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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Emily Rose Winger,

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No. CV 10-923-PHX-MHM

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Plaintiff,

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**ORDER**

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vs.

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Best Buy Co., Inc., et al.

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Defendants.

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Pending before the Court is Defendants Best Buy Co., Inc.’s, Best Buy Stores Limited Partnership’s, and BestBuy.com LLC’s (collectively “Best Buy’s”) Motion to Dismiss Plaintiff Emily Rose Winger’s Amended Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 33) The Court has reviewed the motion, Plaintiff’s response, Best Buy’s reply, as well as Plaintiff’s notice of supplemental authority, and now enters its ruling.

23

**I. Background**

24

Plaintiff alleges the following in her Amended Complaint. (Doc. 32) Best Buy operates a nation-wide chain of electronics retail stores, describing itself as “the world’s largest specialty consumer electronics retailer.” (Id. ¶ 6) Plaintiff purchased, on two different occasions, a set of Insignia speakers, model number NS-S6000, advertized to be “3-way speakers.” Plaintiff purchased one set at the Best Buy store at 5051 East Ray Road,

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1 Phoenix, Arizona, in December 2007. Plaintiff purchased a second set on March 4, 2010,  
2 from the internet. (Id. ¶ 10) Insignia is a Best Buy house brand, sold exclusively through  
3 Best Buy. (Id. ¶ 11)

4 Best Buy sold two models of Insignia Car Speakers advertised to be 3-way: the NS-  
5 S600 model purchased by Plaintiff and the NS-S5250 model. Best Buy made representations  
6 that these models were 3-way speakers. (Id. ¶ 12)

7 A 3-way speaker is one in which the sound is “split” in three ways, with three drivers  
8 to reproduce the sounds within those three ranges. (Id. ¶ 13) The more drivers contained in  
9 a speaker, the higher fidelity sound it produces, and the more it costs to produce and  
10 purchase. Thus, a three-way speaker system can support a higher price in the market than  
11 a 2-way system using equivalent-quality components. (Id. ¶ 14) Here, although the speakers  
12 were sold as 3-way speakers, they were in reality only 2-way speakers. (Id. ¶ 15) The  
13 highest range “driver” was actually a non-functioning plastic replica and thus was not  
14 capable of producing any sound. (Id. ¶¶ 15-16)

15 Best Buy sold model number NS-S5250, which was described as a 3-way speaker, on  
16 Insignia’s website. This model also contained a fake driver. (Id. ¶¶ 19-20, 23) In addition,  
17 Best Buy sold various models of speakers as “4-way speakers” that also had fewer drivers  
18 than represented by the “4-way” labeling, and thus were falsely represented in the same way  
19 as the 3-way speakers. (Id. ¶ 24)

20 Best Buy and Best Buy Enterprise Services, Inc. contracted with Peiyang Electro-  
21 Acoustic Co., Ltd. (“Peiyang Electro-Acoustic”), in Shenzhen, Guangdong, China, to  
22 manufacture the Insignia speakers. (Id. ¶ 25) Best Buy had significant involvement in the  
23 design, manufacture, and quality control of the speakers. (Id. ¶¶ 26-28) Best Buy, Best Buy  
24 Enterprise Services, Inc., and Peiyang Electro-Acoustic had a common purpose to defraud  
25 consumers for the purpose of making money by falsely representing 2-way speakers to be  
26 3-way speakers, and acted together as an organization to do so. Best Buy, together with Best  
27 Buy Enterprise Services, Inc. and Peiyang Electro-Acoustic, formed a scheme to defraud  
28 consumers by falsely representing 2-way speakers to be 3-way speakers in Best Buy stores

1 and on its various websites and other sales medium. (Id. ¶¶ 30-31)

2 Best Buy used the United States wires in furtherance of its scheme to defraud by  
3 making false representations over the internet on its own website and on third-party websites  
4 that the speakers were 3-way speakers. (Id. ¶ 32) Best Buy also used the United States mails  
5 in furtherance of its scheme, in particular by relying on the mails to communicate within its  
6 subsidiaries and with Peiyong Electro-Acoustic in furtherance of this scheme and to  
7 communicate with consumers that the speakers were 3-way speakers. (Id. ¶ 33) Best Buy  
8 specifically intended its misrepresentations to deceive consumers. (Id. ¶ 34)

9 Plaintiff claims that Best Buy’s conduct violated the Racketeer Influenced and Corrupt  
10 Organizations Act (“RICO”), 18 U.S.C. § 1962(c). Best Buy moves to dismiss Plaintiff’s  
11 Amended Complaint.

