

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
 4 JUST FILM, INC.; RAINBOW BUSINESS
 5 SOLUTIONS, doing business as
 6 PRECISION TUNE AUTO CARE;
 7 BURLINGAME MOTORS, INC.; DIETZ
 8 TOWING, INC.; THE ROSE DRESS,
 9 INC.; VOLKER VON GLASENAPP; JERRY
 10 SU; VERENA BAUMGARTNER; TERRY
 11 JORDAN; LEWIS BAE; and ERIN
 12 CAMPBELL, on behalf of
 13 themselves, the general public
 14 and those similarly situated,

15 Plaintiffs,

16 v.

17 MERCHANT SERVICES, INC.; NATIONAL
 18 PAYMENT PROCESSING; UNIVERSAL
 19 MERCHANT SERVICES, LLC; UNIVERSAL
 20 CARD, INC.; JASON MOORE; NATHAN
 21 JURCZYK; ROBERT PARISI; ERIC
 22 MADURA; FIONA WALSH; ALICYN ROY;
 23 MBF LEASING, LLC; NORTHERN
 24 FUNDING, LLC; NORTHERN LEASING
 25 SYSTEMS, INC.; GOLDEN EAGLE
 26 LEASING, LLC; LEASE SOURCE-LSI,
 27 LLC; LEASE FINANCE GROUP, LLC;
 28 JAY COHEN; LEONARD MEZEI; SARA
 KRIEGER; BRIAN FITZGERALD; SAM
 BUONO; MBF MERCHANT CAPITAL, LLC;
 RBL CAPITAL GROUP, LLC; WILLIAM
 HEALY; JOSEPH I. SUSSMAN; JOSEPH
 I. SUSSMAN, P.C.; and SKS
 ASSOCIATES, LLC,

Defendants.

No. C 10-1993 CW

ORDER GRANTING IN
 PART AND DENYING
 IN PART
 PLAINTIFFS' MOTION
 FOR LEAVE TO FILE
 A THIRD AMENDED
 COMPLAINT (Docket
 No. 383), GRANTING
 IN PART, DENYING
 IN PART AND
 DEFERRING IN PART
 PLAINTIFFS' MOTION
 TO FILE UNDER SEAL
 (Docket No. 385)
 AND SETTING
 FURTHER DATES

23 _____/
 24 Plaintiffs Volker von Glasenapp, who was the sole shareholder
 25 of Just Film, Inc. and acquired its assets when it dissolved in
 26 2011; Rainbow Business Solutions, doing business as Precision Tune
 27 Auto Care, and its owner Jerry Su; Verena Baumgartner, doing
 28 business as Burlingame Motors; Dietz Towing, Inc., and its CFO and

1 Secretary, Terry Jordan; The Rose Dress, Inc., and its owner Lewis
2 Bae; and Erin Campbell, doing business as Silicon Valley Pet
3 Clinic, move for leave to file their proposed third amended
4 complaint (3AC) in this putative class action. Defendants
5 Merchant Services, Inc. (MSI), National Payment Processing, Inc.
6 (NPP), Universal Card, Inc. (UCI), Universal Merchant Services,
7 LLC (UMS), Jason Moore, Nathan Jurczyk, Robert Parisi, Eric
8 Madura, Fiona Walshe, Alicyn Roy (collectively, the Merchant
9 Services Defendants), Northern Leasing Systems, Inc., MBF Leasing
10 LLC (MBF), SKS Associates LLC (SKS), Jay Cohen, Leonard Mezei,
11 Sara Krieger, and Sam Buono (collectively, the Leasing Defendants)
12 oppose the motion. The motion was taken under submission on the
13 papers. Having considered the papers filed by the parties, the
14 Court GRANTS the motion in part and DENIES it in part. The Court
15 also DENIES in part Plaintiffs' motion to file under seal and
16 DEFERS it in part, and SETS further case management dates.

17 BACKGROUND

18 Plaintiffs allege that Defendants defrauded them and the
19 putative class members in a scheme involving credit and debit card
20 processing services and equipment. Below, for brevity, each
21 individual Plaintiff's last name is used to refer to both that
22 Plaintiff and his or her business, where it is a separate entity.
23 Plaintiffs divide the Defendants into two categories: Merchant
24 Services Defendants and Leasing Defendants.

25 Plaintiffs refer to MSI, NPP, UCI and UMS collectively as the
26 Merchant Services Companies and allege that each of them is the
27 alter ego of the others. In the proposed 3AC, Plaintiffs allege
28 that MSI and NPP were created to trick banks and regulators into

1 believing the Merchant Services Companies were legitimate
2 corporations, and that UMS and UCI were created to hide the
3 illegal activities and proceeds thereof from banks and regulators.
4 Plaintiffs allege the following about the individual Merchant
5 Services Defendants: Moore is the President and in control of each
6 of the Merchant Services Companies, the sole employee, officer,
7 director and shareholder of MSI and NPP, and owns sixty percent of
8 shares in UCI and one hundred percent of shares in UMS; Jurczyk
9 manages all operations of the Merchant Services Companies, is
10 UCI's Vice President of Operations and holds himself out as the
11 Vice President of MSI and NPP; Parisi owns forty percent of the
12 shares of UCI, is UCI's Senior Vice President and holds himself
13 out as the Senior Vice President of MSI and NPP; Madura is UCI's
14 Manager of Corporate Operations and holds himself out as the
15 Manager of Corporate Operations for MSI and NPP; Walshe was the
16 Regional Sales Manager for the Merchant Services Companies and
17 directed their San Jose, California regional office; and Roy is a
18 Senior Account Executive for the Merchant Services Companies.
19 Plaintiffs contend that the Merchant Services Companies are alter
20 egos of Moore, Jurczyk and Parisi.

21 Leasing Defendants are entities and individuals based outside
22 of California. Plaintiffs allege that Northern Leasing owns MBF
23 and controls SKS through a shell company, Pushpin Holdings, LLC.
24 Plaintiffs refer collectively to Northern Leasing, MBF and SKS as
25 the Northern Leasing Companies, each of which is allegedly the
26 alter ego of the others. The following individuals allegedly
27 directed and controlled the Northern Leasing Companies: Cohen,
28 Northern Leasing's President and CEO; Mezei, Northern Leasing's

1 Chairman of the Board; Krieger, Northern Leasing's Vice President
2 for Operations, who holds herself out as MBF's Vice President; and
3 Buono, Northern Leasing's former Vice President of Collections and
4 Customer Service, who also holds himself out as MBF's Vice
5 President. Plaintiffs allege that the Leasing Defendants, except
6 Buono, transfer monies obtained through the alleged fraud in shell
7 companies, such as Northern Funding LLC.

8 In the currently operative second amended complaint (2AC),
9 Plaintiffs generally explain the alleged fraud as follows. Credit
10 and debit card transactions are processed through financial
11 networks, called interchanges, run by entities like Visa and
12 Mastercard. Banks, as members of these interchanges, can sell
13 card processing services directly to merchants, or indirectly
14 through companies and individuals known as Independent Sales
15 Organizations and Merchant Service Providers (ISOs/MSPs). 2AC
16 ¶¶ 67-68. These ISOs/MSPs must be licensed and registered with
17 both Visa and Mastercard, as well as with a bank or a
18 bank-approved processing entity, called a processor. Id. at
19 ¶¶ 67-68.

20 Merchants pay a fee for each credit and debit card
21 transaction. Id. at ¶ 69. The fee is "shared among (1) the bank
22 that issued the credit or debit card to the customer, (2) the
23 interchange, (3) the bank through whom the merchant is accepting
24 the card, (4) the ISO/MSP that solicited the merchant and/or
25 provides customer service to the merchant (if any) and (5) the
26 third party-processor (if any)." Id. Merchants may also be
27 required to pay for credit and debit card processing equipment,
28 such as card terminals. Id. at ¶ 70.

