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GREEN EARTH COFFEE LLC
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEFAN BOKAIE; CAROL BOKIE; SURINDER UPPAL; MARIE UPPAL; GURJIWAN UPPAL; PATRICK WARD; BRENDA WARD; NEERA BHANDARI; and SANDEEP BHANDARI,

Plaintiffs,

GREEN EARTH COFFEE LLC, a California limited liability company; CARLOS ZAMBRANO, an individual; FLYING ROOSTER, LLC, a California limited liability company; EXCHANGE BANK, a California corporation; and DOES 1 through 25, inclusive,

Defendants.

Case No. 3:18-cv-5244

NOTICE AND MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CULTIVATORS' MOTION TO DISMISS

Date: November 29, 2018
Time: 2:00pm
Dept: Courtroom 9, 19th Floor
Judge: Jon S. Tigar
Trial Date: Not yet set
Action Filed: August 28, 2018

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 29, 2018, at 2:00pm, or as soon thereafter as the matter may be heard before the Honorable Jon Tigar at Courtroom 9, located at 450 Golden Gate Avenue, San Francisco, CA, Defendant Cultivators will, and hereby do, move this Court for an order granting this Motion to Dismiss. The motion is based on this Notice, the Memorandum of Points and Authorities, the Declaration of Kenneth Stratton, and the Proposed Order.

ISSUES TO BE DECIDED

1. Have Plaintiffs alleged injury to their "business or property" as required under RICO at 18 U.S.C. § 1964(c)?
2. Are Plaintiffs' alleged damages too speculative and remote to be actionable under RICO?
3. Do Plaintiffs lack standing to allege RICO violations because they were not targeted by illegal activity?
4. Have Plaintiffs alleged a "pattern of racketeering" as required under RICO at 18 U.S.C. § 1961(5)?
5. Have Plaintiffs alleged "economic injury" as required under California Business & Professions Code section 17200?

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

As alleged, Defendants Green Earth Coffee LLC and Carlos Zambrano (the "Defendant Cultivators"), established a cannabis farm in March 2018 at 3062 Adobe Road, Petaluma, intending to cultivate cannabis in accordance with California's new laws legalizing commercial cannabis operations in the state. Now, after just six months of cultivation, the Plaintiffs, some of the farm's neighbors, have sued the Defendant Cultivators, their landlord and their landlord's bank, alleging two federal causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and five state law causes of action. Plaintiffs have seemingly taken it upon themselves to police alleged conduct explicitly authorized by state law and on which the federal government

has consciously decided not to intrude and, in doing so, they are trying to stretch RICO well beyond its established limits in an attempt to shut down a neighbor they find objectionable.

However, having alleged just abstract damages and annoyances from being next to a cannabis farm, the neighbors have failed to plead an actionable claim under RICO, a federal statute designed to address organized crime and racketeering, not a land use dispute. In particular, Plaintiffs' allegations of personal injuries and annoyances from the smells and sounds coming from the cannabis farm, as well as speculative reduction in their property value from living next to a cannabis business, are decidedly not actionable under RICO because they do not constitute concrete (*i.e.*, "out of pocket" monetary) damage to "business or property" as required by 18 U.S.C. § 1962(c). See Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Oscar v. University Students Coop. Ass'n, 965 F.2d 783 (9th Cir. 1992) (en banc); Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990). Moreover, Plaintiffs do not allege, nor can they, that they were "targeted" by any specific RICO predicates, *i.e.,* racketeering crimes enumerated in 18 U.S.C. § 1961(1), or that there has been a "pattern of racketeering" as required under RICO (e.g., at least two predicate "RICO" acts over a "substantial period of time"). See Sedima v. Imrex Co., 473 U.S. 479 (1985); Allwaste, Inc. v. Hecht, 65 F.3d 1523 (9th Cir. 1995).

Meanwhile, Plaintiffs' third cause of action, unfair business practice under section 17200 of California's Business & Professions Code (the Plaintiffs' "Business Code claim"), fails for a remarkably similar reason. Plaintiffs can only state a claim under section 17200 if they have suffered a concrete economic injury; and they have not. See, e.g., Kwikset Corp. v. Superior Court, 51 Cal.4th 310 (2011).

For all these reasons, Defendant Cultivators move the Court to dismiss Plaintiffs' RICO claims and their Business Code claim pursuant to Federal Rules of Civil Procedure 12(b)(6), and to decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law nuisance claims.

