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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

REID YEOMAN and RITA  
MEDELLIN, *on behalf of themselves*  
*and all others similarly situated,*  
Plaintiff,  
  
v.  
  
IKEA U.S.A. WEST, INC.,  
Defendant.

Civil 11cv701-WQH (BGS)  
No.

**ORDER DENYING DEFENDANT'S  
MOTION TO BELATEDLY AMEND  
THE SCHEDULE IN ORDER TO  
FILE A MOTION FOR SUMMARY  
JUDGMENT AS TO THE CLAIMS  
OF ABSENT CLASS MEMBERS**

**[Doc. No. 138]**

Defendant filed the instant motion seeking leave to amend the schedule in order to file a motion for summary judgment. The proposed motion seeks summary judgment as to “the absent class members’ claims on the ground that Plaintiff has no evidence to, and no witness who can, establish the occurrence of a violation of the Song Beverly Credit Card Act other than with respect to Plaintiff’s own claim.” (Doc. Nos. 129 at 4; 138). Plaintiff opposes the motion. (Doc. No. 140.) The Court has thoroughly reviewed all of the papers filed by both parties, not only with respect to the pending motion to amend the schedule, but also all of the papers filed in support of and opposition to Defendant’s

1 motion to decertify and motion in limine regarding its process for entering zip codes at  
2 the register, as well as Judge Hayes's orders on the motions. For the reasons set forth  
3 below, Defendant's request is **Denied**.

4 **I. BACKGROUND RELEVANT TO INSTANT MOTION<sup>1</sup>**

5 Plaintiff's complaint alleges that "Ikea systematically and intentionally violates the  
6 [Song-Beverly Credit Card Act of 1971] by uniformly requesting that cardholders  
7 provide personal identification information, including their ZIP codes, during credit card  
8 transactions, and then recording that information in electronic database systems." (*Id.* at  
9 2.) Plaintiff's Motion for Class Certification was granted on May 4, 2012. (Doc. No. 43.)  
10 The certified class consisted of "all persons from whom Ikea requested and recorded a  
11 ZIP Code in conjunction with a credit card transaction in California from February 16,  
12 2010 through the date of trial in this action." *Id.*

13 On July 10, 2012, two months after the order certifying the class was issued, the  
14 parties sought to continue fact and expert discovery for 90 days because Plaintiff  
15 believed additional Rule 30(b)(6) depositions were necessary and could not be  
16 completed before the July 13, 2012 fact discovery deadline. (Doc. No. 48-1 at 2.) In  
17 their motion to extend time, the parties asked for an additional 90 days for discovery but  
18 did not ask to extend any other deadlines. (*Id.*) Accordingly, the Court found good cause  
19 to extend discovery solely to take the Rule 30(b)(6) witness deposition, but did not find  
20 good cause to otherwise extend any other dates or deadlines. (Doc. No. 50.) Thus, the  
21 deadline to file motions other than motions in limine remained set for October 22, 2012.  
22 (Doc. Nos. 19, 42, 50.)

23 On September 7, 2012, Defendant filed a motion to decertify or modify the class  
24 because during discovery it learned: 1) many cashiers circumvented the ZIP Code  
25 recording process; 2) Defendant's records cannot distinguish between certain signature  
26 debit card transactions, which are not covered by the Song-Beverly Credit Card Act, and

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27  
28 <sup>1</sup>The parties are well aware of the complete background of this matter and it has been set forth in previous orders, including the Order Granting in Part and Denying in Part Plaintiff's Motion to Amend the Schedule and Reopen Discovery. (Doc. No. 114.)

1 credit card transactions; and 3) transactions made at self-checkout kiosks are not covered  
2 by or are exempt from the Song-Beverly Credit Card Act. (*Id.* at 51-1.)

3 Notably, when Defendant filed the motion for decertification, it did not seek to  
4 extend the deadline to file further motions, including any potential motions for summary  
5 judgment. Further, the motion to decertify explicitly raised the very issue that  
6 Defendant’s requested motion for summary judgment intends to address. (*Id.*)

7 On September 28, 2012—about a month before the deadline to file dispositive  
8 motions—the parties jointly requested to continue expert discovery deadlines. (Doc. No.  
9 64.) The request only sought to extend the deadline to exchange supplemental expert  
10 reports and complete expert witness depositions. Defendant did not address a need to  
11 amend the schedule in order to reserve the right to file a motion for summary judgment.  
12 (*See id.*) And on January 3, 2013, the parties filed a motion to continue the pretrial  
13 conference date by 90 days because Defendant’s motion to decertify, Plaintiff’s motion  
14 to exclude witnesses, and Plaintiff’s motion to compel class notice remained pending.  
15 (Doc. No. 87.) The parties sought to be relieved of their duty to prepare pretrial  
16 submissions because they did not know the outcome of the significant pending motions.  
17 (*Id.*) Importantly, the motion made no mention of Defendant’s intent to file a motion for  
18 summary regarding the claims of absent class members. The Court vacated the deadlines  
19 to complete expert discovery and the final pretrial conference. (Doc. No. 88.) The Court  
20 further directed the parties to contact Judge Skomal’s chambers within three days of  
21 receiving a decision on any of the pending motions so that the expert discovery deadline  
22 and pretrial conference could be reset. Because the parties never contacted the  
23 undersigned’s chambers as directed, on March 19, 2013, the Court *sua sponte* issued an  
24 amended scheduling order setting a deadline for the completion of “any and all  
25 remaining expert discovery,” as well as a date for the final pretrial conference and  
26 corresponding pretrial filings. (Doc. No. 94.)

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1 Throughout March and April 2013, the parties litigated the issue of class notice.  
2 (Doc. Nos. 95, 96, 98.) Although Defendant filed extensive briefing and exhibits in  
3 opposition to Plaintiff’s plan for notice, Defendant never mentioned its intent to  
4 belatedly amend the schedule in order to file a motion for summary judgment as to the  
5 absent class members’ claims. (*See generally* Doc. No. 96.)

6 Also relevant to Defendant’s present request to amend the schedule is the fact that  
7 Plaintiff moved to amend the schedule in April 2013—after the decision on Defendant’s  
8 motion to decertify was issued. (Doc. No. 100.) In opposition to Plaintiff’s motion,  
9 Defendant strenuously objected to amending the schedule because it would cause delay.  
10 In fact, Defendant characterized Plaintiff’s request as a “lengthy and unexplained delay  
11 in pursuing the relief she now so belatedly seeks....” (Doc. No. 102 at 7.) Defendant’s  
12 opposition emphasized that the Court amended the schedule on the parties’ request  
13 numerous times, but Plaintiff never expressed a need to take further discovery in any of  
14 those requests for extensions. (*Id.* at 11-12.) As the parties are well aware, the Court  
15 denied Plaintiff’s motion to amend the schedule.

16 On October 14, 2013, Defendant filed the parties’ Joint Motion to Continue the  
17 Mandatory Settlement Conference and final Pretrial Conference. (Doc. No. 123.) The  
18 motion specifically contemplated the parties’ need to complete class notice before  
19 proceeding to trial, but notably omitted any reference to the need to amend the schedule  
20 in order for Defendant to file a motion for summary after class notice was sent. (*Id.* at 2.)  
21 In fact, Defendant waited until eight months after Judge Hayes denied Defendant’s  
22 motion to decertify before first mentioning its intent to file a motion for summary  
23 judgment as to the absent class members’ claims. (*See* Mot. in Limine to Exclude Ikea’s  
24 Process for Entering Zip Codes; Doc. No. 127.)

25 Significantly, the motion Defendant seeks to file if allowed to amend the schedule  
26 would not dispose of the case. The motion solely seeks a decision akin to decertification  
27 of the class action. Defendant argues “Plaintiff cannot offer any *admissible* evidence by  
28 which to prove the occurrence of requests for or the recording of zip codes of any

1 putative class member that violates the Song Beverly Credit Card Act other than with  
2 respect to three particular individuals.” (Doc. No. 138 at 2 (emphasis added).)  
3 Defendant, however, raised this same issue in its Motion in Limine to exclude its  
4 “ ‘Process for entering Zip Codes at the register’ (IKEA 000286) and any testimony  
5 about IKEA’s cashiering process. . . .” (Doc. No. 127-a at 6.) On February 20, 2014,  
6 Defendant’s motion in limine was denied because the court found “Defendant has not  
7 established that Rule 406, or any other authority, precludes the admission of the ‘Process  
8 for entering Zip Codes at the register,’ at this state in the proceedings.” (Doc. No. 153 at  
9 5.)

10 Although Judge Hayes denied the motion in limine, Defendant still seeks to amend  
11 the schedule in order to file a motion for summary judgment as to the absent class  
12 members’ claims.

## 13 II. APPLICABLE LEGAL STANDARDS

14 Federal Rule of Civil Procedure 6(b) governs Defendant’s request to amend the  
15 schedule to file a belated motion for summary judgment. The rule provides: “When an  
16 act may or must be done within a specified time, the court may, for *good cause*, extend  
17 time. . . on motion made after the time has expired if the party failed to act because of  
18 *excusable neglect*.” Fed.R.Civ.P. 6(b)(1)(B) (emphasis added).

19 In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507  
20 U.S. 380, 395 (1993), the United States Supreme Court established a four-part balancing  
21 test for determining whether there has been “excusable neglect.” Although that case  
22 involved Federal Rule of Bankruptcy Procedure 9006(b)(1), the Court reviewed the  
23 various contexts in which the phrase appears in the federal rules of procedure and made  
24 clear that the test applies in all of those contexts. *Id.* at 395. The factors include: (1) the  
25 danger of prejudice to the non-moving party, (2) the length of delay and its potential  
26 impact on judicial proceedings, (3) the reason for the delay, including whether it was  
27 within the reasonable control of the movant, and (4) whether the moving party’s conduct  
28 was in good faith. *Pioneer*, 507 U.S. at 395. *Pioneer* requires a flexible approach and one

1 where no one factor is more significant than any other and cautioned against “erecting a  
2 rigid barrier against late filings attributable in any degree to the movant’s negligence.”  
3 *Id.* at 395 n. 14. The weighing of *Pioneer’s* equitable factors is left to the discretion of  
4 the court. *Pincay v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004).

### 5 **III. DISCUSSION**

6 Defendant wants to amend the schedule at this late stage in order to file a motion  
7 for summary judgment regarding absent class members’ claims. “If leave is granted, the  
8 motion for summary judgment will be made on the ground that plaintiff cannot offer any  
9 admissible evidence by which to prove the occurrence of requests for or the recording of  
10 zip codes of any putative class member that violates the Song Beverly Credit Card Act  
11 other than with respect to three particular individuals—named plaintiff Rita Medellin,  
12 former plaintiff Reid Yeoman, and another individual, Susan Hurtado...” (Doc. No. 138  
13 at 2.)

14 Defendant’s motion is made more than a year after the deadline to file motions for  
15 summary judgment expired, more than nine months after the motion to decertify was  
16 decided, and more than six months after Defendant opposed Plaintiff’s request to amend  
17 the schedule.

#### 18 **A. Whether Defendant Established Excusable Neglect**

19 The Court will balance the four factors set out in *Pioneer* to determine whether  
20 there has been excusable neglect such to excuse Defendant’s failure to abide by the  
21 scheduling order. Accordingly, the Court will address each factor in turn.

##### 22 **1. The Danger of Prejudice to the Non-moving Party**

23 Defendant argues there is no prejudice to Plaintiff or the absent class members  
24 because being “ ‘forced to litigate on the merits cannot be considered prejudicial.’ ”  
25 (Doc. No. 138-1 at 12 (*quoting TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701  
26 (9th Cir.)) Defendant’s argument is based on a false premise. Plaintiff does not oppose  
27 Defendant’s request to belatedly file a motion for summary judgment in order to avoid  
28 litigating the case on its merits. Rather, Plaintiff will suffer prejudice by having to

1 oppose a motion for summary judgment that Defendant itself concedes is premised on  
2 the same issue already addressed in the motion to decertify and the motion in limine. (*Id.*  
3 at 6.) Plaintiff rightfully contends that having to oppose an issue twice decided by Judge  
4 Hayes will cause unnecessary expense and time. (Doc. No. 140 at 7-8.) Further,  
5 Defendant’s contention that there is no prejudice in forcing Plaintiff to litigate on the  
6 merits is a non sequitur. Plaintiff is not seeking to avoid litigating this case on the  
7 merits—rather Plaintiff seeks to litigate the case on its merits at trial. There is no basis  
8 for Defendant to argue otherwise.

