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2
3 IN THE UNITED STATES DISTRICT COURT

4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 EMELIA M. PASTERNAK,

No. C 07-04980 CW

No. C 08-02972 CW

6 Plaintiff,

7 v.

ORDER ON PARTIES'
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

8 TRANS UNION LLC, et al.,

9 Defendants.
10 _____/

11 Plaintiff Emelia M. Pasternak filed a motion for summary
12 judgment. Defendants Capital One Bank (Capital One) and Equifax
13 Information Services (Equifax) oppose the motion and each filed a
14 separate cross-motion for summary judgment.¹ The motions were
15 heard on December 4, 2008. Having considered all of the parties'
16 papers and argument on the motions, the Court hereby denies
17 Plaintiff's motion, grants in part Defendant Capital One's motion
18 and denies it in part, and denies Defendant Equifax's motion.

19 BACKGROUND

20 Between 1998 and 1999, Plaintiff lived on Gayley Avenue in Los
21 Angeles, California, but has not lived there since. Pasternak Dec.
22 (docket no. 30) ¶ 1. In July, 2003, Capital One mailed a pre-
23 approved credit card application to Plaintiff at the Gayley Avenue
24 address. Douglass Dep. 61-62, 65; Pasternak Dec., Ex. 45. Someone
25 other than Plaintiff signed and submitted the application for
26 _____

27 ¹On November 11, 2008, Plaintiff notified the Court that she
28 reached tentative settlements with Defendants TransUnion, LLC and
Experian Information Solutions, Inc. Therefore, Plaintiff's motion for
summary judgment against Experian is denied as moot (Docket No. 113).

1 credit in the name of "Emmy Pasternak." Douglass Dep. 69-70.
2 Capital One received the application and opened an account (2003
3 Account) after verifying the application with information such as
4 Plaintiff's "social security number, address and other
5 identifiers," provided by credit bureaus. Douglass Dec. (docket
6 no. 53) ¶ 7.

7 Within a few months of issuing the credit card, Capital One
8 received a "lost/stolen report" from law enforcement informing it
9 that professional identity thieves had opened this account and
10 others. Douglass Dec. (docket no. 110) ¶ 5; Douglass Dep. 218-19.
11 Capital One contacted Plaintiff about this account and Plaintiff
12 cooperated in the fraud investigation. Douglass Dec. (docket no.
13 53) ¶ 7. Plaintiff verified her identity and confirmed that she
14 did not open the account. Id. Capital One determined that this
15 account was fraudulent and closed it. Id. Capital One then
16 "blocked" the 2003 Account and notified all credit bureaus to
17 delete the trade line. Id. Capital One noted that it "did not
18 determine that the address or social security number for the 2003
19 Account were invalid." Id. However, Capital One removed
20 Plaintiff's social security number and the Gayley Avenue address
21 from the 2003 Account. Id. Ironically, Capital One did this "to
22 prevent the 2003 Account from being updated on her credit file and
23 reported periodically to the credit bureaus, and to prevent
24 negative action on her future credit applications." Id.

25 On September 29, 2003, Plaintiff contacted Equifax through its
26 Automated Fraud Line to request a temporary fraud alert on her
27 credit file. Sapere Dec. ¶ 17. Equifax added the fraud alert,
28 which remained on her credit file until March, 2004. Id.

1 About one year after Capital One determined the 2003 Account
2 to be fraudulent, Capital One mailed another pre-approved credit
3 application addressed to Plaintiff at the Gayley Avenue address.
4 Douglass Dep. 258-59. Capital One does not explain why it mailed a
5 pre-approved credit application to the Gayley Avenue address after
6 it removed her address in 2003 specifically to "prevent negative
7 action on her future credit applications." Capital One received a
8 signed credit application in October, 2004. Douglass Dec. (docket
9 no. 53) ¶ 8. Capital One "matched first and last name and social
10 security number from the application to information from all three
11 bureaus and matched the address to one listed with two of the three
12 bureaus." Douglass Dec. (docket no. 53) ¶ 8. Capital One then
13 "sent a letter to the applicant to further confirm information and
14 received confirmation." Id. Capital One did not describe what
15 information was confirmed in this correspondence. Capital One then
16 issued a credit card (2004 Account) to "Emmy Pasternak" at the
17 Gayley Avenue address. Id. Plaintiff asserts that she did not
18 complete an application, and that the first time she saw it was at
19 a deposition in preparation for this case. Pasternak Dec. ¶ 2.

20 Plaintiff states that in "late 2005" she received a telephone
21 call from a collection agency, during which the agency demanded
22 that Plaintiff pay \$17,500 on the 2004 Account. Pasternak Dec.
23 ¶ 3. Plaintiff told the agency that she never opened the account
24 and knew nothing about it. Id.; Pasternak Dep. 38. Then, on
25 October 25, 2005 Plaintiff obtained a copy of her credit report
26 online and learned that Capital One listed delinquent activity on
27 the 2004 Account. Pasternak Dep. 38. A few weeks later, Plaintiff
28 filed a police report stating that the 2004 Account was fraudulent.

1 Pasternak Dep. 38; Kuiuudjian Dec., Ex. D.

2 Capital One claims it first learned that the 2004 Account
3 might be fraudulent on December 22, 2005, when it attempted to
4 contact Emmy Pasternak to inquire about the status of payment on
5 the account. Douglass Dec. (docket no. 110) ¶ 8. Capital One
6 alleges that it spoke to "an individual who said her name was Emmy
7 Pasternak but who declined to provide identifying information to
8 confirm her identity." Id. In this conversation, the individual
9 told Capital One that she filed a police report and that she did
10 not have a Capital One credit card. Id. In the ensuing week,
11 Capital One claims to have called and left messages for Pasternak
12 four times, but those calls were not returned. Id.