II. Legal Standards

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept the well-pleaded factual allegations in the complaint and construe them in

the light most favorable to the plaintiffs'claims. See, e.g., Galliger v. Becerra, 898 F.3d 1012, 1015 (9th Cir. 2018). However, a court should disregard speculation and a court is not required to accept allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. See, e.g., Bell Atl. Corp. v. Twombly, 5505 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1008 (9th Cir. 2018). As the Ninth Circuit recently explained:

> [W]e begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. We disregard threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. After eliminating such unsupported legal conclusions, we identify well-pleaded factual allegations, which we assume to be true, and then determine whether they plausibly give rise to an entitlement to relief. 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; that is, plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010). "The make-or-break standard ... is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief." Sepúlveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010). Also, while a 12(b)(6) motion is decided on the pleadings, courts may properly consider "official public records[,] documents central to plaintiffs claim[, and] documents sufficiently referred to in the complaint." E.g., Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); accord Mack v. South Bay Deer Dist., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982); Haskell v. Time, Inc., 857 F. Supp. 1392, 1397 (E.D. Cal. 1994).

III. Relevant Facts[1]

Accepting all of Plaintiffs' allegations as true, the facts presented can be summarized as follows:

The Plaintiffs either "own and reside" or just reside on parcels of real property located on Herrerias Way in Sonoma County, California. Complt. ¶¶ 4, 5. In or about March 2018, the Defendant Cultivators leased from Defendant Flying Rooster real property located at 3062 Adobe Road "less than 1,000 feet from Plaintiffs' homes." Complt. ¶¶ 21, 25. Sometime earlier, Defendant Exchange Bank lent money to Flying Rooster to purchase and develop the land at 3062 Adobe Road. Complt. ¶ 9.

Previously, in 2017, Defendant Cultivators "began commercial cannabis operation at 6697 Moro Street in Sonoma County." Complt. ¶ 18. Plaintiffs do not allege any connection to, or damages from, operations at 6697 Morro Street. Then, in or about March 2018, the Defendant Cultivators "abandoned the Morro Street Site and moved their operation to 3062 Adobe Road." Complt. ¶ 21. At 3062 Adobe Road, the Defendant Cultivators "constructed approximately 40 greenhouses, connected them to electricity, and began cannabis cultivation without obtaining permits." Complt. ¶ 21.

At the heart of their Complaint, Plaintiffs have alleged "noxious odors" coming from the 3062 Adobe Road site since April 2018 and that these odors permeate "draperies, furniture, carpeting and clothing" and, "[w]hen the odor is particularly strong, plaintiffs cannot enjoy being in their homes, even with the windows shut." Complt. ¶ 26. Also, these odors have allegedly caused a number of serious discomforts. For example, one Plaintiff alleges that the "smell of cannabis irritates his nose and throat, making him cough and causing a build-up of phlegm which clogs his breathing tube." Complt. ¶ 27. Another alleges the "smell emanating from [D]efendants' cannabis grow makes [her] nauseous and gives her a burning feeling in her lungs." Complt. ¶ 30. Moreover, the Plaintiffs have all alleged that the "commercial cannabis grow is also loud" because of a generator on site which has "run all day and all night since the end

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[1] The following facts are alleged in the Complaint and therefore may be accepted as true for purposes of this Motion, but Defendants do not concede the veracity of any allegations.

of June 2018, interfering with [their] sleep and depriving them of the sense of serenity they previously felt at home." Complt. ¶ 31. Lastly, the Plaintiffs allege the "open and ongoing conspiracy to commit federal crimes near [P]laintiffs' home[s] further diminishes their market value by causing potential buyers to fear associated criminal activity or by otherwise making the homes less attractive to buyers." Complt. ¶ 47.

Notably, the Plaintiffs allege no unlawful conduct unrelated to the cultivation of cannabis by the Defendant Cultivators. Complt. ¶ 37(a)(cultivating and distributing cannabis), ¶ 37(b)(possessing equipment and materials to cultivate cannabis), ¶ 37(d)(rentaing property to grow cannabis), and ¶ 37(e)(conducting financing transactions using proceeds from the cultivation of cannabis). Defendant Flying Rooster committed no unlawful acts unrelated to the cultivation of cannabis by Defendant Cultivators. It leased real property. Complt. ¶¶ 38, 39. Defendant Exchange Bank committed no unlawful acts unrelated to the cultivation of cannabis by Defendant Cultivators. It lent money. Complt. ¶¶ 40, 41. There are no allegations that the Defendant Cultivators imported, received, concealed, bought, sold, or otherwise dealt in cannabis.

IV. Argument

A. Plaintiffs Fail to State a RICO Claim

Plaintiffs allege five state law causes of action and two federal causes of action under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO"). RICO provides a private cause of action for any 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 of RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign 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). Section 1962 also prohibits conspiracies to engage in a pattern of racketeering activity. *See* 18 U.S.C. § 1962(d). RICO provides for the recovery of treble damages and attorneys' fees. 18 U.S.C. § 1962(c). However, the Ninth Circuit

has concluded there is no private right to injunctive relief under RICO. See, e.g., Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir. 1986); accord Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990).

