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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

VIDA F. NEGRETE, as Conservator for  
EVERETT E. OW, an individual and on  
behalf of all other similarly situated  
persons,

Plaintiff,

vs.

ALLIANZ LIFE INSURANCE  
COMPANY OF NORTH AMERICA,

Defendant.

CAROLYN B. HEALEY, an individual,  
and on behalf of all other similarly  
situated persons,

vs.

ALLIANZ LIFE INSURANCE  
COMPANY OF NORTH AMERICA,

Defendant.

Case No. CV 05-6838 CAS (MANx)  
CV 05-8908 CAS (MANx)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
THIRD MOTION FOR SUMMARY  
JUDGMENT**

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1 **I. INTRODUCTION**

2 In these related class action cases, plaintiffs Vida F. Negrete (“Negrete”), as  
3 conservator for Everett Ow (“Ow”), and Carolyn B. Healey (“Healey”) (collectively,  
4 “plaintiffs”), on behalf of themselves and a nationwide class of an estimated 200,000  
5 senior citizens, allege that defendant Allianz Life Insurance Company of North America,  
6 Inc. (“Allianz”) conspired with a network of affiliated Field Marketing Organizations  
7 (“FMOs”) to induce class members to purchase deferred annuities issued by Allianz by  
8 means of misleading statements and omissions regarding the value of those annuities.

9 Negrete filed suit against Allianz on September 19, 2005, alleging the following  
10 claims for relief: (1) violation of the Racketeer Influenced and Corrupt Organization Act,  
11 18 U.S.C. § 1961, et seq. (“RICO”); (2) elder abuse under Cal. Welf. & Inst. Code §§  
12 15610 et seq. (“§ 15610”); (3) unlawful, unfair and fraudulent business practices under  
13 California’s Unfair Competition Law (“the UCL”), Cal. Bus. & Prof. Code §§ 17200, et  
14 seq.; (4) false and misleading advertising under Cal. Bus. & Prof. Code §§ 17500, et seq.  
15 (the “False Advertising Law” or “FAL”); (5) breach of fiduciary duty; (6) aiding and  
16 abetting breach of fiduciary duty; and (7) unjust enrichment and imposition of  
17 constructive trust. On December 22, 2005, Healey filed suit against Allianz, alleging  
18 similar claims for relief. The Court ordered coordination of the two actions as related  
19 cases (collectively, “Negrete”). On November 21, 2006, the Court granted plaintiffs’  
20 motion for class certification as to their nationwide RICO claim, as well as a California-  
21 only subclass asserting statutory violations, including the UCL. Negrete Dkt. No. 134  
22 (“Class Order”).

23 On March 12, 2010, Allianz moved for summary judgment on the RICO claims of  
24 certain Negrete class members which it contended were barred by the doctrine of claim  
25 preclusion as a result of the final judgment entered in Allianz’s favor on January 29,  
26 2010 in Mooney v. Allianz Life Ins. Co. of N. Am., Case No. CV 06-00545 (D. Minn)  
27 (“Mooney”). In an order issued August 18, 2010 (the “Claim Preclusion Order”), the  
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1 Court denied Allianz’s motion for summary judgment and granted plaintiffs’ cross-  
2 motion for partial summary judgment on Allianz’s affirmative defense of claim  
3 preclusion. Claim Preclusion Order at 24.

4 On June 10, 2011, Allianz filed a renewed motion for summary judgment on the  
5 RICO claims. On October 13, 2011, the Court denied the motion, finding that disputed  
6 issues of material fact precluded summary judgment on the required elements of (1) a  
7 RICO enterprise; (2) an injury “by reason of” the conduct constituting the alleged RICO  
8 violation; and (3) a RICO conspiracy. Dkt. No. 805 (“MSJ Order No. 2”).

9 On May 30, 2012, Allianz filed a motion to decertify the nationwide class, a third  
10 motion for summary judgment, and a motion for judgment on the pleadings. Dkt. Nos.  
11 828–830. Plaintiffs filed their oppositions on August 14, 2012, Dkt. Nos. 849–851, and  
12 defendant replied on October 15, 2012, Dkt. Nos. 885–887. In an order issued  
13 December 27, 2012, the Court denied Allianz’s motion to decertify the class in full. Dkt.  
14 No. 929. Allianz’s third motion for summary judgment is presently before the Court.  
15 Because the facts underlying this dispute are well-known to the parties and discussed at  
16 length in the Court’s prior orders, the Court sets forth below only those facts pertinent to  
17 this motion, in conjunction with the parties’ arguments.

## 18 **II. LEGAL STANDARD**

### 19 **A. Summary Judgment**

20 Summary judgment is appropriate where “there is no genuine dispute as to any  
21 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
22 56(a). The moving party has the initial burden of identifying relevant portions of the  
23 record that demonstrate the absence of a fact or facts necessary for one or more essential  
24 elements of each claim upon which the moving party seeks judgment. See Celotex Corp.  
25 v. Catrett, 477 U.S. 317, 323 (1986).

26  
27 If the moving party meets its initial burden, the opposing party must then set out  
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1 specific facts showing a genuine issue for trial in order to defeat the motion. Anderson v.  
2 Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The  
3 nonmoving party must not simply rely on the pleadings and must do more than make  
4 “conclusory allegations [in] an affidavit.” Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871,  
5 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for  
6 the moving party if the nonmoving party “fails to make a showing sufficient to establish  
7 the existence of an element essential to that party’s case, and on which that party will  
8 bear the burden of proof at trial.” Id. at 322; see also Abromson v. Am. Pac. Corp., 114  
9 F.3d 898, 902 (9th Cir. 1997).

10 In light of the facts presented by the nonmoving party, along with any undisputed  
11 facts, the Court must decide whether the moving party is entitled to judgment as a matter  
12 of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 631 &  
13 n.3 (9th Cir. 1987). When deciding a motion for summary judgment, “the inferences to  
14 be drawn from the underlying facts . . . must be viewed in the light most favorable to the  
15 party opposing the motion.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
16 U.S. 574, 587 (1986) (citation omitted); Valley Nat’l Bank of Ariz. v. A.E. Rouse & Co.,  
17 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper  
18 when a rational trier of fact would not be able to find for the nonmoving party on the  
19 claims at issue. See Matsushita, 475 U.S. at 587.

