UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN — SOUTHERN DIVISION

RANDY CLEARY,

Plaintiff,

-vs-

Case No. 2:17-CV-14158-BAF-DRG
Hon. Bernard A. Friedman
Magistrate Judge: David R. Grand

CORELOGIC RENTAL PROPERTY SOLUTIONS, LLC,

Defendant.

PLAINTIFF RANDY CLEARY'S RESPONSE TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL JUDGMENT ON THE PLEADINGS REGARDING COUNT II OF PLAINTIFF'S FIRST AMENDED COMPLAINT

For the reasons set forth in the brief below, Mr. Cleary requests that the Court deny the Motion to Dismiss, or in the Alternative, for Partial Judgment on the Pleadings Regarding Count II of Plaintiff's First Amended Complaint.

Respectfully submitted,

s/ Priya Bali
Priya Bali (P78337)
Ian B. Lyngklip (P47173)
LYNGKLIP & ASSOCIATES
CONSUMER LAW CENTER, PLC
24500 Northwestern Hwy., Ste. 206
Southfield, MI 48075
PH: (248) 208-8864
Priya@MichiganConsumerLaw.Com
Ian@MichiganConsumerLaw.Com

Leslie Brueckner
Public Justice, P.C.
475 14th St., Suite 610
Oakland, CA 94612
Tel: (510) 622-8150
LBrueckner@publicjustice.net

Lucas Rhoads
Public Justice, P.C.
1620 L. St. NW, Suite 630
Washington, D.C. 20036
Tel: (202) 797-8600
LRhoads@publicjustice.net

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Attorneys for Plaintiff

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CORELOGIC RENTAL PROPERTY SOLUTIONS, LLC,

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PLAINTIFF RANDY CLEARY'S BRIEF IN SUPPORT OF RESPONSE TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR PARTIAL JUDGMENT ON THE PLEADINGS REGARDING COUNT II OF PLAINTIFF'S FIRST AMENDED COMPLAINT

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ISSUES PRESENTED

1. Whether Congress in the Fair Credit Reporting Act articulated "the clearest command" that the district courts do not have jurisdiction to issue injunctive relief to private litigants.

2. Whether, in the absence of injunctive relief, this Court should exercise its discretion to issue a declaratory judgment where such a judgment would settle the controversy, clarify the legal relations at issue, and there is no alternative remedy more effective.

CONTROLLING AUTHORITY

Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009)
Califano v. Yamasaki, 442 U.S. 682 (1979)
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)

MEMORANDUM OF LAW

INTRODUCTION

This suit was filed by a Michigan resident whose application for housing was denied based on egregious inaccuracies in a credit report supplied to the rental agency by defendant CoreLogic Rental Property Solutions, LLC. First Amended Complaint, Doc. 8 ("Complaint") ¶¶ 16, 18, 21. He sued CoreLogic under the Fair Credit Reporting Act ("FCRA" or "the Act"), 15 U.S.C. §§ 1681 *et seq.*, seeking damages and declaratory and injunctive relief barring further publication of the inaccurate information. *Id.* ¶ 37. CoreLogic has moved to dismiss the plaintiff's injunctive and declaratory relief claims, arguing private litigants cannot obtain any such relief under the FCRA. Def.'s Mot. to Dismiss, Doc. 13.

CoreLogic's argument does not withstand scrutiny. The U.S. Supreme Court has instructed that a court is authorized to award injunctive relief absent "the clearest command to the contrary from Congress." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979). The FCRA contains *no* such command, let alone the "clearest" one, *id.*, and the Act's legislative history removes any doubt that Congress intended to permit courts to enjoin violations of the FCRA in private lawsuits exactly like this one. Any contrary conclusion would directly undermine the FCRA's core purposes by stripping consumers of their ability to ensure that inaccurate data is not repeated in future credit reports. CoreLogic's motion to dismiss should be denied.

BACKGROUND

1. The Fair Credit Reporting Act. "Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) ("FCRA seeks to ensure 'fair and accurate credit reporting.'" (quoting 15 U.S.C. § 1681(a)(1)). In enacting the FCRA, Congress "creat[ed] a system intended to give consumers a means to dispute—and, ultimately, correct—inaccurate information on their credit reports." *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 431 (4th Cir. 2004).[1]

To this end, the Act places numerous restrictions on credit reporting agencies. Among other things, the FCRA requires that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

To ensure compliance, the FCRA gives citizens a private right of action against credit reporting agencies that willfully or negligently fail to comply with the statute's requirements. *See Ricketson*, 266 F. Supp. 3d at 1094-95 (describing the

[1] *See generally Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 632 (E.D. Va. 2016) (describing the FCRA's legislative history); *Ricketson v. Experian Info. Sols., Inc.*, 266 F. Supp. 3d 1083, 1089–90 (W.D. Mich. 2017) (same).

