

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

KENDALL SCALLY, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

DITECH FINANCIAL, LLC,

Defendant.

CASE NO. 16cv1992-WQH-WVG
ORDER

HAYES, Judge:

The matter before the Court is the motion to dismiss the second amended complaint filed by Defendant Ditech Financial, LLC. (ECF No. 24).

I. Background

On August 9, 2016, Plaintiff Kendall Scally initiated this action by filing a class action complaint against Defendant Ditech Financial alleging causes of action under the Fair Debt Collection Practices Act (“FDCPA”) and the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”). (ECF No. 1). On September 30, 2016, Plaintiff filed a first amended complaint alleging the same causes of action against Defendant. On January 26, 2017, the Court issued an Order granting a motion to dismiss and dismissing the first amended complaint without prejudice. The Court concluded that Plaintiff’s claims were precluded by the Bankruptcy Code because they hinged on allegations that Defendant was attempting to collect a debt previously discharged in bankruptcy. (ECF No. 17).

1 On May 30, 2017, Plaintiff filed a second amended class action complaint against
2 Defendant. (ECF No. 23). Plaintiff again alleges a cause of action for violations of the
3 FDCPA and a cause of action for violations of the Rosenthal Act on behalf of himself
4 and other similarly situated. *Id.*

5 On June 13, 2017, Defendant filed a motion to dismiss for failure to state a
6 claim. (ECF No. 24). On June 30, 2017, Plaintiff filed a response in opposition. (ECF
7 No. 25). On July 10, 2017, Defendant filed a reply. (ECF No. 26).

8 **II. Allegations of the Complaint**

9 “Plaintiff is a ‘consumer’ as the term is defined by 15 U.S.C. section 1692a(3)
10 and a ‘debtor’ as the term is defined by California Civil Code section 1788.2(h).” (ECF
11 No. 23 at ¶ 9). “Plaintiff is informed and believes . . . that Defendant is a ‘debt
12 collector’ as the term is defined by Civil Code section 1788.2(c).” *Id.* ¶ 12. “Defendant
13 attempted to collect a ‘consumer debt’ as the term is defined by the FDCPA and
14 Rosenthal FDCPA.” *Id.* ¶ 13.

15 “Sometime after March 25, 2016, Plaintiff received a collection notice dated,
16 March 25, 2016, from Defendant. The March 25, 2016 stated that Plaintiff owed a debt
17 in the amount of \$7,662.12 to Defendant.” (ECF No. 23 ¶ 18). “The March 25, 2016
18 collection notices stated that ‘Because of interest, late charges, and other charges that
19 may vary from day to day, the amount due on the day you pay may be greater.’” *Id.*
20 ¶ 19. “The March 25, 2016 collection notice was false, confusing, and misleading,
21 because it informs the least sophisticated debtor that interest is accruing on the debt
22 when in fact there was no interest accruing.” *Id.* ¶ 46. “Defendant’s statement
23 attempted to trick Plaintiff into believing that interest, late charges, or other charges are
24 accruing which could force Plaintiff to pay the debt immediately in order to avoid any
25 further increase of the debt.” *Id.*

26 “Sometime after June 20, 2016, Plaintiff received a second collection notice,
27 dated June 20, 2016, from Defendant.” *Id.* ¶ 21. “The June 20, 2016 collection stated
28 in part that ‘We are required to report any debt forgiveness to the Internal Revenue

1 Service.” *Id.* ¶ 22. “This statement is false and misleading . . . because there are many
2 exceptions to IRS reporting requirements and not every debt forgiveness is required to
3 be so reported.” *Id.* ¶ 47.

4 Plaintiff alleges that these statements are in violation of 15 U.S.C. § 1692e, 15
5 U.S.C. 1692e(10), and California Civil Code section 1788.17. *Id.* ¶¶ 45, 47 54. “As a
6 direct result of these statements, Plaintiff suffered bewilderment and confusion over
7 whether he owed any amount to Defendant, what amount in particular was owed, and
8 what his tax consequences may or may not be upon any amount claimed to be owed.”
9 *Id.* ¶ 23. Plaintiff brings this action ¶ on his own behalf and on behalf of all other
10 similarly situated and identifies four classes in this action. *Id.* ¶¶ 25-29.

