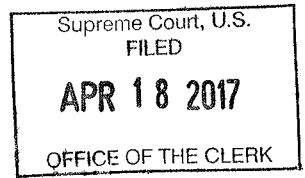


17-137



No.

IN THE
SUPREME COURT OF THE UNITED STATES

Millie Ogden,

Petitioner

v.

Wells Fargo Bank, N.A., Grant Kwok, Yim Fong
Kwok, and, Howard Hsu

Respondents

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Thomas Ogden
Counsel of Record
1108 W. Valley Blvd. 6-862
Alhambra, CA 91803
Thomas@OgdenTaxLaw.com
Tel. (626) 344-8270

Questions presented regarding the
Wells Fargo sham account

1. The circuits are split if RICO proximate cause is based on directness, foreseeability or some combination. As the “directness” test is draconian it is decimating RICO’s evolution. Can RICO proximate cause be clarified as the *Anza* and *Hemi* dissents are confusing everyone?

2. *RJR Reynolds, Inc. v. E.U.*, held a predicate act’s foreign reach defines RICO’s extraterritoriality. Proximate cause, however, is analyzed on whom as it is not clear where the measurement is to start from (i.e., the enterprise’s edge or from a component predicate act). Does *RJR Reynolds*’ rationale of determining extraterritoriality by measuring from inside the enterprise, out, also control proximate cause analysis?

The parties are all captioned. There are no corporate interests entangled with Petitioner's interests in the matter.

Petition for writ of certiorari

Ogden requests this writ be granted to review the 9th Circuit's denial of her RICO claim .

Jurisdiction

Appendix.A, contains the Feb. 10, 2017, rehearing denial. Jurisdiction is proper here. 28 U.S.C. s.1254(1); U.S. Sup. Ct. Rules13.1 &13.3.

Opinion below

Appendix.B, contains the Jan. 3, 2017 opinion, from the 9th Cir. combined docket is 15-55373 &74.

Statute involved

18 USC s.1964(c)'s proximate cause clause: "Any person injured in his business or property by reason of a violation of section 1962 may sue..."

Statement of case

A Wells Fargo sham account was opened in Ogden's stolen name by employee Grant Kwok. Money laundering occurred through the sham account to defraud creditors, and with intent any legal fallout be borne by Ogden. The 9th Circuit acknowledges Ogden may have been harmed by a RICO enterprise. Ogden – like too many identity fraud victims— got stuck with the mess. Ogden spent over five years of her life defending in two lawsuits, 400 miles from where she lived, on the allegation Ogden participated in the criminal business dealing done through the sham account. Ogden lost thousands of hours of expended time value resources,

including attorney time, in the fight to clean up her name against a bank we now know had an entire infrastructure devoted to making sure innocents like Ogden hung.

Wells Fargo had full knowledge of Ogden's ordeal and actively made it impossible for Ogden to rectify the matter. Ogden alleged all the subversive conduct Wells Fargo engaged in about two years before the sham account news broke. Instead of allowing Ogden to proceed, the district court dismissed the underlying suit as no one could believe the allegations Ogden made against Wells Fargo.

It turns out what Ogden alleged was later confirmed by the Los Angeles City Attorney who uncovered the sham account fraud. The City Attorney testified to the Senate what was most appalling was the fact Wells Fargo deliberately made it "impossible" for its victims to clean up the mess. Ogden, in other words, not only had to deal with the actual identity thieves, but was tasked with establishing she was an identity fraud victim with a powerful bank making it impossible to do.

The opinion acknowledges Cesar Ascarrunz was at one time associated with the enterprise, but was determined to have withdrawn from it because of his continued harmful acts against Ogden. Ascarrunz, incidentally, was the one who placed Ogden in the lawsuits to use as a pawn to get his money back. The 9th Cir. says Ascarrunz became an intervening cause against his own identity theft enterprise because of the troubling notion that his additional crimes against the common RICO victim, Ogden, showed his withdrawal. The logic goes that Ascarrunz then intervened against his own enterprise snapping causation.

As an identity fraud victim, Ogden ended up in legal harm's way suffering the legal fallout stemming from the sham account. Those who stole Ogden's identity did so for that purpose as that is what identity thieves intend. Forget about directness or foreseeability as all would agree the suffering an identity fraud victim experiences—through the lost time value of cleaning up the mess—is the obvious injury associated with identity theft. That was the essence of the dismissed RICO claim. The 9th Cir., however, says Ogden's injury was not directly caused by the enterprise, but was directly caused by the person who sued Ogden. Nowhere does the opinion even acknowledge that such legal harm is the common sense expected injury faced by an identity theft victim.

