

No. 71954-8-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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BRIAN AND KAREN HANDLIN,

Appellants,

v.

ON-SITE MANAGER, INC.,

Respondent.

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FILED IN CASE NO. 71954-8-1

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This appeal presents the regrettable choice by Appellants Brian and Karen Handlin (“Appellants” or the “Handlins”) to sue Respondent On-Site Manager, Inc., (“Respondent” or “On-Site”) without alleging cognizable damages or causation, and the trial court’s appropriate dismissal of their claims under CR 12(b)(6).

In their Amended Complaint against On-Site, an internet-based provider of residential leasing services—such as the tenant screening report at issue here—the Handlins claimed that On-Site failed to comply with certain reporting obligations in violation of the Washington Fair Credit Reporting Act (“WFCRA”), RCW 19.182 *et seq.*, and Consumer Protection Act (“CPA”), RCW 19.86 *et seq.*<sup>1</sup> This allegedly resulted in the ultimate *approval* of their August 5, 2013, rental application for an apartment at the Forestview Apartments in Renton, Washington (“Forestview”) being delayed by approximately seventeen days. (The Handlins declined Forestview’s acceptance of their rental application and offer of August 22, 2013, regarding the very apartment they sought.)

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<sup>1</sup> On-Site denies that it violated any laws in Washington, and asserts that the Handlins are seeking through this litigation to insert language that does not exist into the WFCRA in order to manufacture claims against On-Site that otherwise do not exist. However, since the Handlins have admitted that they suffered no cognizable damages caused by On-Site’s alleged misconduct, the Court need not address that issue at this time.

Crucially, the Handlins conceded in their pleadings that it was Forestview that initially denied their application for housing, not On-Site, and Forestview that continued to deny their application even after On-Site timely provided tenant screening information that the Handlins conceded was accurate. Indeed, On-Site completed the only update that the Handlins requested to its report—and delivered an updated version of that report to Forestview—on the very same day On-Site received supporting documentation from the Handlins. As the trial judge observed at oral argument on On-Site’s motion to dismiss, the Handlins simply did not allege what information On-Site failed to provide that “would have made a difference if [the Handlins] had received it earlier to their negotiations with Forestview.” RP 30:1-5. For this reason alone, dismissal of the Handlins’ claims was warranted.

The Handlins also failed to plead any damages—and even if they had, their claims would be against Forestview, not On-Site. The Amended Complaint does not articulate how the Handlins were allegedly harmed by On-Site in their “business or property” as a result of Forestview’s delayed acceptance of their rental application. Nor does it draw a causal connection between such harm and On-Site’s alleged misconduct. Among other things, this omission can be explained by the fact that the delay was entirely Forestview’s responsibility. As discussed further below, the

Amended Complaint concedes that on the date Forestview ultimately accepted the Handlins' application (August 22, 2013), it had in its possession precisely the same report from On-Site as it had on the date On-Site provided its updated report (August 9, 2013). Nothing On-Site did or failed to do even hypothetically caused this alleged delay.

In short, the Handlins failed to plead actionable violations of the WFCRA or any Washington law. For this reason, the trial court correctly dismissed their claims. In addition, although the trial court did not reach the issues, dismissal was warranted because all of the Handlins' claims for injunctive relief are pre-empted by federal law and their claims for injunctive relief under the CPA are statutorily exempted.

On-Site respectfully requests that this Court affirm the trial court's dismissal of the Handlins' claims.

## **II. RESTATEMENT OF ISSUES**

1. Whether the trial court correctly dismissed the Handlins' claims under the WFCRA and CPA where the Handlins failed to allege that On-Site proximately caused them damages?
2. Whether this Court should affirm the trial court's ruling because the Handlins failed to plead a violation of the procedural rules set forth in the WFCRA?

3. Whether this Court should affirm the trial court's ruling because (a) the Handlins' claims for injunctive relief are pre-empted by federal law and (b) their claims for injunctive relief under the CPA are statutorily exempted?
4. Whether the Handlins' appeal is frivolous and, if so, whether the Court order them to pay On-Site's attorneys' fees and costs?

### **III. RESTATEMENT OF FACTS**

#### **A. On-Site's Services.**

On-Site is a consumer reporting agency ("CRA") that provides a variety of on-line services to residential landlords and property managers, including electronic tenant screening reports. CP 3 ¶ 2.2; CP 16. The Handlins are a married couple residing in King County, Washington. CP 2 ¶ 2.1. On-Site's reports include detailed credit, criminal, and civil records of the potential tenants, and are created on-demand once the client/property manager selects custom rental criteria to adjust the screening process to match their particular needs. CP 3 ¶ 3.3, CP 22 n.4.

Significantly, On-Site only maintains and generates a limited amount of the data included in its reports; specifically, residential tenant history, including prior evictions and/or related litigation. CP 22 n.4; RP 6-7. The consumer credit information contained in On-Site's reports (e.g.,

trade lines, collection accounts, mortgages, etc.), however, is maintained, generated by, and purchased from other agencies.<sup>2</sup> *Id.*; RP 31-32.

**B. Timeline of Events According to the Handlins.**

In their Amended Complaint, the Handlins asserted that they “applied for housing at Forestview, but their application was denied based on information Forestview received in a screening report from Defendant On-Site Manager, Inc.” CP 2 ¶ 1.2. They claimed that they then “attempted to obtain their screening reports from On-Site, both to dispute inaccurate contents with On-Site and to challenge Forestview’s grounds for denial.” *Id.* ¶ 1.3. They brought an action against On-Site because, they claimed, “On-Site never provided all of the required information, and unreasonably delayed the disclosures On-Site did make.” *Id.*

However, the timeline of events as described by the Handlins in the Amended Complaint, at oral argument by the Handlins’ counsel, and in the Brief of Appellants, demonstrates otherwise:<sup>3</sup>

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<sup>2</sup> It is important to note that the Handlins were specifically informed exactly who these third party agencies were that contributed information to On-Site’s report on the Handlins, along with their contact information and directions on how to request a free disclosure of the information these agencies maintain in their files regarding the Handlins. RP 12, 31-32. The Handlins, however, failed to allege that they made any attempt to contact these agencies to obtain such disclosures. This is notable because the Handlins admitted during oral argument that it was the information these agencies supplied—and not On-Site’s information—with which the Handlins were ultimately concerned. RP 32:8-12.

<sup>3</sup> The Handlins’ allegations, as set forth below, are accepted solely for present purposes, and not necessarily conceded by On-Site.

