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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE ANTONIO GONZALEZ,
Plaintiff,
v.
SALLIE MAE BANK, et al.,
Defendants.

Case No.: 18cv2457

**ORDER GRANTING IN PART
MOTION TO DISMISS**

Plaintiff Jose Antonio Gonzalez, through counsel, filed his complaint in this case bringing claims under the federal Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA); under California’s Rosenthal Fair Debt Collection Practices Act (RFDCPA) and Consumer Credit Reporting Agencies Act (CCCRAA); and for declaratory relief, apparently under the federal Declaratory Judgment Act. Defendant Sallie Mae Bank (“SMB”) moved to dismiss.

Legal Standards

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The pleading standard is governed by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Under Fed. R. Civ. P. 8(a)(2), “a short and plain statement of the claim showing that the pleader is entitled to relief,” is

1 required, in order to “give the defendant fair notice of what the . . . claim is and the
2 grounds upon which it rests.” *Twombly*, 550 U.S. at 554–55. “Factual allegations
3 must be enough to raise a right to relief above the speculative level” *Id.* at
4 555. “[S]ome threshold of plausibility must be crossed at the outset” before a case
5 is permitted to proceed. *Id.* at 558 (citation omitted). The well-pleaded facts must
6 do more than permit the Court to infer “the mere possibility of misconduct”; they
7 must show that the pleader is entitled to relief. *Iqbal*, 556 U.S. at 679.

8 When determining whether a complaint states a claim, the Court accepts all
9 allegations of material fact in the complaint as true and construes them in the light
10 most favorable to the non-moving party. *Cedars-Sinai Med. Ctr. v. Nat’l League of*
11 *Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007) (citation omitted).
12 “Conclusory allegations and unreasonable inferences, however, are insufficient to
13 defeat a motion to dismiss.” *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).
14 Nor does the Court “assume the truth of legal conclusions merely because they
15 are cast in the form of factual allegations” *Navajo Nation v. Dept. of Interior*,
16 876 F.3d 1144, 1163 (9th Cir. 2017) (citation and quotation marks omitted).

17 **Factual Background**

18 According to the complaint, Defendant Rafael Hernandez asked Gonzalez
19 to co-sign for a student loan he was planning to apply for. Gonzalez alleges he
20 provided Hernandez with his date of birth and social security number, but wanted
21 more information before he would agree to be Hernandez’s co-signer. Gonzalez
22 alleges Hernandez applied for the loan anyway, somehow listing Gonzalez as a
23 co-signer, and the loan was approved.

24 The loan apparently became past due, and SMB attempted to collect from
25 Gonzalez. Although Gonzalez is suing both SMB and Hernandez, only SMB has
26 moved to dismiss; Hernandez has not appeared.

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1 **Discussion**

2 **FDCPA**

3 SMB points out that it is a lender, not a debt collector for purposes of the
4 FDCPA. The complaint agrees that SMB was the lender on the obligation at issue
5 here. It does not allege that SMB's principal business is the collection of debts, nor
6 that it regularly collects or attempts to collect debts owed to others. See 15 U.S.C.
7 § 1692a(6) (defining "debt collector").

8 Gonzalez argues that SMB holds itself out as a debt collector, and if
9 permitted to amend could allege facts showing that. In support of this, he cites an
10 email dated March 8, 2018. (See Decl. of Robert Waller, Ex. 3.) Even if a lender
11 could become a debt collector for FDCPA purposes by holding itself out as one,
12 this email does not do that. Instead, it merely references the loan, which it says is
13 delinquent. A warning below the signature line says "This is an attempt to collect
14 a debt and information obtained will be used for that purpose," but does not
15 mention the FDCPA. Bearing in mind that SMB might be treated as a debt collector
16 under some laws, a generic warning is perhaps not surprising.

17 Because the FDCPA's definition of "debt collector" does not include a
18 "holding out" theory under which an entity that is not otherwise a debt collector
19 could become one merely by holding itself out as one. See *O'Connor v. Wells*
20 *Fargo, N.A.*, 2014 WL 4802994, at *3 (N.D. Cal., Sept. 26, 2014) (holding that even
21 if defendant had held itself out as a debt collector, it was not a debt collector within
22 the definition of the FDCPA); *Hernandez v. Green Tree Servicing LLC*, 2014 WL
23 2586932 at *3 (C.D. Cal., June 9, 2014) ("[W]hether Green Tree is a debt collector
24 under the FDCPA does not turn on whether Green Tree holds itself out as a debt
25 collector.") Even where FDCPA-specific warnings or disclaimers have been given,
26 courts have not treated them as giving rise to an inference that the sender is a debt
27 collector for FDCPA purposes. See *Amelina v. Mfrs. & Traders Trust Co.*, 2016
28 WL 3982483, at *11 (S.D. Cal., July 21, 2016) (surveying cases). In other words,

1 even if SMB had held itself out as a debt collector, that alone would not mean it
2 was one for purposes of the FDCPA.

