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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 DAVID T. GILCHRIST,

11 Plaintiff,

12 v.

13 FIRST NATIONAL BANK OF  
14 OMAHA, et al.,

15 Defendants.

CASE NO. C17-5104 MJP

ORDER ON DEFENDANTS' RULE  
12(B)(6) MOTION TO DISMISS

16 The above-entitled court, having received and reviewed:

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- 18 1. Defendants' Rule 12(b)(6) Motion to Dismiss (Dkt. No. 23)
  - 19 2. Plaintiff's Opposition to Defendants' Motion to Dismiss (Dkt. No. 27);
  - 20 3. Defendants' Reply on rule 12(b)(6) Motion to Dismiss (Dkt. No. 28);

21 all attached declarations and exhibits; and all relevant portions of the records, rules as follows:

22 IT IS ORDERED that the Court GRANTS Defendants' request for judicial notice of the  
23 underlying litigation related to this matter.

24 IT IS FURTHER ORDERED that Plaintiff's claims are DISMISSED with prejudice.

1 **Request for Judicial Notice**

2 While the Court may generally not consider any material outside the pleadings in an  
3 FRCP 12(b)(6) proceeding, pursuant to Fed.R.Evid. 201, judicial notice may be taken of  
4 “documents whose contents are alleged in a complaint and whose authenticity no party  
5 questions,’ ... [and] matters of public record.” Phillips v. World Pub. Co., 822 F.Supp.2d 1114,  
6 1117-18 (W.D. Wash. 2011).

7 Accordingly, this Court grants Defendants’ request that judicial notice be taken of  
8 documents filed in the underlying state cases (including Gilchrist v. First National Bank of  
9 Omaha, Cowlitz County District Court Cause No. 14-s-125) and a prior federal lawsuit (Gilchrist  
10 v. Patenaude & Felix, A.P.C., Case No. 14-5556-RJB, Western District of Washington). While  
11 Plaintiff disagrees with the legal theories advanced by Defendants in relation to these cases, he  
12 makes no objection that the submitted documents are not a proper subject of judicial notice.

13 **Background**

14 Plaintiff’s complaint alleges that he was contacted multiple times during February and  
15 March of 2013 by Defendant First National Bank of Omaha (“the Bank”) regarding money  
16 which the Bank claimed was owed by him. (Dkt. No. 21, Second Amended Complaint (“SAC”),  
17 ¶¶ 6-10.) Following that, he alleges that the Bank retained Defendant Patenaude & Felix  
18 (“Patenaude,” “PFMB”) as collection agents for the money. (SAC, ¶¶ 11-12.)

19 On February 14, 2014, in Cowlitz County Superior Court, Patenaude filed a collection  
20 action against Plaintiff on the Bank’s behalf (Cause No. 14-2-00156-9). (SAC, ¶ 12; Dkt. No.  
21 24, Decl. of Rosenberg, Exs. 1-2.) On June 8, 2014, Plaintiff filed a small claims case in Cowlitz  
22 County District Court against the Bank (Cause No. 14-s-125), alleging a violation of the  
23 Telephone Consumer Protection Act (“TCPA”). A month later, he filed a federal lawsuit  
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1 alleging that Patenaude had violated the Fair Debt Collection Practices Act (“FDCPA”) and the  
2 Fair Credit Reporting Act (“FCRA”). *See Gilchrist v. Patenaude & Felix, et al.*, Case No. 14-  
3 5556-RJB.

4 Gilchrist filed his “Answer, Affirmative Defenses, Counterclaims and Jury Demand” in  
5 the Cowlitz County Superior Court lawsuit on October 1, 2014. (Decl. of Rosenberg, Ex. 4.)<sup>1</sup>  
6 The Bank’s suit against Gilchrist was resolved in the Bank’s favor with a finding that he had  
7 assented to credit agreement with the Bank and owed a certain sum pursuant to that agreement.  
8 Gilchrist appealed that judgment to the Washington State Court of Appeals.

9 On May 26, 2015, by joint motion, the federal claims related to events prior to that date  
10 were dismissed with prejudice. (C14-5556-RJB at Dkt. No. 17.) On October 18, 2016, the state  
11 Court of Appeals affirmed the Superior Court’s grant of summary to the Bank. *Gilchrist v.*  
12 *FNOB*, 196 Wn.App. 1033.

