

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-23429-Civ-COOKE/GOODMAN

MICHAEL LAVIGNE, JENNIFER LAVIGNE,
CODY PYLE, JENNIFER RIBALTA, JEFF
RODGERS, PATRICIA RODGERS, et al.,

Plaintiffs,

vs.

MARK ADDY, et al.,

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION
TO INDIVIDUAL DEFENDANTS' MOTION TO DISMISS**

Plaintiffs, by and through their undersigned counsel, respectfully submit this response in opposition to Individual Defendants' Motion to Dismiss [ECF No. 68]. For the reasons stated herein, the Motion to Dismiss should be denied.

I. Introduction

It takes a village. Defendants claim to have great financial success in Herbalife, and then conspire to tell a unified – but false – story about achieving that success by attending events; events which Defendants then sell to Plaintiffs in expensive non-refundable bulk packages.

While Defendants suggest that the sheer quantity of parties is in and of itself implicitly fatal to the Complaint, the breadth of the fraud is a reflection of a critical component of the scheme: Circle of Success victims are lured into expensive serial participation not just by the fraudulent promises made by the Defendants in isolation, but by the persuasiveness of a unified message presented by hundreds of seemingly independent spokespersons.

The named Defendants are a small subset of the hundreds of distributors who have reached Herbalife's highest levels and who participate in this social media marketed event

system. Plaintiffs have attempted to name only Defendants who fall into one of two categories:

- **Bosses:** Defendants like Susan Peterson, Dan Waldron, John Tartol, and Leslie Stanford, who have been atop the Herbalife scheme for decades and who exert operational level control over events across the country while also acting as the most prominent featured speakers.
- **Lieutenants:** Defendants like Amber & Jason Wick, Kris Bickerstaff, Tommy & Sandy Gioiosa, who are each part of a Boss' organization and who each exert operational level control over Circle of Success events in at least one U.S. region; have influence over nationwide decisions; or are the most active participants in the scheme.

Defendants conspire to manufacture and sustain their fraud by utilizing a classic RICO enterprise, with many individual parts each serving a greater whole – doing more damage together than they ever could alone. Defendants leverage social media to mass distribute their fraudulent story and have scaled their Circle of Success event enterprise into an outsized behemoth wreaking mass consumer harm.

Plaintiffs' allegations are well pled and well founded. They describe a continuous pattern of wire fraud in support of a cartel – cleverly and intentionally disguised as a group of like-minded entrepreneurs – that relieves victims monthly of their money and further saturates them with the idea that events are the key to unlocking Herbalife's just-out-of-reach treasures.

The Complaint adequately pleads dozens of specific acts of wire fraud in furtherance of this scheme to defraud. It alleges that Defendants – who represent the managerial level of the conspiracy – knew that their actions would cause Plaintiffs harm. The events scheme detailed in the Complaint does not, as Defendants argue, arise from the same facts as the claims in the *Bostick* action. Defendants are not parties to the *Bostick* settlement and its release cannot shield them from liability for their actions here.

For these reasons, as further discussed below, the Defendants' Motion to Dismiss the Complaint must be denied.

II. Argument¹

Plaintiffs have satisfied their burden of pleading a facially plausible claim. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Caldwell v. Carnival Corp.*, 944 F. Supp. 2d 1219, 1221 (S.D. Fla. 2013) (Cooke, J. quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). Further, “the RICO statute provides that its terms are to be liberally construed to effectuate its remedial purposes.” *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1349 (11th Cir. 2016) (quoting *Boyle v. United States*, 556 U.S. 938, 944 (2009)).

A. Plaintiffs state a claim under Section 1962(c).

1. **Plaintiffs have adequately pled a causal relationship between Defendants’ predicate acts and Plaintiffs’ injuries.**

The Complaint plainly illustrates how Defendants’ acts of wire fraud have caused Plaintiffs lasting harm. Defendants’ contention that Plaintiffs “largely fail to allege any connection whatsoever to the Individual Defendants” is wrong and premised on an incorrect reading of the law. Mot. at 8. Plaintiffs need only show that they were harmed by Defendants’ fraudulent scheme, not that they were harmed or defrauded by any specific predicate act in furtherance of that scheme.

