UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

AMERICAN FINANCIAL BENEFITS CENTER, et al.,

Plaintiffs,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

Case No: 17-04817

Related to Case No: 18-00806

ORDER GRANTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Dkt. 24

Plaintiffs American Financial Benefits Center ("AFBC"), Ameritech Financial ("Ameritech"), Financial Education Benefits Center ("FEBC"), and Brandon Frere ("Frere") bring the instant action for declaratory relief against the Federal Trade Commission ("FTC"). The matter is presently before the Court on the FTC's motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Dkt. 24. Having read and considered the papers filed in connection with this matter, and being fully informed, the Court hereby GRANTS the motion, for the reasons stated below.[1]

I. BACKGROUND

A. THE PARTIES

AFBC is a California corporation with its principal place of business in Emeryville, California. First Am. Compl. ("FAC") ¶ 5, Dkt. 19. Ameritech is a California corporation with its principal place of business in Rohnert Park, California. Id. ¶ 6. FEBC is a California corporation with its principal place of business in San Ramon, California. Id. ¶ 7. Frere is an individual residing in Sonoma County, California. Id. ¶ 8. Frere is the

[1] The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

CEO and primary shareholder of AFBC, Ameritech, and FEBC (collectively "the Companies," and together with Frere, "Plaintiffs"). Id.

The FTC is an independent agency of the United States government with its headquarters in Washington, D.C. FAC ¶ 12. The Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 41 *et seq*., prohibits "[u]nfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. Id. § 45(a)(1). The FTC is empowered to enforce the FTCA's provisions by filing either an administrative or civil complaint. Id. §§ 45(a) & (b), 53(b).[2] The FTC commissioners alone are charged with deciding—by majority vote—whether to initiate enforcement proceedings and which enforcement mechanisms to employ. 16 C.F.R. § 4.14.

B. THE TELEMARKETING SALES RULE

In 1994, Congress enacted the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101 *et seq.* Among other things, the Telemarketing Act directs the FTC to promulgate rules prohibiting abusive or deceptive telemarketing acts or practices. Id. § 6102(a). Pursuant to this authority, the FTC promulgated the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Ch. I, Subch. C, Pt. 310. A violation of the TSR constitutes a violation of the FTCA. 15 U.S.C. §§ 57a, 6102(c).

In relevant part, the TSR prohibits sellers and telemarketers from misrepresenting, directly or by implication, "[a]ny material aspect of any debt relief service . . . ." 16 C.F.R. § 310(a)(2)(x). The TSR also prohibits sellers and telemarketers from requesting or receiving payment of any fee or consideration for any debt relief services until and unless: (A) the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of the debt pursuant to a plan or agreement executed by the customer; (B) the

[2] The filing of an administrative or civil complaint requires that the FTC have "reason to believe" that a person, partnership, or corporation has violated or will violate the FTCA. 15 U.S.C. §§ 45(b), 53(b). An administrative complaint is tried before an ALJ and subject to *de novo* review by the Commission. Id. § 45(b); 16 C.F.R. §§ 3.51-3.54. If the Commission determines that the Act was violated, it may issue a cease and desist order, which is subject to judicial review in a federal court of appeal. Id. § 45(b), (c). Alternatively, a civil complaint is filed directly in a federal district court. Id. § 53(b).

customer has made at least one payment pursuant to that plan or agreement between the customer and the creditor or debt collector; and (C) to the extent that debts enrolled in a service are reinitiated, settled, or otherwise altered individually, the fee or consideration satisfies certain proportionality criteria. Id. § 310.4(a)(5)(i).

The TSR defines a "debt relief service" as "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." 16 C.F.R. § 310.2(o).

C. THE COMPANIES' OPERATIONS

AFBC and Ameritech were formed to "fill a void [in the student loan industry] by identifying potential federal student loan relief programs available to consumers, preparing documentation for those consumers, and performing other related student loan processing services." FAC ¶ 19. FEBC was formed to provide "supplemental membership benefits," including, but not limited to, personal financial budgetary analysis, access to official forms and documents, access to legal documents, resume and cover letter documentation, tools for keeping budgets, access to educational websites, financial calculators, printable forms and educational kits, life lock identify theft protection, roadside assistance, tax preparation services, credit repair service discounts, medical/everyday savings, and telemedicine. Id. ¶¶ 19, 23. According to Plaintiffs, FEBC's services "do not fall under the definition of a debt relief service program under the TSR." Id. ¶ 23.