11 **III. Legal Standard**

12 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
13 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of
14 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must
15 contain . . . a short and plain statement of the claim showing that the pleader is entitled
16 to relief.” Fed. R. Civ. P. 8(a)(2). “All factual allegations set forth in the complaint are
17 taken as true and construed in the light most favorable to plaintiffs.” *Lee*, 250 F.3d at
18 679. “A district court’s dismissal for failure to state a claim under Federal Rule of Civil
19 Procedure 12(b)(6) is proper if there is a ‘lack of a cognizable legal theory or the
20 absence of sufficient facts alleged under a cognizable legal theory.’” *Conservation*
21 *Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica*
22 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

23 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
24 requires more than labels and conclusions, and a formulaic recitation of the elements
25 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
26 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must
27 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
28 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,

1 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
2 content that allows the court to draw the reasonable inference that the defendant is liable
3 for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must
4 accept as true all of the allegations contained in a complaint is inapplicable to legal
5 conclusions. Threadbare recitals of the elements of a cause of action, supported by
6 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “In sum, for a
7 complaint to survive a motion to dismiss, the non-conclusory factual content, and
8 reasonable inferences from that content, must be plausibly suggestive of a claim
9 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
10 2009) (quotation omitted).

11 **IV. DISCUSSION**

12 Defendant contends that Plaintiff fails to state a claim under the FDCPA or
13 Rosenthal Act because the second amended complaint lacks factual allegations to
14 establish that the debt at issue is a debt for personal, family, or household purposes.
15 (ECF No. 24-3 at 5). Defendant contends that Plaintiff’s claims remain precluded by
16 the Bankruptcy Code because they are premised on a debt discharged in bankruptcy.
17 Defendant contends that the “preclusion doctrine cannot be avoided by simply deleting
18 express references to ‘a discharge’ and ‘bankruptcy’ from a pleading, while continuing
19 to attack the same alleged conduct.” *Id.* at 9. Defendant contends that Plaintiff’s claims
20 should be dismissed with prejudice because they “continue to depend on the legal effect
21 of the discharge of his debt in bankruptcy” and further litigation would be futile and
22 prejudicial. *Id.* at 11.¹

23 Plaintiff contends that the second amended complaint sufficiently alleges that the
24

25 ¹ Defendant requests that the Court take judicial notice pursuant to Federal Rule
26 of Evidence 201 of the following two documents: (1) Plaintiff’s First Amended
27 Complaint filed in this matter on September 30, 2016 and (2) a Bankruptcy Discharge
28 Order entered in September 1, 1998, at ECF No. 5, by the United States Bankruptcy
Court for the Eastern District of Washington in *In re Kendall John Scally*, Case No. 98-
3485-PCW7 (Bankr. E.D. Wash.). (ECF No. 24-4). The Court decides this motion on
different grounds and denies this request for judicial notice as unnecessary. *See, e.g.*,
Asvesta v. Petroutsas, 580 F.3d 1000, 1010 n.12 (9th Cir. 2009)

1 debt at issue is a “consumer debt” covered under the FDCPA. (ECF No. 25 at 5).
2 Plaintiff contends that the allegations in the first amended complaint are “sufficiently
3 clear that this underlying debt arose from a line of credit that Plaintiff used primarily
4 for personal, family, or household purposes.” *Id.* at 5 n.1. Plaintiff contends that the
5 allegation that the debt is subject to the FDCPA and the Rosenthal Act must be accepted
6 as true. *Id.* at 6. Plaintiff requests leave to amend in order to include further allegations
7 about the nature of the debt should the Court grant the motion to dismiss. *Id.* Plaintiff
8 contends that his claims are not foreclosed by the Bankruptcy Code because the claims
9 do not depend on the legal status of the debt. Plaintiff contends that his claims focus on
10 the language of the collections notices rather than the underlying legal status of the
11 debt. *Id.* at 7-8.

12 The Rosenthal Act requires compliance with the federal Fair Debt Collection
13 Practices Act (“FDCPA”) and a debt collector that violates the FDCPA also violates the
14 Rosenthal Act. *See* Cal. Civ Code § 1788.17; *Gates v. MCT Grp., Inc.*, 93 F. Supp. 3d
15 1182, 1192 (S.D. Cal. 2015); *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104,
16 1118 (C.D. Cal. 2005).

