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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIAMOND REAL ESTATE, et al.,

Plaintiffs,

v.

AMERICAN BROKERS CONDUIT, et al.,

Defendants.

Case No. [16-cv-03937-HSG](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS AND
REMANDING STATE LAW CLAIMS**

Re: Dkt. No. 60

This case arises out of a prior trustee sale and planned foreclosure sale of real property located in Hayward, California. *See* Dkt. No. 58 (“FAC”) ¶¶ 9–23. Pending before the Court is the motion to dismiss under Federal Rule of Procedure 12(b)(6) filed by Ocwen Loan Servicing, LLC; Citibank, N.A., as Trustee American Home Mortgage Assets Trust 2006-3, Mortgage-Backed Pass Through Certificates Series 2006-3; American Home Mortgage Servicing, Inc.¹; and Mortgage Electronic Registration Systems, Inc. (collectively, “Defendants”). Dkt. No. 60 (“Mot.”). The Court previously dismissed the original complaint, granting leave to amend as to fourteen of the sixteen causes of action. Dkt. No. 57 (*Diamond Real Estate v. Am. Brokers Conduit*, No. 16-cv-03937-HSG, 2017 WL 412527, at *3 (N.D. Cal. Jan. 31, 2017)). Diamond Real Estate, Porfirio P. Jorque, and Editha Palancia (collectively, “Plaintiffs”) then filed their amended complaint, pleading eight causes of action, including a single federal cause of action under the Racketeer Influenced and Corrupt Organizations Act (“RICO Act”), 18 U.S.C. § 1961 *et seq.* FAC ¶¶ 24–134.² Of these eight causes of action, six were not alleged in the original

¹ In February 2012, American Home Mortgage Servicing, Inc. changed its name to Homeward Residential, Inc. Dkt. No. 9.

² Plaintiffs also seek declaratory relief. *See* FAC ¶¶ 24–38 (First Cause of Action). However, this is not a standalone federal claim. As described in the Court’s prior order, the Declaratory Judgment Act (“DJA”), 28 U.S.C. § 2201, provides an additional remedy, not an independent theory of recovery. *See Diamond*, 2017 WL 412527, at *10 (citing *Team Enters., LLC v. W. Inv. Real Estate Trust*, 721 F. Supp. 2d 898, 911 (E.D. Cal. 2010)).

1 complaint. *Compare id. with* Dkt. No. 1-1 ¶¶ 124–250. Having carefully considered the
 2 arguments raised by the parties’ briefs, the Court finds this matter appropriate for disposition
 3 without oral argument and the matter is deemed submitted. *See* N.D. Civ. L.R. 7-1(b).³

4 In addressing Defendants’ pending motion to dismiss, the Court focuses first on the only
 5 federal cause of action, alleging that Defendants violated the RICO Act. *See* FAC ¶¶ 131–34. As
 6 a threshold issue, the Court’s prior dismissal order did not grant leave to add new claims in the
 7 amended complaint. *See Diamond*, 2017 WL 412527, at *11 (granting leave to amend on fourteen
 8 of the sixteen causes of action alleged in the original complaint). Nor did Plaintiffs seek
 9 Defendants’ consent or the Court’s leave to add the RICO claim. *See* Fed. R. Civ. P. 15(a)(2).
 10 Under these circumstances, new claims asserted for the first time in an amended complaint are
 11 typically stricken. *See, e.g., Benton v. Baker Hughes*, No. CV 12-07735 MMM MRWx, 2013 WL
 12 3353636, at *3 (C.D. Cal. June 30, 2013) (citing cases), *aff’d sub nom. Benton v. Hughes*, 623 F.
 13 App’x 888 (9th Cir. 2015).

14 Even reaching the merits, the result is no different: Plaintiffs’ RICO claim must be
 15 dismissed. “A civil RICO claim requires allegations of the conduct of an enterprise through a
 16 pattern of racketeering activity that proximately caused injury to the plaintiff.” *Swartz v. KPMG*
 17 *LLP*, 476 F.3d 756, 760–61 (9th Cir. 2007). Moreover, to plead a civil RICO claim, plaintiffs
 18 must satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Edwards v.*
 19 *Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004); *see also* Fed. R. Civ. P. 9(b) (“In alleging
 20 fraud or mistake, a party must state with particularity the circumstances constituting fraud or
 21 mistake.”). To avoid dismissal for inadequacy under Rule 9(b), Plaintiffs must “state the time,
 22 place, and specific content of the false representations as well as the identities of the parties to the
 23 misrepresentation.” *See Edwards*, 356 F.3d at 1066 (internal quotation marks omitted). In

25 ³ Specifically, the Court has weighed the arguments raised by the motion, opposition, and reply
 26 briefs. *See* Dkt. Nos. 60, 64–65. However, the Court does not consider the arguments raised by
 27 Plaintiffs’ supplemental brief, filed approximately six weeks after the reply in obvious violation of
 28 the Local Rules. *See* Dkt. No. 66; Civil L.R. 7-3(d) (prohibiting the filing of any supplemental
 material after the reply, with two exceptions (objections to reply evidence and statements of recent
 decisions), neither of which applies to Plaintiffs’ supplemental brief). Defendants justifiably
 objected to Plaintiffs’ supplemental brief on the same day it was filed. *See* Dkt. No. 67.

1 addition, “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
2 requires plaintiffs to differentiate their allegations when suing more than one defendant and inform
3 each defendant separately of the allegations surrounding his alleged participation in the fraud.”
4 *See Swartz*, 476 F.3d at 764–65 (internal quotation marks and brackets omitted).

