

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

GLEND A SHOWS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No.: 1:07-cv-00709-WHB-LRA
	)	
STATE FARM MUTUAL AUTOMOBILE	)	
INSURANCE COMPANY, et al.,	)	
	)	
Defendants.	)	
_____	)	

**STATE FARM FIRE AND CASUALTY COMPANY'S RESPONSE IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Defendant State Farm Fire and Casualty Company (“State Farm Fire”) respectfully submits this response in opposition to Plaintiffs’ motion for leave to amend. (Doc. 64.)

While State Farm Fire is mindful that in normal circumstances leave to amend is freely given, the circumstances here are anything but normal. In light of inexplicable delays, bad faith, and incurable defects, State Farm Fire respectfully requests this Court to deny Plaintiffs’ motion to amend and render a decision on the long-pending Rule 12 motions before granting any leave to re-plead. Deciding the Rule 12 motions first will dispose of several incurable aspects of Plaintiffs’ pleadings and provide important guidance to the parties as to future pleading issues.

While leave to amend pleadings is to “be freely given when justice so requires,” Fed. R. Civ. P. 15(a), such leave is “by no means automatic.” *Addington v. Farmer’s Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. 1981). “The decision to grant or deny a motion to amend is in the sound discretion of the trial court.” *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991) (affirming district court’s denial of motion to amend) (citing *Shivangi v. Dean Witter Reynolds, Inc.*, 825 F.2d 885, 890 (5th Cir. 1987)). Under Fed. R. Civ. P. 15(a), leave to amend may be properly denied for various reasons, including undue delay, bad faith, and futility. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). All of these reasons exist here.

**I. INEXPLICABLE DELAYS WARRANT DENIAL OF THE REQUESTED LEAVE AT THIS TIME**

On August 27, 2007, State Farm Fire filed its Rule 12 motions for judgment on the pleadings and to strike (Docs. 25, 26). The Court then granted, without objection, Plaintiffs’ request for an additional 60 days to respond. Despite having three months to respond, Plaintiffs inexplicably failed to do so. Instead, just three days before their generously extended deadline, Plaintiffs filed this motion for leave to amend their complaint. That leave should be denied at this time due to, among other things, Plaintiffs’ undue delay and lack of diligence in seeking the proposed amendments, *see Foman*, 371 U.S. at 182, and the Rule 12 motions should be decided first.

Though Plaintiffs proffer no excuse whatsoever for their protracted and unjustified delay, under the current Case Management Order (Doc. 57), discovery is set to close in June 2008, a pretrial conference is set for September 2008, and trial is set for October 2008. Plaintiffs' dilatory practices have the effect, if not also the intent, to artificially compress Defendants' ability to take meaningful discovery in this complex case, involving a multiplicity of Plaintiffs, Defendants, and complicated legal issues. Put simply, after having three months to join issue on the pending Rule 12 motions, Plaintiffs have made an eleventh-hour gambit to ostensibly render those motions moot (though they are not), and to start the Rule 12 cycle anew even though discovery is currently set to close in six short months. Yet, a decision on the pending Rule 12 motions will bring repose to many issues that are incurable through the submission of any amended pleading and will provide important guidance to the parties in the event the Court grants Plaintiffs leave to file an amended complaint *after* deciding the long-pending Rule 12 motions.

Plaintiffs' dilatory conduct is improper, and evinces "an effort to amend solely to defeat Defendant's motion to dismiss." *Costello v. Univ. of N.C. at Greensboro*, 394 F. Supp. 2d 752, 757 & n.3 (M.D.N.C. 2005); *cf. Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 141 (5th Cir. 1993) ("[W]here the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate.") (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 599 (5th Cir.1981)).

## **II. IMPROPER PLEADING AND BAD FAITH PLAGUE THE PROPOSED AMENDMENTS**

Leave to amend should also be denied due to Plaintiffs' improper pleading tactics and bad faith. *See Foman*, 371 U.S. at 182. The scandalous and inadmissible "factual" allegations in their proposed amended complaint would only have to be stricken under a motion subsequently brought under Federal Rules of Civil Procedure 8, 10, and 12 in the event the Court permits the amended pleading to be filed under Rule 15 at this time.

