IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

LARRY RELF, on behalf of himself and all those similarly situated,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, J.D. POWER & ASSOCIATES, and MITCHELL INTERNATIONAL, INC.,

Defendants.

CASE NO. 4:18-cv-00240-CDL

MITCHELL INTERNATIONAL, INC.'S AND J.D. POWER'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS III, IV, AND V

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Mitchell International, Inc. ("Mitchell") and J.D. Power[1] move to dismiss the claims brought by Plaintiff Larry Relf ("Plaintiff") for alleged tortious interference (Count III), third-party beneficiary to a contract (Count IV), and civil conspiracy (Count V).

I. INTRODUCTION

This lawsuit is, at its core, a straightforward dispute between Plaintiff and his insurance company ("State Farm") about whether State Farm paid the amount to which Plaintiff was entitled under his State Farm insurance policy when his vehicle was "totaled" in a car accident. As one might expect in a dispute between a policyholder and his insurer, Plaintiff brings claims against State Farm for breach of his insurance contract (Count I) and for bad faith (Count II). Plaintiff

[1] J.D. Power has been incorrectly sued as "J.D. Power & Associates." J.D. Power reserves and does not waive any rights with respect to this issue.

also purports to sue State Farm on behalf of a class of State Farm policyholders whose total loss claims were allegedly underpaid.

However, for reasons that are not at all clear, Plaintiff also attempts to drag Mitchell and J.D. Power into this insurance coverage dispute and try to hold Mitchell and J.D. Power liable for State Farm's alleged underpayment of an insurance claim. Plaintiff does not (and cannot) allege that either Mitchell or J.D. Power had any relationship with Plaintiff, or that Mitchell or J.D. Power played any direct role in the handling of Plaintiff's insurance claim. Rather, the entire basis for Plaintiff's alleged claims against Mitchell and J.D. Power in this insurance coverage dispute is that (i) Mitchell worked with J.D. Power to create a software solution called "WorkCenter Total Loss" ("WCTL") that allows insurers to automatically estimate the value of a "total loss" vehicle; (ii) Mitchell licensed WCTL to State Farm; and (iii) State Farm – without any involvement by Mitchell or J.D. Power – later used WCTL to estimate the value of Plaintiff's vehicle.

As set forth below, Mitchell and J.D. Power respectfully submit that this Court should dismiss all claims against Mitchell and J.D. Power, for several separate and independent reasons:

- Each of Plaintiff's claims against Mitchell and J.D. Power fail because the Georgia Unfair Claims Settlement Practices Act does not permit an insured to bring a private cause of action for an alleged violation of an insurance regulation. However, even if a private cause of action were allowed under the Act, the Regulation only applies to "insurers," and neither Mitchell nor J.D. Power are insurers.

- Plaintiff has not pleaded that either Mitchell or J.D. Power had knowledge of State Farm's insurance contracts with the named Plaintiff, or that Mitchell or J.D. Power engaged in the type of active inducement that could give rise to a claim for tortious interference. Furthermore, the tortious interference claim sounds in fraud, and Plaintiff's allegations are a far cry from the heightened pleading standard under Rule 9(b).

- Plaintiff's claim as a third-party beneficiary of Mitchell's contract with State Farm (Count IV) fails because Plaintiff has not pleaded facts that could plausibly support a claim that Plaintiff was an intended beneficiary of the contract.

- Plaintiff's claim for conspiracy (Count V) fails because conspiracy is not a stand-alone claim, and the other claims against Mitchell and J.D. Power fail as a matter of law. In

addition, Plaintiff's allegations are a far cry from the heightened pleading standard under Rule 9(b).

For all these reasons, each of Plaintiff's claims against Mitchell and J.D. Power should be dismissed, with prejudice.

II. BACKGROUND

A. Mitchell and J.D. Power

Mitchell is a vendor that works with insurers like State Farm – but not directly with the insurers' policyholders – to provide "information, workflow, and performance management solutions to improve business processes for insurance companies and collision repair facilities." *Vehicle Mkt Research, Inc. v. Mitchell Int'l, Inc.*, No. 09-2518-JAR, 2015 WL 3903791, at *3 (D. Kan. June 25, 2015). Mitchell provides total loss valuations as a recommendation for insurers to use in claims processing through its software products and services, which "assis[t] automobile insurers in providing a fair market value for a vehicle that has been declared a total loss." *Vehicle Mkt Research, Inc. v. Mitchell Int'l, Inc*., 767 F.3d 987, 989 (10th Cir. 2014). A vehicle is a "total loss" when, after an accident, it "will cost more to repair than its value at the time of the accident." *Vehicle Mkt Research, Inc*., 2015 WL 3903791, at *3. As another court considering a similar claim has observed, Mitchell is a "third-party vendor acting at the direction of [an insurance company], providing [the insurance company] with analytical reports" that the insurance company may use in the handling of total loss claims of its policyholders. *Jones v. Progressive Cas. Ins. Co.*, No. 16-CV-06941-JD, 2018 WL 4521919 at *4 (N.D. Cal. Sept. 19, 2018).[2]

