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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Donald L. Warring, et al.,  
10 Plaintiffs,  
11 v.  
12 Green Tree Servicing LLC, et al.,  
13 Defendants.

No. CV-14-0098-PHX-DGC

**ORDER**

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15 Defendant E\*Trade Financial Corporate Services, Inc. has filed a motion to  
16 dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 4. The  
17 motion is fully briefed. The Court will grant in part and deny in part the motion for the  
18 reasons set forth below.<sup>1</sup>

19 **I. Background.**

20 Plaintiffs Donald L. Warring and Suzanne Warring obtained a loan for \$471,200  
21 from Countrywide Bank in June 2006 (the “first mortgage”). Doc. 4-1 at 2. The first  
22 mortgage was secured by a deed of trust encumbering the real property located at 2113  
23 Quartz St., Mesa, Arizona 85213. *Id.* The first mortgage was eventually assigned to  
24 Defendant. *Id.* Also in June 2006, Plaintiffs obtained a second loan in the amount of  
25 \$58,900 from Countrywide Home Loans (the “second mortgage”). *Id.* at 3. The second  
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27 <sup>1</sup> Plaintiffs’ request for oral argument is denied because the issues have been fully  
28 briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 mortgage was refinanced in December 2006 with a balance of \$105,000. The second  
2 mortgage was also secured by a deed of trust encumbering the Quarz St. property and  
3 was ultimately assigned to former defendant, Green Tree Servicing LLC (“Green Tree”).  
4 *Id.*

5 In May 2012, Plaintiffs received approval from both Defendant and Green Tree to  
6 sell the Quartz St. property for \$339,900, which was substantially less than the amounts  
7 owed under the first and second mortgages. *Id.* As part of the agreement, Defendant  
8 received \$311,499 from Plaintiffs in satisfaction of the first mortgage. Plaintiffs take  
9 issue with the manner in which Defendant has subsequently reported the first mortgage to  
10 credit reporting agencies. Specifically, Plaintiffs have asked Defendant to stop reporting  
11 the account as “90 Days Past Due” and to remove the phrases “Account paid for less than  
12 the full balance” and “Account paid after foreclosure started.” Doc. 15 at 5. Plaintiffs  
13 commenced this action on December 16, 2013, alleging claims for violation of the Fair  
14 Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (“FCRA”), and breach of contract, and  
15 seeking a declaratory judgment that Defendant is currently reporting inaccurate  
16 information on their credit report. *See* Doc. 1-1.

## 17 **II. Legal Standard.**

18 When analyzing a complaint for failure to state a claim to relief under  
19 Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light  
20 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
21 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the  
22 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are  
23 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*  
24 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the  
25 complaint must plead enough facts to state a claim to relief that is plausible on its face.  
26 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not  
27 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
28 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at

1 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
2 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the  
3 pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

4 **III. Analysis.**

5 **A. FCRA Claim.**

6 As an initial matter, Defendant argues that Plaintiffs’ complaint relies on two  
7 irrelevant Arizona statutes. Doc. 4-1 at 6-7. Plaintiffs’ complaint alleges that “[i]t is not  
8 accurate for a lender . . . to report any derogatory information to Credit Reporting  
9 Agencies, in the event of default by the borrower . . . of a non-recourse loan.” Doc. 1-1,  
10 ¶ 34 (emphasis in original). Plaintiffs allege that the first mortgage “is a non-recourse  
11 loan, pursuant to A.R.S. §§ 33-814(g) and 33-729.” *Id.*, ¶ 21. Defendant argues that its  
12 responsibilities are the same whether a loan is recourse or non-recourse, and that  
13 Plaintiffs’ cited statutes are not applicable. Doc. 4-1 at 6. A.R.S. § 33-814(G) states that  
14 if a trust property is sold pursuant to the trustee’s power of sale, “no action may be  
15 maintained to recover any difference between the amount obtained by sale and the  
16 amount of the indebtedness[.]” Section 33-729 states that in the case of a purchase  
17 money mortgage:

18 [T]he lien of judgment in an action to foreclose such mortgage shall not  
19 extend to any other property of the judgment debtor, nor may general  
20 execution be issued against the judgment debtor to enforce such judgment,  
21 and if the proceeds of the mortgaged real property sold under special  
22 execution are insufficient to satisfy the judgment, the judgment may not  
23 otherwise be satisfied out of the other property of the judgment debtor[.]