1 Plaintiffs alleged that Merchant Services Defendants are
2 ISO/MSPs, and Leasing Defendants provided card processing
3 equipment. Pursuant to a contract, Merchant Services Defendants
4 marketed equipment leases to merchants on behalf of MBF Leasing.
5 2AC ¶ 133.

6 When marketing card processing services, the Merchant
7 Services Companies' independent sales agents, such as Walshe,
8 misled merchants about card transaction rates. In particular,
9 these sales agents used a so-called Rate Sheet, which suggested
10 that the merchants would be charged a fixed rate of 1.79 percent
11 for each card transaction plus a flat monthly service fee. In
12 fact, however, the rates for each transaction varied based on the
13 type of credit card a consumer used. Further, not all of the
14 charges associated with card processing services were reflected on
15 the Rate Sheet, even though sales agents represented they were.
16 The Rate Sheet had a signature line for a merchant to affirm that
17 "all fees have been sufficiently explained to my satisfaction."
18 2AC ¶ 212. If a merchant decided to seek card processing services
19 through Merchant Services Defendants, the merchant generally was
20 asked to sign an Application for Merchant Agreement. Sales agents
21 were instructed to represent that the Application reflected "the
22 entire arrangement with the Merchant Services Defendants." Id. at
23 ¶ 257. However, sales agents did not provide the merchant with
24 the Merchant Card Processing Agreement (MCPA), which provided the
25 terms for card processing services. The Application referred to
26 the MCPA and instructed the merchant "to review the terms and
27 conditions of a 'Merchant Card Processing Agreement included with
28 this application.'" Id. at ¶ 258. According to Plaintiffs,

1 although the MCPAs may have their signatures acknowledging the
2 terms, this is because "Merchant Services Defendants create a
3 signed version using scanners and computer programs to copy the
4 signature . . . onto the document." Id. at ¶ 264.

5 The sales agents also misrepresented the need for and value
6 of leasing card processing equipment from MBF Leasing. Equipment
7 Finance Leases (EFLs) governed merchants' use of this equipment.
8 Some Plaintiffs signed EFLs and some alleged that their signatures
9 on those documents were forged.

10 Plaintiffs also complain about various fees they were
11 charged, including for a "first and last month" deposit, which was
12 not credited to class members' accounts, and a "cancellation fee,"
13 which the Merchant Services Defendants deducted from class
14 members' accounts.

15 Plaintiffs allege that certain Defendants, without a
16 permissible purpose, inquired into and placed negative notations
17 on certain Plaintiffs' consumer credit reports.

18 Von Glasenapp, Jordan and other merchants received "letters a
19 couple times a year informing them of their obligation to pay a
20 personal property tax on the equipment they" leased. 2AC ¶ 274.
21 Leasing Defendants determined the amount of this tax and debited
22 it, along with a processing fee, from Von Glasenapp's, Jordan's
23 and other merchants' bank accounts. However, the collected taxes
24 "are not actually due to, nor are they remitted to, any taxing
25 authority." Id. ¶ 278. Instead, the funds were transferred to
26 shell companies owned by Leasing Defendants.

27 On November 29, 2010, the Court resolved various motions to
28 dismiss Plaintiffs' first amended complaint and allowed Plaintiffs

1 to file a second amended complaint, to remedy various identified
2 deficiencies. Docket No. 179.

3 On August 29, 2011, the Court resolved various motions to
4 dismiss the second amended complaint. Docket No. 292. In that
5 order, the Court dismissed some of Plaintiffs' claims against
6 particular Defendants without leave to amend. The Court stated
7 that, "to the extent that the Court denies leave to amend, it does
8 so because Plaintiffs have failed to state claims, notwithstanding
9 the Court's previous instructions, or because they do not suggest
10 that the claims are not futile," but that, "if Plaintiffs obtain
11 evidence over the course of discovery supporting any claim
12 dismissed by the Court, they may move for leave to amend their
13 complaint." Docket No. 292, 41.

14 On February 2, 2012, the Court granted Plaintiffs' motion to
15 dismiss the claims asserted by Plaintiff Burlingame Motors, Inc.
16 and to file an amended pleading to clarify that Burlingame Motors
17 is a fictitious business name of Plaintiff Baumgartner. Docket
18 No. 335. Plaintiffs had sought to file a separate document
19 entitled "Amendment No. 1 to Second Amended Complaint." Docket
20 No. 327. In the order, the Court required that Plaintiffs
21 "promptly file a third amended complaint incorporating the changes
22 to paragraphs 4 and 8 of the 2AC contained in their proposed
23 amendment." Id. at 5 (citing Civil Local Rule 10-1 ("Any party
24 filing . . . an amended pleading must reproduce the entire . . .
25 pleading and may not incorporate any part of a prior pleading by
26 reference.")). Plaintiffs did not file a third amended complaint
27 at that time, and instead have included the changes to paragraphs
28

1 four and eight in the proposed third amended complaint at issue
2 now.

3 On August 23, 2012, Plaintiffs filed the instant motion for
4 leave to file a third amended complaint and simultaneously filed
5 their motion for class certification to prosecute the claims in
6 the proposed third amended complaint. Docket Nos. 383, 387.

7 On August 24, 2012, Defendants filed various motions to
8 extend time to oppose the motion for class certification until
9 after the motion for leave to amend was resolved. Docket Nos.
10 388, 389.

11 On August 31, 2012, the Court granted Defendants' motions to
12 extend time. Docket No. 397. The Court vacated the briefing
13 schedule on the motion for class certification and stated that it
14 would be reset in the order resolving the instant motion.

15 LEGAL STANDARD

16 The case management order in this action provided that the
17 deadline to add additional parties or claims was December 1, 2011.
18 Docket No. 276. Under Rule 16(b), "[a] schedule shall not be
19 modified except upon a showing of good cause and by leave of the
20 district judge." Fed. R. Civ. Pro. 16(b). Where a schedule has
21 been filed, a party's ability to amend the pleadings is "governed
22 by Rule 16(b), not Rule 15(a)." Johnson v. Mammoth Recreations,
23 Inc., 975 F.2d 604, 608 (9th Cir. 1992). Therefore, where, as
24 here, a party seeks to amend a pleading after the date specified
25 in a scheduling order, it must first show "good cause" for the
26 amendment under Rule 16(b). Id.

27 In order to determine whether good cause exists, courts
28 primarily consider the diligence of the party seeking the

1 modification. Id. at 609; see also Coleman v. Quaker Oats Co.,
2 232 F.3d 1271, 1294 (9th Cir. 2000). “[N]ot only must parties
3 participate from the outset in creating a workable Rule 16
4 scheduling order but they must also diligently attempt to adhere
5 to that schedule throughout the subsequent course of the
6 litigation.” Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D.
7 Cal. 1999).

8 If good cause is shown, the party must next demonstrate that
9 the amendment is proper under Rule 15. Johnson, 975 F.2d at 608.
10 Under that rule, courts consider five factors when assessing the
11 merits of a motion for leave to amend: undue delay, bad faith,
12 futility of amendment, prejudice to the opposing party and whether
13 the plaintiff has previously amended the complaint. Ahlmeyer v.
14 Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir.
15 2009). Although these five factors are generally all considered,
16 “futility of amendment alone can justify the denial of a motion.”
17 Id. at 1055.

