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

CHRISTOPHER MELINGONIS,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

RAPID CAPITAL FUNDING, L.L.C.;
and, MERCHANT WORTHY, INC.,

Defendants.

CASE NO. 16cv490-WQH-KSC

ORDER

HAYES, Judge:

The matters before the Court are the motion to dismiss the first amended complaint filed by Defendant Merchant Worthy, Inc. (“Merchant Worthy”) (ECF No. 26) and the motion for leave to amend the complaint filed by Plaintiff Christopher Melingonis (ECF No. 27).

I. Background

On February 24, 2016, Plaintiff initiated this action by filing a complaint against Defendant Rapid Capital Funding L.L.C. (“Rapid Capital”) alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (ECF No. 1). On April 15, 2016, Rapid Capital filed an answer. (ECF No. 4).

On August 16, 2016, the Magistrate Judge issued a Scheduling Order in this matter requiring that any motion to join other parties, to amend the pleadings or to file additional pleadings be filed on or before September 12, 2016. (ECF No. 17).

1 On October 18, 2016, Plaintiff filed a first amended complaint against Defendant
2 Rapid Capital and the newly-added Defendant Merchant Worthy. (ECF No. 18).

3 On December 30, 2016, Defendant Merchant Worthy filed a motion to dismiss
4 the first amended complaint. (ECF No. 26). Plaintiff did not file a response in
5 opposition to this motion to dismiss. On January 30, 2017, Defendant Merchant
6 Worthy filed a “Notice of No Opposition Filed in Response to Defendant Merchant
7 Worthy Inc.’s Motion and Motion to Dismiss First Amended Class Action Complaint.”
8 (ECF No. 32).

9 On January 9, 2017, Plaintiff filed a motion for leave to file an amended
10 complaint, in which Plaintiff states that he withdraws the first amended complaint.
11 (ECF No. 27). On January 23, 2017, Defendant Merchant Worthy filed a response in
12 opposition to the motion seeking leave to file an amended complaint. (ECF No. 29).
13 On January 30, 2017, Plaintiff filed a reply. (ECF No. 31).

14 **II. Plaintiff’s Motion for Leave to File an Amended Complaint**

15 Plaintiff states that he “withdraws the First Amended Complaint which was filed
16 on October 19, 2016” and requests leave to amend the original complaint to add
17 Merchant Worthy as a defendant. (ECF No. 27-1 at 2). Plaintiff states that he has no
18 objection to Defendant Merchant Worthy’s alternative request to set a new Case
19 Management Conference to restart the deadlines in this action. *Id.* at 3. Plaintiff further
20 requests that Defendant Merchant Worthy’s motion to dismiss be denied as moot. *Id.*
21 at 4. Plaintiff contends that good cause exists to amend his complaint because he could
22 not have included Defendant Merchant Worthy in the original complaint. Plaintiff
23 contends that he was not aware of the existence of Defendant Merchant Worthy or its
24 relation to the current action until September 30, 2016 following the receipt of written
25 discovery. *Id.* at 3; ECF No. 31 at 2. Plaintiff contends that during discovery,
26 Defendant Rapid Capital represented that at least one of the phone calls received by
27 Plaintiff was placed by Defendant Merchant Worthy. (ECF No. 27-1 at 3).

28 Defendant Merchant Worthy contends that Plaintiff should not be granted leave

1 to amend because Plaintiff failed to obtain leave of Court to file the first amended
2 complaint as required by Federal Rule of Civil Procedure 15(a). (ECF No. 29 at 5).
3 Defendant Merchant Worthy contends that it will be prejudiced if it is added as a
4 defendant at this stage of proceedings because, absent intervention by the Court, it will
5 have “no opportunity to participate in any class discovery or prepare for a class
6 certification motion, and will have no meaningful opportunity to participate in fact
7 discovery in this action.” *Id.* at 6. Defendant Merchant Worthy contends that Plaintiff
8 failed to obtain leave of Court to add Defendant Merchant Worthy as a defendant as
9 required by Federal Rule of Civil Procedure 21. *Id.* Defendant Merchant Worthy
10 contends that Plaintiff failed to seek leave of Court to modify the Scheduling Order.
11 Defendant Merchant Worthy contends that Plaintiff has made no showing of good cause
12 to modify the Scheduling Order as required by Federal Rule of Civil Procedure
13 16(b)(4). *Id.* at 8.

