Duval v. Albano et al Doc. 40

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LESLEY DUVAL,

Plaintiff,

v.

JOSEPH ALBANO, *also known as J.D. Albano*, DEBRA ALBANO, and AXIS SPORTS MEDIA, INC.,

Defendants.

16 Civ. 7810 (KPF)

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

After a deal to sell her business went awry, Plaintiff Lesley Duval brought this action against Joseph and Debra Albano (together, the "Albanos") and a company they controlled, Axis Sports Media, Inc. ("AXIS," and with the Albanos, "Defendants"). Plaintiff advanced civil claims under 18 U.S.C. § 1962, the Racketeer Influenced and Corrupt Organizations Act (commonly known as "RICO"), as well as common-law claims for breach of contract, anticipatory breach of contract, fraud, unjust enrichment, and declaratory judgment. In brief, Plaintiff alleges that the Albanos operated a network of associated shell corporations (including AXIS) for the purpose of defrauding businesses and consumers alike, and that Plaintiff herself was defrauded into selling them The Manhattan Cocktail Classic ("MCC"), a business Plaintiff had founded.

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Defendants moved to dismiss the Complaint on January 23, 2017, and their motion was fully briefed as of March 24, 2017. For the reasons that follow, Defendants' motion is denied.

BACKGROUND[1]

A. Factual Background

1. The Sale of MCC

Plaintiff is the founder and former owner of Lesley Townsend LLC, doing business as MCC, an event production company that produced "high-end liquor and cocktail events, including its eponymous annual gala event" that was held in New York City every year from 2009 to 2014. (Compl. ¶ 16).

In or about March of 2014, Joseph Albano approached Plaintiff "with a proposal to purchase MCC." (Compl. ¶ 17). "Mr. Albano represented himself at the time as an experienced event production executive with an extensive history of buying and selling brands and companies." (*Id.*).

On September 9, 2014, Plaintiff entered into a purchase agreement (the "Purchase Agreement") "with The Cocktail Classic LLC ('Buyer LLC'), a shell company formed by the Albano Defendants for the sole purpose of purchasing MCC from [Plaintiff]." (Compl. ¶ 18). "Under the terms of the Purchase

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[1] In resolving Defendants' Motion, the Court has considered the facts as pleaded in Plaintiff's Complaint. ("Compl." (Dkt. #1)). The Court has taken all well-pleaded allegations as true, as it must at this stage. *See, e.g., Vega* v. *Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 78 (2d Cir. 2015). The Court has also reviewed the briefing submitted by the parties and will refer to it as follows: Defendants' memorandum of law in support of their motion to dismiss will be referred to as "Def. Br." (Dkt. #34). Plaintiff's memorandum of law in opposition to Defendants' motion will be referred to as "Pl. Br." (Dkt. #35). Defendants' reply memorandum of law in further support of their motion will be referred to as "Def. Reply." (Dkt. #37).

Agreement, the Buyer LLC agreed to purchase [Plaintiff's] entire membership interest in MCC for a total purchase price of $908,000 ('Purchase Price'), to be paid in quarterly installments of $37,500 over a period of six years." (*Id.* (citing Compl., Ex. A, §§ I-II)).

AXIS was a New York corporation formed by Debra Albano in 2012. (Compl. ¶ 37 & Ex. G). According to Plaintiff, it was used by the Albanos to impart a patina of legitimacy to the transaction: "As part of the transaction to transfer ownership of MCC from [Plaintiff] to the Buyer LLC ... , [Joseph] Albano proposed that AXIS would guaranty payment of the Purchase Price to [Plaintiff]." (*Id.* at ¶ 19). "The Guaranty Agreement was, by its own terms, 'an unconditional guaranty of payment.'" (*Id.* (citing Compl., Ex. B, ¶ 2)). It provided that "[t]o induce the Seller to enter into the Purchase Agreement," AXIS, the Guarantor, "absolutely, conditionally and irrevocably guarantee[d] to [Plaintiff,] the Seller[,] ... the due and punctual payment, observance, performance and discharge of" the Purchase Price. (Compl., Ex. B, ¶ 1). Of particular significance to the instant litigation, AXIS "represent[ed] and warrant[ed] that ... [it] ha[d] the financial capacity to pay and perform its obligations" under the agreement. (*Id.* at ¶ 6).

Joseph Albano signed the Guaranty Agreement on behalf of AXIS as its President. (Compl. ¶ 21; *see also id.*, Ex. B). He also "represented to [Plaintiff] that he intended to rely upon AXIS's event production experience to continue producing the MCC festival successfully ... in order to induce [Plaintiff] to enter

into the MCC [sale transaction] and to gain control of the valuable MCC brand." (*Id.* at ¶ 22).

In reliance on these representations, Plaintiff "transferred all interest in MCC to the Buyer LLC" on September 9, 2014. (Compl. ¶ 23; *see also id.* at ¶ 18). An initial payment of $45,000 was paid with a check signed by Debra Albano "from a corporate entity named 'WSOG LLC.'" (*Id.* at ¶ 23).[2] "On December 15, 2014, the Buyer LLC made a quarterly payment to [Plaintiff] in the amount of $37,500," also using a check signed by Debra Albano. (*Id.*; *see also* Compl., Ex. C).

After that, no further payments were made. To date, the Buyer LLC has not made any additional quarterly payment as required under the Purchase Agreement, and AXIS has "defaulted on its obligation under the Guaranty Agreement to guaranty payment by the Buyer LLC." (Compl. ¶ 26). The MCC festival has not been produced since MCC was purchased. (*Id.* at ¶¶ 28, 31). Instead, Joseph Albano "has made repeated representations regarding attempts to re-sell the company to third-party buyers" (*id.* at ¶ 28), and "indicated on at least two occasions that he [did] not have the funds to satisfy his companies' obligations and ... intend[ed] to default on the future quarterly obligations" (*id.* at ¶ 30).

[2] The Court understands "WSOG" to be shorthand for "World Series of Golf."

