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

CRAWFORD'S AUTO CENTER, INC., *et al.*,	*	
Plaintiffs,	*	
v.	*	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al*.,	*	Case No: 6:14-cv-06016-GAP-TBS
	*	(*Crawford's* Action)
Defendants.	*	MDL Docket No. 2557
	*	**DISPOSITIVE MOTION**

CERTAIN DEFENDANTS' JOINT REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT

The Certain Defendants listed in Exhibit A, attached hereto, jointly submit this reply brief in support of their motion to dismiss Plaintiffs' Amended Class Action Complaint ("Am. Compl.") pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(1), and 12(b)(6).[1]

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

Plaintiffs' repetitious and extended recitation of the Amended Complaint's allegations cannot obscure those allegations' failure to establish the purported "association in fact" RICO enterprises that Plaintiffs claim exist between each of the seven groups of Defendant Insurers[2] and their respective "Information Providers." (*See* Defs. Mot. at 18-21.) Plaintiffs cite *Boyle v. United States*, 556 U.S. 938 (2009), for the proposition that an

[1] Defendants incorporate by reference Sections I, II.A, II.B, II.C, III.A, III.B and IV of State Farm's Reply in Support of Motion to Dismiss the 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.

[2] Plaintiffs repeatedly assert that there are 7 defendants, but in reality, they have sued 85 defendants and referenced over 120 other affiliated entities in footnotes. (Am. Compl., ¶¶ 24-30 & fn. 1-5.)

association-in-fact enterprise may be informal, but that is irrelevant; Defendants do not contend that the purported enterprise must have "any particular type of organizational structure" or "hierarch[y]." (Plfs. Opp. at 37.)

What Defendants *do* contend, and what the Supreme Court has consistently held, is that an enterprise must be a "unit" with a shared, "common purpose." *Boyle*, 556 U.S. at 946; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 369-70 (3d Cir. 2010) ("[I]t is clear after *Twombly* that a RICO claim must plead facts plausibly implying the existence of an enterprise with the structural attributes identified in *Boyle*," including a "shared 'purpose. . . .'"). Here, no well-pleaded facts show that Defendants and the Information Providers joined together to accomplish anything other than their own business affairs. Not only is there no criminal "enterprise" separate and apart from Defendants' customer-supplier business relationship with the Information Providers, but the "common purpose" essential to finding an association-in-fact enterprise cannot exist where, as here, the alleged participants are each pursuing their own self-interested goals, not those of the "enterprise." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). "Since 'diverse parties . . . customarily act for their own gain or benefit in commercial relationships,' a complaint founded on commercial relationships between the alleged components of the enterprise should plead facts 'dispel[ling] the notion that the different parties entered into [the alleged] agreements . . . for their own gain or benefit.'" *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1274 (S.D. Fla. 2003) ("*Managed Care II*") (citations omitted). Plaintiffs fail to dispel the obvious conclusion that the purported enterprise members are pursuing their own commercial

interests, not those of seven different criminal "enterprises," and certainly do not adequately plead that the "members" share a common, unlawful purpose.[3]

A. No Well-Pleaded Facts Dispel That The Members of the Purported Enterprise Are Pursuing Their Own Commercial Interests, Not Those of a Criminal "Enterprise."

The only *facts* alleged are that the Information Providers furnish Defendants with platforms for estimating auto repair costs. (Am. Compl., ¶¶ 5, 32d-f, 50, 51.) Plaintiffs argue that Defendants use those platforms as "the framework and tools to suppress compensation to repair facilities." (Plfs. Opp. at 18.) However, Plaintiffs themselves plead—and do not dispute in opposing dismissal—that (1) the Information Providers expressly state that their estimating platforms are *guidelines* only, and subject to adjustment (Am. Compl., ¶¶ 94-95, 104); and (2) Defendants ignore those limitations and use the platforms in a different manner from how the Information Providers intended. (*Id*., ¶ 91.)