## 12 **II. Standard of Review**

### 13 **A. Rule 8, Federal Rules of Civil Procedure**

14 A complaint must contain “a short and plain statement of the claim showing that the  
15 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Each allegation must be simple,  
16 concise, and direct.” Fed. R. Civ. P. 8(d)(1). A claim must be stated clearly enough to  
17 provide each defendant fair opportunity to frame a responsive pleading. McHenry v. Renne,  
18 84 F.3d 1172, 1176 (9th Cir. 1996).

### 19 **B. Rule 12(b)(6), Federal Rules of Civil Procedure**

20 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact  
21 are assumed to be true and construed in the light most favorable to the non-moving party.  
22 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9<sup>th</sup> Cir. 1996). Dismissal under Rule  
23 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of sufficient  
24 facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d  
25 696, 699 (9th Cir. 1990). To avoid dismissal, a complaint must contain “only enough facts  
26 to state a claim for relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.  
27 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content  
28 that allows the court to draw the reasonable inference that the defendant is liable for the

1 misconduct alleged.” Id. This plausibility standard “‘does not impose a probability  
2 requirement at the pleading stage; it simply calls for enough facts to raise a reasonable  
3 expectation that discovery will reveal evidence’ to prove [the] claim.” al-Kidd v. Ashcroft,  
4 580 F.3d 949, 977 (9th Cir. 2009) (quoting Twombly, 550 U.S. at 556).

5 If the court finds that the Plaintiff does not allege enough facts to support a cognizable  
6 legal theory, the court may dismiss the claim. The court must then decide whether to grant  
7 leave to amend. A court should “‘freely give” leave to amend when there is no “undue delay,  
8 bad faith[,] dilatory motive on the part of the movant, . . . undue prejudice to the opposing  
9 party by virtue of . . . the amendment, [or] futility of the amendment . . . .” Fed. R. Civ. P.  
10 15(a); Foman v. Davis, 371 U.S. 178 (1962). Generally, leave to amend is denied only when  
11 it is clear the deficiencies of the complaint cannot be cured by amendment. DeSoto v.  
12 Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

### 13 **III. Discussion**

14 RICO makes it “unlawful for any person employed by or associated with any  
15 enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to  
16 conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs  
17 through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. 1962(c)  
18 (2009). It allows for civil remedy, authorizing private actions by “any person injured in his  
19 business or property by reason of a violation of [RICO] section 1962.” 18 U.S.C. 1964(c).  
20 To state a claim under section 1962 of RICO, a plaintiff must allege “(1) conduct, (2) of an  
21 enterprise, (3) through a pattern (4) of racketeering activity.” Walter v. Drayson, 538 F.3d  
22 1244, 1247 (9th Cir.2008); see also Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir.  
23 2007) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)). Racketeering  
24 activity includes mail fraud under 18 U.S.C. § 1341 and wire fraud under 18 U.S.C. § 1343.  
25 18 U.S.C. § 1961(1). In creating RICO, Congress expressly admonished that its terms were  
26 to be “liberally construed to effectuate its remedial purposes.” Odom, 486 F.3d at 547  
27 (quoting Sedima, 473 U.S. at 497-98).

#### 28 **A. Standing**

1 Best Buy argues that Plaintiff lacks standing under RICO because her Amended  
2 Complaint fails to allege proximate causation between Best Buy's supposed  
3 misrepresentation and her injury and fails to allege a concrete financial loss. See Chaset v.  
4 Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1086-87 (9<sup>th</sup> Cir. 2002).

### 5 1. Proximate Causation

6 To establish proximate causation, a plaintiff must show "some direct relation between  
7 the injury asserted and the injurious conduct alleged." Holmes v. Sec. Investor Prot. Corp.,  
8 503 U.S. 258, 268 (1992). Best Buy argues that Plaintiff has failed to allege proximate  
9 causation because "[a]ll [Plaintiff] alleges is that she purchased a set of Insignia speakers in  
10 December 2007 from a Best Buy store and purchased a second set of speakers on March 4,  
11 2010 'from the internet' [w]ith "no allegations other than mere purchases that tie any injury  
12 to Best Buy's alleged acts . . . ." To the contrary, Plaintiff alleges that Best Buy misled her  
13 into purchasing 2-way speakers with a phony driver instead of the 3-way speakers she  
14 believed she was purchasing and, as a result, she paid too much. (Doc. 32 ¶ 10, 12-16, 61,  
15 64)

16 To the extent that Best Buy contends that the holding of the Supreme Court in Bridge  
17 v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008) requires Plaintiff to plead reliance  
18 in order to maintain her RICO claim, the Court in Bridge did not adopt such a rule at the  
19 pleading stage. See Johnson v. KB Home, 720 F. Supp. 2d 1109, 1119 (D. Ariz. 2010)  
20 (citing Bridge, 553 U.S. at 658). Accordingly, the Court finds that Plaintiff has sufficiently  
21 alleged proximate causation.

