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 6 **UNITED STATES DISTRICT COURT**
 7 **NORTHERN DISTRICT OF CALIFORNIA**
 8 **SAN JOSE DIVISION**

9 SHERYL MOULTON,
 10 Plaintiff,

11 vs.

12 AMERICREDIT FINANCIAL SERVICES,
 13 INC., dba in California as ACF FINANCIAL
 SOLUTIONS, INC., TRANS UNION LLC,
 14 EQUIFAX INFORMATION SERVICES LLC,
 15 and DOES 1-50

16 Defendants.
 17
 18

) Case No.: C04-02485 JW (HRL)
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)
)

) **REPLY IN SUPPORT OF MOTION TO**
) **FILE AN AMENDED AND**
) **SUPPLEMENTAL COMPLAINT AND**
) **FOR RELIEF FROM THE**
) **SCHEDULING ORDER**

) **DATE: Mar. 28, 2005**
) **TIME: 9 AM**
) **DEPT.: 8**
)
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 20 **I. ARGUMENT**

21 **A. PLAINTIFF HAS PROCEEDED WITHOUT UNDUE DELAY TO AMEND AND**
 22 **SUPPLEMENT HER COMPLAINT AND DEFENDANTS WOULD NOT SUFFER**
 23 **UNDUE PREJUDICE.**

24 **1. Plaintiff has proceeded without undue delay to amend and supplement her**
complaint.

25 Defendant Trans Union LLC (“Trans Union”) contends in its opposition to this motion
 26 that Plaintiff unduly delayed bringing this motion to amend and supplement the complaint, citing
 27 the time since the complaint was filed in June 2004 as well as the time since the cutoff date for
 28 amending the pleadings in the Joint Case Management Statement. However, Plaintiff, who for the

**REPLY IN SUPPORT OF MOTION TO FILE AN AMENDED AND SUPPLEMENTAL COMPLAINT AND FOR
 RELIEF FROM THE SCHEDULING ORDER (C04-02485 JW (HRL))**

1 majority of the time since filing the complaint until representation by present counsel has been in
2 pro se status, has been proceeding with due diligence as set out below. This due diligence is also
3 evident from her attached declaration.

4 Furthermore, Plaintiff seeks not only to amend but also to *supplement* the complaint based
5 on closely-related Fair Credit Reporting Act (FCRA) violations occurring much more recently and
6 well after the filing of the original complaint. These additional claims stem from the defendants'
7 failure to take any corrective action following Plaintiff's dispute letters of August and September
8 of 2004. The need to include these claims in the present litigation did not become apparent until
9 much later, after it became clear that the additional issues raised by Plaintiff were not going to be
10 properly addressed by the defendants. Based on the recency of these additional claims and
11 defendants' failure to respond to the dispute letters, Plaintiff's motion is not untimely.

12 As Plaintiff states in the attached declaration, she is not an attorney and her prior litigation
13 experience is limited to small claims actions. She had been proceeding for most of the tenure of
14 this litigation in pro se status until present counsel agreed to represent her. She has nevertheless
15 proceeded with due diligence and without undue delay. After filing the complaint in June 2004,
16 she engaged in oral and written communications with defense counsel, including attempts to try to
17 work out a satisfactory settlement. After finding counsel to represent her in September 2004, she
18 left the handling of the case entirely in the hands of the retained attorneys. When her attorneys
19 suddenly notified her that they were withdrawing from representing her in December 2004,
20 Plaintiff focused on trying to get extensions on discovery responses that were due from her
21 imminently. In the midst of this, and unfamiliar with pre-trial requirements including the need to
22 contact and hire expert witnesses, she diligently went about trying to find an attorney to continue
23 the representation, talking to more than 10 attorneys in the space of a month before present
24 counsel agreed to take on the case. Shortly after present counsel was retained, this motion was
25 filed.

1 **2. Defendant Trans Union and the other defendants will not suffer any undue**
2 **prejudice if the motion to amend and supplement the complaint is granted.**

3 Trans Union argues in its opposition that it would be prejudiced if the motion for leave to
4 amend is granted because it “has served written discovery and received Plaintiff’s responses, has
5 noticed Plaintiff’s deposition, and is preparing to move for summary judgment after Plaintiff’s
6 deposition is taken (6:4 - 6:7).” Trans Union’s written discovery consists of a single set of
7 requests for admissions, interrogatories and document requests. Regarding noticing Plaintiff’s
8 deposition, counsel for Trans Union first contacted Plaintiff’s counsel about scheduling Plaintiff’s
9 deposition within hours after Plaintiff filed this motion.¹ This preliminary written discovery,
10 belated communications about scheduling Plaintiff’s deposition, and mere planning for a summary
11 judgement motion hardly supports a claim of undue prejudice.

