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

SFR SERVICES, LLC, FOR ITSELF AND AAO Plaintiff, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, FKS INSURANCE SERVICES, LLC, AND PROPERTY LOSS SPECIALIST, LLC Defendants.	:	8:22-cv-00109-KKM-SPF

UNITED PROPERTY & CASUALTY INSURANCE COMPANY'S ("UPC") MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

Defendant UPC respectfully submits this motion to dismiss the Third Amended Complaint [DE 88] of Plaintiff SFR Services LLC ("Plaintiff" or "SFR") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION & BACKGROUND

Plaintiff's claims are an improper attempt to manufacture a federal RICO claim out of disputes already pending in Florida state courts in actions *commenced by Plaintiff* under Florida's comprehensive insurance law framework. While Plaintiff's Amended Complaint makes no direct mention of these suits—even though it directly cites deposition testimony provided in three of the underlying actions—Plaintiff cannot avoid that its claims are governed by Florida insurance

which cases?

law and subject to ongoing lawsuits in Florida state court. Federal and state law both confirm that this federal action cannot supplant Florida's comprehensive statutory framework and that Plaintiffs' claims suffer from numerous other infirmities, requiring dismissal with prejudice.

I. The Parties

SFR is a licensed general contractor in the state of Florida. AC. at ¶ 2. As part of providing general contracting services, SFR enters into an Assignment of Benefits ("AOB") with a homeowner, under which the homeowner assigns its rights and obligations under its homeowner's insurance policy to SFR. *Id.* SFR alleges that executing an AOB is part of the service offered to homeowners, as SFR alleges that it has the "expertise" and "resources" to negotiate with insurance companies and to litigate such disputes. *Id.* at ¶¶ 2, 23–25. Prior to filing this lawsuit, SFR filed approximately 200 lawsuits in Florida state courts claiming that UPC breached its contracts with the 200 Florida homeowners by failing to cover what SFR claims is the full amount of damage covered under policies issued by UPC. *Id.*, Ex. B.

In a typical case where no AOB is executed, a contractor negotiates with a homeowner regarding the scope of necessary repairs, and the homeowner then separately negotiates with their insurance company regarding covered losses. Under SFR's model, once an AOB with SFR is executed, SFR becomes both

contractor and insurance claimant. A homeowner, having assigned their benefits and rights under an insurance policy to SFR, has no remaining role in determining the scope of damage. *Id.*

UPC is an insurance company that provides residential homeowner's insurance policies that protect homeowners against certain losses. *Id.* at ¶ 19. Plaintiff alleges that UPC provided coverage, and improperly denied claims, under the 200 homeowners' policies listed in Exhibit B. *See id.*, Ex. B. Plaintiff also brings claims against FKS Insurance Company ("FKS") and Property Loss Specialist, LLC ("PLS")—adjusting firms that allegedly provide adjusting services for commercial and residential parties at UPC's direction—participated in the alleged scheme. *See generally id.*

II. FUITPA Provides a Comprehensive Framework for Insurance Claims and Disputes.

FUITPA regulates the insurance industry's trade practices and defines what constitutes unfair or deceptive acts, including the rules governing disputes regarding coverage. Fla. Stat. §§ 626.951–626.99. Fla. Stat. § 624.155 (the "Bad Faith Statute") is codified under a separate chapter of the Florida Statutes (Chapter 624 – Insurance Code: Administration and General Provisions) and sets forth the circumstances under which an individual may bring a bad faith claim for extra-contractual damages against an insurer and the procedural mechanisms for doing so. Fla. Stat. § 624.155(1). FUITPA further specifies the circumstances under which

an individual can directly assert a claim against their insurer, referred to as a private right of action. *See Buell v. Direct General Ins. Agency Inc.*, 488 F. Supp. 2d 1215, 1218 (M.D. Fla. 2007) (concluding that the Florida legislature did not intend "to create a private right of action premised on a violation of [a particular FUITPA subsection]" since it expressly authorized private rights of action with regard to certain violations of the FUITPA by way of § 624.155, but did not do so for others). Thus, Florida law makes clear that a claim for bad faith for improperly employing claims handling policies and mechanisms may only be brought if the statutory requirements set forth by the Florida legislature have been met. *See* Fla. Stat. § 624.155. In this case, they have clearly not been satisfied.

what are those requirements?

III. Plaintiff's Claims

Plaintiff's claims are premised on events that occurred in the five-year period following Hurricane Irma, which impacted Florida in September 2017. Plaintiff asserts violations of the federal RICO statute as well as provisions of Florida insurance law based on the assertion that UPC, along with Defendants FKS, PLS, and Mid-America Catastrophe Services, LLC ("Mid-America"), engaged in an overarching "scheme to deny or underpay the insureds who submitted claims. AC. at ¶ 29. As set forth below, Plaintiff's allegations are merely repurposed assertions, already brought by Plaintiff in 200 breach of contract cases

in state court, in an attempt to avoid the statutory requirements, set forth by the Florida legislature to advance bad faith claims under Florida law.

Whether or not UPC did, in fact, wrongfully deny or underpay claims is an issue currently before Florida state courts in each of the approximately 200 lawsuits brought by SFR, including the cases from which Plaintiff cites deposition testimony. *See id.*, Ex. B, listing case numbers of state court suits. Moreover, several of these underlying suits have been voluntarily **settled** by Plaintiff, further undermining any notion that Plaintiffs can—or need to—bring claims on the same purported conduct here.[1]

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege sufficient facts to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading

[1] *See* Notice of Settlement, SFR Services LLC v. Family Security Ins. Co., No. 20-CA-7831 (Fla. 20th Cir. Ct. Feb. 02, 2022) (Family Security Ins. is a UPC insurance company. *Family Security Insurance*, UPC INSURANCE, https://www.upcinsurance.com/family-security (last visited Mar. 25, 2022)); Notice of Voluntary Dismissal with Prejudice, SFR Services LLC v. United Prop. & Casualty Insur. Co., No. 20-CA-6617 (Fla. 20th Cir. Ct. Feb. 01, 2022); Order Approving Settlement Agreement and Dismissal with Prejudice, Reserving Jursidiction to Enforce Settlement and to Reinstate Case, SFR Services LLC v. United Prop. & Casualty Insur. Co., No. 20-CA-3179 (Fla. 20th Cir. Ct. Jan. 25, 2022).

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

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

ARGUMENT

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

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

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

Plaintiff cannot meaningfully dispute that the first and second requirements of McCarran-Ferguson are met here. First, the Supreme Court made clear in *Humana v. Forsyth* that "RICO is not a law that specifically relates to the business of insurance." *Id.* at 307 (internal quotations omitted). Second, the state statutory scheme at issue, FUITPA, was indisputably enacted for the purpose of regulating the business of insurance, as courts in this Circuit have recognized. *See Buell*, 488

F. Supp. 2d at 1217 ("It follows, therefore, that the [F]UITPA is a statutory manifestation of the Florida legislature's intent, in conformity with an Act of Congress, to regulate the insurance industry's trade practices for the benefit of the public by defining, determining, and prohibiting unfair methods of competition and unfair or deceptive acts or practices").

B. Permitting Plaintiff's RICO Claims Would Frustrate the Purpose of Florida Insurance Law, Satisfying McCarran-Ferguson's Third Prong.

Permitting Plaintiff's RICO claim to proceed would likewise violate McCarran-Ferguson's third prong, as the federal statute would invalidate, impair, or supersede the FUITPA and the Bad Faith Statute. The Supreme Court has instructed that a federal law impairs a state law where the federal law directly conflicts with state regulation or where application of federal law would frustrate any declared state policy or interfere with a State's administrative regime. *Forsyth*, 525 U.S. at 309–10 ("The dictionary definition of 'impair' is 'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'"). Permitting Plaintiff to bring a claim seeking damages for RICO violations when Plaintiff has ongoing litigation pending in state court would frustrate the purpose of FUITPA and the Bad Faith Statute and improperly permit Plaintiff a back-door method to avoid the Bad Faith Statute's requirements, exactly what McCarran-Ferguson does not permit.

