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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STERLING PARK, LLC, Plaintiff, v. AXOS FINANCIAL, INC., et al., Defendants.

Case No.: 21-CV-01347 W (BLM)

ORDER GRANTING (1) REQUEST FOR JUDICIAL NOTICE [DOC. 12-1]; (2) AXOS’ MOTION TO DISMISS WITHOUT LEAVE TO AMEND [DOC. 12]; AND (3) HAMILTON’S MOTION TO DISMISS WITH LEAVE TO AMEND [DOC. 13]

Pending before the Court are motions to dismiss the First Amended Complaint (“FAC”) under Federal Rule of Civil Procedure 12(b) filed by Defendants Axos Financial Inc. (“Axos Financial”) and Hamilton Insurance DAC (“Hamilton”). Along with the motion, Defendant Axos Financial has also filed a request for judicial notice. Plaintiff Sterling Park, LLC (“Sterling”) opposes.

The Court decides the matters on the papers submitted and without oral argument. Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** the request for judicial notice [Doc. 12-1], **GRANTS** Axos Financial’s motion to dismiss [Docs. 12]

1 **WITHOUT LEAVE TO AMEND**, and **GRANTS** Hamilton’s motion to dismiss [Doc.
2 13] **WITH LEAVE TO AMEND**.

3
4 **I. BACKGROUND**

5 On March 3, 2020, Plaintiff Sterling Park, LLC refinanced an investment property
6 located in Highland, California (the “Property”) with Bank of the Internet.¹ (*First*
7 *Amended Compl.* (“FAC”) [Doc. 10] ¶ 10.) The refinance was for \$790,000. (*Id.* ¶ 10.)
8 Following the refinance, issues arose between Sterling and the lender regarding the
9 Property’s insurance coverage.

10 As of January 26, 2015, Sterling alleges it had 2 insurance policies for liability and
11 hazard, including flood. (*FAC* ¶ 11, citing Ex. B [Doc. 10-2] and Ex. C [Doc. 10-3].²)
12 On that date, “pursuant to the mortgage agreement, Bank of the Internet demanded to
13 escrow [Sterling’s] flood insurance so that [Sterling] paid the escrow amount and Bank of
14 the Internet paid the insurance company....” (*Id.* ¶ 12, citing Ex. F [Doc. 10-16].³) The
15 following year, Sterling alleges it received notice that “Bank of the Internet would now
16 be Defendant AXOS.” (*Id.* ¶ 13.)

17 In January 2021, Sterling learned that Axos Financial required more flood
18 insurance coverage. (*FAC* ¶ 17.) Axos Financial’s agent told Sterling the amount of
19 flood insurance for a small house and small apartment on the property had to “each be
20 equal to the mortgage on the property which was \$709,000.00 for a total flood insurance
21 coverage of \$1,418,000.00.” (*Id.* ¶ 18.) Sterling contends that although paragraph 6.10
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24 ¹ The FAC alleges Defendant Axos Financial, Inc. was formerly Bank of the Internet and is now
25 commonly known as Axos Bank. (*Id.* ¶ 2.)

26 ² Contrary to this allegation, Exhibit C to the FAC indicates there was “no” coverage for “flood.” (*FAC*,
27 Ex. C at p. 1.)

28 ³ The allegation is not supported by Exhibit F because the exhibit involves coverage for the policy
period 10/24/20 to 10/24/21.. (*FAC*, Ex. P at p. 1.)

1 of the contract only required Sterling to “insure the Property against loss or damage ‘not
2 to exceed full replacement cost,’” which was \$132,800 not \$1,418,000, Axos Financial
3 increased the flood insurance premium to \$10,438.56 per year. (*Id.* ¶ 18, citing Ex. M
4 [Doc. 10-13].) This increased Sterling’s mortgage payment by \$869.88 per month (i.e.,
5 the increased escrow payment) to \$4,785.00. (*Id.*)

6 On March 3, 2021, Axos Financial sent a letter disputing the city designation on
7 the proof of property insurance and insisted Sterling needed to contact the insurance
8 company to change it to Highland instead of San Bernardino. (*FAC* ¶ 19.) The same
9 day, Axos Financial sent another letter informing Sterling, “[b]ecause we did not have
10 evidence that you had hazard insurance on the property listed above, we bought insurance
11 on your property and added the cost to your mortgage loan account.” (*Id.* ¶ 21.)

