IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

NATHAN EARL AIWOHI, et al., Plaintiffs, vs. BANK OF AMERICA, N.A., et al., Defendants.	CIVIL NO. 22-00312 JAO-RT ORDER GRANTING DEFENDANTS BANK OF AMERICA, N.A. AND THE BANK OF NEW YORK MELLON'S JOINT MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT (ECF NO. 76)

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Eight named Plaintiffs[1] bring their second iteration of this putative class action against Defendants Bank of America, N.A. ("BOA") and the Bank of New York Mellon ("BNYM") (collectively, "Defendants") alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964. Defendants move to dismiss the claim with prejudice. ECF No. 43 ("Motion"). For the following reasons, the Court GRANTS Defendants' Motion.

[1] Named Plaintiffs are: Nathan Earl Aiwohi ("Aiwohi"); Toby Alamoana Keohokapu, Jr. ("Keohokapu"); Darlene K. Ebos, as successive personal representative of the Estate of Barbara Anita Baliguat ("Baliguat"); Susan DeShaw ("DeShaw"); Thomas Johnson ("Johnson"); Maria K. Williams-James ("Williams-James"); Lazara A. Rodriguez ("Rodriguez"); and Julie Nicolas ("Nicolas").

I. BACKGROUND

A. Factual History

1. Overview

Plaintiffs have again filed a lengthy, oft-confusing pleading that continues to "impose unfair burdens on litigants and judges" and constitutes a violation of Federal Rule of Civil Procedure ("FRCP") 8. *McHenry v. Renne*, 84 F.3d 1172, 1179–80 (9th Cir. 1996). The First Amended Complaint ("FAC") is 199 pages long, over 600 paragraphs, and appends 48 exhibits that comprise more than 3,300 pages. *See generally* ECF No. 65. As best the Court can discern, Plaintiffs accuse Defendants of engaging in a years-long nationwide scheme to wrongfully prosecute foreclosure cases using fraudulent documents.

Plaintiffs are current or former mortgagors of residential real property. *See generally* ECF No. 65. Five Plaintiffs—Aiwohi, Keohokapu, Baliguat, DeShaw, and Johnson—are or were mortgagors of property in Hawai'i. *See id.* ¶¶ 345, 361, 382, 399, 413. Williams-James, Rodriguez, and Nicolas are or were mortgagors of property in Florida. *See id.* ¶¶ 460, 470, 481. Plaintiffs' mortgage loans either were originated by Countrywide Bank, N.A. or Countrywide Home Loans, Inc. (collectively, "Countrywide"), or transferred to Countrywide, and/or had notes endorsed by Countrywide agents. *See id.* ¶¶ 346, 363, 387, 402, 421, 461, 472, 483. On or about July 1, 2008, BOA purchased Countrywide's operations. *See id.*

¶ 162. Plaintiffs characterize BOA as the "master servicer" or a past servicer for all Plaintiffs' mortgages. *Id.* ¶¶ 217, 221. BONYM, in turn, acts as the "[t]rustee for trusts that own all of Class Plaintiffs' mortgages" other than Johnson's. *Id.* ¶ 218.

2. *State Foreclosure Proceedings Summary And Litigation Status*

State foreclosure proceedings against the Plaintiffs regarding their respective properties were later instituted, as indicated in the following chart:

Mortgagor	**Location of Trial Court**	**Lender**	**Case Number and Foreclosure Plaintiff**	**Date Filed**	**Record Cites**
Aiwohi	Hawai'i	Countrywide Home Loans, Inc.	5CC131000082, BNYM	3/12/13	ECF No. 65 ¶ 345; ECF Nos. 65-16, 65-17; ECF Nos. 43-30, 43-31
Keohokapu	Hawai'i	First Magnus Financial Corp.	1CC121001026, BNYM	4/16/12	ECF No. 65 ¶ 361; ECF Nos. 65-18, 65-20;[2] ECF No. 43-29

[2] Although Plaintiffs also list ECF No. 65-19 as a document associated with the Keohokapu mortgage, the document submitted contains a large "Preview" watermark and is otherwise not readable.