Reasons for granting the writ

The circuits are split on the standard of proximate cause between directness, foreseeability or some combination thereof. *Neurotin Marketing and Sales Pract. Litig.*, 712 F.2d 21 (1st Cir. 2013); *Wallace v. Midwest Financial & Mortgage Serv., Inc.*, 714 F.3d 414, 422 (6th Cir. 2013); *cf.*, the opinion below. The Court's dissents on RICO proximate cause stated in *Hemi* and *Anza* only confuses more. 130 S.Ct. 983, 995; 547 U.S. 451, 463. Application of some foreseeability here would show RICO proximate cause was met.

For RICO standing, the 7th Circuit held in the mail/wire fraud context that money or property obtained by a defendant need not be the plaintiff's money or property, provided plaintiff is directly injured by the defendant's unlawful scheme. *BCS Services, Inc. v. BG Investments, Inc.*, 728 F.3d 633,

638 (7th Cir. 2013). In other words, after 40 years of stifling civil RICO, a court says an injury does not need to be as “direct” as was once thought as standing is indistinguishable from proximate cause. The Court should note Judge Posner’s doubt implicitly expressed on whether the “directness” proximate cause framework is still workable.

The Court should also clarify if last year’s decision in *RJR Reynolds, Inc. v. European Union’s* [Case no. 15-138] rationale for defining RICO extraterritoriality extends to RICO proximate cause analysis. Imagine an enterprise whose only predicate acts are stealing identities to open credit cards. The card company then sues the victims. It is obvious to all the identity fraud victim’s lost time value is the expected and intended injury. According to the opinion, however, the situation could never be actionable under RICO as the I.D. theft enterprise did not cause the time value injury, as it was the credit card company’s suits causing it.

18 USC s.1028(a)(7) is the federal identity fraud statute and is a specific, but seldom used, civil RICO predicate act. It highlights why the “directness” test makes less sense outside a mail/wire fraud enterprise as most are alleged to be. 1028(a)(7)’s associated criminal restitution statute is unique as it allows a judge to award victim’s restitution for lost time value remediating the injury caused by the crime. 18 U.S.C. s. 3663(b)(2)(6). Legal fees incurred to clean up the mess may be considered part of that restitution. *U.S. v. Papagno*, 639 F.3d 1093, 1096-1099 (D.C. Cir. 2011). Since “restitution normally tracks the recovery to which [the victim] would have been

seems Ogden's RICO injury was both foreseeable and directly attributable to the enterprise given the type of restitution allowed. *U.S. v. Rand*, 403 F.3d 489, 494 (7th Cir. 2005).

Based on the recognized time value injury in identity theft, Ogden argued RICO proximate cause must be analyzed stemming from consideration of the component predicate acts to the injury, instead of stemming from the outer walls of the enterprise to the injury. Ogden pointed out *RJR Reynolds, Inc. v. E.U.'s* [S.Ct. no. 15-138] rationale does precisely that when determining RICO extraterritorial reach. The lower court nowhere applied that rationale to its proximate cause analysis as the reality is that analysis seldom is driven by consideration stemming from the component predicate acts to the injury. Far too often, once an enterprise is found, judges can then easily snap proximate cause under the directness test by measuring the chain from the enterprise's edge instead of from the predicate acts forming the enterprise. *RJR Reynolds*, however, seems to confirm it is error to measure from the enterprise's edge outwards.

You can see this notion, too, in *BCS Services*. What if a mail/wire fraud scheme itself is designed to not be direct? Yet, the mail/wire fraud components are sufficient to create an enterprise. Under directness, a judge can easily dispose by measuring proximate cause from the enterprise's edge out to the injury and conclude its directness is not there. As the guidance currently stands, that judge is free to ignore that within the enterprise's edge are component predicate acts in a scheme to be intentionally indirect.

Conclusion

There probably exists no other statutory regime more stifled than civil RICO. Just look at the statistics in decline of RICO suits. Most of civil RICO's list of unique predicate acts have never been used as no one wants to test it out against the directness test. If RICO is to fully capture Congress' remedial intent then the Court needs to rethink, evolve, and clarify proximate cause. The petition should be granted.

Respectfully Submitted,

s/Thomas Ogden

Attorney for Petitioner

APPENDIX

APPENDIX A.....	8
CIRCUIT COURT ORDER DENYING PANEL/EN BANC REHEARING (Feb. 10, 2017)	
APPENDIX B.....	10
CIRCUIT COURT OPINION (Jan. 3, 2017)	

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Seal]: Filed February 10, 2017, Molly C. Dwyer,
Clerk U.S. Court of Appeals

MILLIE OGDEN, Plaintiff-Appellant,

v.

WELLS FARGO BANK, NA,

Defendant,

and

GRANT KWOK; YIM FONG KWOK; HOWARD
HSU,

Defendant-Appellees.

