UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARLA BARKER,

Plaintiff,

-against-

IZIA ROKOSZ, JANELLE DEFREITAS, STEVEN G. LEGUM, FRANK RICHARD HURLEY, GREGG TELSEY, ROBERT FISHBEIN, BETTY J. HINGLE, ROYCE LLC, JACKIE MARKETING LLC, LOCKDECO A/K/A LODECO, "JOHN DOE #1" through "JOHN DOE #100," said names being fictitious and unknown, the parties intended being persons or corporations, if any, having participated in the enterprise described in the complaint,

Defendants.

19 Civ. 00514 (KAM) (SMG)

Date Served: July 24, 2019 upon counsel for all parties by email

PLAINTIFF'S OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS TO DISMISS OF DEFENDANTS IZIA ROKOSZ, STEVEN G. LEGUM, GREGG TELSEY, AND ROYCE LLC

Mobilization for Justice, Inc.
100 William Street, 6th Floor
New York, New York 10038
(212) 417-3700

The Richman Law Group
8 West 126th Street
New York, New York 10027
(718) 705-4579

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PRELIMINARY STATEMENT

Plaintiff Carla Barker respectfully submits this memorandum of law in opposition to the motions to dismiss of Defendant Steven G. Legum and Defendant Izia Rokosz, the latter of which is joined by Defendants Gregg Telsey and Royce LLC.[1,2,3] (Hereinafter, these four Defendants collectively are referred to as the "Moving Defendants.") Both motions seek to dismiss Ms. Barker's New York General Business Law § 349 (GBL § 349) and Racketeer Influenced and Corrupt Organizations Act (RICO) claims against the respective Moving Defendants.

Ms. Barker has plausibly pled these claims. Her Complaint describes how Defendant Janelle Defreitas, now incarcerated for residential mortgage fraud, recognized her as a struggling homeowner on whom she and her contacts could run their equity-stripping mortgage scam. It identifies a series of deceptive acts undertaken by Defendants, including how the hard money loan Ms. Barker received from Defendant Rokosz was conditioned on transfer of the title to her home to a sham corporation, which Defendant Rokosz's attorney Defendant Legum arranged. The Complaint further explains how the loan was an unlawful debt, extracting a usurious rate of interest through deceptive means, including by giving large amounts of the loan's principal to Defendant

[1] Although Defendant Hurley served a purported motion to dismiss, he did not address any causes of action. (Def. Hurley Aff.) On July 10, 2019, this Court ordered Defendant Hurley to clarify his motion and held it in abeyance, determining that once resolved, the Court would set a revised deadline for Plaintiff's opposition as to Defendant Hurley only. By letter to the Court dated July 15, 2019, Defendant Hurley stated his intention not to file a memorandum of law in support of his motion to dismiss, but to "join in the argument made by Defendant Steven Legum." (ECF Doc. 69.) As Defendant Hurley's letter has not been addressed by the Court, Plaintiff does not address his purported motion to dismiss, while reserving the right to do so at a later time, as set forth by this Court's July 10, 2019 order.

[2] Defendants Telsey and Royce LLC (hereinafter the "Telsey Defendants") did not submit their own brief. The Telsey Defendants instead sought to "adopt the arguments made in the Rokosz motion papers and join that Motion." (ECF No. 60.) Defendant Rokosz's Motion to Dismiss does not set forth any basis for dismissal of the Fifth and Sixth Claims for Relief against the Telsey Defendants, nor does it mention the Telsey Defendants at all. Thus, Ms. Barker's RICO and GBL § 349 claims against the Telsey Defendants should, on this basis alone, not be dismissed.

[3] In their motions to dismiss, the Moving Defendants improperly dispute Plaintiff's facts, misrepresent allegations in her Complaint, rely on documents outside the pleadings, and impermissibly demand that Plaintiff prove her case to survive a Rule 12(b)(6) motion. The Court should reject the Moving Defendants' attempts to heighten the pleading standard.

Legum to hold as "escrow," which Ms. Barker was refused access to after she defaulted on the loan (and which is still in Defendant Legum's possession), and by diverting loan proceeds to unknown entities, including Royce LLC, for services unknown and undeclared to Ms. Barker. The Complaint also describes the various roles played by Defendants Telsey, Hurley, Robert Fishbein, Jackie Marketing LLC, and Lockdeco in the scheme and Defendants' association-in-fact enterprise, and adequately pleads that the unlawful debt at issue was incurred in connection with the business of lending money at a usurious rate.

STATEMENT OF FACTS

Ms. Barker, an Afro-Caribbean, has lived in her two-family home located in East Flatbush, Brooklyn (the "Subject Property") for more than 35 years. (Compl. ¶¶ 7, 18.) She and her half-sister, Sandra Vaughan, inherited the home from Ms. Barker's late mother in 2004. (*Id.* ¶ 22.) By 2016, Ms. Barker had fallen behind on her property taxes due to a battle with cancer and was facing continued pressure from Ms. Vaughan, who lives outside of New York, to buy her out of the Subject Property. (*Id.* ¶¶ 26-29, 214.) Having already attempted, unsuccessfully, to obtain a mortgage loan from traditional mortgage lenders, Ms. Barker felt desperate and out of options. (*Id.* ¶ 28.) Through a family friend, Ms. Barker met Defendant Defreitas, who told Ms. Barker that she could help her obtain a mortgage. (*Id.* ¶¶ 29-31.)

Thereafter, Defendant Defreitas informed Ms. Barker that she had found her a mortgage lender, but that she would be required to transfer the Subject Property to a corporation in order to obtain the loan ("the Subject Loan"). (Compl. ¶ 33.) Defendant Defreitas reassured Ms. Barker that Ms. Barker would retain control of the corporation, and thus remain the owner of her house. (*Id.*) Shortly before the loan closing, Defendant Defreitas helped establish J&M Property Holdings, Inc. ("J&M Holdings"), a sham corporate entity created for the sole purpose of being the borrower

of the Subject Loan and evading consumer protection statutes. (*Id.* ¶¶ 33-35, 135, 173.) Ms. Barker never received any incorporation documents, either to sign, review, or keep for her records. (*Id.* ¶ 34.)

Defendant Defreitas then introduced Ms. Barker to Defendant Hurley, whom Defendant Defreitas selected to be Ms. Barker's lawyer at the mortgage closing, and to Defendant Fishbein, who advised he could arrange financing for Ms. Barker. (Compl. ¶¶ 36, 38.) Defendant Fishbein also said that he would be able to help Ms. Barker eventually obtain a Federal Housing Administration ("FHA") mortgage. (*Id.* ¶ 38.) Defendant Defreitas told Ms. Barker that she did not have to worry about monthly payments on the Subject Loan because she would make the payments until Ms. Barker refinanced with an FHA loan. (*Id.* ¶¶ 56, 93.)

The Subject Loan, which was issued in two installments, totaled $450,000.00, carried a disclosed interest rate of 12 percent, and provided for interest-only payments of $4,500 for twelve months and a final balloon payment of the entire principal balance, $450,000.00, due at the end of a one-year term. (Compl. ¶¶ 66, 84, 89.) The terms also prohibited prepayment during the first six months. (*Id.* ¶¶ 66, 84.) Both loan closings took place at the office of Defendant Legum, attorney for the lender. (*Id.* ¶¶ 41-42; 79.) Ms. Barker first learned the identity of the lender, Defendant Rokosz, at the first loan closing. (*Id.* ¶ 42.)

Defendants Legum, Defreitas, Hurley, and Telsey were all present at the first closing, along with Ms. Barker. (Compl. ¶¶ 42-46.) At the closing, Defendant Legum, on behalf of Defendant Rokosz, required Ms. Barker to transfer title to the property to J&M Holdings. (*Id.* ¶ 52.) Ms. Barker was also required, as the sole corporate officer of J&M Holdings, the title owner, to assign all interest and stock in J&M Holdings to Defendant Rokosz as assignee, to be held in escrow by Defendant Legum and released in the event of default. (*Id.* ¶¶ 61, 63.) Ms. Barker was also

required, in her personal capacity, to agree to be bound to the Subject Loan terms as a personal obligor. (*Id.* ¶ 62.) Ms. Barker was also required to sign "escrow" agreements providing that a total of $60,192.68 would be set aside in a purported escrow account held by Defendant Legum, which could be accessed by Defendant Rokosz without notice to Ms. Barker in the event of default. (*Id.* ¶¶ 60, 83.) At the second closing, Defendants induced Ms. Barker to enter into a second loan agreement, without disclosing that the second agreement was for a new loan. (*Id.* ¶¶ 80, 82.) In addition to the Subject Loan, Ms. Barker was also instructed to sign a Promissory Note for $10,000.00, payable to Defendants Telsey and Fishbein. (*Id.* ¶ 59.) Defendants Legum, Hurley, Royce LLC, Jackie Marketing LLC, and Lockdeco a/k/a Lodeco all directly received proceeds from the Subject Loan. (*Id.* ¶¶ 68, 85, 137.) At least $23,990.00 in loan proceeds were distributed to individuals or entities completely unknown to Ms. Barker, for purposes that were never defined or communicated to her: $8,713.33 to Defendant Royce LLC; $14,926.67 to Defendant Jackie Marketing LLC; and $350.00 to Ronald Ifraimov. (*Id.* ¶¶ 68, 85, 155.) At the loan closings, Ms. Barker did not know what Royce LLC or Jackie Marketing LLC were and she was not aware of any services performed by these companies for her benefit. (*Id.* ¶ 69.)

In reality, the Subject Loan had at least a 32.19% interest rate. (Compl. ¶¶ 155-58, 176.) The loan included roughly $85,376.10 in finances charges, consisting of: (a) $60,192.68 retained as "escrow" framed by the Defendants as a premium or other charge for a guarantee protecting the creditor against the obligor's default, but which Defendant Legum continues to retain and which was never released to Ms. Barker or otherwise used to her benefit; (b) at least $23,990.00 paid to corporations and/or individuals unknown to Ms. Barker, for services undeclared to Ms. Barker, that were imposed by the creditor incident to the extension of credit; and (c) $1,193.42 paid to the creditor as an upfront interest charge. (*Id.* ¶ 155; *see id.* ¶¶ 67-71, 83, 85, 99.) Of the $450,000.00,

Ms. Barker benefited from $221,276.85 to buy out Ms. Vaughan and to pay off the tax liens and a small $150 debt to New York State; she never directly received any proceeds from the Subject Loan. (*Id.* ¶¶ 67, 91.)

