie Motor would be actions undertaken for the benefit of defendant Dixie Motor. And as finance manager for defendant Dixie Motor, these actions would also be within the scope of her employment. As the Supreme Court has explained:

> An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. . . . For example, when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies.

Ellerth, 524 U.S. at 756. Accordingly, defendant Dixie Motor has not shown that there is no genuine issue of material fact with respect to its *respondeat superior* liability on count two.

In the alternative, the evidence may support a finding that defendant Pierce was aided in purportedly wrongfully obtaining plaintiff Nina Owens's consumer report by her agency relation with defendant Dixie Motor. It was by virtue of her position as defendant Dixie Motor's finance manager that she was able to obtain this report. See Del Amora, 206 F. Supp. 2d at 953 (finding that Metro Ford was subject to aided-in-the-agency liability where its employee "was able to obtain Del Amora's credit report solely by virtue of his position with Metro Ford and his resultant access to Metro Ford's consumer reporting facilities"). Accordingly, summary judgment for defendant Dixie Motor with respect to count two as to vicarious liability is not warranted.

Similarly, aided-in-the-agency liability applies with respect to plaintiffs' claims in counts three and four that defendant Pierce misused plaintiff Ashley Owens's consumer report, and failed to properly dispose of information derived from plaintiffs' consumer reports. It was only by virtue

of her position as defendant Dixie Motor's finance manager that defendant Pierce was able to obtain access to these reports. Therefore she was aided in the agency relation in any violation of the FCRA in her use of plaintiff Ashley Owens's report, and any failure on her behalf to properly dispose of the information in plaintiffs' consumer reports.

Defendant Dixie Motor argues that aided-in-the-agency liability is not appropriate in the FCRA context. It notes that no case in this circuit has specifically established the propriety of aided-in-the-agency liability in the FCRA context. It further points out that some district courts have declined to base vicarious liability on the aided-in-the-agency or apparent authority rules. In light of the application of the apparent authority rule in Yohay, and the similarities between the apparent authority rule and the aided-in-the-agency rule, the court finds such arguments unavailing.

Defendant Dixie Motor also contends that liability under the aided-in-the-agency rule is inapplicable here where it asserts there is nothing more than the employment relation itself. This argument is without merit. It was not by sole virtue of the fact that defendant Pierce was employed by defendant Dixie Motor that she was able to access plaintiffs' consumer reports. Rather, it was because her employment specifically empowered her to obtain these reports. Cf. Mikels v. City of Durham, N.C., 183 F.3d 323, 332 (4th Cir. 1999) (noting, in a Title VII case, that "harassing conduct that culminates in a 'tangible employment action' against the victim is necessarily conduct 'aided by the agency relation,' since it can only be taken by supervisory employees empowered by their employers to take such action").

The only other circuit court of appeals to have addressed vicarious liability in the FCRA context is the Sixth Circuit in Jones v. Federated Financial Reserve Corp., 144 F.3d 961 (6th Cir. 1998). The facts of Jones are quite similar to those in the case at bar. In Jones, the plaintiff's ex-

husband had a friend, Caylor, who worked for the defendant. Id. at 963. Caylor was authorized to request consumer reports from clerks who operated defendant's credit report request system, and, at plaintiff's ex-husband's behest, requested and received a copy of plaintiff's consumer report. Jones, which was decided one month before the Supreme Court clarified the distinction between apparent authority and the aided-in-the-agency rule, held that defendant was vicariously liable for Caylor's violation of the FCRA under the apparent authority doctrine.

For the foregoing reasons, the court finds that defendant Dixie Motor may be held vicariously liable for the alleged violations of defendant Pierce. Defendant Dixie Motor may be held vicariously liable on count two under a theory of *respondeat superior*. Additionally, defendant Dixie Motor may be held vicariously liable under an aided-in-the-agency-relation theory on counts two, three, and four.

2. State Law Claims

Plaintiffs also assert a variety of claims under North Carolina law against defendant Dixie Motor. As noted above, these are claims for violations of the North Carolina Identity Theft Protection Act ("ITPA"), N.C. Gen. Stat. §§ 75-60 *et seq.*; violations of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1 *et seq.*; negligence per se for failure to comply with the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. § 6801 *et seq.*; breach of contract, and infliction of emotional distress.

