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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: INSURANCE BROKERAGE ANTITRUST LITIGATION **APPLIES TO ALL ACTIONS**	Hon. Garrett E. Brown, Jr. MDL No. 1663 Civil Action No: 04-5184 (GEB)
IN RE: EMPLOYEE-BENEFIT INSURANCE BROKERAGE ANTITRUST LITIGATION **APPLIES TO ALL ACTIONS**	Civil Action No: 05-1079 (GEB) ELECTRONICALLY FILED

OMNIBUS BRIEF OF COMMERCIAL AND EMPLOYEE-BENEFIT DEFENDANTS IN SUPPORT OF MOTION TO DISMISS RICO CLAIMS IN THE SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINTS

RETURNABLE: August 20, 2007

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I. INTRODUCTION

On their third attempt, Plaintiffs still fail to state a RICO claim. Although the Court has now twice ruled that an industry-wide enterprise theory is overly broad and unsustainable, Plaintiffs have refused to drop that theory, and continue to assert a global enterprise and conspiracy allegedly operating through the Council of Insurance Agents and Brokers ("CIAB"). That theory remains as untenable as before, as Plaintiffs' factual pleadings are materially unchanged and again fail to establish a nexus between the alleged predicate acts of fraud and the internal activities of the CIAB.[1]

Despite nearly two years of discovery and the guidance of two opinions from this Court, Plaintiffs also continue to play a shell game with their RICO Enterprise allegations, shuffling between theories in hopes that one of them will finally work. Thus, as an alternative to the "CIAB as Enterprise" theory, Plaintiffs continue to put forward "Broker-centered Enterprises," each consisting of a broker group and a number of insurer groups with which the brokers did business. But while Plaintiffs have excised from their enterprise allegations the most egregious overreaching phrase previously rejected by the Court – referring to insurers with the "ability" and who "seek to be" the strategic partner of a broker – and have dropped a small number of defendants (while adding even more),[2] the Broker-centered strategic partner enterprises are effectively still industry-wide in scope. This is apparent from Plaintiffs' conspiracy allegations, which mimic the "CIAB as Enterprise" theory and assert a variety of *global* conspiracies between and among *all* Defendants to do the same things the Broker-centered Enterprises are accused of doing. Plaintiffs

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[1] In the Employee-Benefit ("EB") Case Plaintiffs do not allege that the CIAB was itself an enterprise but continue to allege that the CIAB as well as LIMRA, an insurer trade association, were mechanisms for conducting a global conspiracy. *See infra* Point I B.

[2] Defendants have separately moved to strike the purported addition of new defendants as well as new plaintiff parties.

have simply taken these broad, global enterprises and conspiracies and artificially broken them down into seemingly smaller "broker-centered" pieces. But by Plaintiffs' own allegations, those pieces do not operate independently of each other but rather in overlapping and parallel fashion as part of an overarching conspiracy.

Plaintiffs have failed to cure the prior pleading deficiencies in the alleged Broker-centered Enterprises. These alleged association-in-fact enterprises, consisting of multiple broker entities and sometimes more than a hundred different insurer entities in different lines of insurance, remain a swarm of dotted lines. Rather than trying to construct a web of solid lines by narrowing their theory to a bid-rigging claim, Plaintiffs reallege a broader theory, based on failure to disclose contingent compensation, and general "steering" activity, that the Court has twice rejected. As a result, the Broker-centered Enterprises still lack sufficiently detailed allegations of an ascertainable structure for decision-making.

The Broker-Centered enterprises also continue to fail the distinctiveness test, which requires Plaintiffs to plead an enterprise separate and apart from the minimal level of association inherent in the commission of the alleged predicate acts by different entities. At most, Plaintiffs list various types of broker and insurer employees who allegedly understood the roles they were to perform. But all Plaintiffs have thereby sought to allege is a conspiracy to commit the predicate offenses, which is insufficient to support an allegation of a RICO enterprise.

Although this Court has not previously addressed the sufficiency of the allegations of RICO elements other than enterprise – and need not reach them now – the pleading deficiencies as to those other elements remain.

First, to survive a motion to dismiss, plaintiffs must plead facts establishing not only that a RICO enterprise existed, but also that each defendant had some part in directing or conducting the affairs of the enterprise, not just defendant's *own* affairs. Plaintiffs do not allege facts meeting this

requirement. All that Plaintiffs allege is the normal business of insurance conducted by each Defendant as part of its own affairs, which is not enough.

Second, Plaintiffs do not adequately plead predicate acts of mail or wire fraud under Rule 9(b) because, among other things, they do not identify any materially fraudulent statements made by any Defendant with the specific intent to defraud them. With respect to the Insurer Defendants, Plaintiffs do not allege a single fraudulent statement made to them. Moreover, Plaintiffs also fail to plead adequately that they actually relied to their detriment on Defendants' alleged misrepresentations and omissions.

Third, Plaintiffs do not directly link any alleged fraud to any concrete financial injury suffered by *them*, as opposed to absent putative class members. Plaintiffs do not and cannot plead that their alleged injury – the supposedly excess prices they paid for insurance – was proximately caused by any fraud directed at them. Under Supreme Court and Third Circuit case law, their claims of injury are too indirect and attenuated to be allowed to proceed.

Finally, Plaintiffs' various allegations of RICO conspiracies cannot survive in light of the applicable pleading requirements recently articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007) ("*Twombly*"). As with their antitrust allegations, Plaintiffs' RICO conspiracy claims do not allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Id.* at 1965. Discovery over the past two years has revealed no such evidence, and the time has come to put an end to Plaintiffs' effort to conjure up a RICO claim they do not have.

A. THE PRIOR PLEADINGS AND COURT RULINGS

Plaintiffs' mixing and matching of allegations of global and Broker-centered Enterprises is nothing new. Plaintiffs originally alleged two "association-in-fact" enterprises (denominated the "Commercial Insurance Enterprise" and "Employee Benefits Enterprise"), essentially comprising

the entire insurance industry. Alternatively, Plaintiffs alleged six "Broker-centered Commercial Enterprises" and three "Broker-centered Employee Benefits Enterprises." The Court ruled that all of these "association-in-fact" enterprises, including the Broker-centered Enterprises, were inadequately pleaded for two fundamental reasons: (1) Plaintiffs provided no details demonstrating "that the members of the enterprises have established any kind of decision-making structure, independent from their regular business practices" (the "structure requirement"), *In re Ins. Brokerage Antitrust Litig.*, 2006 U.S. Dist LEXIS 73055, at **91-92 (D.N.J. Oct. 3, 2006) ("Oct. 3 Op."); and (2) Plaintiffs had "not sufficiently averred that the alleged enterprise has an existence of its own, and performs functions other than the perpetration of the predicate racketeering acts" (the "distinctiveness requirement"). *Id.* at *95.

Plaintiffs then returned, in their Second Amended RICO Case Statements ("2A RICO Stmt" and "2A EB RICO Stmt"), with the same global, industry-wide enterprises re-christened as the "Strategic Partnership Enterprises" (one in the Commercial Case, and two in the EB Case). The so-called "Broker-centered Enterprises" (seven in the Commercial Case, three in the EB Case) also remained intact. Plaintiffs in the Commercial Case also surfaced a new alternative theory, that an industry trade association (the CIAB) was itself (possibly) "the enterprise," in addition to being a member of the Strategic Partnership Enterprises. At the hearing on Defendants' motion to dismiss on March 1, 2007, the Court aptly expressed concern about Plaintiffs' "shotgun" approach to pleading multiple and alternative enterprises.[3]

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[3] *See* March 1 Hearing Tr. (Docket Entry No. 1041) at 42:

> THE COURT: I'm a little concerned about the various enterprises you identify. It's almost a shotgun pattern. If you don't like this enterprise, here's another enterprise . . . I mean, I know alternative pleading. It seems we have a moving target here. What is the enterprise? Well, it's what you want it to be. It could be this, it could be that, it could be something else, maybe it's something else.

In *In re Ins. Brokerage Antitrust Litig.*, 2007 U.S. Dist. LEXIS 25632 (D.N.J. Apr. 5, 2007), the Court again ruled that Plaintiffs' enterprise allegations were inadequately pleaded. The Court concluded that the "CIAB as RICO Enterprise" theory was invalid because Plaintiffs had not alleged "any *fact* indicating that CIAB's *internal* structure has a nexus with the racketeering activities allegedly committed by Defendants." April 5 Slip Opinion ("April 5 Op.") at 49 (emphasis in original). The Strategic Partnership Enterprise allegations were similarly held deficient because Plaintiffs failed sufficiently to allege any structure. *Id.* at 56-57. Finally, the Court found that the alleged Broker-centered Enterprises lacked structure, and separately concluded that Plaintiffs had not satisfied the distinctiveness requirement since the alleged "understanding" among insurance carriers of what their expected roles would be in a Broker-centered Enterprise would amount only to a conspiracy to commit the predicate offenses. *Id.* at 43.