12 On March 29, 2021, Sterling contends it provided “proof of insurance with the
13 address correction” and received confirmation from Axos Financial’s agent that it was
14 received and that the “corrected proof of insurance was ... a sufficient amount as
15 previously requested.” (*FAC* ¶ 22, citing Ex. L.⁴)

16 On May 1, 2021, Sterling “was shocked to receive a mortgage bill for \$10,626.69.”
17 (*FAC* ¶ 23, citing Ex. M.) Sterling alleges the bill reflected an increase by Axos
18 Financial for the cost of Sterling’s force-placed insurance “from \$869.88 per month to
19 \$6,711.57 per month, for a total annual insurance cost of \$80,538.84. This was for
20 [flood] and hazard insurance for which [Sterling] had paid \$8,833 for the full year.” (*Id.*
21 ¶ 23.) This represented an increase of \$5,841.69 per month (over 750%) for the force-
22 placed insurance. (*Id.*, citing Ex. M.) Sterling appears to allege the force-place insurance
23 policy was with Defendant Hamilton Insurance, DAC. (*See id.* ¶ 3.) Axos Financial
24 continued charging Sterling the increased amount through September 2021. (*Id.* ¶ 24.)
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28 ⁴ In the attached Exhibit L, Axos Financial’s alleged agent states: “Hi, [¶] Received your email and will
get this updated to the account.” There is no statement regarding the sufficiency of the coverage.

1 On July 27, 2021, Sterling filed this lawsuit. The original Complaint alleged four
2 state-based claims, and one federal claim for violation of the Real Estate Settlement and
3 Procedures Act (RESPA). (*Compl.* [Doc. 1].) Defendants moved to dismiss the
4 Complaint on the basis that subject-matter jurisdiction was lacking because the sole
5 federal claim was insufficiently pled.

6 On September 15, 2021, Sterling filed the FAC, which dropped the RESPA claim
7 and added a RICO claim under 18 U.S.C. §1962(c). (*See FAC.*) Defendants again argue,
8 among other things, that subject-matter jurisdiction is lacking because Sterling cannot
9 state a RICO violation. (*See Axos P&A* [Doc. 12]; *Hamilton P&A* [Doc. 13].)

10 11 **II. LEGAL STANDARD**

12 The court must dismiss a cause of action for failure to state a claim upon which
13 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
14 tests the complaint's sufficiency. See N. Star Int'l v. Ariz. Corp. Comm'n., 720 F.2d
15 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if doubtful in
16 fact," are assumed to be true. Id. Additionally, all factual allegations must be construed
17 "in light most favorable to the nonmoving party." Gompper v. VISX, Inc., 298 F.3d 893,
18 895 (9th Cir. 2002); see also Walleri v. Fed. Home Loan Bank of Seattle, 83 F.3d 1575,
19 1580 (9th Cir. 1996). However, court is not required to accept legal conclusions couched
20 as facts, unwarranted deductions, or unreasonable inferences. Papasan v. Allain, 478
21 U.S. 265, 286 (1986); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.
22 2001).

23 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
24 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his
25 'entitlement to relief' requires more than labels and conclusions, and a formulaic
26 recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly,
27 127 S.Ct. 1955, 1964 (2007). Instead, the allegations in the complaint "must be enough
28 to raise a right to relief above the speculative level." Id. at 1964-65. A complaint may be

1 dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient
2 facts under a cognizable theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
3 534 (9th Cir. 1984).

