

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

JEREMY FAIR,

Plaintiff,

v.

EXPERIAN INFORMATION SOLUTIONS,
INC., et al.,

Defendants.

Case No. C 16-05712 CW (lead)
C 16-05714 CW
C 16-06367 CW
C 17-00418 CW

ORDER ON MOTIONS TO DISMISS
(Docket Nos. 70 & 74)

_____ /

United States District Court
For the Northern District of California

Before the Court are two motions to dismiss filed by Defendant Experian Information Solutions, Inc.¹ Having considered the parties' papers and oral argument and for the reasons set forth below, the Court GRANTS the motions.

BACKGROUND

The Court has discussed the factual background relevant to Marino's allegations in a previous order (Docket No. 62) and his factual allegations are substantially the same and in large part identical in Plaintiffs' combined First Amended Complaint (1AC). Marino adds detail to his allegations concerning his mortgage.

Heath previously filed a separate complaint and now joins Dahlen and Marino in the consolidated 1AC. The factual background that follows is taken from Heath's portion of the 1AC. On July 2,

¹ Dahlen has settled with Experian and has stipulated to dismiss his claims against Wells Fargo, leaving as a Defendant only Equifax, Inc. Heath has dismissed his claims against USCB, Inc. with prejudice, leaving as a Defendant only Experian.

1 2012, Heath filed for Chapter 13 bankruptcy. On August 10, 2012,
2 he obtained a credit report from CIN Legal Data Services that was
3 based on information that CIN gathered from the three major credit
4 reporting agencies (CRAs), including Experian.² Heath's plan was
5 confirmed on November 8, 2012. On April 11, 2016, Heath ordered a
6 "three bureau report" from Experian. Docket No. 65, 1AC ¶ 132.
7 He found nine "trade lines" in the report that were reporting
8 information he believed to be inaccurate, and on August 5, 2016 he
9 disputed those trade lines by letter to Experian and the other two
10 major CRAs, noting "that Plaintiff had filed for bankruptcy and
11 the account was not reporting the bankruptcy accurately or worse
12 not at all." Id. ¶ 135. Heath alleges that each CRA received his
13 dispute letter and notified each furnisher,³ and later alleges in
14 the alternative that each CRA did not do so.

15 On November 15, 2016, Heath obtained a second credit report
16 from Experian and the other major CRAs. Heath alleges that the
17 second report contained a number of inaccuracies, discussed below,
18 related to his bankruptcy.

19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the
21 claim showing that the pleader is entitled to relief." Fed. R.
22 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to

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24 ² Heath alleges inconsistently that he obtained this credit
25 report prior to filing for bankruptcy. The difference is not
material for the purposes of this Order.

26 ³ Sources that provide credit information to CRAs are
27 referred to as "furnishers" under the FCRA. Gorman v. Wolpoff &
28 Abramson, LLP, 584 F.3d 1147, 1153 (9th Cir. 2009) (citation
omitted).

1 state a claim, dismissal is appropriate only when the complaint
2 does not give the defendant fair notice of a legally cognizable
3 claim and the grounds on which it rests. Bell Atl. Corp. v.
4 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
5 complaint is sufficient to state a claim, the court will take all
6 material allegations as true and construe them in the light most
7 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
8 896, 898 (9th Cir. 1986). However, this principle is inapplicable
9 to legal conclusions; "[t]hreadbare recitals of the elements of a
10 cause of action, supported by mere conclusory statements," are not
11 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
12 (citing Twombly, 550 U.S. at 555).

13 When granting a motion to dismiss, the court is generally
14 required to grant the plaintiff leave to amend, even if no request
15 to amend the pleading was made, unless amendment would be futile.
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
17 F.2d 242, 247 (9th Cir. 1990). In determining whether amendment
18 would be futile, the court examines whether the complaint could be
19 amended to cure the defect requiring dismissal "without
20 contradicting any of the allegations of [the] original complaint."
21 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
22 The court may deny leave to amend for "repeated failure to cure
23 deficiencies by amendments previously allowed." McGlinchy v.
24 Shell Chem. Co., 845 F.2d 802, 809-10 (9th Cir. 1988).

