NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SEAN L. GILBERT, et al.,

Plaintiffs,

v.

MONEYMUTUAL, LLC, et al.,

Defendants.

Case No. 13-cv-01171-JSW

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SETTING STATUS CONFERENCE

Re: Dkt. No. 403

Now before the Court for consideration is the motion for summary judgment filed by MoneyMutual, LLC ("MoneyMutual"), Selling Source, LLC ("Selling Source"), PartnerWeekly, LLC ("PartnerWeekly"), Glenn McKay ("Mr. McKay"), Brian Rauch ("Mr. Rauch"), John Hashman ("Mr. Hashman"), Douglas Tulley ("Mr. Tulley"), Samuel Humphreys ("Mr. Humphreys"), Alton F. Irby, III ("Mr. Irby") (collectively, "Money Mutual Defendants"), and Montel Brian Anthony Williams ("Mr. Williams").

Plaintiffs Sean L. Gilbert ("Mr. Gilbert"), Kimberly Bilbrew ("Ms. Bilbrew"), Keeya Malone ("Ms. Malone"), and Charmaine Aquino ("Ms. Aquino") (collectively "Plaintiffs") obtained "payday loans" that they contend were illegal because: (1) the lenders charged fees greater than that permitted by California Financial Code sections 23000, *et seq.*, the Deferred Deposit Transaction Law ("CDDTL"); and (2) the lenders were not licensed under the CDDTL to make such loans. As noted in prior orders, Plaintiffs have not sued the "Unlicensed Lenders."[1]

Plaintiffs contend Defendants marketed, promoted, and facilitated the making of illegal

[1] When the Court uses the term "Unlicensed Lenders," it means the lender is not licensed in California and is listed in paragraph 41 of the Fifth Amended Complaint ("5AC").

payday loans by the Unlicensed Lenders. Plaintiffs seek relief for alleged violations of the CDDTL (the "CDDTL claim"), alleged violations of the Racketeering Influenced and Corrupt Organizations Act (the "RICO claim"), and alleged violations of the unlawful and fraudulent prongs of California's unfair competition law, Business and Professions Code sections 17200, *et seq.*, ("the UCL claim").[2]

The Court has considered the parties' papers, relevant legal authority, the record in this case, and the parties' arguments at the hearing on this motion. The Court HEREBY GRANTS, IN PART, AND DENIES, IN PART, the motion.

FACTUAL BACKGROUND

A. Defendants and Their Businesses.

Selling Source is the parent holding company of MoneyMutual and PartnerWeekly. (Dkt. No. 403-1, Declaration of Timothy Madsen ("Madsen Decl."), ¶ 2; Dkt. No. 403-2, Declaration of Glenn McKay ("McKay Decl."), ¶ 2.) Mr. Tulley, Mr. Humphreys, and Mr. Irby are principals of former defendant London Bay Capital, which is an indirect majority owner of Selling Source. Although Mr. Tulley and Mr. Irby sit on Selling Source's board of directors, there are very few formalities associated with the board. (Dkt. No. 403-1, Declaration of Donald Putterman ("Putterman Decl."), ¶ 10, Ex. I, Deposition of Douglas Tulley ("Tulley Depo.") at 9:4-16, 11:6-10, 12:10-13; Putterman Decl., ¶ 11, Ex. J, Deposition of Alton Irby, III ("Irby Depo.") at 13:18-22, 14:3-10, 22:12-21.)

Mr. Rauch worked for Selling Source as Director of Online Marketing and at PartnerWeekly as Vice President of Online Marketing, but he was not an officer of either company. (Putterman Decl., ¶ 9, Ex. H, Deposition of Brian Rauch ("Rauch Depo.") at 22:11-23:11.) Mr. Rauch worked at the companies from 2003-2009. (*Id.* at 26:3-4, 27:4-7.) Mr. Hashman worked at Selling Source from 2008 to 2010. During that time, he was not involved with the payday loan lead generation line of business. (Putterman Decl., ¶ 7, Ex. F, Deposition of

[2] The Court granted class certification on the CDDTL claim, the RICO claim, and the UCL claim to the extent it is based on unlawful conduct. *See Gilbert v. MoneyMutual LLC*, 318 F.R.D. 614 (N.D. Cal. 2016).

John Hashman ("Hashman Depo.") at 46:15-47:17, 48:20-22.) Mr. Hashman worked for PartnerWeekly from 2010 as Executive Vice President of Lender Sales and became President in May 2013. Mr. Hashman left PartnerWeekly in January 2014. (*Id.* at 54:13-15, 57:18-58:1, 62:21-24.)

Mr. McKay is the President and Chief Executive Officer ("CEO") of Selling Source. Mr. Madsen is the President of PartnerWeekly and reports to Mr. McKay. Before Mr. Madsen joined PartnerWeekly, he was Vice President of Marketing at Integrity Advance LLC, one of the Unlicensed Lenders. (5AC, ¶ 41jjj; Plaintiffs' Compendium of Evidence ("COE"), Vol. I at 180; COE, Vol. III at 539-40.) Mr. McKay and Mr. Madsen each attest that Selling Source "does not direct or supervise either PartnerWeekly's or MoneyMutual's day to day operations." MoneyMutual does not have employees of its own, so PartnerWeekly acts as MoneyMutual's managing agent. PartnerWeekly has its own management team. (McKay Decl., ¶¶ 1-3; Madsen Decl., ¶¶ 1, 3-4.)

MoneyMutual and PartnerWeekly are lead generation companies. "Lead generation" refers to the practice of putting consumers in search of particular products and services with providers of those goods and services. (*See, e.g.*, Madsen Decl., ¶ 5; McKay Decl., ¶¶ 5, 11, Ex. A.) PartnerWeekly enters into Loan Purchase Agreements ("LPAs") with lenders. (Madsen Decl., ¶ 13.) The LPAs that are in the record contain a section entitled "Warranties." Although the exact language varies, the LPAs in the record all contain provisions where the lenders represent and warrant they are "duly licensed" or "maintain[] all necessary licenses and registrations" to offer "Loan Related Products" or "engage in the activities contemplated under" the LPA. (*Id.* ¶ 13, Exs. B-H.) The warranty section also includes representations regarding compliance with laws relating to usury and, more recently, protections relating to personal information and marketing practices. (*Id.*)

According to Mr. Madsen, "[m]ore recently, PartnerWeekly's LPA also has required compliance with the Online Lender's Alliance ('OLA') Best Practices." (Madsen Decl., ¶ 13, Ex. H (LPA), Ex. I (OLA Best Practices March 2016).) Mr. Madsen also attests that if a PartnerWeekly customer wants to receive leads from MoneyMutual, they must comply with the

MoneyMutual Code of Conduct, which is attached to the LPA. (Madsen Decl., ¶ 13, Ex. H.)

Once a lender executes an LPA, it creates and submits Insertion Orders ("IOs") that set forth the parameters for the types of and numbers of leads they are seeking. The IOs may include information such as states that are excluded from the lending program, income parameters, and the price a lender is willing to pay for qualified leads. (Madsen Decl., ¶ 14, Exs. J-N; McKay Decl., ¶¶ 20-21, Exs. K-O.)

PartnerWeekly also is a "lead aggregator," which means it enters into non-exclusive contracts with third-parties who engage in internet lead generation activities on their own behalf and sell leads to PartnerWeekly. PartnerWeekly will then sell those leads to its customers. (Madsen Dec., ¶ 24; McKay Decl., ¶ 30.) Lenders pay PartnerWeekly based on the leads they acquire. (Madsen Decl., ¶ 19; McKay Decl., ¶ 25.) Mr. McKay attests that he does "not participate in what lenders are 'on-boarded' by PartnerWeekly." (McKay Decl., ¶ 3.)

Mr. Tulley and Mr. Irby testified that they do not have day to day involvement with Selling Source, PartnerWeekly or MoneyMutual and testified they neither decide which lenders to contract with nor decide what criteria are used to select lenders. (Putterman Decl., Ex. I, Tulley Depo. at 9:11-16, 37:25-38:6, 47:11-48:3, 48:22-49:19, 77:9-25, 95:4-6; Putterman Decl., Ex. J, Irby Depo. at 49:4-7, 49:10-17, 50:10-16, 54:4-9, 54:21-55:13.) Mr. Tulley did testify that he thought about licensing issues but was not aware that lenders in the MoneyMutual Defendants' lending network did not have licenses in California. (Putterman Decl., Ex. I, Tulley Depo. at 53:15-54:11.)