Defendants move for summary judgment on all of these claims, advancing numerous arguments. Defendants assert: (1) that plaintiffs' ITPA claims fail; (2) that plaintiffs have failed to forecast evidence of sufficiently severe emotional distress to recover for their claims under North Carolina state law; (3) that all of plaintiffs' state law claims must fail where they cannot be held

accountable for the actions of defendant Pierce under the North Carolina law of agency; (4) that many of plaintiffs' state law claims are preempted by federal law; (5) that plaintiffs' claim for breach of contract must fail; and (6) that plaintiffs are not entitled to punitive damages from defendant Dixie Motor.

a. Plaintiffs' ITPA Claims

Plaintiffs contend that defendant Dixie Motor failed to take reasonable measures to protect against unauthorized access to, or use of, their information in connection with or after its disposal in violation of N.C. Gen. Stat. § 75-64 and failed to properly notify them of the security breach of their information in violation of N.C. Gen. Stat. § 75-65.[10]

With respect to plaintiffs' claim under N.C. Gen. Stat. § 75-65, defendant Dixie Motor argues that plaintiffs have failed to support this claim as they have shown no damages accruing to them as a result of defendant Dixie Motor's failure to properly notify them. N.C. Gen. Stat. § 75-65 explicitly provides that "[n]o private right of action may be brought by an individual for a violation of this section unless such individual is injured as a result of the violation." Plaintiffs have forecast no evidence that any injury, emotional or otherwise, has accrued to them from defendant Dixie Motor's alleged failure to properly notify them of the security breach. Accordingly defendant will be granted summary judgment on plaintiffs' claim under N.C. Gen. Stat. § 75-65.

Plaintiffs' claim under N.C. Gen. Stat. § 75-64 must also fail. The text of this law is quite similar to 16 C.F.R. §§ 682.1 *et seq*. Pursuant to N.C. Gen. Stat. § 75-64, "[a]ny business that conducts business in North Carolina and any business that maintains or otherwise possesses personal information of a resident of North Carolina must take reasonable measures to protect against

[10] Plaintiffs' complaint also alleges a violation of N.C. Gen. Stat. § 75-62, but plaintiffs have abandoned this claim.

unauthorized access to or use of the information in connection with or after its disposal." Disposal is defined, in relevant part, as "[t]he discarding or abandonment of records containing personal information." N.C. Gen. Stat.§ 75-61(7)(a). The statute notes that reasonable measures include "[i]mplementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing personal information so that information cannot be practicably read or reconstructed." N.C. Gen. Stat§ 75-64(b)(1).

As discussed above in the context of plaintiffs' claims for violation of 15 U.S.C. § 1681w, while plaintiffs have presented evidence regarding a failure to safeguard information, they have presented no evidence regarding defendant Dixie Motor's policies and procedures, or lack thereof. regarding disposal of information. Thus, there is no evidence that these procedures were unreasonable, nor is there any showing that it was an unreasonable disposal policy that caused plaintiffs any harm. Based on the foregoing, defendant's motion for summary judgment with respect to plaintiffs' claims under the ITPA is granted.

b. Evidence of Severe Emotional Distress

Defendant Dixie Motor contends that to recover on any of their state law claims, plaintiffs must show that they suffered severe emotional distress as defined by North Carolina law, and that plaintiffs have not done so. The law in North Carolina is clear that a plaintiff must show severe emotional distress to recover on a common law claim for negligent or intentional infliction of emotional distress. See Johnson v. Ruark Obstetrics & Gynecology Associates, P.A., 327 N.C. 283, 304 (1990) (noting that a successful claim for negligent infliction of emotional distress a plaintiff must show, among other things, that the plaintiff suffered severe emotional distress); Dickens v. Puryear, 302 N.C. 437, 452 (1981) (stating that one of the elements a plaintiff must prove to succeed

on a claim for intentional infliction of emotional distress is that the plaintiff suffered severe emotional distress). The parties dispute, however, whether such a showing is required on plaintiffs' remaining state law claims.

As an initial matter, the court notes that under North Carolina law, "as a general rule, damages for mental anguish suffered by reason of the breach [of a contract] are not recoverable." Lamm v. Shingleton, 231 N.C. 10, 14 (1949). This is because, in the main, contracts are "entered into for the accomplishment of a commercial purpose. Pecuniary interests are paramount." Stanback v. Stanback, 297 N.C. 181, 192, (1979) disapproved of on other grounds by Dickens v. Puryear, 302 N.C. 437 (1981). Thus, a plaintiff may only recover damages for mental anguish arising out of a breach of contract when the following conditions are met:

> First, that the contract was not one concerned with trade and commerce with concomitant elements of profit involved. Second, that the contract was one in which the benefits contracted for were other than pecuniary, I. e. [sic], one in which pecuniary interests were not the dominant motivating factor in the decision to contract. And third, the contract must be one in which the benefits contracted for relate Directly [sic] to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which Directly [sic] involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected.

Id. at 194.

In this case, plaintiffs argue that the purported contract they entered into with defendant Dixie Motor was one in which defendant Dixie Motor agreed "to keep private financial information concerning credit applicants safe and secure." Compl. ¶ 190. Any such contract is concerned with trade and commerce where it relates primarily to the arranging of financing to purchase an automobile from defendant Dixie Motor. Further, pecuniary interests are the dominant motivating factor behind such a contract. Thus, damages for emotional distress are not recoverable under

plaintiffs' breach of contract claim.