- **August 5, 2013** – The Handlins submit a rental application to Forestview. CP 3 ¶ 3.2.
- **On or about August 5, 2013** – Forestview obtains “tenant-screening reports” from On-Site, which include background and consumer credit information about the Handlins. CP 3 ¶ 3.3.
- **Between August 5, 2013 and August 9, 2013** – Forestview denies the Handlins’ rental application, and informs the Handlins that the denial is due to their low “rental score.” CP 3 ¶ 3.4.
- **August 9, 2013** – Appellant Karen Handlin calls On-Site by telephone to inquire about the Handlins’ low “rental score.” CP 4 ¶ 3.5. On-Site discloses to Ms. Handlin that a pending 2008 eviction lawsuit was likely the main reason for the low rental score. *Id.* Forestview (at the direction of Ms. Handlin) sends On-Site documents via fax showing that the lawsuit had been resolved in the Handlins’ favor. CP 4 ¶ 3.6. That same day, On-Site notifies Forestview of the updated information, generates a new report, and sends it to Forestview via fax. CP 4 ¶¶ 3.7-3.8. Forestview informs the Handlins that it will continue to deny their application due to “negative credit history.” RP 30; CP 4 ¶ 3.9.

- **August 13, 2013** – The Handlins submit an online request to On-Site for copies of the information in On-Site’s files regarding their application. CP 4 ¶ 3.10.
- **August 16, 2013** – The Handlins’ counsel sends a letter to On-Site requesting a copy of the Handlins’ “screening report.” CP 4-5 ¶ 3.11.
- **August 19, 2013** – The Handlins request that Forestview reconsider its denial of the Handlins’ rental application. CP 5 ¶ 3.12.
- **August 20, 2013** – On-Site mails a request to the Handlins’ counsel for the Handlins’ state-issued identification, in order to comply with On-Site’s statutory duty under the Federal Fair Credit Reporting Act (“FCRA”), 15 U.S.C.A. § 1681h(a)(1),<sup>4</sup> to fulfill their request for information. CP 5 ¶ 3.15.
- **August 21, 2013** – Just two days after the Handlins requested that Forestview reconsider its rejection of their rental application due to negative credit history, and while Forestview was reconsidering their rental application, the Handlins voluntarily enter into a contract for a different apartment at another apartment complex

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<sup>4</sup> 15 USC § 1681h(a)(1) states: “A consumer reporting agency *shall* require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.” (emphasis added).

(the Windsor Apartments), “rather than continu[ing] to pursue housing at Forestview.” CP 5 ¶ 3.13.

- **August 22, 2013** – Forestview reconsiders the Handlin’s rental application, accepts it, and offers the Handlins the very apartment they sought originally. CP 5 ¶ 3.14. No additional information has been provided by On-Site to Forestview regarding the Handlins since August 9, 2014, thus precluding any alleged damages caused by On-Site. CP 4 ¶ 3.8.
- **August 26, 2013** – The Handlins’ counsel sends copies of the Handlins’ state-issued identification to On-Site, via email and fax. CP 5-6 ¶ 3.16.
- **August 27, 2013** – On-Site mails the contents of its file for the Handlins’ Forestview application to the Handlins’ counsel. CP 6 ¶ 3.17.
- **August 30, 2013** – The Handlins’ counsel receives the material sent by On-Site on August 27. *Id.*

The Handlins argued in opposition to On-Site’s motion to dismiss that that they planned to use On-Site’s disclosures to try to convince Forestview to approve their rental application. CP 40. They claimed they were damaged because they were unable to do so, since they did not receive such disclosures until August 30. CP 40-41. However, the

Handlins conceded that Forestview had a copy of On-Site's updated report as of August 9, 2013, which included the updated information supplied by the Handlins regarding their prior eviction case. CP 4 ¶ 3.8.

Yet Forestview continued to deny the Handlins' application for an apartment. RP 30; CP 4 ¶ 3.9. When it ultimately accepted their application—On August 22—it did so without having received any new information from On-Site since August 9. CP 5 ¶ 3.14; CP 4 ¶ 3.8. As the trial court noted, the Handlins did not plead that Forestview would have accepted their application earlier if On-Site had acted differently between August 9 and August 22. RP 20-21. This makes sense, because On-Site had already provided Forestview with complete and accurate information about the Handlins. CP 4 ¶ 3.8. The following exchange between the trial court and the Handlins' counsel is instructive on this point:

THE COURT: So don't you now need to tell me that having the reports in hand, you can point to the information that you think would have made a difference if your clients had received it earlier to their negotiations with Forestview or something like that?

MR. DUNN: Your Honor, I didn't come to court today prepared to answer that specific question.

RP 30:1–7. For this reason, among others, the Handlins' claims fail, and any effort by them to amend their pleadings after the trial court granted On-Site's motion to dismiss would have been futile. *See, e.g., Shelton v. Azar, Inc.*, 90 Wn. App. 923, 928, 954 P.2d 352 (1998) (where amendment

was futile, trial court abused its discretion by granting motion to amend complaint); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008) (absent a “showing that [plaintiffs] could successfully plead [new] claims, an amendment would be futile”; denial of motion for leave to amend was within the trial court’s discretion).

**C. On-Site’s Motion to Dismiss the Handlins’ Claims**

On-Site filed a motion to dismiss the Handlins’ claims under CR 12(b)(6), for multiple reasons. CP 11-38. First, the Handlins failed to plead any injury proximately caused by On-Site. *Id.* According to the Handlins’ timeline, On-Site timely (i.e., on the same day) provided Forestview with an updated report as soon as the Handlins provided supplemental documentation regarding their prior eviction lawsuit. CP 4 ¶ 3.8. From that moment forward, On-Site played no conceivable role in Forestview’s decision to deny the Handlins’ rental application. Thus, none of the Handlins’ alleged damages (which themselves fail under CR 12(b)(6)) can be attributed to On-Site.

At the hearing on On-Site’s motion, the Handlins attempted to alter their claim on this point—to their own further detriment. Counsel for the Handlins argued that their application was denied by Forestview because of their poor credit score, and that On-Site’s alleged failure to provide the Handlins with copies of their credit report (which is maintained by a

different CRA—not On-Site) limited the Handlins’ ability to “ask that [their score] be overlooked as a reasonable accommodation.” RP 30.