The Eleventh Circuit has recognized that in a causation analysis, “the injurious conduct need not be the sole cause of Plaintiffs’ injuries, only that there must be ‘some direct relation,’ between the conduct and the injury to sustain the claim.” *Id.* at 1349. Defendants’ wire fraud need not be the “sole and exclusive cause” of the loss; but only a “substantial” or “significant contributing cause.” *U.S. Commodity Futures Trading Commn. v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1330 (11th Cir. 2018). “The wrongdoer, in other words, can be held liable to the plaintiff even if the wrongful act was not the sole cause of the loss.” *Id.* See also *Staub v.*

¹ In an improper attempt to circumvent the page requirements of Southern District of Florida Local Rule 7.1 (c)(2), Defendants incorporate former Herbalife Defendants’ motion to dismiss, which has since been denied as moot. See ECF No. 106. See also *Porter v. Collecto, Inc.*, 2014 WL 2612317 (S.D. Fla. 2014) (Striking a response to motion to dismiss for failing to comply with S.D. Fla. L.R. 7.1(c)(2); see also *Jimena v. UBS AG Bank, Inc.*, 2011 WL 2551413, at *1 n.2 (E.D. Cal. 2011) (holding that a Court should disregard a memorandum in excess of page limits). To the extent that the Defendants seek to rely on any of Herbalife’s dismissed arguments in support of its Motion to Dismiss, Plaintiffs expressly reserve the right to file a sur-reply to address any additional arguments.

Proctor Hosp., 562 U.S. 411, 420, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011) (recognizing that “it is common for injuries to have multiple proximate causes”).

The Complaint alleges a pattern of acts – primarily perpetrated over social media – in which Defendants, adhering to a scripted set of misrepresentations, act concertedly to support their fraudulent scheme:

By transmitting and causing to transmit, by means of wire in interstate commerce, writings, signs, signals, pictures and sounds, all in furtherance of, and for the purposes of, executing a scheme or artifice to defraud . . . Defendants have collectively persuaded hundreds of thousands of victims to invest substantial sums into attending events which are held out as the secret to becoming financially successful in a fraudulent scheme to which Defendants know financial success is not possible.

Compl. at ¶ 356.

The Complaint details numerous ways in which the Defendants’ individual and collective use of the wires has directly harmed unwitting consumers, including but not limited to:

- The sale of Circle of Success tickets over Defendant controlled websites to events which Defendants knew to be inherently fraudulent. Compl. ¶¶ 72-75.
- The dissemination of misleading event fliers over these websites and over social media pages controlled by the Circle of Success cabal. Compl. ¶¶ 92-100.
- Social media posts made by Defendants, or via their social media event pages, which dramatically overstate the necessity and value of attending events. Compl. ¶¶ 102, 104-105, 107-108.
- Encouraging low-level Herbalife members to echo the misrepresentations of the Defendants, resulting in thousands of additional misleading messages that influenced Plaintiffs. Compl. ¶¶ 98-99.
- Defendants’ online messages convince Plaintiffs of the necessity of pumping money into Herbalife products in order to “qualify VIP” for Circle of Success events. Compl. ¶ 96.
- Plaintiffs’ damages resulting from the Circle of Success scheme. Compl. ¶¶ 157-59, 162-63, 172-73, 180-81, 190-92, 201-202.

Finally, the Complaint alleges at least two examples of predicate acts committed by each Defendant in support of the scheme and attaches over thirty exhibits corroborating these allegations. *See e.g.* Compl. ¶¶208, 212, 216, 220, 224, 228, 232, 236, 240, 248, 251, 260, 264, 268, 271, 278, 282, 286, 289, 292, 297, 301, 305, 309, 312, 315, 219, 323 and 326; Exhibit 9, 19-46. Plaintiffs allege that they were duped by this steady stream of lies:

As a direct and proximate result of the Defendants' pattern of racketeering activity, Plaintiff class was injured in their business and property. Each Plaintiff was induced by reason of Defendants' misrepresentations, omissions, and blatant untruths – to surrender valuable consideration in order to participate in the inherently fraudulent scheme promoted by Defendants' racketeering enterprise.

Compl. at ¶ 360.

And more specifically:

- “Over the next few years, Jeff and Patti Rodgers – like thousands of other class members similarly situated – were convinced by an onslaught of guarantees that if they modeled the methods of leaders like Defendants Wick, Addy, Bickerstaff, Baker, Carillo, Jones and de la Concepcion, and worked the Herbalife business ‘event to event,’ lasting success was the certain outcome.” Compl. ¶ 155.
- “The Rodgers followed the instructions of company ‘mentors’ and ‘planned their lives around the Herbalife calendar.’” Compl. ¶159.
- “By November 2016, after two years under continuous pressure to ‘attend every event,’ Cody Pyle had attended twenty-six Circle of Success events, as detailed below.” Compl. ¶176.
- “Izaar and Felix were in the downline organization of Defendant President’s Team members Guillermo and Claudia Rasch. Like many others in Herbalife’s Latino market, Felix and Izaar were instructed by their upline to participate in continuous ‘training systems.’ The systems . . . had the Valdezes attending tri-weekly events costing up to \$200 per month.” Compl. ¶186.

Defendants rely on *Ray v. Spirit Airlines*, in which the Eleventh Circuit found the Plaintiffs failed to adequately plead causation when the allegations were nothing more than a “threadbare recital of the elements of a cause of action, supported by mere conclusory

statements.” 836 F.3d 1340 (11th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678). As demonstrated above, the Complaint contains extensive allegations that Plaintiffs spent money on and attended these events as a direct result of Defendants’ participation in a scheme to defraud.

