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

9 Patrick Renner,

10 Plaintiff,

11 v.

12 Bank of America, N.A.,

13 Defendant.

No. CV-14-08051-PCT-JAT

**ORDER**

14 Previously in this case, Defendant moved to dismiss Plaintiff’s first amended  
15 complaint. In response to that motion to dismiss, Plaintiff moved to file a second  
16 amended complaint. Defendant opposed the motion to amend on futility grounds. The  
17 Court’s analysis of Plaintiff’s motion to amend, including Defendant’s futility argument,  
18 is repeated below:

19  
20 **III. MOTION TO AMEND WITH LEAVE OF COURT**

21 Plaintiff filed his Motion to Amend with the purpose of “correct[ing]  
22 deficiencies and add[ing] clarity” to his complaint. (Doc. 25 at 1). The  
23 Lodged SAC includes additional facts that the Court recounts below.

24 From July 1, 2011 until March 15, 2013, Defendant serviced  
25 Plaintiff’s mortgage, originally obtained from Countrywide Home Loans,  
26 Inc. in December 2006. (Doc. 26 at 1). In September 2012, Plaintiff became  
27 aware of alleged inaccuracies in his credit history when BBVA Compass  
28 Bank denied his application to refinance his mortgage due to “negative  
items” in Plaintiff’s credit history. (*Id.* at 2). In particular, Defendant  
reported that: (1) Plaintiff’s mortgage was “part of a Chapter 13  
bankruptcy”; (2) “the account was delinquent”; (3) “the account was  
closed”; and (4) the account had no payment history. (*Id.*).

Plaintiff filed complaints with multiple CRAs stating that the

1 reported information was inaccurate. (*Id.*). In October 2012, the CRAs  
2 notified Plaintiff that Defendant verified the information reported and  
3 determined it was correct. (*Id.*). Plaintiff wrote numerous letters to  
4 Defendant documenting why the information was allegedly inaccurate and  
5 incomplete. (*Id.*). Twice more Plaintiff filed complaints with the CRAs. (*Id.*  
6 at 2–3). Both times the CRAs responded that Defendant had verified the  
7 information being reported as correct. (*Id.*). In September 2013, J.P.  
8 Morgan Chase Bank denied Plaintiff’s application to refinance his  
9 mortgage due to negative information in his credit history. (*Id.* at 3).

10 Plaintiff now seeks to amend the FAC pursuant to Fed. R. Civ. P.  
11 15(a)(2) by including the above-stated facts related to Plaintiff’s FCRA  
12 claim. (*See* Doc. 25).

### 13 **A. Legal Standard**

14 A party may amend a pleading once as a matter of course within 21  
15 days after serving it or within 21 days of service of, among others, a Rule  
16 12(b)(6) motion. Fed. R. Civ. P. 15(a)(1). In all other circumstances, a  
17 party must seek leave to amend from the court. Fed. R. Civ. P. 15(a)(2).  
18 “The court should freely give leave when justice so requires.” *Id.*  
19 Additionally, there is a “longstanding rule that ‘[l]eave to amend should be  
20 granted if it appears at all possible that the plaintiff can correct the defect.’  
21 ” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Balistreri*,  
22 901 F.2d at 701). In determining whether to grant a motion to amend, a  
23 court should consider five factors: “(1) bad faith; (2) undue delay; (3)  
24 prejudice to the opposing party; (4) futility of amendment; and (5) whether  
25 the plaintiff has previously amended his complaint.” *Nunes v. Ashcroft*, 375  
26 F.3d 805, 808 (9th Cir. 2004). “Significantly, ‘[t]he party opposing  
27 amendments bears the burden of showing prejudice,’ futility, or one of the  
28 other permissible reasons for denying a motion to amend.” *Farina v.*  
*Compuware Corp.*, 256 F. Supp. 2d 1033, 1060 (D. Ariz. 2003) (quoting  
*DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987)).  
Additionally, the Ninth Circuit Court of Appeals recognizes that the  
complaint of a pro se plaintiff may be dismissed “only where ‘it appears  
beyond doubt that the plaintiff can prove no set of facts in support of his  
claim which would entitle him to relief.’ ” *Franklin v. Murphy*, 745 F.2d  
1221, 1228 (9th Cir. 1984) (quoting *Haines v. Kerner*, 404 U.S. 519, 521  
(1972)); *see also Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007)  
 (“Dismissal of a pro se complaint without leave to amend is proper only if  
it is absolutely clear that the deficiencies of the complaint could not be  
cured by amendment.”) (quoting *Schucker v. Rockwood*, 846 F.2d 1202,  
1203–04 (9th Cir. 1988)).