Thus, to pursue a claim for damages under the civil RICO statutes, the Plaintiffs here must allege and then prove the following: (1) an injury "in [their] business or property;" (2) that the injury occurred "by reason of" a section 1962 violation under RICO; and (3) that there has been a "pattern of racketeering activity." See Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 653 (2008); Chaset v. Fleer/Skybox Int'l, LP., 300 F.3d 1083, 1086 (9th Cir. 2002).[2]

1. Plaintiffs Do Not Allege Injury to Their Business or Property; Personal Injuries are not Actionable under RICO

To have an actionable claim under RICO, a plaintiff must show damage to either his "business or property." 18 U.S.C. § 1964(c); Sedima v. Imrex Co., 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.")

Here, Plaintiffs have articulated no business interests. Instead, they allege: (1) personal annoyances, (2) physical discomforts, and (3) a speculative loss of value in their property.

But personal injuries, including pecuniary losses that may flow from personal injuries, are not compensable under RICO. See Oscar, 965 F.2d at 785; Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990); accord Jackson v. Sedgwick Claims Management Servcs., Inc., 731 F.3d 556, 565 (6th Cir. 2013) (en banc) ("Although courts

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[2] Often described as the "nuclear option" for fighting organized crime, the RICO statue still has important limits on its reach. In much the same way that Article III narrows the range of justiciable claims, the RICO statute itself limits the types of injuries for which relief may be granted by state and federal courts. Cf Cetacean Cmtv. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) ("If a plaintiff has suffered sufficient injury to satisfy the jurisdictional requirement of Article III but Congress has not granted statutory standing, that plaintiff cannot state a claim upon which relief can be granted."). At one point, courts referred to RICO's requirements for civil recovery as "statutory standing" requirements, *i.e.*, "RICO standing" under 12(b)(1). See, e.g., Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 (9th Cir. 2002). However, more recently, the U.S. Supreme Court and Ninth Circuit have clarified that "statutory standing" is more properly understood under the rubric of whether a particular plaintiff "has a cause of action under the statute." E.g. Lexmark Int'l, Inc. v. Statis Control Components, Inc., 572 U.S. 118, 125 & n.4 (2014).

have used various terms to describe the distinction between non-redressable personal injury and redressable injury to property, the concept is clear: both personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under [RICO]."); Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992)("Not surprisingly, all other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal and emotional injuries."); Grogan v. Platt, 835 F.2d 844, 847 (11th Cir. 1988) ("In our view, the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom."). As the U.S. Supreme Court has explained, the business or property requirement has "restrictive significance." See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Congress "cabin[ed] RICO's private cause of action to particular kinds of injury" and "exclude[ed] personal injuries." RJR Nabisco, Inc. v. Eur. Cmty., 136 S.Ct. 2090, 2108 (2006).

Consequently, the Plaintiffs' RICO causes of action in this case rise or fall on whether they have pled damage to their "property" sufficient to invoke this Court's jurisdiction and state a claim for relief. They have not.

Determining whether there has been an injury to a "property interest" sufficient to support a RICO claim is a two-part inquiry. See, e.g., Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 975 (9th Cir. 2008) (en banc). First, the alleged injury must be a recognized property interest under state law. See, e.g., Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005) (en banc); see also Evans v. City of Chi., 434 F.3d 916, 929 (7th Cir. 2006) ("[U]nder RICO, whether a particular interest amounts to property is quintessentially a question of state law."). Second, even if an injury is proprietary, it must also result in a "concrete financial loss." See, e.g., Oscar, 965 F.2d at 785. A concrete financial loss is one that is monetary and not speculative. Fleischhauer v. Feltner, 879 F.2d 1290, 1299-1301 (6th Cir. 1989) (plaintiffs under section 1964(c) entitled to recover only for money they paid out as a result of racketeering), cert. denied, 493 U.S. 1074 (1990). A plaintiff who merely alleges speculative injury to a "valuable property interest" fails to state a claim under RICO. See, e.g., Berg, 915 F.2d at 464; Chaset, 300 F.3d at 1086-87 ("To demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest").

Furthermore, as the Ninth Circuit has repeatedly explained, under California law a nuisance invasion of real property is a personal injury, *i.e.*, the loss of the right to use and enjoy the property, not damage to the property itself. See, Oscar, 965 F.2d at 787; Berg, 915 F.2d at 464 (concluding loss of enjoyment in property (nuisance, etc.) is "a personal injury in the form of emotional distress, not a claim for an injury to property as section 1964(c) [of RICO] requires."); Ingram v. City of Gridley, 100 Cal. App. 2d 815 (1950); accord Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3d Cir. 1991) ("The significance of section 1964(c)'s plain language is clear: RICO plaintiffs may recover damages for harm to business and property only, not to physical and emotional injuries due to harmful exposure to toxic waste.").

