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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

IMPETUS ENTERPRISE, INC., et al.,

Defendants.

Case No. 8:18-cv-01987-JLS-KES

**PLAINTIFF’S MOTION FOR
LEAVE TO FILE ITS FIRST
AMENDED COMPLAINT AND
MEMORANDUM OF POINTS
AND AUTHORTIES IN
SUPPORT THERETO**

Date: April 5, 2019

Time: 10:30 a.m.

Officer: Hon. Josephine L. Staton

Courtroom: 10-A

1 PLEASE TAKE NOTICE THAT on April 5, 2019, at 10:30 a.m., or as soon
2 thereafter as this matter may be heard in Courtroom 10-A of the above-titled Court,
3 located at 411 West Fourth St., Santa Ana, CA 92701, Plaintiff, the Federal Trade
4 Commission (“FTC” or “Commission”), will and hereby does move this Court for
5 leave to file its proposed First Amended Complaint for Permanent Injunction and
6 Other Equitable Relief (“FAC”) pursuant to Fed. R. Civ. P. 15(a)(2). The FAC is
7 marked as Attachment A to this filing.

8 The FAC differs from the original Complaint [D.E. #2] as follows:

- 9 1. It adds “Studora” and “U.S. Debt Relief” as additional fictitious
10 business names used by defendant Impetus Enterprise, Inc.;
- 11 2. It adds Capital Sun Investments, LLC (“Capital Sun”), also doing
12 business as “Studora,” as an additional defendant;
- 13 3. It adds Jimmy Calderon (“Calderon”), individually and as an officer
14 of Capital Sun, as an additional defendant; and
- 15 4. It expands the common enterprise allegation to include Capital Sun.

16 It does not otherwise substantively alter the allegations with respect to the original
17 defendants, Tuan Dinh Duong (“Duong”); Brenda Avitia-Pena (“Avitia”); Brian
18 Colombana (“Colombana”); Impetus Enterprise, Inc.; Fig Tree & Co., LLC; and
19 relief defendant Noel Solutions, LLC.

20 This is the FTC’s first request for leave to amend its Complaint. The
21 defendants do not oppose this motion but have not stipulated to it, necessitating
22 this filing. As set forth below, the FAC names additional parties who participated
23 in the unlawful debt relief scheme described in the Complaint in violation of
24 Section 5 of the FTC Act and the Telemarketing Sales Rule (“TSR”).

25 This motion is timely. Filing the FAC will not cause any undue delay
26 because this case is in an early stage. Moreover, the proposed amendments will
27 not unduly prejudice named defendants or proposed defendants Capital Sun and
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1 Calderon. The amendments principally relate to Capital Sun and Calderon’s
2 marketing and sale of student debt relief services also promoted by defendants.
3 The FTC notified the Court and the parties of the probability that it would name
4 Capital Sun and Calderon as defendants prior to the November 26, 2018 hearing in
5 this case.¹ Capital Sun and Calderon appeared at that hearing and are subject to the
6 Court’s November 29th Preliminary Injunction as affiliates or successors of the
7 previously-named defendants. Both defendants and proposed defendants have had
8 ample advance notice that the FTC would seek to file the proposed FAC.

9 **I. BACKGROUND**

10 On November 6, 2018, the FTC filed its initial Complaint and moved for a
11 non-noticed Temporary Restraining Order (“TRO”) against defendants.² In
12 pertinent part, the Complaint charged that defendants deceptively marketed debt
13 relief services in violation of the FTC Act and the TSR, and charged illegal upfront
14 fees for telemarketed debt relief services in violation of the TSR.³

15 On November 13, 2018, the Court issued its TRO providing for an asset
16 freeze, appointing a receiver, and authorizing access to defendants’ business
17 premises, including an office in Santa Ana.⁴ On November 15th, the receiver
18 entered the defendants’ office in Santa Ana, and allowed FTC staff to inspect and
19 copy materials found there.⁵ In the office, the receiver found a student debt relief
20 operation highly similar to defendants’ scheme, run under the aegis of “Studora,” a
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22 ¹ Pl.’s Supp. Prelim. Inj. Br. at 14 (Nov. 23, 2018) [D.E. #33].

23 ² *E.g.*, Compl. at 3-5 [D.E. #2].

24 ³ *Id.* at 12-16.

25 ⁴ TRO at 12-14, 20, 30-31 (Nov. 13, 2018) [D.E. #23].

26 ⁵ *See* Receiver Rep. at 11 (Nov. 20, 2018) [D.E. #27]; Pl.’s Supp. Prelim. Inj. Br. at
27 1-10 (Nov. 23, 2018) [D.E. #33].

1 name identified by a former employee as a planned future name 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.”⁷
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,⁸ an
7 illegal sales practice.⁹

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

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

21 ⁷ Receiver Rep. at 11.