14 **A. Legal Standards**

15 A motion for leave to amend filed after the time period specified in a district
16 court’s scheduling order is governed by the “good cause” standard of Federal Rule of
17 Civil Procedure 16(b). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08
18 (9th Cir. 1992). Federal Rule of Civil Procedure 16 provides that a district court must
19 issue a scheduling order that limits “the time to join other parties, amend the pleadings,
20 complete discovery, and file motions.” Fed. R. Civ. P. 16(b). Federal Rule of Civil
21 Procedure 16(b) also provides that “[a] schedule may be modified only for good cause
22 and with the judge’s consent.” *Id.* “Rule 16(b)’s ‘good cause’ standard primarily
23 considers the diligence of the party seeking amendment. The district court may modify
24 the pretrial schedule ‘if it cannot reasonably be met despite the diligence of the party
25 seeking the extension.’” *Johnson*, 975 F.2d at 609 (citing Fed. R. Civ. P. 16 advisory
26 committee’s notes (1983 amendment)). If the court finds that a plaintiff has shown
27 good cause pursuant to Federal Rule of Civil Procedure 16(b), the court must consider
28 whether leave to amend is proper under Federal Rule of Civil Procedure 15. *Id.* at 608.

1 Federal Rule of Civil Procedure 15(a) provides that after the time for amendment
2 “as a matter of course” has passed, “a party may amend its pleading only with the
3 opposing party’s written consent or the court’s leave.” *Id.* Federal Rule of Civil
4 Procedure 15 mandates that leave to amend “be freely given when justice so requires.”
5 *Id.* “This policy is to be applied with extreme liberality.” *Eminence Capital, LLC v.*
6 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation omitted). In *Foman v.*
7 *Davis*, 371 U.S. 178 (1962), the Supreme Court offered several factors for district
8 courts to consider in deciding whether to grant a motion to amend under Rule 15(a):

9 In the absence of any apparent or declared reason – such as undue delay,
10 bad faith or dilatory motive on the part of the movant, repeated failure to
11 cure deficiencies by amendments previously allowed, undue prejudice to
12 the opposing party by virtue of allowance of the amendment, futility of
13 amendment, etc. – the leave sought should, as the rules require, be “freely
14 given.”
15 *Foman*, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101
16 (9th Cir. 2004). “Not all of the [*Foman*] factors merit equal weight. As this circuit and
17 others have held, it is the consideration of prejudice to the opposing party that carries
18 the greatest weight.” *Eminence Capital*, 316 F.3d at 1052 (citations omitted). “The
19 party opposing amendment bears the burden of showing prejudice.” *DCD Programs,*
20 *Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong
21 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule
22 15(a) in favor of granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

20 **B. Discussion**

21 Plaintiff concedes that he filed the first amended complaint without first seeking
22 leave of Court pursuant to Federal Rule of Civil Procedure 15(a) and 21. (ECF No. 27-
23 1 at 3; ECF No. 31 at 3). In the motion seeking leave to file an amended complaint,
24 Plaintiff requests to withdraw the improperly filed first amended complaint and seeks
25 leave to file the first amended complaint. The Court grants Plaintiff’s request to
26 withdraw the first amended complaint.

27 Because the Scheduling Order (ECF No. 17) was entered in this case, Plaintiff’s
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1 motion for leave to amend is initially governed by Rule 16(b).¹ *See Johnson*, 975 F.2d
2 at 608 (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987) (“party seeking
3 to amend pleading after date specified in scheduling order must first show ‘good cause’
4 for amendment under Rule 16(b), then, if ‘good cause’ be shown, the party must
5 demonstrate that amendment was proper under Rule 15”)).

6 Plaintiff contends that he did not learn of Defendant Merchant Worthy’s
7 existence and involvement in this matter prior to receiving discovery responses from
8 Defendant Rapid Capital and filed the amended complaint “as soon as was practicable.”
9 (ECF No. 27-1 at 3). Plaintiff states that he “could not have amended the Complaint
10 before the Court’s cut off of September 12, 2016, because Plaintiff did not learn of the
11 existence of [Defendant Merchant Worthy] until September 30, 2016[.]” (ECF No. 31
12 at 2). Plaintiff includes a declaration by his counsel which states that Plaintiff received
13 Defendant Rapid Capital’s written discovery responses on September 30, 2016 and that
14 “Plaintiff first found out about the existence of [Defendant Merchant Worthy], and their
15 relation to this case, from [Defendant Rapid Capital] in [Defendant Rapid Capital’s]
16 initial discovery responses.” (ECF No. 31-1 at 2). Plaintiff filed the first amended
17 complaint on October 19, 2016 and the motion for leave to file the amended complaint
18 on January 9, 2017. (ECF Nos. 18, 27). Plaintiff provides evidence to establish that,
19 despite proceeding diligently, he could not have met the Court’s September 12, 2016
20 deadline to file a motion to join other parties or amend the pleading. *See Johnson*, 975
21 F.2d at 609. The Court concludes that Plaintiff has shown good cause to amend the
22 complaint to include Defendant Merchant Worthy.