25 DISCUSSION

26 In their 1AC, Plaintiffs bring two causes of action, one
27 under the federal Fair Credit Reporting Act (FCRA), and one under
28

1 California's Consumer Credit Reporting Agencies Act (CCRAA). They
2 bring only the FCRA claim against Experian.

3 The FCRA creates a private right of action only for willful
4 or negligent noncompliance with its requirements. 15 U.S.C.
5 §§ 1681n⁴ (willful), o (negligent); Gorman, 584 F.3d at 1154. A
6 plaintiff may recover actual or statutory damages, as well as
7 punitive damages and attorneys' fees, for willful noncompliance,
8 § 1681n, but only actual damages for negligent noncompliance,
9 § 1681o.

10 In its Order dismissing Dahlen's and Marino's original
11 complaints, the Court found that neither Plaintiff plead
12 "sufficient facts to support an inference that Experian did fail
13 to notify furnishers of Plaintiffs' disputes." Docket No. 62,
14 Order on Mots. to Dismiss (March 29 Order) 10. It dismissed those
15 Plaintiffs' willful noncompliance claims against Experian on that
16 basis, with leave to amend. The lAC does not remedy this
17 deficiency as to any Plaintiff. Accordingly, Plaintiffs' claims
18 of willful noncompliance must be dismissed.

19 The FCRA requires CRAs, in response to a dispute by a
20 consumer, to "conduct a reasonable reinvestigation to determine
21 whether the disputed information is inaccurate and record the
22 current status of the disputed information, or delete the item
23 from the file" within thirty days of receiving notice of the
24 consumer's dispute. § 1681i(a)(1)(A). Section 1681i also
25 requires that, within five days of receiving notice of the

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27 ⁴ All references to the United States Code are to Title 15
28 unless otherwise stated.

1 consumer's dispute, CRAs must "provide notification of the dispute
2 to any person who provided any item of information in dispute."
3 § 1681i(a)(2). Thus, in order to state a claim for negligent
4 violation of section 1681i, a plaintiff must establish that: 1)
5 his credit files contained inaccurate or incomplete information;
6 2) he directly notified the defendant of the inaccuracy; 3) the
7 defendant failed to respond to the dispute; and 4) the defendant's
8 failure to reinvestigate caused the plaintiff to suffer actual
9 damages. See Taylor v. First Advantage Background Servs. Corp.,
10 2016 WL 4762268, at *5 (N.D. Cal.); see also Carvalho v. Equifax
11 Info. Servs., LLC, 629 F.3d 876, 891 (9th Cir. 2010); Gorman, 584
12 F.3d at 1156. The Ninth Circuit has held that, in order to state
13 a claim against a CRA under § 1681i, a plaintiff must identify an
14 actual inaccuracy in the credit report. Carvalho, 629 F.3d at
15 890; Dennis v. BEH-1, LLC, 520 F.3d 1066, 1069 (9th Cir. 2008).

16 Plaintiffs' 1AC does not allege sufficiently that Experian
17 failed to respond to their dispute letters. In their original
18 complaints, Dahlen and Marino alleged that "the most basic
19 investigation required each CRA to send all relevant information
20 via an ACDV to the furnishers which they did not do." Docket No.
21 62, March 29 Order 17 (quoting complaints). In its March 29
22 Order, the Court found this alternative pleading conclusory and
23 noted that neither Plaintiff plead "any facts from which to infer
24 that Experian failed to notify furnishers" nor identified "what
25 relevant information from their dispute letters Experian allegedly
26 failed to transmit." Id. In the 1AC, Plaintiffs jointly allege
27 again, "The most basic investigation required each CRA to send all
28 relevant information via an ACDV to the furnishers which they did

1 not do." Docket No. 65, 1AC ¶ 169. Nor do Plaintiffs remedy the
2 other defects. Accordingly, Plaintiffs' FCRA claims must be
3 dismissed as to Experian.

4 The allegations in the 1AC are insufficient for reasons
5 specific to Marino and Heath as well.

6 1. Marino

7 Marino alleges that his second credit report contained one
8 inaccuracy, namely, that Defendant RoundPoint was reporting his
9 account "with failure to pay listed in the 24 month payment
10 history. Specifically in July of 2016." Id. ¶ 108. He alleges
11 that since he filed for bankruptcy in June 2014 he "has made all
12 of his regularly scheduled monthly payments to Roundpoint on
13 time." Id. ¶ 100.