4 Generally, courts may not consider material outside the complaint when ruling on a
5 motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,
6 1555 n.19 (9th Cir. 1990). However, courts may consider material properly subject to
7 judicial notice without converting the motion into one for summary judgment. Barron v.
8 Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

9
10 **III. REQUEST FOR JUDICIAL NOTICE**

11 Federal Rule of Civil Procedure 201 permits a court to take judicial notice of an
12 adjudicative fact if it is “not subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact
13 is “not subject to reasonable dispute” if it is “generally known,” or “can be accurately and
14 readily determined from sources whose accuracy cannot reasonably be questioned.” Id.
15 201(b)(1)-(2). Under this rule, a court may “take judicial notice of matters of public
16 record without converting a motion to dismiss into a motion for summary judgment,” but
17 it “cannot take judicial notice of disputed facts contained in such public records.” Khoja
18 v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018).

19 Axos Financial requests judicial notice of two documents: (1) a printout from the
20 Federal Deposit Insurance Corporation (FDIC) website for AXOS Bank detailing the
21 Bank Holding Company Ownership and Affiliates and (2) a printout from the California
22 Secretary of State website for AXOS Financial, Inc., detailing the business entity. (*Axos*’
23 *RJN* [Doc. 12-1] 2:10–3:5.) Judicial notice of these documents is appropriate. These are
24 matters of public record and Sterling does not dispute the facts contained therein.

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1 **IV. DISCUSSION**

2 **A. Sterling failed to oppose Hamilton’s motion.**

3 Hamilton contends the motion to dismiss should be granted because Sterling failed
4 to oppose the motion. (*See Notice of Non-Opp’n* [Doc. 17] 2:16–17.) The Court agrees.

5 The Southern District of California Local Rules lay out the procedure for opposing
6 a motion (or not opposing a motion): “each party opposing a motion ... must file that
7 opposition or statement of non-opposition with the Clerk and serve the movant or the
8 movant’s attorney not later than fourteen (14) *calendar* days prior to the noticed hearing.”

9 Civ L.R. 7.1.e.2 (emphasis in original). “The opposition must contain a brief and
10 complete statement of all reasons in opposition to the position taken by the movant”

11 Id. 7.1.f.3.b. “If an opposing party fails to file the papers in the manner required by Civil
12 Local Rule 7.1.e.2, that failure may constitute a consent to the granting of a motion”

13 Id. 7.1.f.3.c.

14 Hamilton was not served with an opposition. (*Notice of Non-Opp’n* at 2:12.)
15 Additionally, although Sterling filed a document and identified it on the docket as an
16 opposition to Defendant Hamilton’s motion, the document is an exact copy of Sterling’s
17 opposition to Axos Financial’s motion to dismiss. (*See Opp’n to Hamilton’s MTD* [Doc.
18 15].) It fails to address or even identify any of Hamilton’s arguments, which include
19 significant differences from Axos Financial’s arguments. While Axos Financial’s motion
20 primarily focuses on the RICO claims and jurisdictional issues (*see Axos’ P&A* [Doc.
21 12]), Hamilton’s motion addresses standing issues, as well as concerns of specificity in
22 the pleadings with respect to Hamilton in the civil fraud and RICO claims (*see*

23 *Hamilton’s P&A* [Doc. 13]).⁵ Sterling therefore also failed to provide any analysis or
24 basis for opposing Hamilton’s arguments. For these reasons, the Court finds Sterling’s
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27 ⁵ Although Hamilton raises standing, the cases it cites as support appear to stand for the proposition that
28 Sterling does not have standing to assert breach of contract claims. It is unclear whether those cases also
preclude Sterling from suing Hamilton for RICO on the basis of standing. Because the Court ultimately
concludes that the FAC fails to state a RICO claim, it declines to decide the standing issue at this time.

1 failure to comply with Civil Local Rule 7.1.e.2 constitutes consent to granting Hamilton’s
2 motion.⁶ See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995) (“Failure to follow a
3 district court’s local rules is a proper ground for dismissal.”)
4

5 **B. Axos Financial failed to name the correct party.**

6 Axos Financial contends that the FAC should be dismissed because the
7 transactions at issue were between Sterling and Axos Bank, not Axos Financial. (*Axos’*
8 *P&A* at 4:22–5:5.) In support of this argument, Axos Financial relies on the exhibits
9 attached to its request for judicial notice, which confirm that Axos Financial, Inc., is an
10 entirely separate and distinct entity from Axos Bank. (*Id.* 5:6–12; *see RJN*, Ex. A, Ex.
11 B.)

