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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KAREN DUELL,

Plaintiff,

vs.

FIRST NATIONAL BANK OF
OMAHA; THE DUNNING LAW
FIRM,

Defendants.

Civil No. 14cv2774-WQH-JLB
ORDER

HAYES, Judge:

The matters before the Court are Defendant Dunning Law Firm's ("Dunning") Motion to Dismiss Counts I & II of the First Amended Complaint (ECF No. 11), and Defendant First National Bank of Omaha's ("FNBO") Motion to Dismiss Count III of Plaintiff's Complaint (ECF No. 12).

BACKGROUND

On November 20, 2014, Plaintiff Karen Duell initiated this action by filing a Complaint against Defendants Dunning and FNBO. (ECF No. 1). On January 9, 2015, Defendant FNBO filed a motion to dismiss. (ECF No. 7). On the same day, Defendant Dunning filed a motion to dismiss. (ECF No. 8).

On January 19, 2015, Plaintiff filed the First Amended Complaint asserting the following claims: (1) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. section 1692, *et seq.*, against Defendant Dunning; (2) violation of the

1 Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), California Civil Code
2 sections 1788-1788.32, against Defendants Dunning and FNBO; and (3) violation of
3 the California Consumer Credit Reporting Agencies Act, California Civil Code section
4 1785.1, *et seq.*, against Defendant FNBO. (ECF No. 9).

5 On January 23, 2015, the Court issued an Order denying Defendants’ motions to
6 dismiss (ECF Nos. 7, 8) as moot. (ECF No. 10).

7 On February 5, 2015, Defendant Dunning filed the Motion to Dismiss Counts I
8 & II of the First Amended Complaint pursuant to Federal Rule of Civil Procedure
9 12(b)(6). (ECF No. 11). On March 2, 2015, Plaintiff filed an opposition. (ECF No.
10 13). On March 11, 2015, Defendant Dunning filed a reply. (ECF No. 17). On the same
11 day, Plaintiff filed an objection to Dunning’s reply on grounds that the reply was
12 untimely. (ECF No. 18).

13 On February 5, 2015, Defendant FNBO filed the Motion to Dismiss Count III of
14 Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No.
15 12). On March 2, 2015, Plaintiff filed an opposition. (ECF No. 14). On March 9,
16 2015, Defendant FNBO filed a reply. (ECF No. 16).

17 On May 26, 2015, the Court issued an Order stating that:

18 IT IS HEREBY ORDERED that the parties shall submit supplemental
19 briefing on the issue of whether Plaintiff’s allegation that Defendant First
20 National Bank of Omaha “reported Plaintiff’s alleged delinquency to credit
bureaus each month” (ECF No. 9 at 5) may constitute collection a activity
within the meaning of the Fair Debt Collection Practices Act....

21 (ECF No. 19). On June 5, 2015, Defendant FNBO submitted a supplemental brief.
22 (ECF No. 20). On June 9, 2015, Plaintiff submitted a supplemental brief. (ECF No.
23 21). On the same day, Defendant Dunning submitted a supplemental brief. (ECF No.
24 22). On June 19, 2015, Defendant FNBO submitted a reply. (ECF No. 23). On the
25 same day, Defendant Dunning submitted a reply. (ECF No. 24).

26 **ALLEGATIONS OF FIRST AMENDED COMPLAINT**

27 “Sometime prior to February 24, 2014, Plaintiff is alleged to have incurred
28 certain financial obligations to FNBO.” (ECF No. 9 ¶ 23). “Sometime thereafter,

1 Plaintiff allegedly fell behind in the payments allegedly owed on the alleged debt.” *Id.*

2 ¶ 24. “As a result, Plaintiff has received numerous written and telephonic
3 communications from Defendant with regard to Plaintiff’s alleged debt.” *Id.* ¶ 25.

4 “Plaintiff contacted Dunning in an effort to amicably resolve Plaintiff’s alleged
5 debt.” *Id.* ¶ 26. “Following confidential settlement discussions, Plaintiff and Dunning
6 finalized a settlement with regard to Plaintiff’s alleged debt alleged to be owed to
7 FNBO.” *Id.* ¶ 27. “Dunning memorialized the settlement via written communication
8 dated February 24, 2014.” *Id.* ¶ 28. The communication stated that “[FNBO] is willing
9 to accept the sum of \$6,106.63 in monthly payments of \$170.00, so long as the first
10 payment is received by my office no later than March 7, 2014.” *Id.* ¶ 29. The
11 communication also stated that “[a]s long as you are current on your payments [FNBO]
12 will refrain from further collection activities.” *Id.* ¶ 30. “Plaintiff reasonably believed
13 that compliance with the terms of the agreement would preclude any adverse actions by
14 FNBO against Plaintiff, including the avoidance of demands for more than \$170.00 per
15 month, negative credit reporting in the event that Plaintiff paid at least \$170.00 per
16 month and a collection lawsuit.” *Id.* ¶ 31.

