

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 JOHN W CONN,

4 Plaintiff,

5 v.

6 EQUIFAX CREDIT REPORTING et al.

7 Defendants.

Case No. 2:21-cv-00558-JAD-EJY

ORDER

AND

REPORT AND RECOMMENDATION

Re: ECF No. 3-1 (Amended Complaint)

8
9 Plaintiff is proceeding *pro se* in this matter and requests to proceed *in forma pauperis* under
10 28 U.S.C. § 1915. Plaintiff filed a first and second *in forma pauperis* application (ECF Nos. 1 and
11 3), and a Complaint and Amended Complaint (ECF Nos. 1-1 and 3-1). Plaintiff submitted his
12 Amended Complaint (ECF No. 3-1) as a matter of course under the Federal Rule of Civil Procedure
13 15(a)(1) within 21 days of filing the complaint and before any response was filed. Therefore, the
14 Amended Complaint is the operative complaint and will be screened by the Court.

15 **I. *In Forma Pauperis* Application**

16 Plaintiff's first *in forma pauperis* application is complete showing an inability to pay fees
17 and costs or provide security therefor as required by 28 U.S.C. § 1915(a)(2) and Local Rule LSR 1-
18 2. The application is granted. This renders the second *in forma pauperis* application moot. The
19 Court will now review Plaintiff's Amended Complaint.

20 **II. Screening the Complaint**

21 When screening a complaint, the Court must identify cognizable claims and dismiss claims
22 that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary
23 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for
24 failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under
25 Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).
26 To survive § 1915 review, a complaint must "contain sufficient factual matter, accepted as true, to
27 state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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1 The court liberally construes pro se complaints and may only dismiss them “if it appears beyond
2 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to
3 relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

4 In considering whether the complaint is sufficient to state a claim, all allegations of material
5 fact are taken as true and construed in the light most favorable to the plaintiff. *Wylter Summit P’ship*
6 *v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the
7 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
8 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
9 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is clear the
10 complaint’s deficiencies cannot be cured through amendment, a pro se plaintiff should be given
11 leave to amend the complaint with notice regarding the complaint’s deficiencies. *Cato v. United*
12 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 A. Plaintiff fails to state a claim against Transunion Credit Bureau and Equifax Credit
14 Reporting.

15 In this case, Plaintiff attempts to bring claims under 15 U.S.C. § 1681, the Federal Credit
16 Reporting Act (“FCRA”), against Transunion Credit Bureau (“TransUnion”) and Equifax Credit
17 Reporting (“Equifax”). Plaintiff alleges that Equifax and TransUnion have “reported on more than
18 one occasion that they do not have a report on or for” him, yet the agencies have produced a report
19 when a third party requested one. ECF No. 3-1 at 4. Plaintiff also alleges that the information in
20 his report, as produced to third parties, is “5-7 years behind.” *Id.* Plaintiff claims that credit
21 applications have been denied when attempting to buy a car and complete dental work because of
22 the agencies’ reports of “old data.” *Id.* As a result of these alleged errors, Plaintiff requests \$5,000
23 in damages from TransUnion, and \$7,500 from Equifax. He requests more from Equifax because
24 the Amended Complaint alleges Equifax wrote a letter to the Consumer Financial Protection Bureau
25 (“CFPB”) “stating that he was a sham and other slanderous comments.” *Id.*¹

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27 ¹ The Court notes that the Complaint Plaintiff attached to his application to proceed *in forma pauperis* cuts off
28 some of the allegations at section IV of the form complaint he used. See ECF No. 3-1 at 4. If he chooses to amend,
Plaintiff may wish to continue his allegations on an additional page attached to his second amended complaint, if needed.

1 Plaintiff does not point to any specific provisions of the FCRA he claims were violated by
2 TransUnion or Equifax. Nonetheless, construed liberally, Plaintiff appears to be contesting both the
3 accuracy of the information contained in his credit report as supplied to third parties, and the
4 companies' failure to disclose his report when requested. Multiple FCRA provisions govern such
5 actions by credit reporting agencies. To the extent Plaintiff wishes to contest the accuracy of his
6 report as provided to third parties, applicable FCRA provisions include 15 U.S.C. §§ 1681e(b) and
7 1681i(a)(1)(A). 15 U.S.C. § 1681e(b) provides that "whenever a consumer reporting agency
8 prepares a consumer report it shall follow reasonable procedures to assure maximum possible
9 accuracy of the information concerning the individual about whom the report relates." 15 U.S.C.
10 § 1681i(a)(1)(A) further requires "reporting agencies to reinvestigate the accuracy of any item when
11 consumer notifies the agency directly."