### 20 **III. ANALYSIS**

21 Allianz argues that partial summary judgment should be granted in its favor for  
22 four independent reasons. First, Allianz argues that plaintiffs fail as a matter of law to  
23 prove as a matter of law that it is a “person” distinct from the alleged “Senior Annuity  
24 Enterprise,” such that there is no “enterprise” to which RICO liability can attach.  
25 Second, Allianz contends that it is entitled to judgment on the RICO claims of any class  
26 member who purchased annuities from field marketing organizations (“FMOs”) that are  
27 not part of the alleged Senior Annuity Enterprise, because class members who bought an  
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1 annuity from these “non-enterprise FMOs” were not injured because of the alleged  
2 RICO violation. Third, Allianz seeks partial final judgment on all claims released by the  
3 Iorio class settlement, pursuant to the parties’ stipulation. Fourth, Allianz asserts that  
4 California’s parol evidence rule bars the application of plaintiffs’ RICO claims, to the  
5 extent that these claims are based upon a theory of promissory fraud. Each argument is  
6 discussed in turn.

7 **A. RICO Claims**

8 As noted in this Court’s prior orders, plaintiffs allege RICO violations pursuant to  
9 18 U.S.C. §§ 1962(c) and (d). Section 1962, subpart c, makes it unlawful “unlawful for  
10 any person employed by or associated with any enterprise . . . to conduct or participate,  
11 directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of  
12 racketeering activity. . . .” The essential elements of a claim premised upon a violation  
13 of § 1962(c) are thus (1) conduct (2) of an enterprise (3) through a pattern of (4)  
14 racketeering activity. Stanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir.  
15 2010). Racketeering activity is defined to include a number of predicate acts, including  
16 mail and wire fraud. 18 U.S.C. § 1961(1). Mail fraud, in turn, requires proof that a  
17 defendant (1) formed a scheme to defraud, (2) used the mails in furtherance of that  
18 scheme, and (3) “did so with the specific intent to deceive or defraud.” Miller v.  
19 Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004).

20 Under section 1964(c), “[a]ny person injured in his business or property by reason  
21 of a violation of section 1962,” can bring a claim for damages. The “by reason of”  
22 language requires a plaintiff to prove “but for” causation, proximate causation, and a  
23 concrete financial loss to a protectable business or property interest. Hemi Group, LLC  
24 v. City of New York, N.Y., 130 S. Ct. 983, 989 (2010). Plaintiffs must prove all of the  
25 required elements to succeed on their RICO claims.

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27 **1. RICO Enterprise**

1 A RICO enterprise “includes any individual, partnership, corporation, association,  
2 or other legal entity, and any union or group of individuals associated in fact although  
3 not a legal entity.” 18 U.S.C. § 1961(4). This definition of enterprise is broad and  
4 illustrative, not exhaustive. See Boyle v. U.S., 556 U.S. 938, 944 n. 2 (2009); Odom v.  
5 Microsoft Corp., 486 F.3d 541, 548 (9th Cir. 2007) (noting that “this definition is not  
6 very demanding”). Enterprises include “any union or group of individuals associated in  
7 fact . . . associated together for the common purpose of engaging in a course of  
8 conduct.” Boyle, 556 U.S. at 944 (quotations omitted). Under Boyle, an association-in-  
9 fact enterprise must have “a purpose, relationships among those associated with the  
10 enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s  
11 purpose.” Id. at 946.

12 In addition, “to establish liability under § 1962(c) one must allege and prove the  
13 existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply  
14 the same ‘person’ referred to by a different name.” Cedric Kushner Promotions, Ltd. v.  
15 King, 533 U.S. 158, 161 (2001). This so-called “distinctiveness” requirement is  
16 satisfied, for example, where “[t]he corporate owner/employee, a natural person, is  
17 distinct from the corporation itself, a legally different entity with different rights and  
18 responsibilities due to its different legal status.” Id. at 163. In Cedric Kushner, the  
19 corporate owner (“RICO person”) had allegedly used his wholly owned corporation  
20 (“RICO enterprise”) as a “vehicle” for the commission of unlawful acts. Id. at 164–65.  
21 The Supreme Court distinguished—and declined to consider the merits of—lower court  
22 decisions finding the distinctiveness requirement unmet, where the alleged enterprise  
23 consisted of the corporation as the RICO “person,” and “the corporation, together with  
24 all its employees and agents” as the “enterprise.” Id. at 164. The Court cited with  
25 approval to McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985), which found that  
26 formal or practical separation would suffice to render an enterprise distinct from an  
27 individual. Cedric Kushner, 533 U.S. at 163.

1 As the Ninth Circuit has held before and after Cedric Kushner, the RICO  
2 enterprise need only be “different from, not the same as or part of, the person whose  
3 behavior [RICO] was designed to prohibit.” Living Designs, Inc. v. E.I. Dupont de  
4 Nemours & Co., 431 F.3d 353, 362 (9th Cir. 2005) (quoting Rae v. Union Bank, 725  
5 F.2d 478, 481 (9th Cir. 1992)). Stated otherwise, the enterprise must be either “formally  
6 or practically separable from the person.” Id. (citing United States v. Benny, 786 F.2d  
7 1410, 1416 (9th Cir. 1986)); see also River City Markets, Inc. v. Fleming Foods W.,  
8 Inc., 960 F.2d 1458, 1461 (9th Cir. 1992) (noting that “an individual cannot associate or  
9 conspire with himself” but “can associate with a group of which he is a member, with  
10 the member and the group remaining distinct entities”); Sever v. Alaska Pulp Corp., 978  
11 F.2d 1529, 1534 (9th Cir. 1992) (holding that formal or practical separation is  
12 sufficient).

13 According to plaintiffs, the Senior Annuity Enterprise consists of Allianz, the 13  
14 FMOs in which Allianz holds ownership interests, and the 6 FMOs who have served as  
15 board members of the Market Advisory Committee (“MAC”).<sup>1</sup> In the late 1990s,  
16 Allianz—and LifeUSA Holding Inc., which merged with Allianz in 1999—began  
17 acquiring ownership interests in certain FMOs under the banner of “Project Procure.”  
18 Pl.’s Statement of Genuine Issues and Addt’l Material Facts (“PSGI”) ¶¶ 1–14. By the  
19 end of the class period, Allianz had acquired all of or a majority stake in ten FMOs, and  
20 held a minority interest in three FMOs. PSGI ¶¶ 4, 8, 11. Plaintiffs contend that FMOs  
21 owned by Allianz serve much the same purpose, and perform much the same functions,  
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23 <sup>1</sup> Plaintiffs’ briefing is not entirely consistent on this point. Compare MSJ Order No.  
24 2 at 10 n. 2 (plaintiffs’ allegation that the Enterprise includes only Allianz, Allianz-owned-  
25 FMOs, and MAC Board members) and Opp’n at 4 (same), with Opp’n at 9 (allegation that  
26 the enterprise “also includes the non-Allianz owned FMOs who target senior citizens”) and  
27 Def.’s Ex. 4 at 20, ¶ 45 (same). Consistent with its prior order, the Court presumes that the  
28 alleged Senior Annuity Enterprise only includes the 13 Allianz-owned FMOs and the six  
FMOs that were members of the MAC Board, in addition to Allianz itself. In any event,  
the difference is immaterial to this motion.

