





1 name identified by a former employee as a planned future for defendants’
2 scheme.⁶ As the receiver reported, “scripts and other documentation showing that
3 Studora was simply a continuation of the Defendants’ operations were found.”
4 Capital Sun’s on-site manager Calderon, informed the receiver that Studora
5 telemarketed student debt relief services, and an employee on the premises advised
6 the receiver that Studora charged consumers upfront fees for such services,
7 illegal sales practice.⁸

8 On November 20, 2018, the receiver reported to the Court that Capital Sun,
9 doing business as “Studora” and managed by Calderon, was an affiliate and/or
10 successor of defendants’ student debt relief enterprise.¹⁰ The receiver also reported
11 that an expedited review of Capital Sun’s customer management database did not
12 readily verify services rendered or results delivered.¹¹ She reported that Capital
13 Sun could not continue to operate, and that it was “very likely that payments were
14 demanded and/or received prior to services being rendered and/or results

16 ⁶ Receiver Rep. at 11; PX14, Dispassionate ¶ 30 (App. at 592) [D.E. #10] (“Two
17 weeks before I quit ASR, Mr. Duong’s personal assistant Valeria . . . told me that
18 ASR was going to change its name to avoid difficulties with the FTC or other legal
19 authorities, and its new name would be Studora.”).

20 ⁷ Receiver Rep. at 11.

21 ⁸ Id. at 13 (“the Customer Service Manager reported that if payment was not made by
22 customers, work was not performed on said customer’s file”); see also id.
23 (“[W]hen discussing up-front payments with Mr. Calderon, he inquired about the
24 law and asked if ‘payments were supposed to be held’ until the DOE (Department
25 of Education) issued its results from a debt relief application.”).

26 ⁹ See 16 C.F.R. § 310.4(a)(5)(i) (barring such fees); see also TRO Mem. at 11,
27 17 (Nov. 6, 2018) [D.E. #5].

28 ¹⁰ Receiver Rep. at 4 n.1, 6, 11.

¹¹ Id. at 6.

1 delivered.¹²

2 On November 26, 2018, after considering an Opposition filed by counsel for
3 Capital Sun and Calderon¹³ and hearing argument, including arguments by counsel
4 for Capital Sun and Calderon, the Court determined that its TRO would remain in
5 effect until a Preliminary Injunction continuing the asset freeze and receivership
6 could issue.¹⁴ On November 29, the Court entered its Preliminary Injunction
7 enjoining individual defendants as well as corporate defendants and “each of their
8 subsidiaries, affiliates, successors, and assigns,” including but not limited to
9 Capital Sun “and Jimmy Calderon (when conducting activities in relation to any of
10 the [corporate] entities).”¹⁵

11 On December 27, 2018, citing issues with PACER, defendant Colombana
12 served his Answer to the FTC Complaint via email upon FTC counsel.¹⁶

13 On December 31, 2018, the FTC filed a Motion for Temporary Stay due to a
14 lapse in appropriations and undersigned counsel were furloughed.¹⁷ On January
15 28, 2019, the FTC withdrew its Motion for Stay when FTC counsel resumed their
16 duties after the renewal of appropriations.¹⁸

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18 ¹² Id. at 12.

19 ¹³ See Opp’n Mem. (filed Nov. 26, 2018) [D.E. #35] (also filed by counsel on
20 behalf of Capital Sun’s affiliate, Premier Capital Investments, LLC).

21 ¹⁴ See Hr’g Minutes (filed Nov. 27, 2018) [D.E. #36]. Calderon appeared at the
22 hearing, but declined to testify. When asked by the Court whether he had evidence
23 of buying a business from defendants, he volunteered that he paid in cash.

24 ¹⁵ Prelim. Inj. at 7 ¶ C (Nov. 29, 2018) [D.E. #38] (also applicable to Premier
25 Capital Investments, LLC).

26 ¹⁶ Attach. B, Colombana Answer (Dec. 26, 2018, served Dec. 27, 2018).

27 ¹⁷ Pl.’s Mot. for Temporary Stay [D.E. #43].

28 ¹⁸ Pl.’s Withdrawal of Stay Motion [D.E. # 45].

1 II. LEGAL STANDARD

2 The FTC requests leave to file the FAC pursuant to Federal Rule 15(a),
 3 which provides that the Court “should freely give leave when justice so requires.”¹⁹
 4 The U.S. Court of Appeals for the Ninth Circuit has stated that “[R]ule 15’s policy
 5 of favoring amendments should be applied with ‘extreme liberality.’²⁰ Indeed, the
 6 Ninth Circuit has held that a district court should resolve a motion to amend “with
 7 all inferences in favor of granting the motion.”²¹

8 Courts consider four factors in determining the propriety of a motion to
 9 amend: bad faith, undue delay, prejudice to the opposing party, or futility of the
 10 amendment.²² The Ninth Circuit has held that prejudice to the opposing party is
 11 the strongest factor and that absent undue delay, or “a strong showing” of the other
 12 factors, a presumption exists in favor of granting the leave to amend.²³ This
 13 liberal standard applies to amendments by parties as well as causes of action.²⁴

14 III. ARGUMENT

15 The FTC readily qualifies for leave to amend its Complaint. The proposed
 16 FAC is filed in good faith, is timely, and will not cause undue prejudice to defendants

18 ¹⁹ FED. R. CIV. P. 15(a)(2).

19 ²⁰ DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (quoting
 20 U.S. v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)).

21 ²¹ Griggs v. Pave Am. Grp, 170 F.3d 877, 880 (9th Cir. 1999) (citing Leighton,
 22 833 F.2d at 186).

23 ²² Foman v. Davis, 371 U.S. 178, 182 (1962); see also Griggs, 170 F.3d at 880.

