IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JAMES A. TURNER and TRACY TURNER, husband and wife,

Plaintiff-Appellants,

v.

FIRST NEW MEXICO BANK,

Defendant-Appellee.

No. 33,303
Luna County
CV-2012-332

ANSWER BRIEF

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
J.C. Robinson, District Judge

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-502(D)(3), I certify that the attached Answer Brief uses 14 point proportionately spaced Times New Roman font and contains 9862 words in the body of the Petition as defined in Rule 12-502(D)(1). This word Count was generated using Microsoft Word 2013.

Dated this 26 day of June, 2014

Lauren Keefe

This is a case that should have come to an end in 2012, when Appellants chose not to appeal a ruling from Judge Daniel Viramontes dismissing their claims. Instead, Appellants attempted to resurrect this case by re-filing the very same claims that Judge Viramontes determined to be invalid. Under clear and well established principles of law, however, Appellants were barred from doing so. The second district court judge to hear this case recognized that Appellants' claims were barred, but also evaluated the same claims on the merits and agreed that Appellants have no viable claims for relief. The second district court judge, accordingly, dismissed Appellants' Complaint in its entirety, as Judge Viramontes did. The rulings of these two district court judges were correct and should be affirmed. Not only are Appellants' claims barred by both collateral estoppel and res judicata, but Appellants are seeking relief where none is to be found, as they have attempted to assert two claims that are not recognized in New Mexico and a third that is preempted by a federal statute. Because Appellants are barred from asserting their claims, and because Appellants have no viable claim for relief, the Court should affirm the ruling dismissing Appellants' claims with prejudice.

SUMMARY OF FACTS AND PROCEEDINGS

Appellants James and Tracy Turner previously operated a dairy in southwestern New Mexico. R.P. 1. While their business was in operation, Appellants obtained financing from Defendant-Appellee First New Mexico Bank

("the Bank"). R.P. 1-2. In 2007, during the economic downturn, Appellants chose to sell their business. R.P. 3. They then paid off their outstanding loans to the Bank. R.P. 4.

Appellants initiated a lawsuit against the Bank on October 21, 2010. R.P. 31-38. The lawsuit was based on two core allegations. First, Appellants claimed that the Bank attempted to micromanage the affairs of their dairy business in a manner they considered "oppressive."[1] R.P. 34-36. Second, Appellants claimed that the Bank failed to update its reports to national credit reporting agencies to reflect that Appellants had paid off their loan in full. R.P. 36-37. Appellants asserted three claims based on these allegations. First, they asserted a claim alleging that the Bank "violated the standards of good faith and fair dealing that are required by Section 55-1-304 of the Uniform Commercial Code 1978 Comp." R.P. 36. Second, they asserted a claim for damages based on the Bank's alleged failure to update its credit reporting. R.P. 36-37. Third, they included a separate claim asserting that they were entitled to punitive damages. R.P. 37-38.

The case proceeded before Judge Daniel Viramontes, who entered an Order dismissing each claim. As to Count I, Judge Viramontes held that the cited provision of the Uniform Commercial Code, NMSA 1978 § 55-1-304, "does not

[1] Because it sought dismissal pursuant to NMRA Rule 1-012(B)(6), the Bank accepted all allegations in each Complaint as true. The Bank, however, expressly denies that it engaged in any wrongful conduct or caused any damages claimed by Appellants.

support an independent cause of action for failure to perform or enforce in good faith." R.P. 32. As to Count II, Judge Viramontes held that the claim was preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"). As to Count III, Judge Viramontes held that New Mexico does not recognize a separate cause of action for punitive damages and that punitive damages are not available as a remedy for violation of the UCC. R.P. 31. Judge Viramontes dismissed each claim without prejudice. R.P. 32.

Judge Viramontes Order was entered on July 16, 2012. Accordingly, if Appellants intended to appeal that ruling they were required to do so by August 15, 2012. They failed to do, and thereby waived the right to appeal. Appellants also did not attempt, upon entry of Judge Viramontes Order dismissing their claims, to re-file those claims in federal court or to assert a cause of action under the FCRA in any forum.

Unfortunately, Appellants' efforts to target the Bank did not come to an end when Appellants gave up their right to appeal Judge Viramontes' ruling, because on September 18, 2012 they filed the instant action, asserting claims that are substantially identical to those that were dismissed in the first action. Indeed, Counts I and III are entirely unchanged. *Compare* R.P. 1-5 *with* R.P. 34-38. Appellants modified Count II only to claim that they suffered damages to their "business relationships" and acknowledge that the Bank had corrected the report

regarding the status of Appellants' loan. *Compare* R.P. 3-4 with R.P. 36-37. That count otherwise remained unchanged as well.

The Bank moved to dismiss, asserting that Appellants' claims are barred by either collateral estoppel or res judicata. R.P. 48-49, 73-76. The Bank also argued that each claim should be dismissed for those reasons identified in Judge Viramontes' Order. R.P. 22-29, 76-81. Judge J.C. Robinson, who was assigned to hear the newly filed action, agreed with each of these arguments. First, he agreed that the claims were barred by both collateral estoppel and res judicata. R.P. 119-23. Second, he agreed that Count I should be dismissed because there is no independent right of action for an alleged violation of § 55-1-304. R.P. 124-25. Third, he agreed that Count II is preempted by the FCRA. R.P. 125-26. Fourth, he agreed that New Mexico does not recognize a separate cause of action for punitive damages. R.P. 127. Judge Robinson dismissed each claim with prejudice. Appellants did not ask him to modify the Order to dismiss any of the claims with prejudice. BIC 3.

This appeal followed. Appellants raise four issues on appeal. As to the first two, Appellants argue that Judge Robinson committed error by dismissing their claims with prejudice, should have dismissed Count II without prejudice so that they could pursue that claim in federal court, even though they never asked him to modify his order. For the third, Appellants argue that Judge Robinson erred in

treating Judge Viramontes' ruling as a final order. For the fourth, Appellants argue that Judge Robinson erred in ruling that Count II is preempted by the FCRA. As shown below, none of these arguments provide grounds for reversal.

ARGUMENT

The Court need not reach any of these questions raised by Appellants because Appellants have failed to challenge Judge Robinson's ruling that their claims are barred by collateral estoppel. In addition, the Court need not address Appellants' arguments regarding the proper form of order because they failed to preserve those arguments for appeal. The Court also need not review the trial court's ruling as to Counts I and III of the Complaint because Appellants' designated questions do not relate to those rulings, and Appellants have conceded that Count III was properly dismissed. BIC 10. But to the extent the Court is inclined to reach any of these issues, it should affirm each portion of the ruling of the trial court. The trial court properly concluded that Appellants' claims are barred by either collateral estoppel or res judicata. In addition, the trial court properly dismissed Count I because there is no independent cause of action for violation of § 55-1-304. The trial court also properly concluded that Count II is preempted by the FCRA. For each of these reasons, the trial court's ruling should be affirmed.