18 DISCUSSION

19 Plaintiffs contend that they discovered new facts during
20 discovery that support extending liability for certain claims to
21 other Defendants, beyond those against whom they currently have
22 stated claims. Included in these are claims that this Court had
23 previously dismissed. Plaintiffs also state that discovery has
24 revealed additional predicate acts for their RICO claims.
25 Defendants do not argue that Plaintiffs have acted without
26 diligence or with undue delay, but instead respond that the
27 proposed amendments would represent a fundamental change to
28 Plaintiffs’ case, for which Defendants should be permitted to take

1 further discovery before the class certification motion is
2 briefed, and that the proposed amendments are deficient as a
3 matter of law, making amendment futile.

4 In addition to these changes, Plaintiffs also seek to change
5 the definitions of proposed subclasses, and add new proposed
6 subclasses, although they keep the same overall class definition.
7 Further, Plaintiffs seek to eliminate references to former
8 Plaintiff Just Film, Inc., which was dissolved in late 2011 with
9 its remaining assets being acquired by its sole shareholder, Von
10 Glasenapp. It does not appear that Defendants substantively
11 oppose these changes.

12 I. Reinstatement of dismissed claims and extension of existing
13 claims

14 A. Reinstatement of dismissed claims against Northern Leasing
15 Systems, Inc.

16 In the August 29, 2011 order, the Court dismissed Plaintiffs'
17 claims against Northern Leasing for RICO violations, common law
18 fraud, breach of contract, breach of implied covenant, negligent
19 misrepresentation, and conversion. At that time, the Court found
20 that Plaintiffs had not alleged sufficiently that Northern Leasing
21 had participated directly in the alleged misconduct or could be
22 held liable through an alter ego theory based on its relationship
23 with MBF. The Court described Plaintiffs' allegations of alter
24 ego liability as boilerplate and found that they had not alleged
25 facts to support the theory.

26 In the proposed 3AC, Plaintiffs seek to add new allegations
27 against Northern Leasing, supporting its direct involvement in the
28 improper activity, and seek to reinstate each of these dismissed
claims against it. Specifically, Plaintiffs now allege that

1 Northern Leasing was the entity that directed and conducted the
2 wire transfers from class members' bank accounts and received the
3 funds, and that Northern Leasing had instructed its banks to put
4 in the description field the name of a shell company that it had
5 set up, such as MBF, so that the true identity of the company
6 making the withdrawals was obscured. See, e.g., Proposed 3AC
7 ¶¶ 86, 92, 462. They also allege that Northern Leasing was in
8 fact the entity that had performed all of the conduct that was
9 purportedly done by MBF, including sending mailings and making
10 phone calls to collect debts. See, e.g., id. at ¶¶ 490, 492-99.
11 In their reply, Plaintiffs clarify that they are not alleging that
12 Northern Leasing should be held liable under an alter ego theory,
13 but rather are alleging that it should be held liable directly
14 because it was in fact the wrongdoer. Plaintiffs assert that they
15 learned this only in the discovery process.

16 Defendants do not argue that Plaintiffs have insufficiently
17 plead the involvement of Northern Leasing in the claims for RICO
18 violations, common law fraud, breach of contract, breach of
19 implied covenant, negligent misrepresentation, and conversion.
20 Instead, they argue that the new RICO predicate acts are
21 insufficiently plead, as to Northern Leasing as well as other
22 Defendants. This argument will be addressed below. Because
23 Defendants have not shown that Plaintiffs' claims are otherwise
24 futile, and because Plaintiffs have now alleged Northern Leasing's
25 direct involvement in the conduct at issue in these claims,
26 Plaintiffs may reinstate these claims against Northern Leasing.

27
28

1 B. Reinstatement of dismissed FCRA claims against Universal
Card, Inc.

2 In the August 29, 2011 order, the Court held that "Von
3 Glasenapp and Bae state FCRA claims against Universal Merchant
4 Services, Northern Leasing and MBF Leasing." Docket No. 292, 32.
5 However, the Court dismissed the FCRA claim against other
6 Defendants, including Universal Card, Inc. (UCI), as based on
7 "boilerplate alter ego allegations." Id.

8 Plaintiffs seek to make the FCRA claim against Universal
9 Merchant Services LLC against UCI as well. Plaintiffs allege that
10 Universal Merchant Services LLC was purportedly dissolved
11 (although they allege that the dissolution process was not done
12 properly and that it is still recognized as a corporate entity by
13 the state of California) and its assets were transferred to UCI.
14 Proposed 3AC ¶ 231. Plaintiffs also allege when Moore registered
15 with Experian on behalf of UCI to conduct credit inquiries, he
16 stated that the company name was "Universal Merchant Services,"
17 even though that company had been purportedly dissolved, and "that
18 the 'Affiliated or Parent Company' of Universal Merchant Services
19 was 'Universal Card, Inc.'" Id. at ¶ 423. Plaintiffs further
20 allege that UCI, using the registration obtained with Experian
21 under the name of Universal Merchant Services LLC, conducted
22 multiple inquiries on Von Glasenapp's credit report, and that it
23 used the Universal Merchant Services name, so that, if Von
24 Glasenapp saw the inquiry on his credit report, he would be unable
25 to hold UCI responsible. Id. at ¶ 485, 501. Plaintiffs represent
26 that they learned during UCI's Rule 30(b)(6) deposition that it
27 was UCI that had the relationship with Experian. Mot. at 7.
28

1 Defendants have not opposed the resurrection of the FCRA
2 claim against UCI. In fact, Defendants acknowledge that Universal
3 Merchant Services LLC became UCI and that "UCI assumed all debts
4 and obligations of UMS." Opp. at 13 n.12. Accordingly,
5 Plaintiffs may amend to reinstate the FCRA claim against UCI.

6 C. Reinstatement of dismissed conversion claims against
7 certain Merchant Services Defendants

8 In the 2AC, Plaintiffs alleged that "Defendants have used ACH
9 withdrawal to extract sums of money from the bank accounts of
10 Plaintiffs and the Class to which they have no right," and that
11 the Merchant Services Defendants specifically had withdrawn "sums
12 equivalent to the first and last month's payment on the equipment
13 finance leases, when in fact the funds were not credited to class
14 members accounts, but rather, counted towards Merchant Services
15 Defendants['] own revenues." See 2AC ¶¶ 270-72, 350, 670-73.

16 In the August 29, 2011 order, the Court held that Plaintiffs
17 stated a claim for conversion against MSI, which they alleged had
18 made the actual withdrawal, but dismissed their claims against the
19 other Merchant Services Defendants for failure to allege facts to
20 support the alter ego theory of liability. Docket No. 292, 34.

21 Plaintiffs now seek to re-allege conversion claims against
22 UCI, NPP, Jurczyk, Moore and Parisi, based on their direct
23 involvement in the purported conversion, and to add additional
24 allegations regarding how the conversion was carried out.
25 Plaintiffs also seek to add a new theory of conversion, alleging
26 that MSI, UCI, NPP, Jurczyk, Moore and Parisi used so-called "gray
27 ACH forms" that purported to authorize "Merchant Services" or
28 "Universal Merchants Services," unregistered fictitious entities,

1 to make withdrawals and that the true identity of the company
2 receiving the funds obtained through these forms was never
3 disclosed to Plaintiffs and class members. Plaintiffs aver that,
4 because the class members had no knowledge of who received the
5 funds, they could not have authorized the deductions. See, e.g.,
6 Proposed 3AC ¶ 831. To their theory that Defendants used the ACH
7 forms to make withdrawals that were not authorized, Plaintiffs
8 seek to add allegations that these Defendants trained their sales
9 agents to leave the amount on the gray ACH form blank and to fill
10 it in with an unauthorized "commission," typically equal to one or
11 two months of lease payments plus taxes, after the class members
12 had signed the forms. Id. at ¶¶ 361-367. They also ask to add
13 allegations that these Defendants wrongfully used these forms to
14 collect unauthorized cancellation fees from the class members.
15 Id. at ¶¶ 836-37. Finally, Plaintiffs seek to allege that these
16 Defendants used gray ACH forms from before July 2007 to collect
17 from merchants fees for chargebacks and insufficient funds that
18 were not authorized specifically on those forms. Id. at
19 ¶¶ 368-72.

