IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

OFFICE DEPOT, INC., Plaintiff, v. MARSH & MCLENNAN COMPANIES, INC., MARSH, INC., MARSH USA, INC., AMERICAN INTERNATIONAL GROUP, INC., AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO., AMERICAN HOME ASSURANCE CO., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, THE ST. PAUL TRAVELERS COMPANIES, INC., DISCOVER REINSURANCE CO., ST. PAUL FIRE & MARINE INSURANCE CO., TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, ACE AMERICAN INSURANCE CO., ZURICH AMERICAN INSURANCE CO., and AMERICAN GUARANTEE AND LIABILITY INSURANCE CO., Defendants.	CASE NO. 50 2005 CA 004396 XXXX MB Honorable Judge Kenneth Stern

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE came before the Court for hearing on the "Marsh Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint," "Defendants' Consolidated Motion to Dismiss or Strike Second Amended Complaint," and "The St. Paul Travelers Defendants' Motion to Dismiss Plaintiff Office Depot, Inc.'s Second Amended Complaint." The Court having reviewed

the file and the law, having reviewed the transcript of the hearing on said Motions and having reviewed and considered the arguments and the law as set forth in the parties' respective submissions and at the said hearing, and in their proposed Orders, and being duly apprised, the Court concludes that the Motions as a matter of law should be, and hereby are, denied as to the entire Second Amended Complaint, for the reasons set forth herein.

The Court initially intended to do its own Order, notwithstanding the thoroughness of the proposed Order submitted by Plaintiff's counsel. However, except for the few instances where this Court has inserted additional language regarding Counts II and III, this Court deems it unnecessary otherwise to amend the wording of the Plaintiff's proposed Order, and, accordingly, this Order is essentially as proposed by Plaintiff's counsel.

It is hereby Adjudged and Ordered, as follows:

I. INTRODUCTION

This is an action brought by plaintiff Office Depot, Inc. ("Office Depot" or "Plaintiff") against Marsh USA, Inc., its parent corporation, Marsh & McLennan Companies, Inc. and a "sister" company, Marsh, Inc. (collectively "Marsh"), and the following named insurance companies: American International Group, Inc.; American International Specialty Lines Insurance Co.; American Home Assurance Co.; National Union Fire Insurance Company of Pittsburgh, Pa; The St. Paul Travelers Companies, Inc.; Discover Reinsurance Co.; St. Paul Fire & Marine Insurance Co.; Travelers Casualty & Surety Company of America; Ace American Insurance Co.; Zurich American Insurance Co.; and American Guarantee and Liability Insurance Co. (collectively the "Insurer Defendants").

Office Depot's Second Amended Complaint (hereinafter "Complaint" or "Compl.") contains 163 paragraphs alleging 13 claims for relief and seeks monetary damages and other relief. In general, as alleged in paragraph 2 of the Complaint, Office Depot contends that Marsh acted in concert with the Insurer Defendants to manipulate the "market for insurance by creating and executing an elaborate bid rigging scheme." Office Depot contends that "Defendants created the illusion of a competitive market for insurance when, in fact, the insurance products were selected, priced and placed through collusive conduct." (*Id.*) As a result, Office Depot alleges that it purchased insurance "at prices in excess of what should have been charged in a fair and efficient marketplace," and that the Insurer Defendants received "increased insurance premiums in excess of what should have been charged in a competitive marketplace." (*Id.*) Office Depot also contends that Defendants' conduct deprived Office Depot of "independent, non-biased insurance brokerage services, as well as free and open competition in the market for insurance," alleging in particular that Marsh "received and retained kickbacks for insurance placements" that created an "undisclosed conflict of interest that adversely impacted Marsh's objectivity ... thereby breaching the fiduciary obligations owed by Marsh to Office Depot." (*Id.* ¶ 4).

The "Marsh Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint" addresses the specific counts of the Complaint directed to the Marsh Defendants (Counts 1- 2, 4, 6) and incorporates generally "Defendants' Consolidated Motion to Dismiss or Strike Second Amended Complaint," which was filed by the Insurer Defendants and which seeks dismissal of all of the remaining counts of the Complaint. While joining in the "Consolidated Motion" filed by other Insurer Defendants, the St. Paul Travelers Defendants (The St. Paul Travelers

Companies, Inc.; Discover Reinsurance Co.; St. Paul Fire & Marine Insurance Co.; and Travelers Casualty & Surety Company of America) have filed "The St. Paul Travelers Defendants' Motion to Dismiss Plaintiff Office Depot, Inc.'s Second Amended Complaint," seeking dismissal of the claims alleged against them individually. All Defendants contend that the various allegations of the Complaint are conclusory, too general, and do not state facts with sufficient "particularity" to establish causes of action under Florida common and statutory law. As a result, it is appropriate at the outset to discuss generally the standards for evaluating the sufficiency of a complaint in ruling on motions to dismiss under the Florida Rules of Civil Procedure.

II. STANDARD OF REVIEW

There is no dispute between the parties that the general rules of pleading set forth in Fla. R. Civ. Proc. 1.110(b) require a complaint to contain a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief" and provide that "[r]elief in the alternative or of several different types may be demanded." According to Rule 1.110(g), a "pleader may set up in the same action as many claims or causes of action ... as the pleader has, and claims for relief may be stated in the alternative .... When 2 or more statements are made in the alternative and 1 of them ... would be sufficient, the pleading is not made insufficient by the insufficiency of 1 or more of the alternative statements." A party may set up multiple claims, "regardless of consistency and whether based on legal or equitable grounds or both." *Id.*

It is equally well-settled, as ruled by the Supreme Court of Florida, that "for purposes of a motion to dismiss for failure to state a cause of action, the movant admits as true all material facts well-pleaded and all reasonable inferences arising from those facts." *Perry v. Cosgrove*,

464 So. 2d 664, 665 (Fla. 2nd DCA 1985), *citing Orlando Sports Stadium, Inc. v. State*, 262 So.2d 881 (Fla. 1972). As ruled by the Fourth District Court of Appeals, in considering a motion to dismiss based on the sufficiency of a complaint, "it is not the court's duty to speculate as to what the true facts may be or what facts may be ultimately proved at the trial of the case. The question of sufficiency of the evidence ... is wholly irrelevant and immaterial in reaching a decision on a motion to dismiss...." *Nantell v. Lim-Wick. Constr. Co.*, 228 So. 2d 634, 637 (Fla. 4th DCA 1969) (reversing dismissal of fraud cause of action). *See Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35 (Fla. 4th DCA 2004).

There may be some disagreement regarding the continued vitality of the so-called "no set of facts" statement commonly cited by the federal courts and by numerous Florida courts, including the Fourth District Court of Appeals, *Almarante v. Art Institute of Ft. Lauderdale,* 921 So. 2d 703, 705 (Fla. 4th DCA 2006), in considering motions to dismiss; but there can be little disagreement that the "ultimate facts" necessary to set forth a cause of action are not the same as the "evidentiary facts" necessary to prove that cause of action by a preponderance of the evidence at trial. *See, e.g., Vantage View, Inc. v. Bali East Dev. Corp.*, 421 So. 2d 728, 731 (Fla. 4th DCA 1982) (ultimate facts are "found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other...."). Although contained in an opinion of three justices who dissented from a per curiam ruling discharging a petition for writ of certiorari as having been improperly granted, the following statement regarding "ultimate facts" is instructive:

> [C]ases are proved at trial by evidentiary facts, from which conclusions of fact or ultimate facts may be reasoned, and ... application of legal principles to these

> conclusions of fact or ultimate facts as they are more commonly called in Florida R.C.P. 1.110(b) and case law, yields conclusions of law, which are dispositive of the issues of the cause. In affirmative pleadings, it is conclusions of fact, or ultimate facts, which must be pleaded, expressly or inferentially. Conclusions of law may be drawn from these pleadings to determine whether a cause of action has been stated. It is not proper to dismiss a complaint on grounds the allegations are only 'conclusions of the pleader' unless these are conclusions of law unsupported by expressed or inferred allegations of ultimate facts or conclusions of fact.