I. APPELLANTS FAILED TO PRESERVE ANY OBJECTION TO JUDGE ROBINSON'S RULING THAT THEIR CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL.

The trial court's ruling should be affirmed in its entirety because Appellants failed to preserve any objection to the trial court's ruling on collateral estoppel and have failed to challenge that ruling in this appeal.

It is well established "an appellate court will not review claimed errors unless they were preserved for review." *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 12 125 N.M. 748, 965 P.2d 332. "The party claiming error must have raised the issue below clearly, and have invoked a ruling by the court, thereby giving the trial court an opportunity to correct any error." *Id.* (internal citations omitted). Arguments not made below will not be considered for the first time on appeal. *See, e.g., Carrillo v. Compusys, Inc.*, 1997-NMCA-003, ¶ 11, 122 N.M. 720, 930 P.2d 1172 ("Worker did not make these arguments below, and therefore we do not consider them on appeal."). In addition, when a trial court bases a decision on separate and independent grounds, an appellant may prevail on appeal only after demonstrating that each basis for the court's decision was erroneous. *See Gonzales v. Lopez*, 2002-NMCA-086, ¶ 17, 132 N.M. 558, 52 P.3d 418 (appellants' argument regarding lack of notice of default did not provide grounds for reversal; because the trial court determined that the contract was void due to fraudulent inducement, "any error based on lack of notice of default would

not affect the result."); *Morris v. Merchant*, 77 N.M. 411, 416, 423 P.2d 606, 609 (1967) (appellants' argument against the application of laches and res judicata did not provide grounds for reversal where the trial court found they had rights under the contract).[2]

Here, the trial court's ruling was based on several independent factors. Among them, the trial court concluded that Appellants' claims were barred by collateral estoppel. R.P. 109-12. Appellants, however, cannot challenge that ruling because Appellants failed to respond after the Bank expressly argued that Appellants' claims were barred by collateral estoppel. R.P. 21-22; 73-75. Accordingly, they failed to preserve any objection to the trial court's ruling, and cannot seek reversal of that ruling on appeal. But even if they could seek reversal on that basis, they have failed to do so. Indeed, their Brief-in-Chief contains no discussion of that doctrine or its application to this case. Because Appellants failed

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[2] *See also, e.g., Foxley v. Foxley*, 939 P.2d 455, 459 (Colo. Ct. App. 1996) (affirming trial court where appellant failed to challenge one of two alternative bases for dismissal of claims); *Roop v. Parker Northwest Paving Co.*, 94 P.3d 885, 895 (Ore. Ct. App. 2004) ("where plaintiff fails to challenge the alternative basis of the trial court's ruling, we must affirm it."); *Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 885 (Tex. Ct. App. 2011) ("If an appellant does not challenge each possible ground for summary judgment, we must uphold the summary judgment on the unchallenged ground."); *Salt Lake County v. Butler, Crockett & Walsh Dev. Corp.*, 297 P.3d 38, 44 (Utah Ct. App. 2013) ("This court will not reverse a ruling of the trial court that rests on independent alternative grounds where the appellant challenges only one of those grounds.").

to challenge this independent basis for the trial court's ruling, they have failed to establish grounds for reversal, and the trial court's decision should be affirmed.

II. APPELLANTS' CLAIMS ARE BARRED BY BOTH COLLATERAL ESTOPPEL AND RES JUDICATA.

The trial court's application of collateral estoppel is not only unchallenged, it is correct and should be affirmed. Likewise, the Court should affirm the trial court's application of res judicata.

In its ruling, the trial court used the terms "res judicata" and "collateral estoppel." R.P. 109-12. In the more modern terminology these doctrines are referenced as "claim preclusion" and "issue preclusion." Claim preclusion bars a party from asserting a claim that was or could have been brought in a prior action against the same party. *See Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61,148 N.M. 106, 231 P.3d 87. Issue preclusion prevents a party from re-litigating "ultimate facts or issues actually and necessarily decided in a prior suit." *DeFlon v. Sawyers*, 2006-NMSC-025, ¶ 13, 139 N.M. 637, 137 P.3d 577. The trial court properly determined that Appellants' claims are barred under both doctrines.

A. The Trial Court Properly Applied Claim Preclusion Because Judge Viramontes Issued a Ruling on the Merits.

First, the trial court properly determined that Appellants' claims are barred by claim preclusion.

Claim preclusion bars a plaintiff from asserting a claim against a defendant when (1) the plaintiff previously filed suit against the same defendant; (2) the plaintiff asserted the same cause of action; (3) there was a final decision in the first suit; and (4) the final decision was on the merits. *See Kirby*, 2010-NMSC-014, ¶ 61 (stating elements). Here, both the parties and the causes of action are the same; in both lawsuits the same plaintiffs sued the same defendants and asserted the same three counts based on the same allegations. *Compare* R.P. 1-5 *with* R.P. 34-38. There was also a final decision issued. R.P. 31-33. Appellants argue that the decision was not final because Judge Viramontes indicated in his Order that he was dismissing the claims without prejudice. BIC 13. Judge Viramontes dismissed Count II, however, after determining that it was preempted. R.P. 32. A dismissal based on preemption is a decision on the merits. *See, e.g., Stewart v. United States Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) ("A district court's analysis of whether the complaint is federally preempted is a question of law and fact; it is a decision on the merits of the pleadings.").[3] As such, claim preclusion applies to a decision dismissing a claim based on preemption. *See id.* at 959. ("Dismissal was not for

[3] *See also, e.g., United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 516-17 (3d Cir. 2007) ("dismissals based on subject matter jurisdiction or preemption should be understood as being on the merits."); *Wikberg v. Moore N. Am., Inc.*, 2000 U.S. App. LEXIS 26852, at *6 (7th Cir. Oct. 6, 2000) ("The district court reasoned that the state court's dismissal of these claims as preempted by VEVRA was a judgment on the merits, and we agree."); *Blab T.V., Inc. v. Comcast Cable Communs., Inc.*, 182 F.3d 851, 855 (11th Cir. 1999) ("preemption operates to dismiss state claims on the merits").

lack of jurisdiction, but rather for the substantive reason that Plaintiffs' claims were preempted by federal law. Therefore, res judicata applies, and the Plaintiffs are barred from litigating any claims they raised or could have raised in *Stewart I*."). Based on the same reasoning, Judge Viramontes' rulings that there is no independent cause of action under Section 55-1-304, and that New Mexico does not recognize a separate cause of action for punitive damages, are rulings on the merits. The trial court therefore properly applied claim preclusion and properly determined that Appellants are barred from asserting the claims that were dismissed from the first action, and that decision should be affirmed.

