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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARIO DIAZ,

Plaintiff(s),

v.

CHASE, et al.,

Defendant(s).

Case No. 2:19-CV-20 JCM (VCF)

ORDER

Presently before the court is Experian Information Solutions, Inc.’s (“defendant”) motion to dismiss. (ECF No. 52). Mario Diaz (“plaintiff”) filed a response (ECF No. 53), to which defendant replied (ECF No. 54).

Also before the court is plaintiff’s motion for leave to file supplemental authority. (ECF No. 55). Defendant responded. (ECF No. 58). Plaintiff has not yet replied, but in light of the court’s discussion below, the motion is ready for adjudication.

I. Background

This action arises from alleged violations of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681–1681x, and Nevada Revised Statute (“NRS”) 598C.130. (ECF Nos. 1, 25). Defendant is a consumer reporting agency (“CRA”), as defined by 15 U.S.C. §§ 1681 et seq. and NRS 598C.100. (ECF No. 1 at 2–3). Plaintiff is a “consumer” pursuant to 15 U.S.C. § 1681a(c) and NRS 598C.040. *Id.* at 2.

On September 12, 2017, defendant provided plaintiff with a FCRA § 1681g consumer disclosure. *Id.* at 14. On June 21, 2018, defendant provided plaintiff with a second FCRA § 1681g consumer disclosure. *Id.* Plaintiff alleges defendant violated the FCRA by failing to disclose (1) all permissible purposes for which soft inquiries were made, (2) when defendant

1 permits third parties to access credit, (3) “behavioral data” defendant stores about plaintiff, and
2 (4) the sources for plaintiff’s addresses and names. *Id.* at 15–20.

3 Plaintiff filed his complaint on January 3, 2019. (ECF No. 1). After defendant files a
4 motion to dismiss the initial complaint (ECF No. 21), plaintiff filed his first amended complaint
5 (“FAC”) (ECF No. 25). On March 27, 2019, defendant filed a motion to dismiss the FAC. (ECF
6 No. 29). The court granted defendant’s motion but granted plaintiff leave to amend. (ECF No.
7 46).

8 On July 23, 2019, plaintiff filed his second amended complaint (“SAC”) (ECF No. 47),
9 which defendant now moves to dismiss (ECF No. 52).

10 **II. Legal Standard**

11 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
12 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short
13 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
14 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
15 require detailed factual allegations, it demands “more than labels and conclusions” or a
16 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
17 (2009) (citation omitted).

18 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
19 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
20 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
21 omitted).

22 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
23 when considering motions to dismiss. First, the court must accept as true all well-pled factual
24 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
25 truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by
26 conclusory statements, do not suffice. *Id.*

27 Second, the court must consider whether the factual allegations in the complaint allege a
28 plausible claim for relief. *Id.* at 679. A claim is facially plausible when plaintiff’s complaint

1 alleges facts that allow the court to draw a reasonable inference that defendant is liable for the
2 alleged misconduct. *Id.* at 678.

3 Where the complaint does not permit the court to infer more than the mere possibility of
4 misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to
5 relief.” *Id.* at 679. When the allegations in a complaint have not crossed the line from
6 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

7 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
8 1202, 1216 (9th Cir. 2011). The *Starr* court held,

9 First, to be entitled to the presumption of truth, allegations in a
10 complaint or counterclaim may not simply recite the elements of a
11 cause of action, but must contain sufficient allegations of
12 underlying facts to give fair notice and to enable the opposing
13 party to defend itself effectively. Second, the factual allegations
14 that are taken as true must plausibly suggest an entitlement to
15 relief, such that it is not unfair to require the opposing party to be
16 subjected to the expense of discovery and continued litigation.

17 *Id.*

18 **III. Discussion**

19 As an initial matter, the court grants plaintiff’s motion for leave to file supplemental
20 authority. (ECF No. 55). The court notes that plaintiff’s supplemental authority, *Ramirez v.*
21 *TransUnion LLC*, predominantly addresses standing, particularly in the class-action context. See
22 *Ramirez v. TransUnion LLC*, ___ F.3d ___, No. 17-17244, 2020 WL 946973 (9th Cir. Feb. 27,
23 2020). However, the court already decided that plaintiff sufficiently alleged standing. (ECF No.
24 46 at 3–4). To the extent the court’s prior order is inapposite to the instant motion, the court
25 assumes—without deciding—that plaintiff has standing to bring his claims.