13 On February 9, 2017, Plaintiff filed the current litigation. (Dkt. No. 1.) He has amended  
14 that complaint twice; the most recent version alleges:

- 15 1. A TCPA claim against the Bank. (SAC at ¶¶ 6-10, 32-35.)
- 16 2. A FDCPA claim based on the allegation that “Matthew Cheung or some other  
17 unknown employee of PFMB... attempted to collect a debt from the Plaintiff in  
18 the name of PFMB by procuring the Plaintiff’s credit reports from TransUnion  
19 and Experian.” (SAC at ¶ 30; *see also* ¶¶ 47, 51, 55.)

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24 <sup>1</sup> The Court notes that this pleading contains no counterclaim against the Bank for a TCPA violation.

1 **Discussion**

2 **Applicable legal standard**

3 FRCP 12(b)(6) motions to dismiss will be granted where a complaint either lacks a  
4 cognizable legal theory or fails to allege adequate facts under a cognizable legal theory.

5 Balistreri v. Pacifica Police Department, 901 F.2d 606, 699 (9th Cir. 1990). Factual allegations  
6 (but not legal conclusions) are deemed true as plead and the complaint is construed in favor of  
7 the plaintiff. Keniston v. Roberts, 717 F.2d 1295 (9th Cir. 1983).

8 Where the moving party demonstrates that further amendment of the pleadings would be  
9 futile, a court is authorized to dismiss a plaintiff's claims with prejudice. Johnson v. Buckley,  
10 356 F.3d 1067, 1077 (9th Cir. 2004).

11 **TCPA claim**

12 In order to avoid a multiplicity of suits, the Federal Rules of Civil Procedure require:

13 A pleading must state as a counterclaim any claim that – at the time of its service – the  
14 pleader has against an opposing party if the claim:

- 15 (A) arises out of the transaction or occurrence that is the subject matter of the  
16 opposing party's claim; and  
(B) does not require adding another party over whom the court cannot acquire  
jurisdiction.

17 FRCP 13(a)(1). The rule “is particularly directed against one who failed to assert a counterclaim  
18 in one action and then instituted a second action in which that counterclaim became the basis of  
19 the complaint.” Mitchell v. CB Richard Ellis Long Term Disability Plan, 611 F.3d 1192, 1201  
20 (9th Cir. 2010). Failure to plead a compulsory counterclaim results in waiver and a preclusion  
21 (under the principle of *res judicata*) from raising it again. Id.

22 To determine whether a counterclaim falls under the mandate of FRCP 13(a) (i.e., is  
23 compulsory), the Ninth Circuit employs the “logical relationship test” under which the term  
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1 “transaction” is construed liberally and flexibly. The term “transaction” “may comprehend a  
2 series of many occurrences, depending not so much upon the immediateness of their connection  
3 as upon their logical relationship.” In re Madigan, 270 B.R. 749, 755 (B.A.P. 9th Cir. 2001).

4 There is no question in the Court’s mind that there is a logical relationship between (1)  
5 the credit agreement between the Bank and Plaintiff, (2) the Bank calling Plaintiff to collect on  
6 the debt, (3) the Bank’s suit against Plaintiff based on the debt and (4) Plaintiff suing the Bank  
7 for violations of the TCPA on the basis of the calls. Plaintiff was clearly aware of the calls – he  
8 even sued the Bank for TCPA violations in small claims court. Despite that awareness, Plaintiff  
9 did not include a TCPA counterclaim in the answer and counterclaims document he filed in the  
10 state court case. Nor does Plaintiff allege that such a counterclaim would have required an  
11 additional party over whom the superior court could not have acquired jurisdiction.

12 All of the elements are present for a finding of a compulsory counterclaim under Rule  
13 13(a). The case cited by Plaintiff in support of his argument that the counterclaim is not  
14 compulsory – Ginwright v. Exeter Fin. Corp., 2016 WL 5867443 (D.Md. Oct. 6, 2016) – is based  
15 on Fourth Circuit authority which employs a different test than here in the Ninth Circuit. The  
16 Ginwright opinion even acknowledges that “the ‘logical relationship’ test, followed by the  
17 United States Court of Appeals for the Ninth Circuit... differs from the Fourth Circuit’s four-part  
18 inquiry.” Id. at \*5.

19 This Court is bound by Ninth Circuit precedent and as such is constrained to find that  
20 Plaintiff’s TCPA cause of action should have been brought as a compulsory counterclaim in the  
21 state court action and therefore cannot be raised in a separate lawsuit (such as this one).