20 Targeting only the allegations that these Defendants did not
21 disclose to Plaintiffs who the ACH form actually authorized to
22 make deductions, Merchant Services Defendants argue that
23 Plaintiffs' new conversion theories inadequately plead damages.
24 They argue that Plaintiffs do not dispute that they signed ACH
25 forms authorizing someone to debit their accounts and that
26 Plaintiffs have not alleged that their accounts were debited by
27 more than the amount reflected on the ACH forms or that someone
28 else tried to collect this amount again. Defendants also contend

1 that UCI has registered "Merchants Services of Irvine" as a
2 fictitious business name in Orange County.

3 These arguments are unavailing for a number of reasons. That
4 someone may have been authorized to debit Plaintiffs' accounts
5 does not mean that Plaintiffs cannot be harmed if a different,
6 unauthorized person or entity has done so instead. Plaintiffs may
7 remain obliged to make a payment to the authorized entity.
8 Further, Plaintiffs have disputed the legitimacy of the ACH forms,
9 including the amount written on these forms: they have alleged
10 that the amount was blank when they signed it, so no amount was
11 authorized to be deducted, and that Merchant Services Defendants'
12 agents filled in these amounts after the forms were signed. They
13 also allege that the forms were used to collect amounts to which
14 these Defendants were not entitled, such as invalid cancellation
15 fees. That they have not alleged that the amounts were collected
16 twice is not determinative. Further, Plaintiffs do plead that
17 some amounts were collected again: they have alleged that Merchant
18 Services Defendants did not credit the "commission" in the form of
19 multiple months of lease payments to Plaintiffs' accounts, so they
20 were responsible for making lease payments for those additional
21 months again. See, e.g., Proposed 3AC ¶ 366. Finally, Plaintiffs
22 have alleged that the ACH forms authorized "Merchant Services" or
23 "Universal Merchant Services," not "Merchant Services of Irvine,"
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1 UCI's registered fictitious business name.¹ As Plaintiffs have
2 noted, none of the Defendants has registered the fictitious
3 business names used on the forms, although others have registered
4 "Merchant Services." UCI's registration of a similar, but not
5 identical, fictitious business name does not, as a matter of law,
6 prevent Plaintiffs from being able to establish that its use of
7 this name was misleading. In the 2AC and proposed 3AC, Plaintiffs
8 have alleged that Merchant Services Defendants used the name
9 "Universal Merchant Services" to imply that it was affiliated with
10 "the legitimate Universal Savings Bank" and the name "Merchant
11 Services" to suggest that they were the merchant services division
12 of numerous reputable banks, such as JP Morgan Chase and Wells
13 Fargo. 2AC ¶¶ 166-67; Proposed 3AC ¶¶ 229-30.

14 Defendants also contend that Plaintiffs have continued to
15 engage in "categorical pleading," failing to identify the specific
16 role each entity or individual played in the alleged conversion.
17 Plaintiffs reply that they have alleged that "in their capacity as
18 officers of UCI, Defendants Moore, Parisi, and Jurczyk created the
19 'gray ACH form,' the tool central to Defendants' ability to
20 convert the funds; transferred the money to either UCI, NPP, MSI,
21 or a shell company controlled by one of those defendants; and
22 worked together to hide the responsible party." Reply at 3
23 (citing Proposed 3AC ¶¶ 360-61, 461, 517, 580). In the cited
24

25 ¹ Defendants have asked the Court to take judicial notice of
26 UCI's registration of "Merchant Services of Irvine," and
27 Plaintiffs have requested that the Court take judicial notice of
28 the results of a search of the Orange County database for
fictitious business names for "Merchant Services" and "Universal
Merchant Services." Neither party objects to the other's request.
The Court grants both parties' unopposed requests.

1 paragraphs, however, Plaintiffs do not allege that Moore, Parisi,
2 and Jurczyk, or the entities, created these forms or took these
3 other actions, and instead continue to group them together, with
4 limited exceptions. Plaintiffs do specifically allege that UCI
5 was the one which performed the withdrawals and that Parisi was
6 the one who ordered each withdrawal and directed that changes be
7 made to the gray ACH form. Thus, because they have identified
8 specific actions taken by UCI and Parisi in furtherance of the
9 alleged conversion, Plaintiffs may pursue this claim against these
10 two Defendants.

11 Plaintiffs also argue that liability can be alleged against
12 all of these Defendants because, although they have not alleged
13 who received the money and instead have plead vaguely that the
14 money was transferred to "UCI or the bank account of Parisi,
15 Moore, Jurczyk, MSI, NPP, UMS, or a shell company," see, e.g.,
16 Proposed 3AC ¶ 517, this is nonetheless permissible "because, as
17 Plaintiffs allege, Defendants do not know" who received the money
18 "either." Reply at 3. Although they do not cite where they made
19 this allegation, Plaintiffs appear to be referring to paragraph
20 360 of the proposed 3AC in which they allege:

21 Parisi testified that the entity receiving the funds was
22 "Merchant Services," but refused to provide any more
23 specifics. Jurczyk (personally and on behalf of UCI)
24 testified that UCI would use the form to collect amounts
25 owed to it, but would not state whether UCI was the only
26 company that received the funds, refusing to make
27 generalizations about the uses of the Gray ACH forms.
28 While Moore testified that MSI and NPP do not conduct
the ACH withdrawals, Jurczyk testified that UCI often
makes ACH withdrawals for monies owed to MSI and NPP.

Proposed 3AC ¶ 360. Elsewhere in the proposed 3AC, Plaintiffs
have also alleged that MSI and NPP have orally subcontracted out

1 to UCI their non-existent "right" to collect certain sums. Id. at
2 ¶ 421. There is nothing in these allegations that supports
3 extending liability to Jurczyk or Moore. Further, it is
4 irrelevant that Defendants have not given Plaintiffs proof of who
5 received the funds; Plaintiffs are required to plead their claims
6 sufficiently, and ultimately have the burden of proving their
7 claims as to each Defendant. However, because Plaintiffs have
8 alleged that UCI made at least some of the ACH withdrawals on
9 behalf of NPP, which authorized it to do so, Plaintiffs may pursue
10 this claim against NPP as well.²

11 Accordingly, the Court grants Plaintiffs leave to amend to
12 add the new allegations supporting their conversion claims and to
13 re-allege these claims against Parisi, UCI and NPP, but not
14 against Jurczyk and Moore.

15 II. New RICO predicate acts

16 The Court has already found that Plaintiffs' RICO claims were
17 properly plead against the Merchant Services Defendants and the
18 Leasing Defendants, except Northern Leasing. In this motion,
19 Plaintiffs seek leave to add additional predicate acts and
20 allegations to their already existing and properly plead RICO
21 claims, which were originally based on wire and mail fraud.
22 Defendants only challenge Plaintiffs' amendments that fall into
23 two categories: (1) misrepresentations made by the Merchant
24 Services Defendants to third parties, other than class members,
25 including alleged breaches of these third parties' regulations or

27
28 ² As noted above, the conversion claim was previously upheld
as sufficiently plead against MSI.

1 contracts with them, as further acts of wire and mail fraud; and
2 (2) allegations that Northern Leasing, Cohen and Mezei engaged in
3 bribery and witness tampering, new predicate acts. Although
4 Defendants characterize the first of these as new claims for fraud
5 or misrepresentation, they are alleged only as RICO predicate
6 acts, not as a new basis for the fraud and misrepresentation
7 claims.

