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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

AMIT MAHAJAN,)	CV F 06-1728 AWI SMS
Plaintiff,)	
v.)	ORDER ON MOTION OF
SANGEETA KUMAR (aka SANGEETA)	DEFENDANT iFREEDOM TO
KUMARI), et al.,)	DISMISS THE FIRST
Defendants.)	AMENDED COMPLAINT
_____)	F.R.C.P. 12(b)(6)

This is an action in diversity for damages and declaratory relief by plaintiff Amit Mahajan (“Plaintiff”) against defendants Sangeeta Kumar (“Sangeeta”) and other individuals and against iFreedom Direct Corporation (“iFreedom”) a Utah mortgage lending company (collectively, “Defendants”). In the instant motion, iFreedom moves for dismissal on all or part of the First Amended Complaint (“FAC”) as to iFreedom only. The motion for dismissal is pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, iFreedom’s motion to dismiss will be granted in part and denied in part.

PROCEDURAL HISTORY

This action was transferred from the District of New Jersey on November 30, 2006. On April 30, 2007, the court dismissed the complaint with respect to iFreedom only, and granted leave to amend. On January 18, 2008, the court denied Plaintiff’s motion for reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and granted

1 thirty days to file an amended complaint. The currently operative First Amended Complaint
2 (“FAC”) was filed on February 19, 2008. The instant motion to dismiss was filed by
3 iFreedom on March 3, 2008. Plaintiff’s opposition was filed on March 28, 2008, and
4 iFreedom’s reply was filed on April 4, 2008. The hearing on the iFreedom’s motion to
5 dismiss was vacated and the matter was taken under submission as of April 14, 2008.

6 **LEGAL STANDARD**

7 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil
8 Procedure if it appears beyond doubt that the plaintiff can prove no set of facts in support of
9 the claim that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73
10 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Balistreri v. Pacifica Police
11 Department, 901 F.2d 696, 699 (9th Cir. 1990). A Rule 12(b)(6) dismissal can be based on
12 the failure to allege a cognizable legal theory or the failure to allege sufficient facts under a
13 cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th
14 Cir.1984). In considering a motion to dismiss, the court must accept as true the allegations of
15 the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740
16 (1976), construe the pleading in the light most favorable to the party opposing the motion,
17 and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g
18 denied, 396 U.S. 869 (1969). In deciding a Rule 12(b)(6) motion, courts do not "assume the
19 truth of legal conclusions merely because they are cast in the form of factual allegations."
20 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981).

21 **PLAINTIFF’S FACTUAL ALLEGATIONS**

22 For purposes of this motion, Plaintiff’s allegations regarding the individual
23 Defendants are not directly at issue and the court’s prior summary of their actions as
24 summarized by the court in its order of April 30, 2007, is sufficient:

25 Plaintiff is a resident of Mercer County, New Jersey. Beginning at a time
26 unknown, Plaintiff began a correspondence with Sangeeta after the latter
27 “reached out” through an internet dating service. After some time, it became
28 known to Plaintiff that Sangeeta was a real estate broker working with
defendant iFreedom (then New Freedom Mortgage Corp.) Relying on
Sangeeta’s representations and statements, Plaintiff formed the intent to
purchase a house in California for himself and in his name only. Sangeeta told

1 Plaintiff she would handle the transaction for Plaintiff and, by her
2 representations, induced Plaintiff to send her substantially all of his savings.
3 Plaintiff understood that Sangeeta would move into his house if their romantic
4 interests blossomed.

5 Plaintiff alleges that Sangeeta received the money Plaintiff sent and she,
6 and/or one or more of the named individual defendants deposited the money in
7 a bank account belonging to Sangeeta and/or the individual defendants.
8 Plaintiff alleges that Defendants continued to misrepresent to Plaintiff that
9 they intended to use the money Plaintiff sent to buy a house on Plaintiffs
10 behalf and in Plaintiff's name. No such house was ever purchased and the
11 money was never returned. Plaintiff also alleges that in the early part of May
12 of 2005, Sangeeta falsely represented to Plaintiff that she owed money to an
13 attorney and convinced Plaintiff that if he loaned her the money, she would
14 pay Plaintiff back. Relying on Sangeeta's representations, Plaintiff loaned the
15 requested money which has never been paid back. Plaintiff alleges
16 Defendants do not even acknowledge the loan.

