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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

NANCY S. KEETCH and RODNEY A.  
KEETCH,

Plaintiffs,

vs.

SAXON MORTGAGE SERVICES,  
COMMENCEMENT OF DISCOVERY  
INC., a Texas Corporation, OCWEN LOAN  
SERVICING, LLC, a Delaware Limited  
Liability Company; SPECIALIZED LOAN  
SERVICING LLC, a Delaware Limited  
Liability Company; EQUIFAX  
INFORMATION SERVICES, LLC, a  
Georgia Limited Liability Company;  
EXPERIAN INFORMATION SOLUTIONS,  
INC., an Ohio Corporation; and TRANS  
UNION LLC, a Delaware Limited Liability  
Company,

Defendants.

NO. 13-CV-0332-JLQ

ORDER DENYING DEFENDANT  
OCWEN'S MOTION TO DISMISS  
AND DIRECTING SUPPLEMENTAL  
BRIEFING ON ISSUE OF  
PREEMPTION

BEFORE THE COURT is Defendant Ocwen Loan Servicing LLC's Motion to Dismiss Plaintiffs' Complaint. (ECF No. 16). Plaintiffs opposed the Motion (ECF No. 28) and Ocwen replied (ECF No. 32). For the reasons set forth below, Ocwen's Motion is **DENIED**.

**I. BACKGROUND**

Plaintiff originally filed this action in Spokane County Superior Court. Defendant Trans Union LLC removed the case to this court on September 17, 2013. In the

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Complaint, Plaintiffs allege two causes of action against Defendant Ocwen: (1) violation of 15 U.S.C. § 1681s-2(b) of the Fair Credit Reporting Act; and (2) violation of Washington's Consumer Protection Act, RCW 19.86.020. The following background is set forth in the Complaint.

In 1998, Plaintiffs obtained a loan in the amount of \$100,300 to purchase a residence at 1217 S. Jefferson Street in Spokane Washington. (ECF No. 20). In 2001, Plaintiffs sold the property in a short sale leaving a deficiency of \$32,377.86 on the loan. (ECF No. 1, Ex. B at ¶ 4.4). On April 25, 2001, Plaintiffs executed a Promissory Note in favor of Meritech Mortgage Services in the amount of \$10,000 to satisfy the deficiency. *Id.* On January 6, 2005, Plaintiffs filed for bankruptcy. *Id.* Saxon was servicing the Note and asserted a claim in the bankruptcy proceedings in the amount of \$8,530.68. Plaintiffs allege the amount owing on the Note was paid through the bankruptcy proceedings. On January 10, 2008, Plaintiffs Chapter 13 bankruptcy was discharged. *Id.* at ¶ 4.18. On August 19, 2008, Plaintiffs' counsel sent Saxon a letter asking Saxon to stop collection notices and reminding Saxon of the bankruptcy discharge of the Meritech debt.

In April 2012 (after Saxon was allegedly acquired by Ocwen), Saxon transferred the "servicing" of the allegedly discharged Note to Ocwen. *Id.* at ¶ 4.32. Plaintiffs received a letter dated April 11, 2012 from Ocwen stating the unpaid debt was \$3,371.76. Plaintiffs also allege they received collection letters from Ocwen dated April 17, 2012, April 21, 2012, and April 23, 2012. Plaintiffs responded to Ocwen and forwarded to it documentation it had previously provided to Saxon. Plaintiffs received additional collection letters and notices from Ocwen dated May 30, 2012, June 4, 2012, June 13, 2012, June 26, 2012, August 26, 2012 and December 31, 2012. *Id.* at ¶¶ 4.46, 4.47, 4.48, 4.49, 4.51, 4.65. As of August 29, 2012 Specialized Loan Servicing, LLC became the "servicer" of the Note.

Both of Plaintiffs' credit reports dated August 22, 2012 showed that they had an Ocwen account that was a "conventional mortgage" that was 120 days late as of May

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2012. *Id.* at ¶¶ 4.69, 4.72, 4.73, 4.80. On September 11, 2012, Plaintiffs sent the three  
2 Defendant credit reporting agencies consumer dispute letters disputing the inaccurate  
3 Ocwen account. *Id.* at ¶ 4.81.

