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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KAREN DUELL,

Plaintiff,

v.

FIRST NATIONAL BANK OF  
OMAHA; THE DUNNING LAW  
FIRM,

Defendant.

CASE NO. 14cv2774-WQH-BGS

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Leave to File a Second Amended Complaint (ECF No. 50) filed by Plaintiff Karen Duell.

**I. Background**

On November 20, 2014, Plaintiff initiated this action by filing a Complaint, alleging claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”), the Rosenthal Fair Debt Collection Practices Act, California Civil Code §§ 1788-1788.32 (“Rosenthal Act”), and the California Consumer Credit Reporting Agencies Act § 1785 *et seq* (“CCCRAA”). (ECF No. 1).

On January 19, 2015, Plaintiff filed a First Amended Complaint alleging the same causes of action. (ECF No. 9). On February 5, 2015, Defendant The Dunning Law Firm (“Defendant Dunning”) filed a motion to dismiss Counts I and II of the First Amended Complaint. (ECF No. 11). On February 6, 2015, Defendant First National Bank of Omaha (“Defendant FNBO”) filed a motion to dismiss Count III of the First

1 Amended Complaint. (ECF No. 12).

2 On July 29, 2015, the Court issued an Order granting in part and denying in part  
3 Defendant Dunning's motion to dismiss and concluding that Plaintiff has alleged  
4 sufficient facts to state a claim pursuant to the FDCPA § 1692e(9) (10) and the  
5 Rosenthal Act § 1788.17 and denying Defendant FNBO's motion to dismiss on the  
6 grounds that Plaintiff has alleged sufficient facts to state a claim pursuant to the  
7 CCCRAA. (ECF No. 25).

8 On November 20, 2015, the Magistrate Judge issued the Scheduling Order  
9 Regulating Discovery and Other Pre-Trial Proceedings. (ECF No. 45). The Magistrate  
10 Judge ordered, "Any motion to join other parties, to amend the pleadings, or to file  
11 additional pleadings shall be filed by December 18, 2015." *Id.* at 1. The Magistrate  
12 Judge ordered, "All fact discovery shall be completed by all parties by March 18,  
13 2016." *Id.* The Order states, "the dates and times set forth herein will not be modified  
14 except for good cause shown." *Id.* at 5.

15 On April 15, 2016, Plaintiff filed a motion for leave to file a Second Amended  
16 Complaint. (ECF No. 50). Plaintiff requests leave of the Court to file a Second  
17 Amended Complaint to include a cause of action under the Fair Credit Reporting Act,  
18 15 U.S.C. § 1681 et seq ("FCRA") because during discovery Defendant FNBO  
19 produced a document that establishes for the first time a violation of the FCRA by  
20 FNBO. (ECF No. 50-1 at 2). Plaintiff states,

21 At this stage of the litigation and due to the nature of the requested  
22 amendment, FNBO's strategy in defending this matter will be minimally  
23 affected since Plaintiff's previous allegation brought pursuant to the  
24 CCCRAA is based on similar claims and/or defenses. Additionally, the  
25 Parties have discussed the proposed amendment in detail . . . thus,  
Defendant should not be unduly surprised. Finally, Plaintiff does not  
anticipate additional discovery in relation to the amendment since the  
amended Complaint would not materially change any position FNBO has  
taken.

26 *Id.* at 4.

27 On April 25, 2016, Defendant FNBO filed an opposition to the motion for leave  
28 to file a Second Amended Complaint. (ECF No. 51). Defendant FNBO contends that

1 Plaintiff has not established good cause to amend the scheduling order, and therefore  
2 the liberal amendment standards of Federal Rule of Civil Procedure 15 should not  
3 apply. *Id.* at 3. On May 16, 2016, Plaintiff filed a reply. (ECF No. 52).