FCRA's private rights of action). The Act specifically provides that "any person who is negligent in failing to comply with" such requirements is liable for "any actual damages sustained by the consumer as a result of the failure." *Id.* § 1681o(a). One who "willfully fails to comply" is liable to the consumer for "any actual damages sustained by the consumer . . . or damages of not less than $100 and not more than $1000, whichever is greater." *Id.* § 1681n(a). Section 1681p in turn grants federal district courts jurisdiction over any "action to enforce any liability created under" the Act.

2. This Lawsuit. Plaintiff Randy Cleary is exactly the sort of consumer Congress had in mind when it passed the FCRA. In 1987, Mr. Cleary had his identity stolen and a criminal began using Mr. Cleary's identity when receiving traffic citations. Complaint ¶ 13. Thus began a more than 30-year struggle with identity theft that persists to the present day. Mr. Cleary has been thrown in jail, issued traffic citations, and accused of a litany of crimes, forcing Mr. Cleary to change his name twice to attempt to escape the use of his stolen identity. *See Cleary v. Heyns*, No. 12-11988, 2014 WL 1118382, at *1 (E.D. Mich. Mar. 21, 2014).[2] The State of

[2] *Cleary v. Heyns* was filed by Mr. Cleary in 2014 against Michigan's Secretary of State (and various other state officials) after his stolen identify had led to suspension of his driver's license and loss of potential employment. He sought an order requiring the State to restore his license and correct its records, as well as damages against state officials for violation of his constitutional rights. Although the court agreed that it was "indisputable that Mr. Cleary did not commit the drug-related offenses for which his license was suspended," it ultimately ruled against him on

Michigan has suspended Mr. Cleary's driver's license numerous times due to the illicit use of his identity—a particularly problematic consequence given that Mr. Cleary is a truck driver by trade.

Most recently, Mr. Cleary applied for housing at Brighton Sylvan Glen Estates, which requested a consumer report from CoreLogic, a consumer reporting agency and the defendant in the present case. Complaint ¶¶ 8, 15. Though Mr. Cleary has never been convicted of any crime, his CoreLogic consumer report contained numerous inaccurate convictions, including breaking and entering a building with intent, unarmed robbery, escaping prison, and a traffic violation and misdemeanor. *Id*. ¶¶ 18-19. Due to these inaccuracies, Mr. Cleary was denied housing. *Id*. ¶ 21.

Mr. Cleary filed suit against CoreLogic on December 26, 2017 and an Amended Complaint on February 1, 2018, seeking damages and injunctive relief, as well as a declaration of his rights relative to the accuracy of the disputed criminal history information. *Id*. ¶¶ 31-35. CoreLogic immediately moved to dismiss or for partial summary judgment on the pleadings, arguing that the FCRA does not permit consumers to obtain injunctive relief against consumer reporting agencies that fail

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various grounds, including that he was given "notice and an opportunity to be heard at a post-deprivation hearing." *Id.* at *10. To this day, most of the state records that improperly bear his name remain uncorrected.

to follow reasonable procedures to assure the accuracy of consumer reports. Doc. 13.

3. Relevant Case Law. The federal courts are split on the legal issue raised in CoreLogic's motion to dismiss. In 2000, the Fifth Circuit held that, because Congress specifically granted power to the Federal Trade Commission ("FTC") to enforce the requirements of the FCRA, 15 U.S.C. § 1681s(a), and did not *expressly* grant similar injunctive power to private litigants, "Congress vested the power to obtain injunctive relief solely with the FTC." *Washington v. CSC Credit Services, Inc.*, 199 F.3d 263, 268 (5th Cir. 2000).