9 The Court also finds that Plaintiff and the absent class members will be prejudiced  
10 by amending the schedule because had Defendant made this request earlier—and  
11 especially if it was made prior to or at the same time Plaintiff made her request to amend  
12 the schedule—the Court very well may have reached a different conclusion with respect  
13 to Plaintiff’s request to amend the schedule to conduct further discovery. At that time,  
14 Defendant adamantly objected to any delay and criticized Plaintiff for “d[oing] nothing  
15 for two months following the Court’s Order on the motion to decertify.” (Doc. No. 102 at  
16 2.) Defendant further argued that Plaintiff’s “strategic decisions and inaction are belied  
17 by the record and are not good cause [to amend the schedule] and reopen discovery.”  
18 (*Id.*) The Court cannot help but be reminded of the idiom, “What is good for the goose is  
19 good for the gander.” When Plaintiff wanted to belatedly amend the schedule,  
20 Defendant highlighted Plaintiff’s inaction. This time it is Defendant’s strategic decisions  
21 and inaction at issue. And Defendant’s reasons for its strategic decisions and inaction  
22 are not any more compelling than Plaintiff’s reasons were when she belatedly moved to  
23 amend the schedule.

24 In sum, the Court finds that Defendant could have filed the motion to amend the  
25 schedule prior to the deadline to file dispositive motions. Moreover, Defendant had  
26 numerous opportunities to, at a minimum, request an extension of the motion filing  
27 deadline in order to alert the court and opposing counsel of its intent to file a motion for  
28 summary judgment after class notice was sent.

1 This factor weighs against allowing Defendant to amend the scheduling order so  
2 that it may file a belated motion for summary judgment.

3 b. The Length of Delay and its Potential Impact on Judicial Proceedings

4 Defendant's motion seeks to amend the schedule more than a year after Defendant  
5 argued Plaintiff should not be allowed an extension of time to reopen discovery and  
6 designate additional expert witnesses because the case would suffer unnecessary delay.  
7 (Doc. No. 102 at 18-22.) Yet, Defendant now contends amending the schedule will not  
8 result in any further delay to the case and it should be permitted to file a motion more  
9 than a year after the deadline to file such motions passed. Defendant attempts to  
10 convince the Court that the motion will not impact the proceedings because the only  
11 additional delay will result from whatever amount of time it takes the district court to  
12 decide the motion. Defendant's argument is unavailing.

13 The final pretrial conference took place on February 27, 2014. (Doc. No. 156.)  
14 The district court ordered the parties to file additional motions in limine no later than  
15 May 5, 2014, and set a hearing on those motions for July 10, 2014. Finally, the trial in  
16 this matter is set to begin September 9, 2014. (*Id.*) Thus, any change to the schedule at  
17 this time will likely impact the timing of the motions in limine and the trial date.  
18 Moreover, the motion Defendant seeks to file will not dispose of the entire case and the  
19 need for the district court to hold a bench trial. Therefore, any delay will not be avoided  
20 even assuming *arguendo* Defendant prevails on its proposed motion for summary  
21 judgment.

22 In *Hartman v. United Bank Card, Inc.*, --- F.R.D. ----, 2013 WL 1442310 (W.D.  
23 Wash. 2013), the plaintiffs delayed nearly nine months following the original class  
24 discovery cut-off before moving for leave to take additional discovery. The court  
25 determined that the nine month delay before moving to take the discovery did not weigh  
26 in plaintiffs' favor. *Id.* at \*4. Recently, a case from this district found that a ten month  
27 delay between a deadline and filing the motion was significant. *Level 3 Commc'ns, Inc.*  
28



1 *v. Lidco Imperial Valley, Inc.*, No. 11cv01258 BTM (MDD), 2012 WL 4848929, at \*8  
2 (S.D. Cal. Oct. 11, 2012).

