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**United States District Court  
Central District of California**

HECTOR PORTALUPPI, et al.,

Plaintiffs,

v.

FORTIFI FINANCIAL, INC. (f/k/a  
Energy Efficient Equity, Inc.), et al.,

Defendants.

Case № 2:20-cv-07959-ODW (RAOx)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS’  
MOTION TO DISMISS [50]**

**I. INTRODUCTION**

Plaintiffs Hector and Carmen Portaluppi bring a Second Amended Complaint (“SAC”) against Defendants FortiFi Financial, Inc. (f/k/a Energy Efficient Equity, Inc.) and the County of Los Angeles (“LA County”). (SAC, ECF No. 49.) Defendants now move to dismiss five of the ten causes of action in the SAC. (Mot. Dismiss (“Mot.” or “Motion”), ECF No. 50-1.) The Motion is fully briefed.<sup>1</sup> (Opp’n, ECF No. 52; Reply,

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<sup>1</sup> Defendants request that the Court judicially notice a Notice of Assessment Contract recorded by the County of Los Angeles, a PACE Program Report and Handbook, and a Los Angeles County Taxpayers’ Guide. (Req. for Judicial Notice (“RJN”), ECF No. 50-4.) Defendants’ requested documents, however, are not pertinent to the Court’s disposition of this matter. Accordingly, the Court **DENIES** as **MOOT** Defendants’ RJN.

1 ECF No. 53.) For the following reasons, Defendants’ Motion is **GRANTED** in **PART**  
2 and **DENIED** in **PART**.<sup>2</sup>

## 3 II. BACKGROUND<sup>3</sup>

4 California’s Property Assessed Clean Energy Program (“PACE Program”)  
5 allows California homeowners to finance green-energy upgrades to their homes through  
6 property assessments (“PACE Assessments”) that are levied and collected by local  
7 governments. (SAC ¶ 29.) The PACE Assessments are contractual in nature, and  
8 homeowners must voluntarily agree in writing to have secured liens placed on their  
9 property (“PACE Liens”) in exchange for green-energy improvements. (*Id.* ¶ 30.)

10 Local governments work with PACE Program Administrators to operate the  
11 PACE Program. (*Id.* ¶ 33.) Contractors and homeowners typically submit applications  
12 (“PACE Applications”) to PACE Program Administrators proposing green-energy  
13 upgrades to a home. (*Id.* ¶¶ 33–35.) PACE Program Administrators then make  
14 unilateral decisions approving or denying these applications. (*Id.* ¶ 34.) After a PACE  
15 Program Administrator approves an application and a contractor makes the approved  
16 upgrades to a home, the PACE Program Administrator disburses the approved upgrade  
17 costs to the contractor and records a PACE Lien on the property. (*Id.* ¶¶ 35–38.) The  
18 local government then bills and collects annual payments from the homeowner as part  
19 of the homeowner’s property tax bill and remits these payments back to the PACE  
20 Program Administrator. (*Id.* ¶ 39.)

21 Plaintiffs are a married couple in their seventies residing in Los Angeles,  
22 California. (*Id.* ¶ 1.) Defendant FortiFi is a PACE Program Administrator. (*Id.* ¶ 33.)  
23 Plaintiffs allege that around October 2018, non-party contractor Eco Tech prepared a  
24 falsified PACE Application on Plaintiffs’ behalf, forged their signatures, and sent the  
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26 <sup>2</sup> Having carefully considered the papers filed in connection with the Motion, the Court deemed the  
27 matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

28 <sup>3</sup> Unless otherwise noted, all factual references and well-pleaded factual allegations derived from  
Plaintiffs’ SAC are accepted as true for purposes of this Motion. *See Ashcroft v. Iqbal*, 556 U.S. 662,  
678 (2009).

1 application to FortiFi. (*Id.* ¶¶ 2–11.) Fortifi approved this application, and Plaintiffs  
2 did not learn of this until October 2019, when they received their annual property tax  
3 bill from County. (*Id.* ¶¶ 9–10, 51.) Plaintiffs’ property tax bill had increased from  
4 \$1,431.84 per year to \$8,815.74 per year, and Plaintiffs later discovered this increase  
5 was due to a new \$69,000 secured PACE Assessment against their home. (*Id.* ¶ 9.)