17 Plaintiff alleges that on or about late September of 2005, Defendants ceased
18 all communication with Plaintiff and closed the bank accounts that held the
19 funds Defendants received from Plaintiff. Defendants have not returned any
20 of Plaintiff's money.

21 Doc. # 17 at 2:16 - 3:14.

22 The court's order of April 30, 2007, dismissed the original complaint with respect to
23 iFreedom because the complaint failed to allege facts that connected Sangeeta's alleged acts
24 to her employment at iFreedom. The FAC alleges a total of eleven claims for relief. All of
25 the claims are alleged against iFreedom and one claim for relief is alleged only against
26 iFreedom. In all but one of the claims alleged, Plaintiff's theory of liability as to iFreedom is
27 that iFreedom is responsible under a theory of respondeat superior for the wrongful acts of
28 their employee, Sangeeta. The FAC alleges facts not alleged in the original complaint that, in
sum, are aimed connecting the wrong alleged to Sangeeta's employment with iFreedom.

The following are general facts newly alleged in the FAC with respect to all claims
for relief:

The FAC alleges that communications from Sangeeta to Plaintiff originated from, or
were sent to, her e-mail address at Skumari@nfmcorp.com or her work telephone number,
both of which were controlled by iFreedom. The FAC alleges contact between Plaintiff and
Sangeeta occurred using iFreedom's e-mail account and telephone number during iFreedom's
normal working hours. The FAC alleges that, because Sangeeta communicated to Plaintiff

1 via these official company channels, he was led to believe that “the purchase of his house in
2 California was legitimate and a part of [Sangeeta’s] duties while employed with defendant
3 iFreedom.” FAC, Doc. # 47 at 4:1 - 4:16.

4 In each of the claims the FAC alleges the following:

5 The wrongful acts of the defendant Sangeeta arose out of and in the course
6 and scope of her employment with, and/or was engendered by her employment
7 with, defendant iFreedom; and such wrongful acts were an outgrowth of such
8 employment, and inherent in her working environment, and typical of or
9 broadly incidental to her employer’s enterprise; and all such acts were done
10 knowingly, and/or ratified by defendant iFreedom; and defendant iFreedom
11 knew or should have known of the acts and/or the propensity of the defendant
12 to engage in the acts complained of herein.

13 In the discussion that follows, this passage is referred to as the “vicarious actions paragraph.”

14 The first five claims for relief in the FAC allege, in order, the common law torts of
15 fraud, conversion, money had and received, interference with prospective business advantage,
16 and intentional infliction of emotional distress. With respect to the first claim for relief for
17 fraud and deceit, the FAC alleges that “defendant iFreedom approved, endorsed and benefited
18 from the actions of defendant Sangeeta, or was otherwise reckless in its disregard of the
19 actions of its employee, defendant Sangeeta.” Doc.# 47 at 6:11-13. With respect to the fifth
20 claim for relief for intentional infliction of emotional distress, the FAC also alleges that
21 “defendant Sangeeta convinced plaintiff to engage in a real estate transaction by using this
22 romantic interest to gain [P]laintiff’s trust and her status as a licensed real estate salesperson
23 and employee of defendant iFreedom to defraud [P]laintiff. Doc. # 47 at 11:8-10.

24 Plaintiff’s sixth claim for relief is against iFreedom only for negligent hiring,
25 supervision and retention. In addition to alleging the vicarious actions paragraph, Plaintiff’s
26 fifth claim for relief alleges Sangeeta was authorized by iFreedom to hold herself out as a real
27 estate agent as a result of her employment and that Plaintiff was defrauded because of the
28 authority given to her by iFreedom. The sixth claim for relief also alleges that Sangeeta used
defendant iFreedom’s office to make an inquiry into Plaintiff’s credit report without the
knowledge or consent of Plaintiff. The FAC alleges the obtaining of credit reports on
customers was within Sangeeta’s scope of employment with iFreedom.