On-Site’s response was simple, and dispositive on the issue: On-Site is not responsible for the accuracy or content of the credit reports issued by third party CRAs, nor does it have an obligation under any state or federal law to produce a *copy* of the credit report to Forestview’s rental applicants. RP 31-32. If the Handlins believed there was incorrect or incomplete information in a credit report issued from data maintained by a different CRA, they should have brought their claims against the non-party CRA that provided the allegedly inaccurate information; i.e., Transunion, Experian, or Equifax. *Id.* The Handlins’ pleadings, however, did not articulate the injury On-Site allegedly caused in connection with information it does not maintain, did not generate, and was not obligated to disclose under any state or federal statute.

The second basis for dismissal argued in On-Site’s motion to dismiss was that the Handlins failed to allege an injury to their “business or property,” as is required under the CPA. CP 23-24. The Handlins claimed they “lost a rental opportunity,” yet conceded in their pleadings that Forestview offered them the very apartment for which they applied. CP 51; CP 5 ¶ 3.14.

Third, On-Site argued that the Handlins failed to assert a claim upon which relief may be granted under certain technical provisions of the WFCRA. CP 21-23. Washington law imposes no obligation on On-Site to provide the Handlins with an exact copy of what it provided to Forestview. *Id.* Rather, On-Site's only responsibility was to *disclose* to the Handlins the contents of its files that it maintains on the Handlins, from which it might generate a report, and to do so on reasonable demand by the Handlins and in a manner authorized by them. *Id.*; *see* RCW 19.182.070(2) ("All *items of information in its files* on that consumer..."). For this reasons, and even assuming the truth of the allegations set forth in the Amended Complaint, On-Site fulfilled these requirements.<sup>5</sup>

Fourth, On-Site argued the Handlins' claims under the WFCRA for injunctive relief are preempted by the FCRA, which reserves injunctive relief solely as a tool of the Federal Trade Commission ("FTC") in order to prevent a patchwork of state court injunctions against financial institutions that would unduly interfere with interstate banking. CP 27-34. The trial court did not reach this argument, since it dismissed the

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<sup>5</sup> Further, a letter from the Handlins' counsel to On-Site, which is referenced in the Amended Complaint, contradicts the Handlins' assertion that On-Site failed to deliver its disclosure by a delivery method they authorized. *See* CP 4-5 ¶ 3.11, CP 7 ¶ 4.A.5.b; RCW 19.182.080(2)(c). Contrary to the Handlins' allegations, counsel's letter specifically authorized On-Site to send the subject disclosure via U.S. Mail. CP 91-93, *Id.*

Handlins' claims based on their failure to allege "an actual injury." RP 32-33. This Court, however, may consider it as an alternative basis upon which to affirm the trial court's ruling.

Fifth, On-Site argued the Handlins' claims for injunctive relief under the CPA are statutorily exempted under RCW 19.86.170. CP 33-35. The trial court did not reach this issue, but this Court may consider it.

**D. The Handlins Admit They Suffered No Damages.**

At oral argument on On-Site's motion to dismiss, the Handlins made key admissions that left the trial court with no choice but to grant On-Site's motion and dismiss their claims.

First, the Handlins admitted, through counsel, that Forestview continued to deny the Handlins' application for an apartment, even after On-Site provided Forestview with its updated report:

The general description of the reason for continuing denial that we had gotten after August 9th was that it had to do with negative credit history. And we anticipated that the reports would show which accounts were showing as delinquent and what the negative credit history was. We thought maybe some of that information might be medical bills that Mr. Handlin had for which we could ask that they be overlooked as a reasonable accommodation. We thought there might be different types of challenges that we could present to Forestview saying why they should admit the Handlins after all. We wound up having to just kind of guess at what we thought might be in there with the August 19th letter.

RP 30:8-20. Yet, as noted above, On-Site is not the entity that generates or maintains the data about which the Handlins complained (i.e., medical collection accounts and their credit score). Moreover, as Appellants concede in their brief to this Court, On-Site’s “reports did not ultimately contain unexpected information that would have made a difference if [the Handlins] received it earlier to their negotiations with Forestview.” Br. of Appellants at 24 (internal quotation marks omitted).

Second, the Handlins admitted that they had already accepted housing elsewhere at the time their request to Forestview for reconsideration was still pending, and before Forestview changed its position by offering them the very apartment for which they had applied. CP 5 ¶ 3.13. As a result of these admissions, the trial court correctly concluded that “the plaintiffs have not alleged an actual injury” caused by On-Site. RP 32:25–33:2.

Notably, the trial court offered the Handlins an opportunity to seek to amend their complaint, but the Handlins chose not to do so. RP 33. In any event, and for the reasons discussed further below, any such effort would have been futile.

The Handlins subsequently filed their Notice of Appeal. CP 85.

#### IV. ARGUMENT

The trial court properly dismissed the claims brought against On-Site for failure to state a claim pursuant to CR 12(b)(6). Even when construed in the light most favorable to the Handlins, the Amended Complaint fails to allege facts sufficient to meet the requisite elements of claims brought under the WFCRA and CPA.

##### A. Standard of Review

CR 12(b)(6) motions to dismiss for failure to state a claim are subject to *de novo* review on appeal. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987). Dismissal is appropriate if it appears beyond doubt that the plaintiff cannot prove any facts that would allow recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The Court is to accept the allegations in the complaint as true and may consider hypothetical facts outside the record. *Id.* “Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may ... be considered in ruling on a CR 12(b)(6) motion to dismiss.” *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 491, 326 P.3d 768 (2014) (internal citation omitted).

**B. The Trial Court Properly Granted On-Site’s Motion to Dismiss the Handlins’ Claims.**

The Handlins alleged that On-Site violated the WFCRA by:

- Not providing an “explanation of the meaning of the rental scores” that On-Site had allegedly “calculated and reported to Forestview.” CP 7 ¶ 4.A.5;<sup>6</sup>
- Not making “the disclosures within a reasonable time after receiving” Appellants’ request for information. *Id.* ¶ 4.A.5(a);
- Not making the disclosures by email or fax. *Id.* ¶ 4.A.5(b); and
- Not including with the disclosure “the addresses and appropriate phone numbers of all state agencies responsible for enforcing any provision of RCW 19.182.” *Id.* ¶ 4.A.5(c).

The Handlins also claimed each of these alleged violations was willful and a “per se” violation of the CPA, pursuant to RCW 19.182.150. CP 9 ¶ 4.B.1. The Handlins did not assert any CPA claims independent of the alleged WFCRA violations. They sought actual and statutory damages under the WFCRA, actual damages under the CPA, and injunctive relief under both Acts. CP 8 ¶ 4.A.9.

