IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Charlotte McFerren, Billie Lee Green, Augustus Bostick, Jr., Mark Adragna, and Courtney Koepf, Plaintiffs, vs. BAIC, Inc., VFG, Inc., SoBell Ridge Corp., Financial Products Distributors, LLC, Performance Arbitrage Company, Life Funding Options, Inc., Andrew Gamber, Mark Corbett, Katharine Snyder, Michelle Plant, David Woodard, Candy Kern-Fuller, and Upstate Law Group, Defendants.	Civil Action No. 6:18-1298-DCC-KFM **REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the motions to dismiss of defendants Candy Kern-Fuller and Upstate Law Group ("Upstate") (collectively, "the Upstate defendants") (doc. 45); *pro se* defendant Mark Corbett (doc. 52); and defendants Performance Arbitrage Company, Inc. ("PAC"), Life Funding Options, Inc. ("LFO"), Katharine Snyder, and Michelle Plant (collectively, "the PAC defendants") (doc. 78). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A) and Local Civil Rule 73.02(B)(2)(e) (D.S.C.), all pretrial matters in cases involving *pro se* litigants are referred to a United States Magistrate Judge for consideration.

PROCEDURAL HISTORY

On May 10, 2018, the plaintiffs filed a complaint alleging causes of action for a declaratory judgment that the defendants' conduct violates the Federal Anti-Assignments Acts; for violation of the Racketeer Influenced Corrupt Organizations Act ("RICO") against individual defendants Gamber, Corbett, Snyder, Plant, Woodard, and Kern-Fuller; and for

common law civil conspiracy against all defendants (doc. 1). On August 3, 2018, the Upstate defendants filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) (doc. 45). On August 21, 2018, the plaintiffs filed a response in opposition (doc. 51) to the motion. On August 22, 2018, defendant Corbett, who was at that time represented by counsel,[1] filed a motion to dismiss (doc. 52) based on the legal analysis and arguments set forth in the motion and memorandum filed by the Upstate defendants. On August 28, 2018, the Upstate defendants filed a reply in support of their motion (doc. 53). On September 5, 2018, the plaintiffs file a response in opposition (doc. 57) to defendant Corbett's motion to dismiss. On November 9, 2018, the PAC defendants filed a motion to dismiss for failure to state a claim (doc. 78). On December 10, 2018, the plaintiffs filed their response (doc. 94). On December 19, 2018, a hearing was held on the pending motions in this case and those pending in two related cases: *Lyons v. BAIC*, 6:17-cv-2362-DCC-KFM ("the *Lyons* case"), and *Life Funding Options, Inc. v. Blunt*, 6:18-cv-944-DCC-KFM ("the *Blunt* case").

ALLEGATIONS

The five plaintiffs in this case are military veterans who were honorably discharged from the United States Army or Navy. They receive either military retirement pay subject to 37 U.S.C. § 701 or military disability benefits subject to 38 U.S.C. § 5301. The plaintiffs contracted to sell portions of their fixed income streams of retirement or disability benefits over a period of months or years in exchange for lump sum payments from willing buyers. The plaintiffs allege that the defendants operated a coordinated scheme in which websites are used to generate leads on veterans who may need money. Thereafter, brokers and salespeople, such as defendant Corbett, follow up with the leads, sending forms for the veteran to complete. The Upstate defendants[2] make inquiries about

[1] Corbett's attorney filed a consent motion to withdraw, which was granted on November 8, 2018 (doc. 73).