2. The Albanos' Additional Alleged Misrepresentations

a. AXIS

According to Plaintiff, the failed MCC transaction was the proverbial tip of the iceberg of Defendants' fraudulent conduct: She alleges that "[b]eginning at least as early as 2013, and continuing through [the filing of the Complaint], the Albano Defendants have made numerous false statements on the AXIS website," including "misrepresentations about AXIS's size as an organization, office location, history of operations, clients roster, and events produced." (Compl. ¶ 70). The AXIS website indicates that the company has been helping its clients "to achieve their objectives by using sports as a winning communication tool" for over fifteen years. (*Id.* at ¶ 32; *see also id.*, Ex. D). Indeed, the website lists as AXIS's clients and partners Miller Lite, Citibank, Red Bull, the Pro Football Hall of Fame, Patrón Tequila, Tiffany & Co., Lowe's, and American Airlines. (*Id.* at ¶ 32; *see also id.*, Ex. D). The website also indicates that AXIS has a "creative and production team of professionals" that includes "graphic designers, producers, technical product managers, script writers, videographers, video editors, video and audio engineers, lighting directors, creative directors, and set designers with 'decades of knowledge and experience.'" (*Id.* at ¶ 32; *see also id.*, Ex. E). And AXIS issued a September 3, 2014 press release announcing its production of a year-long Professional Boxing Tour, the first event of which was to be a prize fight at Mohegan Sun Arena in October 2014. (*Id.* at ¶ 33; *see also id.*, Ex. F).

Plaintiff contends that, in reality, "AXIS is shell company with no assets and ... no employees or clients." (Compl. ¶ 33). The company could not have been in business for over fifteen years because "the entity was only created in 2012." (*Id.*). The October 2014 prize fight at Mohegan Sun is not listed in the public professional records of the boxers alleged to have participated in it. (*Id.*). Indeed, AXIS "has not produced any events in its entire history as a company." (*Id.* at ¶ 40). What is more,

> although the AXIS website states that the company's corporate address is located on West 40th Street in New York, New York and also suggests that the company has offices in Atlanta and Los Angeles, AXIS's Certificate of Incorporation, the [New York State Department of State] website, and the 'Notices' provision in the Guaranty Agreement all list the company's address at the residence of the Albano Defendants in Locust Valley, New York.

(*Id.* at ¶ 34).

b. WSOG

According to Plaintiff, the WSOG entity from the accounts of which the initial payment to Plaintiff was drawn is also mired in fraud. WSOG LLC was organized in Delaware on March 7, 2014. (Compl. ¶ 45). Another WSOG entity was organized in New York on March 2, 2016. (*Id.*; *id.*, Ex. J). Its address for service of process is a Bayville, New York property owned by Debra Albano. (*Id.*; *see also id.*, Ex. J, K).

Plaintiff alleges that "since at least as early as 2014, and continuing through the present, the Albano Defendants have made numerous false representations on the WSOG Website about the current operations of WSOG,"

including “misrepresentations about WSOG’s history of operations since the Albano Defendants took control of the WSOG Website and the WSOG brand.” (Compl. ¶ 70). For example: “The WSOG Website advertises that the company engages in online gambling activities as well as an annual live three-day golfing event in which finalists are eligible to win a $250,000 grand prize.” (*Id.* at ¶ 43). A July 22, 2014 press release on the WSOG website announced “the creation of a partnership between WSOG and AXIS to launch a ‘contest for golfing bloggers,’” the winner of which “would receive a trip to the September 2014 World Series of Golf tournament weekend” at Mohegan Sun. (*Id.* at ¶ 46; *see also id.*, Ex. H). The WSOG website in 2015 and 2016 has maintained different iterations of a membership signup that solicits the payment of a membership fee with no specified benefits of membership. (*Id.* at ¶¶ 46-47; *see also id.*, Ex. H, L).

Plaintiff alleges that neither the Mohegan Sun event nor “the series of subsequent WSOG events that the WSOG Website claims occurred throughout 2014 and 2015” ever took place. (Compl. ¶ 46). And the membership signup is simply “a scheme designed to trick unsuspecting golf and poker enthusiasts into providing credit card information to WSOG and paying a ‘membership fee’ to WSOG for non-existent goods and services.” (*Id.* at ¶ 48).

c. Other Albano-Related Entities

Plaintiff alleges that her claims of fraud are bolstered by the Albanos’ connection “to approximately one dozen inactive companies in New York and Nevada,” all of which “were opened and either closed or abandoned since

2001." (Compl. ¶ 49). "There is little evidence that any of these companies ever conducted any actual business." (*Id.*).

As a specific example, Plaintiff recites that, in 2014, Joseph Albano and one of the Albanos' Nevada entities, Envy Digital Entertainment Inc. ("Envy"), were sued in New Jersey Superior Court by the National Football League Alumni Association (the "NFLAA"), which alleged that it had given Envy and Joseph Albano hotel rooms and Super Bowl tickets in exchange for the production of an NFLAA awards show that Envy and Joseph Albano ultimately revealed themselves as unable to produce. (Compl. ¶ 50). The NFLAA also alleged that Envy and Joseph Albano dramatically misrepresented the progress of that production when asked about it. (*Id.*).

B. Procedural Background

Plaintiff filed her Complaint on October 6, 2016, raising civil RICO claims against the Albanos and common-law claims against all Defendants. (Dkt. #1). On November 16, 2016, Defendants requested that the Court schedule a pre-motion conference to discuss Defendants' contemplated motion to dismiss. (Dkt. #23). That conference was held on December 7, 2016. (Dkt. #28). Afterward, the Court set a briefing schedule for Defendants' motion. (Dkt. #27).

Defendants filed their motion on January 23, 2017. (Dkt. #33-34). Plaintiff filed her opposition to Defendants' motion on February 24, 2017 (Dkt. #35), and Defendants filed their reply on March 24, 2017 (Dkt. #37).

On June 12, 2017, Plaintiff filed a letter requesting that the Court take judicial notice of a case that she alleges "reveals a new piece of the Albano Defendants' fraudulent scheme." (Dkt. #38). Defendants opposed Plaintiff's request on June 13, 2017. (Dkt. #39).

DISCUSSION

A. Applicable Law

Defendants' principal argument is that Plaintiff has overstated her case — that she has attempted, through artful pleading, to transform a run-of-the-mill business dispute into a racketeering enterprise, and thereby obtain treble damages and attorney's fees. To contextualize its explanation of why this argument fails, the Court will outline in this section the complexity of the RICO statute, demonstrating both the statute's nuances and their interplay with the pleading requirements of the Federal Rules of Civil Procedure.