No. 15-55373

D.C. No. 2:14-cv-03579-DMG-SH, Central District of
California, Los Angeles

MILLIE OGDEN, Plaintiff-Appellant,

and

WELLS FARGO BANK, NA,

Defendant-Appellee,

and

GRANT KWOK; YIM

GRANT KWOK; YIM FONG KWOK; HOWARD
HSU,

Defendants

No. 15-55374

D.C. No. 2:14-cv-03579-DMG-SH, Central District of
California, Los Angeles

ORDER

Before: CALLAHAN, BEA, and IKUTA, Circuit
Judges.

The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. 55, is
DENIED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Seal]: Filed January 3, 2017, Molly C. Dwyer, Clerk
U.S. Court of Appeals

MILLIE OGDEN, Plaintiff-Appellant,

v.

WELLS FARGO BANK, NA,

Defendant,

and

GRANT KWOK; YIM FONG KWOK; HOWARD
HSU,

Defendant-Appellees.

No. 15-55373

D.C. No. 2:14-cv-03579-DMG-SH, Central District of
California, Los Angeles

MILLIE OGDEN, Plaintiff-Appellant,

and

WELLS FARGO BANK, NA,

Defendant-Appellee,

and

GRANT KWOK; YIM

GRANT KWOK; YIM FONG KWOK; HOWARD
HSU,

Defendants

No. 15-55374

D.C. No. 2:14-cv-03579-DMG-SH, Central District of
California, Los Angeles

MEMORANDUM*

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Central District of California Dolly M. Gee, District Judge, Presiding. Argued and Submitted December 5, 2016, Pasadena, California.

Before: CALLAHAN, BEA, and IKUTA, Circuit Judges.

Millie Ogden appeals from the district court's dismissal with prejudice of her Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against Grant Kwok, Yim Fong Kwok, Howard Hsu (collectively, "the individual defendants"), and Wells Fargo Bank, N.A. We have jurisdiction pursuant to 28 U.S.C. s. 1291, and affirm.¹

FN1. As the parties are familiar with the facts and procedural history, we restate them here only as necessary to explain our decision.

To state a RICO claim, a plaintiff must allege, among other things, that an enterprise's racketeering activities proximately cause, i.e., "led directly to," her injuries. See *Anza v. Ideal Steel Supply Corp.*, 547 U.S., 451, 461 (2006). Here, Ogden's Second Amended Complaint ("SAC") does not plausibly allege that any of the alleged enterprise's actions proximately caused her injuries. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). Rather, the SAC indicates that Cesar Ascarrunz's actions directly led to Ogden's alleged injuries and are therefore a superseding cause interrupting the "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). While Ascarrunz may have been a part of one of the alleged enterprises at some point in time he clearly was not when he took his actions against Ogden.

See, e.g. Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) (stating that RICO “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs” (quoting 18 U.S.C. s. 1962(c)). As a result, proximate causation is wanting in this case and the district court’s dismissal of Ogden’s RICO claims against the individual defendants may be affirmed on that ground. *See, e.g., ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004(9th Cir. 2014) (noting that a district court may be affirmed “on any ground supported by the record”).

Additionally, because the SAC fails to state RICO claim against Grant Kwok, it also fails to state a RICO claim against his former employer Wells Fargo. *See Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 773 (9th Cir. 2002) (Only if [the employee] is liable for [the plaintiff’s] loss would we additionally consider whether [the employer] was also liable under the doctrine of respondeat superior.”).

“Although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff’s proposed amendments would fail to cure the pleading deficiencies and amendments would be futile.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). Ogden has not identified a factual allegation that could plausibly get her RICO claims over the proximate-cause hurdle. Therefore, dismissal with prejudice is warranted.

AFFIRMED.

Appendix B
US District Court Judgments

District Court Judgment Regarding
Individual Defendants

..... App. B-2

District Court Judgment Regarding
Wells Fargo

..... App B-11

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-- GENERAL

Case No. CV 14-3579 DMG (SH)

Date February 20, 2015

Title *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*

Page 1 of 5

Present: The Honorable Dolly M. Gee, United States
District Judge

Kane Tien :Deputy Clerk

Not Reported: Court Reporter

Attorneys Present for Plaintiff(s): None Present

Attorneys Present for Defendant(s): None Present

Proceedings: IN CHAMBERS- ORDER RE
INDIVIDUAL DEFENDANTS' MOTION TO
DISMISS [23]

I. PROCEDURAL BACKGROUND

On September 12, 2014, Plaintiff filed the operative Second Amended Complaint ("SAC") against Defendants Wells Fargo Bank, Grant Kwok, Yim Fong Kwok, Michael Kwong, and Howard Hsu. [Doc. # 19.] The SAC asserts claims against the individual defendants for (1) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") by individual defendants, and (2) RICO conspiracy against individual defendants.

