

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02755-CMA-NYW

JOSEPH A. KOVACH,

Plaintiff,

v.

NAVIENT SOLUTIONS, INC.,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Nina Y. Wang

This matter comes before the court on Plaintiff Joseph A. Kovach's ("Plaintiff" or "Mr. Kovach") Motion for Leave to Amend Complaint (the "Motion"). [#35, filed June 30, 2017]. The undersigned considers the Motion pursuant to 28 U.S.C. § 636(b), the Order of Reference dated December 30, 2016 [#12], and the memorandum dated July 10, 2017 [#37]. This court respectfully **RECOMMENDS** that the Motion to Amend be **GRANTED**.¹

BACKGROUND

Plaintiff initiated this action by filing his Complaint on November 11, 2016. [#1]. Plaintiff asserts a claim against Defendant Navient Solutions, Inc. ("Defendant" or "Navient") for allegedly violating the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* [*Id.* at 3]. Plaintiff alleges that, beginning in or around August 2015, Defendant placed

¹ Because Local Rule 72.3 defines "[d]ispositive motions" to include motions to amend, *see* D.C.COLO.LCivR 72.3(a), this court addresses the pending Motion in a Recommendation rather than in an Order.

repeated harassing telephone calls to Plaintiff, and continued to place these calls even after Plaintiff requested that all such calls cease. *See [id. at 2-3]*.

On January 6, 2017, the undersigned held a Scheduling Conference, and set the following relevant deadlines: (1) February 24, 2017 for joinder of parties and amendment of pleadings; (2) July 5, 2017 for discovery; and (3) August 4, 2017 for dispositive motion. *See [#18; #19]*. Subsequently, upon motion by the Parties, this court extended the discovery and dispositive motion deadlines to August 18 and September 18, 2017, respectively. *See [#34]*.

Then, on June 30, 2017, Plaintiff filed the instant Motion. In his brief in support of the Motion, Plaintiff asserts that he seeks leave to amend his complaint to reflect the true date of Defendant's harassing calls as May 2015, not August 2015. *See [#36 at 1]*. Plaintiff avers that he served timely discovery on Defendant in January 2017, seeking its relevant call records and recordings related to Plaintiff's case and Defendant produced three recordings. *[Id. at 4]*. However, Navient's Rule 30(b)(6) deponent indicated that he reviewed ten such recordings dating back to May 2015, and Plaintiff contends that it was in May 2015 (not August 2015) that he first requested that Defendant cease the harassing telephone calls. *[Id. at 4-5]*. Defendant then produced the missing recordings to Plaintiff in June 2017. *[Id.]*. On July 21, 2017, Navient filed a Notice indicating, "to expedite resolution of Plaintiff's motion and without waiving any defenses, [Navient] does not oppose Plaintiff's request to amend." [#38].

LEGAL STANDARD

When a party seeks to amend pleadings after the deadline set in the Scheduling Order, the court's consideration is subject to a two-prong analysis. First, a party seeking leave to amend after the deadline set by a Scheduling Order must establish that there is good cause for seeking modification of such order pursuant to Rule 16(b) of the Federal Rules of Civil Procedure. *See*

Gorsuch, Ltd., B.D. v. Wells Fargo Nat'l Bank Ass'n, 771 F.3d 1230, 1240 (10th Cir. 2014). Only after establishing good cause does the court then turn to whether amendment is proper under Rule 15(a) of the Federal Rules of Civil Procedure. *Id.* at 1242; *Pumpco, Inc. v. Schenker Int'l, Inc.*, 204 F.R.D. 667, 668 (D. Colo. 2001).

The determination of good cause under Rule 16 lies within the sound discretion of the court. Fed. R. Civ. P. 16(b)(4). The focus on whether good cause exists focuses on the diligence of the moving party seeking leave; a party establishes good cause when she demonstrates that the deadline in the Scheduling Order could not have been met despite her diligent efforts. *Pumpco*, 204 F.R.D. at 668. This burden is satisfied, for example, when a party learns of new information in a deposition or if the governing law has changed. *Gorsuch, Ltd., B.D.*, 771 F.3d at 1240.

Rule 15(a)(2) provides that leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a)(2). The court may refuse leave to amend upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993); *accord Watson v. Beckel*, 242 F.3d 1237, 1239–40 (10th Cir. 2001) (observing that a court may dismiss a motion to amend if amendment is futile, *i.e.*, the amended complaint would be subject to dismissal for any reason). Ultimately, whether to allow amendment is within the trial court’s discretion. *Burks v. Oklahoma Publ’g Co.*, 81 F.3d 975, 978–79 (10th Cir. 1996).

ANALYSIS

Though Plaintiff seeks leave to amend solely under Rule 15(a), this court finds that Mr. Kovach has demonstrated good cause under both Rules 16 and 15. Plaintiff alleges that Defendant produced only three telephone call recordings in response to his January 2017

discovery request. [#36 at 2]. At the May 19, 2017 Rule 30(b)(6) deposition, Navient's deponent indicated that he had reviewed ten such recordings. [*Id.*]. Plaintiff then requested that Navient supplement its responses, which Navient did by sending Plaintiff the additional recordings in June 2017. [*Id.* at 2, 4]. Thus, only after learning of these recordings that dated back to May 2015, did Plaintiff seek leave to amend his Complaint to incorporate this new information. [*Id.* at 5-6]. I find this sufficient to satisfy good cause under Rule 16(b)(4). *See Gorsuch, Ltd., B.D.*, 771 F.3d at 1240. Further, because Navient does not oppose the requested relief, this court sees no basis for denying the Motion under Rule 15(a). *See Frank*, 3 F.3d at 1365.

CONCLUSION

For the reasons stated herein, this court respectfully **RECOMMENDS** that:

- (1) Plaintiff's Motion for Leave to Amend Complaint [#35] be **GRANTED**; and
- (2) The Clerk of the Court accept for filing [#36-1] and file it as a separate entry on the docket.²

² Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992)

DATED: July 21, 2017

BY THE COURT:

s/Nina Y. Wang
United States Magistrate Judge

(by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).