United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REBECCA MENSAH, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., et al., Defendants.	Case No. 16-cv-05689-WHO Re: Dkt. Nos. 17, 23
REGGIE SATO, Plaintiff, v. EQUIFAX, INC., et al., Defendants.	Case No. 16-cv-05702-WHO Re: Dkt. No. 10
PAUL COLLINS, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., et al., Defendants.	Case No. 16-cv-05715-WHO Re: Dkt. Nos. 19, 25
MELVIN CRAVEN, Plaintiff, v. EQUIFAX, INC., et al., Defendants.	Case No. 16-cv-06318-WHO Re: Dkt. No. 21

MARIA CHAVEZ, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., et al., Defendants.	Case No. 16-cv-06358-WHO Re: Dkt. No. 20
CAROL CONE, Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., et al., Defendants.	Case No. 16-cv-06359-WHO Re: Dkt. Nos. 14, 28 **ORDER GRANTING MOTIONS TO DISMISS**

United States District Court
Northern District of California

INTRODUCTION

Plaintiffs in the six above captioned cases bring these actions for alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681i, 1681s-2(b), and the California Consumer Credit Reporting Agencies Act ("CCRAA"), California Civil Code § 1785.25(a), against several credit reporting agencies ("CRAs") and data furnishers because of reporting related to their bankruptcies and the confirmation of their plans under Chapter 13. Defendants have moved to dismiss the complaints. My colleagues in this District have many similar cases pending before them, so I have the benefit of their thoughtful analyses of the various pleadings issues raised in these motions. And because of the high degree of similarity between the complaints and the common legal issues raised by defendants, it is appropriate to resolve all the motions to dismiss in a single order. For the reasons discussed below, the motions to dismiss are GRANTED with leave to amend.

BACKGROUND[1]

I. FACTUAL BACKGROUND

All of the plaintiffs filed for Chapter 13 bankruptcy: Rebecca Mensah on June 27, 2011; Reggie Sato on August 31, 2011; Paul Collins on November 25, 2015; Melvin Craven on March 20, 2012; Maria Chavez on February 7, 2013; and Carol Cone on December 31, 2012.[2] Chapter 13 "affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property. To proceed under Chapter 13, a debtor must propose a plan to use future income to repay a portion (or in the rare case all) of his debts over the next three to five years." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1690, 191 L. Ed. 2d 621 (2015).

Each plaintiff's plan was confirmed and allowed for unsecured creditors to receive a specified percentage of disbursement of their filed claims: Mensah's plan allowed 0% and was confirmed on September 1, 2011; Sato's plan allowed 100%, confirmed May 10, 2012; Collins' plan allowed 100%, confirmed March 8, 2016; Craven's plan allowed 3.06%, confirmed November 13, 2012; Chavez's plan allowed 100%, confirmed February 7, 2013; and Cone's plan allowed 100%, confirmed December 13, 2013.[3]

After plan confirmation, each plaintiff ordered a "three bureau credit report" from Experian.[4] On these reports, plaintiffs noticed a varying number of trade lines "reporting

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[1] The following requests for judicial notice of various documents filed in plaintiffs' bankruptcy proceedings are GRANTED: *Mensah*, No. 16-cv-5689, Dkt. No. 18 ("*Mensah* RJN by SLS"), Dkt. No. 43 ("*Mensah* RJN by Pl."); *Sato*, No. 16-cv-5702, Dkt. No. 11 ("*Sato* RJN by SLS"). *See Rosales–Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that [a court] may take judicial notice of judicial proceedings in other courts.").

[2] *Mensah*, No. 16-cv-5689, Complaint ("*Mensah* Compl.") (Dkt. No. 1) ¶ 93; *Sato*, No. 16-cv-5689, Complaint ("*Sato* Compl.") (Dkt. No. 1) ¶ 93, SLS Request for Judicial Notice ("*Sato* RJN by SLS") (Dkt. No. 11), Ex. 1; *Collins*, No. 16-cv-5715, Complaint ("*Collins* Compl.") (Dkt. No. 1) ¶ 86; *Craven*, No. 16-cv-6318, Complaint ("*Craven* Compl.") (Dkt. No. 1) ¶ 93; *Chavez*, No. 16-cv-6358, Complaint ("*Chavez* Compl.") (Dkt. No. 1) ¶ 87; *Cone*, No. 16-cv-6359, Complaint ("*Cone* Compl.") (Dkt. No. 1) ¶ 87.

[3] *Mensah* Compl. ¶¶ 96-97; *Sato* Compl. ¶¶ 96-97, RJN by SLS, Ex. 3; *Collins* Compl. ¶¶ 89-90; *Craven* Compl. ¶¶ 99-100; *Chavez* Compl. ¶¶ 93-94; *Cone* Compl. ¶¶ 93-94.

[4] *Mensah* Compl. ¶ 98; *Sato* Compl. ¶ 98; *Collins* Compl. ¶ 91; *Craven* Compl. ¶ 111; *Chavez* Compl. ¶ 105; *Cone* Compl. ¶ 105.

inaccurate, misleading, or incomplete information that did not comport with credit reporting industry standards."[5] Plaintiffs allege that these trade lines continued to report plaintiffs' accounts with past due balances, inaccurate balances, monthly payments, in collections, charged off, and/or open.[6] Some also failed to note that the plaintiffs were making payments on the accounts through their Chapter 13 plans.[7] Plaintiffs do not specify in their complaints which trade lines contained this allegedly inaccurate information.

