

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 MARK MORTIMER,

No. C 12-1936 CW

5                                    Plaintiff,

ORDER GRANTING  
DEFENDANT'S MOTION  
TO DISMISS AND  
GRANTING LEAVE TO  
AMEND

6                                    v.

7 JP MORGAN CHASE BANK, NATIONAL  
8 ASSOCIATION an FDIC insured  
9 corporation and DOES 1 through  
10 100 inclusive,

11                                    Defendant.  
12 \_\_\_\_\_/

13                                    Plaintiff Mark Mortimer has sued Chase Bank USA, N.A., for  
14 allegedly furnishing inaccurate information concerning his credit  
15 card account to Experian, a credit reporting agency (CRA), and  
16 failing to investigate and correct the disputed information. He  
17 also seems to complain that Chase failed to report to Experian  
18 that he continued to dispute information about his Chase account.  
19 Mortimer originally alleged nine causes of action under (1) the  
20 Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681s-2(b); (2) the  
21 California Song-Beverly Credit Card Act of 1971, Civil Code  
22 section 1747; (3) the California Consumer Credit Reporting  
23 Agencies Act (CCRAA), Civil Code section 1785.25(a);  
24 (4) California's Unfair Competition Law (UCL), Business and  
25 Professions Code section 17200; (5) libel, California Civil Code  
26 section 45; (6) intentional infliction of emotional distress;  
27 (7) negligent infliction of emotional distress; (8) deceit,  
28 California Civil Code section 1710; and (9) constructive fraud,  
California Civil Code section 1573. Chase moves to dismiss the

1 action. Docket No. 5. Mortimer opposes the motion. After the  
2 hearing, Mortimer filed a First Amended Complaint (1AC), alleging  
3 only FCRA, CCRAA and UCL causes of action.

4 Having considered all of the parties' submissions and oral  
5 argument, Mortimer's FCRA, CCRAA and UCL claims are dismissed with  
6 leave to amend. The remaining claims are dismissed without leave  
7 to amend.

#### 8 BACKGROUND

9 Mortimer alleges the following. As of November 2009, he held  
10 a Chase credit card account. On November 3, 2009, he filed a  
11 voluntary petition for Chapter 7 bankruptcy in the Northern  
12 District of California. On February 8, 2010, he was granted a  
13 discharge of debts pursuant to 11 U.S.C. § 727. Compl., ¶ 15, Ex.  
14 B, Discharge of Debtor and Final Decree.

15 On April 21, 2011, Mortimer sent a letter to Experian stating  
16 that, among other items allegedly in error, the Chase account  
17 ending in the numbers 0032 "was included in [his] bankruptcy and  
18 should not be showing any lates. Remove these lates now."  
19 Compl., ¶ 16 and Ex. A, Dispute Letter.

20 After receiving notice of Mortimer's allegations from  
21 Experian, he complains, Chase failed to report that Mortimer  
22 disputed the account information. It is not clear why Mortimer  
23 complains of this fact, given that it was Experian that told Chase  
24 that he disputed the reports of delinquencies.

25 On May 10, 2011, Mortimer requested his Experian credit  
26 report to verify that the inaccuracies were corrected. Compl.  
27 Ex. C, Experian Report. According to Mortimer, Chase had removed  
28 the previously reported delinquencies and reported to Experian

1 that his account was closed before he filed for bankruptcy.  
2 Compl., ¶ 17. It is not clear whether he complains that Chase  
3 inaccurately reported his account as closed.

4 On March 15, 2012, Mortimer received his Service 1st Credit  
5 Report, a compilation of credit reports from all three credit  
6 reporting agencies. Compl., Ex. D (Service 1st Report). Mortimer  
7 alleges that Chase "re-reported the disputed information to  
8 Experian, that Plaintiff's account was open and delinquent in  
9 December 2009 and January 2010 even though Plaintiff filed for  
10 bankruptcy." Compl., ¶ 18. Mortimer complains that Chase failed  
11 to report that Mortimer continued to dispute this account  
12 information. Compl., ¶ 18.

13 It seems that the gravamen of Mortimer's complaint is that  
14 Chase reported overdue payments on his account for two months  
15 after he filed for bankruptcy but before his debts had been  
16 discharged. He does not allege that this was inaccurate as a  
17 matter of fact.

18 LEGAL STANDARD

19 A complaint must contain a "short and plain statement of the  
20 claim showing that the pleader is entitled to relief." Fed. R.  
21 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
22 state a claim, dismissal is appropriate only when the complaint  
23 does not give the defendant fair notice of a legally cognizable  
24 claim and the grounds on which it rests. Bell Atl. Corp. v.  
25 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
26 complaint is sufficient to state a claim, the court will take all  
27 material allegations as true and construe them in the light most  
28 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d

1 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
2 to legal conclusions; "threadbare recitals of the elements of a  
3 cause of action, supported by mere conclusory statements," are not  
4 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
5 (citing Twombly, 550 U.S. at 555).