None of the Defendants informed Ms. Barker of her right to rescind the mortgage (Compl. ¶¶ 77, 88, 96, 139), advised her about meeting with a certified loan counselor (*id.* ¶¶ 76, 87), or provided required written disclosures, including a written agreement allowing fees to be paid directly to the contractor Defendant Lockdeco a/k/a Lodeco from amounts extended as credit (*see id.* ¶¶ 68, 71, 136-38.) Although Defendant Hurley required Ms. Barker to sign a letter, dated the same day as the closing, expressing his reservations about the "hard money loan" and requiring that she release him from all liability, he did not explain the true cost of the loan or what the repayment terms would be, or discuss with her the potential consequences of signing, and, notably, he represented her at both the first and second loan closings. (*Id.* ¶¶ 48, 51, 55, 57-58, 82.) When executing the loan documents and agreements, Ms. Barker relied on the reassurances of Defendant Hurley and Defendant Defreitas, people she believed were acting in her best interest. (*Id.* ¶¶ 58, 83.) None of the Defendants provided Ms. Barker with copies of any of the Subject Loan documents or related agreements at either closing. (*Id.* ¶¶ 64-65, 86, 94.)

Two months after the closings, Defendant Telsey came to the Subject Property with another man and informed Ms. Barker that she was behind on her mortgage payments, insisting that Defendant Rokosz would soon own the house. (Compl. ¶ 97.) This was the first time Ms. Barker learned that Defendant Defreitas had not made the monthly mortgage payments as she had promised. (*Id.* ¶ 98.) Ms. Barker called Defendant Legum and asked him to use the funds in the escrow account to cure the default, but Defendant Legum told her this would not be possible. (*Id.* ¶ 99.) After Ms. Barker's default, Defendant Rokosz, as well as other Defendants, collected on the

Subject Loan by demanding payment, transferring Ms. Barker's shares of J&M Holdings to Defendant Rokosz, and commencing two eviction proceedings against Ms. Barker in housing court. (*Id.* ¶¶ 97, 99, 101, 104-06.) As a result of Defendants' scheme to strip her home of equity and efforts to remove her from her home, Ms. Barker has experienced fear, shame, and depression. (*Id.* ¶¶ 103, 116.)

Since 2014, Defendant Rokosz has issued at least 13 other mortgage loans for one-to-four family homes with similar terms to the Subject Loan. (Compl. ¶ 119.) Of those 14 similar mortgage loans, Defendant Legum is a party or otherwise involved in six of the transactions. (*Id.* ¶ 120.) The Complaint alleges that Defendants target distressed homeowners with equity in their homes and issue hard money loans with such onerous terms and costs that default and immediate deed transfer are guaranteed, all while completely stripping the home of equity to their benefit. (*Id.* ¶¶ 211-13.) Defendant Defreitas is currently incarcerated on charges related to a complex mortgage fraud and money-laundering scheme. (*Id.* ¶ 9.)

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint need only provide 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Citizens United v. Schneiderman*, 882 F.3d 374, 380 (2d Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In evaluating a Rule 12(b)(6) motion, a court "constru[es] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017). Ultimately, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [its] facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal quotation omitted).

ARGUMENT

I. PLAINTIFF HAS ADEQUATELY PLED A CLAIM PURSUANT TO RICO.

Section 1962(c) of RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1964(c) provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." Because Ms. Barker has plausibly pled that she was injured in her property by reason of Moving Defendants' violations of Section 1962(c), dismissal of her RICO claims against these Defendants is not warranted.

A. Plaintiff Has Adequately Pled "Collection of an Unlawful Debt."[4]

The "pattern of racketeering activity" and "collection of unlawful debt" elements of Section 1962(c) are disjunctive. "Unlike a 'pattern of racketeering activity' which requires proof of two or more predicate acts, to satisfy RICO's 'collection of unlawful debt' definition [a claimant] need only demonstrate a single collection." *United States v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991). Accordingly, "[i]n order to state a RICO claim based on the collection of an unlawful debt, a plaintiff must allege that (1) 'the debt was unenforceable in whole or in part because of state or federal laws relating to usury,' (2) 'the debt was incurred in connection with the business of lending money at a usurious rate,' and (3) 'the usurious rate was at least twice the enforceable rate.'" *Dae Hyuk Kwon v. Santander Consumer USA*, 742 Fed. Appx. 537, 539 (2d

[4] Notably, Defendant Legum is the only moving defendant who challenges whether Ms. Barker has adequately pled collection of an unlawful debt.

Cir. 2018) (quoting *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 248 (2d Cir. 1985)); *see* 18 U.S.C. § 1961(6) (defining "unlawful debt").[5]

1. Plaintiff Has Adequately Pled That The Debt Was Unenforceable Because of State Laws Relating to Usury, and That The Usurious Rate of The Debt Was At Least Twice The Enforceable Rate.

Ms. Barker alleges that the Subject Loan is unenforceable under New York State usury law. (*See* Compl. ¶¶ 182-91, 216.)[6] The maximum rate of interest upon the loan or forbearance of money or goods in New York is 16 percent. *See* N.Y. Gen. Oblig. § 5-501; N.Y. Banking Law § 14-a. When applied to any loan secured primarily by an interest in real property improved by a one- or two-family residence occupied by the owner, "interest" includes origination fees, points and other discounts, and "all other amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for making the loan or forbearance." N.Y. Comp. Codes R. & Regs. tit. 3, § 4.2(a). Interest does not include certain "amounts payable in connection with the loan or forbearance, if itemized in writing to the borrower," such as

[5] While the Second Circuit does not appear to have ever expressly addressed the meaning of "collection" as used in § 1962(c), other circuits have clarified that "a single act which would tend to induce another to repay on an unlawful debt incurred in the business of lending money" constitutes collection of unlawful debt. *United States v. Eufrasio*, 935 F.2d 553, 576 (3d Cir. 1991) (citing *United States v. Pepe*, 747 F.2d 632, 673-75 (11th Cir. 1984)).

[6] Defendant Legum states that "pursuant to General Obligations Law § 5-521, [the] defense [of usury] is not available to a corporation." (Def. Legum Mem. 10.) While section 5-521(1) of the New York General Obligations Law provides that "[n]o corporation shall hereafter interpose the defense of usury in any action," section 5-521(2) expressly states that subdivision one "shall not apply to a corporation, the principal asset of which shall be the ownership of a one or two family dwelling, where it appears . . . that the said corporation was organized and created . . . within a period of six months prior to the execution, by said corporation of a bond or note evidencing indebtedness, and a mortgage creating a lien for said indebtedness on the said one or two family dwelling." Furthermore, an individual guarantor of a loan made to a corporation covered under section 5-521(2) may interpose the defense of usury. *North Broadway Funding Corp. v. Freed*, 357 N.Y.S.2d 27, 29 (N.Y. App. Div. 1974), *cited with approval in Schneider v. Phelps*, 359 N.E.2d 1361, 1366 (N.Y. 1977). Plaintiff has alleged that the mortgage loans in this case were issued to a sham corporation, the principal asset of which is the ownership of a two-family dwelling, that was organized and created within six months prior to the execution by said corporation of a bond or note evidencing indebtedness and a mortgage creating a lien for said indebtedness on the two-family dwelling. (*See* Compl. ¶¶ 2, 33-35, 52-54, 57-66, 78-84, 135.) She has further alleged that she is the individual guarantor of the usurious loans issued to the corporation. (*See id.* ¶¶ 62, 82.)

"reasonable fees, charges and costs for [specified] services actually and necessarily rendered," including appraisal of the property and title examinations. *Id.* § 4.3.

To determine whether the interest charged on a loan secured primarily by an interest in real property improved by a one- or two-family residence occupied by the owner has exceeded the usury limit, the maximum permissible rate of interest is compared to the "annual percentage rate which will yield a sum equal to the amount of 'interest' as defined in [3 NYCRR § 4.2] when such rate is applied to the unpaid balances of the amount financed, calculated according to the actuarial method (United States rule) by allocating payments between the amount financed and the amount of such 'interest' so that a payment is applied first to such 'interest' and the balance to the unpaid amount financed." 3 NYCRR § 4.4; *see generally* 12 C.F.R. § 266, Appx. J (2019) (Annual Percentage Rate Computations for Closed-End Credit Transactions). The term "amount financed" as defined by section 4.4 means "the sum of (a) the amount of the loan paid to, receivable by, or paid or payable for the account of the borrower, plus (b) such fees, charges or costs not included in 'interest' as defined in [3 NYCRR § 4.2(a)] but which at the time of any calculation of interest have been added to the loan or forbearance." 3 NYCRR § 4.4.

The mortgage loan issued to Ms. Barker totaled $450,000.00, carried a one-year term at a disclosed interest rate of 12 percent, and provided for interest-only payments of $4,500 for twelve months and a final balloon payment of the entire principal balance, $450,000.00. (Compl. ¶¶ 66, 84, 89.) As Ms. Barker states in her Complaint, the Subject Loan "included roughly $85,376.10 in finances charges, consisting of: (a) $60,192.68 retained in escrow as a premium or other charge for a guarantee protecting the creditor against the obligor's default; (b) at least $23,990.00 to corporations and/or individuals unknown to Ms. Barker, for services undeclared to Ms. Barker, that were imposed by the creditor . . . incident to the extension of credit and (c) $1,193.42 to the

creditor as an upfront interest charge." *Id.* ¶ 155. Pursuant to the method for calculating the effective interest rate set forth by 3 NYCRR § 4.4, if this $85,376.10 is considered interest, then the mortgage loan had an annual interest rate of 32.19 percent, more than twice the enforceable rate of 16 percent.

That Ms. Barker has plausibly pled that the $85,376.10 constitutes interest is supported by caselaw. "When determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it." *Ujueta v. Euro-Quest Corp.*, 814 N.Y.S.2d 551, 552 (N.Y. App. Div. 2006) (internal quotation omitted); *Power Up Lending Grp., Ltd. v. Cardinal Energy Grp., Inc.*, No. 16-cv-1545, 2019 U.S. Dist. LEXIS 57527, at *13 (E.D.N.Y. Apr. 3, 2019); *see Alkhatib v. New York Motor Grp., LLC*, No. 13-cv-5643, 2015 U.S. Dist. LEXIS 72055, at *72-73 (E.D.N.Y. June 3, 2015) ("To determine whether a transaction is usurious, a court looks not to its form, but its substance, or 'real character.'")(citations omitted). For example, "a court may properly consider whether a lender is extracting a usurious rate of interest through deceptive means, such as by imposing excessive fees or inflating the loan's principal amount." *Alkhatib*, 2015 U.S. Dist. LEXIS 72055 at *73 (citing *Hillair Capital Investments, L.P. v. Integrated Freight Corp.*, 963 F. Supp. 2d 336, 339 (S.D.N.Y. 2013)). Furthermore, "whether a given fee or commission is a cover for usury is a question of fact." *Ross v. Warthen*, No. 84-cv-4009, 1987 U.S. Dist. LEXIS 1078, at *3 (S.D.N.Y. Feb. 17, 1987); *United States v. Orozco-Prada*, 636 F. Supp. 1537, 1543 n.7 (S.D.N.Y. 1986).