The facts in Oscar are instructive here. In that case, two neighbors sued under RICO the residents of a college residence hall called Barrington because the residents had been engaging in "a wide range of un-neighborly behavior . . . including drug dealing . . . for over twenty years." Oscar, 965 F.2d at 784. Among other things, the plaintiffs (referred to by the court collectively as "Oscar" and "she") accused the drug conspiracy of "filth, risk of disease, and noise; for violence, throwing of garbage on property, urinating on cars [and] vandalism, and for numerous other crimes, misdemeanors, nuisances, and annoyances." Id. Nevertheless, affirming the district court's dismissal of the complaint, the Ninth Circuit concluded the complaint failed to allege "an injury to business or property cognizable under RICO." Id. In reaching its holding, the Oscar Court reconfirmed, first, that RICO requires a showing of "concrete financial loss" and, second, that "personal injuries are not compensable under RICO." Id. at 785. Then, with respect to the plaintiffs' allegations of damage to their property value, the Court held: "Oscar has not alleged any financial loss which would be compensable under RICO. She has not alleged any out-of-pocket expenditures as a direct result of the racketeering activity at Barrington, for example costs incurred to repair damage to her personal property or even to purchase a security system. The only injury she has alleged is a 'decrease in the value of her property' due to the racketeering activities next door. We do not believe that such a decrease entails financial loss to Oscar." Id. at 786. Finally, the Oscar Court rejected the argument that loss of the use and enjoyment of property constituted a cognizable property interest under state law sufficient enough to base a RICO cause of action, writing:

> What Oscar is really complaining about is the 'personal discomfort and annoyance to which [she] has been subjected by a nuisance on adjoining property.' . . . [P]ersonal injuries are not actionable under RICO. Oscar has no doubt lost 'peace of mind' as a result of the activities at Barrington. Berg, 915 F.2d at 464. As we have held in Berg, however, such a loss even when it flows from a valuable property interest — is a 'personal injury in the form of emotional distress, not a claim for an injury to property as section 1964(c) requires.' We do not intend to denigrate the severity of the problems Oscar has alleged or the harm inflicted on her. It is clear, however, that any injury she has suffered is at core an intangible personal injury, not a financial loss to property. Oscar can recover for such injuries under any one of a myriad of state law causes of action. She cannot do so under RICO, however. As the Seventh Circuit said recently in rejecting a RICO claim for economic losses which derived from a fundamentally personal injury: 'Perhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to business or property, but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary. The requirements for pleading an injury cognizable under RICO are quite clear. They are not met here.

Oscar, 965 F.2d at 787-88 (quoting Doe, 958 F.2d at 770 (internal quotes and citations omitted)).

As in Oscar, Berg and the other authorities cited above, the Plaintiffs here cannot transform annoyances, discomforts and loss of "enjoyment" into damage to "business or property" as required under 18 U.S.C. Section 1964 (c) and (d). Rather, these are fundamentally state law nuisance claims. Defendant Cultivators therefore ask the court to dismiss the RICO claims accordingly.

2. Plaintiffs' Alleged Damages are too Speculative to Establish "By Reason Of" Proximate Causation; No RICO Claim without Concrete Financial Loss.

Moreover, to pursue a civil RICO claim, a plaintiff must also make a specific showing of injury and causation; RICO only compensates parties "injured in their business or property ***by reason of*** a violation" of RICO. See, e.g., RJR Nabisco, 136 S.Ct. at 2097 (quoting 18 U.S.C. § 1964(c)) (emphasis added). Put another way, RICO's civil cause of action requires a showing of proximate causation, *i.e.*, direct causation. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) (citing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992)). Directness means that there must be "some direct relation between the injury asserted and the injurious conduct alleged." Holmes, 503 U.S. at 268, 271. A link that is too remote, purely contingent, indirect, or speculative is insufficient. See, e.g., Hemi Grp., LLC v. City of N.Y., 559 U.S. 1, 9-10 (2010). Thusly, to be actionable under RICO, the harm

must be a "concrete financial loss." E.g., Guerrero v. Gates, 442 F.3d 697 707 (9th Cir. 2006) (quoting Chaset, 300 F.3d at 1087); see also Ashcroft, 556 U.S. at 681 (holding that bare assertion of financial loss are "conclusory and not entitled to be assumed true."); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994) (holding a "cause of action does not accrue under RICO until the amount of damages becomes clear and definite"); Canyon Cty., 519 F.3d at 975 (holding RICO requires a showing of cocurate financial loss); Steele v. Hosp. Corp. of Am., 36 F.3d at70-71 (9th Cir. 1994) (same).