## 4 **II. Discussion**

5 “Once the district court has filed a pretrial scheduling order pursuant to Federal  
6 Rule of Civil Procedure 16 which established a timetable for amending pleadings that  
7 rule’s standards control.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-  
8 608 (9th Cir. 1992). Federal Rule of Civil Procedure 16 provides that a district court

- 9 (b) . . . shall . . . enter a scheduling order that limits the time  
10 (1) to join other parties and to amend the pleadings;  
11 (2) to file and hear motions; and  
12 (3) to complete discovery.

A schedule shall not be modified except by leave of . . . [the district court]  
upon a showing of good cause.

13 Fed. R. Civ. P. 16(b). Because a scheduling order was entered in this case on  
14 November 20, 2015, Plaintiff’s motion for leave to amend is governed by Rule 16(b).  
15 *See Johnson*, 975 F.2d at 608 (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C.  
16 1987) (“party seeking to amend pleading after date specified in scheduling order must  
17 first show ‘good cause’ for amendment under Rule 16(b), then, if ‘good cause’ be  
18 shown, the party must demonstrate that amendment was proper under Rule 15.”)).

19 Plaintiff asserts that Defendant FNBO recently produced documents which verify  
20 that Defendant FNBO inaccurately reported information to credit bureaus regarding  
21 Plaintiff’s payment history in violation of the FCRA. Plaintiff asserts that prior to  
22 receiving these documents, Plaintiff did not have sufficient grounds to establish an  
23 FCRA claim. The Court concludes that Plaintiff has demonstrated good cause to amend  
24 the First Amended Complaint.

25 Because the Court finds that Plaintiff has shown good cause, the Court must  
26 consider whether leave to amend is proper under Federal Rule of Civil Procedure 15.  
27 *See Johnson*, 975 F.2d at 608. Federal Rule of Civil Procedure 15 mandates that leave  
28 to amend “be freely given when justice so requires.” Fed. R. Civ. P. 15(a). “This

1 policy is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*,  
2 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S.  
3 178 (1962), the Supreme Court offered several factors for district courts to consider in  
4 deciding whether to grant a motion to amend under Rule 15(a):

5 In the absence of any apparent or declared reason—such as undue delay,  
6 bad faith or dilatory motive on the part of the movant, repeated failure to  
7 cure deficiencies by amendments previously allowed, undue prejudice to  
8 the opposing party by virtue of allowance of the amendment, futility of  
9 amendment, etc.—the leave sought should, as the rules require, be ‘freely  
10 given.’

11 *Foman*, 371 U.S. at 182; see also *Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101  
12 (9th Cir. 2004) (citing *Forman* factors).

13 “Not all of the [*Foman*] factors merit equal weight. As this circuit and others  
14 have held, it is the consideration of prejudice to the opposing party that carries the  
15 greatest weight.” *Eminence Capital*, 316 F.3d at 1052 (citations omitted). “The party  
16 opposing amendment bears the burden of showing prejudice.” *DCD Programs, Ltd. v.*  
17 *Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing  
18 of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in  
19 favor of granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

20 Defendant FNBO asserts that the facts of the case have been known to Plaintiff  
21 since prior to the filing of the First Amended Complaint, therefore Plaintiff has unduly  
22 delayed in requesting leave to amend. Defendant asserts that there is no newly  
23 discovered evidence that would have prevented Plaintiff from bringing the new alleged  
24 claim two years and Defendant contends that it will be prejudiced by having to defend  
25 a new cause of action.


26 After consideration of the submissions of the parties, the Court concludes that  
27 Defendants have not made a sufficiently strong showing of the *Foman* factors to  
28 overcome the presumption of Rule 15(a) in favor of granting leave to amend. See  
*Eminence Capital*, 316 F.3d at 1052.

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1           IT IS HEREBY ORDERED that the motion for leave to file a Second Amended  
2 Complaint (ECF No. 50) is granted. No later than fourteen (14) days from the date this  
3 Order is filed, Plaintiff may file the proposed Second Amended Complaint which is  
4 attached to the motion.

5 DATED: May 27, 2016

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7 **WILLIAM Q. HAYES**  
8 United States District Judge

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