1 as non-Allianz-owned FMOs. For example, these FMO’s recruit, train, and provide  
2 marketing support for their agents, and all are focused on the senior market, even if this  
3 is not the exclusive focus. PSGI ¶¶ 136, 20–35. Moreover, this Court has previously  
4 found that the MAC Board members have demonstrated a “high degree of coordinated  
5 conduct with respect to targeted sales to seniors.” MSJ Order No. 2 at 12. And Allianz-  
6 owned FMOs sell products from as many as 40 other insurance companies. PSGI ¶¶ 70,  
7 73–74.

8         The six largest-producing FMOs served on the MAC Board, along with three  
9 standing members. PSGI ¶ 37. Plaintiffs contend that the enterprise includes six of  
10 these FMOs which are not owned by Allianz. PSGI ¶¶ 38–43. The degree of control  
11 Allianz exercises over the FMOs it does not own is defined by contract, PSGI ¶ 61, and  
12 Allianz and these FMOs do not share executives, employees, or co-mingle operating  
13 funds, and the FMOs handle payment of their operating expenses and employees. PSGI  
14 ¶¶ 44–50. The FMOs are entitled to unilaterally terminate their relationship with Allianz  
15 at any time. PSGI ¶ 64. All FMOs recruit and train agents, solicit sales of annuity  
16 products, deliver the policies to their purchaser, and collect the full initial premium for  
17 each policy sold. PSGI ¶¶ 65, 136. The FMOs have full control over which annuity  
18 products they decide to sell and contract with non-Allianz agents. PSGI ¶¶ 68–69. In  
19 addition, these FMOs sell various securities products offered by other insurance  
20 companies, including non-annuity products, and some of the FMOs also provide  
21 unrelated services like tax consulting, stock advice, and brokerage services. PSGI  
22 ¶¶ 70–72. As Allianz’s former President and Chief Marketing Officer testified, these  
23 FMOs are “completely independent organizations.” PSGI ¶ 75. On the other hand,  
24 Allianz retains full responsibility for developing deferred annuities and providing  
25 actuarial expertise necessary to manage the portfolio of Allianz annuities that the FMOs  
26 sell, and for approving and issuing the annuities. PSGI ¶¶ 66, 67. In exchange for their  
27 efforts, the FMOs earn commissions based on the amount of premiums sold, plus annual  
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1 bonuses tied to the total amount of premiums collected. PSGI ¶ 99.

2 Focusing on plaintiffs’ current and prior allegations with respect to the alleged  
3 Senior Annuity Enterprise, Allianz paints a different factual picture, in addition to  
4 arguing that plaintiffs are bound by their prior allegations or judicial admissions.  
5 Allianz argues that plaintiffs describe “a functionally single-corporation ‘enterprise,’”  
6 which fails to satisfy the distinctiveness requirement articulated by Cedric Kushner.  
7 Because a corporation can act only through its agents and affiliates, Allianz avers, “a  
8 cognizable RICO enterprise must be more than an association of entities conducting the  
9 defendant corporation’s regular affairs.” Id. Allianz contends that other federal courts,  
10 considering similar allegations of RICO enterprises comprised of life insurance  
11 companies and their agents and affiliated marketing organizations, have found the  
12 distinctiveness requirement unmet. Id. at 12–13.

13 In support of its contentions, Allianz notes plaintiffs’ counsel’s previous assertion  
14 that “Allianz exerted control by having interlocking boards of directors and officers, by  
15 imposing requirements and budgeting on them and by gaining more and more control.”  
16 DSUF ¶ 44.<sup>2</sup> Plaintiffs also contended that Allianz-owned FMOs acted as its “pseudo-  
17 captive sales force,” DSUF ¶ 19, and that Allianz was “integrally involved in all aspects  
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20 <sup>2</sup> Allianz again focuses on the “impropriety” of plaintiffs narrowing the breadth of  
21 the alleged Enterprise at oral argument in conjunction with Allianz’s second motion for  
22 summary judgment. Def.’s Statement of Uncontraverted Facts (“DSUF”) ¶¶ 41–44; see  
23 Def.’s Reply to Pl.’s Statement of Genuine Issues and Material Facts (“DRPS”) at 6–13.  
24 As the Court noted in its prior order denying Allianz’s motion, however, the Court “has the  
25 discretion to deem the limitation of the Enterprise to be an amendment to the pleadings,”  
26 but the Court declined to make that determination at that time. Allianz also argues that  
27 plaintiffs’ present contentions contradict their prior allegations of a close-knit enterprise  
28 subject to Allianz’s control. Reply at 7–10 (describing plaintiffs’ allegations in their  
complaints, arguments in support of their original motion for class certification, and  
various subsequent filings). These prior allegations and arguments are binding judicial  
admissions, Allianz argues, and plaintiffs cannot now contradict these prior admissions to  
withstand Allianz’s third motion for summary judgment.

1 of the FMOs’ business operations,” DSUF ¶ 20 (quoting plaintiffs’ Rule 16 disclosures).  
2 This involvement, according to plaintiffs, included “meeting with FMO management to  
3 develop annual budgets and profit goals, assisting with and improving marketing and  
4 sales operations, training FMO staff, assisting with hiring and terminations, transferring  
5 current Allianz employees to fill senior management positions within its wholly-owned  
6 FMOs, and conducting periodic meetings among its Project Procure FMOs to review  
7 business practices and exchange ideas regarding successful marketing and sales  
8 techniques.” Id.

