IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

CASE NO.: 20-000409-CA

TOWER HILL SIGNATURE INSURANCE COMPANY, TOWER HILL PRIME INSURANCE COMPANY, TOWER HILL SELECT INSURANCE COMPANY, TOWER HILL PREFERRED INSURANCE COMPANY, and OMEGA INSURANCE COMPANY,

Plaintiffs,

vs.

SFR SERVICES, LLC and RICKY MCGRAW, ELITE CLAIMS CONSULTANTS, LLC, MATTHEW MCGRAW, JESSICA MCGRAW, MCGRAW PROPERTY SOLUTIONS, LLC and, MCGRAW ASSET MANAGEMENT, LLC.

Defendant.
_____/

SFR SERVICES, LLC,

Counter-Plaintiff,

v.

TOWER HILL SIGNATURE INSURANCE COMPANY, TOWER HILL PRIME INSURANCE COMPANY, TOWER HILL SELECT INSURANCE COMPANY, TOWER HILL PREFERRED INSURANCE COMPANY, OMEGA INSURANCE COMPANY, TOWER HILL INSURANCE GROUP, LLC, INDIAN HARBOR INSURANCE COMPANY, WILLIAM SHIVELY, BLUEGRASS INSURANCE MANAGEMENT, LLC, and U.S. FORENSIC, LLC,

Counter-Defendants.

_____/

OMNIBUS ORDER ON COUNTER-DEFENDANTS' MOTION TO DISMISS COUNTER-PLAINTIFF'S COUNTERCLAIM

THIS CAUSE came before the Court, on Counter-Defendants, TOWER HILL GROUP[1], INDIAN HARBOR INSURANCE COMPANY, and U.S. FORENSIC, LLC'S Motion to Dismiss Counter-Plaintiff, SFR SERVICES, LLC'S Counterclaim, and the Court being advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

The respective Motions to Dismiss of the Counter-Defendants are DENIED for the reasons set forth below.

BACKGROUND

The Counterclaim at issue contains nine counts:

(a.) Count I Violation of Florida's RICO Act against all Counter-defendants;

(b.) Count II Conspiracy to Violate Florida's Rico Act against all Counter-defendants;

(c.) Count III Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against TH Signature;

(d.) Count IV Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against TH Select;

(e.) Count V Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against TH Preferred;

(f.) Count VI Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against TH Prime;

(g.) Count VII Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against Omega;

[1] TOWER HILL SIGNATURE INSURANCE COMPANY, TOWER HILL PRIME INSURANCE COMPANY, TOWER HILL SELECT INSURANCE COMPANY, TOWER HILL PREFERRED INSURANCE COMPANY, OMEGA INSURANCE COMPANY, TOWER HILL INSURANCE GROUP, LLC

(h.) Count VIII Statutory Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541 against Indian Harbor; and

(i.) Count IX Defamation *Per Se* Against TH Group;

As an initial matter, at the hearing held December 8, 2021, Counsel for TH Group conceded that Count IX states a cause of action for defamation *per se*, and as such, the motion to dismiss as to Count IX is denied.

The Counterclaim at issue is similar to the Second Amended Complaint filed by the TOWER HILL GROUP. The Defendants moved to dismiss the Second Amended Complaint based upon (1.) a failure to allege an enterprise; (2.) a failure to plead a pattern of criminal activity; (3.) a failure to properly plead insurance fraud as a predicate act under RICO; (4.) a failure to plead facts that identified each defendants' acts; (4.) a failure of Tower Hill to allege direct injury; and (5.) Counter defendants had no duty to disclose profit margin, so no fraud and therefore no reliance for RICO purposes. The motion to dismiss the Second Amended Complaint was denied by order dated June 1, 2021, for many of the same reasons enumerated below.

TOWER HILL GROUP and INDIAN HARBOR INSURANCE COMPANY's motions are virtually identical in content and will be discussed together. Throughout the argument on the motions to dismiss, all the Counter-defendants repeatedly pointed to facts outside the four corners of the Complaint. While this may be appropriate for a motion for summary judgment, it is not appropriate for consideration here.

CONCLUSIONS OF LAW

I. Stealth Bad Faith Claims Tower Hill Group Indian Harbor Insurance Company - All Counts

Although these Counter-defendants' arguments describe the Counterclaim as "stealth bad faith claims" the core of the argument is that the Counterclaims are preempted by the bad faith

statute. This idea is unsupported by the case law and Florida Statutes themselves. The Florida RICO statute does not impede the operation of the Florida Bad Faith Statute. As plead, the claims based upon 626.9541state a cause of action either as bad faith claims under the statute or common law tort based upon a violation of the statute.

