

1 **** E-filed September 20, 2010 ****

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8 NOT FOR CITATION

9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SAN JOSE DIVISION

12 ED SUMMERFIELD, ARTHUR
SUMMERFIELD, and RITA SUMMERFIELD,

No. C09-02609 HRL

13 Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
SECOND AMENDED COMPLAINT**

14 v.

15 STRATEGIC LENDING CORPORATION, ALI
WEICHLER, LEONARDO "LEO" AGUSTIN,
ERIC SWENSON, and DOES 1-30,

[Re: Docket No. 74]

16 Defendants.

17 _____/

18 This case originally arose out of plaintiff Ed Summerfield's ("Ed") former employment with

19 mortgage company Strategic Lending Corporation ("SLC"). In April 2007, Ed sued SLC, his

20 former boss, Ali Weichler ("Weichler"), and Weichler's purported partners at SLC, Leo Agustin

21 ("Agustin") and Eric Swensen ("Swensen") (collectively, "Defendants") in California state court for

22 violations of the California Labor Code and the common law.¹ A little over two years later, though,

23 in June 2009, Ed voluntarily dismissed his state court action and filed a complaint in federal court

24 which added his parents, Arthur Summerfield ("Arthur") and Rita Summerfield ("Rita"), as

25 plaintiffs as well as a federal claim for violation of the Racketeer Influenced and Corrupt

26 Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. Weichler now moves to dismiss the action

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¹ Ed originally sued only SLC and Weichler, but later added Agustin and Swensen.

1 pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).² (Docket No. 74 (“Motion”).)
2 Upon consideration of the parties’ briefs and the arguments presented at oral argument, the Court
3 grants Weichler’s motion.³

4 BACKGROUND

5 Ed, Arthur, and Rita (collectively, “Plaintiffs”) allege in their Second Amended Complaint
6 that Defendants engaged in a widespread scheme to defraud borrowers and lenders of mortgage
7 loans by forging documents, inflating assets, and committing other illegalities with respect to loans
8 brokered by Defendants, including those made to Arthur and Rita. (Docket No. 68 (“Second
9 Amended Complaint” or “SAC”), ¶ 40 & 42-46.) As a part of their scheme, Plaintiffs allege that
10 “Weichler planned to induce and did induce Ed to work for SLC so that Weichler could sell junk
11 loans (or mortgages) to Ed’s equity-rich parents.” (*Id.* at ¶ 15.) To that end, they allege that
12 Weichler induced Ed to join SLC in May 2003 with a “guarantee” that Ed would be making at least
13 one million dollars a year within four years. (*Id.* at ¶¶ 14 & 17.) Ed claims that he took the job in
14 reliance on Weichler’s promises, but that things did not go as planned. Indeed, the Second
15 Amended Complaint provides a lengthy list of the various wrongs that Weichler allegedly
16 committed against Ed during Ed’s employment, all of which eventually culminated in Ed’s
17 termination on April 29, 2005. (*Id.* at ¶¶ 17-30.)

18 In addition to the allegations surrounding Ed’s employment, Plaintiffs also allege that
19 Defendants harmed Arthur and Rita. “Using promises to Ed as bait,” Plaintiffs allege that Weichler
20 “met with Rita and Arthur many times” while Ed worked for SLC and convinced them “to re-
21 finance their home, to take a line of equity [against their home], and to borrow heavily on other

22 ² As of August 23, SLC does not appear to have been served with any federal complaint or
23 summons, and only after several time extensions did Plaintiffs serve Weichler and Swenson with the
24 federal complaint in December 2009. Agustin, who was served in April 2010, never responded to or
25 answered the complaint and so his default was entered, and Swensen eventually filed for bankruptcy
and is thus subject to an automatic stay. As such, Weichler is the only defendant at issue at this
time.

26 ³ Plaintiffs have not yet served SLC with their complaint and default was entered as Agustin.
27 Pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, all parties who have
28 appeared in this action have expressly consented that all proceedings may be heard and finally
adjudicated by the undersigned. Defendants who have not been served are not deemed “parties” to
the action within the rules requiring consent to magistrate judge jurisdiction. *See Neals v. Norwood*,
59 F.3d 530, 532 (5th Cir. 1995); *see also United States v. Real Prop.*, 135 F.3d 1312, 1317 (9th
Cir. 1998).

