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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CORY HORTON, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

CALVARY PORTFOLIO SERVICES,
LLC.,

Defendant.

Civil No. 13cv0307 JAH(WVG)

**ORDER GRANTING
DEFENDANT'S MOTION FOR
LEAVE TO FILE AMENDED
ANSWER AND COUNTERCLAIM
[DOC. # 31]**

INTRODUCTION

Currently pending before this Court is the motion for leave to file an amended answer and counterclaim filed by defendant Calvary Portfolio Services, LLC ("defendant"). The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS defendant's motion.

BACKGROUND

The instant class action complaint, filed on February 7, 2013, alleges defendant violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, when it placed telephone calls in an attempt to collect a debt incurred by plaintiff Corey Horton ("plaintiff") for the purchase of a used GMC truck through a credit account placed with Navy Federal Credit Union. Defendant purchased the debt from Navy Federal Credit Union. Defendant filed an answer to the complaint on April 14, 2013. A scheduling

1 order setting deadlines for pretrial proceedings was filed on October 25, 2013.

2 Defendant timely filed the instant motion on November 26, 2013, in which it seeks
3 leave to file an amended answer along with a counterclaim. Plaintiff filed an opposition
4 to the motion and defendant filed a reply brief. Thereafter, this Court took the motion
5 under submission without oral argument. *See* CivLR 7.1(d.1).

6 DISCUSSION

7 Defendant seeks leave to file an amended answer adding an omitted counterclaim
8 against plaintiff.

9 **1. Legal Standard**

10 Leave to add a counterclaim omitted from the original answer is governed by
11 Rule 15(a)(2) of the Federal Rules of Civil Procedure which states that:

12 a party may amend its pleading only with the opposing party's written
13 consent or the court's leave. The court should freely give leave when justice
so requires.

14 Fed.R.Civ.P. 15(a)(2). The Supreme Court has instructed lower courts to heed the
15 language of Rule 15(a) to grant leave freely when justice requires. Howey v. United States,
16 481 F.2d 1187, 1190 (9th Cir. 1973). Because Rule 15(a) mandates that leave to amend
17 should be freely given when justice so requires, the rule is to be interpreted with "extreme
18 liberality." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

19 Granting leave to amend rests in the sound discretion of the trial court.
20 International Ass'n of Machinists & Aerospace Workers v. Republic Airlines, 761 F.2d
21 1386, 1390 (9th Cir. 1985). This discretion must be guided by the strong federal policy
22 favoring the disposition of cases on the merits. DCD Programs Ltd. v. Leighton, 833 F.2d
23 183, 186 (9th Cir. 1987). Because Rule 15(a) favors a liberal policy, the nonmoving party
24 bears the burden of demonstrating why leave to amend should not be granted. Genetech,
25 Inc. v. Abbott Laboratories, 127 F.R.D. 529 (N.D. Cal. 1989).

26 However, even though leave to amend is generally granted freely, it is not granted
27 automatically. *See* Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir.
28 2002). Four factors are considered when a court determines whether to allow amendment

1 of a pleading. These are prejudice to the opposing party, undue delay, bad faith, and
2 futility. *See Forsyth v. Humana*, 114 F.3d 1467, 1482 (9th Cir. 1997); *DCD Programs*,
3 833 F.2d at 186; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

4 These factors are not equally weighted; the possibility of delay alone, for instance,
5 cannot justify denial of leave to amend. *DCD Programs*, 833 F.2d at 186; *Morongo Band*
6 *of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). The single most
7 important factor is whether prejudice would result to the nonmovant as a consequence of
8 the amendment. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668
9 F.2d 1014, 1053 (9th Cir. 1981). A motion to amend may also be denied if the new cause
10 of action would be futile. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).
11 A proposed amendment is futile only if no set of facts can be proved under the
12 amendment that would constitute a valid claim. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d
13 209, 214 (9th Cir. 1988).