From the time of its formation in 2011 until late 2015, AFBC provided consumers with both the student loan processing services and the supplemental membership benefits. Id. ¶ 20. Plaintiffs allege that the law was then "unsettled" as to "whether the acceptance of fees for student loan document preparation services would be considered an advanced fee under the TSR." Id. ¶ 21. In 2015, amidst this purported uncertainty, Ameritech and FEBC were formed to separately provide the student loan document preparation services and the supplemental membership benefits. Id. ¶¶ 21-22. Although Ameritech contends that the

TSR does not apply to its services, it nevertheless does not accept payment for services until after customers "receive their results." Id. ¶ 21. FEBC's services are offered to Ameritech's customers through an optional membership program for a monthly fee. Id. ¶¶ 21, 23. According to Plaintiffs, this offer is "merely an external upsell." Id. ¶ 23.

For its part, AFBC stopped selling services to new customers in late 2015; however, AFBC continues to provide existing customers with membership services and to assist those customers with annual recertifications that might be required for any federal loan repayment programs in which they are enrolled. Id. ¶ 20.

D. THE FTC INVESTIGATION

According to Plaintiffs, student debt relief programs started coming under "increased scrutiny" from the FTC in late 2016. Id. ¶ 25. Due to "concerns surrounding that scrutiny," Plaintiffs' counsel wrote to the Chairwoman of the FTC in December 2016, seeking guidance on the Companies' practices. Id. The FTC did not respond. Id.

In July 2017, Plaintiffs learned that the FTC was questioning ex-employees of the Companies regarding their practices. Id. ¶ 26. The FTC was also asking ex-employees to sign declarations for the apparent purpose of taking legal action against the Companies. Id. "Having been met with silence on the Companies' request for guidance and facing a lawsuit that could result in the closure of the Companies," Plaintiffs filed the instant action. Id.

Shortly thereafter, the FTC formally revealed its investigation of the Companies. Id. ¶ 27. On October 3, 2017, the Companies received correspondence from FTC staff stating that they had recommended the filing of an enforcement action against the Companies in federal court for alleged violations of the debt relief provision of the TSR. Id. The correspondence was accompanied by a "proposed federal court complaint." Id.

On October 13, 2017, the FTC announced a nationwide "crackdown" on purported student loan debt relief scams, dubbed "Operation Game of Loans." Id. ¶ 29. Operation Game of Loans has resulted in several actions by the FTC targeting such practices. Id. Complaints filed by the FTC in those actions have been accompanied by temporary restraining orders and motions for preliminary injunction. Id.

E. THE INSTANT ACTION

Plaintiffs initiated the instant declaratory relief action on August 19, 2017, Dkt. 1, and filed the operative First Amended Complaint on November 2, 2017, Dkt. 19. They allege jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201. FAC ¶ 10.

The basis for Plaintiffs' claim rests on the allegation that they "learned Defendant FTC was in the final process of gathering information to file a lawsuit against one or more of Plaintiffs on the purported and factually unsupportable basis that the Companies made misrepresentations to consumers, and also violated the debt relief service provision of the [TSR]." Id. ¶ 3. Plaintiffs allege that "the Companies face the dire threat of being shut down without prior notice," and that "a judicial declaration is necessary to ensure Plaintiffs receive fair treatment and do not have their due process rights violated." Id. ¶ 32.

Plaintiffs seek a declaration from this Court that the debt relief provisions of the TSR do not apply to the Companies, or alternatively, that the Companies are in compliance with the debt relief provisions of the TSR. Id. ¶¶ 38-39. They also seek a declaration that they are not making misrepresentations to consumers in violation of the FTCA. Id. ¶ 40.