13 In January, 2006, Jeremy Pasternak, Plaintiff's brother and
14 lawyer, called Capital One, but Capital One would not speak to him
15 without Plaintiff's authorization. Ogilvie Dec., Ex. 212. Mr.
16 Pasternak complied with Capital One's requirement and faxed over
17 the authorization. Id., Ex. 219. However, Capital One claims
18 never to have received this authorization. Douglass Dec. ¶ 9.

19 Towards the end of February, 2006, Capital One sent the 2004
20 Account to OSI Collection Services, a collection agency. Id. at
21 ¶ 10. OSI then sent Plaintiff a letter requesting payment on the
22 2004 Account. Id. Mr. Pasternak notified OSI that Plaintiff was
23 disputing the 2004 Account as fraudulent. Id. Upon learning this,
24 OSI terminated its collection efforts and returned the account to
25 Capital One. Id. Mr. Pasternak faxed Capital One a letter on
26 March 30, 2006 that explained that Plaintiff was the victim of
27 identity theft and that all future correspondence about the matter
28 should be directed to him. Ogilvie Dec., Ex. 220. Mr. Pasternak

1 also attached a copy of the police report to this fax. Id.

2 Two months later, on June 14, 2006, Capital One sent Plaintiff
3 a letter requesting that she contact Capital One. Douglass Dec.,
4 Ex. 4. On June 21, Mr. Pasternak called Capital One to discuss the
5 2004 Account but was told that Capital One would need written
6 authorization from Plaintiff before it could discuss the account
7 with him. Douglass Dec. ¶ 12. As noted above, Capital One claimed
8 that it had not received Plaintiff's earlier authorization.
9 Nevertheless, on June 23, 2006, Mr. Pasternak faxed another letter
10 to Capital One in which Plaintiff confirmed Mr. Pasternak's
11 authority to speak on her behalf as her lawyer. Douglass Dec., Ex.
12 5.

13 In the beginning of July, 2006, Capital One again referred the
14 2004 Account to a collection agency. Douglass Dep. 506. The
15 agency terminated its efforts and returned the account to Capital
16 One on July 27, 2006 because the agency concluded that this might
17 be a fraudulent account. Id. at 507. For the remainder of 2006,
18 Capital One did not take any action investigating the 2004 Account.
19 Id. at 509-510.

20 Throughout January, 2007, Plaintiff received more dunning
21 telephone calls and letters about the 2004 Account. Pasternak Dec.
22 (docket no. 126) ¶ 8. In early February, 2007, Plaintiff again
23 sent Capital One the police report about the 2004 Account along
24 with letters stating that the 2004 Account was fraudulent. Id. On
25 February 28, 2007, Capital One wrote Plaintiff to acknowledge
26 receipt of her letter and to request that she contact Capital One.
27 Douglass Dec. (docket no. 110) ¶ 14, Ex. 7. Capital One did not
28 receive a telephone call in response to this letter. Id. at ¶ 15.

1 At this point, Capital One initiated a fraud investigation.
2 On March 21, 2007, Capital One investigator Kristi Glass began her
3 efforts to determine whether the 2004 Account was fraudulent. Id.
4 In her investigation, Ms. Glass noted that the signature on the
5 application did not match other signatures in the file. Glass Dep.
6 at 63. Ms. Glass then noted that payments on the account came from
7 multiple people. Id. at 64-65. Ms. Glass commented that if
8 Plaintiff had made payment from her own account, "that would be a
9 major indicator that it was not fraud." Id. at 65. Ms. Glass also
10 noted that she needed confirmation of where Plaintiff was living at
11 the time the 2004 Account was opened. Id. at 68. Ms. Glass then
12 called Mr. Pasternak and left a message for him to return her call.
13 Id. at 69-71. Neither Mr. Pasternak nor Plaintiff returned Ms.
14 Glass's telephone call, and on May 15, 2007, Ms. Glass determined
15 that the claim of fraud was invalid. Id. at 73-74.

16 In March, 2007, two months before Ms. Glass's determination,
17 Capital One had sent the 2004 Account information to the law firm
18 of Patenaude & Felix to determine whether to file a collection
19 action. Patenaude Dec. ¶ 4. On May 21, 2007, Capital One sued
20 Plaintiff in Contra Costa Superior Court to collect on the debt
21 accrued from the 2004 Account. Capital One Bank v. Emmy Pasternak,
22 Case No. L07-03088. On June 14, 2007, three weeks after Capital
23 One filed the suit, it requested that Plaintiff supply it with a
24 copy of the police report, an Affidavit of Identity Theft, a copy
25 of her driver's license and a sample of her signature. Ogilvie
26 Dec., Ex. 71. This letter marked the first time Capital One asked
27 Plaintiff to submit an affidavit attesting to the identity theft.
28 Jeremy Pasternak Dec. ¶ 7.

1 On September 25, 2007, Plaintiff filed an answer to the
2 complaint. Plaintiff's attorney, Mr. Pasternak, attempted to file
3 a cross-complaint at the same time, but asserts that his process-
4 serving company, One Legal, only filed the answer and not the
5 cross-complaint. Jeremy Pasternak Dec. ¶ 8; Ogilvie Dec., Ex. 262.
6 However, copies of both the answer and cross-complaint were timely
7 mailed to Capital One's counsel. Ogilvie Dec., Ex. 261, 262.

8 On September 26, 2007, Plaintiff filed a lawsuit in this
9 Court, charging Capital One and the other Defendants with violating
10 the Fair Credit Reporting Act (FCRA) and the California Identity
11 Theft Law, and malicious prosecution. Case No. C 07-04980. On
12 October 19, 2007, Capital One dismissed without prejudice its
13 collection action filed in Contra Costa County.

14 In March, 2008, Capital One contacted the credit reporting
15 agencies (CRA)² and requested and received a consumer report on
16 Plaintiff, allegedly for the purposes of an account review.
17 Douglass Dep. 195-196.