4 The Complaint alleges that on September 18, 2012, Plaintiff Rodney Keetch  
5 received a response from Defendant Equifax stating that "[Equifax] 'researched' the  
6 Ocwen account, and 'the creditor has verified to our company that the current status is  
7 being reported correctly'" and the status of the account was "balance \$3,298; amount past  
8 due \$778; date of first delinquency February 2012; collection account; conventional  
9 mortgage." *Id.* at ¶ 4.85, 4.86. On September 19, 2012, Plaintiff Nancy Keetch received  
10 a different response from Equifax stating the Ocwen account had been researched and  
11 "this item has been updated to report as paid in full," but also listed a status of "date of  
12 first delinquency February 2012; over 120 past due; conventional mortgage; transferred  
13 or sold." *Id.* at ¶ 4.90.

## 14 **II. LEGAL STANDARD**

### 15 **A. Fed.R.Civ.P. 12(b)(6)**

16 A complaint may be dismissed for failure to state a claim for which relief can be  
17 granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed.R.Civ.P.  
18 12(b)(6). "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal  
19 sufficiency of the complaint." *N. Star. Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581  
20 (9th Cir.1983). In ruling on a motion to dismiss under Rule 12(b)(6), the court takes "all  
21 allegations of material fact as true and construe(s) them in the lights most favorable to  
22 the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th  
23 Cir.1990). The complaint need not contain "detailed factual allegations," but must allege  
24 facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,  
25 556 U.S. 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).

26 "Dismissal with prejudice and without leave to amend is not appropriate unless it  
27 is clear ... that the complaint could not be saved by amendment." *Eminence Capital, LLC*  
28 *v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). However, "[l]eave to amend need

1 not be granted when an amendment would be futile.” *In re Vantive Corp. Sec. Litig.*, 283  
2 F.3d 1079, 1097 (9th Cir. 2002).

### 3 **B. Judicial Notice**

4 Defendant requests judicial notice of the Deed of Trust recorded on September 18,  
5 1998 in the Spokane County Recorder's (Auditor's) Office as Document Number  
6 4820112. (ECF Nos. 18, 20). This document is appropriate for judicial notice because it  
7 is a public record and is “not subject to reasonable dispute.” Fed.R.Evid. 201(b).

## 8 **III. DISCUSSION**

### 9 **A. Fair Credit Reporting Act**

10 Plaintiffs' Third Cause of Action alleges that Ocwen violated the Fair Credit  
11 Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x, by: 1) continuing to furnish  
12 information to CRAs without also stating that the debt was disputed; 2) "failing to fully  
13 and properly investigate" the Plaintiffs' disputes of Ocwen's representations; 3) "failing  
14 to review all relevant information..."; 4) "failing to accurately respond to CRAs"; 5)  
15 "failing to correctly report results of an accurate investigation to another credit reporting  
16 agency"; 6) "failing to permanently and lawfully correct its own internal records to  
17 prevent the re-reporting of the Furnishers' representation to the consumer credit reporting  
18 agencies." (ECF No. 1, Ex. B at ¶7.3).

19 Defendant argues that Plaintiffs' Complaint fails to state a claim under the Fair  
20 Credit Reporting Act § 1681s-2(b) because Plaintiffs fail to specifically plead that the  
21 Credit Reporting Agencies ("CRAs") notified Ocwen of the dispute. Plaintiffs contend  
22 they have adequately pleaded notification but request leave to amend, should the court  
23 decide the claim is inadequately pled.

24 The purpose of the FCRA is “to protect consumers against inaccurate and  
25 incomplete credit reporting.” *Nelson v. Chase Manhattan Mortg. Corp.*, 282 F.3d 1057,  
26 1059 (9th Cir. 2002). In addition to imposing duties on credit reporting agencies  
27 ("CRAs"), “the FCRA imposes some duties on the sources that provide credit  
28 information to CRAs, called ‘furnishers' in the statute.” *Gorman v. Wolpoff & Abramson*,

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*LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009). Title 15 U.S.C. § 1681s–2 outlines the duties of a furnisher, which include both providing accurate information to the CRA in the first instance (15 U.S.C. § 1681s–2(a)), but also investigating and/or correcting inaccurate information (15 U.S.C. § 1681s–2(b)). Although there is no private right of action under §1681s-2(a), a private right of action is permitted for a violation of § 1681s–2(b) which duties “arise only after the furnisher receives notice of dispute from a CRA; notice of a dispute received directly from the consumer does not trigger furnishers' duties under subsection (b).” *Id.* at 1154 (citing *Nelson*, 282 F.3d 1057, 1059 (9th Cir.2002)).