MoneyMutual owns and operates the website www.moneymutual.com and engages in national television and internet advertising to promote the website "to consumers potentially interested in obtaining a loan through one of the lenders" that has completed an LPA and submitted an IO. (Madsen Decl., ¶ 6; McKay Decl., ¶ 6.) MoneyMutual also sends marketing emails to consumers. (Wilens Decl., ¶¶ 14-15; COE Vol. II at 422-444.) The advertisements and website do not reference Selling Source or PartnerWeekly.

If a consumer provides information to the MoneyMutual website, that information is transferred automatically and in real time to PartnerWeekly via the "Ping Tree," a software

program developed by McKay. (Madsen Decl., ¶¶ 6, 16; McKay Decl., ¶¶ 6-7.) The MoneyMutual website and its advertisements refer to a "network" of "participating lenders," but they do not mention or promote specific lenders and do not discuss loan terms. Instead, consumers are advised they must discuss loan terms directly with the lenders. (Madsen Decl., ¶¶ 15, 21; McKay Decl., ¶¶ 22, 26-27; COE, Vol. II at 424-430 (sample of marketing materials).)

It is undisputed that Selling Source, MoneyMutual, PartnerWeekly, and the individual defendants do not have licenses from California with respect to deferred deposit transactions. The California Department of Business Oversight ("DBO") and its predecessors have never advised these entities that they are required to be licensed or that they are required to comply with the CDDTL. (Madsen Decl., ¶ 25; McKay Decl., ¶ 31.)

Mr. Williams acts as a celebrity endorser for MoneyMutual. Mr. McKay attests that Mr. Williams is not involved in the business affairs of Selling Source, PartnerWeekly or MoneyMutual. Mr. McKay also attests that Mr. Williams: "is not consulted or involved in lead generation activities"; "did not develop or contribute to the content" of the website; has had "no role considering lender applications or deciding" which lenders become part of Selling Source's lender network; and was not involved in drafting or enforcing the Lender's Code of Conduct or "setting contract requirements, [or] on-boarding" lenders. (McKay Decl., ¶ 34; *see also* Madsen Decl., ¶ 28.)

B. Plaintiffs and Their Loans.

1. Mr. Gilbert.

On November 26, 2012, Mr. Gilbert used the MoneyMutual.com website to obtain a payday loan from Cash Yes, an Unlicensed Lender. This loan was the only loan Mr. Gilbert obtained through the MoneyMutual website. (Dkt. No. 414, Declaration of Sean L. Gilbert ("Gilbert Decl."), ¶ 2; Dkt. No. 411-6, Declaration of Jeffrey Wilens ("Wilens Decl."), ¶¶ 4-5; COE, Vol. I at 179, 182; Putterman Decl., ¶ 5, Ex. E, Deposition of Sean Gilbert ("Gilbert Depo.") at 26:16-30:9, 79:11-80:10.) Mr. Gilbert knew MoneyMutual was not a lender. (Gilbert Depo. at 196:3-9.)

Mr. Gilbert attests that he trusted Cash Yes because "they were promoted by Money

Mutual and Montel Williams" and believed his "best option for getting a safe payday loan from a company would be to use one of the recommended lenders." (Gilbert Decl., ¶ 3; *see also* Gilbert Depo. at 20:10-24.) Mr. Gilbert also attests that he recalls seeing "something about a 'Code of Conduct' on the Money Mutual website. It said the lenders were monitored by Money Mutual and required to comply with debt collection laws. So, I felt secure in giving my personal information including social security and bank account numbers to the people at Cash Yes. I assumed they were not criminals and my information would be safe." (*Id.* ¶ 4.)

Mr. Gilbert attests that if he had known that Cash Yes was unlicensed and that his personal information could be used to harass him, he would not have taken out a loan from Cash Yes or used the MoneyMutual website for that purpose. (*Id.*, ¶ 5.) Mr. Gilbert did complain about Cash Yes to the California's Department of Corporation's enforcement division, which included a statement that he obtained the loan through MoneyMutual. According to Mr. Gilbert, he complained that MoneyMutual would not give him information, but he did not complain about any other conduct by MoneyMutual. (Gilbert Depo. at 88:20-25, 90:17-92:17, 99:16-102:25, Gilbert Depo. Ex. 54.)

2. Kimberly Bilbrew.

On or about January 30, 2013, Ms. Bilbrew used the MoneyMutual website to obtain a loan from Castle Payday, also known as 7X Services, an Unlicensed Lender. (Dkt. No. 414-1, Declaration of Kimberly Bilbrew ("Bilbrew Decl."), ¶ 2); Wilens Decl., ¶¶ 4-5; COE, Vol. I at 179, 182.) On or about February 4, 2013, Ms. Bilbrew used the MoneyMutual website to obtain a loan from Cash Yes. (Bilbrew Decl., ¶ 4.) On February 12, 2013, Ms. Bilbrew received an email from MoneyMutual, in which it advised her that she "may have additional advances available." (COE, Vol. II at 422.)

Ms. Bilbrew attests that she trusted these lenders because "they were promoted by Money Mutual and Montel Williams" and believed her "best option for getting a safe payday loan from a company would be to use one of the recommended lenders." (Bilbrew Decl., ¶ 8; *see also* Putterman Decl., ¶ 4, Ex. D, Deposition of Kimberly Bilbrew ("Bilbrew Depo.") at 14:18-16:4, 98:15-99:12.) Ms. Bilbrew testified that she knew MoneyMutual was not a lender. (Putterman

Decl., Ex. D, Bilbrew Depo. at 39:6-8.)

Ms. Bilbrew attests that she recalls seeing "something about a 'Code of Conduct' on the Money Mutual website. It said the lenders were monitored by Money Mutual and required to comply with debt collection laws. So, I felt secure in giving my personal information including social security and bank account numbers to the people at the three lenders. I assumed they were not criminals and my information would be safe." (Bilbrew Decl., ¶ 9.) Ms. Bilbrew attests that if she had known that the lenders were unlicensed and that her personal information could be used to harass her, she would not have taken out the loans from them or used the MoneyMutual website for that purpose. (*Id.* ¶ 10.)

3. Keeya Malone.

On November 28, 2012, Ms. Malone used the MoneyMutual website to apply for a payday loan from Cash Yes, but that loan was not funded. (5AC ¶ 53; Putterman Decl., ¶ 1, Ex. A, Deposition of Keeya Malone ("Malone Depo.") at 34:12-22.) On November 29, 2012, Ms. Malone used the MoneyMutual website to obtain a loan from Bottom Dollar Payday, also known as BD PDL Services, LLC, an Unlicensed Lender. (Dkt. No. 414-2, Declaration of Keeya Malone ("Malone Decl."), ¶¶ 2, 8; Wilens Decl. ¶¶ 4-5; COE, Vol. I at 179, 182.)

Ms. Malone attests that she trusted Bottom Dollar because "they were promoted by Money Mutual and Montel Williams" and believed her "best option for getting a safe payday loan from a company would be to use one of the recommended lenders." (Malone Decl., ¶ 4; *see also* Malone Depo. at 90:3-13.) Ms. Malone also attests that she recalls seeing "something about a 'Code of Conduct' on the Money Mutual website. It said the lenders were monitored by Money Mutual and required to comply with debt collection laws. So, I felt secure in giving my personal information including social security and bank account numbers to the people at Bottom Dollar. I assumed they were not criminals and my information would be safe." (Malone Decl., ¶ 5; *see also* Putterman Decl., Ex. A, Malone Depo. at 104:14-105:12.) Ms. Malone attests that if she had known that the lenders were unlicensed and that her personal information could be used to harass her, she would not have taken out the loans from them or used the MoneyMutual website for that purpose. (Malone Decl., ¶ 6.) Ms. Malone has not communicated with any of the MoneyMutual

Defendants. (Malone Depo. at 16:8-17:16.)

4. Charmaine Aquino.

On or about February 1, 2013, Ms. Aquino used the websites "thesmartsellingsolution.com" and "my-paydayloan.com" to apply for loans from "Liquid Ventures" and "Devwire Consulting," which are Unlicensed Lenders. (Dkt. No. 414-3, Declaration of Charmaine Aquino ("Aquino Decl."), ¶ 2; Wilens Decl., ¶¶ 4-5; COE, Vol. I at 180, 182.) On February 11, 2013, Ms. Aquino used the website www.payday-payday.com to obtain a loan from "Vista B LLC," also known as "VIP Loan Shop." On March 8, 2013, Ms. Aquino used the website "firstnationalpaydayloan.com" to obtain a loan from "Vivus Servicing." (Aquino Decl., ¶¶ 3-4.)

