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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EVERETT L. THOMAS; MARTHA  
A. THOMAS,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.;  
WELLS FARGO BANK HOME  
MORTGAGE; BARRETT DAFFIN  
FRAPPIER & WEISS, LLP;  
SOUTHLAND HOME MORTGAGE  
II, LLC; and DOES 1 through 10,  
INCLUSIVE,

Defendants.

CASE NO. 3:15-cv-02344-GPC-JMA

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
WELLS FARGO BANK, N.A.’s  
SECOND MOTION TO DISMISS**

[ECF No. 18]

Before the Court is Defendant Wells Fargo Bank, N.A.’s (“Defendant” or “Wells Fargo”) Second Motion to Dismiss. Def. Mot., ECF No. 18. The motion has been fully briefed. Pl. Opp., ECF No. 21; Def. Reply, ECF No. 22. Upon consideration of the moving papers and the applicable law, and for the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant’s Second Motion to Dismiss with prejudice.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises out of a \$695,000 loan obtained by Plaintiffs in June 2007 from Defendant’s predecessor-in-interest, World Savings Bank, FSB (“WSB”),

1 which was secured by a deed of trust on Plaintiffs' home. Am. Compl. 5, ECF No.  
2 16. In 2009, Plaintiffs obtained a modification on this loan that reduced the  
3 principal balance from \$724,920.30 to \$579,936.24. Am. Compl. 5. Plaintiffs allege  
4 that in October 2013, Plaintiffs sought a new loan modification, and that a Wells  
5 Fargo representative told them that they needed to "stop paying" their mortgage in  
6 order to be eligible to obtain a new loan modification. Am. Compl. 7. Plaintiffs  
7 subsequently defaulted on their loan, and then provided Defendant with a  
8 "completed Loan Modification request" on or around January 14, 2014. *Id.* On  
9 November 12, 2014, the trustee under the deed of trust, Defendant Barrett Daffin  
10 Frappier Treder & Weiss, LLP ("Barrett"), recorded a notice of default. Def.  
11 Request for Judicial Notice ("RJN") Ex. A, ECF No. 18-2. Plaintiffs did not cure  
12 their default, and on June 12, 2015, Barrett recorded a notice of trustee sale, which  
13 scheduled a foreclosure sale for July 9, 2015. RJN Ex. B.

14 Plaintiff Everett L. Thomas filed for Chapter 7 Bankruptcy on July 7, 2015.  
15 RJN Ex. C. This bankruptcy was dismissed without prejudice on July 28, 2015. *Id.*  
16 On September 9, 2015, Plaintiffs allegedly submitted another "completed loan  
17 modification package" to Defendant. Am. Compl. 8. Wells Fargo allegedly  
18 acknowledged receipt of the loan modification application. *Id.* at 9. On November 6,  
19 2016, Defendant sold Plaintiffs' home to Defendant Southland Mortgage II  
20 ("Southland"), LLC. Am. Compl. 10.

21 Plaintiffs allege that Defendant Wells Fargo violated federal law by (1) not  
22 promptly reviewing their September 9, 2015 loss mitigation application to  
23 determine whether it was complete and not notifying them within five days whether  
24 the application is complete in violation of 12 C.F.R. § 1024.41(b); (2) not evaluating  
25 Plaintiffs for all loss mitigation options available and providing written notice to the  
26 borrower stating which loss mitigation options, if any, it would offer to Plaintiffs  
27 within thirty days of receipt of their September 9, 2015 loss mitigation application  
28 in violation of 12 C.F.R. § 1024.41(c); and (3) colluding with Defendant Southland

1 by advertising the foreclosed-upon property with an opening bid above the  
2 property's market value in order to discourage other prospective buyers and allow  
3 Defendant Southland to purchase the property at a lower price in violation of the  
4 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et*  
5 *seq.* Am. Compl. 10–16.