6 When granting a motion to dismiss, the court is generally  
7 required to grant the plaintiff leave to amend, even if no request  
8 to amend the pleading was made, unless amendment would be futile.  
9 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
10 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
11 amendment would be futile, the court examines whether the  
12 complaint could be amended to cure the defect requiring dismissal  
13 "without contradicting any of the allegations of [the] original  
14 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
15 Cir. 1990).

16 Although the court is generally confined to consideration of  
17 the allegations in the pleadings, when the complaint is  
18 accompanied by attached documents, such documents are deemed part  
19 of the complaint and may be considered in evaluating the merits of  
20 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d  
21 1265, 1267 (9th Cir. 1987).

## 22 DISCUSSION

### 23 I. Fair Credit Reporting Act

24 Chase argues that Mortimer's FCRA claim must be dismissed  
25 because he has failed to allege that Chase gave any inaccurate  
26 information to Experian. Mortimer responds that he has alleged  
27 two separate violations of the statute, one claim concerning  
28 Chase's failure to investigate the reported inaccuracy and another

1 claim based on Chase's alleged failure to report Mortimer's  
2 continuing dispute of the claimed inaccuracy to Experian.

3 Congress enacted the FCRA, 15 U.S.C. §§ 1681 et seq., in 1970  
4 "to ensure fair and accurate credit reporting, promote efficiency  
5 in the banking system, and protect consumer privacy." Safeco Ins.  
6 Co. of Am. v. Burr, 551 U.S. 47 (2007). To ensure that credit  
7 reports are accurate, the FCRA imposes certain duties on the  
8 furnishers that provide credit information to CRAs. Gorman v.  
9 Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153 (9th Cir. 2009).

10 Section 1681s-2(a) describes the "[d]uty of furnishers to  
11 provide accurate information," and subsection (b) establishes the  
12 duties of furnishers after receiving notice of a dispute. 15  
13 U.S.C. § 1681s-2. Among other responsibilities, subsection (a)  
14 prohibits furnishers from reporting information with actual  
15 knowledge of errors and requires furnishers to correct and update  
16 information, and provide notice of disputes and closed accounts.  
17 15 U.S.C. § 1681s-2(a)(1)(A), (2), (3). Subsection (b) provides  
18 that the furnisher shall, after receiving notice of a dispute from  
19 the CRA, conduct an investigation of the disputed information;  
20 review all relevant information provided by the CRA; report the  
21 results of the investigation to the CRA; and, if the investigation  
22 reveals that the information is incomplete or inaccurate, report  
23 those results to all other CRAs to which the person furnished the  
24 information. 15 U.S.C. § 1681s-2(b)(1)(A)-(D); Gorman, 584 F.3d  
25 at 1154.

26 While the "[d]uties imposed on furnishers under  
27 subsection (a) are enforceable only by federal or state agencies,"  
28 §§ 1681n and 1681o provide a limited private right of action that

1 applies to § 1681s-2(b)'s requirement to investigate disputes and  
2 report inaccuracies. Gorman, 584 F.3d at 1154 (citing 15 U.S.C.  
3 §§ 1681s-2(c) and (d)).

4 As noted earlier, Mortimer asserts a claim based on Chase's  
5 alleged failure to report to Experian that Mortimer continued to  
6 dispute his payment delinquencies. Here, Mortimer has alleged  
7 that, after he sent Experian a written notice that he disputed  
8 Chase's reporting, Experian notified Chase of his dispute, but  
9 Chase later failed to inform Experian of the results of its  
10 investigation, that is, that Mortimer still disputed the credit  
11 information.

12 This claim is insufficiently alleged because Mortimer has not  
13 asserted that Chase reported incomplete or inaccurate information  
14 in the first place. "Holding that there is a private cause of  
15 action under § 1681s-2(b) does not mean that a furnisher could be  
16 held liable on the merits simply for a failure to report that a  
17 debt is disputed. The consumer must still convince the finder of  
18 fact that the omission of the dispute was 'misleading in such a  
19 way and to such an extent that [it] can be expected to have an  
20 adverse effect.'" Id. at 1163 (citing Saunders v. Branch Banking  
21 & Trust Co. of Va., 526 F.3d 142, 150 (4th Cir. 2008)). "In other  
22 words, a furnisher does not report 'incomplete or inaccurate'  
23 information within the meaning of § 1681s-2(b) simply by failing  
24 to report a meritless dispute, because reporting an actual debt  
25 without noting that it is disputed is unlikely to be materially  
26 misleading." Id.