Warner v. Florida Jai Alai, Inc., 235 So. 2d 294, 297 (Fla. 1970) (Adkins, J. dissenting).

Defendants contend that Office Depot's Complaint does not properly allege ultimate facts and that its allegations are too non-specific and conclusory because the Complaint does not set forth any specific facts showing that any of the bids or quotations on Office Depot's individual insurance policies were rigged, inflated, or otherwise illegal under Florida law. Office Depot contends, however, that it has pled sufficient ultimate facts to establish a basis for relief and that additional facts necessary to provide specific evidence about Defendants' allegedly illegal scheme have been concealed and are exclusively in Defendants' possession, custody or control. Office Depot further alleges that Marsh has failed to produce its books and records, as required by their contract, and that "Marsh has, acting in concert with the Insurer Defendants, affirmatively and fraudulently concealed its unlawful scheme, course of conduct, and conspiracy from Office Depot." (Compl. ¶ 50; s*ee also* ¶¶ 9, 36, 43, 44(b)-(e)). Accordingly, Office Depot contends that it has pled its causes of action with such particularity as the "circumstances permit." Fla. R. Civ. P. 1.120(b). Office Depot also relies in part on the following proposition:

> [W]here the subject matter of the fraud is uniquely within the adverse party's knowledge or control, allegations of fraud based upon information and belief may be acceptable. *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989). Were there no relaxed standard in such circumstances, sophisticated corporate defendants would often be able to successfully conceal the facts

> constituting an alleged fraud. *Craftmatic*, 890 F.2d at 628. Where this is the case, a complaint should allege that the information is in the defendant's control and the allegations of fraud should accompanied by a statement of facts upon which they are based. *Id. See also, Segal v. Gordon,* 467 F.2d 602, 608 (2nd Cir. 1972); *Leisure Founders,* 833 F. Supp. at 1574.

Hekker v. Indian Group, Inc., No. 95-681-CIV-J-16, 1996 WL 578335, at *4 (N.D. Fla. Aug. 19, 1996). *Accord Adelman v. M&S Welding Shop*, 105 So. 2d 802 804 (Fla. 3d DCA 1958) ("[W]hen the matter in reference to which the pleading is claimed to be uncertain is peculiarly within the knowledge of the party attacking it[,] neither party is required to state with particularity matters which are wholly within the knowledge of the adverse party.").

With these pleading principles in mind, the Court now turns to the various motions filed by Defendants, which will be considered in the order in which they were presented during oral argument on July 9, 2007.

III. MOTION TO DISMISS OF THE MARSH DEFENDANTS (COUNTS I, II, IV, VI)

A. The Breach of Contract Claim (Count I)

Office Depot alleges that Marsh served as its principal retail insurance broker for almost six years, from August 1999 through May 2005. (Compl. ¶ 32). For two years of this period, from August 30, 2000 to August 30, 2002, a written contract was in force, a copy of which is attached to the Complaint as Exhibit "A." (*Id.*) In its first claim for relief, Office Depot alleges that Marsh breached several of the paragraphs of this Contract, including the "duties of broker" provisions in paragraph 2; the "qualifications" provisions in paragraph 5 requiring Marsh to "perform the services required ... in a professional, efficient, trustworthy and businesslike manner"; and the provisions of paragraph 13 allowing Office Depot to conduct an audit of "all records and accounts of any insurance policies placed." (Compl. ¶¶ 63, 64, 66 and Exhibit "A").

Marsh has not moved to dismiss any of these allegations, but focuses exclusively on Office Depot's allegation that Marsh breached paragraph 7 of the Contract by "failing to disclose and to credit against the ... fees charged to Office Depot any remunerations or commissions received by Marsh from the insurance carriers who provided policies of insurance to Office Depot." (Compl. ¶ 65). Office Depot also relies on the clause of paragraph 7 requiring Marsh to "disclose any remuneration, including commission, received from the Insurers regarding the insurance coverages specified in Appendix A, and *all such remuneration ... will be credited against the annual fee*." (emphasis added).

Office Depot contends that the portion of "contingent commissions" that Marsh received that are allocable to Office Depot's premiums for the Appendix A insurance coverages should have been credited back to Office Depot pursuant to paragraph 7 of the Contract. Marsh in turn contends that the contingent commissions it received are exempted from being credited back to Office Depot by the following contract language:

> Such remuneration does not include payments that BROKER may receive, in accordance with the custom in its industry, under arrangements with certain insurers which provide for payments based upon such factors as the overall book of business placed by BROKER and its affiliates, the performance of that book or the aggregate commissions paid for that book.

Office Depot contends that even if this language should be construed as referring to contingent commissions, it does not disclose that the Insurer Defendants made such payments to Marsh as kickbacks or bribes for steering Office Depot's insurance business to preferred carriers or in consideration for bid-rigging or other improper market allocation activities. Pointing out that the terminology "contingent commission" is not referenced anywhere in the Contract, Office Depot also complains that Marsh has failed to comply with the next sentence of paragraph 7,

which requires Marsh to "identify where such remuneration is attributable to CLIENT if such information is available." According to Office Depot, the "custom in its industry" language should not be construed to authorize Marsh to receive secret, undisclosed commissions contingent upon steering insurance business to favored insurers or as kickbacks for rigging bids. Even assuming that the guidance provided by the Supreme Court in *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005) regarding interpretation of insurance contracts should be limited to insurance policies rather than broker-policyholder contracts, this Court is reluctant to construe the language of paragraph 7 to bar Office Depot's claim as a matter of law at this stage in the case. *Torwest, Inc. v. Killilea*, 942 So. 2d 1019, 1020-21 (Fla. 4th DCA 2006) (reversing dismissal and remanding "to allow the parties to present parol and extrinsic evidence" as to their intent); *accord Liss v. Liss*, 937 So. 2d 760, 763 (Fla. 4th DCA 2007).

Moreover, the Florida courts have recognized a cause of action in contract for breach of the implied covenant of good faith and fair dealing. *See, e.g., Allstate Ins. Co. v. Regar,* 942 So. 2d 969, 972 (Fla. 2nd DCA 2006); *N. Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325 (Fla. 4th DCA 1996); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 760 (Fla. 1st DCA 1994). Some Florida courts have concluded that breach of this duty also provides a basis for relief in tort. *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 266-67 (Fla. 5th DCA 1987) (recognizing "a cause of action in tort for breach of an implied covenant of good faith and fair dealing."). Whereas the majority of the district courts of appeal apparently construe such a claim as contract-related, Office Depot's Complaint alleging such a claim (Compl. ¶ 54) also warrants denial of Marsh's motion to dismiss Count I. Accordingly, because Marsh has not

moved to dismiss Office Depot's other claims for breach of contract alleged in Count I of the Complaint, and because it is not appropriate to construe the intention of the parties regarding the meaning of paragraph 7 as a matter of law at this stage of the case, Marsh's motion to dismiss Count I is hereby denied.