Ms. Aquino alleges that the "payday-payday.com" and "firstnationalpaydayloan.com" websites are affiliated with Selling Source. (5AC ¶ 54.) Vista B LLC is an Unlicensed Lender. (Wilens Decl., ¶¶ 4-5; COE, Vol. I at 181-82.) Ms. Aquino attests that if she had known the lenders she used through the Selling Source affiliates were unlicensed lenders, she would not have used them. (Aquino Decl. ¶ 6.)

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. Applicable Legal Standard.

"A party may move for summary judgment, identifying each claim or defense … on which summary judgment is sought." Fed. R. Civ. P. 56(a). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment, or partial summary judgment, is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *abrogated on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Once the moving party meets its initial burden, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). It is not the Court's task "to scour the record in search of a genuine issue of triable fact." *Id.*; *see also* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Evidentiary Objections.

Plaintiffs submit a declaration from their counsel Jeffrey Wilens ("Mr. Wilens"). In addition to identifying documents produced by Defendants, Mr. Wilens' declaration includes statements to which Defendants object.

Defendants object to Mr. Wilens' statement: "It was very easy to find desist and refrain orders by various government agencies against the lenders with the order being one of the top 'hits'." (Wilens Decl., ¶ 6 at 2:26-27.) They also object to the statement: "Defendants knew the lenders were targeting California residents." (*Id.* ¶ 16 at 5:12.) The Court SUSTAINS the objections to those statements as improper opinion testimony. The Court also sustains

Defendants' objection to the sentence from paragraph 16 on the basis that it contains an improper legal conclusion.

Defendants object to paragraphs 7 and 8, the first and third sentences of paragraph 11, and the first three sentences of paragraph 16, on the basis that they contain improper legal argument and conclusions in violation of Local Rule 7-5(a). To the extent Mr. Wilens attests, in paragraph 8, that he located cease and desist orders on the internet and has included those cease and desist orders in the COE, the Court OVERRULES the objections. In all other respects, the Court SUSTAINS the objections.

Defendants object to paragraphs 17 through 21, 23, 29, and 30. In those paragraphs, Mr. Wilens describes and analyzes the content of spreadsheets that have not been included as exhibits. According to Mr. Wilens the spreadsheets would be voluminous and "must be summarized in this fashion." (Wilens Decl., ¶ 18.) Defendants object to these paragraphs on the basis that they contain improper opinion testimony relating to damage calculations. The Court SUSTAINS Defendants' objection.

Defendants also object to the Court's consideration of an email dated December 5, 2012 that was sent from Kyle R. Henrie of Direct Financial Solutions to Kristin Wratten and Ron Symon at PartnerWeekly on the basis that Plaintiffs failed to properly authenticate the exhibit with testimony from a witness. (COE, Vol. II at 421.) Mr. Wilens attests that Defendants produced the document during discovery. (Wilens Decl., ¶ 24.) Defendants have not shown that Plaintiffs would be unable to present the facts contained in the email in a form that would be admissible at trial. *See* Fed. R. Civ. P. 56(c)(2). Accordingly, the Court OVERRULES Defendants' objection.

Defendants also object on the basis that the email is not relevant. Relevant evidence is evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. On this record, the Court cannot say the email is irrelevant, and it OVERRULES that objection. The Court will address the materiality of the email in the analysis.

C. The Court Concludes Messrs. Humphreys, Tulley, and Irby Are Entitled to Judgment in Their Favor on All Claims.

It is undisputed that Mr. Humphreys, Mr. Tulley, and Mr. Irby are informal directors of

Selling Source. They move for summary judgment on the basis that Plaintiffs fail to put forth sufficient evidence to show they were involved in the conduct that gives rise to Plaintiffs' claims. "Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct." *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 785 (1979).

Plaintiffs fail to put forth evidence to show there are genuine disputes of material fact about whether these three defendants are involved in the day-to-day operation of Selling Source or in the operations of PartnerWeekly and MoneyMutual. Therefore, Plaintiffs have not shown there are genuine disputes of material fact about whether these Defendants "assist" the lenders in originating the payday loans or whether they are liable for violations of the fraudulent prong of the UCL. For those same reasons, the Court concludes Plaintiffs have not shown genuine disputes of material fact about whether these Defendants participated in the conduct of the alleged enterprise discussed in Section E, *infra*. Because Plaintiffs have not met their burden to show there are disputed issues of fact about whether these three defendants are liable under the CDDTL or RICO, the claim for alleged violations of the unlawful prong of the UCL fails.[3]

Accordingly, the Court GRANTS summary judgment in favor of Mr. Humphreys, Mr. Tulley, and Mr. Irby on all claims for relief.

D. Defendants are Not Entitled to Summary Judgment on the CDDTL Claim.

Plaintiffs CCDTL claim is based on alleged violations of Financial Code section 23005, which provides, in relevant part, that

> [a] person shall not offer, originate, or make a deferred deposit transaction, arrange a deferred deposit transaction for a deferred deposit originator, act as an agent for a deferred deposit originator, or assist a deferred deposit originator in the origination of a deferred deposit transaction *without first obtaining a license* from the

[3] The unlawful prong of the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The parties agree that claims based on the unlawful prong of the UCL rise and fall on the substantive claims for relief. *See Berryman v. Merit Property Mgmt., Inc.*, 152 Cal. App 4th 1544, 1554 (2007) ("[A] violation of another law is a predicate for stating a cause of action" under the unlawful prong.).

commissioner and complying with the provisions of this division.[4]

Cal. Fin. Code § 23005(a) (emphasis added).

1. The Elements of the Claim.

There is a dearth of authority on the proper interpretation of the CDDTL. When the Court granted Plaintiffs' motion for class certification, it stated "Plaintiffs will be required to establish that the MoneyMutual Defendants and [Mr.] Williams engaged in one of the acts prohibited by that provision and did so without a license. In addition, Plaintiffs will be required to show a causal connection between the alleged violation of Section 23005 and their injury." *Gilbert*, 318 F.R.D. at 620. The Court now elaborates on that ruling.

In construing the provisions of a statute, the Court must "first look to the language of the statute to determine whether it has a plain meaning." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). "The preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, [a court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted)), *abrogated on other grounds*, *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014).

Based on the plain language of Section 23005 and Plaintiffs' allegations, the Court concludes that Plaintiffs must prove each of the remaining Defendants "assisted" the Unlicensed Lenders "in the origination" of payday loans. The Court also concludes that the phrase "without first obtaining a license" applies to each of the actions prohibited by Section 23005. *See, e.g.*, *Renee J. v. Superior Court*, 26 Cal. 4th 735, 743 (2001) ("[W]hen several words are followed by a clause that applies as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.") (internal citations and quotations omitted).

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[4] The term "deferred deposit originator" means "a person who offers, originates, or makes a deferred deposit transaction." Cal. Fin. Code § 23001(f).

The Financial Code states that "[a]ny person who is injured by any violation of this division may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both." Cal. Fin. Code § 23064. California courts have construed similar statutory language to require a plaintiff to show that his or her injury was caused by a violation of the statute. *See, e.g., Boorstein v. CBS Interactive, Inc.*, 222 Cal. App. 4th 456, 466-67 (2013) (interpreting Cal. Civ. Code § 1798.84); *cf., Miller v. Hearst Communications*, No. CV-12-733-GHK (PLAx), 2012 WL 3205241, at * 5-6 (C.D. Cal. Aug. 3, 2012) (finding that to show a plaintiff was "injured by a violation" of California's "Shine the Light" law, plaintiff must show injury was caused by the alleged violation).

Thus, in order to prevail on this claim Plaintiffs must show: (1) a defendant assisted a deferred deposit originator in the origination of a deferred deposit transaction; (2) the defendant did not have a license; and (3) that Plaintiffs' injuries were caused by the violation of Section 23005.