The court next considers whether plaintiffs have proffered evidence of severe emotional distress. Severe emotional distress "'means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.'" Waddle v. Sparks, 331 N.C. 73, 83 (1992) (quoting Johnson, 327 N.C. at 304). The North Carolina Supreme Court further explained that:

> "It is only where [emotional distress] is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity."

Id. (quoting Restatement (Second) of Torts § 46 cmt. n. j (1965)). Although "proof of severe emotional distress does not require medical evidence or testimony," Kimes v. Lab. Corp. of Am., Inc., 313 F. Supp. 2d 555, 568 (M.D.N.C. 2004) (citing Coffman v. Roberson, 153 N.C. App. 618, 627-28 (2002)), a plaintiff must produce forecast evidence of "'severe and disabling' psychological problems." Waddle, 331 N.C. at 85.

As noted above, the evidence put forward by plaintiffs would show that plaintiff Nina Owens suffers from stress, sleeplessness, cries frequently, and has become more reserved and depressed; plaintiff Ashley Owens, the evidence shows she also suffers from stress, sleeplessness and nightmares, cries often, and has experienced problems with her menstrual cycle. See Ashley Owens Aff. ¶¶ 50-59; Nina Owens Aff. ¶¶ 46-50; Lamont Cradle Aff. ¶¶ 28-34; Tonae Jones Aff.; Richard Owens Aff.; Oressa Moore Aff.; Kimberly Owens Aff.; Kelly Wilson Aff.; Denise Thomas Aff. Such evidence, however, is insufficient to meet the high bar required to show severe emotional

distress. See, e.g., Hugger v. Rutherford Inst., 63 F. App'x 683, 690 (4th Cir. 2003) (medical reports of worsening anxiety and for one plaintiff, and routine medication management of depression for another were insufficient to show severe emotional distress); Schult v. Int'l Bus. Machines Corp., No. 5:02-CV-357-BR, 2003 WL 24046341, at *3 (E.D.N.C. Oct. 30, 2003) (evidence of plaintiffs' sleeplessness, nightmares, lost weight, anxiety, nausea, and feelings of depression were insufficient to show severe emotional distress); Estate of Hendrickson ex rel. Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 156-57 (2002); Johnson v. Scott, 137 N.C. App. 534, 539-40 (2000).

Where plaintiffs have failed to put forward evidence of severe emotional distress, defendants are entitled to summary judgment on plaintiffs' claim for infliction of emotional distress. The court must now determine and whether plaintiffs must show severe emotional distress to recover on their state law claims under the UDTPA, and their claim for negligence per se.

Such a showing is not required for plaintiffs' UDTPA claims. To prevail on a claim under the UDTPA plaintiffs must show that "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." Dalton v. Camp, 353 N.C. 647, 656 (2001). There is no requirement for severe emotional distress, only that the act proximately caused the plaintiff injury. Therefore plaintiffs need not show they suffered severe emotional distress to recover under the UDTPA. See Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 420, 423-24 (affirming grant of summary judgment with respect to plaintiff's claim for negligent infliction of emotional distress where plaintiff had failed to show any evidence of severe emotional distress, but reversing summary judgment with respect to certain of plaintiff's claims under the North Carolina Debt Collection Act,

N.C. Gen. Stat. § 75-50 *et seq.*).

Nor is such a showing required for plaintiffs' claim for negligence per se for failure to comply with the GLBA. "In North Carolina, as generally, the elements of the prima facie negligence claim are the familiar ones: (1) a duty by defendant to conform his conduct to a particular standard of care, (2) breach of that duty, (3) proximate causation, and (4) injury." Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160 (4th Cir. 1988). North Carolina courts have defined "actual damage to mean some actual loss, hurt or harm resulting from the illegal invasion of a legal right." Hawkins v. Hawkins, 101 N.C. App. 529, 532 (1991) (citing 22 Am.Jur.2d Damages § 2 (1988)) aff'd, 331 N.C. 743 (1992). "'General damages ... include such matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.]'" Iadanza v. Harper, 169 N.C. App. 776, 779 (2005) (alterations in original, quoting 22 Am.Jur.2d Damages § 42 (2003)).

In Iadanza, the plaintiff filed suit against defendant asserting claims for professional negligence, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. Id. at 777. The North Carolina Court of Appeals held that plaintiff's claims for compensatory damages included claims for pain and suffering, and that to show mental pain and suffering, no showing of physical injury was necessary. Id. at 779-80. The court further held that while "severe emotional distress" was an element of claims for negligent or intentional infliction of emotional distress, it was not a needed for mental pain and suffering to be compensable. Id. at 780; see also Klinger v. SCI N. Carolina Funeral Servs., Inc., 189 N.C. App. 404, 2008 WL 706961, at *5 (Mar. 18, 2008) (unpublished table decision) (jury could properly return a verdict for damages for emotional pain and suffering for negligent mishandling of a corpse while finding that claims for

infliction of emotional distress failed for lack of severe emotional distress). Thus plaintiffs' negligence per se claim does not fail due to a lack of severe emotional distress.

c. Agency

Defendant Dixie Motor also argues that it cannot be held liable on any of plaintiffs' state law claims as there is no basis to hold it vicariously liable for those claims under North Carolina law. Defendant Dixie Motor asserts that it cannot be held responsible for torts of its employee, defendant Pierce, committed outside the course of her employment, and that her actions in mailing plaintiffs' financial information to defendant Cherry was outside the course of her employment. "[W]here the employee's action is not expressly authorized or subsequently ratified, an employer is liable only if the act is committed within the scope of and in furtherance of the employer's business." Medlin v. Bass, 327 N.C. 587, 593 (1990) (internal quotations and alterations omitted).

