S180862

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Robert A. Brown and Susana Brown, et al.
Plaintiffs and Appellants,

v.

Stewart Mortensen, etc.

Defendant and Respondent.

After A Decision By The Court of Appeal, Second Appellate District, Division One, Case No. B199793, from the Superior Court of California For the County of Los Angeles, The Honorable Anthony J. Mohr, Judge Presiding Los Angeles Superior Court Case No. BC 289546

Respondent Stewart Mortensen's Answer Brief on the Merits

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

I.
INTRODUCTION

The Court of Appeal correctly preempted Appellants' Third and Fourth Causes of Action alleging Respondent violated the California *Confidential Medical Information Act* ("CMIA") (*Cal. Civ. Code* §56 *et seq.*) pursuant to the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* ("FCRA"). Rather than concede this proper result, Appellants seek to overturn well-established California authority holding that state law causes of action related to the furnishing of credit information are preempted by the FCRA.

As section 1681t(b)(1)(F) of the FCRA preempts all state law causes of action relating to credit reporting, the Court of Appeal correctly held that Appellants' Third and Fourth Causes of Action [hereinafter "the CMIA Claims"] were preempted as a matter of law. Moreover, because Appellants' Fourth Amended Complaint only alleged that Appellants ***reported false and inaccurate information*** regarding Appellants' alleged debt for dental work to the credit reporting bureaus, the Court of Appeal correctly preempted Appellants' CMIA claims pursuant to a long line of authority holding that Section 1681t(b)(1)(F) preempts state law claims

relating to the reporting of inaccurate, incomplete, and misleading information to the credit bureaus.

Moreover, as noted by Appellants, the CMIA allows disclosure by a medical provider of medical information for billing, claims management, and administrative services pursuant to *Civil Code* section 56.10(c)(3). (Appellants' Opening Brief, pg. 2.) Therefore, Respondent, as an assignee of Appellants' dentist, was authorized as a matter of law to make the disclosures alleged in Appellants' Fourth Amended Complaint.

II.

BACKGROUND

Approximately nine years ago, Appellants and Plaintiffs Robert A. Brown, Susana Brown and their children, KI and KA, incurred bills for dental services provided by Dr. Rolf Reinholds. Subsequently, the bills were assigned for collection to Respondent and Defendant Stewart Mortensen. More than seven years ago, Appellants sued Respondent and others, alleging that none of the Appellants owed any debt to the Reinholds, and that Respondent improperly disclosed Appellants' medical information to the collection bureaus in pursuit of Robert Brown's allegedly false debt.

After multiple successful demurrers to causes of action in the original complaint and four amended complaints, Respondent's demurrer to the Fourth Amended Complaint was sustained as to the CMIA Claims with leave to amend. Rather than amend their CMIA Claims, Appellants chose to dismiss those claims and sought appeal. The Court of Appeal upheld the dismissal of Appellants' CMIA claims on the grounds that they were preempted under the FCRA.

The Court of Appeal properly held that Section 1681t(b)(1)(F) of the FCRA preempted Appellants' CMIA Claims ***as pleaded***, noting several times in its decision that Appellants alleged that Respondent reported "inaccurate and incomplete" information to the credit bureaus.

III.

ARGUMENT

A. The Fair Credit Reporting Act Preempts All State Laws That Regulate the Reporting of Credit Information

The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* ("FCRA"), is intended to have a broad reach. Contrary to Appellants' assertion that the "general rule" is that the FCRA does not preempt state law (Appellants' Opening Brief on the Merits ("AOB"), pg. 3), "Courts have repeatedly held that the FCRA is a scheme of federal regulation of

credit reporting so pervasive as to make reasonable the inference ***that Congress left no room for the states to supplement it.***" *Townsend v. Chase Bank USA N.A.* (C.D. Cal. Feb. 15, 2009) 2009 U.S. Dist. LEXIS 13116 at *8.(emphasis added)(citations omitted)[1].

The FCRA clearly evinces an intent to preempt all state statutory laws relating to the furnishing of credit information via Section 1681t(b)(1)(F), which provides in pertinent part:

> "(b) General exceptions. ***No requirement or prohibition may be imposed under the laws of any State–***
> (1) ***with respect to any subject matter regulated under--***
> ***(F) section 623 [15 USCS § 1681s-2],*** relating to the responsibilities of persons who furnish information to consumer reporting agencies..."

15 U.S.C. §1681t(b)(1)(F)(emphasis added).

Section 1681s-2 provides as follows:

> "Responsibilities of furnishers of information to consumer reporting agencies . . .
> . . .A person shall not furnish any information relating to a consumer to any consumer reporting agency if **the person knows or has reasonable cause to believe that the information is inaccurate. . .**"

15 U.S.C. 1681s-2 (emphasis added).

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[1]Pursuant to California Rules of Court, Rule 8.1115(c), online unpublished federal opinions cited by Respondent are attached to this brief.

Appellants cite to *Sanai v. Saltz* (2009) 170 Cal. App. 4th 746, 774 for the proposition that Section 1681t(b)(1)(F) preemption should be limited to the duty of a furnisher to provide accurate information. (AOB, pgs. 11-12) However, the Court of Appeal only cited to Section 1681s-2***(a)*** as support for this proposition. *Sanai*, 170 Cal. App. 4th 746 at 776.

Section 1681s-2***(b)*** imposes a duty upon a furnisher to correct and update credit information and provide notice of dispute. *See* 15 U.S.C. 1681s-2(b). Appellants recognize Section 1681s-2(b) duties (AOB, pg. 5.) but fail to acknowledge that these duties exist regardless of whether the ***disputed information is later determined to be accurate***. *See Abbett v. Bank of Am.* (M.D. Ala. March 8, 2006) 2006 U.S. Dist. LEXIS 12649, 2006 WL 581193, at *11(holding whether the disputed information was accurate was "irrelevant" to furnisher's duties under Section 1681s-2(b)).

Therefore, by virtue of the *Sanai* court's citation to Section 1681s-2, which includes subsections (a) and (b), preemption under the FCRA pursuant to Section 1681t(b)(1)(F) is expansive, and does not solely apply to the reporting of inaccurate credit information.

The broad interpretation of FCRA preemption under Section 1681t(b)(1)(F) mirrors the holding of the Court of Appeal in *Sanai*, which held in pertinent part:

"The plain language of section 1681t(b)(1)(F) clearly eliminated all state causes of action against furnishers of information, not just ones that stem from statutes that relate specifically to credit reporting. "

Sanai, 170 Cal. App. 4th at 774. (*citing Hasvold v. First USA Bank, N.A.* (D.Wyo. 2002) 194 F.Supp.2d 1228, 1239.) *See also Jaramillo v. Experian Info. Solutions, Inc.*, 155 F. Supp. 2d 356, 361-62 (E.D. Pa. 2001)(same).

Similarly, as stated by the U.S. District Court for the Northern District of California, Section 1681t(b)(1)(F) "expresses Congress's intent to preclude state law claims against furnishers of information, and instead to subject them solely to the FCRA." *Howard v. Blue Ridge Bank* (N.D. Cal. 2005) 371 F. Supp. 2d 1139, 1144 (citing *Jaramillo*, 155 F. Supp. 2d 356 at 361-62.)

Moreover, as also noted by the Northern District of California in *Davis v. Md. Bank, N.A.*, "[l]egislative history demonstrates that Congress enacted section 1681t(b)(1)(F) in order to create a uniform scheme governing the disclosure of credit information." *Davis,* 2002 U.S. Dist. LEXIS 26468 at *41 (N.D. Cal. June 18, 2002). The court in *Davis* stated:

"Allowing common law tort claims which implicate the same subject matter as section 1681s-2(1) ***would undermine Congress' intention to create a uniform system***

> ***of protection for consumers***. In light of the foregoing, the Court finds that ***section 1681t(b)(1)(F) preempts both state statutory*** and common law causes of action which implicate the ***subject matter of section 1681s-2."***

Id. at *41 (emphasis added).

Given the broad reach of preemption of 1681t(b)(1)(F), as long as Appellants' CMIA Claims, as pleaded, relate to the credit reporting of Respondent as a "furnisher," it is clear they should be preempted. Moreover, as shown below, Appellants have conceded that their CMIA Claims are based on Respondent's alleged credit reporting of Appellants' credit information. Therefore they should be preempted pursuant to Section 1681t(b)(1)(F).

B. <u>Appellants' Fourth Amended Complaint Asserts CMIA Claims Based on Respondent's "Furnishing" of Information to the Credit Reporting Agencies</u>

On the first page of their Opening Brief on the Merits, Appellants concede that their CMIA Claims are based on Respondent's furnishing of credit information. As stated by Appellants:

> "Appellants' 3rd and 4th causes of action alleged that respondent, Stewart Mortensen ("Mortensen"), violated California's Confidentiality of Medical Information Act, California Civil Code, §§56 et. seq., ("CMIA") by **disclosing appellants' confidential medical information to credit**

reporting agencies without appellants' consent. . . "
(AOB, pg. 1)(emphasis added)

Given that the FCRA clearly preempts state statutory causes of action based on furnishing of credit information, and Appellants have conceded their CMIA claims are based on the furnishing of information to the credit bureaus, the Court of Appeal properly concluded that Section 1681t(b)(1)(F) of the FCRA preempted these claims as a matter of law. *See, e.g., Howard, supra,* at 1144 (preempting *Business & Professions* Code Section 17200 claim pursuant to Section 1681t(b)(1)(F)); *Roybal v. Equifax* (E.D.Cal. 2005) 405 F.Supp.2d 1177, 1182 (preempting Rosenthal Act, CLRA and Section 17200 claims pursuant to Section 1681t(b)(1)(F)); *Sanai v. Saltz* (2009) 170 Cal. App. 4th 746, 773 (holding "1681t(b)(1)(F) 'totally preempts' all state common law tort claims against furnishers of credit information arising from conduct regulated by 15 U.S.C. § 1681s-2".)

C. Appellants' CMIA Claims Are Preempted By 1681t(b)(1)(F) Because They Relate to Respondent's "Furnishing of Information" to the Credit Reporting Agencies; They do not Relate to the Conduct of Credit Reporting Agencies Which Is Governed by Section 1681t(b)(1)(E)

Although the Court of Appeal found that Appellants' CMIA Claims

were preempted pursuant to Section 1681t(b)(1)(F), Appellants now attempt to re-characterize this case as one involving preemption pursuant to Section 1681t(b)(1)***(E)***, not ***(F)***, and then argue that Section 1681t(b)(1)(E) cannot preempt their CMIA Claims.[2] This specious argument cannot withstand even the slightest scrutiny, as Appellants' reference to Section 1681t(b)(1)(E) is misplaced and irrelevant.

As shown above (*See* Section III.A., *supra*), Section 1681t(b)(1)***(F)*** preempts claims relating to a furnisher's reporting of information to the credit bureaus. This is the only relevant FCRA section here. In contrast, Section 1681t(b)(1)(E) clearly relates to the information disclosed in a consumer report, not the duties of a furnisher:

> "No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under ... ***section 1681c of [the FCRA], relating to information contained in consumer reports***, except ***this subparagraph shall not apply to any State law in effect on September 30, 1996.***"

15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

Appellants attempt to create a conflict between Sections 1681t(b)(1)(E) and 1681t(b)(1)(F) by claiming there would be "no point" to

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[2]Section 1681t(b)(1)(E) only preempts claims based on disclosures made in a consumer report prepared by a credit reporting agency. There is no consumer report at issue here.

the language in Section 1681t(b)(1)(E) which does not preempt state laws in effect on September 30, 1996 such as the CMIA, if Section 1681t(b)(1)(F) was allowed to preempt Appellants' CMIA claims (AOB, pgs. 10-11). Appellants assert this would authorize inappropriate disclosure of "tens of millions of records" under Section 1681(b)(1)(F), and therefore the Court of Appeal's preemption of their CMIA claims pursuant to Section 1681(b)(1)(F) was improper. (Ibid).

Appellants' argument fails, as Section 1681t(b)(1)(F) preemption and Section 1681t(b)(1)(E) preemption are easily reconciled. *Black v. Department of Mental Health* (2000) 83 Cal. App.4th 739, 747–748 (holding rules for interpreting federal statutes are similar to rules for interpreting California statutes; the words of a statute must be construed in context and statutes must be harmonized internally and externally).

As shown below, Sections 1681t(b)(1)(F) and 1681t(b)(1)(E) preempt different areas relating to credit reporting. Appellants claim there is a "conflict" allegedly created between the two subsections if preemption of the CMIA is allowed under Section 1681t(b)(1)(F), because Section 1681t(b)(1)(E) precludes preemption of the CMIA claims. Appellants are ***wrong***. For this Court to deny preemption of the CMIA claims under Section 1681t(b)(1)(F) would contravene the clear legislative intent of

Section 1681t(b)(1)(F).

1. **Section 1681t(b)(1)(F) and 1681t(b)(1)(E) Preempt Different Areas Under The FCRA**

A review of Section 1681c shows that Section 1681c is related to the obligations of a ***consumer reporting agency*** to properly report information in a consumer report. Section 1681c does ***not*** relate to the obligations of a "furnisher" such as Respondent. Section 1681c provides in pertinent part:

> ***"Requirements relating to information contained in consumer reports***
> (a) Information excluded from consumer reports. Except as authorized under subsection (b), ***no consumer reporting agency may make any consumer report*** containing any of the following items of information . . ."

15 U.S.C. §1681c(emphasis added).

Reinforcing the limitation of Section 1681c to consumer reporting agencies, the Court of Appeal has noted:

> "Section 1681 states the congressional findings and purpose. Section 1681a is a definition section. Section 1681b ***relates solely to consumer reporting agencies***, and not to users, as the defendants here were. ***The same is true of section 1681c.***"

Emerson v. J. F. Shea Co. (1978) 76 Cal. App. 3d 579, 598 (citing *Hansen v. Morgan* (D. Idaho 1976) 405 F. Supp. 1318) (emphasis added) *rev'd in part on other grounds in Hansen v. Morgan* (9th Cir. Idaho 1978) 582 F.2d

1214.

Therefore, Section 1681t(b)(1)(E) preemption (pursuant to its citation to 15 U.S.C. § 1681c) relates solely to the disclosures made by a credit reporting agency in a consumer report.

In contrast, Section 1681t(b)(1)(F) preemption ***only*** involves claims based on the ***furnisher's*** providing of information to the credit bureaus.

As Appellants' CMIA Claims in their Fourth Amended Complaint are only based on Respondent's "furnishing" of information to the credit reporting bureaus, not the publication of information in a consumer report by a credit bureau, only Section 1681t(b)(1)(F) applies, and does *not* present any conflict with Section 1681t(b)(1)(E).

As shown above, even if furnishers were allowed to furnish accurate medical information pursuant to Section 1681t(b)(1)(F), credit reporting agencies could still be liable for including the information in the report because Section 1681t(b)(1)***(E)*** would not preempt the CMIA. It is undisputed that Respondent is not a credit reporting agency, but merely a "furnisher of information" to credit reporting agencies. Therefore, Appellants' arguments that preemption of the CMIA pursuant to 1681t(b)(1)(F) would lead to a "train wreck" (AOB, pg. 11) in the statutory scheme and lead to potential exposure of "tens of millions of information"

(AOB, pg. 11) is completely unfounded.

This argument is also undone by Appellants' recognition of the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"). FACTA provides more protection under the FCRA for the provision of medical information in a consumer report, (AOB, pg. 22) and was passed ***after*** Appellants filed their original Complaint. Their citation to FACTA demonstrates that Appellants concede that FACTA has eliminated any necessity to protect medical information under the CMIA that may have existed at the commencement of Appellants' action.

2. A Plain Reading of the FCRA Shows that Section 1681t(b)(1)(F) Intentionally Did Not Exempt the CMIA From the Purview of Preemption

"The strong presumption that the plain language of a statute expresses congressional intent is rebutted only in rare and exceptional circumstances." *United States v. Clintwood Elkhorn Mining Co.* (U.S. 2008) 553 U.S. 1, 11, 128 S. Ct. 1511, 1518 (citation omitted). Moreover, "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States* (U.S. 1997) 522 U.S. 23, 29, 118 S. Ct.

285, 139 L. Ed. 2d 215 (citation omitted).

Congress clearly had state statutes in mind when it enacted Section 1681t(b)(1)(F), because it specifically exempted two state statutes from preemption: Section 54A(a) of chapter 93 of the Massachusetts Annotated Laws and section 1785.25(a) of the California Civil Code. *See* 15 U.S.C. 1681t(b)(1)(F)(I) & (ii)

Congress's explicit exclusion of only two specific state statutes from preemption by Section 1681t(b)(1)(F) is a strong indication that Congress intended Section 1681t(b)(1)(F) to preempt all other state statutory claims. This focus on state statutory claims becomes even more evident when all the preemption provisions of 1681t are read together as a whole. If Congress had intended for other state statutory claims (such as the CMIA) to be excluded from Section 1681t(b)(1)(F)'s reach, it would have said so, just as it excluded certain statutory claims from Section 1681t(b)(1)(E). *See Bates, supra.* Therefore, Appellants' argument that the CMIA and *Civil Code* section 1785.13 are applicable to Appellants' CMIA Claims (AOB, pg. 7) must fail, as both statutes are preempted by Section 1681t(b)(1)(F).

Finally, as shown below, although omitted from Appellants' Opening Brief, Appellants' CMIA Claims are based on allegations that Respondent submitted "inaccurate, incomplete, and misleading

information" to the credit bureaus. Appellants do not dispute that the reporting of inaccurate information to the credit bureaus is grounds for preemption exclusively within the purview of Section 1681t(b)(1)(F). (*See* AOB, pgs. 3, 4.) Therefore, as shown below, Appellants' claims are clearly preempted pursuant to Section 1681t(b)(1)(F).

D. Appellants' CMIA Claims Allege "Inaccurate and Incomplete" Reporting to the Credit Bureaus by a Furnisher of Credit Information and Are Therefore Preempted As a Matter of Law

Appellants' Opening Brief disingenuously attempts to narrow the scope of FCRA preemption under 1681t(b)(1)(F) to claims regarding disputed inaccurate information, despite the above authority which makes it clear that Section 1681t(b)(1)(F) preemption is to be construed ***broadly.*** (*See* Section III.A., *supra*) Regardless, Appellants' CMIA claims are solely based on allegations that the information supposedly reported by Respondent was "inaccurate and incomplete." [(Fourth Amended Complaint ("FAC"), ¶39), Clerk's Transcript (hereinafter "CT") 000617] Although Appellants assert they "have a cause of action under the CMIA, whether or not Mortensen accurately disclosed such information," (AOB, pg. 9.), they also concede that the reporting of inaccurate information to the credit bureaus by a furnisher falls within the purview of Section

1681t(b)(1)(F) (AOB, pgs. 3, 4.) Not once in their Opening Brief do Appellants acknowledge the fact that because their CMIA Claims allege the furnishing of inaccurate, incomplete, and misleading information to the credit bureaus by a furnisher (Respondent), that such claims are clearly preempted pursuant to Section 1681t(b)(1)(F).

"The purpose of the FCRA is to ensure accuracy and fairness in credit reporting and to require that such reporting is ***confidential, accurate, relevant, and proper."*** *Matthiesen v. Banc One Mortg. Corp.* (10th Cir. 1999) , 173 F.3d 1242, 1245 (emphasis added). Section 1681t(b)(1)(F) encompasses claims relating to the furnishing of "inaccurate" and "incomplete" information via its citation to Section 1681s-2, as shown below.

Section 1681s-2(a)(1)(A) provides that a person "***[s]hall not furnish any information*** relating to a consumer to any consumer reporting agency if the person knows or ***has reasonable cause to believe that the information is inaccurate."*** 15 U.S.C. §1681s-2(a)(1)(A)(emphasis added).

Section 1682s-2(a)(1)(B) imposes a duty on a furnisher "[t]o correct and update information furnished to a consumer reporting agency information that the person determines ***is not complete or accurate***." 15 U.S.C. §1681s-2(a)(1)(B)(emphasis added)

The FCRA does not define "inaccurate." Statutory interpretation begins with an analysis of the statutory language. *Olson v. Automobile Club of Southern California* (2008) 42 Cal. 4th 1142, 1147. If the statute's text evinces an unmistakable plain meaning, there is no need to go further. *Id.*

When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word. *Wasatch Property Management v. Degrate* (2005) 35 Cal. 4th 1111, 1122. Merriam Webster's dictionary defines "inaccurate" as "not accurate." (See Merriam-Webster Online Dictionary (visited June 13, 2010) <http://www.merriam-webster.com.) Accurate is defined as "free from error especially as the result of care," and "conforming exactly to truth or to a standard." *Id.*

Appellants allege Respondent reported (1) Robert Brown's medical information in order to verify his allegedly false debt [CT 000630, FAC ¶¶95, 96]; and (2) KI and KA's medical information allegedly to verify Appellant Robert Brown's allegedly false debt, despite Appellants' assertion that KI and KA had nothing to do with the debt. [CT 000623, FAC ¶66] Therefore, Appellants have alleged in their CMIA Claims that Respondent did not report the information at issue "free from error" and the

disclosures "did not confirm to truth." In other words, Appellants unequivocally asserted in their CMIA Claims in their FAC that the information allegedly reported was ***inaccurate.***

This result is in line with the holding of the Ninth Circuit that not only does Section 1681t(b)(1)(F)(via its citation to Section 1681s-2) encompass the furnishing of inaccurate and incomplete information, it also concerns information that may be technically accurate, yet ***misleading.*** *See Gorman v. Wolpoff & Abramson, LLP* (9th Cir. Oct. 21, 2009) 584 F.3d 1147, 1163, *amended op., reh'g and reh'g en banc denied.*

In *Gorman*, the Ninth Circuit addressed whether the failure of a furnisher to report the disputed nature of a debt to the credit reporting agencies constituted providing "inaccurate and incomplete" information under 1681s-2. The Ninth Circuit followed the reasoning in *Saunders v. Branch Banking & Trust Co. of Va.* (4th Cir. 2008) 526 F.3d 142, 150 and *Koropoulos v. Credit Bureau, Inc.* (D.C. Cir. 1984) 734 F.2d 37. The *Gorman* court noted that the Fourth Circuit in *Saunders* reasoned that in enacting §1681s-2(b)(1)(D), "Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for ***omissions*** that render the reported information ***misleading.***" *Id.* at 1163 (Citations omitted)(emphasis added).

Saunders held that although the report may have been "technically accurate" in that it reflected the consumer's failure to make any payments on the loan, the court noted that it had previously held that "a consumer report that contains technically accurate information may be deemed 'inaccurate' ***if the statement is presented in such a way that it creates a misleading impression."*** *Saunders*, 526 F.3d at 148 (emphasis added).

The Ninth Circuit in *Gorman* also cited to *Koropoulos v. Credit Bureau, Inc.* (D.C. Cir. 1984) 734 F.2d 37, 40, which held: "[c]ertainly reports containing factually correct information that ***nonetheless mislead their readers are neither maximally accurate*** nor fair to the consumer. . ." (emphasis added). *Gorman*, 584 F.3d at 1163 (citing *Koropoulos, supra*).

Koropoulos has also been cited by several Federal District Courts in California for the proposition that the FCRA "targets not only strictly inaccurate information, but also information that ***is technically accurate but nevertheless misleading***." *Yourke v. Experian Info. Solutions, Inc.* (N.D. Cal. June 20, 2007) 2007 U.S. Dist. LEXIS 47558 at *12(emphasis added); *Andrews v. Trans Union Corp.* (C.D. Cal. 1998) 7 F. Supp. 2d 1056, 1074 (same), *rev'd in part on other grounds in Andrews v. TRW Inc.*, 225 F.3d 1063 (9th Cir. 2000).

As shown below, Appellants' CMIA Claims repeatedly assert that Respondent reported inaccurate information within respect to Appellants Robert Brown, KI and KA–allegations falling directly within the purview of Section 1681t(b)(1)(F) preemption.

1. **Appellants' CMIA Claims Repeatedly Allege That Respondent Reported Inaccurate, Incomplete and Misleading Information Regarding Appellant Robert Brown**

Appellant Robert Brown asserts that he did not owe any debt to his dentist for a $600 dental crown and that Respondent's "disclosures included. . . alleged delinquency in terms of payment of the alleged debts . . ." [CT 000631, (FAC, ¶98)]. Robert Brown also claims that Respondent disclosed his medical information to the credit bureaus, information "which had nothing to do with [Respondent's] allegation that [Robert Brown] had failed to pay for a permanent dental crown." [CT 000633, FAC, ¶102]

The Court of Appeal also noted that the reported information in this case was alleged to be inaccurate and incomplete, stating in pertinent part:

> "Soon after [Respondent's] conversation with [Robert Brown], and continuing for a period of approximately two years, [Respondent] used and disclosed the dental charts, including the confidential medical information contained in them, to three consumer credit reporting agencies . . . Mr. Brown also wrote to the credit reporting agencies, explaining

> that the information they had received was ***inaccurate and incomplete***."

(Court of Appeal's Opinion, pg. 3)(emphasis added). [*See also* CT 000632, FAC, ¶101 and CT 000630, FAC, ¶96]

After purportedly reporting this "inaccurate and incomplete" information, Appellants claimed Respondent was asked to verify the information it had reported to the credit reporting agencies. The Court of Appeal noted the following:

> "[T]he credit reporting agencies contacted [Respondent] for verification of [Robert Brown's] alleged debt. [Respondent] then provided to the credit reporting agencies Mr. Brown's dental history and payments to the dentists for the past 10 years. Mr. Brown claimed that detailed history was not only unnecessary to the alleged debt collection, **but was also inaccurate**."

(Opinion, pg. 3)(emphasis added)[*See also* CT000632, FAC, ¶101.]

As shown above, the Court of Appeal properly recognized that any of Appellants' allegations in their Fourth Amended Complaint that Appellant Brown's medical information was allegedly improperly reported by Respondent to the credit agencies was by definition, either inaccurate, improper, or misleading. Therefore, Robert Brown's CMIA cause of action was properly deemed preempted pursuant to Section 1681t(b)(1)(F) of the FCRA as such allegations fall directly within the purview of Section

1681t(b)(1)(F).

2. Appellants' CMIA Claims Repeatedly Allege That Respondent Reported Inaccurate, Incomplete and Misleading Information Regarding Appellants KA and KI

Appellants allege that confidential medical information of Appellants KA and KI were provided to the credit bureaus for the purposes of "verifying the allegation" of Appellant Brown's dental crown debt, despite the fact "payment for plaintiff's medical care and treatment were not in debt collection." [CT 000623-000624, FAC, ¶¶66, 69]

Therefore, according to Appellants' own allegations, when Respondent included KA and KI's information in its credit reporting of Robert Brown's alleged dental care debt, it had the effect of either:

(1) misrepresenting that the medical treatment of KA and KI was somehow related to R. Brown's allegedly false debt; or

(2) creating the misrepresentation that KA and KI owed a medical debt.

Therefore, any and all of Appellants' allegations in their CMIA Claims that Respondent reported KI and KA's medical information to the credit agencies in support of Appellant Brown's allegedly false debt is by definition, either inaccurate, incomplete, or misleading, and therefore falls

directly within the ambit of Section 1681t(b)(1)(F) preemption.