1. Civil RICO

a. Generally

Plaintiff asserts violations of RICO's third and fourth substantive prohibitions against "racketeering activity." (*See* Compl. ¶¶ 81-93). The third prohibition, contained in Section 1962(c), 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." 18 U.S.C. § 1962(c). A plaintiff bringing a civil RICO claim under Section 1962(c) must allege that (i) the defendant has violated the

substantive RICO statute; and (ii) the plaintiff was injured in her business or property by reason of a violation of Section 1962. *See, e.g.*, *Spool* v. *World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008). To make out a substantive RICO violation, in turn, a plaintiff must allege the (i) conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity. *See, e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co., Inc.,* 473 U.S. 479, 496 (1985); *Cruz* v. *FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013). "The requirements of [S]ection 1962(c) must be established as to each individual defendant." *DeFalco* v. *Bernas*, 244 F.3d 286, 306 (2d Cir. 2001); *accord First Capital Asset Mgmt., Inc.* v. *Satinwood, Inc.,* 385 F.3d 159, 180 (2d Cir. 2004).

The fourth prohibition, in Section 1962(d), makes it unlawful for anyone to conspire to violate any portion of the statute. 18 U.S.C. § 1962(d). As compared with Section 1962(c), the "requirements for RICO[ ] conspiracy charges under § 1962(d) are less demanding: A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that [she has adopted] the goal of furthering or facilitating the criminal endeavor." *First Capital Asset Mgmt.*, 385 F.3d at 178 (alterations in original) (internal quotation mark omitted) (quoting *Baisch* v. *Gallina*, 346 F.3d 366, 376-77 (2d Cir. 2003)). In other words, a "plaintiff must show a corrupt agreement, an overt act in furtherance of that agreement, and membership in the conspiracy by each defendant," all of which "may be inferred from circumstantial evidence." *Cofacredit, S.A.* v. *Windsor Plumbing Supply Co.*, 187 F.3d 229, 240 (2d Cir. 1999). "In the civil context, a

plaintiff must allege that the defendant knew about and agreed to facilitate the scheme." *City of N.Y.* v. *Bello*, 579 F. App'x 15, 17 (2d Cir. 2014) (summary order) (internal quotation mark omitted) (quoting *Baisch*, 346 F.3d at 377).

b. The RICO Enterprise and Its Components

A RICO enterprise must be "an entity separate and apart from the pattern of activity in which it engages." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). As the Second Circuit has "long recognized, the plain language and purpose of the statute contemplate that a *person* violates the statute by conducting an *enterprise* through a pattern of criminality. It thus follows that a corporate person cannot violate the statute by corrupting itself." *Cruz*, 720 F.3d at 120 (emphases in original) (citing *Bennett* v. *U.S. Tr. Co. of N.Y.,* 770 F.2d 308, 315 (2d Cir. 1985)). Rather, a plaintiff bringing a RICO claim must allege the existence of two distinct entities — a person and an enterprise. *See id.* (quoting *City of N.Y.* v. *Smokes-Spirits.com, Inc.,* 541 F.3d 425, 438 n.15 (2d Cir. 2008)).

A "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). And with respect to a person's "participation" in a racketeering enterprise, the Supreme Court has clarified that

> In order to participate, directly or indirectly, *in the conduct* of such enterprise's affairs, [in violation of § 1962(c),] one must have *some part in directing* those affairs. Of course, the word participate makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase directly or indirectly makes clear that *RICO liability is not limited to those with a formal position in*

> *the enterprise, but some part in directing the enterprise's affairs is required.*

United States v. *Praddy*, 725 F.3d 147, 155 (2d Cir. 2013) (internal quotation marks omitted) (quoting *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1993) (footnote omitted) (second "some" emphasized in original; other emphases added in *Praddy*)). Stated somewhat differently, a defendant must be shown to have "participate[d] in *the operation or* management of the enterprise itself." *Id.* (alteration and emphasis in original) (internal quotation marks omitted) (quoting *Reves,* 507 U.S. at 185). This "operation or management" test "has proven to be a relatively low hurdle for plaintiffs to clear … especially at the pleading stage." *First Capital Asset Mgmt.*, 385 F.3d at 176 (citations omitted).

"A RICO enterprise 'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" *DeFalco*, 244 F.3d at 306 (quoting 18 U.S.C. § 1961(4)); *accord First Capital Asset Mgmt.*, 385 F.3d at 173. Unsurprisingly, "RICO requirements are most easily satisfied when the enterprise is a formal legal entity." *First Capital Asset Mgmt., Inc.*, 385 F.3d at 173. Indeed, the Second Circuit has held that "any legal entity may qualify as a RICO enterprise." *D. Penguin Bros. Ltd.* v. *City Nat'l Bank*, 587 F. App'x 663, 666 (2d Cir. 2014) (summary order) (internal quotation marks omitted) (quoting *First Capital Asset Mgmt.*, 385 F.3d at 173) (finding district court erred in concluding that plaintiffs had failed to plead enterprise element, where plaintiffs had alleged that entity was not-for-profit corporation).

Other groupings can still qualify as a RICO enterprise, but the test is somewhat more stringent: "[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Cruz*, 720 F.3d at 120 (alteration in original) (internal quotation marks omitted) (quoting *First Capital Asset Mgmt.*, 385 F.3d at 174).

c. The Requirement of a Pattern

"A 'pattern of racketeering activity requires at least two acts of racketeering activity.'" *DeFalco*, 244 F.3d at 306 (quoting 18 U.S.C. § 1961(5)). These acts must be "related" and they must "amount to or pose a threat of continued criminal activity." *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

i. Relatedness

Predicate crimes must be related both to each other ("horizontal relatedness") and to the enterprise as a whole ("vertical relatedness"). *See Reich* v. *Lopez*, 858 F.3d 55, 60 (2d Cir. 2017) (citing *United States* v. *Cain*, 671 F.3d 271, 284 (2d Cir. 2012)). "Vertical relatedness, which entails the simpler analysis, requires only 'that the defendant was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise.'" *Reich*, 858 F.3d at 61 (quoting *United States* v. *Burden*, 600 F.3d 204, 216 (2d Cir. 2010)).

