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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MILAN KUNWAR,
Plaintiff,
v.
CAPITAL ONE, N.A., et al.,
Defendants.

Case No. 17-CV-04849-LHK
**ORDER DENYING MOTION TO
DISMISS**
Re: Dkt. No. 11

Plaintiff Milan Kunwar (“Plaintiff”) sues Defendant Capital One, N.A. (“Defendant”) for violation of the federal Fair Credit Reporting Act (“FRCA”), 15 U.S.C. § 1681 *et seq.*, and the California Consumer Credit Reporting Agencies Act (“CCRAA”), California Civil Code § 1785.1 *et seq.* Before the Court is Defendant’s motion to dismiss. ECF No. 11. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court DENIES Defendant’s motion to dismiss.

I. BACKGROUND

A. Factual Background

Plaintiff alleges that on December 31, 2015, Defendant issued a Form 1099-C for a bank account that Plaintiff had with Defendant. ECF No. 1-1 at 4. Plaintiff states that “the 1099-C is

1 2017, ECF No. 16 (“Pl. Opp.”), and Defendant filed a Reply on September 18, 2017. ECF No. 17
 2 (“Reply”). Then, on November 11, 2017, Plaintiff filed a “Notice of Dismissal—As to Equifax
 3 Information Services, LLC Only.” ECF No. 19. Thus, Defendant is the only defendant left in this
 4 case.

5 **II. LEGAL STANDARD**

6 **A. Motion to Dismiss Under Rule 12(b)(6)**

7 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a
 8 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint
 9 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
 10 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead
 11 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
 12 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
 13 content that allows the court to draw the reasonable inference that the defendant is liable for the
 14 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is
 15 not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant
 16 has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule
 17 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and construe[s]
 18 the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &*
 19 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

20 The Court, however, need not accept as true allegations contradicted by judicially
 21 noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
 22 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
 23 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
 24 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
 25 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
 26 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
 27 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183

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1 (9th Cir. 2004).

2 **B. Leave to Amend**

3 If the Court determines that a complaint should be dismissed, it must then decide whether
4 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to
5 amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose
6 of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.”
7 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation
8 marks omitted). When dismissing a complaint for failure to state a claim, “a district court should
9 grant leave to amend even if no request to amend the pleading was made, unless it determines that
10 the pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal
11 quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing
12 amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the
13 moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532
14 (9th Cir. 2008).

15 **III. DISCUSSION**

16 Plaintiff asserts two causes of action against Defendant: a cause of action under the FCRA
17 for failure to conduct a reasonable investigation, and a cause of action under the CCRAA for
18 reporting inaccurate information to credit reporting agencies (“CRAs”). Defendant moves to
19 dismiss both causes of action. The Court addresses each in turn.

20 **A. FCRA, 15 U.S.C. § 1681s-2b**

21 Congress enacted the FCRA “to ensure fair and accurate credit reporting, promote
22 efficiency in the banking system, and protect consumer privacy.” *Gorman v. Wolpoff &*
23 *Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551
24 U.S. 47, 52 (2007)). To ensure that credit reports are accurate, the FCRA imposes duties both on
25 credit reporting agencies (“CRAs”) and “on the sources that provide credit information to
26 [consumer reporting agencies], called ‘furnishers’ in the statute.” *Id.* In the instant case,
27 Defendant does not dispute that it qualifies as a furnisher under the FCRA.

1 The obligations of furnishers are described in 15 U.S.C. § 1681s-2b. Under that section of
2 the FCRA, furnishers have certain obligations that are triggered when the furnishers receive notice
3 from the CRA that the consumer disputes the information. *Gorman*, 584 F.3d at 1154.

4 Specifically, after receiving a notice of dispute, the furnisher shall:

- 5 (A) conduct an investigation with respect to the disputed
6 information;
7 (B) review all relevant information provided by the consumer
8 reporting agency . . . ;
9 (C) report the results of the investigation to the consumer reporting
10 agency;
11 (D) if the investigation finds that the information is incomplete or
12 inaccurate, report those results to all other consumer reporting
13 agencies to which the person furnished the information . . . ; and
14 (E) if an item of information disputed by a consumer is found to be
15 inaccurate or incomplete or cannot be verified after any
16 reinvestigation under paragraph (1) . . .
17 (i) modify that item of information;
18 (ii) delete that item of information; or
19 (iii) permanently block the reporting of that item of
20 information.

21 15 U.S.C. § 1681s-2(b)(1).

22 To state a claim against a furnisher of information under § 1681s-2(b), a consumer must
23 allege that “1) the furnisher provided inaccurate information to the [CRA]; 2) the CRA notified the
24 furnisher of a dispute; and 3) the furnisher failed to conduct a reasonable investigation into the
25 accuracy of the disputed information, in light of the information provided to it by the CRA.”