B. The Common Law Tort Claims (Counts II, IV and VI)

In addition to numerous allegations of fraudulent concealment, Office Depot alleged facts, derived from the public record of numerous guilty pleas, showing that Marsh employees and employees of Insurer Defendants who serviced Office Depot's account admitted participating in an illegal scheme to defraud policyholders and to rig bids for insurance coverage. (Compl. ¶¶ 5, 6). For example, in subparagraphs (a)-(c) of paragraph 46, Office Depot alleges that two Marsh senior vice presidents and a Marsh managing director who were "actively engaged in placing Office Depot's casualty insurance" pled guilty to participating in bid rigging and to engaging in "deception and intentionally causing non-competitive quotes to be conveyed to Marsh clients under false and fraudulent pretenses."

The Complaint also references guilty pleas by AIG managers, including an underwriter who signed the 2003 Confirmation of Renewal "for commercial liability umbrella coverage to Office Depot," as well as executives of ACE and Zurich, who admitted participating with Marsh in a scheme to "control the market and protect incumbent insurance companies by the submission of non-competitive quotes as specified by Marsh." (Compl. ¶ 46(c)-(e) and (g)-(i)). Office Depot also alleges that Marsh, acting in concert with the other Defendants, engaged in fraudulent conduct by failing to disclose the precise nature of the commissions that Marsh received,

including commissions based on Office Depot's individual account. (Compl. ¶¶ 2, 9, 44(a) and (b), 55).[1] In paragraphs 39-42 of the Complaint, Office Depot sets forth specific amounts of contingent commissions Marsh received from AIG, St. Paul Travelers, ACE, and Zurich as a result of premiums paid by Office Depot. In paragraph 45, consistent with the allegations of concealment mentioned above, Office Depot alleges that "[t]here is very likely other evidence of Marsh's and the Insurer Defendants' wrongful and fraudulent conduct with respect to Office Depot, which is exclusively in Defendants' possession, custody, or control." (*See also* Compl. ¶ 43). These allegations, when coupled with other specific allegations in the fraud and breach of fiduciary duty Counts (Compl. ¶¶ 76-87), state viable causes of actions under Florida law.

In addition to arguing that the facts, as pled, do not show actionable misconduct, Marsh, joined by the Insurer Defendants, also contends that all of Office Depot's tort causes of actions, including its claims for breach of fiduciary duty, fraud and negligent misrepresentation, must be dismissed under Florida's economic loss rule. Marsh relies upon the proposition that "[t]he prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004) (hereinafter *INA)*. As ruled by the *INA* court, however, other, well-recognized causes of action for tortious misconduct can still be pled,

[1] The memorandum of Davis Polk & Wardwell, dated January 31, 2005, attached as Exhibit B to the Complaint, describes the mechanisms of bid rigging and "steering" of business to preferred carriers that Marsh employed, as well as the fact that information about "B quotes," "accommodation quotes" and steering was not "shared with clients." *Id.* at p. 8. The fact that the law firm, as noted at the outset of the memorandum, investigated activities at Marsh & McLennan Companies, Inc. and Marsh, Inc. is supportive of Office Depot's allegations that these companies conspired with Marsh USA, Inc, to commit the acts complained of in the Complaint.

even when there is a contract in place between the plaintiff and the alleged tort-feasor. Thus, as explained in *INA*, the economic loss rule "'has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action.'" *Id.* at 537 (quoting *HTP, Ltd v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996) (recognizing that fraudulent inducement is an "independent tort" not barred by the economic loss rule)). (*See* Compl. ¶ 54 (alleging fraudulent inducement)).

The *INA* court also quoted from a previous ruling holding that the economic loss rule was "'never intended to bar well-established common law causes of action, such as those for neglect in providing professional services.'" *Id.* at 542 (quoting *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999) (holding that a claim for negligence in rendering professional services is not barred by the economic loss rule)). After citing lower court cases, such as *Invo Fla., Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263, 1266 (Fla. 3rd DCA 2000) holding that the economic loss rule did not bar an action for breach of fiduciary duty, the *INA* court stated that "[w]e now agree that the economic loss rule should be expressly limited." 891 So. 2d at 542. In particular, the court reaffirmed previous rulings recognizing "that in cases involving either privity of contract or products liability, the other exceptions to the economic loss rule that we have developed, such as for professional malpractice, fraudulent inducement, and negligent mis-representation, or free standing statutory causes of action, still apply." *Id.* at 543. While the *INA* court did not expressly list breach of fiduciary duty as one of the causes of action that it had previously recognized as an exception to the economic loss rule, the court's opinion does not contain any language disapproving of the *Invo Fla., Inc.* ruling adopting that proposition.

Marsh cites several cases decided after *INA* that apply the economic loss rule to bar fiduciary duty claims, but those cases are distinguishable. For instance in *Granat v. Axa Equitable Life Insurance Co.*, No. 06-21197-CIV, 2006 WL 3826785, at *5 (S.D. Fla. Dec. 27, 2006), the plaintiffs failed to allege that the insurance company had "engaged in the rendering of professional services" to the plaintiffs. In *McMahen Securities Co. L.P. v. F.B. Foods, Inc.*, No. 8:04-CV-1791-T-24, 2006 WL 1822985, at *7 (M.D. Fla. June 29, 2006), the court ruled that by virtue of an express disclaimer of fiduciary capacity, the contract "negates the existence of a fiduciary duty." In *Royal Surplus Lines Insurance Co. v. Coachmen Industries, Inc.*, 184 Fed. Appx. 894 (11th Cir. 2006), the court rejected an insurance company's unprecedented claim *against its policyholder* for breach of fiduciary duty as barred by the economic loss rule. None of these cases considered a policyholder's cause of action against its insurance broker for breach of fiduciary duty. *See, e.g., Nu-Air Mfg. Co. v. Frank B. Hall & Co.*, 822 F.2d 987, 998 (11th Cir. 1987) (applying Florida law) (noting that the fundamental nature of a broker-client "relationship arises from 'trust and confidence conceptually placed in the superior knowledge, skill and judgment of [the broker].'"); *Southtrust Bank v. Export Ins. Servs., Inc.*, 190 F. Supp. 2d 1304, 1308 (M.D. Fla. 2002) ("[a]n insurance broker has a fiduciary relationship with an insured" under Florida law); *Kraft Co., Inc. v. J&H Marsh & McLennan of Fla., Inc.*, No. 2:06-CV-6-FLM-29DNF, 2006 WL 1876995, at *3 (N.D. Fla. July 5, 2006) (fiduciary duty claim against insurance broker consultant is not barred by the economic loss rule). *See also Fla. Auto. Joint Underwriting Ass'n v. Milliman, Inc.*, No. 4:06cv546-WCS, 2007 WL 1341127, *5-*6

(N.D. Fla. May 3, 2007) (breach of fiduciary duty claim against investment advisor is an exception to the economic loss rule, distinguishing *Royal Surplus Lines* and *Granat*).

Defendants maintain that the Second Amended Complaint does not contain allegations sufficient to create a fiduciary relationship. While it is true that not every insurance broker is a fiduciary, the allegations here allege far more than a mere "go between" or "facilitator" relationship. The allegations of the Second Amended Complaint certainly contain a description of the reasons why Plaintiff relied far more heavily on Marsh's advice than if there had been merely an ordinary, arm's length simple broker arrangement. It is alleged that Plaintiff trusted in Marsh to evaluate Plaintiff's needs and to exercise its judgment, not merely to obtain for Plaintiff the coverages it needed from any insurers of Marsh's choosing, but also to do so in a manner which made a priority of saving Plaintiff as much money as could be saved in obtaining those coverages. Moreover, the allegations are that Marsh went to great lengths to describe its expertise in discrete matters beyond price alone, such as working with Plaintiff to learn Plaintiff's special needs and to obtain coverages addressing those discrete needs, to monitor changes and developments in the insurance marketplace, to negotiate with insurers on Plaintiff's behalf with regard to coverages and terms and premiums, *etc.* The text describes a relationship involving far more trust and reliance than a customer normally would repose in a broker, and is sufficient to establish a fiduciary relationship:

> If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.