Although several courts have followed *Washington*, others have come to the opposite conclusion or called its reasoning into doubt.[3] Particularly relevant here is the Sixth Circuit's ruling in *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009), where the court stated that whether Congress intended to deprive individuals of an injunctive remedy in the FCRA is "far from self-evident." 579 F.3d at 709. *Beaudry* observed that the *Washington* court's holding that the "FCRA's

[3] *See, e.g., Valentine v. First Advantage Saferent, Inc.*, No. EDCV 08–142 VAP (OPx), 2009 WL 4349694, at *14 (C.D. Cal. Nov. 23, 2009) (recognizing the split of authority and declining to address the issue); *Andrews v. Trans Union Corp. Inc.*, 7 F. Supp. 2d 1056, 1084 (C.D. Cal. 1998) (finding injunctive relief available), *aff'd in part, rev'd in part*, 225 F.3d 1063 (9th Cir.), *rev'd on other grounds*, 534 U.S. 19 (2001); *Greenway v. Info. Dynamics, Ltd.*, 399 F. Supp. 1092, 1097 (D. Ariz. 1974). *See also Crabill v. Trans Union, LLC*, 259 F.3d 662, 664 (7th Cir. 2001) (stating in dicta that plaintiff could sue for an injunction under the FCRA).

grant to the FTC of the power to obtain injunctive relief…creates a negative inference that…individuals [may not] seek injunctive relief" failed to take into account "the conflicting negative inferences created by other parts of the statute." *Id.* Thus, *Beaudry* concluded, "the answer is not free from doubt." *Id.*[4]

GOVERNING LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When evaluating a Rule 12(b)(6) motion, "a district court must accept as true all the allegations contained in the complaint and construe the complaint liberally in favor of the plaintiff." *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006) (citing *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995)).

[4] *Beaudry* did not decide the issue because it was not preserved for appellate review, but the Sixth Circuit's decision has been cited as "cast[ing] doubt on the foundational case for the current majority rule…" Meredith Schramm-Strosser, *The "Not So" Fair Credit Reporting Act*, 14 Duq. Bus. L.J. 165, 203 (2016).

ARGUMENT

I. THIS COURT HAS THE POWER TO ISSUE EQUITABLE RELIEF TO ENFORCE THE FCRA.

One of the oldest principles governing the equitable reach of federal courts is that they possess the inherent power to issue injunctions in suits where they have jurisdiction. *See Brown v. Swann*, 35 U.S. 497, 503 (1836) (establishing principle, explaining "great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction"). As stated in the Supreme Court's leading modern decision, "[a]bsent the *clearest command* to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (emphasis added).

In enacting 15 U.S.C. § 1681p, Congress granted such jurisdiction to this Court to hear actions under the FCRA. The Court has jurisdiction over "an action to enforce any liability created under this subchapter." *Id*. There is nothing explicit in the FCRA divesting the Court of its equitable powers in such suits, so the only question is whether the FCRA *implicitly* contains a revocation of such equitable power.

While statutory revocation of equitable authority can be implicit, the Supreme Court has made it clear, time and again, that revocation by inference must meet an exceedingly high standard:

> Unless a statute, then, in so many words, *or by an inference which does not admit of a doubt,* commands... the law should not be so construed. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Brown, 35 U.S. at 503 (emphasis added). Thus, the elimination, by statutory inference, of a federal court's inherent equitable powers in a case over which it has jurisdiction is not lightly found, but, rather, must meet a singularly stringent test. [5]

A. The FCRA Does Not Contain A "Clear[ ] Command" That Precludes Private Litigants From Obtaining Injunctive Relief.

The FCRA's plain language is bereft of any "clear command" that Congress intended to bar citizens from seeking injunctive relief. The Act grants district courts the authority "to enforce any liability created under this subchapter…." 15 U.S.C. § 1681p. Neither "enforce" nor "liability" is defined under the statute. But in common usage, "enforce" is broadly defined as "[t]o give force or effect to (a law, etc.); to compel obedience to" or "[l]oosely, to compel a person to pay damages for not complying with (a contract)." Black's Law Dictionary (10th ed. 2014). "Liability" is defined as "the quality, state, or condition of being legally obligated or accountable; legal responsibility or to society, enforceable by civil remedy or criminal punishment" or "a financial or pecuniary obligation in a specified amount."

[5] *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("'Unless a statute, in so many words, or by a *necessary and inescapable inference*, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'") (emphasis added) (internal citation omitted).

Id. While both terms admit of multiple definitions, each is broad enough to encompass an injunctive remedy, and neither contains the "clearest command" that Congress intended to limit the relief available to private litigants. *Califano*, 442 U.S. at 705.