Because none of the alleged WFCRA violations was actionable, either because the alleged misconduct was not actually prohibited or because the Handlins failed to allege any resulting damages, all of the Handlins’ claims failed under CR 12(b)(6).

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<sup>6</sup> By the Handlins’ own admission, the rental scores were “calculated”, i.e., derived from other data. The Handlins did not allege On-Site maintained or stored the scores (it did not), and did not allege such scores were part of the Handlins’ consumer file (they were not). The Court need not resolve this issues to affirm the trial court’s ruling.

**1. Failure to Plead Damages.**

The trial court correctly dismissed the Handlins' claims because the Handlins alleged no damages. When a plaintiff fails to allege damages in connection with a claim, Washington courts have determined dismissal is warranted under CR 12(b)(6). *Havsy v. Flynn*, 88 Wn. App. 514, 519, 945 P.2d 221 (1997) (plaintiff failed to state a claim for relief by not alleging damages); *Quinn Const. Co., L.L.C. v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 30, 44 P.3d 865 (2002) (where damages were unavailable, the trial court correctly concluded that no set of facts would entitle the plaintiff to relief under that claim).

As the trial court found, it is not sufficient for the Handlins to have included in their Amended Complaint a conclusory statement that they have suffered "economic and non-economic injuries as a direct result and proximate result of [On-Site's] violations..." CP 9 ¶ 4.B.5. The Amended Complaint does not even begin to address the question of damages, and thus falls well short of the requirement that a plaintiff offer more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" to support her claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

In order to plead a claim for a violation of the WFCRA and CPA, a plaintiff must show actual damages, regardless of whether the claim is

allegedly based on willful conduct or not. RCW 19.182.150 expressly states:

For purposes of a judgment awarded pursuant to an action by a consumer under chapter 19.86 RCW, the consumer shall be awarded **actual damages** and costs of the action together with reasonable attorney's fees as determined by the court. However, where there has been willful failure to comply with any requirement imposed under this chapter, the consumer shall be **awarded actual damages, a monetary penalty of one thousand dollars, and the costs of the action** together with reasonable attorneys' fees as determined by the court.

(emphasis added). For the first time on appeal, the Handlins cite to two cases from other jurisdictions in an attempt to argue that actual damages are not necessary to assert a claim under the WFCRA. Both are easily distinguished.

Both *Ashby v. Farmers Ins. Co. of Oregon*, 592 F. Supp. 2d 1307, 1317 (D. Or. 2008) and *Taylor v. Screening Reports, Inc.*, 294 F.R.D. 680, 686 (N.D. Ga. 2013) involved claims arising under the FCRA, which differs from the WFCRA in a key respect: the FCRA “provides for actual damages *or* statutory damages.” *Ashby*, 592 F. Supp. 2d at 1317 (citing 15 U.S.C.A. § 1681(a)) (emphasis added). In other words, “[u]nder [the] FCRA, statutory damages are awarded as an alternative to actual damages.” *Id.* Under the WFCRA, by comparison, a plaintiff must show a

willful violation of the act *and* actual damages before they may qualify for the \$1,000 monetary penalty permitted under RCW 19.182.150.

The trial court correctly noted this distinction, and when pressed, the Handlins conceded they have asserted no cognizable claim to statutory damages:

MR. DUNN [Counsel for the Handlins]: ... I think it's important to keep in mind that for violations of the [WFCRA], private claimants can recover actual damages, but if they can show a willful violation, they can also recover a \$1,000 statutory damage provided in Section 150 of the State FCRA. So we acknowledge that there may be some causation issues down the line. We feel that we've adequately pleaded actual damages and causation in this case. So at this stage --

THE COURT: So aren't those two different things? Don't you still have to prove a harm before you can get to the willful violation section?

MR. DUNN: I don't believe so. I think that -- well, *actually, I think you're right*. I think we have to establish the injury under the Hangman Ridge definition, even if we don't have actual damages to get the statutory damages.

RP 26 (emphasis added).

The other case cited by the Handlins, *Taylor*, *supports* On-Site's position in this regard. 294 F.R.D. at 686. In *Taylor*, the Court dismissed the plaintiff's negligent non-compliance claim under the FCRA because the plaintiff produced no evidence tying his alleged damages (the denial of

his apartment application) with the CRA's failure to provide him with his complete file. *Id.*

**2. No Injury to "Business or Property."**

The Handlins also failed to plead that they suffered an injury to their business or property, which is required under the CPA (and WFCRA, which is only actionable through the CPA). *See, e.g., Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987), implied overruling on other grounds recognized in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012). The Handlins ask this Court to hold for the first time that "tenant screening reports"—which the WFCRA does not require On-Site to disclose to a consumer—are a form of "property" in which the Handlins had a viable ownership interest. This position lacks support and merit.

First, the Handlins misstate and misapply this Court's previous rulings in this area. While this Court has held that "property" encompasses "inconvenience that deprives the claimant of the use and enjoyment of his property" *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 180, 159 P.3d 10 (2007), the Handlins ignore the threshold issue: i.e., whether they actually alleged a property interest in the first instance, meaning a "right to possess, use and enjoy a determinate thing [or] the right of ownership." *Ambach v. French*, 167 Wn.2d 167, 172, 216 P.3d 405 (2009) (citing

Black's Law Dictionary 226 (9th ed. 2009)) (internal citations omitted).  
The answer is they did not. At no time did the Handlins have a right to possess, use and enjoy, much less the right to own, the report prepared by On-Site for Forestview, at the request of Forestview, and at Forestview's sole expense.

This is why a distinction in the WFCRA matters here: RCW 19.182.070 ("Disclosures to consumer") does not permit consumers to request copies of consumer *reports*: It only allows consumers to request disclosure of *information* in the consumers' *file*. See RCW 19.182.070(1)-(5).<sup>7</sup> This is a distinction with a difference, and otherwise complies with the disclosure obligations under the FCRA. See 15 USC § 1681g(a)(1). Significantly, the Amended Complaint does not allege that On-Site actually *maintained* possession of "rental scores" or a "recommendation" in the Handlins' *file* at On-Site at the time the Handlins made their request for information.<sup>8</sup> (Nor does the WFCRA require On-Site to retain such

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<sup>7</sup> RCW 19.182.070 ("Disclosures to consumer") provides, *inter alia*, that a CRA "shall, upon request by the consumer, clearly and accurately disclose ... (1) All *information in the file* on the consumer at the time of request ... (2) All items of *information in its files* on that consumer, including disclosure of the sources of the information, except that sources of information acquired solely for use in an investigative report may only be disclosed to a plaintiff under appropriate discovery procedures...."