New York courts have generally determined whether loan proceeds placed in escrow are interest based on whether those funds were released to the borrower or were otherwise used or made available to the borrower to make payments on the borrower's obligation(s) under the loan.

Compare Sasidharan v. Piverger, 993 N.Y.S.2d 646 (Table) (N.Y. Sup. Ct. 2014), *aff'd in part*, 44 N.Y.S.3d 85 (N.Y. App. Div. 2016) ("[S]ince ACI never received the amount of $63,000 of the $150,000 loaned which was held in escrow and later released to [the lenders], this effectively resulted in [a usurious] annual interest"), *and Simsbury Fund v. New St. Louis Assocs.*, 611 N.Y.S.2d 557, 558 (N.Y. App. Div. 1994) (interest "on the escrowed funds to which defendant had no access made the agreements usurious . . . [and] the possibility of a nonusurious rate of interest in the event of defendant's full performance . . . [does] not make the subject agreements nonusurious"), *with Emigrant Sav. Bank-Long Is. v. Pollack*, No. 12/3259, 2014 N.Y. Slip Op 32527(U) at 5 (N.Y. Sup. Ct.) ("[E]scrow holdback to insure defendant's payment on the loan for two years . . . was available to and entirely depleted by defendant to pay her mortgage over a two year period, as such, these sums were already part of the interest rate and do not involve usury issues"), *and Northern Funding, LLC v. Nai-More Dev. Corp.*, 831 N.Y.2d 355, 355 (N.Y. Sup. Ct. 2006) (no usury violation where plaintiff "never accepted late payments from [borrower], but instead, applied the money in its escrow account towards the overdue monthly payments").

Here, according to Defendant Legum, "[t]he escrowed funds, as the escrow agreement provides, were not and [*sic*] were not to be received by the lender. They were held in escrow to be used in the event of a default by the borrower." (Def. Legum Mem. 10; 3 n.4.) Yet, Ms. Barker has pled that these funds were not used when she defaulted. When Ms. Barker was notified that she was in default, she "asked to use the funds in the escrow account to help her with payments" and "Defendant Legum told her this would not be possible." (Compl. ¶ 99.) Moreover, Defendant Legum admits that he still has the funds. With the exception of $10,458.33 he paid in property taxes pursuant to a stipulation so-ordered by this Court on May 9, 2019 (ECF No. 33), he continues

to hold the remaining $49,734.35 "in escrow." (*See* Def. Legum Mem. 3 n.4.[7]) None of this is consistent with the funds being held in escrow to be used in the event of Ms. Barker's default. The "escrowed" funds were not released to Ms. Barker or otherwise used or made available to her to make payments on her obligations under the loan, and they therefore constituted interest on the loan.[8, 9]

Defendant Legum next argues that the $23,990.00 cited by Ms. Barker does not constitute interest because Ms. Barker directed those payments to be paid to those parties. (Def. Legum Mem. 11.) This is clearly contradicted by Ms. Barker's allegations that these proceeds were distributed "to corporations and/or individuals unknown to [her], for services undeclared to [her], that were imposed by the creditor . . . incident to the extension of credit," consisting of $8,713.33 to

[7] To the extent that Defendant Legum argues that his release of the $10,458.33 means that those funds cannot constitute interest, the argument lacks sense. He released these funds over two years after Plaintiff defaulted on the mortgage loan (Compl. ¶¶ 97-99), and approximately two years after he released the shares of J&M Holdings to Defendant Rokosz (*id.* ¶ 101; Def. Legum Mem. 4).

[8] While Plaintiff does not believe that the documents annexed to Defendant Legum's and Defendant Rokosz's motions to dismiss are properly considered for a Rule 12(b)(6) motion, she notes that the terms of the "escrow" agreements (*see* Def. Legum Mot., Exs. C, L; Def. Rokosz Mot., Exs. I, P) only confirm the true purpose of the agreements. First, the "escrow" agreements provide that if any payments are made by the lender out of the escrowed funds, "any such payments are then added to the sum then due and owing the Lender"—making it impossible that the funds could function as an escrow account. Second, neither of these "escrow" agreements *even contains* a provision about what would happen to the funds if Plaintiff succeeded in paying off the loans. (The absence of any such provision plainly contradicts Defendant Legum's own representation that "[p]er the terms of the escrow agreement, the escrowed funds were to be utilized [in the event of] default and, upon repayment of the sums to Mr. Rokosz, any balance remaining in escrow would be paid to the plaintiff." (Def. Legum Mem. 3 n.4.))

[9] Defendant Legum argues that the "escrowed" funds do not constitute interest because "the release of the escrowed funds was not contingent upon anything beyond the borrower's control." (Def. Legum Mem. 11.) He quotes *Blue Wolf Capital Fund II, L.P. v. American Stevedoring Inc.* to support his argument: "If an instrument provides that the creditor will receive additional payment in the event of a contingency beyond the borrower's control, the contingent payment constitutes interest within the meaning of the usury statutes." (*Id.* at 10-11) (quoting 961 N.Y.S.2d 86, 89 (N.Y. App. Div. 2013)). In *Blue Wolf II*, the court found that funds withheld from the loan principal by the lender as a "deposit" constituted interest because the lender reserved the right to determine the fate of the deposited funds "in its sole discretion." 961 N.Y.S.2d at 88. Legum has mistaken a sufficient condition for a necessary one. While the fact that a payment to a creditor depends on a contingency outside the borrower's control may be sufficient to establish that the payment constitutes interest, the presence of such a contingency is not necessary for something to constitute interest. *See, e.g.*, *Simsbury Fund*, 611 N.Y.S.2d at 558 (stating interest "on the escrowed funds to which defendant had no access made the agreements usurious . . . [and] the possibility of a nonusurious rate of interest in the event of defendant's full performance . . . [does] not make the subject agreements nonusurious").

Defendant Royce LLC, $14,926.67 to Defendant Jackie Marketing LLC, and $350.00 to Ronald Ifraimov. (Compl. ¶ 155; *see id.* ¶¶ 68, 85.) Ms. Barker did not know what Royce LLC or Jackie Marketing LLC were at the closing, she is not aware of any services performed by these companies to her benefit, and the funds "were not paid . . . for purposes that were defined or communicated to" her. (*Id.* ¶¶ 69, 137.) These allegations are sufficient to plead that the $23,990.00 constituted interest on the loan, in that this amount does not include any of the "amounts payable with the loan or forbearance, if itemized in writing to the borrower," enumerated in the applicable regulations as amounts not constituting interest. 3 NYCRR § 4.3.

Furthermore, Ms. Barker has pled that Defendants' association-in-fact enterprise extracted a usurious rate of interest on the Subject Loan by imposing these excessive fees and inflating the principal amount; and whether a given fee or commission is a cover for usury is a question of fact. Particularly when viewed in light of the dubious "escrow" agreements that Ms. Barker describes in her pleading, it is plausible that the $23,990.00 in fees were merely a cover for usury and, considered in its totality and judged by its real character, that the transaction constituted a usurious loan.[10]

2. Plaintiff Has Adequately Pled That The Debt Was Incurred In Connection With "The Business Of Lending Money At A Usurious Rate."

The requirement that an unlawful debt be incurred in connection with "the business of lending money at a usurious rate" originates from RICO's definition of "unlawful debt." *See* 18 U.S.C. § 1961(6) ("'unlawful debt' means a debt . . . 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"). The Second Circuit has not defined the exact contours of "the business of lending money at a

[10] Not only does Defendant Rokosz not address whether the Subject Loan was usurious in his motion to dismiss, he did not move to dismiss Ms. Barker's New York State usury law claim (*see* Compl. ¶¶ 182-191) against him.

usurious rate" requirement. However, it has considered the purpose of the requirement in dicta, explaining that it "seems aimed at the same goal" as the requirement that the rate be at least twice the enforceable rate, which is "to limit the effect of [the] definition to cases of clear 'loan-sharking.'" *Durante Bros. & Sons*, 755 F.2d at 248 (internal quotation omitted); *see generally United States v. Persico*, No. 10-cr-147, 2011 U.S. Dist. LEXIS 63034, at *5-13 (E.D.N.Y. June 9, 2011).

Here, Plaintiff has alleged that, since 2014 alone, "Defendant Rokosz has issued at least 13 other mortgage loans for one-to-four family homes, each of which have similar terms to the Subject Loan, including 12 percent annual interest rates, interest-only payments, and one-year terms." (Compl. ¶ 119.[11]) Plaintiff alleges that Defendants "facilitat[e] loans issued at usurious rates in the State of New York, as part of a fraudulent equity-stripping scheme benefiting" Defendants (*id.* ¶ 216), by "target[ing] distressed homeowners with equity in their homes [and] issu[ing] hard money loans with such onerous terms and costs that default and immediate deed transfer are guaranteed." (*Id.* ¶ 212.) In this way, Ms. Barker has plausibly alleged that the unlawful debt she incurred was incurred in connection with the business of lending money at a usurious rate. *See, e.g.*, *Gregoria v. Total Asset Recovery, Inc.*, No. 12-cv-4315, 2015 U.S. Dist. LEXIS 1818, at *15 (E.D. Pa. Jan.

[11] Just as Ms. Barker does not allege that the loan she received from Defendant Rokosz was usurious on its face, she does not allege here that the 12 percent annual interest rate, interest-only payments, and one-year term on the faces of these loans are sufficient to render them usurious. However, unlike with respect to the loan she received, Ms. Barker does not have access at the pleading stage to documents or information associated with these loans beyond what has been publicly recorded. She must therefore rely on these other loans' indicia of usury to plead that her debt was incurred in connection with the business of lending money at a usurious rate. Ms. Barker is able to do this because "[t]he *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged 'upon information and belief' where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010) (internal citations and quotations omitted); *see also Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013) ("The application of this plausibility standard to particular cases is context-specific, and requires assessing the allegations of the complaint as a whole") (internal citations and quotations omitted); *accord Environmental Servs. v. Recycle Green Services*, 7 F. Supp. 3d 260, 274-75 (E.D.N.Y. 2014) (holding that RICO pleadings subject to Rule 9(b) pleading "may be based on information and belief when facts are peculiarly within the opposing party's knowledge").