## 6 **PROCEDURAL BACKGROUND**

7 On September 1, 2015, Plaintiffs, residents of California, brought suit against  
8 Defendant, a national banking association with its main office located in South  
9 Dakota, in San Diego Superior Court. Notice of Removal 2–5, ECF No. 1. Plaintiffs  
10 alleged violations of (1) Cal. Civ. Code § 2923.7 and (2) Cal. Civ. Code § 2923.6,  
11 and (3) common law breach of contract. *Id.* at 6–9.

12 On October 16, 2015, Defendant removed the case to federal court on the  
13 basis of diversity jurisdiction. Notice of Removal 2. On November 16, 2015,  
14 Plaintiffs filed an *ex parte* motion for a temporary restraining order ("TRO") to  
15 restrain Defendant from selling Plaintiffs' home through a nonjudicial foreclosure  
16 sale, on the basis that such sale would be in violation of a September 9, 2015  
17 temporary restraining order restraining the sale issued by the San Diego Superior  
18 Court. TRO Mot. 2–3, ECF No. 6. Defendant conceded that Plaintiffs' home had  
19 been sold on November 6, 2015, but argued that the sale was proper because the  
20 TRO had expired no later than 14 days after the case was removed pursuant to Fed.  
21 R. Civ. P. Rule 65(b)(2), and Plaintiff had not renewed it. TRO Opp. 3–5. At the  
22 November 20, 2015 hearing on Plaintiffs' TRO motion, the Court denied the  
23 motion, finding that the state court TRO was no longer in effect. ECF No. 11.

24 On January 14, 2016, the Court granted Defendant's first motion to dismiss.  
25 ECF No. 15. The Court found that Plaintiffs' state-law claims were preempted by  
26 the federal Home Owners' Loan Act. *Id.* at 9. The Court granted Plaintiffs leave to  
27 amend in order to add a RICO claim to their suit. *Id.* at 10.

28 Plaintiffs filed their amended complaint on February 10, 2016. Am. Compl.

1 This second motion to dismiss followed.

## 2 LEGAL STANDARD

3 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable  
4 legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal  
5 theory.’” *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th  
6 Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
7 1990)).

8 “To survive a motion to dismiss, a complaint must contain sufficient factual  
9 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
11 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads  
12 factual content that allows the court to draw the reasonable inference that the  
13 defendant is liable for the misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S.  
14 at 556). “Threadbare recitals of the elements of a cause of action, supported by mere  
15 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at  
16 555 (noting that on a motion to dismiss the court is “not bound to accept as true a  
17 legal conclusion couched as a factual allegation.”). “The pleading standard . . . does  
18 not require ‘detailed factual allegations,’ but it demands more than an unadorned,  
19 the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations  
20 omitted). “Review is limited to the complaint, materials incorporated into the  
21 complaint by reference, and matters of which the court may take judicial notice.”  
22 *See Metlzer Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir.  
23 2008).

24 In analyzing a pleading, the Court sets conclusory factual allegations aside,  
25 accepts all non-conclusory factual allegations as true, and determines whether those  
26 nonconclusory factual allegations accepted as true state a claim for relief that is  
27 plausible on its face. *Iqbal*, 556 U.S. at 676–84; *Turner v. City & Cty. of San*  
28 *Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (noting that “conclusory allegations

1 of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6)  
2 dismissal.”) (internal quotation marks and citation omitted). And while “[t]he  
3 plausibility standard is not akin to a probability requirement,” it does “ask[] for  
4 more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S.  
5 at 678 (internal quotation marks and citation omitted). In determining plausibility,  
6 the Court is permitted “to draw on its judicial experience and common sense.” *Id.* at  
7 679.

## 8 DISCUSSION

### 9 I. Judicial Notice

10 “Although generally the scope of review on a motion to dismiss for failure to  
11 state a claim is limited to the Complaint, a court may consider evidence on which  
12 the complaint necessarily relies if: (1) the complaint refers to the document; (2) the  
13 document is central to the plaintiff[’s] claim; and (3) no party questions the  
14 authenticity of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat’l*  
15 *Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and  
16 citations omitted). Fed. R. Evid. 201(b) permits judicial notice of a fact when it is  
17 “not subject to reasonable dispute because it: (1) is generally known within the trial  
18 court’s territorial jurisdiction; or (2) can be accurately and readily determined from  
19 sources whose accuracy cannot reasonably be questioned.” The court may take  
20 notice of such facts on its own, and “must take judicial notice if a party requests it  
21 and the court is supplied with the necessary information.” Fed. R. Evid. 201(c).