### **B. Analysis**

Here, Plaintiff has already amended the Complaint as a matter of  
right pursuant to Rule 15(a)(1) and seeks the Court’s leave to amend his

1 complaint pursuant to Rule 15(a)(2). (Doc. 25 at 1). Defendant argues that  
2 the Court should not grant Plaintiff's Motion to Amend because of  
3 Plaintiff's prior amendment (Doc. 23 at 5) and futility of amendment (Doc.  
27 at 1–2).

#### 4 **1. Prior Amendments**

5 Defendant first argues that the Court should deny Plaintiff's Motion  
6 to Amend because "Plaintiff has already had one opportunity to amend his  
7 Complaint." (Doc. 23 at 5).

8 The Court's discretion to deny an amendment is "particularly broad"  
9 where a plaintiff has previously amended his complaint. *Allen v. City of*  
10 *Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). The presence of prior  
11 amendments may persuade a court to deny leave, even in absence of the  
12 four other factors "when the movant present[s] no new facts but only new  
13 theories and provide[s] no satisfactory explanation for his failure to fully  
14 develop his contentions originally." *Id.* at 374.

15 The Lodged SAC provides nearly two pages of additional facts. (*See*  
16 *Doc. 26 at 1–3*). Moreover, the Lodged SAC provides no additional legal  
17 theories. (*See id.* at 1–5). Because Plaintiff's overwhelming purpose in  
18 seeking leave of court to amend is to add clarity to his existing claim, the  
19 presence of a prior amendment does not weigh against granting Plaintiff's  
20 Motion to Amend.

#### 21 **2. Futility**

22 Defendant next argues that the Court should deny Plaintiff's Motion  
23 to Amend because the Lodged SAC is futile. (Doc. 27 at 1–2).

24 Futility alone is enough to deny a motion for leave to amend. *Nunes*,  
25 375 F.3d at 808. A proposed amendment is futile only if "no set of facts can  
26 be proved under the amendment to the pleadings that would constitute a  
27 valid and sufficient claim." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214  
28 (9th Cir. 1988). Additionally, futility may be found where proposed  
amendments are "either duplicative of existing claims or patently frivolous,  
or both." *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995). The party  
opposing amendment bears the burden of proving futility. *Rodriguez v. City*  
*of Phoenix*, No. CV-11-01992-PHX-JAT, 2014 WL 1053602, at \*3 (D.  
Ariz. Mar. 19, 2014).

Once a plaintiff alleges that a CRA sent notice of a plaintiff's  
consumer dispute to the furnisher, the FCRA creates a private right of  
action, enabling consumer suits for willful (§ 1681(n)) and/or negligent (§  
1681(o)) noncompliance with the duties enumerated in § 1681s-2(b).  
*Gorman*, 584 F.3d at 1154. "The purpose of § 1681s-2(b) is to require  
furnishers to investigate and verify that they are in fact reporting complete  
and accurate information to the CRAs after a consumer has objected to the  
information in his file." *Id.* at 1164. As a result, after receiving a notice of a  
consumer dispute from a CRA, a furnisher must pursue a "reasonable"

1 investigation to determine whether the information is incomplete or  
2 inaccurate. *Id.* at 1157.

3 Defendant alleges that Plaintiff's SAC is futile because: (1) Plaintiff  
4 "provide[s] nothing to suggest [Defendant] was negligent in its  
5 investigation—except for the fact that [Defendant] disagreed with  
6 [Plaintiff's] dispute after conducting its own investigation"; (2) Plaintiff  
7 suggests that Defendant "investigated the dispute and determined it was not  
8 reporting inaccurate information"; and (3) Plaintiff "fails to allege how the  
9 information [provided by Defendant] is inaccurate." (Doc. 27 at 3).

10 **i. Plaintiff's Failure to Allege a Negligent**  
11 **Investigation**

12 Defendant's first argument is that the Lodged SAC is futile because  
13 Plaintiff fails to provide support that Defendant conducted a negligent  
14 investigation. This argument misstates Plaintiff's burden under the FCRA.  
15 To state a claim under the FCRA, Plaintiff must allege that Defendant  
16 negligently *and/or* willfully violated the duties enumerated in § 1681s-2(b).  
17 15 U.S.C. § 1681(n)-(o). Plaintiff alleges that he wrote "numerous letters"  
18 to Defendant both before and after he filed complaints with the CRAs.  
19 (Doc. 26 at 2–3). These letters contained "documented evidence that the  
20 [reported] information was inaccurate and incomplete." (*Id.* at 2). Even  
21 after receiving this "documented evidence," Defendant "continued to refuse  
22 to make corrections." (*Id.*). Pursuant to the FCRA, Plaintiff alleges that  
23 Defendant *willfully* violated its duty to conduct a reasonable investigation,  
24 as enumerated in § 1681s-2(b), by ignoring evidence showing that the  
25 reported information was inaccurate and incomplete. As a result, Plaintiff's  
26 failure to allege that Defendant's conducted a negligent investigation does  
27 not make the claim futile.

28 **ii. Plaintiff's Suggestion that Defendant**  
**Conducted an Investigation**

Defendant's second argument is that the Lodged SAC is futile  
because Plaintiff concedes that Defendant fulfilled its duties under the  
FCRA by suggesting that Defendant performed an investigation. (Doc. 27  
at 3). The FCRA requires furnishers "to conduct at least a reasonable, non-  
cursory investigation." *Gorman*, 584 F.3d at 1157. As a result, Defendant  
could conduct an *unreasonable* investigation and still be in violation of the  
FCRA. As a result, Plaintiff's suggestion that Defendant conducted an  
investigation does not necessarily render the Lodged SAC futile.

**iii. Plaintiff's Failure to Allege How the**  
**Reported Information was Inaccurate**

Defendant's third argument is that the Lodged SAC is futile because  
Plaintiff "fails to allege how the information [reported by Defendant] was  
inaccurate." (Doc. 27 at 3). In the Lodged SAC, Plaintiff alleges that  
Defendant's information was inaccurate because Defendant reported that

1 Plaintiff's "mortgage was part of a Chapter 13 bankruptcy, [that the  
2 account] was delinquent, that the account was closed, and [Defendant was]  
3 not reporting any payment history." (Doc. 26 at 2). These allegations  
4 provide Defendant with sufficient notice of the information Plaintiff claims  
5 to be inaccurate and incomplete. By specifying what reported information  
6 was allegedly inaccurate or incomplete, Plaintiff pleads a set of facts that  
7 constitutes a valid and sufficient claim under § 1681s-2(b). *See Moulton v.*  
8 *AmeriCredit Fin. Servs.*, 2005 WL 1522237, \*3 (N.D. Cal. June 28, 2005)  
(finding that a plaintiff pleaded sufficient facts to state a § 1681s-2(b) claim  
despite failing to allege with specificity how an identified inaccuracy was  
incorrect). As a result, the lack of specificity in *how* identified information  
was inaccurate does not necessarily render the Lodged SAC futile.

9 Accordingly, the Court finds that the Lodged SAC is not futile.  
10 Because Defendant argues no basis other than Plaintiff's prior amendment  
11 and futility of amendment for denying Plaintiff's Motion to Amend,  
Defendant has not met its burden.

12 Doc. 35 at 4-9. In the conclusion of this Order, the Court ordered the Clerk of the Court  
13 to file the lodged second amended complaint (because it was not futile), and ordered the  
14 Defendant to answer.  
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16 Instead of answering, Defendant move to dismiss the second amended complaint,  
17 re-urging all of its futility arguments in terms of failure to state a claim under Federal  
18 Rule of Civil Procedure 12(b)(6). For the reasons detailed by the analysis above, the  
19 Court finds the second amended complaint states a claim. Accordingly,  
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21 **IT IS ORDERED** that the motion to dismiss (Doc. 40) is denied. Defendant shall  
22 answer the second amended complaint within 10 days.  
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24 Dated this 26th day of August, 2014.

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28 James A. Teilborg  
Senior United States District Judge