A ***potential*** decrease in the value of real property is considered too speculative to be actionable under RICO. See Maio v. Aetna, Inc., 221 F.3d 472, 495 (3d Cir. 2000); Oscar, 965 F.2d at 788; Steele, 36 F.3d at 70-71; Marina Point Develop. Assoc. v. U.S., 2005 WL 735933, at *3-4 (N.D. Cal. Mar. 28, 2005); Tsipouras v. W&M Properties, Inc., 9 Supp.2d 365, 368 (S.D.N.Y. 1998); In re Taxable Municipal Bond Securities Litig. v. Kutak Rock and Campbell, 51 F.3d 518, 523 (5th Cir. 1995); Cf Sheperd v. Am. Honda Motor Co., 822 F.Supp. 625 (N.D. Cal. 1993) (holding RICO claim too speculative because predicated on a theory of diminished profitability of an auto dealership). In Sheperd, this Court acknowledged that any attempt to apportion any diminished profitability between illegal RICO action and other lawful market forces would be an exercise in "sheer speculation." Id. at 630; Cf Olson v. United States, 292 U.S. 246, 257 ("Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value — a thing to be condemned in business transactions as well as in judicial ascertainment of truth.") And in Steele, the Ninth Circuit considered RICO claims by four patients who alleged that a scheme of racketeering by a hospital in order to overcharge insurance companies. Steele, 36 F.3d at 70. The plaintiff patients alleged that the racketeering scheme resulted in, among other harms, a depletion of their insurance benefits so that they had to pay out-of-pocket for certain medical procedures which should have been covered by insurance (in other words, a wasting of an asset so that it was worth much less to them). Rejecting this as an injury to property within the meaning of RICO, the Ninth Circuit explained the lack of direct financial loss as follows:

> [Plaintiff] Steele states in his deposition that when his son was admitted at a different facility, he had to pay the whole bill himself because there were no insurance funds left. However, proof of this payment would be insufficient to confer RICO standing because it alone does not show that the payment was caused by the alleged overbilling scheme at the hospital, as distinguished from some other cause. 'In order to maintain a cause of action under RICO … the plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well.' . . . There must be a direct relationship between the injury asserted and the injurious conduct alleged.

Id. at 71 (quoting Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303,1311 (9th Cir. 1992). In this case, even if the Plaintiffs alleged a sale of their properties at a "below market" price (which they have not), trying to tie such an injury to the cannabis cultivation would be an exercise in speculation, given that market price is set by others (i.e., willing buyers) in arms-length negotiations that include countless considerations such as interest rates, property taxes payable, anticipated utility costs, plus the many incalculable sentiments that play into one's decision to purchase a home or other property.

Following the Supreme Court's guidance in Holmes, Hemi Group, Ashcroft, and Anza, it is by now black letter law that the Plaintiffs here cannot support a RICO cause of action without a showing of damages that are "clear and definite," with "proof of actual monetary loss, i.e., an out of pocket loss" that is tied directly to the offending conduct. DeMauro v.DeMauro, 115 F.3d 94, 97-98 (1st Cir. 1997); Canyon Cty., 519 F.3d at 975

3. To have Standing Under RICO Plaintiffs Must Show They Were the Targets of Criminal Conduct

Similar to proximate causation under RICO, the federal courts have consistently held that by-standers do not have standing to seek a remedy under RICO. The "core proximate causation principle" under RICO is to just allow "compensation for those who are directly injured, whose injury was plainly foreseeable and was in fact foreseen, and who were the intended victims of a defendant's wrongful conduct." In re Neurontin Mktg. & Sale Practices Litig., 712 F.3d 21, 38 (1st Cir. 2013).

As the Supreme Court explained in Holmes, RICO targets the initial injury exacted by a violation of the law and is not intended to capture "the ripples of harm" that may "flow" out into the broader world. Holmes, 503 U.S. at 266 n.10. A RICO plaintiff must therefore allege and show that they were the "intended targets" of the defendant's criminal

activities. See Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006); Lexmark Int'l v. Static Control Components, Inc., 134 S.Ct. 1377, 1388-89) (2014) (only those within the "zone of interest" protected by a statute have standing to bring a claim); BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 756 (7th Cir. 20011); Hamm v. Rhone-Poulenc Rorer Pharms., Inc., 187 F.3d 941, 952, 953 (8th Cir. 1999) (former employees injured by fraudulent scheme held to be without RICO standing because the fraudulent scheme was not directed at them); G-I Holdings, Inc. v. Baron & Budd, 238 F.Supp.2d 521, 549 (S.D.N.Y. 2001) ("[t]o have standing, plaintiffs must show that they were the 'intended targets' of the RICO violations"); Medger Evers Houses Tenants Ass'n v. Medgar Evers Houses Assocs., 25 F.Supp.2d 116, 122 (E.D.N.Y. 1998); Dow Chem. Co. v. Exxon Corp., 30 F.Supp. 2d 673, 696 (D. Del. 1998).

In their Complaint, the Plaintiffs characterize themselves as neighbors to an illegal cannabis farm and not as anyone's intended victims. The smells and sounds are clearly understood on the face of the pleading as byproducts to cultivation and that the cannabis was intended for sale, not intended to harm the neighbors or interfere with their enjoyment of property. Complt. §§ 26, 31, 33 (alleging Defendants established "contractual and other relationships with each other and otherwise collaborating to develop the Adobe Road Site for the commercial cultivation, processing, distribution and sale of cannabis."). The Plaintiffs therefore lack "RICO standing" to pursue their RICO claims.

