

1
2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5
6
7

8 LOUISE FRISCO,

9 Plaintiff,

10 vs.

11 MIDLAND CREDIT MANAGEMENT, INC.,

12 Defendant.

Case No.: C-11-03284-YGR

**ORDER DENYING MOTION FOR LEAVE OF
COURT TO AMEND THE COMPLAINT**

13
14 On March 7, 2012, Plaintiff Louise Frisco filed a Motion for Leave of Court to Amend the
15 Complaint (“Motion”). (Dkt. No. 35 (“Mot.”).) In her Motion, Plaintiff seeks to add three-class
16 based claims to her individual unfair debt collection lawsuit, all relating to Defendant’s allegedly
17 secret recordings of telephone calls made to Plaintiff and others in California without their consent.
18 Plaintiff seeks to have this Court exercise supplemental jurisdiction of these California class claims.
19 On March 21, 2012, Defendant Midland Credit Management, Inc. filed an Opposition to Plaintiff’s
20 Motion for Leave of Court to Amend the Complaint. (Dkt. No. 40 (“Opp.”).) Plaintiff filed her Reply
21 on March 28, 2012. (Dkt. No. 42 (“Reply”).)

22 Having considered the parties’ submissions, the Court **DENIES** Plaintiff’s Motion for Leave of
23 Court to Amend the Complaint.¹

24 **I. BACKGROUND**

25 Plaintiff filed this action on July 5, 2011 alleging violations of the Fair Debt Collection
26 Practices Act and Rosenthal Fair Debt Collection Practices Act (“FDCPA” and “RFDCPA,”

27
28 ¹ Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds that this
motion, which has been noticed for hearing on April 17, 2012, is appropriate for decision without oral
argument. Accordingly, the Court VACATES the hearing set for April 17, 2012.

1 respectively). (Dkt. No. 1 (“Compl.”).) In the Complaint, Plaintiff alleges that Defendant’s abusive
2 collection practices relate to the collection of a Bank One account. *Id.* ¶ 6. Defendant allegedly sent
3 Plaintiff a number of collection letters and increased the amount of debt in the course of the letters.
4 *Id.* ¶¶ 10–11. Plaintiff also disputed the debt in numerous writings. *Id.* ¶¶ 8–9. Defendant filed its
5 answer on August 16, 2011. (Dkt. No. 5.) On December 28, 2011, Defendant filed a Motion for
6 Summary Judgment (“MSJ”) based on its contention that Plaintiff cannot prove that the Bank One
7 account is a “debt” as defined in the FDCPA and RFDCPA. (Dkt. No. 18.) The Court found that the
8 MSJ was premature because Plaintiff had not yet had the opportunity to pursue certain discovery that
9 was essential to opposing the MSJ. (Dkt. No. 32.) The Court denied summary judgment without
10 prejudice to Defendant re-filing the motion. *Id.*

11 The deadline to add additional parties or claims in this action occurred on November 17, 2011.
12 (Dkt. No. 15.) The fact discovery cutoff is July 9, 2012, and the expert discovery cutoff is September
13 26, 2012. (Dkt. No. 27.) The deadline to hear dispositive motions is September 11, 2012. *Id.* A trial
14 has been set for December 17, 2012. *Id.*

15 **II. LEGAL STANDARD**

16 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a scheduling order “may be modified
17 only for good cause and with the judge’s consent.” Where a schedule has been ordered, a party’s
18 ability to amend its pleading is governed by this good cause standard, not the more liberal standard of
19 Rule 15(a)(2). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). In
20 order to determine whether good cause exists, courts primarily consider the diligence of the party
21 seeking the modification. *Id.* at 609 (existence or degree of prejudice to opposing party might supply
22 additional reasons to deny a motion); *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th
23 Cir. 2000). Courts also consider five factors when assessing the propriety of a motion for leave to
24 amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether
25 the plaintiff has previously amended the complaint. *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555
26 F.3d 1051, 1055 n.3 (9th Cir. 2009).

27
28

1 **III. DISCUSSION**

2 The operative Complaint alleges violations of the FDCPA and RFDCPA. Compl. ¶¶ 13–18.
3 The Proposed First Amended Complaint (“PFAC”) adds claims for: (1) Violation of California’s
4 Invasion of Privacy Laws, Cal. Pen. Code section 632; (2) Violation of California’s Constitutional
5 Right to Privacy; and (3) Negligence Per Se. (Dkt. No. 35-1.) Each of these new claims is brought by
6 Plaintiff and a California class against Defendant. *Id.* The proposed class is defined as: “[a]ll persons
7 in California whose telephone conversations with [Defendant] were recorded by [Defendant] without
8 their consent to the recording of their conversations.” *Id.* ¶ 21. The previous FDCPA and RFDCPA
9 claims remain brought only by Plaintiff, individually, against Defendant.