2. The Meaning of "Assist … in the origination of a deferred deposit transaction."

Defendants attack the first element of Plaintiffs' claim, and their argument is premised on the meaning of the phrase "assist … in the origination of a deferred deposit transaction." Defendants argue that this phrase means to "aid and abet" and, thus, requires Plaintiffs to show that the Defendants acted with knowledge and intended to provide substantial assistance to the Unlicensed Lenders. Defendants' argument is premised on one of the Court's prior statements in this case. In particular, the Court stated "Plaintiffs' first claim for relief alleges that the" MoneyMutual Defendants and Mr. Williams "aided and abetted Unlicensed Lenders in making unlawful payday loans to California residents. In order to prove this claim, Plaintiffs will be required to show that [they] had actual knowledge that the allegedly unlicensed lenders were engaged in unlawful conduct." (Dkt. No. 213, Order on Motion to Strike at 4:19-22.) The Court framed Plaintiffs' claim in this manner because Plaintiffs alleged that:

> [i]n allowing these illegal lenders to join the Lending Network and in recommending the services of these illegal lenders to consumers, and in concealing the illegal status of the lenders, and by

> representing they were in compliance with all applicable laws, MoneyMutual Defendants and Montel Williams intended to provide and did provide substantial assistance and encouragement to the illegal lenders.

(*See, e.g.*, 5AC ¶ 118.)[5] Plaintiffs do not proffer a specific meaning of the term "assist" but argue they are not required to prove the Defendants knew that lenders were unlicensed. Plaintiffs also argue that if the Court interprets Section 23005 to require them to prove actual knowledge, there are factual disputes that preclude summary judgment.

Section 23005 does not define the term "assist." The term is defined in dictionaries as "to give support or aid to; help." *Random House New Collegiate Dictionary*, at 82 (Rev. ed. 1982); *see also Webster's Third New International Dictionary* at 132 (1981) ("to give support or aid, help; … to perform some service for"). The term also is used in other portions of the CDDTL. For example, the CDDTL provides that a "licensee" shall not "…assist a deferred deposit originator in any way in the making of a deferred deposit transaction unless the deferred deposit originator complies with all applicable federal and state laws and regulations, including the provisions of this division." Cal. Fin. Code § 23037(i). Section 23037 also includes exemptions relating to assisting a "state or federally chartered bank, thrift, savings association, or industrial loan company[.]" The Court concludes those portions of the CDDTL support Plaintiffs' argument that the term "assist" as used in Section 23005 is not equivalent to aiding and abetting.

Plaintiffs also argue the Legislature knew how to incorporate aiding and abetting principles into statutes by including such language. For example, the legislature has stated that it is a violation of Division 9 of the Financial Code for mortgage loan originators to "[c]onduct any business covered by this division without holding a valid license as required under this division, *or*

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[5] Plaintiffs repeated this language in their motion to certify the class, and Plaintiffs' counsel articulated the theory during depositions. (*See* Dkt. No. 227, Motion to Certify at 8:10-18; *see also* Bilbrew Depo. at 63:25-64:1.) Prior to the hearing on this motion, Plaintiffs made no effort to correct the Court's understanding of their theory of the case. However, at the hearing, Plaintiffs argued they have never relied on an aiding and abetting theory to prove the Defendants violated the CDDTL. They acknowledged, however, that the allegations included in the first claim were over inclusive and were intended to be used to support their other claims for relief. (*See, e.g.*, Dkt. No. 449, Transcript of Hearing at 14:19-25.)

assist or aide and abet any person in the conduct of business under this division without a valid license as required under this division." Cal. Fin. Code § 22755(f); *cf.* Cal. Bus. & Prof. Code §§ 1289, 25005. According to Plaintiffs, this demonstrates that the legislature did not intend to incorporate aiding and abetting principles into Section 23005.

To support their argument that the term "assist" must mean "aid or abet," Defendants rely, in part, on *Das v. Bank of America*, 186 Cal. App. 4th 727 (2010). In *Das*, the plaintiff's father suffered a number of strokes, which impacted his reasoning and judgment, and "fell prey to a series of illegal lottery scams." The plaintiff's father instructed the defendant, his bank, to transfer over $300,000 to bank accounts in other countries. *Id.* at 732-33. The plaintiff alleged the defendant's conduct violated various provisions of California's Welfare and Institutions Code addressing elder abuse. One of the provisions at issue was section 15610.30, which provided that "[f]inancial abuse of an elder … occurs when a person or entity does any of the following: … [a]ssists in taking, secreting, appropriating, or retaining real or personal property of an elder … to [sic] a wrongful use or with intent to defraud, or both." Cal. Welf. & Inst. Code § 15610.30(a)(2). The court concluded that the plaintiff's allegations "fail to establish that [the defendant] assisted in financial abuse by third parties." *Id.* at 744.

As is the case here, the relevant provisions of the elder abuse statutes did not define the term "assist." The court held that Section 15610.30(a)(2) "cannot be understood to impose strict liability for assistance in an act of financial abuse." *Id.* It reasoned that, in general, California had adopted the "common law rule for subjecting a defendant to liability for aiding and abetting a tort" and that the adoption of that rule predated the elder abuse statutes. *Id.* (quoting *Casey v. U.S. Bank Nat'l Assn.*, 127 Cal. App. 4th 1138, 1144 (2005)). The court concluded that the legislature would have been aware of that rule when it enacted the statute and concluded that Section 15610.30(a)(2) "is properly interpreted in light of that rule." *Id.* Therefore, the court held that "when … a bank provides ordinary services that effectuate financial abuse by a third party, the bank may be found to have 'assisted' the financial abuse only if it knew of the third party's wrongful conduct." *Id.* at 745.

If Section 23005 simply made it unlawful to assist a deferred deposit originator,

Defendants' argument might have some force. However, it does not. Section 23005 provides that if an entity engages in certain conduct, it must have a license. For that reason, the Court finds Defendants' reliance on *Das* inapposite. Defendants also argue that proposed legislation demonstrates that the legislature recognized that existing legislation, including the CDDTL, does not cover the "lead generation" business. (Dkt. No. 404, Defendant's Request for Judicial Notice, Ex. A.) That proposed legislation has not been passed, and it refers to a separate provision of the Financial Code. The Court concludes it is not persuasive in defining the term "assist." The Court concludes that Section 23005 does not impose a knowledge requirement on Defendants. Rather, the Court concludes the term assist should be interpreted in accordance with the ordinary meaning of the term, *i.e.* to give support to or help.

Defendants do not argue that even if they did not know that the lenders were licensed, their conduct could not qualify as "assisting in the origination of a deferred deposition transaction." Accordingly, the Court concludes they have not met their burden to show they are entitled to judgment in their favor on this claim, and it DENIES, IN PART, their motion on that basis. Plaintiffs also can proceed on this aspect of their UCL claim.

E. The Defendants Are Entitled to Summary Judgment on the RICO Claim.

RICO prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" from conducting or participating "directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of unlawful debt." 18 U.S.C. § 1962(c). RICO provides a civil remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). The Court must construe RICO's provisions liberally to "to effectuate its remedial purposes[.]" *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985) (citation omitted). However, Congress did not enact RICO "to provide a federal cause of action and treble damages for personal injuries." *Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005).[6]

[6] Plaintiffs did not specifically reference RICO in their UCL claim, but they incorporated the allegations relating to the claim by reference. Before the hearing on this motion, Plaintiffs had

Plaintiffs must prove, *inter alia*, the existence of an enterprise and prove Defendants participated in the conduct of the enterprise.[7] *See, e.g., Eclectic Prop. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014); *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005). Plaintiffs also must "prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). The term "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property[.]" 18 U.S.C. § 1961(3). The Ninth Circuit has held the definition of enterprise is not a demanding one to meet. *Odom v. Microsoft Corp.*, 486 F.3d 541, 548 (9th Cir. 2007); *see also Boyle v. United States*, 556 U.S. 938, 945 (2009). Here, Plaintiff asserts the relevant portion of the definition is "any union or group of individuals associated in fact although not a legal entity," *i.e.* an "associated-in-fact enterprise." 18 U.S.C. § 1961(4).

To prove the existence of an associated-in-fact enterprise, Plaintiffs must provide evidence of "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle*, 556 U.S. at 947; *see also Odom*, 486 F.3d at 552 (holding that to show association-in-fact enterprise, plaintiffs must show a common purpose, an ongoing organization, which may be formal or informal, and that the associates function as a continuing unit). In general, "the

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never clearly argued that they intended to borrow the alleged RICO violations to support their UCL claim. Because the Court concludes Defendants are entitled to summary judgment on the RICO claim, any dispute about whether the UCL claim was premised on the RICO claim is moot.