E. Appellants' Argument that the CMIA Should Not Be Preempted Because It Provides Greater Protection than the FCRA Lacks Any Merit

As the Court of Appeal's preemption decision was based on Section 1681t(b)(1)***(F)*** and not 1681t(a), Appellants' argument that the CMIA should apply pursuant to 1681t(a) because it provides stronger protection than the FCRA (AOB, pg. 12) fails as a matter of law.

Moreover, Appellants' assertion that *Credit Data of Arizona, Inc. v. State of Ariz.* (9th Cir. 1979) 602 F.2d 195, *Davenport v. Farmers Ins. Group* (8th Cir. Minn. 2004) 378 F.3d 839, and *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548 support their argument that the FCRA does not preempt their claims because the CMIA gives the consumer "more protection" than the FCRA (AOB, pg. 14) is also incorrect.

As noted by the Court of Appeal, none of these cases addressed section 1681t(b)(1)(F) and, in fact, two of them were decided *before* Congress enacted that section in 1996. (Court of Appeal's Opinion, pg. 11)

When *Credit Data* was decided, Section 1681t of the FCRA read:

> "[The FCRA] does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the

collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter and ***then only to the extent of the inconsistency.***"

Credit Data of Arizona, Inc. v. Arizona, 602 F.2d 195, 197 (9th Cir. Ariz. 1979)(emphasis added).

After *Credit Data* was decided in 1979, Section 1681t was **amended** in 1996, creating subsections (a), (b) and (c). Although Section 1681t(a) states that its preemption provisions apply "***only to the extent of the inconsistency***", this savings provision is not part of Section 1681t(b). *See* 15 U.S.C. § 1681t(a) & 1681t(b). Accordingly, this represents Congressional intent to exclude Section 1681t(b)(1)(F) from the "savings provision" of Section 1681t(a). *See Bates, supra*, 522 U.S. 23 at 29.

Because the savings provision at issue in *Credit Data* was superseded by statute, and inapplicable to Section 1681t(b) claims, so too are *Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal. App. 4th 548, and *Davenport v. Farmers Ins. Group*, 378 F.3d 839 (8th Cir. Minn. 2004) which both rely on *Credit Data*. These decisions are no longer persuasive, and Appellants' citation to these authorities is without merit.

Bolstering the conclusion that *Credit Data* and *Cisneros* have been superseded by the 1996 amendment to Section 1681t is Appellants' own

cited authority, *Sanai*, 170 Cal. App. 4th 746, 777. The Court in *Sanai* expressly acknowledged that the "FCRA contains two preemption sections affecting state law claims that apply to persons who "furnish" information under the FCRA": 1681t(a) and 1681t(b). *Sanai*, 170 Cal. App. 4th at 777. As acknowledged by Appellants, with respect to Section 1681t(a), the Court of Appeal held that there was no implied or field preemption, and therefore a statute would not be preempted to the extent it was not inconsistent with the FCRA. (AOB, pgs. 18-19, citing *Sanai*, 170 Cal. App. 4th 746, 777.) However, the Court of Appeal went on to state:

> "***Notwithstanding this general language preserving state laws that do not conflict with the FCRA***, however, ***in 1996 Congress amended the FCRA to strictly limit the availability of consumer's state remedies against furnishers of credit information***. As amended, 15 United States Code ***section 1681t(b) provides,***"No requirement or prohibition may be imposed under the laws of any State . . (1) with respect to any subject matter regulated under... (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply . . . with respect to section 1785.25(a) of the California Civil Code (as in effect on the date of enactment (September 30, 1996) ... ."

Sanai, 170 Cal. App. 4th 746, 777 (emphasis added).

Therefore, the Court of Appeal in *Sinai* specifically acknowledged that Section 1681t(b), the FCRA section at issue here, demonstrated Congress' intent to ***completely*** preempt the field of credit reporting that was otherwise addressed by state statutes, not just to the point of inconsistency. Therefore, under Section 1681t(b)(1)(F)'s complete preemption, there is no room for state law that offers "greater protection," as contemplated by Section 1681t(a) and by Appellants. The holding in *Sanai* is consistent with the Federal District Courts of the Ninth Circuit. *See Banga v. Allstate Ins. Co.* (E.D. Cal. Mar. 31, 2010) 2010 U.S. Dist. LEXIS 31022 at *12 (noting "Indeed, while the FCRA explicitly saves state law that is not 'inconsistent' with the FCRA, this savings provision does not apply to subjects regulated under 15 U.S.C. § 1681s-2"); *Mora v. Harley-Davidson Credit Corp.* (E.D. Cal. July 7, 2009) 2009 U.S. Dist. LEXIS 61851 at *12, 13 (same); *Howard,* 371 F. Supp. 2d 1139, 1144.

In light of the foregoing, Appellants' argument that the CMIA should not be preempted because it is not inconsistent with the FCRA fails as a matter of law.

F. **Even if Appellants' CMIA Claims Are Not Preempted, As an Assignee of Appellants' Dentist, Respondent Could Disclose Appellants' Information to the Same Extent as any Health Care Provider**

Even if Appellants' CMIA Claims were not preempted under Section 1681t(b)(1)(F), Respondent's disclosures were authorized under the CMIA.

Civil Code Section 56.10(c)(3) provides:

> "(c) A provider of health care, or a health care service plan may disclose medical information as follows: . .
>
> (3) The information may be disclosed to any person or entity that provides billing, **claims management,** medical data processing, **or other administrative services for providers of health care** or health care service plans or for any of the persons or entities specified in paragraph (2). However, no information so disclosed shall be further disclosed by the recipient in any way that would be violative of this part."

Cal. Civ. Code §56.10(c)(3)(Emphasis added).

Appellants do not dispute that the debt at issue was alleged to be owed to Appellants' dentist, who by definition, is a "health care provider, " and have conceded that Respondent was acting as the agent for Appellants' dentist. [CT 000615, FAC ¶33] Therefore, according to Section

56.10(c)(3) of the CMIA, because Appellants' dentist could disclose Appellants' medical information for various administrative services, including debt collection, so could Respondent.

Debt collection is clearly an "administrative service" that is contemplated by Section 56.10(c)(3) for several reasons. First, Section 56.10(c)(3) should be construed broadly. The Court of Appeal has held that 56.10(c)(8)(B) of the CMIA is more specific than 56.10(c)(8)(A), and therefore shows a legislative intent to limit authorization under Section 56.10(c)(8)(B). *See Pettus v. Cole*, 49 Cal. App. 4th 402, 435 (1996).

In contrast, Section 56.10(c)(3) includes the qualifying clause "or other administrative services for providers of health care," which shows an intent that the authorization pursuant to Section 56.10(c) be extensive, as "or other administrative services" modifies the preceding language of Section 56.10(c). *See White v. County of Sacramento* (1982) 31 Cal. 3d 676, 680 (noting that evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma)

In addition, section 56.10(c)(3) authorizes disclosures pursuant to billing, and characterizes billing as an "administrative service." The only difference between billing and debt collection is a matter of timing,

whereby the billed amount is now in default. Therefore, debt collection is an administrative service, just as billing. *See, e.g., Great W. Funding, Inc. v. Mendelson* (E.D. Pa. Dec. 4, 1992) 1992 U.S. Dist. LEXIS 19117, at *2 (party entered into agreement to administer medical claims and hired third party to collect on claims); *Del Campo v. Kennedy* (9th Cir. Cal. 2008) 517 F.3d 1070, 1078 (noting function of agency which collected funds related to bad check rehabilitation program on behalf of police department "appear[ed] to be primarily administrative and relating to debt collection"). If this were not the case, this would mean that health care providers would be able to bill patients, but if the patient let the bill lapse into default, the health care provider would be barred from disclosing the medical information in an effort to collect upon the bill.

The Court of Appeal has recognized that the CMIA authorizes disclosures in an effort to collect payment, when, in *Colleen M. v. Fertility & Surgical Associates of Thousand Oaks* (2005) 132 Cal. App. 4th 1466, 1477, it permitted disclosure of plaintiff's medical information to her ex-fiancé to obtain payment pursuant to Section 56.10(c)(2).

In light of the legislative intent of the CMIA, which favors authorization of disclosures relating to payment and billing, and the broad scope of the clause "or administrative services," debt collection should be

considered within the scope of Section 56.10(c)(3). As credit reporting and verification is part of debt collection, Appellants' CMIA Claims are based on Respondent's administrative debt collection activities, and therefore authorized pursuant to Section 56.10(c)(3) as a matter of law.

IV.

CONCLUSION

It is uncontroverted that the CMIA Claims in Appellants'Fourth Amended Complaint are based on Respondent's alleged furnishing of Appellants' credit information to the credit bureaus. The law is clear that Section 1681t(b)(1)(F) preempts all state law claims relating to the furnishing of credit information to the credit bureaus. Appellants have provided no valid authority that preemption of their CMIA Claims pursuant to Section 1681t(b)(1)(F) of the FCRA would invalidate Section 1681t(b)(1)(E) of the FCRA.

Therefore, Section 1681t(b)(1)(F) applies to Appellants' CMIA Claims as pleaded. Because section 1681t(b)(1)(F) of the FCRA preempts all state law causes of action relating to the furnishing of information to the credit bureaus, the Court of Appeal correctly held that Appellants' CMIA Claims are preempted as a matter of law.

As Appellants' Fourth Amended Complaint only alleges that Appellants provided inaccurate, incomplete, and misleading information relating to Appellants' alleged debt for dental work to the credit reporting bureaus, the Court of Appeal correctly preempted Appellants' CMIA claims. This preemption was proper pursuant to a long line of authority holding that Section 1681t(b)(1)(F) preempts state law claims relating to the reporting of inaccurate, incomplete, and misleading information to the credit bureaus.

Finally, regardless of whether Appellants' CMIA Claims are preempted, the CMIA Claims were properly dismissed. As Appellants have pleaded that Respondent was acting as the assignee of Appellants' dentist, Respondent was entitled to make any disclosures to the same extent as Appellants' dentist. Therefore, Respondent's disclosures to the credit reporting bureaus in connection with debt collection were authorized pursuant to Section 56.10(c) of the CMIA as a matter of law.

In light of the foregoing, this Court should affirm the Court of Appeal's ruling, and Appellants' Third and Fourth Causes of Action in their Fourth Amended Complaint should remain dismissed.

DATED: July 14, 2010

Respectfully submitted,

CARLSON & MESSER LLP

By: David J. Kaminski

David J. Kaminski
Stephen A. Watkins
Attorneys for Respondent Stewart Mortensen

CERTIFICATE OF WORD LENGTH (CRC 8.630(b)(2))

I, David J. Kaminski, certify that the foregoing Respondent's Answer Brief consists of 6,563 words, not including the Proof of Service. The word count was determined through the Properties function of WordPerfect, which was used to generate this brief.

David J. Kaminski

David J. Kaminski

ATTACHED AUTHORITIES

CASE A

LEXSEE 2006 U.S. DIST. LEXIS 12649

ANDY ABBETT, Plaintiff, v. BANK OF AMERICA, Defendant.

CASE NO. 3:04-CV-01102-WKW-VPM (WO)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

2006 U.S. Dist. LEXIS 12649

March 8, 2006, Decided

SUBSEQUENT HISTORY: Motion granted by, Motion denied by, Motion granted by, in part, Motion denied by, in part *Abbett v. Bank of Am., 2006 U.S. Dist. LEXIS 18240 (M.D. Ala., Apr. 6, 2006)*

COUNSEL: [*1] For Andy Abbett, Plaintiff: Kenneth Joseph Riemer, Mobile, AL.

For Bank of America, Defendant: James Cicero Huckaby, Jr., John Winston Scott, Leilus Jackson Young, Jr., Huckaby Scott & Dukes, PC, Birmingham, AL.

JUDGES: W. Keith Watkins, UNITED STATES DISTRICT JUDGE.

OPINION BY: W. Keith Watkins

OPINION

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant Bank of America's Motion for Summary Judgment (Doc. # 77) and Motion to Strike (Doc. # 97) certain evidence presented by Plaintiff Andy Abbett in opposition to the summary judgment (Doc. # 86). For the reasons given below, the Motion for Summary Judgment (Doc. # 77) will be DENIED in part and GRANTED in part, and the Motion to Strike (Doc. # 97) will be DENIED.

I. FACTS AND PROCEDURAL HISTORY

The facts contained in the parties' evidentiary submissions, viewed in a light most favorable to the nonmovant, show the following:

Sandra Bruyn opened a Bank of America credit card account, ending in 8203 ("Account 8023"), prior to her marriage to Mr. Abbett in November 2001. Within a month of the wedding, the new Mrs. Abbett telephoned Bank of America to add Mr. Abbett's name to her account. The parties dispute [*2] whether Mrs. Abbett requested that Mr. Abbett be added as an authorized user or as a contractually liable party. [1] Bank of America added Mr. Abbett as a "co-applicant," which Bank of America contends makes him a contractually liable party. [2]

1 This disputed fact alone defeats Bank of America's Motion for Summary Judgment as to several issues discussed *infra*.

2 Bank of America has moved to strike the Abbetts' affidavits on the grounds that certain portions are speculative, conclusory, and not based on personal knowledge. The Motion (Doc. # 97) will be DENIED. The portions that Bank of America cited are based on personal knowledge and are not speculative or conclusory.

Before Mr. Abbett was added to the account, the balance on Account 8203 was $ 995.39. Mr. Abbett charged $ 23 to the account in December 2001. This charge represents Mr. Abbett's only use of the account and the Abbetts' final charge. The account became past due in January 2002 and delinquent in August 2002. About the time Mr. Abbett [*3] commenced this litigation, Bank of America was attempting to collect $ 2,132.53 from Mr. Abbett.

On December 5, 2002, Mrs. Abbett called Bank of America to report her impending bankruptcy filing and requested information regarding how her husband was

added to the account. The next day, Mr. Abbett called Bank of America to state that he did not sign up for the credit card and requested a copy of the credit application. Mrs. Abbett also disputed that Mr. Abbett was a co-signer on the account on January 2, 2003, via a telephone call.

Mrs. Abbett filed for bankruptcy on May 8, 2003. Account 8203 was one of the debts that was discharged in bankruptcy. At least once prior to filing bankruptcy, Mrs. Abbett wrote a letter to Bank of America disputing Mr. Abbett's status as a co-applicant. After Mrs. Abbett's bankruptcy, Bank of America made attempts to collect the Account 8203 debt from Mr. Abbett. The parties dispute the date on which Bank of America began treating Mr. Abbett as a contractually liable party, and its reasons for doing so.

On numerous occasions, Mrs. Abbett, Mr. Abbett, and his attorney contacted Bank of America, directly and through its collection agencies, disputing Mr. [*4] Abbett's status as co-applicant and requesting an investigation and documentation evidencing his responsibility for the debt. Mr. Abbett did not receive the requested documentation.

As early as August 2003, Bank of America furnished information about Mr. Abbett and Account 8203 to TransUnion. The parties dispute whether this information was false. Notably, Mr. Abbett's August 2003 TransUnion report and September 2003 Equifax report list Account 8023 as an *individual* account.

In addition to disputing the debt with Bank of America, Mr. Abbett disputed the reporting of the debt with TransUnion beginning in mid-2003 through early 2004. The result of each of TransUnion's investigations was "verified, no change." In January 2004, one or more consumer reporting agencies ("CRAs") [3] notified Bank of America that Mr. Abbett disputed information provided by Bank of America. While Bank of America verified the information that had been reported to the CRAs, there is no evidence of Bank of America's investigation upon receipt of notification. [4]

> 3 The Fair Credit Reporting Act, *15 U.S.C. § 1681, et seq.* ("FCRA"), defines "consumer reporting agency":
>
> > Any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
>
> *15 U.S.C. § 1681a(f).*

[*5]

> 4 Not for want of trying. Mr. Abbett filed a Motion to Compel discovery on this issue after repeated attempts to depose Bank of America's *Rule 30(b)(6)* representative to no avail.

Bank of America at first made its own efforts to collect on Account 8023. Beginning in the fall of 2003, however, Bank of America retained a series of collection agencies to collect the balance owed on the account from Mr. Abbett. Trauner, Cohen & Thomas, a law firm, received notification of a dispute from Mr. Abbett and, in February 2004, indicated they had requested Bank of America to investigate the dispute and they would not take further action pending the investigation. However, another collection agency, LTD Financial Services, began attempts to collect from Mr. Abbett by the end of the month. LTD's collection efforts were followed by Creditors Interchange in May and June 2004 and by Allied-Interstate in November 2004. Mr. Abbett or his attorney disputed the debt with each of the collection agencies.

Mr. Abbett filed suit on November 15, 2004. At this stage in the litigation, Bank of America is the sole remaining [*6] defendant. In the Amended Complaint, Mr. Abbett alleges that Bank of America was negligent and wanton in the management of Account 8203 (Counts I and II), violated the provisions of the Fair Credit Reporting Act, *15 U.S.C. § 1681s-2(b)* (Count III), defamed him for representations made to debt collectors and CRAs that he is liable on the account (Counts IV and V), invaded his privacy by disseminating false credit information and attempting to collect a debt known to be not owed by him (Count VI), negligently and wantonly disseminated false credit information (Counts VII and VIII), negligently and wantonly supervised its employees with respect to the handling of credit and account information (Counts IX and X), and conspired with former co-defendants to defraud and defame him (Count XIV).

II. JURISDICTION AND VENUE

Because this case arises under *15 U.S.C. § 1681, et seq.*, the Court exercises jurisdiction over the subject matter of this action pursuant to *28 U.S.C. § 1331*, as well as supplemental jurisdiction pursuant to *28 U.S.C. § 1367*. Additionally, the Court finds that the [*7] record includes adequate allegations supporting personal jurisdiction and venue.

III. STANDARD OF REVIEW

Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id. at 323*. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate [*8] burden of proof. *Id. at 322-23*.

Once the moving party has met its burden, *Rule 56(e)* "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324*. To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. On the other hand, a court ruling on a motion for summary judgment must believe the evidence of the non-movant and must draw all justifiable inferences from the evidence in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

IV. DISCUSSION

[*9] Bank of America has submitted a Motion for Summary Judgment and supporting documentation. Mr. Abbett has opposed the motion with a response brief and an evidentiary submission, which contains certain evidence that Bank of America challenges. The Court addresses each of the grounds presented by Bank of America.

A. Private Right of Action Under the FCRA

As a threshold matter, the Court must decide whether the FCRA provides Mr. Abbett a private right of action. Bank of America asserts that no private right of action exists for claims based on the *provision of inaccurate information* by furnishers to CRAs, which is prohibited by *§ 1681s-2(a)*. The Court agrees with this proposition of law but disagrees that all of Mr. Abbett's claims should be dismissed. [5]

> 5 The FCRA does not provide a federal private right of action under *§ 1681s-2(a)*. *See § 1681s-2(c)(1)* (". . . *sections 1681n* and *1681o* of this title do not apply to any violation of-- (1) subsection (a) of this section, including any regulations issued thereunder . . ."). Courts have routinely held that *§ 1681s-2(a)* may be enforced only by the government as provided in the statute even though it creates an affirmative obligation to refrain from reporting inaccurate information. *See, e.g., Bank One, N.A. v. Colley, 294 F. Supp. 2d 864, 870 (M.D. La. 2003)*. As stated above, the Court agrees with Bank of America that Mr. Abbett cannot maintain a claim under *§ 1681s-2(a)*.

[*10] Mr. Abbett does not assert a claim under *§ 1681s-2(a)*. Mr. Abbett makes only one claim explicitly based on the FCRA. In Count III, he alleges that Bank of America violated *§ 1681s-2(b)*, which *prescribes certain duties* for furnishers of information to CRAs. [6] Through *§ 1681n* and *§ 1681o, the FCRA* provides a private right of action for such violations. *See Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059-60 (9th Cir. 2002)*.

> 6 Bank of America concedes that it is a "furnisher of information" for purposes of the FCRA.

To prevail on a *§ 1681s-2(b)* claim, Mr. Abbett must show that a CRA notified the furnisher of information about the consumer's dispute pursuant to *§ 1681i(a)(2)*. This notice triggers the furnisher's duties under *§ 1681s-2(b)*. The furnisher must then, within 30 days, conduct a reasonable investigation, review information provided by the CRA, report back to the CRA regarding the investigation, and take other action if information is found to be inaccurate, [*11] incomplete, or cannot be verified. *15 U.S.C. § 1681s-2(b)*. This is the gist of Mr. Abbett's claim: "Whether Bank of America's investigation (if any) complied with FCRA . . . . At issue here is Bank of America's position that these requirements do not apply." Doc. # 86, at 16.

Bank of America did not challenge Mr. Abbett's evidence of his *§ 1681 s-2(b)* claim until its reply brief: "Plaintiff has presented no evidence whatsoever regarding either the content of any dispute which Bank of America received from a CRA, the details of any inves-

tigation which Bank of America conducted after receiving notice of a dispute from a CRA, or, perhaps more important, that Bank of America's credit reporting regarding Plaintiff was inaccurate in any way." Doc. # 96, at 10. The latter argument is unpersuasive because the issue of whether Bank of America's reporting was accurate is not only in dispute, but for purposes of *§ 1681 s-2(b)*, it is also irrelevant. [7] *Section 1681s-2(b)* duties exist regardless of whether the disputed information is later determined to be accurate. A substantive investigation is required irrespective of accuracy.

> 7 Bank of America's reliance on *Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11th Cir. 1991)*, is misplaced. The plaintiff in *Cahlin* brought suit against a CRA for a violation of *§ 1681e*, which consists of different elements than a cause of action for a violation of *§ 1681s-2(b)*.

[*12] The remainder of Bank of America's argument is disingenuous in light of the ongoing discovery dispute between the parties. [8] Notwithstanding the fact that discovery is not complete, there is some evidence of notice and investigation. Bank of America's own Account Notes show that on at least two occasions in January 2004 Bank of America received "ACDVs," which Bank of America's supporting documentation on the Motion to Compel briefing defines as "automated consumer dispute verifications" submitted to Bank of America by various CRAs. Bank of America's own documents also hint at what steps its associates would have taken upon receipt of an ACDV.

> 8 The Court is aware of Mr. Abbett's Motion to Compel with respect to discovery on the issues of notice and investigation, including the completion of a *Rule 30(b)(6)* deposition. The Court is also aware of the Magistrate Judge's oral statements that she will grant leave to refile the Motion to Compel pending the outcome of the summary judgment motion.

The Court finds [*13] that Mr. Abbett has presented sufficient evidence of specific facts showing that there is a genuine issue for trial; that is, what actions were taken by Bank of America in order to verify its reports to the CRAs upon receipt of notification of Mr. Abbett's dispute and whether such actions were in compliance with the FCRA. *See, e.g., Johnson v. MBNA America Bank, N.A., 357 F.3d 426, 431 (4th Cir. 2004)*(holding that whether the furnisher of information conducted a reasonable investigation of the consumer's dispute is a question of fact for the jury).

Bank of America also argues that Mr. Abbett has no state law private right of action based on the provision of inaccurate information by furnishers to CRAs, which is prohibited by *§ 1681s-2(a)*. The Court agrees that, insofar as Mr. Abbett's state law claims are for violations of duties established by *§ 1681s-2(a)*, those claims must be dismissed. Bank of America relies on *§ 1681s-2(c)(1)* for support of this proposition; however, the Court finds that the dismissal is required under the following preemption analysis.

B. Preemption of State Law Claims by the FCRA

Bank of America argues that Mr. Abbett's state law [*14] claims, which, it alleges, arise from supposedly inaccurate credit reporting (i.e., Counts Five through Ten), are preempted by *§ 1681t* of the FCRA and must be dismissed. Bank of America argues that the language of *§ 1681t* requires preemption of all state laws, statutory and the common law, related to furnishers of information to CRAs. [9] Mr. Abbett opposes Bank of America's interpretation of the preemption provision and suggests the statute only preempts state statutory laws. [10]

> 9 To the extent that Bank of America advances an argument for implied field preemption ("Congress added *§ 624(b)(1)* to achieve even broader 'field' preemption . . ."), the Court rejects this argument. The statutes at issue provide a "reliable indicium of congressional intent" to preempt state laws; there is no reason to infer a broader preemption. *See Freightliner Corp. v. Myrick, 514 U.S. 280, 288, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995)* (internal citations and quotations omitted). The language of *§ 1681t(a)* refutes Bank of America's "argument that in enacting the Fair Credit Reporting Act Congress intended to preempt the field." *See Credit Data of Arizona, Inc. v. State of Arizona, 602 F.2d 195, 197 (9th Cir. 1979)*; *see also Davenport v. Farmers Ins. Group, 378 F.3d 839, 842-42 (8th Cir. 2004)*. Moreover, *§ 1681t(b)(1)(F)(i),(ii)* excepts certain state statutes from the preemption. This means that furnishers of information must comply with those state statutes. Therefore, Congress clearly intended compliance, albeit somewhat limited, with state laws.

[*15]

> 10 To the Court's knowledge, many district courts but no appellate courts have analyzed this preemption issue. Although aware of the three approaches that courts take to determine the extent and scope of FCRA preemption, *see Barnhill v. Bank of America, N.A., 378 F. Supp. 2d 696, 699-704 (D.S.C. 2005)* (analyzing the three recognized preemption approaches), the Court declines to adopt any of those approaches.

This argument requires the Court to engage in statutory construction. Where a statute contains an express preemption clause, the Court first focuses "on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)* (quoting *CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 , 113 S. Ct. 1732, 123 L. Ed. 2d 387(1993))*. The FCRA contains express preemption provisions:

> (a) In general
>
> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions [*16] of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, *except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.*
>
> (b) General exceptions
>
> No requirement or prohibition may be imposed under the laws of any State--
>
> . . .
>
> (1) with respect to any subject matter regulated under--
>
> . . .
>
> (F) *section 1681s-2* of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--
>
> (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> (ii) with respect to *section 1785.25(a) of the California Civil Code* (as in effect on September 30, 1996);
>
> . . . .

15 U.S.C. § 1681t (emphasis added).

With respect to the instant case, this section mandates Bank of America's compliance with state laws with two exceptions: (1) where state laws are inconsistent [*17] with the FCRA; and (2) where a State has imposed a requirement or prohibition on furnishers of information to CRAs. [11]

> 11 This exception does not apply to the two statutes specifically named in the statute.

The parties would have the Court engage in a more involved preemption analysis, make a determination as to whether Congress intended to preempt state common law as well as state statutory law, and reconcile the seeming conflict among the sections within the FCRA. But, such analysis is wholly unnecessary. From the plain language of the statute, Congress unquestionably intended for no claims to be brought against furnishers of information for making inaccurate reports to CRAs except for those brought by the government. Allowing any private state law action to proceed against a furnisher of information based on violations of duties established by *§ 1681s-2(a)* is inconsistent with the FCRA. Accordingly, Mr. Abbett's state law claims, to the extent that they seek to establish liability for violations of duties [*18] established by *§ 1681s-2(a)*, are preempted by the FCRA and will be DISMISSED. The claims to be dismissed include Counts V, VII, and VIII, as well as Counts VI, IX, X, and XIV to the extent they are based on the dissemination of false credit information.