27 Mortimer argues that he has alleged a claim under § 1681s-  
28 2(b) of the FCRA because Chase unlawfully reported delinquencies

1 after he filed his bankruptcy petition. Mortimer claims, not that  
2 he made timely payments, but that Chase's reporting violated the  
3 letter and the spirit of 11 U.S.C. § 362. Mortimer argues that  
4 this provision of the Bankruptcy Code, which in general imposes a  
5 stay on creditors' collection activities, prohibits Chase from  
6 reporting any derogatory information arising while the bankruptcy  
7 petition was pending. Section 362 does not stand for the  
8 proposition that an individual is not obliged to make timely  
9 payments on his accounts while his petition for bankruptcy is  
10 pending. Rather, § 362 limits collection activities in pursuit of  
11 claims that arose before the bankruptcy petition. While it might  
12 be good policy in light of the goals of bankruptcy protection to  
13 bar reporting of late payments while a bankruptcy petition is  
14 pending, neither the bankruptcy code nor the FCRA does so.  
15 Mortimer has not alleged that he was timely in making payments on  
16 his Chase account in November 2009, December 2009 or January 2010.  
17 Thus, Mortimer has not alleged an inaccuracy or misleading  
18 statement for the purposes of his FCRA claim, and the failure to  
19 report his meritless dispute is not actionable.

20 In footnote seven of his opposition, Mortimer argues that the  
21 court's decision in In re Burgess, 2007 WL 130818 (Bankr. E.D.  
22 Va.), demonstrates that a plaintiff may state a claim for  
23 violation of the automatic stay where the defendant reported post-  
24 petition delinquencies even though the credit report indicated  
25 that the plaintiff received a Chapter 7 discharge and carried a  
26 zero balance. The case is inapposite because it did not involve a  
27 claim under the FCRA, but instead concerned a motion to reopen a  
28

1 bankruptcy case and a claim for violation of the bankruptcy  
2 discharge injunction.

3 Mortimer also contends in his opposition brief that he has  
4 alleged that Chase provided inaccurate and incomplete information  
5 because the Service 1st Report shows that his Chase account was  
6 open and collectable while he was in bankruptcy, when the account  
7 was closed. Such facts, however, are not alleged in Mortimer's  
8 original complaint. Mortimer's 1AC likewise does not allege that  
9 Chase continued to report that he had an account that was open and  
10 delinquent at a time when his account was closed with a zero  
11 balance.

12 Thus, because Mortimer has not alleged that Chase furnished  
13 inaccurate credit information in the first instance or after  
14 investigation, he has insufficiently plead a FCRA violation for  
15 failure to investigate or failure to report its investigation of  
16 the dispute to Experian. Because Mortimer does not dispute that  
17 the payments were delinquent, there was no inaccuracy for Chase to  
18 investigate and no bona fide dispute or corrected information for  
19 Chase to report to back to Experian. However, Mortimer's FCRA  
20 claim is dismissed with leave to amend his complaint to allege  
21 that Chase furnished material false information, and then failed  
22 to investigate and report Mortimer's dispute and the corrected  
23 information.

## 24 II. State Claims

25 Chase argues that Mortimer's state claims should be dismissed  
26 because they are preempted by the FCRA and insufficiently alleged.  
27 Mortimer's original complaint alleged several causes of action  
28 under California statutory and common law which are subject to two



1 preemption provisions of the FCRA, 15 U.S.C. § 1681h(e) and  
2 § 1681t(b)(1)(F). After the hearing on this motion, Plaintiff  
3 submitted his 1AC, omitting his Song-Beverly Credit Card Act  
4 claim, as well as his claims for libel, negligent and intentional  
5 infliction of emotional distress, deceit and constructive fraud.  
6 Accordingly, the Court considers whether Plaintiff's remaining  
7 CCRAA and UCL claims are preempted.

8 Section 1681t states,

9 (a) Except as provided in subsections (b) and (c) of  
10 this section, this subchapter does not annul,  
11 alter, affect, or exempt any person subject to  
12 the provisions of this subchapter from complying  
13 with the laws of any State with respect to the  
14 collection, distribution, or use of any  
15 information on consumers, or for the prevention  
16 or mitigation of identity theft, except to the  
17 extent that those laws are inconsistent with any  
18 provision of this subchapter, and then only to  
19 the extent of the inconsistency.

20 (b) General exceptions

21 No requirement or prohibition may be imposed  
22 under the laws of any State--

23 (1) with respect to any subject matter regulated  
24 under--

25 . . .

26 (F) section 1681s-2 of this title, relating  
27 to the responsibilities of persons who  
28 furnish information to consumer  
reporting agencies, except that this  
paragraph shall not apply--

. . .

