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UNITED STATES DISTRICT COURT

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Northern District of California

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SCOTT RIEGER,

No. C 11-4202 MEJ

7

Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

8

AMERICAN EXPRESS COMPANY,

(Docket No. 4)

9

Defendant.

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I. INTRODUCTION

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Plaintiff Scott Rieger (“Plaintiff”) brings this action against Defendant American Express Company (“Defendant”), alleging violations of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq. Currently pending before the Court is Defendant’s Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 4. Because the Court finds this matter suitable for resolution based on the parties’ written submissions, the Court **VACATES** the hearing set for November 3, 2011. *See* Civil L.R. 7-1(b). After careful consideration of the parties’ arguments, the Court **GRANTS** Defendant’s motion for the reasons set forth below.

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II. BACKGROUND

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The following factual background is taken from Plaintiff’s Complaint. Dkt. No. 1. Plaintiff alleges that in June 2011, after examining his Experian consumer credit report, he discovered that Defendant pulled his credit report. *Id.* ¶¶ 6-7. Specifically, Plaintiff alleges that on the following dates, Defendant “initiated a pull of Plaintiff’s credit report from Experian without permissible purpose”: September 23, 2009; October 26, 2009; November 19, 2009; December 14, 2009; January 22, 2010; February 22, 2010; March 25, 2010; April 30, 2010; May 21, 2010; and June 23, 2010. *Id.* ¶¶ 8-17. Plaintiff further alleges these acts constitute violations of the FCRA. *Id.* ¶¶ 21, 25.

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On September 22, 2011, Defendant filed the present Motion to Dismiss. Dkt. No. 4. In its

1 motion, Defendant argues that Plaintiff fails to allege any improper purpose under the FCRA and it
2 is not required to guess as to which provision of law Plaintiff believes was violated, or what conduct
3 Plaintiff contends amounts to a violation. *Id.* at 6. Defendant further argues that while Plaintiff
4 asserts a claim under 15 U.S.C. § 1681b(f), this provision only applies to consumer reporting
5 agencies, not furnishers of credit information. *Id.* As Plaintiff admits that Defendant is a furnisher
6 of information within the meaning of the FCRA, (Compl. ¶¶ 20, 24), Defendant argues that no claim
7 can be brought against it under § 1681b(f).

8 Plaintiff filed his Opposition to Defendant's Motion on October 5, 2011. Dkt. No. 9. In his
9 Opposition, Plaintiff states that "It is difficult to comprehend the basis for [Defendant's] motion,
10 which appears to have been filed in bad faith." *Id.* at 1. Plaintiff argues that the allegations in his
11 Complaint are "crystal clear": "[Defendant] initiated 10 pulls of Plaintiff's credit report from
12 Experian without permissible purpose," and this "is inherently a clear-cut violation of the [FCRA]." "
13 *Id.* at 2. Plaintiff maintains that the Court "should not tolerate an utterly frivolous motion such as
14 this by a party who does not wish to have its illegal activities exposed." *Id.*

15 **III. LEGAL STANDARD**

16 A motion to dismiss a complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6)
17 tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Black*, 250 F.3d 729,
18 732 (9th Cir. 2001). Rule 8(a)(2) requires that a pleading stating a claim for relief contain "a short
19 and plain statement of the claim showing that the pleader is entitled to relief." The function of this
20 pleading requirement is to "give the defendant fair notice of what the . . . claim is and the grounds
21 upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While a complaint
22 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's
23 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and
24 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual
25 allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555 (internal
26 citations and parentheticals omitted). In considering a 12(b)(6) motion, "[a]ll allegations of material
27 fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory
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1 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for
2 failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also*
3 *Twombly*, 550 U.S. at 555. The court “may generally consider only allegations contained in the
4 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice[.]”
5 *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold and Easement in the*
6 *Cloverly Subterranean, Geological Formation*, 524 F.3d 1090, 1096 (9th Cir. 2008); *United States*
7 *v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

8 If the court dismisses the complaint, it should grant leave to amend even if no request to
9 amend is made “unless it determines that the pleading could not possibly be cured by the allegation
10 of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*quoting Cook, Perkiss and*
11 *Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

12 IV. DISCUSSION

13 The purpose of the FCRA is “to require that consumer reporting agencies adopt reasonable
14 procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and
15 equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper
16 utilization of such information” 15 U.S.C. § 1681(b). “There are essentially three types of
17 actors which interplay in suits under the FCRA, namely 1) consumer reporting agencies, 2) users of
18 consumer reports, and 3) the furnishers of information to consumer reporting agencies.”
19 *Vazquez-Garcia v. Trans Union De Puerto Rico*, 222 F. Supp. 2d 150, 153-54 (D.P.R. 2002). Here,
20 Plaintiff admits that Defendant “is a furnisher of information within the meaning of the FCRA.”
21 Compl. ¶¶ 20, 24.