Defendants also argue that Plaintiffs’ failure to “allege they received or reviewed” the acts of wire fraud alleged in the Complaint should be fatal. Mot. at 8. But Plaintiffs do not need to allege that they received and relied on the communications – only that they were proximately injured by the scheme – in this case, the concerted dissemination of thousands of fraudulent wire transmissions. In *Bridge v. Phoenix Bond & Indem. Co.*, the Supreme Court found that Plaintiffs have standing to sue under RICO even when they are not the direct recipients of the false statements at issue. 553 U.S. 639, 645 (2008). As the Court explained:

The upshot is that RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise’s affairs through a pattern of acts indictable as mail fraud. The gravamen of the offense is the scheme to defraud, and any ‘mailing that is incident to an essential part of the scheme satisfies the mailing element,’ . . . even if the mailing itself ‘contain[s] no false information.’

Id. at 647 (internal citations omitted).

The defendants in *Bridge* raised a similar argument to Defendants here: that Plaintiffs have not alleged how they relied to their detriment on the specific predicate acts. The United States Supreme Court held that Plaintiffs need not do so. Here, as in *Bridge*, it was the Defendants’ scheme – resting on an ecosystem of misrepresentations, lies and omissions – that injured the Plaintiffs.

Accordingly, Plaintiffs have adequately pled causation.

2. Plaintiffs adequately allege that each Defendant participated in the operation or management of the RICO enterprise.

Defendants make the curious argument that the allegations in the Complaint only serve to point a finger at Herbalife for the operation and management of the RICO enterprise; when, in fact, Plaintiffs’ allegations are centered around the actions of the Defendants. Mot. at 11. Many of the damaging financial transactions alleged in the Complaint concern money passing directly from consumers to Defendants in exchange for events organized, operated, promoted and performed by the Defendants. *See* Compl. ¶¶ 71-75.

As previously observed by this Court, a complaint sufficiently alleges “operation or management” when the facts show the defendant had a part in directing the affairs of the alleged enterprise. *Coquina Investments v. Rothstein*, 10-60786-CIV, 2011 WL 197241, at *3–4 (S.D. Fla. Jan. 20, 2011) (Cooke, J.) (citing *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)). Operation or management is not limited to parties who have a formal position or who are primarily responsible for the enterprise’s affairs. *Krehling v. Baron*, 93-347-CIV-FTM-17D, 1994 WL 143061, at *4 (M.D. Fla. Apr. 11, 1994) (“What is required under the ‘operation and management’ test... is that the party have ‘some part in directing the enterprise’s affairs.’”); *see also United States v. Browne*, 505 F.3d 1229, 1277 (11th Cir. 2007) (an enterprise is operated not just by upper management but also by other participants in the enterprise who are under the direction of upper management).

This “some part” standard is easily satisfied here. The Complaint is extensively documented and points only to Boss and Lieutenant-level Defendants who are integral to the operation and management of the Circle of Success enterprise. All Defendants are undeniably involved in the two primary components of the scheme – untruthful speaking engagements and the extensive online promotion of those engagements. Compl. ¶¶1-12, 54-137. While these allegations alone would suffice to meet the standard, the Complaint details a multitude of other ways in which Defendants are actively engaged in the operation and management of this fraudulent enterprise:

- More than half of the Defendants are alleged to be responsible for the organization and production of Circle of Success events in at least one U.S. region. Compl. ¶¶ 212, 216, 232, 236, 240, 244, 248, 256, 260, 265, 268, 275, 282, 286, 290, 293, 298, 301, 305, 309, 319, 323.
- The region controlling Defendants decide who will appear on the event stage. Compl. ¶ 350.
- More than a dozen Defendants are alleged to have been members of the powerful and secretive Strategy and Planning Committee, which helps dictate the course of the entire enterprise. Compl. ¶¶ 209, 213, 217, 221, 225, 229, 233, 237, 241, 245, 249, 253, 257.
- Defendants create and control the entities that collect money for Circle of Success events. Compl. ¶¶72-74.

- The Defendants, who constitute “the leadership” of the enterprise, “took ownership” of the STS system in 2009 under the control of Dan Waldron and the other Boss and Lieutenant level Defendants, sparking a rapid growth in the size and impact of the enterprise. Compl. ¶¶ 64-70.

Defendants, protected by their numerosity, can afford to be more aggressive in their fraudulent marketing of luxury living through Circle of Success event attendance than can the publicly traded Herbalife. The Defendants’ henchmen are legion and have *even less* to lose than the Defendants. Defendants’ RICO enterprise relies on this gradation of risk and responsibility – with Defendants perched atop the system making all the demands and reaping all the rewards.

Plaintiffs more than adequately allege each Defendants’ specific operation and management of the Circle of Success enterprise.