9         Moreover, FMO members of the alleged Senior Annuity Enterprise signed a Field  
10 Marketing Organization Addendum, which states that the FMO will act as Allianz’s  
11 “agent, pursuant to which you solicit applications for insurance, annuities, riders, and  
12 other contracts (the policies).” DSUF ¶ 23.<sup>3</sup> Allianz also points to additional written  
13 agreements that plaintiffs allege that Allianz entered into with all of the FMOs, which  
14 “vested Allianz with ‘exclusive authority . . . to determine the content of any  
15 advertisements, [or] sales literature,” DSUF ¶ 22, and also the “specified operating  
16 standards” FMOs had to adhere to for marketing, recruiting and training of agents, and  
17 finance functions, DSUF ¶ 24. Beyond this agency relationship defined by contract,  
18 Allianz also notes plaintiffs’ allegations of a close agency relationship between Allianz  
19 and the FMOs in practice. Allianz purportedly “strictly enforce[d]” rules regarding the  
20 provision of Statements of Understanding to all prospective purchasers, DSUF ¶ 27,  
21 approved all advertisements and marketing materials used by FMOs, id. ¶¶ 28–29, set  
22 minimum production requirements for agents and FMOs, id. ¶¶ 31–33, provided training  
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24         <sup>3</sup> Allianz argues that plaintiffs are mistaken in arguing that the FMOs at issue signed  
25 an “Agent Agreement for Associate Field Marketing Organizations” (“Agent Agreement”),  
26 rather than the “Field Marketing Organization Addendum” (“Addendum”). In contrast to  
27 the Addendum, the Agent Agreement states that the FMO is “to represent [Allianz] and to  
28 solicit applications for insurance, annuities, and other contracts” and that the FMO is “an  
independent contractor” of Allianz. Pl’s Ex. 83 at 1.

1 and support to FMOs with respect to their sales staff, *id.* ¶¶ 34–36, and regularly  
2 communicated with its FMOs, agents, and MAC Board members regarding product  
3 development, marketing techniques, and compensation incentives, *id.* ¶¶ 37–40. In sum,  
4 since plaintiffs—in their prior and current allegations—purportedly allege a  
5 “functionally single-corporation enterprise that is indistinct from Allianz,” Allianz  
6 contends that the distinctness element has not been met here. Mot. at 13.

7 The Court concludes that summary judgment for Allianz on the “distinctiveness”  
8 requirement is not warranted. First, the Court notes that even an enterprise consisting of  
9 a parent and its subsidiary has been found sufficiently distinct for purposes of RICO  
10 liability. See Watts v. Allstate Indem. Co., 08-cv-1877, 2009 WL 1905047, at \* 6 (E.D.  
11 Cal. July 1, 2009) (reviewing Ninth Circuit cases and concluding that “a corporate parent  
12 is distinct from its corporate subsidiary such that one may be ‘associated with’ the other  
13 for purposes of a claim under 18 U.S.C. section 1962(c)”); but see In re Countrywide  
14 Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 601 F. Supp. 2d 1201, 1214 (S.D. Cal.  
15 2009) (finding that an enterprise comprised of a parent and its subsidiaries does not  
16 satisfy the distinctiveness requirement without “something more”).<sup>4</sup> Unlike situations  
17 where a single corporate defendant is alleged to have “conspire[d] with himself,” River  
18 City, 960 F.2d at 1461, Allianz is alleged to have conspired with 19 formally-separate  
19 corporate entities (the enterprise) in furtherance of its alleged scheme to defraud. And

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21 <sup>4</sup> It is not clear that “something more” is required in this case, where the non-Allianz  
22 owned FMOs are not the subsidiaries of Allianz, but instead affiliates that solicit purchases  
23 of Allianz products from consumers. See In re Countrywide, 601 F. Supp. 2d at 1214  
24 (citing Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923, 934 (7th Cir. 2003));  
25 Fogie v. THORN Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999) (holding that “there  
26 must be a greater showing that the parent and subsidiary are distinct than the mere fact that  
27 they are separate legal entities”). However, even if “something more” than formal legal  
28 separation is required, the Court finds that plaintiffs could meet that burden here. As  
discussed *infra*, there are a number of ways in which Allianz was functionally distinct from  
the FMOs at issue, in addition to utilizing the particular organizational structure that it  
did—rather than relying solely on Allianz employees—to advance its alleged scheme.

1 six of these FMOs are not owned by Allianz at all. This formal separation is alone  
2 sufficient to support a finding of distinctiveness.

3 Second, there are numerous factual disputes with respect to the degree of control  
4 Allianz exercised over the FMOs, both those within and without the Senior Annuity  
5 Enterprise as presently defined. Whether the 19 FMOs at issue were labeled Allianz’s  
6 “agents” or “independent contractors” by contract does not resolve these disputes.<sup>5</sup>  
7 Plaintiffs demonstrate practical separation between Allianz and the FMO members of the  
8 alleged enterprise, regardless of the labels that were attached to the particular  
9 relationships between Allianz and its FMO partners. While the evidence supports  
10 plaintiffs’ contention that all of the FMOs work with Allianz with a view towards selling  
11 as many annuity products as possible in the senior market, this common purpose and  
12 other evidence of coordination does not make the FMOs and Allianz indistinguishable.  
13 See Migliaccio v. Midland Nat’l Life Ins. Co., 2007 WL 316873, at \*3 n. 1 (C.D. Cal.  
14 Jan. 30, 2007) (finding that sales agents were not “so closely related that they could be  
15 viewed as a single entity” where the agents “can and do contract to sell deferred annuity  
16 products issued by other companies”). Particularly with respect to Allianz and the  
17 FMOs it does not own, Allianz does not dispute the numerous ways in which these  
18 FMOs operate independently: selling annuity products offered by other companies,  
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20 <sup>5</sup> In their Response to Allianz’s Separate Statement, plaintiffs did not dispute  
21 Allianz’s contention that Allianz and each of the alleged Senior Annuity Enterprise FMOs  
22 signed an Addendum rather than an Agent Agreement. See id. ¶ 23. In their Opposition,  
23 however, plaintiffs argue that “under the terms of the standardized agreement, the FMOs  
24 are expressly defined as ‘independent contractors,’” quoting the language of the Agent  
25 Agreement. Opp’n at 5; PSGI ¶¶ 61–63. Whether or not plaintiffs are disputing the  
26 validity of Allianz’s contention regarding the Agent Agreement, the Court notes that  
27 Allianz fails to provide any evidence that all 19 FMOs at issue signed the Addendum,  
28 rather than the Agent Agreement. The only exhibit that Allianz points to in support of its  
contention is Def.’s Ex. 6, a signed Addendum between Brokers International, Ltd., and  
Allianz. This evidence is insufficient, standing alone, for Allianz to prove that all the  
FMOs at issue signed one or the other FMO operating agreement with Allianz.

1 offering non-annuity related services to their clients, contracting with non-Allianz  
2 agents, and retaining control over their operations and core business functions. See  
3 Fogie, 190 F.3d at 898 (finding no distinctiveness where the alleged enterprise consisted  
4 of only of entities that “are part of one corporate family operating under common  
5 control”). This evidence belies Allianz’s assertion that it and the alleged Senior Annuity  
6 Enterprise are really one and the same, or that the only business of the FMOs is “the  
7 marketing and sale of life and annuity products,” Reply at 14.