Thus, Plaintiffs acknowledge that the estimating platforms are simply a tool, and the Information Providers do not "promulgate" any particular rate; that is a function of how the tool is allegedly used by Defendants. "Plaintiffs' allegations about [Information Provider's] role in the supposed enterprise suggest only that [it] serviced a software program that

[3] Moreover, the RICO claims fail as a matter of law because the alleged "enterprises" have no existence separate and apart from the alleged racketeering acts themselves. *Boyle* confirms that the "existence of an enterprise is an element distinct from the pattern of racketeering activity and 'proof of one does not necessarily establish the other'" (556 U.S. at 947 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981))), even if "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" (Plfs. Opp. at 38.) In other words, if the "enterprise" simply describes an alleged conspiracy to commit the alleged predicate acts, as it does here, that is insufficient. *See Managed Care II*, 298 F. Supp. 2d at 1274 ("simply conspiring to commit a fraud is not enough to trigger the Act if the parties are not organized in a fashion that would enable them to function as racketeering organization for other purposes") (citation omitted). Here, Plaintiffs' opposition brief makes *no attempt* to show how the seven "enterprises" here are anything but another name for the alleged racketeering acts. (*See* Defs. Mot. at 18-19 and cited cases.) This is another, independent reason to dismiss the Amended Complaint.

[Defendant Insurer] used improperly." *D.M. Robinson Chiropractic, S.C. v. Encompass Ins. Co. of Am.*, No. 10 C 8159, 2013 WL 1286696, at *11 (N.D. Ill. Mar. 28, 2013).

Yet, Plaintiffs inconsistently assert, in conclusory fashion, that the Information Providers have associated with seven different groups of Defendants for the "common purposes" of "establishing and promulgating the prevailing rate" and "defrauding the collision repair facilities." (Plfs. Opp. at 20-21, 36.) Despite their own allegation that Defendants utilize the software platforms in a way not intended by the Information Providers, Plaintiffs nonetheless claim the Information Providers somehow share Defendants' goal of establishing a particular prevailing rate, as opposed to simply maintaining a commercial relationship with Defendant Insurers. These conclusory assertions, which conflict with Plaintiffs' own fact allegations and are designed to confect seven different enterprises where none exist, must be disregarded. *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal").

Stripped of conclusion, argument, and innuendo, the relationships between Defendants and the Information Providers described in the Amended Complaint are nothing more than that of customer-supplier. The allegations that the Information Providers benefit financially from those relationships (*e.g.,* Plfs. Opp. at 20, 23-24; Am. Compl., ¶¶ 57, 58), or "skew" their estimating platforms to be more "amenable to insurer exploitation," (Am. Compl., ¶¶ 117, 195, 201, 207, 213, 219, 225, 231), do not create common unlawful purpose. The *D.M. Robinson* court rejected precisely that notion on indistinguishable facts. (*See* Defs. Mot. at 19 & n. 9.) As here, the plaintiffs claimed that an Information Provider's platform

was flawed and corrupted by the provider's supposed conflict of interest—"tailoring" the platform to suit its insurer client's desires and keep its business—resulting in systematic underpayment to the plaintiffs. However, that profit motive "was not a 'common purpose' shared with Allstate to defraud Allstate policyholders" and failed to plead a RICO enterprise. *D.M. Robinson*, 2013 WL 1286696, at *10.

B. Plaintiffs Cannot Distinguish The Squarely Applicable Holding and Reasoning in *D.M. Robinson*.

Because its analysis and holding are so directly applicable, Plaintiffs attempt at some length to distinguish *D.M. Robinson.* (*See* Plfs. Opp. at 30-35.) The effort is unavailing.

Plaintiffs incorrectly assert that in *D.M. Robinson*, the Information Provider, Mitchell, "was not involved in any way with Allstate's medical claim reimbursement." (*Id.* at 33.) But in fact, the plaintiffs there specifically alleged that Mitchell "intentionally slanted Decision Point to serve the purposes of the enterprise *by actively working to ensure that the reimbursement decisions made by Decision Point were lower*" than Allstate's internal price schedules. *D.M. Robinson*, 2013 WL 1286696, at *10 (emphasis added). Nevertheless, the court correctly held "Mitchell's collaborative work with Allstate to license and service Decision Point is within the bounds of a typical vendor-vendee relationship." *Id.* at *11. The "collaboration" between Defendants and the Information Providers that Plaintiffs assert here (*e.g.*, Plfs. Opp. at 20, 24-25) likewise cannot establish a RICO enterprise.[4]