1 Plaintiff's seventh claim for relief alleges respondeat superior against defendant
2 iFreedom only. The FAC essentially repeats the allegations that Sangeeta was authorized by
3 iFreedom to hold herself out as an agent of iFreedom and that she caused an unauthorized
4 credit inquiry into Plaintiff's credit report using iFreedom's facilities.

5 Plaintiff's eighth, ninth and tenth claims for relief are related to Sangeeta's inquiry
6 into Plaintiff's credit report. The Eighth claim for relief alleges obtaining a credit report
7 under false pretenses in violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C.
8 section 1681n, against iFreedom and Sangeeta. The ninth claim for relief alleges negligent
9 non-compliance with the FCRA in violation of 15 U.S.C. section 1681o (also against
10 iFreedom and Sangeeta), and the tenth claim for relief alleges improper use of a credit report.
11 The eighth, ninth and tenth claims for relief repeat the allegations that Sangeeta caused an
12 unauthorized inquiry into Plaintiff's credit report using iFreedom's facilities and repeats the
13 vicarious actions paragraph.

14 Plaintiff's eleventh and final claim for relief alleges negligent misrepresentation
15 against all defendants. The facts supporting the allegation relate to statements made by the
16 individual defendants upon which Plaintiff relied when he sent money to Sangeeta. The only
17 facts alleged by the FAC that connect iFreedom to the wrongful conduct are set forth in the
18 vicarious actions paragraph.

19 DISCUSSION

20 I. Claims 1 through 5

21 As was the case with Plaintiff's original complaint, the FAC alleges liability against
22 iFreedom on the theory of respondeat superior. "In an ordinary diversity case, federal courts
23 apply the substantive law of the forum in which the court is located." Ins. Co. of N. America
24 v. Federal Express Corp., 189 F.3d 914, 919 (9th Cir. 1999). "The basic test for vicarious
25 liability [under the doctrine of respondeat superior] is whether the employee's tort was
26 committed within the scope of employment." Kephart v. Genuity, Inc., 136 Cal.App.4th 280,
27 291 (3rd Dist. 2006). The determination of the scope of employment can be difficult to
28 determine and a number of formulations have been set forth in cases reflecting different

1 circumstances. Id.

2 Under California law, the determinative factor in establishing vicarious
3 liability under the doctrine of *respondeat superior* is not whether the
4 employee's act was authorized, but whether the act was committed in the
5 course of carrying out the employer's business. [Citations.] Vicarious liability
6 thus may attach for unauthorized, or even prohibited, conduct, if the risk of
that conduct is one that may fairly be regarded as typical of or broadly
7 incidental to the enterprise undertaken by the employer, [Citations.] By
contrast, vicarious liability does not attach if the employee has substantially
8 deviated from his duties for personal purposes. [Citation.]

9 Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865, 876 (9th Cir. 1992).

10 "The determination of an employee's intentional tort will be imputed to the employer
11 if there is a "causal nexus" between the intentional tort and the employee's work. Lisa M. v.
12 Henry Mayo Newhall Mem'l Hosp., 12 Cal.4th 291, 297 (1995). The "causal nexus"
13 requirement is met only if the intentional tort was "engendered by the employment' or arose
14 therefrom." Ins. Co. of N. America, 189 F.3d at 922 (quoting Lisa M., 12 Cal.4th at 297).

15 This requirement for a causal nexus has been variously described as requiring that the
16 employee's tort be "an 'outgrowth' of his employment, 'inherent in the working
17 environment,' 'typical of or broadly incidental to' the employer's business, or, in a general
18 way, foreseeable from [the employees] duties. [Citation.]" Yamaguchi v. Harnsmut, 106
19 Cal.App.4th 472, 482 (1st Dist. 2003) (quoting Lisa M. 12 Cal.4th at pp. 296, 298-299).