1 property, all to the benefit and unlawful gain of the Defendants.” (*Id.* at ¶¶ 31-32.) Arthur and Rita
2 allegedly did so after “succumbing to Weichler’s pressure and false promises” that his loans were
3 “superior products” and “good, solid loans.” (*Id.* at ¶¶ 32 & 38.) Plaintiffs allege that Weichler sent
4 them “false” and “fraudulent” closing cost and interest estimates for the loans Arthur and Rita took
5 on. (*Id.* at ¶ 33.) These loans ended up being “terrible deal[s]” for the couple and eventually they
6 lost “their luxury condo in Munich, [Germany,] and a beach house in Southern California” and they
7 “were also unable to qualify for more reasonable loan packages because their credit had been
8 damaged.” (*Id.* at ¶¶ 33 & 41.)

9 In addition to brokering these loans, Plaintiffs also allege that after “so ingratiating himself
10 into the Summerfield home,” Weichler began secretly meeting with Arthur and “[took] advantage of
11 Arthur’s diminished mental capacity” to get Arthur to start day-trading, which led to over \$500,000
12 in losses. (*Id.* at ¶¶ 34, 36 & 50.) Naturally, though, “Weichler was ready with another predatory
13 loan” to cover those losses. (*Id.* at ¶ 36.)

14 Plaintiffs eventually could not keep entering into loans. Realizing that they were “unable to
15 profit any longer from Rita and Arthur,” Defendants terminated Ed in April 2005 as he was no
16 longer useful to them. (*Id.* at ¶37.) Two years later, Ed sued SLC and Weichler in state court and
17 kicked off the events leading up to present.

18 LEGAL STANDARD

19 “Whenever it appears by suggestion of the parties or otherwise that the court lacks
20 jurisdiction of the subject matter, the court shall dismiss the action.” FED. R. CIV. P. 12(h)(3). A
21 lack of jurisdiction is presumed unless the party asserting jurisdiction establishes that it exists. *See*
22 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (“It is to be presumed that
23 a cause lies outside [a federal court’s] limited jurisdiction and the burden of establishing the
24 contrary rests upon the party asserting jurisdiction[.]”) (citations omitted); *see also Stock West, Inc.*
25 *v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (“A federal court is presumed to lack
26 jurisdiction in a particular case unless the contrary affirmatively appears.”).

27 On motion, a court may also dismiss a complaint for failure to state a claim. FED. R. CIV. P.
28 12(b)(6). The federal rules require that a complaint include a “short and plain statement” showing

1 the plaintiff is entitled to relief. FED. R. CIV. P. 8(a)(2). The statement must “raise a right to relief
2 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 55 (2007). Yet only
3 plausible claims for relief with survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. ____, 129
4 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). A claim is plausible if its factual content “allows the
5 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at
6 1949. A plaintiff does not have to provide detailed facts, but the pleading must include “more than
7 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1950.

8 In deciding a motion to dismiss, the court is ordinarily limited to the face of the complaint.
9 *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). The factual
10 allegations pled in the complaint must be taken as true and reasonable inferences drawn from them
11 must be construed in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336,
12 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995) (citing *Usher v. City of Los*
13 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)). However, the court cannot assume that “the [plaintiff]
14 can prove facts which [he or she] has not alleged.” *Associated General Contractors of California,*
15 *Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). “Nor is the court required
16 to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
17 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)
18 (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)), *amended on other*
19 *grounds by* 275 F.3d 1187 (9th Cir. 2001).

20 “A court should freely give leave [to amend] when justice so requires.” FED. R. CIV. P.
21 15(a)(2). “Four factors are commonly used to determine the propriety of a motion for leave to
22 amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of
23 amendment.” *Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007) (internal citations omitted).
24 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” *Bonin v.*
25 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). An amendment would be “futile” if there is no set of
26 facts can be proved which would constitute a valid claim or defense. *See Miller v. Rykoff-Sexton,*
27 *Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

28

1 **DISCUSSION**

2 The RICO statute makes it illegal for “any person employed by or associated with any
3 enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or
4 participate, directly or indirectly, in the conduct of [an] enterprise’s affairs through a pattern of
5 racketeering activity” or to conspire to do so. 18 U.S.C. §§ 1692(c) & (d). Thus, to state a claim for
6 a violation of this section, a plaintiff must plead “(1) conduct (2) of an enterprise (3) through a
7 pattern (4) of racketeering activity.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