17 “Despite the agreement, FNBO has continued its attempts to collect Plaintiff’s
18 alleged debt. FNBO’s collection attempts falsely represent that Plaintiff is delinquent
19 and that Plaintiff owes more than \$170.00 per month. As a result, FNBO has
20 inaccurately reported Plaintiff’s alleged delinquency to the credit bureaus each month.”
21 *Id.* ¶ 33.

22 “FNBO now seeks to avoid liability by modifying the terms of the agreement as
23 memorialized by Dunning’s February 24, 2014 written communication. Specifically,
24 FNBO claims it was not bound by Plaintiff’s settlement agreement in any manner.” *Id.*
25 ¶ 34. “In the event that Dunning lacked authority to settle Plaintiff’s alleged debt on
26 behalf of FNBO and/or to make the representations in Dunning’s February 24, 2014
27 memorialization, Dunning’s conduct violated both the FDCPA and the RFDCPA.” *Id.*
28 ¶ 35.

1 Through this conduct, Dunning violated 15 U.S.C. § 1692e by using
2 false, deceptive and misleading representations in connection with the
3 collection of Plaintiff's alleged debt. This section is incorporated into the
RFDPCA by Cal. Civ. Code § 1788.17; thus, Dunning also violated Cal.
Civ. Code § 1788.17.

4 Through this conduct, Dunning violated 15 U.S.C. § 1692e(5) by
5 taking action that could not legally be taken. This section is incorporated
6 into the RFDPCA by Cal. Civ. Code § 1788.17; thus, Dunning also
violated Cal. Civ. Code § 1788.17.

7 Through this conduct, Dunning violated 15 U.S.C. § 1692e(9) by
8 distributing a written communication which created a false impression as
9 its authorization and/or approval. This section is incorporated into the
RFDPCA by Cal. Civ. Code § 1788.17; thus, Dunning also violated Cal.
Civ. Code § 1788.17.

10 Through this conduct Dunning violated 15 U.S.C. § 1692e(10) by
11 using false representations and deceptive means to collect Plaintiff's
alleged debt. This section is incorporated into the RFDPCA by Cal. Civ.
Code § 1788.17; thus, Dunning also violated Cal. Civ. Code § 1788.17.

12 *Id.* ¶ 36-39.

13 “Furthermore, FNBO also violated the RFDPCA by continuing collection activity
14 with regard to Plaintiff's alleged debt, including reporting Plaintiff as delinquent to the
15 credit bureaus.” *Id.* ¶ 40.

16 Through this conduct, FNBO violated 15 U.S.C. § 1692e by using
17 false, deceptive and misleading representations in connection with the
18 collection of Plaintiff's alleged debt. This section is incorporated into the
RFDPCA by Cal. Civ. Code § 1788.17; thus, FNBO violated Cal. Civ.
Code § 1788.17.

19 Through this conduct, FNBO violated 15 U.S.C. § 1692e(2)(A) by
20 falsely representing the character, amount, and legal status of Plaintiff's
alleged debt. This section is incorporated into the RFDPCA by Cal. Civ.
Code § 1788.17; thus, FNBO violated Cal. Civ. Code § 1788.17.

21 Through this conduct, FNBO violated 15 U.S.C. § 1692e(8) by
22 communication false information to the credit bureaus regarding Plaintiff's
23 alleged debt. This section is incorporated into the RFDPCA by Cal. Civ.
Code § 1788.17; thus, FNBO violated Cal. Civ. Code § 1788.17.

24 Through this conduct FNBO violated 15 U.S.C. § 1692e(10) by
25 using false representations and deceptive means to collect Plaintiff's
alleged debt. This section is incorporated into the RFDPCA by Cal. Civ.
Code § 1788.17; thus, FNBO also violated Cal. Civ. Code § 1788.17.

26 Through this conduct FNBO violated 15 U.S.C. § 1692f by using
27 unfair and unconscionable means to collect Plaintiff's alleged debt. This
28 section is incorporated into the RFDPCA by Cal. Civ. Code § 1788.17;
thus, FNBO also violated Cal. Civ. Code § 1788.17.