20 The imposition of vicarious liability must be "consistent with the public policies
21 behind the doctrine of respondeat superior: '(1) to prevent recurrence of the tortious conduct;
22 (2) to give greater assurance of compensation for the victim; and (3) to ensure that the
23 victim's losses will be equitably borne by those who benefit from the enterprise that gave rise
24 to the injury.'" Id. at 485-486 (quoting Mary M. v. City of Los Angeles, 54 Cal.3d 202, 209
25 (1991)). In this regard, an employees tortious act will not be held generally foreseeable from
26 the employee's duties if the employee's conduct is "'so unusual or startling that it would
27 seem unfair to include the loss resulting from it among the other costs of the employer's
28 business.'" [Citations.]" Lisa M., 12 Cal.4th at 299.

Whether Sangeeta's alleged acts were with the scope of her employment is a question
of fact that Plaintiff will be required to prove. Yamaguchi, 106 Cal.App.4th at 482.

1 However, in the context of a motion to dismiss, if Plaintiff has alleged facts that, if proven,
2 *could* allow a reasonable juror to find that Sangeeta was acting within the scope of her
3 employment with respect to at least some portion of the harm Plaintiff suffered, the motion to
4 dismiss will be defeated as to any claims for relief that rely upon a theory of respondeat
5 superior. Id.

6 The parties agree that the first five claims for relief in the FAC are claims that are
7 based on a theory of respondeat superior. These five claims are the same as the first five
8 claims in the original complaint, which were dismissed as to iFreedom by the court's order of
9 April 30, 2007, because no facts were alleged that indicated there was a causal nexus between
10 Sangeeta's employment at iFreedom and the wrongful acts that harmed Plaintiff. The
11 question before the court with respect to the first five claims for relief is therefore whether
12 the FAC presents facts sufficient to allege or directly infer a causal nexus. As to Plaintiff's
13 first five claims for relief, the parties have not addressed the issue of whether Plaintiff's
14 allegations are sufficient to state a claim for relief as to the underlying tort against the
15 individual Defendants. In analyzing iFreedom's claims that it cannot be held vicariously
16 liable as to the first five claims for relief, the court has no occasion to analyze whether
17 Plaintiff has adequately pled the elements of the underlying tort and the court expresses no
18 opinion thereon.

19 There are three facts alleged in the FAC that were not alleged in the original
20 complaint and that play directly on the issue of whether the wrongful acts arose from or were
21 engendered by Sangeeta's employment with iFreedom such that a causal nexus might be
22 inferred. The first is that Plaintiff contacted Sangeeta and/or Sangeeta contacted plaintiff
23 through Sangeeta's e-mail account and telephone at iFreedom. The second alleged fact is
24 that the contacts that did occur through Sangeeta's e-mail and telephone at iFreedom
25 occurred during Sangeeta's normal working hours. Third, the FAC alleges that, because
26 Plaintiff contacted Sangeeta at her workplace during normal working hours using iFreedom's
27 communications facilities, Plaintiff was led to subjectively believe that his contact with
28 Sangeeta with respect to the purchase of a house "was legitimate and a part of [Sangeeta's]

1 duties” as a real estate agent working for iFreedom. FAC at 4:13-15.

2 Defendant iFreedom’s basic argument with respect to respondeat superior is that
3 iFreedom cannot be held liable for Sangeeta’s wrongful acts because those acts “must be
4 categorized as a ‘frolic . . . in which [Sangeeta] substantially deviated from the employer’s
5 purpose.’” Doc. # 48 at 8:20-21 (quoting Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d
6 1158, 1164 (9th Cir. 2005). Defendants bolster this argument by pointing out that Sangeeta
7 originally reached out to Plaintiff through an on-line dating service not connected with
8 iFreedom, that her ongoing contacts with Plaintiff occurred, at least in part, at times and
9 using facilities not connected with iFreedom and that the actual conversion of funds is
10 alleged to have been done mainly by Sangeeta’s family, who are not employees of iFreedom.