12 Nowhere in the opposition does Sterling respond to Axos Financial’s argument,
13 nor does it dispute that the exhibits establish Axos Financial is a separate and distinct
14 entity from Axos Bank. (*See Opp’n to Axos MTD* [Doc. 14] 15:19–16:11.) Nor does
15 Sterling contend that Sterling Financial was even remotely involved in the events at issue
16 in this case or has any relationship to this case. For these reasons, the Court will grant
17 Axos Financial’s motion to dismiss without leave to amend.
18

19 **C. The FAC’s fails to state a RICO claim.**

20 Because the sole basis for subject-matter jurisdiction is Sterling’s RICO claim, the
21 Court will also evaluate Defendants’ arguments that the FAC fails to state a RICO
22 violation.

23 To state a RICO claim, a plaintiff must allege facts demonstrating defendants
24 participated in “(1) the conduct of (2) an enterprise that affects interstate commerce (3)
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27 ⁶ Axos Financial also points out that Sterling filed the opposition to its motion four days late in violation
28 of the Local Rules. The Court nevertheless reaches the merits of Axos Financials’ arguments because
the arguments establish leave to amend is not warranted as to Axos Financial.

1 through a pattern (4) of racketeering activity or collection of unlawful debt.” Eclectic
2 Props. E., Ltd. Liab. Co. v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014).
3 “To show the existence of an enterprise under the second element, plaintiffs must plead
4 that the enterprise has (A) a common purpose, (B) a structure or organization, and (C)
5 longevity necessary to accomplish the purpose.” *Id.* (citing Boyle v. United States, 556
6 U.S. 938, 946 (2009)). The fourth element of racketeering activity requires predicate
7 acts, which in this case are alleged to be mail and wire fraud under 18 U.S.C. §§ 1341
8 and 1343. “The mail and wire fraud statutes are identical except for the particular
9 method used to disseminate the fraud, and contain three elements: (A) the formation of a
10 scheme to defraud, (B) the use of the mails or wires in furtherance of that scheme, and
11 (C) the specific intent to defraud.” *Id.* (citing Schreiber Distrib. Co. v. Serv-Well
12 Furniture Co., Inc., 806 F.2d 1393, 1399 (9th Cir. 1986)).

13 As explained below, Sterling’s RICO allegations fail to remotely establish any of
14 these elements.

16 **1. Enterprise**

17 “Section 1961(4) describes two categories of associations that come within the
18 purview of the ‘enterprise’ definition. The first encompasses organizations such as
19 corporations and partnerships, and other ‘legal entities.’ The second covers ‘any union or
20 group of individuals associated in fact although not a legal entity.’” United States v.
21 Turkette, 452 U.S. 576, 581-82 (1981) (citing 18 U.S.C. § 1961(4)).

22 Sterling appears to allege Axos Financial is part of an “associated-in-fact”
23 enterprise.⁷ An “association-in-fact enterprise is ‘a group of persons associated together
24 for a common purpose of engaging in a course of conduct.’” Boyle v. U.S., 556 U.S.

26
27 ⁷ Although the FAC does not specify which enterprise theory Sterling is relying on, the Court reads the
28 FAC in a light most favorable to Sterling, which warrants analyzing under an association-in-fact
enterprise. Additionally, Sterling has signaled in the opposition that it is relying on an association-in-
fact theory to prove enterprise. (*See Opp’n to Axos’ MTD* at 8:26.)