1 Through this conduct FNBO violated 15 U.S.C. § 1692f(1) by
2 collecting any amount neither expressly authorized by the agreement
3 creating Plaintiff's alleged debt nor permitted by law. This section is
4 incorporated into the RFDPCA by Cal. Civ. Code § 1788.17; thus, FNBO
5 also violated Cal. Civ. Code § 1788.17.

6 Through this conduct, FNBO violated Cal. Civ. Code § 1785.25(a)
7 by furnishing information to a consumer credit reporting agency knowing
8 the information was inaccurate.

9 *Id.* ¶ 42-48.

10 Plaintiff further alleges that:

11 In the regular course of its business operations, FNBO routinely
12 furnishes information to credit reporting agencies pertaining to
13 transactions between FNBO and FNBO's consumers, so as to provide
14 information to a consumer's credit worthiness, credit standing and credit
15 capacity.

16 Because FNBO is a partnership, corporation, association, or other
17 entity, and is therefore a "person" as that term is defined by Cal. Civ. Code
18 § 1785.3(j), Defendant is and always was obligated to not furnish
19 information on a specific transaction or experience to any consumer credit
20 reporting agency if the person knows or should have known that the
21 information is incomplete or inaccurate, as required by Cal. Civ. Code §
22 1785.25(a). FNBO knew or should have known that Plaintiff was timely
23 making Plaintiff's required payments. Thus, FNBO violated Cal. Civ.
24 Code § 1785.25(a).

25 *Id.* ¶¶ 61-62.

26 The First Amended Complaint asserts three claims for relief: (1) violation of the
27 FDCPA, 15 U.S.C. section 1692, *et seq.*, against Defendant Dunning Law Firm; (2)
28 violation of the RFDCPA, California Civil Code sections 1788-1788.32, against
29 Defendants Dunning Law Firm and FNBO; and (3) violation of the California
30 Consumer Credit Reporting Agencies Act, California Civil Code section 1785.1, *et seq.*,
31 against Defendant FNBO.

32 LEGAL STANDARD

33 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state
34 a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of
35 Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must
36 contain ... a short and plain statement of the claim showing that the pleader is entitled
37 to relief." Fed. R. Civ. P. 8(a)(2). "A district court's dismissal for failure to state a
38

1 claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of a
2 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
3 legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)
4 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

5 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
6 requires more than labels and conclusions, and a formulaic recitation of the elements
7 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
8 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must
9 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
10 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
11 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
12 content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must
14 accept as true all of the allegations contained in a complaint is inapplicable to legal
15 conclusions. Threadbare recitals of the elements of a cause of action, supported by
16 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “While the pleading
17 standard for Rule 8(a) is liberal, the ‘[f]actual allegations must be enough to raise a right
18 to relief above the speculative level.’” *Cook v. Brewer*, 637 F.3d 1002, 1006 (9th Cir.
19 2011) (quoting *Twombly*, 550 U.S. at 555). “In sum, for a complaint to survive a
20 motion to dismiss, the non-conclusory factual content, and reasonable inferences from
21 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”
22 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

23 **Motion to Dismiss by Defendant Dunning (ECF No. 11)**

24 Defendant Dunning moves to dismiss Plaintiff’s FDCPA and RFDCPA claims asserted
25 against Dunning.

26 **I. Fair Debt Collection Practices Act and Rosenthal Act**

27 Plaintiff brings the FDCPA claim against Defendant “Dunning only,” but brings
28

1 the RFDCPA claim against both Defendant Dunning and Defendant FNBO.¹ (ECF No.
2 9 at 9). Defendant Dunning contends that Plaintiff's allegations are conclusory and
3 speculative and Plaintiff does not allege facts to support the FDCPA claim. Defendant
4 Dunning contends that Plaintiff does not allege facts to support a claim that Defendant
5 Dunning did not have the authority to negotiate with Plaintiff. Defendant Dunning
6 contends that Plaintiff does not allege that Dunning made false reports about the debt,
7 or that Dunning incorrectly reported the status of the debt. Defendant Dunning
8 contends that Plaintiff does not allege that Dunning was involved in any of the activities
9 carried out by FNBO that serve as the basis for the Complaint.