22 Plaintiff’s motion to dismiss that claim will be granted.  
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1 FCRA/FDCPA claims

2 Plaintiff concedes that these claims arise out of Patenaude’s obtaining of his credit report  
3 on February 10, 2016 “while in litigation with the Plaintiff.” (Dkt. No. 27, Response at 2-3.)  
4 That litigation involved the collection of a debt from Plaintiff, and the case authority in both  
5 Washington State and the Ninth Circuit is clear: when a debt collector obtains a consumer’s  
6 credit report in the process of collecting a debt (including a lawsuit for that purpose), there is no  
7 FCRA violation. The circumstances in § 1681b of the FCRA under which it is permissible for  
8 consumer reporting agencies to furnish credit reports include “the use of consumer reports for  
9 debt collection purposes, as long as the obligation owed by the consumer stems from a credit  
10 transaction involving the consumer.” Rodriguez v. Experian Info. Solutions, Inc., 2016 WL  
11 3976563 at \*3 (W.D. Wash. July 25, 2016).

12 Plaintiff’s authority to the contrary is distinguishable on this basis: none of Plaintiff’s  
13 cases involve credit reports obtained by a creditor’s attorney collecting on a debt.<sup>2</sup> A debt  
14 collector (including a collector’s attorney) who obtains a credit report for purposes of collecting  
15 a debt has not violated the FCRA. *See* Landaker v. Bishop, White, Marhall & Weibel, P.S.  
16 (2012 WL 6025741 at \*6 (W.D. Wash. Dec. 4, 2012)). Plaintiff’s FCRA claims must be  
17 dismissed on that basis.

18 Concerning Plaintiff’s FDCPA claim, even if he had succeeded in adequately pleading an  
19 FRCA violation, there is no support for the contention that obtaining a consumer report in  
20 violation of the FCRA is a violation of the FDCPA. Robinson v. TSYs Total Debt Mgt., Inc.,  
21 447 F.Supp.2d 502, 508 (D.Md. 2006). Plaintiff’s position is even less persuasive where no

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23 <sup>2</sup> Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998)(negligence suit); Rice v. Montgomery Ward, 450 F.Supp. 668  
24 (M.D. N.C. 1978)(Equal Opportunity Act claims); Bakker v. McKinnon, 152 F.3d 1007 (8th Cir. 1998)(dental malpractice); Auriemma v. Montgomery, 860 F.2d 273 (7th Cir. 1988)(discrimination lawsuit); Mone v. Dranow, 945 F.2d 306 (9th Cir. 1991)(unfair competition lawsuit); and so on.

1 FCRA violation has been successfully plead. Plaintiff presents no argument and no authority in  
2 his briefing to support his FDCPA claim, and the Court is entitled to find that the FDCPA issue  
3 is waived thereby. *See* Milne v. Hillblom, 165 F.3d 733, 737, n.6 (9th Cir. 1999)(*citing* United  
4 States v. Tisor, 96 F.3d 370, 376 (9th Cir. 1996).

5 Futility of amendment

6 The Court must consider whether, in the wake of a 12(b)(6) dismissal, to allow Plaintiff a  
7 third opportunity to amend his complaint.

8 Five factors are take into account to assess the propriety of a motion for leave to amend:  
9 bad faith, undue delay, prejudice to the opposing party, futility of amendment, and  
10 whether the plaintiff has previously amended the complaint. *See* Nunes v. Ashcroft, 348  
11 F.3d 815, 818 (9th Cir. 2003). “Futility along can justify the denial of a motion to  
12 amend.” Id.

13 Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004).

14 Defendants have moved for dismissal with prejudice, arguing that permitting Plaintiff to  
15 amend his complaint further would be futile. Plaintiff has requested, should it be determined he  
16 has failed to state a claim, that he be given leave to amend. (Response at 11.) However, as  
17 Defendants point out, Plaintiff offers no explanation of how he might amend his claims in order  
18 to avoid further 12(b)(6) rulings against him.

19 In fact, it is the finding of this Court that further amendment would be futile. Plaintiff’s  
20 TCPA claim is a compulsory counterclaim which is now barred – an incurable defect in his  
21 pleadings. Regarding Plaintiff’s FCRA/FDCPA claims, there is clear legal authority that a  
22 creditor’s attorney is permitted to obtain a debtor’s credit report as part of both collection efforts  
23 and litigation related to collection. The Court can conceive of no amendment that would  
24 surmount that obstacle, and Plaintiff has proposed none.

1 **Conclusion**

2 Plaintiff's TCPA claim should have been plead as a compulsory counterclaim in the state  
3 litigation of this debt. His FCRA/FDCPA claims are rendered insufficient by legal authority  
4 indicating that the conduct of which he complains is permissible under the law. Finding that  
5 there is no amendment which could cure these defects, the Court DISMISSES Plaintiff's claims  
6 with prejudice.

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8 The clerk is ordered to provide copies of this order to Plaintiff and to all counsel.

9 Dated: January 8, 2018.

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11 Marsha J. Pechman  
12 United States District Judge