8 That FMO members may have “acted as the face of Allianz” does not necessarily  
9 lead to the conclusion that the alleged enterprise here must be viewed as one  
10 indistinguishable whole, because the FMOs appear to have also acted independently of  
11 Allianz in numerous ways. Quite simply, there is nothing inconsistent between a finding  
12 that Allianz has exerted some control over the FMOs at issue on the one hand, with a  
13 finding that the level of control that Allianz has exerted does not render the alleged  
14 enterprise indistinguishable from Allianz itself on the other. See California Pharmacy  
15 Mgmt., LLC v. Zenith Ins. Co., 669 F. Supp. 2d 1152, 1164 (C.D. Cal. 2009) (finding  
16 that “a mere relationship, whether contractual or even structural, between two corporate  
17 defendants does not preclude their legal separability,” for purposes of RICO liability);  
18 see also In re Nat’l W. Life Ins. Deferred Annuities Litig., 467 F. Supp 2d 1071, 1085  
19 (S.D. Cal. 2006) (finding distinctiveness satisfied where the alleged RICO enterprise  
20 “includes additional persons” who are not “RICO persons”); Bendzak v. Midland Nat.  
21 Life Ins. Co., 440 F. Supp. 2d 970, 988–89 (S.D. Iowa 2006) (same).<sup>6</sup>

22 In fact, it was Allianz who previously argued that it does not “direct the business  
23 activities” of the FMOs, does not require agents to attend training programs, and does  
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25 <sup>6</sup> Allianz attempts to distinguish these cases because the alleged enterprise here does  
26 not include any “individual sales agents,” unlike the enterprises at issue in Bendzak and  
27 Nat’l Western. Reply at 14. Nothing in these decisions, however, implies that the  
28 distinctiveness requirement would not be met without the inclusion of sales agents in the  
alleged enterprises.

1 not require agents to use “specified sales techniques,” in an attempt to counter plaintiffs’  
2 evidence of a common purpose and sufficient relationships between the members of the  
3 alleged enterprise. MSJ Order No. 2 at 9. Now Allianz notes plaintiffs’ prior arguments  
4 and allegations in arguing that the Allianz-owned FMOs are indistinguishable from  
5 Allianz itself, due to the significant level of control that Allianz allegedly exerted over  
6 these and all other FMOs. Contrary to Allianz’s contentions, however, plaintiffs have  
7 not offered allegations and evidence of a materially different Senior Annuity Enterprise  
8 on this motion, as plaintiffs’ arguments are not inconsistent with their prior  
9 representations. Instead, plaintiffs focus on the non-Allianz-owned FMOs who are  
10 MAC Board members, arguing that these FMOs operate with a degree of independence  
11 from Allianz. Thus, plaintiffs contend that it is these FMOs that provide the requisite  
12 “distinctiveness” between the alleged RICO person and enterprise. Because much  
13 remains in dispute about how “tightly” Allianz did, in fact, control these non-Allianz-  
14 owned FMOs, the Court finds that genuine disputes remain as to whether the  
15 combination of Allianz, these MAC Board members, and Allianz-owned FMOs fails to  
16 satisfy the distinctiveness requirement.

17 Allianz’s other principal authorities do not support a contrary conclusion here.  
18 For example, courts in the Ninth Circuit have dismissed a plaintiff’s RICO claim where  
19 the “corporate family of . . . Defendants” constituted both the alleged person and  
20 enterprise for purposes of a RICO claim. In re Toyota Motor Corp., 785 F. Supp. 2d  
21 883, 922 (C.D. Cal. 2011); see also Ice Cream Distributors of Evansville, LLC v.  
22 Dreyer’s Grand Ice Cream, Inc., 09-cv-5815, 2010 WL 3619884 (N.D. Cal. Sept. 10,  
23 2010) aff’d, 487 F. App’x 362 (9th Cir. 2012) (finding that a “§ 1962(c) claim could not  
24 be based on a RICO enterprise comprised of a corporation, a wholly-owned subsidiary  
25 and an employee of that corporate family if these entities were also plead as the RICO  
26 persons”). As noted, disputed issues of fact remain as to whether Allianz and all 19 of  
27 the FMO members of the alleged Senior Annuity Enterprise can be considered the same  
28

1 “corporate family,” particularly where Allianz held no ownership interest in six of these  
2 FMOs. And whether Allianz-owned or not, none of the FMOs are pled as RICO persons  
3 in this case. In addition, the Court notes that these decisions relied heavily on out-of-  
4 circuit precedent, including Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30  
5 F.3d 339 (2d Cir. 1994), while ignoring the Supreme Court’s favorable citation to  
6 McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985), a decision that the Ninth  
7 Circuit has also cited to with approval. See In re Countrywide, 601 F. Supp. 2d at 1214  
8 (discussing out-of-circuit authority and the “formal or practically separable” definition  
9 of distinctiveness from McCullough); Mattel, Inc. v. MGA Entm’t, Inc., 782 F. Supp. 2d  
10 911, 1037–38 (C.D. Cal. 2011) (finding “professional independence” to be the critical  
11 question for determining distinctiveness of a member of the alleged enterprise “never  
12 employed by the corporation”). The evidence in the record demonstrates that despite  
13 coordination on some aspects of their business, the non-Allianz owned FMOs possessed  
14 significant independence from Allianz itself—and these FMOs are at most affiliates of  
15 Allianz, not subsidiaries.<sup>7</sup>

16 Allianz’s citations to out-of-circuit decisions such as Marlow v. Allianz Life Ins.  
17 Co. of N. Am., No. 08-cv-0752, 2009 WL 1328636 (D. Colo. May 12, 2009), Levinson  
18 v. Mass. Mut. Life Ins., Co. 06-cv-086, 2006 WL 3337419 (E.D. Va. Nov. 9, 2006),  
19 Rowe v. Bankers Life & Cas. Co., 09-cv-0491, 2010 WL 3699928 (N.D. Ill. Sept. 13,  
20 2010), and Mear v. Sun Life Assur. Co. of Canada, 06-cv-12143, 2008 WL 245217, at  
21 \*8–9 (D. Mass. Jan. 24, 2008), are similarly unpersuasive. The complaint in Marlow  
22 was dismissed at the pleading stage, where the alleged enterprise consisted of Allianz  
23

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24 <sup>7</sup> Allianz’s reliance on the unpublished decision in Chagby v. Target Corp., 358 F.  
25 App’x 805, 808 (9th Cir. 2009), is also misplaced. The Ninth Circuit summarily affirmed  
26 a dismissal of a complaint that the court found had profound shortcomings in both its  
27 theory of fraud and various other elements of RICO; the court’s finding with regards to the  
28 distinctiveness requirement was offered without explanation and was unnecessary to its  
affirming the decision below.