3. Plaintiffs plead sufficient facts to support an inference of scienter.

The fraud at the heart of the Circle of Success is of a deeply personal nature. “It’s all about the story,” says Defendant Amy Hendricks, “and promoting the trainer themselves.” Compl. ¶ 95. Defendants are uniquely positioned to know that “the story” they tell is false. When any of the dozen or more members of the so-called “Tartol Dynasty” credit event attendance for their success – rather than stacking or naked nepotism – they *know* their story is a blatant misrepresentation intended to mislead. Compl. ¶¶ 36-40, 214.

RICO does not have separate *mens rea* or scienter elements beyond those encompassed in its predicate acts. *Comcast of S. Florida II, Inc. v. Best Cable Supply, Inc.*, 07-22335-CIV, 2008 WL 190584, at *5 (S.D. Fla. Jan. 22, 2008) (quoting *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir.1984)). The requisite intent to defraud under 18 U.S.C. § 1343 exists if the defendant acts “knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to [himself].” *United States v. Keller*, 14 F.3d 1051, 1056 (5th Cir. 1994) (citations omitted). Proof of intent to defraud “may arise by inference from all of the facts and circumstances surrounding the transactions.” *Id.* (citing *United States v. Shively*, 927 F.2d 804, 814 (5th Cir. 1991), *cert. denied sub nom. Johnson v. United States*, 501 U.S. 1209 (1991)). Pursuant to Rule 9(b), intent may be alleged generally. *Comcast of S. Florida II, Inc. v. Best Cable Supply, Inc.*, 07-22335-CIV, 2008 WL 190584, at *5 (S.D. Fla. Jan. 22, 2008).

The Complaint details the methods Defendants use to generate money through banned methods and other means that have nothing to do with event attendance. Compl. ¶¶ 26-53. It alleges numerous misrepresentations by the Defendants, including their false refrain that event attendance and qualification was key to their success in Herbalife. *See* Compl. ¶¶ 3, 33, 101-137, 160, 166, 175, 274. Thus, the Complaint supports an inference that each Defendant lied about the role of events in their own success and intentionally concealed material facts concerning the true size and source of their income.

4. The allegations in the Complaint satisfy Rule 9(b).

To satisfy Rule 9(b), a RICO complaint alleging wire fraud must state: (1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the Plaintiffs; and (4) what the Defendants gained by the alleged fraud. *State Farm Mut. Auto. Ins. Co. v. Kugler*, 11-80051, 2011 WL 4389915, at *4 (S.D. Fla. Sept. 21, 2011); *Heise v. Porcelli*, 807-CIV-1866T-24-MAP, 2008 WL 4190270, at *2 (M.D. Fla. Sept. 8, 2008). An “innocent” use of the wires can be sufficient to satisfy the wire fraud statute so long as the use was in support of a scheme to defraud. *Schmuck v. United States*, 489 U.S. 705, 715 (1989). But far from being “innocent” Defendants here are shown using the wires to distribute the fraudulent message at the heart of their Circle of Success enterprise.

The Complaint contains exhaustive allegations of wrongdoing with scores of exhibits and examples offered in corroboration of those allegations. Defendants argue that Plaintiffs must plead “with particularity how each Defendant is alleged to have engaged in two predicate acts of wire fraud.” Mot. at 7 (emphasis original). But there is no such requirement. Rather, to state a claim against a Defendant under Section 1962(c) a Plaintiff need only allege that the RICO enterprise engaged in at least two predicate acts of wire fraud and that the Defendant participated in the operation or management of that enterprise. *Hpc US Fund 1 v. Wood*, 13-cv-61825, 2014 WL 12496558, at *3; *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006). A Defendant need not be the one pulling the trigger – every successful mob enterprise also needs its Cleaners, its Getaway Drivers, its Brains, and its Financiers. They too are viable RICO Defendants.

However, even assuming arguendo that Plaintiffs were required to plead two predicate acts of wire fraud for each Defendant, Defendants' argument would still fail because Plaintiffs have done so.

Social media has created a new kind of wire fraud – a creeping, constant fraud disguised as casual coffee shop conversation and cooperative scrapbooking. It injects poison into its victims with a million tiny bites; with echoes on echoes. Plaintiffs have included in the Complaint at least two examples of this modern form of wire fraud attributable to each Defendant. *See, e.g.*, Compl. ¶¶ 208, 212, 216, 220, 224, 228, 232, 236, 240, 248, 251, 260, 264, 268, 271, 278, 282, 286, 289, 292, 297, 301, 305, 309, 312, 315, 219, 323 and 326; *id.*, Ex. 9, 19-46. In the examples, the Defendant, or individuals/entities controlled by the Defendant, are shown using the wires to deliberately promote what they know to be a deception. Each example represents thousands of similar instances continuing unabated to the present.