12 Trans Union further argues that Plaintiff’s additional allegations in the proposed First
13 Amended and Supplemental Complaint involve “four separate disputes, each of which triggers
14 responsibilities under Section 1681i of the Fair Credit Reporting Act” and thus would
15 “significantly increase the number of issues in the case.” (6:12-15) The proposed amended and
16 supplemental complaint, however, contains only three causes of action– all based on the same
17 federal statute as in the original complaint. Also, the “initial” and “later” violations in the
18 “FACTUAL ALLEGATIONS” section of the pleading mirror each other with respect to the
19 alleged FCRA violations (see proposed First Amended and Supplemental Complaint, page 2, line
20 22 to page 5, line 14). Thus Trans Union’s contention that it would have to defend against a
21 significantly increased number of issues and conduct a significant amount of additional discovery
22 is without foundation.

23 As stated in Plaintiff’s moving papers, the case is at a relatively early point in its progress
24 with a minimum of discovery having so far been served and answered and no depositions yet

25
26 ¹Trans Union served its notice of the deposition on March 3, 2005. Plaintiff has filed a
27 motion for protective order to prohibit Trans Union from taking Plaintiff’s deposition while the
28 parties await the outcome of this motion. That motion for a protective order and Trans Union’s
opposition have been submitted on the papers to Magistrate Judge Lloyd and a decision on that
motion will presumably have been rendered prior to the Court’s hearing of this motion.

1 taken. No date has yet been set for trial and the date set for the Preliminary Pretrial and Trial
2 Setting Conference, September 12, 2005, is five and one-half months away from the date of the
3 hearing on this matter.

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5 **B. JUDICIAL POLICY FAVORS THAT ALL OF PLAINTIFF'S CLAIMS BE HEARD**
6 **ON THE MERITS**

7 In Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962), the U.S. Supreme Court
8 stated:

9 Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires';
10 this mandate is to be heeded.[citation omitted] If the underlying facts or circumstances
11 relied upon by a Plaintiff may be a proper subject of relief, he ought to be afforded an
12 opportunity to test his claim on the merits. In the absence of any apparent or declared
13 reason--such as undue delay, bad faith or dilatory motive on the part of the movant,
14 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
15 to the opposing party by virtue of allowance of the amendment, futility of amendment,
16 etc.--the leave sought should, as the rules require, be 'freely given.'

17 Under Fed.R.Civ.P. 15(a), Foman, and the other cases previously cited, Plaintiff should be
18 afforded the opportunity to amend and supplement her complaint and thus present *all* of her
19 claims alleging violations of the FCRA before this Court.

20 **C. THERE IS GOOD CAUSE FOR RELIEF FROM THE SCHEDULING ORDER**

21 **1. Plaintiff has been proceeding diligently in pursuing this case.**

22 Trans Union argues that Plaintiff and her former counsel knew about the deadlines in the
23 scheduling order since its filing on November 15, 2004 but failed to act with diligence to meet
24 these deadlines. As set out in her attached declaration, however, Plaintiff *has* acted diligently and
25 appropriately under the circumstances. Between late September and the end of December when
26 Plaintiff was represented by the Brennan law firm, Plaintiff left the handling of the prosecution of
27 the case entirely to her attorneys. She was not consulted beforehand about the cutoff date of
28 November 30, 2004 for amending the complaint. When the firm suddenly and unexpectedly
notified her in December, 2004, that they would be withdrawing from the case, Plaintiff was

1 preoccupied with trying to get extensions on discovery that was imminently due, beginning
2 preparation of discovery responses, and finding another attorney to represent her. Not an
3 attorney, she was not aware of the need to look carefully at the scheduling order and the cutoff
4 dates within it. Plaintiff's due diligence is indicated by the facts that within one month of the
5 previous attorneys' withdrawal, she had obtained discovery extensions, begun preparation of
6 responses, and contacted more than 10 different attorneys about representing her, including
7 present counsel. (See Plaintiff's attached declaration.) The diligence of Ms. Moulton sharply
8 contrasts with that of the pro se Plaintiff in Bradford v. Dana Corp., 249 F.3d 807 (E.D. Missouri
9 2001), in which the court denied plaintiff's motion to amend the scheduling order. In Bradford,
10 the plaintiff sought to modify the scheduling order based on having contact only five attorneys in
11 six months.