18 After some initial discovery, Plaintiff asked Capital One to
19 stipulate to an amended complaint in the 2007 federal case.
20 Capital One refused. The deadline to amend the 2007 complaint had
21 not passed but, rather than moving for leave to amend and
22 supplement the complaint, on June 16, 2008, Plaintiff filed the
23 2008 complaint, Case No. C 08-02972, charging Capital One and
24 Equifax with negligently and willfully violating the FCRA by
25 obtaining Plaintiff's credit report in 2004 and 2008 without a
26 permissible purpose. Capital One moved to dismiss the 2008

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28 ²The credit reporting agencies are Trans Union, Equifax, and Experian.

1 complaint against it asserting that it was an improper attempt to
2 split claims. On September 30, 2008, the Court denied Capital
3 One's motion to dismiss. Docket No. 27.

4 Now, Plaintiff moves for summary judgment against Capital One
5 and Equifax on some of the claims in her 2008 complaint, and
6 Capital One and Equifax move for summary judgment against Plaintiff
7 on all of her claims in the 2007 and 2008 complaints.

8 LEGAL STANDARD

9 Summary judgment is properly granted when no genuine and
10 disputed issues of material fact remain, and when, viewing the
11 evidence most favorably to the non-moving party, the movant is
12 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
13 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
14 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
15 1987).

16 The moving party bears the burden of showing that there is no
17 material factual dispute. Therefore, the court must regard as true
18 the opposing party's evidence, if supported by affidavits or other
19 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
20 F.2d at 1289. The court must draw all reasonable inferences in
21 favor of the party against whom summary judgment is sought.
22 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
23 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
24 1551, 1558 (9th Cir. 1991).

25 Material facts which would preclude entry of summary judgment
26 are those which, under applicable substantive law, may affect the
27 outcome of the case. The substantive law will identify which facts
28 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

1 (1986).

2 Where the moving party does not bear the burden of proof on an
3 issue at trial, the moving party may discharge its burden of
4 production by either of two methods:

5 The moving party may produce evidence negating an
6 essential element of the nonmoving party's case, or,
7 after suitable discovery, the moving party may show that
8 the nonmoving party does not have enough evidence of an
9 essential element of its claim or defense to carry its
10 ultimate burden of persuasion at trial.

11 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
12 1099, 1106 (9th Cir. 2000).

13 If the moving party discharges its burden by showing an
14 absence of evidence to support an essential element of a claim or
15 defense, it is not required to produce evidence showing the absence
16 of a material fact on such issues, or to support its motion with
17 evidence negating the non-moving party's claim. Id.; see also
18 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
19 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
20 moving party shows an absence of evidence to support the non-moving
21 party's case, the burden then shifts to the non-moving party to
22 produce "specific evidence, through affidavits or admissible
23 discovery material, to show that the dispute exists." Bhan, 929
24 F.2d at 1409.

25 If the moving party discharges its burden by negating an
26 essential element of the non-moving party's claim or defense, it
27 must produce affirmative evidence of such negation. Nissan, 210
28 F.3d at 1105. If the moving party produces such evidence, the
burden then shifts to the non-moving party to produce specific
evidence to show that a dispute of material fact exists. Id.

1 If the moving party does not meet its initial burden of
2 production by either method, the non-moving party is under no
3 obligation to offer any evidence in support of its opposition. Id.
4 This is true even though the non-moving party bears the ultimate
5 burden of persuasion at trial. Id. at 1107.

6 Where the moving party bears the burden of proof on an issue
7 at trial, it must, in order to discharge its burden of showing that
8 no genuine issue of material fact remains, make a prima facie
9 showing in support of its position on that issue. UA Local 343 v.
10 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
11 is, the moving party must present evidence that, if uncontroverted
12 at trial, would entitle it to prevail on that issue. Id. Once it
13 has done so, the non-moving party must set forth specific facts
14 controverting the moving party's prima facie case. UA Local 343,
15 48 F.3d at 1471. The non-moving party's "burden of contradicting
16 [the moving party's] evidence is not negligible." Id. This
17 standard does not change merely because resolution of the relevant
18 issue is "highly fact specific." Id.

19 DISCUSSION

20 I. Fair Credit Reporting Act: 15 U.S.C. § 1681

21 A. Plaintiff's Claims Against Capital One

22 Plaintiff's 2007 and 2008 complaints allege that Capital One
23 violated several provisions of the FCRA, 15 U.S.C. § 1681.

24 However, Plaintiff moves for summary judgment against Capital One
25 only for negligent and willful violations of § 1681b(f).

26 1. Permissible Purpose: 15 U.S.C. § 1681b(f)

27 Plaintiff moves for summary judgment against Capital One
28 asserting that there is no genuine issue of any material fact that

1 Capital One violated 15 U.S.C. § 1681b(f) when it reviewed her
2 account in March, 2008. That subsection states, "A person shall
3 not use or obtain a consumer report for any purpose unless the
4 consumer report is obtained for a purpose for which the consumer
5 report is authorized to be furnished under this section." Under
6 § 1681b(a)(3)(A), Capital One may permissibly obtain a credit
7 report if it "intends to use the information in connection with a
8 credit transaction involving the consumer on whom the information
9 is to be furnished and involving the extension of credit to, or
10 review or collection of an account of, the consumer." Plaintiff
11 argues that Capital One violated § 1681b(f) by obtaining her credit
12 report in March, 2008 without a permissible purpose. Plaintiff
13 asserts that Capital One knew Plaintiff did not have a Capital One
14 account, and therefore there was no valid reason to access her
15 credit report for an account review.