3 In the instant case, Defendant delayed more than 13 months after the deadline to  
4 file dispositive motions expired before filing the instant motion to amend the schedule.  
5 At this stage in the proceedings and given the many other extensions the parties  
6 requested and received, the delay is significant. Although the potential motion's specific  
7 impact on the trial date is unknown because the district court's overall caseload affects  
8 the timing of decisions on motions, there is likely to be at least some delay. Moreover,  
9 Defendant could have addressed and dealt with the request to amend the schedule and  
10 sought to reserve the opportunity to file the proposed motion many months ago, thereby  
11 eliminating any further delay since the motion could have been filed at the same time as,  
12 or at any time after, the motion to decertify was filed.

13 Finally, Federal Rule of Civil Procedure 56, which governs Motions for Summary  
14 Judgment or Partial Summary Judgment states: "Unless a different time is set by local  
15 rule or the court orders otherwise, a party may file a motion for summary judgment at  
16 any time *until* 30 days after the close of all discovery." Fed. R. Civ. P. 56(b) (emphasis  
17 added). In this case the Court did order otherwise, and the operative order set October  
18 22, 2012 as the last day to file motions for summary judgment. Nevertheless, Rule 56  
19 provides further support for this Court's determination that Defendant delayed too long  
20 before requesting to file a motion for summary judgment. The very last day for all fact  
21 discovery was August 31, 2012 and the very last day to complete expert discovery was  
22 August 30, 2013—thus at the absolute latest, Defendant should have sought leave to file  
23 a motion for summary judgment by September 29, 2013. Fed. R. Civ. P. 56(b).  
24 Defendant did not do so.

25 Accordingly, this factor weighs against finding Defendant's neglect excusable.

26 c. The Reason for the Delay

27 Defendant's stated reason for the delay is that it chose not to file a motion for  
28 summary judgment as to the absent class members' claims prior to the time to file such a

1 motion expired because had the district court *granted* the motion prior to sending class  
2 notice, the absent class members would not be bound by the judgment. Defendant relies  
3 on *Schwarzchild v. TSE*, 69 F.3d 293 (9th Cir. 1995), to support its position. As Plaintiff  
4 rightfully points out, Defendant’s excuse is “nonsense.” (Doc. No. 140 at. 10.)

5 While it is true that *Schwarzchild* holds that if a court issues a decision *granting*  
6 summary judgment before notice is given to the class, the defendant waives the right to  
7 issue notice to the class—it is not true that a defendant is unable to file for summary  
8 judgement prior to issuing class notice. *See generally, Schwarzchild*, 69 F.3d at 296  
9 (emphasis added). Defendant, however, attempts to expand the narrow holding in  
10 *Schwarzchild* to argue that Defendant *could not* have filed a motion for summary  
11 judgment until class notice was sent. All that must take place for a decision granting  
12 summary judgment to be binding on the class is that notice be sent before judgment is  
13 ultimately granted. *Id.* at 297. There is no prohibition against filing the motion and  
14 requesting that the judge wait to decide the motion until class notice is issued. In the  
15 instant case, Judge Hayes certified a class long before the deadline to file motions for  
16 summary judgment expired. Defendant made a calculated and strategic decision to file a  
17 motion to decertify the class on the same grounds as the proposed motion for summary  
18 judgment will be based, and the record indicates that it is only as a result of losing the  
19 decertification motion that Defendant belatedly seeks the proverbial second bite at the  
20 apple through a late summary judgment motion. (Mot. to Decertify; Doc. No. 51-1 at 11-  
21 13.)

22 Even if Defendant believed it *could not file* a motion for summary judgment until  
23 after class notice was given, Defendant could have at least requested an extension of the  
24 motion filing deadline and set forth its good cause for waiting to formally file the motion  
25 until after class notice was issued. Again, Defendant did not do so.