"[P]redicate acts are *horizontally* related when they 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Reich*, 858 F.3d at 61 (emphasis in original) (quoting *H.J.*, 492 U.S. at 240). "When dealing with 'an enterprise whose business is racketeering activity, such as an organized crime family,' horizontal relatedness can be established simply by linking each act to the enterprise." *Id.* (quoting *United States* v. *Coppola*, 671 F.3d 220, 243 (2d Cir. 2012) (internal punctuation and citations omitted)). "When dealing with an enterprise that is primarily a legitimate business, however, courts must determine whether there is a relationship between the predicate crimes themselves; and that requires a look at, inter alia, whether the crimes share 'purposes, results, participants, victims, or methods of commission.'" *Id.* (quoting *H.J.*, 492 U.S. at 240).

ii. Continuity

"RICO targets conduct that 'amount[s] to or pose[s] a threat of continued criminal activity.'" *Reich*, 858 F.3d at 60 (alterations in original) (quoting *H.J.*, 492 U.S. at 239). "Such continuity can be closed-ended or open-ended." *Id.*

"Criminal activity that occurred over a long period of time in the past has closed-ended continuity, regardless of whether it may extend into the future." *Reich*, 858 F.3d at 60. "As such, closed-ended continuity is 'primarily a temporal concept'" *id.* (quoting *Spool*, 520 F.3d at 184), "and it requires that the predicate crimes extend 'over a substantial period of time'" *id.* (quoting *H.J.*, 492 U.S. at 242). The Second Circuit "generally requires that the crimes

extend over at least two years." *Id.* (citing *Spool*, 520 F.3d at 184 ("Although we have not viewed two years as a bright-line requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-ended continuity[.]")).

"On the other hand, criminal activity 'that by its nature projects into the future with a threat of repetition' possesses open-ended continuity, and that can be established in several ways." *Reich*, 858 F.3d at 60 (quoting *H.J.*, 492 U.S. at 241). When, for example, "the business of an enterprise is primarily unlawful, the continuity of the enterprise itself projects criminal activity into the future." *Id.* (citing *Spool*, 520 F.3d at 185). "And similarly, criminal activity is continuous when 'the predicate acts were the regular way of operating that business,' even if the business itself is primarily lawful." *Id.* (quoting *Cofacredit*, 187 F.3d at 243).

d. Racketeering Activity

"Racketeering activity" is defined in 18 U.S.C. § 1961(1) to include a variety of offenses including, as relevant here, mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, and financial-institution fraud under 18 U.S.C. § 1344. *See* 18 U.S.C. § 1961(1).

i. Bank Fraud

Pleading bank fraud requires allegations that a defendant knowingly executed or attempted to execute a scheme or artifice to (i) defraud a financial institution, or (ii) "to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a

financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344.

ii. Mail and Wire Fraud

By contrast, the "essential elements of [mail and wire fraud] are [i] a scheme to defraud, [ii] money or property as the object of the scheme, and [iii] use of the mails or wires to further the scheme." *United States* v. *Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) (per curiam) (first alteration in original) (internal quotation mark omitted) (quoting *United States* v. *Binday*, 804 F.3d 558, 569 (2d Cir. 2015)). "Because the mail fraud and the wire fraud statutes use the same relevant language, [courts] analyze them the same way." *Id.* (internal quotation marks omitted) (quoting *United States* v. *Greenberg*, 835 F.3d 295, 305 (2d Cir. 2016)).

"[T]he gravamen of the offense is the scheme to defraud." *Weaver*, 860 F.3d at 94 (alteration in original) (internal quotation marks omitted) (quoting *Greenberg*, 835 F.3d at 305). "In order to prove the existence of a scheme to defraud," a party must prove both "'that the misrepresentations were material' and that the defendant acted with fraudulent intent." *Id.* (citation omitted) (quoting *U.S. ex rel. O'Donnell* v. *Countrywide Home Loans, Inc.*, 822 F.3d 650, 657 (2d Cir. 2016)) (citing *Greenberg*, 835 F.3d at 305-06).

(A) Materiality

"A statement is material if the 'misinformation or omission would naturally tend to lead or is capable of leading a reasonable [person] to change [his] conduct.'" *Weaver*, 860 F.3d at 94 (alterations in original) (quoting *United*

States v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc) (discussing honest services fraud)). "In other words, a 'lie can support a fraud conviction only if it is material, that is, if it would affect a reasonable person's evaluation of a proposal.'" *Id.* "A 'false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the [decisionmaker] to which it was addressed.'" *Id.* (alteration in original) (quoting *United States* v. *Corsey*, 723 F.3d 366, 373 (2d Cir. 2013)).

(B) Fraudulent Intent

Intertwined with materiality is the element of fraudulent intent. *See United States* v. *Thomas*, 377 F.3d 232, 242-43 (2d Cir. 2004). The Second Circuit has clarified that "[t]he 'role of the ordinary prudence and comprehension standard [in the materiality element] is to assure that the defendant's conduct was calculated to deceive, not to grant permission to take advantage of the stupid or careless.'" *Weaver*, 860 F.3d at 95 (second alteration in original) (quoting *Thomas*, 377 F.3d at 242). "That is, the unreasonableness of a fraud victim in relying (or not) on a misrepresentation does not bear on a defendant's criminal intent in designing the fraudulent scheme, whereas the materiality of the false statement does." *Id.*

2. Pleading Standards

The difficulties in pleading a viable civil RICO claim arise not merely from the substantive requirements of Section 1962, but from the pleading requirements of the Federal Rules of Civil Procedure, specifically, Rules 12(b)(6) and 9(b).

a. Rule 12(b)(6)

When considering a motion to dismiss under this rule, a court should "draw all reasonable inferences in [the plaintiffs'] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber* v. *Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks and citation omitted) (quoting *Selevan* v. *N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009)). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)).

In this regard, a complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. *See, e.g.*, *Hart* v. *FCI Lender Servs., Inc.*, 797 F.3d 219, 221 (2d Cir. 2015) (citing Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.")).

"While *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to '[nudge a plaintiff's] claims across the line from conceivable to plausible.'" *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (per curiam) (quoting *Twombly*, 550 U.S. at 570). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability,

it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

That said, the "*Twombly* plausibility standard … does not prevent a plaintiff from pleading facts alleged 'upon information and belief' where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Lefkowitz* v. *McGraw-Hill Glob. Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 356 (S.D.N.Y. 2014) (quoting *Arista Records, LLC* v. *Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)). Indeed, the Court is mindful of the Circuit's instruction that "a district court should not dismiss a claim 'unless it is satisfied that the complaint cannot state any set of facts that would entitle [the plaintiff] to relief.'" *Id.* (quoting *Patel* v. *Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001)).

b. Rule 9(b)

"Because they are fraud-based," predicate acts of wire fraud, mail fraud, and bank fraud "must be pleaded with particularity in accordance with Federal Rule of Civil Procedure 9(b)." *Jus Punjabi, LLC* v. *Get Punjabi US, Inc.*, 640 F. App'x 56, 58 (2d Cir. 2016) (summary order) (citing *Lundy* v. *Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013); *First Capital Asset

Mgmt., 385 F.3d at 178). This particularity requirement extends "to each defendant." *Fuji Photo Film U.S.A., Inc.* v. *McNulty*, 640 F. Supp. 2d 300, 314 (S.D.N.Y. 2009).