B. THE CURRENT PLEADINGS

Plaintiffs' Complaints and related pleadings[4] remain a mish-mash of alternative and inconsistent theories. Instead of the 14 different enterprises alleged in their last set of pleadings, Plaintiffs have now "limited" themselves to asserting 12 different enterprises in the two cases. Despite the Court's dismissal of the "CIAB as Enterprise" theory, Plaintiffs (in the Commercial Case) have come back with the very same theory, but with no new facts, asserting that the CIAB was a "global" enterprise that included all Commercial Defendants as members. Plaintiffs also

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[4] Plaintiffs' new complaints are the Second Consolidated Amended Commercial Class Action Complaint ("2A Cplt.") and the Second Consolidated Amended Employee-Benefit Class Action Complaint ("2A EB Cplt.") (the "Complaints"). Their new related pleadings are the Third Amended Commercial RICO Case Statement ("3A RICO Stmt") and the Third Amended Employee Benefits RICO Case Statement ("3A EB RICO Stmt").

continue to assert, as an alternative, 11 Broker-centered Enterprises – 6 in the Commercial Case, 5 in the EB Case.

Although Plaintiffs characterize the Broker-centered Enterprises as "hub-and-spoke" arrangements between a single broker "group" and various insurer "groups," almost all of those groups consist of multiple entities, often operating in completely different lines of insurance.[5] In fact, Plaintiffs have alleged numerous different potential hubs and spokes without any clear delineation of which are allegedly connected to which. For example, the Marsh Broker-centered Enterprises comprise 5 different Marsh entities in the Commercial Case and 8 in the EB Case, and 95 different Insurer Defendant entities in the Commercial Case and 23 in the EB Case. Similarly, the Aon Broker-centered Enterprises comprise 13 Aon entities and 116 Insurer Defendant entities in the two cases.

Plaintiffs allege no facts purporting to explain how each of these alleged Broker-centered Enterprises, with over 100 members, operated as a single continuous unit.[6] Nor is it clear whether Plaintiffs are alleging, for example, one, two, eight or thirteen Marsh "hubs."[7] And it is completely

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[5] For example, what Plaintiffs define as "AIG" includes 15 different entities as disparate as Lexington, which underwrites managed care professional liability (among other things); Hartford Steam Boiler, which offers engineering risk management and loss reduction services; Starr Excess, which provides catastrophic excess liability products; and Illinois National, which provides varied lines, including automobile insurance. *See* 2A Cplt. ¶ 38 and Exhibit A ¶¶ 33, 36, 44-45.

[6] Similarly, the Willis Broker-centered Enterprises comprise 5 Willis entities and 102 Insurer Defendant entities; the HRH Broker-centered Enterprises comprise 1 HRH entity and 18 Insurer Defendant entities; the Wells Fargo Broker-centered Enterprises comprise 2 Wells Fargo entities and 26 Insurer Defendant entities; and the ULR Broker-centered Enterprises comprise 4 ULR entities and 18 Insurer Defendant entities.

[7] That is, there could be one Marsh "hub" consisting of all 8 Marsh Defendant entities in the two cases, or two "hubs" (one for the 5 Marsh entities from the Commercial Case and another for the 8 Marsh entities in the EB Case), or 8 "hubs" (one for each Marsh entity named in either action), or 13 Marsh "hubs" (two for each of the 5 Marsh entities named in both the Commercial and EB Cases and one for the 3 named only in the EB Case).

unclear whether the Marsh hub (or hubs) are alleged to have 114 "spokes" each (one for each Insurer Defendant), 18 spokes (one for each Insurer Defendant Group), or some number in between. The alleged Broker-centered Enterprises resemble not so much hubs and spokes as pins in a pincushion.

Although the Broker-centered Enterprises are pleaded as "separate" RICO enterprises, ostensibly operating independently of one another, this alleged independence is more illusory than real. To begin with, Plaintiffs' "CIAB as Enterprise" theory does not allege any such separateness; all Commercial Broker and Insurer Defendants are alleged to be part of the same enterprise. Plaintiffs are still trying to "mix and match" enterprises – on the one hand, a series of associations-in-fact – on the other hand, a single global enterprise, shifting the same pieces around and hoping that one of them will stick.

Plaintiffs also assert that the Broker-centered Enterprises (and conspiracies) morphed together into broader and global conspiracies in both cases. Plaintiffs allege a "Broker Defendants RICO Conspiracy" among all the Broker Defendants in the Commercial Case, on behalf of a "global class," allegedly carried out in part through the sharing of information among the Broker Defendants and in part through their participation in the CIAB. 2A Cplt. ¶¶ 539-45, 656-60; 3A RICO Stmt at 77-79. Alternatively Plaintiffs assert, on behalf of a global class, a global RICO conspiracy among all Commercial Defendants allegedly "conducted, implemented and facilitated through CIAB." *See* 2A Cplt. ¶¶ 666-75, 3A RICO Stmt at 79-80.

Meanwhile, in the EB Case, Plaintiffs allege, on behalf of a global class, a global RICO conspiracy against all Defendants, consisting of a "Broker Defendant Conspiracy" and an "Insurer Defendant Conspiracy," each existing, allegedly, to facilitate the "Broker-Centered Enterprises."

2A EB Cplt. ¶¶ 692-96; 3A EB RICO Stmt at 63-67.[8] The global EB RICO conspiracy was allegedly carried out, in turn, by the sharing of information among the Broker Defendants and through their participation in the CIAB, and by the sharing of information among the Insurer Defendants and through their participation in LIMRA. Thus, each supposedly separate Broker-centered Enterprise is linked with every Broker Defendant and every Insurer Defendant in each case, through sprawling industry-wide RICO conspiracies, not to mention the multiple and varied global antitrust conspiracies Plaintiffs allege.[9]

The "Broker-centered Enterprises" are entirely artificial. Plaintiffs have simply taken the supposed industry-wide enterprise and conspiracy and divvied it up among various sub-groups of alleged co-conspirators solely in a futile attempt to satisfy the RICO "enterprise" element. One is still left wondering what the enterprise is, what the conspiracy is, who is in each and whether they are the same or different. Plaintiffs have ignored the Court's admonition that a RICO plaintiff "has to allege an actual enterprise rather than to express willingness to assert whatever enterprise the court approves." April 5 Op. at 55.

II. ARGUMENT

A. PLAINTIFFS' RICO CLAIMS ARE SUBJECT TO RULE 9(b)'s HEIGHTENED PLEADING REQUIREMENTS AND THE *DURA/TWOMBLY* PLEADING STANDARDS.

As this Court has previously ruled, because Plaintiffs' RICO claims under 18 U.S.C. § 1962(c) are premised on mail and wire fraud, they are subject to the stringent particularity

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[8] The EB global conspiracy claim does not purport to identify a global enterprise.

[9] *See* 2A Cplt. ¶ 354 ("each of the Broker 'hubs' simultaneously agreed horizontally not to compete with each other by disclosing any competing broker's contingent commission arrangements . . . ."); *id.* ¶ 359 (each of the Insurer Defendants agreed "both with their respective Broker Defendant 'hubs' and horizontally with each other" not to disclose the Broker-centered Conspiracies); 2A EB Cplt. ¶¶ 300 *et seq.* (alleging global antitrust conspiracy among all Broker and Insurer Defendants).

requirements of Fed. R. Civ. P. 9(b). April 5 Op. at 11 (citing, *inter alia*, *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658-59 (3d Cir. 1998)). *See also Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004) (plaintiff must specify "the date, place or time of the fraud," or inject precision into their allegations through alternative means).

In this case, a higher-than-traditional pleading requirement applies not only to the allegations of fraudulent predicate offenses that allegedly constitute a "pattern of racketeering activity," but also to the other elements of Plaintiffs' claims – the existence of an enterprise and the conduct of its affairs by Defendants. As this Court explained in its prior decision:

> if a plaintiff's claims as to any element other than the predicate offense interrelates with a fraudulent conduct that the plaintiff asserts to be the predicate offense - e.g., if the "how" aspect of the fraud is based on defendant's use of an enterprise structure - it would indeed be anomalous for the plaintiff not to plead the structure aspect of the enterprise element with particularity while setting forth the plaintiff's claims as to the enterprise but to plead the very same structure aspect with particularity while setting forth plaintiff's claims as to the predicate offense.

April 5 Op. at 12-13 n.4. As the "how" of the fraudulent conduct alleged here is inextricably interwoven with the structure of the alleged enterprises, and each Defendant's purported operation and management of that enterprise, Plaintiffs' pleadings as to those elements should be held to the same level of particularity as the predicate acts.

Even if the heightened pleading standards of Rule 9(b) did not apply, the Complaints still do not state a claim under the ordinary standards of Rule 8(a). Subsequent to this Court's April 5 decision the Supreme Court handed down its opinion in *Twombly,* which effectively overruled the famous formulation from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that a complaint may not be dismissed for failure to state a claim unless it appears "beyond doubt" that the plaintiff "can prove no set of facts" entitling him to relief. Rather, the Supreme Court held in *Twombly* that claims of conspiracy (in that case antitrust) require "allegations plausibly suggesting (not merely consistent with) agreement," to meet the "threshold requirement of Rule 8(a)(2) that the 'plain

statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 127 S. Ct. at 1966; *see also id.* at 1964-65 (allegations of mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). In so holding, the Court reaffirmed the principle of *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005), that the Rule 8(a) "short and plain statement" must still provide a defendant with the *factual grounds* upon which the plaintiff's claim rests. *See also* April 5 Op. at 7 (legal conclusions made in the guise of factual allegations "are given no presumption of truthfulness", and the court should reject "'unsupported allegations,' 'bald assertions,' or 'legal conclusions.'").