B. The Trial Court Properly Applied Issue Preclusion Because Judge Viramontes Already Decided that Appellants Have No Viable Cause of Action.

The trial court also properly determined that Appellants' claims are barred by issue preclusion. Indeed, "[t]he easiest case for preclusion" arises when, after a complaint is dismissed for failure to state a claim, "a second action is brought on the very same complaint as was found insufficient." *See* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4439 (2d ed. 2002). In such circumstances, "[i]ssue preclusion prevents litigation of the same question of sufficiency." *Id.* Moreover, issue preclusion bars parties from "relitigating the same theories of recovery, that is, the identical issues" after failing to appeal the dismissal of a complaint. *Guzowski v.*

Hartman, 969 F.2d 211, 217 (6th Cir. 1992) ("Since the Guzowskis had not appealed Judge Churchill's decision disposing of the section 2 monopoly issue, they are now barred from relitigating it.").

Issue preclusion applies, and prevents the relitigation of issues, even if a dismissal was without prejudice, and as a result claim preclusion would not normally apply. *See id.* at 213, 216 (holding claims barred by issue preclusion after reversing district court decision apply claim preclusion); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 853 (3d Cir. 1977) (dismissal for *forum non conveniens*, although not grounds for claim preclusion, barred subsequent litigation of issues decided in prior action).[4] This type of preclusion is known as direct, rather than collateral, estoppel:

> In some cases, a judgment does not preclude relitigation of all or part of the claim on which the action is brought. In such case, the rules of the Section precludes relitigation of issues actually litigated and determined in the first action when a second action is brought on the same claim. Issue preclusion in a second action on the same claim is sometimes designated as direct estoppel. If, as more frequently

[4] *See also Muniz Cortes v. Intermedics, Inc.*, 229 F.3d 12, 14 (1st Cir. 2000) (noting that dismissal for lack of subject matter jurisdiction "precludes relitigation of the issues determined in ruling on the jurisdictional question"); *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 851 (9th Cir. 1997) (dismissal for improper venue, although without prejudice, barred plaintiff from relitigating enforceability of venue selection clause); *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) ("Although dismissal of a complaint for lack of jurisdiction does not adjudicate the merits so as to make the case res judicata on the substance of the asserted claim, it does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims.").

> happens, the second action is brought on a different claim, the rule of this Section also applies; in such cases, preclusion is sometimes designated as collateral estoppel.

Restatement of the Law (Second) Judgments § 27 cmt. b (1982); *see also Pastewka*, 565 F.2d at 853 (explaining that a non-merits judgment "create[s] a direct estoppel as to matters which were actually litigated."); *Ex parte Ford Motor Credit Co.*, 772 So. 2d 437, 440 (Ala. 2000) (explaining that direct estoppel, rather than collateral estoppel, applies when the cause of action in the second action is the same as in the first). Otherwise, there would be no way to obtain finality, and a party could continue to assert the same claim against the same party hoping to obtain a different result from a different judge, so long as the dismissal was based on the pleadings and entered without prejudice.

Appellants in this action brought the same three claims they asserted in the first action. The allegations in Counts I and III were entirely unchanged. These claims accordingly, are barred by issue preclusion. As to Count II, Appellants amended their pleading only to add a claim that they suffered damages to their "business relationships." Appellants did so because, as discussed more fully below, they appear to believe that if they identify business-related damages their claim cannot be preempted. The type of damages asserted, however, does not affect the preemption analysis. Instead, as discussed more fully below, and as recognized by both Judge Viramontes and Judge Robinson, Appellants' claims are

preempted because their claims relate to reports about Appellants made to consumer reporting agencies. The question as to whether this claim was preempted was actually litigated in the proceedings before Judge Viramontes, and Judge Robinson properly concluded that the doctrine of issue preclusion applies and bars Appellants from reasserting the same claim based on the same conduct.

III. THE TRIAL COURT PROPERLY DISMISSED COUNT I BECAUSE THERE IS NO INDEPENDENT CAUSE OF ACTION FOR VIOLATING THE DUTY OF GOOD FAITH AND FAIR DEALING UNDER THE UCC.

To the extent the Court is inclined to consider any issues raised in this appeal, despite Appellants' failure and inability to challenge the trial court's ruling that Appellants' claims were barred, it should affirm every aspect of the trial court's ruling. That includes the trial court's decision to dismiss Count I of the Complaint. It is not clear that Appellants intended to challenge the trial court's dismissal of Count I in this appeal, as none of their designated questions relate to that portion of the trial court's ruling. BIC 4. In their general Argument section, however, Appellants repeat various arguments that they made during the proceedings before the trial court in support of that claim. BIC 5-9. Thus, based on the assumption that Appellants are seeking reversal of the trial court's decision, the Bank is addressing this claim. Appellants, however, have set forth no grounds for reversal, because the trial court adopted the correct interpretation of the UCC.

Appellants frame Count I of their Complaint as a claim for violation of the good faith standards imposed by § 55-1-304. R.P. 3. By its express terms, however, that section does not establish an independent cause of action. Indeed, the New Mexico Legislature advised that:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract ... This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

Official Comment to Section 55-1-304. Several other courts have refused to allow claims for breach of this provision, explaining that "while a duty of good faith and fair dealing exists under the U.C.C. as part of every commercial contract ..., the failure to act in good faith ... does not amount to an independent tort." *See Brauer v. NationsBank*, 466 S.E.2d 382, 385 (Va. 1996). Instead, "the breach of an implied duty under the U.C.C. gives rise only to a cause of action for breach of contract." *Id.*[5] Appellants have asserted no such claim and do not allege in their

[5] *See also Rigby Corp. v. Boatmen's Bank & Trust Co.*, 713 S.W.2d 517, 527-28 (Mo. Ct. App. 1986) ("[T]he Code does not intend an independent cause of action in tort for breach of the good faith provisions Rigby pleads and asserts. ... The general duty of good faith ... encompasses only the performance and enforcement of Code contracts."); *see Creeger Brick & Bldg Supply, Inc. v. Mid-State Bank & Trust*, 560 A.2d 151, 153 (Pa. Sup. Ct. 1989) ("Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts."); *Diamond Surfact,*

Complaint that the Bank violated any term of any contract. Accordingly, Appellants failed to state a claim for relief in Count I, and the trial court properly dismissed that claim.

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT COUNT II IS PREEMPTED BY THE FCRA.