26 Turning to the merits of the complaint,¹ plaintiff perfunctorily alleges two claims against
27 defendant. (ECF No. 47 at 29–30). Resolving plaintiff’s first claim “requires a short journey
28 through an array of statutes (all from Title 15 of the code) with a numbering system . . . that only
a lawyer could love.” *Gillespie v. Trans Union Corp.*, 482 F.3d 907, 908 (7th Cir. 2007). The

¹ The court declines defendant’s invitation to treat the SAC as an untimely motion to reconsider and will not apply the law of the case doctrine to bar the SAC. (See generally ECF No. 52).

1 “general allegations” in plaintiff’s SAC catalogue several violations of two discrete sections of
2 the FCRA—§§ 1681e and 1681g—that he incorporates by reference into a single claim:
3 “violation of 15 U.S.C. § 1681 et seq. (FCRA).” (ECF No. 47 at 29).

4 Plaintiff also scatters various accusations that defendant violated NRS § 598C throughout
5 his general allegations. This smattering of allegations is incorporated by reference to form two
6 causes of action: “violation of Nevada Revised Statutes, NRS § 598C.” (ECF No. 47 at 30).

7 Broadly stated, plaintiff continues to allege four purported inaccuracies in violation of 15 U.S.C.
8 § 1681e(b), § 1681g(a)(1)–(3), and NRS 598C.130. (ECF Nos. 1; 25; 47). First, plaintiff argues
9 that defendant failed to provide him with all the permissible purposes for which soft inquiries
10 were made. (ECF No. 47 at 11). Second, defendant purportedly misrepresented when it would
11 permit third parties to access credit. *Id.* Third, defendant supposedly failed to disclose all the
12 “behavioral data” it stores about plaintiff. *Id.* at 12–23. Fourth, plaintiff still claims that
13 defendant failed to disclose the sources for his addresses and names. *Id.* at 24–26.

14 A. Section 1681e(b) claim

15 As a threshold matter, § 1681e(b) applies to consumer reports, which are “CRA-prepared
16 reports that a CRA issues to third parties. . . .” *Shaw v. Experian Info. Sols., Inc.*, 891 F.3d 749,
17 755 n.3 (9th Cir. 2018). Section 1681e(b) of the FCRA provides that “[w]henver a consumer
18 reporting agency prepares a consumer report it shall follow reasonable procedures to assure
19 maximum possible accuracy of the information concerning the individual about whom the report
20 relates.” 15 USCS § 1681e(b) (emphasis added).

21 The law of this circuit, as well as that of almost all other circuits
22 that have addressed the question, supports the following
23 proposition: If a consumer reporting agency provides a report
24 based on a reasonable expectation that the report will be put to a
25 use permissible under the FCRA, then that *report is a “consumer
report” under the FCRA and the ultimate use to which the report is
actually put is irrelevant to the question of whether the FCRA
governs the report’s use and the user’s conduct.*

26 *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1274 (9th Cir. 1990) (emphasis
27 in original). “The language of § 1681b does not expand the definition of a consumer report; it
28

1 instructs the CRAs on when it is permissible to furnish a consumer report.” *Johnson v. Wells*
2 *Fargo Home Mortg., Inc.*, 558 F. Supp. 2d 1114, 1124 (D. Nev. May 14, 2008).

3 “[T]o sustain either a § 1681e or a § 1681i claim, a consumer must first ‘make a prima
4 facie showing of inaccurate reporting by the CRA.’” *Shaw*, 891 F.3d at 759 (9th Cir. 2018)
5 (quoting *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010)); see also
6 *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (To bring a
7 § 1681e claim, the “consumer must present evidence tending to show that a [CRA] prepared a
8 report containing inaccurate information.”). Although § 1681e refers to “maximum possible
9 accuracy” rather than mere technical accuracy, “this does not relieve [plaintiffs] of the burden to
10 prove that the inaccuracy is ‘misleading in such a way and to such an extent that it can be
11 expected to adversely affect credit decisions.’” *Shaw*, 891 F.3d at 757 (quoting *Carvalho*, 629
12 F.3d at 890).

