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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

NARCIZO ZAVALA GUILLEN,

NO. 5:10-cv-05825 EJD (PSG)

Plaintiff(s),

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS**

v.

BANK OF AMERICA CORPORATION, et.

al.,

[Docket Item No. 29]

Defendant(s).

\_\_\_\_\_/

Plaintiff Narcizo Zavala Guillen (“Plaintiff”) brought the instant action against a series of defendants, namely Bank of America, N.A. (“Bank of America”), Experian Information Solutions, Inc., Trans Union LLC, Corelogic Credco, LLC (“Credco”), SRA Associates, Inc. (“SRA”), and Equifax Information Services LLC for claims relating to an alleged identify theft. Presently before the Court is a Motion to Dismiss the First Amended Complaint (“FAC”) brought by Bank of America and SRA (collectively, “Defendants”). See Docket Item No. 29. The court found this matter appropriate for determination without oral argument pursuant to Civil Local Rule 7-1(b), and therefore vacated the associated hearing. As explained below, Defendant’s Motion to Dismiss will be denied as to all claims save for one, and Plaintiff will be granted leave to amend the one dismissed claim.<sup>1</sup>

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<sup>1</sup> This disposition is not intended for publication in the official reports.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

At the core of this action is Plaintiff's allegation that an unidentified person stole his identity and used his personal information to obtain two mortgage loans from Bank of America. See FAC at ¶ 1. On January 8, 2009, Plaintiff received a letter from Bank of America stating the available credit limit on his credit card had been reduced to \$1,000.00. See id. at ¶ 12. Bank of America stated its decision was based on a history of delinquency with creditors. Id. This was a surprise to Plaintiff because he did not have any such delinquency and had made his credit card payments on time. Id.

In response to the letter, Plaintiff went to a Bank of America branch on or about January 21, 2009. Id. at ¶ 13. There he learned that two mortgage loans had been taken out in his name. Id. Plaintiff also filed an identity theft report with the Watsonville Police Department identifying the loans as fraudulent. Id. at ¶ 14

Plaintiff also received two letters from Bank of America on January 21, 2009. Id. at ¶ 15. In the first, Bank of America rejected Plaintiff's request to reinstate his credit limit. Id. In the second, Bank of America informed Plaintiff that his credit card privileges were revoked altogether and instructed Plaintiff to destroy his credit card. Id. Bank of America identified an Experian credit report as the basis for both decisions. Id.

Plaintiff then retained copies of credit report in January and February, 2009. Id. at ¶ 16. From these, Plaintiff discovered that Trans Union and Experian were inaccurately reporting the two delinquent mortgages with Bank of America. Id. at ¶¶ 16, 17. Plaintiff later obtained a subsequent copy of his credit report from Credco. Id. at ¶ 18. It contained the same inaccurate information. Id.

After becoming aware of the incorrect material in his credit report, Plaintiff repeatedly notified Trans Union, Experian and Credco and requested these agencies investigate, correct and delete the inaccurate information. Id. at ¶ 20. As a result of Plaintiff's notices, both Trans Union and Experian placed a seven year fraud alert on his credit file. Id. at ¶¶ 26, 27. Plaintiff alleges on information and belief that Trans Union and Experian each and separately sent Bank of America

1 notice of his dispute and demanded that Bank of America investigate the delinquent loans. Id. at ¶  
2 24.

3 Plaintiff also sent notifications of the inaccurate information directly to Bank of America.  
4 Id. at ¶¶ 28, 29. In response, Bank of America sent Plaintiff a letter on June 29, 2009, wherein it  
5 acknowledged that Plaintiff was a victim of identity theft as to delinquent mortgages and indicated it  
6 had requested removal of the loans from Plaintiff's credit report. Id. at ¶ 31. Despite this  
7 acknowledgment, however, Bank of America continued to report the inaccurate information, and  
8 ultimately referred one of the delinquent mortgages to SRA for collections. Id. at ¶ 33.

9 At some point in 2010, Plaintiff and his family began to receive harassing telephone calls  
10 from SRA employees who demanded that Plaintiff pay the mortgage. Id. at ¶ 34. On or about July  
11 19, 2010, SRA sent Plaintiff a collection letter demanding he pay \$145,816.20 on the delinquent  
12 account. Id. at ¶ 37. SRA also told Plaintiff's son during a telephone call that it was trying to  
13 collect a loan over \$100,000.00, and asked Plaintiff's son if Plaintiff was concerned. Id. at ¶ 42.

14 Plaintiff further alleges that Bank of America eventually commenced a foreclosure  
15 proceeding against the home securing the mortgages, and thereby caused the Santa Cruz County  
16 Recorder's Office to publish defamatory statements concerning Plaintiff in the foreclosure  
17 documents. Id. at ¶ 44. As a result of these actions, Plaintiff claims that he was denied credit, lost  
18 financial opportunities, and has suffered emotional distress. Id. at ¶ 49. This lawsuit ensued.