On November 16, 2017, the FTC filed the instant Motion to Dismiss the First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1). Dkt. 24.[3] The FTC moves to dismiss the action on the grounds that: (1) the Court lacks subject matter jurisdiction to review non-final agency action; (2) the Court lacks subject matter jurisdiction because Plaintiffs' claim for pre-enforcement review is not ripe; and (3) even if the Court has jurisdiction, declaratory relief is inappropriate. Plaintiffs have filed an opposition, Dkt. 30, and the FTC has filed a reply, Dkt. 32.[4]

[3] In light of Plaintiffs' filing of the First Amended Complaint, the Court denied as moot the FTC's motion to dismiss the original complaint. Dkt. 18, 27.

[4] In support of their opposition brief, Plaintiffs also file a request for judicial notice. Dkt. 31. The materials submitted for judicial notice pertain solely to Plaintiffs' arguments regarding ripeness. As discussed below, the Court does not reach the issue of ripeness. The request for judicial notice is therefore DENIED as moot.

On February 7, 2018, the FTC filed an enforcement action against Plaintiffs in the United States District Court for the Northern District of California, seeking injunctive and equitable relief. FTC v. American Financial Benefits Center, et al., No. 3:18-cv-00806. The two actions were deemed related. See Dkt. 38.

II. LEGAL STANDARD

A complaint may be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. "An attack on subject matter jurisdiction may be facial or factual." Edison v. United States, 822 F.3d 510, 517 (9th Cir. 2016). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." Id. (citation omitted). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014).

III. DISCUSSION

A. SUBJECT MATTER JURISDICTION

Plaintiffs invoke the jurisdiction of this Court pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the general federal question statute, 28 U.S.C. § 1331. FAC ¶ 10. The FTC argues that neither statute confers jurisdiction in this case. According to the FTC, the proper—and exclusive—vehicle to obtain judicial review of federal agency action is the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. The FTC further argues that Plaintiffs have not, and cannot, satisfy the jurisdictional prerequisites to review under the APA, which requires a "final agency action for which there is no other adequate remedy in a court." Id. § 704. Plaintiffs respond that the APA does not apply here, but, curiously, fail to identify any other basis for judicial review or the exercise of this Court's jurisdiction. In a footnote, Plaintiffs alternatively argue that, even if the APA applies, "jurisdiction would exist . . . because the actions taken by the FTC would be sufficiently reviewable, and . . . there would be no adequate remedy in court." Opp'n at 6 n.6.

1. The Basis for Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (internal citations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Id. (internal citation omitted). Concomitantly, in suits against the United States, "[s]overeign immunity is an important limitation on the subject matter jurisdiction of federal courts." Vacek v. U.S. Postal Serv., 447 F.3d 1248, 1250 (9th Cir. 2006). "The United States, as sovereign, can only be sued to the extent it has waived its sovereign immunity." Id. (citing Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999)).

Plaintiffs invoke the jurisdiction of this Court pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the general federal question statute, 28 U.S.C. § 1331. As rightly stated by the FTC, the Declaratory Judgment Act "does not create an independent jurisdictional basis for actions in federal court." Marathon Oil Co. v. U.S., 807 F.2d 759, 763 (9th Cir. 1986); see also Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1161 (9th Cir. 2005).[5] Plaintiffs acknowledge as much. Opp'n at 14 (the DJA "does not itself confer federal subject matter jurisdiction"). Thus, the Court must turn its focus to 28 U.S.C. § 1331 and, as discussed below, the APA. See Marathon Oil, 807 F.2d at 763 (assessing subject matter jurisdiction in a suit for declaratory relief regarding agency action pursuant to the "jurisdictional grant" of section 10(c) of the APA).

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," provided that review is not otherwise limited or precluded by statute. 5 U.S.C. § 702. Where a plaintiff seeks judicial review of agency action under the APA, a federal court has subject matter jurisdiction under 28 U.S.C. § 1331. Gallo Cattle Co. v.

[5] Declaratory relief is merely a "remedial arrow in the district court's quiver." Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995).