11 The court agrees with Plaintiff’s contention that two categories of wrongful acts are at
12 issue in this case. Seen from Plaintiff’s point of view, his funds that were sent to Sangeeta
13 had two purposes; to lend assistance to Sangeeta for her personal needs, and to buy a house.
14 Defendant iFreedom’s portrayal of a frolic in which Sangeeta substantially deviated from the
15 employer’s purpose is not compelling in the context of a motion to dismiss in which all
16 inferences must be made in favor of the non-moving party. Defendant iFreedom is in the
17 business of making mortgage loans and Sangeeta’s part in that business was presumably to
18 facilitate the purchases of property that would be funded by iFreedom’s mortgage. While it
19 did not actually serve iFreedom’s purposes when Sangeeta diverted the funds Plaintiff sent to
20 buy the house into the individual Defendants’ accounts; from Plaintiff’s perspective, there
21 was no deviation from iFreedom’s purpose. Plaintiff thought he was buying a house.

22 The FAC alleges facts sufficient to permit a rational trier of fact to find that Plaintiff
23 thought he was dealing with iFreedom when he sent funds to Sangeeta for the purchase of the
24 house. Plaintiff sent money to a person he knew was an employee of iFreedom because she
25 could be reached at an iFreedom telephone number and had an iFreedom e-mail address. The
26 sending of money, to the extent Plaintiff intended that money to go to his housing purchase,
27 could be inferred to be entirely within the normal course of business from Plaintiff’s point of
28 view.

1 The court finds that the FAC alleges facts that, if proven, would allow a rational trier
2 of fact to find that there is a causal nexus between Sangeeta's employment at iFreedom and
3 the harm Plaintiff suffered as to the first five claims for relief to the extent that the harm arose
4 from Plaintiff's effort to buy a house through Sangeeta. The issue of damages is not before
5 the court at this time, but as a preliminary matter, the court sees no basis for iFreedom's
6 liability for financial losses incurred by Plaintiff that were not connected directly to his effort
7 to buy a home. Similarly, iFreedom cannot be held vicariously liable for the acts of non-
8 employees. To the extent Plaintiff's harm resulted from the fraudulent acts of persons other
9 than Sangeeta, iFreedom is not liable. With those limitations on Plaintiff's damages claims
10 in mind, the court finds dismissal of Plaintiff's first five claims for relief is not warranted at
11 the pleading stage.

12 **II. Claim Six – Negligent Hiring, Retention and Supervision**

13 Plaintiff's sixth claim for relief alleges negligent hiring, retention and supervision
14 against iFreedom only. Plaintiff's sixth claim for relief fails because it is inadequately pled.
15 Plaintiff's claim makes two basic factual allegations. Plaintiff alleges that Sangeeta was
16 employed by iFreedom as a real estate sales person authorized to hold herself out as
17 iFreedom's agent. Second, the FAC alleges Sangeeta made a request for a consumer credit
18 report on Plaintiff without Plaintiff's knowledge or permission. Plaintiff also alleges that
19 "iFreedom negligently hired, supervised and retained defendant Sangeeta." and repeats the
20 vicarious actions paragraph quoted above.

21 Plaintiff's allegation that iFreedom negligently hired, supervised and retained
22 Sangeeta is a legal conclusion presented as fact, and as such is not supportive of Plaintiff's
23 claim. Western Mining Council, 643 F.2d at 624. Similarly, the vicarious actions paragraph
24 that is repeated in Plaintiff's sixth claim contains only conclusory statements that are likewise
25 not sufficient to state a factual basis for Plaintiff's claim. Stripped of its conclusory
26 allegations, Plaintiff's sixth claim for relief alleges only that Sangeeta worked for iFreedom
27 and was its agent and that Sangeeta obtained a consumer credit report on Plaintiff without
28 Plaintiff's knowledge or consent. There is absolutely no factual allegation anywhere in the

1 complaint that alleges what iFreedom’s duty to Plaintiff was, how the duty was breached and
2 how the breach was the proximate cause of the harms Plaintiff suffered. Even if Plaintiff had
3 alleged that Plaintiff had a duty to protect Plaintiff from harm (which Plaintiff did not allege),
4 that allegation would not be sufficient. There must be at least some indication of how
5 iFreedom’s actions constituted a breach of that duty that led to Plaintiff’s harm.