Nearly of plaintiffs' remaining state law claims, however, are lodged directly against defendant Dixie Motor and do not rely on it being vicariously liable for actions of defendant Pierce.[11] Both plaintiffs' breach of contract claim, and their negligence per se claim, are made directly against defendant Dixie Motor for its failure to properly safeguard their information.

In their claims under the UDTPA plaintiffs contend, first, that defendant Dixie Motor's representations to the public regarding the safeguards it had in place to protect customer information were false and so were in violation of the UDTPA. Compl. ¶ 174.a. This claim also does not rely on any agency liability.

The only remaining state law claim is plaintiffs' second UDTPA claim that defendant Dixie Motor is liable under the UDTPA for the allegedly falsified credit application created in plaintiff

[11] The court will not consider the applicability of this argument against claims which plaintiffs have abandoned or on which it has already determined summary judgment should be granted.

Nina Owens's name. Id. ¶ 174.b. This conduct is alleged to have been performed by defendant Pierce, but does not relate to her actions in sending plaintiffs' information to defendant Cherry. As discussed above, there is evidence that defendant Pierce's actions in purportedly filling out a false credit application in plaintiff Nina Owens's name was part of an effort to obtain financing for plaintiff Ashley Owens so that plaintiff Ashley Owens could purchase a car from defendant Dixie Motor. See Pierce Dep. 42-43. In that case, those actions would also be within the scope of and in furtherance of defendant Dixie Motor's business, and vicarious liability therefor would be proper. See Medlin, 327 N.C. at 593 ("To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." (quoting Troxler v. Charter Mandala Ctr., Inc., 89 N.C. App. 268, 271 (1988)). The fact that defendant Pierce's alleged actions in creating a false credit application may violate defendant Dixie Motor's policies is no defense to liability. See Johnson v. Lamb, 273 N.C. 701, 707 (1968) ("If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of respondeat superior, . . . the employee's violation of instructions being no defense to the employer."). Based on the foregoing, summary judgment on plaintiffs' remaining state law claims on the ground of a lack of vicarious liability is improper.

d. Preemption

Defendant Dixie Motors also contends that all of plaintiffs' remaining state law claims are preempted by federal law.[12] The Constitution instructs that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[12] The court only considers whether plaintiffs' remaining state law claims are preempted, and does not examine whether claims upon which it has already granted summary judgment would also be preempted.

U.S. CONST. art. VI, cl. 2. Thus, "state law that conflicts with federal law is without effect." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quotations omitted). In considering whether a state law is preempted the court bears in mind that "the purpose of Congress is the ultimate touchstone in every pre-emption case." Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quotations omitted). The court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id.

> Preemption generally occurs in one of three circumstances. First, a federal law preempts state law when Congress expressly declares its intention that state law be preempted. Second, a federal law impliedly preempts state law when Congress has occupied the field by regulating so pervasively that there is no room left for the states to supplement federal law. Third, federal law preempts state law when the federal and state laws actually conflict.

Washington Gas Light Co. v. Prince George's Cnty. Council, 711 F.3d 412, 419-20 (4th Cir. 2013) (quotations omitted). Generally "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Cipollone, 505 U.S. at 517

Defendant Dixie Motor contends that plaintiffs' remaining state law claims, are preempted by the FCRA. Defendant Dixie Motor first argues that plaintiffs' remaining claims are preempted by the FCRA under 15 U.S.C. § 1681h. This section provides that:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence *with respect to the reporting of information* against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C.§ 1681h(e) (emphasis added). As the text of the statute makes clear, it preempts certain

actions relating to improper reporting of consumer information. Here, none of plaintiffs' remaining state law causes of action relate to such reporting of their information. Accordingly none of plaintiffs' remaining state law claims are preempted by 15 U.S.C. § 1681h. See Wells v. Craig & Landreth Cars, Inc., No. 3:10-CV-376, 2012 WL 6487392, at *3 (W.D. Ky. Dec. 13, 2012)(§ 1681h(e) did not preempt plaintiff's state law claims based on a car dealership's accessing her consumer report without authorization); Pinckney v. SLM Fin. Corp., 433 F. Supp. 2d 1316, 1321 (N.D. Ga. 2005) (where plaintiff's state law claims were not based on information disclosed pursuant to sections 1681g, 1681h or 1681m or information disclosed by a user of a consumer report who took adverse action against him based on the content of the consumer report, the his claims were not preempted by section 1681h(e)).