Plaintiffs disputed these allegedly inaccurate trade lines by mail to three credit reporting agencies ("CRAs"): Experian, Equifax, and TransUnion, LLC.[8] Their letters stated that plaintiffs had filed for bankruptcy and that the creditors "were not reporting the bankruptcy accurately or worse not at all;" requested that the creditors investigate "the proper way to report" the bankruptcies; and asserted that there should not be any notations of a past due balance, charge off, monthly payments, transferred or sold, or in collections.[9] Each CRA allegedly received the dispute letters and sent the disputes to each data furnisher via an automated credit dispute verification ("ACDV").[10] Plaintiffs also allege, however, that "[t]he most basic investigation required each CRA to send all relevant information via an ACDV to the furnishers which they did not do."[11]

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[5] *Mensah* Compl. ¶ 99; *Sato* Compl. ¶ 99; *Collins* Compl. ¶ 92; *Craven* Compl. ¶ 112; *Chavez* Compl. ¶ 106; *Cone* Compl. ¶ 106.

[6] *Id.*

[7] *Id.*

[8] *Mensah* Compl. ¶¶ 100-101; *Sato* Compl. ¶¶ 100-101; *Collins* Compl. ¶¶ 93-94; *Craven* Compl. ¶¶ 113-114; *Chavez* Compl. ¶¶ 107-108; *Cone* Compl. ¶¶ 107-108.

[9] *Id.*

[10] *Mensah* Compl. ¶ 102; *Sato* Compl. ¶ 102; *Collins* Compl. ¶ 95; *Craven* Compl. ¶ 115; *Chavez* Compl. ¶ 109; *Cone* Compl. ¶ 109.

[11] *Mensah* Compl. ¶ 121; *Sato* Compl. ¶ 121; *Collins* Compl. ¶ 115; *Craven* Compl. ¶ 134; *Chavez* Compl. ¶ 127; *Cone* Compl. ¶ 126.

Later, each plaintiff ordered a second three bureau report from either Experian or Equifax, or credit reports from Experian, Equifax, and TransUnion.[12] Plaintiffs identify specific data furnishers in these reports that allegedly reported inaccurate information, including balances, past due balances, charge off notations, or negative payment history, or failed to note that the account was disputed.[13] Plaintiffs allege that such reporting does not comport with credit reporting industry standards under the "Metro 2 format." They also allege that these accounts failed to list the correct Consumer Information Indicator ("CII") under Metro 2, which "indicates a special condition that applies to a specific consumer."[14] According to plaintiffs, the furnishers should have listed CII Code "D," which indicates that a Chapter 13 bankruptcy petition has been filed but no discharge has been entered, and "alerts any potential lender that the account is no longer in a collectable status but is being handled by a Chapter 13 trustee."[15] Plaintiffs do not allege that they received a discharge order from the bankruptcy court.

II. PROCEDURAL BACKGROUND

A. *Mensah* (Case No. 16-cv-5689)

Mensah asserts two claims against Specialized Loan Servicing, LLC ("SLS") for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA. She also brings one claim against Experian and Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i, and has since filed a notice of settlement with Equifax. Dkt. No. 31. SLS now moves to dismiss both of Mensah's claims, Dkt. No. 17, as does Experian. Dkt. No. 23.

[12] *Mensah* Compl. ¶ 103; *Sato* Compl. ¶ 103; *Collins* Compl. ¶ 96; *Craven* Compl. ¶ 116; *Chavez* Compl. ¶ 110; *Cone* Compl. ¶ 110.

[13] *Mensah* Compl. ¶ 106; *Sato* Compl. ¶ 106; *Collins* Compl. ¶¶ 98-100; *Craven* Compl. ¶ 119; *Chavez* Compl. ¶¶ 111-112; *Cone* Compl. ¶ 111.

[14] *Mensah* Compl. ¶ 55; *Sato* Compl. ¶ 55; *Collins* Compl. ¶ 55; *Craven* Compl. ¶ 55; *Chavez* Compl. ¶ 55; *Cone* Compl. ¶ 55.

[15] *Mensah* Compl. ¶ 59; *Sato* Compl. ¶ 59; *Collins* Compl. ¶ 59; *Craven* Compl. ¶ 59; *Chavez* Compl. ¶ 59; *Cone* Compl. ¶ 59.

B. *Sato* (Case No. 16-cv-5702)

Sato asserts two claims against SLS for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA. He also brought one claim against Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i, which by agreement has now been dismissed with prejudice. Dkt. No. 35. SLS moves to dismiss the complaint. Dkt. No. 10.

C. *Collins* (Case No. 16-cv-5715)

Collins brings one claim against Experian and Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i. Experian and Equifax move to dismiss his FCRA claim. Dkt. Nos. 19, 25. He also asserted two claims against Lending Club, First Premier Bank, and First National Credit Card for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA. He then voluntarily dismissed First National Credit Card (Dkt. No. 15) and Lending Club (Dkt. No. 47) and I granted First Premier Bank's motion to compel arbitration. Dkt. No. 41.