[2] Kern-Fuller is an attorney and partner in Upstate.

the veteran's financial circumstances, benefits, and physical health after receiving the appropriate authorizations. The defendants compile a list of the veteran's creditors and require the veteran to pay off those debts with his or her lump sum payment. The defendants facilitate the payments to the creditors. The veteran either obtains a life insurance policy or executes an "Option to Purchase Source Defaulted Structured Asset Agreement" ("Option Agreement") with defendant PAC, which is operated by defendants Snyder and Plant. The life insurance policy, if any, pays off the veteran's loan contract in the event of the veteran's death. The Option Agreement also pays off the veteran's loan contract in the event of the veteran's death. The veteran is told by defendants Corbett, BAIC, Inc., VFG, Inc., or SoBell Ridge Corp. that a purchaser has been found to buy his or her benefits. The veteran and the purchaser execute a contract for sale of payments and security agreement, using form contracts supplied by the defendants. The purchaser wires a lump sum to defendant Upstate's IOLTA account. The Upstate defendants then deduct 40-50% of the lump sum as a "commission," which is distributed among the defendants. The Upstate defendants then pay the veteran's existing creditors, deduct other fees and costs, and remit the remainder to the veteran via wire transfer. If the veteran stops making payments under his or her contract, defendants PAC, LFO, Financial Products Distributors, Kern-Fuller, and/or Upstate send collection notices to the veteran. If the purchaser has executed a default buyback agreement with defendant PAC, then PAC or its successor in interest, i.e., LFO (whose agent for service is Kern-Fuller), may sue the veteran (doc.1, comp. ¶¶ 40-49).

APPLICABLE LAW AND ANALYSIS

Rule 12(b)(6)

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 531 (D.S.C. 2014) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Rule 8(a) sets forth a liberal pleading standard, which requires only a " 'short and plain statement of the claim showing the pleader is entitled to relief,' in order to 'give the defendant fair notice of

what . . . the claim is and the grounds upon which it rests.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 570). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

"In deciding whether a complaint will survive a motion to dismiss, a court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc*., 637 F.3d 435, 448 (4th Cir. 2011). The court may consider such a document, even if it is not attached to the complaint, if the document "was integral to and explicitly relied on in the complaint," and there is no authenticity challenge. *Id*. at 448 (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)). *See also Int'l Ass'n of Machinists & Aerospace Workers v. Haley*, 832 F. Supp. 2d 612, 622 (D.S.C. 2011) ("In evaluating a motion to dismiss under Rule 12(b)(6), the Court . . . may also 'consider documents attached to . . . the motion to dismiss, so long as they are integral to the complaint and authentic.'") (quoting *Sec'y of State for Def. v. Trimble Navigation Ltd*., 484 F.3d 700, 705 (4th Cir. 2007)).

Rule 9(b)

Although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," when a party alleges "fraud or mistake," he or she "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Particularity requires that the claimant state "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting 5 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1297 at 590 (2d 1990)). A primary purpose of Rule 9(b) is to ensure

"that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of." *Id.* (internal citations omitted). Lack of compliance with Rule 9(b)'s pleading requirements is treated as a failure to state a claim under Rule 12(b)(6). *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997).

Order in the Lyons Case

As noted above, this case is related to two other cases, the *Lyons* case and the *Blunt* case, which are also pending before the Honorable Donald C. Coggins, Jr., United States District Judge. In *Lyons*, another group of veterans made substantially similar allegations and brought the same causes of action as those alleged in this case. Also, many of the same defendants are named in the *Lyons* case. *See Lyons*, C.A. No. 6:17-cv-2362-DCC-KFM, doc. 1. On April 12, 2018, Judge Coggins denied the motions to dismiss filed by the Upstate defendants and Corbett in the *Lyons* case. *See Lyons*, 2018 WL 1762550 (D.S.C. Apr. 12, 2018). As set out below, the motions to dismiss filed in the instant case should be denied for the same reasons found by Judge Coggins in *Lyons. See id.*

Federal Anti-Assignment Acts

Count I of the plaintiffs' complaint seeks a declaratory judgment under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 that the defendants' conduct violates 38 U.S.C. § 5301 and 37 U.S.C. § 701, collectively referred to as the Federal Anti-Assignment Acts (doc. 1, comp. ¶¶ 130-135). Specifically, 38 U.S.C. § 5301(a)(1) states, "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law . . . ." The complaint alleges that plaintiffs McFerren, Bostick, Adragna, and Koepf receive disability benefits subject to this provision (doc. 1, comp. ¶ 36). Similarly, 37 U.S.C. § 701(a) states, "[A] commissioned officer of the Army, Navy, Air Force, or Marine Corps may transfer or assign his pay account, when due and payable." The Fourth Circuit Court of Appeals has held that this use of the phrase "when due and payable" means that a series of retirement payments cannot be sold or assigned in advance. *See In re Moorhous*, 108

