IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

- x

which cases?

law and subject to ongoing lawsuits in Florida state court. Federal and state law both confirm that this federal action cannot supplant Florida's comprehensive

contractor and insurance claimant. A

an individual can directly assert a claim against their insurer, referred to as a

what are those requirements?

as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Rather, the "complaint must include factual content that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017). In addition, when a claim alleges fraud, Rule 9(b) dictates that "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b); *see also Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1316 (11th Cir. 2007) (civil RICO claims are "essentially a certain breed of fraud claims [that] must be pled with an increased level of specificity" under Rule 9(b)). Failure to satisfy the heighted pleading requirements on a RICO fraud claim requires dismissal. *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1216 (11th Cir. 2020).

Moreover, this court may take judicial notice of the existence of the lawsuits commenced by SFR in Florida state courts pursuant to Federal Rule of Evidence 201(b)(2). Fed. R. Evid. 201(b); *see also United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (quotation omitted). This court may also consider such judicially noticed facts on a motion to dismiss, and the mere consideration of such facts does not require the court to convert a motion to dismiss to a motion for summary judgment. *Sporea v. Regions Bank, N.A.*, No. 20-11812, 2021 WL 2935365, at *2 (11th Cir. July 13, 2021) (citing *Bryant v. Avado Brands, Inc.*, 187 F. 3d 1271, 1278 (11th Cir. 1999).

ARGUMENT

I. The Civil RICO Claim Is Preempted by the McCarran-Ferguson Act.

Plaintiff's civil RICO claim would interfere with Florida state law regulating the business of insurance, requiring dismissal under the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.* The McCarran-Ferguson Act is a federal statute that addresses whether federal legislation may be applied in the face of a state statute regulating the business of insurance, premised on the recognition by Congress that insurance regulation is primarily a power left to the fifty states. *See Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). The McCarran-Ferguson Act preempts the application of federal laws where—as here—the following conditions are met: (1) the federal law does not specifically relate to the business of insurance, (2) the state statute at issue was enacted for the purpose of regulating insurance, and (3) the federal law would invalidate, impair, or supersede state law. *Id.* at 306–07.

A. The First and Second Requirements of McCarran-Ferguson Are Satisfied.

Plaintiff cannot meaningfully dispute that the first and second requirements of McCarran-Ferguson are met here. First, the Supreme Court made clear in *Humana v. Forsyth* that "RICO is not a law that specifically relates to the business of insurance." *Id.* at 307 (internal quotations omitted). Second, the state statutory scheme at issue, FUITPA, was indisputably enacted for the purpose of regulating the business of insurance, as courts in this Circuit have recognized

F. Supp. 2d at 1217 ("It follows, therefore, that the [F]UITPA is a statutory manifestation of the Florida legislature's intent, in conformity with an Act of

explain bad faith requirements. Haven't insurers complained that bad faith law has too low of a bar, that plaintiffs can claim bad faith too easily?

1. Plaintiff's RICO Claim Is a De Facto Bad Faith Claim.

Plaintiff's RICO claim asserts that UPC fraudulently denied the 200 underlying insurance claims and seeks damages stemming from those denials exceeding the covered amounts under the policy, claiming that UPC wrongfully handled, adjusted, and paid (or failed to pay) the underlying insurance claims. This is exactly the kind of dispute governed by the Bad Faith Statute; Plaintiff seeks damages against UPC for its alleged failure to act in good faith to settle claims, by wrongfully denying or underpaying claims for hurricane damage. *See* AC. at ¶¶ 82–83; Fla. Stat. § 624.155(1)(b)(1) (providing that failure to settle claims in good faith when an insurer "could and should have done so, had it acted fairly and honestly toward its insured" is a basis for a civil action against the insurer under the Bad Faith Statute). The only way for an insured in a first-

the only way? can't they just claim breach of contract?

restrictions, and permitting Plaintiff's RICO claim to proceed would therefore frustrate state policy and interfere with Florida's administrative regime, satisfying McCarran-Ferguson's third requirement. *See Kondell v. Blue Cross Blue Shield of Fla., Inc.*, 187 F. Supp. 3d 1348, 1359 (S.D. Fla. 2016); *see also In re Managed Care Litigation*, 185 F. Supp. 2d at 1321–22. First, the Bad Faith Statute imposes strict requirements, not applicable to a RICO claim, on a plaintiff seeking to directly bring a bad faith claimly1.7 (th26)Tj-0. 0.5 (b)- (h)0. c (h)0.[(b)-1 (iff s)-1s5 (h)0.[(2 ((h)0.ins5

of action at this stage. Florida law mandates that *a finding of contractual liability and a determination of contractual damages* are necessaryya t 6 (f)0.5elda lgessag2c degs

Second, apart from the Bad Faith Statute and its preconditions to suit, no other provision of FUITPA or Florida common law would permit Plaintiff to bring claims for damages against an insurer based on allegations of bad faith in denial of coverage. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995) (noting that “first party bad faith actions are actionable only under section 624.155 and not [Florida] common law.”). This absence of a private right of action weighs strongly in favor of the application of McCarran-Ferguson to bar Plaintiff’s RICO claims. *See Kondell*, Keer50 [illegible]

saying claims not actually denied? or too soon to say if claim was legit..?

failed to allege facts sufficient to show the existence of an enterprise, a pattern of racketeering activity, or that any alleged injury was by reason of the alleged substantive RICO violation, requiring dismissal. *See Cisneros*, 972 F.3d at 1211.