D. *Craven* (Case No. 16-cv-6318)

Craven also brings one claim against Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i. Equifax moves to dismiss Craven's FCRA claim. Dkt. No. 21. Craven also asserted two claims against WebBank for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA that, pursuant to a stipulation, I dismissed with prejudice. Dkt. No. 29.

E. *Chavez* (Case No. 16-cv-6358)

Chavez brings one claim against Experian and Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i. Equifax moves to dismiss the complaint. Dkt. No. 20. She also initially asserted but has now dismissed two claims against Tyco and Verizon for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA. Dkt. Nos. 21, 34.

F. *Cone* (Case No. 16-cv-6359)

Cone asserts two claims against TD Bank for failure to reinvestigate and re-reporting inaccurate information in violation of 15 U.S.C. § 1681s-2(b) and the CCRAA. She also brings one claim against Experian and Equifax for failure to reinvestigate in violation of 15 U.S.C. § 1681i. TD Bank moves to dismiss both the FCRA and CCRAA claims. Dkt. No. 14. Equifax also moves to dismiss the FCRA claim. Dkt. No. 28.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555, 570. In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses a complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous

amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

DISCUSSION

Experian and Equifax (the "CRA defendants")[16] move to dismiss plaintiffs' FCRA claim. Data furnishers SLS and TD Bank also move to dismiss both the FCRA and the CCRAA claims against them.

I. FCRA CLAIMS—*MENSAH, SATO, COLLINS, CRAVEN, CHAVEZ, & CONE*

Congress enacted the FCRA "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 52 (2007). "As an important means to this end, the Act sought to make 'consumer reporting agencies exercise their grave responsibilities [in assembling and evaluating consumers' credit, and disseminating information about consumers' credit] with fairness, impartiality, and a respect for the consumer's right to privacy.'" *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009) (citing 15 U.S.C. § 1681(a)(4); alterations in original).

Under the FCRA, when a consumer disputes reported credit information, a CRA must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file." 15 U.S.C. § 1681i(a)(1)(A). A CRA must also "provide notification of the dispute to any person who provided any item of information in dispute." 15 U.S.C. § 1681i(a)(2)(A).

Upon receiving notice of a dispute from a CRA, a data furnisher must:

> (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) . . .;
>
> (C) report the results of the investigation to the consumer reporting agency;

[16] Equifax asserts in a footnote that it is not a "credit reporting agency" as defined by the FCRA, but addresses plaintiffs' claims as if it is a CRA. *Collins* Equifax Mot. at 1 n.1; *Craven* Mot. at 1 n.1; *Chavez* Mot. at 1 n.1; *Cone* Equifax Mot. at 1 n.1. Plaintiffs' responses to Equifax's motions do not respond to this argument. Because I find that the complaints should be dismissed on other grounds, I need not decide this issue now. I assume, without finding, that Equifax is a CRA for the purposes of this Order.

> (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; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly--
>
> (i) modify that item of information;
>
> (ii) delete that item of information; or
>
> (iii) permanently block the reporting of that item of information.

15 U.S.C. § 1681s-2(b)(1). A "furnisher's investigation pursuant to § 1681s-2(b)(1)(A) may not be unreasonable." *Gorman*, 584 F.3d at 1157.

Plaintiffs allege that the CRA defendants failed to conduct a reasonable reinvestigation into the disputed information by not sending all relevant information to the furnishers via an ACDV.[17] Alternatively, plaintiffs contend that the CRA defendants failed to conduct a reasonable reinvestigation because they would have known that plaintiffs had Chapter 13 plans confirmed based on other accounts' reporting.[18] Also, plaintiffs assert that certain furnishers failed to conduct a reasonable reinvestigation by not reviewing industry standards or investigating the terms of plaintiffs' Chapter 13 plans.[19]

A. Inaccuracy

Experian, Equifax, SLS, and TD Bank move to dismiss plaintiffs' FCRA claims for failure to plead an actionable inaccuracy.[20] To state a claim for violation of 15 U.S.C. § 1681i or §

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[17] *Mensah* Compl. ¶¶ 120-122; *Collins* Compl. ¶¶ 114- 116; *Craven* Compl. ¶¶ 133-135; *Chavez* Compl. ¶¶ 126-128; *Cone* Compl. ¶¶ 125-127. There are no remaining CRA defendants in *Sato*.

[18] *Mensah* Compl. ¶¶ 123-133; *Collins* Compl. ¶¶ 117-127; *Craven* Compl. ¶¶ 136-147; *Chavez* Compl. ¶¶ 129-140; *Cone* Compl. ¶¶ 128-139. There are no remaining CRA defendants in *Sato*.

[19] *Mensah* Compl. ¶¶ 110-118; *Sato* Compl. ¶¶ 110-118; *Cone* Compl. ¶¶ 115-123. Furnisher defendants in the other three above-captioned cases have either been voluntarily dismissed or they have not moved for dismissal of plaintiffs' claims.