Thus, even if the structural elements of Plaintiffs' RICO claims – such as an enterprise or operation and management – were analyzed under Rule 8(a) rather than Rule 9(b), the Complaints must still pass muster under *Dura* and *Twombly*. That is, the pleading must be viewed in light of common economic experience and must contain non-conclusory "allegations plausibly suggesting (not merely consistent with)" conduct constituting a violation of the RICO statute. *See Twombly*, 127 S. Ct. at 1966, 1971.

Finally, in view of Plaintiffs' continued failure to commit to a clear and definite enterprise theory, despite having had three attempts, with the benefit of nearly two years of discovery and the Court's guidance, the enterprise allegations warrant even greater scrutiny on this "one final opportunity." As the Third Circuit has made clear:

> A RICO complaint is not a mix and match game in which plaintiffs may artfully invoke magic words to avoid dismissal. Instead, to plead a claim under section 1962(c) the complaint must be capable of being read to satisfy the statutory requirement that persons were conducting a pattern of racketeering through a separate and distinct enterprise. That requirement does not do violence to the notion of notice pleading. It simply reinforces the renewed emphasis on the obligation of responsible pleading.

Glessner v. Kenny, 952 F.2d 702, 714 (3d Cir. 1991), *overruled on other grounds*, *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258 (3d Cir. 1995)).

B. PLAINTIFFS FAIL ADEQUATELY TO PLEAD A RICO ENTERPRISE.

1. The CIAB As Enterprise Theory Is Fatally Flawed And Has Already Been Rejected.

As interpreted by the Third Circuit, in order to plead that a defendant has conducted the activities of an enterprise through a pattern of racketeering activity, within the meaning of 18 U.S.C. § 1962(c), a plaintiff must plead facts establishing that (1) the defendant "is enabled to commit the predicate offenses *solely* by virtue of his position in the enterprise . . . or control over the affairs of the enterprise;" or (2) "the predicate offenses are related *to the activities of that enterprise.*" April 5 Op. at 33 (citing *U.S. v. Provenzano*, 688 F.2d 194, 200 (3d Cir. 1982)) (emphasis added).

In its April 5 Opinion, the Court explained why Plaintiffs had failed to allege that Defendants conducted the affairs of the alleged CIAB Enterprise *through* a pattern of racketeering activity:

> No *fact* stated in Plaintiffs' submissions indicates that Defendants' alleged predicate acts of mail and wire fraud (aimed at Defendants' clients) were related in any way to the activities of CIAB, or that Defendants committed the alleged predicate offenses through the means of CIAB, or that CIAB was somehow indispensable to Defendants in their alleged goal to commit the underlying predicate offenses.

April 5 Op. at 34 (emphasis in original). Plaintiffs' theory and allegations concerning a supposed CIAB Enterprise in the Commercial Case have not materially changed, and the same theory should again be rejected.

As to the first *Provenzano* test, Plaintiffs' theory remains the same: "Absent the Defendants' participation in and control of CIAB, the Defendants would have been unable to perpetuate the fraudulent scheme and attendant predicate acts." 3A RICO Stmt at 74. This is identical to the conclusory assertion the Court has already rejected. *See* 2A RICO Stmt at 76

("Absent their participation in and control of CIAB, the Defendants would be unable to perpetrate the fraudulent scheme and the attendant predicate acts.").

As before, the allegation that CIAB was the "sole" and indispensable mechanism for committing the alleged predicate offenses is negated by Plaintiffs elsewhere in their pleadings. Tellingly, in the 47-page enumeration of the alleged predicate acts (3A RICO Stmt at 16-63), there is *not one mention* of the CIAB. To the contrary, Plaintiffs allege that Defendants communicated frequently with each other, outside the CIAB, to further the alleged fraudulent scheme. *See, e.g.*, 2A Cplt. ¶ 91.[10] The pleadings also contain multiple references to other mechanisms the Defendants allegedly used to facilitate and further the scheme, having nothing to do with the CIAB.[11] Where is the CIAB, if, as Plaintiffs allege, Defendants could not have perpetuated the fraudulent scheme without it? Even when the CIAB is mentioned, it is referred to as but one of a number of methods by which Defendants allegedly carried out the fraud, thus refuting any conclusion that the CIAB was the "sole" conspiratorial mechanism. *See, e.g.*, 3A RICO Stmt at 77 ("[t]he Broker Defendants' conspiracy has been conducted, implement[ed] and facilitated through the sharing of information among the Broker Defendants *and* through their participation in

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[10] *See also, e.g.*, 3A RICO Stmt at 17 (Marsh), 29 (Aon), 38 (Willis), 53 (HRH), 59 (Wells Fargo/Acordia) ("The [] Enterprise Defendants have frequently communicated with each other by mail and/or wire in furtherance of the scheme.").

[11] For example, Plaintiffs point to the exchange of information between Marsh and insurers at "Executive Partnership Meetings." 2A Cplt. ¶ 152. With respect to Aon, Plaintiffs allege that, "To carry out its agreement with its conspiring Insurers to consolidate its business with them and allocate business among them, Aon concentrated control over national contingent commission agreements in the hands of a small group of executives known as the Syndication Group." 2A Cplt. ¶ 162. *See also* 2A Cplt. ¶ 225 ("Wells Fargo/Acordia and its conspiring insurers, moreover, agreed to meet and communicate with each other about their conspiracy under the guise of a purported project to launch a technological 'quoting system' platform for use by its Millennium Partners."); 2A Cplt. ¶ 241 ("HRH's Carrier Consolidation Task Force met with several Insurer Defendants…to discuss potential 'partnerships' and by national contingent commission agreements.").

CIAB"); 2A Cplt. ¶ 151 ("Frequent meetings at the annual CIAB conference at The Greenbrier *also* afforded Marsh the opportunity to share information about its arrangements with its preferred carriers. . . .") (emphasis added).[12]

Plaintiffs' effort to meet the second *Provenzano* test – that the predicate acts are related to the activities of the enterprise – likewise fares no better than before. Instructed to describe the relationship between the enterprise's activities and the pattern of racketeering activity, Plaintiffs respond only with the following: "The purpose of the CIAB Enterprise is furtherance of the interest of large brokers generally and furtherance of the Defendants' scheme more specifically. Accordingly, the predicate acts taken in furtherance of the scheme necessarily relate to the CIAB Enterprise." 3A RICO Stmt at 75. But to say that the *purpose* of the CIAB is to further the members' interests (which is true of every trade association, *see* April 5 Op. at 50 n.20) does not establish what *Provenzano* requires, that the *predicate acts themselves* – here, the allegedly fraudulent mailings – must be "related to the *activities of that enterprise" – i.e.*, the CIAB. *Provenzano*, 688 F.2d at 200; *see Banks v. Wolk*, 918 F.2d 418, 424 (3d Cir. 1990) ("Under 18 U.S.C. § 1962(c), *all predicate acts* in a pattern must somehow be related *to the enterprise.*") (emphasis added).

Plaintiffs fail this test because they have not alleged that the Defendants' mailings were related to the internal activities of the CIAB. *See Schwartz v. Hosp. of Univ. of Pa.*, 1993 WL 153810 (E.D. Pa. May 7, 1993) (*Provenzano* "relatedness" test not met where plaintiff failed to

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[12] Gone from Plaintiffs' current pleadings, although not to be forgotten, is the allegation that the CIAB was but "one mechanism" used by the Defendants to facilitate the alleged conspiracy, and that Defendants "created other devices" to do so. *See* Original Commercial Supplemental Statement of Particularity (Docket Entry No. 845) ¶¶ 6-7; *id.* ¶ 602 ("industry participants created a *variety of devices* to facilitate the conspiracy and to police compliance") (emphasis added). Obviously, Plaintiffs have never believed that CIAB was the sole mechanism for carrying out the alleged fraud.

allege that defendants mailed allegedly fraudulent invoices through or using the alleged enterprise Delaware Valley Hospital Council). Just as the plaintiffs in *Schwartz* failed to demonstrate that the defendant hospital's mailing of invoices was "related" to the Hospital Council's activities, Plaintiffs here have not alleged that the Defendants' mailings were related to the internal activities of the *CIAB itself.* And as the Court previously held, providing a forum for alleged RICO conspirators does not make the forum an "enterprise" with a nexus to the racketeering activities. April 5 Op. at 34-35 (citing *Meridian Mortgage Corp. v. Spivak*, 1993 WL 193364, at *5 (E.D. Pa. June 7, 1993)).

2. The Broker-Centered Enterprises Are Inadequately Pleaded.

a. Plaintiffs Have Not Described An "Ongoing Organization" With A "Framework For Making Or Carrying Out Decisions."

The Court has previously made clear that "[t]o establish a RICO enterprise, a plaintiff must plead factual 'evidence that the various associates function as a [single] continuing unit.'" April 5 Op. at 21 (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)). Thus, the complaint must allege a single ongoing unit with some superstructure or framework for decision-making. *Id.* (citing *U.S. v. Riccobene,* 709 F.2d 214, 222-23 (3d Cir. 1983)). Plaintiffs still have not alleged facts showing how each of the so-called Broker-centered Enterprises, all of whose participants allegedly were also part of a broader, global conspiracy, functioned as an independent, single continuing unit with its own decision-making structure.