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

27 ⁹ *See* 16 C.F.R. § 310.4(a)(5)(i) (barring such fees); *see also* Pl.’s TRO Mem. at 11,
28 17 (Nov. 6, 2018) [D.E. #5].

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 Calderon,¹³ and hearing argument, including arguments by counsel
4 for Capital Sun and Calderon, the Court ordered that its TRO would remain in
5 effect until a Preliminary Injunction continuing the asset freeze and receivership
6 could issue.¹⁴ On November 29th, 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’s 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 to 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].

II. LEGAL STANDARD

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

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

III. ARGUMENT

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

¹⁹ FED. R. CIV. P. 15(a)(2).

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

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

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

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

²⁴ *Leighton*, 833 F.2d at 186.

1 or the added parties, and is 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 no 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 By
10 comparison, the FTC is filing this motion before the parties have commenced
11 discovery in this case. This reasonably 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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17 ²⁵ *Cf. Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987) (upholding a
18 bad faith finding when plaintiff moved to amend in order to add a defendant to
19 destroy diversity jurisdiction).

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

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

22 ²⁸ *See Leighton*, 833 F.2d at 187 (“this suit is still in its early stages, and appellants
23 have offered a satisfactory explanation for their delay”). Rule 15(a)(1) permits
24 parties to amend a pleading to which a responsive pleading is required within “21
25 days after service of a responsive pleading.” FED. R. CIV. P. 15(a)(1)(B). Because
26 Colombana served his Answer on December 27, 2018, the FTC was entitled to file
27 the FAC as of right by January 17, 2019. The FTC was unable to file the FAC by
28 that date due to the furlough of FTC counsel. This constitutes a “satisfactory
evidence of unjust delay in this case”).

1 the Court in ruling on motions to amend,²⁹ the proposed FAC will not prejudice
2 defendants. Such prejudice occurs when newly added parties do not have time to
3 “pursue and preserve the facts relevant to various avenues of defense” of the suit.³⁰
4 Avoiding such “unjust delay”³¹ is important in deciding motions for leave to
5 amend a pleading.³² However, timely notice, whether formal or informal, is
6 sufficient to allay such concerns.³³

7 Here, there is no unjust delay, and thus no prejudice to defendants or
8 proposed defendants. Calderon learned of this lawsuit the same day as the other
9 defendants. He was present when the receiver entered Capital Sun’s office in
10 Santa Ana on November 15th.³⁴ Prior to the November 26, 2018 Preliminary
11 Injunction hearing in this case, the FTC notified the Court and the parties of the
12 probability that it would name Capital Sun and Calderon as defendants.³⁵ Both
13 Calderon and Capital Sun submitted an Opposition to the Preliminary Injunction³⁶
14 and participated in that hearing.³⁷ Both are also subject to the November 29th
15 Preliminary Injunction as affiliates or successors of named defendants.³⁸ Both
16 defendants and proposed defendants have had ample advance notice that the FTC

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18 ²⁹ *Id.*

19 ³⁰ *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400 (9th Cir. 1984).

20 ³¹ *Leighton*, 833 F.2d at 187-88.

21 ³² *Korn*, 833 F.2d at 1400.

22 ³³ *Id.*

23 ³⁴ Receiver Rep. at 6-7.

24 ³⁵ Pl.’s Supp. Prelim. Inj. Br. at 14 (Nov. 23, 2018) [D.E. #33].

25 ³⁶ Opp’n Mem. [D.E. #35].

26 ³⁷ Hr’g Minutes [D.E. #36]

27 ³⁸ Prelim. Inj. at 7 ¶ C [D.E. #38].

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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 20 ³⁹ No previously-named defendants oppose this motion. *See infra* L.R. 7-3
 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; 16 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

Certificate of Service

I hereby certify that on February 5, 2019, I caused a true and correct copy of FTC's Motion for Leave to File its First Amended Complaint and the Proposed Order to be served by the following means on the following persons:

By Notice of Electronic Filing via the Court's CM/ECF System, pursuant to Local Rule 5-3.2:

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By mail to the person's last known address, pursuant to Fed. R. Civ. P. 5(b)(2)(C):

Incorp Services, Inc.
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Agent for Service of Process for:
Defendant Impetus Enterprise, Inc.

Legalzoom.com, Inc.
101 North Brand Blvd, 11th Floor

1 Glendale, CA 91203
2 *Agent for Service of Process for:*
3 *Defendant Fig Tree & Co., LLC*

4 Wyoming Registered Agent
5 1621 Central Ave
6 Cheyenne, WY 82001
7 *Agent for Service of Process for:*
8 *Relief Defendant Noel Solutions, LLC*

9 **By email, consented to in writing, pursuant to Fed. R. Civ. P. 5(b)(2)(e):**

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