[20] *Mensah* SLS Mot. at 5; *Mensah* Experian Mot. at 8; *Sato* Mot. at 4; *Collins* Experian Mot. at 8; *Collins* Equifax Mot. at 5; *Craven* Mot. at 4; *Chavez* Mot. at 5; *Cone* TD Bank Mot. at 9; *Cone*

1681s-2(b), a plaintiff must demonstrate "that an actual inaccuracy exist[s]." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010). "[A]n item on a credit report can be 'incomplete or inaccurate' within the meaning of the FCRA's furnisher investigation provision, 15 U.S.C. § 1681s–2(b)(1)(D), 'because it is patently incorrect, or because it is misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions.'" *Id.* (citing *Gorman*, 584 F.3d at 1163). This standard is equally applicable to claims arising under 15 U.S.C. § 1681i. *See Smith v.Experian Info. Solutions*, No. 16-cv-04653-BLF, 2017 WL 1092377, at *3 (N.D. Cal. Mar. 23, 2017). However, "even if a CRA fails to conduct a reasonable investigation or otherwise fails to fulfill its obligations under the FCRA, if a plaintiff cannot establish that a credit report contained an actual inaccuracy, then the plaintiff's 'claims fail as a matter of law.'" *Connors v. Experian Info. Sols., Inc.*, No. 16-cv-4663-LHK, 2017 WL 168493, at *3 (N.D. Cal. Jan. 17, 2017) (citing *Carvalho*, 629 F.3d at 890). In addition, "a complaint's allegations must dispute *facts* underlying a purported inaccuracy, as the presentation of *legal defenses* to payment will not suffice." *Masimay v. Experian Info. Solutions, Inc.*, No. 16-cv-05684-YGR, 2017 WL 1065170, at *3 (N.D. Cal. Mar. 21, 2017) (original emphasis).

1. Post-Confirmation, Pre-Discharge Reporting of Past Due Balances or Delinquencies

Plaintiffs argue that reporting a delinquency or past due balance that does not reflect a Chapter 13 plan's terms after confirmation, but before discharge, is inaccurate. Courts in this District, however, have consistently held that such reporting is not inaccurate or misleading. *See, e.g.*, *Fair v. Experian Info. Solutions, Inc.*, No. 16-cv-5712, 2017 WL 1164225 (N.D. Cal. Mar. 29, 2017) (Wilken, J.); *In re Experian Info. Solutions Credit Reporting Litig.*, No. 16-cv-5674, Order Granting Defendants' Motions to Dismiss, Dkt. No. 74 (N.D. Cal. Mar. 28, 2017) (Alsup, J.); *Masimay*, 2017 WL 1065170 (Gonzalez Rogers, J.); *Ramos v. Experian Info. Sols., Inc.*, No. 16-cv-06375, 2017 WL 1047019 (N.D. Cal. Mar. 20, 2017) (Hamilton, J.); *Penney v. Experian Info. Solutions, Inc.*, No. 16-cv-5695, 2017 WL 1078649, (N.D. Cal. Mar. 15, 2017) (Armstrong,

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Equifax Mot. at 5.

J.); *Anderson v. Experian Info. Sols., Inc.*, No. 16-cv-03328, 2017 WL 914394 (N.D. Cal. Mar. 8, 2017) (Freeman, J.); *Artus v. Experian Info. Sols., Inc.*, No. 16-cv-03322, 2017 WL 346022 (N.D. Cal. Jan. 24, 2017) (Davila, J.); *Doster v. Experian Info. Sols., Inc.*, No. 16-cv-04629-LHK, 2017 WL 264401 (N.D. Cal. Jan. 20, 2017) (Koh, J.).[21]

Plaintiffs contend that these decisions ignore the Bankruptcy Code. Under 11 U.S.C. § 1322(b)(2), a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." Plaintiffs also point to 11 U.S.C. § 1327(a), under which "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Under these sections, plaintiffs assert that the modification to the rights of creditors "occurs at confirmation and given the res judicata effect of confirmation this modification should be reflected on a consumer's credit report with respect to balances and past due balances."[22]

Courts have found that, pursuant to 11 U.S.C. § 1327, "any issue decided under a plan is entitled to *res judicata* effect." *In re Blendheim*, 803 F.3d 477, 486–87 (9th Cir. 2015) (citing *Bullard*, 135 S.Ct. 1686, 1692 (2015) ("Confirmation has preclusive effect, foreclosing relitigation of any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." (internal quotation marks omitted)). But "although § 1327(a) makes the confirmation plan binding on both the debtor and creditor and limits a creditor's ability to collect on a debt outside of the plan, the confirmation of a plan, standing alone, does not legally alter the

[21] Other district courts in the Ninth Circuit have come to similar conclusions. *See, e.g.*, *Abeyta v. Bank of Am.*, No. 15-cv-02320, 2016 WL 1298109, at *2 (D. Nev. Mar. 31, 2016) (notice of appeal filed) ("[T]he Bankruptcy Code prevents certain collection activities, but it does not alter the fact of delinquency."); *Polvorosa v. Allied Collection Serv., Inc.*, No. 16-cv-1508, 2017 WL 29331, at *3 (D. Nev. Jan. 3, 2017) ("[R]eporting delinquencies during the pendency of a bankruptcy or during a bankruptcy's automatic stay is not itself a violation of the FCRA.").