Notably, in losses like the one at issue, the WCTL software runs automatically and provides a valuation to State Farm on request, within a matter of seconds, without active involvement,

[2] For the convenience of the Court, a copy of the *Jones* order dismissing Mitchell from a putative California class action lawsuit over the use of WCTL with Progressive policyholders is attached as Exhibit A.

participation, or even knowledge by Mitchell – much less by J.D. Power. Plaintiff also does not (and cannot) allege that either Mitchell or J.D. Power had specific knowledge of State Farm's insurance contract with the named Plaintiff.

With regard to J.D. Power, Plaintiff alleges only that Mitchell and J.D. Power "formed a joint partnership to provide [WCTL] total loss valuation reports to insurers such as State Farm." (Cmplt. ¶ 4.) Plaintiff does not allege that there is any contract between J.D. Power and State Farm, much less any relationship whatsoever between J.D. Power and Plaintiff. Rather, all Plaintiff can allege is a relationship between J.D. Power and Mitchell, a separate and independent relationship between Mitchell and State Farm, and yet another separate and independent relationship between State Farm and Plaintiff.

B. Plaintiff's Allegations

The centerpiece of Plaintiff's claims against Mitchell and J.D. Power is that "State Farm has contracted with Mitchell to receive WCTL Reports to determine the "Market Value" of a total loss vehicle and the "Settlement Value" after any applicable deductible." (*Id.* at ¶ 6.) Based on this contractual relationship (the "State Farm Policy"), Plaintiff asserts in conclusory fashion that "State Farm, Mitchell, and J.D. Power have engaged in a scheme to artificially deflate the value of the total loss claims to pay first party insureds less than the actual pre-loss under-value of the total loss vehicle." (*Id.*) Specifically, Plaintiff alleges that the "5-step process" that WCTL uses to "produce accurate and easy-to-understand vehicle valuations" (*Id.* at ¶ 27) is "statistically invalid and does not result in a proper valuation for total loss vehicles in Georgia." (*Id.* at ¶ 29.) Plaintiff concludes, "[t]he intended and wrongful result of the five steps and sub-steps … is that total loss vehicles are undervalued, and State Farm insureds' total loss claims are underpaid." (*Id.* at ¶ 33.)

Plaintiff's Complaint is perhaps most notable for what it does ***not*** allege. Plaintiff does not contend that he had any agreement – or, for that matter, any relationship at all – with Mitchell or

J.D. Power. Nor does Plaintiff claim that he had communications or contact of any kind with Mitchell or J.D. Power during the process of settling his insurance settlement with State Farm. And, Plaintiff does not spell out how he allegedly was damaged, other than to contend generally that he was "deprived … of approximately $298.77 … based upon the statistically invalid downward condition adjustment" (*Id*. at ¶ 53), without alleging what the condition adjustment should have been, or even what settlement amount he ultimately accepted. Rather, the ***sole basis*** for Plaintiff's inclusion of Mitchell and J.D. Power in this lawsuit is that (i) Mitchell worked with J.D. Power to create WCTL; (ii) Mitchell licensed WCTL to State Farm; and (iii) State Farm later used WCTL to estimate the value of Plaintiff's vehicle in the process of adjusting Plaintiff's total loss claim, without any involvement by Mitchell or J.D. Power in doing so.

III. LEGAL STANDARD

To survive a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 633 (2009). This requires more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Conclusory allegations of law and unreasonable or unwarranted inferences of fact are insufficient to defeat a motion to dismiss. *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1340 (11th Cir. 2017). Dismissal without leave to re-plead is appropriate when an amended pleading could not cure the pleading deficiencies. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

Where, as here, each of Plaintiff's claims is predicated on alleged fraud or misrepresentations, Plaintiff's factual allegations must meet the heightened standards of FED. R. CIV. P. 9(b), which requires that "a party must state with particularity the circumstances

constituting fraud or mistake." *Feldman*, 846 F.3d at 1340 The heightened pleading standard requires the complaint to allege "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiff; and (4) what the defendant gained by the alleged fraud." *Id*. (internal quotations and citations omitted). A complaint is plainly barred if it fails to comport with these pleading standards. *In re Galectin Therapeutics, Inc. Securities Lit.*, 843 F. 3d 1257, 1269 (11th Cir. 2016).

IV. ARGUMENT[3]

A. Each of Plaintiff's Claims Fail Because Plaintiff's Remedies Are Limited Under the Georgia Insurance Code.

1. The George Insurance Code Only Allows Claims for Breach of Contract and Bad Faith, And Not the Claims Asserted Against Mitchell and J.D. Power.

