UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

CRAWFORD'S AUTO CENTER, INC. and K&M COLLISION, LLC, on behalf of themselves and all others similarly situated,	*	
Plaintiffs,	*	Case No: 6:14-cv-06016-GAP-TBS
v.	*	(*Crawford's* Action)
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al*.,	*	MDL Docket No. 2557
Defendants.	*	**DISPOSITIVE MOTION**

JOINT MOTION OF CERTAIN DEFENDANTS TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT AND INCORPORATED MEMORANDUM IN SUPPORT

The Certain Defendants listed in Exhibit A jointly move to dismiss Plaintiffs' Second Amended Class Action Complaint ("SAC") (Dkt. No. 205) pursuant to Fed. R. Civ. P. 9(b), 12(b)(1), and 12(b)(6).[1] The SAC asserts claims on behalf of seven nationwide classes for alleged fraud, unjust enrichment, and treble damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"). All are deficient as a matter of law.

MEMORANDUM OF LAW

I. INTRODUCTION

Defendants write automobile insurance and routinely pay for collision repairs; according to Plaintiffs, Defendants all have direct repair program ("DRP") arrangements with various body shops who agree to perform repairs on insured vehicles at prices that the various Defendants have determined to be "prevailing rates." Plaintiffs, non-DRP collision

[1] Defendants incorporate by reference Section III of State Farm's Motion to Dismiss the Second Amended Complaint, in compliance with this Court's established procedure (*see* Scheduling Order, *In re Auto Body Shop Antitrust Litig*., No. 6:14-md-02557 (M.D. Fla. Aug. 15, 2014), Doc. 2, ¶ 8), which provide additional, independent grounds for dismissal here.

repair facilities, admit they performed repair work and accepted payment from Defendants at their respective "prevailing rates," but now claim that they should have been reimbursed more. Plaintiffs allege that Defendants' "prevailing rate" calculations were "flawed," and that Plaintiffs were "defrauded" into accepting them. Plaintiffs call this "racketeering," and assert class claims for RICO treble damages, common law fraud, and unjust enrichment.

The Court is familiar with these allegations, having reviewed and dismissed Plaintiffs' First Amended Complaint ("FAC") in its November 25, 2015 dismissal order (Dkt. No. 201; herein, "Order"). That Order found the FAC was a prohibited shotgun pleading; that it was "likely 100 pages longer than it ought to be;" that the RICO allegations were "nonsensical" for a variety of reasons; and that the fraud allegations "fare no better." The SAC's allegations are in all material respects the same as those summarized in the Court's Order, at pp. 1-2, 9-10, and the Certain Defendants' Joint Motion to Dismiss the FAC, at pp. 5-8.[2] Plaintiffs continue to rely on the same nonsensical theory that this Court has already rejected, i.e., that Plaintiffs were somehow defrauded or extorted into accepting reduced compensation. As this Court held, "[t]here is nothing wrongful about a buyer threatening to take its business elsewhere unless the seller agrees to the buyer's price." (Order at 13.)

Rather than addressing this fundamental problem, Plaintiffs instead made the SAC even longer by adding even more "automobile repair industry minutiae" that adds "little information about what any Defendant did that was actually improper" and fails to state a cause of action. (*Id.* at 11.) Plaintiffs, for example, list more "representative transactions"

[2] Defendants also incorporate by reference the arguments from the briefing on their previous motion to dismiss. *See* Joint Motion of Certain Defendants to Dismiss Amended Class Action Complaint Pursuant to Fed. R. Civ. P. 9(B), 12(B)(1), And 12(B)(6) And Incorporated Memorandum In Support ("FAC MTD") (Dkt. No. 158); Certain Defendants' Joint Reply Brief in Support of Motion to Dismiss Amended Class Action Complaint ("FAC MTD Reply") (Dkt. No. 188).

that Plaintiffs characterize as "fraud." Yet many of these new "misrepresentations" *post-date* the filing of Plaintiffs' original complaint. They only serve to further illustrate that there could be no "fraud" here—Plaintiffs did accept and continue to accept reimbursement from Defendants for their repair work.

In sum, the SAC does nothing to correct the problems previously identified by this Court and should be dismissed for the same reasons. The SAC should also be dismissed for additional reasons not reached by this Court in its November 25th Order, as discussed further below. And given that this is now Plaintiffs' third failed attempt to plead their claims, the SAC should be dismissed with prejudice.

II. THE SAC DOES NOT REMEDY THE FUNDAMENTAL INFIRMITIES IDENTIFIED IN THE COURT'S ORDER DISMISSING THE FAC.

In holding the common law fraud and fraud-based RICO claims alleged in the FAC "utterly fail[ed] to comply with" Federal Rule of Civil Procedure 9(b)'s heightened pleading standard, the Court found "the alleged fraud is described in only the most general terms, with no effort made to identify the allegedly fraudulent statements or the defendants who uttered them." (Order at 14.) Nor did Plaintiffs' pleading of RICO predicate acts (or common law fraud or unjust enrichment) pass Rule 12(b)(6) muster. (*See id.* at 11-16, 17-18.) These fundamental failings persist.

First, the SAC remains a prohibited "shotgun pleading" that improperly lumps numerous Defendants together with generic allegations of wrongdoing. Through usage of "Defendant Insurers" throughout the SAC (*see* SAC ¶¶ 2-5, 23 ("collectively" defining all 84 Defendants as "Defendant Insurers")), Plaintiffs challenge conduct they indiscriminately impute to all 84 Defendants although such universal allegations are plainly not supported by

the facts as pled.[3] As before, each Count incorporates by reference paragraphs "1-194" and "257-323"—virtually all of the SAC's substantive allegations—regardless of whether they have any "relevance to [the] Defendant" named in that Count. (Order at 8.)[4] Thus, in essence, Plaintiffs "assert that all of the bad things were done by all of the Defendants" (*id.* at 15)—the definition of an improper shotgun pleading. The SAC's superficial attempt to address this basic pleading defect falls far short of providing fair notice under Rule 8 and "[w]ithout more, this warrants dismissal." (*Id.* at 8.)