On October 10, 2014, individual defendants Grant Kwok, Yim Fong Kwok, Michael Kwong, and Howard

Hsu (“Defendants”) filed a Motion to Dismiss (“MTD”) Claims One and Two of the SAC. [Doc. #23.] Plaintiff filed her opposition on November 5, 2014. [Doc. # 30.] Defendants filed their reply on November 26, 2014. [Doc. # 39.] The Court deemed this matter appropriate for decision without oral argument and took it under submission. [Doc. # 41.]. For the reasons discussed below, Defendants’ motion is **GRANTED**.

II. FACTUAL BACKGROUND. FN1

FN1. The Court assumes the truth of the factual allegations in the Complaint solely for purposes of deciding the motion to dismiss

On February 28, 2006, Grant Kwok (“Kwok”) opened an account (“Illegal Account”) in Plaintiff’s name at a Northern California Wells Fargo branch. SAC at ¶ 31. Because Kwok and Plaintiff had a prior relationship, Kwok had her social security number, driver’s license number, and date of birth. *Id.* at ¶ 34. At the time, Kwok was working at Wells Fargo and opening customer accounts was one of his responsibilities. *Id.* at ¶ 27. Kwok had previously worked for

CV-90 Civil Minutes- General Initials of Deputy Clerk KT; United States District Court[;] Central District of California[;] Civil Minutes- General[;] Case no. CV 14-3579 DMG(SH)[;] Date February 20, 2015[;] Title: *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*[;] Page 2 of 5

Wells Fargo, but resigned in June 2003 as a result of his financial misfeasance and abuse of his position. *Id.* at ¶ 11.

On June 6, 2005, Howard Hsu's company, Q Entertainment SF, LLC, filed for bankruptcy. *Id.* at ¶ 22. The SAC alleges that the Illegal Account was opened by Kwok to help conceal Howard Hsu's \$350,000 sale of Q Entertainment SF, LLC ("Club Q Transaction") to Cesar Ascarrunz. *Id.* at ¶ 28. On February 28, 2006, the same day the Illegal Account was opened, Ascarrunz wrote a \$60,000 check ("Check") payable to Plaintiff. *Id.* at ¶ 38. At the time, Ascarrunz did not know who Plaintiff was. *Id.* The check was deposited into the Illegal Account on the same day and the money was disbursed to Kwong, Yim Fong Kwok, and Cuong Vuong. *Id.* ¶ 40-42. The Illegal Account was used to conceal an additional \$20,000 that was wired in relation to the Club Q Transaction. *Id.* at ¶ 43. On April 4, 2007, Grant Kwok closed the Illegal Account. *Id.* at ¶ 51.

On April 4, 2007, Ascarrunz called Plaintiff, explained the Club Q Transaction, and asked to be reimbursed the \$60,000 from the Check. *Id.* at ¶ 68. Initially, Ascarrunz threatened Plaintiff, but later wanted Plaintiff to extort Kwok in order to get his money back. *Id.* at ¶¶ 73- 78. After Plaintiff refused to participate, Ascarrunz filed two lawsuits in San Francisco County Superior Court ("SF Lawsuits") naming Kwok, Hsu, Kwong, and Ogden, among others. *Id.* at ¶ 94. Since the SF Lawsuits were filed, Plaintiff has incurred substantial legal fees. *Id.* at ¶ 97.

On August 28, 2011, Plaintiff filed a local police report with the Monterey Park police department. On September 29, 2011, the police spoke with Grant

Kwok who allegedly told them the following lie: “[Ogden] acted as an agent for the sale of Q Entertainment SF, LLC. [Ogden] was aware of the Wells Fargo account opened in her name and [Ogden] did receive a \$60,000 payment from Cesar Ascarrunz.” *Id.* at ¶¶ 104-06. Kwok followed up with the police by sending them the SF Lawsuits material. *Id.* at ¶ 108.

On February 21, 2014, Ascarrunz sent an email that was meant for Plaintiff, in which he threatened to present testimony of witnesses who would claim Plaintiff was fully involved in the Illegal Account. *Id.* at ¶ 99. On June 30, 2014, the SF Lawsuits were dismissed. *Id.* at ¶ 100.

III. DISCUSSION □

Plaintiff's RICO claims fail for the following reasons: (1) failure to allege an injury to Plaintiff's business or property under the Racketeer Influenced and Corrupt Organizations Act

CV-90 Civil Minutes- General Initials of Deputy Clerk KT; United States District Court[;] Central District of California[;] Civil Minutes- General[;] Case no. CV 14-3579 DMG(SH)[;] Date February 20, 2015[;] Title: *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*[;] Page 3 of 5

(“RICO”), 18 U.S.C. § 1961 *et seq.*, (2) failure to allege a RICO enterprise, and (3) failure to allege a pattern of racketeering activity.

