

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 JOSEPH J. SMITH,)
4)
5 Plaintiff,)
6 vs.)
7 ONE NEVADA CREDIT UNION,)
8 Defendant.)

Case No.: 2:16-cv-02156-GMN-NJK

ORDER

9
10 Pending before the Court is the Motion to Dismiss, (ECF Nos. 6, 12), filed by Defendant
11 One Nevada Credit Union ("Defendant"). Plaintiff Joseph J. Smith ("Plaintiff") filed a
12 Response, (ECF No. 14), and Plaintiff filed a Reply, (ECF No. 17). For the reasons discussed
13 below, the Court GRANTS in part and DENIES in part Defendant's Motion.¹

14 I. BACKGROUND

15 Plaintiff's Complaint, (ECF No. 1), brings a class action lawsuit on behalf of himself
16 and those similarly situated, asserting claims under the Fair Credit Reporting Act ("FCRA")
17 and challenging Defendant's alleged practice of obtaining consumer credit information without
18 authorization.

19 Plaintiff alleges that he obtained an auto loan from Defendant in October 2004. (Compl.
20 ¶ 15). By November 2008, Plaintiff alleges that his loan was paid off and his account with

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22 ¹ Also pending before the Court is Defendant's Motion to Strike Plaintiff's Objection to Defendant's Reply.
23 (ECF No. 24). Plaintiff filed two objections in this series of briefings. (See ECF Nos. 15, 22). The arguments in
24 first Objection, (ECF No. 15), are more appropriately raised in Plaintiff's Response, and the Court therefore
25 finds the Objection improper. However, Defendant does not complain about this Objection, and even after
adding the Objection to Plaintiff's Response, Plaintiff meets the page limits articulated in the local rules. See
L.R. 7-3(b). On the other hand, the second Objection, (ECF No. 22), functions as a sur-reply, which are only
permitted upon leave of court. L.R. 7-2(b). Because Plaintiff failed to request leave of Court, the Court
GRANTS Defendant's Motion to strike the second Objection. Further, the Court cautions Plaintiff against filing
additional objections rather than fully developing its arguments in appropriate briefings.

1 Defendant was closed. (Id. ¶ 16). Moreover, Plaintiff received a bankruptcy discharge in
2 October 27, 2015. (Id. ¶ 19). Accordingly, Plaintiff asserts that even if the account had not
3 been closed, any relationship between Plaintiff and Defendant was extinguished by the
4 bankruptcy discharge. (Id. ¶¶ 20–22). After his relationship with Defendant ended, Plaintiff
5 alleges that he did not seek credit of any type from Defendant, that Defendant knew the account
6 had been closed, and yet Defendant obtained information from a credit reporting agency on
7 January 15, 2016, without his authorization or a permissible purpose. (Id. ¶¶ 24–31).

8 Based on these allegations, Plaintiff alleges that Defendant willfully and negligently
9 violated the FCRA. Defendant argues in the instant Motion to Dismiss that: (1) Plaintiff lacks
10 standing to assert such claims; and (2) Plaintiff fails to adequately allege the FCRA violations.
11 (See Mot. to Dismiss “MTD”, ECF No. 6).

12 **II. LEGAL STANDARD**

13 **A. Rule 12(b)(1)**

14 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
15 lack of subject-matter jurisdiction.² Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction
16 is challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott*
17 *v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke the
18 court’s jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly,
19 courts presume lack of subject matter jurisdiction until the plaintiff proves otherwise in
20 response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
21 377 (1994).

23
24 ² Although Defendant’s Motion to Dismiss provides the legal standard for Federal Rule of Civil Procedure
25 (“FRCP”) 12(b)(6) failure to state a claim, (Mot. to Dismiss 2:18–3:20, ECF No. 12), the Court also considers
the Motion under FRCP 12(b)(1), as the bulk of Defendant’s argument implicates the Court’s lack of jurisdiction
to hear the case for lack of standing. See, e.g., *Manor v. D.R. Horton, Inc.*, No. 2:14-cv-2222-JCM-NJK, 2016
WL 1045484, at *1 (D. Nev. Mar. 15, 2016).

