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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 KENDALL SCALLY,  
12 individually and on behalf of all  
13 others similarly situated,  
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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 third amended complaint filed by Defendant Ditech Financial, LLC. (ECF No. 35).

**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

1 precluded by the Bankruptcy Code because they hinged on allegations that Defendant was  
2 attempting to collect a debt previously discharged in bankruptcy. (ECF No. 17).

3 On May 30, 2017, Plaintiff filed a second amended class action complaint against  
4 Defendant. (ECF No. 23). Plaintiff alleged a cause of action for violations of the FDCPA  
5 and a cause of action for violations of the Rosenthal Act on behalf of himself and others  
6 similarly situated. The second amended complaint did not include allegations about the  
7 bankruptcy proceedings related to the underlying debt. *Id.* On November 21, 2017, the  
8 Court issued an Order granting a motion to dismiss and dismissing the second amended  
9 complaint without prejudice. The Court concluded that Plaintiff failed to alleged sufficient  
10 facts to establish that he had been the object of collection activity arising from a consumer  
11 debt covered by the FDCPA, as required to state a claim under the FDCPA and Rosenthal  
12 Act. (ECF No. 28).

13 On January 3, 2018, Plaintiff filed a third amended class action complaint for  
14 violations of the FDCPA and violations of the Rosenthal Act on behalf of himself and  
15 others similarly situated. (ECF No. 33). On January 17, 2018, Defendant filed a motion  
16 to dismiss for failure to state a claim. (ECF No. 35). On February 12, 2018, Plaintiff filed  
17 a response in opposition. (ECF No. 36). On February 16, 2018, Defendant filed a reply.  
18 (ECF No. 37).

## 19 II. ALLEGATIONS OF THE COMPLAINT

20 Plaintiff is a natural person allegedly obligated to pay a consumer debt to  
21 Defendants, alleged to have been due and owing, and is therefore both a  
22 “consumer” as that term is defined by 15 U.S.C. § 1692a(3) of the FDCPA,  
23 and is also therefore a “debtor” as that term is defined by California Civil  
Code § 1788.2(h) of the Rosenthal Act.

24 (ECF No. 33 at ¶ 9). Defendant “regularly collects or attempts to collect, directly or  
25 indirectly, debts owed or due or asserted to be owed or due another” and is a debt collector  
26 as that term is defined by the Rosenthal Act and the FDCPA. *Id.* ¶¶ 11–13.

27 Defendant alleged that Plaintiff owed a debt that it was allegedly collecting  
28 related to money arising out of a line of credit that was issued to Plaintiff,

1 without payment being required at the time of the line of credit having been  
2 rendered to Plaintiff, with an alleged agreement that Plaintiff would pay back  
3 the line of credit over time.

4 *Id.* ¶ 15. “[T]he money alleged to have been owed to Defendant originated from monetary  
5 credit that was extended primarily for personal, family, or household purposes, and  
6 Defendant alleged that the debt was due and owing . . . .” *Id.* ¶16.

7 “Sometime prior to March of 2016, Plaintiff is alleged to have incurred certain  
8 financial obligations with HFC Company, LLC, whereby he received a line of credit for  
9 his use within his personal life for everyday purposes.” *Id.* ¶ 23.

10 The agreement was for Plaintiff to receive the line of credit, for him to use  
11 within his personal life for everyday purchases, which did not require any  
12 payment from Plaintiff at the time, but instead was an agreement whereby  
13 Plaintiff would repay the amount used by him over time in the future, with  
14 interest.

15 *Id.* ¶ 24. “Sometime after March 25, 2016, Plaintiff received a collection notice, dated,  
16 March 25, 2016, from Defendant. The March 25, 2016 [collection notice] stated that  
17 Plaintiff owed a debt in the amount of \$7,662.12 to Defendant.” *Id.* ¶ 27.

18 The March 25, 2016 collection notice stated in part that “Because of interest,  
19 late charges, and other charges that may vary from day to day, the amount due  
20 on the day you pay may be greater. Hence, if you pay the amount shown  
21 above, an adjustment may be necessary after we receive your check, in which  
22 event we will inform you before depositing the check for collection.”

