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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Francee Gulinson, a married woman,

10 Plaintiff,

11 v.

12 Bank of America, NA, an Arizona
13 corporation,

14 Defendant.

No. CV 12-495-PHX-JAT

ORDER

15 Pending before the Court are: (1) Defendant's Motion to Dismiss Plaintiff's
16 Second Amended Complaint (Doc. 8), (2) Plaintiff's Motion to Remand (Doc. 10), and
17 (3) Plaintiff's Motion to Amend Complaint (Doc. 11). The Court now rules on these
18 Motions.¹

19 **I. BACKGROUND**

20 Defendant removed this case to this Court after Plaintiff filed a Second Amended
21 Complaint in Maricopa County Superior Court. In that Complaint, under Count III,
22 entitled "Invasion of Privacy by Reason of Undue Harassment," Plaintiff alleged that
23 "BofA has harassed Plaintiff by use of the telephone in violation of 15 U.S.C. §
24 1692(D)(5) and (6) and § 1692(e)(11)." (Doc. 1-1 at 82). This section of the U.S. Code
25 is part of the Fair Debt Collection Practices Act. Based on this allegation in Plaintiff's

26 ¹ Because the issues have been fully briefed, the Court denies the request for oral
27 argument as it would not aid the Court's decisional process. See Fed.R.Civ.P. 78;
28 *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998); *Lake at Las Vegas Investors
Group, Inc. v. Pac. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th Cir.1991).

1 Second Amended Complaint, Defendant removed this case.

2 Thereafter, Defendant filed a Motion to Dismiss the Second Amended Complaint.
3 Plaintiff then filed a Motion to Remand, arguing that she never intended to assert federal
4 claims under the Fair Debt Collection Practices Act. Plaintiff then filed a Motion to
5 Amend her Complaint and attached her proposed Third Amended Complaint. In her
6 proposed Third Amended Complaint, Plaintiff has abandoned her Fair Debt Collection
7 Practices Act claims. (Doc. 11-4). Defendant agrees that there are no federal claims
8 contained in the proposed Third Amended Complaint, but argues that the Court should
9 deny Plaintiff leave to amend because she has failed to state a claim upon which relief
10 can be granted for invasion of privacy and, thus, allowing amendment would be futile.

11 **II. MOTION TO AMEND**

12 While the decision to grant or deny a motion to amend is within the discretion of
13 the district court, it is necessary for the Court to heed Rule 15(a)'s mandate that "leave to
14 amend 'shall be freely given when justice so requires.'" *Foman v. Davis*, 371 U.S. 178,
15 182 (1962) (internal citation omitted). "In exercising its discretion with regard to the
16 amendment of the pleadings, 'a court must be guided by the underlying purpose of
17 Rule 15—to facilitate decision on the merits rather than on the pleadings or
18 technicalities.'" *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (quoting *United*
19 *States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). This "policy of favoring amendments
20 to pleadings should be applied with extreme liberality." *Id.* (quoting *Webb*, 655 F.2d at
21 979).

22 A Court must consider the following factors in determining whether a motion to
23 amend should be granted: (1) whether the pleading at issue has been previously amended,
24 (2) futility of the amendment, (3) bad faith, (4) undue delay, and (5) prejudice to the
25 opposing party. *Foman*, 371 U.S. at 182; *see also Texaco, Inc. v. Ponsoldt*, 939 F.2d 794,
26 798 (9th Cir. 1991); *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir.
27 1991). "Generally, this determination should be performed with all inferences in favor of
28 granting the motion." *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999)

1 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)).
2 “Significantly, ‘[t]he party opposing amendments bears the burden of showing prejudice,’
3 futility, or one of the other permissible reasons for denying a motion to amend.” *Farina*
4 *v. Compuware Corp.*, 256 F. Supp. 2d 1033, 1060 (D. Ariz. 2003) (quoting *DCD*
5 *Programs*, 833 F.2d at 187).

6 In this case, Defendant makes no arguments regarding previous amendments, bad
7 faith, undue delay, or prejudice. Thus, the Court will only consider whether granting
8 leave to amend would be futile.

9 **A. Futility**

10 A proposed amendment is futile when no set of facts can be proven under the
11 amendment that would establish a valid and sufficient claim or defense. *Miller v. Rykoff-*
12 *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *see also DCD Programs*, 833 F.2d at 186
13 (stating that an amendment should be liberally granted where from the underlying facts or
14 circumstances, the moving party may be able to state a claim). Here, Plaintiff seeks to
15 state a claim for invasion of privacy. Under Arizona law,

16 [w]hen unreasonable action . . . is taken, which foreseeably
17 will probably result in extreme mental anguish,
18 embarrassment, humiliation or mental suffering and injury to
19 a person possessed of ordinary sensibilities, under the same or
20 similar circumstances, then such conduct falls within the
21 forbidden area and a claim for invasion of privacy may be
22 asserted.

20 *Fernandez v. United Acceptance Corp.*, 610 P.2d 461, 463 (Ariz.Ct. App. 1980). While
21 the allegations in the Complaint are sparse, the Court cannot say that no set of facts could
22 be proven under the amendment that would establish a valid, sufficient claim.
23 Accordingly, Plaintiff’s Motion to Amend is granted.

24 Further, even if Defendant’s assertion that “Plaintiff’s proposed amendments are a
25 purposeful effort to avoid federal jurisdiction tantamount to forum shopping,” (Doc. 19 at
26 1), is true, such alleged forum shopping does not come without a price, because by
27 voluntarily abandoning her federal claims, Plaintiff has agreed that this Court can dismiss
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1 such claims with prejudice. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093 (9th
2 Cir. 2011) (“a plaintiff may voluntarily abandon a claim even though his decision may
3 affect the jurisdiction of federal court; after all, the claim he abandons-once dismissed
4 with prejudice-is the price he pays.”) Accordingly, Plaintiff’s claims for violations of the
5 Fair Debt Collection Practices Act are dismissed with prejudice.

6 **III. MOTION TO REMAND**

7 Because the only claims remaining in Plaintiff’s Third Amended Complaint are
8 based on state claims, the Court declines to exercise jurisdiction over those claims. *See*
9 28 U.S.C. §1367(c)(3); *Pitts*, 653 F.3d at 1094.

10 **IV. CONCLUSION**

11 Based on the foregoing,

12 **IT IS ORDERED** that Defendant’s Motion to Dismiss Plaintiff’s Second
13 Amended Complaint (Doc. 8) is granted as follows:

14 Plaintiff’s claims regarding violations of the Fair Debt Collection Practices Act are
15 dismissed with prejudice. All other claims are dismissed without prejudice.

16 **IT IS FURTHER ORDERED** that Plaintiff’s Motion Amend Complaint (Doc.
17 11) is granted. Plaintiff shall file her Third Amended Complaint, currently lodged at
18 Doc. 11-4 within five days of the date of this Order.

19 **IT IS FINALLY ORDERED** that Plaintiff’s Motion to Remand (Doc. 10) is
20 granted. After Plaintiff files her Third Amended Complaint (within five days of the date
21 of this Order), the Clerk of the Court shall remand this action to Maricopa County
22 Superior Court.

23 Dated this 7th day of May, 2012.

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26 
27 James A. Teilborg
28 United States District Judge