14 2. Analysis

15 Defendant seeks to file an amended answer along with a counterclaim against
16 plaintiff for breach of contract, contending the proposed counterclaim is a viable
17 compulsory breach of contract claim and that the *Foman* factors weigh in favor of allowing
18 leave to amend. *See* Doc. # 31. In opposition, plaintiff contends the motion should be
19 denied because (a) the amendment is futile and, thus, the motion is taken in bad faith;
20 and (b) there is no jurisdiction over the counterclaim. *See* Doc. # 38.

21 a. Futility and Bad Faith

22 Plaintiff first contends that leave to amend should be denied on futility grounds
23 because the proposed new counterclaim is untimely. Doc. # 38 at 4-8. Plaintiff further
24 contends that, because defendant seeks to add an untimely counterclaim, defendant's
25 motion is filed in bad faith. *Id.* at 7. In reply, defendant contends that Virginia law
26 requires a factual inquiry in determining whether tolling of the limitations period should
27 be applied and, under the circumstances here, the facts clearly indicate that tolling should
28 apply. Doc. # 40 at 2-6. Therefore, defendant contends that plaintiff's futility argument

1 and his related bad faith argument fail. Id. at 6-7.

2 This Court finds no reason to deny defendant's motion on futility grounds.
3 Plaintiff does not argue that prejudice will result or undue delay has occurred. Although
4 plaintiff does present a persuasive argument supporting his claim that the proposed
5 counterclaim is untimely, defendant also presents persuasive arguments in response. Thus,
6 it is far from clear from the pleadings presented that the counterclaim is untimely.
7 Therefore, this Court finds that defendant's proposed amendment is not futile.

8 **c. Jurisdiction**

9 Plaintiff also argues that defendant's proposed counterclaim is not compulsory and
10 this Court should decline to exercise supplemental jurisdiction over defendant's permissive
11 counterclaim. *See* Doc. # 38 at 8-10.

12 28 U.S.C. § 1367 governs counterclaims and provides that:

13 in any civil action of which the district courts have original jurisdiction, the
14 district courts shall have supplemental jurisdiction over all other claims that
15 are so related to claims in the action within such original jurisdiction that
they form part of the same case or controversy under Article III of the
United States Constitution.

16 28 U.S.C. § 1367(a). Counterclaims are also governed by Rule 13 of the Federal of Rules
17 of Civil Procedure, which categorizes counterclaims as either compulsory or permissive.
18 *See* Fed.R.Civ.P. 13. A compulsory counterclaim is one that "arises out of the transaction
19 or occurrence that is the subject matter of the opposing party's claims."
20 Fed.R.Civ.P. 13(a)(1)(A). The Ninth Circuit applies a "logical relationship test" to
21 determine whether a counterclaim is compulsory. *See Pochiro v. Prudential Ins. Co. of*
22 *Amer.*, 827 F.2d 1246, 1249 (9th Cir. 1987). The logical relationship test requires the
23 Court to "analyze whether the essential facts of the various claims are so logically
24 connected that considerations of judicial economy and fairness dictate that all the issues
25 be resolved in one lawsuit." Id. Failure to bring a compulsory counterclaim bars a later
26 assertion of that claim. Fed.R.Civ.P. 13(a); *Sams v. Beech Aircraft*, 625 F.2d 273, 276 n.4
27 (9th Cir. 1980). Federal courts traditionally have supplemental jurisdiction over
28 compulsory counterclaims because plaintiff would otherwise lose the opportunity to be

1 heard on that claim. *See Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974).