The Court should also affirm the trial court's ruling that Count II of Appellants' Complaint is preempted by the FCRA.

A. Appellants Failed to Develop Their Argument Regarding Preemption.

The Court should decline to review the trial court's preemption decision because Appellants have failed to develop their arguments on this issue.[6] *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (the Court has no duty to review undeveloped arguments). Appellants raise a challenge to the trial court's preemption decision as the fourth of their designated

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Inc. v. The State Cement Plant Commission, 583 N.W.2d 155, 164 (S.D. 1998) ("[A] failure of one contracting party to act in good faith ... in performance of contract or duties under UCC does not give rise to an independent cause of action for damages in favor of [the] other party."); *Central Sav. & Loan Ass'n v. Stemmons Northwest Bank, N.A.*, 848 S.W.2d 232, 239 (Tex. Ct. App. 1992) ("the duty to act in good faith is contractual in nature, and its breach does not amount to an independent tort."); *cf. ADT Security Services, Inc. v. Premier Home Protection, Inc.*, 181 P.3d 288, 293 (Colo. Ct. App. 2007) (UCC's duty of good faith and fair dealing is used to interpret the parties' contractual duties).

[6] Indeed, as shown in BIC 12-14, Appellants have failed to adequately develop their arguments on any issue. Most notably, Appellants fail to cite any case law in support of any of their arguments.

questions for review. BIC 4. They framed that question as follows: "Did Judge Robinson err in finding that the Fair Credit Reporting Act (FCRA) applies to commercial loans?" BIC 4, 14. Appellants purport to address this argument in the final section of their brief. BIC 14. That section, however, consists of only two sentences. BIC 14. The first contains only the conclusory assertion that "Judge Robinson erred in finding that the Fair Credit Reporting Act applies to commercial loans." BIC 14. In the second, Appellants complain that "Judge Robinson did not allow Appellants to present evidence showing that, as a commercial loan, the loan at issue did not fall under the Fair Credit Reporting Act." BIC 14. The section of the brief contains no citation to any authority, and Appellants make no effort to explain either of these contentions.

Appellants do make some additional assertions earlier in their brief that relate to this issue. First, the brief contains a sentence in which Appellants assert that "the FCRA was drafted to address the problems of consumers and credit cards," followed by a citation to a case holding generally that "the relevant provisions of the FCRA ... are limited to consumer credit reports, not business credit reports." BIC 9 (citing *Apodaca v. Discover Financial Services*, 417 F. Supp. 2d 1220 (D.N.M. 2006)). Appellants also attempt to label the Bank's alleged failure to correct its reporting regarding Appellants' loan as a "deliberate and malicious act." BIC 10. But Appellants fail to provide any analysis of

FCRA's preemption provision or direct the Court to any authority supporting their contention that their claim is not preempted. Because they have failed to develop this argument on appeal, the Court should not consider it.

B. Count II Is Preempted.

To the extent the Court is inclined to consider this issue, the Court should affirm the trial court's decision because the trial court was correct in holding that Count II of the Complaint is preempted by the FCRA. The FCRA provides guidelines for the reporting of information by and to the various agencies that provide consumer credit reports, such as Equifax and Transunion, which are designated in the Act as "consumer reporting agencies." The FCRA contains two preemption provisions. The first, which was included when the FCRA was first enacted in 1970, provides that:

> 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 person who furnishes information to a consumer reporting agency ... 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). The second was added in 1996, when Congress expanded the Act to impose new duties on parties that furnish information to consumer reporting agencies. *See* 15 U.S.C. § 1681s-2. It provides that "[n]o requirement or prohibition may be imposed under the laws of any State ... with respect to any subject matter regulated under ... section 1681s-2 of this title, relating to the

responsibilities of persons who furnish information to consumer reporting agencies ... ." 15 U.S.C. § 1681t(b)(1)(F). The trial court applied § 1681h(e) and concluded that Count II is preempted because the Appellants filed suit in their individual capacities and thus are consumers, their claim is in the nature of defamation, and they do not allege that the Bank deliberately reported false information to the consumer reporting agencies. R.P. 114-15.

To the extent that Appellants have developed their arguments on appeal in any meaningful way (which as discussed above they have not), they appear to challenge the trial court's ruling on two grounds. First, they argue that the FCRA's preemption provisions do not apply in this case because the report at issue related to a loan that was issued for commercial purposes. In a related but somewhat contradictory argument, they assert that the trial court erred on holding that the debt in question was a consumer debt, and that the court should have permitted Appellants to present evidence to show that the loan was issued for commercial purposes. BIC 12, 14. Second, by attempting to label the Bank's conduct as deliberate, BIC 10, Appellants appear to argue that Count II falls within the exception recognized under § 1681h(e) for state-law claims based on "false information furnished with malice or willful intent to injure such consumer." Neither argument has any merit.

1. The trial court correctly concluded that the FCRA preempts claims involving reports about individual creditors, regardless of the nature of the underlying debt.

Appellants are wrong in arguing that the FCRA preemption provisions are inapplicable when a report made to a consumer reporting agency relates to a commercial loan.

a. The trial court made no finding regarding the nature of the loan to Appellants.

As an initial matter, Appellants' assertion that they should have been permitted to present evidence regarding the nature of the debt is entirely misplaced, because the trial court never made any finding that the debt was a consumer debt. The Bank sought dismissal under Rule 1-012(B)(6) and did not dispute that the loan to Appellants was made for commercial purposes. And as Appellants recognize elsewhere in their Brief, BIC 14, the trial court's ruling is based on a determination that the FCRA preemption provisions apply even when a report relates to a commercial loan. R.P. 126 (acknowledging Appellants' argument that the FCRA does not apply because the loan in question was a commercial loan). The question posed -- whether the CFRA applies to reports made regarding commercial loans -- is a question of statutory interpretation. The trial court did not need to hear evidence to determine the scope of the FCRA's preemption provisions.

b. Neither of the FCRA's preemption provisions contains an exception for reports regarding debts incurred by individuals for commercial purposes.

Moreover, neither of the FCRA's preemption provisions contains the limitation proposed by Appellants.