12 To make out a prima facie violation under §§ 1681e(b) or 1681i, a consumer must present
13 evidence tending to show that a credit reporting agency prepared a report containing inaccurate
14 information. *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329,1332 (9th Cir. 1995) (applying
15 prima facie test to claims brought under § 1681e(b)); *Shaw v. Experian Info. Sols., Inc.*, 891 F.3d
16 749, 756 (9th Cir. 2018) (applying prima facie test in *Guimond* to claims brought under § 1681i);
17 *see also Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876 (9th Cir. 2010). Information is
18 inaccurate "where it either is 'patently incorrect' or is 'misleading in such a way and to such an
19 extent that it can be expected to adversely affect credit decisions.'" *Shaw*, 891 F.3d at 759 (quoting
20 *Gorman v. Wolfpoff & Abramson, LLP*, 584 F.3d 1147, 1163 (9th Cir. 2009). To state a claim under
21 §1681e(b), a plaintiff "must next show that the consumer reporting agency failed to follow
22 reasonable procedures to assure the maximum possible accuracy of the information." *Calvillo v.*
23 *Experian Info. Sols., Inc.*, 2020 WL 1549574, at *2 (D. Nev. Apr. 1, 2020).

24 Plaintiff does not provide specifics regarding what information on his report is inaccurate.
25 However, he does state that the information is five to seven years old. Plaintiff implies that he has
26 more recent credit history that is not reflected in his report rendering the report of old data inaccurate
27 or incomplete. Such severely out-of-date information may be so misleading such that it could be
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1 expected to adversely affect credit decisions. *See Calvillo*, 2020 WL 1549574 at *3 (“Incomplete
2 information, even if accurate, may nevertheless be misleading.”) (citing *Shaw*, 891 F.3d at 757).
3 However, Plaintiff fails to adequately allege that TransUnion and Equifax failed to follow reasonable
4 procedures to assure the accuracy of his report, as required by § 1681e(b). Plaintiff also fails to
5 allege that he notified the agencies directly of any alleged inaccuracies, or that the agencies failed to
6 reinvestigate when so notified, as required by § 1681i(a)(1)(A). Therefore, Plaintiff has failed to
7 state a claim under either provision.

8 Plaintiff’s contention that the Defendants inaccurately told him that he did not have a credit
9 report could also give rise to a claim under the FCRA’s consumer disclosure requirements. 15
10 U.S.C. § 1681g(a) provides, in part, that “[e]very consumer reporting agency shall, upon request and
11 proper identification of any consumer clearly and accurately disclose to the consumer: ...[a]ll
12 information in the consumer’s file at the time of the request...” A consumer’s file includes “all
13 information on the consumer that is recorded and retained by a [consumer reporting agency] that
14 might be furnished, or has been furnished, in a consumer report on that consumer.” *Shaw*, 891 F.3d
15 at 759 (quoting *Gillespie v. Trans Union Corp.*, 482 F.3d 907, 909 (7th Cir. 2007)). Plaintiff has
16 failed to allege that he requested the consumer information he seeks in a manner envisioned by §
17 1681g. If Plaintiff chooses to amend his Complaint, he should include facts concerning his attempts
18 to request consumer information from the credit reporting agencies, and any responses thereto that
19 he alleges were insufficient or inaccurate.