F.3d 51, 54–56 (4th Cir. 1997).The complaint alleges that plaintiff Green receives retirement pay subject to this provision (doc. 1, comp. ¶ 37). Also, 37 U.S.C. § 701(c) states, "An enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void." The complaint alleges that plaintiff Bostick receives retirement pay subject to this provision (doc. 1, comp. ¶ 38). The complaint further alleges that the defendants induced the plaintiffs into entering into contracts to "sell their retirement or disability benefits for a period of months or years in exchange for a lump sum payment" in violation of these Federal Anti-Assignment Acts (*id.* ¶¶ 3, 134).

The Upstate defendants and Corbett argue in their motions to dismiss that they are not parties to the contracts at issue in this case, and, therefore, the court cannot declare their acts unlawful (doc. 45-1 at 7; doc. 52 at 1). The PAC defendants argue that no declaratory judgment should issue against them because they were not the original assignees of the plaintiffs' benefits (doc. 78-1 at 4). In response, the plaintiffs argue that there is no privity of contract requirement for a declaratory judgment, there is no support for the contention that declaratory judgment is limited to assignees under 28 U.S.C. § 2201, and the defendants misconstrue the complaint's declaratory judgment claim, which is not limited to declaring void the illegal contracts the defendants procured (doc. 51 at 6-9; doc. 94 at 4-8).

"The Declaratory Judgment Act provides that, '[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 126 (2007). (quoting 28 U.S.C. § 2201(a)). The Supreme Court of the United States has "explained that the phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *Id*. at 126-27 (quoting 28 U.S.C. § 2201(a)) and citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). As Judge Coggins found in the *Lyons* case, the plaintiffs here have comprehensively pled the details of the alleged scheme, including the defendants' participation, and assert that this scheme

violates well-established federal law. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (summarizing the requirements for Article III standing). Under well-established Supreme Court precedent, those allegations satisfy Article III standing and are sufficient at the pleading stage under the Declaratory Judgment Act. The defendants' protestations to the contrary, which rely on their claims that they were not a party to the underlying contracts or were not the original assignees, are immaterial in light of the plaintiffs' allegations that the defendants' conduct (as opposed to the contracts alone) are unlawful. Accordingly, the motions to dismiss Count I should be denied.

RICO

Count II of the complaint alleges violation of RICO against individual defendants Gamber, Corbett, Snyder, Plant, Woodard, and Kern-Fuller (doc. 1, comp. ¶¶ 136-149). *See* 18 U.S.C. § 1862. In order for a civil RICO claim to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering." *Sedima, S.P.R.L. v. Imrex* Co., 473 U.S. 479, 496 (1985). The plaintiff must additionally plead proximate cause, such that she was injured in her business or property "by reason of" the RICO violation. *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 6 (2010).

Kern-Fuller, Corbett, Snyder, and Plant argue in their motions to dismiss that the complaint fails to state a RICO claim against them because the plaintiffs fail to plead facts showing: commission of any predicate acts of mail fraud or wire fraud, engagement in an "enterprise," operation or management of a criminal enterprise, injuries proximately caused by the predicate acts, and a pattern of racketeering (doc. 45-1 at 7-17; doc. 52 at 2; doc. 78-1 at 5-13). They further argue that the plaintiffs have failed to satisfy the heightened pleading requirement of Rule 9 in order to base a RICO claim on a mail or wire fraud scheme (*id.*). As set forth below, the undersigned finds that the plaintiffs have alleged sufficient facts to survive a motion to dismiss.