Defendant Dixie Motor also contends that plaintiffs' claims under the UDTPA are preempted by the FCRA under 15 U.S.C. § 1681t. This section provides, first, that

> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a). As the Fourth Circuit has held, this provision "generally permit[s] state regulation of the consumer reporting industry." Ross v. F.D.I.C., 625 F.3d 808, 812 (4th Cir. 2010). However, in 1996, Congress amended the FCRA adding a stronger preemption provision at 15 U.S.C. § 1681t(b), noting that no state law may impose requirements or prohibits with respect to various conduct required or subject matter regulated under numerous portions of the FCRA. Applicable to this case is 15 U.S.C. § 1681t(b)(5)(I), which provides that no state law may impose requirements or prohibitions with respect to conduct regulated by 15 U.S.C. § 1681w. As discussed

above, 15 U.S.C. § 1681w, implemented by 16 C.F.R. §§ 682.1 *et seq.*, governs the proper disposal of consumer information derived from consumer reports for a business purpose.

Although not expressly discussed by defendant Dixie Motor in its arguments regarding preemption under 15 U.S.C. § 1681t(b), it is clear that plaintiff's claim for breach of contract, insofar as it is premised on a failure to properly dispose of plaintiffs' credit reports, is preempted by 15 U.S.C. § 1681t(b)(5)(I) and 15 U.S.C. § 1681w

Plaintiffs' UDTPA claims, however, are not preempted by 15 U.S.C. § 1681t(b)(5)(I) where neither defendant Dixie's purported false representations regarding its system of safeguards nor its creation of an assertedly false credit application in plaintiff Nina Owens's name constitute conduct governed by 15 U.S.C. § 1681w. Nor do any of the other preemption provisions of 15 U.S.C. § 1681t(b) apply to these claims. See, 15 U.S.C. § 1681t(b).

Defendant Dixie Motor contends that all claims made under the UDTPA are preempted by 15 U.S.C. § 1681t, citing the case of Ross v. Washington Mutual Bank, 566 F. Supp. 2d 468 (E.D.N.C. 2008) and the Fourth Circuit's opinion affirming in Ross v. F.D.I.C., 625 F.3d 808 (4th Cir. 2010). Defendants' reliance on the Ross case is misplaced. In that case, the plaintiff brought a claim under the UDTPA for false reporting of credit information. Id. at 808. Fourth Circuit affirmed the district court's finding that plaintiff's UDTPA claim was preempted under 15 U.S.C. § 1681t(b)(1)(F). This provision preempts state laws which impose requirements or prohibitions with respect to 15 U.S.C. § 1681s-2, which relates to responsibilities to properly furnish consumer information to Consumer Reporting Agencies. Id. Contrary to defendant Dixie Motor's suggestion, the Ross case does not stand for the proposition that all UDTPA claims are preempted. Rather, it only examines a UDTPA claim that deals with subject matter regulated by 15 U.S.C. § 1681s-2,

which the Fourth Circuit held was preempted by § 1681t(b)(1)(F). Plaintiffs' UDTPA claim in this case, does not have to do with improper reporting of credit information, thus Ross lends defendant Dixie Motor no support.

Finally, defendant Dixie Motor appears to argue that together the FCRA and GLBA occupy the field and thus preempt state statutes operating in this area. To the extent they propound such an argument, it is without merit. "The FCRA makes clear that it is not intended to occupy the entire regulatory field with regard to consumer reports." Davenport v. Farmers Ins. Grp., 378 F.3d 839, 842 (8th Cir. 2004) (noting the language in 15 U.S.C. § 1681t(a) regarding the preemption of inconsistent state laws). Similarly, the GLBA states that it "shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." 15 U.S.C. § 6807(a). It goes on to explain that state laws are not inconsistent with the GLBA if the protection it affords any person "is greater than the protection provided under this subchapter and the amendments made by this subchapter." 15 U.S.C. 6807(b). Furthermore, the court is mindful of the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wyeth, 555 U.S. at 565. Thus, where the statutory language of both the FCRA and GLBA evinces an intent not to occupy the field, the court finds there is no field preemption of state law causes of action.

e. Breach of Contract

Plaintiffs' allege that defendant Dixie Motor breached express and implied contractual duties to safeguard their private information. Defendant Dixie Motor argued at hearing that it should be

granted summary judgment on this claim for multiple reasons. First, defendant Dixie Motor contends that plaintiffs have no cause of action for breach of contract where they seek damages for emotional distress. Although the court has held that plaintiffs cannot recover for their emotional distress under this claim this does not defeat their claim. In North Carolina, "[w]here [a] plaintiff proves breach of contract he is entitled at least to nominal damages." Robbins v. C. W. Myers Trading Post, Inc., 251 N.C. 663, 666 (1960) (quotations omitted).