Moreover, despite this Court's observation that the 150-page FAC was "likely 100 pages longer than it ought to be" (*id.* at 9), the new iteration weighs in at *175* pages—and *still* fails to plead the specific transactions Plaintiffs are suing over with the requisite Rule 9(b) particularity. Flouting the Court's admonition, Plaintiffs continue to rely on "representative transaction" allegations (*e.g.,* SAC ¶¶ 282-307, Exs. K-P) that bespeak no "fraud" and simply itemize disputes over "procedures or parts which the insurers had not included in their estimates and for which they did not pay." (Order at 14 n. 5.)

Nor does the SAC address the *substantive* infirmities of the RICO predicate allegations—"extortion" in violation of the Hobbs Act, and federal "mail or wire fraud"—

[3] Even within the "Defendant Insurers" group, Plaintiffs improperly lump together numerous separate entities that are allegedly affiliated with a given insurance carrier. For example, Plaintiffs define Defendant "Farmers" as collectively referencing 15 different Defendants, (SAC ¶ 20), and implicating an additional 32 Farmers affiliates mentioned only in a footnote (*see id.* at n. 3). Yet, Plaintiffs fail to make specific allegations against nearly all of the 47 different Farmers Defendants and entities listed. The same is true for the other Defendants, including "Allstate," "GEICO", "State Farm," "Progressive," "Liberty Mutual," "Nationwide." Rather, in sweeping fashion Plaintiffs impute examples of alleged "representative" misconduct to all 84 Defendants and hundreds more entities that are merely identified once.

[4] For example, SAC ¶ 403 incorporates and realleges SAC ¶¶ 1-194 against "Defendant Farmers." However, a "number of the initial" 194 paragraphs "have nothing to do" whatsoever with "Defendant Farmers." *See, e.g.,* SAC ¶¶ 52-53 (individual transaction involving State Farm); *id.* ¶ 54 (individual transaction involving GEICO); *id.* ¶ 54 (individual repair transaction involving Progressive); *id.* ¶¶ 59-60 (individual grievances against Allstate). Those allegations cannot in any way render plausible a RICO claim against any Farmers entity. The same fundamental pleading defect infects each of the RICO claims against the other Defendants.

that the Court identified. Plaintiffs make no attempt to overcome the plain fact that there was "no extortion here" (Order at 13): as in the FAC, they cannot allege that Defendants obtained any property from Plaintiffs, much less through the wrongful means necessary to establish a violation of the Hobbs Act. "'Give me a discount or I'll leave you alone' is not extortion." (*Id.*) The SAC likewise again fails to surmount the basic legal and logical obstacle to their fraud predicate: that the alleged misrepresentation must be *material*. Defendants' "description of the amount of their offers as the 'prevailing rate'" could not "influence the Plaintiffs into doing a $1,000 job for $800"; thus, "the alleged misrepresentations were not only not material, they were not misrepresentations." (*Id.* at 15.)

Unable to comply with the Court's Order and plausibly plead that their compensation was "suppressed" because of "extortion" or material misrepresentations directed to them, Plaintiffs' principal innovation in the SAC—and cause for much of its expanded girth—is the addition of some anecdotal allegations about a handful of unsatisfactory repair jobs by DRPs. (*E.g.,* SAC ¶¶ 34-37, 45-66.) From this, Plaintiffs leap to the conclusion that Defendants are not living up to their "loss indemnity obligations" to policyholders, because, in Plaintiffs' view, the prevailing rate is insufficient to "restore the vehicles to pre-loss condition." (*Id.* ¶¶ 36-37.) Setting aside the gargantuan holes in Plaintiffs' logic[5], the alleged failure to properly repair someone else's car is simply not an injury to ***Plaintiffs'*** business or property under RICO.

As this Court has held, Plaintiffs "must demonstrate an injury to ***their*** property or business by reason of the substantive RICO violation to prevail on their civil RICO claim."

[5] With the millions of auto repairs performed each year, it is hardly remarkable that Plaintiffs found a few that allegedly were inadequate. But the few examples provided by Plaintiffs, even taking all their fact allegations as true, simply do not establish either (i) that the inadequacies in those repair jobs were attributable to carriers' payment of the "prevailing rate"; (ii) that those repair jobs are somehow representative of repairs performed by DRP shops; or (iii) that such faulty repairs would cease to exist if only the "prevailing rate" were higher.

(Order at 16; emphasis added.) Plaintiffs' irrelevant new allegations have nothing to do with ***their*** claimed injury. They are, if anything, wholly derivative of the policyholders' interests, and non-actionable.[6] As this Court observed, "[i]n the absence of any reliance by the Plaintiffs, it is difficult to imagine a way in which the Defendants' alleged misrepresentations as to the actual prevailing rate could have injured the Plaintiffs' property or business." (*Id*.) Plaintiffs' notion that "prevailing rate" misrepresentations were made to someone ***other than*** Plaintiffs certainly lends no heft to that implausible claim.

As with Plaintiffs' faulty FAC, Plaintiffs' purported injury was not "by reason of" any "racketeering scheme." 18 U.S.C. §1964(c). "[T]here is nothing wrongful about a buyer threatening to take its business elsewhere unless the seller agrees to the buyer's price" and "this is all that has been alleged here." (Order at 13.) Thus, Plaintiffs' business decision to accept payment at Defendants' "prevailing rates" and not to pursue the customer for the difference did not result from any alleged "extortion" or "fraud" but rather, from the competitive reality that DRP facilities will in fact accept the Defendants' "prevailing rates." (*See id.* at 15-16.)