6 Plaintiffs allege that although they had proof that the PACE Application was  
7 falsified, LA County did not provide Plaintiffs with any means for contesting the PACE  
8 Assessment. (*Id.* ¶¶ 11, 17–19.) Plaintiffs therefore took out a loan at a 13 percent  
9 annual interest rate to cover the full amount due on their property tax bill. (*Id.* ¶ 13.)

10 Based on the foregoing, Plaintiffs assert claims for violations of the Racketeer  
11 Influenced and Corrupt Organizations Act (“RICO”) under federal law (Claims One  
12 through Three); elder abuse (Claim Four); violations of California’s Unfair Competition  
13 Law (Claim Five); negligence (Claim Six); violations of 42 U.S.C. § 1983 (Claims  
14 Seven and Eight); breach of contract (Claim Nine); and declaratory judgment (Claim  
15 Ten). (*See generally*, SAC.) Defendants move to dismiss Claims One through Three,  
16 Seven, Eight, and Ten. (*See generally*, Mot.)

### 17 III. LEGAL STANDARD

18 Dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal  
19 theory or the absence of sufficient facts alleged under a cognizable legal theory.”  
20 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). “To survive a  
21 motion to dismiss . . . under Rule 12(b)(6), a complaint generally must satisfy only the  
22 minimal notice pleading requirements of Rule 8(a)(2)” —a short and plain statement of  
23 the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *see also* Fed. R. Civ.  
24 P. 8(a)(2). The “[f]actual allegations must be enough to raise a right to relief above the  
25 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The  
26 “complaint must contain sufficient factual matter, accepted as true, to state a claim to  
27 relief that is plausible on its face.” *Iqbal*, 556 U.S.at 678 (internal quotation marks  
28

1 omitted). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of  
2 the elements of a cause of action will not do.’” *Id.* (citing *Twombly*, 550 U.S. at 555).

3 Whether a complaint satisfies the plausibility standard is “a context-specific task  
4 that requires the reviewing court to draw on its judicial experience and common sense.”  
5 *Id.* at 679. A court is generally limited to the pleadings and must construe “[a]ll factual  
6 allegations set forth in the complaint . . . as true and . . . in the light most favorable to  
7 [the plaintiff].” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). But a  
8 court need not blindly accept conclusory allegations, unwarranted deductions of fact,  
9 and unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
10 (9th Cir. 2001).

#### 11 IV. DISCUSSION

##### 12 A. Claims One Through Three: RICO Claims

13 Plaintiffs previously asserted their RICO claims in their First Amended  
14 Complaint (“FAC”). (FAC, ECF No. 25.) The Court granted Defendants’ motion to  
15 dismiss those claims with leave to amend because Plaintiffs failed to plead in detail  
16 FortiFi’s involvement in racketeering activity. (Order 8–9, ECF No. 45.) In their SAC,  
17 Plaintiffs again allege their RICO claims, and Defendants again move to dismiss on the  
18 grounds that Plaintiffs still fail to adequately allege FortiFi’s involvement in  
19 racketeering activity. (*See* SAC; Mot. 20–24.) Plaintiffs’ Opposition does not address  
20 Defendants’ arguments relating to the RICO claims. (*See generally* Opp’n.)

21 Under the Local Rules of the Central District of California, a plaintiff’s failure to  
22 file a timely opposition “may be deemed consent to the granting . . . of the motion.”  
23 C.D. Cal. L.R. 7-12. Although Plaintiffs in the present case have filed a timely  
24 opposition, their opposition is silent with respect to the RICO claims. The motivating  
25 force behind Local Rule 7-12 therefore applies to this situation as it would to one where  
26 Defendants have moved only to dismiss the RICO claims and Plaintiffs have failed to  
27 file an opposition. The Court therefore deems Plaintiffs to have conceded the merits of  
28 those arguments. *See Sherman v. Schneider Nat’l Carriers, Inc.*, No. 18-CV-08609-