A. The Amended Complaint Fails to Allege a RICO Enterprise.

Plaintiff's RICO claim fails because Plaintiff failed to plead facts alleging the existence of an enterprise or that the parties in the alleged enterprise shared a common purpose. To plead the existence of an enterprise under RICO, Plaintiff must plead that at least two distinct entities were involved in the alleged scheme. *Ray*, 836 F.3d at 1355, 1357. Plaintiff's own allegations demonstrate its failure to meet this distinctiveness requirement. Plaintiff contends that the alleged entities in the enterprise beyond UPC—FKS, PLS, Mid-America, UPC's Claims Director Jeff Bergstrom, UPC's claims managers Tim Cotton, Brian Maries, and Trevor McDonald, as well as FKS's desk adjuster Josh DeMint—acted under UPC's control. AC. at ¶ 68. However, members of an alleged enterprise must be "free to act independently of each other and to advance their own separate interests." *Ray v. Spirit Airlines, Inc.*, 126 F. Supp. 3d 1332, 1341 (S.D. Fla. 2015) (internal quotations omitted); *see also Cisneros*, 972 F.3d at 1215. Because Plaintiff's own allegations assert that FKS, PLS, and Mid-America were acting as UPC's agents, at UPC's direction and on UPC's behalf, they could not have been "free to act

independently" as *Ray* requires. *See* AC. at ¶ 32-35, ¶ 4, ¶¶ 8-9, ¶¶ 47, 56, 58; *see also Ray*, 836 F.3d at 1355, 1357.[2]

Plaintiff likewise failed to plead sufficient facts to establish that the members of the alleged enterprise shared a common purpose. *Cisneros*, 972 F.3d at 1211–12. Plaintiff must plead that all the enterprise participants share a common purpose, a requirement that demands more than "an abstract common purpose"; for example, a "generally shared interest in making money" is not enough. *Id.* (*citing Ray*, 836 F.3d at 1352-53 n.3). "Rather, where the participants' ultimate purpose is to make money for themselves, a RICO plaintiff must plausibly allege that the participants shared the purpose of enriching themselves through a particular criminal course of conduct." *Id.*

Plaintiff's conclusory assertion that the alleged members of the enterprise acted with "common purpose" does not suffice, as Plaintiff fails to plead any facts in support of this claim. Indeed, Plaintiff's own allegations indicate that the purported members of the enterprise *lacked* any common purpose: while Plaintiff claims UPC's purpose was to maximize profits, PLS was allegedly "induced to participate" due to a potential purchase of PLS, and FKS was purportedly

pressured into the scheme by UPC. AC at ¶ 9, ¶ 20, ¶ 46, ¶ 54. Further, as to Mid-America, Plaintiff failed to allege sufficient facts relating to Mid-America's involvement, providing only the most abstract and general allegations based solely upon one employee's vague accusations. *See id.* at ¶¶ 59–62.

In *Cisneros*, the Eleventh Circuit addressed a similar set of facts, concluding that plaintiff failed to sufficiently allege a common purpose among the enterprise, which concerned an alleged scheme to sell sick puppies at premium prices. *Cisneros*, 972 F.3d at 1213. The plaintiff in *Cisneros* generally alleged "at the highest order of abstraction that the participants shared a common 'purpose of implementing Petland's scheme to defraud customers.'" *Id.* at 1212. The only facts offered in support of the alleged scheme was that Petland "insists upon 'uniform standards, methods, techniques, and expertise, procedures, and specifications . . . for establishing, operating, and promoting a retail pet business." *Id.* These allegations were deemed insufficient to establish a common purpose[3] (my) innocuous

their unlawful activities," AC. at ¶ 74, the only facts offered in support of the alleged scheme implemented in furtherance of this purported common purpose are the vague claims that "there are contractual relationships, financial ties and continuing coordination of activities . . . . [and that the alleged co-conspirators] engage in consensual decision-making." *Id.* These allegations describe nothing more than an anodyne business model, and, much like the allegations in *Cisneros*, nothing about the allegations here "remotely suggest[] fraud." *Cisneros*, 972 F.3d at 1212; *see also Lewis v. Mercedes-Benz United States*, 530 F. Supp. 3d 1183, 1215–18 (S.D. Fla. 2021) (finding no common purpose where plaintiff failed to allege that parties were acting outside their normal course of business). Plaintiff has alleged no facts to plausibly support the inference that the defendants were collectively trying to make money denying insurance claims through fraudulent activity; rather the defendants were simply trying to operate their businesses for a profit, which is not a common purpose sufficient to establish a RICO enterprise. *See Ray*, 836 F.3d at 1352–53.