"To satisfy this requirement, a complaint must specify the time, place, speaker, and content of the alleged misrepresentations, explain how the misrepresentations were fraudulent and plead those events which give rise to a strong inference that the defendant[ ] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." *Jus Punjabi*, 640 F. App'x at 58 (alteration in original) (internal quotation marks omitted) (quoting *Cohen* v. *S.A.C. Trading Corp.*, 711 F.3d 353, 359 (2d Cir. 2013)); *see also First Capital Asset Mgmt.,* 385 F.3d at 178-79. By contrast, "[m]alice, intent, knowledge, and other conditions of mind may be averred generally." *Kalnit* v. *Eichler*, 264 F.3d 131, 138 (2d Cir. 2001) (alteration in original) (internal quotation marks omitted) (quoting Fed. R. Civ. P. 9(b)).

And while it is true, as described above, "that matters peculiarly within a defendant's knowledge may be pled 'on information and belief,' this does not mean that those matters may be pled lacking any detail at all." *First Capital Asset Mgmt.*, 385 F.3d at 179. "Where a plaintiff is permitted to plead on information and belief, the 'complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.'" *Fuji Photo Film U.S.A.*, 640 F. Supp. 2d at 310 (quoting *Wood ex rel. U.S.* v. *Applied Research Assocs., Inc.*, 328 F. App'x 744, 747 n.1 (2d Cir. 2009) (amended summary order)); *see also DiVittorio* v. *Equidyne Extractive Indus.,*

Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) ("[T]he allegations must be accompanied by a statement of the facts upon which the belief is based.").

B. Analysis

1. A Summary of Defendants' Arguments

Defendants argue that Plaintiff's "complaint is nothing more than a collection of innuendo, rumor, and 'spin.'" (Def. Br. 3). They challenge the adequacy of Plaintiff's enterprise and pattern of racketeering activity allegations. They contest the inclusion of Debra Albano as a Defendant. And they challenge the exclusion of the Buyer LLC, the actual counterparty to the MCC sale transaction.

Defendants first focus on the statements that allegedly underlay the MCC sale transaction. They take issue with two allegedly fraudulent statements — Defendants' representation concerning their ability to meet their obligations in the Guaranty Agreement, and AXIS's claim of "15 years of experience" — which Defendants say are at most mere puffery or statements of future hope or expectation, and not misrepresentations of existing fact. (Def. Br. 3, 8). Defendants also claim they lacked contemporaneous intent to defraud when these statements were made. (*Id.* at 8).

Defendants then contest certain additional facts proffered by Plaintiff as evidence of Defendants' fraudulent intent, including Plaintiff's claims in paragraphs 41 to 48 of the Complaint regarding the World Series of Golf entity. Defendants argue that in this section of the Complaint, Plaintiff is talking about alleged fraud that took place in 2016, two years after the transaction

between the parties in this case, and that the use of a WSOG check does not signify fraud. (Def. Br. 12).

More broadly, Defendants take issue with Plaintiff's RICO claims "pled on information and belief," arguing that this mode of pleading is insufficient to demonstrate the requisite pattern and alleged fraud. (Def. Br. 3, 10). Examples of allegations pled in this way include (i) Plaintiff's allegations that Defendants do not have functioning offices other than at the Albanos' residence (*id.* at 10); and (ii) Plaintiff's allegation that Defendants deliberately undercapitalized their entities (*id.* at 11); (iii) Plaintiff's claims in paragraphs 37, 38, 39, 40, and 42 (*id.*). They also request that the Court take judicial notice of certain websites that they contend bolster the legitimacy of AXIS and Defendants' other businesses and, in consequence, undermine Plaintiffs' enterprise allegations. (*Id.* at 7).

Separate and apart from any deficiencies in Plaintiff's RICO claims, Defendants argue that "[t]here is no well-pleaded case against [Debra] Albano." (Def. Br. 4). The only facts alleged in the Complaint that relate to her are that she is married to Joseph Albano, made an initial payment under the Purchase Agreement, and filed a certificate of incorporation for AXIS. (*Id.*). According to Defendants, naming Debra as a Defendant was just "a mean-spirited attempt to put the Albano family in fear of losing their home." (*Id.*).

Finally, Defendants argue that the company that purchased Plaintiff's business, the Buyer LLC, is a necessary party in this case, which must be added. (Def. Br. 13-14). And upon that party's addition, Defendants believe

this case must be remanded for arbitration pursuant to the arbitration clause in the Purchase Agreement. (*Id.*). All of these arguments are addressed, and rejected, in the remainder of this Opinion.[3]

2. Plaintiff Has Pleaded the Existence of Several Enterprises

Plaintiff has adequately alleged that the Albanos were "persons" under the RICO statute who violated that statute by conducting enterprises — AXIS, the Buyer LLC, and WSOG — through a pattern of criminality. *See Cruz*, 720 F.3d at 120. She alleges that these legal entities were "individual enterprises in and of themselves" (Compl. ¶ 56), and the Court agrees. *See D. Penguin Bros.*, 587 F. App'x at 666 (quoting *First Capital Asset Mgmt.*, 385 F.3d at 173).

Plaintiff has further adequately alleged that these entities "together ... constitute an association-in-fact managed and operated by the Albano Defendants." (Compl. ¶ 56). "An association-in-fact enterprise 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *D. Penguin Bros.*, 587 F. App'x at 667 (quoting *Boyle* v. *United States*, 556 U.S. 938, 945 (2009)); *see also Turkette*, 452 U.S. at 583. "This type of RICO enterprise 'must have at least three structural features: [i] a purpose, [ii] relationships among those associated with the enterprise, and [iii] longevity sufficient to permit these

[3] Defendants make a fifth argument as well: If the Court dismisses Plaintiff's RICO claims, Defendants contend that Plaintiff's common-law claims must necessarily be dismissed as well. (Def. Br. 13). Defendants argue that, in that eventuality, the Court should decline to exercise supplemental jurisdiction. (*Id.*). Because the Court is not dismissing Plaintiff's RICO claims, this argument is moot.

associates to pursue the enterprise's purpose." *D. Penguin Bros.*, 587 F. App'x at 667 (quoting *Boyle*, 556 U.S. at 946).