**A. Violations of Federal Rules 8, 10, and 12 Will Require More Motions**

The most notable addition to the proposed amended complaint is the nearly fourteen pages of unnumbered pleading. That rambling “introduction” is filled with incendiary rhetoric and is later “incorporated by reference in its entirety” in paragraph 197 in a wholly improper effort to meet, and render inscrutable, Plaintiffs’ pleading obligations. Inasmuch as the first numbered paragraph does not appear until page fifteen, the proposed amended complaint clearly violates the express requirements of Federal Rule of Civil Procedure 10(b) that “a party *must* state its claims or defenses in *numbered* paragraphs, each limited as far as practicable to a single set of circumstances.” (Emphasis added.)

This sprawling introduction also violates Federal Rule of Civil Procedure 8(d)(1), which requires that “[e]ach allegation must be simple, concise, and direct.” The matters alleged in these fourteen pages constitute precisely the kind of improper “storybook” pleading that has been repeatedly rejected under the Federal Rules. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996). A complaint that consists of “‘narrative ramblings’ and ‘storytelling or political griping,’” *id.*, it is not “‘the traditional pleading style which prescribes a short and plain statement,’ and it does not provide defendants notice of what legal claims are asserted against which defendants.” *Id.* But neither the Court nor the parties should be required to “sift through [this] storybook complaint in order to find the factual nuggets which support” the Plaintiffs’ claims. *Cohabaco Cigar Co. v. U.S. Tobacco Co.*, 1998 WL 773696, at \*6 (N.D. Ill. Oct. 30, 1998). Rather, the Plaintiffs should “excise the ‘numerous editorial comments and extraneous and irrelevant factual references’” that permeates their proposed amended pleading. *Id.* at \*4.

So, too, the incendiary and breathless rhetoric that litters this “storybook” pleading runs afoul of Federal Rule of Civil Procedure 12(f). As but one example of Plaintiffs’ scurrilous “press-release pleading” are the scandalous and outrageous allegations, which must otherwise be stricken under Rule 12(f), that purport to equate one of this country’s leading businesses with the Mafia.

In many respects, the Enterprise resembled(s) an organized crime family, with STATE FARM acting like a mob boss, while Forensic and RENFROE served(s) as paid “hit men” and helped bury “the bodies.” While this particular Enterprise did not engage in mob-style murders – instead the “hits” here are repeated and related instances of insurance claim fraud and “the bodies” are the electronic and paper trails showing their illegal conduct – the Enterprise’s conduct is exactly the type of organized illegal racketeering that the federal RICO statute was designed to address.

Proposed Am. Compl. at p. 5. Such wild-eyed hyperbole does not, and quite obviously was never intended to, assist in the proper factual explication of Plaintiffs’ case, as contemplated under the Federal Rules. Quite to the contrary.

Pleading “press-release” allegations designed to poison the jury pool is precisely what Plaintiffs have sought to do. Indeed, the scandalous allegations in the proposed amended complaint have already hit their target and served their improper purpose. As recently reported in the local press, “The amended complaint ... says State Farm essentially acted as a ‘mob boss,’ with the vendors serving as ‘hit men’ in a scheme to make money.” Anita Lee, *New Allegations Outlined in State Farm Case*, Sun-Herald, Nov. 28, 2007. Such sharp tactics should not be encouraged.

Plaintiffs are not entitled to use the pleading process as an opportunity to slander State Farm Fire, grab press headlines, and taint the jury pool in the process. Such allegations “are superfluous descriptions and not substantive elements of the cause of action. As such, they have no place in pleadings before the court.” *Alvarado-Morales v. Digital Equip. Corp.*, 843 F.2d 613, 618 (1st Cir. 1988). Indeed, allegations of the kind pleaded in the proposed complaint – “festooned with unnecessary evidentiary detail [and which] seems to have been crafted in order to elicit a strong reaction in the jury room” – are particularly disfavored. *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 739 F. Supp. 158, 165 (S.D.N.Y. 1990). To be sure, “Fed. R. Civ. P. 15(a) requires that leave to amend shall be ‘freely given,’ but there is a difference between freedom and license.” *Id.* at 167.