8 A. Fraud involving third parties

9 In the proposed 3AC, Plaintiffs seek to add the following
10 allegations regarding third parties. To become an ISO/MSP, a
11 sales company must agree to adhere to rigid rules set by Visa,
12 MasterCard and the authorizing processors. Proposed 3AC ¶ 67.
13 These rules and their agreements with these entities, among other
14 things, govern the types of fees that ISOs are allowed to charge
15 and collect from merchants, forbid subcontracting of sales and
16 marketing services and require ISOs to assume all liability for
17 their employees' and agents' acts. Id. at ¶¶ 67, 240. MSI and
18 NPP are registered with Visa, MasterCard and the processors, while
19 UCI is not, but is subcontracted to perform all marketing, sales
20 and support in connection with the Merchant Services Defendants'
21 credit card processing, in violation of the agreements with the
22 processors, Visa and MasterCard. Id. at ¶¶ 70, 239-40, 275.

23 Moore, in concert with Parisi and Jurczyk, allegedly has made
24 numerous false representations to Visa, MasterCard and the
25 processors to induce them to grant NPP and MSI the authority to
26 market and sell credit card services, and to trick them into
27 believing that NPP and MSI continue to be in compliance. Id. at
28 ¶ 240. NPP and MSI told these entities that they were based at an

1 address in Irvine, California, which is actually UCI's address,
2 instead of at the address in Corona del Mar, California that they
3 have stated was theirs during this litigation. Id. at ¶¶ 241,
4 698. They did this because they knew that, if Visa, Mastercard or
5 the processors ever conducted an audit, they would immediately
6 know that the Corona del Mar location did not meet basic security
7 standards which would reveal that these are not legitimate
8 companies. Id. Jurczyk regularly corresponds with the processors
9 and holds himself out as the Vice President but does not tell them
10 that he is the Vice President of UCI, not of NPP or MSI. Id. at
11 ¶ 242. Moore, Jurczyk and UCI tell the processors that NPP and
12 MSI do business as "Merchant Services," although they have not
13 registered this name and denied at deposition that they do
14 business as "Merchant Services." Id. at ¶ 243. UCI, however,
15 does do business under this name. Id. NPP and MSI do not tell
16 the processors that the sales agents and staff of UCI are
17 independent contractors, which cannot be used pursuant to their
18 contracts. Id. at ¶ 245. Instead, UCI gives these agents
19 legitimate-sounding titles, like "Account Executive," to obscure
20 this fact. Id. UCI also requires the agents to use business
21 cards with the logo of "Merchant Services" and a statement that
22 "Merchant Services" is a "Registered ISO/MSP" of the processor.
23 Id. Merchant Services Defendants entered into credit card payment
24 processing contracts with class members on behalf of the
25 processors and mailed, faxed and emailed these to the processors,
26 "making the implicit representation that the contracts were
27 secured in compliance with NPP's and MSI's contracts with the
28

1 Processors, as well as governing Visa and Mastercard rules." Id.
2 at ¶¶ 702, 722.³

3 The Merchant Services Defendants also allegedly charged
4 merchant customers fees in violation of Visa and Mastercard's
5 regulations and NPP's and MSI's agreements with the processors.
6 Merchants who enroll in credit card processing services typically
7 enter into a contract with a processor. Id. at ¶ 347. Under
8 Visa's and Mastercard's regulations, ISOs are prohibited from
9 directly assessing or collecting fees associated with this

10 _____
11 ³ Merchant Services Defendants make several evidence-based
12 arguments that these allegations are false and that Plaintiffs
13 should not be allowed to amend their pleading to add them. The
14 Court rejects these arguments for a number of reasons.

15 First, they argue that Plaintiffs will be unable to prove
16 that Merchant Services Defendants concealed that NPP and MSI are
17 located in Corona del Mar, California, because this address is a
18 matter of public record. Opp. at 5. In support, they request
19 that the Court take judicial notice of print-outs they have
20 submitted from the California Secretary of State's website that
21 shows business entity detail for NPP and MSI and lists their
22 addresses in Corona Del Mar. Defs.' Request for Judicial Notice,
23 Exs. A, B. However, as Plaintiffs point out, these printouts show
24 information that was "current as of Friday, August 31, 2012" and
25 do not show the information that was on file with the California
26 Secretary of State throughout the class period.

27 Second, they state that, at recent depositions, Merchant
28 Services Defendants themselves testified that "Visa and MasterCard
do conduct regular audits of MSI and NPP, are aware of MSI and
NPP's respective subcontracts with UCI, and have approved of these
relationships," including in August 2011, and that neither "Visa
nor MasterCard has ever indicated that MSI's or NPP's subcontract
with UCI violates any terms of their agreement." Opp. at 5.
Notably, Merchant Services Defendants have made only general
statements about the content of their deposition testimony and
have not offered it into evidence.

Finally, although such evidence may be appropriate in a
motion for summary judgment to support an argument that there was
no causal connection between Merchant Services Defendants' alleged
misrepresentations to MasterCard, Visa and the processors and harm
to class members, evidence-based arguments such as these are not
appropriate at the pleading stage.

1 contract from the merchant. Id. Instead, the processor collects
2 fees from the merchant and pays the ISO a share. Id. Further,
3 NPP's contract with a processor, Transfirst LLC, prohibited NPP
4 from directly assessing merchants' bank accounts for fees
5 associated with the merchants' contracts with Transfirst; instead,
6 the merchants provided Transfirst with ACH authorization to debit
7 and credit their accounts for fees associated with credit card
8 processing, and Transfirst gave NPP a share. Id. at ¶ 348.
9 Plaintiffs allege that, when Merchant Services Defendants enrolled
10 merchants in processing services with Transfirst, they altered
11 Transfirst's terms of service to contain an early termination fee,
12 although they did not usually show these terms to customers at
13 all. Id. at ¶¶ 350-52. Plaintiffs also allege that, when
14 customers cancelled their contracts with processors, Merchant
15 Services Defendants either used this early termination fee to
16 scare the customers into continuing with their contracts (if the
17 customers were valuable ones) or directly collected the fee from
18 the customers' bank accounts, using the banking information that
19 the customer provided when enrolling in the processing services.
20 Id. at ¶¶ 353-56.

21 Plaintiffs also allege that the Merchant Services Defendants
22 improperly tried to collect monies that merchants did not pay to
23 the processor. In their agreements with processors, in exchange
24 for being paid a higher share of revenue, MSI and NPP agreed to
25 accept the financial risks related to the merchants that they
26 enrolled; under this arrangement, if a merchant defaulted on debts
27 owed to the processor, the processor could deduct those fees from
28 the amount paid to MSI and NPP. Id. at ¶ 420. Although, under

1 the Visa and Mastercard regulations, they were prohibited from
2 collecting directly from merchants debts owed under the agreements
3 between the merchants and processors, MSI and NPP have orally
4 purported to subcontract to UCI the non-existent "right" to
5 collect losses. Id. at ¶ 421. As a result, UCI has mailed
6 hundreds or thousands of collections letters to merchants,
7 conducted credit inquiries, reported debts to credit bureaus and
8 turned over debts to third party collection agencies. Id. at
9 ¶ 422.