All three features are pleaded here. Plaintiff alleges that the Albanos utilized AXIS, the Buyer LLC, and WSOG "to create the appearance of long-functioning and successful business ventures in the sports, entertainment, event production[,] and media industries." (Compl. ¶ 59; *see also id.* at ¶¶ 60-62). The Albanos did so in order to profit themselves, through such ventures as the MCC transaction and the "credit card scam perpetrated through the current WSOG Website." (*Id.* at ¶ 63, *see also id.* at ¶¶ 61-62). Plaintiff has also alleged relationships among those entities: the Albanos are married, have represented themselves as the officers of AXIS, and operate these entities out of properties they own (*id.* at ¶¶ 1, 12, 34, 36-38); Debra Albano made the first MCC transaction payment with a WSOG check (*id.* at ¶¶ 23, 37); AXIS agreed to guarantee the Buyer LLC's obligations to Plaintiff under the Purchase Agreement (*id.* at ¶¶ 18-22); and AXIS and WSOG have in the past announced themselves as partners (*id.* at ¶ 46). And these relationships are alleged to span from early 2014 through October 6, 2016, the date that Plaintiff brought this case.

And Plaintiff has adequately alleged that the Albanos were persons who participated, directly or indirectly, in the conduct of the affairs of the enterprise or enterprises. For example, Joseph Albano is identified as the president and/or CEO of AXIS, and "he was the face of all negotiations and day-to-day operations in connection with the MCC Transaction." (Pl. Br. 6 (citing Compl.

¶¶ 17, 19, 24, 27-31, 33, 36-38, 55)). Debra Albano "signed AXIS's certificate of incorporation as the incorporator, designated herself as the original agent for service of process, signed the two MCC Transaction payment checks on behalf of WSOG and the Buyer LLC, and owns the property listed as the address for service of process on WSOG." (*Id.* (citing Compl. ¶¶ 37, 38, 41, 45, 55)). All of these allegations suffice to plead one, if not several, RICO enterprises.

3. Plaintiff Has Pleaded a Pattern of Racketeering Activity

To plead a pattern of racketeering activity, Plaintiff must plead that each of the Albanos, through the commission of two or more predicate acts constituting a pattern of racketing activity, directly or indirectly participated in the enterprises alleged in the Complaint. In this regard, Defendants challenge Plaintiff's ability to plead predicate acts of bank, wire, or mail fraud. Specifically, Defendants argue that the Albanos never misrepresented their ability to meet their obligations under the Guaranty Agreement, nor did they fraudulently misrepresent AXIS's "15 years of experience." Defendants also take issue with Plaintiff's reliance on allegations made "on information and belief."

The Court cannot accept Defendants' arguments at this stage of the litigation. Plaintiff has pleaded the existence of a scheme to defraud, comprising material misrepresentations made by Defendants with fraudulent intent. Plaintiff has also pleaded with particularity facts to support her allegations of Defendants' fraud. And insofar as Plaintiff has pleaded "matters peculiarly within a defendant's knowledge … 'on information and belief,'" she

has not pled such matters "lacking any detail at all." *See First Capital Asset Mgmt.*, 385 F.3d at 179. Rather, Plaintiff has "adduce[d] specific facts supporting a strong inference of fraud[.]" *See Fuji Photo Film U.S.A.*, 640 F. Supp. 2d at 310 (quoting *Wood ex rel. United States*, 328 F. App'x at 747 n.1); *DiVittorio,* 822 F.2d at 1247.

With regard to the alleged misstatement in the Guaranty Agreement — to the effect that AXIS "ha[d] the financial capacity to pay and perform its obligations" under that agreement (Compl., Ex. B, ¶ 6(e)) — Plaintiff identified who made the statement (Joseph Albano, as President of AXIS), and where and when it was made (in the Guaranty Agreement, at the time of the agreement's execution), and why the statement was fraudulent (because at the time, AXIS could not guarantee the payment of the Buyer LLC's obligations under the Purchase Agreement). (Compl. ¶¶ 21-22, 25, 27-28). Plaintiff has alleged materiality and fraudulent intent: AXIS's Guaranty was intended to and in fact did induce Plaintiff to execute the Purchase Agreement with the Buyer LLC, which lacked assets of its own.

Defendants retort that the statement is mere puffery. And Defendants are correct that "declaration[s] of intention, hope, or projections of future earnings" have been identified in this District "as the hallmarks of inactionable puffery." *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 508-09 (S.D.N.Y.) (collecting cases), *opinion corrected on denial of reconsideration*, 612 F. Supp. 2d 397 (S.D.N.Y. 2009). But optimistic statements "may be actionable upon a showing that the defendants did not genuinely or reasonably believe the

positive opinions they touted …, or that the opinions imply certainty." *Lapin* v. *Goldman Sachs Grp., Inc.*, 506 F. Supp. 2d 221, 239 (S.D.N.Y. 2006); *see also Novak* v. *Kasaks,* 216 F.3d 300, 315 (2d Cir. 2000) (holding that statements that inventory situation was "in good shape" and "under control" were actionable because defendants "allegedly knew that the contrary was true"); *In re IBM*, 163 F.3d 102, 107 (2d Cir. 1998). Here, AXIS's representation in the Guaranty Agreement is actionable because Joseph Albano represented that AXIS had the capacity to guarantee the entirety of the Buyer LLC's obligations under the Purchase Agreement when, it is alleged, he knew that it did not.

A similar result obtains in evaluating the alleged misstatements on the AXIS and WSOG websites. (*See* Compl. ¶¶ 24, 32-33, 70). Plaintiff has identified the Albanos as the authors of the statements,[4] identified where and when they were posted on the AXIS and WSOG websites, and provided evidence of facts that directly disprove the websites' statements. Defendants respond by introducing facts that they believe undermine Plaintiff's evidence,

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[4] Courts in this Circuit have accepted the doctrine of group pleading in the context of Rule 9's requirement of statement attribution. *See, e.g.*, *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Wells Fargo Sec., LLC,* 797 F.3d 160, 173 (2d Cir. 2015) ("Where a plural author is implied by the nature of the representations — for instance, where, as here, [i] the alleged fraud is based on statements made in the offering materials and [ii] the complaint gives grounds for attributing the statements to the group — group pleading may satisfy the source identification required by Rule 9(b)."); *S.E.C.* v. *Espuelas*, 579 F. Supp. 2d 461, 482 n.10 (S.D.N.Y. 2008) ("[T]he group pleading doctrine can only be invoked to attribute fraudulent statements to defendants, remaining wholly insufficient to plead scienter."). Here, given Plaintiff's allegation that AXIS is an entity operated wholly and solely by the Albanos, the Court finds the Complaint gives grounds for attributing the statements on AXIS's website to both Albanos. The Court notes, however, that if discovery indicates that only Joseph Albano managed AXIS's website, Plaintiff may be left with little to support her claims against Debra Albano. *See DeFalco* v. *Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) ("The requirements of section 1962(c) must be established as to each defendant.").