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

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

Plaintiff's RICO claim asserts that UPC fraudulently denied the 200 underlying insurance claims and seeks damages stemming from those denials exceeding the covered amounts under the policy, claiming that UPC wrongfully handled, adjusted, and paid (or failed to pay) the underlying insurance claims. This is exactly the kind of dispute governed by the Bad Faith Statute; Plaintiff seeks damages against UPC for its alleged failure to act in good faith to settle claims, by wrongfully denying or underpaying claims for hurricane damage. *See* AC. at ¶¶ 82–83; Fla. Stat. § 624.155(1)(b)(1) (providing that failure to settle claims in good faith when an insurer "could and should have done so, had it acted fairly and honestly toward its insured" is a basis for a civil action against the insurer under the Bad Faith Statute). The only way for an insured in a first-party insurance claim to recover consequential damages caused by an unfair denial of coverage under Florida law is to bring a claim pursuant to the Bad Faith Statute. *See Citizens Prop. Ins. Corp. v. Perdido Sun Condo Ass'n*, 164 So.3d 663, 667 (Fla. 2015); *Talat Enters. v. Aetna Cas. & Sur. Co.*, 753 So.2d 1278, 1281 (Fla. 2000); *Nirvana Condo Ass'n v. QBE Ins. Corp.*, 589 F.Supp.2d 1336 (S.D. Fla. 2008). Fla. Stat. § 624.155.

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

2. The Bad Faith Statute's Restrictions Prevent a Private Right of Action.

The Bad Faith Statute imposes procedural restrictions on litigants seeking extra-contractual damages for violations of FUITPA. RICO contains no such

restrictions, and permitting Plaintiff's RICO claim to proceed would therefore frustrate state policy and interfere with Florida's administrative regime, satisfying McCarran-Ferguson's third requirement. *See Kondell v. Blue Cross Blue Shield of Fla., Inc.*, 187 F. Supp. 3d 1348, 1359 (S.D. Fla. 2016); *see also In re Managed Care Litigation*, 185 F. Supp. 2d at 1321–22. First, the Bad Faith Statute imposes strict requirements, not applicable to a RICO claim, on a plaintiff seeking to directly bring a bad faith claim for damages against an insurer for violations of FUITPA. For instance, any private right of action brought under the Bad Faith Statute is conditioned on a plaintiff's satisfaction of, *inter alia*, Fla. Stat. § 624.155's pre-suit notice provision. *See Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1349 (S.D. Fla. 2019). Specifically, Fla. Stat. §§ 624.155(3)(a) and (b) require that an insured provide their insurer with 60 days' written notice of an alleged violation before filing suit. Such notice must include, among other things, the statutory provision(s) allegedly violated, the facts and circumstances giving rise to the violation, and the name(s) of any individuals involved. This notice provision is designed to give the insurer an opportunity to cure before a bad faith action can be commenced. *See* Fla. Stat. § 624.155(3)(c). Plaintiff makes no claim to have satisfied this requirement for suit for the 200 claims listed in Exhibit B.

Even if Plaintiff *had* satisfied the pre-suit notice requirement, Plaintiff could not bring an action under Fla. Stat. § 624.155 based on the 200 underlying causes

of action at this stage. Florida law mandates that *a finding of contractual liability and a determination of contractual damages* are necessary elements of a bad faith action. Plaintiff must therefore *succeed* on each of the 200 underlying state court litigations before it can bring a bad faith action. *See Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1273 (Fla. 2000). Here, Plaintiff's breach of contract claims are currently being adjudicated in state court. As a result, any cause of action brought pursuant to Florida's Bad Faith Statute would be dismissed as premature in Florida state court, as there has been no determination on liability and extent of damages. *Liberty Mutual Ins. Co. v. The Farm, Inc.*, 754 So. 2d 865, 866 (Fla. Dist. Ct. Appl. 2000).