Gracey v. Eaker, 837 So.2d 348, 352 (Fla. 2002), quoting *Quinn v. Phipps*, 93 Fla. 805, 113 So.

419, 421 (1927).

> A fiduciary relationship may be implied by law, and such relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties." *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002), quoting from *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994).

Office Depot has alleged that Marsh "expressly and impliedly assumed fiduciary duties to Office Depot under Florida law, including the duty of good faith and fair dealing, the duty of full and fair disclosure of all material facts, the duty of loyalty, and the duty of care springing from the parties' relationship." (Compl. ¶ 54). Office Depot further alleges that Marsh was obligated to exercise its fiduciary duties "solely in the interests of Office Depot ... to find the best available coverage at the best price, as well as to exercise good faith and fair dealing, full and fair disclosure, and care and loyalty to the interests of Office Depot." (Compl. ¶ 72).[2] Office Depot asserts that Marsh "breached these duties by acting in its own pecuniary interests in disregard of the interests of Office Depot...." (Compl. ¶ 73). Contrary to Defendants' allegations, Office Depot expressly alleges that the fiduciary duties Marsh assumed "imposed more stringent standards of conduct than those normally arising out of contract, and imposed duties of disclosure exceeding those existing in arms-lengths business transactions." (Compl. ¶ 54).

These allegations, coupled with allegations regarding Marsh's involvement in orchestrating the alleged kickback and bid rigging scheme, set forth a viable cause of action for

[2] Marsh's contention that the "independent contractor" clause of the Contract somehow disclaims Marsh's responsibility as a broker-fiduciary is inconsistent with the language of paragraph 5 of the Contract requiring Marsh to perform its services in a "professional, efficient, trustworthy and businesslike manner," and with applicable Florida law. *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853-54 (Fla. 2003). Unlike the contract in *McMahen Securities Co. v. F.B. Foods, Inc.*, *supra* at 11, which expressly disclaimed any responsibility to act "in any other capacity, including as a fiduciary," 2006 WL 1822985 at *7, nothing in the Marsh-Office Depot Contract disclaims Marsh's status as a fiduciary obligated to act exclusively on Office Depot's behalf.

breach of fiduciary duty. Like Office Depot's claims for fraud, negligent misrepresentation and the statutory claims discussed below, Office Depot's fiduciary duty claims are not barred by the economic loss rule. Office Depot also has set forth ultimate facts with sufficient particularity to state a cause of action for fraud under Florida law. *See, e.g., Nat'l Ventures, Inc. v. Water Glades 300 Condo. Ass'n,* 847 So. 2d 1070, 1074 (Fla. 4th DCA 2003) (""a constructive fraud is deemed to exist where a duty under a ... fiduciary relationship has been abused'"); *Rogers v. Mitzi,* 584 So. 2d 1092 (Fla. 5th DCA 1991) (where duties arising under a confidential relationship have been abused, the breach of fiduciary duty is equivalent to fraud). Accordingly, and for the additional reasons stated below in addressing the arguments of the Insurer Defendants regarding the common law claims alleged against all Defendants, Marsh's Motion to Dismiss is denied in its entirety.

IV. MOTION TO DISMISS OF THE INSURER DEFENDANTS

A. The Statutory Causes of Action (Counts VII, VIII, X and XII)

Defendants contend that Office Depot's statutory claims are barred because those claims are not pled with adequate factual specificity or "particularity"; because the facts, as pled, do not set forth viable causes of action; because some of the claims asserted are exempted from coverage under the Florida Antitrust Act; and because some of the causes of action seek relief exclusively within the purview of the Office of Insurance Regulation and the Department of Financial Services. The Court will address each of these issues in relation to the Counts of the Complaint to which they relate.

1. Restraint of Trade (Count VII)

Count VII of the Complaint asserts a claim under the Florida Antitrust Act, Fla. Stat. § 542.18. Defendants argue that this claim should be dismissed for the following reasons: (1) the claim does not meet the particularity requirements of Rule 1.120(b), (2) the Complaint does not adequately allege a *per se* claim; (3) the Complaint does not adequately allege a "rule of reason" claim, and (4) the claim is barred by the McCarran-Ferguson Act.

(a) Office Depot has adequately pled its Florida Antitrust Claim.

Relying on Fla. Stat. § 542.32, which provides that "due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal statutes," the Insurer Defendants rely on federal authorities addressing motions to dismiss antitrust claims under the Federal Rules of Civil Procedure. The reference to substantive federal law in Fla. Stat. § 542.32 does not, however, displace Florida's "ultimate facts" pleading standard or the normal presumptions applied in considering motions to dismiss under Rule 1.140(b)(6). *Almarante*, 921 So. 2d at 705 ("Motions under rule 1.140(b)(6) should be granted only when the party seeking dismissal has conclusively demonstrated that plaintiff could prove no set of facts whatsoever in support of the cause of action."); *Ingalsbe*, 869 So. 2d at 35 (plaintiff need only allege ultimate facts as to each element of its cause of action).

The federal courts have recognized that "dismissals on the pleadings are particularly disfavored in fact-intensive antitrust cases." *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227, 1235 (11th Cir. 2005). According to the Eleventh Circuit, a motion to dismiss is disfavored "where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-

conspirators." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp. S.A.*, 711 F.2d 989, 995 (11th Cir. 1983).

The elements of a claim under the Florida Antitrust Act are (1) a "contract, combination or conspiracy" which was (2) "in restraint of trade or commerce" in this state and that (3) damaged the plaintiff. *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1300 (M.D. Fla. 2001).

Office Depot alleges that "the Insurer Defendants agreed with Marsh that they would submit noncompetitive bids for the business of some customers, including Office Depot, to guarantee that the incumbent insurance carrier would retain the business of a particular customer seeking to purchase insurance." (Compl. ¶ 97). Office Depot further alleges that "Marsh orchestrated and supervised a scheme among competing insurers, including the Insurer Defendants, to engage in bid rigging. The scheme included the agreement to fix the price that Office Depot paid for commercial lines of insurance by rigging the bids and artificially setting the prices that the Insurer Defendants and other participating insurers submitted to Office Depot." (*Id.* ¶ 108). Office Depot asserts that contingent commissions were paid to encourage Marsh to facilitate the illegal bid rigging conspiracy. (*Id.* ¶ 97).

The Complaint explains how the allegedly illegal scheme was implemented via Marsh's solicitation of noncompetitive bids. Marsh would solicit "A quotes" from incumbent carriers, which guaranteed that the policy was steered to incumbents (regardless of incumbents' ability to quote more favorable terms or premiums), and also would solicit so-called "B quotes" and "C quotes" from carriers who understood that they would not be receiving the particular business

but would be a preferred provider at a later time. (Compl. ¶¶ 101-103). *See* note 1, *supra.* The Complaint sets forth Defendants' acts in furtherance of the conspiracy, as they related specifically to Office Depot's account. (*Id.* ¶ 104(a)-(i)). As pointed out above, several of Defendants' employees, including employees who handled Office Depot's account, have pled guilty to violating the antitrust laws. (*Id.* ¶ 46(a)-(i)).

The Complaint sufficiently alleges the essential elements of a claim under the Florida Antitrust Act. Nothing more is required at this stage, particularly given Office Depot's allegations that the evidence of the scheme is in Defendants' exclusive possession. *See, e.g., United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 881 (11th Cir. 2003) ("Courts typically allow the pleader an extra modicum of leeway where the information supporting the complainant's case is under the exclusive control of the defendant."); *see also In re Vitamins Antitrust Litig.*, No. Misc 99-197 (TFH), 2000 WL 1475705, at *11 (D.D.C. May 9, 2000) (rejecting contention that "plaintiffs must specifically allege acts committed by each defendant to show its involvement in the conspiracy ...").[3]

(b) The Complaint properly alleges a *per se* claim.

Office Depot has alleged a bid-rigging and customer steering scheme, both of which are *per se* unlawful under the Florida Antitrust Act. *Cf. St. Petersburg Yacht Charters, Inc. v.*

[3] The St. Paul Travelers Defendants contend that they should be dismissed because Office Depot has not made allegations against them individually. Under the circumstances alleged, proof that any individual carrier participated in the alleged Marsh bid rigging scheme or otherwise rewarded Marsh by improperly paying contingent commissions for steering Office Depot's business their way is a subject for discovery and is not required at the pleadings stage. Moreover, the Court notes that Office Depot alleges that St. Paul paid Marsh $198,000 in contingent commissions in connection with Office Depot's account. (Compl. ¶40). The motion of St. Paul Travelers to dismiss must succeed or fail on the same basis as the motion filed on behalf of the other Insurer Defendants.

Morgan Yacht, Inc., 457 So. 2d 1028, 1050 (Fla. 2nd DCA 1984) (per se violations include price fixing, customer allocations, and geographical market divisions). "Conspiracies between firms to submit collusive, noncompetitive, rigged bids are per se violations [of the antitrust laws]. ... An agreement that one company would not submit a bid lower than another is price fixing of the simplest kind and is a per se violation." *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (internal citations omitted).

Defendants do not deny that bid-rigging can be a per se violation of the antitrust laws. Rather, Defendants argue that Office Depot has not alleged sufficient facts to show actual bid-rigging on Office Depot's insurance program because Office Depot has not specifically identified a rigged bid on any particular policy that it purchased. As explained above, however, the Court has determined that the Complaint sets forth sufficient, ultimate facts to establish a pattern of bid-rigging generally; and Office Depot specifically alleges that this illegal conduct adversely affected its own insurance program. Proof showing that any specific quotation or bid was in fact rigged is a matter for discovery.

Defendants further argue that the Complaint merely alleges a "vertical" conspiracy as between Marsh and each of the Insurer Defendants – one that should be evaluated under the rule of reason – and does not adequately allege a per se "horizontal" price-fixing conspiracy. Office Depot argues that it has adequately alleged a horizontal price-fixing conspiracy orchestrated by Marsh as the middleman. *See, e.g., United States v. All Star Indus.*, 962 F.2d 465, 473 (5th Cir. 1992) ("defendants cannot escape the per se rule simply because their conspiracy depended upon the participation of a 'middle-man', even if that middleman conceptualized the conspiracy,

orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty").[4] In *All Star Industries*, defendants argued that plaintiff failed to prove a horizontal conspiracy because each defendant, individually, dealt only with the middleman and not with each other. *Id.* at 421. The court found that a horizontal conspiracy and a per se violation of the antitrust laws had been shown because the defendants had acted through the middleman who "was [the defendants'] conduit for passing their inflated, non-competitive specialty steel bids onto unsuspecting end users." *Id.* at 473. Similarly, the Court finds that Office Depot has properly stated a per se violation of the Florida Antitrust Act in this case.

(c) The Complaint properly alleges a rule of reason claim.

A "rule of reason" claim must allege: (1) the persons or entities to the agreement intended to harm or restrain competition; (2) an actual injury to competition; and (3) how the restraint is unreasonable, as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint. *Parts Depot v. Fla. Auto Supply, Inc.*, 669 So.2d 321, 326 (Fla. 4th DCA 1996). The plaintiff must also allege and prove that the defendant's conduct had a significant anticompetitive effect in a relevant market. *De Long Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1507 (11th Cir. 1989).

Defendants argue that Office Depot has not adequately alleged a relevant market. The Complaint alleges "one or more relevant markets for the sale of commercial insurance," and further alleges that Defendants have the ability to affect price in that market. (Compl. ¶ 110).

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[4] Office Depot's allegations showing that the Insurer Defendants engaged in a horizontal conspiracy, orchestrated by Marsh as the middleman, distinguishes Office Depot's claim from the claims alleged in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Twombly*, the claims were based solely on allegations of "parallel conduct, not on any independent allegation of actual agreement among the [defendants]" to engage in anti-competitive conduct." *Id.* at 1960. There was also no middleman involved, and the case did not involve allegations of bid rigging.

The Complaint describes the specific lines of insurance that Office Depot purchased (Compl. ¶¶ 39-42), including excess casualty insurance, and details various guilty pleas, including a plea by a Marsh Managing Director, who stated that the purpose of the scheme "was to maximize Marsh's profits by controlling the market. . . ." (*Id.* ¶ 46(c)). These allegations properly allege a relevant market at this stage of the litigation. *See Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2nd Cir. 2001) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market."); *Griffiths v. Blue Cross & Blue Shield*, 147 F. Supp. 2d 1203, 1213 (N.D. Ala. 2001) ("even in cases in which the relevant market must be shown, such is essentially a question of fact, which may be properly developed and refined through the discovery process.") (internal citation omitted).

(d) The McCarran-Ferguson Act does not bar Office Depot's claim.

The McCarran-Ferguson Act exempts the "business of insurance" from the federal antitrust laws if state law regulates such activity and the complained of activity does not constitute a "boycott." 15 U.S.C. §§ 1011, 1012, 1013(b). Section 542.20, Florida statutes, provides: "Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." Defendants argue that Office Depot's claims implicate the "business of insurance" within the meaning of the McFarran-Ferguson Act, and that, by virtue of Section 542.20, which they contend incorporates McCarran-Ferguson, such conduct is not actionable under the Florida Antitrust Act. Application of the McCarran Ferguson exemption depends on whether or not "a particular practice is part of the 'business of insurance' exempted from the antitrust laws...." *Union Labor Life Ins. Co. v.*

Pireno, 458 U.S. 119, 120 (1982). McCarran Ferguson exempts the "business of insurance" not the "business of insurance companies." *Id.* at 132. Further, "the Act's language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.'" *Id.* at 133.

In *Pireno,* the Supreme Court ruled that the practice at issue had to satisfy each of the following criteria to qualify for the exemption: "*[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry...." *Id.* (emphasis in original). As ruled by the Supreme Court, a wide variety of anti-competitive conduct "would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do." *Group Life & Health Ins. Co v. Royal Drug Co.,* 440 U.S. 205, 233 (1979) (allowing antitrust claim for fixing prices of prescription drugs sold to policyholders) (citation omitted). The Court perceives that there is a difference between engaging in the "business of insurance," as defined by the United States Supreme Court, and engaging in other activities that affect policyholders but have nothing whatsoever to do with "spreading a policyholder's risk." The Court agrees with Office Depot's arguments that the bid rigging practices alleged are not an "integral part of the policy relationship" between the insurers and their insured and do not fit within either of the first two prongs of the Supreme Court's "business of insurance" test.[5] *See also In re Ins. Brokerage*

[5] Marsh contends that because brokers are included in the definition of "person" in Fla. Stat. § 624.04, it engages in the "business of insurance" for purposes of the exemption. However, as noted above, the fact that someone is

Antitrust Litig., MDL No. 1663, 2006 WL 2850607, at *9-*10 (D.N.J. Oct. 3, 2006) (rejecting McCarran-Ferguson defense); *Autry v. NW Premium Servs., Inc.*, 144 F.3d 1037, 1044 (7th Cir. 1998) (insurance premium financing agreements between insurance companies and insureds are ancillary to the insurance relationship, and "[t]he fact that the money borrowed ultimately pays insurance premiums is incidental.").[6] Because the practices alleged do not constitute the "business of insurance," Office Depot's allegations are not exempted from the Florida Antitrust Act by virtue of the McCarran-Ferguson Act and Section 542.20.