10 Plaintiff contends that the Complaint alleges that Defendant Dunning agreed that
11 Plaintiff would pay a total amount of \$6,106.63 via monthly payments of \$170.00, and
12 that as long as Plaintiff made each monthly payment, FNBO would refrain from further
13 collection activity. Plaintiff contends that, contrary to Dunning's representations made
14 in inducing payment from Plaintiff, FNBO continues to assert that Plaintiff is
15 delinquent on Plaintiff's alleged debt; that Plaintiff owes more than \$170.00 per month;
16 and that FNBO has reported this alleged delinquency to the credit bureaus. Plaintiff
17 contends that the Complaint alleges that, had Dunning not made these false
18 representations in Defendant's February 24, 2014 written communication, Plaintiff
19 would have proceeded in a different manner with regard to resolving the alleged debt.

20 Section 1692e prohibits the use by a debt collector of "any false, deceptive, or
21 misleading representation or means in connection with the collection of any debt." 15
22 U.S.C. § 1692e. The FDCPA includes a non-exhaustive list of examples of proscribed
23 conduct, including:

24 (5) The threat to take any action that cannot legally be taken or that is not
25 intended to be taken.

26 ...

27 (9) The use or distribution of any written communication which simulates
28 or is falsely represented to be a document authorized, issued, or approved

¹ Defendant FNBO does not move to dismiss Plaintiff's RFDCPA claim against FNBO.

1 by any court, official, or agency of the United States or any State, or which
2 creates a false impression as to its source, authorization, or approval.

3 (10) The use of any false representation or deceptive means to collect or
4 attempt to collect any debt or to obtain information concerning a
5 consumer.

6 *Id.* “Whether conduct violates [§ 1692e] ... requires an objective analysis that takes into
7 account whether the least sophisticated debtor would likely be misled by a
8 communication.” *Gonzales*, 660 F.3d at 1061-62 (internal quotations omitted). “The
9 ‘least sophisticated debtor’ standard is ‘lower than simply examining whether particular
10 language would deceive or mislead a reasonable debtor.’” *Id.* (quoting *Terran*, 109
11 F.3d at 1432). “The standard is ‘designed to protect consumers of below average
12 sophistication or intelligence,’ or those who are ‘uninformed or naive,’ particularly
13 when those individuals are targeted by debt collectors.” *Id.* at 1062 (quoting *Duffy v.*
14 *Landberg*, 215 F.3d 871, 874-75 (8th Cir.2000)). “At the same time, the standard
15 ‘preserv[es] a quotient of reasonableness and presum[es] a basic level of understanding
16 and willingness to read with care.’” *Id.* (quoting *Rosenau v. Unifund Corp.*, 539 F.3d
17 218, 221 (3d Cir. 2008)). “The FDCPA does not subject debt collectors to liability for
18 bizarre, idiosyncratic, or peculiar misinterpretations.” *Id.* (internal quotations omitted).

19 Plaintiff alleges that she finalized a settlement with Dunning which provided that
20 “[FNBO] is willing to accept the sum of \$6,106.63 in monthly payments of \$170.00,
21 so long as the first payment is received by my office no later than March 7, 2014,” and
22 “[a]s long as you are current on your payments [FNBO] will refrain from further
23 collection activities.” (ECF No. 9 ¶¶ 29-30). Plaintiff alleges that she fulfilled her
24 obligations by paying the agreed upon amount per month. Plaintiff alleges that “despite
25 said agreement, FNBO has continued its attempts to collect Plaintiff’s alleged debt.
26 Said collection attempts falsely represent that Plaintiff is delinquent; and, that Plaintiff
27 owes more than \$170.00 per month. As a result, FNBO has inaccurately reported
28 Plaintiff’s alleged delinquency to the credit bureaus each month.” *Id.* ¶ 33. Plaintiff
alleges that “[i]n the event that Dunning lacked authority to settle Plaintiff’s alleged
debt on behalf of FNBO and/or to make the representations in Dunning’s February 24,

1 2014 memorialization, Dunning’s conduct violated both the FDCPA; and, the
2 RFDCPA.” (ECF No. 9 ¶ 35). Plaintiff alleges that through this conduct, “Dunning
3 violated 15 U.S.C. § 1692e(5) by taking action that could not legally be taken;”
4 “Dunning violated 15 U.S.C. § 1692(e)(9) by distributing a written communication
5 which created a false impression as its authorization and/or approval;” and “Dunning
6 violated 15 U.S.C. § 1692e(10) by using false representations and deceptive means to
7 collect Plaintiff’s alleged debt.” *Id.* ¶¶ 37-39.