**B. Plaintiffs' Pleadings Improperly Rest on Ill-Gotten Evidence**

Plaintiffs' amendments, including their new exhibits, are largely based upon evidence improperly obtained by Plaintiffs' counsel, Derek Wyatt, from Nellie Williams, a former employee of Forensic Analysis and Engineering Corporation, which Plaintiffs have dropped as a Defendant in a settlement (believed to be for little to no money, but whose terms have yet to be disclosed) designed to make these issues die. *See, e.g.*, Pls.' Mem. (Doc. 65) at 3-4. Plaintiffs' amendments violate the Federal Rules because they spring from a flagrantly improper subpoena issued in July 2007 in *McIntosh v. State Farm Fire and Cas. Co.*, No. 1:06-cv-1080-LTS-RHW (S.D. Miss.).

These events were no accident. By way of background, Plaintiffs' counsel had previously used improper subpoenas to obtain evidence in *McFarland v. State Farm Fire and Cas. Co.*, No. 1:06-cv-466-LTS-RHW (S.D. Miss.). There the court held that Mr. Wyatt's subpoenas "were improperly issued and void when served" – "thereby depriving Defendant . . . of any notice or opportunity to object thereto." *See* Aug. 30, 2006 Order in *McFarland* (Doc. 35) at 1, 4 (attached as Ex. 1). As the court aptly recognized, "[t]his is a fact which was or should have been known to Plaintiffs' attorney when he issued the subpoenas." *Id.* at 4. The court was also taken aback by counsel's "improper and offensive" *ex parte* communications with court, which sought "the Court's complicity in the acts leading to the production of the documents ...." *Id.* at 3 & n.2. Ultimately, the Court warned that it "is deeply troubled by the conduct of Plaintiffs' counsel in this case." *Id.* at 5.

Undeterred by that cautionary note, in yet another case, *Mullins v. State Farm Fire & Cas. Co.*, No. 1:06-cv-457-LTS-RHW (S.D. Miss.), Plaintiffs' counsel repeatedly set depositions unilaterally, causing the court to find that Plaintiffs' counsel "chose to ignore the clearly stated objection of Forensic's counsel, made no effort to determine an agreeable date, and proceeded to set the depositions of Forensic's employees." Oct. 20, 2006 Order in *Mullins* (Doc. 44) at 3 (attached hereto as Ex. 2). Though the court was "dismayed by the lack of civility and professional courtesy exhibited in this case,"

*id.*, still undeterred, Plaintiffs' counsel unilaterally set the deposition of Ms. Williams, after which the court ordered all pending depositions cancelled. *See* Jan. 3, 2007, Text Only Order in *Mullins*.

Significantly, when Plaintiffs' counsel deposed Ms. Williams on December 14, 2006, Plaintiffs' counsel badgered and browbeat her to produce a multi-disk set of CDs even though privilege was asserted over some of their content. *See* Ex. 3, Williams Dep. at 177:5-17. Though Ms. Williams was, as Plaintiffs' counsel acknowledged, not represented by counsel in her first-ever deposition, *see id.* at 8:1-3, 153:2-3, 175:13-14, Plaintiffs' counsel repeatedly and aggressively threatened her, and told her that she was "in contempt" unless she immediately turned over those CDs in response to the subpoena.

- "You can either turn over the documents that you brought here today pursuant to this order [*i.e.*, referring to the subpoena], or you can choose to be in contempt of this order. Which do you choose?"
- "I'm asking you again, do you choose to be in contempt of this subpoena or are you turning over the documents commanded by the subpoena?"
- "[Y]ou're choosing to do so [not comply] at your peril. ... What happens next will be a proceeding in the United States District Court, District of Nevada, to hold you in contempt."
- "Are you familiar with the United States District Court subpoena? Do you know what the power and import of it is?"
- "Let me just inform you that what you will find out from here on will be a lot more poignant than what you're finding out right now. This ... is a court order that you are to produce what is asked for in this subpoena."
- "It orders you to produce it to us today at the designated time and place. So if you choose not to do that [comply], you're choosing to be in contempt of the subpoena."
- "If you choose not to do it, then you choose not to do it, and you need to understand you are in contempt of the order."
- "So as of this moment, if you are choosing to refuse to produce the information to us, you're in contempt."