17 The FDCPA prohibits debt collectors from engaging in abusive, deceptive, and
18 unfair practices in the collection of consumer debts. *See* 15 U.S.C. § 1692. To state a
19 FDCPA claim, a plaintiff must allege facts sufficient to establish: (1) the plaintiff has
20 been the object of collection activity arising from a consumer debt, (2) the defendant
21 attempting to collect the debt qualifies as a “debt collector,” and (3) the defendant
22 committed some act or omission in violation of the FDCPA. *See Pratap v. Wells Fargo*
23 *Bank, N.A.*, 63 F. Supp. 3d 1101, 1113 (N.D. Cal. 2014) (citing *Gomez v. Wells Fargo*
24 *Home Morg.*, 2011 WL 5834949, at *5 (N.D. Cal. Nov. 21, 2011)). “Because not all
25 obligations to pay are considered debts under the FDCPA, a threshold issue in a suit
26 brought under the Act is whether or not the dispute involves a ‘debt’ within the meaning
27 of the statute.” *Turner v. Cook*, 362 F.3d 1219, 1226–27 (9th Cir. 2004). The FDCPA
28 defines “debt” as “any obligation or alleged obligation of a consumer to pay money

1 arising out of a transaction in which the money, property, insurance, or services which
2 are the subject of the transaction are primarily for personal, family, or household
3 purposes” 15 U.S.C. § 1692a(5). The Ninth Circuit Court of Appeals has
4 determined that debts incurred for business purposes do not fall within the scope of the
5 FDCPA. *Bloom v. I.C. System, Inc.*, 972 F.3d 1067, 1068 (9th Cir. 1992) (“The
6 FDCPA protects consumers from unlawful debt collection practices. Consequently, the
7 Act applies to consumer debts and not business debts.”).

8 The Court’s review is limited to the factual allegations of the second amended
9 complaint at this stage in the proceedings. *Rhodes v. Robinson*, 621 F.3d 1002, 1005
10 (9th Cir. 2010) (quoting *Loux v. Ray*, 375 F.2d 55, 57 (9th Cir. 1967)) (“As a general
11 rule, when a plaintiff files an amended complaint, “[t]he amended complaint supercedes
12 the original, the latter being treated thereafter as non-existent.”); *Lee v. City of Los*
13 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (“As a general rule, a district court may not
14 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.”). In
15 the second amended complaint, Plaintiff alleges that “Plaintiff is a ‘consumer’ as the
16 term is defined by 15 U.S.C. section 1692a(3)” and that “Defendant attempted to
17 collect a ‘consumer debt’ as the term is defined by the FDCPA and Rosenthal FDCPA.”
18 (ECF No. 23 at ¶¶ 9, 13). These statements are legal conclusions insufficient to
19 establish the nature of the debt. *See Iqbal*, 556 U.S. at 678 (“[T]he tenet that a court
20 must accept as true all of the allegations contained in a complaint is inapplicable to legal
21 conclusions. Threadbare recitals of the elements of a cause of action, supported by
22 mere conclusory statements, do not suffice.”). The Court concludes that Plaintiff has
23 failed to allege sufficient facts to establish that Plaintiff has been the object of collection
24 activity arising from a consumer debt covered by the FDCPA. *See Turner*, 362 F.3d at
25 1226–27. Because Plaintiff fails to state a claim under the FDCPA, Plaintiff also fails
26 to state a claim under the Rosenthal Act. *See Cal. Civ. Code § 1788.12.*

27
28 **VI. Conclusion**

1 IT IS HEREBY ORDERED that the motion to dismiss filed by Defendant is
2 GRANTED. (ECF No. 24). The second amended complaint is dismissed without
3 prejudice. Plaintiff shall have thirty (30) days from the date this Order is issued to file
4 a motion for leave to file an amended complaint. If Plaintiff does not file a motion for
5 leave to amend within thirty (30) days of this Order, the Clerk of Court shall close the
6 case.

7 DATED: November 21, 2017

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

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28