2. FDUTPA (Count VIII)

Office Depot's eighth claim alleges a claim under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §§ 501.201, et seq. (Compl. ¶¶ 113-118). The Insurer Defendants, joined by Marsh, challenge this claim, arguing that the Complaint lacks the particularity required for fraud-based claims and that the alleged scheme falls within an insurance exemption to the FDUTPA. As ruled above with respect to Office Depot's breach of fiduciary duty, fraud and negligent misrepresentation claims, Office Depot has pled sufficient ultimate facts to withstand a motion to dismiss the FUDTPA claim on that ground.

The Insurer Defendants also argue that their conduct is exempted from liability by Fla. Stat. § 501.212(4)(d), which exempts from FDUTPA conduct that is "regulated under laws

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engaged in business in the insurance industry does not mean that the conduct at issue is in fact the "business of insurance" for purposes of the exemption. Marsh has not cited any Florida statute that purports to regulate the relationship between an insurance broker and its client, and the many Florida cases recognizing claims against brokers for breach of fiduciary duty and fraud suggest that such regulation is in fact a matter for the Florida courts under Florida's statutory and common law.

[6] The Insurer Defendants' reliance on *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004) is misplaced because there was no broker or middleman involved in that case and because, as noted by the court, the plaintiff did not allege any "third-party agreements" or "cost-cutting side agreements . . . that are not the business of insurance," *id.* at 1334, such as Office Depot has alleged in this case.

administered by" Florida's insurance authorities. Similar to the analysis of the "business of insurance" element under the McCarran-Ferguson Act, however, the Insurer Defendants cannot rely on this statute because their alleged misconduct does not constitute "regulated insurance." *See W.S. Badcock Corp. v. Myers*, 696 So. 2d 776 (Fla. 1st DCA 1996). Furthermore, Marsh's conduct, as broker-fiduciary, certainly is not regulated, as Marsh does not even write insurance policies. *See also* note 5, *supra.* Accordingly, Defendants' motions to dismiss Count VIII are denied.

3. RICO (Count X)

Count X of the Complaint alleges a claim under Florida's Civil Remedies for Criminal Practices Act ("Florida RICO"). (Compl. ¶¶ 122-146). Defendants argue that Office Depot's Florida RICO claim should be dismissed for failure to allege (1) an actionable "enterprise"; (2) Defendants' "conduct or participation" in the "enterprise"; (3) a "pattern" of criminal activity; (4) proximate cause; and (5) an actionable RICO conspiracy. The Court will address each of these arguments in turn.

(a) RICO Enterprise.

The United States Supreme Court has construed the "enterprise" element of a federal RICO claim to require only (a) an ongoing organization that (b) functions with a common purpose of engaging in a course of conduct. *United States v. Turkette,* 452 U.S. 576, 583 (1981). The Florida Supreme Court has followed this broad approach, specifically declining "to adopt the narrow approach" to enterprise utilized by some federal courts. *See Gross v. State*, 765 So. 2d 39, 45 (Fla. 2000). Thus, a Florida RICO enterprise requires only "(1) an ongoing

organization, formal or informal, with a common purpose of engaging in a course of conduct, which (2) functions as a continuing unit." *Id.* (citing *Turkette*, 452 U.S. at 583).

The Florida Supreme Court in *Gross* specifically declined to require proof of the details of the enterprise's organization and decision-making structure, reasoning that the secretive nature of RICO schemes would mean that "direct evidence of a structure may be difficult to obtain." *Id.* at 45 & n.5. Other RICO cases similarly have held that the claimant need only identify the group of corporations and individuals conducting the alleged RICO scheme. *See, e.g., Cantrell v. State,* 403 So. 2d 977 (Fla. 1981); *Bejerano v. State*, 760 So. 2d 218 (Fla. 5th DCA 2000); *United States v. Russo,* 796 F.2d 1443, 1462 (11th Cir. 1986) (enterprise means only a group of persons "whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes"); *San Jacinto Sav. Ass'n v. TDC Corp of Florida,* 707 F. Supp. 1579, 1581 (M.D. Fla. 1989); *see also Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007) (holding that an actionable federal RICO enterprise requires only allegations of a "common purpose," an "ongoing organization," and a "continuing unit").

Defendants urge this Court to adopt the analysis of the District Court of New Jersey, which dismissed the federal RICO claims alleged in the MDL proceeding for failure properly to allege the enterprise element. *See In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2006 WL 2850607, at *14-*17 (D.N.J. Oct. 3, 2006). The MDL court, however, applied the "narrow view" of RICO enterprise that was explicitly rejected by the Florida Supreme Court in *Gross*. 765 So. 2d at 42.

In this case, Office Depot alleges an enterprise consisting of Marsh, acting as a broker and in violation of its fiduciary duties to its client, Office Depot, and the Insurer Defendants, acting in contravention of their putative position as horizontal competitors and instead submitting fictitious, non-competitive bids on policies sold to Office Depot. (Compl. ¶¶ 123-128). Under *Gross*, these ultimate facts sufficiently allege an actionable "enterprise" under Florida RICO.

(b) Conduct or participation in the enterprise.

A plaintiff need not allege that each defendant knowingly conducted or directed the affairs of the enterprise. *See, e.g., LaVornia v. Rivers,* 669 So. 2d 288, 289 (Fla. 5th DCA 1996) (holding that mere receipt of proceeds from criminal activity was sufficient to show defendant's role in managing or operating enterprise). Moreover, a Florida RICO plaintiff need not allege that all members of the conspiracy were participating at all times to show that they had a continuity of participation. *Lugo v. State*, 845 So. 2d 74 (Fla. 2003); *accord Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1286 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007) (holding that "enterprise" may exists even where participants enjoy benefits at different times); *United States v. Suba*, 132 F.3d 662, 672 (11th Cir. 1998) ("[I]f the proof shows the defendant knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a minor role in the overall scheme.").

Office Depot has sufficiently alleged ultimate facts showing Defendants' conduct of and participation in the enterprise. Office Depot specifically alleges that the Insurer Defendants participated in the "illegal payment scheme" (*i.e.*, the "contingent commissions") by which

Marsh was compensated for orchestrating the bid rigging. (Compl. ¶¶ 39-42). Office Depot further alleges that Defendants participated in the enterprise

(a) by sharing and disseminating information about Marsh's clients, including their insurance placement strategies and the details of Marsh's relationships with its clients;
(b) by utilizing and supporting industry associations, such as the Council of Insurance Agents & Brokers, as vehicles for the communication and exchange of information necessary to carry out the scheme;
(c) by uniformly recommending insurance products of the insurers to their clients in order to maximize the value of contingent commissions or fees; and
(d) by developing, participating in and concealing a bid-rigging scheme.

(*Id.* ¶ 127). Office Depot has alleged sufficient participation in the RICO enterprise.

(c) Pattern of racketeering activity.

A "pattern of criminal activity" under Florida RICO means "engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents." Fla. Stat. § 772.102(4) (emphasis added). The plaintiff must allege (a) that the defendants' predicate acts were related to the enterprise charged, and (b) that the predicate acts formed a pattern. *BankAtlantic v. Coast to Coast Contractors, Inc.*, 22 F. Supp. 2d 1354 (S.D. Fla. 1998).