4. Plaintiffs Do Not Allege a "Pattern of Racketeering"

a. Plaintiffs Allege Only One RICO Predicate

To establish a "pattern of racketeering" as required under RICO, a plaintiff must allege "at least two acts of racketeering activity," in other words at least two RICO predicate acts expressly identified by the statute.[3] 18 U.S.C. § 1961(5). A complaint that

[3] As an aside, Defendant Cultivators note that, while RICO only requires at least two interrelated predicate acts of racketeering, virtually no courts have allowed RICO claims based upon just two acts alone to establish a "pattern of racketeering." See Cory R. Argust, Racketeer Influences and Corrupt Organizations, 47 Am. Crim. L. Rev. 961, 967-68 (2010). Rather, the courts have consistently held that a plaintiff must generally show several predicate acts which were both continuous and interrelated. See, e.g., Sedima, 473 U.S. at 496 n.14. As one court explained, this

alleges only one RICO predicate act has failed to state a claim under RICO. See, e.g., Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008).

Similarly, courts have repeatedly held that even multiple RICO offenses, if arising from a single event or for a single purpose, are insufficient to establish a pattern of racketeering. See Howard v. America Online Inc., 208 F.3d 741, 750 (9th Cir. 2000) (holding that both a "flurry of false and misleading advertising" and other "repeated fraudulent schemes" was insufficient to show a pattern of racketeering because it all related to AOL's flat-fee program, a single business campaign); Durning v. Citibank, 990 F.2d 1133, 1139 (9th Cir. 1993) (holding that multiple predicate acts arising from a single business event did not satisfy the open-ended continuity requirement needed to show a pattern of racketeering); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535 (9th Cir. 1992) (holding no pattern of racketeering because conduct was "in a sense a single episode with the singular purpose of impoverishing [plaintiff]"); Religious Tech. Cir. v. Wollersheim, 971 F.2d 364, 366 (9th Cir. 1992); Jarvis v. Regan, 833 F.2d 149, 153-54 (9th Cir. 1987) (affirming dismissal of a RICO claim where the alleged pattern consisted of three acts of mail and wire fraud committed by legal aid organizations in obtaining a single federal grant); Medallion Television Enters., Inc. v. SelectTV of Cal., Inc., 833 F.2d 1360, 1364 (9th Cir. 1987) (finding that predicate acts designed to bring about a single event — the signing of a television contract — did not pose a threat of continuity); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399 (9th Cir. 1986) (affirming dismissal of RICO claims where alleged pattern consisted of fraudulently obtaining a single shipment of goods); Aviva USA Corp. v. Vazirani, 13-16858, 2015 WL 788718, at *1 (9th Cir. December 4, 2015) (series of threatening and false writings did not establish a "pattern" under RICO because the conduct was uniformly directed to expose the target's allegedly unfair business practices); GSI Technology v. United Memories, Inc., No. 13-

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continuity requirement is a "centrally temporal concept" that arises from "Congress's desire to limit RICO's application to ongoing unlawful activities whose scope and persistence pose a special threat to social wellbeing." U.S. Airlines Pilots Assoc. v. Awappa, LLC, 2010 WL 2929322, at *4 (4th Cir. July 30, 2010).

01081, 2014 WL 1572358 (N.D. Cal. Apr. 18, 2014) (alleged series of predicate acts of mail and wire fraud were all operated with a single goal — the acquisition of a contract to design a memory chip). Fundamentally, the federal courts have held that the RICO statute was enacted to attack organized crime engaged in a pattern of many crimes, not a statute to increase the penalties of what is essentially just one crime.

In this case, it is noteworthy that, while there are over a hundred crimes that qualify as "predicate acts" under RICO, such as counterfeiting, sports bribery and human trafficking (18 U.S.C. § 1961(1) (A)-(G)), to rise to the level of "racketeering" activity under RICO, a federal controlled substance offense must specifically involve "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act)." 18 U.S.C. § 1961(1)(D). And yet, the Complaint alleges only one RICO predicate act (*i.e.*, one criminal event), specifically the cultivation of cannabis for sale under California's newly enacted commercial cannabis laws. Complt. §§ 33-35. There are no allegations in this complaint of importing, receiving, concealing, buying, or selling of a controlled substance and no dealing in a controlled substance other than the manufacture of the cannabis itself. And there are no allegations of multiple crimes. As in Howard, Sever, Jarvis and the other cases cited above, all of Plaintiffs' allegations point to just one singular purpose, the cultivation of cannabis, and therefore the Plaintiffs have failed to allege two predicate acts as required by 18 U.S.C. section 1961(5).

b. The Plaintiffs Fail to Allege Sufficient Continuity over Time to Support a RICO Case

Similarly, to establish a cause of action under RICO, plaintiffs must not only allege at least two predicate offenses, but also establish that the racketeering predicates were part of a "continuous pattern that either threatens or constitutes long-term criminal activities." E.g., H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989). Under RICO, "[c]ontinuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. To allege open-ended continuity, a plaintiff must point to "past conduct that by its nature projects into the future with a threat of repetition." Id.; see also Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995); Ticor Title Ins. Co. v. Florida,

937 F.2d 447, 449 (9th Cir. 1991). To allege closed-ended continuity, a plaintiff must allege facts showing that a "series of related predicate[] [acts] extended over a substantial period of time." H.J. Inc., 492 U.S. at 241.

While no bright line test exists for closed-ended continuity, both the Supreme Court and Ninth Circuit have repeatedly held that predicate acts extending over a few months does not satisfy the requirement because Congress enacted RICO out of concern for long-term criminal conduct. See Kan-Di-Ki, LLC v. Sorenson, 723 Fed. Appx. 432, 434 (9th Cir. 2018) ("[U]nder the circumstances present here [involving a 10-month fraud scheme], which involved a limited number of participants and a limited number of alleged actual victims, the alleged scheme was too limited and short in duration to sufficient establish closed-ended continuity."]); Howard v. Am. Online Inc., 208 F.3d 741, 750 (9th Cir. 2000) ("Activity that lasts only a few months is not sufficiently continuous."); Turner v. Cook, 362 F.3d 1219, 1231 (9th Cir. 2004) (holding almost 100 fraudulent communications lasting approximately 11 months not enough to establish closed-end continuity); Religious Tech. Cntr. v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir. 1992) (holding six months of alleged attorney misconduct did not extend over a "substantial period of time" and therefore insufficient to establish closed-end continuity); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1418 (9th Cir. 1991) (holding "an eight-month period of fraudulent activity" did not constitute a pattern of racketeering); see also Religious Tech. Cntr. v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir. 1992) ("We have found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year."). The other federal circuit courts are in accord. See, e.g., Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1140 (5th Cir. 1992) (5 months not a "substantial period of time").

"Open-ended" continuity can only be established if there is a threat of future criminal conduct because it is the criminal enterprise's "regular way of doing business" or there is a pattern of past conduct that by its nature projects into the future with a threat of repetition. See, e.g., Allwaste, 65 F.3d at 1528.

Here, the Plaintiffs do not make even conclusory statements that cannabis cultivation at 3062 Adobe Road was the Defendant Cultivators' "regular way of doing business." In fact, the allegations suggest the opposite. As alleged, the Defendant Cultivators cultivated cannabis at another property, 6697 Moro Street in Sonoma County, for under 12 months from 2017 to 2018

and then "abandoned the Morro Street Site and moved their operation to 3062 Adobe Road" in March 2018. Complt. ¶¶ 18, 21. Therefore, if a pattern actually exists on the face of the Complaint, the pattern is for less than a year of cultivation at any given property. Significantly, Defendants Flying Rooster and Green Earth Coffee have just recently voluntarily entered into a settlement agreement with the County of Sonoma under which all cannabis cultivation at 3062 Adobe Road will permanently cease by November 15, 2018.[4] Stratton Decl., §§ 4, 5, Exh. A. There is nothing alleged to suggest that any cultivation at 3062 Adobe Road would continue past a single growing season.

For all of the above reasons, the Plaintiffs here have not pled a cognizable claim under RICO there has been no injury to "business or property" as required under RICO at 18 U.S.C. section 1964(c); the damages alleged are too speculative to be actionable under a statute that requires proximate causation; the Plaintiffs were not targeted by any unlawful conduct and so they lack standing to seek RICO damages; and there has been no pattern of racketeering as requires under 18 U.S.C. 1961(5) because the activity has lasted just about 6 months and there are no allegations suggesting that the activity will continue; indeed, the allegations are to the contrary.

B. Plaintiff's Third Cause of Action (Unlawful Competition under California Law) Fails Without an Economic Injury

Turning next to the state law causes of action, it is noted that Plaintiffs' third cause of action is brought under California's Unfair Competition Law (its "UCL") found at California Business & Professions Code section 17200, *et seq*. In 2004 California voters passed

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[4] This Court may properly take notice of the fact that Defendants Flying Rooster, Green Earth Coffee and Carlos Zambrano have voluntarily agreed to stop all cannabis cultivation at 3062 Adobe Road by November 15, 2018. Pursuant to Federal Rule of Evidence 201, the Court may "judicially notice a fact that is not subject to reasonable dispute because it: (1) is 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). Case law makes it clear that judicial notice of public records is appropriate. See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.), 102 F.3d 1524 (9th Cir. 1996) ("[A]mple authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss."), *reversed on other grounds by* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); Pritikin v. Comerica Bank, No. C 09-03303 JF (ES), 2009 WL 3857455, at *3 (N.D. Cal. Nov. 17, 2009).

Proposition 64 which amended the UCL and established new standing requirements to discourage what were seen as abusive litigation practices in the state. Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 317 (2011). Now, to satisfy UCL's standing requirements, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury-in-fact, *i.e.*, economic injury, and (2) show that the economic injury was the result of, *i.e.*, caused by, the unfair business practice or false advertising that is the gravamen of the claim." Kwikset Corp., 51 Cal.4th at 322; see also Rubio v. Capital One Bank, 613 F.3d 1195, 1203-04 (9th Cir. 2010).