In particular, § 1681h(e) contains no exception for reports that relate to commercial loans. That provision bars any "consumer" from asserting any claim "with respect to the reporting of information against ... any person who furnishes information to a consumer reporting agency," with the noted exception. *See* § 1681h(e). The term consumer is defined to mean "an individual." *See* § 1681a(c). It is immaterial under this provision, whether the information reported relates to a commercial or personal debt; claims are preempted so long as they (1) are brought by an individual and (2) relate to information that is reported to a consumer reporting agency. *See id.* Here, Appellants are consumers. They are individuals and filed each lawsuit in their individual capacities. R.P. 1, 34. Indeed, they have only filed claims on behalf of themselves as individuals. Despite re-filing their lawsuit three times, they have never asserted a claim on behalf of Turner Dairy. Moreover, they expressly allege that they are seeking relief based on a report made about them, and about the amounts they borrowed and owed, to a consumer reporting agency. R.P. 4 (¶ 2) ("When the Defendant was paid in full it failed to notify various credit reporting agencies to which the Defendant had previously

reported that ***the Plaintiffs*** had an outstanding loan of more than Three Million Dollars ... .) (emphasis added). As a result, § 1681h(e) is applicable to their claim, even though the report at issue related to a debt was incurred for commercial purposes.

Section 1681t(b)(1)(F) also contains no exception for reports related to debts incurred for commercial purposes. That provision preempts any claim that relates to the furnishing of information to consumer reporting agencies. *See* § 1681t(b)(1)(F). As shown in the portion of the Complaint cited above, Appellants claim directly relates to the furnishing of information about them to consumer reporting agencies. As a result, § 1681t(b)(1)(F) is applicable to Appellants' claim even though the report at issue related to a debt that was incurred for commercial purposes.

c. Appellants' arguments are misplaced because this case involves a consumer credit report.

As noted above, Appellants offer no support for their argument to the contrary except to cite to *Apodaca* for the proposition that "the relevant provisions of the FCRA ... are limited to consumer credit reports, not business credit reports." BIC 9. In making this statement, however, the *Apodaca* court was not interpreting or addressing the scope of the FCRA's preemption provisions. Instead, the *Apodaca* court was addressing the scope of damages available through a direct action under the FCRA, holding that a plaintiff who claimed to be harmed by an

inaccurate credit report could not recover damages harmed by her husband's business. *See Apodaca*, 417 F. Supp. 2d at 1228. Appellants interpret *Apodaca* to prevent the recovery of any business-related damages in a FCRA claim, and also appear to believe that if they assert claims that cannot be recovered through the FCRA, then their claims cannot be preempted. Neither proposition is correct. The *Apodaca* court was merely enforcing standard rules of standing in refusing to allow the plaintiff to recover damages incurred by a separate entity. Moreover, the FCRA preemption provisions apply even when they assert damages that cannot be recovered through an action under that Act. This was seen in *Tilley v. Global Payments, Inc.*, 603 F. Supp. 2d 1314 (D. Kan. 2009), where the plaintiff asserted both personal and business damages. The court in that case held that the plaintiff could not recover the damages that were incurred by her business. *See id.* at 1326-30. The court also held that the plaintiff's state-law defamation claim was preempted. *See id.* at 1331. Thus, the preemption provisions barred all claims, whether or not the damages were recoverable through an FCRA claim.

More generally, Appellants are wrong in arguing that the FCRA is inapplicable when a report relates to a commercial debt. Appellants argue that the FCRA only applies to "consumer credit reports," and appear to assume that because the report at issue related to a loan taken out for commercial purposes, it was not a consumer credit report. Under the FCRA, however,

> [t]he term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for --
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 604 [15 USCS 1681b].

15 U.S.C. § 1681a(d). Pursuant to this definition, any report that is made regarding debt owed by an individual is a consumer credit report, whether that debt was incurred for commercial or personal reasons. In other words, it is not the nature of the underlying debt that determines whether the report is a consumer credit report; a report is a consumer credit report so long as it is a report regarding debt incurred by a consumer.

Tilley provides an example. In that case, the plaintiff owned a sports apparel business, and opened a merchant account with the defendant. *See id.* at 1318. The defendant issued a report to the major consumer reporting agencies indicating that the plaintiff incurred $9,949 in debt on this account. *See id.* Although the debt was incurred for commercial purposes, the report was made to the "credit file" maintained under plaintiff's social security number. *See id.* at 1317. In her lawsuit, the plaintiff alleged that the defendant made inaccurate reports regarding this debt and that as a result she had difficulty obtaining credit and had to pay

higher interest rates as a result of the defendant's erroneous report. *See id.* at 1320. The federal district court permitted the plaintiff to proceed with these claims, *see id.* at 1326, recognizing that the report to her personal credit file was a consumer report, even though the underlying debt was incurred for commercial purpose.

Here, similarly, although the underlying debt was incurred for commercial purposes, the loans issued to Appellants individually, and the reports were made to Appellants personal credit files. R.P. 4. Indeed, the very reason that Appellants filed this lawsuit is that the Bank made a report about an amount that they had borrowed. Accordingly, the report at issue was a consumer credit report, and thus accordingly Appellants' argument that preemption is limited to claims involving consumer credit reports does not provide grounds for reversal.

2. Appellants cannot avoid preemption through the untimely attempt to label the Bank's alleged failure to update its report as deliberate.

Appellants are also wrong in arguing that their effort to label the Bank's conduct as deliberate is sufficient to avoid preemption under the malice exception found § 1681h(e). Under the proper analysis, preemption is governed by § 1681t(b)(1)(F), and accordingly Appellants' allegations regarding the Bank's intent are immaterial. But even if preemption is governed by § 1681h(e), Appellants' claims are preempted because the allegations in the Complaint that the Bank's report was accurate at the time it was made, and accordingly Appellants cannot

establish that the Bank deliberately furnished false information to any consumer reporting agency, as required to invoke § 1681h(e)'s malice exception.

a. Preemption is properly addressed under § 1681t(b)(1)(F), which includes no actual malice exception.

In the proceedings before the trial court, the Bank argued that Count II is preempted under either § 1681h(e) or § 1681t(b)(1)(F). R.P. 78-80. Based on recent developments in the law, the Bank urges the Court to apply § 1681t(b)(1)(F) and accordingly to hold that Appellants' claims are preempted under that provision because they relate to the furnishing of information to a consumer reporting agency. On that basis, the Bank urges the Court to affirm the trial court's decision as right for any reason.

Courts have taken three different approaches in determining how to reconcile the FCRA's two preemption provisions: (1) the total approach; (2) the temporal approach; and (3) the statutory approach. *See Himmelstein v. Comcast of the District, L.L.C.*, 931 F. Supp. 2d 48, 57-59 (D.D.C. 2013). "Under the total approach ... courts have held that the new preemption provisions preempts all related state-law causes of action against furnishers of information, even willful violations of state common law." *Id.* at 59 (citing cases). "Under the temporal approach, courts have reconciled the two statutory provisions by holding that the newer one preempts state claims arising after a furnisher of information receives notice of a dispute, whereas the original provision applies to claims prior to that

notice." *Id.* at 57. "The statutory approach ... holds that Congress intended the new FCRA provision's preemption of 'the laws of any state' to preempt only state statutes, but not state common law." *Id.* at 58.

