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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Marilynn J. Ewing,

9 Plaintiff,

10 v.

11 Wells Fargo Bank and Wells Fargo
12 Financial Agency Co.,

13 Defendants.
14

No. CV11-8194-PCT-JAT

ORDER

15 Currently pending before the Court are Defendants' Motion to Dismiss (Doc. 4),
16 Motion to Dismiss Amended Complaint (Doc. 14), and Motion for Summary Disposition
17 (Doc. 15). The Court now rules on the Motions.

18 **I. BACKGROUND**

19 The following are the facts alleged in the Amended Complaint, which the Court
20 presumes true for purposes of resolving the motion to dismiss. On August 14, 2009,
21 Plaintiff Marilynn Ewing applied for a home equity line of credit from Wells Fargo Bank,
22 N.A. to consolidate credit card debt. She was pre-approved for the home equity line of
23 credit by Wells Fargo, N.A. on August 14, but was denied later the same day.

24 On August 21, 2009, Wells Fargo Bank, N.A. made a credit report inquiry on
25 Plaintiff. On that same day, Wells Fargo Bank, N.A. reported to Transunion a second
26 denial of a loan request, but Plaintiff did not make a second loan request. Plaintiff
27 notified Wells Fargo, N.A. in writing of the impermissible credit report inquiry and of the
28 erroneous report of a denial of credit. Plaintiff filed a police report for identity theft

1 regarding the alleged application for credit on or around August 21, 2009.

2 Plaintiff filed a complaint in state court on August 15, 2011 alleging claims under
3 the Fair Credit Reporting Act (the “FCRA”). (Doc. 1-1.) Defendants removed to this
4 Court on December 8, 2011. (Doc. 1.) Defendants filed a Motion to Dismiss Plaintiff’s
5 Complaint on December 15, 2011. (Doc. 4.)

6 Plaintiff filed both a Response to the Motion to Dismiss (Doc. 11) and an
7 Amended Complaint (Doc. 12) on January 26, 2012. Plaintiff filed her Amended
8 Complaint without leave of Court, even though the time for filing an amendment as of
9 right pursuant to Federal Rule of Civil Procedure 15(a)(1) had elapsed. Defendants
10 nonetheless consented to Plaintiff’s filing of the untimely Amended Complaint. (Doc.
11 13, p.2.)

12 Because Defendants consented to Plaintiff filing an Amended Complaint, the
13 Court will treat the Amended Complaint as the operative pleading in this case. The Court
14 therefore will deny the original Motion to Dismiss (Doc. 4) as moot because it does not
15 respond to the operative pleading.¹

16 After Plaintiff filed her Amended Complaint, Defendants filed the pending Motion
17 to Dismiss Amended Complaint (Doc. 14) pursuant to Federal Rule of Civil Procedure
18 12(b)(6) for failure to state a claim. When Plaintiff did not respond to that Motion within
19 the allotted time, Defendants filed a Motion for Summary Disposition (Doc. 15) on
20 March 8, 2012. Plaintiff filed an untimely response to the Motion to Dismiss on March
21 27, 2012. (Doc. 16.) Although Plaintiff did not file a timely Response, because she did
22 actually file a Response, to which Defendants filed a Reply without objection, the Court
23 will treat her Response as timely and will deny the Motion for Summary Disposition as
24 moot.

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27 ¹ Once a party files an amended pleading, the original pleading no longer performs
28 any function and thereafter is treated as “non-existent.” *Ferdik v. Bonzelet*, 963 F.2d
1258, 1262 (9th Cir. 1992).

1 II. LEGAL STANDARD

2 The Court may dismiss a complaint for failure to state a claim under Federal Rule
3 of Civil Procedure 12(b)(6) for two reasons: 1) lack of a cognizable legal theory and 2)
4 insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*
5 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

6 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet
7 the requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a
8 “short and plain statement of the claim showing that the pleader is entitled to relief,” so
9 that the defendant has “fair notice of what the . . . claim is and the grounds upon which it
10 rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v.*
11 *Gibson*, 355 U.S. 41, 47 (1957)).

12 Although a complaint attacked for failure to state a claim does not need detailed
13 factual allegations, the pleader’s obligation to provide the grounds for relief requires
14 “more than labels and conclusions, and a formulaic recitation of the elements of a cause
15 of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual
16 allegations of the complaint must be sufficient to raise a right to relief above a
17 speculative level. *Id.* Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion,
18 of entitlement to relief. Without some factual allegation in the complaint, it is hard to see
19 how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the
20 nature of the claim, but also ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright
21 & A. Miller, *Federal Practice and Procedure* §1202, pp. 94-95 (3d ed. 2004)).

