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

KENDALL SCALLY, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div> v. DITECH FINANCIAL, LLC, <div style="text-align: right; padding-right: 20px;">Defendant.</div>		CASE NO. 16cv1992-WQH-WVG ORDER
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HAYES, Judge:

The matter before the Court is the Motion for Leave to File Third Amended Complaint. (ECF No. 29).

I. Background

On September 30, 2016, Plaintiff Kendall Scally filed the first amended class action complaint against Defendant Ditech Financial, LLC. (ECF No. 11). Plaintiff alleged two causes of action against Defendant on behalf of herself and other similarly situated: (1) violations of the Fair Debt Collection Practices Act (“FDCPA”); and (2) violations of the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”). *Id.*

On October 17, 2016, Defendant filed a motion to dismiss. (ECF No. 14). On January 26, 2017, the Court determined that Plaintiff’s claims were precluded by the Bankruptcy Code and granted the motion to dismiss. (ECF No. 17). The Court dismissed the first amended complaint without prejudice. *Id.*

On May 30, 2017, Plaintiff filed the Second Amended Complaint and again alleged violations of the FDCPA and Rosenthal Act. (ECF No. 23).

1 On June 30, 2016, Defendant filed a motion to dismiss the Second Amended
2 Complaint for failure to state a claim. (ECF No. 24). On November 21, 2017, the
3 Court granted the motion to dismiss. (ECF No. 28). The Court determined that
4 Plaintiff failed to allege sufficient facts to establish that Plaintiff had been the object of
5 collection activity arising from a consumer debt covered by the FDCPA and therefore
6 failed to state a claim under the FDCPA and Rosenthal Act. The Court dismissed the
7 Second Amended Complaint without prejudice and granted Plaintiff thirty days within
8 which to file a motion for leave to file an amended complaint. *Id.*

9 On November 28, 2017, Plaintiff filed the Motion for Leave to File Third
10 Amended Complaint. (ECF No. 29). On December 19, 2017, Defendant filed a
11 response in opposition. (ECF No. 30). On December 23, 2017, Plaintiff filed a reply.
12 (ECF No. 31).

13 **II. Contentions of the Parties**

14 Plaintiff requests leave to file a Third Amended Complaint in order to clarify that
15 the debt at issue in this case is covered under the FDCPA and Rosenthal Act. (ECF No.
16 29). Plaintiff contends that he has not acted in bad faith or with undue delay. *Id.* at 5.
17 Plaintiff contends that no undue prejudice will result to Defendant because of the early
18 stage of proceedings. *Id.* at 6. Plaintiff contends that amendment is not futile because
19 the third amended complaint will clarify that the debt at issue is a line of credit
20 primarily used for personal, family, or household purposes and is properly covered by
21 the FDCPA and Rosenthal Act. *Id.* Plaintiff contends that a substantive evaluation of
22 the merits of Plaintiff's allegations is improper on a motion for leave to amend. *Id.*
23 Plaintiff contends that the claims in the proposed third amended complaint are not
24 precluded by the Bankruptcy Code because they are independent of whether the
25 underlying debt had been discharged. (ECF No. 31 at 8).

26 Defendant contends that the Court should deny leave to amend as futile because
27 the proposed amended complaint is subject to dismissal for failure to state a claim.
28 (ECF No. 30 at 5-6). Defendant contends that the debt at issue was discharged in

1 bankruptcy and Plaintiff's claims are therefore precluded by the Bankruptcy Code. *Id.*
2 at 6-9. Defendant contends that preclusion by the Bankruptcy Code "cannot be avoided
3 by simply deleting express references to a 'discharge' and 'bankruptcy' from a
4 pleading, while continuing to attack the same alleged conduct." *Id.* at 9. Defendant
5 contends that allowing any leave to amend would be unduly prejudicial because it
6 forces Defendant to relitigate claims that have been dismissed. Defendant contends that
7 by omitting references to the bankruptcy discharge in the proposed third amended
8 complaint, Plaintiff seeks to postpone consideration of the Bankruptcy Code's
9 preclusion of his claims. *Id.* at 10.

10 **III. Discussion**

11 Federal Rule of Civil Procedure 15 mandates that leave to amend "be freely given
12 when justice so requires." Fed. R. Civ. P. 15(a). "This policy is to be applied with
13 extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
14 Cir. 2003) (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme
15 Court offered several factors for district courts to consider in deciding whether to grant
16 a motion to amend under Rule 15(a):

17 In the absence of any apparent or declared reason – such as undue delay,
18 bad faith or dilatory motive on the part of the movant, repeated failure to
19 cure deficiencies by amendments previously allowed, undue prejudice to
20 the opposing party by virtue of allowance of the amendment, futility of
21 amendment, etc. – the leave sought should, as the rules require, be "freely
22 given."

23 *Foman*, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101
24 (9th Cir. 2004). "Not all of the [*Foman*] factors merit equal weight. As this circuit and
25 others have held, it is the consideration of prejudice to the opposing party that carries
26 the greatest weight." *Eminence Capital*, 316 F.3d at 1052 (citations omitted). "The
27 party opposing amendment bears the burden of showing prejudice." *DCD Programs,*
28 *Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). "Absent prejudice, or a strong
showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule
15(a) in favor of granting leave to amend." *Eminence Capital*, 316 F.3d at 1052.


The Court concludes that Defendant has not made a sufficiently strong showing

1 of the *Foman* factors to overcome the presumption of Rule 15(a) in favor of granting
2 leave to amend. See *Eminence Capital*, 316 F.3d at 1052. The Court will defer
3 consideration of any challenge to the merits of the proposed second amended complaint
4 until after the amended pleading is filed. See *Hynix Semiconductor Inc. v. Toshiba*
5 *Corp.*, No. C-04-4708, 2006 WL 3093812, at *2 (N.D. Cal. Oct. 31, 2006) (“In view
6 of Rule 15(a)’s permissive standard, courts ordinarily defer consideration of challenges
7 to the merits of a proposed amended pleading until after leave to amend is granted and
8 the amended pleading is filed.”).

9 **IV. Conclusion**

10 IT IS HEREBY ORDERED that the Motion for Leave to File Third Amended
11 Complaint (ECF No. 29) is granted. No later than fourteen (14) days from the date this
12 Order is issued, Plaintiff may file the proposed third amended complaint which is
13 attached to the motion. If Plaintiff does not file the third amended complaint within
14 fourteen days, the Court will order the Clerk of Court to close this case.

15 DATED: January 3, 2018

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

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