

1 **BACKGROUND**

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3 Plaintiff originally initiated this action as an unfair debt
4 collection practices case that was based on Defendant's
5 purportedly harassing telephone calls to Plaintiff. On July 28,
6 2011, this Court issued a Pretrial Scheduling Order ("PTSO")
7 setting July 6, 2012, as the deadline for completion of non-
8 expert discovery, September 6, 2012, as the deadline for expert
9 disclosure, December 6, 2012, as Defendant's dispositive motion
10 filing cut-off, and May 6, 2013, as the date for trial. In the
11 PTSO, the Court also specified that "[n]o joinder of parties or
12 amendments to pleadings is permitted without leave of court, good
13 cause having been shown." PTSO, 1:24-25.

14 Plaintiff subsequently served Defendant with discovery
15 requests, including a request for the production of any
16 recordings of Defendant's phone calls to Plaintiff. Defendant
17 served its responses to those requests on October 26, 2011.
18 Plaintiff thereafter served follow-up requests for production to
19 Defendant to learn whether Defendant had employed any pre-
20 recorded messages informing Plaintiff the calls to her might be
21 recorded. On approximately December 22, 2011, Plaintiff received
22 Defendant's subsequent responses, which confirmed that Defendant
23 had failed to warn Plaintiff her telephone calls were being
24 recorded or to obtain her consent to do so.

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1 At that point, Plaintiff sought and retained experienced
2 class counsel who associated in the matter on January 20, 2012.
3 Shortly thereafter, on January 31, 2012, Plaintiff filed her
4 instant Motion for Leave to File a Second Amended Complaint, by
5 which she seeks to add four class-based causes of action arising
6 out of Defendant's allegedly illegal recording of class members'
7 confidential telephone conversations without their consent. Two
8 of Plaintiff's proposed causes of action are alleged on behalf of
9 a California class pursuant to California Penal Code § 632, which
10 prohibits the recording of confidential telephone calls without
11 all parties' consent, and the right to privacy included in
12 California Constitution, Article I, Section I. One of her other
13 proposed claims is alleged, as an alternative to the California
14 class claims, on behalf of a nationwide class under Washington
15 Revised Code § 9.73.060, and the final proposed cause of action
16 is alleged on behalf of both classes under a negligence per se
17 theory. Plaintiff's Motion is now GRANTED, and she will be
18 permitted leave to add these class claims.

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20 **STANDARD**
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22 Typically, leave to amend should be "freely give[n]...when
23 justice so requires." Fed. R. Civ. Pro. 15(a)(2). Once a
24 district court has filed a pretrial scheduling order pursuant to
25 Rule 16, as this Court did here on July 28, 2011, however, the
26 standards set forth by Rule 16 control. Johnson v. Mammoth
27 Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992); see also
28 PTSO, 1:24-25.

1 "Unlike Rule 15(a)'s liberal amendment policy which focuses
2 on the bad faith of the party seeking to interpose an amendment
3 and the prejudice to the opposing party, Rule 16(b)'s 'good
4 cause' standard primarily considers the diligence of the party
5 seeking the amendment." Johnson, 975 F.2d at 609. In explaining
6 this standard, the Ninth Circuit has stated that:

7 [a] district court may modify the pretrial schedule 'if
8 it cannot reasonably be met despite the diligence of
9 the party seeking the extension.' Moreover,
10 carelessness is not compatible with a finding of
11 diligence and offers no reason for granting of relief.
12 Although the existence or degree of prejudice to the
13 party opposing the modification might supply additional
14 reasons to deny a motion, the focus of the inquiry is
15 upon the moving party's reasons for seeking
16 modification. If that party was not diligent, the
17 inquiry should end.

18 Id. (citations omitted). To demonstrate diligence under Rule
19 16's "good cause" standard, courts have required movants to show
20 that: 1) they were diligent in assisting the Court in creating a
21 workable Rule 16 order; 2) despite their diligent efforts to
22 comply, their noncompliance with a Rule 16 deadline occurred
23 because of the development of matters that could not have been
24 reasonably foreseen or anticipated; and 3) they were diligent in
25 seeking amendment of the Rule 16 order, once it became apparent
26 that they could not comply with the order. Jackson v. Laureate,
27 Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999) (internal citations
28 omitted).

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1 The Allen case also asserts violations of California Penal Code
2 section 632 and California Constitution, Article I, Section 1, as
3 well as a negligence cause of action. Finally, according to
4 Defendant, it will be prejudiced if Plaintiff is permitted to
5 amend because it will be required to file a Motion to Strike or a
6 Motion to Dismiss Plaintiff's class claims as duplicative of
7 those raised in Allen. Defendant will also purportedly be forced
8 to engage in extensive additional discovery and dispositive
9 motion preparation, which would consequently require Defendant to
10 later seek to modify the PTSO.

11 Plaintiff's arguments are well-taken. The record before the
12 Court indicates that Plaintiff timely pursued discovery related
13 to her existing fair debt collection claims and promptly sought
14 leave to add her class claims only one month after she had
15 obtained Defendant's responses indicating those causes of action
16 might be viable. Moreover, even if the Court were to accept
17 Defendant's argument that Plaintiff should have sought amendment
18 upon receipt of the recordings themselves, rather than upon
19 receipt of Defendant's responses indicating it did not utilize
20 pre-recorded messages, the Court would still find the interests
21 of justice served by permitting amendment are outweighed by the
22 marginal delay between Defendant's October production of that
23 evidence and Plaintiff's filing of her current Motion in January,
24 particularly in light of Plaintiff's interim need to locate and
25 retain class counsel. In any event, the Court finds no fault
26 with Plaintiff's decision to expeditiously pursue confirmation as
27 to the legitimacy of her class claims prior to calling upon the
28 resources of this Court in seeking leave to amend.

1 Accordingly, especially given the fact that dispositive motions
2 are not set to be heard until the end of this year and trial is
3 not set to begin until next year, the Court finds Plaintiff was
4 diligent in seeking leave to amend here.

5 The Court likewise rejects Defendant's contention that
6 Plaintiff's Motion should be denied because her class claims are
7 duplicative of those pending in the Allen case. First, this
8 argument is really a substantive challenge to the proposed
9 amended pleading that, while potentially appropriate in response
10 to the Second Amended Complaint, once filed, is not proper in the
11 context of whether Plaintiff should, as an initial matter, be
12 permitted leave to amend. In addition, Plaintiff has advised the
13 Court no class has been certified in that litigation.

14 Accordingly, while the Allen plaintiff may be pursuing putative
15 class claims, it is entirely speculative to presume those claims
16 will ever actually be litigated on behalf of the named class.
17 Moreover, Defendant's "substantial similarity" argument is based
18 on Plaintiff's California-based claims, but wholly ignores the
19 fact that Plaintiff in this case seeks to add additional class
20 claims, one of which arises under Washington law, on behalf of a
21 nationwide class as well. Accordingly, this Court declines to
22 find at this preliminary juncture that any amendment would be so
23 futile as to justify denying Plaintiff's Motion.

24 Finally, Defendant's theory that it will be prejudiced by
25 amendment is likewise rejected. There is still ample time prior
26 to the dispositive motion deadline and the current trial date in
27 which the parties can litigate this case.

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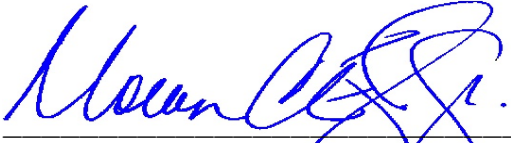
1 Discovery does not close for several months, and there is no
2 indication at this time that any dates in the PTSO will at any
3 point need to be modified. In addition, Defendant's attempt to
4 characterize the potential for additional motion practice or
5 discovery as "prejudicial" fails as well because Defendant has
6 not described anything beyond what is part and parcel of any
7 litigation. Accordingly, no persuasive arguments to the
8 contrary, Plaintiff's Motion is now GRANTED.

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10 **CONCLUSION**

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12 For the reasons just stated, Plaintiff's Motion for Leave to
13 Amend the Complaint (ECF No. 18) is GRANTED. Plaintiff is
14 directed to file her amended complaint not later than five (5)
15 days following the date this Memorandum and Order is
16 electronically filed.

17 IT IS SO ORDERED.

18 Dated: April 20, 2012

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21 MORRISON C. ENGLAND, JR.
22 UNITED STATES DISTRICT JUDGE
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