Baliguat	Hawai‘i	Countrywide Home Loans, Inc.	1CC131003138, BNYM	11/29/13	ECF No. 65 ¶ 382; ECF Nos. 65-21, 65-22; ECF No. 43-32
DeShaw	Hawai‘i	First Magnus Financial Corp.	1CC161001821, BNYM	9/27/16	ECF No. 65 ¶ 399; ECF Nos. 65-23, 65-24, 65-25, 65-26, 65-27; ECF Nos. 43-33, 43-34
Johnson	Hawai‘i	Countrywide Home Loans, Inc.	1CCV190002277, U.S. Bank	12/6/19	ECF No. 65 ¶ 413; ECF Nos. 65-28, 65-29, 65-30; ECF No. 43-35
Williams-James	Florida	Countrywide Home Loans, Inc.	2015-CA-018433, Green Tree Servicing LLC	8/11/2015	ECF No. 65 ¶ 460; ECF Nos. 65-36, 65-37 ECF No. 43-5
Rodriguez	Florida	Amnet Mortgage, Inc.	2009-CA-062378, BNYM	8/25/2009	ECF No. 65 ¶ 470; ECF Nos. 65-38, 65-39; ECF No. 43-4

Nicolas	Florida	Popular Mortgage, Corp.	2019-CA-037059, BNYM	11/1/2018	ECF No. 2 ¶ 759; ECF Nos. 65-40, 65-41, 65-42, 65-43; ECF No. 43-6, 43-7, 43-8, 43-9, 43-10

Of the eight named Plaintiffs, foreclosure proceedings against four—Keohokapu, Williams-James, Rodriguez, and Nicolas—have concluded. *See* ECF No. 65 ¶¶ 210, 214–216, 380; ECF No. 76-4. The foreclosure proceedings against Aiwohi, Baliguat, Johnson, and DeShaw remain open. *Id.* ¶¶ 209, 211–213, 360.

3. *Scheme*

According to the FAC, Defendants "devised a scheme or artifice to defraud . . . for the purpose of filing and prosecuting, or causing the filing and prosecution of, tens of thousands of unlawful foreclosures complaints, in this District, and nationally." *Id.* ¶ 19. As part of this purported scheme, Plaintiffs' mortgages underwent a similar process. First, sometime in the years 2004 through 2006, the Plaintiffs purchased real property in either Florida or Hawai'i. *Id.* ¶¶ 209–216.[3] Plaintiffs, as mortgagors signed mortgage notes payable in varying amounts and

[3] The "Parties" section of the FAC alleges Williams-James made a purchase in October 2006, *see* ECF No. 65 ¶ 214, but the more specific allegations pertinent to Williams-James, and the relevant exhibits, indicate the purchase occurred in 2004, *see id.* ¶¶ 461, 464; ECF Nos. 65-34, 65-36, 65-37.

with different interest rates. *Id.* ¶¶ 346, 362, 384, 400, 421, 461, 471, 482. Next, the notes were endorsed by a Countrywide agent or employee—Plaintiffs contend these endorsements were "false and fraudulent" because the endorsements were "hand ink stamped" and completed "without the knowledge, authorization, or consent" of the person listed as signing. *Id.* ¶¶ 348, 365, 386, 403, 423, 463, 472, 485. Sometime later, a "MERS assignment" would be recorded, wherein the Mortgage Electronic Registration System, Inc. ("MERS") as mortgagee would assign its interest in Plaintiffs' mortgages to another party, such as BONYM or Countrywide. *Id.* ¶¶ 351, 368, 389, 405, 426, 466, 475, 487. Plaintiffs characterize these assignments as "sham[s]," "false and fraudulent conveyance document[s]," and "a nullity, in *toto*." *Id.* ¶¶ 352, 371, 390, 406, 436, 476.