[4] Further misstating *D.M. Robinson*, Plaintiffs contend that the software program there "merely permitted Allstate to interface with Ingenix" and that Mitchell "provided none of the data upon which Allstate's alleged fraud was predicated." (Plfs. Opp. at 32.) But in fact, Ingenix was *also* alleged to be a member of the enterprise, and plaintiffs there asserted that Mitchell incorporated the Ingenix database into its software, even though it was "suffused with fraud" and "systematically slanted in favor of insurance companies." *D.M. Robinson*, 2013 WL 1286696, at *3-4. Indeed, here, Plaintiffs admit that the allegedly flawed data "*all comes from Defendants [sic] Insurers*"—not the Information

Also, and contrary to what Plaintiffs misleadingly suggest, *D.M. Robinson*'s holding did not hinge on whether the Information Provider in that case had "direct dealings" with the alleged victims of the fraud, or was a "lower-rung participant" of the alleged enterprise (*Id.* at 31-32). The *D.M. Robinson* court held that "[e]ven if" the Information Provider there had "participated in RICO conduct," plaintiffs "still have not adequately alleged a RICO enterprise." 2013 WL 1286696, at *8. Indeed, the fact that the Information Providers here have an independent, direct commercial relationship with the Plaintiff collision repair facilities cuts strongly against the notion that they share a "common purpose" with the Defendants or are participants in some amorphous "enterprise."

Nor can Plaintiffs satisfy the shared unlawful purpose requirement by claiming the enterprise members here "mutually benefit" the Defendants Insurers "through strict cost containment and control of insured collision repairs" and the Information Providers by "maintain[ing] their nationwide market dominance and sell[ing] their product to all stakeholders in the industry." (Plfs. Opp. at 32-33.) The *D.M. Robinson* court, denying the identical argument, rejected the notion that a "mutually beneficial" commercial relationship was the same as a *shared unlawful purpose*. *See* 2013 WL 1286696, at *5, 10.

Plaintiffs argue that it "mischaracterizes" *D.M. Robinson* to say that "the shared goal of financial profit by each party conducting its own business does not qualify as a common purpose under RICO"—but in the very next sentence they concede that "the court in *D.M.*

Providers. (Plfs. Opp. at 26 (emphasis added).) Thus, the kind of participation and "symbiosis between the Defendant Insurers and the Information Providers" that Plaintiffs assert here (*id.* at 35) was if anything greater in *D.M. Robinson.* And yet, "Mitchell's and Ingenix's roles" did not "form the basis for an association-in-fact enterprise to defraud policyholders" because "Mitchell and Ingenix had no apparent objective aside from encouraging and enabling Allstate's use of" the software. *D.M. Robinson*, 2013 WL 1286696, at *10. The same conclusion is called for here.

Robinson held that the financial profit achieved by each member conducting its own affairs could not qualify as a common purpose." (Plfs. Opp. at 34.) Following that miscue, Plaintiffs assert that the "common purpose of making money [is] sufficient under RICO." (*Id*. at 35 (citing *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284-85 (11th Cir. 2006)).)

Plaintiffs' suggestion that profit motive alone can establish a "common purpose" makes no sense. Commercial enterprises are in business to achieve profits, and if a desire to make money were sufficient to establish a "common purpose," it is difficult to conceive of any commercial relationship where the "common purpose" element would not be satisfied. *Mohawk Industries*, heavily relied on by Plaintiffs, certainly does not hold that a common desire to "make money" is itself sufficient to create an enterprise if a member is simply acting in its own legal, commercial interest. To the contrary, it is essential that the common interest in "making money" is *making money unlawfully through a pattern of criminal conduct*—not ordinary commercial self interest. *Mohawk Industries,* at 1285 (citing *United States v. Church*, 955 F. 2d 688, 698 (11th Cir. 1992) ("proof of an association's devotion to 'making money *from repeated criminal activity*'" can demonstrate common purpose even if "the criminal activity is diverse")) (emphasis added). In *Mohawk Industries*, the enterprise members were alleged to be jointly "engaged in a conspiracy to bring illegal workers into this country"—*i.e*., they all shared the common *unlawful* purpose of violating immigration laws. In contrast, here, the Information Providers share no interest in (and obtain no benefit from) defrauding or extorting Plaintiffs—only in selling their product to Defendant Insurers and the body shops.