3 And even more so, generic warnings about debt collection that are identical
4 or similar to the one Gonzalez points to have been held insufficient to give rise to
5 an inference that the sender was a debt collector under the FDCPA. See *O'Connor*
6 *v. Wells Fargo, N.A.*, 2014 WL 4802994, at *4 (N.D. Cal., Sept. 26, 2014); *Akil v.*
7 *Carrington Mortg. Servs., LLC*, 2013 WL 3779292, at *2 (E.D. Cal., July 17, 2013).

8 **FCRA**

9 The parties agree that Gonzalez's FCRA remedy, if he has one, is found in
10 15 U.S.C. § 1682s-2(b). They agree that the FCRA provides no private right of
11 action to consumers for a creditor's initial failure to notify credit reporting agencies
12 (CRAs) of a consumer's dispute. Section 1682s-2(b)(1), however, does provide a
13 private right of action. This section requires that, after receiving notice pursuant to
14 § 1681i(a)(2), a furnisher of information (here, SMB) must take certain actions,
15 beginning with an investigation. SMB argues that Gonzalez has no claim under
16 this section, however, because the complaint does not allege SMB received notice
17 of his dispute from a CRA. Rather, it makes allegations about what SMB "knew."
18 (Complaint, ¶¶ 45–48, 50.) It also includes a request that SMB be "enjoined from
19 enforcing the loan," although this appears to be a request under some other
20 provision of law. (*Id.*, ¶ 49.)

21 Gonzalez argues that SMB knew or was on notice that the information it was
22 reporting to CRAs was inaccurate. But merely a creditor's obligation § 1681i(a)(2)
23 requires that the furnisher of information receive notification. Specifically,
24 §1681i(a)(2)(B) requires the CRA to "promptly provide" to the furnisher "all relevant
25 information regarding the dispute" This notification triggers the furnisher's
26 obligation to conduct an investigation. *Gorman v. Wolpoff & Abramson, LLP*, 584
27 F.3d 1147, 1157 (9th Cir. 2009) ("[A] furnisher's obligation to conduct a reasonable
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1 investigation under § 1681s-2(b)(1)(A) arises when it receives a notice of dispute
2 from a CRA.”)

3 Consumers can also initiate a direct dispute by notifying the creditor (*i.e.*, the
4 furnisher of information to the CRA), see 16 C.F.R. § 660.2(b), but this creates no
5 private right of action regardless of how the dispute is resolved.

6 If constructive notice or knowledge of the underlying facts were enough,
7 either direct or indirect disputes would give rise to private rights of action any time
8 a creditor failed to carry out its obligations under either §1681s-2(a) or (b). But in
9 fact, only indirect disputes can give rise to private rights of action under the FCRA;
10 violations of the FCRA in connection with a direct dispute are enforceable only by
11 government officials. *Gustafson v. Experian Info. Solutions, Inc.*, 2014 WL
12 2115210, at *2 (C.D. Cal., May 21, 2014).

13 Gonzalez points to two pages from his Experian credit reports. (Waller Decl.,
14 Exs. 4 and 5.) These include the identical comments “Subscriber reports dispute
15 resolved – consumer disagrees.” These are in a general “comments” section,
16 however, and do not indicate what kind of dispute it was or how Experian came to
17 know of the dispute. But Gonzalez resolves the issue, by explaining that he
18 disputed the obligation directly with SMB, beginning in December of 2017, and that
19 SMB undertook an investigation. (Waller Decl., ¶ 4(b)–(c) and (h).) Under § 1681s-
20 2(a)(3), SMB was obligated to notify Experian that Gonzalez had disputed the
21 information SMB was reporting to Experian. The notions in the Experian reports,
22 in other words, appear to mean that SMB notified Experian that Gonzalez had
23 initiated a direct dispute.

24 In short, the complaint does not allege SMB ever received notice pursuant
25 to § 1681s(a)(2), and the facts Gonzalez proffers would not correct this defect.
26 Rather, they strongly suggest he cannot.

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1 **RFDCPA and CCRAA**

2 SMB argues that the RFDCPA and CCCRAA claims are either preempted or
3 nearly preempted. See *Gorman*, 584 F.3d at 1170–71; *Miller v. Bank of Am., Nat’l*
4 *Ass’n*, 858 F. Supp. 2d 1118, 1124 (S.D. Cal., 2012). Gonzalez largely concedes
5 this, although he argues that to the extent his claims arise under the RFDCPA’s
6 provisions concerning identity theft, they are not. The complaint, however, does
7 not include sufficient allegations regarding identity theft, or of SMB’s knowledge of
8 it.