<sup>8</sup> On-Site denies having been in possession of either of these items at the time the Handlins made their request for information. The Court need not resolve that issue, however, because the Handlins have not alleged otherwise.

information.) The Handlins' failure to allege that On-Site's consumer file on them included such undisclosed information at the time they made their request was fatal to this particular claim. Put simply, the report sought was not the Handlins' property.

Second, the Handlins' interpretation of *Ambach* is misguided. 167 Wn.2d 167, 176, 216 P.3d 405 (2009). There the Court held that the plaintiff's economic loss due to an increased cost of surgery was not sufficient to satisfy the injury prong of the CPA. *Id.* Here, the Handlins argued in Court (but did not plead) that they were denied the opportunity to contest Forestview's initial denial of their applicant for rent—before they accepted a different apartment while their (ultimately successful) request for reconsideration was pending—and were therefore damaged by having to choose to either forfeit their rental application fee at Forestview or submit an additional rental application fee at another location. Not only was this theory not set forth in the Amended Complaint—rendering it ineffective to avoid dismissal—but the *Ambach* Court expressly stated that “out-of-pocket expenses” are personal injury damages that cannot form the basis for a CPA claim. *Id.* at 174.

### **3. Failure to Plead Proximate Cause.**

The CPA and WFCRA require the Handlins to plead an injury proximately caused by On-Site. RCW 19.182.150 (“A violation of this

chapter is an unfair or deceptive act in trade or commerce and an unfair method of competition *for the purpose of applying the consumer protection act*, chapter 19.86 RCW”) (emphasis added); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (to prevail in a private CPA action, a plaintiff must establish “five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) *injury to plaintiff in his or her business or property*; (5) *causation*”) (emphasis added).

In Washington, “[t]he evidence of damage ... must be sufficient to afford a reasonable basis for estimating loss so that speculation and conjecture do not become the basis. Further, the damages must be reasonably foreseeable, and proximately caused by the act upon which liability is based.” *Burkheimer v. Thrifty Inv. Co., Inc.*, 12 Wn. App. 924, 928, 533 P.2d 449 (1975) (internal citations omitted) (emphasis added).

The Handlins asked the trial court to engage in pure speculation regarding the source of their alleged damages: “[H]ad the disclosures been provided sooner, [the] Handlins could have approached Forestview sooner, and *potentially* been offered housing there in time to accept the offer.” CP 51. This is the epitome of speculation. Notably absent from the

Handlins' Amended Complaint was any allegation that they suffered an actual injury proximately caused by On-Site.

In their response brief to On-Site's motion to dismiss, the Handlins asserted they suffered a "lost rental opportunity" because of On-Site's actions. CP 51. But this was not pled in the Amended Complaint and, indeed, is contrary to Appellants' own allegations. The Handlins concede On-Site provided Forestview on August 9 with a revised report that accurately reflected their tenant history. CP 4 ¶¶ 3.7-3.8. Forestview waited until August 22 to offer them the apartment, but On-Site is not even remotely or theoretically responsible for that delay. RP 30; CP 4 ¶ 3.9. Moreover, the rental opportunity was never "lost"—it was offered and the Handlins turned it down. CP 5 ¶ 3.13. Stated plainly, On-Site's alleged acts and omissions could not have proximately caused the Handlins to "lose" a "rental opportunity."<sup>9</sup>

The Handlins have also argued that they were denied the opportunity to contest Forestview's initial (August 9) denial of their rental application. CP 50-51. But this is not part of the Amended Complaint, and is in any event belied by the Handlins' own allegations. The Handlins

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<sup>9</sup> At oral argument, the Handlins' counsel referenced the security deposit Forestview demanded when it accepted the Handlins' rental application. RP 30:21-24. This was not part of the Amended Complaint, however, and the trial court correctly disregarded it. *See* RP 20:17-21:10.

*knew* that Forestview had the correct information on August 9, yet concede in their pleadings that they waited until August 19 to request that Forestview reconsider their application. CP 4 ¶¶ 3.7-3.8. Their assertion that they waited to request reconsideration solely because On-Site did not provide the disclosures to them via email or fax does not articulate an actual, non-speculative injury proximately caused by On-Site.<sup>10</sup>

**4. A Purported “Delay” Does Not Constitute A Deprivation of Property.**

The Handlins argue that, “[a]lthough On-Site eventually produced most of the disclosures to which the Handlins were entitled,” On-Site “deprived the Handlins of the use of the screening reports by unreasonably delaying the disclosure.” Br. of Appellant at 18. In support of this position, the Handlins cite to *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). In so doing, they misapply the narrow holdings of *Sorrel*, a case that involved the withholding of a plaintiff’s money; in other words, property that actually belonged to the plaintiff. *Id.* at 298.

The Handlins then make the tortured and unsupported argument that information On-Site had not yet disclosed—and had no obligation under

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<sup>10</sup> As stated above, the Handlins attempted to conceal from the trial court that they had expressly authorized in writing in their disclosure request letter that the disclosure could be sent via U.S. Mail. *See n.5 supra*. What is more, their counsel’s letter did not disclose that time was of the essence. *Id.* Rather, it explained that the disclosure was for litigation purposes and not to aide the Handlins’ efforts to seek reconsideration of their housing application. *Id.*

the WFCRA to disclose—constituted property belonging to the Handlins, and that On-Site allegedly “interfered with” such “property” by producing it later than the Handlins would have liked—but not later than prescribed by law. This makes no sense and is unsupported.

**C. Failure to Plead a Violation of WFCRA Procedures.**

**1. RCW 19.182.070**

As noted above, RCW 19.182.070 (“Disclosures to consumer”) does not permit consumers to request copies of consumer *reports*: It only allows consumers to request disclosure of information in the consumers’ file. *See* RCW 19.182.070(1)-(5). Moreover, it is unclear what the Handlins claim was missing from the disclosures On-Site produced to them; it appears from another section of the Amended Complaint that the items may consist of “rental scores,” and a “recommendation.” CP 6 ¶ 3.18. Significantly, however, the Amended Complaint does not allege that On-Site actually maintained possession of “rental scores” or a “recommendation” in the Handlins’ file *at the time* they made their request for information.<sup>11</sup> (Nor does the WFCRA require On-Site to retain such information.) Their failure to allege that On-Site’s consumer file on

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<sup>11</sup> On-Site denies having been in possession of either of these items at the time the Handlins made their request for information, but again the Court need not resolve that issue to uphold the trial court’s ruling.

them included such undisclosed information at the time they made their request was fatal to this particular claim.