7, 2015) ("[P]laintiffs aver that DTL is a predatory lender which is in the business of issuing loans at triple digit interest rates to 'people with poor credit and a crushing need for cash' . . . [T]hese allegations are . . . sufficient to plausibly plead a civil RICO claim" (internal citations omitted)), *cited with approval in Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 148-49 (3d Cir. 2016).

B. Plaintiff Has Adequately Pled That the Moving Defendants Conduct or Participate in the Conduct of the Affairs of an Association-in-Fact Enterprise.

1. Plaintiff Has Plausibly Pled That Defendants Comprise an Association-in-Fact Enterprise.

Section 1961(4) of RICO defines "enterprise" to include "any . . . group of individuals associated in fact although not a legal entity." This "concept of an association in fact enterprise is expansive," encompassing any "group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle v. United States*, 556 U.S. 938, 944 (2009) (first quote); *United States v. Turkette*, 452 U.S. 576, 583 (1981) (second quote). Accordingly, "RICO associations-in-fact need exhibit only three structural features: (1) a shared purpose; (2) relationships among the associates; and (3) 'longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *D'Addario v. D'Addario*, 901 F.3 80, 100 (2d Cir. 2018) (quoting *Boyle*, 556 U.S. at 946). "Such a group need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis . . . Members of the group need not have fixed roles; different members may perform different roles at different times . . . Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique." *Boyle*, 556 U.S. at 948; *see generally Alkhatib*, 2015 U.S. Dist. LEXIS 72055 at *31 ("Courts in this district have recognized that *Boyle* establishes a low threshold for pleading such an enterprise" (internal quotation omitted)).

While the existence of an association-in-fact enterprise is a separate element from the pattern of racketeering activity or collection of unlawful debt under RICO, the existence of such an enterprise may be inferred from evidence showing that persons associated with the enterprise engaged in the underlying predicate activity. *See Boyle*, 556 U.S. at 947; *United States v. Granton*, 704 Fed. Appx. 1, 5 (2d Cir. 2017) ("[T]he existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by any abstract analysis of its structure"); *accord United States v. Mazzei*, 700 F.3d 85, 89 (2d Cir. 1983) ("Proof of these separate elements [need not] be distinct and independent, as long as the proof offered is sufficient to satisfy both elements").

Using the familiar language of mail and wire fraud,[12] the Second Circuit has held that "[f]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013); *see D. Penguin Bros. v. City Nat'l Bank*, 587 Fed. Appx. 663, 667-68 (2d Cir. 2014). By contrast, "[p]roof that several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates, is not enough to show that the individuals were members of an enterprise." *D'Addario*, 901 F.3 at 101 (internal quotation and alterations omitted); *see, e.g.*, *Eagle One Roofing Contrs., Inc. v. Acquafredda*, No. 16-cv-3537, 2018 U.S. Dist. LEXIS 59969, at *18 (E.D.N.Y. Mar. 31, 2018) ("[T]he enterprise cannot consist of unrelated individuals committing isolated . . . acts").

Courts therefore look to whether a plaintiff makes "concrete factual assertions as to the mechanics of the interactions among defendants, including facts indicating that the disparate defendants functioned as a unit, or supporting the inference that defendants had a common interest in the success of the so-called enterprise," to determine whether a plaintiff has alleged the "shared

[12] Mail and wire fraud are "the two most frequently alleged predicate acts." Gregory P. Joseph, Civil RICO: A Definitive Guide 109 (4th ed. 2015).

purpose" and "relationships among the associates" of an in-fact enterprise. *Abbott Labs. v. Adelphia Supply USA*, No. 15-cv-5826, 2017 U.S. Dist. LEXIS 1007, at *16 (E.D.N.Y. Jan. 4, 2017); *see, e.g.*, *Delgado v. Ocwen Loan Servicing, LLC*, No. 13-cv-4427, 2014 U.S. Dist. LEXIS 135758, at *50 (E.D.N.Y. Sept. 23, 2014) (existence of an association-in-fact enterprise pled where plaintiffs set "forth facts describing how Defendants functioned as a unit that worked toward a common purpose" and "identify[ing] the role of each Defendant and the linkages among them"); *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685, 699 (S.D.N.Y. 2015) (finding RICO enterprise sufficiently pled where "[t]he Complaint details the actions of each of the Defendants in furtherance of the scheme and describes their relationships to each other").[13]

Here, Plaintiff has pled that Defendants constitute an association-in-fact whose purpose "is to target distressed homeowners with equity in their homes, issue hard money loans with such onerous terms and costs that default and immediate transfer are guaranteed, . . . completely stripping the home of equity to the benefit of the members of the Enterprise." (Compl. ¶ 212.)

> This is accomplished by Defendant Defreitas utilizing her connections in the community to connect a struggling homeowner with Defendant Rokosz and Defendant Fishbein; Defendant Fishbein arranges the financing; Defendant Rokosz issues hard money loans directly to the homeowner or has the homeowner transfer title to a sham corporation which then becomes the borrower and the homeowner is promised he or she will be the sole shareholder and remain effective owner, and must personally guarantee the hard money loan; Defendant Rokosz employs associate Defendant Legum to serve as the attorney for the transaction and "escrow agent" in furtherance of the scheme; Defendant Hurley provides legal services to the homeowner as part of the scheme; Defendant Defreitas arranges for significant proceeds to be paid to a purported construction company, [Defendant] Lockdeco, to perform repairs that are never actually completed . . . and one or more Defendants arranges for significant proceeds to go to associate Defendant Telsey, who appears to accept significant proceeds through two corporations, [Defendants] Royce LLC and Jackie Marketing LLC, in furtherance of the scheme.

[13] Meanwhile, "there is no hard-and-fast time period for satisfaction of the longevity prong." *United States v. Pierce*, 785 F.3d 832, 838 (2d Cir. 2015). The enterprise need only "remain in existence long enough to pursue a course of conduct." *Boyle*, 556 U.S. at 948; *accord Pavlov v. Bank of N.Y. Co.*, 25 Fed. Appx. 70, 71 (2d Cir. 2002) ("The enterprise need not necessarily have a continuity extending beyond the performance of" the underlying RICO act(s)).

(*Id.* ¶ 213.[14])

Plaintiff's allegations constitute "concrete factual assertions as to the mechanics of the interactions among defendants" and "support[] the inference that defendants had a common interest in the success of the so-called enterprise." *Abbott Labs.*, 2017 U.S. Dist. LEXIS 1007, at *16. For example, Defendant Rokosz would not have a struggling, mislead homeowner to lend to, whose default he could ensure for purposes of the equity-stripping scheme, were one not brought to him by Defendants Defreitas and/or Fishbein. There would not be funds to lend the victim, including funds to misappropriate as payment for various Defendants and as cover for usury, without by Defendant Rokosz. Defendant Rokosz would not be able to structure the transactions to ensure the borrower's default and to evade consumer protection laws without the assistance of Defendant Legum, an attorney. Likewise, Plaintiff's pleading illustrates the ways in which Defendant Hurley's faux-representation of the borrower helps to facilitate the scam. For example, Plaintiff states that she "rel[ied] on the reassurances of Defendant Hurley" in executing the mortgage loan documents at issue, (Compl. ¶ 58), and that "[a]t no point during the closing did Defendant Hurley explain to Ms. Barker any of the documents he instructed her to sign, or discuss with her the potential consequences of signing," (*id.* ¶ 51), but that she signed them anyway, "given the presence and participation of Defendant Defreitas and Defendant Hurley, people she trusted and believed were acting in her best interest." (*Id.* ¶ 82.)

Ignoring the substance of Plaintiff's allegations, Defendant Rokosz argues that, except as to himself and Defendant Legum, "Plaintiff has not provided more than conclusory allegations

[14] It has become clear to Ms. Barker since commencing the instant litigation that Defendant Jackie Marketing LLC is more closely affiliated with Defendant Fishbein, as evidenced by the fact that both Defendants are represented by the same attorney. While Ms. Barker cannot amend her pleading at this juncture to reflect this, neither will she rely here on any aspects of what she pled about Defendant Jackie Marketing LLC that she no longer believes to be accurate.

outside of [the other] Defendants' respective roles with respect to this one transaction, and indeed Plaintiff has certainly not 'provide[d] the Court with . . . solid information regarding the hierarchy, organization, and activities of' the alleged enterprise." (Def. Rokosz Mem. 23 (quoting *Moss v. BMO Harris Bank, N.A.*, 258 F. Supp. 3d 289, 301 (E.D.N.Y. 2017) (alterations in original))). However, as the Second Circuit has repeatedly held, "the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by any abstract analysis of its structure." *Granton*, 704 Fed. Appx. at 5; *United Stated v. Krasniqi*, 555 Fed. Appx. 14, 17 (2d Cir. 2014); *United States v. Applins*, 637 F.3d 59, 73 (2d Cir. 2011); *United States v. Burden*, 600 F.3d 204, 215 (2d Cir. 2010). Thus, the existence of such an enterprise may be inferred from evidence showing that persons associated with the enterprise engaged in the underlying predicate activity. *See, e.g.*, *Boyle*, 556 U.S. at 947; *Alkhatib*, 2015 U.S. Dist. LEXIS 72055 at *32-33 ("Plaintiffs' factual allegations describe actions taken by each of the individual defendants . . . from which their roles in the enterprise may be logically inferred"); *Hamana v. Kholi*, No. 10-cv-1630, 2011 U.S. Dist. LEXIS 123306, at *8 (S.D. Cal. Oct. 24, 2011) (plaintiff sufficiently pled an association-in-fact enterprise based on collection of a single unlawful debt where he "allege[d] that Defendants have worked with a common purpose of operating an ongoing loan-sharking operation and identifie[d] the roles individual defendants play in the operation").[15] Ms. Barker's inferences about Defendants' roles in the enterprise are based on detailed allegations about the actions Defendants took in connection with their attempts to collect an unlawful debt from her.

[15] To the extent that Defendant Rokosz is separately arguing that Ms. Barker must provide "solid information regarding the hierarchy [and] organization" of an alleged association-in-fact enterprise, as a matter of law, he is simply incorrect. *See, e.g.*, *Krasniqi*, 555 Fed. Appx. at 17 ("It is beyond peradventure that a RICO enterprise is not required to have business-like attributes such as a name, a hierarchical structure, a set membership, or established rules" (citing *Boyle*, 556 U.S. at 948)).