## 19 II. THE MOTION TO DISMISS

20 Defendants now move to dismiss Claims IV through VIII and Claims X through VII on  
21 various grounds. Each argument is addressed in turn subsequent to a determination on Defendants'  
22 Request for Judicial Notice ("RJN")

### 23 A. Request for Judicial Notice

24 Defendants request the court take judicial notice of various documents. See Defendants'  
25 RJN, Exs. 1-5. These documents include: (1) a Deed of Trust securing a loan in favor of Bank of  
26 America for \$417,000.00, recorded on April 1, 2008; (2) a Deed of Trust securing a loan in favor of

1 Bank of America for \$136,500.00, also recorded on April 1, 2008; (3) a Notice of Default recorded  
2 February 3, 2010; (4) a Notice of Trustee's Sale recorded May 11, 2010; and (5) a Trustee's Deed  
3 Upon Sale recorded June 18, 2010. See id.

4 For a motion to dismiss, the court does not generally look beyond the complaint as doing so  
5 may transform the motion into one for summary judgment. See Fed. R. Civ. P. 12(d). But there are  
6 exceptions to this rule. The court may properly take judicial notice of material which is attached as  
7 part of the complaint or relied upon by the complaint. See Lee v. City of Los Angeles, 250 F.3d  
8 668, 688-69 (9th Cir. 2001). In addition, the court may take judicial notice of matters in the public  
9 record pursuant to Federal Rule of Evidence 201(b). Id. Rule 201(b) requires a "judicially noticed  
10 fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the  
11 territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort  
12 to sources whose accuracy cannot reasonably be questioned." A court "shall take judicial notice if  
13 requested by a party and supplied with the necessary information." See Fed. R. Evid. 201(d).

14 Here, Plaintiff does not challenge the authenticity of the documents contained in Defendants'  
15 RJN. This may be due to the fact that each of the exhibits is subject to judicial notice as matters of  
16 public record. See Fed. R. Evid. 201(b). They are further noticeable because they are relied upon  
17 by the complaint. See FAC at ¶¶ 132-145. Therefore, Defendants' RJN is granted in its entirety.

#### 18 **B. Legal Standard**

19 The court now turns to the substance of the Motion to Dismiss. Federal Rule of Civil  
20 Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the  
21 defendant fair notice of what the...claim is and the grounds upon which it rests." Bell Atlantic Corp.  
22 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short  
23 of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be  
24 granted. Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the  
25 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory."  
26 Mendondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). Moreover, the

1 factual allegations “must be enough to raise a right to relief above the speculative level” such that  
2 the claim “is plausible on its face.” Twombly, 550 U.S. at 556-57.

3 When deciding whether to grant a motion to dismiss, the court generally “may not consider  
4 any material beyond the pleadings.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d  
5 1542, 1555 n. 19 (9th Cir. 1990). The court must accept as true all “well-pleaded factual  
6 allegations.” Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 1950 (2009). The court must also  
7 construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d  
8 1242, 1245 (9th Cir. 1988). “[M]aterial which is properly submitted as part of the complaint may be  
9 considered.” Twombly, 550 U.S. at 555. But “courts are not bound to accept as true a legal  
10 conclusion couched as a factual allegation.” Id.

11 If dismissal is granted, leave to amend should be freely allowed “unless the court determines  
12 that the allegation of other facts consistent with the challenged pleading could not possibly cure the  
13 deficiency.” Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.  
14 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000); Fed. R. Civ. P. 15(a). Where  
15 amendment to the complaint would be futile, the court may order dismissal with prejudice. Dumas  
16 v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996).

17 **C. Claim IV: The Fair Credit Reporting Act (“FCRA”)**

18 Defendants argue the FAC fails to state a claim under the FCRA against Bank of America.  
19 Applicable here are the distinct duties imposed by the FCRA on credit reporting agencies (“CRAs”)  
20 and the furnishers of credit information. On the CRAs, § 1681i(a)(2) requires they provide notice of  
21 a dispute to the corresponding furnisher within five business days of receiving the dispute from the  
22 consumer. On the furnishers, § 1681s-2(b) imposes four duties subsequent to receipt of notice from  
23 the CRA. Nelson v. Chase Manhattan Mortg. Corp., 282 F.3d 1057, 1059 (9th Cir. 2002). Upon  
24 receiving notice from a CRA, a furnisher must: (1) conduct an investigation; (2) review all relevant  
25 information provided by the credit reporting agency; (3) report the results of the investigation to the  
26 credit reporting agency; and (4) if inaccurate information is discovered, report this result “to all

1 [nationwide] consumer reporting agencies to which the person furnished the information.” Id.  
 2 (quoting 15 U.S.C. § 1681s-2(b)). Since a private right of action against furnishers exists only for  
 3 duties imposed by § 1681s-2(b), notice from the CRA to the furnisher is an essential allegation to a  
 4 prima facie case under the FCRA. See Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1154  
 5 (9th Cir. 2008).