22 Defendant seeks judicial notice of: (a) a notice of default issued by the trustee  
23 of the deed of trust, Defendant Barrett, dated November 7, 2014 and recorded in the  
24 official records of the San Diego County Recorder’s Office on November 12, 2014;  
25 (b) a notice of trustee’s sale issued by Defendant Barrett, dated June 11, 2015 and  
26 recorded in the official records of the San Diego County Recorder’s Office on June  
27 12, 2015; (c) the docket for the bankruptcy petition filed by Plaintiff Everett L.  
28 Thomas in the United States Bankruptcy Court for the Southern District of

1 California on July 7, 2015; and (d) the state court complaint filed by Plaintiffs. *See*  
2 RJN Exs. A–D.

3 Neither party questions the authenticity of these documents. The Court finds  
4 that these items are appropriate for judicial notice because they are matters of public  
5 record, the parties do not dispute their authenticity, and they are central to Plaintiff’s  
6 claims. *See, e.g., Gamboa v. Trustee Corps & Cent. Mortgage Loan Servicing Co.*,  
7 2009 U.S. Dist. LEXIS 19613, at \*4–\*10 (N.D. Cal. Mar. 12, 2009) (judicial notice  
8 of recorded documents related to the foreclosure sale, including grant deed and deed  
9 of trust). Therefore, the Court **GRANTS** Defendant’s requests for judicial notice.<sup>1</sup>

## 10 **II. Motion to Dismiss**

### 11 **A. 12 C.F.R. §§ 1024.41(b) & (c)**

12 12 C.F.R. § 1024.41, also known as “Regulation X,” became effective on  
13 January 10, 2014 and specifies loss mitigation procedures that a borrower may  
14 enforce against a loan servicer pursuant to section 6(f) of the Real Estate Settlement  
15 Procedures Act (“RESPA”), 12 U.S.C. 2605(f). Plaintiffs claim that Defendant  
16 violated subsections (b) and (c) of this section, which govern procedures concerning  
17 the receipt and evaluation of loss mitigation applications respectively. Am. Compl.  
18 10–13. Defendant makes three arguments as to why Regulation X does not apply in  
19 the instant case, none of which the Court finds persuasive.

20 First, Defendant argues that Regulation X does not apply because of  
21 Plaintiffs’ repeated loan modification requests. § 1024.41(i) states:

22 (i) Duplicative requests. A servicer is only required to comply with the  
23 requirements of this section for a single complete loss mitigation  
application for a borrower’s mortgage loan account.”

24 Defendant argues that Plaintiffs have made two “complete loss mitigation  
25 applications” since Regulation X came into effect: a “completed Loan Modification  
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27 <sup>1</sup> The Court also takes judicial notice that the bankruptcy docket proffered by Defendant is  
28 incomplete, because it does not include the latest entry on September 16, 2015, which closed the case.  
*See* Bankruptcy Petition #15-04528-MM7, U.S. Bankruptcy Court for the Southern District of  
California, ECF No. 24.

1 request” on or around January 14, 2014, Am. Compl. 7, and the “completed loan  
2 modification package” provided on September 9, 2015, Am. Compl. 8. Def. Mot. 4.<sup>2</sup>