23 *Id.* ¶ 28. “However, no interest, late charges, or other charges were incurring.” *Id.* ¶ 29.  
24 “The March 25, 2016 collection notice was false, confusing, and misleading, because it  
25 informs the least sophisticated debtor that interest is accruing on the debt when in fact there  
26 was no interest accruing.” *Id.* ¶ 56. “Furthermore, Defendant’s statement attempted to  
27 trick Plaintiff into believing that interest, late charges or other charges are accruing which  
28 would force Plaintiff to pay the debt immediately in order to avoid any further increase of  
the debt.” *Id.*

1 “Sometime after June 20, 2016, Plaintiff received a second collection notice, dated  
2 June 20, 2016, from Defendant.” *Id.* ¶ 30. “The June 20, 2016 collection [notice] stated  
3 in part that ‘We are required to report any debt forgiveness to the Internal Revenue Service.  
4 This may result in consequences regarding your federal, state or local tax liability.’” *Id.* ¶  
5 31. “This statement is false and misleading . . . because there are many exceptions to IRS  
6 reporting requirements and not every debt forgiveness is required to be so reported.” *Id.* ¶  
7 58. “Further, this June 20, 2016 collection notice also stated that the outstanding balance  
8 was \$7,662.12, which shows that no interest, late charges, or any other additional charges  
9 had accrued since the March 2016 collection notice.” *Id.* ¶ 32.

10 Plaintiff alleges that these statements are in violation of 15 U.S.C. § 1692e, 15 U.S.C.  
11 § 1692e(5), and 1692e(10) and California Civil Code 1788.17. *Id.* ¶¶ 55, 58, 65. “As a  
12 direct result of these statements, Plaintiff suffered bewilderment and confusion over  
13 whether he owed any amount to Defendant, what amount in particular was owed, and what  
14 his tax consequences may or may not be upon any amount claimed to be owed.” *Id.* ¶ 33.  
15 Plaintiff brings this action on his own behalf and on behalf of all other similarly situated  
16 and identifies four classes in this action. *Id.* ¶¶ 35–39.

### 17 **III. LEGAL STANDARD**

18 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a  
19 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil  
20 Procedure 8(a) provides that “[a] pleading that states a claim for relief must contain . . . a  
21 short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
22 R. Civ. P. 8(a)(2). “All factual allegations set forth in the complaint are taken as true and  
23 construed in the light most favorable to plaintiffs.” *Lee*, 250 F.3d at 679. “A district court’s  
24 dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is  
25 proper if there is a ‘lack of a cognizable legal theory or the absence of sufficient facts  
26 alleged under a cognizable legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240,  
27 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
28 Cir. 1990)).

1            “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting  
4 Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must contain sufficient  
5 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
6 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim  
7 has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
8 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
9 (citation omitted). “[T]he tenet that a court must accept as true all of the allegations  
10 contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the  
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
12 *Id.* (citation omitted). “In sum, for a complaint to survive a motion to dismiss, the non-  
13 conclusory factual content, and reasonable inferences from that content, must be plausibly  
14 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d  
15 962, 969 (9th Cir. 2009) (quotation omitted).

#### 16            **IV. DISCUSSION**

17            Defendant contends that the FDCPA and Rosenthal Act claims remain precluded by  
18 the Bankruptcy Code because they arise from Defendant’s alleged violation of the  
19 Bankruptcy Court’s discharge injunction. Defendant contends that determining whether it  
20 made accurate representations in its collection notices depends on the nature and legal  
21 status of the debt at issue. Defendant contends that Plaintiff “unsuccessfully tried to plead  
22 around the Court’s Dismissal Order and controlling case law without changing the  
23 fundamental premise of his claims.” (ECF No. 35-1 at 5). Defendant contends that  
24 although “Plaintiff’s counsel has deleted the express references to the discharge issued by  
25 the Bankruptcy Court” in the third amended complaint, the “public record” and “Plaintiff’s  
26 prior representations to the Court” establish that Plaintiff believes he was not required to  
27 pay back the debt because the underlying debt was discharged in 1998. *Id.* at 4. Defendant  
28 asserts that the Court may draw on its judicial experience and common sense to accomplish

1 the “context-specific task” of determining whether a complaint states a claim and therefore  
2 may “take judicial notice of the fact that Plaintiff already pled that his debt was incurred in  
3 1996 and prior to the Bankruptcy Court’s 1998 Discharge Order.” *Id.* at 4 n.4. Defendant  
4 contends that Plaintiff’s claims should be dismissed with prejudice because this is  
5 Plaintiff’s fourth attempt to adequately plead his claims and because this “artful pleading”  
6 around the Bankruptcy Code should not be condoned by the Court. *Id.* at 11. Defendant  
7 contends that the Bankruptcy Court is the proper forum for Plaintiff to seek relief from  
8 Defendant’s alleged wrongdoing.