Plaintiff asserts three claims against Mitchell and J.D. Power, but at its core, Plaintiff's complaint is that State Farm did not live up to its contractual obligations vis-à-vis Plaintiff. Georgia law is clear that the remedy in such cases is a claim by the policyholder (here, Plaintiff) against his insurer (here, State Farm) for breach of contract and bad faith – claims that Plaintiff has brought against State Farm (Counts I and II). *See McCall v. Allstate Ins. Co.*, 310 S.E.2d 513, 516 (Ga. 1984) (limiting remedies for failure to pay insurance claims to those provided by the Georgia insurance code); *see also Stiegel v. USAA Cas. Ins. Co.*, No. 4:16-CV-346 (CDL), 2017 WL 4393871, at *2 (M.D. Ga. Oct. 3, 2017) (Land, J.) ("Under Georgia law, an insured who

[3] Plaintiff attempts to incorporate allegations from a separate, unrelated lawsuit into his Complaint. (*See, e.g.*, Cmplt. ¶¶ 44-46.) These allegations are improper, and this Court should ignore them in deciding this motion to dismiss. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 218 F.R.D. 76, 78 (S.D.N.Y. 2003) ("[R]eferences to preliminary steps in litigation and administrative proceedings that did not result in an adjudication on the merits or legal or permissible findings of fact are, as a matter of law, immaterial under Rule 12(f).") (citation omitted). *Hamon v. Farmers Insurance Company, Inc. et al.* involved Oklahoma law, which materially differs from the Georgia total loss statute. In short, nothing about *Hamon* is instructive with regard to the viability of Plaintiff's complaint.

alleges that his insurer failed to pay a claim that is covered under his insurance policy is limited to a claim for breach of contract and bad-faith penalties pursuant to O.C.G.A. § 33-4-6.").

While Plaintiff slaps a different name on his claims against Mitchell and J.D. Power, the substance of those claims relates back to an alleged breach of the State Farm Policy.[4] Plaintiff's claim for tortious interference is predicated on their being a breach of the State Farm Policy. (Cmplt. ¶¶ 85-86.) Plaintiff's claim as a third-party beneficiary of the agreement between Mitchell and State Farm is based on the notion that Mitchell's failure to live up to the terms of the Mitchell-State Farm agreement resulted in Plaintiff's failure to obtain benefits allegedly owed under the State Farm Policy.[5] (*Id.* at ¶ 87.) And, as described in Section IV. D. below, Plaintiff's claim for "conspiracy" is derivative of his other claims. Notably, while Plaintiff does not specify the damages he seeks, it is clear that the remedy for all claims is the same – he wants the amount he claims he is entitled under the State Farm Policy. (*Id.* at ¶ 52.)

In short, Plaintiff's remedies (if any) are limited to claims for breach of contract and bad faith. For this reason alone, all of Plaintiff's claims against Mitchell and J.D. Power must be dismissed.

2. There Is No Private Right of Action Against Non-Insurers Mitchell and J.D. Power under the Georgia Total Loss Regulation.

In addition, Plaintiff cannot bring claims against Mitchell or J.D. Power because neither is an "insurer" for purposes of the Georgia Insurance Code, and there is no private right of action under the Georgia Total Loss Regulation, GA. COMP. R. & REGS. 120-2-52.06 (the "Georgia Total Loss Regulation" or "the Regulation").

[4] This distinguishes the claims here from the claims made against USAA in *Stiegel v. USAA Cas. Ins. Co.*, which involved other theories of recovery including RICO. 4:16-cv-00346-cdl, 2017 WL 4393871 (M.D. Ga. Oct. 31, 2017).

[5] As explained *infra*, note 7, J.D. Power is not a party to the Mitchell-State Farm contract, and there is no basis upon which Plaintiff can plausibly allege J.D. Power breached a contract it is not a party to.

Plaintiff's general complaint is that State Farm allegedly violated the Georgia Total Loss Regulation because "the WCTL methodology used by Defendants is statistically invalid and, therefore, directly violates the Georgia Total Loss Regulations …." (Cmplt. ¶¶ 19 and 40 (stating the market value reports provided by Mitchell's WorkCenter Total Loss settlement system allegedly "constitute a significant underpayment of such total loss claims . . . and a violation of the Georgia Total Loss Regulation")). Further, each of Plaintiff's three claims against Mitchell and J.D. Power is specifically predicated on an allegation that Mitchell and J.D. Power engaged in conduct that allegedly resulted in a violation of the Georgia Total Loss Regulation. (*See id.* at ¶ 85 (basing Plaintiff's tortious interference claim in Count III on an allegation that "J.D. Power and Mitchell wrongfully interfered with State Farm's contractual obligations by knowingly and intentionally selling to State Farm a statistically invalid and wholly arbitrary total loss valuation product . . . to underpay the claims of total loss insureds"); ¶ 92 (basing Plaintiff's third party beneficiary claim on an allegation that "J.D. Power and Mitchell . . . provid[ed] State Farm with total loss valuations that were not statistically valid and were wholly arbitrary in the manner in which State Farm valued total losses"); ¶ 97 (basing Plaintiff's civil conspiracy claim on an allegation that "J.D. Power, Mitchell and State Farm entered into an illicit agreement and conspiracy to utilize WCTL Valuations to provide improper total loss valuations" and "which were not intended to calculate the fair value of total loss vehicles, but rather to improperly undervalue total loss claims")).