24 ²³ Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)
 25 (emphasis in original); see also Shaw v. Burke, No. 17-cv-2386, 2018 WL
 26 2459720, at *3 (C.D. Cal. Mar. 1, 2018) (“There is a presumption that leave to
 amend should be granted.”).

27 ²⁴ Leighton, 833 F.2d at 186.

1 or the added parties, and clearly not futile.

2 A. The Proposed FAC is Filed in Good Faith.

3 The FTC brings this motion for leave to amend in good faith, and not for
4 purposes of delay or to avoid an adverse judgment. There are facts in the record
5 indicating that this motion has been filed in bad faith.²⁵

6 B. The FTC’s Motion is Timely and Will Not Cause Undue Delay

7 This motion is timely filed and will not cause undue delay.²⁶ Indeed, the
8 Ninth Circuit has held that it is an abuse of discretion to deny a motion to amend
9 on the grounds of delay alone, even five years after the filing of a complaint.²⁷ But,
10 comparison, the FTC is filing this motion before the parties have commenced
11 discovery in this case. This reasonable prompt filing negates any suggestion of
12 undue delay and facilitates efficient discovery and proceedings in this case.²⁸

13 C. The Proposed FAC Will Not Prejudice Defendants.

14 Acknowledging that avoiding prejudice should be a “major objective” for
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18 ²⁵ Cf. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987) (upholding a
19 bad faith finding when plaintiff moved to amend in order to add a defendant to
20 destroy diversity jurisdiction).

21 ²⁶ See *Leighton*, 833 F.2d at 187.

22 ²⁷ *Howey v. U.S.*, 481 F.2d 1187, 1190-91 (9th Cir. 1973).

23 ²⁸ See *Leighton*, 833 F.2d at 187 (“this suit is still in its early stages, and appellants
24 have offered a satisfactory explanation for their delay”). Rule 15(a)(1) permits
25 parties to amend a pleading to which responsive pleading is required within “21
26 days after service of a responsive pleading.” Fed. R. Civ. P. 15(a)(1)(B). Because
27 Colombana served his Answer on December 27, 2018, the FTC was entitled to file
28 the FAC as of right by January 17, 2019. The FTC was unable to file the FAC by
that date due to the furlough of FTC Counsel. This constitutes a “satisfactory
explanation” for the modest delay. Cf. *Leighton*, 833 F.2d at 187 (“there is no
evidence of unjust delay in this case”).

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1 would seek to file the proposed FAC. Calderon and Capital Sun have had ample
2 notice of this lawsuit, dispelling any notion of prejudice to adding them as named
3 parties. Moreover, none of the previously-named defendants oppose this motion.³⁹

4 D. Filing the Proposed FAC Is Not Futile

5 To show that a proposed amended complaint would be futile, the opposing
6 party must show that, taking the pleaded facts as true, its allegations fail to state a
7 claim as a matter of law.⁴⁰ Otherwise, a plaintiff “ought to be afforded an
8 opportunity to test [its] claim on the merits.”⁴¹ The addition of Calderon and
9 Capital Sun as defendants, if the allegations against them are taken as true, state a
10 legally sufficient claim under the FTC Act and the TSR and are therefore not futile.
11 For example, the FAC charges that they charged consumers upfront fees for
12 telemarketed debt relief services, a plain violation of the TSR.⁴² Indeed, this Court
13 has twice issued preliminary findings that the FTC is likely to prevail on the merits
14 of its nearly identical allegations against the original defendants.⁴³

15 IV. CONCLUSION

16 For the foregoing reasons, the FTC respectfully requests that this Court grant
17 the FTC’s Motion for Leave to File its First Amended Complaint.

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19 ³⁹ No previously-named defendants oppose this motion. See *infra* L.R. 7-3
20 Statement.

21 ⁴⁰ See *Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bur.*, 701 F.2d 1276,
22 1293 (9th Cir. 1983) (upholding denial of leave to amend when amendment to
23 complaint “could not affect the outcome of th[e] lawsuit”); see also *Miller v.*
Yokohama Tire Corp., 358 F.3d 616, 622-23 (9th Cir. 2004) (same).

24 ⁴¹ *Leighton*, 833 F.2d at 188 (quoting *Foman*, 371 U.S. at 182).

25 ⁴² Att. A at 12 ¶ 30, 16 ¶¶ 44-45, 56 C.F.R. § 310.4(a)(5)(i).

26 ⁴³ TRO at 4 ¶ 4 (finding good cause to believe that defendants violated FTC Act
27 and TSR as alleged in Complaint). Prelim. Inj. at 5 ¶ 7 (same).

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Dated: February 5, 2019

Respectfully submitted,

_____/s/_____
Joshua S. Millard
Brian M. Welke
Barbara Chun (Local Counsel)

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

L.R. 7-3 STATEMENT

Undersigned counsel certifies that, prior to filing the instant motion, counsel conferred concerning this motion with Thomas R. Chapin, counsel for Defendants Duong and Avitia, on December 10, 2018 and December 17, 2018 via email, and December 12, 2018 and thereafter by phone. Mr. Chapin indicated that Duong and Avitia would not oppose this motion. Counsel also conferred concerning this motion with pro se defendant Colombana via email on January 29, 2019, and Colombana responded via email that she would not oppose this motion.

FTC counsel also sought to confer concerning this motion with Richard A. McFarlane and David Kozich, counsel for Jimmy Calderon, Capital Sun Investments, LLC, and Premier Capital Investments, LLC, via email. In response, FTC counsel were contacted by a pro se with another attorney, Michael Thurman, Esq., who may substitute as counsel for those entities in this case. At present, it is uncertain whether Jimmy Calderon, Capital Sun Investments, and Premier Capital Investments would oppose this motion.

_____/s/_____
Joshua S. Millard

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