C. Plaintiffs Mistakenly Rely on a District Court Decision in *Managed Care* —But It Is the Eleventh Circuit's Decision That Controls.

Plaintiffs rely heavily, and mistakenly, on the Southern District of Florida's 2003 decision in *Managed Care II*, which found "that the preliminary sketch of a RICO enterprise" was sufficiently pleaded under the since-overruled *Conley v. Gibson* standard. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007); *Managed Care II,* 298 F. Supp. 2d at 1275. Under the now-governing *Twombly*/*Iqbal* standard, the plaintiffs' sketch would not have established a plausible RICO enterprise, which requires a "shared purpose." *In re Ins. Brokerage*, 618 F.3d at 369-70 (citing *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 400 (7th Cir. 2009) (upholding dismissal of RICO claims that did not "suggest a group of persons acting together for a common purpose or course of conduct")). Notably, the very same *Managed Care* RICO allegations *ultimately failed as a matter of law* because the complained-of conduct, even if unlawful, "could have been in each individual Defendant's economic self interest. For example, the alleged claims processing would have decreased costs and potentially increased profits. Each Defendant undoubtedly had an economic interest in decreasing physician costs. Consequently, the Defendants' allegedly parallel conduct is as easily explained by their theory of rational independent action as by the Plaintiffs' theory of concerted action." *In re Managed Care Litig.*, 430 F. Supp. 2d 1336, 1348 (S.D. Fla. 2006) ("*Managed Care III*").

That result is fully consistent with the Eleventh Circuit's more recent decision in *American Dental Association v. Cigna Corp.*, affirming dismissal of plaintiffs' RICO claim

on the pleadings:[5] "Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." 605 F.3d 1283, 1290 (11th Cir. 2010). Here, the "obvious alternative explanation" is that the Information Providers' activities are directed to the ordinary commercial objective of selling their product, not to defrauding or extorting Plaintiffs on behalf of a phantom RICO enterprise. *See also United Food and Comm'l Wkrs. Unions v. Walgreen Co.*, 719 F.3d 849, 854-55 (7th Cir. 2013) (affirming dismissal where alleged activities were "entirely consistent with [defendants] each going about [their] own business").

In sum, the purported "enterprise" here has no existence apart from each "member's" conduct of its own affairs—for its own gain and benefit, not that of any would-be "enterprise." Although RICO does not reach "simple conspiracies," *In re Ins. Brokerage*, 618 F.3d at 367, Plaintiffs *cannot even plead* a simple conspiracy under *Twombly*—because each member of the would-be conspiracy is pursuing its own economic interests—and they certainly cannot plead a criminal RICO enterprise with its own structure and distinct purpose. *See, e.g., Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 307 (S.D.N.Y. 2010) ("[g]iven the exceptional seriousness of racketeering allegations, a complaint pleading a RICO

[5] In *American Dental Association*, the Eleventh Circuit affirmed dismissal of a RICO claim very similar to the one asserted in *Managed Care II*—indeed, the *American Dental Association* case was transferred to the *Managed Care Litigation* MDL and designated as a tag-along action. The Court held plaintiffs' RICO claim, alleging defendant insurers used automated systems and billing procedures to underpay dental service providers, failed to "plausibly alleg[e] the existence of a long-term criminal enterprise." 605 F.3d at 1292-93, affirming *In re Managed Care Litig.*, No. 03-21266-CIV, 2009 WL 347795, at *4 (S.D. Fla. Feb. 11, 2009) (RICO claim did not "contain sufficient factual allegations about the Defendants agreeing with other entities and/or persons to engage in the ongoing criminal conduct of an enterprise") (citing *Twombly*, 550 U.S. at 570).

violation cannot be held to a lesser standard" than the *Twombly* standard for antitrust conspiracies); *accord In re Ins. Brokerage*, 618 F.3d at 370.[6]

II. The Purported RICO Violations Did Not Cause Plaintiffs Any Injury, And They Lack Standing Because Their Interests, If Any, Are Derivative Of Defendants' Policyholders.

Plaintiffs admit that under RICO, they must plead they were injured "by reason of" the purported racketeering scheme (18 U.S.C. §1964(c)) which requires (a) not only "but for" but proximate cause, and (b) injuries "sufficiently direct . . . that Plaintiffs have standing to sue." (Plfs. Opp. at 58.) The Amended Complaint meets neither requirement.