As an initial matter, neither Mitchell nor J.D. Power is an "insurer," and thus neither is subject the Georgia Total Loss Regulation. The plain language of the Regulation implicates insurers only. *See* GA. COMP. R. & REGS. 120-2-52.06 ("If the *insurer* determines … the *insurer* may elect…"); *and* 120-2-52.06(a) ("The *insurer* may elect…"); *and* 120-2-52.06(b) ("The *insurer*

may elect…") (emphasis added). Georgia's Insurance Code defines "insurer" as "any person engaged as indemnitor, surety, or contractor who issues insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance by whatever name called." O.C.G.A. § 33-1-2(4).

Plaintiff does not allege that Mitchell or J.D. Power are "indemnitor[s], suret[ies], or contractor[s] who issue[] insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance by whatever name called." *Id.* Instead, Plaintiff alleges that "Mitchell and J.D. Power entered into a joint partnership to provide WCTL Vehicle Valuation Reports *to insurers*, including State Farm." (Cmplt. ¶ 22) (emphasis added). There is no plausible reading of the Regulation that would extend its reach to vendors like Mitchell or J.D. Power. For this reason alone, Mitchell and J.D. Power are not subject to the Georgia Total Loss Regulation, and all of Plaintiff's claims against Mitchell and J.D. Power must be dismissed.

Even if this Court finds that Mitchell and J.D. Power are covered by the Georgia Total Loss Regulation, each of Plaintiff's claims against Mitchell and J.D. Power should be dismissed, because Plaintiff cannot pursue a private right of action for an alleged violation of the Georgia Total Loss Regulation. Specifically, the Georgia Total Loss Regulation was promulgated by the Georgia Insurance Commissioner pursuant to its authority authorized by the Georgia Unfair Claims Settlement Practices Act. *See* GA. COMP. R. & REGS. 120-2-52-.01. However, the Georgia Insurance Code also expressly prohibits any private right of action for an alleged violation of the Georgia Unfair Claims Settlement Practices Act. *See* O.C.G.A. § 33-6-37. As a result, each of Plaintiff's claims are barred as a matter of law and should be dismissed. *See, e.g.*, *McGowan v. Progressive* 274 Ga. App. 483, 493 (Ga. Ct. App. 2005) (affirming dismissal of insured's tort claims against insurer and CCC, a Mitchell competitor in the total loss valuation industry, which

were predicated on an alleged violation of the Georgia Total Loss Regulation, finding "that O.C.G.A. § 33-6-37 did not provide an independent basis for [the insured's] claims") (*vacated on other grounds*).

B. Count III Should Be Dismissed Because Plaintiff Fails to Plausibly Allege Claims Against Mitchell and J.D. Power for Tortious Interference.

In Count III, Plaintiff argues that Mitchell and J.D. Power "tortiously interfered" with Plaintiff's insurance contract with State Farm. A tortious interference claim under Georgia law requires: (1) a defendant's improper action or wrongful conduct without privilege; (2) a defendant's purposeful and malicious action with intent to injure; (3) a defendant's inducement of a breach; and (4) damages proximately caused by the tortious acts. *Lockett v. Allstate Ins. Co.*, 364 F. Supp. 2d 1368, 1383 (M.D. Ga. 2005). The defendant must intend the harm or be substantially certain the harm will occur. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 411-12 (2011). Importantly, a tortious interference claim requires the alleged interferer *to induce* one of the contracting parties to breach the contract. *See Int'l Brominated Solvents Ass'n v. Am. Conference of Gov't Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1384 (M.D. Ga. 2005) (dismissing tortious interference claim for failure to show any inducement to breach the contract by the defendant).

Plaintiff's tortious interference claim fails because Plaintiff does not adequately plead that either Mitchell or J.D. Power acted maliciously or purposefully with an intent to injure the Plaintiff. *See Lockett*, 364 F. Supp. 2d at 1383 (stating a purposeful and malicious intent to injure the Plaintiff is necessary to plead a claim for tortious interference). A malicious act requires that Mitchell and J.D. Power had *both* knowledge of Plaintiff's insurance policy with State Farm *and* the intent to interfere with the insurance policy. *See Medlin v. Morganstern*, 601 S.E.2d 359, 362 (Ga. Ct. App. 2004) ("A party cannot intentionally and maliciously induce a breach of a contract of which he or she is unaware."); *Singleton v. Itson*, 383 S.E.2d 598, 599 (Ga. Ct. App. 1989)

("[An] act is malicious when it is done with knowledge of the plaintiff's rights and with the intent to interfere with them."). Plaintiff's tortious interference claim does not meet either prong.