Ms. Barker has also alleged that Defendant Defreitas is now incarcerated for residential mortgage fraud (Compl. ¶¶ 9, 118), and that Defendant Rokosz has issued 13 other mortgage loans with terms similar to those here since 2014 alone, six of which bear Defendant Legum's name. (*Id.* ¶¶ 119-25.)[16] These allegations further inform and support Ms. Barker's pleading of the existence of an association-in-fact. *Cf. Cain v. Bethea*, No. 04-cv-3946, 2007 U.S. Dist. LEXIS 34111, at *11-12 (E.D.N.Y. May 9, 2007) (granting post-motion to dismiss preliminary injunction in RICO mortgage fraud case where "other transactions involving the same players appear to include the same indicia of fraud," "the mortgage broker [and the branch manager of the mortgagor] have been convicted of mortgage fraud," and there were other facts buttressing the family's "contention that they were unsophisticated owners of real property who were swindled out of the title to the property by persons who have victimized others as well").

2. Plaintiff Has Pled That Each of the Moving Defendants Conducts, or Participates in the Conduct of, the Affairs of the Enterprise

Section 1962(c) of RICO specifically makes it unlawful for a person to "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through . . . collection of unlawful debt." In other words, a RICO defendant will not be liable for mere participation in collection of an unlawful debt, "but will sustain liability under the statute for participation in the 'operation or management of an enterprise' through" collection of an unlawful debt. *D'Addario*, 901 F.3d at 103 (quoting *Reeves v. Ernst & Young*, 507 U.S. 170, 179 (1993)). This "'operation or management' test presents a 'relatively low hurdle for plaintiffs to clear, especially at the pleading stage.'" *D'Addario*, 901 F.3d at 103 (quoting *First Capital Asset Mgmt. Inc. v. Satinwood, Inc.*,

[16] Moreover, this Court may take judicial notice that Defendant Fishbein has recently faced other allegations not unlike those Ms. Barker makes here. *See Maitland v. Fishbein*, No. 15-cv-5845, 2019 U.S. District LEXIS 37801, at *3-14 (E.D.N.Y. Mar. 7, 2019) (*pro se* plaintiffs alleged mortgage fraud scheme).

385 F.3d 159, 176 (2d Cir. 2004)) (alteration omitted). The test, moreover, "is 'essentially one of fact.'" *D'Addario*, 901 F.3d at 104 (quoting *First Capital Asset Mgmt.*, 385 F.3d at 176)).

Defendant Rokosz does not challenge whether Ms. Barker has pled that he participates in the operation or management of the enterprise's affairs, except insofar as he argues that Ms. Barker has not adequately alleged the existence of an enterprise in whose operation or management he could participate. By extension, neither do the Telsey Defendants challenge whether Ms. Barker has pled that they participate in the operation or management of the enterprise's affairs. This is just as well. While the Telsey Defendants might point out that Ms. Barker does not plead precisely how each participates in the operation or management of the enterprise's affairs, "[i]t is not always reasonable . . . to expect that when a defrauded plaintiff frames his complaint, he will have available sufficient factual information regarding the inner workings of a RICO enterprise to determine whether a defendant was merely substantially involved in the RICO enterprise or participated in the operation or management of the enterprise." *Alkhatib*, 2015 U.S. Dist. LEXIS 72055, at *48-49 (denying motion to dismiss where plaintiffs' allegations gave "rise to a strong inference that [defendant's] role involved more than simply taking directions and performing tasks helpful to the enterprise, and that she was aware of the overall fraudulent scheme") (internal quotation omitted); *State Farm Mut. Auto Ins. Co. v. Grafman*, No. 04-cv-2609, 2007 U.S. Dist. LEXIS 96751, at *32-33 (E.D.N.Y. May 22, 2007) (denying motions to dismiss where plaintiff "provided sufficient specificity with respect to the parameters of the alleged RICO conspiracy and how each of the defendants may have profited from the enterprise"); *AIU Ins. Co. v. Olmecs Med. Supply, Inc.*, No. 04-cv-2934, 2005 U.S. Dist. LEXIS 29666, at *26 (E.D.N.Y. Feb. 22, 2005) (denying motions to dismiss where defendants effectively "provide no argument as to why plaintiffs' allegations fail to suggest that [they] played some role in directing the affairs of the

enterprise"). "Thus, where the role of the particular defendant in the RICO enterprise is unclear, plaintiffs may well be entitled to take discovery on this question." *Alkhatib*, 2015 U.S. Dist. LEXIS 72055, at *49; *Grafman*, 2007 U.S. Dist. LEXIS 96751, at *33; *AIU Ins. Co.*, 2005 U.S. Dist. LEXIS 29666, at *26.

Defendant Telsey's role as real estate appraiser (Compl. ¶ 40), representative of Defendant Royce LLC (*id.*), mortgage closing attendee (*id.* ¶ 50), and menacing visitor to the Subject Property (*id.* ¶ 97), along with Defendant Royce LLC's receipt of $8,713.33 from the Subject Loan for purposes not declared to Ms. Barker, as a cover for usury (*id.* ¶¶ 68-69, 85), do not readily lend themselves to interpretation by those viewing them from the outside. However, if the only plausible inference to be drawn from these facts were a benign explanation of the Telsey Defendants' actions, the Telsey Defendants were welcome to explain what that inference is in a motion to dismiss. They have not done so. Ms. Barker has alleged enough material information about the Telsey Defendants' involvement in the enterprise to warrant discovery as to whether they were "merely substantially involved in the RICO enterprise or participated in the operation or management of the enterprise." *E.g.*, *Ifill v. West*, No. 96-cv-6308, 1999 U.S. Dist. LEXIS 21320, at *25-28 (E.D.N.Y. Aug. 24, 1999) (internal quotation omitted) (finding that while "the processing of inflated mortgages and fraudulent . . . applications in the course of the defendant's duties as a loan officer may not be sufficient to sustain a RICO claim," plaintiff was "entitled to discovery to determine the extent of the roles, if any, that [the loan officer] played in the enterprise").

Meanwhile, indirectly addressing the element of RICO requiring that a defendant "conduct or participate" in the conduct of the enterprise's affairs, Defendant Legum notes that those who "merely provide professional services" to a RICO enterprise do not necessarily "ha[ve] any

control" over the affairs of the enterprise. (*See* Def. Legum Brf. 8) (quoting *Moss*, 258 F. Supp. 3d at 307). While it is true that "attorneys do not incur RICO liability for the traditional functions of providing legal advice and services," this does "not foreclose the possibility of an attorney or law firm maintaining a operational or managerial position in a RICO enterprise." *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 995 (E.D.N.Y. 1995) (declining to grant law firms' motions to dismiss because attorneys could have maintained an operational or managerial position in association-in-fact enterprise); *see, e.g.*, *Cain v. Bethea*, No. 04-cv-3946, 2007 U.S. Dist. LEXIS 75824, at *153 (E.D.N.Y. Aug. 17, 2007), *report and recommendation adopted in part*, 2007 U.S. Dist. LEXIS 71585 (E.D.N.Y. Sept. 26, 2007) (finding that attorney participated "in directing the affairs of the enterprise through distribution of the proceeds of the fraud to the other participants in the scheme"); *Turkish ex rel. Trask v. Kasenetz*, 964 F. Supp. 689, 695 (E.D.N.Y. 1997) (denying attorney's motion to dismiss because plaintiffs adequately alleged that the lawyer participated in the operation or management of the alleged enterprise); *accord Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994) (upholding attorneys' criminal RICO convictions). Thus, whether an attorney participated in the conduct of a RICO enterprise "depends not . . . on her status as a lawyer but on her actual conduct," and "[d]etermining the extent and nature of her role [may require] a full opportunity for discovery." *Friedman v. Hartmann*, No. 91-cv-1523, 1994 U.S. Dist. LEXIS 3404, at *11-12 (S.D.N.Y. Mar. 22, 1994); *see* No. 91-cv-1523, 1994 U.S. Dist. LEXIS 9727, at *4-5 (S.D.N.Y. July 15, 1994) (denying motion for reconsideration).

Here, Ms. Barker has alleged that, *inter alia*, Defendant Legum: (1) provided the deed transferring the Subject Property to a sham corporation in order to circumvent consumer protection law (Compl. ¶ 52), (2) provided the promissory note for $10,000.00 payable to Defendants Fishbein and Telsey, neither of whom Defendant Legum ever purported to represent (*id.* ¶ 57), (3)

received $7,500.00 in proceeds from the Subject Loan (*id.* ¶¶ 68, 85), (4) serves as the "escrow agent" for the Subject Loan, and, in this role retained $60,192.68 in "escrowed" funds that he refused to release to Ms. Barker and or otherwise use for her benefit (*id.* ¶¶ 60, 83, 99), and (5) has represented Defendant Rokosz in at least five other similar mortgage transactions since 2014. (*Id.* ¶ 120.) Collection of unlawful debt is the predicate act underlying Plaintiff's RICO claim, and the Complaint alleges that Defendant Legum collected proceeds from the Subject Loan, retains "escrow funds" in a manner that make said funds interest on the usurious loan, and regularly represents Defendant Rokosz in similar transactions. These allegations go directly to the role Defendant Legum plays in the enterprise and whether he "merely provides professional services."

C. Plaintiff Has Adequately Pled an Effect on Interstate or Foreign Commerce.[17]

Section 1962(c) of RICO requires that an alleged enterprise be one which is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c). This "does not require RICO plaintiffs to show more than a minimal effect on interstate commerce." *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001); *First Capital Asset Mgmt.*, 385 F.3d at 143 n.12; *see United States v. Mejia*, 545 F.3d 179, 203 (2d Cir. 2008) ("[A]ny . . . conduct having even a *de minimis* effect on interstate commerce suffices"). This low threshold can be met, for example, by the transfer of funds to or from an out-of-state entity, or the prevention of the transfer thereof. [18] Thus, in *DeFalco*, the Second Circuit held that the fact that an enterprise's extortionate demand led plaintiff to break an $8,800 contract with an out-of-state company sufficiently demonstrated that the enterprise's affairs affected interstate commerce. 244 F.3d at 309.

[17] Notably, Defendant Legum is the only moving defendant who challenges whether Plaintiff has adequately pled an effect on foreign or interstate commerce.

[18] In the context of unlawful debt collection, this threshold may be even lower. *See* 15 U.S.C. § 1692(d) ("Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce").