The Complaint alleges that “more than sixty ever-changing U.S. based STS websites” are registered to Defendants or their agents, and names sites registered to Defendants Concepcion, Gioiosa, Tartol, Morrow, and Waldron. Compl. ¶71. Each site offers a steady diet of wire fraud in support of the Circle of Success enterprise. The public uses these sites to read the misleading biographies of the next month's featured speaker, to register their VIP qualification figures, and even to purchase the non-refundable event tickets. Compl. ¶72.

The Complaint alleges that Defendants distribute the misleading event fliers over a collection of Boss and Lieutenant controlled social media pages and specifies ten dated examples of this activity. Compl. ¶¶91-93.

The Complaint alleges that Boss and Lieutenant level Defendants are responsible for the hundreds of thousands of online posts made by low-level Herbalife distributors who are just following the instructions of “the leadership” when touting the irreplaceable value of attending Circle of Success events and encouraging each other to “qualify for everything.” Compl. ¶¶98-99, 136.

The Complaint alleges that Defendants promote the Circle of Success with their individual social media profiles and cites as representative two specific instances in which Defendant Lori Baker used her personal accounts to spread the misleading message that

“Events = Success.” Compl. ¶¶ 104-105. Such posts are spread widely as Defendants conspire to cross promote each other’s misleading online content. Compl. ¶ 94.

The Complaint alleges that the ranking agents of the Boss and Lieutenant level Defendants use social media to distribute particularly aggressive versions of the fraudulent message and it cites three specific predicate acts as representative. Compl. ¶¶ 129, 136, 192.

Among the Complaint’s starkest allegations of the predicate act of wire fraud is an online conference call hosted by the Gioiosa Defendants and featuring Defendants Amber Wick and Dani Edwards. Compl. ¶¶ 197-201. Defendants state in no uncertain terms that Circle of Success event attendance is likely to lead to the rapid accumulation of “legacy” wealth and that call participants should spend their last remaining pennies on the event – or even charge it to a credit card. Circle of Success participants are encouraged to take part in such calls on a weekly basis. Compl. ¶ 69.

Plaintiffs have pointed to a more than plausible pattern of wire fraud. Defendants’ argument must fail because each Defendant has been reasonably notified of their purported role in the scheme as is required by Rule 9(b).

B. Plaintiffs have pled an actionable RICO conspiracy claim under Section 1962(d).

The conspiracy at the heart of Defendants’ RICO enterprise is both overt and covert. Defendants overtly “unite their efforts” and work together toward “common goals.” Compl. ¶¶ 141-43. Covertly, they agree to hide the fact that their success in Herbalife was not, as they claim, due to Circle of Success event attendance but rather to some combination of “illegal or impermissible activity.” Compl. ¶¶ 31-33.

Defendants argue that because Plaintiffs purportedly do not state viable claims for substantive RICO violations under § 1962(c), the RICO conspiracy claim necessarily fails as well. *See* Mot. at 13. For the reasons stated above, Plaintiffs adequately plead substantive RICO violations and Defendants’ argument should be rejected.

Alternatively, Defendants argue that Plaintiffs fail to allege a conspiracy. However, Plaintiffs more than adequately allege facts supporting the inference of each Defendant’s agreement to commit predicate acts in furtherance of the Circle of Success scheme. Defendants acknowledge that “agreement” to participate in a RICO conspiracy may be proven in one of two ways: (1) by showing an “agreement on an overall objective, or (2) by showing that a defendant agreed personally to commit two predicate acts and therefore agreed

to participate in the objective of the conspiracy. *See* Mot. at 13 (citing *United States v. Church*, 955 F.2d 688, 694–95 (11th Cir. 1992)). “The existence of a conspiracy may be inferred from ‘the conduct of the alleged participants or from circumstantial evidence of the scheme.’” *Church*, 955 F.3d at 248 (citations omitted). “The focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. *United States v. Starrett*, 55 F.3d 1525, 1543–44 (11th Cir. 1995). “A RICO conspiracy differs from an ordinary conspiracy in two respects: it need not embrace an overt act, and it is broader and may encompass a greater variety of conduct.” *Id.* (quoting *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984) (footnotes omitted)). Plaintiffs can establish agreement to an overall objective “by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.” *Id.* at 1544. Regardless of the method used to prove agreement, Plaintiffs need not allege “that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy.” *Id.*