and by inviting the Court to draw inferences from Plaintiff's evidence that support *their* arguments. But the Court cannot draw the inferences that Defendants wish that it would at this stage, because the Court is obligated to draw all reasonable inferences in Plaintiff's favor. And even if the Court took judicial notice of the materials submitted by Defendants in support of their motion (Dkt. #33-1), it could not reason from these materials as Defendants urge. The Court cannot take judicial notice of "the truth of the matters asserted" in a document appropriate for judicial notice. *Beauvoir* v. *Israel*, 794 F.3d 244, 248 n.4 (2d Cir. 2015) (internal quotation mark omitted) (quoting *Roth* v. *Jennings*, 489 F.3d 499, 509 (2d Cir. 2007)). Thus, Plaintiff is correct that many of Defendants' arguments against her allegations amount to "alternative explanations" that implicate "question[s] of fact not ripe for adjudication at this stage." (Pl. Opp. 10 n.2). Here, the Court finds that the mass of Plaintiff's factual allegations give rise to a strong inference of fraud.

The Court does agree with Defendants that one method of Plaintiff's pleading does Plaintiff no favors: Where Plaintiff pleads her fraud claims interdependently — *i.e.*, where she pleads that certain statements are fraudulent on the basis of the fraudulence of other statements — Plaintiff's pleading falters. However, in these instances, Plaintiff bolsters her allegations with additional facts evidencing falsity. For example, with regard to Plaintiff's allegation that "the AXIS Website falsely claimed that AXIS's client roster included more than thirty of the largest brands in the United States," Plaintiff argues that falsity was demonstrated by "Defendants' other fraudulent

representations on the AXIS Website." (Pl. Opp. 9-10). However, Plaintiff *also* argues that falsity was evidenced by Joseph Albano's "apparent lack of experience" and "the absence of any other evidence of such work on the AXIS website or the completion of any other successful project via AXIS or Defendants' other companies." (*Id.*).

The same is true with regard to Plaintiff's allegation that "the AXIS website falsely claimed the company had business[] offices in New York City, Atlanta, and Los Angeles." (Pl. Opp. 10 (citing Compl. ¶ 34)). Unhelpfully, Plaintiff claims this statement must be false because of "all of the other falsehoods alleged [in the Complaint] that were intended to create the appearance that AXIS is a successful company." (*Id.*). But Plaintiff also indicates that "[t]he falsity of these statements is supported by ... the fact that AXIS is registered in and operates out of the Albano Defendants' home address, [and] ... the fact that the Georgia and California secretaries of state do not list AXIS as being registered to operate in their jurisdictions." (*Id.*).

All told, Plaintiff's allegations suffice at this stage to support her civil RICO claims against the Albanos. Plaintiff has adequately pleaded that the Albanos violated the RICO statute by conducting enterprises through a pattern of criminality. And though it is a closer call, Plaintiff has adequately pleaded the pattern requirement, by pleading with specificity at least two predicate acts of wire fraud attributed to each of the Albanos.[5] Defendants have argued that

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[5] As best the Court can divine from their briefing, Defendants have not challenged Plaintiff's pleading with respect to the elements of relatedness or continuity. To the extent that Defendants intended to do so, the Court agrees with Plaintiff that such

Plaintiff was unreasonable in relying on the alleged fraudulent statements, but the Court cannot agree. Plaintiff has alleged Defendants' conduct was calculated to deceive, and the Court finds that Defendants' alleged statements were capable of inducing a reasonable person to change his or her conduct. Defendants' motion to dismiss Plaintiff's RICO claims against the Albanos must therefore be denied.

4. This Case Can Continue Absent the Buyer LLC

Separately, Defendants argue that the joinder of the Buyer LLC is required because in that entity's absence, the Court "cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).[6] And where joinder is deemed necessary, the absent person or entity must be joined if feasible. *See* Fed. R. Civ. P. 19(a). The Court finds this also to be a close call, but sides with Plaintiff because it concludes that it is able to "accord complete relief among existing parties" absent the Buyer LLC.

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challenges would fail. Plaintiff has alleged the existence of a scheme that lasted from 2014 through 2016. Moreover, the scheme posed a threat of continued criminality insofar as the AXIS and WSOG websites remained active as of the filing of the Complaint. A consideration of the relatedness factors — purposes, results, participants, victims, and methods of commission — leads the Court to conclude that this element has been pleaded adequately as well. The Court also does not see that Defendants have challenged Plaintiff's RICO conspiracy claims under § 1962(d). But to the extent that such a challenge was intended, the Court finds that the evidence described above, circumstantial and otherwise, is adequate to support Plaintiff's pleading of the Albanos' corrupt agreement, overt acts in furtherance thereof, and membership in the conspiracy.

[6] The Court agrees with Plaintiff that the exact scope and strength of this argument are unclear from Defendants' brief. (*See* Pl. Br. 23). Because Defendants do not cite to Federal Rule of Civil Procedure 19, the Court cannot determine on precisely what basis Defendants are moving. The Court limits its consideration to Rule 19(a)(1)'s first prong, however, because Defendants' cannot argue for joinder under its second prong absent a claim by the Buyer LLC that it has an interest in this suit. *See* Fed. R. Civ. P. 19(a)(1)(B); *Peregrine Myanmar Ltd.* v. *Segal*, 89 F.3d 41, 49 (2d Cir. 1996).

Plaintiff's civil RICO claims are brought only against the Albanos; as such, the Buyer LLC is no more a necessary party than WSOG, another entity implicated in the alleged scheme, and one which Defendants do not argue need be joined. Moreover, Plaintiff's state-law claims are premised only on the nonpayment of the quarterly payments owed under the Guaranty Agreement (involving AXIS), not any breach of the Purchase Agreement (involving the Buyer LLC). Particularly given the language of the Guaranty, the Court can determine that Plaintiff failed to receive the Purchase Price without determining that the Buyer LLC breached the Purchase Agreement.