C. Preemption of All Claims by Equal Credit Opportunity Act

Bank of America asserts that the regulations promulgated under the Equal Credit Opportunity Act ("ECOA") required Bank of America to engage in the precise conduct about which Mr. Abbett complains. [12] Bank of America claims that *12 C.F.R. § 202.10(a)(1)* and its official commentary required it to report Mr. Abbett's participation in the account and that it was not required to "distinguish between accounts on which the spouse is an authorized user and accounts on which the spouse is a contractually liable party." *12 C.F.R. Pt. 202, Supp. I, § 202.10(a).* [13] According to Bank of America, even if Mr. Abbett were only an authorized user on Account 8023, reporting his participation in the account was required by law; thus, all reporting was per se accurate as a matter of law. Bank of America concludes that because its reporting was accurate as [*19] a matter of law, Mr. Abbett's lawsuit is preempted by ECOA.

> 12 The ECOA outlaws irrational credit discrimination based on, among other things, marital status. *15 U.S.C. § 1691 (a)*. Congress authorized the Board of Governors of the Federal Reserve System to prescribe regulations to carry out the purposes of the Act. *15 U.S.C. § 1691b*. The

Board promulgated the regulations codified at *12 C.F.R. § 201.1, et seq.* ("Regulation B"). Regulation B provides, in relevant part:

> (a) Designation of accounts. A creditor that furnishes credit information shall designate:
>
> (1) Any new account to reflect the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account (other than as a guarantor, surety, endorser, or similar party); and
>
> (2) Any existing account to reflect such participation, within 90 days after receiving a written request to do so from one of the spouses.
>
> (b) Routine reports to consumer reporting agency. If a creditor furnishes credit information to a consumer reporting agency concerning an account designated to reflect the participation of both spouses, the creditor shall furnish the information in a manner that will enable the agency to provide access to the information in the name of each spouse.
>
> (c) Reporting in response to inquiry. If a creditor furnishes credit information in response to an inquiry, concerning an account designated to reflect the participation of both spouses, the creditor shall furnish the information in the name of the spouse about whom the information is requested.

12 C.F.R. § 202.10.

[*20]

13 Official Staff Commentary to Regulation B offers further guidance on the regulation of furnishers of credit information:

> *Section 202.10*--Furnishing of Credit Information
>
> 1. Scope. The requirements of *§ 202.10* for designating and reporting credit information apply only to consumer credit transactions. Moreover, they apply only to creditors that opt to furnish credit information to credit bureaus or to other creditors; there is no requirement that a creditor furnish credit information on its accounts.
>
> 2. Reporting on all accounts. The requirements of *§ 202.10* apply only to accounts held or used by spouses. However, a creditor has the option to designate all joint accounts (or all accounts with an authorized user) to reflect the participation of both parties, whether or not the accounts are held by persons married to each other.
>
> 3. Designating accounts. In designating accounts and reporting credit information, a creditor need not distinguish between accounts on which the spouse is an authorized user and accounts on which the spouse is a contractually liable party.
>
> 4. File and index systems. The regulation does not require the creation or maintenance of separate files in the name of each participant on a joint or user account, or require any other particular system of recordkeeping or indexing. It requires only that a creditor be able to report information in the name of each spouse on accounts covered by *§ 202.10*. Thus, if a creditor receives a credit inquiry about the wife, it should be able to locate her credit file without asking the husband's name.
>
> 10(a) Designation of accounts.
>
> 1. New parties. When new parties who are spouses undertake a legal obligation on an account, as in the case of a mortgage loan assumption, the creditor must change the designation on the account to reflect the new parties and must furnish subsequent credit information on the account in the new names.

> 2. Request to change designation of account. A request to change the manner in which information concerning an account is furnished does not alter the legal liability of either spouse on the account and does not require a creditor to change the name in which the account is maintained.

12 C.F.R. Pt. 202, Supp. I, § 202.10.

[*21] Bank of America's argument is not well taken for several reasons.

First, the success of Bank of America's argument is contingent on its framing of the issue and the assumption that it asks this Court to make: that the basis for all of Mr. Abbett's claims is that Bank of America's reporting of him was inaccurate solely because he is merely an authorized user. The argument fails because the plain language of the Complaint, as well as the evidence submitted in opposition to summary judgment, shows other bases for his claims. In any event, none of the remaining claims relate to reporting to CRAs.

Second, the Court is unaware of, nor has Bank of America offered up, [14] any authority supporting the proposition that the regulations promulgated by a federal agency under one federal act (ECOA) could "preempt" the entire legislative scheme under another federal act (FCRA). This Court assumes, without deciding, that a regulation that conflicts with a statute under which it was not promulgated is invalid or, at the very least, must yield to the statute.

> 14 Bank of America's reliance on *Melwani v. First USA Bank, N.A., 96 Fed. Appx. 755, 2004 WL 902320 (2d Cir. 2004)*, and *Moline v. Experian Info. Sys., 289 F. Supp. 2d 956 (N. D. Ill 2003)*, is misplaced. *Moline* is not dispositive of this issue as it does not relate to the ECOA or the provision of the FCRA under which Mr. Abbett sues. *Melwani* is an unpublished, three-paragraph summary decision from a different circuit without a recitation of the facts or any meaningful analysis of a case brought by a *pro se* litigant. Thus, it has no precedential value.

[*22] Moreover, the Board has recognized, albeit in the context of disclosures, that the ECOA and the FCRA impose different requirements on creditors and that the requirements of the both of the Acts must be met. *See 12 C.F.R. Pt. 202, Supp. I § 202.4, paragraph 9(b)(2).* [15] This Court cannot ignore the plain language of the FCRA or place a higher value on one statute over another. Taking the action that Bank of America requests would not satisfy the purposes of either the ECOA or the FCRA. Whatever tension exists between the statutes and their regulations must be resolved by Congress and not this Court.

> 15 The Official Commentary to Regulation B states:
>
> > Combined ECOA-FCRA disclosures. The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or its own files. Disclosing that a credit report was obtained and used in the denial of the application, as the FCRA requires, does not satisfy the ECOA requirement to disclose specific reasons. For example, if the applicant's credit history reveals delinquent credit obligations and the application is denied for that reason, to satisfy *§ 202.9(b)(2)* the creditor must disclose that the application was denied because of the applicant's delinquent credit obligations. To satisfy the FCRA requirement, the creditor must also disclose that a credit report was obtained and used in the denial of the application. Sample forms C-1 through C-5 of Appendix C of the regulation provide for the two disclosures.
>
> *12 C.F.R. Pt. 202, Supp. I § 202.4, paragraph 9(b)(2).*

[*23] Third, ECOA and Regulation B do not preempt Mr. Abbett's state law claims. ECOA provides for federal preemption only if "the laws of any State with respect to credit discrimination" are inconsistent with ECOA, and then only to the extent of the inconsistency. *15 U.S.C. § 1691d.* Regulation B outlines ways in which a state law could be inconsistent with ECOA; however, the provisions cited by Bank of America are inapplicable here. *See 12 C.F.R. 202.11(b).* Furthermore, the Board, which has statutory authority to make determinations of

inconsistency, *see § 1691d(f)*, has not done so with respect to either state common law or state fair credit reporting laws. *See 12 C.F.R. Pt. 202, Supp. I, § 202.11(a)*. The Board has made only two preemption determinations of certain provisions of state credit discrimination statutes. *Id.* Neither apply here.

Accordingly, the Court finds that Regulation B does not preempt Mr. Abbett's FCRA claim and claims under state law.

D. Qualified Immunity Under § 1681h

Bank of America claims that in the absence of preemption, it is entitled to qualified immunity under *§ 1681h(e) of the* [*24] *FCRA*:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence *with respect to the reporting of information* against any . . . person who furnishes information to a consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h(e) (emphasis added). Bank of America reasons that Mr. Abbett's state law claims should be dismissed because he cannot prove that it reported false information or acted with malice or willful intent to injure. These arguments fail because *§ 1681h(e)* is inapplicable to Mr. Abbett's remaining claims. Mr. Abbett's remaining claims are based on Bank of America's management of Account 8023, its attempts to collect the debt, and disclosing information to its hired collection agencies. Because the information on which these claims are based was not reported pursuant to the FCRA provisions, *§ 1681h* is not implicated here.

E. Doctrines of Ratification, Affirmance, and Account Stated

Bank of America argues that the doctrines [*25] of ratification, affirmance, and account stated bar all of Mr. Abbett's claims. Bank of America reasons that not only is there substantial evidence that Mr. Abbett is a co-applicant on Account 8023, but that Mr. Abbett has also become a contractually liable party because he has treated the indebtedness as his own obligation to pay. The Court rejects this argument as a basis for summary judgment.

Ratification is an agency concept by which a principal, who has full knowledge of the unauthorized acts of his agent, affirms those acts as if originally authorized by him. *See Restatement (Second) of Agency § 82* (1958). Issues of agency and affirmance are questions for the jury and Bank of America bears the burden of proving its affirmative defense.

Even if "substantial evidence" exists, it is not the standard by which summary judgment in federal courts is determined. Mr. Abbett has presented evidence that both he and his wife treated him as nothing more than an authorized user and that they then took appropriate action upon discovering Bank of America's intention to hold him contractually liable. This evidence is sufficient to create a factual dispute [*26] precluding summary judgment on this argument. This reasoning equally applies to Bank of America's "account stated" argument.

F. Remaining State Law Claims

Bank of America challenges all of Mr. Abbett's state law claims for failure to state a cause of action as a matter of law. Bank of America claims Mr. Abbett cannot prove that Bank of America furnished inaccurate credit information about him, which is an essential element of all of his state law claims. Because there are genuine issues of material fact that must be resolved by the trier of fact as to the accuracy of the information reported about Mr. Abbett, this argument fails.

Bank of America further challenges two claims and makes specific arguments. First, it is argued that Mr. Abbett has no cause of action for conspiracy because he cannot support his underlying claims. In light of the Court's ruling that there are genuine issues of material fact regarding the underlying causes of action, this argument fails at this time.

Second, Bank of America contends that its communications with its hired collection agencies are not "publications" for the purposes of establishing a defamation claim. See *Robinson v. Equifax Info.* [*27] *Services, LLC*, No. Civ. A. CV 040229 RP, 2005 WL 1712479 at *13 (S.D. Ala. July 22, 2005) (citing *Brackin v. Trimmier Law Firm, 897 So.2d 207, 222 (Ala. 2004))*. In *Brackin*, the Alabama Supreme Court held that a credit union through its employees did not publish to a third party a false and defamatory statement about a former credit union executive because the employees were acting within the line and scope of their employment when they responded to an auditor's question. *Brackin, 897 So.2d at 221-22*. Similarly, the auditor's questions fell within the line and scope of her agency for the credit union, and the extent of the communications regarding the investigation did not exceed what was reasonably necessary. *Id. at 222*. The court's analysis contemplated the facts of the auditor's engagement and investigation in order to determine the line and scope of her agency with the credit union. *See id. at 222*. Unlike the defendants in

Brackin, Bank of America does not set forth any facts to support the non-publication argument and states only that "any communication by Bank of America to its agents or [*28] employees, including the Debt Collector Defendants, in the course of business regarding the collection of the account from Plaintiff is not a 'publication' . . . ." Thus, Bank of America has not met its initial burden of demonstrating no genuine issue of material fact, and summary judgment cannot be granted. *Celotex Corp., 477 U.S. at 322-23.*

V. CONCLUSION

Construing all facts presented in the light most favorable to the non-movant, the Court finds that Mr. Abbett has adequately demonstrated that a genuine issue of material fact exists with regard to some claims.

Therefore, it is ORDERED that the Defendant's Motion for Summary Judgment (Doc. # 77) is DENIED in part and GRANTED in part. The following claims, which seek to establish liability for violations of duties established by *§ 1681s-2(a)*, are preempted by the FCRA and are thus DISMISSED: Count V, defamation for false statements to CRAs; and Counts VII and VIII, negligent and wanton dissemination of false credit information. To the extent the claims are based on the dissemination of false credit information to CRAs, the following claims are also DISMISSED: Count VI, invasion of privacy; Counts IX and [*29] X, negligent and wanton supervision; and Count XIV, conspiracy.

The remaining claims include Counts I and II, negligence or wantonness in the management of Account 8023; Count III, a FCRA claim for violations of duties established by *§ 1681s-2(b)*; and Count IV, defamation for false statements to debt collectors. To the extent the claims are based on the management of the account or attempts to collect the debt, the following claims also remain: Count VI, invasion of privacy; Counts IX and X, negligent and wanton supervision; and Count XIV, conspiracy.

It is further ORDERED that Defendant's Motion to Strike (Doc. # 97) is DENIED.

DONE this the 8th day of March, 2006.

/s/ W. Keith Watkins

UNITED STATES DISTRICT JUDGE

CASE B

LEXSEE 2010 U.S. DIST. LEXIS 31022

KAMLESH BANGA, Plaintiff, vs. ALLSTATE INSURANCE COMPANY and DOES 1 through 10 inclusive, Defendants.

No. CIV S-08-1518 LKK EFB PS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 31022

March 31, 2010, Decided
March 31, 2010, Filed

PRIOR HISTORY: *Banga v. Allstate Ins. Co., 2009 U.S. Dist. LEXIS 86619 (E.D. Cal., Sept. 22, 2009)*

COUNSEL: [*1] Kamlesh Banga, Plaintiff, Pro se, Vallejo, CA.

For Allstate Insurance Company, Defendant: Bonnie Lau, Gayle M Athanacio, Sonia Renee Martin, LEAD ATTORNEYS, Sonnenschein, Nath & Rosenthal, LLP, San Francisco, CA.

JUDGES: LAWRENCE K. KARLTON, UNITED STATES DISTRICT COURT SENIOR JUDGE.

OPINION BY: LAWRENCE K. KARLTON

OPINION

ORDER

Plaintiff brings claims against defendant Allstate Insurance Company concerning plaintiff's homeowner's insurance policy. Because plaintiff is proceeding pro se, this case was assigned to a magistrate judge under *Local Rule 302(c)(21)* (formerly L.R. 72-302(c)(21)) and *28 U.S.C. § 636(b)(1)*.

Defendant moved to dismiss plaintiff's claims. Plaintiff opposed this motion and moved for leave to file an amended complaint. On September 22, 2009, the magistrate judge filed findings and recommendations regarding these two motions. These were served on the parties and contained notice that any objections to the findings and recommendations were to be filed within ten days. Defendant filed objections on October 9, 2009, and they were considered by the undersigned. [1] In addition, plaintiff prematurely filed a "Third Amended Complaint" on October 21, 2009, which defendant moved to dismiss on November 9, [*2] 2009. On December 28, 2009, plaintiff acknowledged that the Third Amended Complaint was filed prematurely and therefore moved to withdraw that amended complaint. Because the Third Amended Complaint was filed without leave to amend, plaintiff's motion to withdraw that complaint will be granted and defendant's motion to dismiss that complaint will be denied as moot.

1 On December 28, 2009, plaintiff filed an opposition to defendant's objections to the September 22, 2009 findings and recommendations, contending that the objections should not be considered because they were untimely. Dckt. No. 36. Although defendant's objections were in fact untimely, plaintiff's opposition thereto was also untimely. *See Fed. R. Civ. P. 72(b)(2)*.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. *28 U.S.C. § 636(b)(1)*; *McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981)*. As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. *See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979)*. The magistrate [*3] judge's conclusions of law are reviewed de novo. *See Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983)*.

The court adopts the magistrate judge's findings and recommendations in full, except as they pertain to the unfair competition law ("UCL") claim. [2] The magistrate judge concluded that the UCL claim failed insofar as it was predicated on violations of *15 U.S.C. §§ 1681m(a)* and *1681s-2(a)*, because these statutes did not themselves provide a private cause of action. Conversely, the magistrate judge concluded that the UCL claim could proceed insofar as it was predicated on a violation of *15 U.S.C. § 1681s-2(b)*, because this section did provide a cause of action. Under California law, the mere presence or absence of a private right of action in a statute does not determine whether a violation of that statute may serve as the predicate of a UCL claim. The court nonetheless concludes that the UCL claim fails as to all three predicates.

2 As noted by the magistrate judge's findings and recommendations, this case has an irregular procedural history, rooted in the magistrate judge's erroneous order disregarding plaintiff's first amended complaint. The court adopts the [*4] magistrate judge's recommended resolution of these procedural issues, and treats the motion to dismiss as challenging the first amended complaint. *See* Findings and Recommendations, 1-3.

I. Discussion

Plaintiff's first amended complaint ("FAC") alleges that defendant violated the federal Fair Credit Reporting Act ("FCRA"), *15 U.S.C. § 1681m(a)*, [3] by taking an action adverse to plaintiff on the basis information contained in a consumer report without providing notice to plaintiff. FAC PP 11-14. The FAC alleges that this same conduct violated California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200* ("UCL").

3 Although plaintiff cites *15 U.S.C. § 1681m* without reference to a particular subsection, *subsection (a)* is the only one encompassing plaintiff's allegations.

Plaintiff's proposed second amended complaint ("SAC") alleges that defendant violated the FCRA by making false reports to a credit reporting agency, SAC PP 15-19, and by failing to notify plaintiff that defendant had reported negative information to a credit reporting agency, SAC P 21. These claims implicate two other provisions of the FCRA, respectively, *15 U.S.C. §§ 1681s-2(a)* and *(b)*. The SAC alleges that this conduct [*5] also violated California's Unfair Competition Law. The SAC further alleges various common law claims, violation of the California Consumer Credit Reporting Act, and violation of *California Civil Code § 1785.26(b)-(c)* (itself a section of the California Consumer Credit Reporting Act).

The court adopts the magistrate judge's findings and recommendations regarding all but the unfair competition law claim. To summarize those recommendations, the FRCA claims seeking to enforce *15 U.S.C. §§ 1681m(a)* and *1681s-2(a)* fail because FCRA does not provide a private right of action for enforcement of these claims. Plaintiff adequately alleges claims under *15 U.S.C. § 1681s-2(b)* and *California Civil Code § 1785.25(a)*. The remaining non-UCL claims fail because plaintiff has not adequately alleged that defendant violated an obligation imposed upon it.

Plaintiff's UCL claim must proceed, if at all, on the basis of conduct that is "unlawful" because it is in violation of one of the above statutes, as explained in findings and recommendations. Conduct that is prohibited by a statute may be actionable under the UCL even if the predicate statute does not provide a private right of action. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 561, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (1998)* [*6] (rejecting the argument that plaintiff "should not be permitted to use the UCL to obtain relief, indirectly, for violation of an underlying statute . . . that [plaintiff] is not authorized to enforce directly."), *id. at 566* (rejecting the argument that "a private UCL claim is barred whenever the predicate statute fails to afford a private right of action."). Thus, the mere fact that the FCRA does not provide a private right of action for enforcement of *15 U.S.C. §§ 1681m(a)* and *1681s-2(a)* does not preclude plaintiff from bringing a UCL claim predicated on violation of those sections. [4]

4 Although the California electorate has narrowed the scope of the UCL since *Stop Youth Addiction,* the current requirement that a plaintiff have personally suffered a loss of money or property does not abrogate the above holding, and the injury requirement has been satisfied in this case. *Cal Bus. & Prof. Code. § 17204.* Moreover, it appears that this action, brought by a consumer seeking to enforce what is essentially a consumer protection statute, is the type of claim intended by the California legislature to fall within the scope of the UCL. *C.f. Intervest Mortg. Inv. Co. v. Skidmore, 632 F. Supp. 2d 1005, 1008 (E.D. Cal. 2009)* [*7] (Karlton, J.) (California legislature did not intend the UCL to permit a guarantor to use the UCL to enforce an FDIC safety and soundness regulation).

I take this opportunity to note that I did not designate my decision in *Intervest, 632 F. Supp. 2d 1005*, for publication, although neither did I designate it as not for publication or otherwise

> actively discourage its inclusion in the Federal Supplement. So far as I am aware, the Federal Supplement's publisher, Thompson West, is free to include district court decisions *sua sponte*. I note, however, that in light of the publisher's modern practice, readers should not assume that a decision's inclusion in the Federal Supplement signals a determination by the decision's author that it is particularly noteworthy, cogent, or otherwise worthy of consideration. *Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 151 (E.D. Cal. 1981)* (Karlton, J.) ("it is my firm belief that published opinions should be limited to novel matters, knotty legal problems, matters of great public importance, great public interest or where the court wishes to criticize existing law.").

Nonetheless, the UCL cannot be used to "'plead around' [an] absolute bar[] to relief contained [*8] in other possible causes of action." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Insofar as plaintiff's UCL claim is predicated on a violation of *15 U.S.C. § 1681m(a)*, *15 U.S.C. § 1681m(h)(8)(B)* is a "bar" to relief. Insofar as the UCL claim is predicated on violations of *15 U.S.C. §§ 1681s-2(a)* and *(b)*, the claim is preempted by *15 U.S.C. § 1681t(b)(1)(F)*.

A. *Section 1681m(a)*

Section 1681m, relating to "requirements on users of consumer reports," contains the following paragraph:

> (8) Enforcement.
>
> > (A) No civil actions. Sections 616 and 617 [*15 U.S.C. §§ 1681n* and *1681o*] shall not apply to any failure by any person to comply with this section.
> >
> > (B) Administrative enforcement. This section shall be enforced exclusively under section 621 [*15 U.S.C. § 1681s*] by the Federal agencies and officials identified in that section.

15 U.S.C. § 1681m(h)(8). Subparagraph A does not bar plaintiff's UCL claim. Although the subparagraph is titled "no civil actions," titles are not themselves controlling. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., U.S. , , 128 S. Ct. 2326, 2336, 171 L. Ed. 2d 203 (2008)*. The body of the subparagraph merely provides that [*9] the private rights of action provided by those two sections of the Fair Credit Reporting Act do not permit enforcement of *section 1681m*. Under *Cel-Tech Communications, 20 Cal. 4th at 182*, a statute's failure to provide a private right of action is not itself an "absolute bar to suit" for purposes of an unfair competition claim.

Subparagraph B, however, is a bar to suit. Rather than merely describing the scope of particular rights of action, this subparagraph provides that administrative enforcement is the sole enforcement mechanism. Under *Cel-Tech Communications,* this is a bar to private suit. Accordingly, as a matter of state law, violation of *15 U.S.C. § 1681m* cannot serve as the predicate for a UCL claim. Because this claim fails as a matter of California law, the court does not address whether a UCL claim predicated on *15 U.S.C. § 1681m(a)* would be preempted as a matter of federal law.

B. FCRA Preemption of Claims Enforcing section 1681s-2

The remaining possible predicates for plaintiff's UCL claim are violations of *15 U.S.C. §§ 1681s-2(a)* and *(b)*. The only possible "bar" to this use of these predicates is preemption under the FCRA. Accordingly, the court analyzes this issue from [*10] the preemption perspective.

"In general, the FCRA does not preempt any state law 'except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.'" *Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1166 (9th Cir. 2009)* (quoting *15 U.S.C. § 1681t(a)*). Two subsections provide exceptions to this general rule, explicitly preempting certain types of state laws. *See generally Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1004 (9th Cir. 2008)* (citing *Bank of Am. v. City and County of S. F., 309 F.3d 551, 558 (9th Cir. 2002))* (discussing explicit preemption). One exception lies in *section 1681t(b)*, which specifically applies to subjects regulated by *sections 1681s-2(a)* and *(b)*, the remaining possible predicates for plaintiff's UCL claim. Under this section,

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under

...

> (F) section 623 [*15 USCS § 1681s-2*], relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--
>
> . . .
>
> (ii) with respect to *section 1785.25(a) of the California Civil Code* [*11] (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996)

15 U.S.C. § 1681t(b)(1). [5] Numerous district courts have held that this section "totally preempts 'all state statutory and common law causes of action which fall within the conduct proscribed by *§ 1681s-2*.'" *Forester v. Pa. Higher Educ. Assistance Agency, 2009 U.S. Dist. LEXIS 107372, *16-17 (C.D. Cal. Oct. 30, 2009)* (quoting *Buraye v. Equifax, 625 F. Supp. 2d 894, 899 (C.D. Cal. 2008)*); *see also Mora v. Harley-Davidson Credit Corp., 2009 U.S. Dist. LEXIS 61851 (E.D. Cal. July 7, 2009), Howard v. Blue Ridge Bank, 371 F. Supp. 2d 1139, 1143 (N.D. Cal. 2005)* (UCL claim predicated on *15 U.S.C. § 1681s-2* preempted), *Jaramillo v. Experian Info. Solutions, Inc., 155 F. Supp. 2d 356, 362 (E.D. Pa. 2001)* (Pennsylvania statute preempted to the extent it would allow private enforcement of *15 U.S.C. § 1681s-2*). In a passage in *Gorman* explicitly demarcated as dicta, the Ninth Circuit observed that "*§ 1681t(b)(1)(F)* appears to preempt all state law claims based on a creditor's responsibilities under *§ 1681s-2*," although the court held that a separate FCRA preemption provision, *section 1681h(e)*, "suggests [*12] that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice." *Gorman, 552 F.3d at 1026.*

> 5 In addition to the language quoted above, subparagraph (b)(1)(C) of this section applies to matters regulated under *15 U.S.C. § 1681m*. As noted in the preceding section of this opinion, because the court concludes that plaintiff's UCL claim predicated on a violation of *15 U.S.C. § 1681m(a)* fails as a matter of California law, the court does not address whether this aspect of the UCL claim is preempted.

It appears to this court that the issue is more complex than these opinions have recognized. In *Cipollone v. Liggett Group*, the court interpreted a statute providing that "No requirement or prohibition based on smoking and health shall be imposed under State law . . . ." *505 U.S. 504, 515, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)* (quoting the Public Health Cigarette Smoking Act of 1969 § 5(b)). The plurality opinion held that state law merely imposing "liability" was not preempted, distinguishing imposition of "liability" from imposition of a "requirement or prohibition." *Id. at 526 n.24.* (Stevens, J., joined by Rehnquist, C.J. and White and O'Connor, JJ.). This principle implies that insofar [*13] as the UCL is used merely to provide for enforcement of pre-existing obligations, it is not preempted by the FCRA.

This aspect of *Cipillone* plurality's opinion has not been clearly embraced by subsequent decisions. The Court has held that state laws enforcing federal requirements are not preempted by various other preemption clauses, but the text of those statutes preempted state law only to the extent that it imposed requirements "in addition to or different from" the federal obligations. *See, e.g., Riegel v. Medtronic, Inc., 552 U.S. 312, 316, 322, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008)* (Medical Device Amendments to the Food, Drug, and Cosmetics Act, *21 U.S.C. § 360k(a)*), *Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 439, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)* (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), *7 U.S.C. § 136v(b)*). *See also Premium Mortg. Corp. v. Equifax Info. Servs., LLC, 583 F.3d 103, 106 (2d Cir. 2009)* (per curiam) (noting that *15 U.S.C. § 1681t(b)* was analogous to the statutes at issue in *Reigel* and *Cipillone*). This "in addition to or different from" language is absent from the FCRA. Indeed, while the FCRA explicitly saves state law that is not "inconsistent" with the FCRA, this savings provision does not apply [*14] to subjects regulated under *15 U.S.C. § 1681s-2*.