The only two federal circuit courts to address the question have adopted the total approach. In *Purcell v. Bank of America*, 659 F.3d 622 (7th Cir. 2011), the Seventh Circuit first rejected the statutory approach, and in particular the contention that § 1681t(b)(1)(F)'s language preempting any "requirement or prohibition ... imposed under the laws of any State" applied only to statutory enactments. The court explained that:

> The district court's conclusion that the word "laws" in a federal statute refers to state statutes but not state common law produces a sense of déjá vu. This is how *Swift v. Tyson*, 41 U.S. 1, 10 L. Ed. 865 (1842), understood the word "laws" in the Rules of Decision Act, now codified at 28 U.S.C. § 1652. But *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), overruled *Swift* and held that reference to state "laws" comprises all sources of legal rules, including judicial opinions. It is hard to see why the judiciary should again tread *Swift*'s path. Many modern decisions about preemption follow *Erie* and hold that a federal statute preempts state common law to the same extent as it preempts state statutory law.

Id. at 623-24. The Seventh Circuit then rejected the contention that the temporal approach is necessary to avoid a conflict with § 1681h(e), explaining that:

> we do not perceive any inconsistency between the two statutes. Section 1681h(e) preempts ***some*** state claims that could arise out of reports to credit agencies; § 1681t(b)(1)(F) preempts ***more*** of these claims. Section 1681h(e) does not create a right to recover for wilfully false reports; it just says that a particular paragraph does not preempt claims of that stripe. Section 1681h(e) was enacted in 1970.

> T wenty-six years later, in 1996, Congress added § 1681t(b)(1)(F) to the United States Code. The same legislation also added § 1681s-2. The extra federal remedy in §1681s-2 was accompanied by extra preemption in § 1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges. Reading the earlier statute, §1681h(e), to defeat the later-enacted system in § 1681s-2 and § 1681t(b)(1)(F), would contradict fundamental norms of statutory interpretation.
>
> Our point is not that §1681t(b)(1)(F) repeals §1681h(e) by implication. It is that the statutes are compatible: the first-enacted statute preempts some state regulation of reports to credit agencies, and the second-enacted statute preempts more. There is no more conflict between these laws than there would be between a 1970 statute setting a speed limit of 60 for all roads in national parks and a 1996 statute setting a speed limit of 55. It is easy to comply with both: don't drive more than 55 miles per hour. Just as the later statute lowers the speed limit without repealing the first (which means that, if the second statute should be repealed, the speed limit would rise to 60 rather than vanishing), so § 1681t(b)(1)(F) reduces the scope of state regulation without repealing any other law. This understanding does not vitiate the final words of §1681h(e), because there are exceptions to §1681t(b)(1)(F). When it drops out, §1681h(e) remains. But, even if our understanding creates some surplusage, courts must do what is essential if the more recent enactment is to operate as designed.

Id. at 625 (emphasis added). The Seventh Circuit accordingly concluded that § 1681t(b)(1)(F) preempts all state law claims that relate to the furnishing of information to consumer reporting agencies, regardless of the intent of the furnisher. *See id.* The Second Circuit reached the same conclusion, holding that "the operative language in § 1681h(e) provides only that the provision does not preempt a certain narrow class of state law claims; it does not prevent the later-enacted § 1681t(b)(1)(F) from accomplishing a more broadly-sweeping

preemption." *MacPherson v. JPMorgan Chase Bank, N.A.*, 665 F.3d 45, 48 (2nd Cir. 2011).

To the extent the Court determines it is necessary to reach this issue at all, the Bank urges the Court to follow the reasoning of *Purcell* and *MacPherson*[7] and to construe § 1681t(b)(1)(F) as governing the preemption analysis. Under § 1681t(b)(1)(F), it immaterial whether Appellant's Complaint can be read to allege that the Bank deliberately reported false information; that section preempts all state law claims that relate to the reports made to consumer reporting agencies. *See Himmelstein*, 931 F. Supp. 2d at 57 ("the malice/willfulness requirement does not exist in the new statute."); *Jaramillo v. Experian Info. Solutions, Inc.*, 155 F. Supp. 2d 356, 361-62 (E.D. Pa. 2001) (§ 1681t(b)(1)(F) precludes any claim based on a report to a consumer reporting agency). Here, Count II is based on allegations that the Bank failed to correct a report to a consumer reporting agency. As such, it is preempted under § 1681t(b)(1)(F), and the trial court's decision holding that Count II is preempted should be affirmed.

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[7] These opinions had not been issued when the Bank first raised the issue of preemption in response to Appellants' initial Complaint. At that time, no circuit court had addressed the apparent conflict between the two provisions, and the Bank accordingly looked to cases from district courts within the Tenth Circuit, including an opinion from the United States District Court for the District of Kansas applying the temporal approach. Upon evaluation of the two recent circuit court opinions, the Bank believes that the total approach best resolves any apparent conflict between the two preemption provisions within the FCRA.

b. The allegations in the Complaint establish that the Bank's report was accurate at the time it was made.

If, however, the Court is inclined to apply one of the alternative approaches, and to conclude that § 1681h(e) governs the preemption analysis in whole or in part, the Court should still affirm because the trial court properly concluded that Appellants cannot invoke the actual malice exception to that provision.

To invoke the actual malice exception, a plaintiff must set forth allegations that, if true, would establish that a defendant knew that it was reporting false information to a consumer reporting agency ***at the time the report was made***. *See Morris v. Equifax Info. Servs.*, 457 F.3d 460, 471 (5th Cir. 2006) (holding that the standard under § 1681h(e) is equivalent to the actual malice standard necessary to overcome a qualified privilege); *Beuster v. Equifax Info. Servs.*, 435 F. Supp. 2d 471, 480 (D. Md. 2006) (a plaintiff must allege that a defendant published material while entertaining serious doubts as to the truth of the publication or "with a high degree of awareness of probable falsity."). Accordingly, allegations that a defendant failed to update information to invoke § 1681h(e)'s malice exception. *See, e.g.*, *Gauci v. Citi Mortgage*, 2011 U.S. Dist. LEXIS 92905, at *6 (C.D. Cal. Aug. 19, 2011) (claim based on allegations that defendant failed to conduct a proper investigation after receiving notice that report were insufficient to invoke the malice exception);

The report at issue in Count II is the Bank's report that Appellants had borrowed, and owed, $3 million. R.P. 4 (¶¶ 1, 2). Appellants do not claim that this information was false at the time it was reported. To the contrary, Appellants acknowledge that they did, in fact, borrow this amount from the Bank. R.P. 4 (¶ 1) ("[D]uring the year 2008, the Plaintiffs were doing business and had borrowed money from the Defendant ... in an amount of over Three Million Dollars."). Appellants instead assert that they were damaged when the bank failed to update its report to show that Appellants had paid off the loan in full. R.P. 4 (¶¶ 1, 2). Because the Bank's report was accurate at the time it was made, Appellants cannot establish that the Bank purposefully reported false information, and therefore cannot invoke the exception to the preemption provision in § 1681h(e). The trial court, accordingly, was correct in holding that Appellants' claims are preempted under § 1681h(e), and the Court should affirm that decision.