Likewise, the civil liability sections of the FCRA do not plainly express a Congressional intent that those remedies should be exclusive. Both Sections 1681n and 1681o state that "any person" who "fails to comply with any requirement . . . is liable to that consumer" for damages and attorney's fees. Nowhere in those sections did Congress expressly *exclude* injunctive relief or provide that damages were the exclusive remedy available to consumers. That makes sense, because under contemporary Supreme Court decisions, which are still followed today, equitable relief was always available, unless specifically denied. *See Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942). For decades, moreover, the Sixth Circuit has recognized that "[t]he mere omission from [an] Act of Congress…of [a] specific remedy…does not restrict the United States Courts from affording equitable relief . . . ." *Heinicke v. Parr*, 168 F.2d 194, 196 (6th Cir. 1948).[6]

[6] *See also In re Murray Energy Corp.*, 788 F.3d 330, 338 (D.C. Cir. 2015) ("failure to mention" a form of equitable relief "counseled against conclusion that" equitable jurisdiction was withdrawn); *Engelbrecht v. Experian Information Services, Inc.*, No. 12-01547 VAP (OPx), 2012 WL 10424896, at *4 (C.D. Cal. Nov. 6, 2012)

Second, turning to the statute as a whole, there is nothing in the FCRA that gives rise to a "necessary and inescapable inference" that Congress intended to preclude private litigants from obtaining injunctive relief. *Weinberger*, 456 U.S. at 313. To the contrary, as the Sixth Circuit observed in *Beaudry*, 579 F.3d at 709, two other subsections of the FCRA—Sections § 1681u(m) and 1681s-2(d)—actually support the *opposite* inference.

Specifically, Section 1681u directs consumer reporting agencies, in certain defined circumstances, to report "the names and addresses of all financial institutions at which a consumer maintains . . . an account" to the Federal Bureau of Investigation ("FBI"). 15 U.S.C. § 1681u(a). The section then sets out a damages provision, 15 U.S.C. § 1681u(j), that allows consumers to recover damages from "any agency of department of the United States" that violates Section 1681u.

Crucially, Section 1681u *then* states: "Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section *shall be the only judicial remedies and sanctions for violation of this section.*" *Id.* § 1681u(m) (emphasis added). Such an exclusive remedies provision is conspicuously absent from Sections 1681n and 1681o, implying that the damages available under those provisions are *not* the "only judicial remedies and sanctions available." *See*

("FCRA does not restrict a private plaintiff's right to equitable relief 'in so many words.'") (quoting *Weinberger*, 456 U.S. at 313).

Beaudry, 579 F.3d at 709 (noting that Section 1681u(m) creates a "conflicting negative inference" that "other remedies would otherwise be available implicitly.").

If Congress intended that the explicit inclusion of one remedy necessarily prohibited any remedy not enumerated, Section 1681u(m) would be utterly useless, contradicting the Supreme Court's recent reiteration that "one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Section 1681s-2(d) suggests a similar inference. There, Congress provided that "[t]he provisions of law described in paragraphs (1) through (3) of subsection (c) . . . *shall be enforced exclusively* as provided under section 1681 of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title." 15 U.S.C. § 1681s-2(d) (emphasis added). Once more, this exclusive enforcement provision implies that the FCRA's civil liability provisions—which are not subject to any explicit limitation of remedies—do *not* deprive courts of their authority to issue injunctive relief to "enforce" the FCRA's provisions.

The *Washington* court reached the opposite conclusion by looking to Congress's explicit grant of enforcement authority to the FTC in Section 1681s(a), which provides that "[c]ompliance with the requirements imposed under [the FCRA] shall be enforced…by the [FTC]." *See* 199 F.3d at 268. The Fifth Circuit reasoned

that this provision, when combined with the *absence* of any such explicit authorization in the FCRA's civil liability provisions, implies that Congress did not intend for private litigants to "enforce compliance" with the FCRA. *Id.* In so ruling, however, the Fifth Circuit failed to accord proper weight to the other provisions of the FCRA that give rise to an equally powerful *opposite* inference. *See Beaudry*, 579 F.3d at 709.