14 But Marino again has not alleged that his dispute letter put
15 Experian on notice of this alleged inaccuracy. In the March 29
16 Order, the Court dismissed Marino's claim regarding this
17 inaccuracy because he did "not allege that his dispute letter
18 stated that he was current on his debt to RoundPoint." Docket 62,
19 March 29 Order 16-17. In the 1AC, Marino alleges that his dispute
20 letter "specifically put each Creditor on notice that Plaintiff
21 had filed for bankruptcy and there should not be any late payments
22 reported in the payment history," Docket No. 65, 1AC ¶ 104, but no
23 more. Thus, he still has not alleged that his dispute letter put
24 Experian on notice of the inaccuracy he alleges and his FCRA claim
25 against Experian must fail.

26 2. Heath

27 Heath alleges that his second credit report contained four
28 inaccuracies, which he alleges create an "entirely misleading

1 picture" of his creditworthiness. Docket No. 65, 1AC ¶ 148.
2 First, Defendant "USCB was reporting Plaintiff's account . . . as
3 seriously past due and in active collection status." Docket No.
4 65, 1AC ¶ 139. This Court, in keeping with the overwhelming
5 majority of the decisions issued by judges in this district, has
6 rejected the theory that it constitutes an actionable inaccuracy
7 under the FCRA to report a debtor's pre-bankruptcy delinquencies
8 during the pendency of a bankruptcy proceeding prior to discharge.
9 Docket No. 62, March 29 Order 6-7; Mortimer v. JP Morgan Chase
10 Bank, Nat. Ass'n, No. C 12-1936 CW, 2012 WL 3155563, at *3 (N.D.
11 Cal. Aug. 2, 2012).

12 Second, Heath alleges that "USCB has never updated the CII to
13 D to illustrate to lenders that this account is in fact not
14 collectable and Plaintiff's wages cannot be garnished by USCB for
15 any amount whatsoever."⁵ Docket No. 65, 1AC ¶ 140. He alleges
16 that had this indicator been updated his account would reflect a
17 Chapter 13 Wage Earner Plan (WEP), which "alerts any potential
18 lender that the account is no longer in a collectable status but
19 is being handled by a Chapter 13 trustee." Id. ¶ 60. This Court
20 and others in this district have found that it is not "inherently
21 inaccurate under the FCRA" to violate credit reporting industry
22 standards. Docket No. 62, March 29 Order 7; see also Mensah v.

23 _____
24 ⁵ "The Metro 2 format was developed by the [Consumer Data
25 Industry Association] in an effort to universally report debts in
26 a particular manner." Docket No. 65, 1AC ¶ 39. "The Consumer
27 Information Indicator (CII) is a critical field in the Metro 2
28 Format that indicates a special condition that applies to a
specific consumer." Id. ¶ 56. "CII Metro 2 Code 'D' indicates
that a Chapter 13 petition has been filed, is active, but no
discharge entered." Id. ¶ 60.

1 Experian Info. Sols., Inc., No. 16-CV-05689-WHO, 2017 WL 1246892,
2 at *8 (N.D. Cal. Apr. 5, 2017); Mamisay v. Experian Info. Sols.,
3 Inc., 2017 WL 1065170, No. 16-CV-05684-YGR, at *6 (N.D. Cal. Mar.
4 21, 2017); Basconcello v. Experian Info. Sols., Inc., No. 16-CV-
5 06307-PJH, 2017 WL 1046969, at *7 (N.D. Cal. Mar. 20, 2017);
6 Mestay v. Experian Info. Sols., Inc., 2016 WL 3383961, No. 15-CV-
7 03645-EMC, at *2 (N.D. Cal. June 20, 2016).