3 Plaintiffs respond that “each time Plaintiff tendered a Loan Modification they  
4 believed they were complete [sic], but Defendant ultimately placed Plaintiffs’ [sic]  
5 back on the Loan Modification roller coaster by requesting more documents, or  
6 simply denying the request without explanation.” Pl. Opp. 3. In the amended  
7 complaint, Plaintiffs state that they submitted a “completed Loan Modification  
8 request” on January 14, 2014, Am. Compl. 7, but that “[b]ecause Defendant failed  
9 to assign a single point of contact, Plaintiff’s [sic] were never able to determine the  
10 current status of their loan modification request, and were never able to determine  
11 exactly what information Defendant required to conclude a Loan Modification, and  
12 were never provided with accurate and/or consistent information regarding the  
13 status of the modification or the status of the now pending nonjudicial foreclosure,”  
14 *id.* at 8. Plaintiffs then allege that “[o]n September 9, 2016 [sic] Plaintiffs provided  
15 Defendant Wells Fargo with a renewed and COMPLETED LOAN  
16 MODIFICATION PACKAGE pursuant to the specific request of the Defendants.”  
17 *Id.* Defendant then “acknowledged receipt of the LOAN MODIFICATION  
18 PACKAGE submitted by the Plaintiffs.”

19 Defendant seeks to hoist Plaintiffs upon the petard of having characterized  
20 their January 14, 2014 loan modification “request” as “complete.” But the Court  
21 observes that the amended complaint appears to distinguish between the “complete .  
22 . . request” of January 14, 2014 and the “COMPLETED . . . PACKAGE” of  
23 September 9, 2015, that § 1024.41(b) requires a servicer to exercise reasonable  
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25 <sup>2</sup> Defendant also argues that Plaintiffs submitted an additional “completed Loan Modification  
26 Package” on July 30, 2015, as referenced in the original state court complaint, RJN Ex. D, at 19.  
27 However, Defendant cannot rely on the purported July 30, 2015 application, since it was not alleged  
28 by Plaintiffs in their amended complaint. While the Court takes judicial notice of the existence of the  
original state court complaint, the Court granted Plaintiffs leave to amend their complaint. At the  
motion to dismiss stage, we accept as true the factual allegations in the amended complaint. *See*  
*Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164  
(1993).

1 diligence in obtaining documents and information to complete a loss mitigation  
2 application, and that Plaintiffs allege that Defendants made a “specific request” for  
3 the “renewed” loan modification “package” submitted on September 9, 2015. A  
4 plausible interpretation of the facts as alleged is thus that Plaintiffs submitted a loan  
5 modification application on January 14, 2014, Defendant considered that  
6 application incomplete and requested additional information, and upon that  
7 information being provided by Plaintiffs on September 9, 2015, Defendant  
8 acknowledged receipt of what Defendant then considered a “complete” application.  
9 It would be absurd to find that a borrower sending a “renewed” set of materials at  
10 the request of a loan servicer renders that borrower’s initial loss modification  
11 request duplicative, and hence allows the servicer to escape the reach of Regulation  
12 X. The Court thus declines to find Plaintiffs’ loan modification requests repetitive.

13 Second, Defendant argues that §§ 1024.41(b) & (c) do not apply due to the  
14 timing of the application. In relevant part, § 1024.41(b) states:

- 15 (2) Review of loss mitigation application submission.  
16 (i) Requirements. If a servicer receives a loss mitigation  
17 application 45 days or more before a foreclosure sale, a servicer  
18 shall:  
19 (A) Promptly upon receipt of a loss mitigation application,  
20 review the loss mitigation application to determine if the  
21 loss mitigation application is complete; and  
22 (B) Notify the borrower in writing within 5 days  
23 (excluding legal public holidays, Saturdays, and Sundays)  
24 after receiving the loss mitigation application that the  
25 servicer acknowledges receipt of the loss mitigation  
26 application and that the servicer has determined that the  
27 loss mitigation application is either complete or  
28 incomplete.

In relevant part, § 1024.41(c) states:

- 24 (1) Complete loss mitigation application. If a servicer receives a  
25 complete loss mitigation application more than 37 days before a  
26 foreclosure sale, then, within 30 days of receiving a borrower's  
27 complete loss mitigation application, a servicer shall:  
28 (i) Evaluate the borrower for all loss mitigation options available  
to the borrower; and  
(ii) Provide the borrower with a notice in writing stating the  
servicer’s determination of which loss mitigation options, if any,  
it will offer to the borrower on behalf of the owner or assignee of  
the mortgage.