10 Finally, Plaintiffs allege that the Merchant Services
11 Defendants used "fraudulent ACH forms" to represent falsely to
12 banks that they were authorized to deduct money from class
13 members' accounts. Plaintiffs allege that these forms were
14 fraudulent because they listed a non-existent entity as the
15 recipient and merchants were never told what entity would be
16 receiving the funds. See, e.g., id. at ¶¶ 358-361, 461. Thus,
17 according to Plaintiffs, when "UCI, on behalf of itself, other
18 Defendants, or its alter-egos, make the ACH withdrawal, they are
19 making a false representation to the bank that that entity has
20 explicit authorization of the merchant to conduct the withdrawal
21 to induce the bank to permit them to deduct the funds from the
22 class member's account," which "UCI knows . . . to be false, as
23 the class cannot give authorization to a fictitious non-entity."
24 Id. at ¶ 358; see also id. at ¶ 372. Plaintiffs also state that
25 Merchant Services Defendants falsely represented to the banks that
26 they were authorized to make the ACH withdrawals for certain sums
27 of money to which they were not actually entitled, including for
28 the improper cancellation fees and other debts under the

1 processing contract between the merchant and the processor that
2 are described above. See, e.g., id. at ¶¶ 353, 461, 481, 501,
3 517, 545, 580, 718.

4 Merchant Services Defendants argue that Plaintiffs have not
5 plead adequately that they themselves relied on these purported
6 misrepresentations to third parties. They also contend that
7 Plaintiffs do not have standing to bring claims based on
8 misrepresentations to third parties, because they have not alleged
9 sufficiently that they suffered an injury in fact that was caused
10 by the misconduct.

11 RICO creates a private cause of action for “[a]ny person
12 injured in his business or property by reason of a violation of
13 section 1962 of this chapter.” 18 U.S.C. § 1964(c). Section
14 1962(c), in turn, makes it “unlawful for any person employed by or
15 associated with any enterprise engaged in, or the activities of
16 which affect, interstate . . . commerce, to conduct or
17 participate, directly or indirectly, in the conduct of such
18 enterprise’s affairs through a pattern of racketeering activity,”
19 and § 1962(d) makes it “unlawful for any person to conspire to
20 violate” subsection (c). “Racketeering activity” is defined to
21 encompass a variety of predicate acts that are set forth in 18
22 U.S.C. § 1961(1), including mail fraud, wire fraud, witness
23 tampering, and bribery. A “‘pattern of racketeering activity’
24 requires at least two acts of racketeering activity.” 18 U.S.C.
25 § 1961(5).

26 “To have standing under civil RICO, [a plaintiff] is required
27 to show that the racketeering activity was both a but-for cause
28 and a proximate cause of his injury.” Rezner v. Bayerische

1 Hypo-Und Vereinsbank AG, 630 F.3d 866, 873 (9th Cir. 2010). See
2 also Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 989
3 (2010) (citing Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258,
4 268 (1992)). "When a court evaluates a RICO claim for proximate
5 causation, the central question it must ask is whether the alleged
6 violation led directly to the plaintiff's injuries." Anza v.
7 Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006) (emphasis
8 added). There must be "'a direct causal connection' between the
9 predicate wrong and the harm." Hemi Group, 130 S. Ct. at 994
10 (quoting Anza, 547 U.S. at 460). "A link that is too remote,
11 purely contingent, or indirect is insufficient." Id. at 989
12 (internal quotation marks and formatting omitted). "In some
13 cases, reliance may be 'a milepost on the road to causation.'"
14 Poulos v. Caesars World, Inc., 379 F.3d 654, 664 (9th Cir. 2004)
15 (quoting Blackie v. Barrack, 524 F.2d 891, 906 n.22 (9th Cir.
16 1975)).

17 However, Merchant Services Defendants are incorrect when they
18 argue that Plaintiffs must allege that they themselves were aware
19 of, and personally relied upon, the purported misrepresentations.
20 In Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008),
21 the Supreme Court held that first-party reliance is not an element
22 of a RICO claim based on mail fraud or required to establish
23 proximate causation, and that "a person can be injured 'by reason
24 of' a pattern of mail fraud even if he has not relied on any
25 misrepresentations." Id. at 649-54. In so holding, the Court
26 noted that plaintiffs still may be required to show that someone
27 had relied on the misrepresentations in order to prove proximate
28 causation ultimately. Id. at 658-59 ("none of this is to say that

1 a RICO plaintiff who alleges injury 'by reason of' a pattern of
2 mail fraud can prevail without showing that someone relied on the
3 defendant's misrepresentations") (emphasis in original). In
4 Bridge, the Court emphasized that proximate causation is "a
5 flexible concept that does not lend itself to a black-letter rule
6 that will dictate the result in every case." Id. at 654 (internal
7 quotation marks and citations omitted). Instead, proximate
8 causation is the label given to "the judicial tools used to limit
9 a person's responsibility for the consequences of that person's
10 own acts, with a particular emphasis on the demand for some direct
11 relation between the injury asserted and the injurious conduct
12 alleged." Id. (internal quotation marks and citations omitted).

13 Further, as Plaintiffs argue, to establish standing, they are
14 not required to show that each individual predicate act caused
15 them an injury, but rather that the pattern of racketeering
16 activity did. In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479
17 (1985), the Supreme Court stated that the plaintiff is required to
18 plead "compensable injury [consisting of] harm caused by predicate
19 acts sufficiently related to constitute a pattern." Id. at 497.
20 The Seventh Circuit has explained that, after establishing that
21 predicate acts are sufficiently related to constitute a pattern of
22 racketeering activity, "a plaintiff need not demonstrate injury to
23 himself from each and every predicate act making up the RICO
24 claim." Corley v. Rosewood Care Ctr., 388 F.3d 990, 1004 (7th
25 Cir. 2004) (discussing Marshall & Ilsley Trust Co. v. Pate, 819
26 F.2d 806, 809-10 (7th Cir. 1987)). Instead, the plaintiff must
27 prove only "an injury directly resulting from some or all of the
28 activities comprising the violation." Marshall, 819 F.2d at 809.

1 See also Deppe v. Trippe, 863 F.2d 1356, 1366 (7th Cir. 1988) (“no
2 requirement exists that the plaintiff must suffer an injury from
3 two or more predicate acts, or from all of the predicate acts. . . .
4 Thus, a RICO verdict can be sustained when a pattern of
5 racketeering acts existed, but when only one act caused injury.”);
6 Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268
7 (3d Cir. 1987) (finding that the statute required only injury from
8 “any predicate act,” not all, and stating that a contrary holding
9 would mean that, “[f]or example, if an organized crime group were
10 to operate a protection racket, extorting money from each merchant
11 in a community, then each merchant’s injury would be separate, and
12 therefore, . . . none could recover”); Edgenet, Inc. v. GS1,
13 AISBL, 742 F. Supp. 2d 997, 1015 n.6 (E.D. Wis. 2010) (noting that
14 the Supreme Court did not hold otherwise in Hemi Group); Gregory
15 P. Joseph, Civil RICO: A Definitive Guide 58-59 (3d ed. 2010) (“As
16 long as the pattern of racketeering activity has caused harm to
17 the plaintiff’s business or property, the plaintiff has RICO
18 standing. The plaintiff is not obliged to plead or prove that it
19 has been injured by multiple predicate acts, as long [l]as it has
20 been injured by at least one predicate act.”). Defendants cite no
21 cases stating that plaintiffs must plead or prove that they were
22 harmed by each predicate act alleged.

23 Here, the Court has already found that Plaintiffs have
24 properly plead RICO claims, which they had standing to pursue.
25 See Docket No. 179, 29-30. In addition, they allege that they
26 have been directly injured by at least one of the new predicate
27 acts; Plaintiffs have alleged that Merchant Services Defendants
28 represented to banks and ACH providers that they were authorized

1 to debit money from class members' accounts, even though they were
2 not entitled to collect these amounts, and that money was
3 unlawfully taken from their bank accounts as a result. Merchant
4 Services Defendants do not contest that the new alleged predicate
5 acts are related enough to the predicate acts previously plead or
6 to each other to constitute part of the same pattern of
7 racketeering. Accordingly, the Court finds that these are not
8 barred as a matter of law for failure to plead standing or
9 reliance.