9 Plaintiff contends that the claims alleged in the third amended complaint are not  
10 foreclosed by the Bankruptcy Code because his claims do not turn upon the discharged  
11 nature of the debt. Plaintiff contends that his “claims only challenge the language in the  
12 two collection notices” and “can be proven by the Collection Notices themselves without  
13 any reference or inquiry whatsoever into the underlying debt itself.” (ECF No. 36 at 2–3).  
14 Plaintiff asserts that Defendants take the position that “once a consumer’s debt is  
15 discharged in bankruptcy, that consumer can never bring a claim under the FDCPA against  
16 the debt collector” and that this position is unsupported by precedent from the Ninth Circuit  
17 Court of Appeals. *Id.* at 3. Plaintiff contends that he “is not . . . asserting FDCPA violations  
18 in his TAC based upon violations of section 524 of the Bankruptcy Code.” *Id.* at 5.

19 California’s Rosenthal Act requires compliance with the federal FDCPA and a debt  
20 collector that violates the FDCPA also violates the Rosenthal Act. *See* Cal. Civ. Code §  
21 1788.17; *Gates v. MCT Grp., Inc.*, 93 F. Supp. 3d 1182, 1192 (S.D. Cal. 2015);  
22 *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1104, 1118 (C.D. Cal. 2005). The FDCPA  
23 prohibits debt collectors from engaging in abusive, deceptive, and unfair practices in the  
24 collection of consumer debts. *See* 15 U.S.C. § 1692. Section 1692e prohibits the use by a  
25 debt collector of “any false, deceptive, or misleading representation or means in connection  
26 with the collection of any debt” and includes a non-exhaustive list of examples of  
27 proscribed conduct. 15 U.S.C. § 1692e. To state a FDCPA claim, a plaintiff must allege  
28 facts sufficient to establish: (1) the plaintiff has been the object of collection activity arising

1 from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a “debt  
2 collector,” and; (3) the defendant committed some act or omission in violation of the  
3 FDCPA. *See Pratap v. Wells Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1113 (N.D. Cal.  
4 2014) (citing *Gomez v. Wells Fargo Home Morg.*, 2011 WL 5834949, at \*5 (N.D. Cal.  
5 Nov. 21, 2011)). “Because not all obligations to pay are considered debts under the  
6 FDCPA, a threshold issue in a suit brought under the Act is whether or not the dispute  
7 involves a ‘debt’ within the meaning of the statute.” *Turner v. Cook*, 362 F.3d 1219, 1226–  
8 27 (9th Cir. 2004) (citing *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1075 (9th Cir.  
9 2001)). Under the FDCPA, the term “debt” is defined as “any obligation or alleged  
10 obligation of a consumer to pay money arising out of a transaction in which the money,  
11 property, insurance, or services which are the subject of the transaction are primarily for  
12 personal, family, or household purposes . . . .” 15 U.S.C. § 1692a(5). Debts incurred for  
13 business purposes do not fall within the scope of the FDCPA. *Bloom v. I.C. System, Inc.*,  
14 972 F.3d 1067, 1068 (9th Cir. 1992).

15 The Bankruptcy Code prohibits collection of a discharged debt. Section 524 of the  
16 Bankruptcy Code provides,

17 A discharge in a case under this title . . . operates as an injunction against the  
18 commencement or continuation of an action, the employment of process, or  
19 an act, to collect, recover or offset any such debt as a personal liability of the  
debtor whether or not discharge of such debt is waived.

20 11 U.S.C. § 524(a)(2). The Bankruptcy Code provides a remedy for a violation of section  
21 524 through civil contempt under section 105. *Walls v. Wells Fargo, N.A.*, 276 F.3d 509,  
22 510 (9th Cir. 2002). The Bankruptcy Code provides a debtor’s exclusive remedy for  
23 violations of section 524 and precludes fair debt collection claims hinging upon whether a  
24 debt was discharged in bankruptcy. *Id.* In *Walls v. Wells Fargo*, the Ninth Circuit Court  
25 of Appeals stated, “The Bankruptcy Code provides its own remedy for violating § 524,  
26 civil contempt under § 105. To permit a simultaneous claim under the FDCPA would  
27 allow through the back door what Walls cannot accomplish through the front door—a  
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1 private right of action.” *Id.* at 510. “This would circumvent the remedial scheme of the  
2 Code under which Congress struck a balance between the interests of debtors and creditors  
3 by permitting (and limiting) debtors’ remedies for violating the discharge injunction to  
4 contempt.” *Id.* However, claims that do not turn on the discharged nature of the debt are  
5 not precluded under the reasoning of *Walls*. See *Goad v. MCT Grp.*, No. 09CV1321  
6 BTM(POR), 2010 WL 1407257, at \*3 (S.D. Cal. Apr. 6, 2010), *aff’d*, 576 F. App’x 707  
7 (9th Cir. 2014).