In this case, the court declines to read this footnote from *Cipillone* broadly. The Ninth Circuit has implied that the FCRA preempts plaintiff's UCL claim, and district courts have uniformly found claims of this type to be preempted, although none have discussed this precise issue. Accordingly, the court concludes that plaintiff's UCL claim is preempted insofar as it is predicated on violations of *15 U.S.C. §§ 1681s-2(a)* and *(b)*, and therefore that the UCL claim fails in its entirety.

II. Conclusion

For the reasons stated above, it is ORDERED that:

1. The proposed Findings and Recommendations filed September 22, 2009, Dckt. No. 29, are ADOPTED IN PART. The court DECLINES to adopt these Findings and Recommendations as they pertain to plaintiff's Un-

fair Competition Law claim, and the court ADOPTS the remainder;

2. Defendant's Motion to Dismiss, Dckt. No. 13, is granted;

3. Plaintiff's First Amended Complaint is dismissed with leave to amend;

4. Plaintiff's motion for leave to file a Second Amended Complaint, Dckt. No. 22, is granted in part and denied in part. Plaintiff may amend to add claims for violation of *California Civil Code § 1785.26(a)* [*15] and *15 U.S.C. § 1681s-2(b)*.

5. Plaintiff's Motion to Withdraw the "Third Amended Complaint," Dckt. No. 37, is granted;

6. Defendant's Motion to Dismiss plaintiff's "Third Amended Complaint," Dckt. No. 33, is denied as moot; and

7. Plaintiff is directed to file, within 30 days of the filing date of this order, a Fourth Amended Complaint setting forth only those claims identified in the Findings and Recommendations, without the addition of any new claims. In addition, plaintiff shall attach to her Fourth Amended Complaint all reports or documents upon which she relies, including but not limited to all pertinent credit reports, notices of adverse action, insurance premium assessments, and correspondence with defendant Allstate.

IT IS SO ORDERED.

DATED: March 31, 2010.

/s/ Lawrence K Karlton

LAWRENCE K. KARLTON

SENIOR JUDGE

UNITED STATES DISTRICT COURT

CASE C

LEXSEE 2002 U.S. DIST. LEXIS 26468

DAVID M. DAVIS, Plaintiff, v. MARYLAND BANK, N.A., Defendant.

No. C 00-04191 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2002 U.S. Dist. LEXIS 26468

June 18, 2002, Filed
June 19, 2002, Filed

DISPOSITION: Defendant's motion to dismiss and motions for summary judgment granted.

COUNSEL: [*1] For DAVID M. DAVIS, ACE RECOVERY SERVICES, INC., Plaintiffs: Owen T. Mascott, James Louis Kohl, Oakland, CA.

For MARYLAND BANK, AMERICA, N.A., defendant: George G. Weickhardt, Pamela J. Zanger, Ropers Majeski Kohn & Bentley, San Francisco, CA.

For MARYLAND BANK, AMERICA, N.A., Counter-claimant: George G. Weickhardt, Pamela J. Zanger, Ropers Majeski Kohn & Bentley, San Francisco, CA.

For DAVID M. DAVIS, Counter-defendant: Owen T. Mascott, Oakland, CA.

JUDGES: Saundra Brown Armstrong, United States District Judge.

OPINION BY: Saundra Brown Armstrong

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion to Dismiss Third and Eighth Causes of Action of First Amended Complaint and All Claims of Ace Recovery Systems [Doc. No. 75-1] and Defendant's Motion for Summary Judgment or in the Alternative, for Ruling that Certain Matters are Without Substantial Controversy [Doc. No. 77-1]. Having read and considered all of the parties' papers and being fully informed, the Court finds the matter is appropriate for resolution without a hearing. See *Fed.R.Civ.P. 78*. The Court hereby GRANTS [*2] Defendant's motion to dismiss and motion for summary judgment.

I. Background

A. Factual History

This matter arises from disputes related to Plaintiff's alleged delinquency in paying his credit card bills and the resulting reporting of that information by Defendant to a credit agency. Plaintiff, David Davis ("Davis") is a president and chief executive officer of Ace Recovery Services, Inc. ("Ace"). Ace is a debt collection service. In December of 1996, Davis opened a credit account with Maryland Bank, N.A. ("MBNA"). This account was designated with the last four digits 7151 ("7151 Account") with a credit limit of $ 12,100.00. In addition to Davis, Ms. Wanda Salone was authorized to use the card. Along with the credit card was MBNA's standard credit agreement. (Declaration of Michelle Foster ("Foster Decl."), Ex. C.) Beginning in December of 1996, MBNA sent Davis a credit card statement each month the account was open. The statements indicated the charges incurred and payments made for the preceding billing cycle, as well as the total balance, the minimum amount due, and the due date. (Foster Decl., Exs. D, H.) The back of the statements further provided the procedure [*3] for disputing the bill as required under federal law and included a form to be sent to MBNA to alert them to an error. (Foster Decl., P 4, Ex. E.) Plaintiff does not

recall any month when he failed to receive an account statement for the 7151 Account while it was open. (Declaration of George G. Weickhardt, Ex. N ("Davis Depo.") at 92:16-93:6). Customarily, however, Plaintiff did not review the statements for accuracy. (Davis Depo. at 91:11-17.)

From 1996 through September of 1999, Davis was frequently delinquent in paying the minimum amount due on the 7151 Account. It is undisputed that he was five days late fourteen times, thirty days late nine times, and failed to make any payment at all thirteen times. (Foster Decl., P 5, Exs. D, F, H, I. On April 15, 1997, a charge in the amount of $ 3000.00 was placed on the 7151 Account. (Foster Decl., Ex. D.) The charge was based on an April 12, 1997 transaction using a "convenience" or "access check" which is similar to a normal draft which is drawn on a bank account. The statement containing this charge was dated April 19, 1997. It is undisputed that Davis received a statement containing this $ 3,000.00 charge on or around April 19, 1997. (Weickhardt [*4] Decl., P 9, Ex. W.) Davis did not dispute the charge at this time.

In February of 1998, Davis reported to MBNA that his card had been lost or stolen because he was unable to recognize certain charges. Per ordinary procedures, MBNA transferred the balance to a new account ending in the four digits 8728 ("8728 Account") (Foster Decl., P 7.) However, Davis later determined that the charges were made by Ms. Salone, an authorized user. During this period, Davis did not challenge the $ 3000.00 charge to his account. (Davis Depo. at 314:24 - 315:8.)

On July 20, 1998, Davis for the first time exceeded his credit limit. For the next nineteen months, he was charged an "over limit fee" as provided in the credit card agreement. [1] (Foster Decl., P 10, Append. C, Ex. H.) On June 1, 1999, the 8728 Account was "blocked" -- i.e., no further charges were authorized due to Davis' poor payment history. (Foster Decl., P 9.) Later that month, on June 25, 1999, Davis contacted by telephone MBNA to dispute the $ 3000.00 charge made on April 12, 1997, and requested a copy of the check. (Foster Decl., P 11.) On September 11, 1999, after receiving a copy of the check, Davis informed MBNA that he did not recognize [*5] the check and that the signature on the check had been forged. (Foster Decl., P 11.) In September and October of 1999, MBNA contacted Davis on the telephone to discuss. (Foster Decl., PP 11-12.) At some point, Davis alleges that an unidentified employee at MBNA called Davis a "liar." (Davis Depo. at 229:5-25.)

1 For the first seven months he was charged a fee of $ 25.00 per month. The remaining fourteen months he was assessed a $ 29.00 per month fee. (Foster Decl., P 10, Ex. C.)

After approximately five months of investigation, MBNA was unable to obtain evidence to either support or refute Davis's challenge. Therefore, on February 9, 2000, MBNA credited Davis's account $ 3,000.00. (Foster Decl., P 13.) Three days later, the account was "re-aged" which means that the delinquent payments associated with the charge were removed from Davis's account as well as the credit report. (Foster Decl., PP 14-15.) On March 3, 2000, all finance charges which were based on the $ 3,000.00 charge were credited to Davis' account [*6] in the amount $ 673.00. (Foster Decl., P 13.) The following day, the over-limit fees in the total amount of $ 569.00 were also credited to Davis's account. (Foster Decl., P 13.) From September of 1999 through February of 2000, Davis made no payments on his account. (Foster Decl., P 14.)

After all of these adjustments, there was a remaining balance of $ 9,453.00. (Foster Decl., P 17, Ex. H.) Davis does not recall disputing any other charges which comprise this balance. (Davis Depo. at 318:2-19.) Davis made a payment of $ 210.00 on March 30, 2000. (Foster Decl., P 18.) After this March 30, 2000 payment, Davis made no further payments. (Foster Decl., P 18.) As of the closing date of October 20, 2000, the balance due on the account was $ 10,797.31. (Foster Decl., P 18.) On November 17, 2000, the account was canceled and MBNA wrote off the account as a loss. (Foster Decl., P 19.)

B. Procedural History

On October 17, 2000, Plaintiff Davis brought suit in California court against Defendant alleging a single cause of action for a violation of the *Song-Beverly Credit Card Act of 1971*. Plaintiff sought damages in excess of $ 1,000,000.00 based on the harm allegedly caused by Defendant [*7] providing inaccurate information to a credit reporting agency. On November 13, 2000, Defendant removed the action to this Court on the basis of diversity. On November 21, 2000, Defendant filed an answer and counterclaims alleging breach of contract and "money had and received." On April 22, 2002, this Court denied without prejudice Defendant's motion for summary judgment on Plaintiff's claims and granted Defendant's motion for summary judgment on its counterclaims. The Court found that Defendant's motion for summary judgment on Plaintiff's claims was not ripe because it was premised upon an amended complaint not yet filed with the Court. On May 14, 2002, this Court granted Plaintiff leave to file a First Amended Complaint ("FAC") which pled nine claims for relief including (1) violation of *California's Consumer Credit Reporting Act*; (2) the *Federal Fair Credit Billing Act*; (3) Negligent Infliction of Emotional Distress; (4) Intentional Infliction of Emotional Distress; (5) violation of *California's Song-Beverly Act*; (6) Negligence; (7) Intentional Interference

with Prospective Economic Advantage; (8) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (9) Defamation. [*8] The FAC also added Ace Recovery Systems as a co-plaintiff and together they seek over $ 10,000,000.00 in compensatory and statutory damages. Defendant now moves this Court to dismiss certain claims in the FAC and to grant summary judgment as to all remaining claims.

II. Motion to Dismiss

1. Legal Standard

"The issue on a Motion to Dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted." *Sebastian Int'l v. Russolillo, 128 F. Supp. 2d 630, 633 (C.D. Cal 2001)* (citing *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997).*) Under *Rule 12(b)(6)*, a motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-45, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).*

For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. See *Jenkins v. McKeithen, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)*; [*9] *Everst and Jennins, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).* All reasonable inferences are to be drawn in favor of the plaintiff. See *Jacobson v. Hughes Aircraft, 105 F.3d 1288, 1296 (9th Cir. 1997).* Dismissal is proper if the complaint fails to allege either a cognizable legal theory or sufficient facts under a cognizable legal theory. See *Balistreri v. Pacifica Police Dep't, 901 F.2d 696 at 699 (9th Cir. 1990).*

When the complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. See *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service, Inc., 911 F.2d 242, 247 (9th Cir. 1990).* Leave to amend is properly denied "where the amendment would be futile." *Reddy v. Litton Indus., 912 F.2d 291, 296 (9th Cir. 1990).*

2. Discussion

a. Third Claim for Relief: Negligent Infliction of Emotional Distress

Defendant moves to dismiss the Third Claim for Relief which pleads negligent [*10] infliction of emotional distress. MBNA contends that the alleged negligent conduct in resolving the dispute as to Plaintiff's credit account does not give rise to a claim of negligent infliction of emotional distress. The Court agrees. Both Delaware and California narrowly limit a claim of negligent infliction of emotional distress. [2] "It is settled law in Delaware that, in a negligence action, for a claim of mental anguish to lie, an essential ingredient is present and demonstrable physical injury to the plaintiff." *Garrison v. Medical Center of Delaware Inc., 581 A.2d 288, 293 (Del. 1988).* Similarly, California generally authorizes emotional distress damages only in cases of physical injury. See *Branch v. Homefed Bank, 6 Cal. App. 4th 793, 800, 8 Cal. Rptr. 2d 182 (1992).* California also permits recovery for emotional distress in certain specialized cases such as mishandling of remains, false diagnosis of potentially fatal disease, witnessing the injury of close relative, or negligence involving quasi-fiduciary duties in the cases of bad faith denial of insurance coverage. See *id.* (citations omitted).

2 As discussed further below, there is a dispute as to whether Delaware or California law governs disputes arising from the Agreement. The Court finds it appropriate to analyze the amended complaint under both states' laws.

[*11] Plaintiff has alleged no physical injury which supports a claim for negligent infliction of emotional distress under Delaware or California law. Additionally, he has presented no authority that his claim falls within the narrow cases allowing recovery for emotional distress. Plaintiff generally cites to authority governing *intentional* infliction of emotional distress. See *Murphy v. Allstate Ins. Co., 83 Cal. App. 3d 38, 147 Cal. Rptr. 565 (1978)*; *Cervantes v. J.C. Penney Co., 24 Cal. 3d 579 at 593-94, 156 Cal. Rptr. 198, 595 P.2d 975 (1979).* Those cases are inapposite. Plaintiff also relies upon *Crisci v. Sec. Ins. Co., 66 Cal. 2d 425, 58 Cal. Rptr. 2d 13, 426 P.2d 173 (1967)*, for the proposition that a plaintiff may recover for mental distress even if there is no physical injury. However, Crisi concerned whether emotional distress damages could be recovered under a claim of bad faith denial of insurance coverage. This issue is separate from whether a plaintiff may state a claim for negligent infliction of emotional distress based upon the facts presented. See *Soto v. Royal Globe Ins. Co., 184 Cal. App. 3d 420, 434, 229 Cal. Rptr. 192* [*12] (1986). [3] Plaintiff has presented no other authority indicating that alleged negligence in resolving credit disputes or reporting credit information supports a claim for negligent infliction of emotional distress. Absent clear authority to the contrary, this Court does not find that a claim for negligent infliction of emotional distress may lie based upon the facts as alleged by Plaintiff

3 The Court recognizes that at least one California appellate court has permitted the recovery of

emotional distress damages in addition to financial damages for a violation of *California's Credit Card Act*. See *Young v. Bank of America Nat'l Trust & Savs. Ass'n, 141 Cal. App. 3d 108, 115, 190 Cal. Rptr. 122 (1983)*. However, whether the remedies for a violation of *California's Credit Card Act* include emotional distress damages is a legally and analytically separate question from whether a plaintiff may allege a claim for negligent infliction of emotional distress. Consequently, the Court does not find that Young compels denying Defendant's motion.

[*13] Plaintiff also contends that Congress intended that claims for negligent infliction of emotional distress could be brought in the present situation, noting that under *15 U.S.C. section 1681h(e)*, an account holder may recover under a common-law theory of negligence in certain situations. See *Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000)*; *Whitesides v. Equifax Credit Information Servs., Inc., 125 F. Supp. 2d 807, 811 (W.D. La. 2000)*. However, the fact that Federal law does not prohibit state law negligence claims under certain circumstances is not relevant to whether Plaintiff has stated a prima facie claim for negligent infliction of emotional distress in the first instance. Because Plaintiff has failed to state a claim for negligent infliction of emotional distress under either Delaware or California law, the Court need not determine whether the claim fits within the exception under *section 1681h(e)*. Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiff's Third Claim for Relief. Moreover, because neither Delaware or California law provides for recovery of emotional distress damages [*14] in the case of negligent conduct in resolving credit disputes or reporting credit information, amendment would be futile.

b. Eighth Claim for Relief: Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant also moves to dismiss the Eighth Claim for Relief for breach of the implied covenant of good faith and fair dealing, arguing that this cause of action is inapplicable to the case at bar. The Court agrees. It is well-established under both Delaware and California law that a claim for breach of the implied covenant of good faith and fair dealing lies only in cases of bad faith denial of insurance coverage. See *E.I. Dupont de Nemours & Co. v. Pressman, 679 A.2d 436, 445-47 (Del. 1996)*; *Freeman & Mills, Inc. v. Belden Oil Co., 11 Cal. 4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669 (1995)*. Davis concedes that both Delaware and California law narrowly limit the availability of a claim for breach of the implied covenant of good faith and fair dealing and that, as pled, the complaint fails to state a claim. However, he contends that he recently "opted-out of a Class Action [in New York state court] against the defendant [*15] where he was offered a settlement." According to Plaintiff, the court in New York found that the plaintiff class had stated a claim for breach of an implied covenant. Plaintiff concludes that under the *Full Faith and Credit Clause of the Constitution*, this Court should honor the New York court's decision finding a valid claim for the breach of the implied covenant of good faith and fair dealing against MBNA.

Plaintiff's argument is specious. There is no apparent relevance of the claims at bar to an unrelated New York state court decision construing New York law. Plaintiff has provide no authority supporting his argument that this Court is constitutionally compelled to follow the New York state court opinion; in fact, Plaintiff failed to even provide of copy of that opinion for the Court's review. In light of clearly established *controlling* authority, the Court finds that Plaintiff has failed to state a claim for breach of an implied covenant of good faith and fair dealing. Accordingly, the Court GRANTS Defendant's motion to dismiss the Eighth Claim for Relief in the FAC. Moreover, because Plaintiff can state no set of facts consistent with those pled which establishes a viable [*16] claim, the Court does not grant Plaintiff leave to amend.

c. Claims on behalf of Ace Recovery Systems

Defendant further moves to dismiss all claims brought on behalf of Ace Recovery Systems, contending that Ace's claims are barred by the statute of limitations and that it is not a proper party to assert claims against MBNA. It is unclear whether Plaintiff concedes this point as he simply states that he "can see the logic of Defendant's arguments regarding Ace ...." Regardless, the Court finds that the FAC fails to state claims for relief on behalf of Ace.

1.) Statute of Limitations

On May 2, 2002, Plaintiff filed his proposed FAC, purporting to add Ace Recovery Systems as a co-plaintiff Ace seeks lost profits based on the theory that Defendant's conduct regarding Davis' account resulted in lost business opportunities for Ace. Defendant contends that Ace's claims are barred by "every conceivable statute of limitations."

The conduct giving rise to the present claims occurred between 1997 and March of 2000. Under California law, the statute of limitations for personal injury actions -- e.g., defamation, intentional infliction of emotional distress, negligence [*17] -- is one year. See *Cal. Code Civ. Proc. § 340*. Delaware provides a two-year

statute of limitations for these tort claims. See *Wright v. ICI Americas, Inc., 813 F. Supp. 1083 (D. Del. 1993))*. Because the FAC was not filed until May of 2002, Ace's claims for defamation, negligence, intentional infliction of emotional distress are time-barred. [4] Additionally, under California law the claim for intentional interference with prospective economic advantage is also barred. See *Knoell v. Petrovich 76 Cal. App. 4th 164, 168, 90 Cal. Rptr. 2d 162 (1999)* (noting that intentional interference with prospective economic advantage has a two-year statute of limitations) (citing *Cal. Code Civ. Proc. § 339(1)*). Under Delaware law, however, the claim for intentional interference with contract or prospective business relations would not be time-barred because Delaware has a three-year statute of limitations for such claims. *SmithKline Beecham Pharmaceuticals Co. v. Merck & Co., Inc., 766 A.2d 442, 450 (Del. 2000)* (citing 6 Del.C. § 8106).

4 As discussed above, the Court has dismissed the claims for negligent infliction of emotional distress and breach of the implied covenant of good faith and fair dealing as to both Davis and Ace. Moreover, the negligent infliction of emotional distress claim is also barred by the statute of limitations.

[*18] Finally, Ace's statutory claims are time-barred. The Fair Credit Billing Act ("FCBA"), *15 U.S.C. § 1666 et seq.*, requires written-notice of the billing error to be given to the creditor within sixty days of receipt of the error. *15 U.S.C. § 1666(a)*; see also *Dawkins v. Sears Roebuck & Co., 109 F.3d 241, 243 (5th Cir. 1997)*. After notice is given, a claim for relief must be brought within one-year of the creditor's failure to correct the error. *15 U.S.C. § 1640(e)*. There is no allegation that Ace filed any written notice. Furthermore, the FAC was filed well after the alleged billing error in 1997. On both bases the claim is barred. Similarly, the Fair Credit Reporting Act ("FCRA"), *15 U.S.C. section 1681 et seq.*, mandates a two-year statute of limitations following the improper disclosure of a credit history. *15 U.S.C. § 1681p*; see also *TRW Inc. v. Andrews, 534 U.S. 19, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)* (holding that under *15 U.S.C. section 1681p*, two-year statute of limitations is strictly [*19] construed and there is no "discovery rule" applicable). The FAC was filed more than two years after MBNA allegedly improperly reported the status of Davis' account such that it is time-barred under the FCRA. Finally, because the statutory penalties for a violation of California's *Song-Beverly Credit Act* and the *CCRA* are penal in nature, there is a one-year statute of limitations for the claims under those statutes. See *Cal Code Civ. Proc. 340(1)*; see also *Prudential Home Mortgage Co., Inc. v. Superior Court(Diaz), 66 Cal. App. 4th 1236, 78 Cal. Rptr. 2d 566 (1998)* (statutory penalties for violating statute requiring immediate conveyance of deed implicated *section 340(1)*); *Menefee v. Ostawari, 228 Cal. App. 3d 239, 278 Cal. Rptr. 805 (1991)* (statutory penalties for violation of rent control ordinance implicated *section 340(1)*). Thus, Ace's claims under the California statutes are similarly time-barred.

Based on the foregoing, with the exception of the claim for intentional interference with prospective business advantage, all of Ace's claims for relief are barred by the applicable statutes of limitations. Ace has presented no exceptions to the applicable [*20] statutes of limitations; in fact, Ace entirely fails to address Defendant's arguments. [5] Accordingly, the Court finds that all of Ace's claims for relief are procedurally barred by the statute of limitations except the claim for intentional interference with prospective business advantage. Moreover, the Court also finds that, regardless of the procedural bar, Ace fails to state any claims for relief.

5 The Court recognizes that, under *Federal Rule of Civil Procedure 15(c)*, "an amendment adding or substituting plaintiffs will relate back if there is an identity of interests between the plaintiffs." *Bowles v. Reade, 198 F.3d 752, 762 (9th Cir. 1999)*. However, Davis has failed to address whether there is an identity of interests between Davis and Ace. The Court declines to find that the amendment relates back under Federal *Rule 15(c)*.

2. Common law claims on behalf of Ace

The Court finds that Ace has failed to state any common law claims against Defendant MBNA for negligence, defamation, [*21] and intentional interference with economic advantage. As a preliminary matter, the Court finds that Defendant had no duty to Ace such that Ace cannot plead any claims arising under a negligence theory of liability. Under California law, except in very limited circumstances, banks do not owe a duty to non-customers. See e.g., *Chazen v. Centennial Bank, 61 Cal. App. 4th 532, 543-45, 71 Cal. Rptr. 2d 462 (1998)*; *Software Design and Application, Ltd., v. Hoefer & Arnett, Inc., 49 Cal. App. 4th 472, 479, 482-83, 56 Cal. Rptr. 2d 756 (1996)*. The duty owed by the bank is an implied term of the contract between the bank and the depositor. *Chazen, 61 Cal. App. 4th at 543*. Thus, because an account agreement is not intended to benefit third parties unknown to the bank, a third party cannot allege a claim for negligence or breach of contract against a bank. See *id. at 543-45*; see also *Software Design, 49 Cal. App. 4th at 482-83*.

The Court finds this reasoning is persuasive and applicable to the present facts. The account was opened in the name of Plaintiff Davis, not Ace. Nor did the account

list Ace as an entity [*22] authorized to obtain credit on the account. Further, the FAC does not allege that Defendant was aware that the account was also for the benefit of Ace. Accordingly, the Court finds that MBNA owed no duty to Ace and thus Ace has failed to state a claim for negligence against Defendant. Similarly, Ace has failed to allege that MBNA has published any information about Ace which supports a claim of defamation.

Finally, the Court finds that Ace has failed to plead a claim for intentional interference with prospective economic advantage. The elements of the tort of intentional interference with prospective economic advantage are as follows: "(1) The existence of a prospective business relationship advantageous to plaintiff, (2) defendants' knowledge of the existence of the relationship, (3) defendants' intentional conduct designed to disrupt the relationship, (4) actual causation, and (5) damages to plaintiff proximately caused by defendants' conduct." *Maheu v. CBS, Inc., 201 Cal. App. 3d 662, 667, 247 Cal. Rptr. 304 (1988)* (citing *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc., 116 Cal. App. 3d 111, 126, 172 Cal. Rptr. 74 (1981))*; [*23] see also *McHugh v. Board of Educ. of the Milford School Dist., 100 F. Supp. 2d 231, 247 n.15 (D.Del. 2000)*. It is alleged in the FAC that it was Davis, not Ace, who had existing and prospective contracts which were terminated due to Defendant's willful conduct. Thus, the FAC fails to allege that Ace had any contracts, that Defendant's knew of these contracts, or that Ace was otherwise harmed. As such, Ace has failed to state a claim for intentional interference with prospective economic advantage. See e.g., *Billmeyer v. Plaza Bank of Commerce, 42 Cal. App. 4th 1086, 1099, 50 Cal. Rptr. 2d 119 (1995)* (finding third party did not have standing for claim of intentional interference with prospective economic advantage because no claim that third party injured by defendant's conduct).

3. Statutory Claims

Defendant also contends that Ace lacks standing to raise the statutory claims alleged in the Complaint. In particular, MBNA notes that FCRA, the FCBA, California's Song-Beverly Act, and *California's Consumer Credit Reporting Act ("CCRA")* all provide a cause of action only for the account holder. For example, the FCBA provides a claim for relief [*24] in favor of the "obligor" on the account -- i.e., Plaintiff Davis. See *15 U.S.C. § 1666*. Similarly, the liability provisions under the FCRA apply to "any consumer" of credit. *15 U.S.C. §§ 1681n; 1681o. The Song-Beverly Act*'s provisions governing the obligation of credit providers expressly define a "cardholder" as "natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person." *Cal. Civ. Code § 1747.02(d)*. Finally, the CCRA provides protection only for "consumers -- i.e., account holders. See *Cal. Civ. Code section 1785.25*. There is no allegation that Ace entered into any agreement with MBNA to obtain credit. Moreover, there is no allegation that MBNA issued any information about Ace. Consequently, the FAC fails to allege any claims on behalf of Ace. Accordingly, the Court GRANTS Defendant's motion to dismiss the claims by Ace.