A. The SAC Fails to State a Claim Under RICO

1. Legal Fees Are Not a Valid Injury under RICO.

A private plaintiff may raise a claim under RICO if he is “injured in his business or property” because the defendant violated one of RICO’s criminal provisions set forth in 18 U.S.C. § 1962. *Hemi Gp., LLC v. City of New York*, 559 U.S. 1, 130 S. Ct. 983, 987, 175 L. Ed. 2d 943 (2010) (quoting 18 U.S.C. § 1964(c)). “[A] showing of injury requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest.” *Oscar v. Univ. Students Co-op. Ass’n*, 965 F.2d 783, 785 (9th Cir. 1992) (internal citations and quotation marks omitted). Here, the Plaintiff’s claim for damages is comprised of her “substantial legal fees in connection with cleaning up the mess left in the wake of her identity theft.” SAC at ¶ 153.

The Ninth Circuit has generally refused to recognize legal fees as a valid injury to business or property under RICO. *Thomas v. Baca*, 308 Fed. App’x 87, 88 (9th Cir. 2009) (“This court has not recognized the incurrment of legal fees as an injury cognizable under RICO, and we decline to do so here”); *see also Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1086 (C.D. Cal. 2009) (attorneys’ fees and legal expenses not compensable in a RICO claim); *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1204 (C.D. Cal. 2008) (legal fees do not satisfy the concrete financial injury requirement in a RICO action).

2. Plaintiff Fails to Allege an “Enterprise” or Common Purpose.

Under RICO, a plaintiff must allege that the illegal activity was carried out by “any person

employed by or associated with any enterprise.” *Boyle v. United States*, 556 U.S. 938, 943, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) (citing 18 U.S.C. § 1962(c)). The Supreme Court has held that “an enterprise includes any union or group of individuals associated in fact.” *Id.* at 944 (internal citation and quotation marks omitted). “RICO reaches a group of persons associated together for a common purpose of engaging in a course of conduct.” *Id.* Furthermore, “an ‘enterprise’ is not a ‘pattern of racketeering activity’ but is an entity separate and apart from the pattern of activity in which it engages.” *United States v. Turkette*, 452 U.S. 576, 577, 101 S. Ct. 2524, 2525, 69 L. Ed. 2d 246 (1981).

CV-90 Civil Minutes- General Initials of Deputy Clerk KT; United States District Court[;] Central District of California[;] Civil Minutes- General[;] Case no. CV 14-3579 DMG(SH)[;] Date February 20, 2015[;] Title: *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*[;] Page 4 of 5

In the present case, Plaintiff has alleged multiple variations of an enterprise. SAC at ¶¶139-148. FN.2. Each enterprise suffers from the same fatal flaw: the alleged common purpose to defraud Plaintiff of her money and property is undermined by other facts in the SAC. Each actor in the enterprise moved separately from the other regarding the alleged common purpose. The culmination of those actions led to the SF Lawsuits filed by dismissed Defendant Ascarrunz against Defendants and Plaintiff. Further, Plaintiff was never actually defrauded of her money or property by either alleged enterprise.

FN2. Plaintiff alleges that Kwok, Yim Fong, Hsu, Kwong and Ascarrunz constituted the “Ascarrunz Enterprise,” (SAC at para. 140) or, in the alternative that Kwok, Yim Fong, Kwok, and Hsu constitute the “Hsu Enterprise,” (CAT at para. 142), that Ogden was an individual who constituted an enterprise (SAC at para. 144), or that Q Entertainment SF, LLC, was an individual who constituted an enterprise (SAC at para. 145).

CV-90 Civil Minutes- General Initials of Deputy Clerk KT; United States District Court[;] Central District of California[;] Civil Minutes- General[;] Case no. CV 14-3579 DMG(SH)[;] Date February 20, 2015[;] Title: *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*[;] Page 5 of 5

3. Plaintiff Fails to Allege a Pattern of Racketeering Activity

In order to prove a “pattern of racketeering activity,” the Court “requires the showing of a relationship between the predicates and of the threat of continuing activity.” *Howard v. America Online, Inc.*, 208 F.3d 741, 747 (9th Cir. 2000) (internal citation and quotation marks omitted). In order to prove a relationship, the predicates should “have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated events.” *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240, 103 P.U.R. 4th 513, 109 S. Ct. 2893 (1989); *see also Sedima v. Imrex Co.*, 473 U.S. 479, 496, n. 14, 105 S. Ct. 3275, 87 L. Ed. 2d 342

(1985). “A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time.” *H. J. Inc.*, 492 U.S. at 230. In cases where continuity has not been sufficiently established, “liability depends on whether the *threat* of continuity is demonstrated.” *Id.* at 242.