U.S. Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1999). Additionally, the APA waives the United States' sovereign immunity in actions "seeking relief other than money damages." 5 U.S.C. § 702. Thus, although the APA does not itself confer jurisdiction, it both creates a cause of action and provides a waiver of sovereign immunity in suits seeking judicial review of federal agency action under § 1331. Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1170-71 (9th Cir. 2017).

Judicial review under the APA is limited, however. Navajo Nation, 876 F.3d at 1171 (noting that section 702 preserves existing limitations on judicial review, including those set forth in section 704). Specifically, section 704 provides that only "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added).[6] Section 704's finality requirement is jurisdictional. Ukiah Valley Med. Ctr. v. FTC, 911 F.2d 261, 266 (9th Cir. 1990) ("'final agency action' is a jurisdictional requirement imposed by statute"); accord Or. Nat. Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006); Havasupai Tribe v. Provencio, 876 F.3d 1242, 1248 & n.2 (9th Cir. 2017). Thus, to obtain judicial review, Plaintiffs must satisfy the jurisdictional prerequisites of section 704. Navajo Nation, 876 F.3d at 1171 ("[Section] 704's requirement that to proceed under the APA, agency action must be final or otherwise reviewable by statute is an independent element without which courts may not determine APA claims.").

2. Plaintiffs' Arguments in Opposition

Before turning to whether the jurisdictional prerequisites of section 704 are satisfied, the Court considers Plaintiffs' arguments—none of which are compelling—that the APA does not apply. As a threshold matter, however, the Court addresses not what is raised in, but rather, what is omitted from Plaintiffs' opposition. Specifically, although Plaintiffs

[6] The instant action does not challenge FTC action "made reviewable by statute." The only statute implicated here—the FTCA—does not provide for such review. See Floersheim v. Engman, 494 F.2d 949, 954 (D.C. Cir. 1973) ("No district court action for a declaratory judgment is authorized by the Federal Trade Commission Act."). Plaintiffs do not contend otherwise. Thus, the Court limits its analysis to "final agency action for which there is no other adequate remedy in a court."

assert that the APA is inapplicable, they fail to identify any other basis for judicial review or the exercise of this Court's jurisdiction. "'A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.'" Tosco Corp. v. Comt'ys for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001) (quoting Smith v. McCullough, 270 U.S. 456, 459 (1926)). Plaintiffs fail to carry this burden. Plaintiffs invoke 28 U.S.C. §§ 1331 and 2201 in their complaint. For the reasons discussed above, however, bare citation to these statutes is insufficient to establish jurisdiction. See also Gen. Fin. Corp. v. FTC, 700 F.2d 366, 368 (7th Cir. 1983) (a plaintiff "may not bypass the specific method that Congress provided for reviewing adverse agency action," i.e., the APA, simply by suing the agency in district court under general jurisdiction statues such as 28 U.S.C. § 1331). Although the Court could dismiss for lack of subject matter jurisdiction on this basis alone, the Court nevertheless addresses the substance of Plaintiffs' remaining arguments.

Plaintiffs assert that the APA applies to "adverse administrative actions," and that the instant action is "not administrative in nature." Opp'n at 6 (emphasis in original). Plaintiffs offer no support for this assertion, which the Court finds to be utterly without basis. The APA encompasses all "agency action" within an agency's statutory grant of authority. 5 U.S.C. §§ 701(a)(2), (b)(2) & 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). "According to the legislative history of the APA: 'The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or bas[e]s for the action or inaction.'" FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 238 n.7. (quoting S. Doc. No. 248, 79th Cong., 2d Sess., 225 (1946)). The FTC's statutory grant of authority

includes investigating potential law violations and undertaking enforcement proceedings, either administratively under Section 5 or civilly under Section 13(b). The universe of FTC action at issue here therefore constitutes "agency action" to which the APA applies. Id. (holding that the issuance of an administrative complaint constitutes agency action).