[22] *Craven* Oppo. at 14; *Chavez* Oppo. at 14; *Cone* Oppo. to Equifax Mot. at 14; *see also Mensah* Oppo. to Experian Mot. at 6-8.; *Mensah* Oppo. to SLS Mot. at 6-9; *Collins* Oppo. to Experian Mot. at 6-8; *Collins* Oppo. to Equifax Mot. at 12.

debt or the fact that payments are in arrears." *Newkirk v. Experian Info. Solutions, Inc.*, No. 16-cv-5691-SBA, 2017 WL 1078653, at *4 (N.D. Cal. Mar. 16, 2017); *see also Anderson*, 2017 WL 914394, at *5 ("[T]he original debt did exist prior to confirmation and [plaintiff] has cited no authority suggesting that bankruptcy proceedings 'erase' that historical fact for purposes of the FCRA."); *Artus*, 2017 WL 346022, at *5 ("[T]he language that governs such plans, § 1327, describes no effect to the existence or status of a debt upon plan confirmation"). Instead, the full debt amount remains until a debtor successfully completes the plan and obtains an order of discharge in the bankruptcy court. *See Newkirk*, 2017 WL 1078653, at *4 (citing *In re Blendheim*, 803 F.3d at 487; *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 908 (9th Cir. BAP 1999)). Plaintiffs have not alleged that they received discharge orders or that defendants' reporting was inaccurate in light of a discharge.

Also, "[m]any debtors fail to complete a Chapter 13 plan successfully, often because they cannot make payments on time." *In re Blendheim*, 803 F.3d at 487. If this occurs, the Chapter 13 case may either be converted to a case under a different chapter of the Bankruptcy Code or dismissed. *Id.* A "conversion or dismissal returns to the creditor all the property rights he held at the commencement of the Chapter 13 proceeding and renders him free to exercise any nonbankruptcy collection remedies available to him." *Id.* This further supports the conclusion that plan confirmation does not alter the legal status of a debt.

Plaintiffs' citation to *In re Luedtke*, No. 02-35082-SVK, 2008 WL 2952530 (Bankr. E.D. Wis. July 31, 2008), does not persuade me otherwise. There, the bankruptcy court found that the creditor violated a confirmation order—not the FCRA—by reporting to a CRA the original loan amount, rather than the confirmed plan's terms. *Id.* at *6. Although the court suggested that the plaintiff could have proceeded under the FCRA, this was dicta. *Id.* at *5. Additionally, other courts in this District have similarly rejected *In re Luedtke*. *See, e.g.*, *Masimay*, 2017 WL 1092377, at *5 n.5; *Smith*, 2017 WL 1092377, at *4; *In re Experian Info. Solutions Credit Reporting Litigation*, No. 16-cv-5674-WHA, Order Granting Defendants' Motion to Dismiss (Dkt. No. 74) (N.D. Cal. Mar. 28, 2017) at 2.

I join my colleagues in finding that it is not inaccurate to report an account's full unpaid balance after plan confirmation, but before discharge.[23] However, it is "an open question whether such reporting could satisfy the inaccuracy requirement if unaccompanied by any indication that the consumer is in bankruptcy." *Anderson*, 2017 WL 914394, at *5. As the Hon. Beth Freeman noted in *Anderson*, "it may well be possible for a plaintiff to allege facts showing that the reporting of a pre-confirmation delinquency is materially misleading absent any reference to a pending Chapter 13 bankruptcy, at least where a confirmed plan governs the timing and amounts of post-confirmation payments on the debt." *Id.* Plaintiffs are given leave to amend in order to allege whether specific defendants failed to report their bankruptcy filings and why such reporting is misleading.

2. Reporting in Violation of Industry Standards

Plaintiffs also assert that defendants reported inaccurate information by failing to follow credit reporting industry standards, particularly the Metro 2 format. Post-confirmation, plaintiffs allege, the industry standard for reporting balances and monthly payments is to report in accordance with the terms of the Chapter 13 plan and list CII Code "D."[24] They argue that defendants' reporting is inaccurate because they reported the pre-petition debts, rather than the plan terms, and did not list CII Code "D." Plaintiffs allege that a failure to list CII Code "D"

[23] Plaintiffs Craven, Chavez, and Cone submitted identical requests for judicial notice to illustrate the practical implications of such a decision. *Craven*, No. 16-cv-6318, Request for Judicial Notice (Dkt. No. 31); *Chavez*, No. 16-cv-6358, Request for Judicial Notice (Dkt. No. 33); *Cone*, 16-cv-6359, Request for Judicial Notice (Dkt. No. 42). These requests are GRANTED. *See Rosales–Martinez*, 753 F.3d at 894. After another court in this District held that it is not inaccurate to report past due balances after plan confirmation, the plaintiff moved in the bankruptcy court for an order allowing her to make direct payments to a creditor to avoid having a "past due" mark on her credit report. *Craven* RJN, Ex. A. In response, the Chapter 13 trustee objected that: (1) creditors are barred from collecting on pre-petition debt under the automatic stay provision; (2) creditors are bound by the confirmation plan under 11 U.S.C. § 1327; and (3) allowing a debtor to directly pay one creditor would unfairly discriminate against the other unsecured creditors. *Id.*, Ex. B. Based on decisions in this District and the trustee's response, plaintiffs' counsel asserted that plaintiffs are left with a negative mark on their credit reports but are unable to make any payments to remedy that mark. While I appreciate the difficult situation that plaintiffs are facing, this is an issue best left to Congress. *See Smith*, 2017 WL 1092377, at *5 (explaining that any deprivation of benefits associated with filing for Chapter 13 bankruptcy because of reporting of pre-confirmation debts is an issue for Congress, not the courts).

