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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Larry J. Busch, *et al.*,

10 Plaintiffs,

11 v.

12 Owen David Welling, *et al.*,

13 Defendants.

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No. CV-13-02517-PHX-JJT
Consolidated with
No. CV-15-00045-PHX-JJT**ORDER**

15 At issue is Defendant and Counterclaimant Yellow Brick Road, LLC's ("YBR")
16 Motion for Summary Judgment (Doc. 129, MSJ), to which Plaintiff and
17 Counterdefendant Larry J. Busch and Busch Law Center, LLC filed a Response
18 (Doc. 134, Resp.) and in support of which YBR filed a Reply (Doc. 139, Reply). The
19 Court previously granted in part and denied in part YBR's Motion, granting summary
20 judgment as to Counts 3-5 and denying it as to Counts 1-2. (Doc. 146.) Since entering
21 that Order, the Court was made aware of additional evidence—of which it can take
22 judicial notice—and will *sua sponte* grant YBR's Motion for Summary Judgment as to
23 Counts 1-2.

I. BACKGROUND

24 The Court adopts and reiterates the facts as set forth in its previous Order
25 (Doc. 146). However, in that Order, the Court denied summary judgment as to Counts 1-
26 2 of YBR's counterclaim due to a lack of admissible evidence illustrating that the Busch
27 Parties took part in predicate acts that could serve to prove that the alleged racketeering
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1 was part of a continued pattern rather than an isolated transaction. (Doc. 146.) Since
2 entering that Order, the Court has been apprised of at least two separate actions that
3 illustrate such a pattern.

4 First, Mr. Busch was indicted and pled guilty to related criminal charges featuring
5 a nearly identical fact scenario. *See Arizona v. Larry Joseph Busch Jr.*, No. CR2015-
6 129188-003 (Ariz. Super. Ct. 2015); *Arizona v. John Childs*, No. CR2015-129188-001
7 (Ariz. Super. Ct. 2015). There, both Mr. Busch and Larry Childs, his co-conspirator, pled
8 guilty as charged to allegations of illegally controlling an enterprise through racketeering,
9 a class three felony under A.R.S. § 13-2312(B), and knowingly obtaining a benefit by
10 means of false or fraudulent pretenses through a fraudulent scheme, a class two felony
11 under A.R.S. § 13-2310. *Id.* Mr. Childs also pled guilty to theft, a class two felony under
12 A.R.S. § 13-1802(A)(2). *Id.* In doing so, Mr. Busch admitted to using his escrow account
13 to further the fraudulent scheme and assist Mr. Childs in executing the scheme via an
14 ongoing enterprise. *Id.*¹

15 Second, the Arizona State Bar brought charges against Mr. Busch seeking
16 disbarment for conduct virtually indistinguishable from that alleged here. *See In re Larry*
17 *Joseph Busch, Jr.*, No. PDJ 2015-9017 (Ariz. 2017). There, Mr. Busch was again accused
18 of using his escrow account to take in funds to be disbursed once a standby letter of credit
19 was secured—an event which never occurred—at least four times. *Id.* (citing State Bar
20 File Nos. 12-1235, 13-1060, 14-981, 14-3148). Again, in at least one of those instances,
21 Mr. Childs was alleged to have been involved. *Id.* While Mr. Busch did not plead guilty
22 to such charges, he explicitly acknowledged that the charges were made against him,
23 agreed not to challenge them, and consented to disbarment. *Id.*

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26 ¹ The Court notes, as YBR has elsewhere raised, that similar charges are pending
27 in Alabama and Mr. Busch is scheduled to enter a guilty plea in a matter of weeks. *See*
28 *Alabama v. Larry Busch*, No. GJ-14-12-177 (Ala. Super. Ct. 2014). However, because
the plea has not yet been entered and YBR has failed to provide admissible evidence
regarding the allegations in that action, the Court still declines to take judicial notice of
the assertions in that proceeding and relies only on those facts set forth in the body of this
Order.

1 The Court takes judicial notice of both resolved matters. *See* Fed. R. Evid. 201(b)
2 (permitting court to take judicial notice of a fact that is not subject to reasonable dispute);
3 *Green Valley Land & Cattle Co. v. Bailey*, 923 F.2d 861 (9th Cir. 1991) (district court
4 may take judicial notice of guilty plea in inferior court); *Trigueros v. Adams*, 658 F.3d
5 983, 987 (9th Cir. 2011) (the court may take judicial notice of the state court record);
6 *Reiner v. Graiwer*, No. CV 15-7577-GHK (KES), 2015 WL 9999191, at *1 (C.D. Cal.
7 Nov. 25, 2015) (“the Court may take judicial notice of court records in other actions and
8 state bar disciplinary opinions”). While Mr. Busch did not explicitly admit to the charges
9 levied against him by the State Bar, he agreed not to contest them, which is the primary
10 factor in determining whether a fact may be judicially noted. *See Lee v. City of L.A.*, 250
11 F.3d 668, 689-90 (9th Cir. 2001) (“a court, then, may take judicial notice of undisputed
12 facts contained in public records, but it may not take judicial notice of disputed ones”).