24 These statutes are not applicable here. Plaintiffs do not allege that their property  
25 was sold pursuant to a trustee’s power of sale or that Defendant initiated any action to  
26 foreclose on the first mortgage. The Court will grant the motion to dismiss to the extent  
27 Plaintiffs’ claims rely on these statutes.

28 Plaintiffs’ reliance on these Arizona statutes, however, does not necessarily  
provide a basis to dismiss Plaintiffs’ claim under § 1681s-2(b). That claim depends on

1 whether Plaintiffs have successfully alleged that Defendant reported inaccurate or  
2 incomplete information to credit reporting agencies. Defendant argues that Plaintiffs  
3 have not stated a claim under § 1681s-2(b) because they have not alleged that any  
4 information reported by Defendant was inaccurate *per se*. Doc. 4-1 at 5. Defendant  
5 contends that the short sale agreement between it and Plaintiffs “did not address how  
6 [Defendant] would report the E\*Trade Loan to consumer reporting agencies,” and that it  
7 was “otherwise accurate and proper for [Defendant] to report the loan as it did.” *Id.* at 6.  
8 Plaintiffs allege that Defendant “knowingly and intentionally failed to note that the  
9 [Plaintiffs] dispute [Defendant’s] inaccurate report[.]” Doc. 1-1, ¶ 50. Plaintiffs argue  
10 that because Defendant has failed to report their account as disputed, Defendant has  
11 reported inaccurate and incomplete information to credit reporting agencies. Doc. 15  
12 at 7. Plaintiffs find support in *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th  
13 Cir. 2009), where the Ninth Circuit held that “[a] disputed credit file that lacks a notation  
14 of a dispute may well be ‘incomplete or inaccurate’ within the meaning of the FCRA, and  
15 the furnisher has a privately enforceable obligation to correct the information after  
16 notice.” *Id.* at 1164.

17 *Gorman* also noted that “a furnisher does not report ‘incomplete or inaccurate’  
18 information within the meaning of § 1681s-2(b) simply by failing to report a meritless  
19 dispute[.]” *Id.* at 1163. Defendant contends that Plaintiffs’ dispute is meritless because  
20 the information reported by Defendant is accurate, and *Gorman* accordingly does not  
21 salvage Plaintiffs’ claim. Doc. 4-1 at 5-7. Plaintiffs respond that Defendant is reporting  
22 the first mortgage as “currently 90 days past due,” which they contend is inaccurate  
23 because their payment of \$311,499 was tendered in “full and final satisfaction” of the  
24 first mortgage. Doc. 15 at 7-8.

25 Although Defendant’s citation to *Gorman* is correct, it does not provide a basis for  
26 dismissal here. Plaintiffs allege that they disputed Defendant’s reporting of their account  
27 and that Defendant failed to reasonably investigate or report their dispute. This is  
28 sufficient to state a claim under § 1681s-2(b). *See Gorman*, 584 F.3d at 1163. Whether

1 the dispute was in fact meritless, whether Defendant’s investigation was reasonable, and  
2 whether the information reported was accurate are questions for a trier of fact and are not  
3 properly considered at this stage. The Court will deny Defendant’s motion to dismiss  
4 Plaintiffs’ FCRA claim.

5 **B. Breach of Contract Claim.**

6 Under Arizona law, a breach of contract claim requires the plaintiff to show (1) a  
7 contract, (2) a breach, and (3) damages. *Thunderbird Metallurgical, Inc. v. Ariz. Testing*  
8 *Lab.*, 423 P.2d 124, 126 (Ariz. 1967). Plaintiffs’ allege that Defendant “agreed to report  
9 this matter to the Credit Reporting Agencies a certain way.” Doc. 1-1, ¶ 57. Plaintiffs  
10 submitted with their complaint a copy of their short sale agreement with Defendant.  
11 Courts generally may not consider material outside of the pleadings in deciding a  
12 12(b)(6) motion, but it is well settled that a district court may consider materials properly  
13 submitted as part of the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896  
14 F.2d 1542, 1555 (9th Cir. 1989). Defendant argues that the short sale agreement did not  
15 contain any provision addressing how Defendant would report the first mortgage to credit  
16 reporting agencies following the sale of Plaintiffs’ home. Doc. 4-1 at 8. Defendant is  
17 correct. Although the agreement states that Defendant would accept the proceeds of the  
18 sale of Plaintiffs’ home as “full and final satisfaction on the first mortgage indebtedness,”  
19 the agreement does not contain any provision on how Defendant would report the loan  
20 after the sale. *See* Doc. 1-1 at 20-21. Thus, the Court cannot conclude that Plaintiffs  
21 have alleged facts sufficient to show either the existence of a contract on the issue of how  
22 Defendant would report the first mortgage to credit reporting agencies or a breach of the  
23 short sale agreement.

