

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

\*E-Filed 1/18/11\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ANNA VERTKIN, et al.,

No. C 10-03527 RS

Plaintiffs,

v.

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS FEDERAL  
CLAIMS WITH PREJUDICE;  
DECLINING TO EXERCISE  
SUPPLEMENTAL JURISDICTION**

WELLS FARGO HOME MORTGAGE, et  
al.,

Defendants.

---

I. INTRODUCTION

This is a Motion to Dismiss myriad claims brought by plaintiffs Anna Vertkin and Maria Guevara against Wells Fargo, Bank of America, First American Corporation, Benlar Investments, Gail Koren, Candice Tai, Gene Vertkin, Sonja Vertkin, and Michael Vertkin. Plaintiffs seek relief pursuant to eight claims alleging various misdeeds on the part of some or all defendants: (1) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (“RICO”); (2) violations of the Due Process clause of the Fifth Amendment; (3) fraud; (4) unfair business practices as contemplated by California’s Unfair Competition Law; (5) tortious interference with contract; (6) waste, trespass, conversion, intentional infliction of emotional distress, and restraint of trade; (7) wrongful foreclosure; and (8) retaliation. Defendants Wells Fargo

No. C 10-03527  
ORDER

1 and Bank of America argue that plaintiffs' Complaint should be dismissed because plaintiffs lack  
2 standing to pursue these claims, because Vertkin is at any rate estopped from pursuing claims  
3 omitted from her bankruptcy schedule, and because the Complaint fails to state a claim for relief. In  
4 a separate motion to dismiss, defendants Gene, Sonja, and Michael Vertkin echo their co-  
5 defendants' arguments.<sup>1</sup> As plaintiffs have failed to state a plausible RICO or due process claim,  
6 both must be dismissed without leave to amend. The Court declines to exercise supplemental  
7 jurisdiction over plaintiffs' remaining state law claims, and these shall be dismissed without  
8 prejudice.<sup>2</sup> This matter was deemed appropriate for resolution without oral argument pursuant to  
9 Civil Local Rule 7-1(b).

## 10 II. PROCEDURAL HISTORY

11 On April 28, 2010, plaintiffs filed this Complaint in the United States District Court for the  
12 Southern District of Texas. Defendants moved in that district to dismiss the Complaint for improper  
13 venue, to dismiss for failure to state a claim for relief, or to transfer. The case was transferred to this  
14 Court in June of 2010, where it was related to a pending action: C 10-0775 RS *Vertkin v. Wells*  
15 *Fargo, et al.* In that matter, this Court issued an order (the "Related Order") dismissing with  
16 prejudice Vertkin's federal claims, including a nearly identical RICO claim. As the analysis set  
17 forth in the Related Order is squarely applicable here, it is incorporated by reference. To the extent  
18 this Complaint raises different facts or discusses different parties, these are addressed below. The  
19 Related Order also considered and rejected an identical defense argument as to the impact of  
20 Vertkin's bankruptcy proceeding on her ability to bring civil claims. That analysis is similarly  
21 adopted here. As a general matter, while this case involves additional plaintiffs and defendants,  
22 both complaints target the Rose Avenue foreclosure and for the most part discuss identical facts.

## 23 III. FACTUAL BACKGROUND

24  
25 \_\_\_\_\_  
26 <sup>1</sup> No other defendant has made an appearance in this litigation and it is not clear from the docket if  
they were properly served.

27 <sup>2</sup> Plaintiffs also filed a motion to stay proceedings and several motions to strike or limit the scope of  
defendants' factual and legal arguments. There is no basis to grant any of these motions and they  
will therefore be denied.