1 and the plaintiff's former lawyer; the plaintiff alleged that the enterprise members  
2 conspired to make him "the scapegoat in an investigation into Allianz's improper  
3 insurance sales practices." 2009 WL 1328636, at \*1. The court relied heavily on  
4 Fitzgerald v. Chrysler Corp., 116 F.3d 225, 227 (7th Cir. 1997), for the proposition that  
5 an enterprise consisting of a corporation and its subsidiaries could not satisfy the  
6 distinctiveness requirement without any additional allegations as to how this structure  
7 facilitated the defendant's alleged enterprise. Even if the reasoning of Fitzgerald  
8 applies, it does not help Allianz here. Unlike the plaintiff in Marlow, plaintiffs have  
9 presented substantial allegations and evidence that Allianz has used the FMOs at issue to  
10 advance its scheme, relying on a broad network of sales agents that sell insurance  
11 products from many different companies. Opp'n at 13-14; see, e.g., Pl.'s Ex. 149  
12 (detailing the importance of FMO relationships to Allianz's "competitive advantage" in  
13 the annuities market). In this way, it appears that genuine issues of fact remain as to  
14 how Allianz's "decision to operate through subsidiaries rather than divisions somehow  
15 facilitated" its allegedly unlawful scheme. Bucklew, 329 F.3d at 934; see also Rowe,  
16 2010 WL 3699928, at \*4 (dismissing case based upon a finding the distinctiveness  
17 requirement was unmet under the Fitzgerald test); Mear, 2008 WL 245217, at \*8  
18 (applying First Circuit law and dismissing case based upon the court's conclusion that  
19 the independent insurance agents acted "as puppets under [the defendant's] control").  
20 None of these decisions compel a contrary conclusion in this case, because even if  
21 plaintiffs must prove something more than legal distinctiveness, the evidence in the  
22 record appears to support plaintiffs' contention that the non-Allianz-owned FMOs were  
23 functionally distinct from Allianz during the duration of the alleged enterprise.

24 For all of the foregoing reasons, the Court finds that disputed issues of fact  
25 preclude a grant of summary judgment in Allianz's favor on the issue of distinctiveness.

26 **2. "By Reason Of" Requirement for Annuity Purchases from Non-**  
27 **Enterprise FMOs**



1 Any RICO claim for damages requires proof of an injury to “business or property  
2 by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). As discussed  
3 previously, section 1962, subpart c, makes it unlawful for “any person employed by or  
4 associated with any enterprise . . . to conduct or participate, directly or indirectly, in the  
5 conduct of such enterprise’s affairs through a pattern of racketeering activity.” *Id.* §  
6 1962(c). And the “by reason of” language of section 1964 requires a plaintiff to prove  
7 “but for” causation, proximate causation, and a concrete financial loss to a protectable  
8 business or property interest. See *Hemi Group*, 130 S. Ct. at 989; see *Bridge v. Phoenix*  
9 *Bond & Indem. Co.*, 553 U.S. 639, 647 (2008) (“RICO provides a private right of action  
10 for treble damages to any person injured in his business or property by reason of the  
11 conduct of a qualifying enterprise’s affairs through a pattern of acts indictable as mail  
12 fraud.”). “When a court evaluates a RICO claim for proximate causation, the central  
13 question it must ask is whether the alleged violation led directly to plaintiff’s injuries.”  
14 *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461(2006). “A link that is ‘too remote,’  
15 ‘purely contingent,’ or ‘indirect’ is insufficient.” *Hemi Group*, 130 S. Ct. at 989  
16 (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 271, 274  
17 (1992)). Relevant considerations for the directness inquiry include:

- 18 (1) whether there are more direct victims of the alleged wrongful conduct who can  
19 be counted on to vindicate the law as private attorneys general; (2) whether it will  
20 be difficult to ascertain the amount of the plaintiff’s damages attributable to  
21 defendant’s wrongful conduct; and (3) whether the courts will have to adopt  
22 complicated rules apportioning damages to obviate the risk of multiple recoveries.

23 *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185  
24 F.3d 957, 963 (9th Cir. 1999) (citing *Holmes*, 503 U.S. at 269–70; see also *Bridge*, 553  
25 U.S. at 655.

26 Allianz argues that any class members who purchased their annuities from FMOs  
27 which are no longer a part of the alleged Senior Annuity Enterprise did not suffer injury  
28

1 “by reason of” Allianz’s operation or management of the enterprise’s affairs. Mot. at 15.  
2 In Allianz’s view, the “enterprise’s affairs” consisted of no more than those annuity sales  
3 made through the 19 FMOs that were members of the enterprise, and class members who  
4 purchased annuities from non-enterprise FMOs cannot be considered the “direct”  
5 victims of this enterprise’s conduct. At most, Allianz contends, class members who  
6 purchased annuities from non-enterprise FMOs were injured as a result of mail or wire  
7 fraud, but not as a result of the alleged enterprise’s activities. Id. This is so, Allianz  
8 argues, because the dissemination of consumer brochures and SOUs were “non-  
9 enterprise activities,” unrelated to Allianz’s operation or management of the alleged  
10 enterprise. Reply at 17. Therefore, since only Allianz—not the other 19 FMO members  
11 of the alleged enterprise—was allegedly involved in designing and issuing the annuity  
12 products and overseeing the non-enterprise FMOs, Allianz’s management of this  
13 enterprise had nothing to do with the injuries of any class members who purchased their  
14 annuities from non-enterprise FMOs. Id. at 17–18.

15 In opposition, plaintiffs note this Court’s previous finding that proximate  
16 causation can be shown classwide through class members’ signatures on the Statements  
17 of Understanding (“SOUs”), which, plaintiffs argue, applies whether or not the FMO  
18 that sold the annuity is part of the alleged enterprise. Opp’n at 15 (citing PSGI  
19 ¶¶ 139–141). Because class members that purchased their annuity from non-enterprise  
20 FMOs still had to sign the “Allianz-mandated” SOU, they suffered an injury by reason  
21 of Allianz’s operation of the enterprise. This is especially true here, plaintiffs argue,  
22 where the evidence demonstrates that Allianz was the leader of the alleged  
23 enterprise—designing and issuing the annuity products, training sales agents through  
24 workshops and seminars, and determining the content of written sales materials. Id. at  
25 16 (citing PSGI ¶¶ 103–134).<sup>8</sup> In addition, plaintiffs contend that because all of the

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26  
27 <sup>8</sup> Allianz’s primary objections to all of these facts is materiality—that none of these  
28 (continued...)