9 Gonzalez also concedes his CCCRAA claims are preempted, other than
10 those under section 1785.25(a). He does not address SMB’s contention that his
11 claims under this section are inadequately pled, impliedly conceding them. Instead,
12 he offers to amend his complaint to correct the defects.

13 The Court finds these two claims are mostly preempted, and to the extent
14 they are not preempted they are inadequately pled.

15 **Declaratory Relief**

16 Gonzalez’s request for declaratory relief is the only one brought against
17 Hernandez. It merely asks for a determination of Defendants’ rights and
18 obligations. If he prevails, he asks the Court to declare that SMB “must rescind
19 and/or otherwise remove [him] from any obligation for the student loan”
20 (Compl., ¶ 18.) This is actually a request for injunctive relief, however.
21 Furthermore, declaratory relief is not itself a cause of action and does not give rise
22 to federal question jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S.
23 667, 671 (1950). Rather, it is a kind of relief the Court can grant, if appropriate. *Id.*
24 at 671–72. A claim for declaratory relief cannot survive independently of other
25 valid claims. *Snodgrass v. Provident Life & Acc. Ins. Co.*, 147 F.3d 1163, 1167–
26 68 (9th Cir. 1998).

27 Gonzalez’s briefing implies he wants the Court to resolve the underlying
28 controversy about whether he validly agreed to serve as co-signer for Hernandez’s

1 loan. But this claim is not adequately pled or briefed. This is particularly true
2 because allegations against Hernandez raise questions of fraud or mistake, and
3 under Fed. R. Civ. P. 9(b) must be pled with particularity. See, e.g., *U.S. Bank*
4 *Trust, N.A. v. Lindsey*, 2014 WL 12561098, at *8 (C.D. Cal., Nov. 21, 2014)
5 (applying Rule 9(b)'s heightened pleading standard to allegations of forgery of a
6 notary's signature). Even if any of Gonzalez's other claims were adequately pled,
7 he would still need to amend this claim to avoid its dismissal.

8 **Conclusion**

9 The motion to dismiss is **GRANTED IN PART**. Gonzalez's state law and
10 declaratory relief claims are inadequately pled, and are **DISMISSED WITHOUT**
11 **PREJUDICE**. His FDCPA claim cannot be saved by amendment, and is
12 **DISMISSED WITH PREJUDICE**. His FCRA claim probably cannot be saved by
13 amendment, unless he can plead facts showing he also initiated an indirect dispute
14 that gave rise to his claim. His FCRA claim is **DISMISSED WITHOUT**
15 **PREJUDICE**.

16 The complaint identifies federal question as the primary source of the Court's
17 jurisdiction, and asks the Court to exercise supplemental jurisdiction over the state
18 law claims. (Compl., ¶ 9.) In the absence of at least one viable federal question,
19 the Court cannot exercise supplemental jurisdiction over the state claims. 28
20 U.S.C. § 1367(a); *Herman Family Revocable Tr. v. Teddy Bear*, 254 F.3d 802, 805
21 (9th Cir. 2001). And, as noted, the Declaratory Judgment Act is not an independent
22 source of federal question jurisdiction.

23 If Gonzalez thinks he can successfully amend his FCRA claim, he should file
24 an *ex parte* motion (without obtaining a hearing date) for leave to amend that
25 complies with Civil Local Rule 15.1(b). His motion must show that he can state a
26 valid claim under the FCRA, and that the Court can exercise supplemental
27 jurisdiction over the remaining claims.

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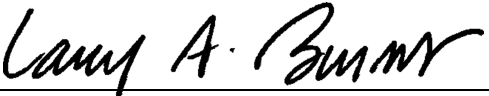
1 Gonzalez’s motion must be filed by **October 2, 2019**. SMB’s opposition, if
2 any, should be filed by **October 23, 2019**. No reply should be filed without leave.
3 If Gonzalez does not believe he can successfully amend, he should file an *ex parte*
4 or joint motion to dismiss.

5 If Gonzalez does not seek leave to amend as ordered, the Court will construe
6 this as his concession that he cannot bring a successful FCRA claim. The case will
7 then be dismissed with prejudice as to the federal claims, and without prejudice as
8 to the state law claims.

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IT IS SO ORDERED.

Dated: September 12, 2019



Hon. Larry Alan Burns
Chief United States District Judge