1 As alleged by the Plaintiffs, Plaintiffs submitted their complete loan  
2 modification package on September 9, 2015, fifty-eight (58) days in advance of the  
3 foreclosure sale which took place on November 6, 2015. Am. Compl. 11–12.  
4 Defendant argues, however, that the foreclosure sale was originally set for  
5 September 10, 2015, the day before Plaintiffs’ submission, and that “the plain and  
6 common sense meaning of the words in the CFR indicate that time is measured from  
7 the date of the submission of an application to the date of the scheduled foreclosure  
8 sale at the time the application is submitted.” Def. Mot. 5.

9 Defendant’s argument is unpersuasive for two independent reasons. First,  
10 Plaintiffs do not allege in the amended complaint that a foreclosure sale was ever  
11 scheduled for September 10, 2015. Defendant points again to Plaintiffs’ original  
12 state court complaint, RJN Ex. D, at 21, but as discussed above, the Court gave  
13 Plaintiffs leave to amend the complaint, and at the motion to dismiss stage, we  
14 accept as true the factual allegations in the amended complaint. *See Leatherman*,  
15 507 U.S. at 164. Second, even if Plaintiffs had so alleged, Defendant’s  
16 interpretation of the relevant subsections of § 1024.41 is unconvincing. By their  
17 plain terms, § 1024.41(b) applies where a servicer receives a loss mitigation  
18 application “45 days or more before a foreclosure sale,” and § 1024.41(c) applies  
19 where a servicer receives a loss mitigation application “more than 37 days before a  
20 foreclosure sale.” Neither phrase states “before the date a foreclosure sale is  
21 scheduled,” “before a scheduled foreclosure sale,” or any such similar formulation,  
22 and Defendant provides no authority to support the proposition that these phrases  
23 should be so interpreted. Thus, the Court construes these two phrases to have their  
24 plain meaning: when a servicer receives a loss mitigation application the requisite  
25 amount of days before a foreclosure sale occurs, the servicer must comply with the  
26 applicable requirements of §§ 1024.41(b) & (c).

27 Finally, Defendant argues that Defendant did not violate § 1024.41(b), which  
28 requires the servicer to “[n]otify the borrower in writing within 5 days (excluding

1 legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation  
2 application that the servicer acknowledges receipt of the loss mitigation application  
3 and that the servicer has determined that the loss mitigation application is either  
4 complete or incomplete,” because Plaintiffs allege in the amended complaint that  
5 “Wells Fargo acknowledged receipt of the Loan Modification Package submitted by  
6 the Plaintiffs.” Def. Mot. 5–6 (citing Am. Compl. 9). However, Plaintiffs also allege  
7 that Wells Fargo either did not do so within the five (5) days required or did not  
8 indicate to Plaintiffs whether the application was complete or incomplete. Am.  
9 Compl. 11. Thus, the Court finds that Plaintiffs have plausibly alleged that  
10 Defendant violated § 1024.41(b).

11 The Court thus **DENIES** Defendant’s motion to dismiss Plaintiffs’ 12 C.F.R.  
12 §§ 1024.41(b) & (c) claims.<sup>3</sup>

### 13 **B. RICO claim**

14 Defendant argues that Plaintiffs’ RICO claim must be dismissed because  
15 Plaintiffs fail to allege the “predicate acts” required for racketeering activity. Def.  
16 Mot. 6–9. The Court agrees.

17 In order to state a RICO claim, plaintiffs must allege the “(1) conduct (2) of  
18 an enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate  
19 acts’) (5) causing injury to plaintiff’s ‘business or property.’” *Living Designs, Inc. v.*  
20 *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (citations  
21 omitted). A predicate act is any act indictable under the provisions of 18 U.S.C. §  
22 1961. *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1201 (C.D. Cal. 2008)  
23 The Ninth Circuit has held that allegations of predicate acts under RICO must  
24 comply with Fed. R. Civ. P. Rule 9(b)’s specificity requirements. *Id.* at 1201–02  
25 (citing *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393,  
26

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27 <sup>3</sup> Defendant also argues that the Court did not give Plaintiffs permission to add the § 1024.41  
28 claims. Def. Mot. The Court’s previous Order did not expressly bar Plaintiffs from adding additional  
claims. *See* ECF No. 15 at 10. Moreover, Fed. R. Civ. P. Rule 15 provides that the Court should freely  
give leave to amend when justice so requires.