13 **II. ANALYSIS**

14 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is
15 appropriate when: (1) the movant shows that there is no genuine dispute as to any
16 material fact; and (2) after viewing the evidence most favorably to the non-moving party,
17 the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v.*
18 *Catrett*, 477 U.S. 317, 322–23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285,
19 1288–89 (9th Cir. 1987). Under this standard, “[o]nly disputes over facts that might affect
20 the outcome of the suit under governing [substantive] law will properly preclude the
21 entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
22 A “genuine issue” of material fact arises only “if the evidence is such that a reasonable
23 jury could return a verdict for the non-moving party.” *Id.*

24 In considering a motion for summary judgment, the court must regard as true the
25 non-moving party’s evidence if it is supported by affidavits or other evidentiary material.
26 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The non-moving party may not
27 merely rest on its pleadings; it must produce some significant probative evidence tending
28 to contradict the moving party’s allegations, thereby creating a question of material fact.

1 *Anderson*, 477 U.S. at 256–57 (holding that the plaintiff must present affirmative
2 evidence in order to defeat a properly supported motion for summary judgment); *First*
3 *Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

4 “A summary judgment motion cannot be defeated by relying solely on conclusory
5 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
6 1989). “Summary judgment must be entered ‘against a party who fails to make a showing
7 sufficient to establish the existence of an element essential to that party’s case, and on
8 which that party will bear the burden of proof at trial.’” *United States v. Carter*, 906 F.2d
9 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

10 As to Counts 3-5, the Court reiterates the analysis provided in its previous Order
11 (Doc. 146), and nothing in this Order shall serve to abrogate the findings and conclusions
12 as to those Counts. However, as to Counts 1-2, the Court finds sufficient evidence to
13 reverse the previous Order’s ruling.

14 **A. Violation of 18 U.S.C. § 1962, et seq. (RICO) (Count 1)**

15 The elements of a civil RICO claim are that a defendant participated in (1) the
16 conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of
17 racketeering activity. *Elec. Prop. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997
18 (9th Cir. 2014) (citing 18 U.S.C. § 1962(c)). Under 18 U.S.C. § 1961(4), an enterprise
19 includes “any individual, partnership, corporation, association, or other legal entity, and
20 any union or group of individuals associated in fact although not a legal entity.” The
21 Busch Parties failed to contest the argument that an enterprise affecting interstate
22 commerce does not exist and the Court will consider that RICO element as met. Even
23 where the Busch Parties argue otherwise, as set forth below, their involvement in a
24 racketeering enterprise is elsewhere admitted.

25 Pursuant to 18 U.S.C. § 1961(5), a civil RICO claim requires at least two acts of
26 racketeering to constitute a pattern. The requisite acts must be “related” and amount to or
27 pose a threat of continued criminal activity. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229,
28 239 (1989). Here, YBR has alleged a pattern of wire fraud conducted by Mr. Childs,

1 Mr. Koster, and the Busch Parties. The elements of a claim for wire fraud are: (1) the
2 existence of a scheme to defraud; (2) the use of wire, radio, or television to further the
3 scheme; and (3) specific intent to defraud. *United States v. Pelisamen*, 641 F.3d 399, 409
4 (9th Cir. 2011) (citation omitted).

5 As previously stated, YBR has presented uncontested facts that it was defrauded
6 and U.S. wires were used in furtherance of the scheme to defraud. Specifically, YBR
7 transferred funds to the Busch Parties and Mr. Busch released those funds to various
8 recipients via wire transfer. All of this was completed on false pretenses and without
9 intent to provide a standby letter of credit as promised. While each of these acts were in
10 furtherance of a singular fraud against YBR and do not, by themselves, pose a threat of
11 continued criminal activity, the Court takes judicial notice of Mr. Busch's guilty plea to
12 nearly identical criminal charges and the uncontested disciplinary charges made against
13 him in his disbarment. Combined with the isolated transaction of which YBR provided
14 ample evidence—and for which the Court granted summary judgment as to Counts 3-5 of
15 YBR's claims—these facts illustrate a pattern of racketeering activity that not only posed
16 a threat of continued criminal activity, but manifested itself in virtually duplicative
17 fraudulent schemes against other parties. As the Court previously stated, YBR is also
18 entitled to an adverse inference regarding Mr. Busch's silence with respect to his
19 relationship with the other parties, particularly in other similar transactions. *Baxter v.*
20 *Palmigiano*, 425 U.S. 308, 318–19 (1976); *Doe ex rel. Rudy-Glanzer*, 232 F.3d 1258,
21 1264 (9th Cir. 2000) (an adverse inference can only be drawn when independent evidence
22 exists as to the facts about which the party refuses to answer). Given the criminal
23 conviction, consent to disbarment, and the adverse inferences drawn, no doubt remains as
24 to the Busch Parties' involvement in a pattern of RICO related activities and schemes.
25 Accordingly, the Court will abrogate and reverse its previous Order (Doc. 146) as to
26 Count 1 of YBR's Motion for Summary Judgment.