The Complaint alleges at ¶ 4.81 that on September 11, 2012, the Plaintiffs mailed dispute letters to all three Defendant CRAs. In ¶ 4.85 and ¶ 4.87 Plaintiffs allege that Mr. Keetch was informed by letter from Equifax dated September 18, 2012 that it had "researched" the Ocwen account, that "the creditor" (suggesting Ocwen) had verified the status of the account, and that information on his credit report was altered. Likewise, the Complaint alleges at ¶ 4.90 that Equifax informed Mrs. Keetch that it had "researched" the Ocwen account and as a result the information on her credit report was updated. Plaintiffs also allege that Mr. Keetch received notice from Experian stating it had "updated" Ocwen account information (¶ 4.95) and that Mrs. Keetch received a response from Trans Union that it had "investigated the Ocwen...item[]" (¶4.96).

In order to survive a Motion To Dismiss under Section 1681s-2(b), Plaintiffs need not specifically allege that the CRA notified the furnisher of the dispute. Indeed, this is a fact a plaintiff may not be able to plead at the time of the filing of the complaint because the FCRA does not require the CRA to notify the consumer when it reports the dispute to the furnisher. *See, Lang v. TCF Nat'l Bank*, 429 Fed.Appx. 464, 466-567 (7th Cir. Sept.21, 2007)(unpublished). Because Section 1681i(a)(2) of the FCRA requires a CRA to promptly notify a furnisher like Ocwen that a consumer has disputed particular information provided to the CRA, it is therefore plausible that Ocwen received notice when the Complaint alleges that (1) Plaintiffs notified a CRA of the disputed information; and (2) that the CRA pursued the dispute. Plaintiffs' alleged receipt of

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2 correspondence from the CRAs stating the dispute had been "researched,"  
3 "reinvestigated," or "verif[ied]" with "the creditor" is more than sufficient to suggest the  
4 plausibility of contact with the furnisher. Other courts agree and Ocwen does not cite a  
5 single case suggesting the pleading standard should be higher. *See, e.g., Lang*, 2007 WL  
6 2752360, at \*2 (7th Cir. Sept.21, 2007)(unpublished)(supra); *Eddins v. Cenlar FSB*,  
7 2013 WL 4054706 (W.D.Ky. 2013)(letter from Trans Union suggesting it had "verified"  
8 the account as accurate was sufficient to avoid dismissal of action under § 1681s2(b));  
9 *Miller v. Best Buy Co., Inc.*, 2013 WL 4502295 (D.Colo. 2013)(allegation that the credit  
10 bureaus "reinvestigat[ed]" was sufficient); *Wang v. Asset Acceptance LLC*, 2010 WL  
11 2985503 (N.D.Cal. July 27, 2010)(rejecting argument that plaintiff must allege  
12 additional facts about notice, including when CRA notified furnisher of the dispute  
13 because defendant "[did] not explain how Wang or similarly situated consumers would  
14 have access to those 'facts' without formal discovery").

15 Accordingly, the Complaint adequately states a claim pursuant to the Fair Credit  
16 Reporting Act §1681s-2(b) against Ocwen.

17 **B. Washington Consumer Protection Act**

18 Plaintiffs' Fifth Cause of Action *alternatively* alleges that the same conduct  
19 violating § 1681s-2 of FCRA, also violates the Washington Consumer Protection Act  
20 (CPA).

21 Ocwen moves to dismiss this claim on the ground that the elements of unfair  
22 conduct and injury are insufficiently pled. The CPA prohibits "[u]nfair methods of  
23 competition and unfair or deceptive acts or practices in the conduct of any trade or  
24 commerce." RCW 19.86.020. A private cause of action exists under the CPA if (1) the  
25 conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public  
26 interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge*  
27 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531  
28 (1986).