A. The Bad Faith Statute Does Not Preempt RICO Claims

The United Supreme Court has held a Rico claim not preempted by a state's bad faith statute. See *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999) (quoting *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993)); see also 15 U.S.C. § 1012(b). "RICO is not a law that 'specifically relates to the business of insurance.'" *Forsyth*, 525 U.S. at 307, 119 S.Ct. 710. Here, the state law RICO claims complement the state statutory claims for relief.

The Court finds the case of *Montoya v. PNC Bank*, 94 F. Supp 3d 1293 at 1316 (S.D. Fla 2015) instructive in deciding the motion to dismiss on these grounds. The *Montoya* court found that the lack of a pre-suit notice in a RICO claim did not frustrate the State's insurance regulatory regime. *Montoya* involved allegations of artificially inflated forced placed insurance by mortgage holders.

> Notably, the Florida Legislature made clear that all state common law and statutory remedies were preserved in enacting the above insurance regulations. See Fla. Stat. §§ 624.155(7), 626.9631. This means a plaintiff is free to bring a common law fraud claim challenging conduct prohibited by Florida's insurance regulations. Such a plaintiff may also seek punitive damages. See Fla. Stat. § 768.72. Accordingly, a RICO claim—even with its treble damages provision—challenging conduct the Florida Legislature has prohibited will not frustrate Florida's interest in regulating that conduct but will, in fact, further that interest.
>
> *Montoya,* at 1316.

The Tower Hill Group Counter-Defendants have provided no binding or persuasive precedent that shows this Court that the bad faith statute preempts the relevant statutory claims. This Court finds that the RICO Claims complemented the rights of insureds. There is no case law

cited by the Tower Hill Group or Indian Harbor that contradicts this proposition. The Motion to Dismiss based upon preemption of the Florida RICO statute is denied.

B. Tower Hill Group and Indian Harbor Insurance Company - Counts III-VIII Violation of Unfair Insurance Trade Practice Practices Act Fla Stat §626. 9541

These Counter-defendants argue that Counts III through VIII should be dismissed because (a) the Counterclaim fails to plead the appropriate predicate for a bad faith claim and (b.) no private cause of action otherwise exists that support these counts. This Court finds that neither of these arguments is persuasive at the motion to dismiss phase.

1. The Claims Under UITPA are Ripe as Plead

These Counter-Defendants Argue that these claims are not ripe in citing to *National Fire Marine v. Infinity Biscayne* 316 so.3d 766 (Fla 3d DCA 2021). However, the Counterclaim at paragraphs 166 to 169 states sixty-day notice was given, and voluntary payment was made. As such, the claims are limited. Only those claims where payment has occurred after the sixty-day notice was sent and the claims as plead are ripe for determination. While the documentation of each claim is not attached to the Counterclaim, no documentation of each claim is attached to the Second Amended Complaint.

2. A Private Cause of Action Exists under 626.9541

The Statutory framework of 626.155(1)(a) provides a private cause of action for violations of 626.9541 (1) (i)(o) or (x). Counts III-VIII fall within provision "i." These allegations appear in paragraphs 160-169 in Count III and are repeated throughout the counts. The Counterclaim cites explicitly to this statutory provision. While these Counter defendants claim that conditions precedent were not met, as stated above, it is plead that the appropriate notices were sent and conditions otherwise met.

3. Counts III through VIII state a cause of action as a Tort or Common Law Restitution Action based upon the Statutory Violations

The defendants cite the case of *Keehn v. Carolina Casualty Insurance Co.*, 758 F.2d 1522 (11th Cir.1985) for the proposition that there is no private cause of action. This case appears distinguishable from the case at bar as the Counts III-VIII, which can fairly be read as stating a claim for a tort based upon the violation of the statute. In *Davis v. Travelers,* 800 F.22d 1050, 1053 (11th Cir. 1986), which found that a tort-based upon statutory violations would not be precluded by *Keene*:

> Even were an action to be predicated on a properly alleged breach of statute tort claim, the holding in *Keehn v. Carolina Casualty Insurance Co.*, 758 F.2d 1522 (11th Cir.1985) would not control. Keehn held that (1) the UITPA created no implied private right of action on the statute itself; and (2) no common law breach of contract claim based on alleged violations of the UITPA existed as, in incorporating the UITPA, the insurance contract thus incorporated the UITPA remedy provisions which provided for administrative remedies only for violation of the act. 758 F.2d at 1524–25. A breach of statute tort claim was not at issue in *Keehn.*