12 Plaintiff's diligence also sharply contrasts with the cases illustrating carelessness and lack
13 of diligence that Trans Union cites in its opposition. In Johnson v. Mammoth Recreations, Inc.,
14 975 F.2d 604 (9th Cir. 1992), the complaint by an injured skier against a ski resort named the
15 wrong entity, the Mammoth holding company rather than the ski resort itself. Well within the
16 scheduling order's cutoff date for amending the pleadings, Plaintiff's counsel was repeatedly
17 notified that he had named the wrong entity but neglected to make the correction. The court
18 found that this behavior to be careless and lacking in diligence. The facts in Turner v. Imperial
19 Stores, 105 F.3d 666 (9th Cir. 1996) are similar. Plaintiff moved to amend her complaint nearly
20 five months after the cutoff date in the scheduling order, claiming that unauthorized changes and
21 deletions had been made to it before it was filed. However, because the changes and deletions
22 went unnoticed for seven months after the complaint was filed because Plaintiff's counsel did not
23 read it, the court denied Plaintiff's motion on the basis of careless and lack of diligence.

24 As discussed above, in contrast to the facts in the cases cited by Trans Union, Plaintiff *has*
25 shown the due diligence to support a finding of "good cause" for modifying the scheduling order
26 pursuant to Fed.R.Civ.P. 16(b). Furthermore, as stated by the court in Johnson itself,
27 "extraordinary circumstances is a close correlate of good cause" and an additional basis for
28

1 modifying a scheduling order. Id. at 610, citing Parkway Gallery Furniture Inc. v.
2 Kittinger/Pennsylvania House Grou, Inc. 116 F.R.D. 363, 365-66 (M.D.N.C. 1987), a case in
3 which the court found sufficient “extenuating circumstances” to grant the plaintiff’s motion to
4 modify the discovery cut off date in the scheduling order.

5 Plaintiff found herself in truly extraordinary circumstances in the present matter at the end
6 of December 2004– suddenly without counsel that she had been relying on to manage the case,
7 unaware that a previous cut off date for amending pleadings had passed without having
8 participated in setting the date in the first place, and unaware of upcoming cut off dates and the
9 potential consequences of not meeting them. Plaintiff’s “extraordinary circumstances” provide an
10 additional basis for modifying the current scheduling order.

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13 **2. Courts have wide discretion in determining what satisfies the “good cause”**
14 **standard for modifying a scheduling order.**

15 Moore’s Federal Practice, Civil §16.14, points out that trial courts have considerable
16 discretion in determining what satisfies the “good cause” standard for modification of a scheduling
17 order. As explained in this section of Moore’s, the “good cause” standard is a middle standard,
18 more strict than the “freely given” standard but more lenient than the “manifest injustice”
19 standard. As further set out in Moore’s, the 1983 Advisory Committee on Civil Rules declared
20 that “the court may modify the schedule on a showing of good cause if it cannot be reasonably
21 met despite the diligence of the party seeking the extension.”

22 Plaintiff, as explained above, and as is apparent from her attached declaration, has
23 proceeded throughout this case with due diligence. Through no fault of her own, she is not
24 reasonably able to meet the cut off dates in the current scheduling order and thus requests that the
25 order be modified.

1 **3. If the Court grants Plaintiff's motion to amend the complaint and add an**
2 **additional defendant in the case, the current Scheduling Order will have to be adjusted.**

3 Plaintiff's proposed amended and supplemental complaint names an additional defendant,
4 Citibank, N.A. If Plaintiff's motion to amend and supplement the complaint is granted, additional
5 time will be required in order for Plaintiff to serve the amended complaint and for defendants,
6 including Citibank, to respond. This will require that the dates on the current Scheduling Order
7 be moved back.

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10 **4. Plaintiff seeks only such amendment of the scheduling order as is necessary to**
adequately present her claims, prepare and respond to discovery, and prepare for trial.

11 Although Plaintiff has proposed an amended scheduling order in the moving papers,
12 Plaintiff is not at all tied to the specific dates proposed. Plaintiff simply seeks sufficient time to
13 effect service of, and obtain responses to, the amended complaint, prepare and respond to
14 discovery, and prepare for trial. Because no trial date has been set and the date set for the
15 Preliminary Pretrial and Trial Setting Conference is September 12, 2005— five and a half months
16 away from the date of the hearing on this matter— it seems possible that the cutoff dates between
17 now and September 12, 2005 could be adjusted without affecting the date the case would go to
18 trial. In addition, as discussed above, the case is at a relatively early point in its progress such
19 that the defendants will not suffer undue prejudice if Plaintiff's motion is granted.

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21
22 **II. CONCLUSION**

23 As discussed above, Plaintiff seeks to amend and supplement her complaint to fully
24 present her claims for violation of the FCRA. The opposition to this motion has not substantiated
25 any undue prejudice to the defendants if the Court grants the motion. Plaintiff also seeks relief
26 from the scheduling order to allow a reasonable opportunity to prepare and respond to discovery,
27 contact and retain experts, and otherwise litigate the case and prepare for trial. She has been
28 proceeding diligently in pursuing this case.