10 Finally, Merchant Services Defendants contend that the
11 allegations of new predicate acts based on misrepresentations to
12 Visa, MasterCard and the processors do not comply with the
13 requirements of Rule 9(b). See Edwards v. Marin Park, Inc., 356
14 F.3d 1058, 1066 (9th Cir. 2004) (the heightened pleading
15 requirements of Rule 9(b) apply to RICO predicate acts based on
16 fraud). Defendants specifically identify paragraphs 240, 720 and
17 722 as conclusory. However, as Plaintiffs point out, other parts
18 of the proposed 3AC give sufficient details of the fraud that they
19 claim Merchant Services Defendants perpetrated on Visa, MasterCard
20 and the processors. For example, in paragraph 722, Plaintiffs do
21 not explain how Merchant Services Defendants purportedly made "the
22 implicit representation that the contracts were secured in
23 compliance with NPP's and MSI's contracts with the Processors, as
24 well as governing Visa and Mastercard rules." However, elsewhere
25 in the proposed pleading, Plaintiffs have explained with
26 specificity what compliance with these rules and contracts
27 entailed and how Merchant Services Defendants allegedly had
28 violated these requirements and concealed this from Visa,

1 Mastercard and the processors. Further, even if Plaintiffs had
2 not sufficiently plead the misrepresentation to third parties,
3 Rule 9(b)'s pleading requirement may be relaxed "where evidence of
4 fraud is exclusively in the defendant's possession," such as where
5 the plaintiffs themselves were not directly involved in the
6 purportedly fraudulent conduct. Sanford v. MemberWorks, Inc., 625
7 F.3d 550, 558 (9th Cir. 2010) (citing United States ex rel. Lee v.
8 Smith-Kline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001)).
9 Finally, even if some of the predicate acts are plead less
10 specifically than others, there are sufficient specifically plead
11 predicate acts to support the RICO claim.

12 Accordingly, the Court grants Plaintiffs' request to amend to
13 allege new predicate acts based on Merchant Services Defendants'
14 purported misrepresentations to third parties.

15 B. Anti-bribery and witness tampering claims

16 Plaintiffs also request leave to add allegations related to
17 two new predicate acts against the Leasing Defendants.
18 Specifically, Plaintiffs seek to add allegations that Northern
19 Leasing, Cohen and Mezei committed witness tampering and bribery,
20 which they explain as follows. When Plaintiffs filed the 2AC in
21 this action, they believed that SKS Associates was the entity
22 conducting the improper ACH transactions. Thus, they sought a
23 preliminary injunction to prohibit SKS Associates from continuing
24 its tax collection efforts.

25 According to Plaintiffs, at that time, Northern Leasing took
26 a number of improper steps to trick the Court into believing that
27 Northern Leasing was not involved in the transactions. Proposed
28 3AC ¶ 215. Cohen and Mezei, on behalf of themselves and Northern

1 Leasing, created a fake "Purchase Agreement" that purported to
2 transfer the right to collect taxes from certain individuals from
3 Northern Leasing to SKS Associates. Id. at ¶ 216. They also
4 created a shell company to serve as SKS Associates' manager and
5 hired Mezei's nephew, Jonathan Mirsky, to act as the shell
6 company's Vice President. Id. at ¶¶ 218-19. Mezei and Cohen each
7 took steps to have Mirsky sign a declaration, which they knew
8 contained false and misleading information, including that the
9 Purchase Agreement was valid, and led Mirsky to believe that the
10 contents of the declaration were accurate. Id. at ¶¶ 217-20. SKS
11 Associates then submitted the declaration to this Court in
12 connection with its opposition to Plaintiffs' motion for a
13 preliminary injunction and in support of its motion to compel
14 arbitration. Id. at ¶ 221. Mezei allegedly paid Mirsky \$20,000
15 for his role. Id. After Plaintiffs subpoenaed the shell
16 corporation, Leasing Defendants took steps to dissolve it. Id. at
17 ¶ 222.

18 In addition, in August 2011, the New York Attorney General
19 subpoenaed Northern Leasing and SKS Associates to provide two
20 witnesses to testify regarding SKS's tax collection scheme. Id.
21 at ¶ 223. Plaintiffs claim that Northern Leasing persuaded Cortes
22 Derussy, an employee without relevant knowledge, to testify. Id.
23 at ¶¶ 223-25. It knowingly provided Derussy with false
24 information in advance of his testimony in order to prevent or
25 delay the testimony of those with actual knowledge of the
26 fraudulent scheme and to ensure that Plaintiffs in this litigation
27 did not learn the information. Id. at ¶¶ 223-26, 743.

28

1 Plaintiffs contend that these activities constitute witness
2 tampering in violation of 18 U.S.C. § 1512(b) and (c) and bribery
3 in violation of 18 U.S.C. § 201(b)(3), in furtherance of the
4 enterprise.

5 Leasing Defendants oppose Plaintiffs' request to add these
6 allegations. They argue that Plaintiffs do not have standing to
7 allege these predicate acts because they cannot plead that their
8 business or property has been injured by the conduct, and that
9 they have not alleged proximate causation between these new
10 predicate acts and the harm they have suffered.

11 As discussed above, Plaintiffs need not plead or prove that
12 they have suffered harm as a result of each individual predicate
13 act, but rather that the predicate acts are all part of a pattern
14 of racketeering activity and that they have suffered harm as a
15 direct result of at least one predicate act. Defendants have not
16 challenged that these predicate acts are alleged to be part of the
17 same pattern of racketeering activity, and it appears that
18 Plaintiffs have plead this adequately. See Turner v. Cook, 362
19 F.3d 1219, 1229 (9th Cir. 2004) (quoting H.J. Inc. v. Nw. Bell
20 Tel. Co., 492 U.S. 229, 239 (1989) ("A 'pattern' of racketeering
21 activity . . . requires proof that the racketeering predicates are
22 related and 'that they amount to or pose a threat of continued
23 criminal activity.'"). Plaintiffs have plead that the alleged
24 witness tampering and bribery were undertaken in order to conceal
25 the role of Northern Leasing in the debt collection scheme and to
26 allow it to continue, and that the predicate acts have taken place
27 over the course of several years.

28

1 Thus, Plaintiffs have alleged sufficiently that the predicate
2 acts are part of the same pattern of racketeering and that they
3 have been directly harmed by at least one of the predicate acts.
4 Because they have alleged injury and standing sufficiently, the
5 Court grants Plaintiffs leave to amend to add these predicate
6 acts.

7 III. Discovery

8 Defendants argue that, if leave to amend is granted, they
9 should be permitted to "reopen class discovery with respect to any
10 permitted new claim and/or class(es), including re-opening the
11 depositions of the named plaintiffs and conducting additional
12 written discovery to investigate the new theories and new
13 classes." Opp. at 19. They also request that class certification
14 briefing be "adjourned until such additional discovery is
15 completed." Id. Defendants state that one example of the further
16 discovery they want to take is to investigate Plaintiffs'
17 "personal knowledge of the purported misrepresentations" to third
18 parties, "their supposed reliance thereon, and any resulting
19 damage." Id.

20 The Court notes that it has not set a separate "class
21 discovery" deadline and that the fact discovery deadline is April
22 19, 2013. See Docket Nos. 276, 367. Accordingly, there is no
23 need to "reopen class discovery" as Defendants have requested.