As predicate acts, Office Depot alleges organized fraud under Fla. Stat. § 817.034(4)(a) and communications fraud under Fla. Stat. § 817.034(4)(b). (Compl. ¶¶ 104, 131-40). These predicate acts were allegedly carried out by and thus were related to the enterprise charged. (*Id.* ¶¶ 142-43). The predicate acts committed specifically against Office Depot lasted at least five

years (1999-2004) and involved the placement of multiple lines of insurance. (*Id.* ¶¶ 134-35). Office Depot further alleges that the scheme was the Insurance Market Enterprise's day-to-day method of doing business (*see id.*), thereby posing a threat of continued illegal activity. *See H.J., Inc. v. NW Bell Tel. Co.*, 492 U.S. 229, 242 (1989) (holding that the "threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business"); *State v. Lucas*, 600 So. 2d 1093, 1095 (Fla. 1992) (continuity can be shown by enterprise's regular way of doing business). Office Depot has alleged sufficient ultimate facts showing a pattern of criminal activity, particularly given that the fraud occurred secretly over an extended period of time. *Gross*, 765 So. 2d at 45.

(d) Proximate cause.

Office Depot alleges that it has been "injured by reason of Defendants' violations" of the Florida RICO statutes. (Compl. ¶ 146; *accord* Fla. Stat. § 772.104). Office Depot further alleges that it reasonably relied on Defendants' fraudulent statements and omissions to its detriment and that it suffered injury in the form of, among other things, paying higher premiums because of Defendants' scheme. (*Id.* ¶¶ 58, 86). These allegations plead "ultimate facts" showing injury from the predicate acts alleged.

Defendants argue that Office Depot has failed to establish proximate cause because Office Depot's contract with Marsh disclosed the payment of contingent commissions and because Office Depot has failed to allege Defendants' misconduct with particularity. For the reasons stated above, the Court has rejected those arguments as a basis for dismissing Office Depot's claims at the pleading stage.

Defendants also argue that Office Depot has failed to allege injury "directly" caused by Defendants' participation in the bid-rigging and customer allocation scheme. The authorities on which Defendants rely, however, all involve claims by third parties for injuries indirectly resulting from harm primarily directed to others. *See Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 262 (1992); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2nd Cir. 1994). The concerns giving rise to the so-called "indirect injury" rule – including the presence of a more appropriate plaintiff, the risk of multiple recoveries for the same harm, and the difficulties in calculating remote injuries (*see id.*) – are completely absent here. Office Depot alleges individual monetary injury because Defendants' scheme caused Office Depot to pay excessive fees and premiums for the placement of its own insurance. Both *Anza* and *Holmes* stand for the proposition that direct victims – such as Office Depot – have standing to sue under RICO. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza,* 126 S.Ct. at 1998.

In this case, Office Depot has sufficiently alleged that its payment of higher premiums flowed directly from Defendants' fraudulent and illegal bid-rigging scheme. *See also, e.g., Mohawk*, 465 F.3d at 1288 (hiring of illegal aliens lowered wages of legal workers). Further, unlike the plaintiffs in *Anza* (competitors) and *Holmes* (plaintiffs suing on behalf of non-purchasers through common law subrogation claim), there are no other, more "directly injured" claimants than Office Depot. Allegations that Office Depot incurred damages as a direct result

of Defendants' alleged scheme to corrupt the market for insurance by using rigged bids and kickbacks paid to Office Depot's fiduciary satisfy the causation element of Florida RICO.

(e) RICO conspiracy.

Defendants advance two arguments as to Office Depot's RICO conspiracy claim. First, they claim that the Complaint fails to state with specificity any actionable conduct under Florida RICO. As discussed above, however, Office Depot has sufficiently alleged the elements of a substantive Florida RICO violation. Second, Defendants assert that Office Depot has failed to allege the Insurer Defendants' agreement to engage in the conspiracy. Office Depot's allegations that the Insurer Defendants knowingly participated in the bid-rigging scheme (including by submitting artificial "B" and "C" quotes), however, satisfies this requirement. *See United States v. Suba*, 132 F.3d at 672 ("[I]f the proof shows the defendant knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a minor role in the overall scheme."); *McCarthy v. Barnett Bank of Polk County*, 750 F. Supp. 1119, 1125 (M.D. Fla. 1990) (requiring only inference of agreement).

Because Office Depot has sufficiently alleged ultimate facts necessary to establish a cause of action for violation of Florida RICO, Defendants' motion to dismiss Count X is denied.

4. Insurance Bad Faith (Count XII)

The Insurer Defendants argue that Office Depot has not pled a viable cause of action for violation of Fla. Stat. § 624.15 because the allegations in the Complaint are not set forth with the level of "specificity" required by the statute and because Office Depot attacks the rate filings of

defendants, a matter exclusively within the purview of the regulatory authority of the Office of Insurance Regulation. Because Office Depot has not exhausted its administrative remedies, Defendants contend that the claims alleged must be dismissed. The Court disagrees.

The bad faith statute sanctions a private, non-administrative cause of action in the Florida courts for certain enumerated offenses by insurance carriers, including specifically claims for violation of Fla. Stat. § 626.9541(1)(o). Under this statute, it is an unfair or deceptive act "knowingly" to collect "as a premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the office...." Defendants contend that Office Depot's Complaint attacks their rate filings rather than premium costs and that such complaints must be presented administratively and are not encompassed by the bad faith statute. This contention is inconsistent with the allegations of the Complaint, in which Office Depot specifically asserts that by paying contingent commissions to Marsh, the Insurer Defendants[7] "acted willfully and in bad faith by improperly, unjustifiably and illegally increasing the premiums paid by Office Depot for insurance issued by the Insurer Defendants ... in violation of Florida law." (Compl. ¶ 155). Office Depot also alleges that by "knowingly collecting from Office Depot a sum in excess of the premium applicable to the insurance policies they issued, the Insurer Defendants violated Fla. Stat. § 626.9541(1)(o)." (Compl. ¶ 158). These allegations, when coupled with the other factual allegations of the Complaint, are sufficient to withstand the Insurer Defendants' motion to dismiss.

[7] The AIG Defendants contend that Defendant American International Group, Inc., as the parent corporation of the insurance companies who issued policies to Office Depot is not itself an "insurer" subject to Section 624.155. Office Depot does not contend otherwise; therefore, this Count is dismissed as to American International Group, Inc.

The Insurer Defendants' "specificity" arguments are based on the notice provisions of Fla. Stat. § 624.155(3), which require, *inter alia*, submission of a notice to the Department of Financial Services ("DFS") and to the insurer 60 days before commencing a civil action. The statute requires the notice to address five categories of information, "with specificity," on a form provided by the DFS. Defendants ask this Court to review the notice forms Office Depot submitted for specificity; however, this argument is inconsistent with the provisions of the statute, which assign responsibility to review the specificity of the notice form to the DFS. The statute expressly provides that the 60 day period does not begin to run "if the department returns a notice for lack of specificity," Fla. Stat. § 624.155(3)(a), and further provides that within 20 days after submission, the "department may return any notice that does not provide the specific information required by this section ... [indicating] the specific deficiencies contained in the notice." *Id.* at § 624.155(3)(c). Office Depot has alleged that the notices it submitted were assigned a "'DFS File Number' acknowledging that the notices were properly received and satisfied the requirements of Fla. Stat. § 624.155(3)." (Compl. ¶ 159). It is not the function of this Court to second guess the truthfulness of this allegation or the decision of the DFS that the notices were sufficiently "specific" to satisfy the administrative requirements of the statute.