6 It is on this narrow ground that Defendants challenge claim IV. Specifically, Defendants  
 7 contend the claim must be dismissed because Plaintiff failed to allege the CRAs, Experian and  
 8 TransUnion, provided notice to Bank of America within five business days. Having reviewed the  
 9 entire FAC, however, the court disagrees with Defendants. Plaintiff does allege that TransUnion  
 10 and Experian sent notice of Plaintiff’s disputes to Bank of America pursuant to § 1681i(a). See FAC  
 11 at ¶ 24. Although Defendants argue they are somehow confused by this reference, that argument  
 12 carries little merit. Defendants are undeniably aware of the applicable five-day notice period to  
 13 which Plaintiff references, even if other timing requirements are stated in the statute. Indeed,  
 14 Defendants were able to identify it in this Motion. There is no room for confusion there.

15 Moreover, while Plaintiff does not provide specific dates upon which the CRAs provided  
 16 notice to Bank of America, a reasonable timeframe can nonetheless be discerned. Based on other  
 17 allegations in the FAC, Bank of America must have received notice of the disputes at some point  
 18 between January, 2009 - when Plaintiff first became aware of the potential identify theft and  
 19 reviewed his credit reports - and May, 2009 - when the CRAs took action on Plaintiff’s complaints  
 20 by placing fraud holds on his credit file. See id. at ¶¶ 12, 26, 27. Taken as a whole, the FAC  
 21 provides the requisite “fair notice” of a plausible claim, which is all that is required at this stage in  
 22 the action. See Twombly, 550 U.S. at 555.<sup>2</sup> Indeed, “[t]he purpose of ‘fact pleading,’ as provided

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23  
 24 <sup>2</sup> In opposition to this Motion, Plaintiff quotes a portion of Pasternak v. Trans Union, No.  
 25 C07-04980 MJJ, 2008 WL 928840, 2008 U.S. Dist. LEXIS 115442, at \*19-20 (N.D. Cal. Apr. 3,  
 26 2008). The Bank argues in reply that the quoted portion could not be located in the order. While the  
 27 court does not find this case of particular import here since it does not discuss the specific  
 28 allegations identified by the plaintiff in that case, it should be noted that the court did, in fact, find  
 the cited passage in the Pasternak order at the pages identified above.

1 by Fed. R. Civ. P. 8(a)(2), is to give the defendant fair notice of the claims against him without  
 2 requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is  
 3 filed and the parties have opportunity for discovery.” Evans v. McDonald’s Corp., 936 F.2d 1087,  
 4 1091 (10th Cir. 1991). Defendant’s motion to dismiss Count IV will therefore be denied.

5 **D. Claim V: California Civil Code § 1785.25**

6 Defendants argue Plaintiff’s claim for violation of California Civil Code § 1785.25 fails for  
 7 two reasons: (1) that other provisions of the California Credit Reporting Agencies Act (“CCRAA”)  
 8 preclude a simultaneous claim under the FCRA, and (2) § 1785.25 is preempted. Both arguments  
 9 are misplaced.

10 **1. Simultaneous CCRAA and FCRA Claims**

11 For their first argument, Defendants rely on California Civil Code § 1785.34, which states  
 12 that “[any consumer credit reporting agency or user of information against whom an action brought  
 13 pursuant to Section 1681n or 1681o of Title 15 of the United States Code is pending shall not be  
 14 subject to suit for the same act or omission under Section 1785.31.” Cal. Civ. Code § 1785.34(a).  
 15 Defendants interpret § 1785.34 to mean that claims under the FCRA and the CCRAA cannot be  
 16 brought in the same complaint, and that Plaintiff must therefore elect remedies. As Plaintiff points  
 17 out, however, this interpretation has been rejected by the sole California appellate court to examine  
 18 this statute in a published opinion. Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th 548, 581 (1995)  
 19 (“The trial court ruled that this section ‘is intended to . . . apply to a circumstance where there is a  
 20 prior action pending under the federal law, and someone brings a later action under the state law. I  
 21 think that’s the plain meaning of the statute.’ We agree with the trial court’s assessment.”). This  
 22 court must defer to the interpretation of the California Court of Appeal absent convincing evidence  
 23 the California Supreme Court would decide the matter differently. See Wolfson v Watts (In re  
 24 Watts), 298 F.3d 1077, 1082 (9th Cir. 2002). No such evidence has been presented here. Moreover,  
 25 the court notes Defendants omitted further discussion of this issue in their reply brief in an apparent  
 26 abandonment of this argument. Thus, the court finds Plaintiff’s CCRAA claim is not precluded by §

1 1785.34.

2 **2. Preemption**

3 Defendant's second argument requires little discussion since the contention that § 1785.25 is  
 4 preempted by 15 U.S.C. § 1681t(b)(1)(F) is contrary to direct Ninth Circuit precedent. After  
 5 recognizing that § 1785.25 is specifically excluded from the FCRA preemption provision, the Court  
 6 held in Gorman v. Wolpoff & Abramson, LLP, 552 F.3d 1008, 1032 (9th Cir. 2009), that "the  
 7 private right of action to enforce Cal. Civ. Code section 1785.25(a) is not preempted by the FCRA."  
 8 Under this express direction, this court must conclude that § 1785.25 is not preempted.