16 Plaintiff's motion for summary judgment on this claim fails
17 because she did not carry her burden to show that there are no
18 genuine issues of material fact. Plaintiff makes many material
19 factual assertions without the proper evidentiary support. For
20 example, Plaintiff asserts that Capital One "determined that
21 plaintiff was not responsible for the 2004 account." However,
22 Capital One disputes this assertion. Capital One claims that, even
23 though it dismissed its case without prejudice against Plaintiff
24 for collection on the 2004 Account, it did so for business reasons,
25 not because it acknowledged the fraudulent nature of the 2004
26 Account. Napolitano Dec. ¶¶ 5-6. Capital One also challenges
27 Plaintiff's assertion that "in August 2007 Capital One had deleted
28 that account from its credit reporting records." Capital One does

1 not dispute that it stopped reporting this account to the credit
2 reporting agencies, but Capital One maintains that it had not
3 deleted the account from its internal records as of March, 2008.
4 Douglass Dec. ¶¶ 5, 20. The existence and status of the 2004
5 Account are factual issues to be resolved at trial. Plaintiff has
6 not carried her burden to show that the March, 2008 review was not
7 for a permissible purpose.³

8 On the same issue, Defendant Capital One moves for summary
9 judgment with respect to the March, 2008 Account review as well.
10 However, Capital One has not carried its burden either. Capital
11 One contends that its account review was permissible because, even
12 though Capital One had ceased collection efforts on the 2004
13 Account by March, 2008, an account still existed in Capital One
14 records at that time, and an existing account is subject to a
15 review. Capital One has not shown that, as a matter of law,
16 reviewing the 2004 Account in March, 2008 was permissible, merely
17 because Capital One did not delete it from its own records. The
18 documents submitted to the Court do not establish that Capital One
19 should have maintained an account for Plaintiff in the first place,
20 given her repeated efforts to notify Capital One that the 2004
21 Account was fraudulent. And, if maintaining the account was
22 impermissible, then the periodic review would be impermissible as
23 well. Thus, there is a triable issue of fact as to whether the
24 March, 2008 review of Plaintiff's 2004 Account was permissible.

25 Capital One also moves for summary judgment on Plaintiff's

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27 ³The Court also denies Plaintiff's motion for summary judgment
28 on her claim that Capital One committed a "willful" violation of
§ 1681b(f) because the "willful" standard requires a more culpable
mental state than the negligence standard.

1 claim that it did not have a permissible purpose for accessing her
2 credit report on October 6, 2004. Capital One argues that this
3 claim is barred by the statute of limitations. Under 15 U.S.C.
4 § 1681p, a plaintiff must bring an action not later than "two years
5 after the date of discovery by the plaintiff of the violation that
6 is the basis for such liability." Plaintiff first included this
7 claim in the suit she filed on June 16, 2008, Case No. C 08-02972.
8 Capital One asserts that Plaintiff discovered the alleged violation
9 as early as October 25, 2005. On this date, Plaintiff accessed her
10 credit report to investigate why she was receiving phone calls
11 about non-payment on the 2004 Account. A few weeks after accessing
12 this report, Plaintiff filed a police report claiming the 2004
13 Account was fraudulent. Plaintiff responds that, even though she
14 accessed this report on October 25, 2005, she did not "discover"
15 Capital One's § 1681 violation until May, 2007, when Capital One
16 produced documents relating to the 2003 Account. Plaintiff
17 explains that, from this document production, she learned that a
18 pre-approved credit application was mailed to her previous Gayley
19 Avenue address in 2004, even after the 2003 Account, which also
20 originated from the Gayley Avenue address, was determined to be
21 fraudulent. Thus, it was at this point that Plaintiff discovered
22 the alleged § 1681 violation because this is when she learned
23 Capital One should not have opened the 2004 Account. The Court
24 concludes that there is a triable issue of fact as to when
25 Plaintiff discovered Capital One's § 1681 violation.

26 In the alternative, Capital One argues that it had a
27 permissible purpose to access Plaintiff's credit report on October
28 6, 2004. Capital One asserts that it reasonably believed it was

1 handling a credit application from Plaintiff when it accessed her
2 report because the first and last name and social security number
3 matched with all three credit bureaus, and the application address
4 matched with two of the three credit reporting bureaus. Capital
5 One also mailed the applicant a letter further to confirm that the
6 application originated from someone at that address. After the
7 applicant responded to the letter, Capital One issued a credit card
8 to "Emmy Pasternak" at the Gayley Avenue address.

9 Capital One asserts that even if it made a mistake in
10 concluding that Plaintiff initiated the credit application, this
11 mistake does not support a § 1681b violation. See Trikas v.
12 Universal Card Servs. Corp., 351 F. Supp. 2d 37, 41-43 (E.D.N.Y.
13 2005). However, Capital One made many mistakes in this case. To
14 its credit, Capital One closed the 2003 Account that originated
15 from the Gayley Avenue address after it learned that the account
16 was fraudulent. Capital One then claims it blocked the 2003
17 Account and removed the Gayley Avenue address. However, one year
18 later, Capital One mailed another pre-approved credit application
19 to Plaintiff at the old Gayley Avenue address. Why would Capital
20 One send Plaintiff a pre-approved credit application to an old
21 address that was removed from its records? Not only an old
22 address, but an old address that, one year ago, was the target of
23 identity theft? The fact that Capital One checked the name and
24 social security number on the 2004 application does not make
25 Capital One's actions reasonable. Capital One claims to have
26 further verified the applicant's identification through another
27 letter, but a response to that letter could not verify that the
28 real Emmy Pasternak resided at that address. Thus, there is a

1 genuine issue as to whether Capital One acted with a permissible
2 purpose when it accessed Plaintiff's credit report in October,
3 2004.

4 Capital One also moves for summary judgment on Plaintiff's
5 claim under 15 U.S.C. § 1681q. This statute provides, "Any person
6 who knowingly and willfully obtains information on a consumer from
7 a consumer reporting agency under false pretenses shall be fined
8 under Title 18, imprisoned for not more than two years, or both."
9 Plaintiff claims that Capital One obtained her credit report as a
10 "convenient but illegal way to investigate" her in this litigation.
11 However, Plaintiff has not presented any evidence to support this
12 statement or any other evidence that supports the claim that
13 Capital One obtained Plaintiff's credit report under "false
14 pretenses." Therefore, the Court grants Capital One's summary
15 judgment motion on this claim.

16 B. Equifax

17 Plaintiff's 2007 and 2008 complaints allege that Equifax
18 violated several provisions of 15 U.S.C. § 1681. However,
19 Plaintiff moves for summary judgment against Equifax for alleged
20 violations only of §§ 1681b(a) and 1681e(a). Equifax cross-moves
21 for summary judgment against Plaintiff on all claims.

22 1. Furnishing Report and Reasonable Procedures:
23 15 U.S.C. § 1681b(a) and 1681e(a)

24 As noted above, under 15 U.S.C. § 1681b(a)(3)(A), Equifax may
25 not provide Capital One a credit report unless it believes that
26 Capital One "intends to use the information in connection with a
27 credit transaction involving the consumer on whom the information
28 is to be furnished and involving the extension of credit to, or the

1 review or collection of an account of, the consumer." Further,
2 Equifax may not give out Plaintiff's credit report "if it has
3 reasonable grounds for believing that the consumer report will not
4 be used for a purpose listed in section 1681b of this title." 15
5 U.S.C. § 1681e(a). Finally, under § 1681e(b), whenever Equifax
6 prepares a credit report "it shall follow reasonable procedures to
7 assure maximum possible accuracy of the information concerning the
8 individual about whom the report relates."

9 Plaintiff asserts that Equifax violated these statutes when it
10 allowed Capital One to access Plaintiff's credit report for an
11 account review in March, 2008. Plaintiff does not identify the
12 evidentiary support needed to sustain her summary judgment motion.
13 Therefore, the Court denies Plaintiff's motion for summary judgment
14 against Equifax.⁴

15 2. Statute of Limitations

16 Equifax argues that the claims in Case No. C 07-04980 arising
17 from issuing a credit report in October, 2004 are time-barred by
18 the two year statute of limitations. See 15 U.S.C. § 1681p. As
19 noted above, the two year statute of limitations in § 1681p begins
20 to run on "the date of discovery by the plaintiff of the violation
21 that is the basis for such liability." Plaintiff's initial
22 complaint against Equifax was filed on September 26, 2007.
23 However, Equifax does not point to any evidence in the record that
24 shows Plaintiff discovered this violation before September 26,

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26 ⁴The Court also denies Plaintiff's motion for summary judgment
27 on her claim that Equifax committed a "willful" violation of
28 § 1681b(f) because the "willful" standard requires a more culpable
mental state than the negligence standard for violating § 1681b(f).

1 2005. Further, Plaintiff argues that she did not "discover" the
2 "violation that is the basis for such liability" until May, 2007 at
3 the earliest. The Court concludes that there is a triable issue of
4 fact as to when Plaintiff discovered Equifax's § 1681 violation.

5 Equifax next argues that Plaintiff cannot establish Equifax's
6 liability for violating any section of the FCRA.

7 3. Inaccurate Information: 15 U.S.C. § 1681e(b)

8 Equifax first argues that Plaintiff's § 1681e(b) claim fails
9 as a matter of law. "In order to make out a prima facie violation
10 under § 1681e(b), a consumer must present evidence tending to show
11 that a credit reporting agency prepared a report containing
12 inaccurate information." Guimond v. Trans Union Credit Information
13 Co., 45 F.3d 1329, 1333 (9th Cir. 1995). However, "an agency can
14 escape liability if it establishes that an inaccurate report was
15 generated despite the agency's following reasonable procedures.
16 The reasonableness of the procedures and whether the agency
17 followed them will be jury questions in the overwhelming majority
18 of cases." Id.

19 To support her claim that Equifax produced an inaccurate
20 report, Plaintiff relies on testimony by Ms. Sapere, an Equifax
21 employee, that accounts belonging to someone other than Plaintiff
22 appeared on Equifax's credit report because Plaintiff was the
23 victim of identity theft. Sapere Dep. at 25. Equifax asserts that
24 a fraudulent account on Plaintiff's credit report does not
25 constitute evidence that the report is inaccurate. The Court
26 disagrees. Maintaining credit information for a person other than
27 Plaintiff in Plaintiff's credit report is one of the more obvious
28 inaccuracies that can appear in a credit report.

1 Irrespective of the reporting inaccuracy, Equifax contends
2 that its procedures are reasonable. However, Equifax admits that
3 it does not have a specific procedure in place to prevent
4 information about a fraudulent account from going on a credit
5 report even after being notified that an account may be fraudulent.
6 Id. at 82. Rather, it has policies and procedures in place to
7 assist consumers with removing false information once it appears on
8 the report. Id. Equifax has not proved that its procedures are
9 reasonable as a matter of law; therefore the Court denies Equifax's
10 summary judgment motion on this claim.

11 4. Reinvestigation: 15 U.S.C. § 1681i

12 Under 15 U.S.C. § 1681i(a)(1), if a customer disputes "the
13 completeness or accuracy of any item of information contained in a
14 consumer's file" then the credit reporting agency "shall
15 reinvestigate free of charge and record the current status of the
16 disputed information, or delete the item from the file." Equifax
17 asserts that the record lacks substantial evidence to support
18 Plaintiff's claim that Equifax violated this statute. The Court
19 disagrees.