5 Here, Plaintiffs fail to plead with particularity the circumstances giving rise to the alleged
6 RICO violation. *See* FAC ¶¶ 131–34. Plaintiffs make only generalized allegations as to the
7 “who” (i.e., “Defendants”), the “what” (e.g., “by abusing fiduciary relationships to encourage
8 plaintiffs to take out loans on their property, by acquiring liens and security interests in all of
9 plaintiffs’ property, and by keeping plaintiffs in perpetual apprehension of foreclosure and
10 financial ruin”), and the “when” (“commencing on or around 07/01/15”), and are silent as to the
11 “where” of the alleged RICO violation. *See id.* Instead, Plaintiffs essentially engage in the
12 “formulaic recitation of the elements of a [RICO claim],” which would not even be sufficient
13 under Rule 8(a), *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), much less under Rule
14 9(b). Accordingly, Plaintiffs’ RICO claim must be dismissed.

15 The Court declines to grant leave to amend the RICO claim. In its prior dismissal order,
16 the Court detailed the deficiencies of Plaintiffs’ original complaint on a claim-by-claim basis, and
17 cautioned that its decision to grant leave to amend was “not an invitation for Plaintiffs to replead
18 substantially similar facts in the hope of a different result.” *See Diamond*, 2017 WL 412527, at
19 *11. Instead of making a good-faith effort to address the deficiencies identified by the Court,
20 Plaintiffs have pled substantially similar facts while asserting, without Defendants’ consent or the
21 Court’s leave, an entirely new (and meritless) federal RICO claim. Plaintiffs’ five-page
22 opposition to the motion to dismiss is conclusory and formulaic, completely fails to address the
23 legal merits of *any* of the claims, and borders on incoherency. *See* Dkt. No. 64. And Plaintiffs
24 have not explained why the RICO claim could not have been asserted in the original complaint.
25 The Court therefore denies leave to amend because, at a minimum, the RICO claim was asserted
26 after undue delay, and because granting further leave to amend under these circumstances would
27 be futile given Plaintiffs’ failure to address (or even to attempt to address) the pervasive
28 deficiencies identified in the Court’s detailed order. *See Leadsinger, Inc. v. BMG Music Pub.*, 512

1 F.3d 522, 532 (9th Cir. 2008) (declaring that district court has discretion to deny leave where
2 movant has acted with undue delay or in bad faith, or where amendment would be futile, among
3 other reasons).

4 Having dismissed Plaintiffs’ sole federal cause of action, the Court must determine
5 whether to exercise supplemental jurisdiction over the causes of action asserted under state law.⁴
6 *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (“A district court ‘may
7 decline to exercise supplemental jurisdiction’ if it ‘has dismissed all claims over which it has
8 original jurisdiction.’” (quoting 28 U.S.C. § 1367(c)(3)). Where all federal claims are eliminated
9 before trial, the various pendant jurisdiction factors (judicial economy, convenience, fairness, and
10 comity) typically weigh in favor of declining to exercise jurisdiction over the remaining state
11 claims. *Id.* Given the early stage of these proceedings, California’s interest in applying its own
12 law, and the absence of any countervailing factors, the Court declines to exercise supplemental
13 jurisdiction over the state law claims. Since the sole basis of removal was federal question
14 jurisdiction, *see* Dkt. No. 1 ¶ 9, remand of the state law claims is appropriate, *see Carlsbad Tech.,*
15 *Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 636–37 (2009); *Bierman v. Toshiba Corp.*, No. C-10-4203
16 MMC, 2010 WL 4716879, at *2 (N.D. Cal. Nov. 12, 2010), *aff’d*, 473 F. App’x 756, 757 (9th Cir.
17 2012).

18 For the foregoing reasons, the Court **DISMISSES** Plaintiffs’ Eighth Cause of Action with
19 prejudice. This dismissal applies to all defendants named in this action.⁵ The Court **REMANDS**
20 the case to state court. The clerk is directed to remand the case forthwith to Alameda County
21

22 ⁴ Although Plaintiffs request declaratory relief, the DJA does not extend federal jurisdiction and a
23 federal court may not award declaratory relief unless an underlying claim provides a basis for
24 federal subject matter jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667,
671–74 (1950).

25 ⁵ Four named defendants were not listed in the moving papers. Western Progressive, LLC
26 (“Western”) appeared in state court prior to removal, but not in federal court, and Western’s
27 declaration of nonmonetary status was attached to the notice of removal. Dkt. No. 1 at 2 & Ex. G.
28 American Brokers Conduit (“ABC”) has not appeared and according to Defendants’ counsel, went
out of business as per its Chapter 11 liquidation filing under bankruptcy. Dkt. No. 15. American
Home Mortgage Acceptance, Inc. and American Home Mortgage Assets, LLC have appeared but,
like Western and ABC, are not listed as movants in the pending motion to dismiss. Mot. at 1. For
the same reasons articulated in this Order, the Court *sua sponte* dismisses the RICO claims against
these four defendants.

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Superior Court and close the case.⁶

IT IS SO ORDERED.

Dated: 5/18/2017


HAYWOOD S. GILLIAM, JR.
United States District Judge

⁶ In reaching its decision, the Court did not rely on the documents submitted with Defendants' request for judicial notice. *See* Dkt. No. 61 ("RJN"). Accordingly, Defendants' RJN is **DENIED AS MOOT.**