Next, defendant Dixie Motor argues that there can be no contract between it and plaintiffs because plaintiffs gave nothing of value to serve as consideration. Consideration "consists of some benefit or advantage to the promisor, *or* some loss or detriment to the promisee." Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 147 (1964). Here, plaintiffs gave defendants their personal financial information, which defendants were able to use in an effort to obtain financing for plaintiffs with the goal of plaintiffs purchasing a vehicle from defendant Dixie Motor. Thus, this financial information was valuable consideration, which would be sufficient to support a contract regarding the safeguarding of plaintiffs' information. contract. See Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 215-16 (1981) (holding that plaintiffs' relinquishing the right to have his child educated by defendant was sufficient consideration to support any agreement to refund tuition paid).

Finally, defendant Dixie Motor contends that this claim must fail where defendants have failed to allege a specific term of the alleged contract that was breached. "In an action for breach of a building or construction contract-just as in any other contract case-the complaint must allege the existence of a contract between plaintiff and defendant, the specific provisions breached, The facts constituting the breach, and the amount of damages resulting to plaintiff from such breach."

Cantrell v. Woodhill Enterprises, Inc., 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968). Plaintiffs allege that defendant Dixie Motor "made various representations in its published privacy policy that it would safeguard customers' private information" and that it "also had an implied contractual duty to keep private financial information concerning credit applicants safe and secure." Compl. ¶¶ 189-90. Plaintiffs allege that these purportedly contractual terms were violated by defendant Dixie Motor through its actions described previously in the complaint. Id. ¶ 191. Thus, this claim does not fail for a lack of specificity.

Polygenix Int'l , Inc. v. Polyzen, Inc., 133 N.C. App. 245 (1999), cited by defendants, is distinguishable There, in considering whether plaintiff was properly sanctioned under N.C. Gen. Stat. § 1A-1, Rule 11, the court found that allegations that defendant's conduct violated the "letter, intent, and spirit" of an agreement between the parties did not support plaintiff's claim for breach of contract. Id. at 252-53. Plaintiffs' pleading is far more detailed than that in Polygenix, where they allege specific contractual duties, and the breach thereof.

Therefore, although plaintiffs cannot recover damages for emotional distress under this claim, defendant Dixie Motor's motion for summary judgment with respect to plaintiffs' breach of contract claim is denied.

f. Punitive Damages

Defendant Dixie Motor moves, finally, for summary judgment on plaintiffs' request for punitive damages on plaintiffs' state law claims. "Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a).

"'Malice' means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5). "'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat.§ 1D-5(7).

"Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." N.C. Gen. Stat. § 1D-15(c). Rather there must be direct action by the defendant. Thus, "[p]unitive damages may be awarded against . . . a corporation, [only if] the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." Id.

"Punitive damages shall not be awarded against a person solely for breach of contract." N.C. Gen. Stat. § 1D-15(d). "Nevertheless, where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages." Newton v. Standard Fire Ins. Co., 291 N.C. 105, 111 (1976). However, "the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." Shore v. Farmer, 351 N.C. 166, 170 (1999).

Punitive damages are not available for violations of the UDTPA. See Holloway v. Wachovia Bank & Trust Co., N.A., 339 N.C. 338, 348 (1994) (citing Pinehurst, Inc. v. O'Leary Brothers Realty, Inc., 79 N.C. App. 51, 63 (1986) for the proposition that punitive damages are not recoverable under Chapter 75). Accordingly, plaintiffs' claim for punitive damages under this statute must fail.

Plaintiffs' negligence per se claim rests upon defendant Dixie Motor's asserted breach of duty to have in place proper security procedures to protect their private information. Plaintiffs have put forward evidence that defendant Dixie Motor gave defendant Pierce little to no training regarding how to keep customers' personal information safe beyond initially verbally describing the job and expectations to her, and providing her with an Equifax brochure on following credit reporting laws. See Pierce Dep. 16-18 40. However, defendant Pierce had eleven (11) years prior experience working as a finance manager at other automobile dealerships. Id. at 14. When she first began working at defendant Dixie Motor, Taintor spoke with her about company policies and expectations, and observed her during a customer's finance application process. Id. at 18-19. She was rarely, if ever, supervised during this process thereafter. Id. Nor was she given any written policies or procedures. Id. at 18. Defendant Dixie Motor was not aware of its objection under 16 C.F.R. § 314.3(a) (the "Safeguards Rule") to have a written information security program. Taintor Dep. 47.

Defendant Dixie Motor had defendant Pierce store rejected finance application documents in a locked file cabinet in her office until the end of the year and then move those documents to another locked cabinet. Pierce Dep. 29; Taintor Dep. 68-69. Defendant Pierce would typically move these rejected applications to locked storage in the main office monthly, but there was no policy for doing so periodically, except that it be done by the end of the year. Pierce Dep. 53; Taintor Dep. 68-69. When defendant Pierce moved these files, if files went missing during this transfer, defendant Dixie Motor did not have a process in place to detect this. Id. at 69-70.