1 AB (JCX), 2019 WL 3220585, at \*5 (C.D. Cal. Mar. 6, 2019) (deeming “Plaintiff’s  
2 failure to address [the] argument as conceding its merits”); *Silva v. U.S. Bancorp*,  
3 No. 5:10-CV-01854-JHN, 2011 WL 7096576, at \*3 (C.D. Cal. Oct. 6, 2011) (finding  
4 that, “Plaintiff concedes his recordkeeping claim should be dismissed by failing to  
5 address Defendants’ arguments in his Opposition”). Accordingly, Defendants’ Motion  
6 is **GRANTED** as to Claims One through Three.

7 **B. Claims Seven, Eight, and Ten: Due Process Claims**

8 Plaintiffs allege that the statutes establishing the PACE Program, California  
9 Streets and Highways Code §§ 5898.10, *et seq.*, and §§ 5900, *et seq.*, authorize local  
10 governments to deprive private persons of their property without the procedural due  
11 process of law guaranteed by the Fourteenth Amendment of the United States  
12 Constitution. (SAC ¶¶ 217–19.) Plaintiffs further allege that, pursuant to the PACE  
13 Program, LA County deprived them of their property without providing them an  
14 opportunity to be heard. (*Id.* ¶¶ 207–16.) Plaintiffs seek relief under 42 U.S.C. § 1983  
15 and 28 U.S.C. § 2201. (*Id.* ¶¶ 207–19, 225–27.)

16 To state a § 1983 claim, “a plaintiff must allege two essential elements, first, that  
17 a right secured by the Constitution and laws of the United States was violated, and  
18 second, that the deprivation was committed by a person acting under color of state law.”  
19 *Teixeira v. Hanneman*, No. 17-CV-06673 PSG (KSx), 2018 WL 5903917, at \*2  
20 (C.D. Cal. May 30, 2018) (internal quotation marks omitted) (citing *West v. Atkins*, 487  
21 U.S. 42, 48 (1988)). Municipalities and other local government units are among those  
22 “persons” to whom section 1983 liability applies. *See Monell v. Dep’t of Soc. Servs.*,  
23 436 U.S. 658, 690 (1978). The parties do not dispute that LA County acted under color  
24 of state law. Rather, the parties disagree as to whether LA County violated Plaintiffs’  
25 rights under the Fourteenth Amendment’s Due Process Clause.

26 *1. The Imposition of a PACE Lien Constitutes State Action*

27 When the government deprives persons of their property, the Due Process Clause  
28 guarantees those persons “the opportunity to be heard ‘at a meaningful time and in a

1 meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting  
2 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Defendants claim that LA County is  
3 not a proper party, describing it as merely a “pass-through entity” that collects and  
4 forwards assessment installments through the property tax bill. (Mot. 25–26.) But what  
5 LA County does with the money it collects bears no significance on whether it must  
6 provide constitutionally adequate procedural safeguards.<sup>4</sup> Because the Due Process  
7 Clause applies to state action, the real issue is whether LA County’s recordation of a  
8 PACE Lien and collection of PACE Assessments constitutes state action.

9 Courts have routinely characterized the imposition of liens—even those imposed  
10 for the benefit of private parties—as state action. *See Connolly Dev., Inc. v. Superior*  
11 *Court*, 17 Cal. 3d 803, 815 (1976) (“There is no question but that the mechanics’ lien  
12 involves significant state action. Not only is the lien governed by detailed statutory  
13 provisions, but it becomes effective only upon recordation with the county recorder, an  
14 official of the state . . . .”); *Adams v. Dep’t of Motor Vehicles*, 11 Cal. 3d 146, 153  
15 (1974) (holding that the imposition of a garageman’s lien constitutes state action  
16 because “the lien is expressly provided for by statute, its execution by sale is authorized  
17 by statute, and a state agency oversees the sale and records the transfer of title”). Here,  
18 a PACE Lien, like a mechanics’ lien or a garageman’s lien, is governed by detailed  
19 statutory provisions. *See* Cal. Sts. & High. Code §§ 5898.10, 5900. Moreover, the act  
20 of a county recorder renders a PACE Lien effective. *See id.* Therefore, the imposition  
21 of a PACE Lien constitutes a state action subject to the Due Process Clause of the  
22 Fourteenth Amendment, and Plaintiffs have sufficiently alleged that LA County,  
23 pursuant to the PACE Program, authorized a PACE Lien to be placed on their home  
24 and proceeded to collect on that lien. (SAC ¶¶ 9–13, 207–19.)

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25 \_\_\_\_\_  
26 <sup>4</sup> Defendants’ reference to *Elberg v. San Luis Obispo County*, 112 Cal. 316, 317 (1896) is inapposite.  
27 In *Eldberg*, the California Supreme Court held that a plaintiff could not sue the defendant county under  
28 section 3819 of the Political Code to recover taxes that the county had collected on behalf of another  
entity. *Id.* at 317–18. Here, Plaintiffs are not seeking repayment of taxes under a more than one  
hundred-year-old law. Rather, Plaintiffs are suing for LA County’s violation of their due process  
rights.

1           2. *The County Deprived Plaintiffs of a Protected Interest*

2           “The requirements of procedural due process apply only to the deprivation of  
3 interests encompassed by the Fourteenth Amendment’s protection of liberty and  
4 property.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972).  
5 Defendants argue that because the County has not foreclosed on Plaintiffs’ property or  
6 even issued a single notice of an intent to begin foreclosure proceedings, LA County  
7 has not deprived Plaintiffs of a property interest deserving of procedural due process  
8 protections. (*See* Mot. 32–34.)

9           However, even absent the initiation of foreclosure proceedings, the imposition of  
10 a PACE Lien on its own constitutes a deprivation of a protected property interest. *Cf.*  
11 *Connolly Dev., Inc.*, 17 Cal. 3d at 813 (1976) (concluding that “the filing of a stop  
12 notice, as well as the recording of a mechanics’ lien, deprives the landowner of a  
13 significant property interest”). Although a PACE Lien does not deprive an owner of  
14 the use of his or her property prior to a foreclosure, it severely hampers the owner’s  
15 ability to sell or encumber the property. *Cf. id.* There is no doubt that a buyer would  
16 be less willing to purchase a property burdened by such a lien and, because a PACE  
17 Lien is a first-priority lien superior to even a mortgage lien, a bank would be less likely  
18 to approve a mortgage for such a property. *See id.* at 812 (“Subsequent purchasers  
19 whose title will be subject to the lien may be unwilling to purchase a lawsuit with the  
20 land; lenders may refuse a loan on property subject to lien claims; the owner may in  
21 some cases be forced to pay a possibly invalid lien in order to clear title to his property  
22 in time for a pending transaction to be consummated.”). Here, the imposition of a PACE  
23 Lien in the amount of \$69,000 on Plaintiffs’ home clearly constitutes a significant  
24 deprivation of Plaintiffs’ property rights subject to the Due Process Clause of the  
25 Fourteenth Amendment.

26           3. *Plaintiffs Adequately Allege a Due Process Violation*

27           Because LA County has deprived Plaintiffs of a protected property interest, the  
28 remaining issue is whether LA County’s procedures comply with constitutional

1 requirements. An inquiry into LA County’s procedures requires consideration of three  
2 distinct factors: (1) the private interests affected; (2) the risk of erroneous deprivation  
3 under current procedures and the probable value of alternative procedural safeguards;  
4 and (3) the government’s interests. *Mathews*, 424 U.S. at 335.