8 An item in a credit report "can be 'incomplete or inaccurate'
9 within the meaning of the FCRA 'because it is patently incorrect,
10 or because it is misleading in such a way and to such an extent
11 that it can be expected to adversely affect credit decisions.'" Gorman,
12 584 F.3d at 1163 (citation omitted). "This requires
13 something more than the mere fact of noncompliance with an
14 industry standard, although noncompliance may be relevant to
15 whether reporting is 'misleading.'" Basconcello, 2017 WL 1046969,
16 at *7. For example, if a plaintiff's credit report includes
17 notice of the bankruptcy filing in other places then it is less
18 likely that the absence of an indicator on one account would be
19 misleading. Id. Heath does not allege that his second credit
20 report did not include any notice of his bankruptcy filing. Nor
21 does he explain how the absence of the CII "D" code in and of
22 itself renders his credit report meaningfully misleading, apart
23 from the effect he alleges it would have on how his past
24 delinquencies would be reported. Accordingly, Heath has not
25 alleged sufficient facts to show that USCB's alleged failure to
26 report the CII "D" indicator for his account rendered it
27 materially misleading.
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1 Third, "Defendant also continues to report failures to pay in
2 the 24 month payment history despite Plaintiff being prohibited by
3 law from making direct payments to Defendant. Specifically
4 starting in July 2013 through May of 2014 Defendant reported a
5 failure to pay each month," as well as from July 2014 through
6 October 2016. Docket No. 65, 1AC ¶¶ 143-44. Heath filed for
7 bankruptcy in July 2012 and his plan was confirmed in November of
8 that year. A confirmed Chapter 13 bankruptcy plan may modify
9 creditors' rights to collect on their claims. See 11 U.S.C.
10 § 1322(b)(2); Jaras v. Experian Info. Sols., Inc., 2016 WL
11 7337540, at *4 (N.D. Cal.). Thus, it may be materially inaccurate
12 to report failures to pay on pre-filing debts after a debtor's
13 bankruptcy plan has been confirmed and payments are being made by
14 the trustee, at least so long as the debtor makes payments to the
15 trustee according to the plan. However, Heath does not allege
16 that he has made all payments under his Chapter 13 plan nor that
17 the trustee made all scheduled payments to USCB.

18 Fourth, Heath alleges, "Defendant has also failed to mark the
19 account as disputed." Docket No. 65, 1AC ¶ 147. However, the
20 simple "failure to report that a debt is disputed" is insufficient
21 to establish liability; rather, "[t]he consumer must still
22 convince the finder of fact that the omission of the dispute was"
23 patently incorrect or materially misleading. Gorman, 584 F.3d at
24 1163. Heath has not established this because he has not
25 sufficiently plead the three alleged inaccuracies discussed in the
26 preceding paragraphs. Id.

27 Accordingly, Heath has not adequately plead that his second
28 credit report contained an actual inaccuracy.

1 Heath pleads the following concerning the notification he
2 provided to Experian:

3 Plaintiff's dispute letter specifically put each Creditor on
4 notice that Plaintiff had filed for bankruptcy and the
5 account was not reporting the bankruptcy accurately or worse
6 not at all. Plaintiff specifically requested each Creditor
7 investigate the proper way to report Plaintiff's bankruptcy
in accordance with credit reporting guidelines. Last,
Plaintiff noted the accounts should be reported disputed if
the Creditor disagreed with Plaintiff's dispute.

8 Docket 65, 1AC ¶ 135. At the hearing, Heath's attorney
9 represented that Heath's dispute letter identified each creditor's
10 account that he alleged was reporting inaccurately. See Docket
11 No. 62, March 29 Order 16; see also Mensah, 2017 WL 1246892, at
12 *8. However, Heath does not clearly allege that Experian reported
13 the alleged inaccuracies discussed above. See Docket No. 62,
14 March 29 Order 16. Furthermore, as discussed, Heath has not
15 sufficiently alleged facts to substantiate those inaccuracies in
16 his complaint, nor has he alleged that his dispute letter did so.

17 CONCLUSION

18 For the foregoing reasons, Experian's Motions to Dismiss are
19 GRANTED (Docket Nos. 70 & 74). Dismissal as to Marino is with
20 prejudice because he has had a previous opportunity to amend his
21 complaint and the Court concludes that further amendment would be
22 futile. Dismissal as to Heath is with leave to amend consistently
23 with this Order within twenty-one days. Any motion to dismiss
24 that follows will be decided on the papers.

25 IT IS SO ORDERED.

26 Dated: July 20, 2017



27 CLAUDIA WILKEN
28 United States District Judge