Plaintiffs describe in detail Defendants’ coordinated methods, their pattern and practice of deceiving victims through Circle of Success events using the Defendant controlled Success Training Seminar (“STS”) system, and each Defendants’ predicate acts in furtherance of that common objective. Rather than address the Complaint, Defendants ignore the multitude of allegations supporting a conspiracy and rest on knee-jerk, tired and inapplicable terminology that the pleading is “shot-gun” and “amorphous.” Defendants claim the conspiracy allegations are “conclusory” and contain “no facts describing an agreement among the Individual Defendants to defraud people into attending STS events.” Mot. at 13. But the opposite is true. The Complaint extensively details: Defendants’ coordinated participation in the Defendant-controlled STS system, *see, e.g.*, Compl. ¶¶ 63-75, their specific roles in carrying out the Circle of Success enterprise including exhibits illustrating and corroborating at least two alleged predicate acts of each Defendant in furtherance of the same conspiratorial objective to defraud victims through events, *see, e.g.*, Compl. ¶¶ 206-328, *id.* Ex. 19-46, each Defendants’ knowledge of and participation in the collective fraud perpetrated in close association with co-conspirators through the common scheme, *see, e.g.*, Compl. ¶¶ 138-

46, and the organized pattern and practice of utilizing the same lies and unscrupulous techniques to cause victims such as the Plaintiffs to part with their money, their jobs, their homes – even their families – based on representations which Defendants knew to be patently false, *see, e.g.*, Compl. ¶¶ 54-61, 67, 90-137, 334, 339, 363-65.

These allegations of coordinated, systematic activity by the Defendants support, at minimum, an inference that Defendants have agreed to participate in a conspiracy to defraud the Plaintiffs and others similarly situated through the illegal and manipulative workings of the Circle of Success enterprise.

C. The *Bostick* settlement does not release claims against Defendants.

Relying on documents outside the four corners of the Complaint, Defendants' last gasp argument claims that the issues alleged in the Complaint were released by the settlement that resulted from a 2013 lawsuit brought against Herbalife's alleged pyramid scheme.² This assertion is erroneous.

Dana Bostick and the other Plaintiffs in the *Bostick* action were part of Herbalife's long running internet "lead generation" system. Under the "lead generation" system, Defendants and other high-level Herbalife distributors made significant financial outlays to purchase radio and television advertising touting vague "work from home" and "internet business" opportunities. Those successfully recruited into the Herbalife business opportunity via this form of advertising were then sold the names of other "leads" like themselves who could potentially be recruited into the scheme. Bostick Compl. ¶¶ 42-51.³

In the five years since the *Bostick* complaint was filed, the Circle of Success has replaced Herbalife's mass media "lead generation" system as the primary focus of time and attention among Herbalife's Boss and Lieutenant level distributors. Compl. ¶¶ 63-65. The Complaint

² If Defendants wish to raise release as an affirmative defense, they will have the opportunity to do so in their Answer. *See* Fed. R. Civ. P. 8(c)(1); *see also Ceithaml v. Celebrity Cruises, Inc.*, 207 F. Supp. 3d 1345, 1356 (S.D. Fla. 2016) (consideration of releases would be premature at motion to dismiss stage as the release of liability is more properly considered an affirmative defense).

³ To the extent the Court wishes to consider documents outside the four corners of the Complaint, the Plaintiffs respectfully request that the Court take judicial notice of docket entries 1, 131, 134 and 137 of the case styled *Bostick v. Herbalife International of America, Inc., et al.*, Case No. 13-cv-02488-BRO-RZ (C.D. Cal. 2013).

here alleges largely post-settlement conduct that does not arise from identical, or even similar, factual predicates to those in the *Bostick* action.

1. Defendants are not parties to the *Bostick* release.

The *Bostick* settlement releases certain claims against the Herbalife entities: Herbalife International of America, Inc., Herbalife International, Inc., and Herbalife Ltd., and “each of their present and former, direct and indirect, subsidiaries, parents, affiliates, unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, and/or representatives.” ECF No. 61 at §8.1. The settlement does not release any of the Defendants because the Defendants are third parties – not employees, agents, representatives, etc.

The eighteen objectors to the *Bostick* settlement argued that the release was overbroad and could be read to include claims against the Boss and Lieutenant level distributors responsible for running the lead generation enterprise to which victims lost substantial sums of money. *See* Case No. 13-cv-02488, Central District of California, ECF No. 134 at 21. But Herbalife argued in its memorandum in support of the final settlement, that “Class members nevertheless retain their rights to pursue claims against third parties.” *Id.* at ECF No. 131 at 7. The Court agreed:

Even assuming the scope of the release may extend to Herbalife’s officers and directors who engaged in lead generation, however, by its plain terms it does not extend to third party lead generation businesses unassociated with Herbalife. As a result, class members believing these businesses harmed them may still file separate lawsuits to recover damages and consequential losses.

Id. ECF No. 145 at 49.

Defendants nevertheless argue that they are protected by the *Bostick* release as “representatives” of Herbalife – but claim they are “representatives” *only if* they are found liable for conspiracy and need the release to shield themselves from liability. ECF No. 68 at 14, n.9. Defendants otherwise concede they are not Herbalife representatives; a position consistent with the settlement language, which does not release the Defendants or other distributors, and with Herbalife’s Rules of Conduct, which expressly state that distributors are not agents of Herbalife. ECF No. 62 at 644, Exhibit G.