26 *Middleton v. Plus Four, Inc.*, 2014 WL 910351, at *3 (D. Nev. Mar. 7, 2014); *see Mortimer v. JP*
27 *Morgan Chase Bank, N.A.*, 2012 WL 3155562, at *3 (N.D. Cal. Aug. 2, 2012) (“This [FCRA]
28 claim is insufficiently alleged because Mortimer has not asserted that [the furnisher bank] reported
incomplete or inaccurate information in the first place.”). Thus, even if a furnisher 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
FCRA claim fails as a matter of law.

Defendant argues that Plaintiff fails to state a claim for violation of 15 U.S.C. § 1681s-2b
because Plaintiff’s complaint does not allege enough facts to plausibly suggest that Defendant

1 reported inaccurate information to the CRAs. Def. Mot. at 7–10. Plaintiff’s complaint alleges that
2 Defendant reported an unpaid balance in Plaintiff’s account with Defendant to the CRAs, and that
3 this was inaccurate because the underlying debt in Plaintiff’s account was cancelled. *See* ECF No.
4 1-1 at 5. However, Defendant states that the only fact Plaintiff offers to support Plaintiff’s
5 allegation that the debt in Plaintiff’s account was cancelled is that Defendant issued a Form 1099-
6 C. Def. Mot. at 7. Defendant argues that “issuance of the 1099-C alone is insufficient to
7 establish” that the debt in Plaintiff’s account was cancelled. *Id.*

8 In support of its argument, Defendant points to 26 C.F.R. § 1.6050P-1,¹ which governs
9 when certain creditors must file a Form 1099-C with the IRS. 26 C.F.R. § 1.6050P-1(a) states that
10 “any applicable entity . . . that discharges an indebtedness of any person . . . must file an
11 information return on Form 1099-C with the [IRS].” However, § 1.6050P-1(a) further clarifies
12 that “a discharge of indebtedness is deemed to have occurred . . . if and only if there has occurred
13 an identifiable event described in paragraph (b)(2) of this section, whether or not an actual
14 discharge of indebtedness has occurred on or before the date on which the identifiable event has
15 occurred.” In turn, § 1.6050P-1(b)(2) lists eight “identifiable event[s]” that trigger the Form 1099-
16 C reporting requirement in § 1.6050P-1(a). The first seven identifiable events, § 1.6050P-
17 1(b)(2)(A)–(G), all appear to be actual discharges, cancellations, or extinguishments of
18 indebtedness. In contrast, the eighth identifiable event, § 1.6050P-1(b)(2)(H), is “the expiration of
19 the non-payment testing period, as described in § 1.6050P-1(b)(2)(iv).” By extension, § 1.6050P-
20 1(b)(2)(iv) states that a “non-payment testing period” has expired “if a creditor has not received a
21 payment on an indebtedness at any time” during a period of at least 36 months (called the “testing
22 period”). Section 1.6050P-1(b)(2)(iv) also states that a creditor can rebut the presumption that a
23 “non-payment testing period” has expired if the creditor shows that it “has engaged in significant,
24 bona fide collection activity at any time during the 12-month period ending at the close of the
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27 ¹ All references to 26 C.F.R. § 1.6050P-1 in this Order are to the version of that regulation that
28 was in effect between July 15, 2014 and November 9, 2016 (when Defendant issued the Form
1099-C in this case), and not to the current version, which took effect on November 10, 2016.

1 calendar year, or if facts and circumstances existing as of January 31 of the calendar year
2 following expiration of the 36-month period indicate that the indebtedness has not been
3 discharged.”

4 In sum, under 26 C.F.R. § 1.6050P-1, any one of eight “identifiable events” can trigger a
5 duty to issue a Form 1099-C. While seven of those “identifiable events” appear to be actual
6 discharges, cancellations, or extinguishments of indebtedness, one event—expiration of a “non-
7 payment testing period”—does not appear to *necessarily* involve any cancellation of debt. Thus,
8 because it is possible that a creditor will have to issue a Form 1099-C even when no debt has been
9 cancelled, Defendant argues that its issuance of a Form 1099-C for the bank account Plaintiff had
10 with Defendant is insufficient to establish that the debt in the account was actually cancelled.
11 Defendant also cites an IRS Information Letter issued in October 2005. *See* I.R.S. Info. 2005-
12 0207, 2005 WL 3561135 (Dec. 30, 2005). In that letter, the IRS addressed a creditor’s concern
13 that filing a Form 1099-C would constitute a written admission that the creditor had discharged
14 debt by stating that “[t]he [IRS] does not view a Form 1099-C as an admission by the creditor that
15 it has discharged the debt and can no longer pursue collection.” *Id.*