### 22 2. Concrete Financial Loss

23 A showing of injury for a civil RICO claim "requires proof of concrete financial loss,  
24 and not merely injury to a valuable intangible property interest." Steele v. Hosp. Corp. of  
25 Am., 36 F.3d 69, 70 (9<sup>th</sup> Cir. 1994). Best Buy argues that Plaintiff "does not claim that she  
26 paid more because of Best Buy's alleged misrepresentation." Best Buy contends that  
27 "Plaintiff's allegation that, generally, a 3-way speaker 'can support a higher price in the  
28 market' is insufficient to establish a concrete financial loss." Plaintiff, however, alleges more

1 in this regard. As discussed above, Plaintiff alleges that Best Buy falsely marketed and  
2 promoted its 2-way Insignia speakers as a superior 3-way system, going so far as to build in  
3 an alleged phony third driver. Plaintiff alleges that she was misled by Best Buy's  
4 misrepresentations, causing her to overpay for her speakers. As such, the Court finds that  
5 Plaintiff has sufficiently alleged a concrete financial loss. See Forsyth v. Humana, Inc., 114  
6 F.3d 1467, 1482 (9<sup>th</sup> Cir. 1997) (overpayment constitutes actionable financial harm), aff'd,  
7 525 U.S. 299 (1999). The Court finds that Plaintiff has adequately alleged that Best Buy's  
8 misrepresentations proximately caused her to suffer a concrete financial loss, and thus  
9 Plaintiff has standing to assert her RICO claim.

10 **B. 18 U.S.C. § 1962© - Pattern of Racketeering Activity**

11 Section 1962(c) of the RICO statute requires a plaintiff to prove that a defendant  
12 participated in an illegal enterprise "through a pattern of racketeering activity." 18 U.S.C. §  
13 1962(c); Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1398 (9<sup>th</sup>  
14 Cir. 1986). This "pattern" must consist of at least two predicate acts of racketeering in the  
15 last ten years. 18 U.S.C. § 1961(5). Racketeering activity includes the predicate acts of mail  
16 and wire fraud. 18 U.S.C. § 1961(1). The circumstances of RICO predicate acts must be  
17 stated with particularity under Fed. R. Civ. P. 9(b), specifically describing "the time, place,  
18 and specific content of the false representations as well as the identities of the parties to the  
19 misrepresentation." Schreiber, 806 F.2d at 1401.

20 To allege a violation of the mail fraud statute or claim wire fraud, "it is necessary to  
21 show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used  
22 the United States mails or wires or caused a use of the United States mails or wires in  
23 furtherance of the scheme; and (3) the defendants did so with specific intent to deceive or  
24 defraud." Schreiber, 806 F.2d at 1399-1400.

25 **1. Predicate Acts**

26 Best Buy argues that Plaintiff's allegations do not establish the required "pattern" of  
27 racketeering activity. Best Buy contends the Amended Complaint lacks the specificity  
28 required by Rule 9(b) by failing to identify Best Buy's particular uses of interstate mail and

1 wires. Best Buy asserts that the complaint “fails to identify a single instance of fraudulent  
2 use of the U.S. mails or interstate wire facilities in furtherance of a scheme to defraud” and  
3 thus falls short of Rule 9(b)’s particularity requirement.

4 For purposes of mail and wire fraud, the only aspects that “require particularized  
5 allegations are the factual circumstances of the fraud itself.” Odom, 486 F.3d at 554. Here,  
6 Plaintiff’s Amended Complaint identifies the alleged phony product and false advertising that  
7 appear on the product packaging, Insignia’s website, and on the website of Best Buy’s outlet  
8 store. By identifying two retail websites operated by Best Buy that misrepresented the phony  
9 speaker sets, the Amended Complaint alleges specific instances of uses of interstate wire  
10 communication facilities.