[7] Plaintiffs also move prove: the enterprise affected interstate commerce; Defendants conducted the alleged enterprise through a pattern of racketeering activity, or collection of unlawful debt; and Plaintiffs were injured in their business or property because of the RICO violations. Defendants have not attacked these elements of Plaintiffs' claims. The Court notes that "'unlawful debt' means a debt (A) … which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, *and* (B) which was incurred in connection with … the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." *Id.* § 1961(6). The fact that a defendant or a given lender may have been unlicensed does not satisfy RICO's definition of "unlawful debt."

'enterprise' is the actor," or the "vehicle," and the "pattern of racketeering activity," or collection of unlawful debt, "is the activity in which that actor engages." *Odom*, 486 F.3d at 549. "[T]he evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Boyle*, 556 U.S. at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

The Ninth Circuit recently reiterated that a member of an enterprise need not have detailed knowledge of all of the other participants or their activities. "Instead, it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) ("[T]he point of making the government show that the defendants ha[d] some knowledge of the nature of the enterprise[] is to avoid an unjust association of the defendant with the crimes of others.").

In order to prove the "conduct" element, Plaintiffs must put forth evidence showing that each Defendant "conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Cedric Kushner*, 533 U.S. at 163 (quoting *Reves v. Ernst & Young*, 507 U.S. 178, 185 (1993) (emphasis in *Reves*). That is, each Defendant "must participate in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 185. In order to determine if a defendant has the requisite level of control of an enterprise's affairs, the Court considers "whether that defendant (1) gave or took directions; (2) occupied a position in the 'chain of command' through which the affairs of the enterprise are conducted; (3) knowingly implemented decisions of upper management; or (4) was indispensable to the achievement of the enterprise's goal." *Tatung Co., Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, 1152-53 (C.D. Cal. 2016) (citing *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008)).

Plaintiffs allege that each of the MoneyMutual Defendants, Mr. Williams, and the Unlicensed Lenders make up the associated-in-fact enterprise. The MoneyMutual Defendants and Mr. Williams do not dispute that: (1) the MoneyMutual Defendants have contractual relationships to provide leads to lenders; (2) MoneyMutual and Mr. Williams promote these lenders to the public as MoneyMutual's "participating network of lenders"; and (3) the relationships between the Defendants and the Unlicensed Lenders would have lasted long enough to "permit" them "to

pursue the enterprise's purpose." *Boyle*, 556 U.S. at 946. (*See* COE, Vol. I at 30-37; COE, Vol. II at 424-430; COE, Vol. III at 525-591.) However, the MoneyMutual Defendants and Mr. Williams argue that Plaintiffs have insufficient evidence to demonstrate they and the Unlicensed Lenders shared a "common purpose." They also argue the evidence is insufficient to show they did anything more than conduct their own affairs.

According to Defendants, the facts show nothing more than a commercial relationship between lead generation companies and their lender customers. Defendants argue that type of relationship is insufficient to establish liability under RICO. "Virtually every business contract can be called an 'association in fact.'" *River City Markets v. Flemings Foods West*, 960 F.2d 1458, 1462 (9th Cir. 1992), *overruled on other grounds by Odom*, 486 F.3d at 551. Although the reasoning varies, "there has been a remarkable uniformity in [the] conclusion that RICO liability must be predicated on a relationship more substantial than a routine contract between a service provider and its client." *Gomez v. Guthy-Renker, LLC*, No. EDCV 14-01425 JGB (KKx), 2015 WL 4270042, at *11 (C.D. Cal. July 13, 2015).

For example, in the *River City* case, the plaintiffs alleged the defendants, Alpha Beta and Fleming, induced plaintiffs to purchase certain Alpha Beta stores but planned to take actions that would reduce the value of those stores. Plaintiffs also alleged the defendants engaged in predicate acts of mail and wire fraud to effectuate the scheme. 960 F.2d at 1460. The Ninth Circuit concluded that, for purposes of a motion to dismiss, the plaintiffs sufficiently alleged the defendants "associated together in a business relationship akin to a joint venture to market the grocery stores, and that it was this 'enterprise' with which each individual defendant interacted in conducting the alleged pattern of mail and wire fraud activities." 960 F.2d at 1461.

Although the court concluded the plaintiffs' allegations were sufficient for purposes of motion to dismiss, it upheld the district court's dismissal of the RICO claim. The court reasoned the plaintiffs had not put forth sufficient evidence to show the agreement between the defendants was anything other than "a routine business relationship under which Fleming would look for buyers and either sell or lease designated Alpha Beta properties, hopefully at a profit to both parties." *Id.* at 1462. For example, the court concluded there was no direct evidence of any

misconduct by the defendants. It also reasoned that the plaintiffs' circumstantial evidence of a joint fraudulent scheme "[a]t most, … presented circumstantial evidence of roughly a month's worth of broken promises by defendants," which was insufficient to show the defendants engaged in a "pattern of racketeering activity." *Id.* at 1463-64.

In the *Odom* case, the plaintiffs alleged the defendants shared a "common purpose of increasing the number of people using Microsoft's Internet Service" and furthered that common purpose by fraudulent means, including the fact that Best Buy made false or misleading statements to consumers. 486 F.3d at 552. The court found the allegations were sufficient to allege the existence of a larger "vehicle," *i.e.* an enterprise, to carry out the alleged racketeering activity. That court cited the plaintiffs' allegations that the defendants "established mechanisms for transferring the plaintiffs' personal and financial information from Best Busy to Microsoft" and their allegations that Best Buy agreed to promote Microsoft products. In return, "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its internet service." *Id.*

In the *Gomez* case, the defendant sold beauty products using a "continuity program." 2015 WL 4270042, at *1. Pursuant to that program, the defendant would bill a consumer, send an initial supply of the product, and then "periodically send[] more of the product and bill[] the [consumer] again using the same payment information." *Id.* The plaintiff alleged that this program was a scheme to obtain consumers' credit card information to charge and collect payment from them without their authorization. *Id.* The plaintiff alleged that the other members of the RICO enterprise were nonparty vendors with whom the defendant contracted to process payments and to provide service to its customers. *Id.*, 2015 WL 4270042, at *2, *8.

The *Gomez* court began its analysis by noting that creative pleading could allow a plaintiff to transform a relationship for "routine commercial services" into a RICO enterprise by making allegations of a defendant's "pattern of racketeering and … an allegation that [defendant] received services" from another entity. *Id.*, 2015 WL 4270042, at *5-6. The court also described various approaches taken by courts to evaluate whether allegations about a commercial relationship could rise to the level of a RICO violation and determined it did not need to choose any particular

approach. It determined the plaintiff had engaged in "artful pleading." It also stated that to treat the allegations as sufficient to allege an associated-in-fact enterprise would "necessarily expand RICO beyond the scope intended by Congress." *Id.*, 2015 WL 4270042, at *8. Therefore, it held the plaintiff's attempt "to characterize a routine contractual relationship for services as an independent enterprise" was deficient as a matter of law. *Id.*, 2015 WL 4270042, at *11.; *see also In re Jamster Marketing Litig.*, MDL No. 1751, 05-cv-0819 JM (CAB), 2009 WL 1456632, at *6-7 (S.D. Cal. May 22, 2009) (concluding plaintiffs failed to allege facts to show common purpose and concluding more is necessary than simply alleging one party engaged in false advertising and other party engaged in misleading billing practices "to reach the conclusion that the parties had the common purpose to increase their revenues by fraudulent means" and distinguishing *Odom* on the basis that there were no allegations of a "*quid pro quo*").

The Court finds the *Gomez* case instructive. That court noted that one approach courts have used to evaluate when a commercial relationship could become an associated-in-fact enterprise is whether a plaintiff demonstrates the common purpose of the enterprise is fraudulent or unlawful. That court also correctly noted that the Ninth Circuit has not expressly adopted such a requirement. *Id.*, 2015 WL 4270042, at *9; *compare Friedman v. 24 Hour Fitness USA, Inc.*, 580 F. Supp. 2d 985, 993-94 (C.D. Cal. 2008) (declining to require allegation of fraudulent purpose and finding plaintiff sufficiently alleged association-in-fact enterprise based on contractual relationship for ordinary financial services). The Court need not resolve this unsettled question. Plaintiffs assert the alleged association-in-fact's common purpose was to promote, market and make *illegal* short-term loans in California. Therefore, they have injected that shared purpose into their case. For that reason, the Court also concludes that unlike the CDDTL claim, Plaintiffs are required to show each of the MoneyMutual Defendants and Mr. Williams knew the loans at issue were illegal.