4. Leave to Amend

The Court further finds that leave to amend would be futile. A plaintiff may not seek leave to [*25] amend to cure deficiencies in the complaint when he cannot state a claim for relief without contradicting the allegations made in the original complaint. *Stone v. Travelers Corp., 58 F.3d 434, 437 n.1 (9th Cir. 1995)*; *Reddy v. Litton Indus., 912 F.2d 291, 296 (9th Cir. 1990)* (citing *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393 at 1401*). Nor may a plaintiff allege facts that do not have or are unlikely to have evidentiary support. See *Fed R. Civ. P. 11(b), 11(c)(1)*; *Warren v. Guelker, 29 F.3d 1386, 1389 (9th Cir. 1994)*. In this case, Ace cannot allege any facts which would be consistent with those presently pled.

d. Davis' Claim for Lost Profits

Finally, Defendant moves to dismiss Davis' claims of lost profits. MBNA contends that Davis lacks standing to claim lost profits on behalf of Ace. The Court concurs. Under California law, a shareholder owns only stock in a corporation, not the corporation's property. See *United States v. Stone, 83 F.3d 1156, 1160-61 (9th Cir. 1996)* ("Well-established principles of corporate law prevent a shareholder from bringing an individual direct cause of action for an injury [*26] done to the corporation or its property by a third party.") (citations omitted); *Miller v. McColgan, 17 Cal. 2d 432, 436, 110 P.2d 419 (1941)* ("It is fundamental ... that the corporation has a personality distinct from that of its shareholders, and that the latter neither own the corporate property nor the corporate earnings. The shareholder simply has an expectancy in each ...."). Similarly, Delaware recognizes that where the injury is suffered by the corporation through lost earnings, a shareholder may only maintain derivative shareholder suit. See *Parnes v. Bally Entertainment Corp., 722 A.2d 1243 (Del. 1999)*. Indeed, a California appellate court has recently found that a single minority shareholder in a two-shareholder corporation lacked standing to seek economic damages based upon lost capital investment, lost earnings, and lost opportunities resulting from the corporation's lost profits. See *Nelson v. Anderson, 72 Cal. App. 4th 111, 126, 84 Cal. Rptr. 2d 753 (1999)*. "Here, the corporation lost earnings, profits, and

opportunities, rendering all the shares valueless. When the injury is to the 'whole body of stock,' the action [*27] must be derivative." *Id. at 127*. The appellate court acknowledged that requiring a minority shareholder file a derivative suit might give the appearance of form over substance. See *id*. However, the court found that the law required such a suit in that situation. See id.

Davis counters that because he is the sole shareholder and President and Chief Executive Officer of Ace, he would be entitled to a salary, bonus, or dividends if the company made a profit. On this basis, he contends he would be entitled to seek compensation based upon Ace's lost profits. While Davis is correct that the dividends become property once they have been issued, Plaintiff provides no authority that lost opportunities for Ace translate into compensable damages for Davis. Indeed, at base, Davis espouses a general policy argument that "American business would be far different" if Defendant's theory was the law. Unfortunately for Plaintiff, Defendant's theory *is* correct as a matter of law; a shareholder cannot sue for injury suffered by the corporation even if this results in incidental injury to the shareholder. See *Parnes, 722 A.2d 1243*; *Nelson, 72 Cal. App. 4th at 126*. [*28] As such, Plaintiff lacks standing to seek damages based upon Ace's alleged lost profits. Accordingly, the Court GRANTS Defendant's motion to dismiss Davis' claims for damages arising from the lost profits allegedly suffered by Ace. Further, Plaintiff does not seek leave to amend nor does the Court find a basis to *sua sponte* grant leave.

For all of the reasons stated above, the Court GRANTS Defendant MBNA's motion to dismiss without leave to Plaintiff to amend his complaint. **III. Motion for Summary Judgment**

1. Legal Standard

Under Federal *Rule 56(c)*, summary judgment is appropriate when the Court concludes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c)*. Thus, summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The party moving for summary judgment bears the initial burden of demonstrating the "absence [*29] of a genuine issue of material fact." *Id. at 323, 106 S. Ct. 2548*. If the movant meets this burden, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. However,

> At summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. Put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing *Matsushita, 475 U.S. at 586, 106 S. Ct. 1348*; [*30] *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968))*. Inferences must be drawn in the light most favorable to the nonmoving party. See *Anderson, 477 U.S. at 255, 106 S. Ct. 2505*; *Matsushita, 475 U.S. at 587-88, 106 S. Ct. 1348*.

2. Discussion

Defendant moves for summary judgment on Plaintiff's remaining claims, contending that (1) the choice-of-law provision in the credit agreement bars claims arising under California law; (2) the state common law and statutory claims are preempted under Federal law; (3) Plaintiffs claims are also barred by the applicable statutes of limitations; (4) Plaintiff has failed to prove a prima facie case for his Federal statutory claims; and (5) there is no triable issue of fact concerning the claim for Intentional Infliction of Emotional Distress. Defendant also moves for summary adjudication on the issue of damages. Plaintiff opposes the motion.

a. Choice-of-Law There is no dispute that the Credit Card Agreement contains a choice-of-law provision. In particular, the provision states "this Agreement is made in Delaware. It is governed by the laws of the State [*31] of Delaware, without regard to its conflicts of laws principles, and by any applicable federal laws ...." (Foster Decl., Ex. C.) MBNA contends that under this agreement, Plaintiff is barred from alleging claims based upon California law. Plaintiff counters that the choice-of-law provision is unenforceable.

A district court applies the choice-of-law rules of the state in which it sits. See *Consul Ltd. v. Solide Enterprises, Inc., 802 F.2d 1143, 1146 (9th Cir. 1986)* (citing

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n. 8, 102 S. Ct. 252, 259 n. 8, 70 L. Ed. 2d 419 (1981)); *In re Yagman, 796 F.2d 1165, 1171 (9th Cir.1986))*; see also *General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1506 (9th Cir. 1995)*. Accordingly, this Court looks to California law to determine whether the choice-of-law provision is enforceable.

Under California law, a choice of law provision - may be enforceable if it meets certain requirements. See *Nedlloyd Lines B.V. v. Superior Court(Sea Winds Ltd.), 3 Cal. 4th 459, 465-66, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992)*. A court first determines either: "(1) [*32] whether the chosen state has a substantial relationship to the parties or their transactions, or (2) whether there is any reasonable basis for the parties' choice of law." *Id. at 466*. If either test is met, "the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law." 14. (footnote omitted).

In this case, there is clearly a reasonable basis for selecting Delaware or Federal law to resolve disputes arising out of the Credit Agreement. MBNA is a Delaware corporation which conducts business in all states. The need for uniform resolution of credit card disputes benefits both MBNA and its customers. Indeed, Plaintiff does not dispute that the choice-of-law provision is rationally based. Thus, the next question is whether a "fundamental policy of California" is implicated by the choice-of-law provision; principally, whether California's consumer protection laws are contravened by the agreement.

Defendant contends that the choice-of-law provision does not contravene any fundamental California public policies. Plaintiff counters that the [*33] choice-of-law provision implicates California's policy of protecting consumers in relation to the credit card industry. The Court finds that the choice-of-law provision does not implicate a fundamental policy of California as it relates to the State's statutory consumer protection laws. Both parties agree that California law affords credit cardholders certain rights. Under the Song-Beverly Credit Card Act, *California Civil Code sections 1747, et seq.*, consumers are entitled to certain protections including a prohibition that credit card issuers not knowingly provide false credit information and that they perform investigations under certain circumstances. See *Cal. Civ. Code § 1747.70*. Additionally, California's Consumer Credit Reporting Act, *California Civil Code sections 1785.1 et seq.*, limits the disclosure of information to credit reporting - agencies. See *Cal. Civ. Code § 1785.25*. These Acts unequivocally represent California's commitment to protect individual credit cardholders from disclosure of inaccurate information. However, this policy is not implicated by the choice-of-law provision because Federal law provides equivalent protections. [6] In fact, the [*34] *Song-Beverly Act* expressly indicates that its sections conform to the Federal Truth in Lending Act ("TILA"), *15 U.S.C. sections 1601 et seq.* The TILA, which includes both the *Fair Credit Reporting Act* and the Fair Credit Billing Act, provides similar protection to debtors against disclosure of inaccurate information as well as imposes certain obligations upon credit providers to investigate claims in certain situations. See *15 U.S.C. §§ 1666, 1681*. Plaintiff has offered no authority or reasoned analysis indicating that the Federal protections for consumers are inconsistent with California's protections such that the choice-of-law provision is unenforceable.

> 6 Defendant represents that Delaware has no similar credit cardholder protections. The Court makes no determination whether California's statutory protections are implicated by Delaware law.

Plaintiff counters that the choice of law provision is unenforceable because the credit card agreement is a contract [*35] of adhesion. However, this argument has expressly been rejected by a recent California Supreme Court decision. See *Wash. Mut. Bank v. Superior Court (Briseno), 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.2d 1071 (2001)*. In Washington Mutual, the party opposing application of the choice-of-law provision argued it was unenforceable by the sole fact the agreement was a contract of adhesion. In rejecting this categorical argument, the court held that "California ... has no public policy against enforcement of choice-of-law provisions contained in contracts of adhesion where they are otherwise appropriate." *Id. at 917*. The court noted that "Nedlloyd's analysis contains safeguards to protect contracting parties, including consumers, against choice-of-law agreements that are unreasonable or in contravention of a fundamental California policy." *Id.* Thus, the mere fact that the contract is one of adhesion is not dispositive. Further, Plaintiffs reliance upon the *Am. Online, Inc. v. Superior Court (Mendoza), 90 Cal. App. 4th 1, 108 Cal. Rptr. 2d 699 (2001)* for a contrary conclusion is misplaced. That case dealt chiefly [*36] with whether a forum selection clause was enforceable and only briefly discussed the choice-of-law provision. The AOL court found that the laws of Virginia were inconsistent with those of California such that consumers would be deprived of protections if forced to litigate under Virginia law. See *90 Cal. App. 4th at 16*. As discussed, Federal law does not contravene California's protections for credit cardholders. Thus, AOL is inapposite.

Based upon the foregoing, the Court finds that there is no triable issue of fact as to whether there is an enforceable choice-of-law provision. Accordingly, Plaintiffs claims based upon California's *Song-Beverly Credit*

Card Act and *California's Consumer Credit Reporting Act* are barred by Plaintiffs credit agreement with MBNA.

b. Preemption

Defendant argues that all of the state statutory and common law claims are preempted by Federal law, in particular the *Federal Fair Credit Reporting Act* ("FCRA"). *Section 1681t of the FCRA* governs the preemptive scope of the FCRA. That section states that as a general matter the FCRA does not preempt state laws. See *15 U.S.C. § 1681t(a)*. However, [*37] there are critical exceptions to this provision. Relevant is *subsection (b)* which provides in pertinent part,

> No requirement or prohibition may be imposed under the laws of any State--(1) with respect to any subject matter regulated under--
>
> ***
>
> (F) *section 1681s-2* of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--
>
> (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> (ii) with respect to *section 1785.25(a)* of the California Civil Code (as in effect on September 30, 1996).

15 U.S.C. § 1681t(b)(1). Section 1681s-2 in turn provides the 'duties incumbent upon a furnisher of credit information. Relevant to this case are *sections 1681s-2(a)and 1681s-2(b)*. In particular, *subsection (a)(1)(A)* provides that "[a] person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or consciously avoids knowing that the information is inaccurate." *15 U.S.C. § 1681s-2(a)(1)(A).Subsection* [*38] *(b)(1)* in turn mandates that,

> After receiving notice pursuant to *section 1681i(a)(2)* of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall--
>
> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to *section 1681i(a)(2)* of this title;
>
> (C) report the results of the investigation to the consumer reporting agency; and
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.

15 U.S.C. § 1681s-2(b)(1).

Defendant contends that all of Plaintiffs common law claims as well as his claims under California's *Song-Beverly Act* and the *CCRA* are preempted under *section 1681t(b)(1)(F)*. Plaintiff counters that his claim under the CCRA is expressly exempted from preemption and further that his remaining claims are not preempted. Neither [*39] the Ninth Circuit nor any other Circuit Court of Appeal has defined the scope of the preemption under the FCRA. However, the majority of district courts have held that the FCRA preempts *both* state statutory and common law causes of action which fall within the conduct proscribed under *section 1681s-2(1)*. See *Aklagi v. Nationscredit Fin. Servs. Corp., 196 F. Supp. 2d 1186 at 1194-95 (D.Kan. 2002)* (finding defamation claim preempted under *section 1681t(b)(1)(F)*); *Hasvold v. First USA Bank, N.A., 194 F. Supp. 2d 1128 at 1239 (D.Wyo. 2002)* (finding FCRA preempts state common law claims for defamation, invasion of privacy, and interference with prospective advantage); *Jaramillo v. Experian Info. Solutions, Inc., 155 F. Supp. 2d 356, 362 (E.D.Pa. 2001)* (*Section 1681t(b)(1)(F)* preempts Pennsylvania's Consumer Protection law); *Carney v. Experian Info. Solutions, Inc., 57 F. Supp. 2d 496, 503 (W.D. Tenn. 1999)* (finding that *section 1681t(b)(1)(F)* preempts Tennessee's consumer protection act); see also *National Home Equity Mortgage Ass'n v. Face, 64 F. Supp. 2d 584, 592 (E.D. Va. 1999)* (noting in dictum that [*40] FCRA meant to preempt state law regulating consumer credit transactions); *Korotki v. Attorney Servs. Corp., 931 F. Supp. 1269, 1280 (D. Mary. 1996)* (noting in dictum that FCRA would preempt tort claims). Only one case has been found which has held that common law tort claims do not fall within the scope of preemption under *section 1681t(b)(1)(F)*. See *Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 931 (N.D. Ill. 2000)* (finding that claims for negligence, defamation, and invasion of privacy "may not fairly be characterized as imposing any requirement

or prohibition on persons who furnish credit" as that term is used in *section 1681t(b)(1)(F)*).

The Court concurs with the majority. As the district court in Jaramilo recognized,

> The plain language of *section 1681t(b)(1)(F)* clearly eliminated all state causes of action against furnishers of information, not just ones that stem from statutes that relate specifically to credit reporting. To allow causes of action under state statutes that do not specifically refer to credit reporting, but to bar those that do, would defy the Congressional rationale for the elimination of state causes of action. [*41]

Jaramillo, 155 F. Supp. 2d at 362. Indeed, the legislative history demonstrates that Congress enacted *section 1681t(b)(1)(F)* in order to create a uniform scheme governing the disclosure of credit information. See *Kodrick v. Ferguson, 54 F. Supp. 2d 788 at 794 (N.D. Ill. 1999)* (discussing legislative history of FCRA's preemption provisions). Allowing common law tort claims which implicate the same subject matter as *section 1681s-2(1)* would undermine Congress' intention to create a uniform system of protection for consumers. In light of the foregoing, the Court finds that *section 1681t(b)(1)(F)* preempts both state statutory and common law causes of action which implicate the subject matter of *section 1681s-2*. Thus, the question is to what extent Plaintiffs state claims fall within the subject matter of this section.

1.) State Statutory Claims

As already discussed, Plaintiff is barred from alleging any California state law claims by the credit agreement. Moreover, Plaintiffs claim under the *Song-Beverly Act* is also clearly preempted under *section 1681t(b)(1)(F)*. *Section 1747.70* under the *Song-Beverly Act* prohibits a card issuer from [*42] "knowingly giving any untrue credit information to any other person concerning a cardholder." *Cal. Civ. Code § 1747.70(a)*. This section tracks the prohibitions under *section 1681s-2(a)*. Similarly, the conduct which forms the basis of a violation of *section 1747.70(b)* implicates *section 1681s-2(b)*. Accordingly, Plaintiffs claims under the *section 1747.70 of California's Song-Beverly Act* are also preempted under *section 1681t(b)(1)(F)*. See e.g., *Jaramillo, 155 F. Supp. 2d at 362* (finding Pennsylvania consumer protection law preempted); *Carney, 57 F. Supp. 2d at 503* (same with regard to Tennessee).

Defendant also contends that Plaintiffs claim under the CCRA is preempted. Defendant concedes that claims under *section 1785.25(a) of the CCRA* are expressly exempted from preemption under the FCRA. See *15 U.S.C. § 1681t(b)(1)(F)(ii)*. That section of the CCRA prohibits furnishing information to a credit reporting agency if the provider knows or should know the information is incomplete or inaccurate. See *Cal. Civ. Code § 1785.25(a)*. However, MBNA argues that while a claim under *section 1785.25(a)* is not preempted, the remedies [*43] for a violation of that section are preempted. For example, *section 1785.25(g)* mandates liability for a violation of *section 1785.25(a)* and *section 1785.31* authorizes a private right of action. *Cal. Civ. Code § 1785.25(g)*; *§ 1785.31*. Defendant contends that because these provisions are not expressly exempted under section *1681t(b)(1)(B)-(F)(i)*, the remedial provisions for a violation of *section 1785.25(a)* are preempted. Another Court in this district has agreed with this reasoning. See *Quigely v. Pennsylvania Higher Edu. Assist. Agency, 2000 U.S. Dist. LEXIS 19847, 2000 WL 1721069 (N.D. Cal. Nov. 8, 2000)*. The Court need not resolve this issue, however, because it is clear that under California, Plaintiff may not state a claim against a furnisher of information for a violation of *section 1785.25(a)*. The California appellate court in *Pulver v. Avco Financial Servs., 182 Cal. App. 3d 622, 633, 227 Cal. Rptr. 491 (1986)*, stated that *section 1785.31*, which authorizes a private right of action for a violation of *section 1785.25*, "does not extend liability to one who furnished information to a credit reporting agency." Thus, Plaintiff cannot allege any claims against MBNA under [*44] *section 1785.25(a)*.

2.) Common Law Tort Claims

The Court finds that the claims for negligence, defamation, and intentional interference with economic advantage are also preempted. The basis for each of these claims is that MBNA failed to comply with the Federal and California statutes which govern the furnishing of credit information and investigation of complaints. For example, Plaintiff bases his negligence claim on the fact that MBNA breached its statutory duties which directly and proximately caused harm to him -- i.e., MBNA failed to properly investigate the alleged inaccurate information disclosed to a credit reporting agency. (FAC, P 38). He also contends that MBNA knowingly and intentionally disregarded Plaintiffs rights in disclosing the information. (FAC, P 39). This is the precise conduct which is proscribed under *section 1681s-2(a)*-(b) and thus is preempted under *section 1681t(b)(1)(F)*. Similarly, the claims for defamation and intentional interference with economic advantage arise from Plaintiffs claims that MBNA improperly disclosed inaccurate credit information. (FAC, PP 41-42, 46-471) As such, these claims too are preempted under the FCRA. See *Aklagi, 196 F. Supp. 2d at 1194-95* [*45] (defamation claim preempted under FCRA); *Hasvold, 194 F. Supp.*

2d at 1238-39 (defamation claim and intentional interference with prospective economic advantage preempted under *section 1681t(b)(1)(F)*). [7]

> 7 Because Plaintiffs common law claims are clearly preempted under the FCRA, the Court does not reach Defendant's argument that they are also preempted under California Uniform Commercial Code *section 4406(f)*.

Plaintiff counters that his claims for negligence and defamation are expressly authorized under *15 U.S.C. section 1681h(e)*. That section provides that,

> No consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency ... except as to false information furnished with malice or willful intent to injure each consumer.

15 U.S.C. § 1681h(e) [*46] . However, as discussed, conduct which falls within *sections 1681s-2(a)(1)(A)-(B)* is preempted. Thus, *section 1681h(e)* only applies to conduct which is not governed by *section 1681s-2(a)(1)(A)-(B)*. See *Aklagi, 196 F. Supp. 2d at 1194-95*; see also *Jaramillo, 155 F. Supp. 2d at 361-62* (finding that *section 1681h(e)* was superseded by 1997 amendments adding *section 1681t(b)(1)(F)* which was meant to "eliminate all state causes of action 'relating to the responsibilities of persons who furnish information to consumer reporting agencies.'"). In this case, Plaintiffs allegations for negligence, and defamation are clearly based on MBNA's failure to investigate his complaints of inaccurate statements which were furnished to the credit reporting agencies. This conduct is governed by *section 1681s-2(a)(1)*-(b), not *section 1681h(e)*, and is thus preempted under *section 1681t(b)(1)(F)*.

The only common law claim which is not preempted is the claim for intentional infliction of emotional distress. Plaintiff alleges that he suffered emotional distress resulting from the disclosure of the information and because an employee of MBNA allegedly called him a "liar." To the extent [*47] the intentional infliction of emotional distress claim relies upon the improper disclosure of information, this claim is preempted under *section 1681t(b)(1)(F)* for the reasons stated above. However, the allegation that an agent of MBNA called Plaintiff a liar is not covered by *section 1681s-2(a)*. Thus, because the intentional infliction of emotional distress claim is also based on MBNA's alleged insult to Plaintiff, it is not preempted.

Based upon the above, the Court finds that Plaintiff has only alleged viable claims for violation of the FCBA, the FCRA, and intentional infliction of emotional distress. Plaintiffs remaining claims are preempted under the FCRA. Defendant moves for summary judgment on these claims contending that Plaintiff has failed to demonstrate a triable issue of fact.

c. Federal Statutory Claims

Plaintiff alleges a claim under the *Federal Credit Billing Act* and the*Federal Fair Credit Reporting Act*. However, based upon the evidence presented, both of these claims fail as a matter of law.

1.) FCBA Claim

The Federal Credit Billing Act generally requires that a credit provider investigate claims of a billing error and verify the accuracy [*48] of a credit card statement. See *15 U.S.C. § 1666*; see also *Am. Express Co. v. Koerner, 452 U.S. 233 at 236, 101 S. Ct. 2281, 8 L. Ed. 2d 802 (1981)*. However, this obligation is only triggered once the consumer sends written notice of the alleged error. *15 U.S.C. § 1666(a)*; see also *Dawkins v. Sears Roebuck & Co., 109 F.3d 241, 243 (5th Cir. 1997)*. Moreover, the written notice must be received by the credit provider within sixty days of the creditor's transmission of the allegedly erroneous credit card statement. *15 U.S.C. § 1666(a)*; see also *Dawkins, 109 F.3d at 243*. Further, pursuant to the Code of Federal Regulations, the sixty-day period begins to run "after the creditor [has] transmitted the *first* period statement that reflects the alleged billing error." *12 C.F.R. § 226.13(b)(1)* (emphasis added).

Under *section 1666(b)(1)*, a billing error includes charges assigned to an account which the account holder did not make. Accordingly MBNA's assignment of the $ 3000 charge to Davis' account, based upon a check Davis contends was forged constitutes [*49] a billing error. MBNA sent the statement reflecting this alleged error to Davis on April 19, 1997. Thus, to trigger a duty to investigate, Davis needed to have sent MBNA *written* notice of the error by June 19, 1997. However, Davis admitted at his deposition that he contacted MBNA only by telephone to dispute the charges. (Davis Depo., 251-52.) Moreover, he does not remember the date; MBNA contends the date was June 25, 1999. (Foster Decl., P 11.) Plaintiff also conceded that it was not his custom to review his statements for accuracy. (Davis Depo., 91:2-17.) Ultimately, Davis has submitted no proof that he sent a written statement to MBNA disputing a charge before June 19, 1997. Thus, Davis has failed to demon-

strate that MBNA's obligation to investigate was triggered. [8]

8 *The Song-Beverly Act* similarly mandates that a furnisher shall be liable for failing to investigate under *section 1747.70(b)* only if the credit cardholder has made a written inquiry within sixty days of the credit provider's transmission of the first statement containing the alleged error. See *1747.02(g)*. Thus, any claim under *section 1747.70(b)* is also a barred.

[*50] Additionally, under *15 U.S.C. section 1640(e)*, the statute of limitations for a violation of *section 1666(a)* is one year from the date of the alleged violation, subject to equitable tolling in certain circumstances. See *King v. California, 784 F.2d 910, 915 (9th Cir. 1986)*. The violation occurred in April of 1997 and Davis did not file his complaint until October of 2000, well beyond the statute of limitations. Davis has not offered any reason the statute should be equitably tolled. In fact, it appears that the reason the error was not discovered sooner was that Davis does not regularly review his monthly statements. Moreover, even if the Court were inclined to toll the statute until he allegedly discovered the error, his claim is still barred. Davis inconsistently represents the date when he discovered the error: in his FAC he alleges he discovered the error in the Fall of 1997. (FAC P 6.) However, Davis now declares that he did not realize there was an error with the $ 3000 charge until May of 1999. (Davis Decl,. P 13.) [9] Assuming the latest date is correct, the FCBA claim is still untimely. Based upon the foregoing, the Court finds there [*51] is no triable issue of fact that MBNA violated *section 1666* and/or that the claim was timely filed. Accordingly, Plaintiffs claim under the *Federal Credit Billing Act* fails as a matter of law.

9 Davis avers that he sent Defendant written notice on June 18, 1999 demanding an investigation. (Davis Decl., P 13). In support, he has attached the letter purportedly sent. However, this letter was not produced to Defendant during discovery. Accordingly, Defendant objects to this document. Because it was not produced during discovery, the Court SUSTAINS Defendant's objection and excludes this document. See *Workman v. Frito-Lay. Inc., 165 F.3d 460, 466 (6th Cir. 1999)*; see also *Fed.R.Civ.P. 26(a), 37(c)(1)*. Moreover, even if the Court were to consider this document, it is dated June 18, 1999, which is well beyond the sixty-day window under *section 1666(a)*.

2.) FCRA Claim

As noted above, the FCRA imposes potential liability upon a credit provider in two situations: if it furnishes to [*52] a credit reporting agency information it knows to be inaccurate or if it fails to conduct an investigation after it has been notified by a credit reporting agency that the specific information is inaccurate. *15 U.S.C. § 1681s-2(a)-(b)*. The FCRA expressly provides that there is no private right of action for a violation of *section 1681s-2(a). 15 U.S.C. § 1681s-2(d)*. Rather, that section is enforced exclusively by Federal and State officials. Id. There is a private right of action against a provider of credit under *section 1681s-2(b)*. See *Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059-60 (9th Cir. 2002)*. However, the Ninth Circuit has recognized that *section 1681s-2(b)* includes a "filtering mechanism" which requires that a "disputatious consumer notify a credit reporting agency" and the credit reporting agency in turn notify the provider of credit. *Id. at 1060*. The duty to investigate is "triggered only after the furnisher receives notice of the dispute from a consumer reporting agency, not just the consumer." *Aklagi, 196 F. Supp. 2d at 1193* (citations omitted).

[*53] In this case, Plaintiff has failed to present any admissible evidence that (1) he notified a credit reporting agency of his claims; and more importantly, (2) that the credit reporting agency notified MBNA of the dispute. Davis has submitted two letters purportedly sent to the credit reporting agencies alleging a billing error. The letters were purportedly sent on February 23, 1998, and September 21, 1999 respectively to the Equifax and "CBI" credit reporting agencies. (Davis Decl., P 14; Exs. J, K.) However, counsel for Plaintiff candidly admits that these documents were not produced during discovery. [10] Moreover counsel states that he "can neither confirm nor deny the authenticity of the documents" and Davis has not authenticated them either. (Kohl Decl., P 6.) Based upon Plaintiffs counsel's own admission, these documents are inadmissible. See *Fed.R.Civ.P. 56(e)*.

10 Defendant objects to these documents. Because they were not produced during discovery, the Court SUSTAINS Defendant's objection and excludes the documents. See *Workman, 165 F.3d at 466*; see also *Fed.R.Civ.P. 26(a), 37(c)(1)*.

