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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Home Care Services, Inc., an Arizona corporation d/b/a LJM Air Conditioning; John Lamont and Lisa Lamont, man and wife,

No. 09-CV-2518-PHX-GMS

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ORDER

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Plaintiff,

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vs.

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Advanta Bank Corporation, a Utah industrial bank,

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Defendant.

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Pending before the Court is Defendant’s Motion to Dismiss Counts Six Through Eight of the Amended Complaint (Dkt. # 22). For the following reasons, the Court denies the Motion.¹

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BACKGROUND

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The Complaint alleges the following facts. In September 2006, Ms. Tamarom In, who was once a defendant in this action, provided office administration services to Home Care Services, Inc. d/b/a LJM Air Conditioning (“LJM”), by virtue of an agreement between LJM

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¹ Plaintiffs’ request for oral argument is denied because the parties have had an adequate opportunity to discuss the law and evidence and oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

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1 and Diversified Human Resources, Inc., which was Ms. In's employer. Ms. In then applied
2 to Advanta Bank Corporation ("Advanta") for issuance of a credit card to LJM. No person
3 with authority to act on LJM's behalf authorized, knew of, ratified, or received of any notice
4 or benefit from Ms. In's credit card application. Advanta failed to verify the accuracy of the
5 information that Ms. In provided in the application and failed to confirm Ms. In's authority
6 to apply for and to receive the credit card. Ms. In began using the credit card issued to LJM
7 and falsified company reports to conceal this activity.

8 In August of 2008, Advanta's fraud investigator reported that the credit card was
9 fraudulently obtained by Ms. In to LJM's detriment and that Advanta would write-off the
10 credit card balance that remained on the card. Advanta's legal department, however, did not
11 follow that course of action and instead informed LJM that both LJM and its president and
12 CEO, John Lamont, were liable for the amount of the unpaid balance. Advanta then,
13 according to Plaintiffs, began "knowingly and wrongfully" reporting false information to
14 credit reporting agencies, presumably regarding the liability for the card payments.

15 The Revised Third Amended Complaint ("TAC") raised three new claims: (1)
16 violation of 15 U.S.C. § 1681s-2, (2) defamation, and (3) intentional infliction of emotional
17 distress.² In their Response to this Motion, Plaintiffs clarify that these three claims apply
18 only to the Lamonts individually and not to LJM as an entity.

19 DISCUSSION

20 **I. Statutory Background of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.***

21 Plaintiffs allege a violation of the Fair Credit Reporting Act ("FCRA") against
22 Advanta. Defendant's Motion asserts both that Plaintiffs' FCRA claim fails and that FCRA
23 preempts Plaintiffs' state law claims for intentional infliction of emotional distress and
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25 ²The notice of removal included a different version of the Third Amended Complaint.
26 This Court then granted Plaintiffs' Motion to Amend to file their "Revised" Third Amended
27 Complaint (Dkt. ## 32, 33), which Plaintiffs apparently inadvertently neglected to file
28 originally. Because the revised version raises substantially the same claims and the parties
appear to proceed under the revised TAC, the Court analyzes the Motion to Dismiss under
the revised TAC.

1 defamation.

2 Under FCRA, Sections 1681n and 1681o provide a general cause of action for a
3 plaintiff who successfully alleges that a defendant willfully or negligently failed to comply
4 with an applicable section of FCRA. *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147,
5 1154 (9th Cir. 2009) (citing 15 U.S.C. §§ 1681n, 1681o). Plaintiffs allege that Advanta
6 violated Section 1681s-2, which sets forth two main duties relating to the “responsibilities
7 of furnishers of information to consumer reporting agencies.” 15 U.S.C. § 1681s-2. Section
8 1681s-2(a) deals with the duty “to provide accurate information.” *Id.* § 1681s-2(a).
9 Meanwhile, Section 1681s-2(b) applies only after a furnisher receives information of a
10 dispute from a consumer reporting agency and imposes certain affirmative duties on
11 furnishers. *Id.* § 1681s-2(b). After receiving notice of a dispute, a furnisher then has an
12 obligation to conduct an investigation, review relevant information, and report the results of
13 the investigation to the consumer reporting agency. *Id.* If the information is found to be
14 incomplete or inaccurate, the furnisher must report the results to all consumer reporting
15 agencies to whom the information was furnished, as well as modify, delete, or permanently
16 block the reporting of that incomplete or inaccurate information. *Id.*

17 **II. Plaintiffs’ FCRA Claims**

18 To the extent Plaintiffs allege that Advanta violated Section 1681s-2(a), that claim is
19 dismissed because there is no private right of action for a violation of Section 1681s-2(a). *See*
20 15 U.S.C. § 1681s-2(c) (stating that “sections 1681n and 1681o of this title,” which impose
21 civil liability for willful or negligent failure to comply with the FCRA, “do not apply to any
22 violation of [Section 1681s-2(a)]”); *Gorman*, 584 F.3d at 1154 (“[Section] 1681s-2 limits this
23 private right of action to claims arising under [Section 1681s-2(b)] . . . Duties imposed on
24 furnishers under [Section 1681s-2(a)] are enforceable only by federal or state agencies.”).