Plaintiffs further assert that the APA is remedial rather than jurisdictional in nature. In support of this assertion, Plaintiffs string together an unintelligible series of quotations—all of which are taken out of context—with wholly unsupported pronouncements. See Opp'n at 6-7. For example (with a quote that lacks an opening quotation mark and ends with an "id." citation to a case that had not yet been cited), Plaintiffs assert that "[']the Court will not hold that the broadly *remedial* provisions of the [APA] are unavailable to review administrative decisions under the 1952 Act in the absence of clear and convincing evidence that Congress so intended.'" Id. at 6 (quoting CCCO-W. Region v. Fellows, 359 F. Supp. 644, 647 (N.D. Cal. 1972) (emphasis therein) (quoting Rusk v. Cort, 369 U.S. 367, 379-80 (1962) (holding that the Immigration and Nationality Act of 1952 does not preclude review under the APA))). The district court decision to which Plaintiffs cite grappled with an issue that has since been decided, i.e., whether the APA itself confers jurisdiction. As stated above, it does not. Nevertheless, for suits under the APA, "'final agency action' is a jurisdictional requirement imposed by statute." Ukiah Valley, 911 F.2d at 266.

Moreover, the fundamental question at issue in Rusk—whether judicial review under the APA was precluded by the statute authorizing agency action—is not implicated here. Plaintiffs profoundly misapprehend this point. The APA provides that, except where "statutes preclude judicial review" or "agency action is committed to agency discretion by law," "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §§ 701(a), 702. Here, the FTC does not move to dismiss on the ground that judicial review is precluded by the FTCA or that the challenged agency action

is committed to agency discretion by law.[7] Consequently, Plaintiffs need not demonstrate otherwise. But Plaintiffs err in believing that sections 701 and 702 aid their cause. To be sure, nothing in the FTCA precludes judicial review of FTC action. See A. O. Smith Corp. v. FTC, 530 F.2d 515, 521 (3d Cir. 1976); accord Wearly v. FTC, 616 F.2d 662, 666 (3d Cir. 1980). However, that simply clears the path for Plaintiffs to obtain judicial review under the APA; it in no way supports the notion that FTC action is broadly reviewable independent of the APA. See Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (holding that judicial review *under the APA* will not be cut off by another statute absent clear and convincing evidence that such was the intent of Congress), abrogated on another ground by Califano v. Sanders, 430 U.S. 99 (1977).

Thus, having disposed of Plaintiffs' arguments, the Court turns to consider the APA's finality requirement.

3. Finality Under the APA

As stated above, finality requires a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The FTC argues that this requirement is not satisfied here. In a footnote, Plaintiffs respond that, even if the APA applies, "the actions taken by the FTC would be sufficiently reviewable and that there would be no adequate remedy in court." Opp'n at 6 n.6. By failing to address the issue outside a "terse one-sentence footnote," Plaintiffs have waived any argument that jurisdiction exits under the APA. Recycle for Change v. City of Oakland, 856 F.3d 666, 673 (9th Cir. 2017) (holding

[7] In a footnote of its reply brief, the FTC asserts for the first time that decisions to initiate an investigation or bring an enforcement action are matters committed to the agency's discretion by law, and as such, are unreviewable. Reply at 4 n.2. Matters raised for the first time in a reply brief are not properly before the Court. Dream Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 995 (9th Cir. 2009) (arguments "not specifically and distinctly argued in [the] opening brief" are waived). Furthermore, although an agency's decision *not* to investigate or enforce is generally unreviewable, Heckler v. Chaney, 470 U.S. 821, 831 (1985), the Supreme Court has left open the question of whether a decision to investigate or enforce is likewise unreviewable. Standard Oil, 449 U.S. at 238 n.7 (declining to address the question of whether the issuance of a complaint is unreviewable as a matter committed to agency discretion in light of the Court's conclusion that the issuance of a complaint is not final agency action). Given the absence of final agency action in this case, *infra*, the Court declines to reach the matter left open by the Supreme Court.

that the plaintiff waived an argument "never raised in its briefs, other than in a terse one-sentence footnote"). Waiver aside, the Court finds that finality under the APA is lacking.

a. Final Agency Action

For agency action to be final, two conditions must be satisfied: (1) "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." U.S. Army Corps. of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). These conditions are not satisfied here. The challenged FTC actions—its investigation, decision to file a complaint, and filing of a complaint—are of an "interlocutory nature." Id. No rights, obligations or legal consequences are determined thereby. Id. Thus, they do not constitute final agency action.