8 **A. Section 1692e(5)**

9 Section 1692e(5) prohibits a debt collector from making a “threat to take any
10 action that cannot legally be taken or that is not intended to be taken.” 15 U.S.C. §
11 1692e(5). Plaintiff alleges that the communication from Dunning stated that “[FNBO]
12 is willing to accept the sum of \$6,106.63 in monthly payments of \$170.00, so long as
13 the first payment is received by my office no later than March 7, 2014,” and “[a]s long
14 as you are current on your payments [FNBO] will refrain from further collection
15 activities.” (ECF No. 9 ¶¶ 29-30). The alleged language of the communication cannot
16 reasonably be read as a “threat to take any action that cannot legally be taken or that is
17 not intended to be taken.” 15 U.S.C. § 1692e(5). The Court finds that Plaintiff fails to
18 state a claim pursuant to Section 1692e(5). Defendant Dunning’s Motion to Dismiss
19 is granted as to Section 1692e(5).

20 Furthermore, Plaintiff alleges that “[Section 1692e(5)] is incorporated into the
21 RFDCPA by Cal. Civ. Code § 1788.17; thus, Dunning also violated Cal. Civ. Code §
22 1788.17.” (ECF No. 9 ¶ 37). The Rosenthal Act requires compliance with the FDCPA,
23 and a debt collector that violates the FDCPA also violates the Rosenthal Act. *See* Cal.
24 Civ. Code § 1788.17; *Gates v. MCT Grp., Inc.*, No. 13CV2611-MMA DHB, 2015 WL
25 1349985, at *9 (S.D. Cal. Mar. 13, 2015); *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp.
26 2d 1104, 1118 (C.D. Cal. 2005). Because Plaintiff fails to state a claim against
27 Defendant Dunning pursuant to Section 1692e(5), Plaintiff also fails to state a claim
28 against Defendant Dunning as to California Civil Code section 1788.17.

1 **B. Section 1692e(9)**

2 Section 1692e(9) prohibits “[t]he use or distribution of any written
3 communication ... which creates a false impression as to its source, authorization, or
4 approval.” 15 U.S.C. § 1692e(9).

5 Plaintiff alleges that the settlement agreement entered into by Defendant Dunning
6 and Plaintiff stated that “[FNBO] is willing to accept the sum of \$6,106.63 in monthly
7 payments of \$170.00, so long as the first payment is received by my office no later than
8 March 7, 2014.” (ECF No. 9 at ¶ 29). Plaintiff alleges that the communication also
9 stated that “[a]s long as you are current on your payments [FNBO] will refrain from
10 further collection activities.” *Id.* ¶ 30. Plaintiff alleges that “[d]espite the agreement,
11 FNBO has continued its attempts to collect Plaintiff’s alleged debt. FNBO’s collection
12 attempts falsely represent that Plaintiff is delinquent and that Plaintiff owes more than
13 \$170.00 per month.” *Id.* ¶ 33. The Court finds that Plaintiff has alleged sufficient facts
14 to state a claim that Defendant Dunning did not have the authorization or approval of
15 Defendant FNBO when Dunning represented that “[FNBO] is willing to accept the sum
16 of \$6,106.63 in monthly payments of \$170.00, so long as the first payment is received
17 by my office no later than March 7, 2014,” and that “[a]s long as you are current on
18 your payments [FNBO] will refrain from further collection activities.” *Id.* ¶ 29-30.
19 Defendant Dunning’s Motion to Dismiss is denied as to Section 1692e(9). The
20 Complaint adequately alleges that Defendant FNBO continues to engage in collection
21 activities despite Defendant Dunning’s representation that Defendant FNBO would
22 “refrain from further collection activities.” *Id.* ¶ 30.

23 Furthermore, Plaintiff alleges that “[Section 1692e(9)] is incorporated into the
24 RFDCPA by Cal. Civ. Code § 1788.17; thus, Dunning also violated Cal. Civ. Code §
25 1788.17.” (ECF No. 9 ¶ 38). The Rosenthal Act requires compliance with the FDCPA,
26 and a debt collector that violates the FDCPA also violates the Rosenthal Act. *See* Cal.
27 Civ. Code § 1788.17; *Gates*, No. 13CV2611-MMA DHB, 2015 WL 1349985, at *9;
28 *Hosseinzadeh*, 387 F. Supp. 2d at 1118. Because Plaintiff has alleged sufficient facts

1 to state a claim pursuant to Section 1692e(9), Plaintiff has also alleged sufficient facts
2 to state a claim against Defendant Dunning pursuant to California Civil Code section
3 1788.17.