25 Plaintiffs also allege a violation of Section 1681s-2(b), for which a private right of
26 action exists. Upon review of the TAC, Defendant’s Reply withdrew its argument that
27 Plaintiffs failed to state a claim under Section 1681s-2(b). (Dkt. # 30.) Accordingly,
28 Plaintiffs’ claim under Section 1681s-2(b) survives.

1 **II. Plaintiffs' Common Law Claims**

2 Defendant moves to dismiss Plaintiffs' common law claims for intentional infliction
3 of emotional distress and defamation because 15 U.S.C. § 1681t(b)(1)(F) preempts state
4 common law claims. Plaintiffs respond that the law of the case doctrine precludes this
5 argument and that, in any event, their state common law claims are not preempted.³ Because
6 the Court concludes that preemption is inapplicable, the Court need not discuss the law of
7 the case doctrine.

8 Defendant contends that 15 U.S.C. § 1681t(b)(1)(F) preempts Plaintiffs' claims for
9 defamation and intentional infliction of emotional distress. "[S]tate law that conflicts with
10 federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)
11 (internal quotations omitted); see U.S. Const. Art. VI, cl. 2. Congress may indicate
12 preemptive intent either through the statute's express language or through its structure and
13 purpose. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008).

14 Although FCRA generally preempts state laws only to the extent those laws are
15 inconsistent with federal law, FCRA includes two preemption provisions: Section
16 1681t(b)(1)(F) and Section 1681h(e). *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147,
17 1166 (9th Cir. 2009). Section 1681h(e) was enacted in 1970 and provides,

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

24 15 U.S.C. § 1681h(e). In 1996, Congress added Section 1681t(b)(1)(F), which states:

25 No requirement or prohibition may be imposed under the laws of any State--

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27 ³ Defendant also contends that Advanta, as a corporation, is incapable of suffering
28 emotional distress. Plaintiffs, however, clarify that its intentional infliction of emotional
distress claim applies only to the Lamonts personally.

1 (1) with respect to any subject matter regulated under--

2 (F) section 1681s-2 of this title, relating to the responsibilities of
3 persons who furnish information to consumer reporting
agencies, except that this paragraph shall not apply--

4 (i) with respect to section 54A(a) of chapter 93 of the
5 Massachusetts Annotated Laws (as in effect on
September 30, 1996); or

6 (ii) with respect to section 1785.25(a) of the California
7 Civil Code (as in effect on September 30, 1996);

8 *Id.* § 1681t(b)(1)(F). In other words, Section 1681t(b)(1)(F) preempts certain claims
9 regarding subject matter governed by Section 1681s-2. *See id.* Defendant contends that
10 Plaintiffs' claims for defamation and intentional infliction of emotional distress are
11 preempted because they stem from the reporting of credit information about John Lamont,
12 which relates to the "responsibilities of persons who furnish information to consumer
13 reporting agencies," *see id.*

14 The parties dispute what types of claims FCRA preempts, as Sections 1681t(b)(1)(F)
15 and 1681h(e) are somewhat in conflict. Plaintiffs suggest that Section 1681t governs only
16 the preemption of statutory claims, whereas Section 1681h(e) governs the preemption of
17 common law claims. The Court is unaware of any binding Ninth Circuit authority explicitly
18 deciding this issue, but *Gorman* offers meaningful guidance. 584 F.3d at 1165–68. *Gorman*
19 recognized the potential tension between Section 1681t(b)(1)(F) and Section 1681(h)(e)
20 because, while the former appears to preempt all state law claims based on a creditor's
21 responsibilities under Section 1681s-2, the latter implies that claims in the nature of
22 negligence, defamation, and invasion of privacy may proceed if the plaintiff alleges falsity
23 and malice. *Gorman*, 584 F.3d at 1166. In addressing this conflict, *Gorman* highlighted
24 several ways to reconcile these statutes and to clarify the appropriate scope of FCRA
25 preemption. *Id.* at 1167.

