

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. TATRO,

Plaintiff,

v.

STERLING JEWELERS, INC., a
Delaware corporation; T-MOBILE,
U.S.A., INC.; a Delaware corporation;
MACY’S RETAIL HOLDINGS, INC., a
New York corporation; TARGET
CORPORATE SERVICES, INC., a
Minnesota corporation; RAC
ACCEPTANCE, LLC, a Delaware
Limited Liability Company; VERIZON
NEW ENGLAND, INC., a New York
corporation; DFS SERVICES, INC., a
Delaware Limited Liability Company,
APPLE INC., a California corporation;
FDS BANK, FSB, A Federal Savings
Bank; SONY ELECTRONICS, INC.,
California corporation; VERIZON
WIRELESS, LLC, A Delaware Limited
Liability Company; NEXTEL
COMMUNICATIONS OF THE MID-
ATLANTIC., a Delaware corporation;
BILL ME LATER, INC., a Delaware
corporation; DIRECTV, LLC, a California
Limited Liability Company, TD BANK,

Case No.: 17cv1305-JAH (MSB)

**ORDER GRANTING DEFENDANTS
FIRST PREMIER BANK AND BILL
ME LATER’S MOTIONS TO
DISMISS (Doc. Nos. 74, 75) AND
DENYING DEFENDANT BILL ME
LATER’S MOTION TO DISMISS
(Doc. No. 88)**

1 USA, NA, a National Banking
2 Association; CREDIT ONE BANK, NA, a
3 National Banking Association; FIRST
4 PREMIER BANK, a National Banking
5 Association; CAPITAL ONE BANK,
6 USA, NA. a National Banking
7 Association; SYNCRONY BANK;
8 BANK OF AMERICA CORPORATION;
9 PNC FINANCIAL SERVICES, GROUP,
10 INC.; MIDLAND CREDIT
11 MANAGEMENT, INC., a Kansas
12 corporation; THE NORTHLAND
13 GROUP, INC., a Minnesota corporation;
14 WELLS FARGO CARD SERVICES,
15 INC., a Iowa corporation, WELLS
16 FARGO BANK, NA, a National Banking
17 Association; CONSUMERINFO.COM,
18 INC., a California corporation; CAPITAL
19 ONE AUTO FINANCE, a Texas
20 corporation; G.E. CAPITAL
21 FINANCIAL, TRANS UNION
22 INTERACTIVE, a California company,
23
24
25
26
27
28
Defendants.

INTRODUCTION

19 Pending before the Court is Defendant First Premier Bank’s (“First Premier Bank”) motion to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Doc. No. 74. Also pending before the Court is Defendant Bill Me Later’s motions to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. Nos. 75, 88. The motions are fully briefed and unopposed. The Court construes Bill Me Later’s second motion to dismiss (Doc. No. 88) as duplicative of Bill Me Later’s first motion to dismiss (Doc. No. 75). After careful review of the pleadings, and for the reasons set forth below, the Court **GRANTS** First Premier Bank’s motion to dismiss (Doc. No. 74); **GRANTS** Bill Me Later’s first motion to dismiss (Doc. No. 75); and **DENIES** Bill Me Later’s second motion to dismiss (Doc. No. 88) as moot.

1 **BACKGROUND**

2 On June 26, 2017, Plaintiff filed a complaint against all named defendants, alleging
3 they mishandled his financial information. See Doc. No. 1. Plaintiff alleges federal claims
4 under the Fair Credit Reporting Act (“FCRA”) and Fair Debt Collection Practices Act
5 (“FDCPA”). Id. Plaintiff also alleges Rhode Island state law claims. Id. Specifically,
6 Plaintiff makes the following claims: (1) Willful, wanton, and reckless disregard; (2)
7 Violations of the Fair Credit Reporting Act (“FRCA”); (3) Violations of Rhode Island’s
8 Impersonation and Identity Fraud Act; and (4) Intrusion on Plaintiff’s Rhode Island state
9 law right to privacy. Id. On March 13, 2018, First Premier Bank filed a motion to dismiss
10 pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for a lack of personal
11 jurisdiction. Doc. No. 74. On the same day, March 13, 2018, Bill Me Later filed a motion
12 to dismiss pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure for failure to state
13 a claim. Doc. No. 75. On April 23, 2018, Plaintiff filed a document requesting additional
14 time to respond to Defendants’ motions to dismiss. Doc. No. 78. Plaintiff filed what the
15 Court construes to be a motion to stay proceedings on the same day, April 23, 2018. Doc.
16 No. 79. On May 2, 2018, this Court GRANTED Plaintiff’s motion to stay proceedings and
17 stayed proceedings until July 1, 2018. On July 25, 2018, Bill Me Later filed what the Court
18 construes to be an identical motion to dismiss (Doc. No. 88) to the motion filed on March
19 13, 2018 (Doc. No. 75).