Although they allege 11 supposedly separate Broker-centered Enterprises, Plaintiffs make no attempt to plead separate facts of "structure" as to any of them. *See* 2A Cplt. ¶ 504; 2A EB Cplt. ¶ 525. Directed in the RICO Case Statement to describe the structure and purpose of the alleged enterprises, Plaintiffs provide a single generic list of different types of "executives," "account executives" and "employees" of the brokers and insurers who "interface" with each

other, plan, monitor and direct the "steering or retention of business," and keep track of reports of compensation and premium volume. *See* 3A RICO Stmt at 67-68; 3A EB RICO Stmt at 57-58. These generic descriptions merely allege that a conglomeration of people played some role in one of 11 different Broker-centered Enterprises that were part of a larger purported global conspiracy.

In an attempt to track the general guidance given by the courts, Plaintiffs use conclusory catch-words such as "implement," "monitor" and "direct." *See* 3A RICO Stmt at 67-68; 3A EB RICO Stmt at 57-58. But beyond these restatements of elements, no *facts* are pleaded to show, as to any enterprise, how its decisions were made on a group basis and as a single, continuing unit. *See Canadian-American Oil Co. v. Delgado,* 1997 U.S. App. LEXIS 5120, at **3-4 (9th Cir. Mar. 14, 1997) (allegations of structure deficient despite allegation that "certain defendants were 'management' while others were 'backers'" because "[s]uch conclusory statements . . . do not suffice to avoid dismissal under Rule 12(b)(6)") (cited in April 5 Op. at 23). Indeed, the pervasive assertions of a global conspiracy, as well as the allegation that the CIAB's structure was essential to carrying out the fraud, *negate* any notion that the Broker-centered Enterprises operated their affairs through some separate structure of their own. *See Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 n.5 (3d Cir. 1984) (where plaintiffs' allegations negate enterprise element, RICO claim should be dismissed).

Inevitably, whenever entities conspire to commit a crime or fraud they have employees who "interface" with each other and help carry out the conspiracy. But a listing of those employees' titles and positions (whether by name or, as here, generically) does not establish an enterprise, even if the defendants play particular roles and are aware of each others' actions. *See* April 5 Op. at 24. If simply identifying, by name, title or role the employees involved in the conspiracy were enough to allege a structured enterprise, then every alleged conspiracy could be characterized as a RICO enterprise. That is not the law. *See In re Am. Investors Life Ins. Co.*

Annuity Mktg. & Sales Practices Litig., 2006 U.S. Dist. LEXIS 35980, at **19-20 (E.D. Pa. June 2, 2006) (finding no structure pleaded despite allegation that defendants performed certain critical roles, *e.g.*, Sales Group "performed legwork" in selling living trust kits and annuities; Annuity Group provided the annuities; and attorneys prepared living trust documents and helped Sales Group members gain access to plaintiffs under guise of attorney-client relationship).

As this Court previously held, "the sufficiency of plaintiff's structure-related allegations turns on plaintiffs' pleading of facts indicating a potential web of 'solid lines' that interrelate the entire alleged enterprise rather than on assertions that indicate merely a swarm of dotted and/or vanishing lines, or a multitude of clusters randomly operating within the perimeters of the alleged enterprise." April 5 Op. at 21 (citing *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000)). The alleged Broker-centered Enterprises, however, consist solely of the individual contractual relationships between certain Broker Defendants and Insurer Defendants, with no explanation of how each of these individual business relationships was interrelated and dependent upon each other. Each alleged Broker-centered Enterprise consists of multiple broker entities and multiple insurer entities involved in different lines of insurance, yet Plaintiffs do not connect any specific broker entities to specific insurer entities, or any insurer entities to each other, in any coherent fashion. There is nothing alleged to indicate, for example, how or why Defendant National Union of Louisiana, located in Baton Rouge, which provides liability products and services, could be part of the same enterprise with Defendant Westchester Fire, headquartered in Roswell, Georgia, which provides property and casualty insurance, and with Defendant Liberty Mutual Insurance in Boston, which provides fire, marine, life and casualty insurance.[13] Yet these three insurer entities, along with nearly 90 others, are alleged to be "associated-in-fact" with each

[13] *See* 2A Cplt. ¶ 38 and Exhibit A ¶¶ 38, 52, 124.

other as part of an Aon "Broker-centered Enterprise" with 11 different Aon entities, including Aon Risk Services ("Aon Risk") of Michigan, Aon Risk of Maryland, Aon Risk of Texas and others. 2A Cplt. ¶ 502(b) and Exhibit A ¶¶ 11, 13, 14.

Labeling the Broker-centered Enterprises as "hub-and-spoke" enterprises does not advance Plaintiffs' claim. "Most courts have found that complaints alleging hub-and-spoke enterprises fail to satisfy the RICO enterprise requirement." *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 183 (D. Mass. 2003). This is because allegations of hub-and-spoke enterprises most often fail to allege a "rim to connect the spokes." *Id.* at 184. In such cases, even if the alleged spokes can be independently connected to an alleged hub, nothing connects the spokes so as to show concerted (rather than independent) action in furtherance of a common purpose. "Such a series of discontinuous independent frauds is not an 'enterprise.' Each is a single two-party conspiracy." *New York Auto. Ins. Plan v. All Purpose Agency & Brokerage, Inc.*, 1998 WL 695869 , at *6 (S.D.N.Y. Oct. 6, 1998) (rejecting a purported hub-and-spoke enterprise in which automobile insurance provider conspired with individual clients to provide them lower insurance rates, without any evident association among the clients). *See also Cedar Swamp Holdings, Inc. v. Zaman,* 2007 U.S. Dist. LEXIS 36286, *18 (S.D.N.Y. May 17, 2007) (rejecting hub-and-spoke enterprise); *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 97-98 (S.D.N.Y. 1993) (same).

In its April 5 Opinion, the Court suggested that a narrowly tailored "hub-and-spoke" enterprise based on "structural links between a Broker Defendant and its Incumbent and Accommodating Insurers" under an "A" and "B" quote bid-rotation scheme "*might* be sufficiently defined for the purposes of Rule 8(a) pleading of the enterprise element." April 5 Op. at 38-39 (emphasis added). Whether or not such a pleading could have satisfied a post-*Twombly* Rule 8(a) standard, that is *not* what Plaintiffs have pleaded, or even purported to plead, here. Plaintiffs'

answer to question 6 of the RICO Case Statement, which required them to describe the structure and purpose of the alleged enterprise, does not define a "seminal" hub-and-spoke bid-rigging enterprise structured around an "incumbent always retains the business" rule. Rather, Plaintiffs describe broader, amalgamated enterprises involving the "steering *or* retention" of business and the payment of contingent commissions to maximize the brokers' profits, which might or might not involve "steering" to the incumbent.[14]

None of the purportedly separate Broker-centered Enterprises is defined as a bid-rigging scheme, *simpliciter*.[15] The alleged "structure" of the Broker-centered Enterprises instead consists of a series of unilateral decisions by brokers to steer business to their "strategic partners" in whichever direction and for whatever reason they choose, including the payment of contingent commissions. Here, too, the alleged hub-and-spoke enterprises lack a "rim." The enterprises Plaintiffs posit are ones in which many insurer "spokes" competed against each other for many broker "hubs'" attention and business, by paying higher contingent commissions (which Plaintiffs

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[14] For example, Plaintiffs allege that "Aon . . . actively steered business to its partners who had agreed to pay the highest Contingent Commissions in exchange for an allocation of Aon's business." 2A EB Cplt. ¶ 151. Although expunged from their amended pleadings, Plaintiffs have previously asserted that the brokers acted "based entirely on maximizing Contingent Commissions" (1A EB Cplt. ¶ 237), an objective that could and often would conflict with protecting the incumbent, who might or might not pay the most contingent commissions. For example, as Plaintiffs earlier alleged, one broker gave a "last look" to companies that paid the greatest financial incentive, "*whether or not they were the incumbent.*" 1A Cplt. ¶ 343 (emphasis added).

[15] Plaintiffs had strong incentives to forego a straight bid rigging RICO claim: (a) the supposed "incumbent always wins" rule is both implausible and inconsistent with the facts and Plaintiffs' own pleadings; (b) none of the Plaintiffs has standing to allege such a scheme because no Plaintiff alleges that its insurance placement was subject to a rigged bid; (c) each alleged rigged bid will engender substantial individual issues that will predominate over any common issues; and (d) given the isolated instances of bid-rigging, alleged damages would be very limited in scope.

concede are legal).[16] The presence of such competition negates any inference of collective, structured decision-making. April 5 Op. at 57. *See also VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000) (no RICO enterprise where the complaint alleged only that certain parties did business with one another and/or conspired with one another); *In re Am. Investors,* 2006 U.S. Dist. LEXIS 35980, at **21-22 (no RICO enterprise where complaint did not allege how the various associates of the enterprise were interrelated through a common decision-making structure).

b. The Complaints Fail To Allege An Enterprise Distinct From The Alleged Pattern Of Racketeering.