13 As defendant notes “it is not even clear from the SAC that [plaintiff] makes a § 1681e(b)
14 claim in the first place.” (ECF No. 52 at 6). Plaintiff does not allege any inaccuracy in his credit
15 report. (See generally ECF No. 47). Instead, he alleges a variety of technical violations under
16 § 1681g and NRS 598C. *Id.* Thus, the court grants defendant’s motion insofar as it pertains to
17 any purported violation of § 1681e(b).

18 B. Section 1681g and NRS 598C claims

19 Section 1681g of the FCRA provides that “[e]very consumer reporting agency shall, upon
20 request, and subject to section 610(a)(1), clearly and accurately disclose to the consumer . . . [a]ll
21 information *in the consumer’s file* at the time of the request.” 11 U.S.C. § 1681g(a)(1) (emphasis
22 added). The Ninth Circuit has unambiguously held that “[a] consumer’s file includes ‘all
23 information on the consumer that is recorded and retained by a CRA that might be furnished, or
24 has been furnished, in a consumer report on that consumer.’” *Shaw*, 891 F.3d at 759 (quoting
25 *Cortez v. Trans Union, LLC*, 617 F.3d 688, 711–12 (3rd Cir. 2010)).

26 In *Shaw*, the Ninth Circuit held that “[a] consumer’s file includes all information . . . that
27 might be furnished, or has been furnished, in a consumer report on that consumer.” *Shaw*, 891
28 F.3d at 759 (citations omitted). But this does not open the door for every shred of information to

1 be included in a consumer disclosure simply because there is some slight chance it might
2 someday be in a consumer report: “A more reasonable view . . . would require some showing . . .
3 that [the CRA] included similar information in a consumer report in the past or that it plans to do
4 so in the future.” *Gillespie v. Trans Union Corp.*, 482 F.3d 907, 909 (7th Cir. 2007).

5 As the Seventh Circuit remarked, “Congress, it seems, chose to limit the right to contest
6 information to material actually contained in consumer reports. And, of course, it was free to
7 draw the line as it did.” *Id.* at 910. Thus, § 1681g requires CRAs to disclose only information
8 that has previously been, or might be, included in a consumer report, as distinct from a consumer
9 disclosure. See *Foskaris v. Experian Information Solutions, Inc.*, No. 17-cv-506-KJD-PAL,
10 2018 WL 3381394 at *3 (D. Nev. Mar. 21, 2018) (holding Section 1681g only applies to
11 information that has been, or might be, included in a consumer report, not a consumer
12 disclosure).

13 Plaintiff urges an expansive reading of § 1681g. Plaintiff contends that any information
14 in a consumer disclosure might be included in a consumer report. Thus, by plaintiff’s estimation,
15 all information that defendant has on plaintiff might appear in a consumer disclosure. Any of
16 that information might appear in a consumer report, and so all of that information must be
17 included in a § 1681g disclosure.

18 Plaintiff’s argument is unavailing. Plaintiff makes no showing that defendant included
19 similar information in a consumer report in the past or that it plans to do so in the future.
20 Plaintiff makes no attempt to limit the far-reaching scope of his interpretation, which is directly
21 contrary to statute and case law across the country.

22 1. Permissible purpose and misrepresentation claim

23 In support of his permissible purpose and misrepresentation claims, plaintiff alleges that
24 “[defendant] explained to [p]laintiff in its Section 1681g disclosures that ‘[w]e offer credit
25 information about you to those with a permissible purpose,’ when in fact on information and
26 belief [defendant] makes such information available to consumers for purposes which are
27 impermissible in nature.” (ECF No. 47 at 11). This “information and belief” is not supported by
28 specific facts; instead, it is supported only with the conclusory and speculative allegation that

1 “information on a consumer disclosure might include the soft-inquiry information” Id. at
2 10–11.

3 But plaintiff admits that “soft inquiries” are shared only with plaintiff. Id. at 9 (“The
4 First and Second Experian Reports contained a list of inquiries shared both with others (‘Hard
5 Inquiries’) and those purportedly only shared with the Plaintiff (‘Soft Inquiries’).”). Plaintiff
6 does not allege that soft-inquiry information has ever been shared in a consumer report.

7 Accordingly, plaintiff’s § 1681g and NRS 598C claims fail insofar as they rely on
8 omission of a permissible purpose or misrepresentation thereof.