11 Plaintiff further alleges that Defendants communicated among themselves via U.S.  
12 mail and interstate wire facilities to further their deceptive scheme. (Doc. 32 ¶ 61) Plaintiff  
13 alleges that Defendants’ illegal conduct and wrongful practices were carried out by an array  
14 of employees, working across state boundaries, who necessarily relied upon frequent  
15 transfers of documents, information, products and funds by the U.S. mails and interstate wire  
16 facilities. (Id. ¶ 58) The nature and pervasiveness of the scheme, which was orchestrated  
17 out of Best Buy’s corporate offices, necessarily required those offices to communicate  
18 directly and frequently with each other, with Best Buy Enterprise Services, Inc., with Peiying  
19 Electro-Acoustic, with its retail stores across the nation, and with consumers by the U.S.  
20 mails and by interstate wire facilities. (Id. ¶ 59) Plaintiff also alleges that “[m]any of the  
21 dates of Defendants’ uses of the U.S. mails and interstate wire facilities . . . have been hidden  
22 and cannot be alleged without access to Defendants’ books and records, which are within  
23 Defendants’ exclusive control. (Id. ¶ 60)

24 Rule 9(b) “requires the identification of the circumstances constituting fraud so that  
25 the defendant can prepare an adequate answer from the allegations.” Odom, 486 F.3d at 555  
26 (quoting Schreiber, 806 F.2d at 1400). Here, the allegations in the Amended Complaint  
27 adequately identify the circumstances constituting fraud, thus there is no apparent reason to  
28 find that Defendants will be unable to prepare an adequate answer. The Court finds that

1 Plaintiff's allegations of the circumstances of mail and wire fraud are sufficient to satisfy the  
2 pleading requirements of Rule 9(b).

### 3                   **2.       Fraudulent Intent**

4           Best Buy contends that Plaintiff has “fail[ed] to allege fraudulent intent with the  
5 particularity required by Rule 9(b).” Rule 9(b), however, does not require that intent be  
6 alleged with particularity: “While the factual circumstances of the fraud itself must be alleged  
7 with particularity, the state of mind—or scienter—of the defendants may be alleged generally.”  
8 Id. at 554 (citing In re GlenFed, Inc. Sec. Litig. 42 F.3d 1541, 1547 (9<sup>th</sup> Cir. 1994) (en banc))  
9 (“We conclude that plaintiffs may aver scienter generally, just as the rule states—that is,  
10 simply by saying that scienter existed.”). Plaintiff alleges that Best Buy “specifically  
11 intended its misrepresentations to deceive consumers.” (Id. ¶ 34) Plaintiff further alleges  
12 that Best Buy sold the 2-way speakers under its house brand; the speakers contained a phony  
13 driver; Best Buy marketed these 2-way speakers as 3-way speakers and did so for nearly a  
14 decade. (Id. ¶¶ 15-24) As such, the Court finds that Plaintiff has adequately alleged that  
15 Best Buy intended to defraud its customers.

16           Accordingly, the Court finds that Plaintiff adequately alleges a pattern of racketeering  
17 activity in the form of mail and wire fraud as predicate acts that occurred over a substantial  
18 period of time within the last ten years. See 18 U.S.C. § 1961(5).

### 19                   **3.       RICO Enterprise**

20           RICO's enterprise requirement is construed broadly, encompassing “any individual,  
21 partnership, corporation, association, or other legal entity, [or] any union or group of  
22 individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4); see Boyle  
23 v. United States, ---U.S. ----, ----, 129 S. Ct. 2237, 2243, 173 L. Ed. 2d 1265 (2009). The  
24 enterprise must be distinct from the individuals comprising it: “[T]o establish liability under  
25 § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and  
26 (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”  
27 Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001). There is no  
28 requirement that the enterprise be a “business-like entity,” but it must have a structure, which



1 consists of “a purpose, relationships among those associated with the enterprise, and  
2 longevity sufficient to permit these associates to pursue the enterprise's purpose.” Boyle, 129  
3 S. Ct. at 2243-244. An association-in-fact enterprise is “a group of persons associated  
4 together for a common purpose of engaging in a course of conduct,” which is “proved by  
5 evidence of ongoing organization, formal or informal, and by evidence that the various  
6 associates function as a continuing unit.” United States v. Turkette, 452 U.S. 576, 583  
7 (1981).

8 Best Buy argues that Plaintiff has not adequately alleged a RICO enterprise that is  
9 separate and distinct from Best Buy’s ordinary business. Best Buy contends that Plaintiff’s  
10 “formulaic recitations” constitute the entirety of Plaintiff’s claim that Best Buy is distinct  
11 from the alleged RICO action:

12 ¶ 52: “. . . Members of this Enterprise operate businesses that perform  
13 services distinct from the pattern of racketeering alleged herein.”