Florida law thus imposes numerous procedural hurdles on Plaintiff before any claim based on allegedly wrongful denials of coverage could be brought in Florida state court. Allowing Plaintiff's RICO claim to proceed would circumvent the Bad Faith Statute's procedural preconditions, impairing the application of FUITPA. *See Braunstein v. Gen. Life Ins. Co.*, No. 01-6040-CIV, 2002 WL 31777635, at *4 (S.D. Fla. Nov. 19, 2002) ("[t]he application of RICO, which does not contain Florida's procedural limitations . . . directly conflicts with state regulation, frustrates Florida's declared state policy, and interferes with Florida's administrative regime in dealing with these types of claims."); *Weinstein v. Zurich Kemper Life*, No. 01-6140-CIV, 2002 WL 32828648, at *3 (S.D. Fla. Mar. 15, 2002) (RICO claimed preempted as it impaired Florida insurance law).

Second, apart from the Bad Faith Statute and its preconditions to suit, no other provision of FUITPA or Florida common law would permit Plaintiff to bring claims for damages against an insurer based on allegations of bad faith in denial of coverage. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995) (noting that "first party bad faith actions are actionable only under section 624.155 and not [Florida] common law."). This absence of a private right of action weighs strongly in favor of the application of McCarran-Ferguson to bar Plaintiff's RICO claims. *See Kondell*, 187 F. Supp. 3d at 1360 (Florida law would be impaired where there is no private right of action under Florida insurance law and no other viable state cause of action was identified). Thus, allowing Plaintiff's claim to proceed would impair Florida law, requiring dismissal of Plaintiff's RICO claim. *See id.* at 1361.

II. The Amended Complaint Fails to State a Claim for a Civil RICO Violation.

Even if Plaintiff's civil RICO claim is not dismissed on McCarran-Ferguson Act grounds (which it should be), Plaintiff's RICO claim still fails to plead the requirements of 18 U.S.C. § 1962(c). *See Ray v. Spirit Airlines*, 836 F.3d 1340, 1348 (11th Cir. 2016). When, as here, a plaintiff brings a civil RICO action for damages, the plaintiff must also show "(1) the requisite injury to business or property, and (2) that such injury was by reason of the substantive RICO violation." *Id.* (internal citations omitted). Plaintiff's RICO claim must be dismissed because Plaintiff

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

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

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

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

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

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

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

---

[2] Moreover, as officers of UPC and FKS, Bergstrom, Cotton, Maries, McDonald, and DeMint are not distinct for the purposes of establishing an enterprise. *See Ray*, 836 F.3d at 1357 (discussing that "there is no distinction between the corporate defendant and an enterprise composed to the corporation and some of its officers").

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

In *Cisneros*, the Eleventh Circuit addressed a similar set of facts, concluding that plaintiff failed to sufficiently allege a common purpose among the enterprise, which concerned an alleged scheme to sell sick puppies at premium prices. *Cisneros*, 972 F.3d at 1213. The plaintiff in *Cisneros* generally alleged "at the highest order of abstraction that the participants shared a common 'purpose of implementing Petland's scheme to defraud customers.'" *Id.* at 1212. The only facts offered in support of the alleged scheme was that Petland "insists upon 'uniform standards, methods, techniques, and expertise, procedures, and specifications . . . for establishing, operating, and promoting a retail pet business." *Id.* These allegations were deemed insufficient to establish a common purpose, noting that the allegations "simply describe[d] an anodyne franchise business model, not a common purpose to defraud[,]" that allegations similar to those made by plaintiff could be made about countless law-abiding companies, and that "nothing about the allegations remotely suggests fraud." *Id.*

innocuous

The same analysis applies here. While Plaintiff generally alleges that the alleged enterprise participants share a common purpose of "deriving profits from

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

B. The Amended Complaint Fails to Allege a Pattern of Racketeering Activity.

In addition to failing to establish an enterprise, Plaintiff failed to adequately allege a pattern of racketeering activity, which requires Plaintiff to allege that each defendant participated in the affairs of the enterprise through a 'pattern of racketeering activity,' which requires 'at least two acts of racketeering activity.'"