1 938, 946 (2009). Such an enterprise “must have at least three structural features: a
2 purpose, relationships among those associated with the enterprise, and longevity
3 sufficient to permit these associates to pursue the enterprise’s purpose.” Id. at 945.
4

5 **i. Common Purpose**

6 Though Sterling argues that it has alleged the existence of a common purpose (*see*
7 *Opp’n to Axos’ P&A* 9:2), the FAC contains “no specific facts indicating that defendants
8 acted with an objective unrelated to ordinary business or government aims.” Comm. to
9 Protect Our Agric. Water v. Occidental Oil & Gas Corp., 235 F. Supp. 3d 1132, 1175
10 (E.D. Cal. 2017). Once the conclusory allegations are stripped from the FAC, all that
11 appears is an ordinary business dispute between Sterling and its lender relating to
12 whether Sterling had sufficient hazard insurance on the Property and whether the lender’s
13 purchase of force-placed insurance was proper. (*See FAC* ¶¶ 21–24, 42, 44.) These
14 allegations fail to suggest a common purpose even remotely. Gomez v. Guthy-Renker,
15 LLC, 2015 WL 4270042, at *11 (C.D. Cal. July 13, 2015) (“RICO liability must be
16 predicated on a relationship more substantial than a routine contract between a service
17 provider and its client.”). *cf.* Odom v. Microsoft Corp., 486 F.3d 541, 543 (9th Cir.
18 2007) (finding a RICO enterprise’s common purpose was adequately plead where the
19 complaint alleged specific facts describing the fraudulent means used to carry out the
20 scheme). Sterling, therefore, failed to properly allege the common-purpose element.
21

22 **ii. Structure/Organization and Continuity.**

23 Along with a common purpose, a plaintiff must sufficiently allege an “ongoing
24 organization” to adequately plead an enterprise. Turkette, 452 U.S. at 583. “An ongoing
25 organization is ‘a vehicle for the commission of two or more predicate crimes.’” Odom,
26 486 F.3d at 552. Moreover, a plaintiff must also sufficiently allege “that the various
27 associates function as a continuing unit.” Turkette, 452 U.S. at 583.
28

1 Here, the closest Sterling comes to attempting to allege an ongoing organization is
2 the boilerplate allegation that “Defendant AXOS and Defendant HAMILTON have
3 entered a non-competitive and exclusive business relationship/conspiracy whereby
4 Plaintiff was forced into paying for force-placed insurance provided by Defendant
5 HAMILTON, where the cost was far in excess of the value provided by comparative
6 companies to profit both Defendants.” (*FAC* ¶ 6.) This allegation is entirely conclusory.
7 There are no facts remotely suggesting an “organization.” Similarly, there are no facts
8 suggesting continuity. This element is not sufficiently pled.

9 10 **2. Conduct**

11 The RICO statute states that a defendant must “conduct or participate, directly or
12 indirectly, in the conduct of [the] enterprise’s affairs....” 18 U.S.C. § 1962(c). More
13 than mere participation in the enterprise’s affairs is required as RICO liability only
14 applies to “those who participate in the operation or management of an enterprise through
15 a pattern of racketeering activity.” *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993).
16 Thus, “one must have some part in directing [the enterprise’s] affairs.” *Id.* at 179. This
17 means RICO liability “depends on showing that the defendants conducted or participated
18 in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs.” *Cedric Kushner*
19 *Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (citing *Reves*, 507 U.S. at 185)
20 (emphasis in original).

21 Sterling has failed to allege any facts remotely suggesting Defendants did anything
22 except participate in the conduct of their own business affairs. See *In re Jamster Mktg.*
23 *Litig.*, 2009 WL 1456632, at *5 (S.D. Cal. May 22, 2009) (finding RICO claims were not
24 adequately plead because, after plaintiff’s legal conclusions were set aside, all that
25 remained was “conduct consistent with ordinary business conduct and an ordinary
26 business purpose”). Thus, Sterling has failed to adequately plead the conduct element.