[24] *See, e.g.*, *Chavez* Compl. ¶¶ 80-86.

makes it appear as if "a consumer has not addressed outstanding debt obligations through the bankruptcy process" and that creditors are free to collect despite the automatic stay, causing "a more negative inference regarding a consumer's credit worthiness."[25] In support of this argument, plaintiffs' cite *Nissou-Rabban v. Capitol One Bank (USA), N.A.*, No. 15-cv-1675, 2016 WL 4508241 (S.D. Cal. June 6, 2016), where the court held that the plaintiff plausibly stated a claim under the FCRA where she alleged that a data furnisher failed to comply with Metro 2 format by reporting an account as "charged off" rather than CII code "D" or "no data," and that such reporting may be misleading to those making credit decisions. *Id.* at *4-5.

Courts in this District have generally distinguished or disagreed with this portion of *Nissou-Raban*. *See, e.g.*, *Devincenzi v. Experian Info. Sols., Inc.*, No. 16-cv-04628-LHK, 2017 WL 86131, at *6 (N.D. Cal. Jan. 10, 2017) ("[A]t most *Nissou-Raban* stands for the proposition that a furnisher that reports delinquent debts during the pendency of a bankruptcy should also report the fact that a bankruptcy is pending so that creditors know that those delinquent debts may be discharged in the future."); *Anderson*, 2017 WL 914394, at *6. The courts in this District have "repeatedly held that accurately reporting a delinquent debt during the pendency of a bankruptcy is not rendered unlawful simply because a plaintiff alleges that the reporting, though accurate, was inconsistent with industry standards." *Doster*, 2017 WL 264401, at *5 (collecting cases); *see also Anderson*, 2017 WL 914394, at *6 ("[D]istrict courts within the Ninth Circuit overwhelmingly have held that a violation of industry standards is insufficient, without more, to state a claim for violation of the FCRA."); *Mestayer v. Experian Info. Sols., Inc*., No. 15-cv-03645-EMC, 2016 WL 7188015, at *3 (N.D. Cal. Dec. 12, 2016) (holding that reporting accurate information but deviating from Metro 2 format was not misleading where bankruptcy also reported). I find these cases more persuasive than *Nissou-Raban*. Therefore, deviation from industry standards by itself is insufficient to allege inaccurate or misleading reporting. To the extent that plaintiffs' FCRA claims are based solely on the theory that defendants did not comply with industry standards, these claims are dismissed.

[25] *See, e.g.*, *Chavez* Compl. ¶¶ 64-66.

3. Allegations Regarding the Three Bureau Credit Reports and Dispute Letters

In order to state a claim against the CRA defendants, plaintiffs must identify which CRA reported the allegedly "incomplete or inaccurate" information in the three bureau reports. *See Anderson*, 2017 WL 914394, at *4; *Doster*, 2017 WL 264401. Plaintiffs allege that they each ordered a "three bureau report," on which they noticed several different trade lines with inaccurate information. After disputing these reports, plaintiffs ordered either a second "three bureau report" or a second credit report from Experian, Equifax, and TransUnion. The complaints do not specify whether Experian or Equifax reported the allegedly inaccurate information, as opposed to the other bureaus. The FCRA claims against the CRA defendants are dismissed on this ground.

Similarly, plaintiffs do not identify which trade lines in their first three-bureau reports contained the allegedly inaccurate information. Nor do plaintiffs allege that they identified in their dispute letters the specific defendant furnishers or the individual basis for their belief that each of those accounts was inaccurately reported. Therefore, plaintiffs failed to allege that their dispute letters raised any actual inaccuracy on the part of specific defendant furnishers.[26] The FCRA claims against SLS and TD Bank are dismissed on this basis.

4. Failure to Report Account as Disputed—*Cone*

Plaintiff Cone alleges that TD Bank failed to report that her account was being disputed. *Cone* Compl. ¶ 111. "A disputed credit file that lacks a notation of dispute may well be 'incomplete or inaccurate' within the meaning of the FCRA, and the furnisher has a privately enforceable obligation to correct the information after notice." *Gorman*, 584 F.3d at 1164 (citing 15 U.S.C. § 1681s-2(b)(1)(D)); *see also Wang v. Asset Acceptance LLC*, No. C 09-4797-SI, 2010 WL 2985503 (N.D. Cal. July 27, 2010). However, a furnisher is not always liable for failure to report a debt as disputed. For instance, "a furnisher does not report 'incomplete or inaccurate'

