IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MACEL CAROLYN FILLMORE, Plaintiff, v. EQUIFAX INFORMATION SERVICES, LLC and ELAN FINANCIAL SERVICES, Defendants.	§ § § § § § § § § §	1:16-CV-1042-RP

ORDER

Before the Court in the above-entitled matter are Plaintiff Macel Carolyn Fillmore's ("Plaintiff") Motion for Leave to File an Amended Complaint, (Dkt. 17); Motion to Strike, (Dkt. 18), and Motion for Extension of Time, (Dkt. 19). Having reviewed the filings and responses thereto, relevant law, and the case file, the Court hereby issues the following Order.

I. BACKGROUND

The above-entitled action, which alleges negligent or willful violations of the Fair Credit Reporting Act ("FCRA"), was filed in this Court on September 6, 2016. (Dkt. 1). Defendant Equifax Information Services, LLC ("Equifax") filed its Answer on December 8, 2016, (Dkt. 8), and a Motion for Judgment on the Pleadings on January 26, 2017, (Dkt. 12). Defendant Elan Financial Services ("Elan") filed a Motion to Dismiss on January 20, 2017. (Dkt. 11). Instead of responding to the motions filed by Equifax and Elan, Plaintiff filed a Motion for Leave to File an Amended Complaint, (Dkt. 17); a Motion to Strike, (Dkt. 18); and a Motion for Extension of Time, (Dkt. 19). Defendants object, contending that the proposed amendment is futile. (Elan Resp., Dkt. 28, at 2; Equifax Resp., Dkt. 24, at 7).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15(a)(2) permits leave to amend "when justice so requires." The Rule "evinces a bias in favor of granting leave to amend." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981); *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 566 (5th Cir. 2002). However, leave to amend "is by no means automatic." *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991). A district court may deny leave to amend if it has a "substantial reason" to do so. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002). Futility of amendment is a substantial reason, and a proposed amendment is futile if it fails to state a claim upon which relief could be granted such that it would be subject to dismissal. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000). That standard provides that a complaint "must provide the [plaintiffs'] grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. DISCUSSION

Plaintiff's proposed Amended Complaint seeks relief under the Fair Credit Reporting Act ("FCRA"). (Prop. Am. Compl., Dkt. 17-1, at 1 (citing 15 U.S.C. § 1681)). Specifically, she alleges that Equifax and Elan (collectively, "Defendants") "are reporting an account that contains negative and derogatory information on Plaintiff's credit report, even though she is not obligated or financially responsible for paying the account," (*id.* ¶ 7); that Equifax "did not follow reasonable procedures to assure maximum possible accuracy and has been reporting false and inaccurate information even after it has known or should have known the information was correct," (*id.* ¶ 26); that Elan "did not

provide a good faith investigation into the disputed authorized user account, (*id.* ¶ 27); and that Defendants' alleged violations of the FCRA were both willful and negligent, (*id.* ¶ 39).

Plaintiff's proposed Amended Complaint alleges minimal new facts. It instead incorporates new legal arguments, many of which appear to be responses to arguments made by Defendants in their Motion for Judgment on the Pleadings and Motion to Dismiss. (*See, e.g.*, Prop. Am. Compl., Dkt. 17-1, ¶¶ 60–64 (a section titled "Statute of Limitations" that raises many of the legal issues discussed below). Having reviewed those legal arguments, the Court concludes that Plaintiff's request for leave to file her Amended Complaint should be denied as futile.

Defendants argue that Plaintiff's claims are barred by the limitations provision of the FCRA, which provides that any action brought under the Act must be brought either within two years after the date of the plaintiff's discovery of the violation or within five years after the date on which the violation occurred, whichever arises first. 15 U.S.C. § 1681p(1); (Elan Resp., Dkt. 28, at 3–4; Equifax Resp., Dkt. 24, at 3–4). Because Plaintiff's proposed Amended Complaint "does not plead new facts to cure the limitations bar" but instead "makes legal arguments based on opinions issued prior to the 2003 amendments to the FCRA statute of limitations that [applies] to this case," Defendants assert, Plaintiff's motion should be deemed futile and denied. (Elan Resp., Dkt. 28, at 6; Equifax Resp., Dkt. 24, at 6).