The plaintiffs' RICO action is predicated on mail and wire fraud (doc. 1, comp. ¶¶ 143-145). To allege a RICO pattern, "two or more predicate acts of racketeering must

have been committed [by a defendant] within a ten year period." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002) (citing 18 U.S.C. § 1961(5)). "Racketeering activity" includes federal mail and wire fraud. *See id.* (citing 18 U.S.C. § 1961(1)); *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc*., 367 F.3d 212, 233 (4th Cir. 2004). Such fraud claims must be pled with particularity. *See, e.g., Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989). However, "[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre-discovery evidence of those facts." *Harrison*, 176 F.3d at 784.

A plaintiff asserting a RICO claim predicated on mail or wire fraud must show both (1) a scheme disclosing an intent to defraud and (2) the mails or interstate wires were used in furtherance of the scheme. *Chisholm v. TranSouth Fin. Corp*., 95 F.3d 331, 336 (4th Cir. 1996) (citation omitted). It is possible for defendants to violate RICO if they commit two or more acts of mail or wire fraud and the acts are sufficiently related and sufficiently continuous. *Morley v. Cohen*, 888 F.2d 1006, 1009-11 (4th Cir. 1989). However, the Fourth Circuit has cautioned courts against basing a RICO claim on predicate acts of mail and wire fraud because "'[i]t will be the unusual fraud that does not enlist the mails and wires in its service at least twice.'" *Anderson v. Found. for Advancement, Educ. and Emp't of Am. Indians*, 155 F.3d 500, 506 (4th Cir. 1998) (quoting *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154–55 (4th Cir. 1987)). Notably, "the mails and wires do not have to be used by each defendant, but merely in furtherance of the scheme." *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 594 (D. Md. 2014) (citing *Kerby v. Mortg. Funding Corp*., 992 F. Supp. 787, 801 (D. Md. 1998)). *See also Superior Bank, F.S.B. v. Tandem Nat. Mortg., Inc*., 197 F. Supp. 2d 298, 323 (D. Md. 2000) ("section 1962(c) includes no requirement that mail or wire be used by each defendant.") (citations omitted). Rather, it is sufficient that plaintiffs have pled the alleged scheme to defraud and the defendant's role in it with sufficient particularity as to give adequate notice and enable the defendant to prepare a responsive pleading. *See Chambers*, 43 F. Supp. 3d at 594-96.

The moving defendants argue that the plaintiffs have failed to adequately plead that the individual defendants committed any predicate acts and engaged in a pattern of racketeering activity. The undersigned disagrees. The complaint specifically alleges that Kern-Fuller managed and maintained the IOLTA account that the defendants utilized as the conduit through which investors' and veterans' money flowed (doc. 1, comp. ¶ 66). The plaintiffs allege that, prior to closing a pension transaction with the defendants, veterans must prove that they have instructed the Veterans Administration ("VA") to deposit the veteran's entire monthly benefit directly into the IOLTA account maintained by Kern-Fuller (*id.* ¶ 67). Purchasers wired their funds to the IOLTA account, and Kern-Fuller would deduct a percentage for the defendants' commission and wire the commission proceeds to the other defendants, including Corbett (*id.* ¶¶ 69-70). Allegedly, Kern-Fuller would then deduct fees from the remainder and wire the balance to the veteran and/or the veteran's pre-existing creditors (*id.* ¶ 71). Each month, after Kern-Fuller received the veteran's entire benefit directly from the VA or withdrew the funds from the veteran's bank account, Kern-Fuller transmitted the veteran's monthly loan payments to the purchasers by wire transfer and remitted any remainder to the veteran, also by wire transfer (*id.* ¶ 72). The plaintiffs have alleged at least three specific instances of this type of transaction (*id.* ¶ 103 (McFerren's transaction was completed on or about August 18, 2017); *id*. ¶ 109 (Green took out multiple loans between 2013 and 2015); *id*. ¶ 115 (Bostick's transaction took place in 2016)).