The Court also finds guidance in *United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849 (7th Cir. 2013). In that case, the plaintiff asserted a RICO claim against Walgreens and two drug companies, which manufactured and sold generic drugs, and asserted the defendants formed an associated-in-fact

enterprise known as the "Hrp enterprise." *Id.* at 854. According to the plaintiff, the defendants formed the enterprise to defraud insurance providers by overcharging prescriptions for the drugs by using dosage formats that did not correspond with a patient's prescription format, which could not be substituted without a physician's approval but which were priced under a more favorable reimbursement formula. *Id.* at 851-52.

The court concluded that even if the plaintiff's allegations were sufficient to plead the existence of an associated-in-fact enterprise, it failed to allege that the defendants were "conducting the affairs of the 'Hrp enterprise' as opposed to their own affairs." *Id.* at 854; *cf. Gomez*, 2015 WL 4270042, at *9 (noting that courts also evaluate whether the facts demonstrate parties to a contract are pursuing individual economic interests rather than a shared purpose to determine whether commercial relationship could be considered an associated-in-fact enterprise). The court reasoned that although there were communications among the defendants about the changes in prescription format, there were no allegations that "officials from either company involved themselves in the affairs of the other" or that profits from either company were "siphoned off to the Hrp enterprise or to individual enterprise members." *Id.* at 854-55.

Apart from the LPAs and the IOs, there is no evidence that the MoneyMutual Defendants and Mr. Williams communicated with the Unlicensed Lenders on any other matters. There also is no evidence that the Unlicensed Lenders have any involvement in the affairs of the MoneyMutual Defendants or Mr. Williams; nor is there evidence that the converse is true.

Plaintiffs argue that the MoneyMutual Defendants and Mr. Williams conducted the affairs of the enterprise by promoting the loans, and that the Unlicensed Lenders conducted the affairs of the enterprise by making the loans. Unlike the *Odom* case, the facts do not suggest that all Unlicensed Lenders – or even a particular Unlicensed Lender –worked together with the MoneyMutual Defendants or Mr. Williams "in an indispensable and integrated" manner to further the purpose of the alleged enterprise. *See Jamster,* 2009 WL 1456632, at *6. For example, although the parties entered into LPAs, there is not evidence of the type of "cross-marketing" agreement discussed in *Odom*.

Rather, these facts are more akin to the facts in the *United Food* case, where the plaintiffs

relied on the fact that the activities taken by both parties were illegal. That court reasoned the plaintiff could not "bootstrap its allegations of illegal conduct into allegations that Walgreens and Par conducted the affairs of an enterprise by asking us to infer that because the activities were illegal, they therefore must have also have been coordinated activity undertaken on behalf of the Hrp enterprise." *United Food*, 719 F.3d at 855. As that court stated, "RICO does not penalize parallel, uncoordinated fraud." *Id.*

The Court's conclusion that Defendants are entitled to judgment on the RICO claim is further supported by the fact that Plaintiffs fail to show there are disputed issues of material fact about whether the remaining MoneyMutual Defendants and Mr. Williams knew that the Unlicensed Lenders' conduct was unlawful, either based on the terms of the loans or because the lenders were not licensed in California. In reaching this conclusion, the Court notes that Plaintiffs have consistently alleged the RICO enterprise existed in 2009. (*See, e.g.*, First Amended Complaint, ¶¶ 28-29, 108; 5AC ¶¶ 23-25, 134.)[8]

To show Defendants' knowledge of illegality, Plaintiffs rely on earlier iterations of the complaints in this case and in a related case, *Pham v. JPMorgan Chase Bank, N.A.*, Alameda County Superior Court No. RG12652919.[9] (COE, Vol. III at 638-666.) However, those complaints were filed well after the alleged enterprise came into existence. Plaintiffs also rely on enforcement actions initiated in other states. Again, those actions were initiated after the alleged enterprise came into existence. In addition, for reasons discussed below in connection with Mr. Williams, the Court concludes that Plaintiffs have not shown an evidentiary link between these actions and the inferences they would ask a jury to draw from them.

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[8] Plaintiffs allege that "during the Class Period" the MoneyMutual Defendants and Mr. Williams were organized and associated with each other in the alleged associated-in-fact enterprise. Plaintiffs allege the Class Period began on February 11, 2009. Although it is Plaintiffs' burden to prove the existence of the enterprise, Plaintiffs fail to clearly articulate whether each member joined the alleged enterprise at that time or at some later point.

[9] That case was removed to this Court on December 31, 2012, and the Court remanded the case for lack of subject matter jurisdiction on April 10, 2013. *See Pham v. JPMorgan Chase Bank, N.A.*, No. 12-cv-6579-JSW, Dkt. Nos. 1, 48. The plaintiffs in that case did not assert a RICO claim.

Plaintiffs also argue that the enterprise could not have existed without the Unlicensed Lenders because, without them, Defendants' business would have been crippled. Plaintiffs rely, in part, Mr. Wilens' declaration and his analysis of Defendants' profits, but the Court sustained Defendants' objections to that evidence. There is evidence that 109 of the lenders that were part of the MoneyMutual Defendants' network of lenders during the class period were not licensed in California. (Wilens Decl., ¶¶ 2-4, COE, Vol. II at 592-595.) However, there is insufficient evidence to conclude that the MoneyMutual Defendants business as a whole would be crippled if it were to cease doing business with those lenders. The Court therefore concludes this evidence is not sufficient to create a genuine dispute of material fact about the existence of the alleged enterprise.

Plaintiffs also cite to the email from Kyle Henrie to an employee of PartnerWeekly, which states: "We have hit a bit of a snag with our legal department. They are concerned that the leads we post to your ping tree may be sent to 'unlicensed' lenders (i.e. offshore, tribal)." (COE, Vol. II at 421.) However, there is no evidence that any of the named Defendants knew about this email. At best, the email is a "scintilla" of evidence and is not sufficient to overcome Defendants' motion.[10]

The Court now considers more specific evidence of each defendant's knowledge of the illegality of the loans at issue and evidence that could be construed to show they conducted the affairs of the enterprise.

a. Mr. Williams.

Mr. Williams testified that his manager, lawyer, and publicists vet the companies with whom he does business, including MoneyMutual. He also testified that since he has been involved with MoneyMutual, he has received about twelve complaints about the company, which "is better than half the businesses that I am involved with[.]" (*See, e.g.*, Putterman Decl., ¶ 8, Ex. G, Deposition of Montel Williams ("Williams Depo.") at 34:20-35:13, 91:12-92:11, 113:3-11,

[10] The Court also notes that Plaintiffs alleged that Direct Financial Solutions was an "Unlicensed Lender," an allegation that appears to be contradicted by this email. (*See* 5AC ¶41.nn.)

119:5-17.) Mr. Williams also testified that he has never discussed MoneyMutual's arrangements with its lenders, did not know the identities of lenders within the MoneyMutual network, did not know that some states had ordered lenders to stop making loans in their states because the lenders were not licensed or were operating illegally, and was not aware that the California DBO had issued cease and desist orders to Cash Yes, Bottom Dollar, and other lenders in the MoneyMutual network. (Putterman Decl., Ex. G, Williams Depo. at 12:21-25, 13:15-17, 40:8-22, 95:20-24, 96:7, 119:18-120:5, 140:10-15, 145:22-146:4, 147:13-148:11, 150:17-152:15.)

Plaintiffs argue Mr. Williams was named as a defendant in *Pham*. Plaintiffs also argue Mr. Williams also was named in in an action brought by regulators in New York, which alleged that lenders in the Selling Source network were violating New York's laws regarding usury. (McKay Decl., ¶ 16, Ex. D.) Plaintiffs argue that a reasonable jury could infer from these proceedings that Mr. Williams knew the loans at issue were illegal in California. Neither of these proceedings demonstrate Mr. Williams' knowledge of the purpose of the alleged enterprise at any time prior 2012. The Court also concludes these proceedings are not sufficient to demonstrate a genuine issue of material fact about Mr. Williams' knowledge of the enterprise's unlawful purpose. The *Pham* complaint consists of allegations, not proof, of illegality.