6 Because Plaintiff’s sixth claim for relief allege none of the elements of negligence as
7 to defendant iFreedom, the claim will be dismissed.

8 **III. Claim Seven – Respondeat Superior**

9 Plaintiff’s seventh claim for relief makes the factual allegations that Plaintiff was
10 defrauded by Defendants and that Sangeeta caused an improper credit inquiry to be made and
11 a report to be obtained by Sangeeta. In terms of its factual allegations, Plaintiff’s seventh
12 claim for relief is duplicative of the claims alleged in the first through fifth, eighth, ninth and
13 tenth claims for relief. The title of the claim – respondeat superior – is the theory used by
14 Plaintiff to claim liability against iFreedom as to the above-listed claims for relief. The court
15 cannot discern any basis for a free-standing claim based on the facts alleged or the legal
16 theory presented. Plaintiff’s seventh claim for relief will therefore be stricken as duplicative.

17 **IV. Claims Eight and Nine – Improper Request of Credit Report**

18 Claims eight and nine allege willful violation of the FCRA pursuant to 15 U.S.C.
19 section 1681n, and negligent violation of the FCRA pursuant to section 1681o, respectively.
20 Both claims allege the improper credit inquiry was made on April 19, 2005. Plaintiff’s eighth
21 claim alleges no facts that specifically tie the credit inquiry with Sangeeta’s employment. The
22 only factual allegations are the previously-quoted vicarious actions paragraph, which contains
23 only conclusory statements without supporting facts and the general allegation that the
24 “obtaining of credit reports was within the scope of Sangeeta’s employment with iFreedom.”
25 Plaintiff’s ninth claim for relief, by contrast, alleges that the credit inquiry was made from the
26 offices of iFreedom. The court will infer, for purposes of this discussion, that there was only
27 one request for a credit report and that the request is alleged to have been made from the office
28 of iFreedom.

1 To state a claim for wilful violation of the FCRA pursuant to 15 U.S.C. section 1681n,
2 Plaintiff must allege facts to show that: (1) Defendants obtained a “consumer report” from a
3 “consumer reporting agency,” (2) Defendants obtained the report under false pretenses or
4 knowingly without a permissible purpose, and (3) Defendant acted willfully. Myers v. Bennet
5 Law Offices, 238 F.Supp.2d 1196, 1201 (D. Nev. 2002); section 1681n. Before the court can
6 address the issue of whether iFreedom is vicariously or directly liable for the violation, the
7 court must address whether Plaintiff’s eighth claim for relief is adequately pled as to Sangeeta.

8 The court begins by cautioning Plaintiff to be more attentive to the need to make
9 factual allegations that are consistent with the terminology used in the statute upon which the
10 claim is based. The FAC alleges that Defendants “caused a credit inquiry to be made into
11 [P]laintiff’s credit report,” FAC at 13:16, and that Defendants “improperly obtained” “the
12 credit inquiry of April 19, 2005.” FAC at 14:10. 15 U.S.C. section 1681n establishes civil
13 liability for “a natural person who obtains a *consumer report* under false pretenses” Id.
14 (italics added). It is by no means obvious that Plaintiff means “consumer report” when he
15 uses the phrase “credit inquiry.” “Credit inquiry” would naturally suggest an application for a
16 credit or “consumer” report from a credit reporting agency, not the report itself. Only because
17 iFreedom does not complain about the inexactness of Plaintiff’s choice of words will the court
18 presume that by “credit inquiry” Plaintiff means to allege that Defendants requested and
19 received a “consumer report” within the meaning of section 1681n. The court will similarly
20 presume the request for the consumer report was made to a consumer reporting agency. The
21 court will also take the final leap and supply by inference the allegation that Sangeeta acted
22 wilfully. While the omission of such a central element in a claim for relief might otherwise be
23 fatal to the claim, the court will supply the inference here because willfulness can be fairly
24 inferred from the FAC as a whole and because the court does not desire to waste time on
25 another motion to dismiss a further amendment of the complaint.