8 “Racketeering activity” is defined as a number of specific criminal acts under federal and
9 state laws. *See* 18 U.S.C. § 1961(1). Here, Plaintiffs base their RICO claim on the predicate crimes
10 of mail and wire fraud (18 U.S.C. §§ 1341, 1343).⁴ *See* 18 U.S.C. § 1961(1)(B). The elements of
11 mail and wire fraud consist of (1) a scheme or artifice devised with (2) the specific intent to defraud
12 and (3) use of the United States mails or interstate wires in furtherance thereof. *Orr v. Bank of*
13 *America, NT & SA*, 285 F.3d 764, 782 (9th Cir. 2002) (citation omitted). And since Plaintiffs’
14 predicate crimes are based upon allegations of fraud, they must be pled with particularity. FED. R.
15 Civ. P. 9(b); *Odom v. Microsoft Corp.*, 486 F.3d 541, 553–54 (9th Cir. 2006).

16 **A. Ed Lacks Standing to Bring a Civil RICO Claim**

17 “Under RICO’s civil enforcement mechanism, ‘[a]ny person injured in his business or
18 property by reason of a violation of [18 U.S.C. § 1962] may sue therefor in any appropriate United
19 States district court’” *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir.
20 2008) (quoting 18 U.S.C. § 1964(c)). “To have standing under § 1964(c), a civil RICO plaintiff
21 must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his
22 harm was ‘by reason of’ the RICO violation, which requires the plaintiff to establish proximate

23 ⁴ Plaintiffs offhandedly attempt to allege other predicate racketeering activity, but these also fail.
24 For instance, while Plaintiffs also allege “extortion” as a predicate crime in Paragraph 49 of the
25 Second Amended Complaint (apparently “by [Weichler] threatening to terminate Ed if he did not
26 assist in obtaining loans from his parents in December 2003 and June 2004”), Plaintiffs do not
27 sufficiently state a claim for extortion under the Hobbs Act, 18 U.S.C. § 1951, or any other state law
28 extortion statute. In addition, while Plaintiffs allege the predicate crime of “interstate transportation
and sale of fraudulently obtained goods” in the same paragraph, Plaintiffs do not cite to any specific
predicate crime under RICO. *See, generally*, 18 U.S.C. § 1961(1). And lastly, Plaintiffs contend in
their opposition to Weichler’s Motion that they allege financial institution fraud (18 U.S.C. § 1344)
as a predicate crime, but nowhere in the Second Amended Complaint do they actually make this
allegation. (Opp’n at 6-7; *see* SAC, ¶¶ 46-52.)

1 causation.” *Id.* (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Sedima*, 473
2 U.S. at 496).

3 Where a plaintiff is asserting injury to property, he or she must allege “concrete financial
4 loss.” *Id.* at 975 (quoting *Oscar v. Univ. Students Coop. Ass’n.*, 965 F.2d 783, 785 (9th Cir. 1992)
5 (en banc)). However, “[f]inancial loss alone . . . is insufficient.” *Id.* “Without a harm to a specific
6 business or property interest — a categorical inquiry typically determined by reference to state law
7 — there is no injury to business or property within the meaning of RICO.” *Id.* (quoting *Diaz v.*
8 *Gates*, 420, F3d. 897, 900 (9th Cir. 2005) (en banc)).

9 In this case, Ed’s RICO claim as currently pled is based on Plaintiffs’ allegation that because
10 Defendants’ acts resulted in Arthur and Rita losing large sums of money, Ed’s “inheritance
11 eventually was wiped out, as was his ability to borrow from the equity in properties owned by Rita
12 and Arthur.”⁵ (SAC, ¶ 33.) More specifically, Plaintiffs allege that “[t]he properties owned by
13 Plaintiffs [meaning Arthur and Rita] were in a family trust created by Arthur and Rita. Ed, with his
14 sister, was one of two primary trust beneficiaries and derived income from the trust when, for
15 example, monies were dispersed; thus, he had a present property interest destroyed by Defendants as
16 well as his access to credit secured by these properties.” (*Id.* at ¶ 39.)