20 In August, 2007, Plaintiff sent Equifax a letter disputing
21 "inaccurate information in my credit file." Sola Dec., Ex. D. In
22 the letter, Plaintiff told Equifax that "the account you are
23 reporting is fraudulent. I never opened it. It apparently was
24 opened by an identity thief." Id. She asked Equifax to
25 "investigate this promptly, carefully and completely and delete
26 this account from my credit report." Id. By the time Equifax
27 received the letter, it had already deleted the Capital One 2004
28 Account because another credit reporting agency, Trans Union, had

1 notified Equifax that the account was fraudulent. However, Equifax
2 did not reinvestigate or delete Capital One "account reviews"
3 listed in the credit report because, it asserts, Plaintiff only
4 asked it to investigate the account, not "account reviews."
5 Equifax's reading of Plaintiff's letter is unpersuasive. A jury
6 could reasonably conclude that Plaintiff asked Equifax to
7 investigate and delete all items on her credit report relating to
8 this account, including "account reviews." Therefore, the Court
9 denies Equifax summary judgment on this issue.

10 5. Disclosure to Consumer: 15 U.S.C. § 1681g

11 Title 15 U.S.C. § 1681g(a) provides that "every consumer
12 reporting agency shall, upon request . . . clearly and accurately
13 disclose to the consumer . . . all information in the consumer's
14 file at the time of request." Equifax asserts that this claim
15 fails as a matter of law because Equifax complied with Plaintiff's
16 request for a credit report. Further, Equifax asserts that it is
17 not liable because it maintains and follows strict procedures to
18 ensure compliance with the law.

19 Plaintiff argues that Equifax failed to provide her with "all
20 information" in her file when it gave her the credit report in
21 June, 2007. In deposition testimony, Equifax agreed that "there
22 were three inquiries in February 2007, that are not listed on the
23 report that went to plaintiff in June of 2007." Sapere Dep. at
24 190-191. This admission suggests that Equifax did not accurately
25 disclose all of Plaintiff's information. Therefore, the Court
26 denies Equifax summary judgment on the § 1681g claim.

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6. Procedures for Furnishing Credit Report:
15 U.S.C. § 1681e(a)

Under 15 U.S.C. § 1681e(a), Equifax "shall maintain reasonable procedures designed to avoid" improper disclosures, and "limit the furnishing of consumer reports to the purposes listed under section 1681b of this title." Pursuant to § 1681b(a)(3)(A), Equifax may furnish a consumer report to a person who it has reason to believe "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of the consumer." Plaintiff argues that Equifax violated this statute when it provided Capital One with Plaintiff's credit report in October, 2004, and in March, 2008 for an account review. Equifax moves for summary judgment asserting that Plaintiff cannot prove a violation of this statute on either occasion.

a. The October, 2004 Credit Report

Plaintiff argues that Equifax knew that Plaintiff's identity had been stolen from the Gayley Avenue address and that issuing a credit report in October, 2004 to Capital One for a credit card to be issued to the same address was impermissible under § 1681b(a)(3)(A). Equifax counters that, although it was aware that the 2003 Account was fraudulent, it had no information linking the fraud to the Gayley Avenue address and, at the time it issued a credit report to Capital One in October, 2004, it had no information that the 2004 Account also originated from the Gayley Avenue address. Equifax further states that "the Gayley Avenue address first reported on Plaintiff's credit file in February,

1 2005." Sapere Dec. ¶ 21. Plaintiff does not present any evidence
2 to counter Equifax's assertions that it did not associate the
3 Gayley Avenue address with fraud on Plaintiff's account. However,
4 Plaintiff argues that Equifax's failure to maintain a record of the
5 Gayley Avenue address in connection with the fraudulent 2003
6 Account was itself negligent. Equifax's record-keeping policies
7 may have contributed to the release of Plaintiff's credit report
8 for an impermissible purpose. Therefore, the Court denies
9 Equifax's summary judgment motion on this claim.

10 b. The March, 2008 Account Review

11 By March, 2008 Equifax had deleted the Capital One 2004
12 Account from Plaintiff's credit file. However, Equifax argues that
13 it had a permissible purpose to allow Capital One to review
14 Plaintiff's credit file at that time because, before Capital One
15 requested the review, Capital One certified to Equifax that it had
16 a permissible purpose to make the review. The Ninth Circuit has
17 held, "Section 1681e requires more from a credit reporting agency
18 than merely obtaining a subscriber's general promise to obey the
19 law." Pintos, 5014 F.3d at 800. The court continued that "a
20 subscriber's certification cannot absolve the reporting agency of
21 its independent obligation to verify the certification and
22 determine that no reasonable grounds exist for suspecting
23 impermissible use. Blanket certification cannot eliminate all
24 genuine issues of material fact with regard to Experian's
25 liability." Id. at 800-801. However, the court stopped short of
26 requiring credit agencies to verify each credit report request
27 individually. Id. at 801 n.6. ("Even if Experian did not have to
28 verify PCA's request for Pintos's credit report individually, §

1 1681e(a) still required proper verification of PCA generally”).

2 As noted above, § 1681b(a)(3)(A) allows Capital One to obtain
3 a credit report only if it “intends to use the information in
4 connection with a credit transaction involving the consumer.”

5 Equifax knew the 2004 Account was closed at the time of the
6 October, 2008 account review; thus it is not clear what “credit
7 transaction” could have involved the consumer at that time.

8 See Pintos v. Pacific Creditors Ass’n, 504 F.3d 792, 798-99 (9th
9 Cir. 2007). There is a triable issue of fact as to whether Equifax
10 is liable for allowing the March, 2008 review of Plaintiff’s 2004
11 Account.

12 7. Damages

13 Under 15 U.S.C. § 1681o, if any person negligently fails to
14 comply with any requirements under the FCRA, Plaintiff may recover
15 for “any actual damages sustained by the consumer as a result of
16 the failure.” “The term ‘actual damages’ has been interpreted to
17 include recovery for emotional distress and humiliation.” Guimond,
18 45 F.3d at 1333. A violation of the FCRA is actionable “even
19 absent a denial of credit.” Id.