[26] Some plaintiffs alleged that defendants reported balances that differed from either the proof of claim filed in the bankruptcy court or the bankruptcy trustee's accounting in light of payments made under the plan. These alleged inaccuracies appear to be independent from plaintiffs' theory regarding the effect of the confirmation order, and may potentially state a claim. However, plaintiffs should include much more detailed allegations, such as whether the dispute letter stated that the accounts were inaccurate on these bases, and whether the payments made to the furnishers occurred before or after plaintiffs ordered their credit reports.

information within the meaning of § 1681s-2(b) simply by failing to report a meritless dispute, because reporting an actual debt without noting that it is disputed is unlikely to be materially misleading." *Gorman*, 584 F.3d at 1163. Instead, there must be a "bona fide dispute," meaning "a dispute that could materially alter how the reported debt is understood." *Id.*; *see also Blakeney v. Experian Info. Sols., Inc.*, No. 15-cv-05544-LHK, 2016 WL 4270244, at *5 (N.D. Cal. Aug. 15, 2016) ("[O]mitting the disputed nature of a debt, if the dispute could materially alter how the reported debt is understood, may be 'incomplete or inaccurate' reporting.").

Cone's underlying dispute with TD Bank is that it reported her account as "charged off" despite her confirmed Chapter 13 plan. *Cone* Compl. ¶ 111. Cone's allegations that such reporting is inaccurate are less than clear. She asserts that: (1) TD Bank transferred the account to a third party after Cone filed for bankruptcy; (2) the third party filed a proof of claim for $3,358; (3) TD Bank is owed nothing because the account was transferred to another creditor; and (4) even assuming that money was owed to TD Bank, it should have reported the account with CII Code "D," rather than as "charged off." *Id.* Cone argues that TD Bank's reporting of the account as "charged off" is misleading because it "implies that the account is still subject to some type of collection rather than not owing any outstanding balance." *Cone* Oppo. to TD Bank Mot. at 5.

As pleaded, Cone's allegations regarding the inaccuracy of TD Bank's reporting are insufficient. If she chooses to amend, Cone should make clear whether she is alleging that the "charged off" notation is inaccurate because that account had been transferred to a third party or because the notation does not comply with industry standards and the confirmation order. If the latter, Cone should specify whether TD Bank reported her pending bankruptcy and, if so, allege facts showing how the "charged off" notation could nevertheless be misleading. She should also include allegations why the failure to note this dispute is inaccurate or misleading. Because plaintiffs have not adequately alleged an actionable inaccuracy, the FCRA claims are dismissed.

B. Allegations Regarding Notice

When a CRA receives a dispute from a consumer, it is required to provide to the data furnisher a notification of the dispute that includes "all relevant information." 15 U.S.C. § 1681i(a)(2). Therefore, plaintiffs may state a claim against a CRA defendant if they allege that

they disputed particular accounts reported in their first three-bureau reports and that the CRA failed to notify the relevant furnishers of the dispute, so long as all other pleading requires regarding inaccuracy and damages are met. *Anderson*, 2017 WL 914394, at *7. However, to state a claim against a furnisher, a plaintiff must allege that the furnisher received notice of the dispute from a CRA, which triggered the furnisher's duties under 15 U.S.C. § 1681s-2(b). *Drew v. Equifax Info. Servs., LLC*, 690 F.3d 1100, 1106 (9th Cir. 2012); *Adkins v. Experian Info. Sols., Inc.*, No. 16-cv-02150-EJD, 2016 WL 6841700, at *1 (N.D. Cal. Oct. 7, 2016).

Plaintiffs allege that the CRA defendants received plaintiffs' dispute letters and sent the dispute to each data furnisher via an ACDV. Plaintiffs also assert that "[t]he most basic investigation required each CRA to send all relevant information via an ACDV to the furnishers which they did not do."[27] These allegations are inconsistent and cannot state a claim under the FCRA against either the CRA defendants or the furnisher defendants. *See Manley v. Experian Info. Sols., Inc.*, No. 16-cv-03355-LHK, 2017 WL 151540, at *5 (N.D. Cal. Jan. 16, 2017); *cf. Anderson*, 2017 WL 914394, at *7. To the extent that plaintiffs base their claims against the CRA defendants on failure to notify the data furnishers of the dispute, these claims are dismissed. The FCRA claims against the data furnishers in *Mensah*, *Sato*, and *Cone* are also dismissed for failure to plausibly allege that the furnishers received notice of the dispute. Plaintiffs are given leave to amend in order to plausibly allege facts supporting whether or not the CRA defendants notified the relevant furnishers of plaintiffs' disputes.

C. Willfulness or Negligence Allegations

The CRA defendants also move to dismiss plaintiffs' claims for failure to plead willfulness or actual damages. I need not decide this issue now because plaintiffs' FCRA claims are dismissed on other grounds, as discussed above.