1 **3. Racketeering**

2 To prove racketeering activity, a plaintiff must allege one of several predicate acts
3 enumerated in 18 U.S.C. § 1961(1). In this case, Sterling has alleged mail and wire fraud
4 under 18 U.S.C. §§ 1341 and 1343. “The mail and wire fraud statutes are identical
5 except for the particular method used to disseminate the fraud, and contain three
6 elements: (A) the formation of a scheme to defraud, (B) the use of the mails or wires in
7 furtherance of that scheme, and (C) the specific intent to defraud.” Eclectic Props. E.,
8 LLC, 751 F.3d at 997. Rule 9(b)’s heightened particularity pleading standard only
9 applies to “the factual circumstances of the fraud itself” while “the state of mind ... of the
10 defendants may be alleged generally.” Odom, 486 F.3d at 554. Thus, “the pleader must
11 state the time, place, and specific content of the false representations as well as the
12 identities of the parties to the misrepresentation.” Schreiber Distrib. Co., 806 F.2d at
13 1401.

14 The FAC is devoid of allegations suggesting the formation of a scheme to defraud.
15 There are no allegations satisfying the particularity requirement regarding when or how
16 the mail or wires were used for any purported scheme. There is also nothing suggesting
17 either Defendant had an intent to defraud. In short, the FAC fails each of the elements
18 required to show racketeering activity predicated on mail and wire fraud. See Gustafson
19 v. BAC Home Loans Servicing, LP, 2012 WL 7071469, at *6 (C.D. Cal. Dec. 20, 2012)
20 (dismissing plaintiff’s RICO claim when plaintiff’s allegations lacked the requisite
21 “specific content of the false representations or omissions and fail[ed] to connect any of
22 the Defendants to the alleged predicate acts with anything more than a sweeping
23 allegation that each Defendant committed the predicate act”).

24
25 **4. Pattern**

26 A “‘pattern of racketeering activity’ requires at least two acts of racketeering
27 activity” 18 U.S.C. § 1961(5). Because Sterling has failed to adequately allege any
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1 predicate acts to prove racketeering activity above, Sterling has also failed to plead this
2 element.

3
4 **D. State Law Claims**

5 Federal jurisdiction hinges on whether Sterling can plead a RICO claim.⁸ Given
6 the numerous hurdles Sterling faces in repairing the RICO claim, the Court reserves
7 judgment on the state law issues until it becomes clear this Court has subject-matter
8 jurisdiction.

9
10 **E. Leave to Amend**

11 Sterling requests leave to amend the FAC. (*Opp'n* [Doc. 14] 15:20.) However, for
12 the reasons stated above, the allegations in the FAC do not come close to alleging a
13 RICO claim. This is particularly true with respect to Hamilton, which is rarely
14 mentioned in the FAC. Instead, the allegations strongly suggest this case involves a
15 routine business dispute between Sterling and the lender related to the force-placed
16 insurance. Nor does Sterling's opposition identify any facts suggesting it can cure the
17 deficiencies with the RICO claim.

18 Nevertheless, Federal Rule of Civil Procedure 15(a)(2) provides that courts
19 "should freely give leave when justice so requires." Given this standard, the Court will
20 grant Sterling one opportunity to amend the FAC to state a RICO claim.


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26 ⁸ Although Sterling has served the wrong entity in Axos Financial, Inc., Sterling's FAC indicates that it
27 intended to sue Axos Bank who "is headquartered" in San Diego. (*FAC* ¶ 2.) As Sterling is an LLC
28 with members residing in New York City and San Francisco, complete diversity is not met. (*Id.* ¶ 1.)
Moreover, the heavy prevalence of state law claims and early nature of the suit point against exercising
supplemental jurisdiction.

1 **V. CONCLUSION & ORDER**

2 For the reasons set forth above, the Court **GRANTS** Defendant Axos' request for
3 judicial notice [Doc. 12-1] and motion to dismiss [Doc. 12] **WITHOUT LEAVE TO**
4 **AMEND**. The Court **GRANTS** Defendant Hamilton's motion to dismiss [Doc. 13]
5 **WITH LEAVE TO AMEND**. Sterling's second amended complaint is **due on or**
6 **before April 20, 2022.**

7 **IT IS SO ORDERED.**

8 Dated: March 29, 2022

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10 _____
11 Hon. Thomas J. Whelan
12 United States District Judge
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