First, the *Washington* court cursorily dismissed the negative inference created by Section 1681s-2(d), reasoning that this provision merely addresses "whether the FTC has exclusive enforcement authority over all of § 1681e (which it plainly does not)," and is irrelevant to whether FTC has the "exclusive ability to obtain one type of remedy (injunctive relief) available under 1681(e)." 199 F.3d at 269 n.5. But interpreting Section 1681s-2(d) as intending to limit all relief to that provided in §1681s (and preventing private litigants from seeking damages under §1681n and 1681o) would make Section 1681s-2(c) superfluous.[7] The only reading that gives effect to both provisions is that s-2(c) withdraws the private right of action for damages and s-2(d) separately provides that only administrative entities may

[7] Section 1681s-2(c) provides that, subject to certain exceptions, the civil remedies provisions of the FCRA (Section 1681n and 1681o) "do not apply to any violation of" Section 1681s-2. If, as the *Washington* court held, Section 1681s-2(d) was merely intended to clarify that the FTC and other federal and state agencies and officials have exclusive authority to enforce Section S-2, then there would have been no need for Section 1681s-2(c) to say that citizens do *not* have the authority to enforce Section S-2 under the civil remedy provisions of Sections 1681n and o.

"enforce" the requirements, *i.e.* exercise injunctive authority, of the enumerated provisions.

Second, the *Washington* court entirely failed to notice the exclusive remedy provision of Section § 1681u(m) which—as explained above—strongly suggests that Congress did *not* intend for the FCRA's civil liability provisions to bar citizens from seeking an injunctive remedy. Instead, the Fifth Circuit looked to a *different* provision of Section 1681u, Section 1681u(n), which provides that "injunctive relief shall be available to require compliance with the procedures of this section." *See* 199 F.3d at 269.[8] The Fifth Circuit reasoned that, because Section 1681u(n) references injunctive relief, any section that *doesn't* reference injunctive relief must necessarily exclude it.[9] In so arguing, however, the Fifth Circuit failed to notice Section 1861u(m), which gives rise to the exact *opposite* inference in the context of the very same provision. *See Beaudry*, 579 F.3d at 709.[10]

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[8] The Court cited Section 1681u(m), which has since been recodified as Section 1681u(n). The "Limitation of Remedies" provision, then Section 1681u(l), has been recodified as 1681u(m).

[9] The *Washington* court stated that 1681u(n) "would be unnecessary if injunctive relief were otherwise available." *Id.* at 269. Had the court considered Section 1681u(m), however, they would have recognized that 1681u(n) is necessary precisely because the preceding provision expressly *excluded* any remedies that might otherwise be implied. Thus, read together, the provisions support the general availability of injunctive relief to private litigants under the FCRA.

[10] *See Engelbrecht*, 2012 WL 10424896, at *4 (internal quotations omitted) ("the negative implications to be drawn from the FCRA's silence regarding equitable

At best, then, as *Beaudry* observed, the FCRA gives rise to "conflicting negative inferences" as to the availability of an injunctive remedy under the Act's civil liability provisions. 579 F.3d at 709. That alone is reason enough to reject CoreLogic's argument here, for—as stated at the outset—"[a]bsent the *clearest command* to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano*, 442 U.S. at 705 (emphasis added). The FCRA does not contain anything resembling the sort of "clearest command" required to wipe out injunctive relief.

B. The FCRA's Legislative History and Statutory Purpose Show that Congress Did Not Bar Citizens from Seeking Injunctive Relief.

If there were any remaining doubt on this point, it would be dispelled by the FCRA's legislative history and overriding purpose. *See Wheeling-Pittsburg Steel Corp. v. Mitsui & Co., Inc.*, 221 F.3d 924, 927 (6th Cir. 2000) (holding that "canon of statutory construction [that, 'where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it,'] *must give way to evidence of* '*a contrary legislative intent.*'" (quoting *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11 (1979)) (emphasis added).

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relief in Sections 1681*n* and 1681*o*, express grant of injunctive powers in Sections 1681 s and 1681*u*(m), and express limitation to enumerated remedies in Section 1681*u*(l) scarcely could qualify as the clearest command of Congress or a necessary and inescapable inference.").

1. CoreLogic's Argument is Contradicted by the FCRA's History.

First, the FCRA's legislative history contains powerful and conclusive evidence that Congress intended to allow citizens to seek injunctive relief for the purpose of correcting inaccuracies in credit reports. The Senate Report accompanying the bill that contained the FCRA's civil liability and judicial enforcement provisions emphasizes the difficulty that consumers face in both detecting and *correcting* inaccurate information in their credit reports. S. Rep. No. 91-517, at 3 (1969) ("Exhibit 15-2") ("even when individuals gain access to [their] credit file[s], they sometimes have difficulty in correcting inaccurate information.").[11]

To address this problem, the Report specifically provides:

> Section 616—Civil Liability for Willful Non-Compliance—Consumers can bring civil actions to ***enforce compliance***. If a willful