Plaintiff alleges only that Mitchell and J.D. Power had generalized knowledge that State Farm entered into insurance policies with its insureds, and that those polices required State Farm to "promptly and properly pay total loss claims." (Cmplt. ¶ 82). Plaintiff does not allege that Mitchell or J.D. Power had any specific or actual knowledge of Plaintiff's insurance policy with State Farm, much less a specific intent to interfere with the terms and conditions of any such insurance contract. These bare and conclusory assertions are insufficient to support a tortious interference claim under Georgia law. Indeed, allowing a tortious interference claim to proceed based on generalized knowledge of a category of contracts would expand the tort of tortious interference well beyond anything recognizable under Georgia law.

Mitchell is a defendant in this lawsuit only because State Farm used WCTL to obtain an automated WCTL valuation with respect to Plaintiff's vehicle. Plaintiff does not allege that Mitchell was aware that State Farm had an insurance contract with any particular individual, much less Plaintiff. And, even then, Plaintiff does not (and cannot) allege that Mitchell knew the specific terms and conditions of the insurance contract between Plaintiff and State Farm. Instead, Plaintiff merely alleges that Mitchell was aware of the Plaintiff simply by virtue of his name appearing on the WCTL recommended valuation report provided to State Farm. (*See id*. at ¶ 82.) But, allegations of general knowledge of the existence of Plaintiff are not nearly enough to meet the requirement under Georgia law that a defendant in a tortious interference claim intentionally interfere with the contract through malicious and purposeful acts. *See Hayes v. Irwin,* 541 F. Supp. 397, 429 (N.D. Ga. 1982) ("Since intentional interference is a prerequisite [to an intentional tort],

it presupposes knowledge of the plaintiff's interest or facts that would lead [one] to believe in their existence.").

The tortious interference claim against J.D. Power is even more attenuated. Plaintiff's sole basis for making J.D. Power a defendant in this lawsuit is that J.D. Power worked with Mitchell in developing WCTL. Plaintiff does not allege that J.D. Power has a contract with State Farm, much less that any WCTL request was made to J.D. Power (which it was not). There are no allegations that J.D. Power had knowledge of Plaintiff's contract with State Farm, nor could Plaintiff credibly allege that J.D. Power knew State Farm had queried the WCTL database for any particular valuation. Put simply, the tortious interference claim against J.D. Power should be dismissed because there is no plausible allegation in the Complaint that J.D. Power ever interacted with State Farm regarding Plaintiff's claim at all.

Moreover, under Georgia law, Plaintiff cannot simply allege that Mitchell and J.D. Power persuaded State Farm to break its contract with Plaintiff. *Wood v. Archbold Med. Ctr., Inc.*, 738 F. Supp. 2d 1298, 1369 (M.D. Ga. 2010). Rather, Plaintiff must show that Mitchell and J.D. Power's conduct was itself wrongful. *Id.* Plaintiff's allegation that Mitchell and J.D. Power provided a software product and total loss valuation service that – when used by State Farm in evaluating Plaintiff's total loss, without any involvement from Mitchell or J.D. Power – allegedly resulted in a breach of the contract by State Farm does not plausibly allege improper conduct by Mitchell or J.D. Power.

Plaintiff asserts in conclusory fashion that "J.D. Power and Mitchell wrongfully interfered with State Farm's contractual obligations to Plaintiff by knowingly and intentionally selling to State Farm [allegedly] statistically invalid and wholly arbitrary total loss valuation product for the [alleged] specific purpose of enabling State Farm to underpay the claims of total loss insureds,

including Plaintiff." (Cmplt. ¶ 85.) In other words, the sole legal hook to try to hold Mitchell liable (which does not apply to J.D. Power) is that Mitchell entered into an agreement with State Farm to provide WCTL valuations to State Farm *when requested by State Farm*. This does not meet the Georgia requirement that the alleged interferer *intentionally caused* State Farm to breach its insurance contracts with Plaintiff through the use of improper conduct. Merely providing State Farm with access to software that allowed State Farm to generate a valuation hardly rises to the level of inducement or coercion.