While the Court's Order focused on Plaintiffs' failure to plead RICO predicate acts, this was "not the only shortcoming[]" (*id.* at 16); chief among the further reasons for dismissal is Plaintiffs' inability to establish any "associat[ion] in fact" RICO enterprise. 18 U.S.C. § 1961(4). Plaintiffs allege a series of associations-in-fact between the insurer Defendants and their respective vendors of auto repair estimating software programs, dubbed by Plaintiffs as

[6] *See, e.g., Maiz v. Virani*, 253 F.3d 641, 654-655 (11th Cir. 2001) (injury that is "indirect" or "derivative" does not confer RICO standing); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc*., 140 F.3d 898, 906 (11th Cir. 1998) (party "whose injuries result 'merely from the misfortunes visited upon a third person by the defendant's acts' lacks standing to pursue a claim under RICO"). Thus, to the extent Plaintiffs' pleadings now explicitly rely on purported injury to third-party policyholders, dismissal is also in order under Federal Rule of Civil Procedure 12(b)(1). (*Cf.* Order at 10 (declining to rule on standing argument because it "relies on facts outside the pleadings and is therefore premature").)

"Information Providers," who supposedly furnish Defendants with "flawed and rigged data" on repair costs. (*E.g.*, SAC ¶¶ 85, 88, 195-256.) Yet, in a virtually identical context, a court held that the Information Providers and insurance companies did not share the requisite "common purpose" to constitute an association-in-fact enterprise. *D.M. Robinson Chiropractic, S.C. v. Encompass Ins. Co. of Am.*, No. 10 C 8159, 2013 WL 1286696, at *9 (N.D. Ill. Mar. 28, 2013).

Finally, the Court's Order dismissed the common law fraud and unjust enrichment claims as impermissible shotgun pleading; as noted, the SAC remains so. In any event, these tag-along claims fail as a matter of law. As the Court observed, there was no fraud because there were no material misrepresentations or reliance (Order at 17), and there was no unjust enrichment because Plaintiffs conferred no benefit upon Defendants (*see id*. at 18 n.10). The SAC makes no attempt to cure these (and other) legal infirmities.

Plaintiffs' complete failure to address the "serious flaw[s]" (*id.* at 8) identified in the Order requires that the SAC be dismissed with prejudice in its entirety. *See Equity Lifestyle Props., Inc. v. Fla. Mowing and Landscape Services, Inc.*, 556 F.3d 1232, 1241 (11th Cir. 2009) (affirming dismissal with prejudice where plaintiff "failed to follow the district court's explicit direction in framing its third amended complaint" and "district court bent over backwards to give [plaintiff] a chance to present and litigate" claims). Below, Defendants briefly recapitulate the points and authorities supporting that result, including those that the Court did not expressly address in dismissing the FAC.

III. THE SAC'S RICO CLAIMS STILL FAIL AS A MATTER OF LAW.

A RICO claim requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." 18 U.S.C. § 1962(c); *Langford v. Rite Aid of Ala., Inc.,* 231 F.3d 1308,

1311 (11th Cir. 2000). In addition, "'a civil RICO plaintiff must show that the racketeering activity caused him to suffer an injury,'" which requires that "the predicate acts must not only be the 'but for' cause of the injury, but the proximate cause as well." *Green Leaf Nursery v. E.I. DuPont de Nemours & Co*., 341 F.3d 1292, 1307 (11th Cir. 2003) (internal citation and quotation omitted)). The SAC pleads none of these requisites; it is clear Plaintiffs cannot do so.

A. The SAC Does Not Establish The Requisite Predicate Offenses For A RICO Violation.

The RICO statute defines and limits "racketeering activity" to include only certain "*specified* state-law crimes, any 'act' indictable under various *specified* federal statutes, and *certain* federal 'offenses.'" *H.J. Inc. v. Nw. Bell Tel., Co.*, 492 U.S. 229, 232 (1989) (emphasis added); 18 U.S.C. § 1961(1). "'[T]o survive a motion to dismiss [a RICO claim], a plaintiff must allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts.'" *Rogers v. Nacchio*, 241 F. App'x 602, 607 (11th Cir. 2007) (citation omitted). The FAC failed to adequately allege any predicate offenses of purported wire fraud and extortion (Order at 11-16), and the SAC adds nothing to change that conclusion. [7]

1. Plaintiffs' "Fraud"-Based RICO Claims Still Are Not Pleaded With Rule 9(b) Particularity.

As this Court previously explained, to assert an illegal enterprise through a pattern of fraud, "Plaintiffs must comply with particularity requirements of Federal Rule of Civil Procedure 9(b)." (Order at 14.) The Court stated that Plaintiffs are required to allege: "(1) the *precise* statements, documents, or misrepresentations made; (2) the *time*, *place*, *and*

[7] Of course, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'" in response to a Rule 12(b)(6) motion "requires more than labels and conclusions. . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc*., 326 F.3d 1183, 1185 (11th Cir. 2003).

person responsible for the statement; (3) the *content and manner in which these statements misled* the [p]laintiffs; *and* (4) *what the defendants gained* by the alleged fraud." *Id.* (quoting *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (emphasis added)).

Yet, as noted above, rather than refine their allegations with the requisite specifics, Plaintiffs merely scatter the SAC with more references to "Defendant Insurers" and their broad assertions of supposed "fraudulent and extortionate conduct." (SAC ¶ 178; *see id.* ¶¶ 177, 184, 185.) Like the FAC before it, the SAC fails because it describes the alleged fraud in "only the most general terms, with no effort made to identify the allegedly fraudulent statements or the defendants who uttered them." (Order at 14.) Again, Plaintiffs assert generally that they are "fraudulently told—uniformly and consistently" that certain "additional operations or expanded procedures, as well as the labor times listed to perform these repairs, do not meet the so-called prevailing rate." (SAC ¶ 4.) This sort of generic pleading is utterly insufficient under Rule 9(b).