20 Equifax argues for summary judgment on all claims because
21 Plaintiff cannot show any injury or damages caused by Equifax.
22 This argument fails. The record shows that Plaintiff at least
23 incurred costs for requesting her credit application and mailing
24 her dispute letters to Equifax. These out-of-pocket expenses
25 constitute cognizable economic damages for FCRA purposes.

26 8. Punitive Damages for Willful Conduct

27 Title 15 U.S.C. § 1681n allows for punitive damages if any
28 person “willfully fails to comply with any requirement” of the

1 FCRA. The Supreme Court recently interpreted the term "willful" in
2 the context of the FCRA to include "reckless" violations of the
3 law. Safeco Insurance Co. v. Burr, 127 S. Ct. 2201, 2209-2210
4 (2007). The Court stated that "a company subject to FCRA does not
5 act in reckless disregard of it unless the action is not only a
6 violation under a reasonable reading of the statute's terms, but
7 shows that the company ran a risk of violating the law
8 substantially greater than the risk associated with a reading that
9 was merely careless." Id. at 2215.

10 Equifax argues that there is no basis for a claim of punitive
11 damages in this case. The Court disagrees. Plaintiff has carried
12 her burden to show that there are material issues of fact as to
13 whether Equifax acted in reckless disregard of the law. The jury
14 will determine whether Equifax negligently released Plaintiff's
15 credit report, and whether that disclosure was in reckless
16 disregard of the law.

17 II. Plaintiff's Identity Theft Claim Against Capital One

18 The California Identity Theft Law provides, "A person may
19 bring an action against a claimant to establish that the person is
20 a victim of identity theft in connection with the claimant's claim
21 against that person." Cal. Civ. Code § 1798.93. Capital One moves
22 for summary judgment asserting that it cannot be liable under this
23 statute because it does not meet the statutory definition for a
24 "claimant."

25 A claimant is defined in the statute as "a person who has or
26 purports to have a claim for money or an interest in property in
27 connection with a transaction procured through identity theft."
28 Cal. Civ. Code § 1798.92. The term claimant, as defined in the

1 statute, "reflects a present tense interest in a debt or attempt to
2 collect." Satey v. JPMorgan Chase & Co., 521 F.3d 1087, 1092 (9th
3 Cir. 2008). The statute does not apply to a "'claimant' who no
4 longer has a claim at the time the suit is filed." Id. at 1093.

5 The operative date to determine whether Capital One is a
6 claimant is "the time the suit is filed." Id. Plaintiff filed
7 suit against Capital One on September 26, 2007, but that complaint
8 did not include a cause of action under the § 1789.92. On December
9 7, 2007, Plaintiff filed her first amended complaint which included
10 the § 1789.92 cause of action. Capital One argues that it was not
11 a claimant on December 7, 2007 because it dismissed its Collection
12 Action without prejudice on October 19, 2007. However, dismissing
13 a lawsuit without prejudice is not the same as ceasing to have a
14 "present tense interest in a debt." At no time before December 7
15 did Capital One relinquish its interest in the debt relating to the
16 2004 Account. Therefore, Capital One is a claimant under
17 § 1798.92.

18 Capital One alternatively asserts that it cannot be held
19 liable under the California Identity Theft Law because of the
20 compulsory cross-complaint rule under California law. Under
21 California Code of Civil Procedure § 426.30(a), "if a party against
22 whom a complaint has been filed and served fails to allege in a
23 cross-complaint any related cause of action which (at the time of
24 serving his answer to the complaint) he has against the plaintiff,
25 such party may not thereafter in any other action assert against
26 the plaintiff the related cause of action not pleaded." A "related
27 cause of action" is a "cause of action which arises out of the same
28 transaction, occurrence, or series of transactions or occurrences

1 as the cause of action which the plaintiff alleges in his
2 complaint." Cal. Civ. Proc. Code § 426.10(c).

3 As noted above, in May, 2007, Capital One sued Plaintiff in
4 state court in Contra Costa County seeking to collect on the 2004
5 Account. Plaintiff filed an answer in that case, but did not file
6 a cross-complaint to dispute the 2004 Account. Capital One asserts
7 that Plaintiff's failure to bring a claim under the California
8 Identity Theft Law in the cross-complaint in the prior collection
9 action bars the present claim. The Court agrees.

10 Plaintiff's identity theft claim is a "related cause of
11 action" to Capital One's collection action. Both causes of action
12 arise from the same series of transactions and occurrences -- the
13 credit card debt. Either Plaintiff owes a debt to Capital One for
14 credit card charges, or Plaintiff is not liable for the debt
15 because she is the victim of identity theft. Therefore, by not
16 filing the identity theft claim as a cross-complaint in the state
17 collection action, Plaintiff is barred from seeking redress for the
18 identity theft claim in this cause of action. Thus, the Court
19 grants Capital One's summary judgment motion on this claim.

20 III. Plaintiff's Malicious Prosecution Claim Against Capital One

21 Capital One moves for summary judgment on Plaintiff's claim
22 that Capital One's state collection action was a malicious
23 prosecution. Under California law, the tort of malicious
24 prosecution is "disfavored both because of its potential to impose
25 an undue chilling effect on the ordinary citizen's willingness to
26 report criminal conduct or to bring a civil dispute to court and
27 because, as a means of deterring excessive and frivolous lawsuits,
28 it has the disadvantage of constituting a new round of litigation

1 itself." Zamos v. Stroud, 32 Cal. 4th 958, 966 (2004) (internal
2 citations and quotations omitted). To prevail on a malicious
3 prosecution claim, Plaintiff must establish that Capital One's
4 state collection action against her: "(1) was commenced by or at
5 the direction of the defendant and was pursued to legal termination
6 in plaintiff's favor; (2) was brought without probable cause; and
7 (3) was initiated with malice." Id. at 965.