9 Since Defendants' arguments each fail, the motion to dismiss Claim V will be denied.

10 **E. Claims VI: California Civil Code § 1788**

11 Plaintiff's sixth claim alleges Defendants violated California's Rosenthal Act, and  
 12 specifically California Civil Code § 1788.17, through improper debt collection practices. The  
 13 Rosenthal Act was designed "to prohibit debt collectors from engaging in unfair or deceptive acts or  
 14 practices in the collection of consumer debts and to require debtors to act fairly in entering into and  
 15 honoring such debts." Cal. Civ. Code § 1788.1. Part of the Rosenthal Act, which is the part invoked  
 16 by Plaintiff here, provides that "every debt collector collecting or attempting to collect a consumer  
 17 debt shall comply with the provisions of" its federal equivalent, the Fair Debt Collection Practices  
 18 Act ("FDCPA"). Cal. Civ. Code § 1788.17. One of the FDCPA prohibitions incorporated into the  
 19 Rosenthal Act proscribes "false, deceptive, or misleading representation or means in connection  
 20 with the collection of any debt." See 15 U.S.C. § 1692e. The term "debt collection" is "any act or  
 21 practice in connection with the collection of consumer debts." Cal. Civ. Code § 1788.2(b).  
 22 Defendants argue this claim must be dismissed because: (1) the claim is barred by the applicable  
 23 statute of limitations, (2) the state laws are preempted, and (3) Plaintiff fails to state of claim. Each  
 24 argument is addressed and rejected below.

25 **1. Statute of Limitations**

26 Pursuant to California Civil Code § 1788.30(f), any action under the Rosenthal Act must be

1 brought “within one year from the date of the occurrence of the violation.” Relying on this section,  
2 Defendants contend Plaintiff’s claim is time-barred because he first became aware of a potential  
3 identity theft on January 8, 2009, and filed reports with law enforcement reporting such theft on  
4 January 22, 2009, but did not file this action until December 21, 2010 - nearly two years later. See  
5 FAC at ¶¶ 12, 14. As they state in the their reply, Defendants believe the general legal maxim that a  
6 statute of limitations begins to run when a plaintiff first becomes aware of facts underlying his  
7 claims should apply to claims under § 1788.30.

8       Aside from the fact that Defendants cite no supportive authority outside of the limitations  
9 statute itself, the court must reject this argument for another reason. Without directly stating as  
10 much, Defendants are attempting to classify Plaintiff’s initial discovery of potential identify theft as  
11 “debt collection” under the Rosenthal Act. But even under the general definition contained in §  
12 1788.2(b), such a classification cannot be made. As plead, the letter Plaintiff received from Bank of  
13 America on January 8, 2009, does not constitute an “act or practice in connection with the collection  
14 of consumer debts,” but was instead a notice that his credit limit would be reduced. Similarly, the  
15 act of filing a police report is not “debt collection.” Plaintiff could not have known in January,  
16 2009, that Bank of America would refer the delinquent loans to SRA and that SRA would then begin  
17 collection efforts. Moreover, Defendants’ application of the statute of limitations could lead to an  
18 absurdity by requiring plaintiffs in cases such as this one to file lawsuits under the Rosenthal Act  
19 before any actual collection efforts are attempted. Looking at the allegations contained in the FAC,  
20 activities falling within the definition of “debt collection” did not occur until 2010, when Plaintiff  
21 and his family began to receive telephone calls from SRA. See FAC at ¶ 34. Since Plaintiff  
22 commenced this case in December, 2010, his Rosenthal Act claim is not barred by the one-year  
23 statute of limitations stated in § 1788.30.<sup>3</sup>

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24  
25       <sup>3</sup> Even if the court accepted Defendants’ argument, it would still find Plaintiff’s claim timely-  
26 filed. Both state and federal courts have applied the “continuing violation” doctrine to Rosenthal  
27 Act claims in appropriate circumstances. Joseph v. J.J. Mac Intyre Cos., L.L.C., 281 F. Supp. 2d  
28 1156, 1160-62 (N.D. Cal. 2003); Komarova v. National Credit Acceptance, Inc., 175 Cal. App. 4th

## 2. Preemption

Much like in response to Plaintiff's CCRAA claim, Defendants argue Plaintiff's Rosenthal Act claim is preempted by the FCRA. But unlike the CCRAA claim, this preemption issue requires a more developed discussion.

Generally, the FCRA does not preempt state laws. 15 U.S.C. § 1681t(a). There are certain exceptions, however. Relevant here is the exception contained in § 1681t(b), which preempts requirements or prohibitions imposed by state law with respect to any subject matter regulated under § 1681s-2. 15 U.S.C. § 1681t(b)(1)(F); Trout v. BMW of N. Am., No. 2:04-CV-01466-BES-LRL, 2007 WL 602230, 2007 U.S. Dist. LEXIS 12000, at \*6-7 (D. Nev. Feb. 20, 2007). As stated with regard to Claim IV, § 1681s-2 imposes certain obligations on furnishers of credit information.