The Supreme Court's decision in Standard Oil, wherein it held that the issuance of an administrative complaint to initiate FTC enforcement proceedings is not final agency action, is instructive. 449 U.S. 232, 239 (1980). In that case, an investigation led the FTC to issue a complaint against eight major oil companies. Id. at 234. One oil company sued the FTC, seeking a declaration that the issuance of the complaint was unlawful and requiring it to be withdrawn. Id. at 235. As in the instant case, wherein Plaintiffs allege that an enforcement action is "factually unsupportable," FAC ¶ 3, the plaintiff in Standard Oil attacked the FTC's complaint on the ground that it was issued without the requisite "reason to believe" that the company had violated the FTCA. 449 U.S. at 235.

The Supreme Court held that the issuance of a complaint, i.e., an "averment of 'reason to believe,'" is "not a definitive statement of position." Id. at 241. Rather, it represents "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." Id. The Supreme Court noted that a complaint is not conclusive and may be dismissed following a hearing. Id. Further, even if the FTC enters a cease and desist order at the conclusion of the proceeding, the company "is still not bound by the Commission's decision until judicial review is complete or the opportunity to seek

review has lapsed." Id. "Thus, the averment of reason to believe is a prerequisite to a definitive agency position on the question whether [the company] violated the Act, but itself is a determination only that adjudicatory proceedings will commence." Id. at 241-42. In sum, the issuance of a complaint has "no legal force or practical effect . . . other than the disruptions that accompany any major litigation." Id. at 243.

The circumstances of the instant case are similar to those in Standard Oil, and its holding controls. 449 U.S. at 247 ("Because the Commission's issuance of a complaint . . . is not 'final agency action' under § 10(c) of the APA, it is not judicially reviewable before administrative adjudication concludes."); Ukiah Valley, 911 F.2d at 263 ("The district court correctly determined that the FTC's issuance of an administrative complaint did not constitute 'final agency action' and that judicial review was therefore premature under Standard Oil."). As of the filing of this action—and the operative pleading—the FTC had not yet filed a complaint. However, if the issuance of a complaint does not constitute final agency action, then *a fortiori*, the investigation leading up to the decision to file a complaint does not constitute such action. See also Gen. Fin. Corp., 700 F.2d at 368 (holding that the district court lacked jurisdiction over an action challenging the lawfulness of an FTC investigation).

The fact that the FTC elected to file a civil, as opposed to administrative complaint, is of no consequence. See City of Oakland v. Holder, 901 F. Sup. 2d 1188, 1196 (N.D. Cal. 2013) (finding that "the DOJ's filing of [a] forfeiture action" did not constitute "'final agency action' under § 704 of the APA," and dismissing a complaint challenging the forfeiture action for lack of subject matter jurisdiction), aff'd sub nom. City of Oakland v. Lynch, 798 F.3d 1159, 1166-67 (9th Cir. 2015) ("The Government's decision to file the forfeiture action is not 'final,' because it is not an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'") (quoting Bennett v. Spear, 520 U.S. at 177-78) (internal quotation marks and citations omitted). Indeed, the filing of a civil complaint "simply makes evident the [FTC's] intention to challenge the

status quo; any rights, obligations, and legal consequences are to be determined later by a judge." Lynch, 798 F.3d at 1166-67.

Without addressing the holdings of the foregoing authorities, Plaintiffs assert that they are "readily distinguishable, and in no way undermine[] the validity of Plaintiffs' claims." Opp'n at 7. Specifically, Plaintiffs note that the complainants in General Finance sought to enjoin an ongoing FTC investigation, whereas, in the instant action, Plaintiffs do not seek "to prevent the FTC from proceeding with its investigation (which is, of course, concluded)." Opp'n at 7; id. at 8. Similarly, Plaintiffs note that the complainants in Standard Oil and Ukiah Valley sought to halt administrative proceedings that had already commenced, whereas, in the instant action, an enforcement proceeding had not (as of the filing of the operative complaint) begun. Id. Plaintiffs further note that, unlike in the aforementioned cases, the pleading here does not allege that the FTC's investigation or complaint is unlawful. Plaintiffs identify these distinctions without articulating the import thereof. This is unsurprising, given that they are distinctions without a difference.