1 1400–01 (9th Cir. 1986)). In turn, Rule 9(b) requires that plaintiffs allege the time,  
2 place, and manner of each act of fraud, the nature of the fraudulent scheme, and the  
3 role of each defendant in the scheme. *Id.* at 1202 (citing, among others, *Lancaster*  
4 *Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 405 (9th  
5 Cir.1991), *cert. denied*, 502 U.S. 1094 (1992); *Rothman v. Vedder Park*  
6 *Management*, 912 F.2d 315, 317 (9th Cir. 1990)).

7 Plaintiffs allege a number of wrongdoings by Defendants Wells Fargo and  
8 Southland.<sup>4</sup> However, Plaintiffs do not allege the specific predicate acts, such as  
9 mail fraud or wire fraud, that form the basis of the alleged scheme of racketeering.  
10 *See Graf v. Peoples*, No. CV 07–4731–VAP (E), 2008 WL 4189657, at \*6 (C.D.  
11 Cal. Sept. 4, 2008) (“Plaintiff’s RICO claims incorporate the Complaint’s initial  
12 lengthy description of many different asserted acts of wrongdoing by various  
13 Defendants. Plaintiff does not expressly identify any RICO predicate acts, but  
14 simply incorporates his previous allegations. Such ‘shotgun’ pleading is insufficient  
15 to plead a RICO claim.”); *Savage v. Council on American–Islamic Relations, Inc.*,  
16 No. C 07–6076 SI, 2008 WL 2951281, at \*14 (N.D. Cal. July 25, 2008) (finding  
17 that a RICO claim was insufficient where plaintiff set forth a “redundant narrative  
18 of allegations and conclusions of law, but [made] no attempt to allege what facts are  
19 material to his claims under the RICO statute, or what facts are used to support what  
20 claims under particular subsections of RICO”); *Federal Reserve Bank of San*  
21 *Francisco v. HK Systems*, No. C–95–1190 MHP, 1997 WL 227955, at \*3 (N.D. Cal.  
22 Apr. 24, 1997) (finding that a complaint was insufficient for failure to “identify  
23 exactly which acts are ‘predicate acts’ for RICO liability”). The Court thus finds

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24  
25 <sup>4</sup> Specifically, Plaintiffs allege that over the last four years, Defendant Southland has purchased  
26 hundred of properties in San Diego County from Defendant Wells Fargo. Am. Compl. 14. Plaintiffs  
27 allege that Southland is comprised largely of ex-Wells Fargo employees, and that as a result,  
28 Defendants share a “special relationship” and inside information. Am. Compl. 13–14. Plaintiffs allege  
that Southland identifies properties that “will realize a significant equity immediately upon close of  
the nonjudicial foreclosure sale,” whereupon Wells Fargo “fast tracks” a foreclosure sale process  
where the opening bid is set at higher than the market value of the home. Am. Compl. 15. Plaintiffs  
allege that these practices discourage other buyers from attending the foreclosure sale, allowing  
Southland to obtain the property at below market price. Am Compl. 15.

1 that Plaintiffs have failed to adequately identify specific predicate acts as an element  
2 to their civil RICO claim, and thereby **GRANTS** Defendant’s motion to dismiss  
3 Plaintiffs’ RICO claim.<sup>5</sup>

4 **C. Leave to Amend**

5 Fed. R. Civ. P. Rule 15 provides that courts should freely grant leave to  
6 amend when justice requires it. Accordingly, when a court dismisses a complaint for  
7 failure to state a claim, “leave to amend should be granted unless the court  
8 determines that the allegation of other facts consistent with the challenged pleading  
9 could not possibly cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957  
10 F.2d 655, 658 (9th Cir. 1992) (internal quotation marks omitted). Amendment may  
11 be denied, however, if amendment would be futile. *See id.*

12 Plaintiffs seek leave to amend in order to add a California elder financial  
13 abuse claim to their suit. Pl. Opp. 4–5. Under the Elder Abuse and Dependent Adult  
14 Civil Protection Act, elder financial abuse occurs when a person or entity “[t]akes,  
15 secretes, appropriates, obtains, or retains real or personal property of an elder or  
16 dependent adult for a wrongful use or with intent to defraud, or both.” Cal. Welf. &  
17 Inst. Code § 15610.30. However, the Court has already previously dismissed  
18 Plaintiffs’ state law claims based on Cal. Civ. Code § 2923.6, Cal. Civ. Code §  
19 2923.7, and breach of contract on the basis that these claims were preempted by the  
20 federal Home Owners’ Loan Act (“HOLA”). ECF No. 15 at 9. Plaintiffs’ amended  
21 complaint contains similar factual allegations as their original complaint, and courts  
22 have likewise found that California elder financial abuse claims are preempted by

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23  
24 <sup>5</sup> Defendant also argues that Plaintiff fails to allege proximate cause between any RICO  
25 violation and a concrete financial injury to Plaintiffs. Def. Mot. 6–8. To make out a RICO claim,  
26 Plaintiff must also plead that a defendant’s violation was both the “but for” and proximate cause of  
27 a concrete financial injury. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999).  
28 Defendant argues that even if Southland did have insider information from Wells Fargo, this was not  
a proximate cause of Plaintiffs’ injury, because “if not Southland Mortgage, than either Wells Fargo  
or another third party would have purchased the property at the foreclosure sale” anyway. Def. Mot.  
7. However, Plaintiffs allege that Defendants’ collusion encouraged Wells Fargo to “fast track” the  
foreclosure, implying that if it were not for the collusion between Defendants, the foreclosure of  
Plaintiffs’ property would not have occurred so precipitously, nor with alleged disregard of federal  
regulations, with the result that Plaintiffs’ home would not have been sold on November 6, 2015.

1 HOLA. *See, e.g., Cosio v. Simental*, No. CV 08-6853PSGPLAX, 2009 WL 201827,  
2 at \*5 (C.D. Cal. Jan. 27, 2009). Thus, the Court finds that amendment of the  
3 Amended Complaint to add a financial elder abuse claim would be futile, and  
4 thereby **DENIES** Plaintiffs' request for leave to amend in order to add a financial  
5 elder abuse claim.

6 However, the Court **GRANTS** Plaintiffs leave to amend their RICO claim in  
7 order to identify the specific predicate acts that form the basis of the alleged scheme  
8 of racketeering so as to cure the deficiencies identified in Part II.B of this Order.  
9 The Court cautions Plaintiffs that they are **NOT** permitted to add any additional  
10 claims to any second amended complaint.

### 11 **CONCLUSION**

12 For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- 13 1. Defendant Wells Fargo Bank, N.A.'s Second Motion to Dismiss, ECF No. 18,  
14 is **DENIED** with respect to Plaintiffs' 12 C.F.R. §§ 1024.41(b) & (c) claims,  
15 and **GRANTED** with respect to Plaintiffs' RICO claim. Plaintiffs' RICO  
16 claim, 18 U.S.C. § 1961 et seq., is hereby **DISMISSED** without prejudice.
- 17 2. **Within thirty (30) days** of the issuance of this Order, Plaintiff must file  
18 either a second amended complaint or a notice of election not to file a second  
19 amended complaint. Defendant must file any response **within fourteen (14)**  
20 **days** after service of the amended pleading.
- 21 3. The hearing on this motion, currently set for April 29, 2016, is hereby  
22 **VACATED.**

23 **IT IS SO ORDERED.**

24  
25 DATED: April 28, 2016

26   
27 HON. GONZALO P. CURIEL  
28 United States District Judge