22 Under the FCRA, “furnishers” of credit are only liable as set forth in 15 U.S.C. § 1681s-2.
23 Under § 1681s-2, a furnisher of credit is liable for violating “the duty to provide accurate
24 information, [§ 1681s-2(a),] and the duty to undertake an investigation upon receipt of notice of
25 dispute from a consumer reporting agency [§ 1681s-2(b)].” *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1,
26 11 (D. Mass. 2004) (*quoting Carney v. Experian Info. Solutions, Inc.*, 57 F. Supp. 2d 496, 501 (W.
27 D. Tenn. 1999)). Pursuant to 15 U.S.C. §§ 1681s-2(c)(1) and 1681s-2(d), enforcement of violations
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1 of § 1681s-2(a) is limited exclusively to designated state and federal officials. Consequently, courts
2 have consistently held that there is no private action for violations of § 1681s-2(a). *See, e.g., Gibbs*,
3 336 F. Supp. 2d at 11; *Aklagi v. NationsCredit Fin. Servs. Corp.*, 196 F. Supp. 2d 1186, 1192 (D.
4 Kan. 2002); *Carney*, 57 F. Supp. 2d at 502.

5 A private cause of action is available under § 1681s-2(b). *Gibbs*, 336 F. Supp. 2d at 11.
6 However, such an action is only triggered when a furnisher of information receives a notice of a
7 consumer dispute from a credit reporting agency. *Peasley v. Verizon Wireless (VAW) LLC*, 364 F.
8 Supp. 2d 1198, 1200 (S.D. Cal. 2005) (“Courts have consistently held that for the duty imposed by §
9 1681s-2(b) to be triggered, the furnisher of information must have received notice of the dispute
10 from a consumer reporting agency, not from the consumer.”); *Royal v. Equifax*, 405 F. Supp. 2d
11 1177, 1179-80 (E.D. Cal. 2005) (recognizing “that a private right of action against a furnisher of
12 credit information exists only if the disputatious consumer notifies the CRAs in the first instance”).
13 “A furnisher is liable under the FCRA only if it does not respond to a formal notice of consumer
14 dispute from a consumer reporting agency.” *Arikat v. JP Morgan Chase & Co.*, 430 F. Supp. 2d
15 1013, 1023-25 (N.D. Cal. 2006) (dismissing cause of action for violation of FCRA for failure to
16 state a claim); *see also* 15 U.S.C. § 1681s-2; 15 U.S.C. § 1681i(a)(2); *Nelson v. Chase Manhattan*
17 *Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir. 2002) (holding that Congress set up 15 U.S.C. §
18 1681s-2(b) as a “filtering mechanism” wherein a disputatious consumer notifies a consumer
19 reporting agency which in turns notifies the furnisher, and only a nonresponsive furnisher may be
20 privately sued).

21 When a furnisher receives such a notice, it must conduct an investigation, review
22 information from the credit reporting agency, report the results of the investigation to the credit
23 reporting agency, and, if the investigation uncovers that information was incorrectly furnished,
24 report the inaccuracies to all consumer reporting agencies possessing the incorrect information.
25 *Nelson*, 282 F.3d at 1060; 15 U.S.C. §1681s-2(b).

26 Here, Plaintiff fails to allege that Defendant received any notice of his dispute from a credit
27 reporting agency, which is necessary to trigger a private cause of action under § 1681s-2(b). Thus,
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1 Plaintiff's claim is subject to dismissal because he has failed to allege the perquisites to bring a
2 claim under §1681s-2(b). *See Peasley*, 364 F. Supp. 2d at 1200 (dismissing action because “[t]he
3 first amended complaint does not allege that [Defendant] was ever notified by a credit reporting
4 agency Thus, the complaint fails to state a claim for violation of §1681s-2(b) upon which relief
5 can be granted.”); *Abouelhassan v. Chase Bank*, 2007 WL 3010421, at *3 (N.D. Cal. Oct. 12, 2007)
6 (FCRA claim dismissed because “Plaintiff has not met the pleading requirements for a §
7 1681s-2(a)(1)(B) claim against a furnisher. Specifically, Plaintiff does not allege that: (1) he
8 notified the CRA of any inaccuracies; (2) the CRA determined they were viable; and (3) Chase was
9 contacted by the CRA.”).

10 **V. CONCLUSION**

11 For the reasons set forth above, the Court **GRANTS** Defendant's motion to dismiss.
12 However, the Court finds that the deficiencies in Plaintiff's Complaint could possibly be cured by
13 the allegation of other facts. Accordingly, dismissal is with leave to amend. Within 30 days from
14 the date of this Order, Plaintiff may file an amended complaint if he is able to allege the following
15 under 15 U.S.C. § 1681s-2(b): (1) he contacted a credit reporting agency; (2) the agency, in turn,
16 submitted a formal notice of consumer dispute to Defendant; and (3) Defendant failed to respond to
17 the notice. As Plaintiff could have provided this information in support of his Opposition, he should
18 be mindful that bare allegations will not be accepted. Ideally, Plaintiff should attach documentation
19 of the consumer dispute from the credit reporting agency. If documentation is not available, he must
20 at least provide factual allegations to support his claim, such as when he submitted his claim and to
21 which credit reporting agency. If Plaintiff fails to file an amended complaint in compliance with this
22 Order, this case shall be deemed dismissed with prejudice and the Clerk of Court shall terminate the
23 case.

24 **IT IS SO ORDERED.**

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26 Dated: October 25, 2011

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Maria-Elena James
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

4 || SCOTT RIEGER

Plaintiff,

Case Number: 11-04202 MEJ

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CERTIFICATE OF SERVICE

7 AMERICAN EXPRESS

Defendant.

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on October 25, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

14 Scott Rieger
2697 Parkside Drive
15 Fremont, CA 94536

Dated: October 25, 2011

Richard W. Wiekling, Clerk
By: Brenda Tolbert, Deputy Clerk