As to defendants Snyder and Plant, the complaint alleges that Snyder is the president of defendant PAC, Plant is the vice president of defendant PAC, and they both direct the operation of defendant LFO (*id.* ¶¶ 87-90); the complaint alleges acts by Snyder and Plant committed in those capacities. Specifically, the defendants require the veterans to pay off [pre-existing debts] with his or her lump sum payment, and defendants PAC, Snyder, Corbett, and the Upstate defendants facilitate the payments to those creditors (*id.* ¶ 43). The defendants require veterans to either purchase life insurance or to enter into an Option Agreement (*id.* ¶ 80). The veteran pays PAC a fee to enter into one of these Option Agreements (*id.*). Specifically, plaintiff McFerren, who is 35 years old, paid these defendants

$600 for this "protection" on a transaction involving approximately $23,500; plaintiff Bostick, who is 45 years old, paid $1,200 for this protection on a transaction involving approximately $25,200; and Green, who is 60 years old, paid $1,400 for this protection on a transaction involving approximately $13,000 (*id.* ¶ 83). PAC's fee was deducted from the amount that the plaintiffs were to receive from the Upstate defendants (*id.* ¶ 84). The complaint further alleges that PAC is not licensed to issue life insurance policies (*id.* ¶ 85). The purchaser wires a lump sum to the Upstate defendants who then deduct 40-50% of the lump sum as commission, which is distributed among the defendants, including the PAC defendants (*id.* ¶ 46). If the veteran stops making payments under his or her contract, defendants PAC, LFO, Financial Products Distributors, and the Upstate defendants send collection notices to the veteran (*id.* ¶ 48). If the veteran stops making payments, the purchaser may invoke the default buyback agreement, which requires PAC to issue a promissory note to the purchaser (*id.* ¶ 91). In exchange for this promissory note, PAC receives an assignment of the purchaser's rights under the contract for sale of payments and security agreement that the purchaser and the veteran had signed (*id.* ¶ 92). This promissory note is predicated upon electronic payments made by PAC and LFO to the purchasers. A sample promissory note is attached to the complaint and states that payments will be made via an electronic funds transfer (doc. 1-10 at 3-5). Defendant Snyder executes assignments of veterans' contracts from PAC to LFO, with Kern-Fuller notarizing those assignments (doc. 1, comp. ¶ 88). The Upstate defendants filed a lawsuit against plaintiff Adragna in the Greenville Court of Common Pleas on behalf of defendant LFO. The third exhibit to that complaint is an assignment agreement between the purchasers and LFO (*id.* ¶ 124; *see* doc. 1-10). Based upon the foregoing, the complaint sufficiently alleges commission of RICO predicate acts by defendants Kern-Fuller, Corbett, Plant, and Snyder.

The court further finds that the plaintiffs have sufficiently alleged that these defendants engaged in an "enterprise." Enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Boyle v. U.S.*, 556 U.S. 938, 945 (2009) (internal quotation marks and

citation omitted). The plaintiffs have alleged that the defendants engaged in an enterprise that coordinated various corporations and websites to buy the plaintiffs' and other veterans' benefits and funnel the proceeds through Kern-Fuller's IOLTA account (doc. 1, comp. ¶ 139). The plaintiffs allege that Corbett, operating under "doing business as" names, maintains numerous websites used by the defendants to generate leads on veterans who may need money (*id.* ¶¶ 19, 51-52, 58-61). The plaintiffs allege that Snyder has acted at various times as director of defendant Voyager Financial Group (now known as VFG, Inc.), director of defendant BAIC, president of defendant BAIC, is currently the president of defendant PAC, and serves or has served as an officer of various other entities that share offices, addresses, or business models with the defendants herein (*id.* ¶ 87). The plaintiffs further allege that Plant was formerly the director of compliance of defendant Voyager and is currently vice president and chief operating officer ("COO") of PAC, and both Snyder and Plant direct the operation of defendant LFO (*id.* ¶¶ 89-90). The plaintiffs allege that PAC participated in the origination process, insured these transactions (through Option Agreements and default buyback agreements), participated in loan servicing activities, acted as a debt collector, and sued veterans (*id.* ¶ 75). PAC received a fee deducted from the amount the plaintiffs received from the Upstate defendants (*id.* ¶ 84). The complaint includes factual allegations showing the various associates that function as a continuing unit as they shift their operations across various entities (*id.* ¶¶ 21-23, 64, 81). Based upon the foregoing, the plaintiffs have adequately alleged that these defendants engaged in an enterprise.