Additionally, RCW 19.182.070 imposes *no timeframe* within which disclosures under that subsection must be produced. Thus the timing of On-Site's disclosures was not actionable under RCW 19.182.070. In any event, the Handlins' pleadings concede that On-Site mailed its disclosure to them on August 27, 2013—a mere 13 days after their first request. CP 6 ¶ 3.17.

The Handlins also failed to state a claim under RCW 19.182.070, as discussed further above, because they allege no damages proximately resulting from it.

## **2. RCW 19.182.080**

As to the Handlins claims regarding the timing of On-Site's disclosures under RCW 19.182.080(1), the Handlins continue to rely on a flawed interpretation of the phrase “on reasonable notice.” Br. of Appellants at 10. This phrase refers to the *consumer's* burden to submit a request for information in a manner that provides On-Site with “reasonable notice” of what they seek. RCW 19.182.080(1). The Handlins ask this Court to read the phrase to impose on *On-Site* a burden to produce requested information “within a reasonable amount of time.” *Id.*; CP 7 ¶4.A.5. They (again) cite no authority for this assertion, which is

inconsistent with the plain language of the statute. If the framers of RCW 19.182.080 intended to require that CRAs make disclosures within a reasonable amount of time, they would have stated as much. They did not do so, and thus this Court should interpret the statute as meaning what it says.

### **3. RCW 19.182.090**

The Handlins' allegations regarding "reinvestigation" under RCW 19.182.090 likewise failed to state a claim upon which relief may be granted. The Handlins alleged On-Site violated various provisions of that statute by allegedly not (1) informing them that it had completed a reinvestigation; (2) providing them with "the results of the reinvestigation within five days thereafter"; (3) providing them with a "consumer report" or a "description of any changes made to their reports"; and (4) not notifying them of their right to submit a statement disputing certain information On-Site relayed to Forestview. CP 8 ¶ 4.A.8.

The Amended Complaint concedes, however, that the Handlins only requested that On-Site update one item of information that it had relayed to Forestview—regarding the status of a prior eviction action against the Handlins—and that On-Site "corrected its report to reflect that the 2008 eviction lawsuit had been dismissed." CP 4 ¶¶ 3.6, 3.7. Forestview subsequently offered the apartment at issue to the Handlins,

CP 5 ¶ 3.14, but they rejected it because they had already rented another apartment. CP 5 ¶ 3.13. In short, and for the reasons discussed further above, the Handlins pled no damages proximately resulting from On-Site's alleged violation of RCW 19.182.090.

**D. The Handlins Are Not Entitled to Seek Injunctive Relief.**

The Handlins final attempt to circumvent the requirement that they plead and prove an injury and damages focuses on their claim for injunctive relief. The Handlins argue that because “injunctive relief against further violations [of the CPA] is also available, [it] clearly impl[ies] that injury without monetary damages will suffice.” Br. of Appellants at 22.

However, injunctive relief is not available to the Handlins. While the Handlins asserted that they may state a claim for injunctive relief under either the WFCRA or the CPA without first showing an injury caused by On-Site, the trial court correctly followed the law and rejected that contention.

**1. RCW 19.182.150 Expressly Excludes Injunctive Relief as a Remedy for Claimants Pursuing CPA Claims Based on Alleged WFCRA Violations**

RCW 19.182.150 sets forth the remedies available to a plaintiff seeking to establish a CPA violation through evidence of WFCRA violations. Specifically, it provides:

For purposes of a judgment awarded pursuant to an action by a consumer under chapter 19.86 RCW, the consumer shall be awarded actual damages and costs of the action together with reasonable attorney's fees as determined by the court. However, where there has been willful failure to comply with any requirement imposed under this chapter, the consumer shall be awarded actual damages, a monetary penalty of one thousand dollars, and the costs of the action together with reasonable attorneys' fees as determined by the court.

For several reasons, this recitation of available remedies establishes decisively that the Washington Legislature intended to *exclude* injunctive relief as a remedy for plaintiffs, such as the Handlins, pursuing CPA claims based on alleged WFCRA violations.

First, the plain language of RCW 19.182.150 excludes any mention of injunctive relief, and thus the Washington Legislature clearly intended that it not be available. *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (if statutory language is clear on its face, the court must give effect to its plain meaning and assume the legislature means exactly what it says).

Second, the CPA specifically describes the relief available in a civil action under its provisions. *See* RCW 19.86.090. If the framers of the WFCRA intended the relief available under RCW 19.182.150 to be the same as the relief available under the CPA, then they would either have stated as much in the statute or excluded any discussion of remedies from RCW 19.182.150. By specifically setting forth available remedies and

excluding injunctive relief, the framers of RCW 19.182.150 made it clear that plaintiffs pursuing CPA claims based on alleged WFCRA violations are not entitled to injunctive relief.

Third, the framers of RCW 19.182.150 had good reason to exclude injunctive relief from the list of available remedies because, with respect to activity regulated under the FCRA, Congress has “vested the power to obtain injunctive relief solely with the FTC.” *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000).

## **2. The Claim for Injunctive Relief Is Pre-Empted**

“Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation.” *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011) (citing *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 430–31, 759 P.2d 427 (1988); U.S. CONST. art. VI (federal law is the “supreme law of the land”)).

State legislation may be preempted by federal law in more than one way. First, Congress may preempt state law by stating so in express terms. Second, Congress may preempt state law where a scheme of federal regulation is sufficiently comprehensive to allow a reasonable inference that Congress “left no room” for supplementary state regulation. Third, where Congress has “left room” for supplementary state regulation, federal law may preempt state law to the extent it actually conflicts with federal law. Such a conflict exists where compliance with both state and federal law is impossible, or where state law presents

an obstacle to the accomplishment and execution of federal purposes and objectives.

16 WASH. PRAC., TORT LAW AND PRACTICE § 1:5 (3d ed.). “Preemption may be implied when state law actually conflicts with federal law.” *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). A conflict arises “when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* Here, Congress has expressed its intent to vest in the FTC the exclusive power to seek injunctive relief against violations of the FCRA and state laws that supplement it.