4 **C. Section 1692e(10)**

5 Section 1692e(10), which prohibits “[t]he use of any false representation or
6 deceptive means to collect ... any debt, has been referred to as a ‘catchall’ provision, and
7 can be violated in any number of novel ways.” *Gonzales*, 660 F.3d at 1062 (internal
8 quotations omitted). In the Ninth Circuit, the standard to determine whether a
9 communication is deceptive or misleading under Section 1692e(10) is whether the
10 “least sophisticated consumer” could have been deceived or misled. *Wade v. Reg'l*
11 *Credit Ass’n*, 87 F.3d 1098, 1100 (9th Cir.1996); *Donohue v. Quick Collect, Inc.*, 592
12 F.3d 1027, 1033 (9th Cir.2010); *see also Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d
13 1222, 1227 (9th Cir.1988).

14 Plaintiff alleges that Dunning violated these section of the FDCPA because the
15 settlement agreement entered into by Defendant Dunning and Plaintiff stated that “[a]s
16 long as you are current on your payments [FNBO] will refrain from further collection
17 activities.” (ECF No. 9 ¶ 30). Plaintiff alleges that she “reasonably believed that
18 compliance with the terms of the agreement would preclude any adverse actions by
19 FNBO against Plaintiff, including the avoidance of demands for more than \$170.00 per
20 month, negative credit reporting in the event that Plaintiff paid at least \$170.00 per
21 month and a collection lawsuit.” *Id.* ¶ 31. Plaintiff further alleges that “[d]espite the
22 agreement, FNBO has continued its attempts to collect Plaintiff’s alleged debt. FNBO’s
23 collection attempts falsely represent that Plaintiff is delinquent and that Plaintiff owes
24 more than \$170.00 per month. As a result, FNBO has inaccurately reported Plaintiff’s
25 alleged delinquency to the credit bureaus each month.” *Id.* ¶ 33. Applying the least
26 sophisticated consumer standard, Plaintiff could reasonably believe that Defendant
27 Dunning’s representation – “[a]s long as you are current on your payments [FNBO] will
28 refrain from further collection activities” – included refraining from “negative credit

1 reporting in the event that Plaintiff paid at least \$170.00 per month.” (ECF No. 9 ¶¶ 29-
2 31). The Court finds that Plaintiff has alleged sufficient facts to state a claim pursuant
3 to Section 1692e(10). Defendant Dunning’s Motion to Dismiss is denied as to Section
4 1692e(10)

5 Furthermore, Plaintiff alleges that “[Section 1692e(10)] is incorporated into the
6 RFDCPA by Cal. Civ. Code § 1788.17; thus, Dunning also violated Cal. Civ. Code §
7 1788.17.” (ECF No. 9 ¶ 39). The Rosenthal Act requires compliance with the FDCPA,
8 and a debt collector that violates the FDCPA also violates the Rosenthal Act. *See* Cal.
9 Civ. Code § 1788.17; *Gates*, No. 13CV2611-MMA DHB, 2015 WL 1349985, at *9;
10 *Hosseinzadeh*, 387 F. Supp. 2d at 1118. Because Plaintiff has alleged sufficient facts
11 to state a claim pursuant to Section 1692e(10), Plaintiff has also alleged sufficient facts
12 to state a claim against Defendant Dunning pursuant to California Civil Code section
13 1788.17.

14 **Motion to Dismiss by Defendant FNBO (ECF No. 12)**

15 Defendant FNBO moves to dismiss Plaintiff’s Credit Reporting Agencies Act
16 (“CCRAA”) claim brought against Defendant FNBO only.

17 Defendant FNBO contends that the Fair Credit Reporting Act (“FCRA”)
18 specifically preempts state laws that proscribe restrictions on furnishers of information.
19 Defendant FNBO contends that Plaintiff has not alleged that FNBO is a credit reporting
20 agency or a user of information. Defendant FNBO contends that Plaintiff has only
21 alleged that FNBO is a furnisher of information and this Court has already found that
22 a private right of action does not exist under the CCRAA against furnishers of
23 information. Plaintiff contends that the FCRA does not preempt California Civil Code
24 section 1785.25(a).

25 **I. Private Right of Action**

26 California Civil Code section 1785.25(a), provides that “[a] person shall not
27 furnish information on a specific transaction or experience to any consumer credit
28 reporting agency if the person knows or should know the information is incomplete or

1 inaccurate.” Cal. Civ. Code § 1785.25(a). California Civil Code section 1785.31(a),
2 provides “[a]ny consumer who suffers damages as a result of a violation of this title by
3 any person may bring an action in a court of appropriate jurisdiction against that
4 person....” Cal. Civ. Code § 1785.31(a).