9 2. Behavioral data claim

10 Plaintiff contends that “[defendant’s] failure to disclose all information it maintained
11 regarding [p]laintiff caused him to suffer a concrete informational injury.” (ECF No. 47 at 22
12 (emphasis added)). This expansive view of disclosure requirements is supported only by
13 conjectural allegations. For instance, plaintiff contends that certain “score factors” and
14 “[a]dverse [a]ction [r]easons” “suggest that ‘behavioral’ data can form the basis of a credit
15 score.” Id. at 23 (emphasis added). In fact, the only new allegation in plaintiff’s complaint on
16 this point is a description of the sort of data that “Alteryx” maintains, which plaintiff alleges
17 suffered a data breach. Id. at 13–20.

18 Plaintiff does not allege that defendant maintains any demographic data on him, that
19 defendant has ever included such data in a consumer report, or that this demographic data has
20 specifically impacted his creditworthiness. As defendant points out, plaintiff “fails to identify
21 any information about [p]laintiff that [defendant] stores or transmitted to any third party, much
22 less in connection with a credit, employment, or insurance transaction.” (ECF No. 52 at 12
23 (emphasis in original)). Further, because plaintiff failed to plausibly allege that this information
24 was reported in defendant’s consumer reports, the court declines the invitation to expand the
25 definition of a consumer report to include these compilations of behavioral data See, e.g.,
26 Parker v. Equifax Info. Servs., LLC, No. 2:15-CV-14365, 2017 WL 4003437, at *3 (E.D. Mich.
27 Sept. 12, 2017) (“The accumulation of biographical information from Equifax’s products does
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1 not constitute a consumer report because the information does not bear on Parker’s credit
2 worthiness.”).

3 Accordingly, the court grants defendant’s motion as it pertains to plaintiff’s behavioral
4 data claim.

5 3. Address and name sources

6 Defendant is obligated by 15 U.S.C. § 1681g(a)(2), (3), and NRS 598C.130 to disclose
7 relevant information which—upon request—can include the name and address of each person
8 that procured a consumer report and the sources of defendant’s information. 15 U.S.C. §
9 1681g(a)(2) (“Every [CRA] shall, upon request, . . . clearly and accurately disclose to the
10 consumer . . . [t]he sources of the information”); 15 U.S.C. § 1681g(a)(3) (“Every [CRA]
11 shall, upon request, . . . clearly and accurately disclose to the consumer . . . [i]dentification of
12 each person . . . that procured a consumer report”); Nev. Rev. Stat. § 598C.130 (“Upon
13 request . . . a [CRA] shall . . . [d]isclose the name of each person who has received from the
14 reporting agency information concerning him”).

15 Here, plaintiff claims that he cured his source-of-address and source-of-name claim.
16 (ECF No. 53 at 19–20). Plaintiff argues that he “amended his allegations to allege that he
17 properly requested all of his Section 1681g disclosures.” *Id.* at 9 (emphasis in original).
18 Plaintiff contends that requesting all of his disclosures is sufficient to trigger defendant’s duty to
19 disclose the source of its information about him and the names and addresses of whoever
20 procured a consumer report. *Id.* at 20 (emphasizing the “Ninth Circuit’s liberal, consumer-
21 oriented interpretation of the FCRA”). But the complaint actually alleges that plaintiff received
22 two reports from defendant that “were properly requested.” (ECF No. 47 at 9). Thus, plaintiff
23 alleges, defendant “was obligated to provide all of its Section 1681g disclosures, without
24 limitation, in connection with at least the First Experian Report, as Section 1681j Required
25 [defendant] to make ‘all’ of the disclosures pursuant to Section 1681g without limitation.” *Id.*

26 This legal conclusion is not entitled to a presumption of truth when considering a motion
27 to dismiss, see *Iqbal*, 556 U.S. at 678–79, and fails to actually allege that plaintiff requested
28 defendant’s sources.

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Accordingly, the court finds that the SAC still fails to state a claim upon which relief can be granted. Defendant’s motion to dismiss is granted with prejudice. See Rubke v. Capital Bancorp Ltd., 551 F.3d 1156, 1167 (9th Cir. 2006) (holding that a court has particularly broad discretion to dismiss with prejudice when a plaintiff has already amended the complaint).

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s motion to dismiss (ECF No. 52) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff’s motion for leave to file supplemental authority (ECF No. 55) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff’s SAC be, and the same hereby is, DISMISSED with prejudice.

The clerk is instructed to enter judgment and close the case accordingly.

DATED March 26, 2020.


UNITED STATES DISTRICT JUDGE