First, any distinction between the posture of the FTC investigation in this case and the cited cases is immaterial. To conclude otherwise would lead to the illogical result that, while neither an investigation nor the filing of a complaint are final agency actions subject to judicial review, the interim decision to conclude an investigation and file a complaint is a final agency action. Plaintiffs offer no support for this unsound proposition, and the Court finds none. Second, any distinction between the nature of the claims raised in this case and the aforementioned cases is merely a matter of framing. Plaintiffs seek a declaration that the Companies either are not subject to or are in compliance with the TSR. A declaration of that sort would have the same practical effect as a declaration that the FTC investigation or complaint lacks the requisite foundation or is unlawful; in either event, the FTC would be precluded from pursuing an enforcement action. See also Opp'n at 6 ("Plaintiffs are challenging the FTC's right to bring any action against them under the TSR . . . ."). In view of the foregoing, the Court finds that Standard Oil is controlling, and that Plaintiffs have failed to demonstrate otherwise.

b. Other Adequate Remedy

Additionally, Plaintiffs fail to demonstrate the absence of another "adequate remedy." As the FTC rightly states, if and when the FTC initiates a civil enforcement action (which it now has), Plaintiffs will be able to present all of the defenses and arguments they seek to advance in this action. See Opp'n at 4 n.2 (noting that the FTC's civil complaint alleges "the exact same claims against the exact same parties"). Likewise, the remedy Plaintiffs seek—a ruling that the Companies are either not subject to or in compliance with the TSR—will be available in that action. As discussed above, the filing of the enforcement action simply makes evident the FTC's intention to challenge the Companies practices; "any rights, obligations, and legal consequences are to be determined later by a judge." Lynch, 798 F.3d at 1167. Thus, "there is another adequate remedy—the [enforcement] action." Id. (holding that judicial review was not available under the APA because the filing of a forfeiture action was not a final agency action and the forfeiture action itself provided an adequate remedy).

The proper forum to adjudicate whether the Companies' practices are subject to and in compliance with the TSR is in the enforcement proceeding. See X-Tra Art v. Consumer Prod. Safety Comm'n, 969 F.2d 793, 796 (9th Cir. 1992) (holding that the proper forum to adjudicate whether the plaintiff's product was a banned substance under the Federal Hazardous Substance Act was in the condemnation proceeding instituted by the Commission, not the declaratory action filed by the plaintiff). Further, the opportunity to appear and be heard in the enforcement action "satisfies the requirements of due process." Ewing v. Mytinger & Casselberry, 339 U.S. 594, 598 (1950) (no hearing is required at a preliminary stage of an administrative proceeding, i.e., upon a finding of probable cause, so long as a hearing is held before any order becomes effective); see also X-Tra Art, 969 F.2d at 796 (the Commission's election to proceed directly with a condemnation proceeding in district court, as opposed to an administrative enforcement proceeding, does not violate due process). Although Plaintiffs allege that "the Companies face the dire threat of being shut down without prior notice," FAC ¶ 32, that contention is without merit. See 15 U.S.C.

§ 53(b) (providing that, in an action to enjoin any false advertisement, the Commission may obtain a temporary restraining order or preliminary injunction only "after notice to the defendant"). Thus, contrary to Plaintiffs' allegation, a declaratory relief action is not necessary to ensure their "fair treatment." FAC ¶ 32.

4. Summary

Although Plaintiffs have attempted to plead around the APA, they fail to identify any other cause of action arising out of the facts alleged. As the FTC has shown, a suit seeking judicial review of agency action—in this case, investigation into the lawfulness of the Companies' practices and initiation of enforcement proceedings related thereto—may be brought only if the finality requirement of section 704 is met. Here, Plaintiffs have failed to demonstrate either a final agency action subject to judicial review or the absence of another adequate remedy in court. Accordingly, jurisdiction is lacking.