Plaintiffs argue that they showed "but for" causation because they would not have "accepted" purportedly "suppressed" compensation for repair work "but for Defendant Insurers' conduct," *i.e.*, the alleged "misrepresentations" and "extortionate conduct." (Plfs. Opp. at 60.) Plaintiffs rely on *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), for the proposition that first-party reliance is not always required to establish a RICO violation. (Plfs. Opp. at 59.) However, in reiterating that "but for" causation is required for a RICO claim, *Bridge* made clear that RICO plaintiffs who allege injury "by reason of" mail or wire fraud likely cannot succeed "without showing that *someone* relied on the defendant's misrepresentations." 553 U.S. at 653-54, 658 (italics in original). Plaintiffs—who know full well what their costs are—cannot pretend that *they* relied on any "misrepresentation" about repair rates, but attempt to invoke *Bridge* by arguing (though not pleading) that the

[6] Plaintiffs' reliance on *In re Ins. Brokerage* is misplaced. (Plfs. Opp. at 37). In that case, the RICO claim was premised on "purposefully uncompetitive sham bids" and "an expectation of reciprocity and cooperation among the insurers" that gave rise to a plausible claim under Section 1 of the Sherman Act. 618 F.3d at 376. No such conspiracy is or could be pleaded here, where the allegations merely demonstrate an ordinary vendor-supplier relationship between Defendants and the Information Providers, and conduct that is fully consistent with each entity's independent commercial interests.

"suppression of repair compensation . . . resulted from *reliance by insureds* and third party vehicle owners on statements made to them by Defendant Insurers regarding the so-called prevailing rates for repairs . . . *pursuant to the purportedly applicable terms of insurance policies*." (Plfs. Opp. at 60 (emphasis added).)

Of course, that is precisely why Plaintiffs lack the sufficiently direct interest in this purported controversy necessary to invoke the Court's subject matter jurisdiction. (*See* Defs. Mot. at 31-32.) Plaintiffs do not address Defendants' Rule 12(b)(1) motion outside of a conclusory footnote denial. (*See* Plfs. Opp. at 61 n. 17.) As Plaintiffs have acknowledged, however, the "prevailing rate" is simply the measure of the insurer's obligation under its contract with its policyholder, and any claim that such amount is inadequate belongs to policyholders who had to go out of pocket to pay for repairs—not to Plaintiffs. Plaintiffs' supposed injury is at most indirect and derivative of the policyholders' interests, and therefore not actionable. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir. 1998) ("[A] 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.").

Moreover, Plaintiffs freely admit that many repair facilities in fact charge no more than the supposedly "suppressed" prevailing rates. (Am. Compl., ¶¶ 48-49.) That may place Plaintiffs under competitive pressure, but it does not limit what they may charge for repair services. If they wanted to charge more than a Defendant was willing to pay, they could either charge the customer for the difference between Plaintiffs' rates and the insurance

company's rates, or decline the repair job altogether.[7] That Plaintiffs chose not to do so—because they did not want to cede the work to a competitor DRP facility—is not an injury "by reason of" any RICO violation. If Plaintiffs go out of business, it is not because they face a "Hobson's Choice," it is because they cannot (or choose not to) meet the prices other shops are willing to do the work for. That is not RICO injury: federal law does not exist to protect Plaintiffs from "[t]he Darwinian working of competition." *See Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1204, 1206 (7th Cir. 1981).[8]

Accordingly, the Amended Complaint must be dismissed under Rule 12(b)(6) for failure to plead the required "but for" causation, and under Rule 12(b)(1) for lack of standing.

III. Plaintiffs Fail to Plead Any RICO Conspiracy Claim.

Plaintiffs do not dispute that failure to plead a substantive RICO claim under § 1962(c) is fatal to their ability to plead a RICO conspiracy claim. (*See* Defs. Mot. at 21; Plfs. Opp. at 66-67.) Because Plaintiffs' § 1962(c) claims are defective for all of the reasons set forth in Defendants' moving and reply papers, their RICO conspiracy claims likewise must fail.

Even if Plaintiffs could plead substantive RICO claims, their RICO conspiracy claims still fail. Plaintiffs cite to *American Dental Association*, 605 F.3d at 1294-95, but make no

[7] Plaintiffs argue that charging the customer the difference is not realistic (Plfs. Opp. at 62-63), but if, as they claim, their work is so far superior to their DRP competitors, then it is fair to assume that some customers will pay extra for the privilege.

