

for anything beyond the shipping-and-handling costs associated with the trial offer." *Id.* at 312; see also *Van Dyke*, 605 F.2d at 224. Here, there is no allegation of such explicit deceit: the plaintiffs affirmatively consented to the fully-disclosed terms of the membership club offer, and do not dispute that those terms governed their relationship with Trilegiant.

[HN8] The elements of mail and wire fraud must be pled with particularity. See *Fed. R. Civ. P. 9(b)*; *Lundy v. Catholic Health Sys. of Long Island*, 711 F.3d 106, 119 (2d Cir. 2013); *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999). The complaint must detail the specific statements that are false or fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993); see, e.g., *In re [*125] Ford Fusion & C-Max Fuel Econ. Litig.*, 2015 U.S. Dist. LEXIS 155383, 2015 WL 7018369, at *33 (requiring plaintiffs [****15**] to "sufficiently allege the who, what, when, where, and why of the fraud at issue under Rule 9(b)").

The plaintiffs argue that the district court erred by requiring them to allege specific misrepresentations *in the use of the mail or wires* to satisfy Rule 9(b). Their theory is that even if Trilegiant made otherwise innocent use of the wires, it did so to advance an enterprise that was deceptive overall. E.g., *Brewer v. Village of Old Field*, 311 F. Supp. 2d 390, 403 (E.D.N.Y. 2004) (While the mailings themselves did not contain misrepresentations, "the complaint allege[d] a close connection between the defendants and the alleged fraudulent scheme" and the mails were "simply used in furtherance of a master plan to defraud.").

True, [HN9] the mail or wire communications themselves need not contain a false statement. See *Schmuck v. United States*, 489 U.S. 705, 715, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989); see also *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 78 (E.D.N.Y. 2006) (when alleging use of the mail and wires, "the pleader need only allege that the mail and wire fraud were in furtherance of a larger scheme to defraud" and "the communications themselves need not have contained false or misleading information") (internal quotation marks omitted); *Calabrese v. CSC Holdings, Inc.*, 283 F. Supp. 2d 797, 808 (E.D.N.Y. 2003) ("a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications" is sufficient to satisfy Rule 9(b)) (internal quotation marks omitted). [****16**] But a plaintiff still needs to allege a material misrepresentation as part of the defendants' scheme to fraud to state a violation of section 1341 or 1343. See *O'Donnell*, 822 F.3d at 657. That is so notwithstanding characterization of the alleged frauds as predicate acts of a racketeering conspiracy.⁶ The complaint here lacks the particularized allegation of an underlying "scheme to defraud" animated by a material misrepresentation.

⁶ [HN10] A valid claim that does not rest on specific misrepresentations in the use of the mails or wires always identifies fraud with particularity at some level of the enterprise. See, e.g., *Liberty Mut. Ins. Co. v. Blessinger*, No. 06 CV 391(NGG)(ARL), 2007 U.S. Dist. LEXIS 21781, 2007 WL 951905, at *7-8 (E.D.N.Y. Mar. 27, 2007) (complaint specified how members of the conspiracy "submitted insurance applications to the plaintiff ... which contained false and incomplete information intended to mislead plaintiff," and "detail[ed] the nature of the false statements"); *Wood v. Incorporated Village of Patchogue*, 311 F. Supp. 2d 344, 358-60 (E.D.N.Y. 2004) (complaint included allegations that defendants made misrepresentations by submitting annual payroll statements certifying inaccurate information); *SKS Constructors*, 458 F. Supp. 2d at 76-78 (credit card charges and checks did not contain misrepresentations, but the wrongdoing within the conspiracy included "wrongfully endorsed checks payable to XL and then deposited those checks in accounts for himself," "purchased raw materials on credit while never intending to pay for those materials," and "fraudulently obtained" credit in others' names).

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