14 ¶ 53: “The Enterprise engages in, and its activities affect, interstate  
15 commerce and has an existence apart from the racketeering acts set  
16 forth herein.”

17 ¶ 54: “While all Defendants participate in and are members and part of  
18 the Enterprise, they also all have an existence separate and distinct  
19 from the Enterprise.”

20 Best Buy asserts that “the best Plaintiff can muster to support the alleged RICO enterprise  
21 is the ‘manufacture and selling of speakers and other audio equipment,’” which is “activity  
22 that is co-extensive with Best Buy’s ordinary business.”

23 The Amended Complaint, however, alleges that the enterprise not only consists of all  
24 Defendants, but also Best Buy Enterprise Services, Inc. and Peiyong Electro-Acoustic. (Doc.  
25 32 ¶ 52) Best Buy Co., Inc. and Best Buy Enterprise Services, Inc. together controlled the  
26 design and manufacture of the speakers, contracting with Peiyong Electro-Acoustic. With  
27 Best Buy’s tacit or express approval, the speakers were manufactured with a false driver.  
28 Best Buy Co., Inc. then worked with Best Buy Stores, L.P., BestBuy.com, LLC, and Peiyong  
Electro-Acoustic to advertise and sell those speakers as 3-way speakers, in spite of their  
knowledge that the speakers were not as advertised. (Id. ¶ 55) As such, the Court finds that

1 Plaintiff has adequately alleged the existence of an enterprise comprised not only of  
2 Defendant Best Buy but of other non-defendant entities as well, that was allegedly engaged  
3 in fraudulent activity that was not co-extensive with Best Buy's ordinary business.  
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5 Best Buy also argues that Plaintiff fails to allege an enterprise with an ascertainable  
6 structure. As set forth above, an ascertainable structure consists of "a purpose, relationships  
7 among those associated with the enterprise, and longevity sufficient to permit these  
8 associates to pursue the enterprise's purpose." Boyle, 129 S. Ct. at 2243-244. Best Buy  
9 concedes that "Plaintiff perhaps alleges a relationship between Best Buy and Peiying  
10 Electronic Acoustic Co.," however it contends that Plaintiff "fails to offer facts showing a  
11 common purpose or longevity of the enterprise."

12 In her Amended Complaint, Plaintiff alleges that "Best Buy, together with Best Buy  
13 Enterprise Services, Inc. and Peiying Electro-Acoustic, formed a scheme to defraud  
14 consumers by falsely representing 2-way speakers to be 3-way speakers." As such, the Court  
15 finds that Plaintiff's allegations are sufficient to allege a common purpose.

16 With respect to the requirement of longevity, Plaintiff alleges that Best Buy  
17 introduced the 3-way speaker models in question in approximately 2001. (Id. ¶ 21) Plaintiff  
18 alleges that she purchased one set at a Best Buy store in December 2007, and she purchased  
19 a second set on March 4, 2010, from the internet. (Id. ¶ 10) Even considering only the  
20 December 2007 and March 4, 2010 dates, this two-year-plus time span is more than  
21 sufficient to establish longevity. Cf. Odom, 486 F.3d at 553 (finding "[a]n almost two-year  
22 time span [] far more than adequate" to establish continuity).

#### 23 **IV. Conclusion**

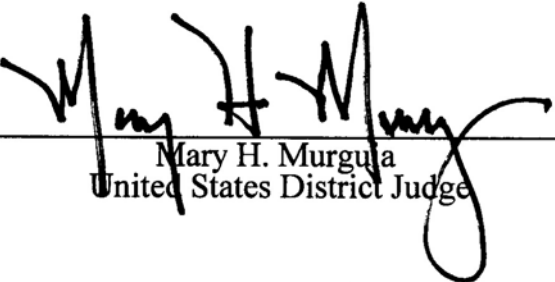
24 Based on the foregoing, the Court concludes that Plaintiff's Amended Complaint  
25 alleges "enough facts to state a claim for relief that is plausible on its face," Twombly, 550  
26 U.S. at 570, to warrant the case to proceed to discovery. Accordingly,

27 **IT IS ORDERED** denying Best Buy's Motion to Dismiss Plaintiff's RICO claim.  
28 (Doc. 33)

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**IT IS FURTHER ORDERED** directing the Clerk of Court to reassign this case.

DATED this 21<sup>st</sup> day of March, 2011.



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Mary H. Murgula  
United States District Judge