Defendant ACE contends that the bad faith claim against it should be dismissed because, as shown by a separate affidavit, Office Depot did not properly serve ACE with a copy of the notice of violation, which contained the wrong address for the company. However, at the hearing, counsel for Office Depot presented the Court with a copy of an April 16, 2007 letter from counsel for ACE to the DFS acknowledging that ACE had received notice of the alleged

violation directly from the DFS and showing that ACE responded to the notice by denying any violation of Florida law. This letter, dated more than sixty days ago, appears to have been submitted to the DFS pursuant to Section 624.155(e), which requires the "insurer that is the recipient of a notice filed pursuant to this section ... to report to the department on the disposition of the alleged violation." The Court agrees with Office Depot that under these circumstances, it would exalt form over substance to dismiss the Complaint against ACE, with leave to amend after another 60 days have passed. All of the requirements of the statute have been satisfied, and ACE responded to the notice of violation more than sixty days ago by denying that it committed any violation of Florida law. Accordingly, the motion of ACE and the other Insurer Defendants to dismiss Count XII of the Complaint is denied.

B. Other Common Law Causes of Action (Counts III, V, IX, XI)

The Insurer Defendants, joined by Marsh, seek dismissal of Office Depot's remaining common law claims for conspiracy, aiding and abetting, unjust enrichment and commercial bribery on various grounds, none of which persuade this Court that any of these claims should be dismissed on the pleadings. Certainly, because all of these claims assert well-recognized causes of action closely related to the fraud and fiduciary duty claims discussed above, the economic loss rule is not applicable. As ruled in Part III, *supra*, where, as here, Office Depot alleges that the Defendants committed fraudulent acts in connection with breaches of fiduciary duties, Florida courts have recognized that actionable claims exist. *Nat'l Ventures v. Walter Glades 300*

Condo. Ass'n, supra, at 13. Similarly, Florida courts have recognized that "[w]here a third party ... deals with another's agent ... with knowledge that the agent is acting in violation of his fiduciary obligation to its principal ... the third party may be held jointly liable with the agent for secret profits." *Martin Co. v. Commercial Chemists, Inc.*, 213 So. 2d 477, 480 (Fla. 4th DCA 1968). *See also State ex rel Spitzer v. Liberty Mut. Holding Co.*, 15 Misc. 3d 1110(A) (N.Y. Sup. Ct. 2007) (denying motion to dismiss claim that insurer induced breaches of fiduciary duties).

No lengthy recitation is needed to recognize that a cause of action for civil conspiracy is adequately pled:

> This court has held that "[a] civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy."

Lipsig v. Ramlawi, 760 So.2d 170, 180-81 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla. 2001). The Second Amended Complaint alleges that the insurer Defendants knew that Marsh was misrepresenting to Plaintiff that the insurance being provided was at the best premiums available in the marketplace and was , and that Marsh was instead tailoring Plaintiff's insurance purchases not only to benefit Marsh, who allegedly was receiving under-the-table kickbacks from the insurer Defendants, but also to benefit the insurer Defendants, who were able to charge and collect from Plaintiff noncompetitive higher premiums than they would have received, and were able to issue policies containing terms and conditions less favorable to Plaintiff, than would have been the case had Marsh negotiated for the benefit of Plaintiff.

The decision in *Phillips Chemical Co. v. Morgan*, 440 So. 2d 1292 (Fla. 3rd DCA 1983), discussed during oral argument, is instructive. Like the situation in *Martin Co.*, the *Phillips* case involved a fee splitting or profit sharing arrangement orchestrated by a sales employee (Morgan) of a chemical company (Phillips). Morgan, whose duties "included the brokerage" of certain materials, arranged secretly to split the profits of sales transactions with a third party, Gamble, who acted as a distributor of chemical products. The evidence, as fully developed at trial, showed that Morgan had certified that he was not "accepting commissions, rebates, or other remuneration from those doing business with his employer." *Id.* at 1294 n.2.[8]

Interestingly, the trial jury had ruled against the employer-principal (Phillips) by awarding damages to Gamble for an unpaid shipment of sulfuric acid that Phillips had purchased from Gamble. The Third District Court of Appeals reversed, ruling that the trial court had erred in failing to direct a verdict in favor of Phillips as to all claims. *Id.* Characterizing the circumstances as a "flagrant case of commercial bribery involving kickbacks," *id.* at 1293, the Court ruled that the transactions "contrived by Morgan ...were in blatant disregard of the elemental fiduciary duties owed an employer not to deal with his business for the agent's own benefit." *Id.* at 1294 (citations omitted). The Court concluded that under such circumstances, the "unfaithful" fiduciary, as well as "participating third-parties ... are clearly liable as a matter of well-established law for the amounts improperly received by Morgan in undisclosed compensation...." *Id.*

[8] As ruled above, the issue of whether or not the nature of and reasons for the commissions being paid by the Insurer Defendants to Marsh was adequately disclosed to Office Depot cannot be resolved at the pleading stage of this case.

Defendants contend that *Phillips* is distinguishable because (a) it does not involve insurance and (b) the case before this Court does not involve "secret" profits or fee-splitting arrangements. However, as stated above, this Court has concluded that Office Depot has adequately alleged that the contingent commissions paid by the Insurer Defendants to Marsh are tantamount to kickbacks or commercial bribes for steering Office Depot's insurance business to Defendants and otherwise are payments made in consideration for illegally and improperly rigging bids for insurance in breach of Marsh's fiduciary duties. Office Depot has repeatedly alleged that Marsh concealed its illegal activities from Office Depot in express violation of Marsh's fiduciary obligations of disclosure. Inferentially, if not expressly, the allegations of the Complaint are sufficient to show that the Insurer Defendants acted with knowledge of Marsh's status as Office Depot's broker and fiduciary.[9]

Accordingly, Defendants' Motion to Dismiss Counts III, V and XI of the Complaint are hereby denied. Similarly, because the facts alleged, if proven, may entitle Office Depot to equitable relief in the nature of a constructive trust or restitution for unjust enrichment, and bearing in mind that Rule 1.110(g) permits pleading both legal and equitable claims in the alternative, Office Depot's claim for unjust enrichment also withstands Defendants' motions to dismiss. While a remedy for unjust enrichment cannot duplicate the remedy potentially available

[9] The arguments of the Insurer Defendants (in their brief) that Fla. Stat. § 626.581 legalizes the contingent commissions paid are unavailing because that statute only applies to agents of the insurer, not to broker-fiduciaries of an insured. As ruled by Florida courts in holding that insurance carriers are not bound by the negligent acts of a broker in placing inadequate coverage, "'[a] broker ... acts as a middleman between the insured and insurer... [a]nd ... is ordinarily employed by a person seeking insurance, and when so employed, is to be distinguished from the ordinary insurance agent who is employed by an insurance company....'" *Auto-Owners Ins. Co. v. Yates*, 368 So.2d 634, 636 (Fla. 2nd DCA1979) (quoting 16 Appleman, *Insurance Law and Practice* § 8726 (1968)). Moreover, the statute clearly does not sanction payments by insurers that allegedly constitute illegal kickbacks and commercial bribes to broker-fiduciaries.

under Count I for breach of contract, Defendants vigorously contend that there is no viable contract claim for the contingent commissions paid, at least while the Contract was in effect. Under such circumstances, and subject to later discovery and proof, it would be premature to dismiss Office Depot's unjust enrichment claim as having been subsumed by the breach of contract cause of action. Accordingly, Defendants' Motion to Dismiss Count IX of the Complaint is denied.

WHEREFORE, for the foregoing reasons, and except as stated hereinabove with respect to the Claims in Count XII against American International Group, Inc., which are hereby DISMISSED, the Defendants' Motions to Dismiss are hereby DENIED. In addition, because the claim in Count XIII for punitive damages is premature, that claim is DISMISSED WITHOUT PREJUDICE to renewal on an appropriate showing supporting a claim for punitive damages.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 24th day of September, 2007.

Kenneth D. Stern

KENNETH D. STERN
CIRCUIT JUDGE

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