23 Because the Court finds that Plaintiff has shown good cause, the Court considers
24 whether leave to amend is proper under Federal Rule of Civil Procedure 15. *See*
25 *Johnson*, 975 F.2d at 608. Defendant Merchant Worthy contends that it will be
26 prejudiced by being added as a defendant at this point in the proceedings because a
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28 ¹ On March 8, 2017, the Magistrate Judge vacated the remaining dates on the
scheduling order in light of these pending motions. (ECF No. 37).

1 number of deadlines in the Scheduling Order have already passed. In *DCD Programs*,
2 the Ninth Circuit Court of Appeals noted that “[a]mending a complaint to add a party
3 poses an especially acute threat of prejudice to the entering party.” *DCD Programs*,
4 833 F.2d at 187 (quoting *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397,
5 1400 (9th Cir. 1984)). However, in *DCD Programs* the Court determined that the
6 newly added defendant would not be prejudiced by the timing of the proposed
7 amendment in because the case was at the discovery stage with no trial date pending or
8 pretrial conference scheduled. *Id.* at 187-88. This case is currently in the discovery
9 stage and no trial date is pending. Further, Plaintiff states that he has “no objection to
10 [Defendant Merchant Worthy’s] alternative request to set a new Case Management
11 Conference to restart the deadlines in this action” and requests the Court reset the
12 discovery deadlines. (ECF No. 27-1 at 3-4). Defendant Merchant Worthy has not
13 satisfied its burden to demonstrate that it will be prejudiced if it is named in an amended
14 complaint. The Court concludes that Defendant Merchant Worthy has not made a
15 sufficiently strong showing of the *Foman* factors to overcome the presumption of Rule
16 15(a) in favor of granting leave to amend. *See Eminence Capital*, 316 F.3d at 1052.

17 **III. Defendant Merchant Worthy’s Motion to Dismiss**

18 Defendant Merchant Worthy moves this Court for an Order dismissing the first
19 amended complaint against Defendant Merchant Worthy and dismissing Merchant
20 Worthy as a defendant in this action. (ECF No. 26-1 at 3). Defendant contends that
21 Plaintiff has failed to comply with Federal Rule of Civil Procedure 15(a), Federal Rule
22 of Civil Procedure 21, and the Court’s Scheduling Order issued on August 16, 2016.
23 Alternatively, Defendant Merchant Worthy requests that the Court “set a new
24 scheduling conference to restart the deadlines in this action in order to allow [Defendant
25 Merchant Worthy] to participate on a fair basis with the other parties and avoid such
26 prejudice.” *Id.* at 3.

27 Plaintiff did not file a response in opposition to this motion to dismiss. In his
28 reply in support of the motion seeking leave to file an amended complaint, Plaintiff

1 states, "Plaintiff did not file an opposition to [Defendant Merchant Worthy's] motion,
2 as they were correct in pointing out Plaintiff's error in failing to request leave to amend
3 the complaint. Plaintiff thought it would be best to instead make that request for leave
4 to amend and offer the court a different remedy than dismissal." (ECF No. 31 at 2-3).
5 The Court has granted Plaintiff's request to withdraw the first amended complaint. The
6 Court denies the motion to dismiss as moot.


7 **IV. Conclusion**

8 IT IS HEREBY ORDERED that Plaintiff's request to withdraw the first amended
9 complaint is GRANTED. (ECF No. 27).

10 IT IS FURTHER ORDERED that the motion for leave to amend the complaint
11 is GRANTED. (ECF No. 27). Plaintiff has leave to file an amended complaint adding
12 Merchant Worthy as a defendant. Plaintiff shall file the amended complaint within
13 fourteen (14) days of the date this Order issues.

14 IT IS FURTHER ORDERED that the motion to dismiss filed by Merchant
15 Worthy is DENIED as moot. (ECF No. 26). Any requests regarding a new scheduling
16 order or additional discovery matters are referred to the Magistrate Judge.

17 DATED: May 1, 2017

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19 **WILLIAM Q. HAYES**
United States District Judge

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