The Broker-centered Enterprises also fail to satisfy the distinctiveness requirement of RICO. The Supreme Court held in *Turkette,* 452 U.S. at 583, that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.* at 583. The Third Circuit has held that a RICO enterprise "must be something more than simply the pattern of racketeering activity through which the racketeers conducted or participated in its affairs." *U.S. v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994); *see also Riccobene*, 709 F.2d at 221-24. Otherwise, "every conspiracy to commit fraud that requires more than one person to commit is a RICO organization and consequently every fraud that requires more than one person to commit is a RICO violation." *Stachon,* 229 F.3d at 676 (quotation omitted).

The distinctiveness requirement was explained in *U.S. v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982) (cited with approval by this Court, *see* April 5 Op. at 25). In *Bledsoe*, even though two

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[16] *See* Mar. 1 Hearing Tr. at 29 ("We don't challenge contingent commission payments").

schemes were conducted over time using the same *modus operandi,* the court found there was no structure beyond that which was inherent in commission of the predicate acts:

> [U]nder RICO an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetuate a crime without some degree of association apart from the commission of the crime itself. Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period. Congress clearly did not intend such an application of the Act.

674 F.2d at 664.

Associated Electric Cooperative v. Sachs Electric Co., 1987 WL 14499, at *2 (W.D. Mo. Jan. 12, 1987), illustrates the point. There, the plaintiffs alleged that defendants

> conspired to form and did form an enterprise, with which they subsequently associated, the purposes of which were . . . to allocate electrical construction contracts among defendants for the purpose of charging excessive prices . . . and to arrange for the submission of collusive, non-competitive, fraudulent and rigged bids.

The court held that these allegations did not establish any enterprise apart from the acts constituting the pattern of racketeering. *See also* April 5 Op. at 26 (citing *Union Fed. Bank v. Howard,* 2005 U.S. Dist. LEXIS 17887, at *12 (N.D. Ind. Aug. 23, 2005) (where a RICO plaintiff attempts to characterize the language that merely describes the alleged enterprise's activities as language that identifies the structure of the enterprise, such allegations are insufficient to plead a RICO claim)).

Similarly here, the fact that certain broker employees and executives, and certain insurer employees and executives, allegedly perform the same roles in the alleged conspiracy, even using the same *modus operandi* from one transaction to the next, does not establish a structure to the alleged enterprise apart from that necessary to commit the predicate acts. That some employees "plan for the steering or retention of business," others "monitor" such business and "determine

compensation," while others "keep track of reports" regarding placement volume (3A RICO Stmt at 67-68) at most alleges that defendants engaged in a purported continuing conspiracy to commit mail fraud. As this Court stated, "[t]he plaintiff cannot reduce plaintiff's structure allegations to a mere claim of conspiracy, since participants in any conspiracy always play certain roles and have some idea of what the other participants are doing." April 5 Op. at 24. *See also Parrino v. Swift,* 2006 WL 1722585, at *2 (D.N.J. June 19, 2006) (dismissing RICO claims where plaintiffs alleged that defendants were "part of an association, in fact, . . . that . . . share a common purpose, unity and identifiable structure, of an ongoing scheme to defraud plaintiffs and to unlawfully obtain money by means of false and fraudulent representations regarding the services they would perform for plaintiffs").

Plaintiffs' RICO Case statement confirms their failure to allege any enterprise apart from the predicate acts. In answer to question 7, which asks them to describe "in detail" whether the pattern of racketeering and the enterprise are separate, Plaintiffs make the conclusory statement that "the racketeering activity and the enterprise are separate." The answer goes on to assert that:

> The members of each Enterprise share a common purpose and each Enterprise is continuing and has a *structure for decision-making and* for *oversight, coordination and facilitation* ***of the predicate offenses.*** The pattern of racketeering activity includes numerous acts of mail and wire fraud in furtherance of a fraudulent scheme whereby each Broker Defendant allocates business to the Insurer members in exchange for kickbacks in the form of contingent commissions and/or other payments.

3A RICO Stmt at 69 (emphasis added); *see also* 3A EB RICO Stmt at 59.

In other words, the enterprise exists solely to oversee, coordinate, and facilitate commission of the predicate offenses. Take away the predicate acts and there would be no enterprise; thus there is no distinctiveness. *See Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 400-01 (S.D.N.Y. 2000) ("[I]n assessing whether an alleged enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is appropriate to consider whether the

enterprise would still exist were the predicate acts removed from the equation."). Put differently, Plaintiffs have defined the enterprise by what it *does,* not what it *is*. But "although a pattern of racketeering activity may be the means through which the enterprise interacts with society, it is not itself the enterprise, for an enterprise is defined by what it *is*, not what it *does*." *Stachon*, 229 F.3d at 676 (emphasis added).

In answer to question 8, which asks how the racketeering activity differs from the usual and daily activities of the enterprise, if at all, Plaintiffs assert that:

> *The daily activities of the enterprise include some legitimate activities relating to the distribution of insurance on a competitive basis.* The racketeering activity is comprised of a fraudulent scheme to allocate business on a noncompetitive basis resulting in additional profits for all Defendants as well as concealment of the scheme.

3A RICO Stmt 69 (emphasis added); 3A EB RICO Stmt at 60 (same). These assertions are indistinguishable from Plaintiffs' answers to the corresponding "distinctiveness" question in the two prior RICO case statements, neither of which were found sufficient by the Court. *See* Original RICO Stmt at 37 (Docket Entry No. 184) ("*Many of these services and products are legitimate and non-fraudulent. Normally the activities of the enterprises involve recommendations and the provision of insurance products which best meet the needs of the insured."*) (emphasis added); *see also* 2A RICO Case Statement at 77 (Docket Entry No. 844).

Plaintiffs understandably feel compelled to concede that the Broker and Insurer Defendants engage in some legal and legitimate business activities in addition to the allegedly fraudulent predicate acts of which they are accused. But the alleged members engaged in these legitimate activities in their individual capacities, not as an independent "enterprise." As the Court previously stated, the RICO distinctiveness requirement cannot be satisfied without factual allegations establishing that the enterprise, "functioning *as an independent, free standing*

association in fact, engages in a pattern of activity which differs from the usual and daily activities of its members." Oct. 3 Op. at **94-95 (emphasis added).

As alleged by Plaintiffs, the broker and insurer members of the alleged enterprises only "partner" insofar as they allegedly conspire to commit fraud. When the Defendants engage in legitimate functions, they are doing so as individual business entities – and ones that are fiercely competing, at that. Try as they may, Plaintiffs cannot define the "enterprise" here as anything more than the alleged coming together of otherwise independent actors to commit alleged predicate acts of fraud. Under the Court's prior rulings, and Third Circuit law, that is not an adequate pleading of distinctiveness.[17]

C. THE COMPLAINTS FAIL TO ALLEGE THAT DEFENDANTS OPERATED THE ALLEGED ENTERPRISE.

To conduct or participate, directly or indirectly, in the conduct of [a RICO] enterprise's affairs under § 1962(c) – again, an essential element of a RICO claim – "one must participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). To do so, a defendant "must have had some part in directing or conducting the affairs of the enterprise, *not just defendant's own affairs*." April 5 Op. at 26 (emphasis added). Plaintiffs do not allege facts meeting this requirement.

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[17] The Complaints contain another defect in their enterprise allegations. Plaintiffs allege that the Broker-centered Enterprises are associations-in-fact that included various corporations. However, a plain reading of the RICO statute indicates that a corporation cannot be a constituent of an association-in-fact enterprise. *See* 18 U.S.C. § 1961(4) (referring to a "group of individuals associated in fact"). In 2006, the Supreme Court heard argument on this very issue but ultimately remanded the case on other grounds. *See Mohawk Indus., Inc. v. Williams,* 126 S. Ct. 2016 (2006) (transcript of oral argument available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-465.pdf). Although current Third Circuit law recognizes that corporations may be members of association-in-fact enterprises, *see*, *e.g.*, *U.S. v. Console*, 13 F.3d 641, 652 (3d Cir. 1993), Defendants reserve the right to argue otherwise should this issue again reach the Supreme Court.

Plaintiffs allege that Defendants conducted the affairs of the Enterprises "by reaching agreement" regarding contingent commission payments; through their positions in or sponsorship of industry trade associations such as the CIAB; by steering business; by monitoring new and renewal business; by collecting and paying "inflated" premiums and computing premium levels; by paying contingent commissions; and by "coordinating concealment of the scheme." See 2A Cplt. ¶¶ 506-07, 525-26; 2A EB Cplt. ¶ 529. But this is all nothing more than the normal business of insurance conducted by each Defendant as part of its own affairs, in business and contractual relationships with others. As the Court has already held, merely having a business relationship with and performing services for an enterprise, such as financial, accounting, and legal services, is not equivalent to participation in operation and management of the enterprise. April 5 Op. at 27.

The business of the Insurer Defendants necessarily includes exchanging information with brokers about potential customers and general market conditions, deciding whether or not to quote on a piece of potential business, providing or withholding quotes, setting premium rates and compensating the broker involved in the policies the Insurer Defendants issued. Plaintiffs' allegations that the Insurer Defendants attended an industry function or sponsored the work of a trade association also merely allege a business relationship. That each Insurer Defendant conducted its own affairs in the highly competitive insurance business does not establish operation and management of a Broker-centered or industry-wide RICO enterprise. And if the insurers are not conducting or participating in a Broker-centered Enterprise, then it would be circular to say that the brokers were participating in the conduct of the very enterprise that Plaintiffs are trying to establish. Absent insurer conduct or participation in the alleged enterprise, the brokers would only be directing their own affairs, not those of the alleged enterprise.