5 District courts in the Ninth Circuit are split on the issue of whether Section
6 1785.25(a) provides a private right of action against furnishers of information.
7 *Compare Miller v. Bank of Am., Nat. Ass’n*, 858 F. Supp. 2d 1118, 1125 (S.D. Cal.
8 2012) (dismissing plaintiff’s CCRAA claim against Bank of America because “Plaintiff
9 alleges Defendant [Bank of America] is a furnisher of information” and “[p]rivate
10 plaintiffs cannot bring CCRA[A] claims against a furnisher of credit information.”) *and*
11 *Samuel v. CitiMortgage, Inc.*, No. C 12-5871 MEJ, 2013 WL 1501491, at *4 (N.D. Cal.
12 Apr. 10, 2013) (same) *with Steiner v. OneWest Bank, FSB*, No. C 13-05349 SBA, 2014
13 WL 2452212, at *3 (N.D. Cal. May 30, 2014) (rejecting argument that dismissal of
14 plaintiffs’ CCRAA claim was warranted because there is no private right of action
15 under Section 1785.25(a) against furnishers of information to credit reporting agencies)
16 *and Esquivel v. Bank of Am., N.A.*, No. 2:12-CV-02502-GEB, 2013 WL 5781679, at *6
17 (E.D. Cal. Oct. 25, 2013) (rejecting argument that CCRAA does not permit claims
18 against furnishers of information) *and McFaul v. Bank of Am., N.A.*, No. CV 12-5685
19 PSG, 2013 WL 2368056, at *2 (N.D. Cal. May 29, 2013) (finding that Section
20 1785.25(a) provides a private right of action against furnishers of information).

21 The district courts that have found no private right of action exists against
22 furnishers of information pursuant to Section 1785.25(a) rely on *Pulver v. Avco*
23 *Financial Services*, 182 Cal. App. 3d 622 (1986). *See, e.g., Miller*, 858 F. Supp. 2d at
24 1125. *Pulver* states that “[Section 1785.31(a)] gives the consumer an action for
25 damages against a credit reporting agency or a user of information for violation of its
26 provisions ... it does not extend liability to one who furnishes information to a credit
27 reporting agency.” *Pulver v. Avco Fin. Servs.*, 182 Cal. App. 3d at 633. Accordingly,
28 the district courts finding that no private right of action exists against furnishers of

1 information pursuant to Section 1785.25(a) have required plaintiffs to allege that the
2 defendant was either a user of information or a credit reporting agency. *See Miller*, 858
3 F. Supp. 2d at 1125 (“Here, Plaintiff alleges Defendant BAC is a furnisher of
4 information; Plaintiff makes no allegations that Defendant is a user of information or
5 a credit reporting agency. Thus, section 1785.31 does not authorize Plaintiff to bring a
6 CCRA[A] claim against Defendant. Accordingly, to the extent Plaintiff attempts to
7 bring a CCRA[A] claim against Defendant BAC in its capacity as a furnisher of credit
8 information, he cannot do so and the claim is dismissed without prejudice.”); *Samuel*,
9 2013 WL 1501491, at *4 (“Here, Plaintiffs allege Defendant is a furnisher of
10 information; Plaintiffs makes no allegations that Defendant is a user of information or
11 a credit reporting agency. Thus, section 1785.31 does not authorize Plaintiffs to bring
12 a CCRA[A] claim against Defendant. Accordingly, to the extent Plaintiffs attempts to
13 bring a CCRA[A] claim against Defendant in its capacity as a furnisher of credit
14 information, they cannot do so and the claim is DISMISSED.”).

15 However, as pointed out by the district courts that have found a private right of
16 action exists against furnishers of information pursuant to Section 1785.25(a), *Pulver*
17 pre-dates the California Legislature’s 1993 amendment of the CCRAA. *See McFaul*,
18 2013 WL 2368056, at *2 (“But *Pulver* pre-dates the California Legislature’s 1993
19 amendment of the CCRA[A] to include Section 1785.25, which explicitly provides a
20 private cause of action against parties furnishing information to credit reporting
21 agencies.”); *Steiner*, 2014 WL 2452212, at *3 (“OneWest contends that dismissal of
22 Plaintiffs’ CCRAA claim is warranted because there is no private right of action under
23 Civil Code § 1785.25(a) against furnishers of information to credit reporting agencies.
24 In support of its position, OneWest relies on [*Pulver*]. OneWest’s reliance on *Pulver* is
25 misplaced. *Pulver* pre-dates the California Legislature’s 1993 amendment of the
26 CCRAA to include § 1785.25.”).