24 Plaintiffs also argue that Defendant’s actions are “an attempt to collect a debt that  
25 has allegedly been fully and finally settled, and accordingly it is a breach of contract.”  
26 Doc. 15 at 8. Plaintiffs’ complaint alleges that “[Defendant’s] failure to accurately report  
27 the [first mortgage] . . . to the Credit Reporting Agencies constitutes a continued effort to  
28 collect a debt that the [Defendant is] not entitled to collect,” and is therefore a breach of

1 the short sale agreement. Doc. 1-1, ¶ 58. But Plaintiffs cite no authority for the  
2 proposition that reporting “Account paid for less than the full balance,” “Account paid  
3 after foreclosure started,” or “90 days past due” constitute efforts to collect a debt.  
4 Plaintiffs cite no other efforts by Defendant to collect any portion of the first mortgage.  
5 This allegation, without more, is not sufficient to state a claim for breach of contract.  
6 The Court will grant Defendant’s motion to dismiss the breach of contract claim.<sup>2</sup>

7 **C. Declaratory Judgment.**

8 Plaintiffs plead their declaratory judgment claim “pursuant to the provisions of  
9 A.R.S. § 12-1831, *et seq.*” Arizona’s Declaratory Judgments Act. Doc. 1-1, ¶ 65.  
10 Defendant argues that this state-law claim should be dismissed because a more  
11 appropriate remedy is available and because the declaratory judgment claim is preempted  
12 by the FCRA. Doc. 4-1 at 8-9. Defendant cites a number of cases holding that the FCRA  
13 preempts state statutory and common law causes of action arising out of conduct  
14 proscribed by § 1681s-2. *Id.* at 9 (citing cases).

15 In response, Plaintiffs request that the Court “enter a judgment that the [Plaintiffs]  
16 do not owe anything under this loan.” Doc. 15 at 10. Plaintiffs’ complaint, however,  
17 does not request such relief. Plaintiffs’ complaint asks the Court to declare that  
18 Defendant “improperly reported and [is] continuing to report inaccurate information,”  
19 (Doc. 1-1, ¶ 65), that the Court order Defendant to report the first mortgage to credit  
20 reporting agencies as “paid as agreed,” (*id.*, ¶ 66), and that the Court order Defendant to  
21 “delete any reference to ‘account paid for less than the full balance,’ ‘account paid after  
22 foreclosure started,’ and/or ‘90 days past due,’” (*id.*, ¶ 67).

23 Section 1681t(b)(1)(F) of the FCRA provides that “[n]o requirement or prohibition  
24 may be imposed under the laws of any State [ ] with respect to any subject matter  
25 regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons

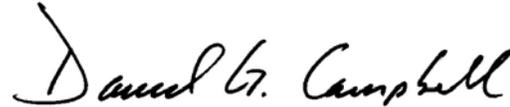
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27 <sup>2</sup> Plaintiffs attempt to argue that Defendant has violated 15 U.S.C. § 1692(e)(2)(8)  
28 by failing to communicate that their debt is disputed. Doc. 15 at 8. Because Plaintiffs’  
complaint does not state any claim under § 1692, the Court need not consider this  
argument.

1 who furnish information to consumer reporting agencies[.]” 15 U.S.C. § 1681t(b)(1)(F).  
2 Plaintiffs’ requested declaratory relief appears to cover a subject regulated by § 1681s-2,  
3 namely the reporting of inaccurate information to credit reporting agencies. See 15  
4 U.S.C. § 1681s-2(a)(1)(A)-(B). The Court accordingly will grant Defendant’s motion to  
5 dismiss. See *Keshishian v. AFNI Inc.*, No. CV 12-4204-GAF, 2012 WL 5378819, at \*4  
6 (C.D. Cal. Nov. 1, 2012) (noting that the Ninth Circuit has not yet addressed this issue  
7 and finding that “the majority of district courts have favored the total preemption  
8 approach, determining that § 1681t(b)(1)(F) totally preempts all state statutory and  
9 common law causes of action which fall within conduct proscribed under § 1681s-2.”)  
10 (internal citation, quotation marks, and brackets omitted).

11 **IT IS ORDERED** that Defendant’s motion to dismiss (Doc. 4) is **granted in part**  
12 **and denied in part** as set forth above.

13 Dated this 11th day of June, 2014.

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18 David G. Campbell  
19 United States District Judge  
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