(ii) with respect to section 1785.25(a)  
of the California Civil Code (as  
in effect on September 30, 1996);

15 U.S.C. § 1681t.

In sum, § 1681t generally provides that the FCRA does not  
preempt state law requirements, except those relating to the

1 furnishing of accurate information to CRAs. An exception to the  
2 exception is California Civil Code section 1785.25(a), a provision  
3 of the CCRAA, which is specifically not preempted.

4 Mortimer alleges a CCRAA claim under section 1785.25(a),  
5 which states, "A person shall not furnish information on a  
6 specific transaction or experience to any consumer credit  
7 reporting agency if the person knows or should know the  
8 information is incomplete or inaccurate." Mortimer alleges that  
9 Chase "intentionally and knowingly reported inaccurate and false  
10 information regarding delinquency in payment to credit reporting  
11 agencies and date of discharge in violation of California Civil  
12 Code § 1785.25." Compl. at ¶ 50. Unlike the FCRA, the CCRAA  
13 includes a private right of action to enforce the prohibition  
14 against supplying incomplete or inaccurate consumer credit  
15 information. Cal. Civ. Code § 1785.25(g) ("A person who furnishes  
16 information to a consumer credit reporting agency is liable for  
17 failure to comply with this section, unless the furnisher  
18 establishes by a preponderance of the evidence that, at the time  
19 of the failure to comply with this section, the furnisher  
20 maintained reasonable procedures to comply with those  
21 provisions."). Mortimer's CCRAA claim is not preempted by the  
22 FCRA. Gorman, 584 F.3d at 1169; see also Carvalho v. Equifax  
23 Information Services, LLC, 629 F.3d 876, 888-89 (9th Cir. 2010).  
24 As explained above, however, Mortimer has failed to allege a  
25 falsity. Therefore, Mortimer's CCRAA claim under section  
26 1785.25(a) is dismissed with leave to amend to allege one.

27 Mortimer also asserts a UCL claim. In El-Aheidab v. Citibank  
28 (South Dakota), N.A., 2012 WL 506473 (N.D. Cal.), relying on

1 Gorman, another judge in this district ruled that, to the extent  
2 the plaintiff based his UCL claim solely on violations of  
3 section 1785.25(a), such a claim is not preempted because it does  
4 not impose any additional substantive duties on the defendant and  
5 is merely an additional procedural vehicle for enforcing section  
6 1725.25(a). Although Gorman did not address whether FCRA  
7 preempted a claim under the UCL, it considered a defendant's  
8 argument that the plaintiff's claim under section 1785.25(a) was  
9 preempted, despite the language of the § 1681t(b)(1)(F) exception,  
10 because the two provisions that established a private right of  
11 action to enforce section 1785.25(a) were found elsewhere in the  
12 state Civil Code and were not expressly excepted from FCRA  
13 preemption. The Ninth Circuit, however, rejected this argument,  
14 because the two provisions referred to do not impose a  
15 "requirement or prohibition" but instead "merely provide a vehicle  
16 for private parties to enforce other sections, which do impose  
17 requirements and prohibitions." 584 F.3d at 1171.

18 As alleged in Mortimer's claim, the UCL does not impose any  
19 additional duties, but is merely another vehicle for enforcing  
20 section 1725.25(a). A UCL claim under section 17200 "'borrows'  
21 violations of other laws and treats them as unlawful practices  
22 independently actionable under section 17200." Saunders v.  
23 Superior Court, 27 Cal. App. 4th 832, 838-39 (1994).

24 Wang v. Asset Acceptance, LLC, 681 F. Supp. 2d 1143, 1150  
25 (N.D. Cal. 2010), also relied on Gorman, but concluded that the  
26 plaintiff's UCL claims were preempted without regard to whether  
27 they were predicated on a violation of section 1725.25(a). Wang  
28 determined that the UCL "does impose a requirement or prohibition.

1 This statutory scheme prohibits 'any unlawful, unfair or  
2 fraudulent business act or practice . . . [and] provides  
3 plaintiffs with an independent cause of action." 681 F. Supp. 2d  
4 at 1150. This Court finds El-Aheidab more persuasive because the  
5 fact that the UCL provides for a cause of action does not  
6 demonstrate that the law itself imposes an additional requirement.


7 Thus, Mortimer's UCL claim is not preempted, but it is  
8 dismissed because, as explained above, he has not alleged an  
9 inaccuracy in the first instance.

10 CONCLUSION

11 Chase's motion to dismiss is granted. Mortimer's FCRA, CCRAA  
12 and UCL claims are dismissed with leave to amend to allege an  
13 actual factual inaccuracy. Mortimer may submit an amended  
14 complaint, within seven days, solely to address the defects  
15 addressed in this order. No new claims may be alleged. The  
16 parties shall appear for a case management conference on October  
17 4, 2012 at 2:00 pm.

18 IT IS SO ORDERED.

19  
20 Dated: 8/2/2012

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CLAUDIA WILKEN  
United States District Judge