Here, Plaintiff alleges a variety of predicate acts, including the Club Q Transaction, Kwok’s sending of prejudicial information to a police officer, the opening of the Illegal Account, and extortion relating to the SF Lawsuits. SAC at ¶¶ 131-138. The purpose of each action was different and involved largely different actors (although most of the events other than the SF Lawsuits involved Kwok). *Id.* While the Defendants were tangentially linked, there are no distinguishing characteristics alleged in the SAC that would elevate the relationship beyond isolated events. As for continuity of the activity, Defendants’ alleged predicate acts occurred within a 14-month period over seven years ago. SAC at ¶¶ 28, 31, 40-51, 59-64, 67-84. The alleged extortion email sent by dismissed Defendant Ascarrunz in February 2014 is the only predicate act that occurred outside the 14-month period from February 28, 2006 to April 20, 2007. SAC at ¶ 99. Thus, continuity is not established.

The SAC also alleges no facts giving rise to even an inference that the threat of continuing racketeering activity exists. The Illegal Account was closed in 2007 and the SF Lawsuits against Plaintiff were dismissed in June 2014.

Leave to amend should not be given where any amendment would be futile. Plaintiff has failed to

adequately plead three elements necessary to establish a RICO claim: (1) injury, (2) an “enterprise,” and (3) a pattern of racketeering activity, and it does not appear that any additional amendments to the pleadings could remedy these deficiencies. Accordingly, Claim 1 is dismissed without leave to amend.

B. The Complaint Fails to State a Claim for RICO Conspiracy

The Ninth Circuit has held that a “failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy.” *Howard*, 208 F.3d at 751. “To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses.” *Id.*; see also *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir. 1993) (“a RICO conspiracy requires proof of an arrangement to violate a substantive RICO provision.”). Here, Plaintiff failed to adequately plead a substantive violation of RICO. Thus, Plaintiff is barred from bringing a claim of conspiracy to commit RICO acts under section 1962(d).

Because Plaintiff has not pleaded and cannot plead a substantive RICO claim, it would be futile to allow an amendment to cure the defective pleading of a RICO conspiracy. Accordingly, Claim 2 is dismissed without leave to amend.

IV. CONCLUSION

In light of the foregoing, Defendants’ Motion to Dismiss is **GRANTED** as follows:

(1) Claim 1 of the SAC (violation of 18 U.S.C. § 1962(c)) is dismissed with prejudice as to the moving defendants; and

(2) Claim 2 of the SAC (violation of 18 U.S.C. § 1962(d) by conspiring to violate § 1962(c)) is dismissed with prejudice as to the moving defendants.

IT IS SO ORDERED.

[Wells Fargo Judgment]

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES-- GENERAL**

Case No. CV 14-3579 DMG (SH)

Date February 20, 2015

Title *Millie Ogden v. Wells Fargo Bank, N.A., et. al.*

Page 1 of 5

Present: The Honorable Dolly M. Gee, United States
District Judge

Kane Tien :Deputy Clerk

Not Reported: Court Reporter

Attorneys Present for Plaintiff(s): None Present

Attorneys Present for Defendant(s): None Present

Proceedings: IN CHAMBERS- ORDER RE WELLS
FARGO'S MOTION TO DISMISS [20]

I. PROCEDURAL BACKGROUND

On May 8, 2014, Plaintiff Millie Ogden filed a Complaint against Defendants Wells Fargo Bank, N.A. ("Wells Fargo"), Omnibus Trading Corporation, CNC Noodle Company. Grant Kwok, Yim Fong Kwok, Barbara Chuan Qin, Betty Lim; Kieu Bich Vuong, Cuong Vuong, Howard Hsu, Jason Hanigan, Michael Kwong; Kendric Kwok; Kevin Vuong, Sophal Ear, Nancy Gee, and Cesar Ascarrunz. [Doc. #1.] On June 25, 2014, Plaintiff filed a First Amended Complaint ("FAC"). [Doc. #11.] On July 1, 2014, Plaintiff filed a Notice of Dismissal pursuant to Fed. R. Civ. P. 41(a)(1) as to Defendants CNC Noodle Company, Betty Lim, Kieu Bich Vuong, Cuong Vuong, Barbara Chuan Qin, Jason Hanigan, Kevin Vuong, Sophal Ear, Nancy Gee, Kendric Kwok, and Cesar Ascarrunz. [Doc. #12.]

On September 12, 2014, Plaintiff filed the operative Second Amended Complaint ("SAC") against Defendants Wells Fargo Bank, Grant Kwok, Yim Fong Kwok, Michael Kwong, and Howard Hsu. [Doc. # 19.] The SAC asserts claims for (1) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") by individual defendants; (2) RICO conspiracy against individual defendants; (3) RICO vicarious liability against Wells Fargo; (4) unfair competition by Wells Fargo in violation of section 17200 of the California Business and Professions Code; (5) Wells Fargo's noncompliance with section 530.8 of the California Penal Code; (6) negligent hiring by Wells Fargo; (7) negligent retention of employee by Wells Fargo; and (8) negligence on the part of Wells Fargo.

On October 18, 2014, Wells Fargo filed the instant Motion to Dismiss the SAC ("MTD"). [Doc. #20.] On November 5, 2014, Plaintiff filed her opposition

“Opp.”). [Doc. # 31.] On November 24, 2014, Wells Fargo filed its reply. (“Reply”). [Doc. # 37.] The Court deemed the

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matter appropriate for decision without oral argument and took it under submission. [Doc. # 41.] For the reasons discussed below, Wells Fargo’s motion is **GRANTED**.

II. FACTUAL BACKGROUND [FN1]

FN1. The Court assumes the truth of the factual allegations in the Complaint solely for purposes of deciding the motion to dismiss

On February 28, 2006, Grant Kwok (“Kwok”) opened an account (“Illegal Account”) in Plaintiff’s name at a Northern California Wells Fargo branch. SAC at ¶ 31. Because Kwok and Plaintiff had a prior relationship, Kwok had her social security number, driver’s license number, and date of birth. *Id.* at ¶ 34. At the time, Kwok was working at Wells Fargo and opening customer accounts was one of his responsibilities. *Id.* at ¶ 27. Kwok had previously worked for Wells Fargo, but resigned in June 2003 for financial misfeasance and abuse of his position. *Id.* At ¶ 11. Kwok opened the Illegal Account to help

conceal Howard Hsu's \$350,000 sale of Q Entertainment SF, LLC ("Club Q Transaction") to Cesar Ascarrunz. *Id.* at ¶ 28. On the same day the Illegal Account was opened, Ascarrunz wrote a \$60,000 check ("Check") payable to Plaintiff. *Id.* at ¶ 38. At the time, Ascarrunz did not know who Ogden was. *Id.* The Check was deposited into the Illegal Account on the same day, and the money was disbursed to Kwong, Yim Fong Kwok, and Cuong Vuong. *Id.* at ¶¶ 40-42.

On April 4, 2007, Ascarrunz called Plaintiff, explained the Club Q Transaction, and asked to be reimbursed the \$60,000 from the Check. *Id.* at ¶ 68. Initially, Ascarrunz threatened Plaintiff, but later wanted Plaintiff to extort Kwok in order to get his money back. *Id.* at ¶¶ 73-78). After Plaintiff refused to participate, Ascarrunz filed two lawsuits in San Francisco County Superior Court ("SF Lawsuits") naming Kwok, Hsu, Kwong, and Ogden, among others. *Id.* at ¶ 94. Since the SF Lawsuits were filed, Plaintiff has incurred substantial legal fees. *Id.* at ¶ 97.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or to allege sufficient facts to

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support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (“Rule 8 . . . does not require ‘detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.’”)

For the purposes of a 12(b)(6) motion, a court must accept all factual allegations as true. *Twombly*, 550 U.S. at 555. “The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

If a court dismisses certain claims under Rule 12(b)(6), it must determine whether to grant leave to amend pursuant to Federal Rule of Civil Procedure 15(a)(2). “Courts are free to grant a party leave to amend whenever ‘justice so requires,’ and requests for leave should be granted with ‘extreme liberality.’” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (internal citations omitted); Fed. R. Civ. P. 15(a)(2). A court should deny leave to amend only

when “the pleading could not possibly be cured by the allegation of other facts.” *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (internal citation and quotation marks omitted).

V. DISCUSSION

The MTD asserts that Plaintiff’s claims fail for each of the following reasons: (1) failure to adequately plead respondeat superior liability; (2) Plaintiff’s lack of standing to state a RICO claim; (3) failure to allege a RICO enterprise, a pattern of racketeering activity, and predicate RICO acts of extortion or conspiracy.

A. The SAC Fails to Allege Respondeat Superior Liability

A private plaintiff may raise a claim under RICO if he is “injured in his business or property” because the defendant violated one of RICO’s criminal provisions set forth in 18 U.S.C. § 1962. *Hemi Gp., LLC v. City of New York*, 559 U.S. 1, 130 S. Ct. 983, 987, 175 L. Ed. 2d 943 (2010) (quoting 18 U.S.C. § 1964(c)). The Supreme Court has held that proximate cause must be shown in order for a plaintiff to have standing under RICO. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). Thus, a “direct relationship” between the injury and injurious conduct is necessary. *Id.* at 269. In *Holmes*, the Supreme Court determined that Holmes’s acts in a stock manipulation scheme that bankrupted

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two stockbrokers—which ultimately prevented them from meeting their obligations to their clients and thus forced the plaintiff to reimburse those clients—were potentially a “but for” cause of the injury, but were not a proximate cause because there was no direct relationship between Holmes’s alleged conduct and plaintiff’s asserted injury. *Id.* at 271. The Ninth Circuit has applied the same standard in RICO cases. *See Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 773 (9th Cir. 2002); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992).

In the present case, Plaintiff’s injury is comprised of legal fees incurred in defending against the SF Lawsuits filed by dismissed Defendant Ascarrunz. The predicate acts for the RICO claims are mail and wire fraud in connection with the Q Club Transaction. While the Illegal Account opened by Grant Kwok may be a “but for” cause of the SF Lawsuits, it was not a direct cause. The direct cause of Plaintiff’s injury is the SF Lawsuits filed by Cesar Ascarrunz. Plaintiff fails to establish that Grant Kwok’s alleged conduct while employed by Defendant Wells Fargo was the proximate cause of her injury. Therefore, Kwok is not liable for Plaintiff’s injury and, consequently, Wells Fargo cannot be liable under RICO for Kwok’s money laundering activities. *See Oki Semiconductor Co.*, 298 F.3d at 774.

Plaintiff further alleges that Kwok and Wells Fargo, among others, conspired to violate RICO.

Under RICO, respondeat superior liability attaches only if the employer benefitted from its employee's RICO violation. *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-55 (9th Cir. 1992). To state a claim against the employer based on respondeat superior liability, the Plaintiff must sufficiently allege that the employee entered "into the offending agreement benefitting [the employer] and that she entered into that agreement within the course and scope of her employment." *Oki Semiconductor Co.*, 298 F.3d at 776 (the plaintiff failed to allege respondeat superior liability where Wells Fargo employee laundered the proceeds of a conspiracy's theft because conspiring to violate RICO was outside the course and scope of employment).

Here, Plaintiff does not allege any facts plausibly demonstrating that Kwok's alleged RICO conspiracy benefitted Wells Fargo, nor does she have any factual moorings for the proposition that Kwok entered into the RICO conspiracy within the course and scope of his employment. In the SAC, Plaintiff also alleges no facts regarding the underlying conspiratorial agreement. Plaintiff conclusorily alleges that Kwok opened the Illegal Account while acting within the course and scope of his employment. The subsequent actions that caused Plaintiff's damages, however, were related to the money laundering scheme involving the San Francisco night club, not his employment at Wells Fargo.

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Kwok was employed by Wells Fargo to open new bank accounts, not to conduct a “bank fraud business” which ultimately included defrauding Wells Fargo, his employer. SAC at ¶ 9. Thus, even if Plaintiff could allege facts to show that Kwok entered into a conspiracy with Wells Fargo, Plaintiff would be unable to plausibly allege that Kwok acted within the course and scope of his employment. Conspiring to violate RICO falls well outside the course and scope of Kwok’s employment as a customer accounts representative. As a result, no amendment to Plaintiff’s complaint would cure this fatal flaw. While Wells Fargo offers alternative grounds for dismissal in its MTD, the Court finds that Plaintiff’s inability to allege respondeat superior liability is fatal and it therefore need not address the alternative grounds.

Leave to amend should not be given where amendment would be futile. *Serra v. Lappin*, 600 F.3d 1191, 1200 (9th Cir. 2010). Plaintiff has failed to adequately plead the elements necessary to establish respondeat superior liability under a RICO claim, and no amendment would cure that deficiency. The Court finds that granting leave to amend would be futile. Accordingly, Claim 3 for RICO vicarious liability is **DISMISSED** without leave to amend.

B. The State Law Claims Are Dismissed Because There Is No Federal Question

Because the sole federal claim against Wells Fargo has been dismissed, the Court declines to

exercise supplemental jurisdiction over the state law claims against Wells Fargo. *See* 28 U.S.C. § 1367; *Ove v. Gwinn*, 264 F.3d 817, 821, 826 (9th Cir. 2001) (“[a] court may decline to exercise supplemental jurisdiction over related state-law claims once it has dismissed all claims over which it has original jurisdiction”) (citation and internal quotation marks omitted)).

Accordingly, Claims 4, 5, 6, 7, and 8 are **DISMISSED** without prejudice.

IV. CONCLUSION

In light of the foregoing, Defendant’s Motion to Dismiss the RICO vicarious liability claim against Wells Fargo is **GRANTED** with prejudice, and the state law claims against Wells Fargo are dismissed without prejudice.

IT IS SO ORDERED.