Cisneros, 972 F.3d at 1215 (citing 18 U.S.C. § 1962(c), 1961(5)). An act of racketeering activity, otherwise known as a "predicate act," can be any in a long list of state and federal crimes. *See* 18 U.S.C. § 1961(1). The complaint must contain sufficient facts with respect to each alleged predicate act to render it independently indictable as a crime. *See Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1381 (11th Cir. 1997).

Plaintiff alleges that the predicate acts committed by Defendants, including UPC, on behalf of the alleged enterprise involved the use of mails and wires in furtherance of a scheme to defraud, in violation of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. As with any allegation of fraud, Plaintiff's allegations as to the predicate acts must satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b), which requires a plaintiff "state with particularity the circumstances constituting fraud," including "(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 defendants gained by the alleged fraud." *Id.*; *see also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010).

SFR falls far short of the heightened pleading bar imposed by Rule 9(b). The Amended Complaint claims, in the most conclusory terms, that Defendants and

co-conspirators utilized interstate mails and wires in furtherance of their scheme to prepare false reports and estimates to deny or underpay valid claims. AC. at ¶¶ 89–90. The only predicate act alleged with any semblance of specificity is that "Defendants and co-conspirators caused a text to be sent in 2020." *Id.* at ¶ 91. Even if this low level of specificity was enough, one predicate act is not enough to establish a pattern of racketeering. The other acts mentioned—the alleged phone call with FKS and the Mid-American Online Meeting *id.* at ¶ 91—contain no specificity whatsoever. Plaintiff's failure to provide the specificity in their pleading requires dismissal of their RICO claim.

C. The Amended Complaint Fails to Allege Injury.

Plaintiff also failed to allege injury as a result of the purported fraudulent activity. "When a private plaintiff relies on a violation of the mail or wire fraud statutes as a predicate act for civil RICO, he faces an additional hurdle before he can obtain recovery: he must show not only that the mail or wire fraud statutes have been violated, but also that he has suffered an injury as a result of the violation." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991) (*abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 533 U.S. 639 (2008)). Section 1964(c) provides civil remedies only to those who are injured "by reason of" racketeering activity. 18 U.S.C. § 1964(c); *Anza v. Idea Steel Supply Corp.*, 547 U.S. 451, 457 (2006)

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

Plaintiff fails to allege a direct injury as a result of the alleged racketeering activity, alleging only that "[a]s a direct and proximate result of the conspiracy and Defendants' racketeering activities, SFR sustained damages." AC. at ¶ 88. Such an allegation is insufficient to demonstrate an injury as a result of the violation. Nor can Plaintiff's allegations that it received fraudulent estimates establish a direct injury. As explained by the Court in *Ray*, "[t]he mere fact of having been misled does not ineluctably give rise to a RICO cause of action unless the act of misleading the plaintiffs actually caused them injury in their business or to their property that they would not otherwise have suffered." *Ray*, 836 F.3d at 1350.

Plaintiff likewise fails to adequately allege any plausible theory of reliance. The fact that SFR has commenced more than 200 cases in Florida state courts for breach of contract, *see* AC., Ex. B, demonstrably shows that Plaintiff did not rely on UPC's purportedly fraudulent representations. Rather, Plaintiff outright rejected UPC's representations. Because Plaintiff cannot establish reliance, Plaintiff necessarily failed to plead facts sufficient to show injury, and this claim should be dismissed.