27 Furthermore, the Ninth Circuit Court of Appeals has recognized that a private
28 right of action exists to enforce Section 1785.25(a) against furnishers of information.

1 See *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1171 (9th Cir. 2009) (“[I]t
2 is California Civil Code section 1785.25(a), and only section 1785.25(a), that imposes
3 legal duties-‘rule[s] of law that must be obeyed’-on furnishers of information.”).

4 The California Legislature’s 1993 amendment of the CCRAA providing a private
5 cause of action against parties furnishing information to credit reporting agencies and
6 the Ninth Circuit’s recognition that a private right of action exists against furnishers of
7 information pursuant to Section 1785.25(a), support the conclusion that a private right
8 of action exists against furnishers of information pursuant to Section 1785.25(a).

9 In this case, Plaintiff alleges that through its conduct, “FNBO violated Cal. Civ.
10 Code § 1785.25(a) by furnishing information to a consumer credit reporting agency
11 knowing the information was inaccurate.” (ECF No. 9 ¶ 48). Plaintiff further alleges
12 that “[i]n the regular course of its business operations, FNBO routinely furnishes
13 information to credit reporting agencies pertaining to transactions between FNBO and
14 FNBO’s consumers, so as to provide information to a consumer’s credit worthiness,
15 credit standing and credit capacity.” *Id.* ¶ 61. Plaintiff’s allegations are sufficient to
16 state a claim pursuant to Section 1785.25(a).

17 **II. Preemption**

18 “Section 1681t(b)(1)(F), the FCRA’s preemption provision, expressly exempts
19 this subsection-California Civil Code section 1785.25(a)-from its general exclusion of
20 state law claims on matters governed by § 1681s-2.29.” *Gorman v. Wolpoff &*
21 *Abramson, LLP*, 584 F.3d 1147, 1169 (9th Cir. 2009). “It is California Civil Code
22 section 1785.25(a), and only section 1785.25(a), that imposes legal duties-‘rule[s] of
23 law that must be obeyed’-on furnishers of information. Congress explicitly saved this
24 section from preemption in the FCRA.” *Id.* at 1171. The Ninth Circuit Court of
25 Appeals held in *Gorman* that, “[b]ecause the plain language of the preemption provision
26 does not apply to private rights of action, and because the likely purpose of the express
27 exclusion was precisely to permit private enforcement of these provisions, we hold that
28 the private right of action to enforce California Civil Code section 1785.25(a) is not

1 preempted by the FCRA.” *Gorman*, 584 F.3d at 1172-73; *see also* *Carvalho v. Equifax*
2 *Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010) (discussing *Gorman* and stating
3 that “*Gorman* holds only that the FCRA does not preempt section 1785.25(a) claims
4 against furnishers.”).


5 Plaintiff alleges that through its conduct, “FNBO violated Cal. Civ. Code §
6 1785.25(a) by furnishing information to a consumer credit reporting agency knowing
7 the information was inaccurate.” (ECF No. 9 ¶ 48). Plaintiff further alleges that “[i]n
8 the regular course of its business operations, FNBO routinely furnishes information to
9 credit reporting agencies pertaining to transactions between FNBO and FNBO’s
10 consumers, so as to provide information to a consumer’s credit worthiness, credit
11 standing and credit capacity.” *Id.* ¶ 61. The Court finds that Plaintiff’s CCRAA claim
12 pursuant to Section 1785.25(a) is not preempted by the FCRA. Defendant FNBO’s
13 Motion to Dismiss Count III of Plaintiff’s Complaint is denied.

14 CONCLUSION

15 IT IS HEREBY ORDERED that Defendant Dunning Law Firm’s Motion to
16 Dismiss Counts I & II of the First Amended Complaint (ECF No. 11) is GRANTED in
17 part and DENIED in part. Defendant Dunning’s Motion to Dismiss is GRANTED with
18 respect to Plaintiff’s claim that Defendant Dunning violated Section 1692e(5) of the
19 FDCPA and the corresponding provision under the RFDCPA. Defendant Dunning’s
20 Motion to Dismiss is DENIED in all other respects.

21 IT IS FURTHER ORDERED that Defendant FNBO’s Motion to Dismiss Count
22 III of Plaintiff’s First Amended Complaint (ECF No. 12) is DENIED.

23 DATED: July 29, 2015

24 
25 **WILLIAM Q. HAYES**
26 United States District Judge