Although the Ninth Circuit has not defined the scope of FCRA preemption, district courts in this circuit have found state Rosenthal Act claims preempted by the FCRA. See, e.g., Trout, 2007 WL 602230, 2007 U.S. Dist. LEXIS 12000, at \*10-12; Pacheco v. Citibank (South Dakota), N.A., No. C 07-01276 JSW, 2007 WL 1241934, 2007 U.S. Dist. LEXIS 34821, at \*5-7 (N.D. Cal. Apr. 27, 2007); Johnson v. JP Morgan Chase Bank, 536 F. Supp. 2d 1207, 1215 (E.D. Cal. 2008); Davis v. Md. Bank, N.A., No. C 00-04191 SBA, 2002 WL 32713429, 2002 U.S. Dist. LEXIS 26468, at \*36-40 (N.D. Cal. June 19, 2002); Roybal v. Equifax, 405 F. Supp. 2d 1177, 1181 (E.D. Cal. 2008). The premise underlying each of these affirmative preemption decisions appears to be the following, as

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324, 343-46 (2009); Newman v. Capital One Servs., No. C 05-05409 JW, 2006 U.S. Dist. LEXIS 54820, at \*17-19 (N.D. Cal. June 12, 2006); Roybal v. Equifax, No. 2:05-cv-1207-MCE-KLM, 2006 U.S. Dist. LEXIS 31709, at \*5-6 (E.D. Cal. May 19, 2006). "The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts." Joseph, 281 F. Supp. 2d at 1161. If a pattern can be found, then the action is timely if filed within one year of the most recent alleged violation. Id.

Here, the FAC contains allegations which fall within the limitations period. Plaintiff alleges that he and his family received multiple harassing phone calls from SRA in 2010. See FAC at ¶ 34. He also alleges that on or about July 19, 2010, SRA sent a letter to Plaintiff demanding payment on a delinquent account with Bank of America. See FAC at ¶¶ 37-41. In addition, Plaintiff cites to a telephone conversation between SRA and his son that occurred sometime after July 19, 2010. See FAC at ¶ 42. These allegations constitute a pattern of related conduct sufficient to trigger the continuing violation doctrine, even if the statute of limitations began to run in January, 2009.

1 aptly stated by a fellow district court in this circuit: “furnishers of information cannot provide  
 2 inaccurate information, but if they do, any state statutory and common law causes of action brought  
 3 as a result of this conduct are preempted by the FCRA.” Trout, 2007 U.S. Dist. LEXIS 12000, at  
 4 \*7-8. It follows then that conduct which falls outside of that described 15 U.S.C. § 1681s-2 is not  
 5 preempted. See Pasternak v. Trans Union, No. C07-04980 MJJ, 2008 WL 928840, 2008 U.S. Dist.  
 6 LEXIS 115442, at \*9-10 (N.D. Cal. Apr. 3, 2008); see also Brown v. Mortensen, 51 Cal. 4th 1052,  
 7 1064 (2011) (“[A]bsent persuasive evidence Congress intended more expansive preemption, we  
 8 must prefer the narrower reading of the scope of section 1681t(b)(1)(F)'s preemption clause, the  
 9 reading that extends preemption only to state laws relating to furnisher accuracy or dispute  
 10 resolution.”).

11 Here, in contrast to those cases finding preemption, Plaintiff’s particular allegations under  
 12 Claim VI do not implicate the subject matter regulated by § 1681s-2. Plaintiff contends that  
 13 Defendants engaged in conduct designed to annoy, harass, oppress and abuse Plaintiff, that  
 14 Defendants used false representations in their collections attempts, and that Defendants had  
 15 impermissible communications with third parties. See FAC at ¶¶ 92-95. This type of conduct is  
 16 specifically prohibited by 15 U.S.C. §§ 1692b through 1692f as incorporated by California Civil  
 17 Code § 1788.17. And to be clear, such conduct arises from the role of Defendants as “debt  
 18 collectors” under California Civil Code § 1788.2, rather than from Bank of America’s role as a  
 19 “furnisher” of credit information per § 1681s-2(b). The court therefore finds that Plaintiff’s claim  
 20 under the Rosenthal Act is not preempted as plead.

### 21 3. Failure to State a Claim

22 Defendants also argue that Plaintiff failed to state a sufficient claim for relief under the  
 23 Rosenthal Act. But recognizing the liberal pleading standard allowed by Federal Rule of Civil  
 24 Procedure 8, the court must disagree. See Twombly, 550 U.S. at 556-57. Looking at the entire  
 25 FACT, Plaintiff alleges multiple violations of the Rosenthal Act: (1) Bank of America referred the  
 26 delinquent mortgages to SRA for collection after acknowledging he was a victim of identify theft

1 (FAC at ¶¶ 31, 33); (2) Plaintiff received harassing phone calls and voice messages from SRA  
2 during their effort to collect (FAC at ¶ 34, 35); (3) SRA sent Plaintiff a demand letter on July 19,  
3 2010 (FAC at ¶¶ 37-42); and (4) SRA had contact with a third-party about the delinquent mortgages,  
4 namely Plaintiff's son (FAC at ¶ 42). These allegations are adequate to state a plausible claim,  
5 which is all that is required at this point in the action. Id.