1 FMOs were “necessary” to carry out the alleged scheme, serving as Allianz’s “innocent  
2 or unsuspecting agent” for the sales of its products, any harm suffered by the class  
3 members occurred as a direct result of Allianz’s direction of the overall enterprise.  
4 Plaintiffs aver that RICO imposes liability not only on persons who commit the  
5 prohibited predicate acts, but also on those persons who cause the acts to be committed.  
6 In support of their contentions, plaintiffs cite to a number of cases standing for the  
7 principle that a causal link is not broken by the presence of a third party intermediary  
8 who is not a member of the alleged enterprise. Because Allianz has “instigated” the  
9 alleged scheme to defraud seniors, plaintiffs argue that Allianz caused harm that was  
10 “both foreseeable and intended.” Opp’n at 18.

11 The Court concludes that Allianz is not entitled to a grant of summary judgment  
12 on this issue. A RICO defendant’s conduct cannot be so neatly divided into “enterprise  
13 activities” and “non-enterprise activities,” with only the former supporting liability  
14 under RICO. Contrary to Allianz’s contentions, all of Allianz’s conduct in furtherance  
15 of the alleged enterprise’s affairs—whether Allianz acted alone or in conjunction with  
16 other members of the enterprise—are what caused the class members to suffer their  
17 alleged injuries.<sup>9</sup> Thus, Allianz’s development of the annuity products, design and  
18

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19 <sup>8</sup>(...continued)  
20 facts raise a genuine issue of fact relevant to any of the four grounds upon which Allianz  
21 seeks a grant of summary judgment in its favor. As discussed in this order, however,  
22 plaintiffs’s additional facts are not “immaterial” to the issues that Allianz raises by way of  
23 its motion, but raise disputed issues that preclude a grant of summary judgment in Allianz’s  
24 favor. In addition, Allianz makes numerous evidentiary objections, primarily on the  
25 grounds that plaintiffs mischaracterize the contents of various exhibits or fail to lay a  
26 proper foundation for their admission. Having reviewed the exhibits in question, the Court  
27 finds Allianz’s objections are largely without merit for the evidence relied on in this order.  
28 To the extent that plaintiffs have mischaracterized various exhibits or rely on irrelevant  
evidence, the Court disregards plaintiffs’ contentions of fact to the contrary.

<sup>9</sup> Plaintiffs cite to the “foreseeable and natural” consequence standard of proximate  
(continued...)

1 dissemination of the marketing materials and SOUs, creation and utilization of the MAC  
2 Board to further its marketing efforts, and leadership of the enterprise are all “enterprise  
3 activities” that were undertaken in furtherance of an alleged scheme to defraud financial  
4 products purchasers. See MSJ Order No. 2 at 13 (noting plaintiffs’ evidence that Allianz  
5 “owned and controlled 13 FMOs, retained the right to terminate any FMO, trained sales  
6 agents, and required all FMOs and sales agents to promise in writing to supply  
7 customers with particular product brochures and SOUs”). This also includes the  
8 allegedly excessive commissions and lucrative incentive programs that Allianz created  
9 for all FMOs and their agents, see PSGI ¶¶ 133, 135, which purportedly furthered the  
10 enterprise’s “common purpose” of increasing the sales of Allianz products in the senior  
11 market, MSJ Order No. 2 at 12 (discussing plaintiffs’ evidence of a common purpose).<sup>10</sup>

12 Moreover, as discussed in this and prior orders, plaintiffs have presented  
13 substantial evidence of how the FMOs that are members of the enterprise are purportedly  
14 what enabled Allianz to carry out its alleged scheme as successfully as it did, providing  
15 Allianz with its “competitive advantage” in the annuity and financial products  
16 marketplace.<sup>11</sup> See MSJ Order No. 2 at 10–11 (detailing substantial communications and  
17

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18 <sup>9</sup>(...continued)

19 cause from Bridge in arguing that they have satisfied the proximate causation requirement  
20 here. The Court notes, however, that the Supreme Court appeared to implicitly disavow  
21 reliance on this language from Bridge in the Hemi Group decision: “in the RICO context,  
22 the focus is on the directness of the relationship between the conduct and the harm,” not  
foreseeability. 130 S. Ct. at 991.

23 <sup>10</sup> Although the parties do not discuss the “directness” factors from the Holmes  
24 decision, these considerations also support a finding that plaintiffs and their fellow class  
25 members are the most direct—indeed, the intended victims—of the enterprise’s alleged  
26 scheme to defraud.

27 <sup>11</sup> As with those cases plaintiffs cite in their opposition, Allianz here “created and  
28 maintained systematic links for a common purpose” to aid in the marketing of its annuity

(continued...)

1 involvement of MAC Board in improving product marketing, design, and development).  
2 Allianz cannot unilaterally redefine the alleged enterprise’s affairs based upon an  
3 exceedingly narrow conception of Allianz’s “operation or management” of the 19 FMO  
4 members of the enterprise, while ignoring plaintiffs’ evidence that Allianz undertook all  
5 of these actions in furtherance of the enterprise’s affairs—and not simply its own.

6 Because all of Allianz’s actions appear to have been in furtherance of the alleged  
7 enterprise’s unlawful scheme—and not a frolic and detour by Allianz alone—a  
8 reasonable jury could find that all of the class members were directly injured by the  
9 enterprise’s affairs. Accordingly, Allianz’s motion for summary judgment on this issue  
10 is denied.

11 **C. Iorio Judgment and Release**

12 Plaintiffs do not dispute that pursuant to the parties’ stipulation and this Court’s  
13 order, final judgment is appropriate on all the claims released by the settlement  
14 agreement in Iorio v. Allianz Life Ins. Co. of N. Am., No 05-cv-0633 (S.D. Cal. 2008).  
15 See Dkt. No. 814 (ordering that the Iorio release is effective “to release and bar further  
16 prosecution of . . . any and all of the claims included within the Released Transactions  
17 described in the Iorio Agreement and Judgment”). Allianz argues that by its plain terms,  
18 this order includes the claims asserted on Ow’s behalf with respect to his MasterDex 10  
19 annuity purchase.