B. The 0.009 Tw 0.5 18 [P)-53 (t)-2((d)-2sTT1 1 to1 (u)-1.w ()-Tj-0.00A-47(hr203.1 18(h)2433 (

co-conspirators utilized interstate mails and wires in furtherance of their scheme to prepare false reports and estimates to deny or underpay valid claims. AC. at ¶¶ 89–90. The only predicate act alleged with any semblance of specificity is that "Defendants and co-conspirators caused a text to be sent in 2020." *Id.* at ¶ 91. Even if this low level of specificity was enough, one predicate act is not enough to establish a pattern of racketeering. The other acts mentioned—the alleged phone call with FKS and the mailing

(a plaintiff must plead facts sufficient to show that the racketeering activity "not only was a 'but for' cause of [the] injury, but was the proximate cause as well.").

Plaintiff fails to allege a direct injury as a result of the alleged racketeering activity, alleging only that "[a]s a direct and proximate result of the conspiracy and Defendants' racketeering activities, SFR sustained damages." AC. at ¶ 88. Such an allegation is insufficient to demonstrate an injury as a result of the violation. Nor can Plaintiff's allegations that it received fraudulent estimates establish a, fra(i)0.7 (s

III. Plaintiff's Breach of Contract Claim Must Be Dismissed for Impermissible Claim Splitting.

Plaintiff's breach of contract claim must be dismissed for impermissible claim splitting. As already discussed, Plaintiff's claims in this lawsuit are nothing more than repurposed versions of the breach of contract claims Plaintiff has already brought against UPC in separate lawsuits in state court. *See* AC., Ex. B. If final, the state court suits brought by Plaintiff "would preclude the second [here, federal] suit." *Greene v. H&R Block E. Enters.*, 727 F. Supp. 2d 1363, 1367 (S.D. Fla. 2010) (quoting *Stark v. Starr*, 94 U.S. 477, 485 (1876)). Accordingly, Plaintiff's breach of contract claim in Count II must necessarily fail as a matter of law as impermissible claim splitting. *Id.*

When a plaintiff brings an action in both state and federal court, federal courts apply the Florida claim splitting rule which prohibits claim splitting between state and federal courts. *See Robbins v. GM de Mex., S. de R.L. de CV.*, 816 F. Supp. 2d 1261, 1264 (M.D. Fla. 2011); *Bowman v. Coddington*, 517 F. App'x 683, 685 (11th Cir. 2013). To determine whether a cause of action must be dismissed as impermissible claim splitting, courts in Florida analyze: "(1) whether the case involves the same parties and their privies, and (2) whether separate cases arise from the same transaction or series of transactions." *Vanover v. NCO Fin. Servs.*, 857 F.3d 833, 841–42 (11th Cir. 2017); *see also Robbins*, 816 F. Supp. 2d at 1264. Both requirements are satisfied. First, this case and the state court case involve the same

parties. *See Robbins*, 816 F.

Rules of Civil Procedure, a plaintiff is required to plead the "who, what, where, when, why" of the alleged fraud. *Brooks*, 116 F.3d at 1371.

Plaintiff's allegations fall far short. The amended complaint fails to specify the allegedly fraudulent statements by Defendants with the required particularity; to the extent Plaintiff relies upon "false adjusting reports and/or engineering reports," the amended complaint fails to include the time and place of each statement, the person responsible for making the statement, and the content of the specific alleged misstatement. AC. ¶ 104. Further, Plaintiff simply cannot credibly aver that it was misled by any of the allegedly false statements, as evidenced by the approximately 200 lawsuits filed (some of which were subsequently settled).

The allegations in the complaint are also insufficient to state a claim for common law fraud under Florida law. To demonstrate common law fraud, a plaintiff must plead facts sufficient to establish that: (1) the opposing party made a misrepresentation of a material fact; (2) the opposing party knew or should have known the falsity of the statement; (3) the opposing party intended to induce the aggrieved party to rely on the false statement and act on it; and (4) the aggrieved party relied on that statement to his or her detriment. *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010). Plaintiff cannot demonstrate reliance on any alleged misrepresentations because, as discussed above, it filed suit for breach of contract in approximately 200 cases on the basis of UPC's alleged misrepresentations,

clearly indicating a disbelief in the veracity of UPC's alleged representations. AC., Ex. B. a

1321 (S.D. Fla. 2002)(stating that Florida law does "not expressly provide for private causes of action to victims of insurance fraud."). Indeed, the only place where a private cause of action is demonstrated for violations under FUITPA is by way of a claim made pursuant to Fla. Stat. § 624.155. The Bad Faith Statute sets the manner in which any statutory claims must be made. *See supra* Section (I)(B)(2). Plaintiff failed to allege the conditions precedent to a suit premised on violations of FUITPA and must, therefore, be dismissed.

CONCLUSION

For the foregoing reasons, Defendant UPC respectfully requests that the Court dismiss the Third Amended Complaint in its entirety and grant any other relief deemed just and proper.

Respectfully submitted,

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