17 But as Weichler points out in his opposition — and as counsel for Plaintiffs conceded at oral
18 argument — the trust containing Ed’s “inheritance” is revocable. And under basic principles of trust

19 ⁵ Citing *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), Plaintiffs argue in their
20 opposition that Ed’s injured property interest is his “legal entitlement to business relations
21 unhampered by schemes prohibited by the RICO predicate statutes.” *Id.* at 1168 n.4. The plaintiffs
22 in *Mendoza* were a class of day laborers who alleged that their employers had depressed their wages
23 by illegally hiring undocumented workers at below-market wages. *Id.* at 1166. The Ninth Circuit
24 determined that the plaintiffs’ alleged property interest in the “legal entitlement to business relations
25 unhampered by schemes prohibited by the RICO predicate statutes,” was sufficient to provide them
26 with standing under RICO. *Id.* at 1168-1172. Although Plaintiffs’ Second Amended Complaint
27 does not mention this purported property interest with respect to Ed’s RICO claim, to the extent that
28 Ed bases his RICO claim on harm resulting from his employment and termination from SLC, his
argument fails. First, Ed’s allegations are distinguishable from the plaintiffs in *Mendoza*, because
there, the plaintiffs’ alleged that their wages were depressed as a result of the defendants’ alleged
predicate acts of racketing activity (hiring undocumented workers in violation of 8 U.S.C. § 1324).
See *id.* at 1168. Here, however, while Ed’s employment and subsequent termination at SLC might
be considered overt acts that were parts of Defendants’ alleged RICO conspiracy, these acts are not
predicate acts of racketeering activity under RICO. And as the Supreme Court has made clear,
“injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO .
. . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)
[RICO conspiracy].” *Beck v. Prupis*, 529 U.S. 494, 505 (2000).

1 law, since the trust is revocable, Ed’s interest in it is, at least up to this point in time,⁶ “is ‘merely
2 potential’ and can ‘evaporate in a moment at the whim of the [trustor].” *Steinhart v. County of Los*
3 *Angeles*, 47 Cal.4th 1298, 1319-20 (2010) (quoting *Johnson v. Kotyck* 76 Cal.App.4th 83, 88, 90
4 (1999); *see also Cal. Prob. Code* § 15800(a) (“Except to the extent that the trust instrument
5 otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the
6 time that a trust is revocable and the person holding the power to revoke the trust is competent . . .
7 [t]he person holding the power to revoke, and not the beneficiary, has the rights afforded
8 beneficiaries under this division.”). With no present interest in the funds contained in the trust, Ed
9 cannot claim that he suffered injury to his “business or property,” and so he does not have standing
10 under RICO.

11 **B. Arthur and Rita’s RICO Claim Also Fails**

12 Arthur and Rita’s RICO claim is also problematic. In their Second Amended Complaint,
13 they allege that Defendants’ plan was to sell them “junk loans.” (SAC, ¶ 15.) Allegedly, they
14 would enter into these loans because of Weichler’s promises of wealth to their son Ed. (*Id.* at ¶¶ 31-
15 32.) Indeed, Weichler allegedly met with Arthur and Rita “many times” while Ed was at SLC, and
16 he convinced them to enter into loans in December 2003 and June 2004. (*Id.* at ¶ 31-33.) Plaintiffs
17 allege that Defendants faxed them documents that included “fraudulent” estimated closing costs for
18 these loans and misrepresented the loans as “superior products” during telephone calls to them. (*Id.*
19 at ¶ 33.) They also allege that Defendants’ falsely inflated the values of their assets by forwarding
20 “false” information to lenders about their loans. (*Id.* at ¶ 40.) On top of all this, Plaintiffs also
21 allege that Weichler persuaded Arthur to begin day-trading — a hobby that eventually resulted in
22 him losing over \$500,000. (*Id.* at ¶¶ 34, 36 & 50.)

23 First of all, as for Arthur’s day-trading losses, the Court is at a complete loss to understand
24 how his losses were “by reason of” Defendants’ alleged predicate acts of mail and wire fraud or
25 their alleged scheme to defraud borrowers and lenders of mortgage loans. In fact, aside from
26 Weichler introducing Arthur to day-trading, there are no allegations at all which link any of
27

28 ⁶ Indeed, Arthur and Rita are very much alive and there is no contention whatsoever that they are incapacitated.

1 Defendants' conduct to Arthur's losses in the stock markets. And without such a link, Plaintiffs'
2 lack standing to bring a RICO claim with respect to these losses.