[*54] More importantly, even were the Court to consider the documents, they merely indicate that Plaintiff complained to credit reporting agencies. It is only *after* these agencies in turn notify the credit provider that the duty to investigate is triggered. Plaintiff has provided no evidence that any credit reporting agency ever contacted MBNA about the alleged billing error. He contends that because the credit reporting agencies were required to notify MBNA of these complaints, the Court should presume that MBNA received notice. However,

Plaintiff has presented no authority that the Court may presume an essential element of a claim under *section 1681s-2(b)* based upon Plaintiffs unsupported statement that a credit agency must notify a furnisher of credit upon receipt of a consumer's complaint. Rather, the Court finds that because there is no triable issue of fact that MBNA received notice from a credit reporting agency, Plaintiffs claim against MBNA under the *Fair Credit Reporting Act* fails as matter of law.

d. Intentional Infliction of Emotional Distress

Defendant also moves for summary judgment on Plaintiffs claim for intentional infliction of emotional distress. It [*55] contends that Plaintiff has failed to present sufficient evidence that there was outrageous conduct. The Court agrees.

The elements for a claim of intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous - conduct." *Ess v. Eskaton Properties, Inc., 97 Cal. App. 4th 120, 129, 118 Cal. Rptr. 2d 240 (2002)* (citing *Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d 975 (1979)*); see also *Cummings v. Pinder, 574 A.2d 843, 845 (Del. 1990)* (recognizing tort of intentional infliction of emotional distress as presented in *Restatement (Second) of Torts § 46(1) (1965)*). "Conduct, to be "'outrageous'" must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." *Trerice v. Blue Cross of Cal., 209 Cal. App. 3d 878, 883, 257 Cal. Rptr. 338 (1989)* (citing *Fowler v. Varian Associates, Inc., 196 Cal. App. 3d 34, 44, 241 Cal. Rptr. 539 (1987)*); [*56] see also *Mattern v. Hudson, 532 A.2d 85, 85-86 (Del. Super. 1987)*. "While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Trerice, 209 Cal. App. 3d at 883* (citations omitted); *Mattern, 532 A.2d at 86*.

Plaintiffs intentional infliction of emotional distress claim is based on the allegation that an MBNA employee called Plaintiff a "liar" on two occasions. (Davis Decl., P 13.; Davis Depo., 229:9-21; 272:7-14.) [11] However, mere insults, without more, are insufficient as a matter of law to allege a claim of intentional infliction of emotional distress. See *Cole v. Fair Oaks Fire Prot. Dist., 43 Cal. 3d 148, 155, n.7, 233 Cal. Rptr. 308, 729 P.2d 743 (1987)* (citing *inter alia, Rest.2d Torts, § 46, com. d.*)). For example, in Yurick v. Superior Court (Antonetti), the California appellate court found that defendant's comments to plaintiff that he was senile and a liar were not "so egregiously [*57] outside the realm of civilized conduct as to give rise to actionable infliction of mental distress." *209 Cal. App. 3d 1116, 1129, 257 Cal. Rptr. 665 (1989)*. The two accusations that Davis is a liar, no matter how unfounded they may be, are not so "extreme" as to be beyond the bounds of that normally tolerated in civilized society. See *Yurick, 209 Cal. App. 3d at 1129*. For these reasons, the Court finds there is no triable issue of fact that MBNA's conduct was outrageous such that Plaintiffs claim of intentional infliction of emotional distress fails as a matter of law.

> 11 As a result, Davis alleges he suffered emotional distress which was manifested in an upset stomach and "a little anxiety." He also sometimes would break out in sweats. (Davis Depo., 236:7-239:1.) However, Plaintiffs doctor stated that Plaintiffs upset stomach began prior to alleged discovery of the billing error in 1998 and that his stomach problems were associated with eating foods late at night, particularly "grease, pizza, pepper, and especially hot pepper, and pork." (Weickhardt Decl., Ex. O, 10:17-24.)

[*58] **e. Claims for Negligence. Defamation, and Intentional Interference with Prospective Economic Advantage**

Finally, although Plaintiffs remaining claims for negligence, defamation, and intentional interference with prospective economic advantage are preempted by the FCRA, the Court finds that those claims fail in any event. Plaintiffs negligence claim is predicated upon MBNA's alleged breach of the duties imposed by the FCRA and the FCBA. In support of its claim, Plaintiff relies chiefly upon *Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135 (E.D.Mo. 2000)* (finding triable issue as to whether bank was negligent in investigating claims after receiving notification from credit reporting agency of consumer complaint). However, as discussed above, there is no triable issue of fact that MBNA violated either statute; it did not receive a timely complaint from Davis or a credit reporting agency which would trigger the duty to investigate and, as discussed below, there is no evidence that MBNA disclosed false information. Thus, Plaintiffs claim for negligence necessarily must fail.

Similarly, Plaintiff has failed to present evidence creating an issue of triable fact [*59] concerning his claim of defamation. MBNA has provided evidence that it charged $ 3,000.00 to Davis' account based upon a convenience check bearing his signature. (Weickhardt Decl., P 14). Although Plaintiff now contends that check was stolen and his signature was forged, he has presented

no argument nor evidence that MBNA erred in charging the $ 3,000.00 to his account in April of 1997. Indeed, the charge was removed merely as a courtesy to Davis. (Foster Decl., P 13.) More importantly, MBNA has also provided evidence that after completing its investigation -- under which it was under no legal duty to perform -- it removed the $ 3,000.00 charge and all finance and late-fees based upon that. charge, and that it "re-aged" the account, i.e., removed any delinquent payments associated with the charge from report issued to the credit reporting agency. (Foster Decl., PP 13-14). As a result, *any report issued after the re-aging would not have indicated any delinquent payment related to the $ 3,000.00.* Plaintiff has offered no evidence rebutting this fact nor does he identify any false information concerning his accounts with MBNA. [12] Consequently, there is no triable issue of fact as [*60] to whether MBNA published false information and Davis' defamation claim fails as a matter of law.

12 Plaintiff has presented two documents purporting to be credit history reports. (Ex. M.) However, MBNA objects to consideration of these documents as neither has been authenticated. The Court SUSTAINS this objection. See *Fed.R.Civ.P. 56(e).* More importantly, the evidence in these documents is *consistent* with the evidence presented by MBNA. In particular, MBNA has introduced evidence that Davis was five days late fourteen times, thirty days late nine times, and failed to make any payment at all thirteen times. (Foster Decl., P 5, Appendices 1-4; Exs. D, F, H, I.) This information is also provided in the reports and Davis has presented no evidence rebutting this information. Additionally, Davis' conclusory statements that inaccurate evidence was reported lack foundation and otherwise are insufficient to create a triable issue of fact. See *Fed.R.Evid. 701*; *Hansen v. United States, 7 F.3d 137, 138 (9th Cir.1993)* (conclusory allegations in declaration unsupported by evidentiary facts did not create a triable issue of fact).

[*61] Finally, Plaintiff has failed to present evidence concerning a necessary element of a claim for intentional interference with prospective economic advantage: that MBNA knew that Plaintiff had existing or prospective contracts. See *Maheu 201 Cal. App. 3d at 667*; *McHugh, 100 F. Supp. 2d at 247 n. 15.* The only evidence Davis submits are apparent proposed contracts with various companies by which Ace would agree to collect the debts owed to those companies. (Ex. T.) However, there is no evidence nor argument that MBNA was aware of these proposed contracts. Thus, there is no triable issue that Plaintiff intentionally interfered with any prospective economic advantage. [13]

13 Because the Court finds that summary judgment is appropriate on all of Plaintiffs claims, it is unnecessary to reach Defendant's argument that Plaintiff has not created a triable issue of fact as to damages. Additionally, unless otherwise indicated above, the Court OVERRULES as moot Defendant's objections to evidence as the Court has not relied upon the evidence which forms the basis of Defendant's objections because it was irrelevant to the issues presented.

[*62] IV. Conclusion

The undisputed evidence demonstrates that Plaintiff was regularly delinquent on paying his MBNA account and that it was only when he exceeded his credit limit and MBNA finally blocked his account that he "discovered" a fraudulent charge against his account nearly over two years earlier. After an investigation, MBNA removed this charge as a courtesy to Davis. The credit reports were duly updated to reflect this chance. As a result, no false information was ever reported to anyone. In a futile and frivolous effort to oppose Defendant's motions, Plaintiff relies upon unauthenticated documents, many of which were never produced in discovery, conclusory allegations which lack any foundation or evidentiary support, and legal analysis which often fails to cite to relevant authority. Such evidence and argument warrants little consideration and, in any event, does not present a basis for denying Defendant's motions. Rather, for all of the reasons stated above, the Court GRANTS Defendant's motion to dismiss and motions for summary judgment.

IT IS SO ORDERED.

Dated: 6-18-02

SAUNDRA BROWN ARMSTRONG

United States District Judge

No. C 00-04191 SBA

JUDGMENT

[*63] In accordance with the Court's Orders of April 22, 2002 and June 19, 2002, granting Defendant's motions for summary judgment, IT IS HEREBY ORDERED that final judgment is entered in favor of Defendant Maryland Bank, N.A. for the amount of$ 10,797.31, plus interest at a rate of 22.98% from November 17, 2000 to the present, and that Plaintiff David M. Davis shall take nothing from this matter and Defendant shall recover its costs.

IT IS SO ORDERED.

Dated: 6-19-02

SAUNDRA BROWN ARMSTRONG United States District Judge

CASE D

LEXSEE 1992 U.S. DIST. LEXIS 19117

GREAT WESTERN FUNDING, INC. v. MARK MENDELSON, et al.

CIVIL ACTION NO. 91-CV-5188

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1992 U.S. Dist. LEXIS 19117

December 2, 1992, Decided
December 4, 1992, Filed; December 7, 1992, Entered

COUNSEL: For GREAT WESTERN FUNDING, INC., PLAINTIFF: TIMOTHY I. MC CANN, BRENDAN P. MAILEY, LINDA A. CARPENTER, MC CANN, MAILEY & GESCHKE, 1831 CHESTNUT ST., SECOND FL., THE PROFESSIONAL BLDG., PHILA, PA 19103, USA.

For BRENDAN P. MAILEY, PETITIONER: BRENDAN P. MAILEY, MC CANN, MAILEY & GESCHKE, 1831 CHESTNUT ST., SECOND FL., THE PROFESSIONAL BLDG., PHILA, PA 19103, USA. For TIMOTHY I. MC CANN, PETITIONER: TIMOTHY I. MC CANN, MC CANN, MAILEY & GESCHKE, 1831 CHESTNUT ST., SECOND FL., THE PROFESSIONAL BLDG., PHILA, PA 19103, USA.

For INTERCAPITAL FUND, XXI, a California Limited Partnership, TERRA YIELD #10 JOINT VENTURE, a Texas Corporation, RESEARCH CAPITAL, INC., a Texas Corporation, INTERVENOR-PLAINTIFFS: ROBERT T. VANCE, JR., BROWN, VANCE, JACKSON & SMITH, 718 ARCH STREET, THE CAST IRON BLDG., STE. 304S, PHILA, PA 19106, USA.

For MARK MENDELSON, EDWARD SILVERMAN, M.D., FRANKLIN SQUARE HOSPITAL, HAMPTON HOSPITAL GROUP, INC., ROBERT N.C. NIX, III, ESQUIRE, P. SUE MILLER, F. MATTHEW COPPOLINO, THE HONORABLE, DAVID ELBAUM, D.O., THOMAS KELLY, MAURO A. CHECCHIO, JAMES DUFFY, DEFENDANTS: MICHAEL K. CORAN, MARK L. ALDERMAN, KLEHR, HARRISON, HARVEY, BRANZBURG & ELLERS, 1401 WALNUT STREET, PHILA, PA 19102-2678, USA.

For OBERMAYER, REBMANN, MAXWELL & HIPPEL, CHARLES M. GOLDEN, ESQUIRE, ROBERT A. MACDONNELL, ESQUIRE, LOUIS B. KUPPERMAN, ESQUIRE, DEFENDANTS: DANIEL P. FINEGAN, PACKARD BUILDNG, 14TH FLOOR, PHILA, PA 19102, USA. RICHARD A. O'HALLORAN, JOSEPH P. DOUGHER, OBERMAYER, REBMANN, MAXWELL & HIPPEL, 15TH & CHESTNUT STS., 14TH FL., PACKARD BLDG., PHILA, PA 19102, USA.

For MEDFUND 91, INTERCAPITAL FUNDING, XXI, INTERCAPITAL FUNDING, XXII, TERRA YIELD, #10 JOINT VENTURE, RESEARCH, CAPITAL, INC., MOVANTS: ROBERT T. VANCE, JR., BROWN, VANCE, JACKSON & SMITH, 718 ARCH STREET, THE CAST IRON BLDG., STE. 304S, PHILA, PA 19106, USA.

JUDGES: [*1] JOYNER

OPINION BY: BY THE COURT; J. CURTIS JOYNER

OPINION

MEMORANDUM AND ORDER

JOYNER, J.

Plaintiff, Great Western Funding, Inc., filed a complaint on August 13, 1991, against Defendants, Mark Mendelson, Edward Silverman, M.D., Franklin Square Hospital (FSH), Hampton Hospital Group, Inc. (HHG),

Robert N.C. Nix, III, Esquire, P. Sue Miller, The Honorable F. Matthews Coppolino, David Elbaum, D.O., Thomas J. Kelly, Mauro Checcio, James Duffy (hereinafter referred to as the "Hospital Defendants") and Obermayer, Rebmann, Maxwell, and Hippel, Charles M. Golden, Robert A. MacDonnell, and Louis B. Kupperman (hereinafter the "Law Firm Defendants").

Presently before this Court are the Defendants' motions to dismiss Plaintiff's complaint as to Counts I, II, III, IV, V and VI for failure to join an indispensable party, also as to Count I for failure to plead adequately a cause of action for fraud under *Rule 9(b)*, and additionally as to Count III for Plaintiff's alleged inability to satisfy the requirements of the Statute of Frauds, 13 Pa. C.S.A. § 8319. Defendants further moves to dismiss Count V because Plaintiff has no claim for relief against them upon a theory of tortious interference or conspiracy to [*2] tortiously interfere, and to dismiss Counts I and V against Mr. Thomas Kelly as Mr. Kelly has allegedly been incorrectly named as a defendant.

I. *FACTS*

The facts, as alleged in the complaint, are as follows. On August 23, 1990, Metropolitan Hospital entered into agreements with FSH and HHG, whereby FSH would purchase Metropolitan Hospital and HHG would be the guarantor and surety for FSH's obligation and would manage the hospital. FSH and HHG were unable to raise sufficient capital, and were therefore unable to close on the agreements. In late November, 1990, defendant Silverman contacted Plaintiff concerning whether Plaintiff would provide the necessary financing for FSH. Negotiations took place between Plaintiff and Defendants and were completed by Defendant, Obermayer, Rebmann, Maxwell and Hippel, acting as counsel for both Plaintiff and Defendants. A Purchase and Sale Agreement was entered into between Plaintiff and FSH on December 13, 1990, whereby Plaintiff agreed to purchase accounts receivable from FSH and FSH, in return, would provide Plaintiff with a first lien security interest on all accounts receivable. Also on December 30, 1990, a Claims Management Agreement was [*3] entered into between Plaintiff and FSH, pursuant to which Plaintiff agreed to administer claims for FSH in exchange for a claims management fee. A Collection Agreement was also entered into by Plaintiff, defendant FSH and defendant MacDonnell, pursuant to which MacDonnell agreed to serve as collection agent for Plaintiff. Similar agreements were entered into between Plaintiff and defendant Silverman. Plaintiff further alleges that as an inducement to enter into the above-described agreements, defendant HHG and its shareholders, Mendelson and Silverman agreed to convey to Plaintiff a 50% interest in HHG upon completion of the $ 2.75 million of financing.

II. DISCUSSION

Plaintiff's complaint makes several allegations with regard to the representations made by Defendants. First, Plaintiff alleges that the Law Firm Defendants each represented to it that they would undertake the filing of UCC-1 financing statements in order to perfect Plaintiff's first lien security interest in the accounts receivable of FSH and that Mendelson and Silverman represented that they had instructed Obermayer, Rebmann, Maxwell and Hippel to timely file the financing statements. These statements were never [*4] filed and Plaintiff alleges it relied upon the above representations. Plaintiff also contends that the Hospital Defendants falsely represented to Plaintiff that Plaintiff would receive a first lien security interest in accounts receivable of FSH, knowing these accounts receivable had been and/or were to be pledged to a third party, U.S. Concord, Inc. In addition, Plaintiff asserts that Defendants negotiated and authorized a $ 7 million loan from Concord, Inc., and in consideration, gave Concord a first lien security interest in the accounts receivable of FSH, being fully aware that these accounts had already been pledged to Plaintiff and representing to Plaintiff that the Concord financing was secured by real estate only. Further, Plaintiff avers that defendant Mendelson prevented Concord from entering into a subordination agreement with Plaintiff, and that Defendants refused to permit Plaintiff to perform services on pledged receivables pursuant to the Claims Management Agreement. Plaintiff also avers that defendants MacDonnell and Golden did not perform their obligations under the collection agreements and never intended to do so.

Lastly, Plaintiff contends that it has performed [*5] all of its obligations under the agreement and that it justifiably relied upon the representations of Defendants who knew that the statements were materially incorrect and made them with the intention to defraud Plaintiff. As a result, Plaintiff provided funding to FSH and Silverman in the amount of approximately $ 1.8 million, of which approximately $ 864,000 has not been paid to Plaintiff.

When considering a motion to dismiss, a court must view the allegations of the complaint and all reasonable inferences therefrom in the light most favorable to the plaintiff. Unless a plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief, the complaint should not be dismissed. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974)*; *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957)*; *Unger v. National Residents Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1991)*. Let us now review each of the Defendants' contentions.

A. *Indispensible Party*

Defendants first seek to dismiss Counts I, II, III, IV, V and [*6] VI of Plaintiff's complaint for failure to join an indispensable party, inasmuch as the action should be in the name of Terra Research Group, who Defendants claim is the assignee of all of Plaintiff's claims. Defendants base their contention on a letter from Terra Research to Mr. Robert N.C. Nix advising Mr. Nix that a trust had been established to receive any and all proceeds from any settlement in the future that may occur regarding the dispute between FSH (and/or Dr. Edward Silverman) and Great Western Funding. The letter goes on to state that Terra is considered a creditor of Great Western Funding and that the purpose of the letter is to put the Defendants on notice of the appointment of a trustee.

After further review of the letter, this Court feels that it is not apparent from the letter whether or not Great Western assigned or transferred any or all of its rights and interests in this litigation to Terra Research Group. Therefore, at this time, we find the information provided is insufficient to rule on the relationship between Great Western and Terra as to whether or not an assignment was created. We shall thus defer ruling on this point until such time as the parties have [*7] had an opportunity to take discovery with regard to this issue and have notified the Court that it is ripe for disposition by filing a motion for summary judgment.

B. *Fraud*

Next, the Defendants assert that Plaintiff has failed to adequately plead a cause of action for fraud under *Rule 9(b). Fed.R.Civ.P. Rule 9(b)* requires that all allegations of fraud be stated with particularity. However, *Rule 9(b)* cannot be viewed in isolation, but rather must be read in light of the general simplicity and flexibility contemplated by the federal rules. *Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 100 (3d Cir. 1983)*; *U.S. v. Kensington Hospital, 760 F.Supp. 1120, 1124 (E.D. Pa. 1991)*; *Antinoph v. Laverell Reynolds Securities, Inc., 703 F.Supp. 1185, 1190 (E.D. Pa. 1989)* 5A Wright, Miller and Kane, *Federal Practice and Procedure 2d,* §§ 1291 and 1298.

Rule 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The Rule "requires plaintiffs to plead the circumstances of the alleged fraud with particularity [*8] to ensure that defendants are placed on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of fraud." *Craftmatic Sec. Litg. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)* (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), 782 F.Supp. 295, 298 (W.D. Pa. 1991).*

In support of its fraud claim, Plaintiff alleges that Defendants conspired to and did defraud it by inducing it to provide approximately two million dollars in funding to Silverman and FSH which Defendants had no intent to perform upon, and by offering Plaintiff a 50% equity interest in HHG upon completion of the initial funding as an incentive to enter into the agreements. Second, Plaintiff contends that Defendants falsely represented that Plaintiff would have a first lien security interest in accounts receivable of FSH, when they knew these accounts receivable had been and/or were to be pledged to Concord. Defendants then gave Concord a first lien security interest in accounts receivable, knowing that they had already been pledged to Plaintiff. [*9] Finally, the complaint avers that MacDonnell and Golden represented to Plaintiff that they would serve as collection agents when they had no intention to do so at the time that they entered into that agreement.

Viewing these allegations in the light most favorable to the Plaintiff, we find that it has pled enough facts with sufficient particularity to state a claim for fraud and has sufficiently identified the parties involved in each factual situation to withstand a motion to dismiss. The complaint also provides Defendants with the notice to which they are entitled under *Rule 9(b)* and indicates circumstances under which Defendants advised it that the financing statements would be filed.

With respect to the hospital board members, Plaintiff has sufficiently set forth such facts as would enable a trier of fact to infer some kind of knowledge by the Defendants that they were participating in a fraudulent scheme. Indeed, the complaint clearly avers that the Board granted both the Plaintiff and Concord a first lien security interest in the accounts receivable of FSH.

In addition, with respect to the Law Firm Defendants, Plaintiff asserts that these Defendants took part in the negotiations [*10] of the various agreements and made representations to Plaintiff that the filing of a financing statement was being undertaken to perfect Plaintiff's interest. For whatever reason, the filings were never completed and it therefore remains to be found whether or not fraud was involved and who was responsible.

C. *Statute of Frauds*

Next, Defendant HHG contends that Count III of the complaint should be dismissed with prejudice because Plaintiff cannot satisfy the Statute of Frauds, 13 Pa. C.S. § 8319, which provides that a contract for sale of securities is not enforceable unless it is set forth in writing signed by the party against whom enforcement is sought.

After further review of the contracts at issue, this Court finds that in the complaint, Plaintiff is not purporting to establish a contract for the sale of securities, but is

rather contending that the 50% interest was an inducement for its agreement to provide funding. Accordingly, the alleged contracts are not subject to nor violative of the Pennsylvania Statute of Frauds. The language of the complaint states that to further induce Plaintiff to enter into the agreements, defendant HHG and its shareholders, defendants Mendelson [*11] and Silverman, entered into an agreement with Plaintiff that upon completion of $ 2.75 million of financing, Silverman and Mendelson would convey to Plaintiff a 50% interest in HHG. This Court does not view this as Plaintiff purporting to establish a contract for the sale of securities, but is rather contending that the 50% interest was an inducement for its agreement to provide funding. Accordingly, the alleged contracts are not subject to nor violative of the Pennsylvania Statute of Frauds. Furthermore, if needed, the letter of intent memorializing the parties' agreement would most likely be held to be sufficient evidence to satisfy 13 Pa. C.S. § 8319.

D. *Civil Conspiracy and Tortious Interference*

Defendants next move for dismissal of Count V of Plaintiff's complaint which purports to state a claim against the Hospital Defendants for civil conspiracy to wrongfully interfere with a contract to which they were not signatories and to which Plaintiff has no claim for relief. Count V of the complaint states that "all of the defendants, acting in conspiracy and for the purpose of converting plaintiff's funds, have wrongfully interfered with contracts to which they were not signatories." [*12] After further review of the pleading, this Court finds that Plaintiff has failed to adequately plead a claim for conspiracy to interfere with Plaintiff's business contracts.

In Pennsylvania, a charge of civil conspiracy requires a showing that defendants combined either to do an unlawful act or a lawful act by unlawful means. *Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3d Cir. 1988).* Tortious interference, in turn, requires that the following elements be pled: that a prospective contractual relationship exists; there is a purpose or intent to cause harm to the plaintiff by preventing the relationship from occurring; the absence of privilege or justification; and actual damage resulting from defendant's conduct. *Zions First National Bank, N.A. v. United Health Club, Inc., 704 F.2d 120, 125 (3d Cir. 1983); Restatement (second) of Torts § 766B* (1979). In this case, Plaintiff has failed to show this Court how a conspiracy has occurred; instead, Plaintiff has merely alluded to the word "conspiracy" and to various facts from which one may infer a conspiracy existed. While such allegations are insufficient [*13] to withstand a motion to dismiss, this Court will grant Plaintiff twenty days leave from the date hereof to replead its civil conspiracy claim should it so desire. *See generally,* 5A Wright, Miller and Kane, *Federal Practice and Procedure 2d,* § 1357. In addition, the only averment offered in support of a tortious interference claim is that "defendants refused to permit plaintiff to perform services pursuant to the Claims Management Agreement, including failure to provide plaintiff with full and complete access to the books and records of FSH, refusal to permit plaintiff to install computers at FSH and to undertake the management of all claims." It can be assumed that the "defendants" referred to above are the FSH defendants as they would be the only ones with the ability to prohibit the Plaintiff from performing the above-mentioned services. Clearly then, Plaintiff has not stated a claim of tortious interference as the FSH defendants are parties to the contract which Plaintiff is contending was to be interfered with. A party cannot be liable for tortious interference with contract to which it is a party. *Michaelson v. Exxon Research and Engineering Company, 808 F.2d 1005, 1007-1008 (3d Cir. 1987).* [*14] Otherwise, the Court finds no other facts in the pleadings to make out a claim for tortious interference.

E. *Incorrect Party*

Finally, Defendants contend that Mr. Thomas Kelly was incorrectly named as a defendant because he was not a director at the time of the events at issue. Rather, he became a member of the Board on February 21, 1991 after all of the events at issue in this case occurred. Defendants have attached an affidavit of Mr. Kelly along with the minutes of the meeting of the Board of Directors held on February 21, 1991 in support of this contention. After review of the minutes of the meeting, specifically the report to the Chairman, it is stated that "Mr. Thomas Kelly, President of the Sheet Metal Workers Union, has resigned from the Board due to his inability to continue the necessary effort and time." The next sentence goes on to state that "Mr. Thomas Kelly has been appointed to fill the approved vacancy." This Court finds that there is a question as to whether or not there are two Thomas Kelly's involved in this situation.

Therefore, until further discovery takes place, this Court will accept as true Plaintiff's contention that counsel for both parties discussed [*15] the possibility that there were two Thomas Kelly's and that one of them may have been incorrectly named as a party. If so, after appropriate discovery on the matter, the improper Thomas Kelly could be removed either upon agreement of counsel, or if necessary, following the filing of a motion for leave to amend the pleading.

IV. *Conclusion*

For the above reasons, an appropriate order will follow granting Defendants' motion to dismiss as to Count V of Plaintiff's complaint and denying the motions to dismiss as to the remainder of Plaintiff's complaint.

ORDER

AND NOW, this 2nd day of December, 1992, upon consideration of Defendants' Motions to Dismiss Plaintiff's Complaint and Plaintiff's response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED as to Count V of the Complaint and Count V of the Complaint is DISMISSED with leave granted to replead a claim for civil conspiracy only, if it so desires within 20 days of date of this Order.