6 For these reasons, Defendants' motion to dismiss claim VI will be denied.

7 **F. Claim VII: The FDCPA**

8 In response to Claim VII for violations of the FDCPA, Defendants argue (1) it is barred by  
9 the statute of limitations and (2) that Plaintiff failed to state a claim. Based on the court's decision  
10 with respect to the Rosenthal Act claim, the court must also reject Defendants' similar contentions  
11 for this claim. The statute of limitations provided by the FDCPA is identical to that of the Rosenthal  
12 Act. "An action to enforce any liability created by this title...may be brought...within one year from  
13 the date on which the violation occurs." 15 U.S.C. § 1692k(d). As already indicated above, Plaintiff  
14 alleges multiple violations within the limitations period. Thus, this claim, like Claim VI, is not time-  
15 barred.

16 Additionally, because California Civil Code § 1788.17 directly incorporates provisions of the  
17 FDCPA, alleged violations of the federal law generally constitute violations of the state law and vice  
18 versa. Langdon v. Credit Mgmt. LP, No C 09-3286 VRW, 2010 U.S. Dist. LEXIS 16138, at \*7-8  
19 (N.D. Cal. Feb. 24, 2010) (citing Brown v. Bank of Am., No. ED CV 09-1997 PSG (SSx), 2010 U.S.  
20 Dist. LEXIS 4585, at \*4 (C.D. Cal. Jan. 4, 2010)). The court's finding that Plaintiff has sufficiently  
21 stated a claim under § 1788.17 compels the same finding under the FDCPA. Defendants' motion to  
22 dismiss Claim VII is denied.

23 **G. Claim VIII: California Civil Code § 1798.92**

24 Plaintiff's eighth claim arises under California Civil Code § 1798.92 et. seq., pursuant to  
25 which a "victim of identify theft" may bring an action against a "claimant" in order to establish that  
26 the "person is a victim of identity theft in connection with the claimant's claim against that person."

1 Cal. Civ. Code § 1798.93(a). Defendant argues this claim must be dismissed because: (1) Bank of  
2 America is no longer a “claimant” as defined in the statute, and (2) the state statute is preempted.

3 **1. Bank of America as “claimant”**

4 California Civil Code § 1798.92(a) defines a “claimant” as “a person who has or purports to  
5 have a claim for money or an interest in property in connection with a transaction procured through  
6 identity theft.” According to the Ninth Circuit, “the term ‘claimant,’ ...reflects a present tense  
7 interest in a debt or attempt to collect.” Satey v. JP Morgan Chase & Co, 521 F.3d 1087, 1092 (9th  
8 Cir. 2008). Thus, “claimant” cannot be construed to “include a person who had an interest in a  
9 disputed debt at some point in the past, but who no longer retains the interest at the time suit is  
10 filed.” Id. at 1093.

11 Relying on the holding in Satey described above, Defendants contend Bank of America  
12 cannot be considered a “claimant” as defined in § 1798.92 because it did not have a claim to the  
13 subject loans at the time the suit was filed. They cite to allegations that Bank of America previously  
14 agreed that Plaintiff was a victim of identity theft and requested the credit reporting agencies remove  
15 the delinquent accounts from his credit reports. See FAC at ¶ 31; Ex. 6. Moreover, Bank of  
16 America argues its interest in the loans expired when the property securing the loans was foreclosed  
17 upon on June 3, 2010. See RJN, Ex. 5.

18 Plaintiff argues otherwise. Plaintiff alleges Defendants continued to pursue payment on the  
19 loans after Bank of America’s admission in 2009 and after the ultimate foreclosure, identifying the  
20 subject loans as a basis for the default. See RJN, Ex. 3. Plaintiff also received numerous telephone  
21 calls from SRA in 2010. In addition, Plaintiff received a letter from SRA on July 19, 2010 - over a  
22 month after the house had been sold at a trustee’s sale - demanding payment on the loans. See FAC  
23 at Ex. 5. Plaintiff believes these allegations demonstrate Defendants’ continued belief that Plaintiff  
24 owed them money.

25 Each side’s argument carries some merit here. But Plaintiff’s position is stronger at least at  
26 this stage in the case. Primarily, the court must be mindful that this argument is raised within a

1 motion to dismiss where it must accept as true all of Plaintiff's "well-pleaded factual allegations"  
 2 (Iqbal, 129 S.Ct. at 1950), and must construe such allegations in the light most favorable to Plaintiff.  
 3 Love, 915 F.2d at 1245. As long as Plaintiff's theory of liability "is not facially implausible, the  
 4 court's skepticism is reserved for later stages of the proceedings." In re Gilead Sciences Sec.  
 5 Litigation, 536 F.3d 1049, 1057 (9th Cir. 2008). "A claim has facial plausibility when the plaintiff  
 6 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
 7 liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949. As described in the preceding  
 8 paragraph, Plaintiff alleged facts are sufficient to at least raise an inference that Bank of America  
 9 continued to claim an interest in the subject loans after it first admitted Plaintiff was an identify theft  
 10 victim and later foreclosed on the property securing the loans. SRA also continued collection efforts  
 11 after both of these events. Since the circumstances remained unchanged at the time this case was  
 12 filed, Bank of America would therefore qualify as a claimant under § 1798.92(a).<sup>4</sup> For this reason,  
 13 the court concludes, at least for the purposes of this motion, that Plaintiff has plead a plausible  
 14 claim.

## 15 2. Preemption

16 Defendants further argue that Plaintiffs § 1798.92(a) claim is preempted by the FCRA, and  
 17 more particularly 15 U.S.C. § 1681t(b)(1)(F). The court finds this argument unavailing for reasons  
 18 similar to those discussed in connection with Plaintiff's Rosenthal Act claim. Again, the FCRA  
 19 does not preempt state claims to the extent they implicate conduct falling outside of that described in

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20  
 21 <sup>4</sup> Although they do not state it explicitly, Defendants may be relying on California's anti-  
 22 deficiency statute, California Code of Civil Procedure § 580b, as a partial basis for this argument.  
 23 Per § 580b, Bank of America is precluded from obtaining a judgment against Plaintiff for the  
 24 difference between the outstanding amount of the subject loans and the amount recovered by  
 25 foreclosure sale of the residence. This would in turn support Bank of America's contention that it is  
 26 not presently a "claimant" under California Civil Code § 1798.92(a) because it can no longer file  
 27 suit against Plaintiff to recover on the loans. But that alone is not enough to defeat Plaintiff's claim.  
 28 "Section 580b, by its own terms, eliminates a creditor's ability to seek a deficiency judgment, but it  
 does not eliminate the underlying debt." Herrera v. LCS Fin. Servs. Corp., NO. C09-02843 THE,  
 2009 U.S. Dist. LEXIS 81850, at \*20-21 (N.D. Cal. Sept. 9, 2009). Thus, although Bank of  
 America's interest in the loans may have been entirely theoretical after the foreclosure sale,  
 continued attempts to collect on the loans, as alleged by Plaintiff, are nonetheless plausible.

1 15 U.S.C. § 1681s-2. Much like the allegations at issue in Pasternak v. Trans Union, 2008 U.S. Dist.  
 2 LEXIS 115442, at \*10-11, Plaintiff’s allegations here concern “the direct relationship between the  
 3 credit provider and the consumer....that Defendant failed to diligently investigate after Plaintiff  
 4 directly notified Defendant that she was a victim of identity theft, and that Defendant wrongfully  
 5 continued their collection efforts against [him] even after receiving that notification.” This conduct  
 6 does not arise from Bank of America’s role as a “furnisher” of credit information, and Defendants  
 7 have not cited authority holding otherwise. As such, the court finds that Plaintiff’s claim under  
 8 California Civil Code § 1798.92 is not preempted by the FCRA.

9 **H. Claim X: Defamation**

10 Plaintiff alleges in the tenth claim that Bank of America defamed him, both orally and in  
 11 writing, when it caused to be recorded documents identifying Plaintiff as a debtor in default.  
 12 Defendants argues this claim fails for two reasons: (1) the claim is prohibited by California Civil  
 13 Code § 1785.32, and (2) the claim fails due to privilege.

14 **1. California Civil Code § 1785.32**

15 Defamation “involves the intentional publication of a statement of fact that is false,  
 16 unprivileged, and has a natural tendency to injure or which causes special damage.” Smith v.  
 17 Maldonado, 72 Cal. App. 4th 637, 645 (1999). California Civil Code § 1785.32 puts a limit on  
 18 defamation-based tort claims arising from the foreclosure process. It provides that “no consumer  
 19 may bring any action or proceeding in the nature of defamation, invasion of privacy or negligence  
 20 with respect to the reporting of information against any consumer reporting agency, any user of  
 21 information, or any person who furnishes information to a consumer reporting agency, based on  
 22 information disclosed pursuant to Sections 1785.10, 1785.15 or 1785.20 of this title, except as to  
 23 false information furnished with malice or willful intent to injure such consumer.” In enacting this  
 24 section, California has chosen to confine the right of a consumer to assert a common law cause of  
 25 action for defamation only to those circumstances where the furnisher of credit information collects,  
 26 stores or disseminates false information concerning the consumer with malice. Hiemstra v. TRW,

1 Inc., 195 Cal. App. 3d 1629, 1635 (1987).

2 Here, Plaintiff alleges that Bank of America acted with malice and “conscious, reckless,  
3 wanton disregard” when it failed to remove the inaccurate information from the foreclosure  
4 documents recorded in Santa Cruz County. See FAC at ¶ 144. Incorporating the prior paragraphs of  
5 the FAC, Plaintiff notified Bank of America that he disputed his responsibility for the subject loans,  
6 and that Bank of America persisted in its collection attempts even after its admitted Plaintiff was a  
7 victim of identity theft. See id. at ¶¶ 31, 33, 34-37, 44. The court find these allegations sufficient to  
8 meet the malice exception contained in § 1785.32. See Griley v. Nat'l City Mortg., No. CIV.  
9 2:10-1204 WBS KJM, 2010 WL 3633766, 2010 U.S. Dist. LEXIS 96329, at \*13 (E.D. Cal. Sept. 13,  
10 2010). As a result, the defamation claim is not precluded by California Civil Code § 1785.32.

## 11 2. Privilege

12 Defendants further argue that Plaintiff’s defamation claim is barred by California Civil Code  
13 § 2924(d)(1), which deems privileged publications and recordings required by the foreclosure  
14 process. The privilege specified by § 2924 incorporates the more general one provided by  
15 California Civil Code § 47. See Cal. Civ. Code § 2924(d) (“All of the following shall constitute  
16 privileged communications pursuant to Section 47...[t]he mailing, publication, and delivery of  
17 notices as required by this section.”). Defendants do not clarify, however, which privilege should  
18 apply here. There are two choices: an absolute privilege, as described in subsection (b) of California  
19 Civil Code § 47, or a qualified privilege, as stated in as stated in subsection (c) of § 47. Some courts  
20 in this district have suggested a split of authority exists as to which of these privileges apply in this  
21 context. See, e.g., McFadden v. Deutsche Bank Nat’l Trust Co., No. 2-10-cv-03004 JAM KJN PS,  
22 2011 WL 3606797, 2011 U.S. Dist. LEXIS 91010, at \* (E.D. Cal. Aug. 16, 2011); Susilo v. Wells  
23 Fargo Bank, N.A., No. CV 11-1814 CAS, 2011 WL 2471167, 2011 U.S. Dist. LEXIS 66567, \*  
24 (C.D. Cal. June 21, 2011); Khom Som v. JPMorgan Chase Bank, N.A., No. 2:09-cv-02405-JAM-  
25 DAD, 2010 U.S. Dist. LEXIS 31097, at \* (E.D. Cal. Mar. 31, 2010).

26 On this issue, the court finds persuasive the interpretation of the California Court of Appeal

1 in Kachlon v. Markowitz, 168 Cal. App. 4th 316 (2008). “[S]ection 2924 deems the statutorily  
 2 required mailing, publication, and delivery of notices in nonjudicial foreclosure, and the  
 3 performance of nonjudicial foreclosure procedures, to be privileged communications under the  
 4 qualified, common-interest privilege of [Civ. Code] section 47, subdivision (c)(1).” Kachlon, 168  
 5 Cal. App. 4th 316, 333 (2008). Under the qualified privilege, Bank of America’s communications  
 6 and recordings in relation to the foreclosure are only privileged to the extent such publications were  
 7 made without malice. See Cal. Civ. Code § 47(c). Having concluded above that Plaintiff’s  
 8 allegations of malice in relation to the foreclosure process are sufficient, Bank of America’s  
 9 foreclosure activities are not subject to the § 2924 privilege.

10 Defendants’ motion to dismiss Claim X will be denied.

11 **I. Claims XI and XII: Intrusion Upon Seclusion and False Light**

12 Plaintiff’s final two claims allege invasion of privacy against Bank of America through  
 13 intrusion upon seclusion and false light. Defendants argue that these claims are barred by California  
 14 Civil Code § 1785.32. But just as with Plaintiff’s defamation claim, the allegations of malice  
 15 against Bank of America place these claims outside of the statutory bar. Accordingly, this argument  
 16 similarly fails.

17 Defendant’s also argue these claims are barred by the statute of limitations. While Plaintiff  
 18 argues believes differently, the applicable limitations period for of invasion of privacy is one year in  
 19 California. See Cal. Civ. Proc. Code § 340(c); Schneider v. United Airlines, 208 Cal. App. 3d 71,  
 20 76 (1989); Wiener v. Super. Ct., 58 Cal. App. 3d 525, 529 (1976).

21 The one-year statute of limitations leads to a different result for each claim. Since Plaintiff’s  
 22 claim for intrusion upon seclusion is based on conduct which arose within the limitations period,  
 23 such as the foreclosure in June, 2010, and the debt collection activities in July, 2010, the court does  
 24 not find it time-barred, and least at this stage. In contrast, the claim for false light as to Bank of  
 25 America relies on the reporting of allegedly false information to the credit agencies. See FAC at ¶  
 26 157. Since Plaintiff admittedly discovered the existence of the false information in January, 2009,

1 the statute of limitations bars this claim as it is currently plead.

2 Pursuant to the discussion above, the motion to dismiss claim XI is denied. The motion to  
3 dismiss claim XII is granted with leave to amend to allow Plaintiff the opportunity to clarify *which*  
4 actions by *which* defendants are implicated by that particular claim.

5 **III. ORDER**

6 Based on the foregoing:

- 7 1. Defendant's Motion to Dismiss is DENIED as to Claims V, VI, VII, VIII, X and XI.  
8 2. The Motion to Dismiss is GRANTED as to Claim XII without leave to amend. Any  
9 amended complaint must be filed within 30 days of the date this Order is filed.  
10 3. The court will file a separate order addressing scheduling for this action.

11  
12 **IT IS SO ORDERED.**

13 Dated: August 31, 2011

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15 EDWARD J. DAVILA  
16 United States District Judge  
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1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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9 **Dated: August 31, 2011**

**Richard W. Wieking, Clerk**

By:           /s/ EJD Chambers            
**Elizabeth Garcia**  
**Courtroom Deputy**

**United States District Court**  
For the Northern District of California

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