26 Among these approaches, the Ninth Circuit analyzed the "statutory" approach now
27 advanced by Plaintiffs, under which "[Section 1681t(b)(1)(F)] preempts only state law claims
28 against credit information furnishers brought under state statutes, just as 1681h(e) preempts

1 only state tort claims.”⁴ *Id.* *Gorman* then impliedly rejected the statutory approach,
2 concluding that the FCRA’s text suggests that at least some common law claims may be
3 preempted. *See* 584 F.3d at 1166–68. While the statutory approach is premised on a
4 distinction between statutory and common law claims inasmuch as Congress was concerned
5 with protecting furnishers from inconsistent statutory obligations, the *Gorman* court
6 explained that “this distinction” between statutory and common law claims “does not appear
7 in the text of the statute.” 584 F.3d at 1167 n. 25; *see also Alvarado v. Cajun Operating Co.*,
8 588 F.3d 1261, 1268 (9th Cir. 2009) (“The starting point for the interpretation of a statute is
9 always its language,” and “courts must presume that a legislature says in a statute what it
10 means and means in a statute what it says there.”) (citation omitted). To the contrary, Section
11 1681t(b)(1)(F)’s use of “[t]he phrase ‘[n]o requirement or prohibition’ sweeps broadly and
12 suggests no distinction between positive enactments and common law . . . those words easily
13 encompass obligations that take the form of common-law rules.” *Id.* (citing *Cipollone v.*
14 *Liggett Group, Inc.*, 505 U.S. 504,521 (1992)); *see also, e.g., Johnson v. JP Morgan Chase*
15 *Bank*, 536 F. Supp. 2d 1207, 1214–15 (E. D. Cal. 2008) (holding that common law causes
16 of action were preempted by Section 1681t(b)(1)(F)); *Roybal v. Equifax*, 405 F. Supp. 2d
17 1177, 1182 (E. D. Cal. 2005) (“On its face, FCRA precludes all state statutory or common
18 law causes of action that would impose ‘any requirement or prohibition’ on the furnishers
19 of credit information.”). That Section 1681t exempts various statutes from preemption does

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21 ⁴ *Gorman* also described the “temporal approach,” which is not advanced by either
22 party in this case. The Ninth Circuit stated,

23 Attempting to give meaning to both sections, other courts have observed that
24 § 1681t(b)(1)(F) relates to “any subject matter regulated under section
25 1681s-2,” the section which regulates the responses of furnishers to notices of
26 dispute. Hence, these courts apply a “temporal approach,” holding that “causes
27 of action predicated on acts that occurred before a furnisher of information had
28 notice of any inaccuracies are not preempted by § 1681t(b)(1)(F), but are
instead governed by § 1681h(e).

584 F.3d at 1167.

1 not mean that only state statutes, and not common law claims, are preempted. Therefore, the
2 Court rejects Plaintiffs’ statutory approach and concludes that Section 1681t(b)(1)(F)
3 generally preempts both statutory and common law causes of action.

4 This does not end the Court’s analysis, however. Although the Court finds that
5 Section 1681t(b)(1)(F) applies to both statutory and common law claims generally, Section
6 1681h(e) states that certain tort claims are barred “*except* as to false information furnished
7 with malice or willful intent to injure such consumer.” 15 U.S.C. § 1681h(e) (emphasis
8 added). As *Gorman* stated, “[Section] 1681h(e) suggests that defamation claims can proceed
9 against creditors as long as the plaintiff alleges falsity and malice.”⁵ 584 F.3d at 1166.
10 Several canons of statutory interpretation confirm this view.

11 Beginning, as always, with the text of FCRA, the Court “must interpret statutes as a
12 whole, giving effect to each word and making every effort not to interpret a provision in a
13 manner that renders other provisions of the same statute inconsistent, meaningless or
14 superfluous.” *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). If
15 possible, therefore, the Court reads Sections 1681t(b)(1)(F) and 1681h(e) consistently.
16 Although the two sections appear at odds, a plausible consistent interpretation is that Section
17 1681t(b)(1)(F) provides a general preemption rule, while Section 1681h(e) provides an
18 exception for specifically-enumerated torts. To the extent the two sections are inconsistent,
19 “[i]t is a well-settled canon of statutory interpretation that specific provisions prevail over
20 general provisions.” *NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994).
21 Here, Section 1681t(b)(1)(F), which uses broad “[n]o requirement or prohibition” language,
22 must yield to the more specific Section 1681h(e), which mentions specific types of tort
23 claims and the additional requirements to plead falsity and malice. As *Gorman* explained,
24 Section 1681h(e) is “more specific for preemption purposes, because the tension is the nature
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26 ⁵ In a footnote, *Gorman* also stated that Section 1681t(b)(1)(F) “probably” preempted
27 the libel claim, although *Gorman* explicitly did not decide the question. 584 F.3d at 1166 n.
28 23. In any event, *Gorman* seems at least to acknowledge that Section 1681h(e) may present
a different preemption analysis than does Section 1681t(b)(1)(F).