The moving defendants next argue that the plaintiffs have failed to sufficiently plead that they operated or managed a criminal enterprise. As set out above, the plaintiffs allege that Kern-Fuller controlled the IOLTA account through which payments to and from the defendants flowed in connection with the alleged pension scheme, and she purported to assist veterans in obtaining identity and financial verification documents, reviewed pre-approval documents, gathered information about the veteran's pre-existing creditors, made payments to those creditors, facilitated the execution of the contracts, sued allegedly

defaulting veterans in an effort to enforce the agreements, and deducted commissions that were wired to other defendants (*id.* ¶¶ 66-74). The plaintiffs also allege that defendant Corbett operated and maintained different websites related to the scheme, followed up on veteran leads by sending forms requiring extensive personal disclosures by veterans, interviewed interested veterans, and monitored the progress of each transaction (*id.* ¶¶ 19, 42, 58-61). The complaint alleges that Snyder and Plant both play directing roles in defendants PAC and LFO and previously served as officers in other entities that share officers, address, or business models with their co-defendants, including VFG, Inc. (*id.* ¶¶ 87-90). In their capacities as directing officers for PAC and LFO, Plant and Snyder executed assignments to obtain the right to sue veterans to collect unpaid benefits (*id.* ¶¶ 91-94; doc. 1-9 at 3-11). The assignments – the documents that put PAC and LFO into the allegedly illegal position of being the direct assignee of the veterans' pensions – list Plant as the vice president and COO of PAC and Snyder as the president of PAC (doc. 1-9 at 3-11).

Based upon the foregoing, the undersigned finds that the plaintiffs have adequately alleged that these defendants operated or managed a criminal enterprise. *See Reves v. Ernst and Young*, 507 U.S. 170, 171 (1993) ("An enterprise is 'operated' not just by upper management" but "also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it."); *Thomas v. Ross & Hardies*, 9 F. Supp.2d 547, 554-55 (D. Md. 1998) ("A person may violate § 1962(c) if he conducts the affairs of an enterprise, even though he does so through the provision of professional services.").

Likewise, the plaintiffs have sufficiently pleaded that their injuries were proximately caused by these defendants' predicate acts. Where fraud is the alleged predicate act, a plaintiff must allege that he "justifiably relied, to his detriment, on the defendant's material misrepresentation" to sufficiently plead proximate cause. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc*., 367 F.3d 212, 233 (4th Cir. 2004). Here, the plaintiffs allege that defendant Kern-Fuller helped to verify veterans' "eligibility" for the RICO scheme, provided "advice" to veterans about how to evade the potential scrutiny of the VA regarding the disposition of their benefits, received and wired the funds to close the

contracts, and pursued allegedly defaulting veterans through legal action (doc. 1, comp. ¶ 74). Defendant Corbett maintained websites that generated leads on veterans who may need money, followed up with veteran leads, interviewed veterans, solicited information from veterans, searched for purchasers, compiled lists of creditors, facilitated payments to creditors, and monitored the progress of each veteran's transaction (*id.* ¶¶ 42-43, 56-57, 60-61). The plaintiffs allege that the defendants failed to disclose that the transactions were prohibited and void under the Federal Anti-Assignments Acts, failed to disclose the multiple lawsuits and regulatory actions taken against the defendants, failed to disclose to the purchasers and veterans the substantial commissions received by the defendants, and failed to disclose the applicable interest rate or finance charge associated with the transactions (*id.* ¶ 96-99).

