

1 Brett Lewis, Esq. (*pro hac vice*)  
 Brett@iLawco.com  
 2 Michael D. Cilento, Esq. (*pro hac vice*)  
 Michael@iLawco.com  
 LEWIS & LIN, LLC  
 4 77 Sands Street, 6th Floor  
 Brooklyn, NY 11201  
 5 Tel: (718) 243-9323  
 6 Fax: (718) 243-9326

7 Ji-In Lee Houck (SBN 280088)  
 8 jiin@houckfirm.com  
 THE HOUCK FIRM  
 9 16501 Ventura Blvd, Suite 400-199  
 Encino, CA 91436  
 10 Tel: (888) 446-8257

11  
 12 *Attorneys for Plaintiff*  
 VPN.COM LLC

13  
 14 UNITED STATES DISTRICT COURT  
 15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16  
 17 **VPN.COM LLC,**  
 18 Plaintiff;  
 19 v.  
 20 **George Dikian et al.,**  
 21 Defendants.

Case No.  
 2:22-cv-04453-AB-MAR

**MEMORANDUM IN  
 SUPPORT OF MOTION  
 FOR LEAVE TO FILE FIRST  
 AMENDED COMPLAINT  
 [Cilento Declaration submitted  
 herewith]**

Motion Date: 10/06/23 10:00 AM

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1 **INTRODUCTION**

2 Plaintiff VPN.Com LLC (“VPN”) respectfully submits this motion for  
3 leave to file a first amended complaint in this action. The proposed first  
4 amended complaint should not be controversial as it does not seek to add any  
5 new claims – in fact, it deletes the original complaint’s claim for RICO, and  
6 leaves only a single claim for fraud, which also appeared in the original  
7 complaint. The Court should not deviate from the axiomatic policy of freely  
8 granting leave to amend.

9  
10 **FACTS**

11 **A. Timing of Amendment**

12 VPN filed its Complaint in this action on June 29, 2022, naming  
13 George Dikian, Qiang Du, and John Doe as Defendants. (ECF 1). Du was  
14 subsequently voluntarily dismissed from this action. (ECF 35). It took  
15 George Dikian (“Dikian”, “Defendant” or “Eitan Z.”) nearly six months to  
16 answer the Complaint. (ECF 33). Initially, Dikian’s use of pseudonyms, in-  
17 accurate addresses, and mailbox services precluded personal service, forcing  
18 VPN to file an application for alternative service. (*See* Decl. of Michael D.  
19 Cilento, Esq. dated September 6, 2023 (“Cilento Dec.”) ¶ 5 citing ECF 17).  
20 After the Court granted that Motion and VPN made alternative service,  
21 Dikian defaulted. (*Id.* ¶ 6 citing ECF 25). Ultimately, Dikian finally  
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1 appeared, the parties stipulated to set aside the default, and Dikian filed an  
2 answer on December 9, 2022. (*Id.* ¶¶ 7-9 citing ECF 33).

3 VPN sued Defendant as “George Dikian,” because that was the name  
4 VPN believed was the true identity of the individual that orchestrated and  
5 committed the fraud. (*Id.* ¶ 10). After more of VPN’s own, early investiga-  
6 tion, it was suspected that “George Dikian” may in fact be a fake identity.  
7 (*Id.* ¶ 11). VPN also discovered an individual that it believed could be the  
8 true identity of “George Dikian,” but VPN could not fully confirm this. (*Id.*  
9 ¶ 12). Defendant Dikian, and his counsel, for their part, refused to confirm,  
10 either formally or informally, the true identity of Defendant Dikian for nearly  
11 a year after the case commenced. (*Id.* ¶ 13).

12 Only after several threats of a motion to compel, the first being via  
13 letter on February 3, 2023, and after more evidence came in that pointed to  
14 the true identity, did “George Dikian” finally on May 8, 2023, disclose his  
15 true identity to VPN. (*Id.* ¶ 14). Even before Dikian would confirm his true  
16 identity, however, VPN informed Dikian via email on April 26, 2023, that  
17 VPN would like to meet and confer regarding a planned motion for leave to  
18 file an amended complaint in the action to, inter alia, name the identity that  
19 VPN strongly believed was Dikian’s true identity, and to add in certain other  
20 allegations, including that of a previous victim of Dikian. (*Id.* ¶ 15). In this  
21 April 26 meet-and-confer email, VPN sent Dikian a redlined proposed  
22 amended complaint that VPN intended to file. (*Id.* ¶ 16). After receiving the  
23

1 proposed amended complaint, Dikian specifically asked VPN through email  
2 from counsel to hold off on filing the amended complaint until after the me-  
3 diation scheduled for June 30, 2023, as it would make the chances of a suc-  
4 cessful mediation greatly increase. (*Id.* ¶ 17).