As for the CIAB enterprise, the Court likewise held that it cannot be reasonably inferred from the mere fact of the Broker Defendants' CIAB membership "that they were interrelated in a

fashion enabling them to affect, non-marginally, each other's decisions or actions or to affect the conduct of each other's Incumbent and Accommodating Insurers. . . ." April 5 Op. at 54. Here, as before, all that Plaintiffs have alleged is that the broker members of the CIAB executed CIAB's internal business operations and management and produced CIAB's product (conferences, publications, etc). *Id.* at 49; *see, e.g.,* 2A Cplt. ¶¶ 444-50, 516-17, 519-20; 3A RICO Stmt at 73. This does not establish operation and control of the alleged "enterprise."[18]

D. THE COMPLAINTS FAIL TO PLEAD RICO PREDICATE ACTS.

1. Plaintiffs Have Failed To Plead Adequately The Predicate Acts Of Mail And Wire Fraud.

Plaintiffs assert that Defendants engaged in mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, by mailing and wiring correspondence, marketing materials, contracts, agreements, insurance policies, invoices and the like, which allegedly contained fraudulent misrepresentations and omissions. *See, e.g.*, 2A Cplt. ¶¶ 532-35; 2A EB Cplt. ¶¶ 537-38. However, Plaintiffs do not plead mail and wire fraud with the particularity required by Fed. R. Civ. 9(b). First, Plaintiffs do not plead facts showing that Defendants' alleged misrepresentations were in fact false, or that they were material. Plaintiffs also do not adequately allege that the misrepresentations were made with the specific intent to defraud. Moreover, Plaintiffs have not alleged that any of the Insurer Defendants made any representation at all to any of the named Plaintiffs. Finally, Plaintiffs do not plead adequately that they relied on any alleged misrepresentations or omissions.

The elements of a claim for mail or wire fraud are: "(1) the existence of a scheme to defraud; (2) the use of the mails [or wires] . . . in furtherance of the fraudulent scheme; and (3)

[18] The allegation that the CIAB Enterprises were operated "in some instances by bid rigging" (3A RICO Stmt at 77) does not establish anything more than isolated alleged misconduct, not operation or conduct of a much broader overall enterprise.

culpable participation by the defendant, that is, participation by the defendant with specific intent to defraud." *U.S. v. Dobson*, 419 F.3d 231, 237 (3d Cir. 2005); *see also Fitch v. Radnor Indus., Ltd.*, 1990 U.S. Dist. LEXIS 13023, at **16 n.5, 19 (E.D. Pa. Oct. 2, 1990). "[M]ateriality of falsehood is [also] an element of the federal mail fraud [and] wire fraud . . . statutes." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see also Corley v. Rosewood Care Ctr., Inc. of Peoria*, 388 F.3d 990, 1005 (7th Cir. 2004). In addition, as discussed earlier, a plaintiff seeking to base a RICO claim on mail or wire fraud must plead these elements with the particularity required by Rule 9(b). *Lum*, 361 F.3d at 223-24.

a. Plaintiffs Do Not Plead Any Materially Fraudulent Statements Or Omissions.

Plaintiffs claim two basic forms of misrepresentations and omissions. First, they contend that Defendants failed to disclose the receipt by Broker Defendants of contingent commission payments (or that the materials sent to policyholders were "insufficient to fully disclose" these payments). *See, e.g.*, 3A RICO Stmt at 22, 24, 25-26, 35-36, 41-42, 49-50, 55-57, 61-62. Second, Plaintiffs allege that in websites, client letters, policies and other correspondence, the Broker Defendants made representations that they would act in their clients' "best interests," but did not in fact do so. *See, e.g.,* 2A Cplt. ¶ 535. None of these alleged misrepresentations or omissions constitutes actionable mail or wire fraud.

With regard to contingent commissions, Plaintiffs repeatedly admit that Broker Defendants *disclosed* that they were receiving contingent commission payments. For example, Marsh's engagement agreements with clients disclosed:

> . . . as is the custom in Marsh's industry, ***Marsh has agreements with certain insurers under which Marsh may receive payments based upon such factors as the overall book of business placed by it and its affiliates, the performance of that book or the aggregate commissions paid for that book. Such "placement service revenue" would be in addition to any other compensation Marsh may receive*** such as retail, excess and surplus lines and wholesale brokerage fees or commissions, administrative fees

> and similar items. At your request, Marsh will provide additional information in this regard.

3A RICO Stmt at 22 (emphasis added).[19]

Plaintiffs argue that instead of disclosing only that the brokers "may" receive contingent commissions, Defendants should have disclosed the "significance" that these payments had on the placement process. *See, e.g.*, 2A Cplt. ¶ 458. According to Plaintiffs, the "significance" was that contingent commissions "provided the motive – greed – that incentivized the Brokers to ignore their duty to find for their clients the best policies at the best price and, instead," to steer business to "the few Insurers who agreed to pay the largest contingent commissions." 2A Cplt. ¶ 80; *see also* 2A EB Cplt. ¶ 93. But, having concededly received disclosures that the brokers could receive contingent commissions from insurers, Plaintiffs were on notice of any potential conflict of interest. Defendants were not required to go further and characterize those facts in a pejorative fashion. *See, e.g., Kas v. Fin. Gen. Bankshares, Inc.*, 796 F.2d 508, 513 (D.C. Cir. 1986) ("The violation arising from the failure to disclose . . . a potential conflict of interest does not turn on the failure to disclose . . . true motivations but rather stems from the failure to disclose a fact that puts the shareholder on notice of a potential impairment of . . . judgment."); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 375 (3d Cir. 1993) ("We do not mean to suggest that § 10(b) or Rule 10b-5 requires insiders to characterize conflict of interest transactions with pejorative nouns or adjectives.") (citation omitted).

In light of the disclosures that Plaintiffs themselves acknowledge, Plaintiffs cannot state a mail or wire fraud claim. *See, e.g., Straub v. Vaisman & Co.*, 540 F.2d 591, 597 (3d Cir. 1976). And any claim that Defendants somehow hid the magnitude of contingent commission payments

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[19] *See also, e.g.*, 3A RICO Stmt at 19-23 (Marsh); 32-35 (Aon); 41 (Willis); 55 (HRH); and 61 (Wells Fargo/Acordia); 2A Cplt. ¶¶ 452-57; 2A EB Cplt. ¶¶ 466-71.

is belied by the references in the Complaints and Plaintiffs' other pleadings to publicly available information about the volume of contingent commissions. *See* 2A Cplt. ¶ 452; *see also* Pl. Class Cert. Br. (Docket Entry No. 370), at 28 ("[t]he contingent commissions paid by insurers are disclosed in their filings with the NAIC [National Association of Insurance Commissioners] throughout this period").

With regard to the allegation that the Broker Defendants promised but failed to act in their clients' "best interests," that generic, subjective statement is plainly immaterial. Such "'[p]uffing' or 'sellers talk' is not actionable under the federal mail fraud statute." *In re Managed Care Litig.*, 150 F. Supp. 2d 1330, 1346 (S.D. Fla. 2001) (defining as "textbook examples of puffery" such statements as "'PruCare HMO *provides the Rock Solid health coverage you deserve*'. . . '*Quality is part of everything we do.*'") (emphasis added); *see also Corley*, 388 F.3d at 1008-09 (holding that sales puffery "does not qualify as material," and therefore a *"generic promise to provide 'high quality' services cannot . . . be the basis of a mail fraud claim"*) (emphasis added).

Even if not viewed as puffery, the "best interests" statement at most amounts to a contractual promise of future performance, not a representation of present fact. As a result, it could not be actionable absent factual allegations, not made here, that the Broker Defendants had no intention of performing the promise to these Plaintiffs. *See Corley*, 388 F.3d at 1007 ("The fact that [defendant] subsequently broke a promise is not evidence that it never intended to keep the promise when made. At most this is evidence of breach of contract, not fraud.").

Furthermore, for mail and wire fraud, a plaintiff must allege that defendants had "knowledge of the illicit objectives of the fraudulent scheme and willfully intend that those larger objectives be achieved." *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 908-09 (3d Cir. 1991). Plaintiffs, however, have not alleged that the supposed misstatements – contained in standard business communications to them, such as agreements, invoices, policies, and the like – were

accompanied by a specific intent to further the alleged grander fraudulent scheme. No intent to defraud can reasonably be inferred from such communications. *See, e.g., Asbeka Indus. v. Travelers Indem. Co.*, 831 F. Supp. 74, 89 (E.D.N.Y. 1993) ("[I]innocuous business communications . . . do not even remotely disclose a 'scheme to defraud'. . ., nor do they even remotely give rise to a strong inference of intent to defraud. The cases are legion that a RICO complaint cannot be predicated on innocuous business communications, absent some factual basis for inferring the sender's intent to defraud the recipient via a scheme to defraud.") (citations omitted).[20]

b. Plaintiffs Fail To Plead Fraud Against The Insurer Defendants For Additional Reasons.