As to defendants Snyder and Plant, the complaint alleges that, through the companies they direct, they helped verify veterans'"eligibility" for the scheme, obtained payments for illegal and unnecessary life insurance from veterans' lump-sum payments, and then sent collection notices and sued veterans for unpaid benefits (*id.* ¶¶ 44, 49, 77, 82-88, 90, 94). Further, the complaint alleges that Snyder and Plant made misrepresentations upon which the plaintiffs relied to their detriment. For example, the Option Agreement form on PAC letterhead, attached to the complaint as Exhibit H, provides for a payout to the purchaser in the event that the veteran defaults "due to the [veteran] permanently no longer being qualified to receive the payment(s) [from the VA]" (*id.* ¶ 82; *see* doc. 1-8). The Option Agreement says that PAC will purchase all rights that the purchaser has to the structured asset upon this type of default (doc. 1, comp. ¶ 82). However, as detailed in the complaint, the only way this option is invoked is if the veteran dies, in which case the right to payments is extinguished, and the purchaser has no recourse (*id.* ¶ 86). Therefore, this Option Agreement offers no additional protection to the plaintiffs who paid for it from their lump-sum payments (*id.*). In addition, when Snyder and Plant sought to collect unpaid benefits through assignments executed with purchasers, they allegedly concealed and failed to disclose to

veterans that the underlying assignments were unlawful and conferred no legal rights to the veterans' benefits (*id.* ¶ 94-96).

Based upon the foregoing, the undersigned finds that the plaintiffs have pled the RICO cause of action with sufficient particularity, and, therefore, the motions to dismiss Count II should be denied.

Civil Conspiracy

Count III of the plaintiffs' complaint alleges civil conspiracy against all defendants (*id.* ¶¶ 150-155). Specifically, the plaintiffs allege that the defendants "are engaged in a civil conspiracy to deprive veterans of their pensions and benefits in violation of the Federal Anti-Assignment Acts" and "have conspired in an effort to exact unconscionable profits through the unlawful purchase of the Plaintiffs' pensions and benefits" (*id.* ¶¶ 151-152.). In South Carolina, "[a] civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *Allegro, Inc. v. Scully*, 791 S.E.2d 140, 144 (S.C. 2016) (internal quotation marks and citation omitted). "In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 875 (S.C. Ct. App. 2009) (citation omitted).

The Upstate defendants argue four bases for dismissal: (1) third-party immunity for attorneys; (2) failure to plead separate acts; (3) failure to plead special damages; and (4) failure to state a claim (doc. 45-1 at 18-21). The PAC defendants argue the latter three bases for dismissal (doc. 78-1 at 13-14), and defendant Corbett argues generally that the complaint fails to state a claim for civil conspiracy against him and joins in with the Upstate defendants' arguments (doc. 52 at 1-2). For the reasons detailed below, the district court should reject each of the defendants' arguments at this stage of the proceedings.

First, the Upstate defendants argue that they are immune from liability because they did not represent the plaintiffs or breach any independent duty to the plaintiffs. As stated by Judge Coggins in the *Lyons* case, "The law is well-established that 'an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.'" *Lyons,* 2018 WL 1762550, at *5 (quoting *Stiles v. Onorato*, 457 S.E.2d 601,602 (S.C. 1995)). As discussed throughout, the plaintiffs here have alleged that the defendants were engaged in a complex scheme to enrich themselves in violation of federal law. Accordingly, the undersigned recommends that the district court reject this argument.