20 With respect to Plaintiff’s damages requests, he may collect actual damages for an agency’s
21 negligent failure to comply with these provisions, and punitive damages if any such noncompliance
22 is willful. *See* 15 U.S.C. §§ 1681o and 1681n. Plaintiff appears to be seeking punitive damages
23 from Equifax based on information Equifax conveyed to the CFPB. However, punitive damages
24 under the FCRA may only be imposed if the reporting agency “willfully fails to comply with any
25 requirement imposed” by the FCRA. 15 U.S.C. § 1681n(a). Plaintiff does not allege that Equifax
26 purposely failed to comply with the FCRA. His claim that Equifax should be additionally penalized
27 because of allegedly untruthful letters to the CFPB lacks any cognizable statutory basis in the FCRA.
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1 Further, the Court notes that the FCRA sets the statute of limitations for bringing suit at “2
2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability” or
3 “5 years after the date on which the violation that is the basis for such liability occurs.” 15 U.S.C. §
4 1681p. Plaintiff does not state when the violations he alleged occurred. If Plaintiff chooses to amend
5 his Complaint, he should specify when these alleged violations occurred and when he discovered
6 them.

7 B. Plaintiff fails to state a claim against the Federal Consumer Financial Protection
8 Bureau.

9 Plaintiff also brings a claim against the CFPB for “fail[ing] [him] as a US citizen in their
10 obligation to protect US citizens from bad financial practices and policy.” ECF 3-1 at 4. As his
11 basis for jurisdiction on this claim, Plaintiff contends that the CFPB “failed to act in accordance with
12 their Charter as stated by the U.S. Congress which is to protect U.S. Citizens from Financial abusive
13 practices.” *Id.* at 3. Plaintiff fails to state with clarity what claim, and under what law or legal
14 theory, he purports to bring against this agency. As far as this Court is aware, the FCRA does not
15 provide a private right of action against the CFPB for any failure to “protect” individuals from the
16 actions of consumer reporting agencies. Nor is this Court aware of any “charter” bestowing a private
17 right of action for individuals to challenge a regulatory agency’s purported general failure to adhere
18 to its Congressional purpose. Plaintiff fails to state a cognizable claim against the CFPB.

19 For the reasons stated above, the Amended Complaint does not state a claim for which relief
20 can be granted under the FCRA. Although it is not clear that the deficiencies identified can be cured,
21 the Court will allow Plaintiff an opportunity to file an amended complaint to the extent he believes
22 he can state a claim.

23 **III. ORDER**

24 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff’s request to proceed *in forma*
25 *pauperis* is **GRANTED**. Plaintiff shall not be required to pay the filing fee of four hundred two
26 dollars (\$402.00). Plaintiff is permitted to maintain this action to conclusion without the necessity
27 of prepayment of any additional fees or costs or the giving of a security therefor. This order granting
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1 leave to proceed *in forma pauperis* shall not extend to the issuance and/or service of subpoenas at
2 government expense.

3 IT IS FURTHER ORDERED that Plaintiff's second *in forma pauperis* application, ECF No.
4 3, is DENIED as moot.

5 IT IS FURTHER ORDERED that the Clerk of Court shall separate Plaintiff's Amended
6 Complaint (ECF No. 3-1) from ECF No. 3 and file the same on the docket.

7 **IV. RECOMMENDATION**

8 IT IS HEREBY RECOMMENDED that Plaintiff's Amended Complaint be dismissed
9 without prejudice and with leave to amend.

10 IT IS FURTHER RECOMMENDED that Plaintiff shall have until **August 23, 2021**, to file
11 a second amended complaint, if the noted deficiencies can be corrected. If Plaintiff chooses to file
12 a second amended complaint, Plaintiff is informed that the Court cannot refer to a prior pleading
13 (i.e., the original complaint) in order to make the amended complaint complete. This is because, as
14 a general rule, an amended complaint supersedes the original complaint. Local Rule 15-1(a) requires
15 that an amended complaint be complete in itself without reference to any prior pleading. Once a
16 plaintiff files a second amended complaint, all prior complaints no longer serve any function in the
17 case. Therefore, in Plaintiff's second amended complaint, as in his prior complaints, each claim and
18 the involvement of each Defendant must be sufficiently alleged.

19 IT IS FURTHER RECOMMENDED that if Plaintiff fails to timely comply with the terms
20 of this Order, this action will be dismissed without prejudice in its entirety.

21 Dated this 21st day of July, 2021.

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24 ELAYNA J. YOUCHAK
25 UNITED STATES MAGISTRATE JUDGE
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NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. In 1985, the Supreme Court held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). The Ninth Circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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