[11] Courts agree that S. 823 is "the original version of the Senate bill that turned out as FCRA." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58 (2007). *See also TRW Inc. v. Andrews*, 534 U.S. 19, 33 (2001) (using S. 823 in the court's legislative history analysis). S. 823 contained the FCRA's provisions related to civil liability, jurisdiction of courts, and administrative enforcement. *See* Exhibit 15-3 §§ 616, 617, 618, 620. Around the same time, other bills were introduced that created other sections of the FCRA unrelated to the accuracy of credit reports. *E.g.* S. 721, 91st Cong. (1969) (addressing unsolicited credit cards), H.R. 13244, 91st Cong. (1969) (same), H.R. 16444, 91st Cong. (1970) (addressing recordkeeping at financial institutions). But the language of S.823 was incorporated verbatim into 91 H.R. 15073—the bill approved by the Conference Committee, Conf. Rep. No. 91-1587, and passed by Congress.

> violation can be shown, the consumer can collect actual damages, punitive damages of up to $1000 and attorney fees. * * *
>
> Section 620—Administrative Enforcement—Compliance would be ***further enforced*** by the Federal Trade Commission with respect to consumer reporting agencies and users of reports who are not regulated by any other Federal agency. The FTC can use the cease and desist authorities and other procedural, investigative and enforcement powers which it has under the FTC Act to secure compliance.

Id. at 7. The italicized reference to consumers' right to "enforce compliance" with the FCRA is crucially important because this is the same language Congress used to grant the power to obtain injunctive relief to the FTC. *See* S. 823, 91st Cong. §620 (Nov. 5, 1969) ("Exhibit 15-3") ("*Compliance* with the requirements imposed under [the FCRA] shall be *enforced* under the Federal Trade Commission Act by the Federal Trade Commission.") (emphases added). By using this language with reference to the FCRA's civil liability provisions, the Senate Report makes clear that Congress *also* intended for *consumers* to be able to "enforce compliance" by obtaining injunctive relief under the FCRA. This is underscored by the Report's statement that "[c]ompliance [with the FCRA] would be ***further*** enforced by the Federal Trade Commission with respect to consumer reporting agencies." Exhibit 15-2 at 7 (emphasis added).

Contemporaneous Senate testimony on this language drives this point home. Lewis B. Stone, an original drafter of the language in the enforcement provisions,[12] explained to Congress in a hearing on S. 823:

> To enforce these rights, a right to bring a civil action for damages ***or to enjoin violation was authorized***. ***The injunction could be used to force the credit bureau to correct an error.*** A willful violation of this act-which could include a willful refusal to change the notation-would also subject the credit bureau to exemplary damages.

Exhibit 15-4 at 59-60 (statement of Lewis B. Stone, assistant counsel to Governor Rockefeller of New York) (emphasis added). Here again, the italicized language shows that Congress intended to give private litigants the power to bring a civil action "to enjoin violation[s]" of the act. *Id.*

Importantly, this legislative history is not cited in any case to consider the availability of injunctive relief under the FCRA. To Plaintiff's knowledge, neither the *Washington* court nor any other court that followed *Washington*'s holding was made aware of the key language in the Senate Report or Mr. Stone's accompanying testimony that citizens can sue to "enjoin violation[s]" under the FCRA. Indeed, there is no mention *at all* of the FCRA's legislative history, as it pertains to injunctive relief, in *Washington* or in any of the numerous courts that have relied on that decision.

[12] Hearing Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong. ("Exhibit 15-4") 48 (May 1969) (statement of John D. Caemmerer, State Senator from New York).

This is a fatal flaw. The Sixth Circuit has emphasized the central importance of legislative history in gleaning the intent of Congress, going as far as to explain that some "canon[s] of statutory construction must give way to evidence of a contrary legislative intent." *Wheeling-Pittsburg*, 221 F.3d at 927 (citation omitted). Here, even if traditional "canon[s] of statutory construction" supported CoreLogic's interpretation of the FCRA—and they do not—that interpretation would have to "give way to [this] evidence of a contrary legislative intent." *Id.*

2. CoreLogic's Argument Is Contrary to the FCRA's Purposes.

Beyond that, accepting CoreLogic's argument would directly undermine the primary purpose of the FCRA—something this court cannot do. *See Negonsett v. Samuels*, 507 U.S. 99, 104 (1993) (in construing a statute, the courts' role is to give effect to the intent of Congress). *See also Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 138 (3d Cir. 2000) (where Congress enacts remedial legislation, the statute "should be construed broadly to effectuate its purpose.") (citation omitted).