26 The court finds or infers that Plaintiff has pled, albeit minimally, facts to support a
27 prima facie claim of violation of 15U.S.C. section 1681n as to Sangeeta. The next question is
28 whether Plaintiff has alleged facts sufficient to attach liability for Sangeeta’s alleged acts to

1 iFreedom.

2 Plaintiff alleges that obtaining consumer credit reports was within the scope of
3 Sangeeta's employment and, by implication, the report was requested from iFreedom's office.
4 Based on those two allegations, the court finds that Plaintiff has alleged facts upon which a
5 rational trier of fact could find defendant iFreedom vicariously liable for Sangeeta's act, albeit
6 just barely. Accepting as fact for purposes of this motion Plaintiff's allegation that Sangeeta
7 obtaining credit reports was within the scope of Sangeeta's employment at iFreedom, and
8 accepting that the request for the offending credit report was made at iFreedom's office during
9 office hours, a rational trier of fact could infer that: (1) iFreedom can be held liable under
10 agency theory because Sangeeta was cloaked with authority to use iFreedom's facilities and
11 password to obtain such reports, see Myers, 238 F.Supp.2d at 1202; or (2) iFreedom can be
12 held liability under the theory of respondeat superior because obtaining such reports was
13 within the scope of Sangeeta's duties such that it was reasonably foreseeable that such a tort
14 could arise from Sangeeta's performance of her duties. Yamaguchi, 106 Cal.App.4th at 482.
15 Dismissal of Plaintiff's eighth claim for relief is therefore not appropriate as to iFreedom at
16 the pleading stage.

17 Plaintiff's ninth claim for relief for negligent violation of FCRA in violation of 15
18 U.S.C. 1681o is not adequately pled. While the court could supply the allegation of a request
19 for a consumer report from a credit reporting agency as it did above, the court will not supply
20 the allegation of negligence. With respect to Sangeeta, the facts generally alleged in the FAC
21 point to actions taken willfully and knowingly. A claim of willful violation of FCRA does not
22 state or incorporate a claim of negligent violation. Myers, 238 F.Supp.2d at 1204. The court
23 cannot conjure the missing allegation of negligence out of alleged facts that generally point to
24 willful misconduct. Because the court cannot supply allegations supporting Sangeeta's
25 liability, Plaintiff's claim against iFreedom must fail for lack of specificity.

26 There are two possible theories that could explain Plaintiff's claim that iFreedom is
27 liable for the negligent violation of FCRA. Either it is Plaintiff's contention that iFreedom is
28 vicariously liable under a theory of respondeat superior for Sangeeta's negligent violation, or

1 iFreedom was directly liable because it was negligent in preventing Sangeeta’s willful
2 violation. Plaintiff does not address either theory. Any claim that iFreedom is liable on a
3 theory of respondeat superior for Sangeeta’s negligence must fail because Plaintiff has not
4 adequately pled negligence with respect to Sangeeta. Any claim that iFreedom is liable
5 because it was directly negligent must also fail because Plaintiff has not pled the elements of
6 negligence as to iFreedom. Plaintiff’s ninth claim for relief will be dismissed.

7 **V. Claim Ten – Improper Use of Credit Report**

8 Plaintiff’s tenth claim for relief alleges improper use of a consumer report against
9 Sangeeta and iFreedom. Again, the court will supply the presumption that by “credit inquiry”
10 Plaintiff means “consumer report.” The claim fails because no legal basis for entitlement to
11 relief is alleged and because there is no factual allegation that the consumer report was used in
12 any way whatsoever. So far as the court can discern, improper use of a consumer report is not
13 directly actionable under section 1681. To the extent FCRA creates remedies for inappropriate
14 *use* of consumer reports, the remedies for such improper use are incorporated in allowable
15 damages resulting from either willful or negligent non-compliance with FCRA. 15 U.S.C. §
16 1681n(a)(1)(B). Plaintiff alleges no other legal basis for relief. Plaintiff’s tenth claim for
17 relief will be dismissed.