5 VPN agreed to hold off on filing the motion to amend, and the parties  
6 submitted a stipulation to extend the amended pleadings case deadline to July  
7 28, 2023, and other certain deadlines were extended, and the Court So Or-  
8 dered the stipulation on May 3, 2023. (*Id.* ¶ 18 citing ECF 45). Unfortunately,  
9 the parties could not settle at the mediation; however, at Dikian’s explicit  
10 request at the mediation and through an email from counsel for Dikian, the  
11 parties scheduled and held follow-up talks to see if a resolution could be pos-  
12 sible. (*Id.* ¶ 19 citing ECF 48, Mediation Report (reporting that follow-up  
13 talks were being scheduled)). Unfortunately, those talks too were unsuccess-  
14 ful, and did not conclude until the last conversation between the parties via  
15 phone on July 14, 2023. (*Id.* ¶ 20).

16 During the time from the mediation through to the conclusion of the  
17 further talks (*i.e.*, from June 30 – July 14), the parties, through counsel, had  
18 been negotiating a stipulation to extend case deadlines, including the time to  
19 hear a motion to amend pleadings, since VPN had again agreed to hold off  
20 on filing the motion to amend until the talks concluded. (*Id.* ¶ 21). On July  
21 10, 2023, counsel had a formal meet and confer call on several issues,  
22  
23

1 including the need to stipulate to extend certain case deadlines, including the  
2 deadline for motions to amend pleadings. (*Id.* ¶ 22).

3         However, on the night of July 12, 2023, essentially a day before the  
4 settlement talks fully broke down on July 14, Dikian’s counsel sent an email  
5 withdrawing consent to extend the deadline for an amended pleadings hear-  
6 ing date, and informed undersigned counsel that the time to confer on a mo-  
7 tion to amend pleadings is “long passed.” (*Id.* ¶ 23). Accordingly, VPN’s  
8 counsel informed Dikian’s counsel that contrary to him thinking he could  
9 simply induce VPN into delaying the filing of its amended complaint, and  
10 then rug pull a stipulation, VPN would be moving by ex-parte application for  
11 leave to file an amended complaint within the case deadline date. (*Id.* ¶ 24).  
12 In response to VPN informing Dikian that VPN planned to submit such ap-  
13 plication, Dikian then submitted an application for a TRO and for leave to  
14 file a motion for a protective order to proceed anonymously or pseudony-  
15 mously. (*Id.* ¶ 25).

16         Thereafter, on July 20, 2023, this Court denied Dikian’s TRO, and fur-  
17 ther ordered that VPN would be permitted to file a motion seeking leave to  
18 file an amended complaint within seven (7) days of the Court’s Order on  
19 Dikian’s pseudonym motion. (*Id.* ¶ 26 citing ECF 52 at p. 4). The Court then  
20 denied Dikian’s pseudonym motion on August 29, 2023. (*Id.* ¶ 27 citing ECF  
21 59). VPN now submits this timely motion for leave to file a first amended  
22 complaint. (*Id.* ¶ 28).





1 **LEGAL STANDARD**

2 Federal Rule of Civil Procedure 15 governs the amendment of plead-  
3 ings, which provides that a party may amend its pleading with the opposing  
4 party’s written consent or the court’s leave. Fed. R. Civ. P. 15(a)(2). The  
5 court should freely give leave “when justice so requires.” *Id.* This policy is  
6 “to be applied with extreme liberality.” *Owens v. Kaiser Found. Health Plan,*  
7 *Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citations omitted).

8 In determining whether to freely grant leave, a court considers the fol-  
9 lowing four factors, with all inferences made in favor of the moving party:  
10 (1) undue delay, (2) prejudice to the opposing party, (3) futility, and (4) bad  
11 faith. *See Forman v. Davis*, 371 U.S. 178, 182 (1962); *Griggs v. Pace Amer-*  
12 *ican Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). In the Ninth Circuit,  
13 prejudice to the opposing party carries the greatest weight in the analysis.  
14 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

15 **ARGUMENT**

16  
17 The Court should not deviate from the extremely liberal policy of  
18 freely granting leave when justice so requires. The amendments VPN seeks  
19 to make in its proposed first amended complaint should not be controversial:  
20 VPN only seeks to state the correct name of Dikian, to delete its claim for  
21 RICO, and to add in certain limited allegations learned from discovery that  
22 support the proposed amended complaint’s single claim for fraud. There was  
23

1 no bad faith or delay by VPN, there is no prejudice to Defendant, and the  
2 single claim for fraud cannot be considered futile.

3 **A. No Bad Faith or Undue Delay**

4 Bad faith is shown by evidence of improper purpose to amend a com-  
5 plaint, and the ultimate issue is whether the amendment is an attempt to deny  
6 the opposing party a fair opportunity to be heard. *Thornton v. McClatchy*  
7 *Newspapers, Inc.*, 261 F.3d 789, 793 (9th Cir. 2001). For example, bad faith  
8 can be demonstrated by an attempt to undo jury waiver through an amended  
9 complaint (*id.*), asserting an affirmative defense to incur unnecessary ex-  
10 penses (*Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th  
11 Cir. 2001), or attempting to destroy diversity through amendment. (*Sorosky*  
12 *v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987)).