Even *assuming arguendo* that the WCTL produces statistically invalid valuations (and Mitchell and J.D. Power vigorously dispute Plaintiff's allegation that the WCTL methodology is somehow invalid), it still cannot result in an induced breach because State Farm controls how it settles total loss claims, with no input, much less *coercion*, from either Mitchell or J.D. Power. And, Plaintiff does not allege any facts supporting such control or coercion by Mitchell or J.D. Power.[6]

Finally, Plaintiff also alleges that "State Farm has suppressed and concealed material facts relating to Mitchell's improper WCTL Valuation system …." (*id*. at ¶ 42) and that Mitchell and J.D. Power allegedly intentionally and wrongfully used a statistically invalid and wholly arbitrary

[6] This Court is not the first to have to address a tortious interference claim relating to an insurer's use of WCTL. In a substantially similar case against Progressive and Mitchell regarding Progressive's use of the WCTL valuations in settling a claim with a Progressive policyholder, a federal judge in the Northern District of California dismissed the plaintiff's tortious interference claim against Mitchell. *Jones v. Progressive Cas. Ins. Co.*, No. 16-CV-06941-JD, 2018 WL 4521919 at *4 (N.D. Cal. Sept. 19, 2018). (For the convenience of the Court, a copy of the *Jones* order dismissing Mitchell from a putative California class action lawsuit over the use of WCTL with Progressive policyholders is attached as Exhibit A.) The Court found "that Mitchell, as an outside claims services provider, [in] generat[ing] comparative reports at Progressive's direction, … [e]ven assuming the reports were misleading," was not enough to plausibly state a claim "that Mitchell intended to disrupt [the plaintiff's] policy with Progressive, or knew that interference was likely to occur." *Jones*, 2018 WL 4521919 at *5. As was the case in *Jones*, Plaintiff's conclusory allegations here that "J.D. Power and Mitchell had actual knowledge that State Farm used the WCTL Valuations" and thus, "wrongfully interfered with State Farm's contractual obligations to Plaintiff …" (Cmplt. ¶¶ 83 & 85), are insufficient as a matter of law. While J.D. Power was not a defendant in the *Jones* case, the reasoning used by the *Jones* Court would apply here in at least equal (if not greater) force to Plaintiff's even more attenuated tortious interference claim against J.D. Power.

methodology in the software. (*See id.* at ¶¶ 29-33 (the "wrong" being that the parties allegedly misrepresented the WCTL reports as being valid)). When, as here, Plaintiff's claim for intentional interference is predicated on allegations of deceptive or fraudulent conduct, the allegations must meet Rule 9(b)'s heightened standards of particularity. *See* FED. R. CIV. R. 9(b). Thus, Plaintiff's allegations must include "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiff; and (4) what the defendant gained by the alleged fraud." *Feldman*, 849 F.3d at 1340. (internal quotations and citations omitted).

As the court in *Jones* found in regard to similar fraud allegations, the Plaintiff failed to "allege that Mitchell promised him anything about the nature, scope, or contents of the reports." *Jones*, 2018 WL 4521919 at *4. Similarly here, Plaintiff's allegations fail to meet the heightened burden because Plaintiff fails to allege that Mitchell or J.D. Power intentionally made any representation to Plaintiff that concealed any material facts or gave rise to any duty to disclose any information. Nor could they, because neither Mitchell nor J.D. Power have any direct contact with any of State Farm's insureds, including Plaintiff. With no communications to allege, Plaintiff obviously fails to assert any "precise statements," much less the specific "time, place, and person responsible for the statement." *Feldman*, 849 F.3d at 1340. Further, Plaintiff fails to allege how the nonexistent "statements misled" him or what Mitchell and J.D. Power "gained by the alleged fraud." *Id.* Notably, in *Jones*, the plaintiff allegedly had a phone call with a Mitchell representative, yet the court still failed to find any "inference that Mitchell made misrepresentations to [the plaintiff]." *Jones*, 2018 WL 4521919 at *4. With no direct communication plausibly alleged (nor could it, as no communications between Mitchell or J.D.

Power and Plaintiff ever occurred), Plaintiff fails to meet the heightened particularity standard for their fraud-based claim.

C. Count IV Should be Dismissed Because Plaintiff Fails to Plausibly Allege Status as Third-Party Beneficiary of the Agreement Between Mitchell and State Farm.

Under Georgia law, a third-party beneficiary must be an *intended* beneficiary by the contracting parties to an agreement. *See Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1251 (11th Cir. 2015). If the non-party receives merely an incidental or consequential benefit from a contract, the non-party does not have a right to enforce the contract. *Roland v. Shreve*, 958 F. Supp. 2d 1361, 1366 (M.D. Ga. 2013). Instead, for a non-party to be an intended beneficiary of the contract so as to give standing to seek to enforce the terms of the contract, the contract at issue must clearly indicate an intent to directly benefit the third party or a class of persons to which that party claims to belong. *Id*.; *see also* O.C.G.A. § 9-2-20(b). Plaintiff's allegations fall far short of meeting the standard required to allege that he was an intended third-party beneficiary of the contract between State Farm and Mitchell.[7]

As a preliminary matter, Plaintiff does not allege that the Mitchell-State Farm contract "clearly indicate[s] an intent to benefit" Plaintiff. *Roland*, 958 F.Supp. 2d at 1366. This failure – which cannot in good faith be remedied, since there is no such provision in the Mitchell-State Farm contract – dooms Plaintiff's third-party beneficiary claim.[8]

[7] With respect to the allegations against J.D. Power, Plaintiff's claims are entirely baseless. Plaintiff does not and cannot credibly allege that J.D. Power is party to the Mitchell agreement with State Farm or that J.D. Power intended the State Farm-Mitchell contract to benefit Plaintiff. Nor can Plaintiff state any plausible basis for why J.D. Power (as a non-party to the State Farm-Mitchell contract) would be liable for Mitchell's alleged breach of its contract with State Farm. Accordingly, even if Plaintiff stated a claim against Mitchell as a third-party beneficiary of Mitchell's contract with State Farm (which they do not), Plaintiff has no conceivable basis in law or fact for any third-party beneficiary claim by Plaintiff against J.D. Power.