Just as the "representative transactions" that Plaintiffs attached to the FAC failed to provide the requisite support to meet Rule 9(b), the same is true of the attachments to the SAC. As this Court previously found, those attachments are "merely spreadsheets listing a series of transactions where the insurers' estimates (and resulting payments) were lower than the Plaintiffs' invoices" that offered "nothing" to "indicate[] any insurer committed fraud." (Order at 14 n. 5.) The only difference is that the SAC has a longer list of meaningless examples than the FAC, many of which (addressed below) post-date Plaintiff's first complaint in this suit. (*See* SAC Exs. K, M.) As with the FAC, these examples only support that "Defendant Insurers" informed Plaintiffs, in itemized fashion, what they were willing to pay for each repair – a fact

which "belies any notion that the insurers were trying to commit fraud via their repair estimates." (Order at 14 n. 5.) Thus, Plaintiffs' fraud-based RICO claims once again fall woefully short under Rule 9(b) and can be dismissed on this basis too.

2. As A Matter of Law, No "Fraud"-Based RICO Predicate Act Can Be Premised On Plaintiffs' "New" Allegations.

"Moving beyond the pleading requirements, the Plaintiffs," as in the FAC, "have failed to satisfy the substantive requirements for pleading a fraud claim." (Order at 15.) Indeed, the theory of "fraud" Plaintiffs propose is the same one this Court dismissed in the FAC—"that [Plaintiffs] were misled as to what the 'so-called industry prevailing rates' were." Plaintiffs again contend that they "would not have accepted the suppressed compensation for repair work and services" but for Defendants' "material misrepresentations, concealment and omissions," and that Plaintiffs "had no reasonable means of verifying, testing or discovering the accuracy (or lack thereof) of [Defendant Insurers'] representations of their purported prevailing rates." (SAC ¶¶ 180, 253, 321.)

Tellingly, many of the "new" allegations of repair transactions subject to the supposed RICO scheme *post-date* the initial filing of this lawsuit.[8] In other words, even after Plaintiffs knew of the supposed scheme, they continued to accept the "prevailing rates." That hardly makes Plaintiffs' allegations of "fraud" plausible, and is in itself refutation of any claim that Plaintiffs were somehow misled into accepting such rates in the past.[9]

---

[8] *See, e.g.,* SAC Ex. K at 6 (listing transactions with Allstate from June 2014 to October 2014); *see also* SAC ¶ 61 (grievance from August 2014), ¶ 302 (grievance from May 2014), ¶ 304 (grievance from December 2015).

[9] So too, Plaintiffs cannot sue over conduct going back almost ten years due to alleged "fraudulent concealment" because these allegations—all of which remain the same in the SAC as they were in the FAC (*see* SAC ¶¶ 318-21)—do not toll the applicable four-year limitations period since Plaintiffs' own allegations demonstrate they have been well aware of the challenged conduct for a long time, and such allegations fall far short of satisfying Rule 9(b). *See* FAC MTD at pp. 29-31; FAC MTD Reply at pp. 13-14.

Thus, as in the FAC, Plaintiffs still "have not alleged that they were misled as to the amount they would be paid for any repair job—*i.e.*, that they were deceived into believing they would receive, say, $1,000 for their work but only received $800." (Order at 15.) As this Court previously observed, "[o]ne would expect to find that the rates paid by (at least) 70 percent of those in the market are, in fact, the prevailing rates." (*Id.* at 16.)[10] Plaintiffs may have been unhappy with the situation, but they made conscious decisions to perform repair work and accept payment from the Defendants knowing full well they would not be paid their list prices or rack rates. And they did so on multiple occasions in the nearly two years since filing this suit.

Simply stated, Plaintiffs' complaints about the purported "prevailing rate" calculations cannot and do not state a *prima facie* fraud-based RICO claim. Plaintiffs know their own labor and parts costs, know what processes and procedures are necessary to repair a car, and know their own profit margins. Plaintiffs also know that DRP competitors accept the "prevailing rates." So, representations about "prevailing rates" *could not have been material* because they could not be "capable of influencing" Plaintiffs, and Plaintiffs could not reasonably have relied on those alleged representations in deciding whether to accept a given repair job. (Order at 15 (quoting *U.S. v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009)).) As such, "it is difficult to imagine a way in which the Defendants' alleged misrepresentations as to the actual prevailing rate could have injured the Plaintiffs' property or business." (*Id.* at 16.) Even if wires were used in that endeavor, that does not constitute fraud, much less a RICO predicate act. *See Am. Dental Ass'n*, 605 F.3d at 1291 (affirming

[10] Plaintiffs have altered this allegation slightly in the SAC, changing "70%" to "approximately two thirds." (*Compare* FAC ¶ 1 *with* SAC ¶ 1.)

dismissal of RICO suit by plaintiff dentists against defendant insurance companies based on alleged inadequate reimbursement under "standard dental coding procedures," because "Plaintiffs have not shown how they were misled by" anything defendants said); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007) (affirming dismissal of RICO claims where complaint did not allege that defendants made any affirmative misrepresentations in the mailings).

Finally, the SAC also adds copious (and irrelevant) allegations of claimed injury to policyholders through allegedly inadequate repairs by DRPs based on insurance contracts to which Plaintiffs are not parties[11]—derivative claims that could not be the basis for a cause of action ***by Plaintiffs***. Equally extraneous are Plaintiffs' allegations on a potpourri of topics ranging from the actions of state insurance commissioners; to the growth of multi-shop operators, or MSOs, to performance metrics; to buyback/guarantee provisions. (*See* SAC ¶¶ 36, 45-52.) None of these "new" allegations show a ***material misrepresentation*** that a Defendant Insurer affirmatively made to a Plaintiff. The few allegations added to reflect individual repair shop grievances merely state that ***some*** representatives of ***some*** Defendants spoke to various ***third party insureds*** about a repair. For example, Nationwide's Tom Flowers advising the vehicle owner of an Audi that Nationwide "would not cover" the repair shop's overcharges; or "Farmers" advising its insured that "she would responsible for the overcharges" indicate only that the repair shops knew, prior to performance, how much the insurers would pay, and performed anyway. (*Id.* ¶¶ 303-04.) Statements such as these are

[11] *See, e.g.,* SAC ¶ 37 ("the so-called prevailing rate established through Defendant Insurers' direct repair programs are not sufficient to restore the vehicles to pre-loss condition"); ¶ 54 (alleging that in 2012 Maryland DRP facility made "flawed repairs" to 2007 Lexus); ¶¶ 51-52, 55-64 (other examples of alleged inadequate repairs).

not fraud, nor do they suffice as the basis for Plaintiffs' fraud-based RICO claim.