8 The Court’s review is limited to the factual allegations of the third amended  
9 complaint and any materials properly subject to judicial notice at this stage in the  
10 proceedings.<sup>1</sup> See *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (quoting *Loux*  
11 *v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)) (“As a general rule, when a plaintiff files an  
12 amended complaint, [t]he amended complaint supersedes the original, the latter being  
13 treated thereafter as non-existent.”); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th  
14 Cir. 2001) (“As a general rule, a district court may not consider any material beyond the  
15 pleadings in ruling on a Rule 12(b)(6) motion.”). The third amended complaint does not  
16 contain any factual allegations that Plaintiff’s debt at issue in this litigation has been  
17 discharged in bankruptcy. As currently pleaded, the third amended complaint challenges  
18 only that the language of the collection notices violate the Rosenthal Act and the FDCPA.  
19 Defendant provides a copy of a Bankruptcy Discharge Order filed in United States  
20 Bankruptcy Court for the Eastern District of Washington in *In Re Kendall John Scally*, Case

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23 <sup>1</sup> Defendant’s request for judicial notice of Plaintiff’s First Amended Complaint (ECF No. 35-2 at 2) is  
24 denied as unnecessary. See, e.g., *Asvesta v. Petroustas*, 580 F.3d 1000, 1010 n.12 (9th Cir. 2009) (denying  
25 request for judicial notice where judicial notice would be “unnecessary”). Plaintiff’s request for judicial  
26 notice of the Bankruptcy Discharge Order filed in United States Bankruptcy Court for the Eastern District  
27 of Washington in *In Re Kendall John Scally*, Case No. 98-3485-PCW7 (ECF No. 35-2 at 2–4) is granted  
28 pursuant to Federal Rule of Evidence 201. Plaintiff did not oppose the request for judicial notice and  
courts may take judicial notice of “proceedings in other courts, both within and without the federal judicial  
system, if those proceedings have a direct relation to matters at issue.” *U.S. ex rel. Robinson Rancheria*  
*Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation and internal quotations  
omitted).

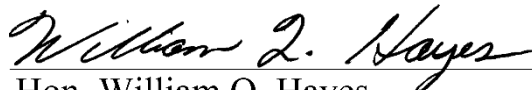


1 No. 98-3485-PCW7. (ECF No. 35-2 at 3-4). This document does not establish that the  
2 underlying debt at issue in this litigation was discharged in bankruptcy prior to Defendant’s  
3 alleged collection activity in 2016. Plaintiff’s claims may ultimately be precluded by the  
4 Bankruptcy Code to the extent they turn on the discharged nature of the underlying debt.  
5 *See Walls*, 276 F.3d at 510; ECF No. 17. *But see Goad*, 2010 WL 1407257, at \*3 (“The  
6 Court reiterates that not all fair debt collection practices claims are precluded just because  
7 the debt at issue was discharged in bankruptcy. Claims that are independent of the  
8 bankruptcy discharge—i.e., claims that do not turn upon the discharged nature of the  
9 debt—would not interfere with the remedial scheme of the Bankruptcy Code.”). However,  
10 at this stage in the proceedings and based on the material the Court may properly consider  
11 on a Rule 12(b)(6) motion, the Court cannot conclude that Plaintiff’s claims as pleaded in  
12 the third amended complaint are precluded by the Bankruptcy Code. *See PAE Gov’t Servs.,*  
13 *Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007) (“[T]here is nothing in the Federal  
14 Rules of Civil Procedure to prevent a party from filing successive pleadings that make  
15 inconsistent or even contradictory allegations.”).

16 **V. CONCLUSION**

17 IT IS HEREBY ORDERED that the motion to dismiss the third amended complaint  
18 filed by Defendant Ditech Financial, LLC is DENIED. (ECF No. 35).

19 Dated: May 3, 2018

20   
21 Hon. William Q. Hayes  
22 United States District Court  
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