[8] As a serial litigator of WCTL claims – this is the fourth claim that one of Plaintiff's attorneys has brought based on an insurer's use of WCTL – Plaintiff's counsel is well aware that the standard agreement between Mitchell and its insurance company customers does not include a third-party beneficiary provision. However, if the proper protections against disclosure of this confidential agreement are put in place, Mitchell is willing to allow Plaintiff's counsel to

Next, if this Court finds Plaintiff meets the heightened Rule 9(b) pleading standard for the tortious interference claim or the conspiracy claim discussed below (which the Court should not), this Court cannot simultaneously find Plaintiff has plausibly alleged a third-party beneficiary claim because the allegations are irreconcilably contradictory. In Count IV, Plaintiff alleges that Mitchell and State Farm intended to benefit putative class members through the State Farm-Mitchell agreement, calling themselves "intended beneficiaries." (Cmplt. ¶ 91.) Yet, also in Count IV, Plaintiff incorporates by reference allegations that J.D. Power, Mitchell, and State Farm intended – indeed "conspired" – to defraud Plaintiff. (*See id.* at ¶¶ 86 & 97.) In other words, according to Count IV, Plaintiff was the victim of a scheme by State Farm, Mitchell and J.D. Power to defraud him and at the same time the express intended beneficiary of that scheme. These contradictory allegations cannot be reconciled. Of course, "a court need not feel constrained to accept as truth conflicting pleadings that make no sense, or that would render a claim incoherent, or that are contradicted … by statements in the complaint itself." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371 (S.D.N.Y. 2001); *cf., Brookhaven Landscape & Grading Co., Inc. v. J. F. Barton Contracting Co.*, 676 F.2d 516, 523 (11th Cir. 1982) ("litigants may pursue alternative theories of recovery, regardless of their consistency[, … but a] party may not … recover separately on inconsistent theories when one theory precludes the other or is mutually exclusive of the other."). Indeed, because the allegations are inherently contradictory, they necessarily are implausible and must be dismissed. *In re Galectin Therapeutics, Inc.*, 843 F.3d at 1269 ("To survive a motion to dismiss, … the complaint must allege enough facts to state a claim to relief that is plausible on its face.") (internal quotations omitted).

confirm that the Mitchell contract with State Farm is not materially different in this regard from the Mitchell contracts with other insurers that Plaintiff's counsel already has seen.

Setting aside the inherently contradictory nature of the claims, Plaintiff bases his entire third-party beneficiary claim on the single conclusory allegation – without any factual basis – that "[a]s insureds for whom valuations were prepared under this Agreement, Plaintiff and the Class are intended beneficiaries of the Agreement between State Farm and Mitchell and are entitled to sue for breach of that Agreement." (Cmplt. ¶ 91.) Plaintiff, however, fails to allege ***any*** facts sufficient to show a "clear and manifest intent" by Mitchell or State Farm – much less Mitchell ***and*** State Farm – that the contract was "actually and expressly intended to benefit" Plaintiff. Moreover, Plaintiff does not (and cannot) allege any actual knowledge by Mitchell of Plaintiff, or of his relationship with State Farm. Thus, Plaintiff is unable to allege any facts sufficient to show that Mitchell had the alleged requisite intent to identify Plaintiff as an intended third party beneficiary. Instead, Plaintiff is left with simply the conclusory allegations that he was an "intended beneficiary" of the contract between Mitchell and State Farm. Without any factual basis for the intent allegation, Plaintiff's claim against Mitchell must be dismissed.

D. Count V Should be Dismissed Because Plaintiff Has Not Plausibly Alleged a Claim for Civil Conspiracy.

Plaintiff's claim for civil conspiracy should be dismissed because Plaintiff does not (and cannot) allege that Mitchell and J.D. Power took any actions at all directed to the Plaintiff – much less entered into a scheme to defraud Plaintiff. As such, Plaintiff's allegations fall far short of the heightened pleading standards necessary to plausibly allege a claim for civil conspiracy.

