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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VICTOR PATENAUDE,

Plaintiff,

v.

ECMC, a nonprofit corporation and
Does 1-10,

Defendants.

Case No. 3:22-CV-00279-DMS-AGS

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION FOR SUMMARY
JUDGMENT, AND GRANTING
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

This case is before the Court on Defendant Educational Credit Management Corporation (“ECMC”)’s motion to dismiss. The matter is fully briefed and the Court heard oral argument on the motion; the matter is ripe for adjudication. For the following reasons, the Court grants the motion to dismiss in part and denies in part, and grants Plaintiff leave to file a second amended complaint.

I.

BACKGROUND

Plaintiff is an attorney with law school debt who alleges violations of the (1) Fair Debt Collection Practices Act (“FDCPA”), (2) Rosenthal Act, (3) Telephone Consumer Protection Act (“TCPA”), and (4) Fair Credit Reporting Act (“FCRA”)

1 against ECMC in relation to the handling of his federal student loan. (ECF No. 9.)
2 Plaintiff filed his complaint in state court and former Defendant Nelnet Servicing
3 LLC (“Nelnet”), removed it to the district court. (ECF No. 1.) The Court held an
4 informal telephonic 12(b)(6) conference with the parties on April 7, 2022. Both
5 Defendants raised numerous issues with the complaint, including that they were not
6 debt collectors as defined by the FDCPA.

7 The parties agreed, and the Court ordered, that Plaintiff would file a first
8 amended complaint (“FAC”) within three weeks to address deficiencies in his initial
9 pleading. (ECF No. 5.) Plaintiff failed to do so, filing only after the Court issued an
10 order to show cause (“OSC”). (*See* ECF Nos. 8–10.) The FAC was filed on May 18,
11 2022; the Court accepted the filing and discharged the OSC. (ECF No. 12.) Shortly
12 after, Nelnet was voluntarily dismissed after reaching a settlement with Plaintiff.
13 (*See* ECF Nos. 14, 16, 18.)

14 Defendant ECMC filed the instant motion to dismiss on June 16, 2022. (ECF
15 No. 15.) Plaintiff filed a response in opposition (ECF No. 17) and Defendant filed a
16 reply. (ECF No. 20.) The Court heard oral argument on the motion on July 29, 2022.
17 (ECF No. 23.)

18 II.

19 DISCUSSION

20 Defendant ECMC moves to dismiss under Federal Rule of Civil Procedure
21 12(b)(6) for failure to state a claim upon which relief can be granted. (ECF No. 15.)
22 Plaintiff agrees in his opposition to dismiss his claims under the Rosenthal Act,
23 TCPA, and FCRA. (ECF No. 17.) Accordingly, these claims are dismissed with
24 prejudice.

25 Plaintiff opposes dismissal of the FDCPA claim and in his opposition seeks
26 leave to file a second amended complaint (“SAC”) alleging additional facts on this
27 cause of action. (ECF No. 17 at 2–3.) He also seeks to add a new claim, for invasion
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1 of privacy. (*Id.*) During oral argument, Defense counsel agreed that a separate
2 noticed motion on the leave to amend is unnecessary, as Defendant adequately
3 addressed this request in its reply.

4 **A. FDCPA Claim**

5 Plaintiff alleges ECMC is a debt collector, as it regularly attempts to collect
6 student loans, and attempted to collect on Plaintiff’s defaulted student loan. (*Id.* at
7 1). ECMC argues that it does not qualify as a debt collector, as Plaintiff’s debt was
8 not in default when it was *acquired by* ECMC, as required by the FDCPA. *See* 15
9 U.S.C. 1692a(6)(F)(iii) (excluding from the definition of debt collector one collecting
10 on a debt “which was not in default at the time it was obtained”). During oral
11 argument, Defense counsel stated he was confident that Plaintiff’s debt was not in
12 default when acquired by ECMC. Plaintiff’s counsel responded that he believed he
13 could allege in good faith that ECMC met the definition of a debt collector as
14 concerns Mr. Patenaude. Given the liberal standard for granting amendments and
15 the lack of undue prejudice to Defendant—the most important factor when assessing
16 requests to amend—Plaintiff’s request for leave to file a SAC alleging these facts is
17 granted. *See Foman v. Davis*, 371 U.S. 1778, 182 (1962); *Eminence Capital, LLC v.*
18 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (affirming that “prejudice to the
19 opposing party [] carries the greatest weight” when determining whether leave to
20 amend should be granted).

21 The SAC must squarely address whether Plaintiff’s debt was in default when
22 it was acquired by ECMC. Plaintiff’s counsel here is reminded of his obligations
23 under Federal Rule of Civil Procedure 11, that is, that he must ensure a reasonable
24 inquiry has been made to gather information and that all “factual contentions have
25 evidentiary support.” Fed. R. Civ. P. 11. Gathering this information may include
26 conferring with defense counsel, as discussed during the hearing. Should Plaintiff’s
27 counsel fail to comply with Rule 11, Defendant may choose to move for sanctions
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1 under Rule 11(c). Plaintiff can move to voluntarily dismiss the FDCPA claim should
2 he discover he cannot credibly allege that ECMC acquired the debt when it was
3 already in default.

4 **B. Privacy Claim**

5 Plaintiff also seeks to add a state law claim for violation of the right to privacy
6 to the SAC. (ECF No. 17 at 2.) Defendant represents that such a claim was discussed
7 during the informal 12(b) conference, and thus contemplated by Plaintiff prior to the
8 filing of the FAC. By failing to include this complaint in the FAC, Defendant argues,
9 Plaintiff was not diligent and thus should not be granted leave to include this claim
10 in the SAC. (ECF No. 20 at 3). During oral argument, Plaintiff's counsel represented
11 that this claim against ECMC was only discovered—through informal discovery with
12 Nelnet—after the 12(b) conference and the filing of the FAC. Based on these
13 representations, the Court grants Plaintiff leave to include the privacy claim in the
14 SAC. Again, in filing the SAC, Plaintiff is reminded of his Rule 11 obligations.
15 Should the FDCPA claim be dismissed, this Court will be deprived of jurisdiction, in
16 which case Plaintiff may elect to refile the right of privacy claim in state court.

17 III.

18 CONCLUSION AND ORDER

19 Plaintiff's claims against Defendant ECMC under the Rosenthal Act, TCPA,
20 and FCRA are dismissed with prejudice. Plaintiff's motion for leave to file a second
21 amended complaint is granted. Plaintiff shall file the SAC by **August 15, 2022**.

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Before filing, the Court invites the parties to meet and confer regarding whether ECMC meets the definition of a debt collector, specifically whether Plaintiff's debt was in default when acquired by ECMC. Following the filing of the SAC, Defendant may file a 12(b) or other appropriate motion, including a Rule 11 filing if believed to be warranted.

IT IS SO ORDERED.

Dated: August 1, 2022



Hon. Dana M. Sabraw, Chief Judge
United States District Court