2 Permissive counterclaims encompass “any claim that is not compulsory” or does
3 not “arise out of the transaction or occurrence that is the subject matter of the opposing
4 party’s claim.” Fed.R.Civ.P. 13(b). Permissive counterclaims require an independent basis
5 for subject matter jurisdiction. *See Otsuka v. Polo Ralph Lauren Corp.*, 2008 WL
6 2037621 * 3 (N.D.Cal.)(citing *Iglesias v. Mutual Life Ins. Co. v. New York*, 156 F.3d 237,
7 241 (1st Cir. 1998)); *Sparrow v. Mazda American Credit*, 385 F.Supp.2d 1063, 1070
8 (E.D.Cal. 2005)(citing *Unique Concepts, Inc. v. Manuel*, 930 F.2d 573, 574 (7th Cir.
9 1991)). When there is no independent basis for jurisdiction over a permissive
10 counterclaim, the Court may still exercise supplemental jurisdiction over such claims if
11 they are “so related to the claims in the action ... that they form part of the same case or
12 controversy.” 28 U.S.C. § 1367(a). The Court may decline to exercise supplemental
13 jurisdiction over a permissive counterclaim if (1) the counterclaim raises a novel or
14 complex issue of state law; (2) the counterclaim substantially predominates over the
15 original claims; (3) the original claims have been dismissed; or (4) where there are
16 exceptional circumstances or other compelling reasons to decline jurisdiction. 28 U.S.C.
17 § 1367(c).

18 Plaintiff contends that there is no logical relationship between the claims presented
19 in this case and defendant’s proposed counterclaim. Doc. # 38 at 9. In reply, defendant
20 contends that, in the Ninth Circuit, a logical relationship between overlapping facts, such
21 as here, has been found on more tenuous connections between those facts. Doc. # 40 at 8
22 (citing *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987);
23 *Albright v. Gates*, 362 F.2d 928, 929 (9th Cir. 1966)(claim for recovery of price of
24 worthless securities logically related to slander claim regarding sales of securities);
25 *Newberry Corp. v. Fireman’s Fund Ins. Co.*, 95 F.3d 1392, 1403 (9th Cir. 1996)(claim
26 regarding use of equipment logically related to creditor’s counterclaim)). Defendant argues
27 that “[t]he factual overlap between [plaintiff] opening his account, breaching his
28 agreement, and receiving calls about his outstanding balance is undeniable.” *Id.* Thus,

1 defendant contends the proposed counterclaim is compulsory. Id. In addition, defendant
2 contends that, even if the Court finds the counterclaim is permissive, the Court should still
3 exercise supplemental jurisdiction over the claim because there is a common nucleus of
4 operative facts. Id.

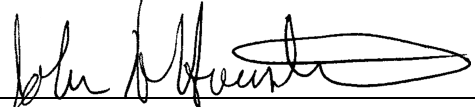
5 This Court finds defendant's proposed counterclaim is compulsory, in that the facts
6 concerning plaintiff's alleged breach of contract for failure to pay his debt and defendant's
7 alleged wrongful acts occurring when defendant sought to recover plaintiff's debt clearly
8 overlap significantly. Thus, this Court finds there is a clear logical relationship between
9 the claims, requiring this Court to exercise jurisdiction over defendant's proposed
10 counterclaim. See Pochiro, 827 F.2d at 1249. Therefore, this Court find plaintiff's
11 jurisdictional arguments fail.

12 CONCLUSION AND ORDER

13 Based on the foregoing, IT IS HEREBY ORDERED that:

- 14 1. Defendant's motion for leave to file an amended answer and counterclaim
15 [doc. # 31] is **GRANTED**;
- 16 2. Defendant shall file its amended answer and counterclaim¹ **no later than**
17 **August 1, 2014**; and
- 18 3. Plaintiff shall answer or otherwise respond to defendant's counterclaim **no**
19 **later than August 21, 2014**.

20 Dated: July 23, 2014

21 
22 JOHN A. HOUSTON
23 United States District Judge
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27 ¹ Defendant notes that its proposed counterclaim contains a typographical error. See Doc. # 40 at 7.
28 Therefore, this Court deems it appropriate to require defendant to file its amended answer and counterclaim
that does not contain the typographical error as opposed to the proposed amended answer and counterclaim
submitted as Doc. # 31-2, Exh. A.