1 “Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed
2 without prejudice so that a plaintiff may reassert his claims in a competent court.” *Frigard v.*
3 *United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam). However, where there is no way
4 to cure the jurisdictional defect, dismissal with prejudice is proper. See *id.*

5 Lack of standing is a defect in subject matter jurisdiction and may be challenged under
6 Rule 12(b)(1). See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The
7 standing doctrine has a constitutional and a prudential component. *Elk Grove Unified Sch. Dist.*
8 *v. Newdow*, 542 U.S. 1, 11 (2004) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62,
9 (1992) (constitutional standing), and *Allen v. Wright*, 468 U.S. 737, 751 (1984) (prudential
10 standing)). To satisfy the constitutional component, a plaintiff must meet three requirements:
11 (1) the plaintiff must have suffered an injury in fact; (2) that is fairly traceable to the challenged
12 conduct of the defendant; and (3) it must be likely, as opposed to merely speculative, that the
13 injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61. The plaintiff bears
14 the burden of establishing these elements, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990),
15 and must allege sufficient facts to demonstrate that each element has been met, *Warth v. Seldin*,
16 422 U.S. 490, 518 (1975).

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

18 Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a
19 cause of action that fails to state a claim upon which relief can be granted. See *North Star Int'l*
20 *v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to
21 dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
22 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
23 on which it rests. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
24 whether the complaint is sufficient to state a claim, the Court will take all material allegations
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1 as true and construe them in the light most favorable to the plaintiff. See *NL Indus., Inc. v.*
2 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

3 The Court, however, is not required to accept as true allegations that are merely
4 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
5 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
6 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
7 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
8 *Twombly*, 550 U.S. at 555) (emphasis added). “A claim has facial plausibility when the
9 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged.” *Id.* Rule 8(a)(2) requires that a plaintiff’s
11 complaint contain “a short and plain statement of the claim showing that the pleader is entitled
12 to relief.” Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because
13 “they impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179
14 (9th Cir. 1996).

15 **III. DISCUSSION**

16 **A. Standing**

17 Defendant relies on the Supreme Court’s decision in *Spokeo v. Robins*, 136 S.Ct. 1540,
18 (2016), to argue that Plaintiff’s “generalized allegations of an invasion of privacy” resulting
19 from the alleged unauthorized and impermissible pull of his credit report is a mere “innocuous,
20 hyper-technical violation” of the FCRA and does not result in a concrete harm. (MTD 4:21–22,
21 5:14, ECF No. 6). Plaintiff counters that his allegation that Defendant obtained credit
22 information without a permissible purpose or his written consent as required under the FCRA
23 demonstrate harm to a substantive right—invasion of his privacy—and not a mere procedural
24 violation. (Resp. 6:1–18, ECF No. 14).

1 In Spokeo, Thomas Robins sued Spokeo, Inc., an alleged consumer reporting agency that
2 operates a “people search engine,” for publishing inaccurate information about him. Spokeo,
3 136 S.Ct. at 1542. On appeal, the Ninth Circuit Court of Appeals found that Robins had
4 standing to bring suit against Spokeo. See *id.* at 1544–45. Specifically, the Ninth Circuit held
5 that Robins had adequately alleged injury in fact because he stated that “Spokeo violated his
6 statutory rights, not just the statutory rights of other people,” and that “Robins’s personal
7 interests in the handling of his credit information are individualized rather than collective.” *Id.*
8 at 1544. The Supreme Court reversed, finding the Ninth Circuit’s standing analysis evaluated
9 only particularization, not concreteness, and was therefore incomplete.² The Court observed
10 that “not all inaccuracies [in a credit report] cause harm or present any material risk of harm.”
11 *Id.* at 1550. The Court identified as an example of a mere technical or “bare procedural
12 violation,” divorced from any other concrete harm, the reporting of an incorrect zip code in a
13 consumer’s credit report. *Id.*

14 Following the Supreme Court’s decision in Spokeo, courts in the Ninth Circuit have held
15 that willful noncompliance with the FCRA results in concrete harm to a substantive right. See,
16 e.g., *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017) (“The authorization requirement [of
17 the FCRA] creates a right to privacy by enabling applicants to withhold permission to obtain
18 the report from the prospective employer, and a concrete injury when applicants are deprived of
19 their ability to meaningfully authorize the credit check.”); *Demmings v. KKW Trucking, Inc.*,
20 No. 3:14-cv-494-SI, 2017 WL 1170856, at *10–11 (D. Or. Mar. 29, 2017); *Terrell v. Costco*
21 *Wholesale Corp.*, No. C16-1415JLR, 2017 WL 951053, at *5 (W.D. Wash. Mar. 10, 2017); *In*
22 *re Ocwen Loan Servicing LLC Litig.*, No. 3:16-cv-00200-MMD-WGC, 2017 WL 1289826, at
23 *3–5 (D. Nev. Mar. 3, 2017).