A civil conspiracy requires an act by two or more persons to either commit a tort or to act lawfully by methods which constitute a tort. *See Brown Bark II, L.P. v. Dixie Mills, LLC*, 732 F. Supp. 2d 1353, 1359 (N.D. Ga. 2010). Civil conspiracy itself is not a viable cause of action, but rather must be tied to an underlying tort claim. *See Peterson v. Aaron's, Inc.*, 108 F. Supp. 2d

1352, 1356 (N.D. Ga. 2012). When grounded in alleged fraud, like here, conspiracy claims must also meet Rule 9(b)'s heightened particularity requirements. *Feldman*, 849 F.3d at 1344.

First, the civil conspiracy claim is derivative of Plaintiff's other tort claims. Because Plaintiff fails to plausibly allege any of his other claims against Mitchell and J.D. Power, the civil conspiracy claim must also fail. *Id.* (dismissing civil conspiracy claim for lack of underlying tort or wrong). But, even if this Court determines that Plaintiff plausibly alleged a claim to which the civil conspiracy claim can attach (and it should not), Plaintiff's civil conspiracy claim fails to satisfy the heightened pleading standards of Rule 9(b) and should be dismissed.

Plaintiff alleges that "State Farm has suppressed and concealed material facts relating to Mitchell's improper WCTL Valuation system and its pre-existing scheme in conspiracy with J.D. Power and Mitchell to intentionally undervalue automobile property claims …." (Cmplt. ¶ 42.) Plaintiff further alleges that State Farm, Mitchell, and J.D. Power entered into an "illicit" agreement to provide "improper" valuations through the use of a statistically invalid methodology to "improperly undervalue loss claims." (*See id.* at ¶ 97.) As such, Plaintiff's civil conspiracy claim sounds in fraud, and is subject to the heightened pleading standards of Rule 9(b). *See GE Life & Annuity Assur. Co. v. Barbour*, 191 F. Supp. 2d 1375, 1383 (M.D. Ga. 2002) ("Georgia law … provides that suppression of a material fact which a party is under an obligation to communicate constitutes fraud.") (internal quotations omitted). Thus, Plaintiff must allege "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiff; and (4) what the defendant gained by the alleged fraud." *Feldman*, 849 F.3d at 1340 (internal quotations and citations omitted). Plaintiff's allegations against Mitchell and J.D. Power are a far cry from this heightened standard.

Indeed, other than alleging that State Farm allegedly "suppressed and concealed" certain facts (Cmplt. ¶ 42), Plaintiff's Complaint is devoid of any allegations regarding allegedly fraudulent activity or statements by Mitchell and J.D. Power. Nor does Plaintiff include any allegations regarding what Mitchell and J.D. Power supposedly obtained as a consequence of the alleged fraud. Rather, Plaintiff merely concludes, without supporting facts, that "J.D. Power, Mitchell and State Farm entered into an illicit agreement and conspiracy to utilize WCTL Valuations to provide improper total loss valuations[, s]pecifically … to underpay Plaintiffs … ." (*Id*. at ¶ 97.) In other words, Plaintiff alleges nothing more than an agreement between Mitchell and State Farm to work together so that Mitchell could provide State Farm with recommended total loss vehicle valuation reports. But an agreement to enter into a commercial relationship – without any further factual allegations in support – fails to plausibly allege the existence of a fraudulent civil conspiracy. Plaintiff's conclusory allegations of an alleged "illicit agreement" fail to plausibly allege a claim, much less meet Rule 9(b)'s heightened pleading standard. *See, e.g.*, *Jones*, 2018 WL 4521919 at *4-5 (dismissing Plaintiff's fraud allegations for failure to meet the heightened Rule 9(b) pleading standard). Thus, this claim must be dismissed.

V. CONCLUSION

For all these reasons, Mitchell and J.D. Power respectfully request that the Court dismiss each cause of action alleged against Mitchell and J.D. Power, with prejudice.

[signature on following page]

Date: February 8, 2019

Respectfully submitted,

/s/ *Travis C. Hargrove*
Travis C. Hargrove
Georgia Bar No. 141374
thargrove@thefinleyfirm.com
The Finley Firm, P.C.
200 13th Street
Columbus, GA 31901
Telephone: 706.322.6226
Facsimile: 706.322.6221

A. McCampbell Gibson
Georgia Bar No. 292741
macgibson@thefinleyfirm.com
3535 Piedmont Road
Building 14, Suite 230
Atlanta, GA 30305
Telephone: 404.320.9979
Facsimile: 404.320.9978

-and-

Scott T. Schutte *(pro hac vice forthcoming)*
scott.schutte@morganlewis.com
Morgan, Lewis & Bockius LLP
77 West Wacker Drive, Fifth Floor
Chicago, IL 60601
Telephone: 312.324.1000
Facsimile: 312.324.1001

Counsel for Defendants J.D. Power and Mitchell International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019 a true and correct copy of Defendants J.D. Power and Mitchell International, Inc.'s Motion to Dismiss and Memorandum In Support was filed electronically and served on all counsel of record via the Court's ECF System.

/s/ *Travis C. Hargrove*
Travis C. Hargrove