As usual, Defendants seek to have it both ways. Defendants' position is internally inconsistent, self-serving, and wrong as a matter of law. A "co-conspirator" is not tantamount to a "representative" as Defendants would have the Court find: conspiring with others in a racketeering enterprise does not make the co-conspirators "representatives" of one another. In fact, pursuant to the intracorporate conspiracy doctrine, it is not possible for a corporation and its agents to conspire, "just as it is not possible for an individual person to conspire with himself." *Dickerson v. Alachua Cty. Com'n*, 200 F.3d 761, 767 (11th Cir. 2000). Yet Defendants insist that one can only be engaged in a conspiracy if he is a representative of the entity with whom he is conspiring. Accordingly, Defendants' argument fails.

2. Even if Defendants were covered by the release language, dismissal of Plaintiffs' claims based on *Bostick* would violate due process.

a) Defendants have not shown that Plaintiffs' interests in this case were adequately represented in *Bostick*.

Dismissal based on *Bostick* would be improper because nothing within the four corners of the Complaint or in the record before this Court shows that Dana Bostick adequately represented the interests of Plaintiffs or the putative class in connection with these claims in the *Bostick* case. "Without adequate representation, a court order approving a claim-preclusive class action settlement agreement cannot satisfy due process as to all members of the class." *Hesse v. Sprint Corp.*, 598 F.3d 581, 588–89 (9th Cir. 2010) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[T]he Due Process Clause ... requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) ("To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them."); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) ("[I]f the plaintiff was not adequately represented in the prior action, or there was a denial of due process, then the prior decision has no preclusive effect.")). "Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members." *Hesse*, 598 F.3d at 589 (citing *Hanlon*, 150 F.3d at 1020 (9th Cir. 1998)).

As illustrated below, *Bostick* arose from a different factual predicate than this case. *Bostick* did not raise claims or seek damages in connection with an events-based scheme or

event attendance. Moreover, it does not appear that in *Bostick*, the class representative vigorously prosecuted or represented these interests on behalf of the class, and Defendants have not shown otherwise. Accordingly, Defendants have not and cannot establish the adequacy of the class representative in *Bostick* to satisfy due process and to have represented the interests of Plaintiffs and class members in this case.

b) Plaintiffs' claims do not arise from an identical factual predicate as those in *Bostick*.

The present Complaint is about the events sold by the Defendants. The Complaint alleges a distinct and elaborate enterprise comprised of the Defendants, Herbalife, and other entities that illegally generate money for Defendants through a “tools business.” Compl. ¶¶ 47-48.

In contrast, *Bostick* involved claims that Herbalife induced members to purchase unsellable products in unnecessary bulk. The centerpiece of the *Bostick* case was class members' purchases of Herbalife products based upon misrepresentations made in the mostly mailed marketing materials. *Bostick* Compl. ¶¶175-185. *Bostick* examined Herbalife's marketing plan and failure to follow its own safeguards. *Id.* ¶¶186-213. The *Bostick* plaintiffs raised claims under RICO based upon Herbalife's use of a pyramid scheme to defraud class members and those claims were dismissed before settlement. *Id.* ¶¶56-137.

A “settlement agreement's bare assertion that a party will not be liable for a broad swath of potential claims does not necessarily make it so.” *Hesse*, 598 F.3d at 590 (internal citations and quotations marks omitted). Although a settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, that is only the case where the released claim is “based on the *identical factual predicate* as that underlying the claims in the settled class action.” *Hesse*, 598 F.3d at 590 (quoting *Williams*, 517 F.3d at 1133) (emphasis added).

In *Hesse*, the Ninth Circuit found that a release of claims in a prior class settlement did not bar subsequent claims by settlement class members that did not arise from an identical factual predicate. The prior action involved a broad release of claims in a nationwide settlement between Sprint and its customers. It arose out of Sprint's billing of customers for specific federal regulatory fees. Although the claims in *Hesse* also involved the imposition of fees charged by Sprint, it dealt specifically with a state tax surcharge invoiced to Sprint's Washington customers. The court of appeals held that the *Hesse* claims did not arise from an

identical factual predicate as the claims in the prior class action, therefore, the release in the prior settlement did not bar the current claims.

Similarly, the factual predicate in this case is distinct from that in *Bostick*. The predicate is laid out in the first paragraph of the Complaint:

This action seeks recovery from a corrupt organization of individuals and entities who act together, using misrepresentation and deceit, *to sell access to a series of emotionally manipulative live events.*

Compl. ¶ 1 (emphasis added).

The Complaint details a Circle of Success enterprise comprised of these live events. It alleges that the “events are pitched as the guaranteed pathway to attaining life changing financial success” and that they “are held each month in dozens of locations across the country, and range in size from 200 to 20,000 attendees.” Compl. ¶ 2. Members are told that they must attend every event to be successful and that they should “qualify for everything” if they want to get rich. Compl. ¶¶ 3, 6.