The FCRA was enacted in 1970 “to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593 (E.D. Tex. 2005) (citing 15 U.S.C.A. § 1681(a)(4)). The WFCRA was enacted in 1993 in order to supplement the FCRA, but not to conflict with it or otherwise impede on the jurisdiction of the FTC. According to the legislative history of the WFCRA:

The Fair Credit Reporting Act of 1970 (FCRA) is the principle federal law governing the practices of credit reporting agencies. In addition, approximately 20 states have enacted laws that address various aspects of the credit reporting industry. Many of these other state provisions track the federal law. In Washington, no laws directly govern the activity of credit reporting agencies....

\* \* \*

Testimony For: Despite the existence of a federal consumer credit reporting statute, consumers need the additional protections afforded by a state credit reporting statute. ***The proposed state statute does not conflict with the federal law*** and adds protections that have been under consideration in Congress for the past two years.

House Bill Rep., ESSB 5574, House Committee on Financial Institutions and Insurance, 53rd Leg., 1993 Reg. Sess. (Wash. 1993) (emphasis added).<sup>12</sup> In short, the WFCRA was properly intended from its inception to be interpreted consistently with the FCRA, and thus not to permit private plaintiffs to pursue remedies against CRAs that have been exclusively reserved to federal agencies like the FTC.

In this instance, allowing the Handlins to pursue injunctive relief against a CRA such as On-Site would conflict with, and thus frustrate the purpose of, the FCRA. *See, e.g., Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 824-26 (E.D. Tex. 2007) (“Since Congress intended the power to obtain injunctive relief to lie solely with the FTC, any state law claim that would provide injunctive relief to a private litigant would frustrate this purpose and conflict with the FCRA.”).

The Fifth Circuit Court of Appeals held, in *Washington v. CSC Credit Servs. Inc.*, that “the affirmative grant of power to the FTC to

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<sup>12</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/1993-94/Pdf/Bill%20Reports/House/5574-S.HBR.pdf>. On-Site requests that the Court take judicial notice of the facts relayed in the excerpt of this legislative document, as cited above.

pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress *vested the power to obtain injunctive relief solely with the FTC.*” 199 F.3d 263, 268 (5th Cir. 2000) (emphasis added). Numerous cases have relied on *Washington* for the proposition that private plaintiffs may not pursue injunctive relief under the FCRA, because the FTC retains exclusive jurisdiction in this area.<sup>13</sup>

Thus the question presented in the instant case is whether private plaintiffs may avoid preemption by invoking state laws, such as the CPA, to seek the same injunctive relief they are otherwise prohibited from seeking under the FCRA for the purpose of addressing the same conduct expressly regulated by the FCRA. The answer is “no.” To allow private plaintiffs to pursue injunctive relief against a CRA pursuant to state law would impermissibly allow states to perform an “end-run” around

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<sup>13</sup> See, e.g., *Weiss v. Regal Collections*, 385 F.3d 337, 341 (3d Cir. 2004); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1145 (N.D. Cal. 2005); *Yeagley v. Wells Fargo & Co.*, No. 05-03403, 2006 WL 193257, at \*2 (N.D. Cal. Jan. 23, 2006); *Hamilton v. DirecTV, Inc.*, 642 F. Supp. 2d 1304, 1305-06 (M.D. Ala. 2009); *Jones v. Sonic Automotive, Inc.*, 391 F. Supp. 2d 1064, 1065 (M.D. Ala. 2005); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593 (E.D. Tex. 2005); *In re Trans Union Corp. Privacy Litigation.*, 211 F.R.D. 328, 339 (N.D. Ill. 2002); see also *Bumgardner v. Lite Cellular, Inc.*, 996 F. Supp. 525, 526-27 (E.D. Va. 1998) (finding that courts are not permitted to grant injunctive relief to plaintiffs bringing actions pursuant to the FCRA); *Mangio v. Equifax, Inc.*, 887 F. Supp. 283, 284 (S.D. Fla. 1995) (same).

Congress's clear intent to reserve injunctive relief exclusively for the FTC, which is specifically charged with regulating CRAs like On-Site.

Indeed, those courts that have addressed the issue all appear to have reached the same conclusion: such an end-run around federal preemption is impermissible, and state law claims for injunctive relief are therefore preempted to the extent they are predicated on alleged violations of the FCRA and/or violations of state laws (like the WFCRA) that supplement the FCRA. *See, e.g., Quadrant Info. Servs., LLC v. LexisNexis Risk Solutions, Inc.*, No. 11-6648, 2012 WL 3155559 (N.D. Cal. Aug. 2, 2012) (plaintiff's claim for injunctive relief under state consumer protection law preempted by the FCRA); *Blue Ridge Bank*, 371 F. Supp. 2d at 1145 (same); *Hogan v. PMI Mortg. Ins. Co.*, No. 05-3851, 2006 WL 1310461, at \*10 (N.D. Cal. May 12, 2006) (same); *Hamilton*, 642 F. Supp. 2d at 1306-07 ("Because the FCRA vests the FTC exclusively with the right to seek injunctive relief ... a state law claim that grants a private litigant access to equitable relief would frustrate and conflict with the FCRA."); *Jarrett v. Bank of Am.*, 421 F. Supp. 2d 1350, 1352-53 (D. Kan. 2006) (plaintiff's common law claim for injunctive relief was preempted by the FCRA because "only the [FTC] can seek injunctive relief from a consumer reporting agency" and "the FCRA preempts state laws to the extent that they are inconsistent with the federal statute."); *Millett v. Ford*

*Motor Credit Co.*, No. 04-2450, 2006 WL 1301160, at \*5 (D. Kan. May 9, 2006) (same).

In *Quadrant*, for example, a California federal district court considered whether the plaintiff could rely on alleged violations of the FCRA to seek injunctive relief under California's Unfair Competition Law ("UCL"), which makes actionable any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The court held it could not, and thus dismissed, under Fed. R. Civ. P. 12(b)(6), the plaintiff's UCL claim for injunctive relief:

The FCRA requires credit reporting agencies to adopt reasonable procedures relating to the collection, communication, and use of consumer credit information to ensure fair and accurate credit reporting ... Although private litigants may maintain a claim for damages under the FCRA, only the [FTC] is empowered by statute to seek equitable relief ... As such, *this Court has uniformly concluded that a UCL claim for injunctive relief is preempted by the FCRA.*

*Quadrant*, 2012 WL 3155559, at \*3 (citing *Washington*, 199 F.3d at 268) (other internal citations and quotation marks omitted) (emphasis added).