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1 **B. Conspiracy to Violate 18 U.S.C. § 1962, et seq. (Count 2)**

2 Under 18 U.S.C. § 1962(d), it is unlawful for a person to conspire to violate any
3 provision of § 1962. A claim under this section requires that a defendant be “aware of the
4 essential nature and scope of the enterprise and intended to participate in it.” *United*
5 *States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quotation omitted). Previously,
6 the Court denied YBR’s Motion for Summary Judgment as to Count 2 for the same
7 reasons it denied YBR’s Motion as to Count 1—a lack of indisputable facts regarding the
8 Busch Parties’ frequent involvement in multiple fraudulent transactions as an escrow
9 agent. As with the preceding, the Court takes judicial notice of Mr. Busch’s guilty plea
10 and consent to disbarment which, coupled with the adverse inferences properly drawn
11 from Mr. Busch’s declination to testify, provide those facts. YBR has already proven the
12 Busch Parties’ knowledge and intent to participate in a fraud via evidence regarding its
13 transaction and adverse inference. Accordingly, the Busch Parties’ knowledge of and
14 involvement in the essential scope of the fraud as required by § 1962(d) are satisfied. For
15 the reasons stated in the preceding section, the parties are equally entitled to summary
16 judgment as to Count 2, and the Court reverses its previous Order (Doc. 146) in this
17 regard.

18 **C. Damages**

19 Because the Court denied YBR’s Motion as to Counts 1-2, it also denied YBR’s
20 request for treble damages pursuant to 18 U.S.C. § 1964(c). Now that the Court has
21 admissible evidence for it to grant summary judgment on YBR’s RICO claims, it will
22 allow for treble damages of YBR’s principal damages—its \$300,000 loss of investment.
23 Thus, YBR is entitled to \$900,000 is damages.

24 YBR also seeks punitive damages in addition to its compensatory damages,
25 trebled. (MSJ at 16-17.) As YBR argues, the Ninth Circuit recognizes that punitive
26 damages authorized by state law are available in addition to treble damages. (MSJ at 17
27 (citing *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1130 (9th Cir. 1997).)
28 Specifically, punitive damages are available in fraud-based claims when gross fraudulent

1 activity or malice or ill will are evident. *Hunger Contracting Co. v. Sanner Contracting*
2 *Co.*, 492 P.2d 735, 741 (Ariz. 1972). On the whole, the Busch Parties participated in
3 gross fraudulent activity—both against YBR and others. Further, both malice and ill will
4 can be gleaned from the size, scope, and frequency of the Busch Parties’ fraud, and the
5 adverse inferences that are drawn from Mr. Busch’s refusal to testify as to his knowledge
6 or intent in perpetrating the fraud in concert with the co-conspirators. *See, e.g., United*
7 *States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2014). As such, and as the Court has
8 addressed elsewhere (*see* Doc. 145), punitive damages are appropriate. As the Court
9 previously discussed in regards to the Childs Defendants, the appropriate punitive
10 damages are determined by applying a multiplier of three, granting YBR an additional
11 \$900,000. Accordingly, the total award to YBR is \$1.8 million.

12 **D. Attorneys’ Fees**

13 Pursuant to 18 U.S.C. § 1964(c), the terms of the Escrow Instructions, and A.R.S.
14 § 12-341.01, YBR requests its attorneys’ fees and costs in defending and offensively
15 litigating this action because the Court has found RICO violations and because the claims
16 arise out of the contracts between the parties. The Court agrees that, under 18 U.S.C.
17 § 1964(c) and, as evidenced by the Escrow Instructions, A.R.S. § 12-341.01, YBR is
18 entitled to seek reasonable attorneys’ fees and costs.

19 **IT IS THEREFORE ORDERED** granting Defendant and Counterclaimant
20 Yellow Brick Road, LLC’s Cross-Motion for Summary Judgment (Doc. 129) as to
21 Counts 1-2, which was previously denied (Doc. 146).

22 **IT IS FURTHER ORDERED** that Yellow Brick Road, LLC shall file its
23 application for attorneys’ fees no later than April 28, 2017. The Court will decide what
24 attorneys’ fees and costs will be awarded upon ripeness of the application.

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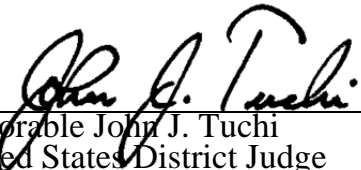
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IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment in favor of Defendant and Counterclaimant Yellow Brick Road, LLC on all of their Counterclaims against Plaintiff Larry J. Busch and Busch Law Center, LLC and close this matter.

Dated this 31st day of March, 2017.



Honorable John J. Tuchi
United States District Judge