IT IS FURTHER ORDERED that the parties are DIRECTED to proceed to take discovery with respect to all remaining issues and claims raised in the pleadings, including those concerning indispensible and proper parties. Thereafter, those [*16] issues may again be raised by filing any motion(s) for summary judgment or to amend the pleadings which the parties may deem appropriate.

BY THE COURT:

J. CURTIS JOYNER, J.

CASE E

LEXSEE 2009 U.S. DIST. LEXIS 61851

LUIS MANUEL MORA, INDIVIDUALLY AND ON BEHALF OF THE CLASS, Plaintiff, v. HARLEY-DAVIDSON CREDIT CORP., A CORPORATION, AND DOES 1 THROUGH 10, INCLUSIVE, Defendants.

1:08-cv-01453 OWW GSA

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 61851

July 7, 2009, Decided
July 7, 2009, Filed

PRIOR HISTORY: *Mora v. Harley-Davidson Credit Corp., 2009 U.S. Dist. LEXIS 20250 (E.D. Cal., Feb. 23, 2009)*

COUNSEL: [*1] For Luis Manual Mora, Plaintiff: William M Krieg, LEAD ATTORNEY, Law Offices of William M Krieg, Fresno, CA.

For Harley-Davidson Credit Corp., Defendant: Heather Brae Hoesterey, Reed Smith LLP, San Francisco, CA.

JUDGES: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

OPINION BY: Oliver W. Wanger

OPINION

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STRIKE (DOC. 8)

I. INTRODUCTION.

Plaintiff Luis Manuel Mora ("Mora") filed this class action lawsuit against Defendant Harley-Davidson Credit Corporation ("HDCC") in the Superior Court of the State of California, County of Merced, on August 19, 2008. Plaintiff alleges HDCC violated California's Rees-Levering Automobile Sales Finance Act ("ASFA"), *California Civil Code § 2981 et seq.*, and Unfair Competition Law, *California Business and Professions Code § 17200 et seq.*, when it sent customers notices of its intent to dispose of repossessed vehicles that were defective under California law and attempted to collect deficiencies from debtors that were legally prohibited because HDCC failed to strictly comply with ASFA's notice provisions. On September 26, 2008, Defendant HDCC filed a notice of removal pursuant to *28 U.S.C. §§ 1332, 1441*, and *1446* and [*2] the Class Action Fairness Act of 2005 ("CAFA").

Before the court for decision is Defendant's motion to dismiss, or in the alternative, motion to strike Plaintiff's claims to the extent they are based on alleged false reporting to credit reporting agencies. The motions are based on the ground that such claims are expressly preempted by the Fair Credit Reporting Act ("FCRA"), codified at *15 U.S.C. § 1681 et seq.* Plaintiff opposes, arguing FCRA does not preempt the claims and Plaintiff's state claims are based on state consumer protection laws that are unrelated to FCRA.

II. BACKGROUND.

Plaintiff entered into a conditional sales contract to purchase a new 2006 Harley-Davidson motorcycle with financing arranged through Defendant HDCC. As a financed sale of a motor vehicle, Plaintiff asserts this transaction is controlled exclusively in California by ASFA. The selling dealer sold and assigned its interest in the sales contract to lienholder HDCC. Plaintiff contends that the motorcycle was plagued by defects that the dealer was unable to repair after numerous attempts. He voluntarily surrendered it to HDCC in August 2007.

Plaintiff alleges that on September 4, 2007, HDCC sent Plaintiff a notice [*3] of intent to dispose of a repossessed vehicle that failed to comply with ASFA and applicable provisions of the California Commercial Code. Plaintiff argues that, under ASFA, if a lender fails to give a legally compliant notice before it sells or disposes of a repossessed or surrendered vehicle, it loses its right to any deficiency owed from the buyer and is prohibited from claiming or asserting any deficiency. Accordingly, Plaintiff claims HDCC has no legal right to attempt to collect any claimed deficiency from him and a purported class of similarly situated former owners of Harley-Davidson motorcycles financed by HDCC. HDCC has both attempted to collect and successfully collected a claimed deficiency from Plaintiff.

Plaintiff seeks to represent a class of "all persons from whom HDCC and its associates, affiliates, and subsidiaries claims it is owed a deficiency that was invalid due to HDCC's defective NOTICE(S) and its failure to comply with the notice requirements of Rees-Levering." (Doc. 1-2, Complaint at 8.) Plaintiff asserts that the allegedly defective notice he received is a standard notice HDCC sends as a matter of common business practice to persons claimed to be liable to [*4] HDCC under its conditional sales contract covering HDCC repossessed vehicles. *(Id.* at 7.) Plaintiff asserts that, at least four years prior to the date of his complaint, HDCC has regularly collected and attempted to collect deficiencies from proposed class members in violation of ASFA. *(Id.)* Plaintiff is "unable to state the precise number of potential members of the proposed class because that information is in the sole possession of HDCC." *(Id.* at 8.) Plaintiff believes the size of the proposed class is "at least in the hundreds." *(Id.)*

Plaintiff seeks: 1) a declaration that HDCC did not comply with AFSA and has no right to assert any deficiency claim against any class member, 2) damages in the form of recovery for all class members of payments made to HDCC on the deficiency claims, compensation for damage to the credit records of class members, and actual damages, 3) an injunction prohibiting HDCC from future collection efforts and forcing it to disgorge profits, 4) to set aside judgments HDCC successfully sought and obtained against class members who it claimed owed a deficiency, and 5) attorney's fees.

III. LEGAL STANDARD.

A. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6).*

A [*5] motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).* While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, it is required to contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007); see also Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)* (issue is not whether plaintiff will ultimately prevail, but whether claimant is entitled to offer evidence to support the claim). Dismissal is warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).* In deciding a motion to dismiss, the court accepts as true all [*6] material factual allegations in the complaint and construes them in the light most favorable to the plaintiff. *See Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002).*

The court need not accept as true allegations that contradict facts which may be judicially noticed. *See Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987).* For example, matters of public record may be considered, including pleadings, orders, and other papers filed with the court or records of administrative bodies, *see Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986),* while conclusions of law, conclusory allegations, unreasonable inferences, or unwarranted deductions of fact need not be accepted. *See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); see also Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994)* ("[A] document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned."). Allegations in the complaint may be disregarded if contradicted by facts established by exhibits attached to the complaint. *Sprewell, 266 F.3d at 988.* Thus when ruling on a motion to dismiss, [*7] the court may consider facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court may take judicial notice. *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1988).*

B. Motion to Strike Pursuant to *Fed. R. Civ. P. 12(f).*

Rule 12(f) provides that "redundant, immaterial, impertinent, or scandalous matter" may be stricken from any pleading. *Fed. R. Civ. P. 12(f).* A motion to strike is limited to pleadings. *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).* Motions to strike are disfavored and infrequently granted. *Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F.Supp. 945, 947*

(C.D. Cal. 1990), abrogated on other grounds by Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993). Such motions should be granted only where it can be shown that none of the evidence in support of the allegation is admissible. *Id.*

IV. DISCUSSION.

Defendant moves to dismiss Plaintiff's claims to the extent they are based on allegations relating to Defendant's duties as a furnisher of information to credit reporting agencies. Plaintiff makes [*8] a number of allegations in his complaint related to HDCC's conduct in reporting information to credit reporting agencies. First, Plaintiff alleges:

> Plaintiff is informed and believes that HDCC and/or its agents regularly report or communicate to consumer credit reporting organizations that purported deficiencies following disposition of repossessed vehicles pursuant to the unlawful practices described herein are bad debts when, in fact, Plaintiff and other similarly-situated persons are not liable for said deficiencies as a matter of law, as set forth above.

(Doc. 1-2, Complaint at P12.) Plaintiff also contends that one of the questions of law and fact common to the proposed class is "whether HDCC falsely reported deficiencies as valid debts to credit reporting organizations." *(Id.* at P17.) Finally, Plaintiff asserts that class members "who have been subject to efforts by HDCC or its agents or successors to collect the invalid debts or who have had negative information on the invalid debts reported to credit reporting agencies are entitled to compensation for damage to their credit and/or other damages." *(Id.* at P21.) Defendant argues FCRA preempts any state claims related to furnishers [*9] of information to credit reporting agencies and their responsibilities.

A. Federal Pre-emption

State law is pre-empted under the Supremacy Clause of Article VI of the United States Constitution in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-98, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983).* Pre-emption fundamentally is a question of congressional intent, see *Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)*, and "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).*

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *Id.* Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of [*10] state laws on the same subject." *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947).* The Supreme Court has emphasized that where the field Congress is said to have pre-empted includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "'clear and manifest.'" *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)* (quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. at 230*).

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. The Supreme Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, see *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941).*

B. As Applied to FCRA.

FCRA sets forth its relationship to state law in *§ 1681t*, entitled "Relation to State laws":

> (a) In general
>
> Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions [*11] of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a).

FCRA provides for general exceptions to *§ 1681t(a)* in *§ 1681t(b)*:

> (b) General exceptions. No requirement or prohibition may be imposed under the laws of any State-
>
> > (1) with respect to any subject matter regulated under-
> >
> > (F) *section 1681s-2* of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply-
> >
> > (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
> >
> > (ii) with respect to *section 1785.25(a) of the California Civil Code* (as in effect on September 30, 1996).

15 U.S.C. § 1681t(b)(1)(F).

From these sections, it is clear that while generally the FCRA does not preempt state law, it sets forth exceptions that do provide for preemption in certain cases. Specifically, no "requirement [*12] or prohibition" under state law can be imposed regarding the subject matter regulated under *15 U.S.C. § 1681s-2*, which relates to "the responsibilities of persons who furnish information to consumer reporting agencies." *15 U.S.C. § 1681s-2* reads in part:

> (a) Duty of furnishers of information to provide accurate information
>
> > (1) Prohibition
> >
> > (A) Reporting information with actual knowledge of errors
> >
> > A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

Plaintiff contends that the FCRA was not intended to preempt the field. It is evident field pre-emption does not apply from *§ 1681t(a)*'s command that "this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State" relating to collecting or distributing information on consumers except to the extent state laws are inconsistent with *§ 1681t. See Credit Data of Arizona, Inc. v. State of Arizona, 602 F.2d 195, 197 (9th Cir. 1979)*. Plaintiff further argues that FCRA plainly limits its preemption of state regulations "only to [*13] the extent of the inconsistency" with those regulations. This is inaccurate. The plain language of *§ 1681t(b)(1)(F)* expressly preempts any state law relating to the duties of furnishers of information to consumer reporting agencies. In addition, while *15 U.S.C. §§ 1681t(b)(1)(F)(i)* and *(ii)* exempt a specific Massachusetts law and *California Civil Code § 1785.25(a)* from such preemption, Plaintiff does not assert any claims under Massachusetts law or *California Civil Code § 1785.25(a)* and thus no exception applies here to the express pre-emption of state law relating to furnishers of information to consumer reporting agencies.

Here Plaintiff seeks damages for harm to class members' credit and possible injunctive relief, although the complaint is unclear as to the latter. Title *15 U.S.C. § 1681s-2(a)* specifically requires furnishers of credit information to provide accurate information. Plaintiff alleges HDCC provided false and/or inaccurate reporting of class members' deficiencies to credit reporting agencies. Because FCRA regulates furnishers' provision of accurate information to credit agencies and Congress intended this to be exclusive, any state claim with respect to false or inaccurate [*14] reporting is pre-empted.

Plaintiff argues FCRA does not pre-empt state consumer statutes that are unrelated to credit reporting, like ASFA and the UCL. Here Plaintiff misses the point. Whether Plaintiff seeks relief under ASFA or the UCL, allegations of false reporting to credit agencies relate to "the responsibilities of persons who furnish information to consumer reporting agencies" as regulated under *15 U.S.C. § 1681s-2*. To the extent Plaintiff asserts claims based on HDCC's alleged false reporting, such claims are expressly pre-empted by FCRA.

No Ninth Circuit or other circuit authority has been located that is directly on point. However, in dicta in *Gorman,* the Ninth Circuit took the position that all state law claims related to furnishers' reporting duties are expressly pre-empted: "Although *§ 1681t(b)(1)(F)* appears to preempt all state law claims based on a creditor's responsibilities under *§ 1681s-2*, *§ 1681h(e)* suggests that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice." *Gorman v. Wolpoff & Abramson, LLP, 552 F.3d 1008, 1026 (9th Cir. 2009).* A number of district courts have reached the same conclusion. *See Howard v. Blue Ridge Bank, 371 F.Supp.2d 1139, 1144 (N.D. Cal. 2005)* [*15] (finding UCL claim preempted because "Congress intended the FCRA to preempt state laws regarding the duties of furnishers and the remedies available against them, rather than allowing different liabilities for furnishers depending on the state of suit"); *Roybal v. Equifax, 405 F.Supp.2d 1177, 1181 (E.D. Cal. 2005)* (finding UCL claim, among others, pre-empted and stating "[o]n its face, the FCRA precludes all state statutory or common law causes of action that would impose any "requirement or prohibition" on the furnishers of credit information"); *Jaramillo v. Experian Information Solutions, Inc., 155 F.Supp.2d 356, 361-62 (E.D. Pa.2001)* ("it is clear from the face of *section 1681t(b)(1)(F)* that Congress wanted to eliminate all state causes of action 'relating to the responsibilities of persons who furnish information to consumer reporting agencies' "); *Hasvold v. First USA Bank, 194 F.Supp.2d 1228, 1239 (D. Wyo. 2002)* ("federal law under the FCRA preempts plaintiff's claims [for defamation and invasion of privacy] against the defendant relating to it as a furnisher of information"); *Riley v. General Motors Acceptance Corp., 226 F.Supp.2d 1316, 1322 (S.D. Ala. 2002)* (finding preemption [*16] of state tort claims for negligence, defamation, invasion of privacy and outrage, and acknowledging that "there is no question that the statutory prohibition precludes suits under state consumer protection laws").

V. CONCLUSION.

For the reasons set forth above, Defendant's motion to dismiss and strike Plaintiff's claims as they relate to alleged false and/or inaccurate reporting by Defendant to credit reporting agencies is GRANTED.

IT IS SO ORDERED.

Dated: July 7, 2009

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

CASE F

LEXSEE 2009 U.S. DIST. LEXIS 13116

ROBERT TOWNSEND, an individual, Plaintiff, v. CHASE BANK USA N.A.; MANN BRACKEN, LLC; PALISADES COLLECTIONS; et al.; Defendants.

CASE NO. SACV08-00527 AG (ANx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 13116

February 15, 2009, Decided
February 15, 2009, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *Townsend v. Chase Bank USA, N.A., 2009 U.S. Dist. LEXIS 22921 (C.D. Cal., Mar. 20, 2009)*

COUNSEL: [*1] Robert Townsend, Plaintiff, Pro se, Dana Point, CA.

For Chase Bank USA NA, Mann Bracken LLC, Defendants: George G Weickhardt, Wendy Chai Krog, LEAD ATTORNEYS, Ropers Majeski Kohn and Bentley, San Francisco, CA.

For Palisades Collection, LLC, formerly known as Doe 1, Defendant: Wendy Chai Krog, LEAD ATTORNEY, Ropers Majeski Kohn and Bentley, San Francisco, CA.

JUDGES: Andrew J. Guilford, United States District Judge.

OPINION BY: Andrew J. Guilford

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is a Motion to Dismiss ("Motion") filed by Defendants Chase Bank USA, N.A. ("Chase Bank"), Mann Bracken, LLC ("Mann Bracken"), and Palisades Collections, LLC ("Palisades"). Defendant J.P. Morgan Chase International ("Chase") has joined in the Motion. Oral argument was heard on January 5, 2009, and the Court is now prepared to rule.

Plaintiff Robert Townsend ("Plaintiff"), proceeding *pro se,* is engaged in a diligent search for justice before this Court. Plaintiff currently has five cases pending in this Court, all of them raising similar legal and factual issues. In this case, Plaintiff has now been allowed to amend his defective Complaint three times. Because Plaintiff has still failed to state a viable claim [*2] against any defendant, justice requires the Court, after considering all papers and arguments submitted, to GRANT Defendants' Motion without leave to amend.

BACKGROUND

The following facts are taken from Plaintiff's Third Amended Complaint ("TAC"), and for the purposes of this Motion, the Court assumes them to be true.

Plaintiff and Chase Bank entered into a written contract providing for credit cards to be issued to Plaintiff. In 2006, a dispute arose between Plaintiff and Chase Bank as to the true amount Plaintiff owed Chase Bank under the credit card agreements. (TAC P 13.) Chase Bank then initiated "aggressive collection activities" against Plaintiff. (TAC P 13.) In 2007, Plaintiff received a letter from Mann Bracken stating that Mann Bracken was the assignee of Chase Bank on debts owed to Chase Bank by Plaintiff. (TAC P 14.) Plaintiff contacted Mann Bracken to dispute the debt. (TAC P 15.) Mann Bracken responded by providing documents purporting to validate the debt, but did not respond to Plaintiff's request for documentation in accordance with the requirements of the Fair Debt Collection Practices Act. (TAC P 15.) In 2008, Plaintiff received a letter from Palisades stating that [*3] Palisades had purchased the debts owed by

Plaintiff to Chase Bank. (TAC P 17.) That letter threatened that if Plaintiff did not pay the debt, Palisades would report information about his account to credit bureaus. (TAC P 18.) Plaintiff alleges that Mann Bracken's and Palisades' collection activities against him violated, among other things, the California and federal Fair Debt Collection Practices Acts. Plaintiff also challenges Chase Bank's business practices, including Chase Bank's imposition of backdated rate increases and additional finance charges on certain accounts. (TAC PP 21-28.)

Plaintiff's Third Amended Complaint states fourteen claims against Defendants, numbered as follows: (1) violations of California's Fair Debt Collection Practices Act, *Cal. Civ. Code § 1788, et seq.;* (2) violations of the Federal Fair Debt Collection Practices Act, *15 U.S.C. § 1692, et seq.;* (3) defamation/credit slander; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) violations of the Racketeering and Influence Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961, et seq.;* (7) declaratory and injunctive relief under *18 U.S.C. § 1964(a)*; (8) unjust enrichment; (9) fraud; (10) [*4] unfair competition, in violation of *Cal. Bus. & Prof. Code § 17200, et seq.;* (11) intentional infliction of emotional distress ("IIED"); (12) breach of contract; (13) violations of the Truth in Lending Act ("TILA"), *15 U.S.C. § 1601, et seq.;* (14) breach of the implied covenant of good faith and fair dealing.

Defendants here move to dismiss all claims under *Federal Rule of Civil Procedure 12(b)(6).*

LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. *Fed R. Civ. P. 12(b)(6). Rule 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed R. Civ. P. 8(a)(2).* "[O]rdinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005).* "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (per curiam) (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)).* Thus, a complaint may [*5] not be dismissed for failure to state a claim where the allegations plausibly show "that the pleader is entitled to relief." *Bell Atlantic, 127 S.Ct. at 1965.* Conversely, a complaint should be dismissed for failure to state a claim where the factual allegations do not raise the "right of relief above the speculative level." *Id.*

In deciding a 12(b)(6) motion, the Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 670 (9th Cir. 1993); see also Enesco Corp v. Price/Costco, Inc., 146 F.3d 1083, 1085 (9th Cir. 1988).* However, courts are not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).*

"A *pro se* litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)* (internal quotation omitted).

ANALYSIS

1. [*6] PLAINTIFF'S FIRST AND SECOND CLAIMS FOR VIOLATIONS OF THE CALIFORNIA AND FEDERAL FAIR DEBT COLLECTION PRACTICES ACTS

Plaintiff's first claim for violations of California's Fair Debt Collection Practices Act ("FDCPA") is brought against all defendants. Plaintiff's second claim for violations of the federal FDCPA is brought against Chase Bank, Mann Bracken, Palisades, and other related defendants. Plaintiff alleges that Defendants engaged in "unfair, unlawful, and unconscionable" means to attempt to collect a debt purportedly owed by Plaintiff, including threatening to report Plaintiff to credit agencies and attempting collection activities. (TAC P 84.)

Plaintiff fails to state a claim under either the California or federal FDCPA. Both Acts are directed at false, misleading, or harassing communications to consumers. *See Cal. Civ. Code § 1788, et seq.; 15 U.S.C. § 1692, et seq.* Courts have held that the date and contents of each alleged communication in violation of the FDCPA must be pled with particularity. *See, e.g., Arikat v. J.P. Morgan Chase & Co., 430 F. Supp. 2d 1013, 1027 (N.D. Cal. 2006); Gorman v. Wolpoff & Abramson, LLP, 370 F. Supp. 2d 1005, 1013 (N.D. Cal. 2005).* Here, Plaintiff [*7] fails to cite specific instances of communications violating the FDCPA. Plaintiff's TAC gives only vague descriptions of false, misleading, or harassing communications Plaintiff received from Defendants and fails to identify the persons making such communications, the dates those communications were received, or even the contents of the communications. Plaintiff's claims must fail.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's first claim for violations of the California Fair

Debt Collection Practices Act and Plaintiff's second claim for violations of the federal Fair Debt Collection Practices Act.

2. PLAINTIFF'S THIRD CLAIM FOR DEFAMATION/CREDIT SLANDER

Plaintiff's third claim for defamation and credit slander is brought against Chase Bank, Mann Bracken, Palisades, and other related defendants. Plaintiff alleges that "Defendants, and each of them, stated to each other, including communications among themselves and repeated to others, both verbally and in writing, that Plaintiff owed a debt to CHASE and was delinquent in his repayment obligations." (TAC P 101.) These statements allegedly were false because "Plaintiff's credit accounts with CHASE, and the credit extended to [*8] him as alleged by CHASE, was never owed CHASE on a credit account and Plaintiff never was delinquent in repayment obligations for any account or other obligation with CHASE unless falsely manipulated to appear so by CHASE for its economic benefit." (TAC P 101.)

The Court agrees with Defendants that, to the extent Plaintiff's claim is based on credit reporting, it is preempted by the Fair Credit Reporting Act ("FCRA"). The FCRA provides:

> No requirement or prohibition may be imposed under the laws of any state
>
> (1) With respect to any matter regulated under . . .
>
> (F) Section 623 [*15 U.S.C. § 1681s-2*], relating to the responsibilities of persons who furnish information to consumer reporting agencies . . . .

15 U.S.C. § 1681t(b). The FCRA thus preempts all matters regulated by *Section 1681s-2(a)*, which broadly states the various duties of furnishers of credit information to provide accurate information to credit reporting agencies. Courts have repeatedly held that the FCRA is a scheme of federal regulation of credit reporting so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. *Kodrick v. Ferguson, 54 F. Supp. 2d 788 (N.D. Ill. 1999)*; *Nat'l Home Equity Mortgage Ass'n v. Face, 64 F. Supp. 2d 584 (E.D. Va. 1999)*. [*9] Federal courts in California have consistently held that the FCRA preempts both statutory and common law claims under state law against furnishers of information for failing to properly investigate and report allegedly erroneous information. *See Buraye v. Equifax, 2008 U.S. Dist. LEXIS 80732 (C.D. Cal. 2008)*; *Howard v. Blue Ridge Bank, 371 F. Supp. 2d 1139 (N.D. Cal. 2005)*; *Roybal v. Equifax, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2005)*; *Davis v. Maryland Bank, N.A., 2002 U.S. Dist. LEXIS 26468 (N.D. Cal. 2002)*.

To the extent that Plaintiff's defamation claim is *not* based on credit reporting, Plaintiff fails to plead defamation with sufficient particularity. "The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Gilbert v. Sykes, 147 Cal. App. 4th 13, 34, 53 Cal. Rptr. 3d 752 (2007)*. Plaintiff fails to specifically allege the contents of any of the defamatory statements. Plaintiff also fails to allege which defendant made the allegedly defamatory statements and to which other defendants or third parties the allegedly defamatory statements were made. Plaintiff fails to state a claim for defamation under *Rule 12(b)(6)*.

Defendants' [*10] Motion to Dismiss is GRANTED as to Plaintiff's third claim for defamation and credit slander.

3. PLAINTIFF'S FOURTH CLAIM FOR FRAUDULENT MISREPRESENTATION

Plaintiff's fourth claim for fraudulent misrepresentation is brought against Chase Bank, Mann Bracken, Palisades, and other related defendants. Plaintiff alleges that Defendants and their agents advised Plaintiff by letters, including one dated January 5, 2007, "that [Plaintiff] owed a sum originally to CHASE that was due and past due and that it had a right to collect on this debt when in fact said parties knew or could reasonably ascertain [Plaintiff] did not owe the monies claimed." (TAC P 108.) Plaintiff alleges that Defendants knew the representations were false and made them "with the intention to deceive and defraud Plaintiff and to induce Plaintiff to make payments to [Defendants] in order to make themselves monies from the fraudulent dealings and allegations of the amount of the debt by CHASE and other related defendants, charges, fees, and interest assessed against Plaintiff." (TAC P 110.)

Plaintiff fails to plead fraudulent misrepresentations with sufficient particularity. Under *Federal Rule of Civil Procedure 9(b)*, "[i]n [*11] all averments of fraud or mistake, circumstances constituting fraud or mistake shall be stated with particularity." Specifically, "the complaint must specify such facts as the times, dates, places and benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)*. Here, all of Plaintiff's accusa-

tions fail to allege specific instances of fraudulent misrepresentations. Plaintiff fails to allege who made the representations, when and where the representations were made, how they were made, and what the specific content of the representations was. The pleading standard "may be relaxed as to matters peculiarly within the opposing party's knowledge." *Wool v. Tandem, 818 F.2d 1433, 1439 (9th Cir. 1987)* (superceded on other grounds). But *Wool* does not apply here. Plaintiff should know when and where the allegedly fraudulent representations were made to him. These representations are not "peculiarly within the opposing party's knowledge."

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's fourth claim for fraudulent misrepresentation.

4. PLAINTIFF'S FIFTH CLAIM FOR NEGLIGENT MISREPRESENTATION

Plaintiff's fifth claim for negligent [*12] misrepresentation is brought against Chase Bank, Mann Bracken, Palisades, and other related defendants. Plaintiff's negligent misrepresentation claim suffers from the same defects as his fraudulent misrepresentation claim. Plaintiff again fails to allege who made the allegedly negligent representations, when and where the representations were made, how they were made, and what the specific content of the representations was. Plaintiff fails to state a claim for negligent misrepresentation.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's fifth claim for negligent misrepresentation.

5. PLAINTIFF'S SIXTH CLAIM FOR RICO VIOLATIONS

Plaintiff's sixth claim for violations of RICO is apparently brought against Chase Bank, Mann Bracken, Palisades, and other related defendants. Plaintiff alleges that the defendants "knowingly and willfully conspired and agreed among themselves to engage in unwarranted collection activities against Plaintiff although Plaintiff disputed the alleged debt, that then became the subject of collection activities." (TAC P 122.) As part of a continuing and established "pattern of racketeering activity," the defendants allegedly "did conspire among themselves, [*13] directly and indirectly, to disseminate false and misleading information to members of the general public, including Plaintiff, who received such information, respecting credit cards offered to members of the public by CHASE" and "did charge persons, including Plaintiff . . . unreasonable fees, charges, and penalties that were not disclosed to the credit card holders or if disclosed, the disclosures were hidden in the massive amount of printed matter given credit card holders." (TAC PP 133-35.)