With respect to the first requirement, to assert a UCL claim, a private plaintiff needs to have "suffered injury in fact and ... lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. The purpose of section 17204 is to "eliminate standing for those who have not engaged in any business dealings with would-be defendants." E.g., Kwikset, 51 Cal.4th at 317. "[A] plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim." Hall v. Time Inc., 158 Cal. App. 4th 847, 854 (2008) (internal citations omitted). Hypothetical injuries are insufficient to confer standing. See, e.g., Birdsong v. Apple, Inc., 590 F.3d 955, 959-60 (9th Cir. 2009)

In Birdsong, for example, the plaintiffs brought a UCL action against Apple, Inc. claiming that its iPod devices were causing hearing loss and that, because of this, the plaintiffs had suffered financing harm because their iPods were worth less than they otherwise would. Id. at 957. In rejecting these claims, the Ninth Circuit focused chiefly on the nature of the harms pled, writing:

> To have standing under California's UCL, as amended by California's Propisition 64, plaintiffs must establish that they (1) suffered an injury in fact and (2) lost money or poperty as a result of the unfair competition. . . . The requisite injury must be 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. …The plaintiffs' alleged economic harm centers on their claim that the iPod has a defect (an inherent risk of hearing loss), which caused their iPod to be worth less than what they paid for them. … [B]ut the alleged loss in value does not constitute a distinct and palpable injury that is actual or imminent because it rests on a hypothetical risk of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner.

Id. at 959-61 (internal citations and quotations omitted).

In the case at bar, the Plaintiffs have not "engaged in business dealings" with the Defendants, as required by the California Supreme Court in Kwikset; and the Plaintiffs have not alleged any loss of money or property, as required under Cal. Bus. & Prof. Code § 17204. Their allegations of hypothetical losses from diminished present value of their property because "potential buyers" may fear unidentified "associated criminal activity" are insufficient to give them standing against their neighbors. Hall, 158 Cal.App.4th at 853. As with their RICO claims then, the Plaintiffs' allegations are garden variety "land use" nuisance claims, not claims of unlawful business practices.

C. The Court Should Not Grant Leave to Amend the Complaint as it Would be Futile Given the Existing Allegations

While disfavored, dismissal without leave to amend a complaint is appropriate if amendment would be futile. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F. 1393, 1401 (9th Cir. 1986). Here, the Plaintiffs' complete failure to satisfy each of the necessary elements for a private cause of action under RICO shows that amendment would be futile. Simply put, RICO was enacted to combat organized crime, not to create additional remedies in a land-use dispute between neighbors. Any conceivable amendment in line with the Complaint, as filed, would be futile as it could not gloss over the Plaintiffs' failure to allege: (1) an injury "in [their] business or property . . . by reason of" a section 1962 violation under RICO [indeed, Plaintiffs have alleged they have not suffered concrete damage to their real property (see Complt. ¶ "potential buyers")]; and (2) that there has been a "pattern of racketeering activity" [indeed Plaintiffs have alleged the singular federal crime of cannabis cultivation for just about six months (see Complt. ¶¶ 21, 33-35)].

D. Court Should Decline Supplemental Jurisdiction

Lastly, given the fundamental defects in the Plaintiffs' RICO case, the Defendant Cultivators ask the Court to decline to exercise supplemental jurisdiction over Plaintiffs' state law claims. See 28 USC §1367(c)(3). In the event that all federal law claims are eliminated before trial, a district court will weigh the following factors before deciding

whether to exercise pendent jurisdiction: judicial economy, comity, convenience, and fairness. See, e.g., Bryant v. Adventist Health System/W., 289 F.3d 1162, 1169 (9th Cir. 2002). The Supreme Court has cautioned that "if the federal claims are dismissed before trial, ... the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); see also Carnegie-Mellon Univ. v. Cohill, 484 US 343, 350 n.7 (1988); Imagineering, Inc. v. Kiewitt Pac. Co., 976 F.2d 1303, 1309 (9th Cir. 1992); Townsend v. Columbia Operations, 667 F.2d 844, 850 (9th Cir. 1982); Danner v. Himmefarb, 858 F.2d 515, 523 (9th Cir. 1988) (district court has broad discretion to dismiss state law claims when the federal claims have been fully resolved).

As this case is properly understood as a land use nuisance case between neighbors (and one that could largely turn on the appropriateness of cultivation under state and local cannabis laws), the fundamental interests of economy, comity and fairness are better served by resolution before a California state court.

CONCLUSION

For the foregoing reasons, the Defendant Cultivators ask the court to dismiss, without leave to amend, the Plaintiff's first, second and third causes of action, and remand the case to state court for resolution of the Plaintiff's causes of action grounded in nuisance and county land use code.

Dated: October 15, 2018

Respectfully Submitted,

Rogoway Law Group

By __/s/Ken Stratton_____
Kenneth Stratton