Plaintiffs' RICO claims fail as to the Insurer Defendants for additional reasons. First, although Plaintiffs attempt to fold 114 Insurer Defendants, 25 more than before, into the alleged fraud schemes, nowhere in their more than 800 pages of pleadings in the two cases do Plaintiffs identify a single alleged false statement made by any Insurer Defendant to any named Plaintiff, much less do Plaintiffs specify the date, place, time or content of any such misrepresentations. As a result, Plaintiffs fail utterly to satisfy the requirements of *Rolo, Lum*, and this Court's holding that "the plaintiff must absolutely allege who made a misrepresentation to whom and sufficiently

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[20] To the extent Plaintiffs attempt to predicate their mail fraud claims on an alleged fiduciary duty by brokers to disclose, they have not pleaded facts establishing any such duty. Although not presently before the Court, the Broker Defendants have previously moved to dismiss Plaintiffs' breach of fiduciary duty claim for the reasons set forth in Docket Entry No. 284-1 at 44-46. Even if Plaintiffs could successfully plead such a claim, it would not be susceptible to class certification. *See, e.g., Kaser v. Swann*, 141 F.R.D. 337, 341-42 (M.D. Fla. 1991) (required proof of "trust and confidence" to show fiduciary relationship "makes this case unsuited for class certification"); *In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001) (reversing grant of class certification based, *inter alia*, on district court's failure to consider how individualized choice of law analysis of the forty-eight different jurisdictions, which "operate to discourage class treatment," would impact on predominance requirement).

set forth the general content of the misrepresentation." *See* April 5 Op. at 11; *see also* Oct. 3 Op. at *96 n.17 (finding that Plaintiffs' mail and wire fraud allegations failed to satisfy Rule 9(b) although not reaching issue because of deficiencies in enterprise allegations). Nor do Plaintiffs allege that the Insurer Defendants owed Plaintiffs any general fiduciary duty to disclose.[21]

2. The Complaints Do Not Adequately Allege That Plaintiffs Relied On Any Purported Scheme To Defraud.

Plaintiffs also fail adequately to allege that they actually and detrimentally relied on any representation or omission by any Defendant, and accordingly the RICO claims should be dismissed on this basis as well. Although the Third Circuit has not resolved the issue, "most courts now agree that reliance must be shown when mail fraud is a predicate act in a civil RICO case." *Cooper v. Broadspire Servs., Inc.*, 2005 US. Dist. LEXIS 14752, at *25 n.7 (E.D. Pa. July 20, 2005) (citing *Allen Neurosurgical Assocs., Inc. v. Lehigh Valley Health Network*, 2001 U.S. Dist. LEXIS 284, at **14-15 (E.D. Pa. Jan. 18, 2001)).[22] Beyond conclusory allegations, however, the new pleadings are bereft of any allegations of reliance whatsoever. *See, e.g.*, 2A Cplt. ¶ 551; 3A RICO Stmt at 80-81. Instead, Plaintiffs stand on unsupported boilerplate. *See id.* ("In addition, Plaintiffs and Class members reasonably relied on the Broker Defendant's representations and omissions in paying higher premiums that included the kickbacks to the Broker Defendant.") Such conclusory allegations of reliance are insufficient under Rule 9(b).

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[21] Nor can Plaintiffs cure their defective RICO claims by alleging that the Insurer Defendants aided and abetted the Broker Defendants' alleged fraud. The Third Circuit has held that no aiding and abetting liability exists under the civil RICO statute. *See Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843 (3d Cir. 2000).

[22] *See, e.g.*, *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 559 (5th Cir. 2000); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Cent. Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *N.J. Carpenters Health Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 324, 339 n.19 (D.N.J. 1998).

See, e.g., Panella v. O'Brien, 2006 U.S. Dist. LEXIS 59880, at **26-28 (D.N.J. Aug. 24, 2006); *Parker v. Learn the Skills Corp.*, 2006 U.S. Dist. LEXIS 12468, at *21 (E.D. Pa. Mar. 23, 2006). In fact, Plaintiffs do not allege that they even *saw or read* Defendants' correspondence, agreements, policies, etc., let alone relied on them. Any facts supporting actual reliance are peculiarly within the knowledge of the named Plaintiffs, and the absence of any such concrete facts speaks volumes and requires dismissal of the RICO claims.

3. The EB-Specific Predicate Act Claims Are Deficient.

In the EB Case only, Plaintiffs make two claims of predicate acts specific to that case, neither of which is adequately alleged. First, Plaintiffs allege that the Defendant EB Insurers provided false or incomplete information on ERISA Form 5500s and falsely certified information provided with respect to compensation paid to Broker Defendants as required by ERISA section 103. *See, e.g.*, 3A EB RICO Stmt at 16, 29-31, 36-37, 42, 49; 2A EB Cplt. ¶¶ 389-457.[23] However, Plaintiffs do not allege that Form 5500 reporting or any certifications were communicated to the *named* employee Plaintiffs or were deficient with respect to ERISA plans that were sponsored by the *named* employer Plaintiffs. The allegations lack any specificity regarding the identities of the affected plans or the content of any allegedly false certifications regarding such plans. Accordingly, Plaintiffs' mail and wire fraud allegations based on the Form 5500s do not satisfy Rule 9(b).

Second, the EB Plaintiffs allege that Defendants violated 18 U.S.C. § 1954 by accepting and/or paying undisclosed compensation to influence the Broker Defendants with respect to employee benefit plans. *See, e.g.*, 3A EB RICO Stmt at 14; 2A EB Cplt. ¶¶ 534-35. This claim cannot be sustained. *See, e.g., Sante Mineral Waters, Inc. v. Schotz*, 1991 U.S. Dist. LEXIS

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[23] There are no such allegations against any of the Broker Defendants.

11347, at **4-6 (N.D. Cal. June 3, 1991) (rejecting allegation that insurer's payments of commissions to its agents for sale of life insurance policies showed that insurer intended to influence its agents to cause the employee benefit plan to purchase more insurance from insurer in violation of 18 U.S.C. § 1954). As the court in *Schotz* reasoned, were the law otherwise, it would be a criminal act every time an insurer pays a broker or agent to encourage more business from an ERISA plan, a regular practice in the insurance industry. Here, as in *Schotz*, the insurers are simply paying a broker to encourage more business from an ERISA plan and the brokers disclosed that they may receive compensation for volume or growth. *See* 2A EB Cplt. ¶¶ 466-72.[24]

E. THE COMPLAINTS FAIL TO PLEAD THAT SOME ACT OF THE DEFENDANTS PROXIMATELY CAUSED PLAINTIFFS' ALLEGED INJURIES.

Plaintiffs' RICO claims also fail for the fundamental reason that Plaintiffs do not allege a RICO injury directly and proximately caused by any act of Defendants. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

As a threshold matter, in a putative class action, the sufficiency of the allegations of injury and causation must be assessed with respect to the *named plaintiffs*. *See Lewis v. Casey*, 518 U.S. 343, 357(1996); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169-70 (3d Cir. 1987). Thus, absent a concrete injury-in-fact suffered by these Plaintiffs and proximately caused by the alleged RICO violation, there is no standing and hence no RICO claim. *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000) (interpreting RICO statutes as "requiring a RICO plaintiff

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[24] The § 1954 allegations also fail to meet Rule 9(b), which applies because the allegations are premised on the alleged fraudulent failure to disclose contingent commissions (2A EB Cplt. ¶ 521). *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (where a plaintiff alleges "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim", the "claim is said to be 'grounded in fraud' or to 'sound in fraud' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)").

to make two related but analytically distinct threshold showings" of (1) a "concrete financial loss" that was (2) proximately caused by defendant's RICO violation) (citations omitted).

Furthermore, a RICO plaintiff needs to be able to establish a *direct* causal link between the alleged fraud and their injury in order to make out a RICO claim. As the Supreme Court recently held, "[w]hen 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 v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006). Accordingly, speculative and conclusory allegations of causation, lacking supporting facts, should not be credited. *See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *First Nationwide Bank,* 27 F.3d at 771.

Here, Plaintiffs' allegations of injury and causation are entirely conclusory and speculative. They claim that they "paid more for the insurance they procured through the Broker Defendants than they otherwise would have" had Defendants disclosed contingent commission payments to Plaintiffs' satisfaction. 2A Cplt. ¶¶ 377, 401; 2A EB Cplt. ¶ 343; *see also* 3A RICO Stmt at 80-81. But Plaintiffs nowhere allege how additional disclosures of such commissions would have affected the prices they paid (or by how much), thereby failing to provide Defendants with "some indication of the loss and the causal connection that the plaintiff has in mind . . . ." *See Dura,* 544 U.S. at 347.

The mere fact, if it is even a fact, that contingent commissions are built into the premiums paid by policyholders (and it is hotly contested in the class certification motion whether and to what extent this is true), does not establish any injury "by reason of" a RICO violation as required by 18 U.S.C. § 1964(c). Plaintiffs have previously conceded that it is not the mere payment of contingent commissions that they challenge, but only the "*improper use*" of contingent commission agreements through alleged bid-rigging, "steering" or other specific misconduct. Pl.