Again, however, plaintiffs have raised no evidence to show that defendant Dixie Motor acted willfully or wantonly, especially in the light of evidence that defendant Dixie Motor had never had

a prior breach of customer security, Taintor Dep. 56, and evidence that defendant Pierce had never been reprimanded prior to this incident. Pierce Dep. 19-20. See Rogers v. T.J.X. Companies, Inc., 329 N.C. 226, 230-31 (1991)("Willful conduct is done purposefully in violation of law, or knowingly of set purpose, or without yielding to reason. Wanton conduct is done wickedly or needlessly, manifesting a reckless indifference to the rights of others.") (citations omitted). Thus plaintiffs' claims for punitive damages on this claim also fails.

Similarly, where plaintiffs' claim for breach of contract rests upon defendant Dixie's failure to have in place proper procedures to safeguard personal information, and to properly dispose of the same, even assuming, *arguendo*, that any breach of any such contract to safeguard information was, or was accompanied by, a tort, it could not support any punitive damages. See Shore, 351 N.C. at 170. Therefore defendant's motion for summary judgment on plaintiffs' claims for punitive damages under North Carolina law is granted.

D. Analysis of Defendant Western's Motion

Defendant Western urges the court to grant it summary judgment on plaintiff Nina Owens's claim against it for liability of surety. Plaintiff Nina Owens seeks to hold defendant Western liable for certain of her claims against defendant Dixie Motor.

North Carolina requires motor vehicle dealers to furnish surety bonds in order to cover certain losses or damages for purchasers of motor vehicles. N.C. Gen. Stat. § 20-288(e). Under that statute, "any purchaser" who has "suffered any loss or damage by . . . any . . . act of a license holder subject to this subsection that constitutes a violation of [Article 12] or Article 15 of this [Chapter 20] shall have the right to institute an action to recover against the license holder and the surety." Id. The two elements to a claim pursuant to this statute are: "1) the dealer's violation of either

article 12 or article 15 of chapter 20 of the General Statutes of North Carolina and 2) the suffering of damages and losses by the consumer." Tomlinson v. Camel City Motors, Inc., 330 N.C. 76, 79 (1991). Thus, the statute makes a surely liable to any purchaser of a motor vehicle for damages associated with a dealer's violation of state law in relation to that motor vehicle purchase. See Ferris v. Haymore, 967 F.2d 946, 950 (4th Cir. 1992).

Plaintiff Nina Owens alleges violations of Article 12, including that defendant Dixie Motor engaged in unfair and deceptive practices in violation of N.C. Gen. Stat. § 20-294(6), and false advertising relating to its licensed dealership in violation of N.C. Gen. Stat. § 20-294(7). Defendant Western maintains that plaintiff Nina Owens does not have standing to sue under the bond, arguing that she is not a "purchaser" for purposes of her claim against it as is required for recovery.

In the court's prior order denying defendant Western's motion to dismiss, the court noted plaintiff Nina Owens alleged that the conduct of defendant Dixie Motor which gave rise to her claims for liability of surety against defendant Western resulted from her 2007 purchase of a vehicle from defendant Dixie Motor. See Owens v. Dixie Motor Co., No. 5:12-CV-389-FL, 2013 WL 3490395 at *6 (E.D.N.C. July 11, 2013). Where plaintiff Nina Owens alleged a link between her 2007 purchase and the alleged misconduct in this case, the court found that the complaint alleged she was a purchaser for purposes of her claim against defendant Western. See id. at *6-7. Specifically, plaintiff Nina Owens alleged that defendant Dixie Motor was able to create a false financing application so as to obtain her consumer report by using information that she furnished in connection with her 2007 automobile purchase. See Compl. ¶¶ 48-60, 202-204. Defendant Western now asserts that the evidence of record conclusively demonstrates that information provided by plaintiff Nina Owens in connection with her 2007 purchase was not used to create the

2011 financing application.

Defendant Western points out that much of the information contained in the 2007 purchase records is inconsistent with the 2011 financing application. Specifically, these records are inconsistent with respect to plaintiff Nina Owens's: (1) home phone number, (2) automobile insurance company, (3) automobile insurance agent, (4) length of time at her residence, (5) monthly mortgage payment, (6) and length of employment.[13] Compare Nina Owens Dep. Ex. 12, with Ashley Owens Dep. Ex. 3, Credit Application, 10. Defendant Western argues that the information on the 2011 financing application therefore could not have been drawn from the records from plaintiff Nina Owens's 2007 purchase.

This evidence alone fails to conclusively demonstrate that records from Nina Owens's 2007 purchase were not used in creating the 2011 finance application. While there are discrepancies between the two documents, there are also a great many similarities, including plaintiff Nina Owens's: (1) name, (2) address, (3) birth date, (4) social security number, (5) employer name, (6) work phone number, and (7) mortgage company. Compare Nina Owens Dep. Ex. 12, and Nina Owens Mortgage Payment Proof (DE 71-2, p. 51) with Ashley Owens Dep. Ex. 3, Credit Application, 10. Thus, while the discrepancies noted establish that the 2007 purchase records were not the only source used in creating the 2011 financing application, they do not establish that the information from the 2007 purchase records was not used in creating the 2011 financing application at all.