Plaintiff's Complaint alleges that she complained of inaccurate information on her credit report via a letter dated August 11, 2014 ("the Letter"). (Compl., Dkt. 1, ¶¶ 32–42). The Letter states, in relevant part, that

> Ms. Fillmore was NOT a signer, obligor or accommodation party to . . . the accounts. Ms. Fillmore was merely an Authorized User of these accounts. Ms. Fillmore has made an attempt with your company to have the Authorized User accounts removed from her personal credit history. Both accounts remain on her personal credit file.

(Letter, Dkt. 11, at 9). Based on that text, Defendants argue that Plaintiff had "discover[ed] the facts that give rise to [her] claim" by, at the latest, August 2014. *See Mack v. Equable Ascent Fin., LLC*, 748 F.3d 663, 665 (5th Cir. 2014) (applying the "general approach under the discovery rule that a limitations period begins to run when a claimant discovers the facts that give rise to a claim"). As Plaintiff's original Complaint was not filed until September 6, 2016, (Dkt. 1), Defendants assert, her claims are therefore barred by the two-year applicable statute of limitations. In her proposed Amended Complaint, Plaintiff argues that the FCRA provides a private right of action for consumers only once a data furnisher fails to provide a good faith and reasonable investigation into a consumer's dispute of reported information. (Prop. Am. Compl., Dkt. 17-1, at 27). The relevant date, according to Plaintiff, is therefore the date she received the results of the investigation undertaken by Defendants: September 16, 2014.

But for the text of the Letter, the Court would agree with Plaintiff. However, the Letter indicates that Plaintiff had previously "made an attempt with [Defendants] to have the Authorized User accounts removed from her personal credit history." (Letter, Dkt. 11, at 9). While the Letter does not specify whether Plaintiff received a response from Defendants following her earlier dispute notice, it represents—at a minimum—a second notice of Plaintiff's dispute. Because "additional report[s] cannot restart the limitations clock," the date of Defendants' response to the Letter is immaterial. *See Bittick v. Experian Info. Sols., Inc.*, 419 F. Supp. 2d. 917, 919 (N.D. Tex. 2006) (explaining that holding otherwise "would allow plaintiffs to indefinitely extend the limitations period by simply sending another complaint letter to the credit reporting agency").[1]

[1] In her Amended Complaint, Plaintiff also argues that "the transmission of the same credit report is a separate and distinct tort to which a separate statute of limitations applies." (Prop. Am. Compl., Dkt. 17-1, at 29 (citing *Hyde v. Hibernia Nat'l Bank in Jefferson Par.*, 861 F.2d 446, 449–50 (5th Cir. 1988)). As Defendants note, however, the Fifth Circuit case law cited by Plaintiff predates the 2003 version of the FCRA. Subsequent opinions by that Court suggest that a second dispute notice does not restart the limitations period. *See Mack*, 748 F.3d at 665; *Bittick*, 419 F. Supp. 2d. at 919.

IV. CONCLUSION

Plaintiff's proposed Amended Complaint fails to state a claim upon which relief could be granted and is therefore futile. Her Motion for Leave to File an Amended Complaint, (Dkt. 17), should be and is hereby **DENIED**. Her Motion to Strike, (Dkt. 18), which was predicated on the Court's acceptance of her Amended Complaint, is also **DENIED**.

While much of the legal analysis contained in the instant Order applies equally to Plaintiff's original Complaint (and, therefore, Defendants' Motion for Judgment on the Pleadings and Motion to Dismiss), the Court will permit Plaintiff to respond to those dispositive motions based on the facts alleged in her original Complaint. Plaintiff's Motion to Extend Time, (Dkt. 19), is therefore **GRANTED**. Plaintiff's response is due on or before July 31, 2017.

SIGNED on July 17, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE