UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: 2:20-cv-10455-SB-PD	Date: December 27, 2021

Title: ***Eric T. Mitchell v. Specialized Loan Servicing LLC***

Present: The Honorable	**STANLEY BLUMENFELD, JR., U.S. District Judge**
Victor Cruz Deputy Clerk	N/A Court Reporter
Attorney(s) Present for Plaintiff(s): N/A	Attorney(s) Present for Defendant(s): N/A

Proceedings: **ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [Dkt. No. 72] AND DEFENDANT'S JOINT MOTION FOR SUMMARY JUDGMENT [Dkt. No. 111]**

Plaintiff Eric Mitchell contends that Defendant Specialized Loan Servicing, LLC improperly reported his loan status while he was under a forbearance plan, in violation of his federal and state statutory rights and in breach of the parties' agreement. He moves to certify a class of borrowers who entered into similar forbearance agreements with Defendant and had their data reported to third party credit reporting agencies. Dkt. No. 72. Defendant moves for summary judgment on all of Plaintiff's claims. Dkt. No. 111. As explained below, the Court finds that Defendant properly reported Plaintiff's loan status and is entitled to summary judgment. The Court therefore **grants** Defendant's motion for summary judgment and **denies as moot** Plaintiff's motion for class certification.

I. BACKGROUND

Although the parties have submitted many hundreds of pages of briefing and evidence, the dispositive facts of this case recounted below are relatively simple

and entirely undisputed.[1] Plaintiff took out a second mortgage loan on his home in 2019, and Defendant began servicing the loan in January 2020. Joint Appendix of Facts (JAF) 14, 19, 239–40, Dkt. No. 111-2. On April 7, 2020, Plaintiff called Defendant and requested a three-month loan forbearance through Defendant's interactive voice response (IVR) system. JAF 24–25, 244, 248. After Plaintiff indicated that he sought forbearance due to the negative economic impact of the COVID-19 pandemic, the IVR system prompted him to choose one of three options that "best fit" his situation: (1) loss of income or lessened hours, (2) illness that adversely affected his home, or (3) small business income being reduced. JAF 253. Plaintiff selected the first option. JAF 26. Plaintiff was current on his loan payments at the time. JAF 121.

Defendant approved the forbearance plan and sent Plaintiff a letter dated April 8, 2020, providing that Plaintiff was not required to make payments for three months, from May 1, 2020 through July 1, 2020. JAF 27, 31–32, 258. The letter stated that during the forbearance plan, "[d]elinquent reporting will not be made to the Credit Bureaus, as long as you make your payments according to the forbearance plan detailed below." JAF 34.

On June 24, 2020, Plaintiff called Defendant and requested that his forbearance plan be extended for three more months, representing that he was still experiencing a hardship. JAF 35–36, 263. Defendant approved the extension and sent Plaintiff a letter dated June 25, 2020, extending the forbearance plan until October 1, 2020. JAF 37–38, 269. The June 25 letter provided that "[d]uring the forbearance period, we will report your account as current to the credit bureaus so that there will not be any negative impact on your credit." JAF 39.

Defendant makes monthly reports to the credit reporting agencies (CRAs), using the "Metro 2" format, which is generally considered the industry standard for credit reporting. JAF 51–52. The information Defendant reported to the CRAs for the months while the forbearance plan was in effect is found at Exhibit L to the Joint Appendix of Evidence. JAF 119; Dkt. No. 111-5 at 38–39 of 50. For example, the report sent by Defendant to the CRAs for June 2020 was as follows:

[1] The parties' evidentiary objections therefore have no bearing on the Court's analysis and are overruled as moot.

July 2020 reporting for June 2020

[redacted] PR ERIC T MITCHELL [redacted] 5B 2601 290,342 11-00/00/0000 / /
04/01/20 0 0 AW:
MOST RECENT - NEWEST TO OLDEST: DD000BBBBBBB
PRIOR 12 - NEWEST TO OLDEST: BBBBBBBBBBBB
PRIM:CONS INF IND / CONS TRAN TP 3 / ECOA CD 1

**Reported account status 11 (current account), comment code AW (affected by natural or declared disaster) and ECOA of 1 (individual).

Dkt. No. 111-5 at 39 of 50.

The entry "11-00/00/0000" in the top right indicates that Plaintiff's account is current (code 11) and has no reported date of first delinquency. *Id.* at 41 of 42. The "0" in the center of the second line indicates that there is zero past due balance. *Id.* The "AW" code at the end of the second line indicates that the account is affected by a natural or declared disaster. *Id.* The summary at the end of the report reiterates that the account is reported as current and that the account is affected by a natural or declared disaster. *Id.* All of these codes were consistently reported for the months Plaintiff was in the forbearance plan, and Plaintiff does not challenge their accuracy. JAF 122–24.

The parties' dispute focuses instead on the payment history profile (PHP) in the third line, which reports the "most recent" payment history for the last twelve months, with one character for each month. The "B" code represents that Defendant had no information for the months before it began servicing Plaintiff's loan (in January 2020); the "0" code represents that Plaintiff was not past due for the three months before entering the forbearance plan (February–April 2020); and the "D" code indicates the absence of data or payment history available while Plaintiff was in the forbearance plan (May–June 2020). Dkt. No. 111-5 at 41 of 50; JAF 119. Defendant consistently reported the character "D" for each month during the forbearance plan. JAF 125.

In August 2020, while under the forbearance plan, Plaintiff sought to purchase a new car for $96,000, which he attempted to finance. JAF 134–38. Plaintiff was unable to obtain financing either from the dealership or from two banks that declined to provide a loan. JAF 141, 147–48, 158. Believing that the CRAs were construing the reports from Defendant in a way that negatively impacted Plaintiff's credit report, Plaintiff repeatedly contacted Defendant and

filed disputes with the CRAs contending that the information was inaccurate. JAF 160, 165, 171–72, 192–93, 206–07.

Defendant concluded that it was correctly reporting Plaintiff's account information and declined to modify its reports for the months of Plaintiff's forbearance plan. Plaintiff then filed this suit, alleging claims for (1) intentional violation of the Fair Credit Reporting Act (FCRA), specifically 15 U.S.C. § 1681s-2; (2) negligent violation of the FCRA; (3) violation of the California Consumer Credit Reporting Agencies Act (CCRAA), Cal. Civ. Code § 1785.25; (4) breach of contract; (5) violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17203; and (6) negligence. Dkt. No. 10 (Am. Class Action Compl.). Plaintiff moves to certify a class of similarly situated borrowers who entered into forbearance plans with Defendant and had account data reported to CRAs, Dkt. No. 72, and Defendant moves for summary judgment on all of Plaintiff's claims, Dkt. No. 111.

II. LEGAL STANDARD - SUMMARY JUDGMENT

Summary judgment is appropriate where the record, taken in the light most favorable to the opposing party, shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The moving party has the initial burden of establishing that there are no disputed material facts. *Id.* at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A court "may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Arguments based on conjecture or unfounded belief do not raise a genuine issue of material fact. Moreover, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary

judgment may be granted." *R.W. Beck & Assocs. v. City of Sitka*, 27 F.3d 1475, 1481 n.4 (9th Cir. 1994) (citing *Anderson*, 477 U.S. at 249).

III. DISCUSSION

Plaintiff has agreed to voluntarily dismiss his negligence claim. Dkt. No. 111 at 1. Defendant moves for summary judgment on Plaintiff's remaining claims for violations of the FRCA, CCRAA, and UCL and for breach of contract.

A. Statutory Claims

The parties' central dispute is whether Defendant correctly reported Plaintiff's loan account information to the CRAs in compliance with 15 U.S.C. § 1681s-2(a)(F). That provision was added as part of the CARES Act and governs reporting of loan accommodations during the COVID-19 pandemic. It requires that a furnisher who granted relief—including loan forbearance—to a consumer affected by the COVID-19 pandemic beginning in early 2020 must "report the credit obligation or account as current" unless the account was delinquent before the accommodation. *Id.* § 1681s-2(a)(F)(ii).

It is undisputed that Defendant at all relevant times reported the account status of Plaintiff's loan as "current" (both in the account status field and again in the summary), reported no date of first delinquency, and reported zero past due balance. Plaintiff nevertheless contends that Section 1681s-2(a)(F)(ii) required Defendant to report the loan as "current" in every possible field and that because Defendant entered the "D" code instead of "0" in the PHP for the months of the forbearance plan, Defendant did not report Plaintiff's loan as "fully current." In the Metro 2 format, "0" indicates "0 payments past due (current account)," while "D" indicates "No payment history available this month." Dkt. No. 111-4 at 30 of 63.

The parties have not cited any relevant authorities interpreting Section 1681s-2(a)(F)(ii), which was enacted less than a year ago, but its text is straightforward. It makes no reference to the PHP field, nor does it expressly require a furnisher to report a loan as current in multiple fields. It includes a single affirmative mandate: the furnisher must "report the credit obligation or account as current." 15 U.S.C. § 1681s-2(a)(F)(ii). Defendant did just that, reporting the account status of Plaintiff's loan as "current." Accordingly, Defendant complied with the FCRA by reporting Plaintiff's account as current.

Plaintiff relies on policy arguments and guidance from third parties to argue that Defendant's reporting was inaccurate and violated the FCRA. Even assuming that such arguments are useful in understanding what the statute requires, Plaintiff has not identified any authority mandating the use of the code "0" in the PHP under these circumstances. To the contrary, the guidance specifically addressing this issue supports Defendant's conclusion that its reporting was correct. For example, the "Metro 2 Format COVID-19 CARES ACT Post-Accommodation Reporting Guidance" published by TransUnion in July 2020 instructs that "0–6 or D" should be used in the PHP field. Dkt. No. 111-19 at 5 of 29. Similarly, the CARES Act Reporting Guidelines published by the Consumer Data Industry Association (CDIA) in April 2020 instructs furnishers as follows:

> Payment History Profile (report All prior history)
> - Report value 0 for the months during the Accommodation period
> - As an option, increment the Payment History Profile with value D during the Accommodation period

Id. at 26 of 29. Plaintiff contends that "[t]his guidance provides a clear directive to report the PHP with 'value 0,' followed by an additional *option* to add 'value D' and nothing suggests that the option negates the directive to use 'value 0' when reporting during the accommodation period." Dkt. No. 111-1 at 28. Defendant produces uncontroverted evidence that it is impossible to report more than one value for each month in the PHP. Dkt. No. 111-10 at 5 of 32. Thus, Plaintiff's suggestion that the CDIA guidance requires the use of "0" and only allows the furnisher to include "D" as an optional supplement is an impossible reading. Instead, since only one character can be entered, the guidance can only reasonably be read to instruct furnishers that using "D" instead of "0" is an acceptable option. The industry guidance therefore supports the conclusion that Defendant did not violate the FCRA by using the "D" code in conjunction with its reporting that the loan status was "current."

In sum, Defendant complied with Section 1681s-2(a)(F)(ii) by reporting Plaintiff's account status as "current," and Defendant's additional use of the "D" code in the PHP section is not prohibited by the FCRA. Because Defendant correctly reported Plaintiff's account status, its investigation and response to Plaintiff's complaints of inaccuracies (including its confirmation to the CRAs that

the information was accurate) were not unreasonable.[2] Defendant is therefore entitled to summary judgment on Plaintiff's claims for intentional and negligent violations of the FCRA. Because Defendant's reporting was accurate and complied with the FCRA, Plaintiff's claims for violation of the CCRAA and the UCL based on the alleged inaccurate reporting likewise fail. *See* Cal. Civ. Code § 1785.25(a) (CCRAA) ("A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate."); *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1185 (2012) ("When a statutory claim fails, a derivative UCL claim also fails.").[3]

B. Breach of Contract

In addition to his statutory claims, Plaintiff also alleges that Defendant breached its contractual obligation to "report [Plaintiff's] account as current to the credit bureaus so there will not be any negative impact on [Plaintiff's] credit." Dkt. No. 111-5 at 34 of 50 (June 25, 2020 letter). Whether this language promised to do more than comply with the FCRA's reporting requirements is questionable, but Defendant does not move for summary judgment on that basis. Instead, Defendant argues that Plaintiff's breach of contract claim fails as a matter of law because (1) it is preempted by the FCRA and (2) the forbearance plan lacked consideration and therefore was not an enforceable contract. Most courts have concluded that the FCRA does not preempt breach of contract claims based on "requirements voluntarily assumed by contract." *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1152 (C.D. Cal. 2012) (collecting cases). Nevertheless, Plaintiff's claim fails because the forbearance agreement was not an enforceable contract supported by consideration.

Consideration is "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as

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[2] The parties raise as separate summary judgment issues a number of related arguments about whether Defendant's reporting was accurate, whether its investigations were reasonable, whether Defendant acted willfully, and whether Plaintiff can show actual damages. Because Defendant's reporting and investigation complied with the FCRA, the Court does not reach the latter issues.