B. RIPENESS & DISCRETION TO DENY DECLARATORY RELIEF

The FTC also moves to dismiss the First Amended Complaint on the grounds that Plaintiffs' claims for pre-enforcement review are not ripe and that declaratory relief is inappropriate. In light of the Court's determination regarding finality, it need not consider whether the case is ripe or the appropriateness of declaratory relief. The Court pauses, however, to address one final argument raised by Plaintiffs.

In support of their argument that the APA does not preclude review, Plaintiffs cite Abbott Laboratories and its progeny for the proposition that pre-enforcement review of agency action is routinely permitted. See Opp'n at 8-9. Plaintiffs' discussion confuses the issues of finality and ripeness; though similar, they are "analytically distinct" doctrines. Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1021, 1028 (D.C. Cir. 1991).

Without delving into the contours of the ripeness doctrine, it suffices for present purposes to note that ripeness itself requires final agency action. Pence v. Andrus, 586 F.2d 733, 737 (9th Cir. 1978) (holding that fitness for judicial decision—one of the two prongs to establish ripeness— "requires a finding that the agency action is final and that the issues involved are legal ones") (citing Abbott Labs., 387 U.S. at 149 (finding that the regulations

at issue were "final agency action" in deciding that the matter was ripe for review)). Plaintiffs' reliance on Abbott Laboratories and its progeny is therefore misplaced.

C. LEAVE TO AMEND

In the event that this Court dismisses the First Amended Complaint, Plaintiffs request leave to amend. Specifically, Plaintiffs assert:

> Plaintiffs can correct any legal or factual issues that need to be addressed in an amended pleading. If this Court believes the [FAC] to be inadequate, Plaintiffs can remedy any problem, including the addition of potential federal causes of action, addressing the APA with more detail, and/or add[ing] other appropriate relief not currently pled. In addition, the facts of this matter are changing by the day. As noted, the FTC very well may have filed its own federal court complaint by the time of the hearing in this matter.

Opp'n at 15.

Although leave to amend should be given freely, a district court may dismiss an action without leave where a plaintiff's proposed amendments could not possibly cure the pleading deficiencies. Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011). "When a proposed amendment would be futile, there is no need to prolong the litigation by permitting further amendment." Gardner v. Martino, 563 F.3d 981, 990 (9th Cir. 2009) (quoting Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1088 (9th Cir. 2002) (affirming denial of leave to amend where plaintiff could not cure a basic flaw, i.e., a lack of standing, in their pleading)).

Here, Plaintiffs' "proposed amendments" are ill-defined and ineffective; they amount to nothing more than a bare request for leave to amend, despite the fact that Plaintiffs already amended their complaint without success after the FTC filed its earlier motion to dismiss. Moreover, even the vaguely defined proposed amendments—i.e., addressing the APA and updating the factual background to include the filing of the FTC's civil complaint—would be futile. Notwithstanding Plaintiffs' attempt to plead around the APA, the Court has analyzed the APA's requirements and concludes that judicial review thereunder is precluded. As discussed in detail above, the actual filing (as opposed to the anticipated filing) of the FTC's civil complaint does not alter the finality analysis.

In sum, Plaintiffs' proposed amendments cannot cure the fundamental and fatal deficiencies in their complaint, and leave to amend is therefore DENIED.

IV. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), Dkt. 24, is GRANTED, and the First Amended Complaint is DISMISSED without leave to amend.

2. The Clerk shall close the file and terminate all pending matters.

3. The CMC scheduled for July 12, 2018, at 2:45 p.m., see Dkt. 122, shall remain on calendar in Case No. 18-00806.

4. The joint referral for a mandatory settlement conference with a magistrate judge, see Dkt. 126, shall remain in effect as to Case No. 18-00806.

IT IS SO ORDERED.

Dated: May 29, 2018

Saundra B Armstrong

SAUNDRA BROWN ARMSTRONG
Senior United States District Judge