1 The factual description included in the Related Order is incorporated by reference. Unique  
2 to this Complaint is plaintiffs’ averment that Michael Vertkin’s brother Gene and his then-wife,  
3 plaintiff Maria Socorro Ruiz Guevara, participated in the purchase of the Rose Avenue property in  
4 1994. At the time Gene Vertkin “jointly” purchased the property, plaintiffs claim he forged a power  
5 of attorney on behalf of Guevara and in favor of himself. Using this power of attorney, they allege  
6 he secretly gifted certain properties to Michael Vertkin, including his portion of the California  
7 property at issue in this case. The Complaint does not include an explanation of how these facts,  
8 even if true, are relevant to either Anna and Michael Vertkin’s loan or to the ultimate foreclosure  
9 sale. Plaintiffs also present facts relating to defendant Frank Howard Allen Realtors. Plaintiffs  
10 complain that during the period when Wells Fargo had taken possession of the Rose Avenue  
11 property in the autumn of 2009, Frank Howard Allen Realtors and its agents had access to any mail  
12 Vertkin might have received. Plaintiffs characterize the realtors’ failure to forward this mail to  
13 Vertkin as “mail fraud.”

### 14 III. LEGAL STANDARD

15 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure  
16 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
17 2001). Rule 8 of the Federal Rules of Civil Procedure further provides that to state a claim, a  
18 pleading must contain “a short and plain statement of the claim showing that the pleader is entitled  
19 to relief.” The first part of this requirement—“a short and plain statement of the claim”—cannot be  
20 read without reference to the second part—“*showing* that the pleader is entitled to relief.” Fed. R.  
21 Civ. P. 8(a)(2) (emphasis added). The Supreme Court has made clear that while “showing” an  
22 entitlement to relief does not require “detailed factual allegations,” it does “demand[] more than an  
23 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937,  
24 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, “[a] pleading  
25 that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action  
26 will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
27 enhancement.’” *Id.* (citations omitted).

1 If the Court concludes that the complaint should be dismissed, it must then decide whether to  
2 grant leave to amend. “[A] district court should grant leave to amend even if no request to amend  
3 the pleading was made, unless it determines that the pleading could not possibly be cured by the  
4 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe v.*  
5 *United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

6 IV. DISCUSSION

7 A. Judicial Notice

8 As explained in the Related Order, the Court takes judicial notice of the following facts: (1)  
9 the record in Vertkin’s bankruptcy proceeding; (2) the Deed of Trust was recorded on September 2,  
10 2005; (3) a Notice of Default was recorded on October 1, 2009; and (4) a Notice of Trustee Sale was  
11 recorded on January 5, 2010.

12 B. Federal Jurisdiction

13 While plaintiffs insist this Court has federal subject matter jurisdiction by way of diversity  
14 jurisdiction, the parties are not completely diverse. Vertkin contends she is a resident of Texas. In  
15 her Complaint, she avers that at least three other defendants are also residents of that state. While  
16 diversity jurisdiction is accordingly absent, plaintiffs’ first and second claims for relief—  
17 respectively, for violation of the civil RICO statute and the due process clause—do arise under  
18 federal law and therefore trigger this Court’s federal question jurisdiction.

19 B. Bankruptcy Proceedings

20 As explained in the Related Order, Vertkin’s bankruptcy proceedings have now been  
21 terminated. Accordingly, defendants’ standing and estoppel arguments no longer remain viable.

22 B. RICO

23 Defendants move to dismiss plaintiffs’ claim for civil damages in light of defendants’  
24 alleged RICO violations. Plaintiffs’ Complaint suffers from the same defects highlighted by the  
25 Related Order. This Complaint too falls woefully short of stating a colorable RICO claim. It fails  
26 to pinpoint *what* racketeering activity, as defined in section 1961(1), defendants committed. Even  
27 splicing those allegations which *resemble* “racketeering” activity—such as the claim that Gene