26 All of Defendant’s proffered reasons for waiting more than a year before seeking  
27 to amend the scheduling order and file a motion for summary judgment are weak.  
28 Defendant made a calculated decision to file a motion to decertify the class and a

1 strategic decision to file a motion in limine on the same issue. As the Court explained  
2 when Plaintiff made her belated motion to amend: “[T]actical decisions do not amount to  
3 affirmative showings of excusable neglect under Rule 6(b).” *African Am. Voting Rights*  
4 *Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1350 (8th Cir. 1995); *see also Sil-Flo,*  
5 *Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1519 (10th Cir. 1990) (characterizing failure to timely  
6 file counterclaim as tactical, and thus not due to excusable neglect); *Level 3 Commc’ns,*  
7 *Inc.*, 2012 WL 4848929, at \*8 (“a deliberate decision” is “not excusable neglect).

8 In addition, Defendant fails to acknowledge that as of May 4, 2012, it knew a class  
9 was certified and notice would be provided. (Doc. No. 43.) And as of August 31, 2012,  
10 all fact discovery was complete and Defendant was fully aware of the evidentiary issues  
11 it now seeks to use as the basis for its motion for summary judgment. (Doc. No. 42.)  
12 There was nothing preventing Defendant from alerting the Court to its desire to file a  
13 motion for summary judgment and at least request an extension of the motion deadline  
14 based on the need to send class notice prior to filing the motion.

15 There is no doubt that the reason for the delay was completely in Defendant’s  
16 control. The only stated basis for the delay was a decision by counsel not to request an  
17 extension of time and a decision not file the motion for summary judgment until after  
18 class notice was sent. Defendant had complete control over the timing of this motion and  
19 had all the relevant information to file the motion since August 31, 2012. Accordingly,  
20 this factor weighs against finding excusable neglect.

21 d. Whether the Moving Party’s Conduct Was in Good Faith

22 The final factor is whether Defendant acted in good faith. When Plaintiff filed her  
23 belated motion to amend the schedule, the the Court was loathe to characterize Plaintiff’s  
24 actions as bad faith, and the Court is similarly loathe to characterize Defendant’s delay in  
25 filing this motion as bad faith. It does not appear, however, that the calculated decision  
26 to wait this long before asking to amend the schedule was done in good faith. Defendant  
27 made a deliberate and willful decision to file a timely motion to decertify. Defendant also  
28 chose not to request an extension of the motion filing deadline during any of the five

1 motions to amend the schedule and extend deadlines filed after the class was certified.  
2 Additionally, Defendant strongly opposed Plaintiff's request to amend the schedule in  
3 May 2013. Significantly, at the time Defendant opposed Plaintiff's request to amend the  
4 schedule, the decision on the decertification motion had already issued and Defendant  
5 was well aware that a class remained intact. Yet, Defendant still failed to mention an  
6 intent to file a summary judgment motion as to the absent members' claims. Analogous  
7 to the Court's characterization of Plaintiff's actions when she filed her belated motion to  
8 amend the schedule, the Defendant's actions with respect to this belated motion do not  
9 appear to be a "devious. . .or bad faith failure..." but the Court cannot say that the  
10 conduct was in good faith. *See TCI Group Life Ins. Plan*, 244 F.3d at 698. Therefore,  
11 this factor does not weigh in either party's favor.

12 e. Balancing of All Factors

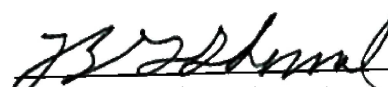
13 Given that there are no bright line or per se rules defining "excusable neglect,"  
14 after balancing the equities in this case, the Court finds that the prejudice to Plaintiff,  
15 along with the delay to the case, and the fact that the delay was within Defendant's  
16 control, all weigh against determining the neglect yes  
17 excusable. Therefore, the Court denies Defendant's motion to amend the schedule in  
18 order file a motion for summary judgment regarding absent class members' claims.

19  
20 **III. CONCLUSION**

21 After thoroughly considering each of the *Pioneer* factors, the Court concludes that  
22 Defendant does not satisfy the excusable neglect standard and good cause does not  
23 appear to amend the schedule. Accordingly, the motion to amend is DENIED.

24 IT IS SO ORDERED.

25 DATED: March 20, 2014

26  
27   
28 Hon. Bernard G. Skomal  
U.S. Magistrate Judge  
United States District Court