24 The Court finds the Honorable Judge Miranda Du’s well-reasoned opinion in *In re*
25 *Ocwen Loan Servicing* particularly persuasive. There, Judge Du distinguished between the

1 plaintiffs' similar allegations of willful and negligent noncompliance with the FCRA. See *In re*
2 *Ocwen Loan Servicing LLC Litig.*, 2017 WL 1289826, at *3. Likewise, the Court addresses
3 these claims separately.

4 **1. Willful Noncompliance**

5 With regard to willful noncompliance, Judge Du held that in light of *Spokeo* and the
6 Ninth Circuit's decision in *Syed*, the plaintiffs' allegations that the defendant loan servicer
7 willfully failed to comply with the FCRA by continuing to obtain credit information even after
8 plaintiffs' debts had been discharged in bankruptcy constituted a "concrete harm to a
9 substantive right." *Id.* at *5. The same reasoning applies here to support Plaintiff's argument
10 that "if a plaintiff is claiming an invasion of privacy, . . . the plaintiff need not allege any
11 additional harm to have standing." (Resp. 4:27–28).

12 Defendant argues that as its customer, "Plaintiff specifically authorized Defendant to
13 obtain credit reporting information concerning Plaintiff." (MTD 9:2–3). This argument rings
14 hollow. The idea that a single authorization to obtain credit reporting information for a once
15 existing account would authorize an institution to continue to obtain such information
16 pertaining to a terminated account into perpetuity strains credulity. Defendant does not even
17 attempt to explain why it would require such information for a terminated account beyond its
18 conclusory assertion that it had a permissible purpose in doing so.

19 Again, Judge Du's opinion is instructive:

20 The FCRA is clear that account review inquiries are permissible to
21 determine whether the consumer continues to meet the terms of the
22 account. 15 U.S.C. § 1681b(a)(3). The operative word in this
23 provision is "continues," which indicates Congress recognized that
24 once an individual terminated her relationship with a lender it was
25 no longer permissible for the lender to access the account—
precisely because the lender would have no reason for doing so.
Given that the FCRA was enacted specifically to combat
unnecessary and unwanted invasions of consumer privacy and
maintain consumer confidentiality in the credit bureau industry,
Congress enumerated and clearly established specific permissible

1 purposes for a reason. By restricting such improper credit inquiries,
2 Congress recognized the concrete harm that is caused by such
3 inquiries. Just as § 1681b(b)(2)(A)'s disclosure requirement
4 "creates a right to privacy" and results in "concrete injury" when
5 violated, credit inquiries that exceed the scope of § 1681b(a)(3)—as
6 alleged here—invade a plaintiff's right to privacy and result in
7 concrete harm, thereby satisfying Article III standing.

8 Id. at *5.

9 For the same reasons, the Court finds that Plaintiff has satisfied Article III standing
10 requirements with regard to his willful noncompliance claims.

11 **2. Negligent Noncompliance**

12 On the other hand, "[a]llegations of negligent noncompliance require a lower burden of
13 proof regarding scienter than willful noncompliance. The FCRA reflects this difference in
14 requiring that the lower burden of demonstrating negligent noncompliance be balanced by a
15 showing of actual damages." Id. at *6; see also 15 U.S.C. § 1681n(a)(1). Here, Plaintiff alleges
16 that "Defendant's behavior caused Plaintiff to suffer mental and emotional distress as a result
17 of Defendant's invasion of Plaintiff's privacy." (Compl. ¶ 35).