Like the previous iterations of Plaintiff's RICO claim, this claim fails to plead RICO violations with sufficient particularity. *Federal Rule of Civil Procedure 9(b)* applies to RICO fraud allegations. *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989). Rule 9(b)* requires the pleader to state the time, place, and specific content of the false representations, as well as the identities of the relevant parties. *Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004).* Here, Plaintiff fails to mention any specific statements, charges, or penalties. The TAC fails to allege specific acts of racketeering activity by individual defendants and fails to state a claim under [*14] RICO.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's sixth claim for RICO violations.

6. PLAINTIFF'S SEVENTH CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff's seventh claim seeks declaratory and injunctive relief under *18 U.S.C. § 1964(a).* That statute allows district courts to enjoin future violations of RICO. Because Plaintiff's sixth claim for violations of RICO fails, his claim for declaratory and injunctive relief under *Section 1964(a)* must also fail.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's seventh claim for declaratory and injunctive relief.

7. PLAINTIFF'S EIGHTH CLAIM FOR UNJUST ENRICHMENT

Plaintiff's eighth claim for unjust enrichment is apparently brought against Chase Bank. Plaintiff alleges that Chase Bank adds "unreasonable, unconscionable, and illegal charges to the original debt" and then uses "extortionate practices" to collect the "over charges." (TAC P 165.) As a result of those debt collection practices, Plaintiff alleges, Chase Bank has been "unjustly enriched by their collection of falsely misrepresented debt." (TAC P 166.)

Plaintiff's claim for unjust enrichment must fail. Unjust enrichment is a basis for granting restitution where [*15] "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Juarez v. Arcadia Financial, Ltd., 152 Cal. App. 4th 889, 915, 61 Cal. Rptr. 3d 382 (2007)* (internal citations omitted). Here, Plaintiff fails to actually allege that he ever paid Chase Bank or any other defendant the allegedly unreasonable, unconscionable, and illegal charges. There is no allegation that the defendants in this case are "holding any of [P]laintiff's funds that they must restore." (Motion 17:15-16.) Plaintiff does not state a claim for unjust enrichment.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's eighth claim for unjust enrichment.

8. PLAINTIFF'S NINTH CLAIM FOR FRAUD

Plaintiff's ninth claim for fraud is brought against all defendants. Plaintiff accuses Chase of (1) "charging excessive fees and/or penalties"; (2) engaging in "creative bookkeeping"; (3) adding terms to the contract without proper or adequate notice to Plaintiff by, in some cases, "inserting the changes in other material sent to Plaintiff in such a way that it would easily be overlooked and in language not reasonably understandable"; (4) providing for "universal default" by "inserting the reasons for [*16] implementation of extraordinary changes in interest to be charged (AKA penalty) in material sent to Plaintiff in such a way that it would easily be overlooked and in language not reasonably understandable"; (5) extending lines of credit to Plaintiff without warning him that "frequent use of the line of credit beyond a certain unilaterally decided percentage would subject Plaintiff to a penalty rate of interest" and stating the potential for such interest in "material sent to Plaintiff in such a way that it would easily be overlooked and in language not reasonably understandable, even unintelligible and incomprehensible"; (6) using the "mails and telephone lines" to prepare purportedly accurate monthly statements; and (7) mailing knowingly inaccurate statements. (TAC P 173.)

Like the previous iterations of Plaintiff's fraud claim, this claim fails to plead fraud with sufficient particularity. Under *Federal Rule of Civil Procedure 9(b)*, "[i]n all averments of fraud or mistake, circumstances constituting fraud or mistake shall be stated with particularity." Specifically, "the complaint must specify such facts as the times, dates, places and benefits received, and other details of the alleged [*17] fraudulent activity." *Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)*. Here, all of Plaintiff's accusations fail to allege specific instances. The pleading standard "may be relaxed as to matters peculiarly within the opposing party's knowledge." *Wool v. Tandem, 818 F.2d 1433, 1439 (9th Cir. 1987)* (superceded on other grounds). But *Wool* does not apply here. Plaintiff should know when and where the allegedly fraudulent representations were made to him. These representations are not "peculiarly within the opposing party's knowledge."

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ninth claim for fraud.

9. PLAINTIFF'S TENTH CLAIM FOR UNFAIR COMPETITION

Plaintiff's tenth claim for unfair competition is brought against all defendants. Plaintiff alleges that Defendants have engaged in conduct constituting unfair competition as defined by *California Business & Professions Code Section 17200*, including violations of the California and federal Fair Debt Collection Practices Acts, a civil conspiracy in violation of RICO, and fraud.

Under California law, to establish a claim that a practice is unlawful or unfair under *§ 17200*, a plaintiff must first establish that some other statute [*18] has been violated or some tort has been committed. Under *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, courts may not simply impose their own notions of fairness or unfairness. Plaintiff's must show a tort, violation of a statute, or violation of some other recognized duty. *Id.; See also Diaz v. Allstate Ins. Co., 185 F.R.D. 581 (C.D. Cal. 1998)*; *People Ex Rel Renne v. Servantes, 86 Cal. App. 4th 1081, 103 Cal. Rptr. 2d 870 (2001)*. Here, Plaintiff has predicated his *§ 17200* claim on alleged violations of the FDCPA and RICO and fraud. Because the Court has already established that those claims must fail, Plaintiff's unfair competition claim must also fail.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's tenth claim for unfair competition.

10. PLAINTIFF'S ELEVENTH CLAIM FOR IIED

Plaintiff's eleventh claim for IIED is brought against all defendants. Plaintiff alleges that "Defendants' ongoing effort to collect from Plaintiff on a debt they knew or should have known was not due resulted in a significant financial and emotional burden on Plaintiff." (TAC P 191.) Plaintiff alleges that Defendants "knew Plaintiff was unsophisticated, had limited financial resources, [*19] and could not afford to retain counsel to advise and represent him," but continued to pursue aggressive collection activities against him regardless. (TAC P 191.)

Plaintiff fails to state a claim for IIED. Under California law, the elements of an IIED claim are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d 975 (1979)*. To be considered "outrageous," conduct must be so extreme as to exceed all bounds of conduct usually tolerated in a civilized community. *Id. at 593*. Conduct will be found actionable where the "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Cochran v. Cochran, 65 Cal. App. 4th 488, 494, 76 Cal. Rptr. 2d 540 (1998)*.

Here, Plaintiff fails to allege facts showing extreme and outrageous conduct. While the collection activities pursued against him undoubtedly caused Plaintiff [*20] significant stress, the Court cannot find that, under the facts alleged by Plaintiff, any of the defendants in this case engaged in conduct so extreme as to exceed all bounds of conduct usually tolerated in a civilized community. Plaintiff acknowledges that "each individual act may seem small," but asserts that "the totality of the continuing harassment, over an extended period of time is clearly something that rises to the level where a person of reasonably [*sic*] sensibilities would say it is outrageous." (TAC P 194.) The Court cannot agree.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's eleventh claim for intentional infliction of emotional distress.

11. PLAINTIFF'S TWELFTH CLAIM FOR BREACH OF CONTRACT

Plaintiff's twelfth claim for breach of contract is brought against Chase Bank. This claim is substantially identical to the breach of contract claims brought in the original Complaint, First Amended Complaint, and Second Amended Complaint. Plaintiff alleges that Chase Bank breached the agreement between the parties by imposing, enforcing, and collecting illegal penalties and additional fees; raising the applicable interest rate; and falsely reporting to third parties that [*21] Plaintiff defaulted on payments due. (TAC PP 197-209.)

In its July 2, 2008 Order dismissing Plaintiff's original Complaint, this Court held that Plaintiff's breach of contract claims were preempted by: (1) *12 C.F.R. § 7.4008(d)(2)*, which allows a national bank to make non-real estate loans without regard to state law limitations concerning terms of credit, disclosure and advertising, and rates of interest on loans; (2) *12 C.F.R. § 7.4002*, which provides that a national bank may charge its customers non-interest charges and fees; and (3) the Fair Credit Reporting Act. *See* July 2, 2008 Order at 4-7. Plaintiff's latest breach of contract claim contains the same allegations as his original breach of contract claim and is therefore preempted by federal law.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's twelfth claim for breach of contract.

12. PLAINTIFF'S THIRTEENTH CLAIM FOR TILA VIOLATIONS

Plaintiff's thirteenth claim for violations of TILA is apparently brought against Chase Bank. Plaintiff alleges that on June 6, 2007, he "provided written [*sic*] to CHASE" that "he believed a billing error had occurred with the current billing statement received via the postal service but previous [*22] errors as well." (TAC P 212.) According to Plaintiff, Chase Bank then failed to comply with the requirements of TILA set forth at *15 U.S.C. § 1666*. The "billing error" cited by Plaintiff is the fact that Chase Bank's periodic statements explain how Chase bank calculates balances "in font so small with ink bended into the paper as to render it indistinguishable, indecipherable, and unintelligible." (TAC P 213.) Plaintiff concludes that "it is impossible" to ascertain how Chase bank determines balances. (TAC P 215.)

Plaintiff fails to state a claim under TILA. First, as Defendants point out, the size of print used on Chase Bank's billing statements is not the type of "billing error" covered by TILA. *See 15 U.S.C. § 1666(b)* (defining billing errors to include, for example, computation errors, failures to reflect payments made or credits issued, reflections of goods or services not accepted by a creditor, or reflections of extensions of credit not made to the creditor). Second, the Court cannot find that it is "impossible" to determine how Chase Bank calculates balances on credit card statements. Attached to the TAC are several of Plaintiff's statements from Chase Bank for the period from [*23] January 2006 through January 2007. On the first page of the statements, a section titled "Finance Charges" sets forth the daily period rate, the corresponding annual percentage rate, the average daily balance, and the resulting finance charges. The second page of the statements includes a section titled "Explanation of Finance Charges," which sets forth a detailed explanation of how Chase Bank calculates periodic finance charges. Finally, Plaintiff does not allege that he sent Chase Bank a communication including his name and account number; a statement that Plaintiff believed the statement contained a billing error and the amount of the billing error; and a statement setting forth Plaintiff's reasons for believing the statement contained a billing error, as required by *15 U.S.C. § 1666(a)*. Plaintiff's TILA claim must fail.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's thirteenth claim for violations of the Truth in Lending Act.

13. PLAINTIFF'S FOURTEENTH CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff's fourteenth claim for breach of the implied covenant of good faith and fair dealing is apparently brought against Chase Bank. Plaintiff alleges [*24] that Chase Bank violated the implied covenant of good faith and fair dealing by "imposing penalties in addition to a late charge for late payments" and "retroactively increasing interest rates on the customer without any advanced notice whatsoever." (TAC P 219.) Again, these claims are preempted by federal law. *See* July 2, 2008 Order at 4-7.

Defendants' Motion to Dismiss is GRANTED as to Plaintiff's fourteenth claim for breach of the implied covenant of good faith and fair dealing.

DISPOSITION

Plaintiff has been given several opportunities to amend his pleadings in this case. The Court is satisfied that the deficiencies of the Third Amended Complaint cannot be cured by further amendment. *See Noll, 809 F.2d at 1448.* Defendants' Motion is GRANTED without leave to amend.

IT IS SO ORDERED.

DATED: February 15, 2009

/s/ Andrew J. Guilford

Andrew J. Guilford

United States District Judge

CASE G

LEXSEE 2007 U.S. DIST. LEXIS 47558

STEVEN R. YOURKE, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., Defendant.

No. C 06-2370 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 47558

June 20, 2007, Decided
June 20, 2007, Filed

COUNSEL: [*1] For Steven R. Yourke, Plaintiff: Mark F. Anderson, LEAD ATTORNEY, Kemnitzer, Anderson, Barron & Ogilvie, San Francisco, CA; Kan Tung Donohoe, Kemnitzer Anderson Barron & Ogilvie LLP, San Francisco, CA.

For Experian Information Solutions Inc, Defendant: Angela M. Taylor, LEAD ATTORNEY, Jones Day, Irvine, CA; Lucinda Warnett Andrew, Jones Day, Dallas, TX; Xuan-Thu Phan, Miller Law Group, PC, Larkspur, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Experian Information Solutions, Inc. moves for summary judgment on Plaintiff Steven Yourke's claims of negligent and willful non-compliance with the Fair Credit Reporting Act (FCRA). Plaintiff opposes the motion. The matter was heard on May 10, 2007. Having considered all of the papers filed by the parties, the evidence cited therein and oral argument, the Court denies Defendant's motion.

BACKGROUND

This dispute arises out of a series of tax liens filed against Yourke based on his failure to file federal and state tax returns for tax years 1995 through 1997 and 1999 through 2002. The liens ranged from $ 9,916 to $ 741,167, based on estimates by the Internal Revenue Service [*2] and Franchise Tax Board of the amount of tax potentially due. Yourke states that he did not file tax returns in those years because he had no tax liability. After the liens were filed, Yourke filed his tax returns for the years in question. The IRS and FTB agreed that he did not owe taxes and released all of the liens by September, 2005. [1] The FTB charged Yourke collection cost recovery fees of $ 114, $ 120 and $ 11, pursuant to *California Revenue and Taxation Code § 19254.*

1 The FTB filed four tax liens: a $ 129,986 lien in January, 1999 for the 1996 tax year, which was recorded as released in August, 1999, a $ 741,167 lien in June, 2000 for the 1997 tax year, which was recorded as released in October 2000, a $ 9,916 lien in January, 2003 for the 1999 and 2000 tax years, which was recorded as released in June, 2005, and a $ 19,374 lien in September, 2004 for the 2001 and 2002 tax years, which was recorded as released in September, 2005. The IRS filed one $ 51,655 lien in April, 2004, which was recorded as released in September, 2004.

These liens began appearing on Yourke's credit report sometime prior to October, 2005, when he first called Experian regarding the reporting of the liens [*3] on the report. At that time all five tax liens were reported by Experian. Although all five liens had been recorded as released, Experian reported only two of them as having been released. [2] All of the liens were listed at the high amounts for which they had originally been filed. Yourke

informed the customer relations department that his reports were inaccurate. Yourke followed up with Experian in writing on October 27, 2005; he sent letters from the FTB, indicating that no tax was due for each of the years in question, that Yourke had paid the total amounts due including penalties and interest and that the FTB had filed a release of lien for each lien recorded. He further requested that all references to the liens be expunged from his credit report because he "never owed any taxes and never failed to pay that [which he] owed." Anderson Declaration, Exhibit B.

> 2 The consumer versions of Yourke's report which he presents as evidence state that the liens are "paid" rather than "released." Defendant presents evidence that the liens are reported as "released" in all reports provided to creditors. The consumer version of the report is only provided to Yourke and would not be used to deny [*4] him credit. Thus it is irrelevant.

Pursuant to *15 U.S.C. § 1681i*, Experian reinvestigated the liens after receiving Yourke's complaint. Experian states that its public records vendor confirmed that the five liens had been filed but that each had been released. Experian updated Yourke's report to indicate that each of the liens was released and sent him a copy of the new version with a correction summary on December 12, 2005. The liens were still listed with the high amounts for which they had been filed.

Yourke wrote another letter to Experian on January 10, 2006. He again explained that he had not in fact owed any taxes and that any amounts paid in order for the liens to be released were fees. He stated that the liens were "now correctly reported as 'paid'" but argued that they should be expunged from his report because "they have no relevance to the issue of [his] creditworthiness." Anderson Declaration, Exhibit D. He again attached the letters from the FTB. Yourke also attached an IRS document, which showed that the lien had been filed but that he had been credited back for the amounts the IRS had believed he owed and the lien had been released.

On January 26, January 31 and February [*5] 14, 2006, Experian sent Yourke additional copies of his credit report, indicating that the information regarding the released liens had been verified in November, 2005. The liens were all listed at the high amounts for which they had originally been filed. Experian customer affairs specialist Carrie Higginbotham also sent a letter on February 14, 2006, stating that a tax lien "is part of public records and may be reflected on the credit report." Anderson Declaration, Exhibit E. Further, the letter noted that "Blacks Law Dictionary defines release as *to discharge a claim one has against another.* It does not state that the debt has been released by payment of a claim." *Id.* (emphasis in original).

After continuing complaints by Yourke, Experian updated the credit report in March, 2006 to indicate the small amounts actually paid by Yourke as the claim amount for the FTB liens. In April, 2006, Experian updated the credit report to indicate $ 0 for the amount of the federal lien. Yourke states that Trans Union and Equifax, the other two major credit reporting agencies, agreed to delete the tax lien information entirely from his report.

Yourke states that in January, 2006, Citibank denied his [*6] application for a credit card and Wells Fargo denied his application for a personal loan. Yourke also alleges that he suffered emotional distress.

On April 4, 2006, Yourke filed his complaint stating claims for negligent and willful non-compliance with the FCRA. Yourke alleges that Experian failed to comply with *15 U.S.C. § 1681e(b)*, which requires Experian to "use reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," and *15 U.S.C. § 1681i(a)(5)(A)*, which states that when "information is found to be inaccurate or incomplete or cannot be verified," Experian must "promptly delete that item of information from the consumer's file or modify that item of information as appropriate, based on the results of the reinvestigation."

Experian now moves for summary judgment on both claims, arguing that the inclusion of the liens, and the amounts for which they were filed, on Yourke's report was not incorrect and therefore triggered no duty to make any changes. Further, Experian argues that even if Yourke were able to demonstrate a triable issue of fact regarding its compliance with FCRA, Yourke has not provided any admissible [*7] evidence of damages stemming from its actions.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. *Fed. R. Civ. P. 56*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).*

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex, 477 U.S. at 324*; *Eisenberg, 815 F.2d at 1289.* The court must draw all reasonable inferences in favor of the

party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)*.

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

Where [*8] the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods. *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000)*.

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

Id.

If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim. *Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*; *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)*. If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the non-moving party to produce "specific evidence, through affidavits or admissible discovery [*9] material, to show that the dispute exists." *Bhan, 929 F.2d at 1409*.

If the moving party discharges its burden by negating an essential element of the non-moving party's claim or defense, it must produce affirmative evidence of such negation. *Nissan, 210 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.*

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

DISCUSSION

I. Violations of the FCRA

The FCRA creates a private right of action against credit reporting agencies for negligent or willful non-compliance with its duties. *15 U.S.C. §§ 1681n, 1681o*. Both of Yourke's claims require a prima facie showing of inaccurate information to proceed. *See Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1334 (9th Cir. 1995)*.

Experian argues that Yourke cannot demonstrate that there was any inaccuracy in his report. Experian [*10] cites *Cahlin v. General Motors Acceptance Corporation, 936 F.2d 1151 (11th Cir. 1991)*, for the proposition that an item on a credit report, even if potentially misleading, does not give rise to a private right of action if it is not technically incorrect. Experian argues that Yourke's request is similar to that in *Cahlin*, where the plaintiff sought to have all references to a prior loan dispute removed from his credit report. There, the plaintiff had terminated an auto lease agreement, believing that he could do so within ninety days without penalty or financial obligation. The lessor sent two notices to the plaintiff, indicating that he owed $ 3,842.44 and threatening legal action. The plaintiff later settled with the lessor's collection attorney by paying $ 2,000 as full satisfaction for the indebtedness. Between the time the plaintiff returned the car and the time he settled with the lessor, the lessor reported the account as delinquent and later as charged off as an active receivable. Therefore, the credit reporting agency listed an "I9" rating, indicating a charged off account, with a balance due of $ 3,843.44.

After the plaintiff satisfied the terms of the settlement, the lessor [*11] informed the credit reporting agency that the loss had been paid in full and stated, "We would appreciate your marking your file accordingly." *Id. at 1155*. In response, the credit reporting agency kept the I9 rating, but changed the account balance to $ 0. Both the plaintiff and the lessor, at the plaintiff's request, continued to complain to the credit reporting agency, seeking deletion of I9 rating. The credit reporting agency first changed the rating on the account to an I1 rating, indicating that the account was paid within thirty days of billing but kept the I9 rating in the plaintiff's credit history. Eventually, based on instructions from the lessor, the agency removed all negative information about the lease account from the plaintiff's account history.

The Eleventh Circuit held that the inclusion of the negative history "was more accurate than the negative-free report that [the plaintiff] contends he should have received." *Id. at 1159 n.19*. In this case, it is undisputed

that the liens were valid when filed. As in *Cahlin,* reporting the liens as released, with the small amounts that Yourke paid to have them released, is more accurate than omitting any information regarding the [*12] liens. However, triable issues of fact remain concerning the accuracy of Yourke's report when he first requested it in October, 2005 for purposes of *§ 1681e(b)*, and the reasonableness of Experian's response to his complaints about the report for purposes of *§ 1681i(a).*

As recognized by the Eleventh Circuit in *Cahlin,* some courts have held that "factually correct information that could also be interpreted as being misleading or incomplete" is enough to sustain a claim under the FCRA. *Id. (citing Koropoulos v. Credit Bureau, Inc., 236 U.S. App. D.C. 136, 734 F.2d 37 (D.C. Cir. 1984); Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982); see also, Andrews v. Trans Union Corp., 7 F. Supp. 2d 1056, 1074 (C.D. Cal. 1998)* ("*Section 1681e(b)* targets not only strictly inaccurate information, but also information that is technically accurate but nevertheless misleading."), *rev'd in part on other grounds in Andrews v. TRW Inc., 225 F.3d 1063 (9th Cir. 2000).* The *Cahlin* court also noted that other courts allow the reporting of "factually correct information about a consumer that might nonetheless be misleading or incomplete in some respect." *Cahlin, 936 F.2d at 1157 (citing McPhee v. Chilton Corp., 468 F. Supp. 494 (D. Conn. 1978);* [*13] *Todd v. Associated Credit Bureau Servs., Inc., 451 F. Supp. 447 (E.D. Pa. 1977), aff'd mem., 578 F.2d 1376 (3d. Cir. 1978), cert. denied, 439 U.S. 1068, 99 S. Ct. 834, 59 L. Ed. 2d 33 (1979)).*

In *Koropoulos,* the D.C. Circuit followed the reasoning of *Alexander,* holding that *§ 1681e(b)* applies "to consumer reports even though they may be technically accurate, if it is shown that such reports are not accurate to the maximum possible extent." *734 F.2d at 42 (quoting Alexander, 553 F. Supp. at 952).* However, because the statute requires only maximum *possible* accuracy, the court held that a balancing test should be used to determine whether a reporting agency has violated *§ 1681e(b). Id.* Under this test, the court should

> weigh the potential that the information will create a misleading impression against the availability of more accurate or complete information and the burden of providing such information. Clearly the more misleading the information [i.e., the greater the harm it can cause the consumer] and the more easily available the clarifying information, the greater the burden upon the consumer reporting agency to provide this clarification. Conversely, if the misleading information is of relatively insignificant [*14] value, a consumer reporting agency should not be required to take on a burdensome task in order to discover or provide additional or clarifying data, and it should not be penalized under this section if the procedures used are otherwise reasonable.

Id. (quoting Alexander, 553 F. Supp. at 952) (alterations in original).

Other courts have similarly held that technical accuracy is not sufficient to satisfy *§ 1681e(b). See, e.g., Dalton v. Capital Associated Indus., 257 F.3d 409, 415 (4th Cir. 2001)* ("A report is inaccurate when it is 'patently incorrect' or when it is 'misleading in such a way and to such an extent that it can be expected to [have an] adverse[]' effect.) *(quoting Sepulvado v. CSC Credit Servs., 158 F.3d 890, 895 (5th Cir. 1998))* (alterations in original). The legislative history, which indicates that the FCRA was enacted "to protect consumers from being unjustly damaged because of inaccurate *or arbitrary* information," supports this broader interpretation of *§ 1681e.* S. Rep. No. 91-517, at 1 (1969) (emphasis added); *see also* 115 Cong. Rec. 2411 (1969) (statement of Sen. Proxmire) ("perhaps the most serious problem in the credit reporting industry is the problem of accurate [*15] *or misleading* information." (emphasis added)).

The Court finds that Experian's original reporting in October, 2005 of only two of the liens as released when all five had been recorded as released creates a triable issue of fact with respect to whether it violated *§ 1681e(b).* Further, after Yourke demonstrated that the liens had all been released with the payment of little or no money, Experian's continued inclusion of the liens as released but with the full amount for which they were originally filed could be viewed as misleading. A creditor who saw a tax lien filed for a large amount and released could reasonably believe that Yourke had in fact failed to pay that amount in taxes. Experian argues that its decision to change the report on the liens to state only the amount Yourke actually paid to have them released undermines Yourke's claims. However, Experian's failure to change the amount of the liens until five months after Yourke first complained, and only under continued pressure from Yourke, creates a triable issue of fact regarding the reasonableness of Defendant's reinvestigation process under *§ 1681i(a).*

II. Damages

In the alternative, Defendant argues that Yourke's claims fail [*16] as a matter of law because he has not produced evidence that any denial of credit was due to the inclusion of the tax liens on his credit report. How-

ever, the Ninth Circuit has held that evidence of "a failure to comply with *§ 1681e(b)* is actionable even absent a denial of credit" and noted that "'actual damages' has been interpreted to include recovery for emotional distress and humiliation." *Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).* At his deposition, Yourke testified that he experienced "anxiety, headaches, insomnia, anger, feelings of frustration, and helplessness, feelings of rage," which he attributed to the amount of effort he put into getting Experian to change his report combined with the feeling that he was being ignored. Anderson Declaration, Exhibit T at 84-85.

Therefore, the Court denies Defendant's motion for summary judgment on this ground.

III. Punitive Damages

Finally Defendant argues that Yourke's claim for punitive damages must fail because he cannot demonstrate that it willfully violated the FCRA. However, Defendant's argument is based on its assertion that it did not violate the FCRA. Therefore, the Court denies Defendant's motion [*17] to dismiss on this ground.

CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion for summary judgment (Docket No. 34). [3] As discussed at the hearing, the parties shall continue to try to settle this matter using the same mediator they have already used. If that is not possible, they shall request that the Court refer the case to a magistrate judge for a settlement conference. A pretrial conference will be held on August 7, 2007 at 2:00 PM. A four day jury trial is scheduled to begin on August 20, 2007 at 8:30 AM.

3 Defendant's motion in limine to exclude the testimony of Plaintiff's expert witness Evan Hendricks (Docket No. 35) is GRANTED for purposes of this motion. The motion to exclude Hendricks' testimony at trial is denied without prejudice to raising as a motion in limine at the pretrial conference.

IT IS SO ORDERED.

Dated: 6/20/07

CLAUDIA WILKEN

United States District Judge

DECLARATION OF SERVICE

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am over eighteen years of age, and not a party to the within cause. I am a resident of the County of Los Angeles, State of California. My business address is 5959 W. Century Blvd, Ste. 1214, Los Angeles, California 90045.

I sent the **RESPONDENT'S ANSWER BRIEF** on all interested parties in this action: as follows: Either via next-day delivery via Federal Express or by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail in the city of Los Angeles, California, addressed to the offices or residences as follows:

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Honorable Anthony J. Mohr, Judge Presiding
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Executed on July 14, 2010, at Los Angeles, California

Sue A. Vigil