As explained above, the FCRA's core purpose is **"**to ensure fair and accurate credit reporting . . . and protect consumer privacy." *Safeco*, 551 U.S. at 52. Depriving private litigants of the ability to rectify mistakes on their credit reports would flout the central purpose of the FCRA: to "*prevent* consumers from being unjustly

damaged because of inaccurate or arbitrary information in a credit report." Exhibit 15-2 at 1 (emphasis added).

As multiple courts have noted in reference to the FCRA, "a consumer without the right to bring a claim for injunctive relief would be helpless to correct her credit information." *Alston v. Equifax Info. Services, LLC*, CIV.A. TDC-13-1230, 2014 WL 6388169, at *3 (D. Md. Nov. 13, 2014) (quoting *Engelbrecht*, 2012 WL 10424896 at *5). Absent injunctive relief, a consumer plagued by inaccurate records—such as Mr. Cleary—would be forced repeatedly to bring damages actions each time he is injured by an inaccurate report. Absent voluntary compliance by the credit agency, the inaccuracies would continue unless and until the FTC takes an interest in the consumer's particular case and brings an action to enjoin the violation—an unlikely occurrence under any circumstances, but particularly given that agency has been notoriously lax in its enforcement of the FCRA's requirements.[13]

[13] In forty years, the FTC brought only 87 enforcement actions against credit bureaus, users of consumer reports, and furnishers of credit information. Alexandra P. Everhart Sickler, *The (Un)Fair Credit Reporting Act*, 28 Loy. Consumer L. Rev. 238 (2016) (citing FEDERAL TRADE COMMISSION REPORT, FORTY YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH INTERPRETATIONS 1 (Jul. 2011), *available at* https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summaryinterpretations/110720fcrareport.pdf.

In short, construing the statute as prohibiting consumers from seeking an injunctive remedy would gut the most crucial, central goal of the entire statutory framework. *See Englebrecht*, 2012 WL 10424896 at *5. Congress cannot have intended such an absurd result, and this Court should not embrace it here. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

C. Other Statutes Confirm that the FCRA Does Not Bar Citizens from Seeking Injunctive Relief.

Other statutory schemes reinforce the conclusion that the FCRA does not deprive the courts of authority to issue injunctive relief. For example, the Freedom of Information Act ("FOIA") confers jurisdiction on courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Despite this narrow grant of authority, the U.S. Supreme Court held that other forms of injunctive relief are available under FOIA.[14]

Likewise, the Perishable Agriculture Commodities Act ("PACA") narrowly authorizes district courts "to entertain…actions by the Secretary to prevent and

[14] *See Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 18-20 (1974) (holding that, although "[FOIA's] express grant of jurisdiction to enjoin in a specific way, coupled with a limited sanction, might suggest that the Act's provision for compelled production was intended to be the exclusive enforcement method," courts also have the implicit power to "enjoin agency action pending the resolution of an asserted FOIA claim.").

restrain dissipation of the trust." 7 U.S.C. § 499e (c)(5)(ii). Two circuit courts have considered whether "the specific grant of jurisdiction to the district courts to enable the Secretary to seek an injunction . . . mean[s] that *only* the Secretary of Agriculture" may do so. *Tanimura*, 222 F.3d at 137 (emphasis in original). *See also Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 158 (11th Cir. 1990). Rejecting this negative implication, both circuits relied in part upon "our familiar maxim that "[a]bsent a clear congressional command to the contrary, federal courts retain their authority to issue injunctive relief…" *Tanimura*, 222 F.3d at 138 (citing *Frio Ice*, 918 F.2d at 157).

Like PACA, Congress's grant of injunctive power to the FTC under the FCRA was intended to "expand, rather than to restrict" jurisdiction to enforce the FCRA. *Id.* at 138. To conclude otherwise would result in an absurd situation—wherein those harmed by inaccurate credit reports are unable to remedy those inaccuracies. This court should "not read the plain language of the statute to bring about this absurd result." *Tanimura*, 222 F.3d at 138.[15]

[15] Contrary to the Fifth Circuit's conclusion in *Washington*, 199 F.3d at 268 n. 4, the Fair Debt Collection Practices Act ("FDCPA"), does not imply a contrary result. *See Andrews*, 7 F. Supp. 2d at 1084 n.33 (rejecting comparison between the FCRA and FDCPA); *Engelbrecht*, 2012 WL 10424896 at *5 (distinguishing the "FCRA from statutes like the FDCPA, under which violators must make additional collection attempts (and, thus, additional actionable violations) to cause further harm.").