3. As A Matter of Law, No "Extortion"-Based RICO Predicate Act Can Be Premised On Plaintiffs' "New" Allegations Either.

The FAC made conclusory references to the crime of "extortion" under the Hobbs Act (18 U.S.C. § 1951)[12] as a RICO predicate (FAC ¶¶ 178, 180, 243, 246, 248, 298); the SAC repeats those allegations (SAC ¶¶ 178, 181, 263, 266, 268, 329). For example, the SAC retains the assertion that Defendants "extorted Plaintiffs and the proposed Classes through wrongful use of fear of economic loss, in that Plaintiffs and the members of the Classes would not be able to perform the insured repairs unless they accepted the suppressed compensation paid by Defendant Insurers. . . ." (*Id.* ¶ 268.) In its Order, the Court found this assertion "nonsensical" on its face; after all, "Plaintiffs admit . . . that they accepted what they believed to be suppressed compensation because if they refused to work that cheaply, some other repair shop would get the work. This is not the sort of fear of economic loss that can support an extortion claim. Under the Hobbs Act, the victim must fear an actual loss, not merely the loss of a potential benefit." (Order at 12.) The Court was correct: as a matter of law, these allegations cannot sustain "extortion" as a RICO predicate offense.

A necessary element of any extortion claim is the "obtaining of property" from the alleged victim. "Obtaining property requires 'not only the deprivation but also the acquisition of property.' . . . That is, it requires that the victim 'part with' his property, . . . and that the extortionist 'gain possession' of it." *Sekhar v. U.S.*, 133 S. Ct. 2720, 2725 (2013) (citations omitted). The SAC does not allege that Plaintiffs parted with any property, much less that

[12] The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added).

Defendants somehow *acquired* property, in connection with the repair transactions at issue. Plaintiffs thus have still wholly failed to establish the first element of an extortion predicate act.

Vainly attempting to address this fundamental deficiency, the SAC adds still more conclusory allegations, characterizing Plaintiffs' "right to make business decisions free from outside pressure" and "[t]he value of the services performed by Plaintiffs" as "property subject to extortion" and suggesting that their services somehow "relieved Defendant Insurers of their obligations to their insureds under the policies." (SAC ¶¶ 276, 277.) The Supreme Court has squarely rejected Plaintiffs' gambit: *Scheidler v. Nat. Org. for Women, Inc.*, 537 U.S. 393 (2003), held that "women's right to seek medical services," "doctors' rights to perform their jobs," and "clinics' rights to provide medical services" did not constitute "something of value" that can be "exercise[d], transfer[red], or s[old]" and therefore was not "property" under Hobbs Act. *Id.* at 399-400, 405. Plaintiffs' services and alleged rights likewise cannot constitute "property" for purposes of their extortion claim.

Moreover, even if services constituted "property" under the Hobbs Act, it is clear that ***Defendants*** have not ***obtained*** services (or money) from Plaintiffs; they ***paid*** Plaintiffs for services rendered to ***their insureds***. In so doing, Defendants did not acquire, or deprive Plaintiffs of, property that Defendants "could exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405. *Cf. A&E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, 6:14-cv-00310-GAP-TBS, Dkt. No. 291 ("*A&E* Dismissal Order"), at 9-10 ("The repairs at issue obviously provided a benefit to the owners of the vehicles" but conferred no "benefit" on the insurers, only "an obligation to pay for it").

Even if Plaintiffs could establish some "property" acquired by Defendants, their

unchanged allegations and theory of the case make clear that they cannot establish the ***other*** essential element of extortion, *i.e.*, wrongful use of actual or threatened force, violence, or fear to obtain the would-be "property." Plaintiffs allege that they "accept[ed] suppressed compensation for insured repairs predicated on fear of economic harm," the "fear" being the loss of "business with Defendant Insurers." (SAC ¶ 276.) At most then, Plaintiffs have established that Defendants drove a hard bargain, but "hard bargaining" is not extortion. "[W]here the defendant has a claim of right to property and exerts economic pressure to obtain that property, that conduct is not extortion and no violation of the Hobbs Act has occurred." *Rennell v. Rowe*, 635 F.3d 1008, 1012 (7th Cir. 2011). "[T]here is nothing wrongful about a buyer threatening to take its business elsewhere unless the seller agrees to the buyer's price" (Order at 13), and Defendants' refusal to pay the higher prices that Plaintiffs want to charge is simply not "extortion" under the Hobbs Act.

Plaintiffs errantly suggest that the element of wrongfulness is met because Defendants "steer[ed] repair work away from" Plaintiffs in violation of "respective states' laws." (SAC ¶ 278 (citing 31 Pa. Code §§ 62.3(b)(3), 146.8(b), (d); N.C. Gen. Stat. § 58-3-180(a), (b), (b1); § 58-33-76(a)).) However, no well pleaded facts sustain a violation of any of these statutes, and even if they did, these statutes are not blanket prohibitions on "steering"; they provide only that an insurer may not ***require*** an insured to use a specific repair shop, but clearly permit an insurer to ***recommend*** repair shops to its insureds if certain conditions are met. *See, e.g.*, N.C. Gen. Stat. § 58-3-180(b1).