3 As for the injury suffered by Arthur and Rita as a result of taking out the "junk loans," the
4 Court is unsure whether they suffered harm "by reason of" Defendants' alleged conduct, largely
5 because their claim is so insufficiently pled.

6 Most notably, Plaintiffs fail to sufficiently allege any predicate acts of racketeering activity.
7 Mail fraud, as one might imagine, requires the use of the mails. 18 U.S.C. § 1341. Despite the
8 obviousness of this element, Plaintiffs do not allege in their Second Amended Complaint that any
9 mailing ever took place. For example, Plaintiffs allege that Swensen and Weichler "forwarded false
10 information to lenders about Plaintiffs" in connection with the June 2004 loan, but they make no
11 mention of how this forwarding took place. (SAC, ¶ 40.) Without describing with particularity the
12 use of the mails, Plaintiffs do not sufficiently allege mail fraud as a predicate act of "racketeering
13 activity" to support their RICO claim.

14 Next, wire fraud is an indictable offense under 18 U.S.C. § 1343 only if it involves interstate
15 wire communications. 18 U.S.C. § 1343; *see also Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1276
16 (7th Cir. 1989). Plaintiffs fail to allege that any of the wire communications purportedly made in
17 support of Defendants' scheme (*e.g.*, any telephone calls made or faxes sent) were interstate. (*See*
18 SAC, ¶¶ 33, 38 & 40.) On the contrary, because the Second Amended Complaint alleges that all
19 parties are located in California, it is reasonable to infer that the alleged fraudulent communications
20 were intrastate.⁷ *See Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 880 F.Supp.
21 1202, 1212-13 (N.D. Ill. 1995). Thus, like their mail fraud allegations, Plaintiffs do not sufficiently
22 allege wire fraud as a predicate act of "racketeering activity" to support their RICO claim.

23 But even if Plaintiffs had alleged mailings or interstate wirings, their claim would still fail
24 because it is not pled with particularity (as it must be when they base their claim on predicate acts of
25 mail and wire fraud). Quite simply, they never explain what the fraudulent statements or omissions
26 were. For example, Plaintiffs describe the loans they entered into as "junk loans," "junk
27

28 ⁷ Indeed, Plaintiffs even state that Defendants sent a fax to a lender in Emerald Hills, California,
which is obviously an intrastate wiring. (SAC, ¶ 40.)

1 mortgages,” or “predatory loans” which were “terrible deals,” but these are conclusions, not facts.
2 (SAC, ¶¶15, 33, 35-36.) They say that they later found out “the true nature of the predatory and
3 fraudulent loan products they had been sold,” but they do not explain what this means. (*Id.* at ¶ 38.)
4 They say that Weichler told them the loans were “superior products,” but they do not say how they
5 were not. (*Id.* at ¶¶ 32 & 38.) They say that Defendants sent them fraudulent estimated closing
6 costs on their loans, but they do not say what they were or why they were fraudulent. (*Id.* at ¶ 33.)
7 Despite all of the inflammatory allegations, the Court still does not know what the supposed
8 fraudulent conduct was. And, without knowing what the fraudulent conduct was, the Court cannot
9 understand how Arthur and Rita’s “business or property” may have been harmed “by reason of”
10 Defendants’ conduct so as to provide them with standing to bring a RICO claim.

11 **C. The Court Will Not Exercise Supplemental Jurisdiction over Plaintiffs’ State Claims**

12 Plaintiffs’ Second Amended Complaint also includes several state claims, including those
13 that allege various California Labor Code violations. The Court declines to exercise supplemental
14 jurisdiction over these claims unless and until Plaintiffs adequately plead a federal claim.

15 **CONCLUSION**

16 Based on the foregoing:

- 17 1. Weichler’s motion to dismiss Plaintiffs’ RICO claim is granted with leave to amend;
- 18 2. The Court declines to exercise supplemental jurisdiction over Plaintiffs’ state law claims;
19 and
- 20 3. Plaintiffs may file an amended complaint without fourteen days of this order.

21 **IT IS SO ORDERED.**

22 Dated: September 20, 2010

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25 HOWARD R. LLOYD
26 UNITED STATES MAGISTRATE JUDGE
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C 09-02609 HRL Notice will be electronically mailed to:

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