Second, the defendants contend that the plaintiffs have failed to allege any acts in furtherance of the conspiracy separate and apart from other wrongful acts alleged in the complaint. However, as in *Lyons*, the complaint here contains numerous allegations separate and apart from the predicate RICO acts, which are sufficient separate acts to state a claim for civil conspiracy. *See Lyons,* 2018 WL 1762550, at *5. With regard to the Upstate defendants, these alleged acts include: acts to manage the conspiracy's bank account (doc. 1, comp. ¶ 66), monitor whether payments were made (*id.* ¶ 73), and review veterans' identity or financial verification documents (*id.* ¶ 74). With regard to the PAC defendants, these alleged acts include: acts to review identity and financial verification documents (*id.* ¶ 77), purportedly guarantee the transactions by selling Option Agreements to veterans and purchasers (*id*. ¶ 74), or sue veterans for nonpayment (*id.* ¶¶ 79, 94). As argued by the plaintiffs, the PAC defendants' acts allegedly arise to the level of an unauthorized sale of insurance in violation of state law and go beyond the specific mail and wire fraud predicates (doc. 94 at 20). In addition, the plaintiffs allege that the defendants have represented themselves as "partners" or as part of the financial "team," operating "in an effort to exact unconscionable profits through the unlawful purchase of the Plaintiffs' pension benefits" (*id.* ¶ 152). Thus, the plaintiffs have pled separate acts sufficient to state a claim for civil conspiracy against the moving defendants.

Third, the moving defendants claim that the plaintiffs have failed to adequately plead special damages. Special damages are "[d]amages for losses that are the natural and proximate, but not the *necessary*, result of the injury [and] may be recovered only when such special damages are sufficiently stated and claimed." *Sheek v. Lee*, 345 S.E.2d 496, 497 (S.C. 1986) (emphasis in original) (quoting *Hobbs v. Carolina Coca-Cola Bottling Co.*, 10 S.E.2d 25, 28 (S.C. 1940)). The plaintiffs' complaint alleges that "the acts of the defendants in furtherance of the conspiracy caused the plaintiffs to suffer special damages, including but not limited to financial distress (including the economic losses incurred – directly and indirectly – by virtue of having to pay extortionately high, but undisclosed, rates of imputed interest), emotional distress and mental anguish" (doc. 1, comp. ¶ 154). Elements of these damages are unique from those damages sought in the plaintiffs' RICO claim (*see id.* ¶ 147). Thus, the plaintiffs have adequately pled special damages.

Fourth, the Upstate defendants argue that "there are no allegations to infer that [the defendants] had an ulterior purpose or intended to specifically harm these individual plaintiffs" (doc. 45-1 at 20). However, "the primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff." *Allegro, Inc*., 791 S.E.2d at 144 (citing *Pye v. Estate of Fox*, 633 S.E.2d 505, 511 (S.C. 2006)). As in *Lyons*, the plaintiffs here have pled this element of civil conspiracy as well as the facts necessary to give rise to this element (*see* doc. 1, comp. ¶ 153 ("The primary purpose or object of the combination is to injure the Plaintiffs (and others) as they seek to avoid the application of the Federal Anti-Assignment Acts. They do this by engaging in ongoing misrepresentations concerning the nature of the underlying transactions.")).

Lastly, the PAC defendants argue that the plaintiffs fail to allege that "any Defendant combined with any person or entity to injure any Plaintiff" (doc. 78-1 at 13). As argued by the plaintiffs, the complaint details allegations regarding the PAC defendants' collaboration with their co-defendants in the alleged scheme (doc. 1, comp. ¶¶ 40-49) and includes allegations that PAC's fee was deducted from the amount the plaintiffs received from the Upstate defendants (*id.* ¶ 84), that the same forms of assignment were used by

both PAC and LFO (*id.* ¶ 94; see also docs. 1-9, 1-10), and that the PAC defendants' "insurance alternative" product was offered to plaintiffs Green and Bostick by co-defendant Corbett (doc. 1, comp. ¶ 81). Accordingly, this argument should be rejected.

Here, the plaintiffs have alleged sufficient facts to state a claim for relief for civil conspiracy "'that is plausible on its face.'" *Robinson*, 551 F.3d at 222 (quoting *Twombly*, 550 U.S. at 570). Based upon the foregoing, the motions to dismiss Count III should be denied.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the district court deny the defendants' motions to dismiss (docs. 45, 52, 78).

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

January 25, 2019
Greenville, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).