V. APPELLANTS CANNOT SEEK REVERSAL OF THE TRIAL COURT'S DECISION TO ENTER A DISMISSAL WITH PREJUDICE.

The Court should also affirm the trial court's decision to dismiss Count II with prejudice[8] because Appellants failed to preserve any objection to the form of

[8] The Bank does not understand Appellants to argue that Count I should have been dismissed without prejudice, as Appellants' argument regarding the form of dismissal relate only to the trial court's ruling that Count II is preempted, and not to the decision that there is no independent cause of action for violating the duty of good faith and fair dealing under the UCC. BIC 12-13.

the trial court's order and because a dismissal based on preemption is a decision on the merits and is properly entered with prejudice.

A. Appellants Failed To Preserve Any Objection to the Form of Dismissal.

Appellants cannot seek reversal of Judge Robinson's decision to dismiss their claims with prejudice because they failed to preserve this issue during the proceedings before the trial court. As noted above, an appellate court will not review claimed errors unless they were preserved for review. Here, Appellants admit that they did not ask the trial court to amend his ruling to dismiss the claims without prejudice. BIC 11. They claim that they did not need to do so because any such request would be "an exercise in futility." BIC 11. It is not clear that New Mexico recognizes a futility exception to its preservation requirement. But assuming such an exception exists, it should not apply here because Appellants have failed to offer any reason why it would have been futile to raise this issue with the trial court. If the Appellants indeed had convincing reasons why the dismissal should be without prejudice (which they do not), Appellants could have and should have presented those reasons to the trial court. Appellants either could have raised that argument in response to the Banks' motion to dismiss, or could have filed a motion asking the trial court to modify the form of order dismissing the claims. There is no reason to believe that the trial court would not have given due consideration to any arguments raised in this manner. Because Appellants

gave the trial court no opportunity to consider their arguments regarding the proper form of dismissal, they should not be permitted to seek relief in this Court.

B. A Dismissal Based on Preemption Should Be With Prejudice.

Appellants' arguments also provide no basis to reverse the trial court's ruling. Appellants argue that the trial court, after determining that Count II was preempted by the FCRA, should have dismissed that claim without prejudice and committed error by dismissing the claim with prejudice. BIC 12-14. Essentially, they ask the Court to permit them to re-file the same claims a third time, and to indeed permit them to endlessly re-file the same meritless claims against the same party in hopes that they can obtain a different result, while forcing the Bank to expend time and resources to re-litigate the same issue. Appellants also fault Judge Robinson for "changing" Judge Viramontes Order, and argue that Judge Robinson was in some way bound to enter an order dismissing without prejudice because Judge Viramontes chose to do so. BIC 12-13. It was Appellants, however, who invited a second court to consider the merits of their claims, and they cannot be heard to complain that the result was different. Moreover, Appellants cite no authority that would legally sanction such a campaign of harassment, and indeed the law provides that Judge Robinson made the correct decision in entering an order that would prevent that result.

1. A dismissal based on preemption is a ruling on the merits.

As discussed above, *see supra* Part II(A), a dismissal based on preemption is a ruling on the merits. As a result, a decision dismissing claims based on preemption should be with prejudice. *See Turek v. General Mills, Inc.*, 662 F.3d 423, 425 (7th Cir. 2011) (when a state law claim is preempted, "dismissal is the proper outcome -- but dismissal on the merits, with prejudice like other merits judgments ... ."); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 764 (5th Cir. 1989) (overturning decision to dismiss preempted claims without prejudice and remanding with instructions to enter an order dismissing with prejudice); *Reyes v. Premier Home Funding, Inc.*, 640 F. Supp. 2d 1147, 1160 (N.D. Cal. 2009) ("The Court GRANTS Wachovia's Motion as to Plaintiff's claims for unfair competition and negligence on preemption grounds to the extent they are based on violations of TILA, RESPA or other laws specifically regulating lending. ***Since such claims are preempted, dismissal is with prejudice.***") (emphasis added); *Etedali v. Town of Danvers*, 2009 Mass. App. Div. 240, * 3 (Mass. Ct. App. 2009) ("We affirm the allowance of the Mass. R. Civ. P., Rule 12(b) (6) motion, but hold that the dismissal is with prejudice because the subject matter of the lawsuit has been preempted by Federal law."). Accordingly, courts routinely dismiss preempted state law claims with prejudice. *See, e.g., Riley v. Cordis Corp.*, 625 F. Supp. 2d 769, 790 (D. Minn. 2009) (dismissing preempted claims with prejudice); *Murray v.*

Motorola, Inc., 982 A.2d 764, 789 (D.C. 2009) (affirming trial court's decision to dismiss state court claims with prejudice).[9] The trial court in this case, likewise, was correct in dismissing Appellants' claims with prejudice.

2. Appellants have no basis to seek a different result.

In an effort to obtain a different outcome, Appellants argue that the trial court was required to dismiss their claim without prejudice because he determined that he did not have jurisdiction over the claim. BIC 12. But it was the trial