Plaintiff's argument with respect to the New York proceeding is that because New York concluded certain loans were unlawful, the same must be true for California. However, Plaintiffs do not present evidence that Mr. Williams was aware of the terms of the payday loans issued by the Unlicensed Lenders or was aware of the terms of payday loans in general. They also do not present evidence that Mr. Williams had any knowledge that payday loans were issued on terms that would be considered usurious on a national basis. For this reason, Plaintiffs have not shown an evidentiary link between the New York regulatory action and the inference they would ask a jury to draw from it.

b. Mr. Rauch.

It is undisputed that Mr. Rauch worked for Selling Source and PartnerWeekly in February 2009 and left in August 2009. It also is undisputed that he was not an officer of either company. (Putterman Decl., Ex. H, Rauch Depo. at 22:11-23:11, 26:3-4, 27:4-7.) Mr. Rauch testified that

during 2008-2009, he "oversaw the selling of leads to lenders." (*Id.* at 25:20-23.) Mr. Rauch also testified that the LPAs required lenders to make certain warranties and testified he relied on those representations. (*See, e.g.*, COE, Vol. I, Rauch Depo. at 132:1-15, 143:4-18.)[11] Mr. Rauch agreed that the general purpose for a lender to purchase a lead would be to fund a loan. (*Id.*, Rauch Depo. 131:16-19.) However, Mr. Rauch denied knowing that lenders were not operating under the model of a California licensed lender. He also testified he did not know whether the lenders were operating legally or not. (Putterman Decl., Ex. H, Rauch Depo. at 31:24-5, 32:12-21, 63:16-24, 91:3-5, 96:11-14.) Plaintiffs have not put forth any evidence that would contradict this testimony.[12]

c. Mr. Hashman.

Mr. Hashman testified that he began working for Selling Source in 2008. Mr. Hashman testified he was not involved with payday loan lead generation between 2008 and 2010. He testified he became involved with that business when he joined PartnerWeekly in 2010. (COE, Vol. II, Hashman Depo. at 32:22-24; Putterman Decl., ¶ 7, Ex. F, Hashman Depo. at 46:15-47:17, 48:20-22, 56:10-13.)[13] Mr. Hashman testified that he did not "know the licensing of the lenders." (Putterman Decl., Ex. F, Hashman Depo. at 71:12-14.) Like Mr. Rauch, Mr. Hashman testified that PartnerWeekly relied on the lender's warranties contained in the LPAs. (*Id.* at 73:15-23, 76:7-10, 138:3-21, 180:19-181:2.) Although Mr. Hashman testified that he may have seen some loan agreements as part of the on-boarding process, he did not testify about loan agreements for California customers. There also is no testimony presented from which a reasonable juror could

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[11] The excerpts of Mr. Rauch's deposition submitted by Plaintiffs are located at COE, Vol. I at 183-245. When the Court cites to a deposition excerpt submitted by Plaintiffs, it is citing to the page and line of the deposition transcript, rather than the page of the COE on which the excerpt is located.

[12] As noted, Plaintiffs attached certain cease and desist orders to earlier versions of the complaint in this case. Plaintiffs have not presented evidence that Mr. Rauch learned of those orders while working for PartnerWeekly, and Mr. Rauch stopped working for PartnerWeekly before Plaintiffs filed this case. Therefore, those cease and desist orders have no bearing on his knowledge of whether any lenders were licensed.

[13] The excerpts of Mr. Hashman's deposition submitted by Plaintiffs are located at COE, Vol. II at 277-330.

infer that Mr. Hashman saw the terms of those loan agreements or that, if he had, he knew the terms would result in loans that could only be considered usurious. (COE, Vol. II, Hashman Depo. at 93:18-94:21, 96:8-20.) Mr. Hashman also testified that he had not seen a cease and desist order issued to any of the lenders in the MoneyMutual network. (*See, e.g.,* Putterman Decl., Ex. H, Hashman Depo. at 79:17-23.)

d. Mr. McKay.

Mr. McKay was one of the original founders of Selling Source, served as President in 2009, and has served as President and CEO since 2012. (McKay Decl., ¶¶ 1, 8; COE, Vol. II, Deposition of Glen McKay ("McKay Depo.") at 97:7, 17-25.)[14] Mr. McKay attested that he does "not participate in determining what lenders are 'on-boarded' by PartnerWeekly, in communicating with PartnerWeekly customers on operational matters, or in any other operational matter." (McKay Decl., ¶ 3.) Mr. McKay testified that he only learned about cease and desist orders issued against some of the Unlicensed Lenders through this and the *Pham* litigation. (COE, Vol. II, McKay Depo. at 194:12-15; McKay Decl., ¶ 12.)

Mr. McKay attests that as a founder of Selling Source, he has "witnessed the evolution of small-dollar, short term lending, over the last ten years, and the evolution of the business of those Selling Source subsidiaries engaged in generating leads for acquisition by small-dollar short-term lenders." (McKay Decl., ¶ 8.) Mr. McKay also attests that he is aware that the market for such lending has changed over the last decades because of "controversy" regarding state licensing of purely on-line lenders. (*Id.*) Mr. McKay also is a member of the board of the Online Lender's Alliance. (*Id.* ¶ 20.) From this evidence, a reasonable jury could infer Mr. McKay had some knowledge of the payday loan industry in general.

Mr. McKay also testified that lenders were required sign an LPA, and testified that "[a]s long as they signed the agreement stating they were following applicable rules, Selling Source would accept them as a customer." (COE, Vol. II, McKay Depo. at 79:24-80:1.) There is some

[14] Mr. McKay's deposition was taken in the *Pham* litigation and the parties have agreed to use discovery in that case in this case. The excerpts of Mr. McKay's deposition submitted by Plaintiffs are at COE, Vol. II at 246-76.

evidence in the record that the legal interest rates on short-term loans vary by state. (*Compare* McKay Ex. B *with* Ex. D.) The Court concludes Plaintiffs have failed to put forth sufficient evidence to create an evidentiary link that would permit a reasonable jury to infer that any knowledge Mr. McKay had about the alleged illegality of loans in other states would mean that he must have known that loans offered by the MoneyMutual Defendants also would be illegal in California.

e. Selling Source, Money Mutual, and PartnerWeekly.

The corporate defendants fall within the RICO definition of "person," and it is undisputed that Plaintiffs do not contend that any of the corporate defendants are the alleged "enterprise." "[A] corporation acts only through its directors, officers, and agents." *Cedric Kushner*, 533 U.S. at 165. Therefore, in order to evaluate the corporate defendants' knowledge, the Court looks to what the entities' officers and directors knew about whether the loans at issue were illegal. For the reasons set forth above, the Court concludes that Plaintiffs have not met their burden to show there are genuine issues of material facts about whether the corporate defendants had the requisite knowledge and shared the common purpose of the alleged associated in fact enterprise.[15]

Having examined the record and considering the facts in the light most favorable to Plaintiffs, the Court concludes that even if it can be said that some of the MoneyMutual Defendants have been less than scrupulous in their behavior, there is insufficient evidence in the record to establish the "type of concerted activity undertaken on behalf of an identifiable enterprise necessary to a successful RICO claim." *United Food*, 719 F.3d at 851. In sum, Plaintiffs have failed to establish disputed issues of fact about whether the various members of the alleged associated-in-fact enterprise were pursuing a "shared purpose" rather than "pursing their individual economic interests." *Gomez*, 2015 WL 4270042, at *9; *cf. In re Countrywide Financial*

[15] Plaintiffs argue that the jury could infer that because PartnerWeekly had an "on boarding" process that included checking on potential customers, its officer and directors "must have" stumbled on cease and desist orders about lenders. Plaintiffs also argue that because some of the lenders were located in foreign countries, it would be unlikely that they would be licensed in California. (*See* Opp. Br. at 21:15-24.) The Court concludes these inferences are speculative and lack the evidentiary links in the record to permit a reasonable jury to reach those conclusions.

Corp. Mortgage-Backed Sec. Litig., No. 11-ML-02265-MRP (MANx), 2012 WL 10731957, at *8-*9 (C.D. Cal. June 29, 2012) (finding plaintiffs failed to allege association-in-fact enterprise under Ohio's corrupt practices act where, on the face of the complaint, "it appears that each of the non-parties identified … entered into a business relationship for their own commercial reasons").[16]

Accordingly, the Court GRANTS Defendants' motion for summary judgment on the RICO claim.