Plaintiffs also lob assertions that unspecified "Defendant Insurers" purportedly "fail[ed] to personally inspect a damaged vehicle when providing a repair estimate" and

required Plaintiffs to "use aftermarket parts . . . that are not at least equal to the original parts." (SAC ¶ 279, citing 63 P.S. § 861; 11 NCAC §§ 4.0419, 4.0426.) Aside from being wholly unsupported by well-pleaded fact, it is unclear how these regulations—designed to protect consumers—could give rise to any enforceable right on Plaintiffs' part, let alone how their violation might have caused the transfer of property from Plaintiffs to Defendants as the Hobbs Act requires.[13]

B. The Purported RICO Violations Did Not Cause Plaintiffs Any Injury.

Plaintiffs also must show injury "by reason of" a RICO violation (18 U.S.C. § 1964(c)) which requires both "but for" and proximate causation, *i.e.*, a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 (1992). Plaintiffs argue that "but for" Defendants' purported "wrongful conduct," they "would have received more in compensation and would not have suffered injury" (SAC ¶ 176), but Plaintiffs cannot establish causation because "[g]enerally, a person who discovers the truth may not claim that a defendant's misrepresentation or omission of information harmed him." *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989). Or as this Court put it, "[t]here are no allegations that the Defendant Insurers' description of the amount of their offers as the 'prevailing rate' could or did influence the Plaintiffs into doing a $1,000 job for

[13] Plaintiffs also misstate these regulations, neither of which require an insurer to "personally inspect" a vehicle. The North Carolina Administrative Code provides that an insurer cannot "refuse to inspect the damaged vehicle if a personal inspection is requested by the claimant," but "may satisfy the requirements of this Section by having a competent local appraiser inspect the damaged vehicle." 11 NCAC § 4.0419. And that Code does not prohibit use of all "after market" parts, only those that are not "at least equal to the original part in terms of fit, quality, performance and warranty." 11 NCAC § 4.0426. The Pennsylvania statute requires only that an appraisal state if it has "been prepared based on the use of aftermarket crash parts" and identify all such parts. 31 Pa. Code § 62.3(b)(10), (11).

$800." (Order at 15.)[14]

Plainly put, if Plaintiffs wanted to charge more than a Defendant was willing to pay, they could either charge the customer for the difference between their rates and the insurance company's rates, or decline the job altogether. But Plaintiffs chose not to do so, because they did not want to cede the work to a competitor DRP facility that would charge no more than the Defendants were willing to pay. That is not an injury "by reason of" any RICO violation. It is competition, pure and simple, and RICO was not designed to protect Plaintiffs from "[t]he Darwinian working of competition." *See Quality Auto Body, Inc. v. Allstate Ins. Co.,* 660 F.2d 1195, 1206 (7th Cir. 1981).

C. Plaintiffs Cannot Plead A Valid "Association-in-Fact" RICO Enterprise.

Plaintiffs purport to allege a series of "association-in-fact" RICO enterprises. 18 U.S.C. § 1961(4). (*See* SAC ¶¶ 10, 170-72.) An association-in-fact enterprise requires a structure, evidenced by (1) a common purpose; (2) "relationships among those associated with the enterprise;" and (3) "longevity sufficient to permit the associates to pursue the enterprise's purpose." *Boyle v. U.S.*, 556 U.S. 938, 944-45 (2009). In the Eleventh Circuit, the "person" and the "enterprise" cannot be the same. *U.S. v. Goldin Indus., Inc.,* 219 F.3d 1271, 1275-76 (11th Cir. 2000). Liability thus requires showing the "defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs." *Reves v. Ernst & Young,* 507 U.S. 170, 185 (1993).

In dismissing the FAC, the Court found Defendants' arguments that Plaintiffs failed

[14] The same is true of Plaintiffs' assertions, discussed above, that unspecified Defendants did not comply with certain state regulations pertaining to repair appraisals; such unsupported claimed violations could not be either the but for or proximate cause of Plaintiffs' alleged injury.

to offer any "specificity as to the workings of the RICO enterprises" were "not unfounded" (Order at 11); the SAC's substantive allegations relating to the purported associations-in-fact are identical to the FAC's.[15] It again describes no criminal "enterprise" separate and apart from Defendants' customer-supplier business relationship with the Information Providers. Again, "[t]he reader who makes it all the way through" the SAC "comes away with detailed knowledge of automobile repair industry minutiae but little information about what any Defendant did that was actually improper." (*Id.*) Accordingly, as detailed in the FAC MTD at pp. 18-21, and FAC MTD Reply at pp. 1-10, incorporated by reference herein, there is no association-in-fact enterprise because (a) the purported "enterprise" is just a name for the acts alleged, and (b) the "common purpose" essential to finding such an enterprise cannot exist where, as here, the alleged participants are each pursuing their own self-interested goals, not those of the "enterprise." As discussed in the prior briefing, *D.M. Robinson Chiropractic,* 2013 WL 1286696, at *9, dismissed a RICO claim on virtually identical allegations; Plaintiffs allege no new facts that could distinguish that persuasive holding.

D. The RICO Conspiracy Claims Fail As Well.

"The Plaintiffs' failure to properly assert substantive RICO claims is also fatal to their RICO conspiracy claims" under 18 U.S.C. § 1962(d), "which do not incorporate any additional allegations." (Order at 16 n. 8 (citing *Rogers*, 241 F. App'x at 609 (citing *Jackson v. Bellsouth Telecomm'cns*, 372 F.3d 1250, 1269 (11th Cir. 2004))).) Even if Plaintiffs had

[15] As described above, the SAC contains even more "minutiae" than the FAC about the automobile repair industry, including, for example, specific brand names of each defendant groups' DRP Program, (*see* SAC ¶ 38 n.7), yet provides *zero* detail on the workings of the alleged RICO enterprise and *zero* specifics as to which Defendant took which allegedly wrongful action in furtherance of such enterprise. Moreover, many of these new allegations relate to State Farm, its alleged repair system and its relationship with information providers, and have nothing to do with other Defendants. *See* SAC ¶¶ 81-84, 253, 256.

adequately pleaded civil RICO claims under § 1962(c), the RICO conspiracy claims still fail. The SAC merely recites the legal conclusion that Defendants engaged in a conspiracy in violation of § 1962(d) (SAC ¶¶ 340, 360, 380, 400, 420, 440); to the extent there are any factual allegations, they demonstrate (at best) nothing more than parallel actions by Defendants, for which there is an "obvious alternative explanation," *viz.,* that Defendants use the Information Providers to efficiently process claims and decrease costs. *Am. Dental Ass'n*, 605 F.3d at 1294-95.