Because plaintiff Nina Owens has no direct knowledge as to how the 2011 finance

[13] Although only four years passed between the 2007 purchase and the 2011 financing application, there is a *five* year difference reflected between the two sets of documents for the number of years that plaintiff Nina Owens lived at her residence and worked for her employer.

application was created, defendant Western also asserts that there is no evidence as to whether that finance application was prepared using records from plaintiff Nina Owens's 2007 purchase. Defendant Western contends that the only admissible evidence on this issue is defendant Pierce's testimony that she prepared the 2011 financing application without referring to the 2007 purchase records in preparing that document. Pierce Dep. 68-69, 81.

Ultimately, however, there is still a genuine issue of material fact as to whether defendant Pierce or anyone at defendant Dixie Motor utilized records from plaintiff Nina Owens's 2007 purchase in creating the 2011 financing application without her permission. While plaintiffs have not, at this time, set forth direct evidence showing that defendant Pierce utilized information from the 2007 purchase records, there is circumstantial evidence presented from which a reasonable jury could infer that these records were used. Specifically, the undisputed evidence shows that plaintiff Nina Owens gave defendant Dixie Motor information identical to some of the information appearing on the 2011 financing application in connection with her 2007 automobile purchase. See Nina Owens Dep. Ex. 12; Nina Owens Mortgage Payment Proof (DE 71-2, p. 51); Ashley Owens Dep. Ex. 3, Credit Application, 10. Plaintiffs have also presented evidence that plaintiff Nina Owens did not disclose to defendant Pierce the information used to complete the 2011 financing application. Nina Owens Dep. 37; Nina Owens Aff. ¶¶ 13-19 (DE 93-1); Ashley Owens Dep. 138; Lamont Cradle Aff. ¶¶ 13-16. Accordingly, because a reasonable jury could infer, based on the evidence presented, that information from the 2007 purchase records were used in creating the 2011 financing application, defendant Western's motion for summary judgment is denied.

E. Possibility of Summary Judgment for Defendant Pierce on Plaintiff's Claim for Infliction of Emotional Distress

Rule 56(f)(3) of the Federal Rules of Civil Procedure provides that,"[a]fter giving notice and

a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." The parties are hereby noticed that the court is considering entry of summary judgment in favor of defendant Pierce on plaintiffs' claim for infliction of emotional distress. The court has found, in considering of defendant Dixie Motor's motion for summary judgment, that there is no genuine issue of material fact that plaintiffs did not suffer the requisite severe emotional distress as defined by North Carolina law. Such a finding would appear to necessitate also a finding that this claim must also fail as against defendant Pierce as a matter of law. Accordingly, where the court has given notice of the possibility of summary judgment on this claim, plaintiffs shall have fourteen (14) days from entry of this order to respond to the court's notice, and defendant Pierce shall be given fourteen (14) days from the filing of plaintiffs' response to also brief the matter.

CONCLUSION

Based upon the foregoing, defendant Pierce's motion for partial summary judgment (DE 72) is GRANTED IN PART as to punitive damages on count four and DENIED IN REMAINING PART. Defendant Dixie Motor's motion is GRANTED IN PART and DENIED IN PART. More specifically:

- Defendant Dixie Motor is not directly liable for any FCRA violations, but only vicariously liable for any violations committed by defendant Pierce, and such vicarious liability can only lead to punitive damages on count two.
- Defendant Dixie Motor's motion for summary judgment is granted as to plaintiffs' claims in count one under the ITPA.
- Defendant Dixie Motor may not be held liable for more than nominal damages on plaintiffs' breach of contract claim in count seven. This claim is also preempted to the extent it is premised on defendant Dixie Motor's failure to properly dispose of information from plaintiffs' consumer reports.

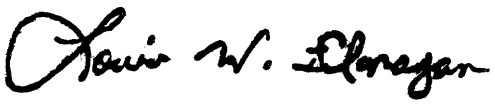
- Defendant Dixie Motor's motion for summary judgment is granted as to plaintiffs' claims in count eight for infliction of emotional distress.

- Defendant Dixie Motor's motion for summary judgment is granted as to plaintiffs' claims for punitive damages under state law.

Defendant Western's motion for summary judgment (DE 70) is DENIED.

Plaintiffs shall also have fourteen (14) days from entry of this order to file any response to the court's consideration of summary judgment on plaintiffs' claim for infliction of emotional distress as against defendant Pierce. Defendant Pierce may also file briefing on the matter within fourteen (14) days after the filing of any response by plaintiffs.

SO ORDERED, this the 31st day of March, 2014.



LOUISE W. FLANAGAN
United States District Judge