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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 NINA OSHANA SEPARATE
12 PROPERTY TRUST, dated
13 September 16, 2015,

Plaintiff,

14 v.

15 BANK OF AMERICA, N.A.;
16 BAYVIEW LOAN SERVICING,
17 LLC; SELECT PORTFOLIO
18 SERVICING, INC.; and DOES 1-
19 100, inclusive,

Defendants.

Case No.: 17cv2408-WQH-RBB

ORDER

20 HAYES, Judge:

21 The matter before the Court is the motion seeking leave to file a second amended
22 complaint. (ECF No. 21).

23 **I. BACKGROUND**

24 On November 30, 2017, Plaintiff Nina Oshana Separate Property Trust initiated this
25 action by filing a Complaint with Jury Demand against Defendants Bank of America, N.A.
26 (“Bank of America”), Bayview Loan Servicing LLC (“Bayview”), Select Portfolio
27 Servicing, Inc. (“Select Portfolio”), and doe defendants. (ECF No. 4).

28 Plaintiff filed an Amended Complaint on December 18, 2017. (ECF No. 3)

1 Defendants respectively filed three motions to dismiss the Amended Complaint.
2 (ECF Nos. 4, 6, 9).

3 On April 18, 2018, the Court issued an Order stating in part,

4 Plaintiff is ORDERED TO SHOW CAUSE why this action should not
5 be dismissed for lack of subject matter jurisdiction. Plaintiff shall file any
6 response to this Order no later than May 2, 2018. If Plaintiff fails to satisfy
7 its burden of establishing subject matter jurisdiction, this action shall be
dismissed without prejudice.

8 (ECF No. 15).

9 On May 3, 2018, Plaintiff filed a response to the Order to Show Cause requesting
10 that the Court refrain from dismissing this action and instead allow Plaintiff to file a second
11 amended complaint which cures the pleading deficiencies identified by the Court. (ECF
12 No. 18).

13 On May 7, 2018, the Court issued an Order stating that Plaintiff shall file any motion
14 for leave to file a second amended complaint on or before May 18, 2018. (ECF No. 20).

15 On May 18, 2018, Plaintiff filed a motion seeking leave to file a second amended
16 complaint. (ECF No. 21).

17 On June 11, 2018, Defendants Select Portfolio, Bank of America, and Bayview each
18 filed responses in opposition. (ECF Nos. 22, 23, 24).

19 The docket reflects that Plaintiff has not filed any reply.

20 **II. DISCUSSION**

21 Plaintiff seeks leave to amend in order “to include a second basis for Subject Matter
22 Jurisdiction and restate, accurately and fully, its Federal Question Jurisdiction basis, in
23 addition to the California state law claims.” (ECF No. 21-1). Plaintiff contends that the
24 proposed second amended complaint (“SAC”) remedies the previous deficiencies
25 identified by the Court. Plaintiff contends that there has been no undue delay, that Plaintiff
26 has not acted in bad faith, and that there is no undue prejudice to Defendants. Further,
27 Plaintiff contends that its proposed amendment is not futile.

1 Defendant Select Portfolio contends that leave to amend should be denied as futile.
2 Select Portfolio contends that Plaintiff fails to satisfy Rule 8(a)(2) because the proposed
3 SAC fails to distinguish which Defendant committed the alleged wrongdoing. Select
4 Portfolio further contends that Plaintiff lacks standing to bring this action. Select Portfolio
5 contends that Plaintiff fails to plead any viable claim against Select Portfolio. (ECF No.
6 22).

7 Defendant Bank of America requests that the Court deny Plaintiff's motion and issue
8 an order granting its pending motion to dismiss with prejudice. Bank of America contends
9 that the proposed amendments are futile and fail to cure the legal defects of previous
10 pleadings. Bank of America contends that the proposed SAC fails to state a claim for its
11 new cause of action under the Real Estate Settlement Procedures Act ("RESPA") as well
12 as its prior state law causes of action. (ECF No. 23).

13 Defendant Bayview contends that the Court should deny leave to amend because the
14 proposed SAC "does not cure the serious defects plaguing the first amended complaint –
15 including that Plaintiff lacks standing to even bring this lawsuit in the first place." (ECF
16 No. 24 at 1–2). Bayview contends that Plaintiff's proposed SAC is futile and that leave to
17 amend would prejudice Defendants. Bayview contends that it will suffer unnecessary
18 litigation expenses at having to file a second motion to dismiss without the benefit of the
19 a ruling on Bayview's pending motion to dismiss. Bayview contends that the allegations
20 of the proposed SAC are insufficient to state a claim

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

27 In the absence of any apparent or declared reason – such as undue delay, bad
28 faith or dilatory motive on the part of the movant, repeated failure to cure

1 deficiencies by amendments previously allowed, undue prejudice to the
2 opposing party by virtue of allowance of the amendment, futility of
3 amendment, etc. – the leave sought should, as the rules require, be “freely
4 given.”

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

13 The Court concludes that Defendants have not made a sufficiently strong showing
14 of the *Foman* factors to overcome the presumption of Rule 15(a) in favor of granting leave
15 to amend. See *Eminence Capital*, 316 F.3d at 1052. The Court will defer consideration of
16 any challenge to the merits of the proposed SAC until after the amended pleading is filed.
17 See *Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-4708, 2006 WL 3093812, at *2
18 (N.D. Cal. Oct. 31, 2006) (“In view of Rule 15(a)’s permissive standard, courts ordinarily
19 defer consideration of challenges to the merits of a proposed amended pleading until after
20 leave to amend is granted and the amended pleading is filed.”).

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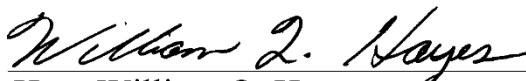
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1 **III. CONCLUSION**

2 IT IS HEREBY ORDERED that the motion seeking leave to file a second amended
3 complaint filed by Plaintiff is GRANTED. (ECF No. 21). No later than ten (10) days from
4 the date this Order is issued, Plaintiff may file the proposed second amended complaint
5 attached to the motion as Exhibit 1. (ECF No. 21-2). If Plaintiff does not file the second
6 amended complaint within ten (10) days, the Court will order the Clerk of Court to close
7 this case.

8 Dated: July 3, 2018

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10 Hon. William Q. Hayes
11 United States District Court
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