22 Rule 8’s pleading standard demands more than “an unadorned, the defendant-
23 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(citing
24 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions
25 will not suffice. To survive a motion to dismiss, a complaint must contain sufficient
26 factual matter, which, if accepted as true, states a claim to relief that is “plausible on its
27 face.” *Iqbal*, 556 U.S. at 678. Facial plausibility exists if the pleader pleads factual
28 content that allows the court to draw the reasonable inference that the defendant is liable

1 for the misconduct alleged. *Id.* Plausibility does not equal “probability,” but plausibility
2 requires more than a sheer possibility that a defendant acted unlawfully. *Id.* “Where a
3 complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops
4 short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citing
5 *Twombly*, 550 U.S. at 557).

6 In deciding a motion to dismiss under Rule 12(b)(6), a court must construe the
7 facts alleged in the complaint in the light most favorable to the drafter of the complaint
8 and the court must accept all well-pleaded factual allegations as true. *See Shwarz v.*
9 *United States*, 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, courts do not have to
10 accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478
11 U.S. 265, 286 (1986).

12 **III. ANALYSIS AND CONCLUSION**

13 Defendants argue that Plaintiff has not stated a claim under the FCRA for false
14 reporting or for improper credit inquiry. The Court will deal with each claim in turn.

15 **A. False Reporting**

16 Defendants assert that Plaintiff has failed to state a claim for false reporting
17 because she did not allege that she submitted a 15 U.S.C. §1681s-2(b)(1) notice of
18 dispute to the credit reporting agency. Defendants further argue that Plaintiff’s reporting
19 of the problem directly to Defendants did not cure this defect.

20 Congress enacted the FCRA to ensure fair and accurate credit reporting, to
21 promote efficiency in the banking system, and to protect consumer privacy. *Gorman v.*
22 *Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009). To ensure accurate
23 credit reporting, the FCRA imposes some duties on the sources that provide information
24 to credit reporting agencies or “furnishers,” as they are called in the statute. *Id.* Section
25 1681s-2 prescribes two categories of responsibility for furnishers of information to credit
26 reporting agencies. *Id.* at 1564.

27 Subsection (a) outlines furnishers’ duty to provide accurate information to credit
28 reporting agencies. *Id.*; 15 U.S.C. §1681s-2(a). Subsection (b) imposes certain

1 obligations, including duties to investigate, that are triggered when a furnisher receives
2 notice from a credit reporting agency that the consumer disputes the information provided
3 by the furnisher. *Id.*; 15 U.S.C. §1681s-2(b). Subsection (b) duties arise only after the
4 furnisher receives notice of a dispute from a credit reporting agency; notice of a dispute
5 sent to the furnisher directly from the consumer does not trigger the duties. *Gorman*, 584
6 F.3d at 1154.

7 The FCRA expressly creates a private right of action for willful or negligent
8 noncompliance. *Id.* (citing 15 U.S.C. §§1681n & o). But section 1681s-2 limits this
9 private right of action to claims arising under subsection (b), the duties triggered upon
10 notice of a dispute from a credit reporting agency. 15 U.S.C. §1681s-2(c). Duties
11 imposed on furnishers under subsection (a) are enforceable only by government agencies.
12 *Gorman*, 584 F.3d at 1154.

13 Plaintiff alleges that Defendant Wells Fargo, N.A., who is a furnisher under the
14 FCRA, inaccurately reported to Transunion, a credit reporting agency, that Wells Fargo
15 had denied a second loan request from Plaintiff. Plaintiff alleges she never filled out a
16 second loan application. Plaintiff further alleges that she notified Wells Fargo, N.A. of
17 the erroneous report of a denial of credit. But Plaintiff does not allege that she submitted
18 a notice of dispute to Transunion.

19 Consumers have a private right of action under the FCRA against a furnisher for
20 false reporting only for violations of 15 U.S.C. §1681s-2(b). And a furnisher's
21 subsection (b) duties are triggered only if a consumer sends a §1681i notice of dispute to
22 the credit reporting agency. Because Plaintiff has not alleged that she sent such a notice
23 to Transunion, her claim for false reporting against Defendants necessarily fails. The
24 Court therefore will grant Defendants' Motion to Dismiss Amended Complaint with
25 respect to the false reporting claim.

26 **B. Improper Credit Report Inquiry**

27 Defendants argue that Plaintiff has failed to state a claim for an improper credit
28 inquiry because she has not alleged plausible factual allegations that Wells Fargo

1 obtained a credit report with no permissible purpose. Defendants contend that the
2 allegations in the Amended Complaint are consistent with at least three of the permissible
3 purposes for a credit inquiry listed in 15 U.S.C. §1681b(a)(3).