Likewise, *Signor v. v. Safeco, of Illinois,* 20220 WL 6271169 (S.D. Fla 2020) involved a breach of contract claim and a claim for declaratory relief. *3-4

> In addition, Defendant has not demonstrated that the Florida legislature intended to preempt declaratory judgment or other common law or civil claims by not providing a separate private cause of action for all UITPA provisions. Florida's UITPA specifies that the statute does replace or abrogate the civil and common law rights that exist outside of the statute. *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 887–88 (Fla. 4th DCA. 2007) (citing Fla. Stat. § 624.155). Federal and State courts in Florida have held that other civil and common law causes of action could be pursued even when they necessarily required an adjudication of a plaintiff's rights under Florida's UITPA.

See also: *Buell v. Direct General* 2007 WL 1296347.

The claims made under UITPA state a cause of action under section 626.9541(1) (i) and/or sound in a statutory tort. Either way, the motion to dismiss is denied on this ground.

C. Tower Hill Group, Indian Harbor Insurance Company, Bluegrass Insurance Management Counts I-II Violation of Florida RICO

1. Pleading Reliance is Not Required to Sustain a RICO action.

The Counter-defendants argue that the Counter-Plaintiffs lack standing to bring a RICO cause of action. Counter-defendants rely heavily on a lack of reliance argument on the alleged predicate acts. See *Florida Evergreen* 336 F.Supp.2d 1239, (S. D. Fla 2004). However, subsequent case law form the United States Supreme Court has found that no reliance is required for a statutory RICO action *Bridge v. Phoenix Bond & Indem. Co*. 553 US 639, 661 (2008). The *Evergreene* decision occurred four years prior to *Bridge*. Further in *Montoya*, 94 F. Supp 3d 193, 1308 (S.D. Fla 2015), the Court acknowledges the *Bridge* ruling and adopts the notion that reliance is unnecessary to establish proximate cause under RICO. Therefore, dismissing the Complaint for failing to plead reliance sufficiently is not warranted.

2. Direct Injury is Sufficiently Plead.

These Counter Defendants argue that the insureds, not SFR, were directly injured. The Pleading contains sufficient allegations of direct injury based upon the predicate acts at ¶¶ 2,5, 27, 28, 36, and 112-124.

In *Funding Metrics LLC, v. Decision One Debt Relief LLC* 2019 WL 3759111, *2 (S.D. Fla 2019) which discusses the *Anza* factors for direct injury under RICO. The Counterclaim alleges a scheme was an attempt to disrupt the assignment of claims from Tower Hill's Insured to SFR. As the assignee, SFR is the only party who can recover damages and there is no danger of duplicate recovery. Further as assignee, SFR is the immediate victim of the alleged RICO violation that can be expected to vindicate the laws by pursuing their own claims. Last, the damages, if any, are ascertainable in the difference from the amount paid by these Counter-Defendants versus a proper

value for the work. Overall, the Court finds that the *Anza* factors are met by the facts contained in the Counterclaim.

II. US Forensics Motion to Dismiss Counts I-II

This Counter defendant files a motion to dismiss on similar grounds as the other counter-defendants. Specifically, the issues of reliance, ripeness, and direct damages are addressed above and equally applicable here. As to direct damage, the Court would add that *Cypress/ Spanish v. Professional* 814 F. Supp 2d 698 712-713(N.D. Tex. 2011) is instructive. USF'S motion to dismiss based upon these grounds is denied. The Court notes that many of USF's arguments are more appropriate for a Motion for Summary Judgment, not a Motion to Dismiss. For instance, on pages six to seven of the motion, USF avers that 'Rather it is undisputed that all such decisions were made solely by Tower Hill." This conclusion appears nowhere in the Complaint and is contradicted by what is plead at ¶¶80-90 of the Counterclaim. USF asks this Court to make a ruling by relying on facts outside the four corners of the Complaint that are indeed disputed by the allegations of the Counterclaim. The specific allegations of Tower Hill's participation in the scheme are found at ¶¶80-90 of the Counterclaim.

1. Particularity and Proximate Cause

USF argues that the Motion to Dismiss the Counterclaim against them should be granted because it lacks particularity. In addition, the Counterclaim alleges that the reports generated by USF are in the possession of the Plaintiff and the Counter plaintiff does not have access to them this is plead at paragraphs 35 and 38 of the Counterclaim and that information has been concealed as privileged.