Under New York law, it is well-settled that unconditional guarantees are enforceable if written in "clear and unambiguous" terms. *HSH Nordbank Ag N.Y. Branch* v. *Swerdlow*, 672 F. Supp. 2d 409, 418 (S.D.N.Y. 2009) (collecting cases), *aff'd sub nom. HSH Nordbank AG N.Y. Branch* v. *Street*, 421 F. App'x 70 (2d Cir. 2011) (summary order). And "[w]here a guaranty states that it is 'absolute and unconditional,' guarantors are generally precluded from raising any affirmative defense." *Id.* (citing *CFC* v. *Merrill Lynch,* 188 F.3d 31, 35 (2d Cir. 1999)); *see also Elmhurst Dairy, Inc.* v. *Van Peenen's Dairy, Inc.*, No. 10 Civ. 8627 (JSR), 2012 WL 1116978, at *2 (S.D.N.Y. Mar. 24, 2012). At the very least, it is the case that "a guarantor cannot assert defenses that it expressly waived in the guaranty agreement." *HSH Nordbank Ag*, 672 F. Supp. at 418. Indeed, "[u]nder New York law, the only affirmative defenses that are not waived by an absolute and unconditional Guaranty are payment and lack of consideration for the Guaranty." *Overseas Private Inv. Corp.* v. *Moyer*, No. 15

Civ. 8171 (KBF), 2016 WL 3945694, at *4 (S.D.N.Y. July 19, 2016) (citing *CIT Group/Commercial Servs., Inc.* v. *Prisco*, 640 F. Supp. 2d 401, 410 (S.D.N.Y. 2009) (citing *Walcutt* v. *Clevite Corp.*, 13 N.Y.2d 48, 55-56 (1963))).

Here, the Guaranty Agreement identifies itself as "an unconditional guarantee of payment and not of collection." (Compl., Ex. B, ¶ 2). It "absolutely, unconditionally[,] and irrevocably guarantees to the Seller ... the due and punctual payment, observance, performance[,] and discharge of ... the Purchase Price[.]" (*Id.* at ¶ 1). It allows that Plaintiff

> may at any time and from time to time, without notice to or further consent of the Guarantor, extend the time of payment of the Guaranteed Obligations, and may also make any agreement with [the Buyer LLC] or [MCC] for the extension, renewal, payment, compromise, discharge or release thereof, in whole or in part, without any way impairing or affecting the Guarantor's Obligations[.]

(*Id.* at ¶ 3(a)). And it asserts that the Guaranteed Obligations hereunder "shall not be released or discharged, in whole or in part, or otherwise affected by," among other things, "any change in the time, place[,] or manner of payment of the Guaranteed Obligations"; the substitution of a party "liable with respect to the Guaranteed Obligations"; "any change in the corporate existence, structure or ownership of [the Buyer LLC]"; or "any insolvency, bankruptcy, reorganization or other similar proceeding affecting [the Buyer LLC]." (*Id.* at ¶ 3(b)). In other words, notwithstanding any number of good reasons for the Buyer LLC's nonpayment of its obligations, the Guaranty Agreement obligated

AXIS to pay Plaintiff the original Purchase Price that Axis guaranteed therein. *See HSH Nordbank Ag*, 672 F. Supp. 2d at 418-19.

Given this language, the Court need not adjudicate the validity or existence of any justification for the Buyer LLC's nonpayment in order to determine the scope of AXIS's liability. To the contrary, AXIS has likely waived its right to raise the affirmative defenses it has disclaimed in the Guaranty Agreement that could implicate the Buyer LLC. *See HSH Nordbank Ag*, 672 F. Supp. 2d at 418; *Overseas Private Inv. Corp.*, 2016 WL 3945694, at *4. And even if AXIS were to raise the affirmative defenses available to it notwithstanding any waiver — payment and a lack of consideration — neither would require the Court to determine the Buyer LLC's underlying liability for breach. The Court can imagine a variety of scenarios in which the Purchase Price was not paid but the Purchase Agreement not breached. But for purposes of this litigation, these imaginings are irrelevant. Plaintiff's claim that the Guaranty Agreement was breached requires only a showing of nonpayment, not any showing that the Purchase Agreement was breached.

The Buyer LLC is therefore not an indispensable party here. It may vindicate its claims in a separate litigation or arbitration as appropriate, and this case will continue without its joinder.[7]

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[7] Moreover, the Court notes that even if the Buyer LLC were an indispensable party that could not be joined for some reason, "Rule 19(b) does not authorize dismissal simply because such a party cannot be joined. Instead, the Court would have to determine 'whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus being regarded as indispensable.'" *Jota* v. *Texaco, Inc.*, 157 F.3d 153, 162 (2d Cir. 1998) (quoting Fed. R. Civ. P. 19(b)). "And in making this determination, the Court [would] consider, among other things, 'the extent to which, by protective provisions in the judgment, by the

CONCLUSION

As a policy matter, the Court sympathizes with the frustration evident in Defendants' briefing. Indeed,

> there is no question that RICO's private right of action, in conjunction with the statute's inclusion of mail and wire fraud (for which there is no independent private right of action) as racketeering acts, creates federal treble damage actions out of business disputes that would otherwise never be in federal court. However, the Supreme Court long ago observed that "this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress."

Fresh Meadow Food Servs., LLC v. *RB 175 Corp.*, 282 F. App'x 94, 100 (2d Cir. 2008) (summary order) (quoting *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

For all of the reasons outlined above, Plaintiff's Complaint passes muster. Accordingly, Defendants' motion to dismiss is DENIED, and the Clerk of Court is directed to terminate the motion at docket entry 33. The parties are directed to file a joint status letter and proposed case management plan that comply with the requirements outlined in the Court's Notice of the Initial Pretrial Conference (Dkt. #13) on or before **August 9, 2017**. The parties are forewarned that the Court will be disinclined to extend discovery deadlines, once those deadlines are proposed by the parties and endorsed by the Court.

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shaping of relief, or other measures, the prejudice can be lessened or avoided.'" *Id.* (quoting Fed. R. Civ. P. 19(b)). Here, even if the Buyer LLC were an indispensable party, the Court is not convinced dismissal would be required in these circumstances. The Court could utilize protective provisions in its judgment or otherwise shape relief so as to protect the interests and rights of the Buyer LLC.

SO ORDERED.

Dated: July 18, 2017
New York, New York

KATHERINE POLK FAILLA
United States District Judge