Class Cert. Br. at 7 (Docket Entry No. 370) (emphasis added). But the named Plaintiffs do not allege that any of *their* policies were subject to bid-rigging or steering conduct. Indeed, Plaintiffs concede that the Defendants regularly engage in "some legitimate activities relating to the distribution of insurance on a competitive basis." *See* 3A RICO Stmt at 69. For all that appears from the pleadings, Plaintiffs' placements were competitively marketed and they suffered no injury whatsoever.

Because Plaintiffs do not allege with any specificity that any of their own policies was subjected to any illegal conduct, any alleged injury they suffered in the form of increased premiums could only flow, if at all, indirectly from wrongful conduct directed at others. This is particularly true inasmuch as Plaintiffs would be claiming that wrongful conduct in one line of insurance (*e.g.*, Connecticut workers' compensation) impacted pricing in a wholly different line of insurance (*e.g.*, California earthquake). Plaintiffs are in effect relying on some sort of "market taint" or "umbrella" theory, as they have stated in the past. *See* Pl. Mem. in Opp. to Defs' Motions to Dismiss Corrected First Consol. Amended Comm. Cplt. (Docket Entry No. 344), at 3.

This is precisely the sort of speculative and attenuated claim that the Supreme Court and Third Circuit have held should not be allowed to proceed under either an antitrust or RICO theory. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 440-41 (3d Cir. 2000); *Mid-West Paper Prods. Co. v. Cont'l Group, Inc.*, 596 F.2d 573, 581, 586 (3d Cir. 1979) (rejecting "umbrella pricing" theory where, with no factual basis for alleging that their own purchases, or those of all class members, were directly affected by any illegality, plaintiffs alleged that the entire class paid "higher prices that arguably ensued in the entire industry" as a result of defendants' allegedly anticompetitive conduct directed at some subset of class purchases);

McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996) ("antitrust standing principles apply equally to allegations of RICO violations").[25]

The named Plaintiffs' injury and causation claims are thus "highly conjectural" and would "transform [the] litigation into the sort of complex economic proceeding" courts have declined to entertain. *Mid-West Paper*, 596 F.2d at 584-85. Were this case to proceed, the finder of fact would have to determine how much each plaintiff paid for its insurance, what portion of the premium is attributable to contingent commissions, whether the particular contingent commissions that contributed to each Plaintiff's premiums were legitimate or not, and whether Plaintiffs ultimately paid a higher price as a result of contingent commissions.[26] These are precisely the sort of guessing games that the proximate causation requirement is intended to avoid. *See Anza,* 126 S. Ct. at 1998 ("The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.").

F. THE COMPLAINTS DO NOT PLEAD A RICO CONSPIRACY UNDER 18 U.S.C. § 1962(d).

Plaintiffs' RICO conspiracy claims under § 1962(d) should be dismissed for two independent reasons. First, as demonstrated above, Plaintiffs failed to plead a valid substantive RICO claim under § 1962(c) and for this reason alone the § 1962(d) claims fail. *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996); *see* April 5 Op. at 29 ("in the event of

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25 Plaintiffs' cause is not helped by their assertion that "[d]ue in part to the fungibility of risk, the pricing of different types of commercial insurance is closely aligned, such that a catastrophic event like a flood will typically raise premiums not just for the directly affected lines of coverage but for other products as well." 2A Cplt. ¶ 71. It is folly to posit that the isolated specific instances of misconduct alleged in the pleadings are the type of Katrina-like catastrophic event that could impact prices in the entire insurance industry.

26 In the case of the "Employee Plaintiffs," there would also have to be a determination of which portion of the alleged increase in premium was passed on to them from their non-party employers or other group healthcare providers, who were the direct purchasers of insurance.

dismissal of all substantive RICO claims in the action, a plaintiff cannot bring a § 1962(d) claim based on a non-RICO claim") (citing *Beck v. Prupis*, 529 U.S. 494 (2000)).

Second, Plaintiffs do not allege enough factual matter to suggest an agreement to facilitate the commission of a substantive RICO offense under § 1962(d). Neither the Complaints nor the amended RICO Statements adequately allege, as they must, that each Defendant in each of the 14 different purported conspiracies knowingly agreed to facilitate a scheme that includes the operation or management of a RICO enterprise. *See Smith v. Berg,* 247 F.3d 532, 538 (3d Cir. 2001). Indeed, the Complaints allege nothing more than parallel conduct separately undertaken by the myriad members of the purported conspiracies. But allegations of parallel conduct, even consciously undertaken, must be coupled with allegations of facts pointing toward a meeting of the minds. *Twombly*, 127 S.Ct. at 1966.

Plaintiffs allege no such facts, and certainly not "with specificity" or "particularized" as is required. *See Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989). All 14 of the RICO conspiracies alleged in Plaintiffs' latest pleadings rely entirely on contentions of parallel conduct; none provides facts suggesting a meeting of the minds to engage in unlawful conduct as distinct from independent action that was in the economic self-interest of each Defendant. Therefore, all of Plaintiffs RICO conspiracy claims should be dismissed under Rule 12(b)(6).

1. The Defective Broker-Centered RICO Conspiracies

As to the alleged Broker-centered Conspiracies, Plaintiffs allege no *facts* to support their conclusion that all members of each conspiracy – some containing more than 100 different members – entered into an agreement. The fact that multiple insurance companies may have entered into separate, lawful contingent commission agreements with some of the same brokers, "when viewed in light of common economic experience" (*Twombly*, 127 S. Ct. at 1971), does not suggest an agreement among all Insurer Defendants to conceal those agreements. Even if

Plaintiffs offered a specific factual contention – which Plaintiffs have not – that each broker allegedly agreed with each individual carrier to conceal the existence of their contingent commission agreement,[27] that allegation of mere parallel conduct still amounts to nothing more than a series of independent actions. *See, e.g., First Nationwide*, 820 F. Supp. at 97-98 (cited in April 5 Op. at 56) ("[I]t appears at worst that several borrowers each committed a similar but independent fraud with the aid of a particular lender, and that each such borrower acted on a particular occasion to benefit him or herself and not to assist any other borrower.").

Plaintiffs admit, as they must, that contingent commission agreements are a long-standing industry practice. As such, each Insurer Defendant had its own pro-competitive reasons for entering into these agreements regardless of what other insurers did and there is no reason to infer that all insurers conspired to do that which had long been done. *Twombly*, 127 S. Ct. at 1971 (engaging in "routine market conduct" provides "no reason to infer that the companies had agreed among themselves to do what was only natural anyway"). Indeed, there are no allegations of any communications between the dozens of Insurer Defendants in each alleged conspiracy manifesting an agreement between them, or even allegations providing any reasonable basis to infer that such an agreement exists. Thus, the Broker-centered Conspiracy allegations fail as a matter of law.

2. The Defective Broker Defendants' RICO Conspiracies

Plaintiffs compound the deficiencies in each of the 11 Broker-centered Conspiracies by also alleging parallel conduct by each Broker Defendant to create "Broker Defendants" Conspiracies allegedly to prevent Plaintiffs and members of the Class from becoming aware of the

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[27] The fact that brokers disclosed the receipt of contingent commissions to their clients undermines Plaintiffs' allegation that the Broker and Insurer Defendants "agreed to keep their contingency commission arrangements secret" through confidentiality provisions in the agreements (2A Cplt. at p. 109). Moreover, Plaintiffs acknowledge that the contingent commission agreements did not preclude such disclosures as might be required by law. *See, e.g.*, 2A Cplt. ¶ 406.

terms and the significance of contingent commission agreements. 3A RICO Stmt at 77-78; *see also* 3A EB RICO Stmt at 64.

Not a single specific fact is alleged identifying when, where, how, or who entered into the alleged conspiracy among all Broker Defendants. *See Twombly*, 127 S. Ct. at 1971 n.10 ("the pleadings mentioned no specific time, place or person involved in the alleged conspiracies"). Plaintiffs' claims of Broker Defendant Conspiracies are based merely on allegations of parallel conduct by 38 large insurance brokers who compete for the business of members of the putative class. This Court's prior analysis of the Plaintiffs' deficient RICO enterprise claim applies equally to the present RICO conspiracy claim, and even more so after *Twombly*:

> [T]he presence of similar goals, strategies and business models, legal or illegal, employed by various members of the industry does not, on its own, indicate that these entities comprise a RICO [conspiracy]. The presence of such similarities does not preclude a competition among these entities for their share of the market, but the presence of such competition precludes finding of a RICO [conspiracy].

April 5 Op. at 57.

3. The Defective Global RICO Conspiracies

Finally, Plaintiffs allege no facts supporting their claim of virtually industry-wide RICO conspiracies involving all Defendants in each case. The only attempt to connect this disparate mass of entities is through their participation in the CIAB and LIMRA. But mere participation in a trade association does not support an inference of conspiracy. *See, e.g., Twombly*, 127 S. Ct. at 1971 n.12; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir. 1993). Other than allegations of parallel conduct, and conjecture, Plaintiffs provide no basis for "a single reasonable factual inference" in support of the alleged global conspiracies. *See* April 5 Op. at 36.

CONCLUSION

Plaintiffs have failed in their final attempt to cure the many defects in their RICO claims. Consequently, all RICO claims in the two cases should now be dismissed with prejudice.

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