This represents the chicken and egg problem of litigating cases involving insurance claim files. Until the claims are sustained, the information is objected to as privileged. Nevertheless, USF asks for particularity to sustain the claims. The Court finds that the *Morehouse* decision is instructive. *Hill v. Morehouse Med. Assocs., Inc.,* No. 02-14429, 2003 WL 22019936 *3 (11th Cir. 2003)(Particularity requirement relaxed where specific information is in the hands of the opposing party.)

USF argues that there is no proximate cause, but that argument is not appropriate for a motion to dismiss. The Court cites to the *Montoya* opinion at 1308-1309. *Montoya* explains that in cases, whereas here, involving mail and wire fraud, SFR need only plead the use of the mail in furtherance of a scheme to defraud. Here it is alleged that USF engineering reports were sent to Tower Hill in order to undervalue or deny claims that were assigned to SFR fraudulently. USF'S motion on this basis is denied.

2. Enterprise, Operated and Managed, and Pattern of Racketeering

USF claims that SFR fails to allege facts sufficient to establish an enterprise. SFR establishes an association in fact, enterprise in the Counterclaim. The *Boyle* Court found that an enterprise is simply a continuing unit that functions with a common purpose" *Boyle v. United States*, 129 S. Ct. 2237, 2245 (2009). SFRs allegations of USF working in concert with the insurance companies to devalue claims satisfy this requirement. See Counterclaim at ¶¶80-90 and 112.

Next, USF claims the Counterclaim does not meet the RICO requirement that USF Operated/managed the enterprise or, in other words, that it made important decisions. SFR cites to *Handen v. Lemaire, 112 F.3d 1339, 1349 (8th Cir. 1997).* At para 84 of the Counterclaim, it is alleged that the fraudulent engineering reports generated by USF were designed to reach a certain result and were not based upon sound engineering methodology. Like the lawyers in *Handeen v.*

Lemaire, 112 F.3d 1339, 1349 (8th Cir. 1997) who tried to hide profits from the US trustee. USF steered the process to disguise the extent of the damage on behalf of Tower Hill. These facts demonstrate sufficient operational control to satisfy the requirements of RICO.

USF argues that SFR failed to allege a pattern of racketeering. The Counterclaim alleges at paragraph 113 that this false reporting occurred for 2017 through 2021. Once again, the *Cypress* case is instructive *Cypress,* 814 F. Supp 2d at 714. In Cypress, it was alleged that the fraudulent reporting was sent over the project's life, and the Court found that allegation satisfied the RICO statute. As such, SFR has satisfied pleading the racketeering elements of RICO.

The respective motions of all of the Counter-defendts are denied, and they shall file an answer within twenty days of the date of this order.

DONE AND ORDERED in Stuart, Martin County, Florida, this 10th day of January 2022, ~~2021~~.

Honorable Gary L. Sweet
CIRCUIT COURT JUDGE

Copies Furnished To:

Michael J. Pike, Esq.
Daniel Lustig, Esq.
Talina Bidwell, Esq.
Tim O'Neill, Esq.
Andrew J. Boloy, Esq.
Pike & Lustig, LLP
1209 N. Olive Ave.
West Palm Beach, FL 33401
Telephone: (561) 855-7585
Facsimile: (561) 855-7710
pleadings@pikelustig.com
Counsel for Defendants and Counter-Plaintiff

Michael Monteverde, Esq.
Kali Lauren M. Sinclair, Esq.
Zinober Diani & Monteverde, P.A.
2400 West Cypress Creek Rd., Suite 420
Fort Lauderdale, Florida 33309
Telephone: (954) 256-9288
Facsimile: (727) 498-8902
michael@zinoberdiana.com
kali@zinoberdiana.com
adie@zinoberdiana.com
Counsel for Plaintiffs; Bluegrass Insurance Management, LLC; Tower Hill Insurance Group; and Indian Harbor Insurance Company

Lloyd R. Schwed, Esq.
Bailey E. Fore, Esq.
Schwed Kahle & Kress, P.A.
11410 North Jog Road, Suite 100
Palm Beach Gardens, FL 33418
Telephone: (561) 694-0070
Facsimile: (561) 694-0057
Lschwed@schwedpa.com
baileyfore@schwedpa.com
Co-Counsel for US Forensic, LLC

Larry E. Demmons, Esq.
The Demmons Law Firm, LLC
3201 Ridgelake Drive
Metairie, Louisiana 70002
Telephone: (504) 296-6417
Facsimile: (504) 335-0749
larry@demmonslaw.com
Co-Counsel for U.S. Forensic, LLC (Admitted Pro Hac Vice)