Here, contrary to Defendant Legum's bare assertion that "[t]he complaint alleges not facts, but only the conclusion that the enterprise engages in or affects interstate commerce," (Def. Legum Mem. 12), Plaintiff specifically alleges that $150,000 from the Subject Loan was transferred to an individual residing out of state, Ms. Barker's half-sister Sandra Vaughan, in exchange for Ms. Vaughan transferring her share of the title of the Subject Property to Ms. Barker. (*See* Compl. ¶¶ 53, 67, 214.) Contemporaneously, Defendant Legum provided Defendant Hurley with the deed transferring the Subject Property to J&M Holdings, which Defendant Hurley instructed Ms. Barker to sign, (*see id.* ¶ 52), and Defendant Rokosz issued the usurious loan intended to deprive Ms. Barker of ownership of J&M Holdings and thereby strip all equity in the Subject Property. By pleading that the enterprise's affairs effectuated the transfer of $150,000.00 to a resident of one state in exchange for her interest in real property in another state—an effect on interstate commerce over 17 times greater than the $8,800.00 effect held adequate in *DeFalco*—Ms. Barker has satisfied the interstate commerce element of RICO.

II. PLAINTIFF HAS ADEQUATELY PLED A CLAIM PURSUANT TO GBL § 349.

Section 349(a) of the New York General Business Law ("GBL") prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute exists "to expand enforcement authority beyond the Attorney General and thereby ensure more optimal protection of the public." *City of New York v. Smokes-Spirits.Com, Inc.*, 883 N.Y.S.2d 772, 776 (N.Y. 2009). Claims under GBL § 349 are analyzed under a three-factor test requiring: (1) a consumer oriented transaction; (2) a deceptive act by the defendant; and (3) an injury caused by such deceptive acts. *See Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015); *Smokes-Spirits.Com*, 883 N.Y.S.2d at 776. "[A]n action under § 349 is not subject to the pleading-with-particularity requirements of Rule 9(b) . . . but need only meet the

. . . pleading requirements of Rule 8(a)." *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2d Cir. 2005). Ms. Barker has pled all elements of GBL § 349, and Defendants' arguments to the contrary are unconvincing.

A. Plaintiff Has Pled Defendants' Practices Were Consumer-Oriented.

Defendants claim that Ms. Barker fails to satisfy the consumer-oriented conduct prong of GBL § 349 because she has offered no evidence or allegation that another party was affected by Defendants' bad practices (Def. Legum Mem. 14), and because all the deceptive acts alleged in the Complaint "were done to the corporate Borrower and not to an individual consumer or consumers at large." (Def. Rokosz Mem. 13.)[19] Defendants have overlooked clear allegations in Ms. Barker's Complaint and misapprehended established precedent.

Consumer-oriented conduct within the meaning of GBL § 349 is "broadly interpreted" and "requires merely that the conduct at issue 'have a broader impact on consumers at large.'" *Koch v. Greenberg*, 626 F. App'x 335, 340 (2d Cir. 2015) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995)). In establishing that this requirement should be broadly interpreted, the New York Court of Appeals reasoned that the statute "was intended to 'afford a practical means of halting consumer frauds at their incipiency without the necessity to wait for the development of persistent frauds.'" *Oswego*, 647 N.E.2d at 744 (citing Mem. of Gov. Rockefeller, 1970 NY Legis. Ann., at 472-473). The statute is designed "to secure an honest market place where trust, and not deception, prevails." *Koch*, 626 F. App'x at 340 (citing *Goshen v. Mutual Life Ins. Co. of New York*, 774 N.E.2d 1190, 1195 (N.Y. 2002)). Defendants argue that they are shielded from liability because any deceptive acts were made toward a sham corporation. But, Ms. Barker has sufficiently alleged that Defendants' deceptive

[19]Defendant Rokosz claims Ms. Barker has not identified any false advertising in her Complaint. (*See* Def. Rokosz Mem. 12.) Ms. Barker did not allege Defendants engaged in false advertising in her Complaint.

acts and practices were in fact directed at Ms. Barker, a consumer, and have a broader impact on consumers at large, in violation of GBL § 349.

1. Although the Subject Loan Was Issued to a Sham Corporation, Defendants' Conduct Was Directed at Ms. Barker, a Consumer.

Defendant Rokosz argues that "all of Mr. Rokosz's acts complained of were done to the (corporate) Borrower." (Def. Rokosz. Mem. 13.) Without citing any case law, Defendant Rokosz concludes that GBL § 349 thus does not apply. This argument is not supported by precedent and only highlights the deceptive nature of the transaction, which Defendants specifically structured to evade consumer protection laws.

GBL § 349 "is a broad, remedial statute." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 818 N.E.2d 1140, 1144 (N.Y. 2004). In the context of similarly remedial consumer protection statutes, courts liberally construe text in favor of the consumer in order to effectuate the underlying purpose. *See, e.g., N. C. Freed Co. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1214 (2d Cir. 1973) (finding TILA must be construed liberally "[s]ince the statute is remedial in nature" and "designed to remedy . . . unscrupulous and predatory creditor practices"); *Vincent v. Money Store*, 736 F.3d 88, 98 (2d Cir. 2013) ("Because the FDCPA is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated.") (internal quotation marks omitted). Where a transaction is structured in a manner that subverts the purpose of the consumer protection statute, courts and regulators have determined the consumer must nonetheless be able to seek redress. *See* N.Y. Banking Law § 6-*l*(3) (statute applies "to any person who in bad faith attempts to avoid the application of this section by any subterfuge"); *Aries Fin., LLC v. 12005 142nd St., LLC*, 7 N.Y.S.3d 372, 374 (N.Y. App. Div. 2015) (citing to New York Banking Law 6-*l*(3) to invalidate loan made to LLC, even though statute applies only to natural persons); *Amonette v. IndyMac Bank, F.S.B.*, 515 F.Supp.2d

1176, 1183 (D. Haw. 2007) (finding plaintiff in her individual capacity had standing to sue under TILA, even though mortgage loan was issued to a revocable living trust and not a natural person); *Schneider v. Phelps*, 359 N.E.2d 1361, 1365 (N.Y. 1977) (stating that creation of a corporation to evade usury laws subverts the very purpose of usury laws, which are intended to "protect desperately poor people from the consequences of their own desperation," and stating "the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans").

Defendant Rokosz claims that the Subject Loan was "not made toward a consumer." (Def. Rokosz Mem. 9.) However, Ms. Barker has alleged that she was the true borrower of the Subject Loan and that the corporate borrower was a mere sham invented so Defendants could evade consumer protection laws. (Compl. ¶¶ 135, 173, 199.) Ms. Barker, the true borrower, is a natural person who maintains the Subject Property as her principal residence.[20] (Compl. ¶ 7.) She inherited the Subject Property from her late mother. (Compl. ¶ 22.) Defendants told Ms. Barker she was required to transfer the Subject Property to a corporation in order to take out the Subject Loan. (Compl. ¶ 33.) At Defendants' insistence, J&M Property Holdings, Inc. ("J&M Holdings") was established for the sole purpose of being the borrower in the subject transaction. (Compl. ¶¶ 33-35.) Because J&M Holdings was a mere sham, its existence must be disregarded by the Court in analyzing whether or not Ms. Barker has pled a cause of action under GBL § 349, which is a remedial statute meant to be read broadly. If bad actors may easily avoid GBL § 349 liability with sham corporations, the statute's purpose of securing an honest market place would be eviscerated

[20] Defendant Rokosz now seeks to cast doubt on whether the Subject Property is Ms. Barker's principal residence. (Def. Rokosz. Mem. n. 2.) This is an improper attempt to raise facts outside the pleadings. It is also contradicted by Defendant Rokosz's own actions, who, as president of J&M Holdings, commenced two housing court proceedings against Ms. Barker to evict her from her home. (Compl. ¶ 104.)

and deception would prevail. J&M Holdings was a mere sham corporation and the Court should regard Ms. Barker, a consumer, as the true borrower.

Moreover, the plain language of GBL § 349 permits recovery to "any person who has been injured by reason of any violation of this section." GBL § 349(h). It is true that a business is not a consumer for the purposes of GBL § 349: "the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes.'" *Cruz v. NYNEX Info. Res.*, 703 N.Y.S.2d 103, 107 (N.Y. App. Div. 2000). However, it is well established that GBL § 349 does not require an allegation of direct dealings with a consumer. *See Oswego*, 647 N.E.2d 741 (permitting pension fund plaintiffs to proceed with GBL § 349 claim against a bank concerning account terms that might affect consumers, even though plaintiffs were not themselves consumers); *Securitron, Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (finding consumer-oriented prong satisfied in suit brought by a business entity against its competitor, where defendant made disparaging comments to plaintiff's potential employers, and such actions were deemed "contrary to the public interest"); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 786 F. Supp. 182, 215 (E.D.N.Y. 1992), *vacated in part on other grounds*, 973 F.2d 1033 (2d Cir. 1992) ("[C]orporate competitors now have standing to bring a claim under [GBL § 349] . . . so long as harm to the public at large is at issue."). "The critical question, then, is whether the matter affects the public interest in New York, *not whether the suit is brought by a consumer*." *Securitron*, 65 F.3d at 264 (emphasis added).

Thus, even if J&M Holdings was a legitimate corporation with a legitimate purpose, Ms. Barker has alleged Defendants' deceptive acts and practices have nonetheless affected Ms. Barker, a consumer. Ms. Barker has alleged that the Subject Loan was secured by her primary residence, which she maintains as a family home. (Compl. ¶¶ 7, 21.) At the closing, Ms. Barker was required,

as the sole corporate officer of J&M Holdings, the title owner, to assign all interest and stock to Defendant Rokosz as assignee, to be held in escrow and released to Defendant Rokosz upon default. (Compl. ¶ 61.) Ms. Barker was also required, in her *personal capacity*, to agree to be bound to the Subject Loan terms as a personal obligor. (Compl. ¶ 62.) Therefore, by the terms of the Subject Loan and accompanying agreements, immediately upon default, Ms. Barker lost title to her home and was personally liable for the full debt. As more fully set forth *infra* II.C., Ms. Barker, a consumer, has adequately alleged injury as a result of Defendants' violations of GBL § 349. In fact, Defendant Rokosz surmises that Ms. Barker simply made "what ended up being for Plaintiff a bad deal" (Def. Rokosz Mem. 10), acknowledging that Ms. Barker herself was negatively affected by the Subject Loan transactions. Ms. Barker has therefore alleged Defendants' acts and practices were directed at and affected a consumer.