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[9] *Accord Ramirez v. Medtronic Inc.*, 961 F. Supp. 2d 977, 1003 (D. Ariz. 2013); *Leube v. UMR*, 2013 U.S. Dist. LEXIS 39092 at *8 (S.D. Cal. Mar. 20, 2013); *General Truck Drivers, Warehousemen, Helpers Sales & Serv., & Casino Emples., Teamsters Local Union No. 957 v. Heidelberg Distrib. Co.*, 2013 U.S. Dist. LEXIS 30983 (S.D. Ohio Mar. 6, 2013); *Borroughs Corp. v. Blue Cross Blue Shield of Mich.*, 2012 U.S. Dist. LEXIS 127587 at *29-30 (E.D. Mich. Sept. 7, 2012); *Smith v. Maryland*, 2012 U.S. Dist. LEXIS 117109, at *23 (D. Md. Aug. 20, 2012); *Tuck v. Wells Fargo Home Mortg.*, 2012 U.S. Dist. LEXIS 97777 at *9 (N.D. Cal. July 13, 2012); *Hudson v. Beazer Homes, Inc.*, 2011 U.S. Dist. LEXIS 64260, at *9 (N.D. Ga. June 16, 2011); *Miller v. Alza Corp.*, 759 F. Supp. 2d 929, 945 (S.D. Ohio 2010); *Purcel v. Advanced Bionics Corp.*, 2010 U.S. Dist. LEXIS 67109, at *43 (N.D. Tex. June 30, 2010); *Jones v. Home Loan Inv., F.S.B.*, 718 F. Supp. 2d 728, 741 (S.D. W. Va. 2010); *Lanigan v. Express Scripts, Inc. (In re Express Scripts, Inc)*, 2008 U.S. Dist. LEXIS 26127, at *41 (E.D. Mo. Mar. 6, 2008); *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 318 (E.D. Pa. 2007); *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 2006 U.S. Dist. LEXIS 90526, at *12 (S.D. Tex. Dec. 12, 2006); *Weinstein v. Zurich Kemper Life*, 2002 U.S. Dist. LEXIS 28850, at *11 n.3 (S.D. Fla. Mar. 15, 2002); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1189 (C.D. Cal. 2001); *Arroyo v. Puerto Rico Sun Oil Co.*, 919 F. Supp. 62, 65 (D.P.R. 1996); *Eirman v. Olde Discount Corp.*, 697 So. 2d 865, 866 (Fla. Ct. App. 1997); *Chung v. McCabe Hamilton & Renny Co.*, 128 P.3d 833, 842 (Haw. 2006); *Miranda v. Jewel Companies, Inc.*, 548 N.E.2d 1348 (Ill. Ct. App. 1989); *Beyer v. Acme Truck Line, Inc.*, 802 So. 2d 798, 801 (La. Ct. App. 2001); *Parsons v. Comcast of Cal./Colo./Wash. I, Inc.*, 208 P.3d 1261, 1265 (Wash. Ct. App. 2009).

court's wording, and not its decision, that was in error. Despite the trial court's choice of words, a decision on preemption, however, is not a decision on the jurisdiction of the court. *See Blab T.V.*, 182 F.3d at 855 (a decision on "ordinary preemption" does not relate to the jurisdiction of the court). It is, as shown above, a decision on the merits, and thus a dismissal based on preemption is properly made with prejudice.

Appellants also argue that the trial court's dismissal with prejudice prevented them from pursuing relief in federal court. Notably, Appellants did not attempt to seek relief in federal court after Judge Viramontes dismissed their claims without prejudice. But the trial court's ruling had no such effect. Indeed, Appellants' argument is based on a fundamental misunderstanding of federal preemption. When a claim is preempted under a federal statute, it cannot be brought in any forum -- state or federal. *See id.* ("ordinary preemption ... may be invoked in either federal or state court."). More particularly, state-law claims that are preempted by the FCRA cannot be brought in either state or federal court. *See, e.g., Pinson v. Equifax Credit Info. Servs., Inc.*, 316 Fed. Appx. 744, 751 (10th Cir. 2009) (federal district court properly dismissed state-law claims after determining they were preempted by the FCRA); *Thomas v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 22078, at *9 (D. Utah Feb. 20, 2014) ("In this case, both of Plaintiff's causes of action are based upon Defendant's furnishing of credit information to the

CRAs. As such, they are preempted by the FCRA and, therefore, must be dismissed.").[10] As the trial court properly concluded, Appellants' state-law claim is preempted by the FCRA. As a result, that claim could not be brought in any forum and was properly dismissed with prejudice.

Appellants' confusion might arise because many statutes that preempt state law claims provide for relief through a statutory cause of action. The FCRA, likewise, creates a private right of action. *See* 15 U.S.C. § 1681o(a) and 15 U.S.C. § 1681n(a). The trial court's dismissal of Appellants' state law claim -- with or without prejudice -- would in no way interfere with Appellants' ability to assert a claim under the FCRA. But Appellants have no viable claim for relief under the FCRA. The Act only permits claims against furnishers of information that fail to conduct an investigation after receiving a report from a consumer reporting agency. *See* 15 U.S.C. § 1681o(a) and 1681n(a). Appellants do not allege that they made a report to any consumer reporting agency, and the Bank received no such report.

Moreover, any claim under the FCRA would be untimely. Claims under the FCRA must be brought within two years of the discovery alleged violation. *See* 15

[10] *See also Spartalian v. Citibank, N.A.*, 2013 U.S. Dist. LEXIS 20092, at *16 (D. Nev. Feb. 13, 2013) ("the negligence claim is preempted and dismissed with prejudice to the extent that it relies on duties arising under the FCRA ... ."); *Smith v. Capital One Fin. Corp.*, 2012 U.S. Dist. LEXIS 66445, at *19 (N.D. Cal. May 11, 2012) ("The fifth cause of action for negligence is dismissed against Capital One and HSBC, based on FCRA preemption. The dismissal is with prejudice.").

U.S.C. § 1681p. Appellants' claim for relief is based on the allegation that they suffered injuries when FNMB failed to report that they had paid off their loan. R.P. 4. Appellants claim that the alleged failure occurred in 2008. *See id.* Appellants were aware of the problem with the reporting on their loan by at least October 22, 2008, when they sent a letter to FNMB's counsel. R.P. 11. Appellants therefore were required to file any claim for relief under the FCRA by October 22, 2010. Appellants filed their original complaint in state court on October 21, 2010. It is likely that the time for them to file a claim for violation of the FCRA had already expired, as they likely discovered the reporting issue before October 21, 2008. But to the extent it did not -- i.e., assuming that Appellants discovered the reporting issue on October 22, 2008 -- it was incumbent on Appellants to seek relief in federal court within the time remaining upon entry of Judge Viramontes' Order. Appellants, however, chose not to do so and allowed the time for filing a claim under the FCRA to expire. Regardless, Appellants could not bring their preempted state law claims in any forum, and accordingly there is no basis to reverse the trial court's ruling dismissing those claims with prejudice.

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the Court affirm the ruling of the trial court.

Respectfully submitted,

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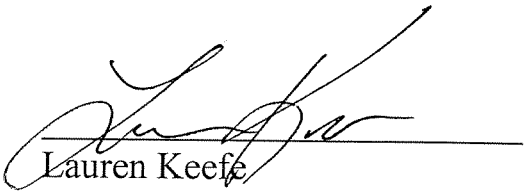
CERTIFICATE OF SERVICE

I, Lauren Keefe, HEREBY CERTIFY and duly swear that this 26th day of June, 2014, that a true and correct copy of the foregoing Reply was served upon the person listed by mailing or delivering same to each party.



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