16 Further, Defendant points to a published decision from the United States Court of Appeals
17 for the Fourth Circuit holding that at the summary judgment stage, a creditor’s issuance of a Form
18 1099-C alone is not enough to create a triable issue of fact as to whether the creditor has cancelled
19 any debt. Def. Mot. at 8–9. In *FDIC v. Cashion*, 720 F.3d 169 (4th Cir. 2013), the Fourth Circuit
20 first noted that “there is no uniformity in how [] courts have resolved the central inquiry” of
21 whether the issuance of a Form 1099-C “create[s] a genuine issue of material fact as to whether [a
22 debt] had been cancelled or assigned.” *Id.* at 177. The Fourth Circuit then sided with the
23 “approach taken by a majority of the courts to consider the matter,” and stated that “[t]he plain
24 language of [26 C.F.R. § 1.6050P-1] leads us to conclude that filing a Form 1099-C is a creditor’s
25 required means of satisfying a reporting obligation to the IRS; it is not a means of accomplishing
26 an actual discharge of debt, nor is it required only where an actual discharge has already
27 occurred.” *Id.* at 178–79. *Cashion* is the only published decision from any federal court of

1 appeals that has spoken on this issue.

2 However, as the Fourth Circuit noted in *Cashion*, some lower courts have reached the
3 opposite conclusion. 720 F.3d at 178; *see, e.g., In re Reed*, 492 B.R. 261, 273 (Bankr. E.D. Tenn.
4 2013) (stating that “the issuance of a Form 1099-C *reflects* that a financial institution has, in
5 accordance with 26 U.S.C. § 6050P and 26 C.F.R. § 1.6050P-1, discharged an indebtedness,
6 which must then be reported by the debtor as taxable income,” and acknowledging that it is
7 “aware that it has adopted the minority view”). Plaintiff urges the Court to follow this line of
8 cases. Pl. Opp. at 8–9. Notably, neither the Ninth Circuit nor any court within this district has
9 ruled on whether, at the summary judgment stage, a creditor’s issuance of a Form 1099-C alone
10 creates a genuine issue of fact as to whether the creditor cancelled a debt.

11 The Court need not adopt a position on this issue at this stage of the proceedings. Even
12 assuming that a creditor’s issuance of a Form 1099-C alone cannot create a genuine issue of fact
13 as to whether the creditor cancelled a debt *at the summary judgment stage*, the instant case is still
14 only at the motion to dismiss stage. Thus, unlike at summary judgment, where the parties have
15 had the benefit of discovery, the relevant inquiry here on a motion to dismiss is whether
16 Defendant’s issuance of a Form 1099-C is sufficient to *plausibly* suggest that the debt in Plaintiff’s
17 account with Defendant was cancelled. Given that seven of the eight “identifiable events” that can
18 trigger a creditor’s duty to issue a Form 1099-C are all forms of debt cancellation, and that the
19 eighth “identifiable event” can still involve a cancellation of debt, the Court finds that Defendant’s
20 alleged issuance of a Form 1099-C is enough to plausibly suggest that Plaintiff’s indebtedness was
21 cancelled.

22 Defendant asserts one more argument on this issue by relying on a concession made by
23 Plaintiff. In his opposition, Plaintiff states that “[c]ode ‘H’ is the code listed on this Plaintiff’s
24 Form 1099-C received from Defendant Capital One,” Pl. Opp. at 4, which indicates that the event
25 that triggered Defendant’s obligation to issue a Form 1099-C was the eighth “identifiable event”
26 (listed in 26 § 1.6050P-1(b)(2)(H)): expiration of a “non-payment testing period.” As discussed
27 above, expiration of a “non-payment testing period” is the only “identifiable event” that does not
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1 *necessarily* involve any actual cancellation of debt. Thus, Defendant argues that because it issued
2 the Form 1099-C in the instant case merely because there was an expiration of a “non-payment
3 testing period,” Plaintiff has not alleged sufficient facts to plausibly suggest that Plaintiff’s debt
4 was cancelled.

5 The Court is not persuaded. As an initial matter, although both parties state in their
6 respective briefs that the Form 1099-C in the instant case contained an “H” code, Plaintiff’s
7 complaint does not state this fact, and neither party has submitted or attached a copy of the Form
8 1099-C issued by Defendant. Nonetheless, the Court’s finding remains the same even under the
9 assumption that Defendant issued the Form 1099-C in this case merely because of an expiration of
10 a “non-payment testing period.” As the Court explained above, under 26 C.F.R. § 1.6050P-
11 1(b)(2)(iv), an expiration of a “non-payment testing period” occurs only if (1) “a creditor has not
12 received a payment on an indebtedness” for at least 36 months; (2) the creditor has not shown that
13 it “has engaged in significant, bona fide collection activity at any time during the 12-month period
14 ending at the close of the calendar year”; and (3) the creditor has not shown that “facts and
15 circumstances . . . indicate that the indebtedness has not been discharged.” In other words, an
16 expiration of a “non-payment testing period” means that a debtor has not made any payments on
17 his debt for a long time (at least 3 years), and that the creditor to whom the debt is owed has not
18 come forward with evidence of any attempts to collect on that debt within the past year or any
19 indications that the debt remains outstanding. The existence of all of these factors in conjunction
20 plausibly suggests that the debtor’s debt has been cancelled. Thus, the expiration of a “non-
21 payment testing period” is sufficient to plausibly suggest that a debt has been cancelled for
22 purposes of surviving a motion to dismiss, even though expirations of “non-payment testing
23 periods” do not *necessarily* involve debt cancellations.

24 Finally, Defendant argues that even if Plaintiff has sufficiently alleged that Plaintiff’s debt
25 was cancelled, Plaintiff’s claim for violation of 15 U.S.C. § 1681s-2b fails because Plaintiff “has
26 not alleged adequately that [Defendant] failed to conduct a reasonable investigation in response to
27 [Plaintiff’s] dispute.” Def. Mot. at 10. Specifically, Defendant argues that Plaintiff “includes no

1 [factual] allegations whatsoever about” Defendant’s investigation, and thus Plaintiff assertion that
2 Defendant failed to conduct a proper investigation is conclusory. *Id.* at 11.

3 The Court disagrees with Defendant. Although it is true that Plaintiff’s complaint does not
4 allege anything about the specific steps Defendant took during its investigation process, as
5 explained above, Plaintiff’s complaint sufficiently alleges that (1) the debt in Plaintiff’s account
6 with Defendant was cancelled, and thus (2) Defendant’s reporting of that debt to the CRAs was
7 inaccurate. Plaintiff’s complaint further alleges that Plaintiff brought this alleged inaccuracy to
8 the attention of Equifax and Defendant, and that both Equifax and Defendant responded to
9 Plaintiff’s dispute “without removing” the alleged inaccuracy. ECF No. 1-1 at 5. Thus, assuming
10 that Defendant’s reporting of Plaintiff’s debt to the CRAs was inaccurate—as the Court must do at
11 this stage of the proceedings—Defendant’s failure to correct this inaccuracy after investigating it
12 in response to Plaintiff’s dispute plausibly suggests that Defendant’s investigation into the
13 inaccuracy was unreasonable.

14 Accordingly, the Court DENIES Defendant’s motion to dismiss Plaintiff’s first cause of
15 action for violation of 15 U.S.C. § 1681s-2b.

16 **B. CCRAA, Cal. Civ. Code § 1785.25(a)**

17 Section 1785.25(a) of the CCRAA provides that “[a] person shall not furnish information
18 on a specific transaction or experience to any consumer credit reporting agency if the person
19 knows or should know the information is incomplete or inaccurate.” Cal. Civ. Code. § 1785.25(a).
20 The CCRAA provides for a private right of action to enforce this provision. *Id.* §§ 1785.25(g),
21 1785.31(a). “[B]ecause the CCRAA ‘is substantially based on the Federal Fair Credit Reporting
22 Act, judicial interpretation of the federal provisions is persuasive authority and entitled to
23 substantial weight when interpreting the California provisions.’” *Carvalho v. Equifax Info. Servs.*
24 *LLC*, 629 F.3d 876, 889 (9th Cir. 2010) (quoting *Olson v. Six Rivers Nat’l Bank*, 111 Cal. App. 4th
25 1, 12 (2003)).

26 Similar to Plaintiff’s FCRA claim, Plaintiff asserts that Defendant violated the CCRAA by
27 inaccurately reporting an unpaid balance in Plaintiff’s account with Defendant to the CRAs, when

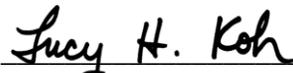
1 in reality this debt in Plaintiff’s account had been cancelled. *See* ECF No. 1-1 at 5. Defendant
2 argues that Plaintiff’s CCRAA claim “fails for the same reason as Plaintiff’s first claim for
3 violation of the FCRA”—specifically, that Plaintiff has not alleged facts sufficient to plausibly
4 suggest that the debt in Plaintiff’s account with Defendant was cancelled. Def. Mot. at 12.
5 However, for the reasons stated above, the Court finds that Plaintiff has sufficiently alleged that
6 Plaintiff’s debt was cancelled, and thus that Defendant reported inaccurate information to the
7 CRAs by reporting an unpaid balance. As a result, the Court DENIES motion to dismiss
8 Plaintiff’s CCRAA claim.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Defendant’s motion to dismiss is DENIED.

11 **IT IS SO ORDERED.**

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13 Dated: December 4, 2017

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16 LUCY H. KOH
17 United States District Judge
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