

1 Plaintiffs instituted this putative class action in Alameda County Superior Court on
2 May 12, 2008, against KeyBank and Great Lakes. Student Loan Xpress, Inc. (“SLX”) and
3 American Education Services (“AES”) – which allegedly made and serviced loans to Silver
4 State students – were added as defendants in a First Amended Complaint filed four days
5 later. All defendants stipulated to allow Plaintiffs to file a Second Amended Complaint
6 (“SAC”), which was filed on June 11, 2008. SLX removed the action to federal court on
7 June 13.

8 The parties then engaged in mediation and stipulated to enlarge the time for responses
9 to the complaint to be filed. Plaintiffs settled with SLX and dismissed SLX and AES from
10 this action on October 23, 2009. The settlement disposed of approximately 80 percent of the
11 class claims, as the majority of loans at issue were held by SLX and serviced by AES.

12 Mediation with KeyBank and Great Lakes (collectively “Defendants”) was
13 unsuccessful, and Defendants responded to the SAC on April 24, 2009 by moving to dismiss
14 and to compel arbitration. The Court denied the motion to compel arbitration on July 8, 2009
15 – a ruling Defendants have appealed to the Ninth Circuit – and ordered the parties to agree
16 upon a briefing schedule and hearing date for the motion to dismiss. On August 17, 2009,
17 this matter was stayed except for document discovery and the motion to dismiss.

18 Defendants filed a new motion to dismiss on October 5, 2009, and noticed it for
19 hearing on November 9, which the parties then stipulated to continue to December 21 to
20 allow Plaintiffs time to complete settlement negotiations with SLX. The Court continued the
21 hearing again to February 1, 2010, based on Plaintiffs’ representation that they would move
22 for leave to file an amended complaint. Plaintiffs did so on November 16, 2009, filing with
23 the motion a copy of the proposed Third Amended Complaint (“TAC”). Plaintiffs filed a
24 supplemental declaration on November 24, attaching a revised TAC to which an additional
25 prayer for relief had been added. Defendants opposed the motion.

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1 **LEGAL STANDARD**

2 Once a responsive pleading has been filed, the Federal Rules of Civil Procedure
3 permit a party to amend its complaint “with the opposing party’s written consent or the
4 court’s leave,” which the court “should freely give . . . when justice so requires.” Fed. R.
5 Civ. P. 15(a)(2). Leave to amend is ordinarily granted with “extreme liberality.” *United*
6 *States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Four factors are considered in weighing
7 the permissibility of amendment: “bad faith, undue delay, prejudice to the opposing party,
8 and futility of amendment.” *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991)
9 (citing *Foman v. Davis*, 371 U.S. 178 (1962)). Whether to grant leave to amend is a matter
10 of the district court’s discretion. “In exercising this discretion, a court must be guided by the
11 underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the
12 pleadings or technicalities.” *Webb*, 655 F.2d at 979.

13
14 **DISCUSSION**

15 Plaintiffs seek leave to file a TAC to address arguments raised by Defendants in their
16 motion to dismiss. They assert that Defendants would not be prejudiced because no
17 meaningful litigation has occurred until this point, and stress that they have never before
18 sought to amend the complaint in response to a challenge by a defendant. Defendants
19 counter that Plaintiffs have unduly delayed filing their TAC and insist that allowing
20 amendment would result in prejudice.

21 Plaintiffs’ SAC – the currently operative complaint – asserts that Defendants violated
22 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*,
23 aided and abetted the fraud perpetuated by Silver State, and violated the federal Racketeering
24 Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962 *et seq.* The claims
25 are premised on KeyBank’s alleged violation of the Federal Trade Commission’s “Holder
26 Rule,” which requires sellers to include in consumer contracts a notice that any holder of the
27 contract is subject to whatever claims or defenses the debtor could assert against the seller.
28 16 C.F.R. §§ 433.2(a) & (b). The Holder Rule provides that “it is an unfair or deceptive act

1 or practice” for a seller to (a) “[t]ake or receive a consumer credit contract,” or (b) “[a]cept .
2 . . . the proceeds of any purchase money loan” if the contract does not contain the required
3 notice. *Id.* Plaintiffs allege that KeyBank, by intentionally omitting the Holder Notice from
4 its student loan promissory notes and ensuring that Silver State left the notice off its
5 contracts, is guilty of unlawful, unfair and fraudulent business practices. They seek only
6 injunctive relief.