5 Plaintiffs plausibly allege that the *Mathews* factors weigh in favor of finding that  
6 the PACE Program and LA County’s implementation of it violate the Fourteenth  
7 Amendment’s Due Process Clause. First, Plaintiffs point to a significant deprivation of  
8 property rights arising from the imposition of PACE Liens, often in the amounts of tens  
9 of thousands of dollars. (SAC ¶ 120.) Second, Plaintiffs allege that the County accepts  
10 easy-to-forge electronic signatures on PACE documents as “determinative and  
11 conclusive” of a homeowners’ consent to the levying of PACE Assessments, leading to  
12 a high risk of erroneous deprivation. (*Id.* ¶ 126.) Plaintiffs cite instances where  
13 contractors have either falsified PACE documents or obtained signatures on those  
14 documents by fraud. (*Id.* ¶¶ 51–52, 72–74.) Moreover, Plaintiffs assert that the County  
15 does not verify that the requested green-energy improvements have actually been made  
16 before collecting on PACE Liens, and detail at least one instance where a PACE Lien  
17 was imposed for nonexistent improvements. (*Id.* ¶¶ 83–85.) Finally, Plaintiffs argue  
18 that the government can take additional steps to prevent erroneous deprivations without  
19 incurring a large cost, for example, by not relying exclusively on the assertions  
20 contained in electronic documents, or by requiring hearings when there is a dispute  
21 concerning the imposition of a PACE Lien. (Opp’n 23–25.)

22 Defendants argue that because the PACE Assessment is essentially a tax, only a  
23 post-assessment hearing is required. (Mot. 27–28.) This argument is undermined by  
24 Defendants’ own characterization of the PACE Assessment as contractual in nature,  
25 and Defendants’ description of the County’s role as a “pass-through entity.” (Mot. 13–  
26 14.) More importantly, because the PACE Assessments are immediately forwarded to  
27 PACE Program Administrators, their collection does not implicate the government’s  
28 “substantial interest in protecting the public purse”—an interest courts have relied on



1 in upholding the sufficiency of post-assessment hearings. *Larson v. United States*,  
2 888 F.3d 578, 587 (2d Cir. 2018) (quoting *Flora v. United States*, 362 U.S. 145, 175  
3 (1960)).

4 Defendants nevertheless make several arguments highlighting the burden that  
5 pre-assessment hearings would impose on LA County, which they claim outweigh the  
6 private interests at issue. (Reply 10–14.) However, the issue of whether Plaintiffs are  
7 entitled to a pre-assessment hearing is not dispositive as to Plaintiffs’ claim. Plaintiffs  
8 do not complain only of the lack of a pre-assessment opportunity to be heard. For  
9 example, Plaintiffs contest the limited steps LA County takes to verify the authenticity  
10 of electronically filed PACE documents, which do not need to be notarized or contain  
11 a wet signature. (SAC ¶ 126.) Plaintiffs additionally allege that the PACE Program  
12 fails to provide any post-assessment procedure to contest the imposition of a PACE  
13 Lien. (*Id.* ¶¶ 122, 215.)

14 Defendants assert that Plaintiffs could have appealed the imposition of their  
15 PACE Lien to a county board. (Mot. 30–31.) However, the law that Defendants cite  
16 permits a hearing only for the reassessment of the value of a home due to a change in  
17 ownership or new construction. *See* Cal. Rev. & Tax. Code § 1605.5. Because  
18 Defendants have cited no law contradicting Plaintiffs’ assertion that LA County did not  
19 provide any procedure to contest the imposition of the PACE Lien, the Court accepts  
20 Plaintiffs’ assertion as true. *See Lee*, 250 F.3d at 688.

21 The Court need not, and does not, determine the minimum procedures the Due  
22 Process Clause requires in this context. Because Plaintiffs plausibly allege that the Due  
23 Process Clause requires LA County to provide some sort of procedure to contest the  
24 imposition of a PACE Lien, and because they further allege that LA County provided  
25 no such procedure, Plaintiffs adequately state a claim for a violation of their procedural  
26 due process rights. Accordingly, Defendants’ Motion is **DENIED** with respect to  
27 Claims Seven, Eight, and Ten.

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**V. CONCLUSION**

For the reasons discussed above, Defendants’ Motion to Dismiss (ECF No. 50) is **GRANTED** with respect to Claims One through Three, and **DENIED** with respect to Claims Seven, Eight, and Ten.

**IT IS SO ORDERED.**

March 1, 2022



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**OTIS D. WRIGHT, II  
UNITED STATES DISTRICT JUDGE**