Relying on *Quadrant*, another California federal district court has held:

Allowing private litigants to enforce provisions of the FCRA by injunction through a state law vehicle *would constitute an end-run around Congress's clear intent* that the power to enforce the FCRA must rest with the FTC alone. Accordingly, the UCL claims for injunctive relief are preempted.

*Moran v. Screening Pros, LLC*, No. 2:12-CV-05808-SVW, 2012 WL 10655744, at \*8 (C.D. Cal. Sept. 28, 2012), *on reconsideration in part*, 2012 WL 10655745 (C.D. Cal. Nov. 20, 2012) (emphasis added).

### **3. Injunctive Relief Is Exempted Under the CPA**

RCW 19.86.170 (“Exempted actions or transactions — Stipulated penalties and remedies are exclusive”) exempts “actions and transactions” which are “otherwise permitted, prohibited or regulated under laws administered by ... any other regulatory body or officer acting under statutory authority of ... the United States.” *See Miller v. U.S. Bank of Washington, N.A.*, 72 Wn. App. 416, 420-21, 865 P.2d 536, 540 (1994). The exemption applies “if the particular practice found to be unfair or deceptive is specifically permitted, prohibited, or regulated.” *Id.* “When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.” *Id.* Courts consider three factors with respect to the application of “primary jurisdiction”:

1. The administrative agency has the authority to resolve the issues that would be referred to it by the court;
2. The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and
3. The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that the danger exists that judicial action would conflict with the regulatory scheme.

*Id.* at 421.

**a. *FTC Authority***

There is no question that the FTC has authority to enforce the FCRA against CRAs such as On-Site through the pursuit of, among other things, injunctive relief:

The [FTC] shall be authorized to enforce compliance with the requirements imposed by this subchapter under the [FTCA] ... with respect to consumer reporting agencies....

15 U.S.C.A. § 1681s; *see also* 15 U.S.C.A. § 45 (b) (authorizing the FTC to compel a party to “cease and desist” the use of “any unfair method of competition or unfair or deceptive act or practice in or affecting commerce”).

**b. *FTC Competence***

The FTC was specifically created, empowered, and directed by Congress “to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C.A. § 45 (a)(2). Likewise, Title 15, Chapter 41, Subchapter III of the United States Code is devoted to the regulation of CRAs. *See, e.g.*, 15 U.S.C.A. § 1681 (“There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the

consumer's right to privacy."'). The FTC is charged with enforcing compliance by CRAs with the FTCA. 15 U.S.C.A. § 1681s.

Given this "pervasive federal regulation" of CRAs, 15 U.S.C.A. § 1681's intent to regulate unfair and deceptive practices by consumer reporting agencies, and the statutory enforcement function of the FTC, the FTC is uniquely qualified to pursue and enforce injunctive relief, as warranted, against CRAs such as On-Site. *See Miller*, 72 Wn. App. at 422.

*c. Pervasive Regulatory Scheme*

Because this case involves "alleged improper conduct that is governed by federal statute, state court decisions could potentially conflict with the" FTC's decisions and regulations. *Miller*, 72 Wn. App. at 422. "Thus, since the issues fall within the scope of a pervasive regulatory scheme and a danger exists that judicial action could conflict with that regulatory scheme, the third factor" set forth in *Miller* is also satisfied. *Id.*

In sum, RCW 19.86.170, interpreted in light of the doctrine of "primary jurisdiction," exempts from the CPA injunctive relief for alleged violations of WFCRA. The Handlins' claims for injunctive relief are reserved to the exclusive authority of the FTC, statutorily barred, and should therefore be dismissed pursuant to CR 12(b)(6).

**E. On-Site Should Be Awarded Its Attorneys' Fees and Costs.**

On-Site requests reasonable attorney fees and costs under RAP 18.9(a) for having to respond to a frivolous appeal.

The Court will dismiss review of a case “if the application for review is frivolous, moot, or solely for the purpose of delay.” RAP 18.9(c). The Court may order a party who uses the Rules of Appellate Procedure “for the purpose of delay, files a frivolous appeal ... to pay terms or compensatory damages to any other party[.]” RAP 18.9(a).

An appeal is frivolous when, after considering the record and resolving all doubts in favor of the appellant, there are no reasonably debatable issues. *Tiffany Family Trust Corp. v. City of Kent*, 119 Wn. App. 262, 275, 77 P.3d 354 (2003), *aff'd* 155 Wn.2d 225, 119 P.3d 325 (2005).

The Handlins' Amended Complaint against On-Site is deficient, for all of the reasons articulated above. Yet, despite these fatal errors, the Handlins continue to assert that, “[h]ad On-Site produced the disclosures promptly, the Handlins could have approached Forestview sooner and likely secured an offer for housing there at an earlier date. This would have enabled them to both accept the Forestview offer, and to avoid incurring the additional search time and expenses.”

This Court should award appropriate sanctions for the Handlins' appeal of an unsalvageable complaint so that they will be cautioned from

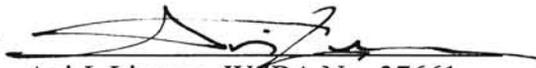
continuing an unreasoned vendetta against On-Site. Sanctions “may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) (citing *Rhinehart v. Seattle Times. Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)).

## V. CONCLUSION

For the foregoing reasons, On-Site respectfully requests that this Court affirm the trial court’s dismissal of the Handlins’ claims, and award On-Site its attorneys’ fees and costs under RAP 18.9.

DATED this 30th day of October, 2014.

McNAUL EBEL NAWROT & HELGREN PLLC

By:   
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*Attorneys for Respondent*

**DECLARATION OF SERVICE**

On October 30, 2014, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Eric Dunn, WSBA No. 36622	<input type="checkbox"/>	Via Messenger
Northwest Justice Project	<input type="checkbox"/>	Via U.S. Mail
401 Second Avenue S, Suite 407	<input type="checkbox"/>	Via Overnight Delivery
Seattle, WA 98104	<input type="checkbox"/>	Via Facsimile
Phone: 206-464-1519	<input checked="" type="checkbox"/>	Via E-mail (Per Agreement)
Fax: 206-624-7501		
Email: <a href="mailto:ericd@nwjustice.org">ericd@nwjustice.org</a>		
<a href="mailto:marien@nwjustice.org">marien@nwjustice.org</a> (asst.)		
<i>Attorneys for Appellants</i>		

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 30th day of October, 2014, at Seattle, Washington.

  
 \_\_\_\_\_  
 Lisa Nelson, LEGAL ASSISTANT