2. Defendants' Deceptive Practices Have a Broader Impact on Consumers at Large.

While Defendant Rokosz focuses exclusively on the premise that "the challenged actions" were all directed toward a corporation (Def. Rokosz Mem. 9, 13), Defendant Legum claims "Plaintiff has not come forward with any evidence or allegations that any other party was 'defrauded.'" (Def. Legum Mem. 14). But, this is not the proper standard to determine whether or not practices are consumer-oriented.

To establish that deceptive acts or practices have a broader impact on consumers at large and are thus "consumer-oriented" for purposes of GBL § 349, a plaintiff "need not show that the defendant committed the complained-of acts repeatedly—either to the same plaintiff or to other consumers—but instead must demonstrate that the acts or practices have a broader impact on consumers at large." *Oswego*, 647 N.E.2d at 744. "Consumer-oriented conduct does not require a repetition or a pattern of deceptive behavior." *Id.* On the other hand, "[p]rivate contract disputes,

unique to the parties . . . would not fall within the ambit of [GBL § 349]." *Id.* Thus, for example, where a financial institution interacts with a plaintiff "as any customer entering the bank," that plaintiff is able to satisfy the consumer-oriented conduct prong in the sense that the acts complained of "potentially affect similarly situated consumers." *Id.* at 745. The Second Circuit characterizes the critical inquiry to be "whether the matter affects the public interest in New York." *See Securitron*, 65 F.3d at 264.

Having had no prior relationship with Defendant Rokosz (Compl. ¶ 42), Ms. Barker was treated "as any customer entering the bank," or in this case, any distressed homeowner with significant equity in her property. Though not required, Ms. Barker has alleged that Defendants have a pattern and practice of issuing similar loans to similarly situated consumers in New York City. As of the date the Complaint was filed, Defendant Rokosz, since 2014, had issued at least 13 other mortgage loans with similar terms to the Subject Loan, including 12 percent annual interest rates, interest-only payments, and one-year terms. (Compl. ¶ 119.) All of these mortgage loans were issued for one-to-four family homes, not commercial properties. (Compl. ¶ 119.) Of those 14 mortgage loans, including the Subject Loan, Defendant Legum is a party or otherwise involved in six of those transactions. (Compl. ¶ 120.) Thus, Ms. Barker has not only alleged acts that could potentially affect similarly situated consumers—she has alleged acts that have actually impacted similarly situated consumers. Ms. Barker has therefore sufficiently pled consumer-oriented conduct within the meaning of GBL § 349.

A. Plaintiff Has Pled Defendants' Practices Were Materially Misleading.

Defendant Rokosz argues that Defendants' business practices could not have violated GBL § 349 because they were not likely to mislead a reasonable consumer. (Def. Rokosz Mem. 14-21.) Defendant Rokosz further argues that his individual conduct was not deceptive because he did not personally interact with Ms. Barker and the loan documents themselves were not materially

misleading. (Def. Rokosz Mem. 9-13.) These arguments misstate the Complaint's assertions of Defendants' deceptive acts and practices.

The New York Court of Appeals has adopted "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego*, 647 N.E.2d at 744 (N.Y. 1995). This definition is modeled on the Federal Trade Commission's (FTC) prohibition on deceptive practices, 15 U.S.C. § 45. *Id.* Defendants' material misrepresentations in issuing and collecting on a usurious, hard-money loan were likely to mislead a reasonable consumer in two ways that violate GBL § 349. First, Defendant Rokosz's issuance and collection of the Subject Loan is a deceptive practice because the loan included illegal fees and was usurious and void. Second, the net impression of Defendant Rokosz's issuance of the Subject Loan—including loan documents that omitted material contract terms and were not provided to the borrower, coupled with Defendants' oral misrepresentations—were likely to mislead a reasonable consumer in Ms. Barker's circumstances.

1. Defendant Rokosz's Issuance and Collection of Unlawful Debt is a Deceptive Act or Practice.

In New York, loans with an interest rate of over 16% are usurious and deemed void *ab initio*. N.Y. Gen. Oblig. §§ 5-501, 5-511; N.Y. Banking Law § 14-a. "New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349." *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d. Cir. 2007) (citing *Negrin v. Norwest Mortgage, Inc.*, 700 N.Y.S.2d 184, 193 (N.Y. App. Div. 1999)). It is well established that falsely representing a consumer owes money he or she does not is a material misrepresentation likely to mislead a reasonable consumer. *See F.T.C. v. Verity Int'l, Ltd.*, 335 F. Supp. 2d 479, 497 (S.D.N.Y. 2004), *aff'd in relevant part by* 443 F.3d 48, 63 (2d Cir. 2006) (defendants'

representation to consumers that they were "legally obligated to pay . . . was materially false and a violation of Section 5(a) of the FTC Act"). Several federal courts have agreed that presenting consumers with agreements for void debt, or collection of void debt, constitutes a deceptive act or practice. *See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 782-83 (S.D.N.Y. 2018) (finding agreements with interest rates that violate New York usury law were "likely to mislead a reasonable consumer as to the nature, terms, and obligations of the contractual arrangement" in violation of GBL § 349); *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 U.S. Dist. LEXIS 177756, at *42 (S.D.N.Y. Dec. 2, 2016) (denying motion to dismiss a pleading of deception for "[m]isrepresentations regarding the legal or practical consequences of failing to pay back… a debt" and "misrepresenting the applicability of state or federal law to the loans — laws that would, if applicable, make the loans void"); *Consumer Fin. Prot. Bureau v. Think Fin., LLC*, No. 17-cv-127, 2018 U.S. Dist. LEXIS 130898, at *20 (D. Mont. Aug. 3, 2018) ("[M]aterial misrepresentations occurred when Defendants informed consumers, impliedly and explicitly, that they possessed a legal obligation to pay."); *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 15-cv-7522, 2016 U.S. Dist. LEXIS 130584, at *31 (C.D. Cal. Aug. 31, 2016) (same).[21]

Defendant Rokosz collected illegal fees by originating and collecting on a loan with a usurious interest rate of at least 32.19%, which was void pursuant to New York usury law, and violated the federal RICO prohibition on the collection of unlawful debt. (Compl. ¶¶ 158, 176,

[21] Because the 2010 Consumer Financial Protection Act (CFPA)'s prohibition on deceptive acts and practices was modeled on the Federal Trade Commission Act (FTCA), *compare* 12 U.S.C. § 5536(a)(1)(B), *with* 15 U.S.C. § 45(a), courts have adopted the FTCA definition of a "deceptive act or practice" in the CFPA as well. *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016) (citing *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) ("[C]ourts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter.")).

190.); *see supra* I.A. The Complaint identifies numerous explicit ways in which Defendant Rokosz, as well as other Defendants, personally attempted to collect on this usurious loan, including by demanding payment, transferring Ms. Barker's shares of J&M Holdings to Defendant Rokosz, and commencing two eviction proceedings against Ms. Barker. (Compl. ¶¶ 97, 99, 101, 104-110.) By attempting to collect on this loan, Defendant Rokosz expressly and implicitly misrepresented to Ms. Barker that she had a legal obligation to repay the Subject Loan, when, in fact, the Subject Loan was void *ab initio* and entirely uncollectable. Because a reasonable consumer like Ms. Barker could reasonably assume that fees charged in association with a loan are legal, and the loan is not void, Defendant Rokosz's attempts to collect the Subject Loan were deceptive acts. Regardless of any other misrepresentations or omissions concerning the Subject Loan, Defendant Rokosz's collection of this unlawful debt alone was a deceptive act or practice in violation of GBL § 349.

2. The Net Impression of Defendants' Issuance of the Subject Loan was Likely to Mislead a Reasonable Consumer in Ms. Barker's Circumstances.

In addition to the stand-alone violation of GBL § 349 that arises upon issuing and collecting loans in violation of state usury law, Defendants' oral misrepresentations, omissions, and false statements to Ms. Barker were also likely to mislead a reasonable consumer in her circumstances, particularly when paired with the Subject Loan documents that omitted material terms and disclosures and were not provided to Ms. Barker until well after the closing. Defendant Rokosz claims that that his conduct could not be deceptive because the Subject Loan terms were "clear on their face" and that Plaintiff has failed to allege that "she was literally unable to read them." (Def. Rokosz Mem. 12.) This argument misconstrues both the allegations in the Complaint and the legal standard for assessing a claim under GBL § 349.

GBL § 349 claims "are based on deceptive business *practices*, not on deceptive contracts." *Gaidon v. Guardian Life Ins. Co. of Am.*, 704 N.Y.S.2d 177, 183 (N.Y. 1999) (finding that a reasonable consumer could be materially misled by the defendants' marketing of a vanishing premium life insurance policy that "created unrealistic expectations"). In the context of contract formation, a defendant's oral assurances can materially mislead a reasonable consumer to read an ambiguous contract as offering better terms than a defendant intended to provide. *See Orlander v. Staples, Inc.*, 802 F.3d 289, 301 (2d. Cir. 2015). Moreover, "[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Delgado*, 2014 U.S. Dist. LEXIS 135758, at *24 (quoting *F.T.C. v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)). An omission is deceptive in violation of New York law "where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Oswego*, 647 N.E.2d at 745.

In addition, a consumer's reasonableness must be assessed in the context of the specific consumers who are targeted in solicitation of a product. *See Sims v. First Consumers Nat'l Bank*, 758 N.Y.S.2d 284, 286 (N.Y. App. Div. 2003) (finding that the putative consumer class, which consisted of consumers not eligible for traditional credit, had sufficiently pled that small-type "hidden" fees were materially misleading in violation of GBL § 349 "when combined with high-pressure advertising to a uniquely vulnerable group of consumers[.]"); *see also Gaidon*, 704 N.Y.S.2d at 183 (N.Y. 1999) (noting that consumers vary in their level of sophistication of understating of complex financial calculations). "[I]n assessing the adequacy of Section 349 pleadings, courts may take into account the parties' relative bargaining positions and access to information." *Watts v. Jackson Hewitt Tax Serv.*, 579 F. Supp. 2d 334, 346-48 (E.D.N.Y. 2008) (finding omission of disclosure language could be materially misleading to a reasonable consumer,

in light of the target consumer's lack of sophistication and experience with the advertised product, tax preparation services).

Here, Plaintiff has plainly pled that the loan documents did not disclose the true cost of this hard-money loan. The loan documents falsely and misleadingly stated that the Subject Loan had a 12% interest rate. (*See* Compl. ¶¶ 66, 84.) In fact, the Subject Loan had an annual percentage rate of 32.19%. (*Id.* ¶¶ 155-58.); *see supra* I.A. By structuring the Subject Loan as two separate transactions, Defendants also convinced Ms. Barker to enter into a second loan agreement for an additional $120,000 without clearly disclosing that the second agreement was for a new loan, thereby further masking the true cost of the Subject Loan. (*See* Compl. ¶¶ 80, 82.) These explicit misrepresentations make clear that the loan documents were not "clear on their face" and the true cost of credit was never fully disclosed.