IV. PLAINTIFFS' COMMON LAW FRAUD AND UNJUST ENRICHMENT CLAIMS ALSO FAIL AS A MATTER OF LAW.

Common law fraud. Plaintiffs' common law fraud claim is deficient for many of the same reasons that their RICO fraud claim fails. To start with, "Plaintiffs' failure to plead with particularity in relation to their RICO claims is also fatal to their state law fraud claim." (Order at 17.) And, as a matter of law, just like the RICO fraud claim, the alleged common law fraud could be neither material to Plaintiffs nor the cause of their alleged injury as a matter of law, because Plaintiffs knew the facts relevant to their decision whether to accept or reject work from Defendants' insureds. *Supra*, pp. 10-13. Likewise, Plaintiffs cannot establish the justifiable reliance that is "an element of fraud claims under both North Carolina and Pennsylvania law." (Order at 17.)

Unjust enrichment. First, where, as here, "the plaintiff's claim of unjust enrichment is predicated on the same allegations of fraudulent conduct that support an independent claim of fraud, resolution of the fraud claim against the plaintiff is dispositive of the unjust enrichment claim as well." *Ass'n Ben. Servs. v. Caremark Rx, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007).

Second, unjust enrichment requires that the plaintiff confer a benefit on the defendant

(Order at 18 (citing cases)), and Defendants receive no "benefit" from repairs to ***their policyholders'*** cars. As this Court held in the *A&E* case, the unjust enrichment claim must be dismissed because "Plaintiffs have not conferred a benefit upon the Defendants. . . . The repairs at issue obviously provided a benefit to the owners of the vehicles" but "the only effect of such a repair on the insurance company is the incurring of an obligation to pay for it." (*A&E* Dismissal Order at 9.) The insurance company's allegedly wrongful retention of money was not a "benefit" either, as it "is certainly not something that has been conferred upon it by the repair shop." (*Id*. at 10.)

Third, "[t]he law of unjust enrichment is concerned solely with enrichments that are unjust independently of wrongs and contracts." (*Id*.) Here, however, "Plaintiffs are contending that the Defendants engaged in wrongful conduct—conspiring to fix the prices they had to pay for repairs—and as a result ended up with money that would otherwise have been paid over to the Plaintiffs. The allegation of wrongful conduct takes this matter outside of the bounds of an unjust enrichment claim." (*Id*.)[16] Likewise, Plaintiffs' allegations of a RICO conspiracy here takes this case "outside the bounds" of unjust enrichment, and the claim therefore must be similarly dismissed.

CONCLUSION

For all the reasons discussed above, the undersigned Defendants respectfully request that the Court dismiss the SAC with prejudice in its entirety.

[16] In any case, as discussed above, there is nothing "unjust" about Plaintiffs having to compete with DRPs and accept the payment rates on offer from Defendants. "Reduced to its essence, Plaintiffs' position is that they are entitled to obtain what they believe to be the reasonable value of their services, and that Defendants are obligated to pay that amount, regardless of the price agreed upon between Plaintiffs and their customers at the outset of the transaction. Plaintiffs cite no law in support of this novel theory." *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co.*, No. 6:14-MD-2557-ORL-31, 2015 WL 4887690, at *6 (M.D. Fla. Aug. 17, 2015).

Dated: February 15, 2016

Respectfully submitted,

/s/ Lori J. Caldwell
Lori J. Caldwell (Florida Bar No. 0268674)
Rumberger, Kirk & Caldwell, P.A.
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Facsimile: (407) 841-2133
Email: lcaldwell@rumberger.com

Richard L. Fenton (admitted *pro hac vice*)
Mark L. Hanover (admitted *pro hac vice*)
Dentons US LLP
233 South Wacker Drive, Suite 5900
Chicago, Illinois 60606
Tel: (312) 876-8000
Fax: (312) 876-7934
Email: richard.fenton@dentons.com
Email: mark.hanover@dentons.com

Bonnie Lau
Dentons US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105
Tel: (415) 882-5000
Fax: (415) 882-0300
Email: bonnie.lau@dentons.com

Counsel for The Allstate Corporation, Allstate Insurance Company, Allstate County Mutual Insurance Company, Allstate Fire & Casualty Insurance Company, Allstate Indemnity Company, Allstate New Jersey Insurance, Allstate New Jersey Property & Casualty Insurance Company, Allstate Property & Casualty Insurance Company, Encompass Indemnity Company, Esurance Insurance Company, and Esurance Property & Casualty Insurance Company

/s/ David L. Yohai (w/permission)
David L. Yohai (admitted *pro hac vice*)
John P. Mastando III (admitted *pro hac vice*)
Eric S. Hochstadt (admitted *pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007
david.yohai@weil.com
john.mastando@weil.com
eric.hochstadt@weil.com

Counsel for Farmers Insurance Exchange, Truck Insurance Exchange, Farmers Insurance Company of Arizona, Farmers Insurance Company of Oregon, Farmers Insurance Company of Washington, Farmers Insurance Company, Inc., Farmers Texas County Mutual Insurance Company, Illinois Farmers Insurance Company, Mid-Century Insurance Company, Foremost County Mutual Insurance Company, Bristol West Insurance Company, Coast National Insurance Company, 21st Century Centennial Insurance Company, 21st Century Indemnity Insurance Company, and 21st Century Insurance Company

/s/ Joseph E. Ezzie (w/permission)
Joseph E. Ezzie (admitted *pro hac vice*)
Trischa Snyder Chapman (admitted *pro hac vice*)
BAKER HOSTETLER LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215-4260
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
jezzie@bakerlaw.com
tchapman@bakerlaw.com