The Complaint provides background on Herbalife and the Defendants, but also goes into detail concerning the Circle of Success enterprise, the intentionally manipulative nature of Circle of Success events, Defendants’ participation in the enterprise, and the impact of the events on the Plaintiffs. *See, e.g.*, Compl. ¶¶ 54-146 (detailing events), ¶¶ 149-202 (Plaintiffs), ¶¶ 210-328 (Defendants). Each of the counts in the Complaint is based upon that factual predicate, set forth in the general allegations, concerning the Circle of Success events and STS system. *See* Compl. Counts I-V. Events, including specific events and the various aspects of those events, are discussed in a majority of the allegations and are referenced hundreds of times throughout the Complaint. *Bostick* does not contain similar allegations concerning the events enterprise.

The Complaint describes the STS system, comprised of a web of intricately coordinated entities. *See* Compl. ¶¶ 67-75. It describes how event tickets are purchased over these STS websites and how money is paid to various companies established by the Defendants. Compl. ¶¶ 71-75. The allegations explain how at Circle of Success events, attendees are encouraged to buy tickets for future STS events in bulk packages of between five and twenty tickets, and that these tickets are non-refundable. Compl. ¶ 75. The Complaint alleges that Defendants make much of their money running “tools businesses” that are fully

detached from Herbalife's compensation plan. Compl. ¶ 47. President's Team distributors do not disclose when revenue from "tools businesses" like the Circle of Success have funded the mansions, exotic automobiles, yachts, and helicopters used in their mass marketing of these events. Compl. ¶ 48.

In *Bostick*, Herbalife argued consequential damages should not be available to members of the *Bostick* class. See Bostick ECF No. 137 at 11 ("The parties have articulated in their respective briefs in support of final approval the strong arguments Herbalife has for why class members are limited to recovering amounts they paid to Herbalife, i.e., not to third parties."); see also Bostick ECF No. 131 at 4 ("Such product purchases were the only way in which money was allegedly transferred from claimants to Herbalife").

There were no event-based claims in *Bostick*. Events are mentioned just a handful of times and only in connection to the way Herbalife markets itself and its products. *Bostick* did not seek damages in connection with event attendance. The Complaint does not allege that Bostick attended events or seek any recovery in connection with such event attendance. None of the claims in *Bostick* were asserted against the Defendants in this case.

Thus, the nucleus of operative facts in *Bostick* is far from identical to that in the present case. The Circle of Success damages alleged here are driven by the Defendants and are distinct from whatever damages Herbalife and the Defendants may have caused through their operation of an alleged pyramid scheme.

3. Even if the *Bostick* settlement released claims against the Defendants, the release would not apply to the Defendants' post-settlement conduct or those specifically excluded from the release.

Defendants acknowledge that the claims of four of the eight Plaintiffs were not released in *Bostick*. ECF No. 68 at 14; see also ECF No. 70 at 1. Cody Pyle and Mike and Jen LaVigne were part of a subset of Herbalife distributors who started after the commencement of the *Bostick* action and were excluded from the settlement class. Bostick Stipulation of Settlement §1.13.2. Jen Ribalta was excluded for having reached the "GET Team" level in Herbalife's marketing plan. Bostick Stipulation of Settlement §1.13.1. Defendants cannot argue the release applies to these, or any similarly situated, Plaintiffs.

Moreover, it is well established that "a class action settlement's release is unenforceable against claims predicated on the defendant's post-settlement conduct." *Feller v.*

Transamerica Life Insurance, 2016 WL 6602561, at *6 (9th Cir. Nov. 8, 2016) (refusing to apply release to post-settlement conduct); see also *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, ML 04-1610 AHM, 2005 WL 5678842, at *7 (C.D. Cal. Apr. 26, 2005) (Plaintiffs' breach of contract claims were not based on the identical factual predicate as the prior action because it involved actions by defendants years after the settlement which could not have been asserted in the prior litigation. Accordingly, the release, "as broad as it is" could not bar Plaintiffs' breach of contract claim"). Here, even if the December 2014 *Bostick* release were the operative cut-off point, the Complaint alleges dozens of examples of post-settlement conduct. See, e.g. Compl. ¶¶74, 92, 102, 104-108, 127-31, 136, 155-62, 165-72, 176-80.

III. Conclusion

Defendants complain that the Complaint contains "lumped" allegations that do not satisfy the various legal standards involved. Mot. at 5. Meanwhile, the Motion to Dismiss fails to point to deficiencies in the Complaint regarding any single specific Defendant. Plaintiffs, on the other hand, plead a concrete, cognizable, continuing harm and each of the named Defendants plays a critical role in perpetrating that harm by engaging and conspiring to engage in a pattern of racketeering activity. Accordingly, Defendants' Motion to Dismiss should be denied.

Dated: September 14, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of September 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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