7 Plaintiffs now propose to amend their complaint to address some of the arguments
8 raised by Defendants’ motion to dismiss. Plaintiffs augment their fraud allegations to satisfy
9 Federal Rule of Civil Procedure 9(b)’s requirement that the circumstances constituting fraud
10 be pled with particularity. The TAC would add another prayer for relief, “to permanently
11 enjoin KeyBank’s unfair and deceptive acts and practices committed against the residents of
12 the State of California.” Supp. Decl. of Kevin F. Rooney, ¶ 3. Plaintiffs would eliminate the
13 RICO claim, because – as Defendants pointed out – injunctive relief is unavailable in civil
14 RICO actions brought by private parties. Finally, Plaintiffs propose to restructure the
15 remaining two claims, for violating the UCL and aiding and abetting fraud, into six claims by
16 breaking each specific violation into a distinct count.¹

17 Defendants contend that Plaintiffs have flouted the July 17, 2009 deadline to amend
18 the pleadings, and that Plaintiffs’ motion may therefore be granted only “for good cause”
19 because it would require modification of a scheduling order. Fed. R. Civ. P. 16(b)(4).
20 However, the Court never adopted the July 17 deadline – which the parties proposed in joint
21 case management statements filed on April 20 and August 10 – in a scheduling order.
22 Therefore, Plaintiffs’ motion is properly assessed under the liberal standards of Rule 15,
23 rather than the stricter “good cause” requirement of Rule 16.

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25 ¹ The UCL provides remedies for “unfair competition,” which is defined as “any
26 unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200.
27 The TAC would break down the UCL claim into four separate counts: two based on the
28 “unlawful” prong (for violating 16 C.F.R. §§ 433.2(a) & 433.2(b)), one based on the “unfair”
prong, and another based on the “fraud” prong. The claim for “aiding and abetting fraud” in
the SAC would be converted to two counts under the UCL for aiding and abetting Silver
State’s unlawful violations of 16 C.F.R. §§ 433.2(a) and 433.2(b). The Court observes that
the first four causes of action in Plaintiffs’ proposed TAC misidentify the Holder Rule as
appearing at 16 C.F.R. § 433.1, rather than at 16 C.F.R. § 433.2.

1 Defendants argue that the motion should be denied based on undue delay and
2 prejudice. Defendants characterize the TAC as “inexcusably late.” Defs.’ Opp’n at 8. They
3 argue that many of Plaintiffs’ revisions are based on arguments Defendants first raised in
4 their April 24, 2009 motion to dismiss, and that the TAC’s new factual allegations were
5 drawn from materials Plaintiffs received in April and July. Defendants also anticipate that
6 the TAC will necessitate that they file another motion to dismiss, adding to the cost of the
7 litigation.

8 Defendants’ arguments are insufficient to surmount Rule 15’s policy in favor of
9 liberal amendment. Although it may be true that Plaintiffs could have moved for leave to
10 amend earlier than they did, a delay of a few months is hardly undue. Furthermore, filing the
11 TAC may in fact expedite the litigation by addressing issues preemptively, before the Court
12 rules on Defendants’ motion to dismiss. The only prejudice Defendants identify relates to
13 the cost of filing another motion to dismiss; allowing amendment does not otherwise hamper
14 their ability to defend this action. There is no evidence of bad faith, and no basis for
15 concluding that amendment is futile. The *Foman* factors all weigh in favor of allowing leave
16 to amend, which the Court therefore GRANTS.

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18 **CONCLUSION**

19 For the reasons set forth above, Plaintiffs’ motion for leave to amend is GRANTED.
20 Plaintiffs shall file the Third Amended Complaint by Monday, December 21, 2009. The
21 hearing on Defendants’ motion to dismiss Plaintiffs’ SAC, calendared for February 1, 2010,
22 is VACATED as moot.

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24 IT IS SO ORDERED.

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26 Dated: 12/16/2009



27 THELTON E. HENDERSON, JUDGE
28 UNITED STATES DISTRICT COURT