13 Here, there is no bad faith by VPN in seeking to file a first amended  
14 complaint. The purposes for the amended complaint are simple: VPN needs  
15 to name the correct party, Eitan Z., and VPN wishes to delete its RICO claim  
16 and to add support to its fraud claim. Since the fraud claim was already in the  
17 original complaint, with the identical core allegations, Dikian will not be de-  
18 nied an opportunity to be heard.

19 There also was no undue delay by VPN. Since Dikian refused to pro-  
20 vide his true identity for nearly a year after the case commenced, VPN could  
21 not amend its complaint to name the proper party before such disclosure. *See*  
22 *Cilento Dec.* ¶¶ 10-14. It was only after several threats of a motion to compel,  
23

1 the first being via letter on February 3, 2023, and after more evidence came  
2 in that pointed to the true identity, did “George Dikian” finally on May 8,  
3 2023, disclose his true identity to VPN. (*Id.* ¶ 14).

4 Moreover, Dikian has been on notice of the proposed amended com-  
5 plaint since April 26 when VPN sent Dikian a proposed amended complaint  
6 that contained the significant changes that are also now proposed in the first  
7 amended complaint. (*Id.* ¶¶ 15, 16). The parties then stipulated for VPN to  
8 hold off on filing the amended complaint, and even extended the amended  
9 complaint deadline to reflect that agreement. (*Id.* ¶¶ 17, 18). Before the case  
10 deadline expired for amending pleadings, VPN informed Dikian that VPN  
11 was going to move for leave to file its proposed amended complaint, to which  
12 Dikian filed an ex-parte application to prevent, in order to move the Court for  
13 leave to proceed pseudonymously. (*Id.* ¶ 23-25).

14 Thereafter, on July 20, 2023, this Court denied Dikian’s application,  
15 and further ordered that VPN would be permitted to file a motion seeking  
16 leave to file an amended complaint within seven (7) days of the Court’s Order  
17 on Dikian’s pseudonym motion. (*Id.* ¶ 26 citing ECF 52 at p. 4). The Court  
18 then denied Dikian’s pseudonym motion on August 29, 2023. (*Id.* ¶ 27 citing  
19 ECF 59). Accordingly, given VPN's efforts to date to file its first amended  
20 complaint, and given this Court’s ruling allowing same, it cannot be seriously  
21 argued that there was undue delay on the part of VPN.

1                   **B. No Prejudice to Defendant**

2                   VPN’s proposed amendments to the complaint will not cause prejudice  
3 to Defendant. The proposed amended complaint does not add any new claims  
4 – it actually deletes the second claim in the original complaint for RICO and  
5 simply keeps the only other claim from the original complaint, which is for  
6 fraud. Defendant has been on notice of the single claim for fraud against him  
7 since the original complaint was filed. Not only that, but as described above,  
8 Defendant has also been on the notice that the proposed amended complaint  
9 was going to be filed months ago, with the same significant changes as in the  
10 proposed first amended complaint submitted herewith. Thus, there is nothing  
11 that could catch Defendant by surprise, and nothing to indicate that Defend-  
12 ant would be at an unfair disadvantage in defending or responding to the al-  
13 legations and single claim for fraud in the proposed amended complaint that  
14 was already in the original complaint.

15                   **C. Amended Complaint is Not Futile**

16                   The futility factor inquires whether the amendment provides explana-  
17 tions or allegations to address the deficiencies in the original pleadings. *See*  
18 *IV Sols., Inc. v. Empire HealthChoice Assurance, Inc.*, 800 F. App'x 499, 501  
19 (9th Cir. 2020) (“Dismissal without leave to amend is improper unless it is  
20 clear, upon de novo review, that the complaint could not be saved by any  
21 amendment.”). Here, similar to the above factors, since the proposed  
22 amended complaint does not add any new claims but rather deletes a claim,  
23

1 there can be no argument that the proposed amended complaint’s single claim  
2 for fraud would be futile. The claim is supported by detailed allegations of  
3 Dikian’s orchestration and participation in the fraud. To be sure, there were  
4 no claimed deficiencies in the original complaint to begin with: Defendant  
5 did not move to dismiss the Complaint nor did Defendant move for summary  
6 judgment on any claim in the original complaint. Accordingly, there can be  
7 no serious argument that the proposed amended complaint would be futile.

8  
9 **CONCLUSION**

10 For the foregoing reasons, VPN respectfully requests that the Court  
11 grant leave for VPN to file its first amended complaint.

12 Respectfully Submitted,

13 Dated: September 6, 2023

14 By: Michael Cilento  
Michael D. Cilento

15 **LEWIS & LIN LLC**

16 Brett Lewis, Esq. (*pro hac vice*)

17 Michael D. Cilento, Esq. (*pro hac vice*)

18 **THE HOUCK FIRM**

19 Ji-In Lee Houck (SBN 280088)

20 *Attorneys for Plaintiff*

21 *VPN.COM LLC*

**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record Plaintiff VPN.COM LLC, certifies that this brief contains 2282 words, which complies with the word limit of L.R. 11-6.1.

By: Michael Cilento  
Michael D. Cilento

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