4 The FCRA provides that a consumer reporting agency may furnish a consumer
5 report under the following circumstances:

6 (3) To a person to which it has reason to believe –

7 (A) intends to use the information in connection with a credit
8 transaction involving the consumer on whom the information is to be
9 furnished and involving the extension of credit to, or review or collection of
an account of, the consumer; or

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11 (F) otherwise has a legitimate business need for the information –

12 (i) in connection with a business transaction that is initiated
13 by the consumer; or

14 (ii) to review an account to determine whether the consumer
15 continues to meet the terms of the account.

16 15 U.S.C. §1681b(a)(3)(A),(F)(i)(ii). A consumer whose credit report is obtained for
17 reasons other than those allowed in the statute may recover actual and punitive damages
18 and attorneys' fees and costs from the user of such information. *Mone v. Dranow*, 945
19 F.2d 306, 307-08 (9th Cir. 1991)(citing 15 U.S.C. §1681n).

20 Plaintiff alleges in the Amended Complaint that on August 21, 2009, after Wells
21 Fargo had denied her a loan, Wells Fargo reported an additional credit report inquiry
22 even though it "had no permissible purpose for obtaining a credit report." (Doc. 12 ¶9.)
23 Viewing this allegation in the light most favorable to Plaintiff, Plaintiff alleges that
24 because Wells Fargo had already denied her loan application and because she did not
25 make a second loan application, Wells Fargo no longer had a permissible purpose for
26 making a credit inquiry regarding the loan application.

27 But, as Defendants point out, there could be many other permissible reasons for
28 Wells Fargo to make a credit inquiry regarding Plaintiff. Moreover, the allegation that
Plaintiff filed a police report for identity theft might indicate that someone used her
identity to apply for another loan or some other credit transaction with Wells Fargo, in
which case Wells Fargo might have had a legitimate reason for pulling Plaintiff's credit

1 report.

2 The Court does not have to presume Plaintiff's legal conclusion that Wells Fargo
3 "had no permissible purpose for obtaining a credit report" is true. And Plaintiff must do
4 more than simply make this bald allegation to survive a motion to dismiss. Plaintiff must
5 make plausible factual allegations, not legal conclusions, demonstrating that Wells Fargo
6 did not have a permissible purpose for making the credit inquiry on August 21. Because
7 she had not done so, the Court will grant Defendants' Motion to Dismiss Amended
8 Complaint with regard to Plaintiff's impermissible credit inquiry claim as well.

9 Plaintiff did not seek leave to amend her Amended Complaint. But the Ninth
10 Circuit Court of Appeals has instructed district courts to grant leave to amend, *sua*
11 *sponte*, when dismissing a case for failure to state a claim, unless the court determines
12 that the pleading could not possibly be cured by the allegation of other facts. *Lopez v.*
13 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)(quoting *Doe v. United States*, 58 F.3d 494,
14 497 (9th Cir. 1995)). Because the Court cannot say that Plaintiff could not cure the
15 deficiencies of the Amended Complaint with the allegation of additional facts, the Court
16 will give Plaintiff leave to file a Second Amended Complaint.

17 But the Court cautions Plaintiff that this will be her last bite at the apple. The
18 Court can deny leave to amend when a party repeatedly fails to cure the deficiencies of
19 her pleading. In the Second Amended Complaint, Plaintiff must plead plausible facts
20 demonstrating Defendants' liability and must also identify which statutory sections she
21 claims Defendants violated. Further, she must plead with particularity what damages she
22 suffered as a result of Defendants' actions. It is not sufficient to simply allege that she
23 was damaged.

24 Accordingly,

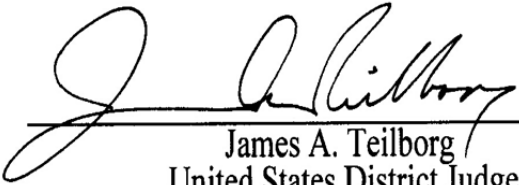
25 **IT IS ORDERED** GRANTING Defendants' Motion to Dismiss Amended
26 Complaint (Doc. 14) with leave to amend.

27 **IT IS FURTHER ORDERED** that Plaintiff must file her Second Amended
28 Complaint within ten (10) days of the date of this Order. If Plaintiff fails to file a Second

1 Amended Complaint within ten days, the Clerk shall dismiss this case without further
2 notice pursuant to Federal Rule of Civil Procedure 41(b) for failure to comply with a
3 Court order.

4 **IT IS FURTHER ORDERED** DENYING as moot Defendants' Motion to
5 Dismiss (Doc. 4) and Motion for Summary Disposition (Doc. 15).

6 Dated this 21st day of May, 2012.

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11 James A. Teilborg
12 United States District Judge
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