F. The UCL Fraud Claim.

Based on the Court's prior rulings, this claim is asserted only on behalf of the individual Plaintiffs against the MoneyMutual Defendants and is limited to representations set forth in the MoneyMutual Defendants' Code of Lender Conduct. *See generally Gilbert v. Bank of America*, No. 13-cv-1171-JSW, 2015 WL 12951230 (N.D. Cal. May 27, 2015). Plaintiffs allege the Code of Conduct includes a representation that "Lenders shall not engage in harassing or abusive collection practices and agree to comply with any and all applicable federal and state collections practices laws and regulations." (5AC ¶¶ 104-106.) Plaintiffs also allege the Code of Conduct states that "Lenders on the network are prohibited from using the borrower's personal information to market other products or services or give the information to third parties." (*Id.* ¶ 103.) Plaintiffs assert that lenders routinely violated both of these provisions. Plaintiffs also assert that, contrary to their representations, the MoneyMutual Defendants neither monitored the lenders nor took action against those lenders.

Plaintiffs previously stated that they did not seek to hold Mr. Hashman or Mr. Rauch directly liable on the UCL claim. Rather, they stated they would rely on a civil conspiracy theory. *See Gilbert*, 2015 WL 12951230, at *5. In order to prove a claim based on a civil conspiracy theory, Plaintiffs must prove (1) the formation and operation of the conspiracy and (2) damage resulting to plaintiff from (3) an act or acts done in furtherance of the common design. *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 511 (1994). An essential aspect of the

[16] The plaintiffs in *In re Countrywide* asserted a claim under Ohio's corrupt practices act, which is patterned on the federal RICO statute and Ohio courts look to federal law to interpret its provisions. 2012 WL 10731957, at *8.

first element is an agreement by the defendant to participate in the alleged conspiracy. *See Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). The Court concludes the evidence discussed above in connection with the RICO claim would not be sufficient for a reasonable jury to infer the requisite agreement. The Court concludes Mr. Rauch and Mr. Hashman are entitled to judgment in their favor on the UCL claim.

The remaining MoneyMutual Defendants argue that they are entitled to judgment on this claim because Plaintiffs cannot establish they relied on representations relating to the Code of Lender Conduct. Ms. Aquino did not attest or testify that she saw or relied on the statements in the Code of Conduct when she obtained her loans. Accordingly, all MoneyMoney Defendants are entitled to summary judgment in their favor as to her claim. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009).

Mr. Gilbert, Ms. Malone, and Ms. Bilbrew each attest they recall seeing the Code of Conduct and recall seeing the representations that MoneyMutual monitored its network of lenders and that lenders were required to comply with debt collection laws.[17] Although Defendants argue that Plaintiffs either attempted to or did obtain payday loans from other websites, including www.cashadvance.com, a PartnerWeekly affiliate, these facts are relevant to a particular Plaintiff's credibility. The Court concludes Ms. Malone, Mr. Gilbert, and Ms. Bilbrew have put forth evidence to show genuine and material issues of disputed on fact on the issue of reliance.[18]

Defendants also argue Plaintiffs cannot show the representations at issue are false. In contrast to claims for common law fraud, a claim under the UCL's fraud prong "requires no proof that the plaintiff was actually deceived." *Clemens v. DaimlerChrysler, Corp.*, 534 F.3d 1017, 1025-26 (9th Cir. 2008). Instead, UCL claims are governed by a reasonable consumer test. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) ("[T]he false or misleading advertising

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[17] At her deposition, Ms. Malone testified she could not recall seeing the portion of the website in which MoneyMutual stated that it monitored its lenders for compliance with the Code of Lender Conduct. (Malone Depo. at 124:14-25 (referring to paragraph 105 of Third Amended Complaint, which is identical to paragraph 105 of 5AC).) Defendants have not argued that Ms. Malone's declaration on this issue should be ignored as a sham declaration.

[18] Defendants do not argue the statements at issue would not be material to a reasonable consumer.

and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.") (citation omitted). As part of this reasonable consumer standard, plaintiffs must show that members of the public are likely to be deceived, whether by explicitly false representations or by misleading, deceptive, or confusing representations. *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

Mr. Madsen attests that PartnerWeekly has an onboarding process "intended to assure that prospective lead purchasers are actual bona fide lenders, not hackers or fraudsters looking to purchase private consumer information for nefarious purposes." (Madsen Decl., ¶ 11.) He also attests that "[w]e conduct periodic tests by 'seeding' the Ping Tree with fictitious leads which we can (and do) track to ferret out abuse." (Madsen Decl., ¶ 13.)

Plaintiffs argue the Unlicensed Lenders lenders used their information to harass them and argue they received emails from other lenders. Ms. Malone's testimony on whether she received emails from other lenders after visiting the MoneyMutual.com website is not entirely consistent. (*Compare* Malone Depo. at 23:16-24:17 *with id.* at 81:7-15.) She did testify that she did not know where the senders of the emails got her email address but that she could not think of how her email address was obtained other than through her interaction with the MoneyMutual website. (*Id.* at 81:11-15, 81:20-23, 122:12-19, 123:2, 147:2-11.) Ms. Malone also testified about threatening phone calls she received. She testified some were from a collection agency, although they "did not say where they're from." Ms. Malone did not complain to MoneyMutual about these phone calls or the emails. (*Id.* at 25:21-29:8, 31:1-32:2, 32:8-13, 123:7-13.)

Ms. Bilbrew testified that she suffered "harassment … from various phone calls, … lenders that I didn't take loans out with, but people who had my information calling me on my cell phone and at work." (Bilbrew Depo. at 44:21-45:4, 45:13, 67:21-68:5.) Ms. Bilbrew acknowledged that she did not know whether MoneyMutual was responsible for the conduct and acknowledged that she did not notify MoneyMutual of the problems. She also consistently testified that the harassment and constant emails began only after she provided MoneyMutual with her information. (*Id.* at 45:18-46:8; *see also id.* at 48:12-49:1 ("I just know that I put my information in MoneyMutual's website, and I've been having problems ever since with

harassment and scammers."); 84:18-85:21, 107:10-109:14.) Mr. Gilbert testified that Cash Yes called him at his office and sent him emails in efforts to collect on the loans and that he complained about these contacts to the California DBO. (*Id.* at 83:14-21, 91:4-92:17, 112:2-24.)

Although it is a close question, the Court concludes Plaintiffs have put forth sufficient evidence to overcome, in part, the MoneyMutual Defendants' motion for summary judgment on the fraudulent prong of the UCL.

Accordingly, the claims asserted by Ms. Malone, Ms. Bilbrew and Mr. Gilbert for violations of the UCL's fraudulent prong shall proceed against Selling Source, PartnerWeekly, MoneyMutual, and Mr. McKay.

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, AND DENIES, IN PART, Defendants' motion for summary judgment as follows:

1. Mr. Humphreys, Mr. Tulley, and Mr. Irby are entitled to judgment in their favor on all claims.

2. The remaining MoneyMutual Defendants and Mr. Williams are entitled to judgment on the RICO claim, and on the claim for alleged violations of the unlawful prong of the UCL that could be construed to encompass the RICO claim.

3. The remaining MoneyMutual Defendants and Mr. Williams are not entitled to judgment on the CDDTL claim or alleged violations of the unlawful prong of UCL claim, to the extent it is premised on alleged violations of the CDDTL. That claim will proceed.

4. The remaining MoneyMutual Defendants are entitled to judgment in their favor on the claim for alleged violations of the fraudulent prong of the UCL asserted by Ms. Aquino. In addition, Mr. Rauch and Mr. Hashman also are entitled to judgment in their favor on the alleged violations of the unlawful prong of the UCL asserted by the remaining Plaintiffs.

5. The claim for alleged violations of the fraudulent prong of the UCL asserted by Ms. Bilbrew, Mr. Gilbert, and Ms. Malone will proceed against MoneyMutual, Selling Source, PartnerWeekly, and Mr. McKay.

The Court HEREBY ORDERS the parties to appear for a status conference on Friday,

November 30, 2018 at 11:00 a.m. The parties shall meet and confer as that term is defined in the Northern District Civil Local Rules and shall submit a joint status statement by no later than November 21, 2018 setting forth their proposal for further ADR and proposed pretrial and trial dates. The Court ORDERS the parties to review its guidelines for civil jury and bench trials before they meet and confer on these issues.

IT IS SO ORDERED.

Dated: October 30, 2018

JEFFREY S. WHITE
United States District Judge