24 If Defendants seek to take further depositions of individuals
25 whom they have already deposed, they shall meet and confer with
26 Plaintiffs on this topic and, if they are unable to reach an
27 agreement, they shall seek permission from the discovery
28 Magistrate Judge in compliance with her Order regarding Discovery

1 Procedures. See Docket No. 313. In any discovery motion that
2 Defendants may file on this issue, they shall clearly explain what
3 they need to ask these individuals. The Court notes that the
4 example that Defendants have provided here would not justify
5 allowing further depositions of the named Plaintiffs because, as
6 explained above, Plaintiffs' theory regarding the
7 misrepresentations to third parties is not that Plaintiffs
8 themselves relied or knew about the misrepresentations but that
9 the third parties did, to Plaintiffs' detriment.

10 The Court resets the briefing schedule on Plaintiffs' motion
11 for class certification, as set forth below.

12 IV. Plaintiffs' Motion to Seal

13 Concurrently with their motion for leave to file a 3AC,
14 Plaintiffs filed a motion for leave to file under seal a number of
15 documents, including portions of their motion for class
16 certification and its supporting evidence, portions of the motion
17 for leave to file a 3AC, and portions of Exhibit A thereto, which
18 contained their proposed 3AC. Docket No. 385. In subsequent
19 declarations filed pursuant to orders issued by this Court,
20 Plaintiffs have represented that they requested that portions of
21 the motion for leave to file a 3AC and of the proposed 3AC be
22 sealed because they contain allegations, facts or arguments based
23 on documents and testimony that were designated as confidential by
24 either Leasing Defendants or Merchant Services Defendants. See
25 Simplicio Decl., Ex. A, Docket No. 411; Simplicio 1st Suppl.
26 Decl., Ex. D, Docket No. 420.

27 Local Rule 79-5(d) provides that, when a party files an
28 administrative motion seeking to submit material under seal that

1 another party to the action has designated as confidential, the
2 designating party must file a declaration establishing that the
3 information is sealable. Civil L.R. 79-5(d). "If the designating
4 party does not file its responsive declaration . . . , the
5 document or proposed filing will be made part of the public
6 record." Id.

7 Leasing Defendants have filed several declarations in support
8 of the motion to seal. See Nigro Decl., Docket No. 419; Nigro
9 Suppl. Decl., Docket No. 423; Krieger Decl., Docket No. 423. In
10 these declarations, Leasing Defendants offer support for sealing
11 certain evidence that Plaintiffs have submitted in support of
12 their motion for class certification, but have not provided
13 reasons to seal any portion of Plaintiffs' motion for leave to
14 file a 3AC or of their proposed 3AC.

15 Merchant Services Defendants have also filed a declaration in
16 support of the motion to seal. See Jurczyk Decl., Docket No. 424.
17 However, Merchant Services Defendants likewise do not offer
18 support for sealing any portion of Plaintiffs' motion for leave to
19 file a 3AC and provide reasons for sealing only a portion of
20 paragraph 541, line sixteen⁴ of the proposed 3AC.

21 Merchant Services Defendants seek to seal a portion of a
22 record that is closely related to the merits of Plaintiffs'
23 claims. To establish that the document is sealable, the party who
24 has designated it as confidential "must overcome a strong
25 presumption of access by showing that 'compelling reasons

26

27 ⁴ Although, in his declaration, Jurczyk identifies line
28 fifteen of paragraph 541, see Jurczyk Decl. 13, row 2, he appears
to refer to the monetary amount contained in line sixteen instead.

1 supported by specific factual findings . . . outweigh the general
2 history of access and the public policies favoring disclosure.'"
3 Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 679 (9th Cir. 2010)
4 (citation omitted). Cf. id. at 678 (explaining that a less
5 stringent "good cause" standard is applied to sealed discovery
6 documents attached to non-dispositive motions).

7 Jurczyk explains that the relevant portion of paragraph 541,
8 line sixteen of the proposed 3AC describes "information regarding
9 compensation paid to Merchant [Services] Defendants by their
10 service providers," which gives insight into the contractual
11 pricing arrangements between these entities. Jurczyk Decl.

12 ¶ 6.b.i. He states that the pricing terms "are favorable compared
13 to those generally available in the marketplace as well as those
14 secured by competitors," and that, if the pricing arrangements
15 became public, Merchant Services Defendants would lose their
16 competitive advantage because their competitors "would take steps
17 to secure similar or better pricing from their service providers."
18 Id. at ¶ 6.a.i. Jurczyk further states that this information
19 would provide competitors with "insight into the types of products
20 and services that Merchant [Services] Defendants have found to be
21 most successful," which could allow competitors to "adjust their
22 own strategies and models to compensate for or adopt those of
23 Merchant [Services] Defendants." Id. at ¶ 6.b.i.

24 "[S]ources of business information that might harm a
25 litigant's competitive standing' often warrant protection under
26 seal." In re NCAA Student-Athlete Name & Likeness Licensing
27 Litig., 2012 U.S. Dist. LEXIS 140779, at *15 (N.D. Cal.) (quoting
28 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)).

1 Merchant Services Defendants have provided sufficient evidence
2 that public disclosure of the compensation term in paragraph 541,
3 line sixteen of the proposed 3AC would competitively harm them in
4 the future. This information, however, is not relevant to the
5 resolution of the motion for leave to file the proposed 3AC.
6 Thus, the information can be redacted in the proposed 3AC and
7 filed under seal in the final 3AC.

8 Accordingly, the Court GRANTS in part, DENIES in part and
9 DEFERS in part Plaintiffs' motion to file under seal. The request
10 to seal portions of the motion for leave to file a 3AC is denied.
11 The Court finds compelling reasons to prevent public disclosure of
12 the compensation term in paragraph 541, line sixteen of the
13 proposed 3AC, but denies the motion to seal as to the remainder of
14 the document. Plaintiffs shall redact this information in the
15 proposed 3AC and they are granted leave to file the corresponding
16 term in the final 3AC under seal. The Court defers ruling on the
17 request to seal portions of the motion for class certification and
18 its supporting evidence.

19 CONCLUSION

20 For the reasons set forth above, the Court GRANTS in part
21 Plaintiffs' motion for leave to file a 3AC and DENIES it in part
22 (Docket No. 383). Plaintiffs may file the 3AC as requested,
23 except that they may not re-allege their conversion claims against
24 Jurczyk and Moore.

25 The Court GRANTS in part Plaintiffs' motion to file under
26 seal, DENIES it in part and DEFERS it in part (Docket No. 385).
27 Within three days of the date of this Order, Plaintiffs shall file
28 in the public docket their motion for leave to file a 3AC and a

1 redacted version of Exhibit A. By that date, Plaintiffs shall
2 also file a redacted version of their final 3AC in the public
3 record and an unredacted version under seal.

4 The Court resets the case schedule as follows:

<u>Event</u>	<u>Date</u>
5 6 Deadline for Plaintiffs to file 7 their Third Amended Complaint	Forthwith, but no later than three days after the date of this Order
8 9 Deadline for Plaintiffs to file, if necessary, an amended motion for class certification	Thursday, December 13, 2012
10 11 Deadline for Defendants to file their opposition to Plaintiffs' 12 motion for class certification, in one or two joint briefs, 13 totaling no more than fifty pages.	Thursday, January 24, 2013
14 15 Deadline for Plaintiffs to file reply in support of motion for class certification, in a 16 single brief of no more than twenty pages.	Thursday, February 14, 2013
17 Case Management Statement due	Thursday, February 28, 2013
18 19 Further Case Management conference and hearing on Plaintiffs' motion for class 20 certification	Thursday, March 7, 2013, at 2:00 p.m.

21 IT IS SO ORDERED.

22
23 Dated: 12/6/2012


CLAUDIA WILKEN
United States District Judge