18 The Court finds that these allegations are too sparse and conclusory to support Plaintiff's
19 negligence claim. "[A] plaintiff must support a claim for damages based on emotional distress
20 with something more than his or her own conclusory allegations." *Myers v. Bennett Law*
21 *Offices*, 238 F. Supp. 2d 1196, 1206 (D. Nev. 2002). While Plaintiff alleges that he "suffer[ed]
22 mental and emotional distress as a result of Defendant's invasion of Plaintiff's privacy,"
23 (Compl. ¶ 35), the Complaint offers no specific facts about how Plaintiff suffered those
24 damages. See *Sion v. SunRun, Inc.*, No. 16-cv-05834-JST, 2017 WL 952953, at *2 (N.D. Cal.
25 Mar. 13, 2017) (finding identical allegation insufficient to allege actual damages necessary to
support a negligence claim under the FCRA). Mere recitals of the elements of a cause of

1 action, supported only by conclusory statements, are insufficient. *Iqbal*, 129 S.Ct. at 1949.
2 Accordingly, the Court dismisses this claim without prejudice.

3 **B. Failure to Allege Willfulness**

4 Defendant also argues that the Complaint fails to “adequately plead a willful or
5 negligent violation of the statute in order to state a FCRA claim.” (MTD 10: 17–18). Because
6 the Court finds *supra* that Plaintiff has failed to sufficiently allege a negligent violation, the
7 Court confines its analysis to willfulness.

8 A defendant acts “willfully” for purposes of the FCRA if the defendant knowingly or
9 recklessly disregards its statutory duties. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57–58
10 (2007). “[A] company subject to FCRA does not act in reckless disregard of it unless the
11 action is not only a violation under a reasonable reading of the statute’s terms, but shows that
12 the company ran a risk of violating the law substantially greater than the risk associated with a
13 reading that was merely careless.” *Id.* at 69. Thus a plaintiff seeking to recover damages under
14 a willfulness theory “must allege, at a minimum, that the defendant’s reading of the FCRA is
15 ‘objectively unreasonable.’” *Kirchner v. Shred-it USA Inc.*, No. 2:14-1437 WBS, 2014 WL
16 6685210, at *1 (E.D. Cal. Nov. 25, 2014) (quoting *Safeco*, 551 U.S. at 69).

17 Plaintiff alleges that “Defendant’s actions were willful under 15 U.S.C. §§ 1681n
18 because Defendant was aware of the FCRA’s prohibitions on impermissibly pulling consumers’
19 credit reports.” (Compl. ¶ 32). Further, Plaintiff alleges that Defendant “submitted a credit
20 report inquiry on January 15, 2016, over seven years after Plaintiff’s relationship with
21 Defendant had ended” without a plausible purpose. (*Id.* ¶¶ 26–31). Defendant argues that its
22 “alleged conduct is also protected pursuant to the [FCRA] provision which allow credit
23 information to be obtained ‘ . . . to determine whether the consumer continues to meet the terms
24 of the account.’” (Resp. 9:11–16) (citing 15 U.S.C. § 1681b(a)(F)(ii)). As discussed *supra*, the
25 FCRA does not support Defendant’s assertion with regard to a closed account. See *Syed*, 853

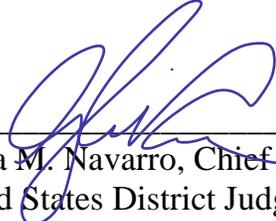
1 F.3d at 505 (finding willfulness sufficiently pled where FCRA “unambiguously foreclose[d]”
2 the defendant’s subjective interpretation of the FCRA). Taking Plaintiff’s allegations as true,
3 the Court therefore finds that Plaintiff has adequately alleged facts showing Defendant’s
4 interpretation of the FCRA is objectively unreasonable. The Motion to Dismiss is therefore
5 denied as to this claim.

6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss, (ECF Nos. 6, 12), is
8 **GRANTED in part** and **DENIED in part**. Plaintiff’s claim for negligent violation of the
9 FCRA is **DISMISSED without prejudice**. Plaintiff’s claim for willful violation of the FCRA
10 survives. Plaintiff shall have twenty-one days from the filing date of this Order to file an
11 amended complaint should he elect to do so. Failure to file an amended complaint by this date
12 will result in dismissal of Plaintiff’s negligent violation claim with prejudice.

13 **IT IS FURTHER ORDERED** that Defendant’s Motion to Strike, (ECF No. 24), is
14 **GRANTED**. The Clerk shall **STRIKE** Plaintiff’s Objection to Defendant’s Reply, (ECF No.
15 22).

16 **DATED** this 27 day of June, 2017.

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21 Gloria M. Navarro, Chief Judge
22 United States District Judge
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