Ernest E. Vargo (admitted *pro hac vice*)
Michael E. Mumford (admitted *pro hac vice*)
BAKER HOSTETLER LLP
127 Public Square, Suite 2000

Cleveland, Ohio 44114-1214
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
evargo@bakerlaw.com
mmumford@bakerlaw.com

Counsel for Liberty Mutual Holding Company, Inc., Liberty Mutual Group, Inc., The First Liberty Insurance Corporation, Liberty County Mutual Insurance Company, Texas, Liberty Mutual Fire Insurance Company, Liberty Mutual Insurance Company, LM General Insurance Company, Peerless Insurance Company, Safeco Insurance Company of America, and Safeco Insurance Company of Illinois

/s/ Jeffrey S. Cashdan (w/permission)
Jeffrey S. Cashdan (admitted *pro hac vice*)
Claire C. Oates (admitted *pro hac vice*)
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 472-5139
jcashdan@kslaw.com
coates@kslaw.com

/s/ Michael R. Nelson (w/permission)
Michael R. Nelson (admitted *pro hac vice*)
Kymberly Kochis (admitted *pro hac vice*)
Francis X. Nolan (admitted *pro hac vice*)
SUTHERLAND ASBILL & BRENNAN LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703
Telephone: (212) 389-5068
michael.nelson@sutherland.com
kymberly.kochis@sutherland.com
frank.nolan@sutherland.com

Counsel for The Progressive Corporation, Progressive American Insurance Company, Progressive Casualty Insurance Company,

Progressive Classic Insurance Company, Progressive Michigan Insurance Company, Progressive Mountain Insurance Company, Progressive Northern Insurance Company, Progressive Northwestern Insurance, Progressive Preferred Insurance Company, Progressive Security Insurance Company, Progressive Southeastern Insurance Company, Progressive West Insurance Company, Progressive Gulf Insurance Company, Progressive Specialty Insurance Company, Progressive Advanced Insurance Company, Progressive Choice Insurance Company, Progressive Direct Insurance Company, Progressive Garden State Insurance, Progressive Marathon Insurance Company, Progressive Paloverde Insurance Company, Progressive Select Insurance Company, Progressive Premier Insurance Company of Illinois, Progressive Universal Insurance Company, Artisan & Truckers Casualty Company, United Financial Casualty Company, and Progressive County Mutual Insurance Company

/s/ Michael H. Carpenter (w/permission)
Michael H. Carpenter
Michael N. Beekhuizen
David J. Barthel
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
carpenter@carpenterlipps.com
beekhuizen@carpenterlipps.com
barthel@carpenterlipps.com

Joshua S. Goldberg (ARDC #6277541)
CARPENTER LIPPS & LELAND LLP
180 North LaSalle Street, Suite 2640
Chicago, Illinois 60601

Telephone: (312) 777-4300
Facsimile: (312) 777-4839
goldberg@carpenterlipps.com

Counsel for Nationwide Mutual Insurance Company, Allied Property & Casualty Insurance Company, AMCO Insurance Company, Colonial County Mutual Insurance Company, Depositors Insurance Company, Nationwide Affinity Insurance Company of America, Nationwide Agribusiness Insurance Company, Nationwide Insurance Company of America, Nationwide Mutual Fire Insurance Company, and Nationwide Property & Casualty Insurance Company

EXHIBIT A

The Allstate Corporation
Allstate Insurance Company
Allstate County Mutual Insurance Company
Allstate Fire & Casualty Insurance Company
Allstate Indemnity Company
Allstate New Jersey Insurance
Allstate New Jersey Property & Casualty Insurance Company
Allstate Property & Casualty Insurance Company
Encompass Indemnity Company
Esurance Insurance Company
Esurance Property & Casualty Insurance Company
The Progressive Corporation
Progressive American Insurance Company
Progressive Casualty Insurance Company
Progressive Classic Insurance Company
Progressive Michigan Insurance Company
Progressive Mountain Insurance Company
Progressive Northern Insurance Company
Progressive Northwestern Insurance
Progressive Preferred Insurance Company
Progressive Security Insurance Company
Progressive Southeastern Insurance Company
Progressive West Insurance Company
Progressive Gulf Insurance Company
Progressive Specialty Insurance Company
Progressive Advanced Insurance Company
Progressive Choice Insurance Company
Progressive Direct Insurance Company
Progressive Garden State Insurance
Progressive Marathon Insurance Company
Progressive Paloverde Insurance Company
Progressive Select Insurance Company
Progressive Premier Insurance Company of Illinois
Progressive Universal Insurance Company
Artisan & Truckers Casualty Company
United Financial Casualty Company
Progressive County Mutual Insurance Company
Nationwide Mutual Insurance Company
Allied Property & Casualty Insurance Company
AMCO Insurance Company
Colonial County Mutual Insurance Company
Depositors Insurance Company
Nationwide Affinity Insurance Company of America
Nationwide Agribusiness Insurance Company
Nationwide Insurance Company of America
Nationwide Mutual Fire Insurance Company
Nationwide Property & Casualty Insurance Company
Liberty Mutual Holding Company, Inc.
Liberty Mutual Group, Inc.
The First Liberty Insurance Corporation
Liberty County Mutual Insurance Company, Texas
Liberty Mutual Fire Insurance Company
Liberty Mutual Insurance Company
LM General Insurance Company
Peerless Insurance Company
Safeco Insurance Company of America
Safeco Insurance Company of Illinois
Farmers Insurance Exchange
Truck Insurance Exchange
Farmers Insurance Company of Arizona
Farmers Insurance Company of Oregon
Farmers Insurance Company of Washington
Farmers Insurance Company, Inc.
Farmers Texas County Mutual Insurance Company
Illinois Farmers Insurance Company
Mid-Century Insurance Company
Foremost County Mutual Insurance Company
Bristol West Insurance Company

Coast National Insurance Company
21st Century Centennial Insurance Company

21st Century Indemnity Insurance Company
21st Century Insurance Company
State Farm Mutual Automobile Insurance Company
State Farm Fire and Casualty Company