

The plaintiffs' theory, which is unsupported by case law, does not preserve a genuine dispute on the issue of consent. The district court correctly granted summary judgment on the plaintiffs' ECPA claim.

III

[HN4] We review the district court's dismissal of the RICO and the RICO conspiracy claims *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiffs. *Schlessinger v. Valspar Corp.*, 686 F.3d 81, 85 (2d Cir. 2012). Because the appellants have not properly alleged any predicate acts of actionable fraud, we affirm.

[HN5] To sustain a RICO claim under 18 U.S.C. § 1962(c), a plaintiff must show "(1) that the defendant (2) through the [*124] commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains and interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (citing 18 U.S.C. § 1962(a)-(c)). And to state a RICO conspiracy, a plaintiff must allege "the existence of an agreement to violate RICO's substantive provisions." *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997) (internal quotation marks omitted).

[HN6] Section 1961(1) sets forth an exhaustive list of predicate "acts" that can constitute a pattern of "racketeering activity," including section 1341 and 1343 (mail and wire [**14] fraud, respectively). The complaint alleges thousands of acts of mail and wire fraud in furtherance of the RICO enterprise and RICO conspiracy, including Trilegiant's billing (by transmitting fraudulent charges on credit card bills), use of telephones (in refund mitigation to preserve fraudulent gains), and use of the internet (to initiate the scheme through post-transaction marketing and datapass).

[HN7] "The elements of mail or wire fraud are (i) a scheme to defraud (ii) to get money or property (iii) furthered by the use of interstate mail or wires." *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000); see 18 U.S.C. §§ 1341, 1343. "The gravamen of the offense is the scheme to defraud." *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 657 (2d Cir. 2016). A "scheme to defraud" is "a plan to deprive a person of something of value by trick, deceit, chicane or overreaching." *Autuori*, 212 F.3d at 115 (citing *McNally v. United States*, 483 U.S. 350, 358, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)). To make out such a scheme, a plaintiff must provide proof of a material misrepresentation. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).⁵

⁵ Plaintiffs rely on several Sixth Circuit cases for the proposition that a "scheme to defraud" describes a category of unethical or unfair practices broad enough to capture post-transaction marketing. See *United States v. Warshak*, 631 F.3d 266, 311 (6th Cir. 2010) ("[T]he scheme to defraud element required under Section 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society.'"); see also *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979). Insofar as the plaintiffs seek to avoid pleading a material misrepresentation in the scheme to defraud, their reliance on *Warshak* is misplaced. See *O'Donnell*, 822 F.3d at 657.

In any event, *Warshak* and *Van Dyke* are easily distinguishable. In *Warshak*, the court relied on specific facts that disclosures were not made and products were not properly described: customers were charged unauthorized fees, received "unwanted (and unauthorized) additional shipment[s]," and were "never informed during the ordering process that they would be charged

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