Plaintiffs allege Defendants eventually used or will use these assignments, as well as false declarations in support thereof, in foreclosure cases against Plaintiffs in Hawai'i or Florida state courts. *Id.* ¶¶ 353–354, 373, 375–376, 391–395, 409–411, 431, 467–469, 497–499. Defendants' process allegedly permits various foreclosure plaintiffs to wrongfully demonstrate standing to foreclose—and to succeed in the foreclosure process—through fraudulent documentation. *See* ECF No. 65 ¶¶ 9, 79. To this end, Plaintiffs allege Defendants "utilize United States mail and wire services to transmit false and fraudulent statements, material misrepresentations, forged mortgage note endorsements, false or fraudulent

mortgage assignments, false or fraudulent Affidavits, Affidavits containing material omissions of fact, and other false declarations, in interstate commerce." *Id.* ¶ 131. According to Plaintiffs, Defendants' actions with respect to these foreclosure cases amount to racketeering, and their actions have "injured [Plaintiffs'] property interest by reason of [certain] substantive racketeering predicate acts . . . including the loss or imminent loss of their initial investments in their homes and their homes." *Id.* ¶ 1, 540, 542.

B. Procedural History

Plaintiffs commenced this putative class action on July 19, 2022, asserting a RICO claim as well as a claim under the Fair Housing Act ("FHA"). ECF No. 2. In March 2023, the Court granted Defendants' joint motion to dismiss based on Rule 12(b)(6) but permitted Plaintiffs leave to file an amended pleading. ECF No. 57. The FAC asserts a single RICO claim. *See* ECF No. 65 ¶ 529. Plaintiffs request actual and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. *Id.* ¶¶ 603–07.

After granting the parties' request to exceed page- and word-count limitations, *see* ECF No. 70, Defendants filed their Motion on August 14, 2023. ECF No. 76. Plaintiffs filed an opposition, and Defendants filed a reply. ECF Nos. 81, 84. Pursuant to Local Rule 7.1(c), the Court elected to decide the Motion without a hearing. *See* ECF No. 89; *see also* LR 7.1(c) ("Unless

specifically required, the court may decide all matters, including motions, petitions, and appeals, without a hearing.").

II. LEGAL STANDARDS

A. Rule 8

Pursuant to Rule 8, complaints must include a "short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), and "each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). The purpose of Rule 8 is at least in part to "give the defendant[s] fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). Complaints run astray of this purpose when they fail to concisely, directly, and clearly identify: the claims asserted, each defendant the claims are asserted against, and the specific factual allegations that give rise to each claim. *See, e.g.*, *McHenry*, 84 F.3d at 1179–80; *Sasaki v. Inch*, 2019 WL 2094428, at *2 (D. Haw. May 13, 2019); *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014).

Similarly, a complaint may also violate Rule 8 where it includes so much irrelevant, redundant, or confusing information that "its true substance, if any, is well disguised." *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008); *see also Knapp v. Hogan*, 738 F.3d 1106, 1111 (9th Cir. 2013) (quoting *U.S. ex rel. Garst v. Lockheed–Martin Corp.*, 328 F.3d 374, 378 (7th Cir.

2003) ("Complaints that are filed in repeated and knowing violation of Federal Rule 8's pleading requirements are a great drain on the court system, and the reviewing court cannot be expected to 'fish a gold coin from a bucket of mud.'")). The Ninth Circuit has explained why requiring concise and direct allegations in a complaint is so important, and the troubles that befall litigants and courts if claims proceed on inadequately pled complaints:

> Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges. As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one plaintiffs filed, and must prepare outlines to determine who is being sued for what. Defendants are then put at risk that their outline differs from the judge's, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. . . . The judge wastes half a day in chambers preparing the "short and plain statement" which Rule 8 obligated plaintiffs to submit. He [or she] then must manage the litigation without knowing what claims are made against whom. This leads to discovery disputes and lengthy trials, prejudicing litigants in other case[s] who follow the rules, as well as defendants in the case in which the prolix pleading is filed.

McHenry, 84 F.3d at 1179–80. Complaints that fail to meet Rule 8's pleading requirements are subject to dismissal at the discretion of the Court. *Renshaw v. Renshaw*, 153 F.2d 310, 310–11 (D.C. Cir. 1946).

B. Rule 12(b)(6)

FRCP 12(b)(6) authorizes dismissal of a complaint that fails "to state a claim

upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion to dismiss, "the court accepts the facts alleged in the complaint as true," and "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged." *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)) (alteration in original). Conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (citation omitted). Furthermore, the court need not accept as true allegations that contradict matters properly subject to judicial notice. *See Sprewell*, 266 F.3d at 988.

"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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). The tenet that the court must accept as true all of the allegations contained in

the complaint does not apply to legal conclusions. *See id.* As such, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)) (some alterations in original).

If dismissal is ordered, the plaintiff should be granted leave to amend unless it is clear that the claims could not be saved by amendment. *See Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007) (citation omitted)).

III. DISCUSSION

Defendants attack the FAC on several grounds. Initially, they contend dismissal is warranted due to the Plaintiffs' refusal to comply with Rule 8's "short and plain" pleading requirements—particularly because the Court admonished Plaintiffs for their prolix original complaint. ECF No. 76 at 20–24. Substantively, they claim Plaintiffs' re-pled RICO claim fails as a matter of law due to the litigation exception, Plaintiffs' lack of standing to challenge any note assignments, the application of the *Noerr-Pennington* doctrine,[4] and failure to plead a plausible

[4] This doctrine "arose in the antitrust context" and has since been applied "outside the antitrust field." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (discussing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,*

RICO enterprise. ECF No. 76 at 24–37. They also contend Plaintiffs could have, and should have, raised their RICO claims in their respective state court foreclosure proceedings, which were each filed years prior to the commencement of this case. *Id.* at 44–51. Thus, they contend, res judicata or collateral estoppel preclude those Plaintiffs whose foreclosure cases are now finalized from advancing them now; and, for the claims brought by Plaintiffs whose state court proceedings remain ongoing, Defendants contend that this Court should abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (the *Colorado River* doctrine). *Id*.

Plaintiffs respond that Rule 8 does not doom the FAC as it "documents a decade long pattern of intentional frauds." ECF No. 81 at 25–29. They further insist that neither *Noerr-Pennington* nor the litigation exception should apply here, and point to False Claims Act lawsuits in Florida, as well as Hawai‘i foreclosure cases, to argue that Defendants can be liable under RICO for their alleged scheme. *Id.* at 7–25, 30–41. Finally, Plaintiffs add that extrinsic fraud and "no full or fair opportunity to litigate" in Florida permits the Court to eschew principles of res judicata and collateral estoppel, and they reiterate their previous arguments against application of *Colorado River* abstention. *Id.* at 43–48.

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365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)).

A. Judicial Notice and Conversion of the Motion

Defendants again request judicial notice of the records in the state foreclosure actions against Plaintiffs. ECF No. 75-1 at 20 n.4. They refer back to their previous motion to dismiss which attached various filings from those state actions, *see* ECF Nos. 43-4 through 43-43, a chart summarizing those proceedings, *see* ECF No. 43-3, and an appellate dismissal in the Keohokapu foreclosure, *see* ECF No. 76-4. Plaintiffs' opposition brief does not respond to the request. ECF No. 81.[5]

The Court concludes that it can take judicial notice of the requested documents. Under FRCP 12(b)(6), review is ordinarily limited to the contents of the complaint. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Sprewell*, 266 F.3d at 988. A Rule 12(b)(6) motion is treated as a motion for summary judgment if matters outside the pleadings are considered. *See Anderson v.*

[5] Plaintiffs request the Court take judicial notice of an appeal scheduled for oral argument before the Eleventh Circuit for a False Claims Act case that was dismissed by the District Court. ECF No. 81 at 34. However, the docket indicates that argument was removed from the calendar and—as of March 27, 2024—has not yet been rescheduled. *See Bruce Jacobs v. JP Morgan Chase Bank N.A.*, 22-10963, ECF Nos. 47, 49. Moreover, it is unclear to the Court how the fact of a False Claims Act appeal could impact the litigation here—particularly as it involves separate parties and a non-RICO claim—and does not appear to be directly related to this matter. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (judicial notice permitted when outside proceedings are directly related to instant litigation). The Court therefore declines to take judicial notice of the appeal.

Angelone, 86 F.3d 932, 934 (9th Cir. 1996); Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). However, courts may "consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citations omitted). In addition, courts may consider evidence necessarily relied upon by the complaint if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder*, 450 F.3d at 448 (citations omitted).

Under Federal Rule of Evidence 201, a court may take judicial notice of facts "not subject to reasonable dispute" that either "(1) [are] generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)–(c)(1). A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (internal

quotation marks and citations omitted).

Defendants' exhibits are filings from Plaintiffs' state court proceedings, so they are properly the subject of judicial notice. *See generally* ECF Nos. 43-4 through 43-43; ECF No. 76-4. Plaintiffs' FAC identifies the case numbers of the various state court proceedings as well as the filing dates for relevant pleadings and motions, *see* ECF No. 65 ¶ 509, and they attach to their FAC similar underlying court documents. *See, e.g.,* ECF Nos. 65-16 through 65-31 and 65-34 through 65-43. Additionally, the filings are generally known within the Court's territorial jurisdiction and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Thus, the Court takes judicial notice of Exhibits 1–35 in Defendants' original motion to dismiss and Exhibit 2 of the current Motion. ECF Nos. 43-4 through 43-43; ECF No. 76-4. Because judicial notice as to the foregoing documents is proper, the Court need not treat the Motion as one for summary judgment, and the Court declines to do so. Indeed, references to the state foreclosure proceedings appear throughout the FAC and form the heart of Plaintiffs' RICO claim.

B. Compliance with Rule 8

Defendants again assert that the FAC fails to comply with the requirements of Rule 8, and further, fails to comply with the Court's prior order admonishing Plaintiffs for filing "an egregiously long, unnecessarily complex, and confusing

complaint." ECF No. 57 at 29. The Court agrees.

The Court previously found that Plaintiffs' complaint amounted to "a tangled web of assertions" that failed to state a claim against Defendants. ECF No. 57 at 30. And indeed, in the course of the hearing on the prior Motion to Dismiss, Plaintiffs' counsel urged the Court to grant him leave to amend, saying, "I will make every effort to streamline this complaint[.]" ECF No. 56 at 34. But the FAC does little to cure the Rule 8 defects from the original complaint—counting exhibits, it is actually 700 pages *longer* than the original complaint. *Compare* ECF No. 2 *with* ECF No. 65. The FAC's length is not its only flaw, as the pleading's substance has also not improved. The FAC is replete with irrelevant facts, argumentative statements that do not constitute factual allegations, and lengthy recitations—usually from extra-circuit lawsuits—that often do not involve Defendants or even relate to a civil RICO claim. It also discusses various legal doctrines (e.g., litigation privilege; extrinsic and intrinsic fraud; incorporated records; unclean hands; Article III standing) that do little to provide Defendants fair notice of what claims Plaintiffs bring and the *factual* bases for these claims. Instead, Defendants and the Court must sift through the prolix FAC and attempt to separate fact from legal argument to determine whether Plaintiffs have stated a claim. *See McHenry*, 84 F.3d at 1179-80 (no abuse of discretion in dismissing complaint for Rule 8 violations); *but see Hearns v. San Bernardino Police Dep't*,

530 F.3d 1124, 1131 (9th Cir. 2008) (discussing less drastic alternatives to dismissal).

Because the Court previously alerted Plaintiffs to these deficiencies, Plaintiffs' FAC—which is as difficult to decipher as the original complaint—can be dismissed for failing to comply with the requirements of Rule 8 and the Court's prior order. *See Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). While dismissal could be premised on this basis alone, the Court nonetheless addresses Plaintiffs' RICO claim on the merits.

C. RICO Claim

The RICO statute provides civil remedies for "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962(c), which Plaintiffs invoke here, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). The statute defines "racketeering activity" "to encompass dozens of state and federal offenses, known in RICO parlance as predicates. . . . A predicate offense implicates RICO when it is part of a "pattern of racketeering activity"—a series of related predicates that together demonstrate the existence or threat of

continued criminal activity." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 329–30 (2016) (citing *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989); 18 U.S.C. § 1961(5)).

The elements of a civil RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to [a] plaintiff's business or property." *United Bhd. of Carpenters & Joiners v. Bldg. & Constr. Trades Dep't, AFL–CIO*, 770 F.3d 834, 837 (9th Cir. 2014) (some internal quotation marks and citation omitted). A pattern requires at least two acts of racketeering activity. *See* 18 U.S.C. § 1961(5). Further, because Plaintiffs' RICO claims are based on fraud, these allegations must meet Rule 9(b)'s heightened pleading standard and state with particularity the time, place, and specific content of the false representations. *See* Fed. R. Civ. P. 9(b); *see also Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065–66 (9th Cir. 2004). Further, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together[.]" *Swartz*, 476 F.3d at 764–65. "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme." *Id.* (citations and alterations omitted).

Plaintiffs allege that BOA, in an enterprise involving BNYM and other loan servicers, schemed to improperly "fix" Plaintiffs' loan files by forging note

endorsements and falsifying MERS mortgage assignments. Thereafter, during state proceedings, the foreclosure plaintiffs used the "fixed" loan files to create affidavits containing either false or incomplete statements of fact, which courts then, together with the "fixed" loan files, relied and will rely upon in adjudicating foreclosure proceedings. *See* ECF No. 65 ¶¶ 86, 103, 104, 120, 123, 309, 328, 332. Plaintiffs' FAC continues to allege that the fraud at issue in their RICO claim was perpetrated in the foreclosure courts, and re-alleges the same "Class Action Predicate Acts Matrix" as the original complaint, listing "false pretense filings" and date and location of these filings. *See id.* ¶ 509; *see also* ECF No. 2 ¶ 759.

Defendants argue that Plaintiffs fail to state a RICO claim because, *inter alia*, they fail to state a predicate act of fraud as contemplated by the statute since their allegations turn on litigation activity. *See* ECF No. 76-1 at 25–32. Although Defendants provide several additional bases for dismissal, *id.* at 32–50, the Court addresses only the litigation activity argument, as it is dispositive.

As the Court previously stated, litigation activity, standing alone, is insufficient to state a RICO claim in the Ninth Circuit. ECF No. 57 at 20 (citing *United States v. Koziol*, 993 F.3d 1160, 1174 (9th Cir. 2021) (collecting and discussing civil RICO cases)). As *Koziol* reasoned, multiple other circuits "conclude[] that RICO does not authorize suits by private parties asserting claims against business or litigation adversaries, based on litigation activities, and seeking

treble damages, costs, and attorneys' fees." *Id.* (citations omitted). The cases *Koziol* discussed echo the proposition that "allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act." *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018). The policy arguments underpinning this rule are obvious: "[i]n the absence of corruption . . . 'prosecuting litigation activities as federal crimes would undermine the policies of access and finality that animate our legal system.'" *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016).[6] Furthermore, permitting such claims "would result in the inundation of federal courts with civil RICO actions that could potentially subsume all other state and federal litigation in an endless cycle where any victorious litigant immediately sues opponents for RICO violations." *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1055 (8th Cir. 2024) (internal quotation marks and citation omitted).

[6] Plaintiffs' FAC at times obliquely alleges corruption within the Florida state-court system, alleging that the Florida Third District Court of Appeal "has completely eviscerated a homeowners' procedural dure process rights in Miami-Date County," and has permitted due process rights to "take[] a backseat to judicially constructed and expanded rule interpretations regarding Florida's litigation immunity" due to its "pro bank judicial mentality." ECF No. 65 ¶¶ 198–208, 267–276. It is unclear to the Court what the purported relevance of these allegations are to the civil RICO claim alleged—particularly regarding Hawai'i Plaintiffs—but in any event, Plaintiffs disavow them in their opposition, stating they would remove this section from a second amended complaint, ECF No. 81 at 28, and conceding these allegations are "simply irrelevant to whether Defendants violate the RICO act," ECF No. 81 at 22.

The FAC alleges RICO predicate acts that turn on litigation activity—Plaintiffs' FAC contains a "Predicate Activity Matrix" that duplicates the very same alleged predicate activities from its original complaint. *Compare* ECF No. 2 ¶ 759 *with* ECF No. 65 ¶ 509. As before, Plaintiffs expressly state that the perpetrated fraud was the *filing* of various documents in various identified state cases, alleging Defendants' purpose was the "filing and prosecuting, or causing the filing and prosecution of, tens of thousands of unlawful foreclosures complaints, in this District, and nationally." *See* ECF No. 65 ¶ 19; *see also id.* ¶¶ 133, 534, 557, 569, 572, 594.

Faced with this caselaw, Plaintiffs urge the Court to consider *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 83 (2d Cir. 2015), a class action out of the Second Circuit in which a debt-purchasing company, law firm, and process-serving company allegedly bought consumer debt, filed actions against consumers, improperly served them, and filed fraudulent service documents to obtain default judgments in state court. ECF No. 81 at 20. But as the *Kim* court noted, *Sykes* is unhelpful to assess failure to state a RICO claim—the decision related to class certification and "did not review the district court's denial of the defendants' motion to dismiss." *See Kim*, 884 F.3d at 105 (citing *Sykes*, 780 F.3d at 79–80). Although courts have not categorically foreclosed all RICO actions based on litigation activity when there exist relevant out-of-court predicate acts, Plaintiffs

fail to allege such acts here despite a second chance to do so. The Court therefore agrees with the "overwhelming weight of authority bar[ring]s a civil RICO claim based on the use of the mail or wire to conduct allegedly fraudulent litigation activities as predicate racketeering acts" and dismisses the FAC on this basis. *See Carroll v. U.S. Equities Corp.*, 2019 WL 4643786, at *12 (N.D.N.Y. Sept. 24, 2019) (collecting cases); *Luther v. Am. Nat. Bank of Minnesota*, 2012 WL 5471123, at *6 (D. Minn. Oct. 11, 2012) *report and recommendation adopted,* 2012 WL 5465888 (D. Minn. Nov. 9, 2012) (same).

The Court previously considered and decided the first round of dispositive motions practice on similar grounds, and admonished Plaintiffs about the consequences of failing to allege adequate factual allegations in an amended complaint. ECF No. 57 at 22. Following initial dismissal of their complaint, Plaintiffs then requested and were granted two separate extensions to file the FAC. *See* ECF Nos. 59, 60, 62, 63. Yet the crux of the legal deficiency in the complaint—acts constituting litigation activity—was not addressed or rectified by the FAC. The Court therefore concludes that Plaintiffs' RICO claims cannot be saved by amendment as amendment would be futile, *see Swartz*, 476 at 760, and dismisses Plaintiffs' FAC with prejudice.

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IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' Motion to Dismiss with prejudice. ECF No. 76. The Clerk of Court is directed to enter judgment in favor of Defendants and close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, March 28, 2024.

Jill A. Otake
United States District Judge