[8] Plaintiffs mistakenly attempt to distinguish *Quality Auto Body* because it "was decided over 30 years ago" and because the defendant insurers in that case did not operate DRP programs. (Plfs. Opp. at 61). In fact, Allstate had operated a DRP program for years before. *See Quality Auto Body*, 660 F.2d at 1199. Moreover, the precepts expressed in *Quality Auto Body* are as valid today as they ever were, and don't depend on the nature of the cause of action. Certainly, Plaintiffs' dubious use of the RICO statute represents no substantive improvement over the antitrust claim in *Quality Auto Body*.

attempt to distinguish its holding, which requires dismissal here of Plaintiffs' "wholly conclusory" and "formulaic recitations" of alleged conspiracy. Plaintiffs allege no facts that would support seven discrete RICO conspiracies. (*See* Am. Compl., ¶¶ 308, 326, 344, 362, 380, 398.) To the extent Plaintiffs attempt to allege a single overarching conspiracy among all Defendants, Plaintiffs' inadequate allegations, as in *American Dental Association*, show nothing more than "parallel conduct that could just as well be independent action" by Defendants. This Court has previously rejected such allegations as insufficient to demonstrate conspiracy, and Plaintiffs provide no rejoinder. *A&E Auto Body, Inc. v. 21st Century Centennial Ins. Co*., 6:14-cv-00310-GAP-TBS, Court Order, Doc. 293 (Jan. 22, 2015), p. 18. Accordingly, Plaintiffs' RICO conspiracy claims are insufficient and should be dismissed.

IV. Plaintiffs' Fraudulent Concealment Claim Necessarily Fails Because Plaintiffs Knew of Their Alleged Injuries When Each Occurred.

Plaintiffs purport to bring this lawsuit on behalf of seven putative nationwide classes challenging conduct going back nearly ten years (Am. Compl., ¶ 277), but fail to allege any facts that would support tolling the applicable four year statute of limitations.[9] In fact, the allegations Plaintiffs *do* assert demonstrate that they unquestionably knew of their alleged injuries *at the time each occurred*. (*See id*., Exs. E & F (setting forth the precise amount, for each of the 59 transactions that Plaintiffs identify, of the purported "shortfall").)

[9] Plaintiffs do not dispute that RICO claims are subject to a four year statute of limitations, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), or dispute that it is the "discovery of the injury, not discovery of the other elements of a claim [that] . . . starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). (*See* Plfs. Opp. at 72-73.)

Plaintiffs' allegations relating to "fraudulent concealment" also fail because nowhere in the 157-page Amended Complaint or the 75-page opposition brief do Plaintiffs set forth, as they must, when and/or how they discovered that they were allegedly injured. (Defs. Mot. at 30).[10] Plaintiffs request that the Court decide "when the discovery rule cut-off might apply" (Plfs. Opp. at 75) after fact discovery, but ignore the Eleventh Circuit's clear instruction that Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Ziemba v. Cascade Int'l. Inc*., 256 F.3d 1194, 1202 (11th Cir. 2001) (internal quotations omitted); *cf. Limestone Dev. Corp. v. Village of Lemont, Ill*., 520 F.3d 797, 803 (7th Cir. 2008) (Posner, J.) (dismissing RICO claims for failing to allege sufficient facts and emphasizing that, post-*Twombly*, "defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim").

CONCLUSION

For all the reasons discussed above and their moving papers, the undersigned Defendants respectfully request that the Court dismiss the Amended Complaint with prejudice in its entirety.

[10] There is also no basis to equitably toll the statute of limitations, which Plaintiffs acknowledge is an exception, and not the rule. (*See* Defs. Mot. at 31, n. 19; Plfs. Opp. at 73.) Whether Defendants actively misled Plaintiffs (and they did not) is beside the point given Plaintiffs' *actual* knowledge of their alleged injuries. *See Henderson v. Reid*, 371 App'x 51, 53-54 (11th Cir. 2010) (affirming dismissal of RICO claim where plaintiff knew of injury and waited years to file).

Dated: May 13, 2015

Respectfully submitted,

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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