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

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

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

parties. *See Robbins*, 816 F. Supp. 2d at 1264 (M.D. Fla. 2011) (noting that the claim-splitting doctrine "clearly requires identity of parties—and in particular identity of defendants."). Second, the instant case and the state court cases arise from the same transaction or series of transactions. *See Vanover*, 857 F.3d at 842; *see also Greene*, 727 F. Supp. 2d at 1368. Here, a final resolution in state court would likely preclude the instant case. As of now, a finding by a state court that UPC was not liable for breach of contract in any of the approximately 200 cases pending in state court would preclude SFR from reasserting in federal court that UPC is liable for breach of contract on that claim. *See In re Hazan*, 10 F. 4th 1244, 1250 (11th Cir. 2021) *see also D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, 416 (1921). Plaintiff's breach of contract claim must be dismissed.

IV. The Amended Complaint Fails to State a Claim for Common Law Fraud.

Plaintiff's common law fraud claim requires dismissal because plaintiff fails to satisfy Rule 9(b)'s heightened pleading standard and fails to demonstrate common law fraud under Florida law. Plaintiff alleges in Count III that Defendants "knowingly created, or caused to be created, false adjusting reports and/or engineering reports" relating to coverage claims stemming from Hurricane Irma. AC. at ¶ 104. As described above, under Rule 9(b) of the Federal

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

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

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

clearly indicating a disbelief in the veracity of UPC's alleged representations. AC., Ex. B. at ¶ 23; *see Green Leaf Nursery v. E.I. DuPoint de Nemours & Co.*, 341 F.3d 1292 (11th Cir. 2003) (Given the "antagonistic and distrusting relationship" between the parties, it was not reasonable for plaintiff to rely on defendant's statements, and therefore plaintiff's fraud claim failed).

V. The Claims Brought Pursuant to FUITPA Should Be Dismissed Because Plaintiff Failed to Comply with the Conditions Precedent to Suit.

Plaintiff's FUITPA claims should be dismissed since Plaintiff failed to follow the procedural requirements of Fla. Stat. § 624.155. Florida state insurance law regulates the business of insurance under FUITPA. FUITPA was enacted with the purpose of "regulat[ing] trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress) [also known as the McCarran-Ferguson Act]." Fla. Stat. § 626.951(1). The FUITPA "is a statutory manifestation of the Florida legislature's intent, in conformity with [McCarran-Ferguson], to regulate the insurance industry's trade practices for the benefit of the public." *Buell v. Direct Gen. Ins. Agency, Inc.*, 488 F. Supp. 2d 1215, 1217 (M.D. Fla. 2007). And relevant to Counts IV–VIII, FUITPA bars unfair claim settlement practices. *See* Fla. Stat. § 626.9541(1)(i).

FUITPA does not explicitly create or deny a private right of action for an insurer's violation of the Act. *See In re Managed Care Litig.*, 185 F. Supp. 2d 1310,

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

CONCLUSION

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

Respectfully submitted,

By: /S/ Michael A. Monteverde
MICHAEL A. MONTEVERDE
FREDRIC S. ZINOBER
Zinober, Diana & Monteverde
2400 E. Commercial Blvd., Suite 420
Fort Lauderdale, FL 33308
(954) 256-9288
michael@zinoberdiana.com
fred@zinoberdiana.com
Counsel for United Property & Casualty Insurance Company

MAEVE L. O'CONNOR
SUSAN REAGAN GITTES
JAIME FREILICH-FRIED
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
mloconnor@debevoise.com
srgittes@debevoise.com
jmfried@debevoise.com
Counsel for United Property & Casualty Insurance Company

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

On August 12, 2022, counsel for the Defendant United Property & Casualty Insurance Company's contacted the Plaintiff's counsel to inform them of Defendant United Property & Casualty Insurance Company's intent to file a motion to dismiss. Plaintiff's counsel confirmed their intent to oppose this motion.

/s/ Michael A. Monteverde
Michael A. Monteverde

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2022, a copy of this document was filed electronically through the CM/ECF system and furnished by email to all counsel of record.

/s/ Michael A. Monteverde
Michael A. Monteverde