20 In opposition, plaintiffs contend that Ow’s claims related to his MasterDex 10  
21 annuity are not subject to the Iorio settlement and release, because Ow “has  
22 demonstrated his intent to exclude himself from the Iorio action” by filing and  
23 prosecuting the instant case, partly on the basis of his purchase of the MasterDex10

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24  
25 <sup>11</sup>(...continued)

26 products. See In re Actiq Sales & Mktg. Practices Litig., 07-cv-4492, 2009 WL 1444443,  
27 at \*5 (E.D. Pa. May 22, 2009) (discussing an alleged enterprise consisting of a  
28 pharmaceutical company and pain management specialists and other doctors paid to  
publish articles on the defendant’s behalf).

1 annuity. Opp'n at 24. In particular, plaintiffs argue that Ow need not have formally  
2 opted-out of the Iorio action, and is not bound by the order entered in this case, because  
3 prosecution of this “competing” class action was effective to register his intent to  
4 exclude himself.

5 The Court finds that contrary to plaintiffs’ contentions, Ow’s claims with respect  
6 to his MasterDex 10 annuity are also subject to the Iorio release. Notably, plaintiffs do  
7 not dispute that Ow did not explicitly opt-out of the Iorio settlement; that plaintiffs did  
8 not expressly exclude Ow’s claims from the “Released Transactions” that this Court  
9 ordered extinguished, Dkt. No. 812; or that the Iorio release would otherwise be  
10 effective to bar Ow’s prosecution of his claims, save for Ow’s prosecution of this case.  
11 Absent any language excluding Ow’s MasterDex 10 claims from the scope of the  
12 parties’ stipulation to enforce the Iorio release, the Court cannot carve-out an exception  
13 to its prior order for Ow to prosecute these claims in this case.

14 In addition, Ow’s prosecution of this lawsuit is insufficient to serve as an opt-out  
15 from the Iorio class and settlement agreement. While filing of an individual lawsuit  
16 *during* the pendency of the opt-out period is “an effective expression of a class  
17 member’s desire to opt out,” McCubbrey v. Boise Cascade Home & Land Corp., 71  
18 F.R.D. 62, 69 (N.D. Cal. 1976), courts have repeatedly found that maintenance of a  
19 separate lawsuit, which was initiated *prior* to the plaintiff receiving notice of the  
20 proposed settlement, does not serve as an opt-out from the class settlement. See  
21 Bowman v. UBS Fin. Services, Inc., 04-cv-3525, 2007 WL 1456037, at \*2 (N.D. Cal.  
22 May 17, 2007) (collecting cases). Here, plaintiff Ow indisputably filed this lawsuit long  
23 before the proposed settlement was reached in Iorio; as such, his maintenance of this suit  
24 was insufficient to opt-out of the Iorio settlement and judgment. Plaintiffs offer no  
25 authority to the contrary, as Hanlon v. Chrysler Corp., 150 F.3d 1011(9th Cir. 1998), is  
26 distinguishable. There, a member of the Hanlon class initiated a separate lawsuit after  
27 the proposed Hanlon class settlement was submitted but before it was approved,  
28

1 apparently for the sole purpose of excluding himself and others from the Hanlon  
2 settlement class. Id. at 1024–25. The court agreed with the district court that this class  
3 member’s actions were sufficient to “serve[] as an individual opt-out” from the Hanlon  
4 case. Unlike the absent class member in Hanlon, Ow initiated the Negrete action long  
5 before a proposed settlement was reached in Iorio, and the mere maintenance of this  
6 long-running suit is insufficient to serve as Ow’s opt-out from Iorio. Accordingly, the  
7 Court finds that judgment shall be entered on the claims of all class members barred by  
8 the Iorio agreement and judgment, including Ow’s claims with respect to his purchase of  
9 the MasterDex 10 annuity.

10 **D. Parol Evidence Rule**

11 Allianz argues that this Court should apply the parol evidence rule from California  
12 law to plaintiffs’ federal RICO claims, which Allianz contends are premised upon a  
13 promissory fraud theory of liability. The Court disagrees.

14 Generally, the parol evidence rule does not act to bar extrinsic evidence related to  
15 a fraud claim rather than a breach of contract claim. Cal. Code of Civil P. § 1856(f).  
16 Until very recently, however, the parole evidence rule did preclude “*promissory* fraud  
17 claims premised on prior or contemporaneous statements at variance with the terms of a  
18 written integrated agreement.” Casa Herrera, 32 Cal. 4th at 346 (emphasis added)  
19 (quoting Bank of Am. etc. Assn. v. Pendergrass, 4 Cal. 2d 258 (1935)). But in  
20 Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n, S190581, — Cal.  
21 4th —, 2013 WL 141731 (Cal. Jan. 14, 2013), the California Supreme Court overruled  
22 Pendergrass and its progeny, concluding that the limitation on the fraud exception to the  
23 parol evidence rule was “plainly out of step with established California law,” and also  
24 “inconsistent with the terms of [section 1856].” Id. at \*8. In overruling Pendergrass, the  
25 court “reaffirm[ed] the venerable maxim [that] it was never intended that the parol  
26 evidence rule be used as a shield to prevent the proof of fraud” from entering the  
27 courtroom. Id. (citation and quotation omitted).

1           Given this recent evolution of California law, Allianz’s argument that plaintiffs  
2 have “characterized” their RICO claims in promissory fraud terms fails in light of  
3 Riverisland. Because plaintiffs bring RICO claims grounded in fraud—not claims for  
4 breach of contract—evidence related to their claims is plainly not barred by the parol  
5 evidence rule. Riverisland, 2013 WL 141731 at \*1. None of Allianz’s arguments, nor  
6 the cases Allianz relies on, survive the force of the California Supreme Court’s decision  
7 in Riverisland. Accordingly, Allianz’s motion for summary judgment on this basis is  
8 denied.

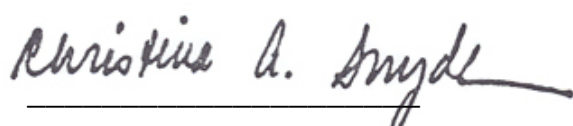
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10 **V. CONCLUSION**

11           In accordance with the foregoing, Allianz’s motion for summary judgment is  
12 hereby GRANTED in part and DENIED in part. Judgment shall be entered on the  
13 claims of all class members barred by the Iorio agreement and judgment pursuant to this  
14 Court’s prior order.

15  
16           IT IS SO ORDERED.

17  
18           Dated: February 25, 2013



19  
20           CHRISTINA A. SNYDER  
21           United States District Judge