1 Vertkin forged a power of attorney in his favor,<sup>3</sup> that Vertkin’s realtors committed “mail fraud” in  
2 early 2010 because they had access to her home but failed to forward her mail, or that the corporate  
3 defendants entertained a nefarious plot to foreclose on the Rose Avenue property—no lucid pattern  
4 emerges. In order to demonstrate a pattern of racketeering activity, a plaintiff must “show that the  
5 racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal  
6 activity.” *H.J. Inc. v. NW Bell Tele. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). It is not  
7 plausible, for example, that Gene Vertkin’s allegedly forged power of attorney in the late 1990s has  
8 anything to do with the Vertkins’ default on a loan obligation entered into a decade later or the  
9 corporate defendants’ attempt to enforce it. Also like the complaint in the related matter, the one in  
10 this action lacks facts plausibly suggestive of an enterprise. While plaintiffs *conclude* defendants  
11 were involved in some “ultra complicated web of trickery,” (Compl., 4:18), all they have *shown* is  
12 parallel conduct.

13 Viewed in a light most favorable to plaintiffs as required on a motion to dismiss, the  
14 Complaint fails to state a plausible RICO claim. While plaintiffs have advanced a litany of alleged  
15 facts covering a vast timeframe, they simply do not constitute any coherent presentation that could  
16 translate into a RICO claim for relief. Granting leave to amend would be futile, and therefore the  
17 motion to dismiss is granted without leave to amend.

18 C. Due Process Claims

19 The second claim for relief alleges that defendants violated the due process clause of the  
20 Fifth Amendment. That constitutional provision operates solely as a constraint on governmental  
21 entities. *See Betts v. Brady*, 316 U.S. 455, 462 (1942) (holding that due process of law is secured  
22 against invasion by the federal government); *Castillo v. McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir.  
23 2005) (the Fifth Amendment prohibits the federal government from depriving persons of due  
24 process). Bank of America and Wells Fargo are private entities, and therefore a due process claim is

25 \_\_\_\_\_  
26 <sup>3</sup> Notably, Gene Vertkin’s alleged forgery took place in 1994. The earliest of her other allegations  
27 of improper conduct would seem to be the loan issued to the Vertkins in 2005. Even if some sort of  
28 pattern could be deduced between this forgery and any other event discussed in the Complaint, the  
time gap between them would be greater than ten years. 18 U.S.C. § 1961(5).

1 foreclosed as a matter of law. Defendants Gene Vertkin, Sonja Vertkin, and Michael Vertkin are  
2 individuals and not a part of the federal government, so the due process claim is similarly  
3 inapplicable. Plaintiffs' claim for relief is therefore dismissed, without leave to amend.

4 D. Supplemental Jurisdiction

5 Plaintiffs' remaining claims arise under state law. No reason would warrant the exercise of  
6 discretionary jurisdiction over those claims by this Court. *See* 28 U.S.C. § 1367(c)(3) (providing  
7 that a district court may decline to exercise supplemental jurisdiction where it "has dismissed all  
8 claims over which it has original jurisdiction"). Accordingly, plaintiffs' state law claims are  
9 dismissed without prejudice.

10 V. CONCLUSION

11 Plaintiffs have not advanced a colorable claim under RICO or the due process clause, and  
12 defendants' motions to dismiss these claims are granted. Amendment would be futile and therefore  
13 dismissal is without leave to amend. Because plaintiffs' remaining claims raise issues of state law,  
14 those claims are dismissed without prejudice.

15  
16 IT IS SO ORDERED.

17  
18 Dated: 1/18/11

19   
20 \_\_\_\_\_  
21 RICHARD SEEBORG  
22 UNITED STATES DISTRICT JUDGE  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**THIS IS TO CERTIFY THAT A HARD COPY OF THIS ORDER WAS MAILED TO:**

**Maria Socorro Ruiz Guevara**  
17 Saint Rafael Way NE  
Hanceville, AL 35077

**Gennady & Sonja Vertkin**  
325 Calais Drive  
Keller, TX 76248

**Michael Vertkin**  
PO Box 2465  
Keller, TX 76244

DATED: 1/18/~~2010~~  
2011

/s/ Chambers Staff  
Chambers of Judge Richard Seeborg

\* Counsel are responsible for distributing copies of this document to any co-counsel who have not registered with the Court's electronic filing system.