II. CCRAA CLAIMS—*MENSAH, SATO,* & *CONE*

Defendants SLS and TD Bank also move to dismiss the CCRAA claims in *Mensah*, *Sato*, and *Cone*. Similar to the FCRA, the CCRAA provides that "[a] person shall not furnish

[27] *Mensah* Compl. ¶¶ 102, 121; *Sato* Compl. ¶¶ 102, 121; *Collins* Compl. ¶¶ 95, 115; *Craven* Compl. ¶¶ 115, 134; *Chavez* Compl. ¶¶ 109, 127; *Cone* Compl. ¶¶ 109, 126.

information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know that the information is incomplete or inaccurate." Cal. Civ. Code § 1785.25(a). "[B]ecause the CCRAA 'is substantially based on the Federal Fair Credit Reporting Act, judicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions.'" *Carvalho*, 629 F.3d at 889 (quoting *Olson v. Six Rivers Nat'l Bank*, 111 Cal. App. 4th 1, 12 (2003)). The failure to plead an actionable inaccuracy, as discussed above, is also grounds for dismissal of plaintiffs' CCRAA claims.

III. ARGUMENTS UNIQUE TO DEFENDANT SLS—*MENSAH* AND *SATO*

In *Mensah* and *Sato*, defendant SLS also argues that plaintiffs' FCRA and CCRAA claims are barred by judicial estoppel and the statute of limitations.

A. Judicial Estoppel

In deciding whether judicial estoppel bars a plaintiff's claims, a court considers: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). "In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). "The reason is that the plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is estopped from representing in the lawsuit that a claim *does* exist." *Id.* (original emphasis).

A court will find judicial estoppel "when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *see also Hay v. First Interstate Bank of Kalispell*, N.A., 978 F.2d 555, 557 (9th Cir. 1992) (finding estoppel where "*all*

facts were not known to" the plaintiff during pendency of bankruptcy case, "but enough was known to require notification of the existence of the asset to the bankruptcy court"). "The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding." *Hamilton*, 270 F.3d at 785.

Mensah's Chapter 13 plan was confirmed on September 1, 2011, and she obtained a discharge order on September 14, 2016. *Mensah* RJN by SLS, Exs. 2, 3. Her claims are based on her two credit reports, ordered on March 8, 2016, and August 15, 2016. *Mensah* Compl. ¶¶ 99, 103. Sato's Chapter 13 plan was confirmed on May 10, 2012, and he received a discharge order on June 15, 2016. *Sato* RJN by SLS, Exs. 2, 3. His claims are based on his two credit reports, ordered on March 25, 2016, and September 2, 2016. *Sato* Compl. ¶¶ 98, 103. Based on the judicially noticeable documents, it appears that neither Mensah nor Sato listed this cause of action on their schedules before obtaining a confirmation order. However, both confirmation orders were entered before Mensah or Sato ordered any of the relevant credit reports.

While judicial estoppel may apply to Mensah's and Sato's claims, I decline to make such a finding on this record. Judicial estoppel would not apply based on the entry of the confirmation orders alone because Mensah and Sato could not have known about these claims at that time. Although plaintiffs received discharge orders, there is no information regarding whether they ever amended their schedules after plan confirmation, but before discharge. Nor is it "clear that [plaintiffs'] failure to amend the schedules disadvantaged the creditors in a significant way, given that the potential damages here are likely nominal." *Basconcello v. Experian Info. Solutions, Inc.*, No. 16-cv-6307-PJH, 2017 WL 1046969, at *4 (N.D. Cal. Mar. 20, 2017). And for Sato, it is not clear whether he could have known about these claims before discharge because he did not order his second credit report until after discharge. Should Mensah and Sato amend their claims, SLS may raise this issue again on a fuller record.

B. Statute of Limitations

SLS argues that Mensah's FCRA and CCRAA claims and Sato's CCRAA claim are barred by the applicable statute of limitations. An action for a violation of the FCRA must be filed "not later than the earlier of--(1) 2 years after the date of discovery by the plaintiff of the violation that

is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." 15 U.S.C. § 1681p. An action for a violation of the CCRAA "may be brought . . . within two years from the date the plaintiff knew of, or should have known of, the violation of this title, but not more than seven years from the earliest date on which liability could have arisen." Cal. Civ. Code § 1785.33. The seven year limitation does not apply, however, when the defendant "materially and willfully misrepresented any information" that is material to establishing the defendant's liability. *Id.*

Mensah filed her lawsuit on October 5, 2016, and her plan was confirmed on September 1, 2011. Sato also filed his lawsuit on October 5, 2016, and his plan was confirmed May 10, 2012. SLS argues that the statute of limitations began to run on the date of plan confirmation. *Mensah* SLS Mot. at 4; *Sato* Mot. at 4. SLS argues that Mensah and Sato should have known of the alleged FCRA and CCRAA violations any time after their plans were confirmed because their credit scores were readily available. This argument is unpersuasive. SLS has not argued why Mensah and Sato should have ordered their credit reports any earlier than they did. Given that SLS's alleged liability arises from credit reports that were ordered in the same year that the lawsuits were filed, I decline to find that the actions are barred by the statute of limitations.

CONCLUSION

The motions to dismiss plaintiffs' complaints for failure to state a claim are GRANTED with leave to amend in accordance with this Order. Any amended complaints shall be filed within 20 days of the date below.

IT IS SO ORDERED.

Dated: April 5, 2017

WILLIAM H. ORRICK
United States District Judge