The court rejects Ocwen's contention that Plaintiffs' claim is inadequately pled

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2 because there are no "allegations that Ocwen has continued [after November 2012] to  
3 report improper information..." (ECF No. 16 at 7). To state a claim under the CPA, it is  
4 not necessary that the allegedly unfair conduct be ongoing for a certain length of time.  
5 For the first time, in its Reply Ocwen also raises the additional argument that the  
6 Complaint is deficient because "there are no factual allegations as to what recoverable  
7 injury Ocwen has caused." Ocwen correctly points out that personal injury damages for  
8 such things as inconvenience, mental distress, or embarrassment are not recoverable  
9 under the CPA. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27 (2009).  
10 However, the CPA's "injury" requirement is distinct from "damages" and covers a broad  
11 range of harm, including non-quantifiable losses (e.g., the alleged negative impact on  
12 credit history) or when "property interest or money is diminished because of the  
13 unlawful conduct even if the expenses caused by the statutory violation are minimal."  
14 *Mason v. Mortgage Am., Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990). The  
15 Complaint alleges Plaintiffs have had to pay increased interest on an auto loan as a result  
16 of the violation. ECF No. 1, Ex. B at ¶ 4.100.

17 Although Plaintiffs' CPA claim against Ocwen is not defective on the grounds  
18 argued by Ocwen in its Motion, it appears the Plaintiffs' CPA claim could be dismissed  
19 as to the Defendant furnishers because it is expressly preempted by language of the  
20 FCRA. Section 1681t of the FCRA provides, in pertinent part, that "[n]o requirement or  
21 prohibition may be imposed **under the laws of any State**-(1) with respect to any subject  
22 matter regulated under ... (F) **section 1681s-2** of this title, relating to the responsibilities  
23 of persons who furnish information to consumer reporting agencies ...." 15 U.S.C. §  
24 1681 t(b). The Ninth Circuit in *dicta* has indicated that under the preemption language  
25 of § 1681t(b), no claim can be brought under the other state statutes for conduct covered  
26 by 15 U.S.C. § 1681s-2. *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1026  
27 (9th Cir. 2009). The majority of and numerous other district courts have reached the  
28 same conclusion. *See e.g., Dvorak v. AMC Mortg. Services, Inc.*, 2007 WL 4207220, at  
\*5 (E.D.Wash. 2007)(J. Suko)(finding Plaintiffs' Washington CPA claim preempted by

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2 FCRA); *Howard v. Blue Ridge Bank*, 371 F.Supp.2d 1139, 1144 (N.D.Cal.2005) (finding  
3 UCL claim preempted because "Congress intended the FCRA to preempt state laws  
4 regarding the duties of furnishers and the remedies available against them, rather than  
5 allowing different liabilities for furnishers depending on the state of suit"); *Roybal v.*  
6 *Equifax*, 405 F.Supp.2d 1177, 1181 (E.D.Cal.2005) (finding UCL claim, among others,  
7 pre-empted and stating "[o]n its face, the FCRA precludes all state statutory or common  
8 law causes of action that would impose any "requirement or prohibition" on the  
9 furnishers of credit information"); *Jaramillo v. Experian Information Solutions, Inc.*, 155  
10 F.Supp.2d 356, 361–62 (E.D.Pa.2001) ("it is clear from the face of section  
11 1681t(b)(1)(F) that Congress wanted to eliminate all state causes of action 'relating to  
12 the responsibilities of persons who furnish information to consumer reporting agencies'  
13 ").

14 As the preemption issue was not addressed in the briefs, any party may, within **ten**  
15 **(10) days** from the date of this Order, file a supplemental brief, no longer than five (5)  
16 pages in length, explaining why the court should or should not dismiss Plaintiffs' CPA  
17 claim with prejudice against the furnishers on the grounds it is preempted by FCRA.

#### 18 **IV. CONCLUSION**

19 For the reasons set forth above, **IT IS HEREBY ORDERED:**

20 1. Defendant Ocwen's Motion to Dismiss (ECF No. 16) is **DENIED**.

21 2. Any party wishing to address the issue of preemption raised herein may file a  
22 supplemental brief no longer than five (5) pages within ten (10) days of this Order.

23 The Clerk of the Court shall enter this Order and provide copies to counsel.

24 Dated this 6th day of November, 2013.

25 s/ Justin L. Quackenbush  
26 JUSTIN L. QUACKENBUSH  
27 SENIOR UNITED STATES DISTRICT JUDGE  
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