1 of the claims preempted, and [Section] 1681h(e) specifies certain claims that can be
2 brought.” 584 F.3d at 1167 n. 24; *see also Morris v. Bank of Am.*, 2010 WL 761318 at *8 (N.
3 D. Cal. Mar. 3, 2010) (citing *Gorman* and noting that “FCRA preemption is inapplicable
4 where the defendant’s conduct is malicious or willful”). Therefore, Section 1681h(e)
5 provides somewhat of an “exception from preemption” if a plaintiff can prove falsity and
6 malice. *See Weseman v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 542961 at *4–5 (D.
7 Or. Feb. 22, 2008) (discussing that Section 1681h(e) allows certain claims enumerated in that
8 section if the plaintiff can show falsity and malice).

9 Defendant urges the Court to adopt the “total preemption” approach and to conclude
10 that Section 1681t(b)(1)(F) impliedly repealed Section 1681h(e), effectively preempting all
11 statutory and common law claims. Defendant points to several opinions of district courts that
12 have held that FCRA preempts both statutory and common law claims. *See, e.g., Johnson v.*
13 *JP Morgan Chase Bank*, 536 F. Supp. 2d 1207, 1214–15 (E. D. Cal. 2008); *Cope v. MBNA*
14 *Am. Bank, NA*, 2006 WL 655742 at *8–9 (D. Or. Mar. 8, 2006); *Roybal v. Equifax*, 2006 WL
15 902276 at *3–4 (E. D. Cal. Apr. 4, 2006); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139,
16 1143–44 (N. D. Cal. 2005); *Davis v. Md. Bank, N.A.*, 2002 WL 32713429 at *11–15 (N.D.
17 Cal. June 19, 2002).

18 Despite these cases, and despite the fact that Section 1681t(b)(1)(F) generally
19 preempts both statutory and common law claims, the Court finds it possible to give
20 substantive meaning to both Sections 1681t(b)(1)(F) and 1681h(e). “[R]epeals by
21 implication are not favored.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).
22 Repeals by implication apply only where “the intention of the legislature to repeal [is] clear
23 and manifest” and where either “provisions in the two acts are in irreconcilable conflict” or
24 where “the later act covers the whole subject of the earlier one and is clearly intended as a
25 substitute” *Id.* (internal quotations omitted). Section 1681t(b)(1)(F) clearly does not cover
26 the entire subject matter as Section 1681h(e), nor do the sections appear to be in
27 irreconcilable conflict, so the Court will not find implied preemption. *See Sites v. Nationstar*
28 *Mortgage, LLC*, 646 F. Supp. 2d 699, 707 (M. D. Pa. 2009) (holding that Section 1681h(e)

1 was not impliedly repealed because it would null the section and stating that an argument that
2 Section 1681t covers the entire subject matter of Section 1681h(e) is “clearly inapplicable”;
3 *Barnhill v. Bank of Am., N.A.*, 378 F. Supp. 2d 696, 699 (D. S.C. 2005) (same). As already
4 explained, Section 1681h(e) can fairly be read as a limited exception to Section
5 1681t(b)(1)(F). While Section 1681t(b)(1)(F) generally preempts both statutory and common
6 law claims, Section 1681h(e) deals with a specific situation of claims in the nature of
7 negligence, defamation, and invasion of privacy for which a plaintiff pleads the false
8 information was reported with malice.

9 Additionally, Congress evinced no intent to repeal Section 1681h(e), as Congress
10 added Section 1681t(b) at the same time that it amended Section 1681h(e) to clarify the types
11 of state common law causes of action preempted by FCRA. *See Islam v. Option One*
12 *Mortgage Corp.*, 432 F. Supp. 2d 181, 191 (D. Mass. 2006) (“Finally, and perhaps most
13 convincing, the fact that Congress amended Section 1681h(e) in the same Act that it added
14 Section 1681t(b) belies any argument that the latter was meant to repeal the former
15 completely.”) (citing Pub. L. No. 104-208, 110 Stat. 3009-396, 3009-439 (1996)). Therefore,
16 under Section 1681h(e), Plaintiffs may plead claims for defamation and intentional infliction
17 of emotional distress based on the reporting of information because they have alleged falsity
18 and malice.⁶

19 To survive a motion to dismiss, Plaintiffs must also have alleged factual allegations
20 of falsity and malice sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*
21 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining standard for a motion to dismiss);
22 *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (requiring “more than a sheer
23 possibility” of liability to survive a motion to dismiss).

25 ⁶ Section 1681h(e) allows a plaintiff, if he or she properly alleges falsity and malice,
26 to bring a claim for actions “*in the nature of* defamation, invasion of privacy, or negligence
27 with respect to the reporting of information.” 15 U.S.C. § 1681h(e) (emphasis added). While
28 intentional infliction of emotional distress is not specifically included in this list of torts, the
claim is “in the nature of” a claim for the negligent reporting of information.