Defendants also made several oral misrepresentations, false statements, and omissions to Ms. Barker to induce her to accept the Subject Loan. Defendants represented to Ms. Barker that she was required to transfer her home to a corporation as a condition of obtaining a loan. (*See* Compl. ¶¶ 33, 51-52, 61-62.) The formation of this sham corporation was critical to Defendants' scheme to evade consumer protection statutes: upon Ms. Barker's alleged default on the Subject Loan, rather than, for example, pursuing a foreclosure action, Defendant Rokosz immediately seized the shares of this sham corporation and sought to evict Ms. Barker—first through agents' intimidation tactics and then through a housing court action. (*See* Compl. ¶¶ 102, 104.) None of the Defendants ever advised Ms. Barker of the documents she signed or of several material terms of the Subject Loan, such as the effective APR of the Subject Loan, the thousands of dollars of loan proceeds disbursed to entities and parties unknown to Ms. Barker, and her agreement to assign all interest and stock in J&M Holdings to Defendant Rokosz, thereby guaranteeing transfer of title

to her home. (*See* Compl. ¶¶ 51, 57, 69-71, 96, 138.)[22] Moreover, none of the Defendants ever provided Ms. Barker with a copy of any incorporation documents for J&M Holdings, or with copies of any of the documents signed at either closing, thus omitting valuable information that could have influenced Ms. Barker's decision-making. (Compl. ¶¶ 34, 57, 64-65, 86, 94.)

Of course, even if copies of the Subject Loan documents had been provided to Ms. Barker prior to or at closing, these documents still deceptively omitted material disclosures and terms, including disclosures specifically required by TILA, HOEPA and New York Banking Law § 6-*l*. (Compl. ¶¶ 77, 88, 97 (failure to disclose the right to rescind the mortgage); ¶ 160 (failure to provide specific disclosures and require loan counseling in violation of HOEPA); ¶ 177 (failure to provide a list of housing counselors, a mandated notice before closing, and that the Subject Loan was a high-cost home loan under New York law).) Defendant Rokosz also violated state and federal law by failing to have Ms. Barker sign an explicit written agreement allowing the exorbitant and hidden fees to be paid directly to Defendant Lockdeco a/k/a Lodeco from amounts extended as credit. (Compl. ¶¶ 71, 160, 177 (citing violations of 15 U.S.C. § 1639(i); N.Y. Banking Law § 6-*l*(2)(n)).) Each of these deceptive omissions were material because they would have impacted Ms. Barker's decision to enter into the Subject Loan. For example, if Ms. Barker had been able to access a free housing counselor—a required disclosure under New York law and mandatory requirement under HOEPA—she would not have entered into this predatory, high-cost loan that

[22] Although Defendant Hurley expressed concerns about Ms. Barker's ability to repay the loans at the closings, he did not explain the true cost of the Subject Loan or the repayment terms. (Compl. ¶¶ 48, 51, 55, 57-58.) To the extent that Defendants claim their acts and practices could not be deceptive because Ms. Barker was represented at the loan closings by Defendant Hurley, this fact alone does not support dismissal of her GBL § 349 claim. *See Barkley v. United Homes, LLC*, No. 04-cv-875, 2012 U.S. Dist. LEXIS 85793, at *48-52 (E.D.N.Y. June 20, 2012) (finding sufficient pleading of GBL § 349 where scheme involved steering plaintiffs to other members of the conspiracy, such as attorneys selected by defendants to represent plaintiffs at the mortgage loan closings). Here, Ms. Barker has alleged that Defendant Hurley was selected by one of the Defendants to represent her. (Compl. ¶ 36.)

did not take her ability to repay into account. (Compl. ¶¶ 76, 87.)[23] Notably, Defendant Rokosz has not moved to dismiss Ms. Barker's well-pleaded claims under TILA, HOEPA, New York Banking Law § 6-*l*, or usury.

Defendant Rokosz argues that Ms. Barker was not acting as a reasonable consumer because she believed many of Defendants' false claims, including that they could assist her in obtaining an FHA insured loan and that Defendant Defreitas would make her mortgage payments. (Def. Rokosz Mem. 15-17.) But Defendant Rokosz ignores the important context in which these assertions were made. First, Defendant Defreitas only promised Ms. Barker she would make the Subject Loan payments while they secured the FHA financing to refinance the Subject Loan. (*See* Compl. ¶¶ 38, 56, 93.) Next, because Ms. Barker inherited her home from her mother and is a high-school graduate, she was inexperienced with obtaining a mortgage loan and had no expertise in mortgage finance. (*See* Compl. ¶¶ 18, 21-22.) Finally, much like the consumers in *Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, Ms. Barker was in a particularly vulnerable circumstance when she was subjected to Defendants' targeted misrepresentations because of her battle with cancer, the resulting debts that she owed, and her inability to obtain traditional credit. (Compl. ¶¶ 27-28, 31.)

When Defendants' false statements to Ms. Barker are considered in context with Ms. Barker's relative lack of understanding of mortgage financing, her financial desperation when she was approached by Defendants, and Defendants' omission of material contract terms and disclosures in the loan documents, the net impression of Defendants' issuance of the Subject Loan could objectively mislead a reasonable consumer in Ms. Barker's circumstances. Moreover, the indicia of fraud in the transaction that Defendant Rokosz points out—which supposedly should

[23] These regulatory requirements were specifically designed to protect consumers, who are generally not sophisticated in mortgage finance, from being misled by predatory loan terms. *See, e.g., DLJ Mortgage Capital, Inc. v. Smith*, 2007 N.Y. Slip Op. 32745(U), 2 (N.Y. Sup. Ct. 2007) ("NY Banking Law § 6-l seeks to prevent . . . unscrupulous lending by prohibiting lenders from engaging in many of the activities associated with predatory lending.").

have convinced any reasonable consumer not to go through with the transaction (*see* Def. Rokosz Mem. 15-17)—merely highlight that Defendants intentionally disguised the true nature of the transaction from Ms. Barker in order to evade consumer protection statutes.

C. Plaintiff Has Suffered Injury As a Result of Defendants' Deceptive Practices.

Under GBL § 349, "a claim will not lie where the deceptive act itself was the only injury." *Servedio v. State Farm Ins. Co.*, 889 F. Supp. 2d 450, 452 (E.D.N.Y. 2012). In addition to pecuniary harm, time spent and costs incurred defending against meritless collection lawsuits are cognizable injuries. *See, e.g.*, *Fritz v. Resurgent Capital Servs., LP*, 955 F. Supp. 2d 163, 174 (E.D.N.Y. 2013); *In re Gm LLC Ignition Switch Litig.*, 339 F. Supp. 3d 262, 329 (S.D.N.Y. 2018) (finding plaintiff entitled to lost personal time as a result of deceptive practices). Injury can also take the form of "humiliation, anger, anxiety, emotional distress, fear, frustration and embarrassment." *Rozier v. Fin. Recovery Sys.*, No. 10-cv-3273, 2011 U.S. Dist. LEXIS 61307, at *16 (E.D.N.Y. June 7, 2011) (citing *Wood v. Capital One Servs., LLC*, 718 F. Supp. 2d 286, 292 (N.D.N.Y. 2010)). Here, as a result of Defendants' conduct, Ms. Barker has suffered the loss of her equity, the time and expense of defending against the collection of an illegal debt, and emotional distress.

Defendant Rokosz argues Ms. Barker has failed to allege any actual injury caused by Defendant Rokosz's conduct because she benefited in obtaining mortgage financing. (Def. Rokosz Mem. 21.) But this argument misses the point. Where goods or services have been exchanged, a plaintiff need not allege that they received no value whatsoever. *See Rodriguez v. Hanesbrands Inc.*, No. 17-cv-1612, 2018 U.S. Dist. LEXIS 28002, at *14 (E.D.N.Y. Feb. 20, 2018). Here, the damages are clear: Ms. Barker lost title to her house and was charged significant fees as a part of the predatory transaction. (*See* Compl. ¶¶ 107, 155.) Ms. Barker has alleged that Defendants used

deceptive documents and misstatements to strip Ms. Barker's home of equity. (Compl. ¶ 199.) As a result, Ms. Barker lost title to her home to a sham corporation that Defendant Rokosz now purports to control. (Compl. ¶ 101.) Ms. Barker also alleged that she only benefitted from $221,276.85 of the $450,000.00 Subject Loan. (Compl. ¶ 91.) The remaining loan proceeds, primarily disbursed to the benefit of Defendants, as well as the loss of remaining equity in the value of her property, are actual and pecuniary harms to Ms. Barker as a result of Defendants' deceptive acts and practices.

Ms. Barker has alleged that the underlying transaction led to two eviction proceedings brought by Defendant Rokosz, as president of J&M Holdings, to evict Ms. Barker from her own home only months after she took out the Subject Loan. (Compl. ¶ 104.) Ms. Barker's time spent and costs incurred related to defending herself against these collection efforts are damages under GBL § 349. Finally, as a result of falling victim to this scam and the resulting risk of losing her home, Ms. Barker has suffered emotional distress. Ms. Barker has alleged that, as a result of the Defendants' efforts to remove her from her home, she has experienced fear, shame, and depression. (Compl. ¶¶ 103, 117). Accordingly, Ms. Barker has alleged recoverable damages under GBL § 349. The loss of Ms. Barker's home, the loss of equity in her property, the time she spent litigating frivolous eviction proceedings against her, and the mental and emotional distress she has suffered are all actual harms caused by Defendants' deceptive acts and practices.

CONCLUSION

For the reasons set forth above, Plaintiff Barker respectfully requests that the Court deny Moving Defendants' Motions to Dismiss.

Dated: July 24, 2019
New York, New York

MOBILIZATION FOR JUSTICE, INC.

By: __/s/ Belinda Luu_____
Belinda Luu
Carolyn Coffey
Adrienne Warrell, of counsel to
Jeanette Zelhof, Esq.
100 William Street, 6th Floor
New York, NY 10038
Tel: (212) 417-3866

THE RICHMAN LAW GROUP

By: __/s/ Randal Wilhite_____
Randal Wilhite, *pro hac vice*
Kim Richman
8 West 126th Street
New York, NY 10027
Tel: (718) 705-4579

Counsel for Plaintiff