II. DECLARATORY RELIEF IS AVAILABLE TO PRIVATE LITIGANTS UNDER THE DECLARATORY JUDGMENT ACT.

CoreLogic's motion to dismiss plaintiff's claim for declaratory relief also lacks merit. Mr. Cleary's claim falls within the broad remedial provision of the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201(a), which provides that:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*

See 28 U.S.C. § 2201(a) (emphasis added). Importantly, the DJA carves out exceptions to its use but does not mention the FCRA.[16] And, although declaratory and injunctive relief

> have many attributes in common…, they are distinct remedies that may or may not be sought together in the same action…. A judge may determine that plaintiffs are entitled to declaratory relief, which at the same time denying the issuance of injunctive relief on equitable grounds.

Moore's Federal Practice, 3d Edition, Vol. 12, p. 57-26 & 57-27 (1999). The Sixth Circuit, moreover, has tacitly recognized the right of a private FCRA plaintiff to relief under the DJA. *See Aetna Casualty & Surety Company v. Sunshine Corp.*, 74 F.3d 685, 688-89 (6th Cir. 1996).

[16] The DJA applies to any "case of actual controversy within its jurisdiction, *except with respect to* Federal taxes…, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding…" 28 U.S.C.A. § 2201 (emphasis added).

This lawsuit presents an "actual controversy" within the meaning of the DJA because Mr. Cleary alleges that "CoreLogic failed to follow reasonable procedures to ensure the maximum possible accuracy of the report which it issued in violation of 15 U.S.C. § 1681e(b). Complaint ¶ 23. Moreover, Mr. Cleary would benefit from a declaration that his credit report is inaccurate, precluding the need for future litigation.[17]

This case also meets the Sixth Circuit's five-factor test to determine whether a court should exercise its jurisdiction over a declaratory judgment:

> (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

AmSouth Bank v. Dale, 386 F.3d 763, 785 (6th Cir. 2004) (citation omitted). Plaintiff asks this Court to "declare his rights relative to the accuracy of the disputed credit information." Complaint ¶ 34. If this Court were to grant this relief, it would "settle the controversy" as to the accuracy of CoreLogic's report on Mr. Cleary. Moreover, if injunctive relief is unavailable to plaintiff, there would be no

[17] *Cf. Bentley v. Providian Financial Corp.*, No. 02 Civ. 5714(WHP)(FM), 2003 WL 22234700, at *5 (S.D.N.Y. April 21, 2003) (denying declaratory relief for lack of "actual controversy" where plaintiff did not allege under the FCRA that "reasonable procedures [were] not followed and disclosures [were] made."

"alternative remedy that is better or more effective"—indeed, there would be no alternative remedy *at all* to help Mr. Cleary clear his name. Thus, this Court should at least grant Plaintiff the requested declaratory relief.

Respectfully submitted,

s/ Priya Bali
Priya Bali (P78337)
Ian B. Lyngklip (P47173)
LYNGKLIP & ASSOCIATES
CONSUMER LAW CENTER, PLC
24500 Northwestern Hwy., Ste. 206
Southfield, MI 48075
PH: (248) 208-8864
Priya@MichiganConsumerLaw.Com
Ian@MichiganConsumerLaw.Com

Leslie Brueckner
Public Justice, P.C.
475 14th St., Suite 610
Oakland, CA 94612
Tel: (510) 622-8150
LBrueckner@publicjustice.net

Lucas Rhoads
Public Justice, P.C.
1620 L. St. NW, Suite 630
Washington, D.C. 20036
Tel: (202) 797-8600
LRhoads@publicjustice.net

Dated: April 13, 208

Attorneys for Plaintiff

Certificate of Service

I hereby certify that on April 13, 2018, I electronically filed the foregoing paper with the Clerk of The Court and served the document on all parties entitled to notice via the CM/ECF system.

Respectfully submitted,

s/ Priya Bali
Priya Bali (P78337)
LYNGKLIP & ASSOCIATES
CONSUMER LAW CENTER, PLC
Attorneys for Randy Cleary
24500 Northwestern Hwy., Ste. 206
Southfield, MI 48075
PH: (248) 208-8864
Priya@MichiganConsumerLaw.Com

Dated: April 13, 2018