[3] The Court does not reach Defendant's additional argument that the UCL claim is preempted by the FCRA.

he is at the time of consent lawfully bound to suffer, as an inducement to the promisor." Cal. Civ. Code § 1605. The benefit or prejudice "must actually be bargained for as the exchange for the promise"—that is, it "must have induced the promisor's promise." *Steiner v. Thexton*, 48 Cal. 4th 411, 421 (2010).

The only consideration Plaintiff identifies as supporting the existence of a contract is his "attestation of hardship, provision of additional information, and promise to repay the debt on deferred terms in light of the risks presented by economic downturn created by the pandemic," and his only argument is that he gave consideration "when he provided information regarding his hardship." Dkt. No. 111-1 at 46–47. Plaintiff explains:

> SLS required borrowers like Mitchell, seeking the type of forbearance offered on the IVR system, to respond in a particular way by selecting one of the three choices deemed acceptable. [JAF 253] This additional step, not required under the original loan contract, constitutes valid consideration to support a contractual obligation under *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, 553 (N.D. Cal. 2012) and other cases cited.

Dkt. No. 122 at 4 (full citation to *Sutcliffe* added).

Plaintiff relies principally on *Ansanelli v. JP Morgan Chase Bank, N.A.*, No. C 10-03892 WHA, 2011 WL 1134451, at *4 (N.D. Cal. Mar. 28, 2011), which held that where "plaintiffs expended time and energy and made financial disclosures in furtherance of the agreement, which they would not have been required to do under the original contract," consideration supported an agreement to modify a loan agreement. Similarly, *Sutcliffe* relied on *Ansanelli* and held that plaintiffs who submitted financial documents not required under the original loan and agreed to go to credit counseling if requested had adequately alleged consideration for a loan modification. 283 F.R.D. at 553. Plaintiff argues that, like the plaintiffs in *Ansanelli*, he "provided information regarding his hardship" to which Defendant would not otherwise have been entitled. Dkt. No. 111-1 at 47. But there is no evidence that Plaintiff spent any time and energy preparing disclosures in furtherance of the agreement. Instead, the only evidence of Plaintiff's "provi[sion of] information regarding his hardship" is that he selected

the number 1 on the IVR telephone system to indicate the type of financial hardship he was incurring, namely, loss of income.[4]

There is no evidence that Plaintiff's selection of the number 1 on the IVR system provided any benefit to Defendant or any legally cognizable detriment to Plaintiff. In *Mehta v. Wells Fargo Bank, N.A.*, the court held that the plaintiff's completion and submission of a loan modification was not valid consideration to support a contract because the plaintiff "conferred no benefit on Wells Fargo nor suffered any prejudice. Although 'courts do not weigh the quantum of the consideration as long as it has some value,' this consideration has absolutely no value." 737 F. Supp. 2d 1185, 1197 (S.D. Cal. 2010) (quoting *A.J. Indus., Inc. v. Ver Halen*, 75 Cal. App. 3d 751, 761 (1977)). Plaintiff has not even suggested, much less produced evidence to show, how Defendant benefitted in any way from Plaintiff's statement on the IVR system that he was experiencing a loss of income, nor how making this statement caused Plaintiff any prejudice. Moreover, just as in *Mehta*, "even if this consideration had value, it fails to meet the second aspect of consideration [because] it was not 'actually . . . bargained for as the exchange for the promise.'" *Id.* (quoting *Steiner*, 48 Cal. 4th at 421). Accordingly, the forbearance agreement was not an enforceable contract, and Defendant is entitled to summary judgment on Plaintiff's claim for breach of contract.[5]

IV. ORDER

Because Defendant complied with the reporting requirements of the FCRA and the forbearance agreement was not an enforceable contract, Defendant's motion for summary judgment is **GRANTED** and Plaintiff's claims are **DISMISSED** on the merits with prejudice. Plaintiff's motion for class certification is therefore **DENIED** as moot.

A final judgment will be entered separately.

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[4] To the extent Plaintiff relies on his agreement to repay his debt under the deferral plan—which he identifies as consideration in passing but does not expressly argue was valid consideration—it is well-established that "[d]oing or promising to do what one is already legally bound to do cannot be consideration for a promise." *Sutcliffe*, 283 F.R.D. at 552.

[5] Plaintiff argues that even where consideration is lacking, a contract may be enforceable under the doctrine of promissory estoppel. Plaintiff, however, has not alleged a claim for promissory estoppel.