10 Plaintiff contends that she has good cause to amend the complaint because discovery in this
11 action has revealed that Defendant secretly recorded telephone calls made to Plaintiff and that
12 Defendant has a practice of not informing debtors that telephone calls are being recorded. Mot. at 3.
13 Plaintiff further contends that she has been diligent in this action in seeking discovery for the
14 production of any recordings and meeting and conferring with Defendant to resolve disputes over
15 those requests. *Id.* at 4. She acted promptly to retain class counsel and to seek amendment once it
16 became apparent that the Court’s scheduling order could not be met with regard to the deadline for
17 amending pleadings. *Id.* at 5.

18 In support of her Motion, Plaintiff primarily relies on *Kuschner v. Nationwide Credit, Inc.*, 256
19 F.R.D. 684 (E.D. Cal. 2009), in which a court permitted an additional pleading in a “substantially
20 similar situation.” Mot. at 5. Plaintiff states that she is in the process of preparing additional
21 discovery regarding the illicit phone recordings, and expects to file a motion for class certification by
22 June 5, 2012 (which is well in advance of the current July 9, 2012 discovery cut off). *Id.* at 6. She
23 further states that a “potential change” to the trial date may be necessary. Reply at 2; Mot. at 6.
24 According to Plaintiff, minimal discovery is needed prior to class certification. Reply at 3 (“Plaintiff
25 should be able to obtain the limited discovery well in advance of the July 9, 2012 deadline.”) In fact,
26 she “can likely complete in a single deposition the discovery she needs prior to a motion for class
27 certification.” *Id.* at 4; *see also* Reply at 3–4 (stating that the certain requirements for class
28 certification can also be established by a single interrogatory, at one deposition, or by simple “yes” or

1 “no” questions during a deposition). Because of this, there is supposedly no unfair prejudice to
2 Defendant. Reply at 5.

3 Defendant, on the other hand, asserts that the PFAC is “unnecessary, would work a severe
4 prejudice on [Defendant], and would be a waste of judicial resources because there is a class action
5 alleging the same claims against [Defendant] that has been pending for a year in California state
6 court.” Opp. at 1. In that action (filed on April 1, 2011), significant discovery has occurred and a
7 motion for class certification will be heard in November 2012. *Id.* at 1 & 6. The proposed
8 amendment would “necessarily push back the deadlines in the Court’s Scheduling Order” and, despite
9 Plaintiff’s characterizations, puts this litigation in a situation where “[d]iscovery requests must be
10 served and responded to, depositions taken and defended, and potential motions to compel filed and
11 opposed.” *Id.* at 6. In other words, the undue burden placed on Defendant consists of having to
12 respond to additional discovery, oppose class certification, and file dispositive motions under the
13 current schedule.² *Id.*

14 With respect to the pending action in California state court, *Pepper v. Midland Credit*
15 *Management, Inc.*, Case No. 37-2011-00088752-CU-BT-CTL (“*Pepper*”), Defendant asserts that it
16 will be exposed to defending “two nearly identical lawsuits” and that Plaintiff’s interests are
17 represented in the *Pepper* class action. Opp. at 5. Defendant also claims there will be no prejudice to
18 Plaintiff if this Motion is denied because she is able to litigate her class claims against Defendant in
19 state court. *Id.* at 7.

20 While Plaintiff highlights her diligence in seeking amendment of the Complaint and focuses
21 on whether she has “good cause,” the Court notes that Plaintiff seeks more than a simple change to a
22 scheduling order. Plaintiff’s proposed amendment completely changes the nature of this entire action
23 and the Court disagrees that the proposed amendment and necessary class discovery (including that
24 needed by Defendant) are as simple as she contends. The PFAC seeks to substantially change the
25 scope of this action by: (1) replacing a single plaintiff with potentially thousands of plaintiffs; (2)
26 converting a debt collection action into a right of privacy class action with both constitutional and tort
27 claims; (3) expanding the operative time period from 2010–2011 to an unspecified class period; and

28 ² Defendant also notes that Plaintiff’s Motion was filed approximately one month after this Court denied the
MSJ “solely to permit Plaintiff to conduct discovery on the reason the debt was incurred.” Opp. at 2.

1 (4) calling into question Defendant’s business “pattern and practice[s]” at large as opposed to its
2 conduct as to Plaintiff alone. *See* PFAC ¶¶ 21–30; Mot. at 3.

3 Further, the Court notes that Plaintiff’s Motion is entirely focused on whether *she* can
4 complete additional discovery before the close of discovery in July. She fails to take into
5 consideration the discovery that Defendant will need to take to oppose the motion for class
6 certification, prepare a motion for de-certification, and generally defend itself in the proposed class
7 action. If the Court were to permit this amendment, the scope of issues presented, damages alleged,
8 and evidence required to prove both types of claims will be substantially different than with the
9 operative Complaint. In addition, this action has proceeded in this District since July 2011 with the
10 Court’s understanding that it was a relatively straightforward debt collection action. It is because of
11 the straightforward nature of the operative Complaint that this Court (and the court that had the case
12 prior to reassignment) set aside two days for trial in December 2012. Plaintiff’s proposed amendment
13 makes it very unlikely that this trial date can remain in place, and motions regarding class certification
14 and de-certification and additional discovery will need to be taken into consideration in adjusting the
15 entire schedule. *Both sides* must be permitted sufficient time to address class certification and
16 develop their overall claims or defenses.

17 While it is true that *Kuschner* (upon which Plaintiff heavily relies in her Motion) involved
18 underlying facts reminiscent of those at hand (*i.e.*, plaintiff alleged a violation of the FDCPA and
19 defendant sought leave to file a counterclaim based on plaintiff recording phone conversations
20 without defendant’s consent), the proposed counterclaim did not add *class claims* based on the
21 recorded conversations. *Kuschner*, 256 F.R.D. at 686–87. The desired addition of a class and three
22 new claims is dramatically different than the proposed amendment in *Kuschner*, which arose “from
23 the same transaction or occurrence as those comprising plaintiff’s complaint.” *Id.* at 689. While the
24 alleged recordings of conversations with Plaintiff may have arisen from the same transaction or
25 occurrence underlying the FDCPA and RFDCPA claims, the same cannot be said for the proposed
26 class members.

27 Beyond the mere changing of the scheduling order, the Court has discretion to exercise
28 supplemental jurisdiction over state law claims under 28 U.S.C. section 1367(a) & (c). *Acri v. Varian*

1 *Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). Supplemental jurisdiction under section 1367(a)
2 may exist as to claims “that are so related to claims in the action within [the Court’s] original
3 jurisdiction [such] that they form part of the same case or controversy” and may include claims for
4 joinder or intervention of additional parties. A court may decline supplemental jurisdiction under sub-
5 section (a) if, among other reasons, the claim “substantially predominates over the claim or claims
6 over which the district court has original jurisdiction.” 28 U.S.C. § 1367(c)(2). As drafted, the class
7 claims in the PFAC now predominate over Plaintiff’s FDCPA and RFDCPA claims. The Court
8 believes those claims will necessarily require significant adjustment to the current scheduling order,
9 and that those state law claims will further become of the focus of the litigation.

10 In denying this Motion, the Court agrees with Defendant that the *Pepper* litigation will
11 sufficiently represent Plaintiff’s interests regarding the allegedly surreptitious phone recordings. That
12 action was filed on April 1, 2011 and discovery commenced in June 2011. Written discovery has
13 been propounded and responded to, and the hearing on a motion for class certification is scheduled for
14 November 2012. (Declaration of Edward D. Totino in Support of Defendant’s Opposition (Dkt. No.
15 40-2) ¶¶ 2–4.) Indeed, the court in *Pepper* set the November class certification hearing at a Class
16 Action Case Conference conducted one year before, in November 2011. *Id.* This Court does not
17 believe that judicial efficiency is served by attempting to insert a right of privacy class action within
18 this individual debt collection action, where another class action has significantly progressed and is in
19 a much more developed procedural posture compared to where this action would be. Moreover,
20 Plaintiff retains the option of filing her own class action in state court—there is nothing barring her
21 from doing so.³

22
23
24 ³ Plaintiff contends that the *Colorado River* doctrine applies and requires this Court to have “full confidence”
25 that the state action will adequately protect Plaintiff and absent class members. Reply at 2 & 5–6. However,
26 *Colorado River* is a doctrine of abstention applicable to claims under the concurrent jurisdiction of federal and
27 state courts. *Krieger v. Atheros Communications, Inc.*, 776 F. Supp. 2d 1053, 1057–58 (N.D. Cal. 2011)
28 (permitting a district court to abstain from exercising jurisdiction in favor of parallel state proceedings where
doing so would serve the interests of wise judicial administration). While abstention under the *Colorado River*
doctrine is a narrow exception to the obligation of federal courts to exercise the jurisdiction given to them
(*Krieger*, 776 F. Supp. 2d at 1057; Reply at 5–6), such analysis is inapplicable in this situation, where this
Court is declining to exercise supplemental jurisdiction over state claims in response to a motion for leave to
amend.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Leave of Court to Amend the Complaint is **DENIED**. This Order terminates Dkt. No. 35.

IT IS SO ORDERED.

Dated: April 16, 2012


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE