

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

8 **LOUISE FRISCO,**

9 **Plaintiff,**

10 **vs.**

11
12 **MIDLAND CREDIT MANAGEMENT**
13 **INC.,**

14 **Defendant.**

Case No.: 4:11-cv-3284-YGR (KAW)

**ORDER GRANTING PLAINTIFF'S
MOTION TO CONTINUE DISCOVERY
CUTOFF**

15 This case has been referred to the undersigned to resolve Plaintiff's motion to continue the
16 discovery cutoff. Plaintiff requests a continuance of the fact discovery deadline in order to depose
17 third party JP Morgan Chase's compliance officer. For the following reasons, Plaintiff's motion is
18 granted.

19 **I. Factual Background**

20 Plaintiff alleges that Defendant Midland Credit Management violated the Fair Debt
21 Collection Practices Act and Rosenthal Fair Debt Collection Practices Act. Dkt #1. Plaintiff alleges
22 that Defendant was attempting to collect an alleged debt once owed to Bank One, although Plaintiff
23 never obtained any loans from Bank One. *Id.* JP Morgan Chase is the successor in interest to the
24 Bank One Account at issue. Dkt #57 at 2.

25 On February 9, 2012, Judge Gonzalez Rogers denied Defendant's motion for summary
26 judgment without prejudice in order to allow Plaintiff to conduct additional discovery. Dkt #32 at 3-
27 4. Defendant argued that Plaintiff could not prove that the Bank One account was a "debt" as
28 defined by the FDCPA and FRDCPA, meaning that it was incurred "primarily for personal, family

1 or household purposes." Dkt #18 at 1, 3, 5, 8. Judge Gonzalez Rogers allowed Plaintiff to subpoena
2 records from Chase, ruling that the records were "directly relevant to the issue of the 'debt' and, thus,
3 essential in opposing the motion for summary judgment." *Id.*

4 Plaintiff issued a subpoena to Chase in February 2012. Dkt #57 at 2, 3. In April 2012,
5 Plaintiff received documents from Chase indicating that the account at issue was an individual
6 consumer credit card. *Id.* at 2. Chase provided no information regarding the nature of the charges
7 on the credit card. *Id.* at 2, 3.

8 In early May 2012, Plaintiff noticed the deposition of Chase's compliance officer, Beth
9 Henderson, for June 1, 2012. Dkt #57 at 3. The day before the deposition was scheduled to occur,
10 Chase informed Plaintiff that it wanted to have a protective order in place before the deposition; that
11 the deposition should be of "Beverly White," not "Beth Henderson"; that a valid subpoena had to be
12 issued from the U.S. District Court from the Southern District of Indiana; and that it would not
13 produce a deponent on June 1. *Id.* at 4.

14 On June 1, 2012, Chase circulated a proposed protective order to Plaintiff and Defendant. *Id.*
15 On June 4, 2012, Plaintiff re-noticed the depositions for both Beverly White and Beth Henderson for
16 June 20, 2012.¹ *Id.* On June 13, 2012, Chase's counsel objected to the subpoenas again on the
17 grounds that no method for recording the testimony was specified; a protective order should be in
18 place before the deposition; and the subpoena had not been issued by the U.S. District Court from
19 the Southern District of Indiana. Dkt #52 at 14-17. On June 13, 2012, Plaintiff agreed to Chase's
20 proposed protective order. Dkt #57 at 2. Defendant did not respond to the proposed protective
21 order. *Id.* Plaintiff attempted to re-notice the depositions again on June 18, 2012. Dkt #57 at 4. On
22 June 19, 2012, Chase again served objections. *Id.* On June 26, 2012, Chase told Plaintiff that
23 Beverly White, the correct witness, would not be produced until a protective order was in place--
24 which Defendant had still not agreed to--and that White was engaged with a family illness, and so
25 Chase could not provide any proposed dates for a deposition. Dkt #57 at 3. On July 6, 2012, the last
26 business day before the July 9, 2012, discovery cutoff, Plaintiff asked Defendant to approve the
27

28 ¹ It appears that, probably due to a typographical error, this subpoena for Beth Henderson gave the
date of June 1, 2012 for the deposition. *See* Dkt #52 at 14.

1 proposed protective order. *Id.* On July 9, Defendant responded that as discovery was closed, it
2 would not approve the protective order. *Id.* This motion followed.

3 **II. Analysis**

4 The fact discovery cutoff in this case was July 9, 2012. Dkt #27. This deadline may only be
5 modified for "good cause." Fed. R. Civ. P. 16(b)(4). This standard is met if the deadline "cannot
6 reasonably be met despite the diligence of the party seeking the extension." *Johnson v. Mammoth*
7 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). "Although the existence or degree of prejudice
8 to the party opposing the modification might supply additional reasons to deny a motion, the focus
9 of the inquiry is upon the moving party's reasons for seeking modification." *Id.*

10 As explained above, Plaintiff has been attempting to discover the information it seeks since
11 the Court denied Defendant's motion for summary judgment in February of this year. Although five
12 months have elapsed since that time, Plaintiff has been reasonably diligent in moving the process
13 forward during this period, considering that she had to obtain and review the subpoenaed documents
14 before attempting to depose Chase's compliance officer.

15 To be sure, Plaintiff could have taken more precautions to ensure that the depositions were
16 completed in a timely manner. It also may have been Plaintiff's fault that the subpoenas to Chase's
17 employees were defective. Even if the subpoenas had been valid, however, it appears that Beverly
18 White's unavailability due to family matters would have prevented Plaintiff from timely taking the
19 deposition.

20 Defendant contends that Plaintiff's motion should be denied because "[t]he discovery
21 Plaintiff seeks is completely irrelevant." Dkt #57 at 6. In order to prevail under the FDCPA and
22 FRDCA, Plaintiff must prove that the Bank One account is a "debt," meaning that the charges on
23 the account were incurred "primarily for personal, family, or household reasons." *Id.* Defendant
24 asserts that, because "Chase has already said it has no statements reflecting charges on the account
25 and neither Ms. White nor Ms. Henderson know the nature of the charges or why they were
26 incurred," the deposition will not lead to any information that will assist Plaintiff in opposing
27 summary judgment. *Id.*

28

1 The Court disagrees. First, the scope of discovery is broad. *See* Fed. R. Civ. P. 26(b)(1)
2 ("discovery [must only be] reasonably calculated to lead to the discovery of admissible evidence");
3 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) ("The key phrase in this definition--
4 'relevant to the subject matter involved in the pending action'--has been construed broadly to
5 encompass any matter that bears on, or that reasonably could lead to other matter that could bear on,
6 any issue that is or may be in the case."). Plaintiff should be entitled to fully explore and test
7 Chase's assertion that it lacks information regarding the charges on the account. Second, Judge
8 Gonzalez Rogers found that "the subpoena to the original creditor[] is directly relevant to the issue
9 of the 'debt' and, thus, essential in opposing the motion for summary judgment." The information
10 that Plaintiff now seeks through Chase's employee's deposition is the same information that she
11 previously sought through the subpoena. Therefore, Defendant's argument that the discovery
12 Plaintiff seeks is irrelevant and will not allow Plaintiff to oppose summary judgment is foreclosed by
13 Judge Gonzalez Rogers' previous order.

14 Finally, Defendant's argument that Plaintiff will not be able to survive summary judgment
15 unless she obtains evidence directly proving that the credit from the Bank One account was used to
16 pay for personal, family, or household expenses is unconvincing. Defendant claims that "testimony
17 from a Chase representative who will say the Bank understood the account was a consumer credit
18 card" is irrelevant to summary judgment. Dkt #57 at 7. But Defendant cites no persuasive authority
19 to support this position. The Ninth Circuit has held that a "lender's motives [and] the fashion in
20 which the loan is memorialized are [not] dispositive of" whether a loan is a "debt" for the purposes
21 of the FDCPA. *See Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992). But even though
22 the lender's motives are not *dispositive*, they may still be relevant. *See also Slenk v. Transworld*
23 *Sys., Inc.*, 236 F.3d 1072, 1075 (9th Cir. 2001) ("We have found it necessary when classifying a loan
24 to 'examine the transaction as a whole,' paying particular attention to 'the purpose for which the
25 credit was extended in order to determine whether [the] transaction was primarily consumer or
26 commercial in nature.'") (citations omitted). The Bank One account, according to Chase, is an
27 individual consumer credit card as opposed to a corporate or business card, suggesting that the
28 purpose for which the credit was extended may not have been commercial in nature. Therefore,

1 Plaintiff should not be prevented from attempting to obtain more information about the Bank One
2 account, even if Chase claims that the actual account statements are unavailable.

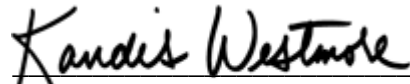
3 Defendant further contends that if the discovery deadline is continued, it will be
4 "substantially prejudiced," as it will be prevented from timely filing its motion for summary
5 judgment, which is due on August 7, 2012. Dkt #57 at 6. As noted above, although the focus of the
6 "good cause" analysis is whether the moving party has been diligent, prejudice to the opposing party
7 might also affect the analysis. Here, any prejudice is slight. If the timing of this deposition prevents
8 Defendant from timely filing its motion for summary judgment, Defendant can seek an extension of
9 time to do so.

10 **III. Conclusion**

11 The Court finds that good cause exists for the requested extension of time. Plaintiff is
12 granted 30 days from the date of this order to depose JP Morgan Chase's compliance officer.

13 It is so ORDERED.

14 **DATE: July 23, 2012**



KANDIS A. WESTMORE
UNITED STATES MAGISTRATE JUDGE

15
16
17
18
19
20
21
22
23
24
25
26
27
28