20 The Ninth Circuit has held that a district court may properly grant a motion to
21 dismiss as unopposed pursuant to a local rule where the local rule permits, but does not
22 require, the granting of a motion for failure to respond. See Ghazali v. Moran, 46 F.3d 52,
23 53 (9th Cir. 1995). Civil Local Rule 7.1.f.3.c provides that “[i]f an opposing party fails to
24 file the papers in the manner required by Civil Local Rule 7.1.e.2, that failure may
25 constitute a consent to the granting of a motion or other request for ruling by the court.”
26 Although the Court may grant Defendants’ motions to dismiss as unopposed, in the
27 interests of justice, the Court addresses the merits below.

28 //

1 **DISCUSSION**

2 **I. Legal Standard**

3 **a. Rule 12(b)(2)**

4 Under Rule 12(b)(2), a court may dismiss a case for lack of jurisdiction over the
5 person. The Ninth Circuit has established a two prong test for determining if the Court’s
6 assertion of personal jurisdiction is proper. Jurisdiction must comport with: (1) the state
7 long-arm statute, and (2) the constitutional requirement of due process. Mattel, Inc., v.
8 Greiner & Hausser GMBH, 354 F.3d 857, 863 (9th Cir. 2003) (quoting Ziegler v. Indian
9 River County, 64 F.3d 470, 473 (9th Cir. 1995)).

10 As to the first prong, California’s long arm statute provides that “a court of this state
11 may exercise jurisdiction on any basis not inconsistent with the Constitution of this State
12 or of the United States.” Cal. Civ. Proc. Code § 410.10. Because California law allows the
13 exercise of jurisdiction to the same extent as due process under the United States
14 Constitution, the only question is whether the exercise of jurisdiction over the defendant is
15 constitutional. See Mattel, 354 F.3d at 863. Under a due process analysis, the Court may
16 only exercise jurisdiction in accord with “traditional notions of fair play and substantial
17 justice,” thus the nonresident defendant is required to have “certain minimum contacts”
18 with the forum state in order for jurisdiction to be proper. Id. (quoting International Shoe
19 Co. v. Washington, 326 U.S. 310, 316 (1945)).

20 Personal jurisdiction may be found where the defendant’s activities subject him to
21 either general or specific jurisdiction. General jurisdiction exists where a nonresident
22 defendant’s activities within a state are “substantial” or “continuous and systematic.” Data
23 Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).
24 In the absence of general jurisdiction, a nonresident defendant may still be sued in the
25 forum if specific jurisdiction exists. Id. The Ninth Circuit has established a three part test
26 to determine whether there is specific jurisdiction over a defendant:

27 ‘Specific’ jurisdiction exists if (1) the defendant has performed some act or
28 consummated some transaction within the forum or otherwise purposefully availed

1 himself of the privilege of conducting activities in the forum, (2) the claim arises out
2 of or results from the defendant's forum-related activities, and (3) the exercise of
3 jurisdiction is reasonable.

4 Mattel, 354 F.3d at 863 (quoting Bancroft & Masters v. Augusta Nat'l Inc., 223 F.3d 1082,
5 1086 (9th Cir. 2000)).

6 **b. Rule 12(b)(6)**

7 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
8 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
9 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter
10 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319,
11 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a
12 dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents
13 a cognizable legal theory yet fails to plead essential facts under that theory. Robertson,
14 749 F.2d at 534. While a plaintiff need not give "detailed factual allegations," he must
15 plead sufficient facts that, if true, "raise a right to relief above the speculative level." Bell
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

17 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
18 accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
19 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
20 plausible when the factual allegations permit "the court to draw the reasonable inference
21 that the defendant is liable for the misconduct alleged." *Id.* In other words, "the
22 nonconclusory 'factual content,' and reasonable inferences from that content, must be
23 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
24 572 F.3d 962, 969 (9th Cir. 2009). "Determining whether a complaint states a plausible
25 claim for relief will ... be a context-specific task that requires the reviewing court to draw
26 on its judicial experience and common sense." Iqbal, 129 S.Ct. at 1950.

27 When ruling on a motion to dismiss, the Court may consider the facts alleged in the
28 complaint, documents attached to the complaint, documents relied upon but not attached

1 to the complaint when authenticity is not contested, and matters of which the Court takes
2 judicial notice. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court
3 determines that a complaint fails to state a claim, the court should grant leave to amend
4 unless it determines that the pleading could not possibly be cured by the allegation of other
5 facts.

6 **II. Analysis**

7 First Premier Bank argues that this Court does not have general jurisdiction because
8 First Premier Bank is not headquartered or incorporated in California. Doc. No. 74 at pgs.
9 4-5. First Premier Bank also contends that this Court does not have specific jurisdiction
10 because First Premier Bank does not have any connections to California. Id. at pgs. 5-6.

11 Bill Me Later argues that there is no such cause of action as “willful, wanton, and
12 reckless disregard.” Doc. 75-1 at pg. 9. Bill Me Later contends that even if this cause of
13 action was interpreted as an FCRA claim, it is still duplicative of the second cause of action.
14 Id. Bill Me Later argues that Plaintiff fails to allege facts to state a claim under the FCRA.
15 Id. at pgs. 9-10. Bill Me Later asserts Plaintiff fails to show that Bill Me Later engaged in
16 any ‘willful’ wrongdoing. Id. at pgs. 10-11. Bill Me Later contends that Plaintiff does not
17 have standing under Rhode Island law, and Rhode Island law is irrelevant in this case. Id.
18 at pgs. 11-12. Bill Me Later asserts that Plaintiff’s allegations are legal conclusions and
19 insufficient. Id. at pg. 12. Bill Me Later argues that Plaintiff’s Rhode Island claims are
20 untimely. Id. at pgs. 12-13.

21 The Court will first address First Premier Banks’ motion to dismiss for lack of
22 jurisdiction. The Court will then address Bill Me Later’s motions to dismiss for failure to
23 state a claim.

24 **a. Personal Jurisdiction**

25 Plaintiff bears the burden of making a prima facie showing that jurisdiction is proper.
26 Mattel, 354 F.3d at 862 (citing Harris Rutsky, 328 F.3d at 1128). “To make that showing,
27 [a plaintiff] need only demonstrate facts that, if true, would support jurisdiction over the
28 [d]efendants.” Id. The Court finds that Plaintiff does not make a prima facie showing that

1 this Court has personal jurisdiction over First Premier Bank. First Premier Bank is not
2 headquartered or incorporated in California. See Doc. No. 74 at pgs. 4-5. Further, Plaintiff
3 does not show that First Premier Bank has sufficient contacts with the state of California.
4 ““Conflicts between the facts contained in the parties’ affidavits must be resolved in
5 [plaintiff’s] favor for purposes of deciding whether a prima facie case for personal
6 jurisdiction exists.”” AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.
7 1996); see also Doe v. Unocal Corp., 922 (9th Cir. 2001). The Court finds here, there is
8 no conflict of facts, but rather Plaintiff has not alleged facts to make a prima facie showing
9 that jurisdiction is proper. Thus, the Court **GRANTS** First Premier Bank’s motion to
10 dismiss (Doc. No. 74).

11 **b. Failure to State a Claim**

12 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
13 truth of all factual allegations and must construe all inferences from them in the light most
14 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002);
15 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). This Court follows
16 Ninth Circuit rule in noting that legal conclusions need not be taken as true merely because
17 they are cast in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200
18 (9th Cir. 2003); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The
19 Court finds while Plaintiff asserts that he was a customer of Bill Me Later, Plaintiff does
20 not plead sufficient facts to suggest Bill Me Later engaged in any wrongdoing. Plaintiff
21 asserts that he was not involved in the credit transactions when the alleged wrongdoing
22 occurred, but Plaintiff does not adequately plead Bill Me Later’s wrongdoing in those
23 credit transactions. Plaintiff does not offer any facts in support of his claims against Bill
24 Me Later. The Court finds Plaintiff fails to “raise a right to relief above the speculative
25 level.” See Twombly, 550 U.S. at 545. Thus, the Court **GRANTS** Bill Me Later’s motion
26 to dismiss (Doc. No. 75). Accordingly, the Court **DENIES** Bill Me Later’s second motion
27 to dismiss (Doc. No. 88) as moot because it is duplicative.

28 //

1 CONCLUSION

2 Based on the foregoing reasons, **IT IS HEREBY ORDERED THAT** Defendant
3 First Premier Bank and Defendant Bill Me Later’s motions to dismiss (Doc. Nos. 74, 75)
4 are **GRANTED**. Plaintiff’s complaint against Defendants First Premier Bank and Bill Me
5 Later is **DISMISSED** without prejudice. Defendant Bill Me Later’s second motion to
6 dismiss (Doc. No. 88) is **DENIED** as moot.

7
8 **IT IS SO ORDERED.**

9
10 DATED: December 17, 2018

11
12 
13 _____
14 JOHN A. HOUSTON
15 United States District Judge
16
17
18
19
20
21
22
23
24
25
26
27
28