18 **VI. Claim Eleven – Negligent Misrepresentation**

19 Plaintiff’s eleventh claim for relief alleges negligent misrepresentation against all
20 defendants. Plaintiff’s eleventh claim alleges no facts that are particular to iFreedom other
21 than the conclusory statements that are set forth in the previously-quoted vicarious actions
22 paragraph. While Plaintiff’s claim alleges that Defendants entered into a financial relationship
23 with Plaintiff in order to buy a home, there is no evidence anywhere in the FAC that Plaintiff
24 entered into an agreement with iFreedom or that iFreedom directly made any representations
25 to Plaintiff, other than the representations that may have been made by Sangeeta. Thus, there
26 are no facts alleged that would support a claim of negligent misrepresentation against
27 iFreedom on a theory of direct liability. The only basis for attaching liability against iFreedom
28 for negligent misrepresentation is on a theory of respondeat superior or agency.

1 The tort of negligent misrepresentation consists of the same elements as the tort of
2 fraud except that negligent misrepresentation does not require scienter or intent to defraud.
3 McClain v. Octagon Plaza, LLC., 159 Cal.App.4th 784, 792-793 (2nd Dist. 2008). As such,
4 negligent misrepresentation is analogous to a “lesser included offense” of fraud. Because
5 Plaintiff realleges and incorporates allegations made with respect to all other claims for relief
6 in his eleventh claim for relief, the court must infer that at least some of the instances of
7 negligent misrepresentation include instances of contact between Sangeeta and Plaintiff that
8 were carried out with the intent of buying a house during iFreedom’s normal business hours
9 using iFreedom’s communications facilities. It also follows that to the extent iFreedom can be
10 held vicariously liable for fraudulent statements by Sangeeta that related to Plaintiff’s effort to
11 purchase a home, those same acts could give rise to iFreedom’s liability under vicarious
12 liability if the representations that caused the harm were found by a jury to be negligent, rather
13 than motivated by an intent to defraud. As was the case with Plaintiff’s first five claims for
14 relief, the court finds that a rational trier of fact could find that there is a causal nexus between
15 Sangeeta’s employment at iFreedom and the harm Plaintiff suffered as a result of Sangeeta’s
16 negligent representations to the extent that the harm arose from Plaintiff’s effort to buy a
17 house through Sangeeta and to the extent the negligent representations were made by
18 Sangeeta. Plaintiff’s eleventh claim for relief will not be dismissed, but damages arising out
19 of the claim are subject to the same limitations noted as to the first five claims for relief.
20

21 THEREFORE, in accordance with the foregoing discussion:

- 22 1. Defendant iFreedom’s motion to dismiss claims one through five of the FAC is
23 DENIED.
- 24 2. Defendant iFreedom’s motion to dismiss claim six of the FAC is GRANTED.
- 25 3. Plaintiff’s seventh claim for relief for “Respondeat Superior” is hereby STRICKEN as
26 duplicative as to all Defendants.
- 27 4. Defendant iFreedom’s motion to dismiss Plaintiff’s eighth claim for relief for willfully
28 obtaining a consumer credit report under false pretenses is DENIED.

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- 5. Defendant iFreedom’s motion to dismiss Plaintiff’s ninth claim for relief for negligent violation of FCRA is GRANTED as to defendant iFreedom only.
- 6. Defendant iFreedom’s motion to dismiss Plaintiff’s tenth claim for relief for improper use of a consumer credit report is GRANTED as to all Defendants.
- 7. Defendant iFreedom’s motion to dismiss Plaintiff’s eleventh claim for relief for negligent misrepresentation is DENIED.

IT IS SO ORDERED.

Dated: May 27, 2008

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE