

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA

**Borrego Community Health Foundation v. Inland Valley  
Investments, LLC**

Borrego Community Health Foundation · No. 21-cv-01417-AJB-AGS · Decided March 13, 2023

SUMMARY

The United States District Court for the Southern District of California denied Borrego Community Health Foundation’s motion for leave to amend the complaint and granted defendants’ motion to dismiss its Third Amended Complaint. The court held that the RICO claims were inadequately pleaded under Rules 9(b) and 12(b)(6), including because the defendants were improperly lumped together and the complaint did not sufficiently allege their participation in the enterprise’s affairs. The court dismissed the RICO claims with leave to amend, declined supplemental jurisdiction over the state-law claims, and ordered any Fourth Amended Complaint to be filed by April 3, 2023.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States District Court for the Southern District of California                                                                                                                                                                                                                                                                                                                                           |
| WRITING FOR THE COURT | Anthony J. Battaglia                                                                                                                                                                                                                                                                                                                                                                                           |
| JURISDICTION          | United States District Court for the Southern District of California                                                                                                                                                                                                                                                                                                                                           |
| DECIDED               | March 13, 2023                                                                                                                                                                                                                                                                                                                                                                                                 |
| DOCKET                | 21-cv-01417-AJB-AGS                                                                                                                                                                                                                                                                                                                                                                                            |
| DISPOSITION           | other                                                                                                                                                                                                                                                                                                                                                                                                          |
| PROCEDURAL POSTURE    | Defendants moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Third Amended Complaint, and Plaintiff moved under Rule 15 for leave to amend in order to effectively consolidate this action with another lawsuit. The court denied the motion for leave to amend, granted dismissal of the RICO claims with leave to amend, and declined supplemental jurisdiction over the state-law claims. |
| STANDARD OF REVIEW    | On a Rule 12(b)(6) motion, the court tests the legal sufficiency of the complaint, accepting well-pleaded factual allegations as true and construing them in the plaintiff’s favor, but disregarding legal conclusions and conclusory recitals. A statute-of-limitations defense may support dismissal at the pleading stage only when the running of                                                          |

the limitations period is apparent on the face of the complaint. RICO fraud allegations are subject to Rule 9(b)'s particularity requirement.

**PRECEDENTIAL VALUE**

unpublished

**TOPICS**

motions to dismiss

statute of limitations

pleadings

civil procedure

commercial litigation

**PRACTICE AREAS**

civil procedure

commercial litigation

health law

real estate

**QUESTIONS PRESENTED**

1. Whether Rule 15 was an appropriate procedural vehicle for Plaintiff's request to effectively consolidate this action with a separate action involving additional defendants.
2. Whether Plaintiff's civil RICO claim was barred by the statute of limitations on the face of the Third Amended Complaint.
3. Whether Plaintiff adequately pleaded a substantive RICO violation under 18 U.S.C. § 1962(c), including the conduct, enterprise, and racketeering-activity elements and the particularity required by Rule 9(b).
4. Whether Plaintiff could adequately plead a RICO conspiracy under 18 U.S.C. § 1962(d) without adequately pleading a substantive RICO violation.
5. Whether the court should exercise supplemental jurisdiction over the remaining state-law claims after dismissing the federal RICO claims.

**HOLDINGS**

1. Rule 15 was not an appropriate procedural vehicle for Plaintiff's requested effective consolidation. The motion was procedurally defective because Rule 42(a), rather than Rule 15, governs consolidation, and the additional defendants had not been joined, notified, or given an opportunity to be heard.
2. The RICO claim could not be dismissed as time-barred because the Third Amended Complaint plausibly alleged that the injury was not discovered until October 2020, and the limitations period was not apparent on the face of the complaint.
3. Plaintiff failed to state a claim under § 1962(c) because it impermissibly lumped the Defendants together, failed to plead the alleged fraud with Rule 9(b) particularity as to each Defendant, failed to support its alter-ego theory with factual allegations, and failed to adequately plead that Defendants participated in the operation or management of the alleged enterprise.
4. Plaintiff failed to state a claim under § 1962(d) because it failed to adequately plead a substantive RICO violation.
5. After dismissing all claims over which it had original jurisdiction, the court declined to exercise supplemental jurisdiction over the remaining state-law claims.

## KEY QUOTATIONS

*“The rule providing for the Court’s power to consolidate matters is Rule 42(a).” (at 2)*

*“To determine whether the statute of limitations has run on a civil RICO claim, the Ninth Circuit applies the “injury discovery” rule.” (at 3)*

*“Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to differentiate their allegations when suing more than one defendant and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.” (at 5)*

*“To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.” (at 6)*

*“That said, because Plaintiff has been aware of Defendants’ challenges to its pleadings and afforded a prior opportunity to amend, the Court grants Plaintiff one, final opportunity to cure the deficiencies in its RICO claims.” (at 8)*

## FACTUAL BACKGROUND

Borrego Community Health Foundation, a California nonprofit and federally qualified health center, leased three clinic properties from entities controlled by Daryl Priest. Plaintiff alleged that its former CEO executed 30-year leases in 2012, 2015, and 2016 at substantially above-market rents without required approval from Plaintiff’s board. Plaintiff alleged that the former CEO, his successor, and Defendants concealed the lease terms from the board, and that the alleged over-market terms came to light after a 2020 law-enforcement raid and subsequent review and appraisal. Plaintiff asserted state-law claims and RICO claims based on the alleged scheme.

## PROCEDURAL HISTORY

Plaintiff commenced the action in San Diego Superior Court and filed successive amended complaints. After the Second Amended Complaint added RICO claims, Defendants removed the action to federal court. A prior district judge dismissed the SAC with leave to amend as to deficiencies involving the RICO allegations and statute of limitations. Plaintiff filed a Third Amended Complaint, Defendants moved to dismiss, and after briefing was complete the case was transferred to Judge Battaglia. The court denied Plaintiff’s procedurally defective Rule 15 motion, dismissed the RICO claims with one final opportunity to amend, and conditionally directed remand of the state-law claims if Plaintiff failed to amend.

## DISPOSITION

other

## REMAND INSTRUCTIONS

Plaintiff was ordered to file a Fourth Amended Complaint and a redlined version by April 3, 2023, with Defendants’ response due April 17, 2023. If Plaintiff failed to amend, the RICO claims would be dismissed without leave to amend and the state-law claims would be remanded to San Diego Superior Court.

## CASES CITED

- Von Saher v. Norton Simon Museum of Art, 592 F.3d 954, 969 (9th Cir. 2010)
- Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)
- Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156 (1987)
- Pincay v. Andrews, 238 F.3d 1106, 1109-10 (9th Cir. 2001)
- Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)
- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)
- Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004)
- Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014)
- Odom v. Microsoft Corp., 486 F.3d 541, 545, 547 (9th Cir. 2007) (en banc)
- Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007)
- Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011)
- Reves v. Ernst & Young, 507 U.S. 170, 185 (1993)
- United Energy Owners Comm., Inc. v. United States Energy Mgmt. Sys., Inc., 837 F.2d 356, 362 (9th Cir. 1988)
- Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 194 (9th Cir. 1987)
- Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000)
- Sanford v. MemberWorks, Inc., 625 F.3d 550, 561 (9th Cir. 2010)

## OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF  
CALIFORNIA 10 11 BORREGO COMMUNITY HEALTH Case No.: 21-cv-01417-AJB-AGS  
FOUNDATION, a California non-profit 12 public benefit corporation, ORDER: 13 DENYING  
MOTION FOR LEAVE TO 14 Plaintiff, AMEND THE COMPLAINT and 15 v. GRANTING  
MOTION TO DISMISS 16 INLAND VALLEY INVESTMENTS, THE THIRD AMENDED  
LLC, a California limited liability 17 COMPLAINT company; DRP HOLDINGS, LLC, a 18  
California limited liability company; (Doc.

Nos. 19, 36) PROMENADE SQUARE, LLC, a 19 California limited liability company; and 20  
DOES 1 through 50, inclusive, 21 Defendants. 22 23 24 Before the Court are two motions—a  
motion to dismiss the Third Amended 25 Complaint filed by Inland Valley Investments, LLC  
("Inland"); DRP Holdings, LLC 26 ("DRP"); and Promenade Square, LLC ("Promenade")  
(collectively, "Defendants") and a 27 motion for leave to amend the TAC filed by Borrego  
Community Health Foundation 28 ("Plaintiff" or "BCHF") after the motion to dismiss was fully  
briefed and taken under 1 submission by this Court.

For the reasons set forth below, the Court DENIES the motion 2 for leave to amend the TAC as  
procedurally defective and GRANTS the motion to dismiss. 3 I. BACKGROUND 4 Plaintiff

BCHF is a California non-profit corporation and federally qualified health center that provides healthcare to individuals in underserved communities. It operates over 60 clinics throughout San Diego, Riverside, and San Bernardino counties.

Defendants Inland, Promenade, and DRP (collectively referred to in the TAC as the “Priest LLCs”) are limited liability companies engaged in the business of commercial real estate. Defendants’ sole member and manager is Daryl Priest (“Priest”). Priest develops, owns, and leases commercial property and is a long-time personal friend of BCHF’s former chief executive officer (“CEO”), Bruce Hebets (“Hebets”).

Defendants leased three health care clinics to BCHF. According to Plaintiff, Hebets worked with Defendants—operating through Priest—to create, implement, and maintain the three leases, which bound BCHF to 30-year leases at more than twice the fair market rent. Plaintiff alleges that although all leases require approval from BCHF’s all-volunteer Board of Trustees (“Board”), the leases at issue were never presented to the Board for authorization or approval.

Instead, Hebets unilaterally signed each of the contracts (collectively referred to in the TAC as “Priest Leases”), in September 2012, September 19 2015, and February 2016. The Priest Leases were also later amended without the Board’s knowledge or approval. Hebets retired from BCHF in 2018. BCHF continued to lease the three properties from Defendants.

Plaintiff alleges that during his final years as CEO, Hebets was in communication with Priest and Priest’s senior executive in charge of Defendants’ operations, Travis Lyons (“Lyons”), who was also aware of the exorbitant lease terms. Plaintiff asserts that Priest and Lyons maintained direct involvement in BCHF’s operational and management decisions that were essential to the continuation of the grossly overpriced leases and carried out Hebets’ directives relating thereto.

As Hebets was nearing retirement, Lyons began having regular private meetings with Hebets’ successor as CEO, Mikia Wallis (“Wallis”), who at that time, was BCHF’s Chief Legal Officer. According to Plaintiff, Lyons and Wallis held private meetings about the leases at issue and worked together to maintain these leases without Board knowledge of the over-market terms.

In October 2020 and unrelated to this matter, law enforcement authorities conducted a raid at BCHF’s offices. Plaintiff alleges it afterwards reviewed numerous contracts, including the three leases. BCHF obtained an independent appraisal that concluded the rent was substantially more than market value, and the lease terms were excessive. In June 2021, BCHF initiated this action in San Diego Superior Court, asserting several state law claims against Defendants related to the rent paid under the three leases.

12 BCHF thereafter filed a First Amended Complaint, and later in July 2021, a Second 13 Amended Complaint (“SAC”), adding allegations that Defendants violated the Racketeer 14 Influenced and Corrupt Organizations Act. Defendants removed the case to federal court 15 based on federal question jurisdiction. 16 In August 2021, Defendants filed a motion to dismiss the SAC, which the 17 then-presiding district judge granted with leave to amend the deficiencies it identified with 18 respect to the RICO allegations and the statute of limitations.

Plaintiff filed a Third 19 Amended Complaint (“TAC”), and Defendants again filed a motion to dismiss. After the 20 motion was fully briefed, the case was transferred to the undersigned district judge. This 21 Court took the matter under submission. Plaintiff subsequently filed a motion for leave to 22 amend the complaint. This Order follows. 23 II. MOTION FOR LEAVE TO AMEND THE COMPLAINT 24 Federal Rules of Civil Procedure (“Rule”) 15(a) governs when pleadings may be 25 amended, and as relevant here, provides that courts should freely grant leave to amend 26 “when justice so requires.” Fed.

R. Civ. P. 15(a)(2). 27 Plaintiff filed a motion for leave to amend its complaint, asking the Court to 28 “effectively merge” the instant action and its other, later-filed lawsuit against over 40 1 defendants (described as “the Multi-Scheme Litigation”) “into one matter” to promote 2 “judicial efficiency and economy.” (Doc. No. 36 at 9 n.2.)

The Court does not find Rule 3 15 an appropriate procedural vehicle for Plaintiff’s request. The rule providing for the 4 Court’s power to consolidate matters is Rule 42(a).<sup>1</sup> 5 Plaintiff concedes it is pursuing a Rule 15 motion in place of a “traditional 6 consolidation motion.” (Doc. No. 36 at 9 n.2.) Plaintiff, however, points to no case where 7 a court has applied Rule 15 in the unconventional manner it proposes.

And, in any event, 8 the numerous defendants in the Multi-Scheme Litigation are not a party in this case, nor 9 have they been given notice or an opportunity to be heard on the instant motion. The Court 10 thus declines to find that “justice so requires” the remedy Plaintiff seeks. See Fed. R. Civ. 11 P. 15(a)(2). 12 Accordingly, for the foregoing reasons, the Court DENIES Plaintiff’s motion for 13 leave to amend as procedurally defective.

(Doc. No. 36.) 14 III. MOTION TO DISMISS 15 Having denied Plaintiff’s motion to amend the complaint, the Court turns to 16 Defendant’s motion to dismiss the operative complaint—the TAC. In it, Defendant argues 17 primarily that Plaintiff’s claim under the Racketeer Influenced and Corrupt Organizations 18 Act (“RICO”), is time-barred, and in the alternative, contends that Plaintiff has not 19 sufficiently pled any of its causes of action.

The Court considers these arguments in turn. 20 A. Statute of Limitations - RICO 21 A suit may be dismissed under Rule 12(b)(6) based on the statute of limitations “only 22 when the running of the statute is apparent on the face of the complaint.” Von Saher v. 23 24 25 1 Federal Rules of Civil

Procedure 42(a) provides: 26 Consolidation. If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; 27 (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

28 1 Norton Simon Museum of Art, 592 F.3d 954, 969 (9th Cir. 2010). Dismissal on this basis 2 “can be granted only if the assertions of the complaint, read with the required liberality, 3 would not permit the plaintiff to prove that the statute was tolled.” *Jablon v. Dean Witter 4 & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). 5 RICO actions have a four-year statute of limitations.

*Agency Holding Corp. v. 6 Malley–Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). To determine whether the 7 statute of limitations has run on a civil RICO claim, the Ninth Circuit applies the “injury 8 discovery” rule. *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001). Pursuant to this 9 rule, the limitations period “begins to run when a plaintiff knows or should know of the 10 injury that underlies his cause of action.” *Id.* The rule thus “creates a disjunctive two-prong 11 test of actual or constructive notice, under which the statute begins running under either 12 prong.” *Id.* Pertinent here, constructive notice is established if the plaintiff “had enough 13 information to warrant an investigation which, if reasonably diligent, would have led to 14 discovery of the fraud.” *Id.* at 1110.

15 Here, the injury giving rise to Plaintiff’s RICO claim is based on the three leases its 16 former CEO executed with Defendants. Plaintiff alleges the terms of the leases were 17 excessive in terms of the grossly-over-market rents and duration of each lease. Defendants 18 argue the statute of limitations began to accrue when the three leases were executed in 19 2012, 2015, and 2016.

Because Plaintiff did not file suit until June 4, 2021, Defendant 20 argues, the TAC makes clear that the RICO claim is time-barred. The Court disagrees. 21 Plaintiff’s TAC contains allegations that although the leases were entered into in 22 2012, 2015, and 2016, Hebets signed these leases outside of the normal procedures and 23 they “were never presented to the BCHF Board for authorization or approval.” (Doc.

No. 24 16 at ¶ 35.) The TAC goes on to allege that both Hebets and his successor Wallis knew that 25 BCHF’s Board “would review only those contracts presented to them” and would not have 26 reason to see the Priest Leases unless the board executive managing the relationship with 27 2 Internal citations, quotations, and alteration are omitted from the case citations in this Order unless 28 1 the property company decided to present them.

(*Id.* at ¶ 60.) Plaintiff further alleges that 2 the amounts paid every month for each of the leases were not separately reported to the 3 Board, but rather, “melded into a line item on financial reports of all facility lease expenses 4 combined for all 20+ Southern California facilities.” (*Id.* at ¶ 61.) According to Plaintiff, 5 because Hebets and Wallis concealed the over-market leases from the

Board, the injury 6 resulting therefrom did not come to light until the government investigation in October 7 2020.

(Id. at ¶ 57.) 8 Thus, accepting the allegations in the TAC as true and construing them in the light 9 most favorable to Plaintiff, the Court finds Plaintiff has adequately pled that the statute of 10 limitations did not begin to accrue on its RICO claim until October 2020. Defendants' 11 attempts to establish otherwise by submitting documentary evidence via a request for 12 judicial notice is unavailing.

Based on the parties' briefing, there is apparent dispute over 13 when Plaintiff "had enough information to warrant an investigation which, if reasonably 14 diligent, would have led to discovery of the fraud." Pincay, 238 F.3d at 1110.

The place 15 for determining such disputes, however, is not in a motion to dismiss. As previously noted, 16 a motion to dismiss based on the statute of limitations may be granted "only when the 17 running of the statute is apparent on the face of the complaint." Von Saher, 592 F.3d at 18 969. 19 Accordingly, because the TAC, read with the required liberality, plausibly shows 20 that the RICO claim is not time barred, the Court declines to dismiss this claim on statute 21 of limitations grounds.

See id. ("A complaint cannot be dismissed unless it appears beyond 22 doubt that the plaintiff can prove no set of facts that would establish the timeliness of the 23 claim."). 24 B. Failure to State a Claim 25 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint, i.e. 26 whether the complaint lacks either a cognizable legal theory or facts sufficient to support 27 such a theory.

Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001) (citations omitted). For 28 a complaint to survive a Rule 12(b)(6) motion to dismiss, it must contain "sufficient factual 1 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. 2 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 3 570 (2007)).

In reviewing the motion, the court "must accept as true all of the allegations 4 contained in a complaint," but it need not accept legal conclusions. Id. "Threadbare recitals 5 of the elements of a cause of action, supported by mere conclusory statements, do not 6 suffice." Id. (citing Twombly, 550 U.S. at 555). 7 Defendant contends that Plaintiff has failed to sufficiently plead its RICO claims.

8 The parties do not dispute that because Plaintiff's RICO claim is based on Defendants' 9 alleged commission of mail, wire, and healthcare fraud, Rule 9(b)'s particularity standard 10 applies. See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065–66 (9th Cir. 2004) ("Rule 11 9(b)'s requirement that in all averments of fraud or mistake, the circumstances constituting 12 fraud or mistake shall be stated with particularity applies to civil RICO fraud claims.").

13 The Court discusses the sufficiency of Plaintiff's RICO claims in turn. 14 1. RICO – 18 U.S.C. § 1962(c) 15 Plaintiff alleges a violation of 18 U.S.C. § 1962(c), which provides, in pertinent part: 16 It shall be unlawful for any person employed by or associated with any 17 enterprise engaged in, or the activities of which affect, interstate or foreign 18 commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]

19 20 To state a RICO claim under § 1962(c), a plaintiff must allege that the defendant 21 participated in "(1) the conduct of (2) an enterprise that affects interstate commerce (3) 22 through a pattern (4) of racketeering activity[.]" *Eclectic Properties E., LLC v. Marcus & 23 Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014); *Odom v. Microsoft Corp.*, 486 F.3d 541, 24 547 (9th Cir.

2007) (en banc). 25 To begin, Defendants argue that the core of Plaintiff's alleged fraudulent scheme is 26 Hebets' and Wallis' "successful concealment of the over-market leases from BCHF" and 27 that "Hebets and Wallis knew that volunteer BCHF Board members would review only 28 those contracts presented to them, and that they would never have reason to see the Priest 1 LLC leases unless the BCHF executive managing the relationship with [the] Priest LLCs 2 decided to present the leases." (Doc.

No. 16 at ¶¶ 59, 60.) Defendants assert that the TAC 3 points to concealment and misrepresentations only by Hebets and Wallis and contains no 4 allegation that Defendants misrepresented or concealed anything from BCHF. They further 5 argue that Plaintiff's TAC improperly lumps all Defendants together in its allegations, and 6 thus, has failed to satisfy Rule 9(b) heightened pleading standard.

The Court agrees. 7 "Rule 9(b) does not allow a complaint to merely lump multiple defendants together 8 but requires plaintiffs to differentiate their allegations when suing more than one defendant 9 and inform each defendant separately of the allegations surrounding his alleged 10 participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir.

2007). 11 Plaintiff explains that the TAC describes Defendants jointly as the Priest LLCs because 12 they acted in unison in carrying out the RICO scheme, and in support, points to Paragraph 13 22 of the TAC, which alleges "there is such unity of interest and ownership between the 14 Priest LLCs that the separate personalities of the limited liability companies no longer 15 exist" and cites cases applying the alter ego doctrine.

(Doc. No. 16 at ¶ 22.) To the extent 16 Plaintiff seeks to have the Court disregard the three defendants' separate corporate entities, 17 consider them as one, and as the alter ego of each other, the Court finds Plaintiff has not 18 sufficiently pled facts to support its alter ego theory. Plaintiff's allegation simply tracks the 19 elements of the alter ego doctrine.

See *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the 20 elements of a cause of action, supported by mere conclusory statements, do not suffice.”). 21 Without factual allegations to support its alter ego theory, the Court declines to find that 22 Plaintiff has pled enough to overcome Rule 9(b)’s prohibition against “lump[ing] multiple 23 defendants together[.]” *Swartz*, 476 F.3d at 764.

The Court finds this pleading deficiency 24 subjects Plaintiff’s TAC to dismissal. 25 Moreover, merely alleging that Defendants “worked with BCHF insiders,” who then 26 entered into over-market-price leases, prevented the leases from being seen by the BCHF 27 Board, and paid the rents is not enough to support a finding that Plaintiff has pled the 28 circumstances of each of the defendants’ alleged fraud with particularity.

Because Plaintiff 1 has failed to specify the who, what, where, when, and how as to each defendant allegedly 2 defrauded BCHF, the Court finds Plaintiff has not satisfied Rule 9(b)’s heightened pleading 3 standard. See *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 4 (9th Cir. 2011) (“To satisfy Rule 9(b), a pleading must identify the who, what, when, 5 where, and how of the misconduct charged, as well as what is false or misleading about the 6 purportedly fraudulent statement, and why it is false.”).

7 Although unnecessary, the Court also finds Plaintiff’s allegations with respect to the 8 “conduct” element of a RICO claim inadequately pled. The conduct element requires 9 Plaintiff to demonstrate that Defendants conducted or participated in the conduct of the 10 enterprise’s—here, BCHF3—affairs. See *Reves v. Ernst & Young*, 507 U.S. 170, 185 11 (1993).

To that end, Plaintiff must allege facts showing that Defendants “participate[d] in 12 the operation or management of the enterprise itself.” *Id.* 13 Notably, in dismissing the SAC, the prior district judge found there were “no factual 14 allegations in the amended complaint as to Defendants’ participation in BCHF’s operation 15 or management.” (Doc. No. 15 at 3.)

Plaintiff’s TAC remains deficient in this regard. That 16 Defendants “worked with Hebets to devise management and operations decisions at 17 BCHF” is not enough. Plaintiff must plead more with respect to, for example, when, where, 18 how each defendant allegedly took over BCHF’s management and operations.

Because 19 Plaintiff’s allegations concerning Defendants’ participation in the conduct of BCHF’s 20 affairs are conclusory, it has failed to plead the element of conduct, and in turn, a RICO 21 claim. Based on the foregoing, the Court finds that Plaintiff has failed to state a RICO 22 claim.

Accordingly, the Court DISMISSES Plaintiff’s RICO claim pursuant to 18 U.S.C. 23 § 1962(c). 24 25 26 3 BCHF asserts it was the RICO enterprise. *United Energy Owners Comm., Inc. v. United States Energy Mgmt. Sys., Inc.*, 837 F.2d 356, 362 (9th Cir. 1988) (“plaintiffs are free to allege that they or one of their 27 members is a RICO enterprise or part of a RICO enterprise.”); *Sun Sav. & Loan Ass’n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir.

1987) (“the enterprise that [plaintiff] has alleged in its complaint is [plaintiff] 28 1 2. RICO – 18 U.S.C. § 1962(d) 2 Defendants also challenge Plaintiff’s claim under the RICO conspiracy statute, 18 3 U.S.C. § 1962(d). They argue that because Plaintiff failed to adequately plead a substantive 4 violation of RICO by any defendant, it cannot allege a conspiracy to violate RICO.

The 5 Court agrees. “Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do 6 not adequately plead a substantive violation of RICO.” Howard v. Am. Online Inc., 208 7 F.3d 741, 751 (9th Cir. 2000).

Because Plaintiff failed to plead a substantive RICO claim, 8 the Court finds it has necessarily failed to plead a claim under the RICO conspiracy statute. 9 See id. Accordingly, the Court DISMISSES Plaintiff’s RICO claim pursuant to 18 U.S.C. 10 § 1962(d). 11 \*\*\* 12 Lastly, in its opposition to the instant motion to dismiss, Plaintiff asks for leave to 13 amend should the Court dismiss its claims, but offers no new facts that would be added to 14 the new complaint that would address Defendants’ challenges or the deficiencies identified 15 herein.

The Court, however, recognizes that “[a] dismissal for failure to state a claim 16 pursuant to 12(b) (6) should not be granted unless it appears beyond doubt that the plaintiff 17 can prove no set of facts in support of [its] claim which would entitle [it] to relief.” Odom, 18 486 F.3d at 545. That said, because Plaintiff has been aware of Defendants’ challenges to 19 its pleadings and afforded a prior opportunity to amend, the Court grants Plaintiff one, final 20 opportunity to cure the deficiencies in its RICO claims.

21 // 22 // 23 // 24 // 25 // 26 // 27 // 28 // I IV. CONCLUSION 2 For the foregoing reasons, the Court GRANTS Defendants’ motion to dismiss as to 3 RICO claims (seventh cause of action) WITH LEAVE TO AMEND.’ Having 4 // dismissed all claims over which it has original jurisdiction, the Court declines to exercise 5 //supplemental jurisdiction over the state law claims.

Sanford v. MemberWorks, Inc., 625 6 // F.3d 550, 561 (9th Cir. 2010) (“A district court may decline to exercise supplemental 7 // jurisdiction if it has dismissed all claims over which it has original jurisdiction.”) 8 IT IS HEREBY ORDERED that Plaintiff’s fourth amended complaint, along with 9 //a redlined version, must be filed no later than April 3, 2023.

Defendants’ response must be 10 filed no later than April 17, 2023. Failure to file an amended complaint will result in 11 dismissal of the RICO claims without leave to amend and remand of the state law claims 12 San Diego Superior Court. 13 IT IS SO ORDERED. 14 15 Dated: March 13, 2023 © 16 Hon, Anthony J.Battaglia 17 United States District Judge 18 19 20 21 22 23 24 25 26 27 —\_\_sSsSsSsSsSsSsSsSs 28 4 Because the Court has not relied on the documents Defendants requested it judicially notice, it DENIES their request without prejudice.