8 Capital One argues that the state collection action did not
9 terminate in Plaintiff's favor because Capital One dismissed the
10 action without prejudice. "Where a proceeding is terminated other
11 than on its merits, the reasons underlying the termination must be
12 examined to see if it reflects the opinion of either the court or
13 the prosecuting party that the action would not succeed." Oprian
14 v. Goldrich, Kest & Assoc., 220 Cal. App. 3d 337, 343 (1990). "The
15 focus is not on the malicious prosecution plaintiff's opinion of
16 his innocence, but on the opinion of the dismissing party."
17 Robbins v. Blecher, 52 Cal. App. 4th 886, 893 (1997). "Should a
18 conflict arise as to the circumstances of the termination, the
19 determination of the reasons underlying the dismissal is a question
20 of fact." Ross v. Kish, 145 Cal. App. 4th 188, 198 (2006).
21 Capital One asserts that it dismissed the state collection action
22 for "business reasons." However, the "circumstances surrounding
23 the dismissal of the case indicate a concession on the part" of
24 Capital One that "the claim lacked merit." Id. The Court
25 concludes that there is a triable issue of fact as to the
26 circumstances of the termination.

27 In the probable cause inquiry, the Court makes "an objective
28 determination of the 'reasonableness' of the defendant's conduct,

1 i.e., to determine whether, on the basis of the facts known to the
2 defendant, the institution of the prior action was legally
3 tenable." Sheldon Appel Co. v. Albert & Oviker, 47 Cal. 3d 863,
4 878 (1989). "Probable cause requires evidence sufficient to
5 prevail in the action or at least information reasonably warranting
6 an inference there is such evidence." Puryear v. Golden Bear Ins.
7 Co., 66 Cal. App. 4th 1188, 1195 (1998). Capital One argues that
8 it had probable cause to pursue its collection action because
9 Plaintiff never provided it with a "written statement that the
10 debtor claims to be the victim of identity theft with respect to
11 the specific debt being collected by the debt collection." Cal.
12 Civ. Code §§ 1788.18(a)-(b). The written statement contemplated by
13 § 1788.18(b)(3) must contain specific information identifying the
14 debtor and describing the identity theft. However, the requirement
15 to provide this written statement pertains to consumer claims only
16 under the Rosenthal Act. It is not a precondition for a malicious
17 prosecution claim against a debt collector. Further, at no point
18 until several weeks after Capital One sued Plaintiff in the
19 collection action did Capital One request this information.
20 Therefore, Capital One did not have sufficient evidence to
21 reasonably warrant an inference that it would prevail in the
22 action. The Court concludes that Capital One did not have probable
23 cause to sue Plaintiff in the state collection action.

24 "The 'malice' element of the malicious prosecution tort
25 relates to the subjective intent or purpose with which the
26 defendant acted in initiating the prior action." Estate of Tucker
27 v. Interscope Records, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting
28 Sheldon Appel, 47 Cal.3d at 874). One California Court of Appeal

1 explained that:

2 malice is present when proceedings are instituted
3 primarily for an improper purpose. Suits with the
4 hallmark of an improper purpose are those in which:
5 (1) the person initiating them does not believe that
6 his claim may be held valid; (2) the proceedings are
7 begun primarily because of hostility or ill will;
8 (3) the proceedings are initiated solely for the
9 purpose of depriving the person against whom they are
10 initiated of a beneficial use of his property; (4) the
11 proceedings are initiated for the purpose of forcing a
12 settlement which has no relation to the merits of the
13 claim.

14 Sierra Club Found. v. Graham, 72 Cal. App. 4th 1135, 1157 (1999).

15 "Malice is usually a question of fact for the jury to determine.
16 Summary judgment on the basis of lack of malice is nonetheless
17 appropriate when there is no evidence from which a reasonable fact
18 finder could conclude that the defendant pursued the underlying
19 action with malice." Estate of Tucker, 515 F.3d at 1030 (internal
20 citation omitted).

21 Here, Plaintiff has presented evidence from which a reasonable
22 fact finder could conclude that Capital One pursued the underlying
23 state collection action with malice. Plaintiff notified Capital
24 One as early as December, 2005 that she was the victim of identity
25 theft and that the 2004 Account was fraudulent. Nevertheless,
26 Capital One sent the 2004 Account to a collection agency two
27 separate times, once in February, 2006, and then again in July,
28 2006. On both occasions the collection agency returned the account
back to Capital One concluding that the account might be
fraudulent. It wasn't until March 21, 2007 that Capital One
initiated its own fraud investigation. Despite noting several
indicators that the 2004 Account was fraudulent, such as multiple
signatures on the 2004 Account not matching and payments from

1 multiple people, not including the ostensible debtor, Capital One
2 concluded that the claim of fraud was invalid. Less than a week
3 after this determination, Capital One sued Plaintiff in state court
4 to collect on the 2004 Account. In sum, there is a triable issue
5 of fact as to whether Capital One initiated its state collection
6 action with malice. Therefore, the Court denies Capital One's
7 summary judgment motion on the malicious prosecution claim.

8 CONCLUSION

9 For the foregoing reasons, the Court denies Plaintiff's motion
10 for summary judgment (Docket No. 28 in Case No. 08-2972), and
11 grants in part Defendant Capital One's motion for summary judgment
12 and denies it in part (Docket No. 106 in Case No. 07-4980). The
13 Court denies Defendant Equifax's motion for summary judgment
14 (Docket No. 103 in Case No. 07-04980). Plaintiff may proceed with
15 her claim against Capital One for negligent non-compliance with the
16 FCRA and malicious prosecution, and with her claim against Equifax
17 for negligent and willful non-compliance with the FCRA. Within two
18 weeks of the date of this order, Plaintiff must file a consolidated
19 complaint clarifying which of Defendants' acts fall under which
20 cause of action. Nothing else may be changed or added.

21 IT IS SO ORDERED.

22 Dated: 12/19/08

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24 _____
25 CLAUDIA WILKEN
26 United States District Judge
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