*Id.* at 175:13-17; 176:1-2, 14-16; 180:9-14; 181:3-5, 7-12, 16-20; 182:22-24; 183:16-18. After this long and uncomfortable exchange, Ms. Williams simply surrendered wholesale all the data she had, including data Forensic claimed was outside the scope of the subpoena. *See id.* at 184.

Plaintiffs' counsel berating of Ms. Williams and telling her that she was "in contempt" was way out-of-bounds on multiple levels. "[I]n order to impose sanctions on a nonparty, violation of a court order is generally required in addition to the failure to comply with the subpoena." *Taylor v. Hart*, 2007 WL 1959211, at \*1 (S.D. Ohio June 29, 2007). Moreover, instructing a non-party witness as to the effect of a subpoena in such a fashion "constitute[s] an abuse of process," *Fox Indus., Inc. v. Gurovich*, 2006 WL 2882580 at \*9 (E.D.N.Y. Oct. 6, 2006), "and vexatious behavior, evincing a deliberate effort to usurp the authority of the court." *Id.* at \*10. "It is the court's duty to rule on the validity of subpoenas and to direct the recipients to comply or not comply, not the attorney's, and [counsel] has, simply put, usurped the authority of the court. ... The court will not tolerate such behavior." *Id.* at \*8.

The Federal Rules of Civil Procedure grant attorneys broad power to issue subpoenas as "officer[s] of [the] court." Fed. R. Civ. P. 45(a)(3). Yet, with great power comes great "responsibility and liability for the misuse of this power." Fed. R. Civ. P. 45 advisory committee's note on 1991 amendment.

The risks attached to the misuse of the subpoena power are great. Under this delegation of public power, an attorney is licensed to access, through a non-party with no interest to object, the most personal and sensitive information about a party. ... [M]isuse of the subpoena power ... compromises the integrity of the court's processes. ... When the power is misused, public confidence in the integrity of the judicial process is eroded.

*Spencer v. Steinman*, 179 F.R.D. 484, 489 (E.D. Pa. 1998), *vacated in part on other grounds*, 1999 WL 33957391 (E.D. Pa. Feb. 26, 1999). Only a court – not a lawyer – can determine whether a witness is "in contempt" of a subpoena. *See* Fed. R. Civ. P. 45(e).

These unfortunate episodes merely laid the groundwork for the startling events that were to happen next. Plaintiffs' counsel served a subpoena on Ms. Williams *without* (once again) giving any

notice to the court or counsel. *See, e.g.*, FAEC's Oct. 10, 2007 Sur-Reply to Pls.' Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc. (Doc. 721) in *McIntosh* at 6-8. The subpoena required Ms. Williams to bring her personal computer to a computer technician who opened her computer and physically extracted her hard drive. *See* Ex. 4, Williams Dep. in *McIntosh*, at 273:1-6. Depriving Ms. Williams of the custody of her hard drive, he then placed it in a pre-addressed and pre-paid shipping box, sealed it, and instructed Ms. Williams to deliver it to a private mail location to dispatch it to Plaintiffs' forensic computer consultants. *See id.*

To be sure, Ms. Williams was reluctant to relinquish her computer because it contained her personal and private records. *See id.* at 273:16-17. Yet, Ms. Williams, a recent widow, was reluctant to object to the subpoena because of two things.

First, the browbeating that Plaintiffs' counsel gave her during the *Mullins* deposition – an experience that Mr. Wyatt chose to revisit with her in *McIntosh* – lead her to believe she had to follow the terms of the July 2007 subpoena for her computer's hard drive no matter what or be “in contempt.”

Q. [Y]ou were reluctant to produce [the CDs] . . . and we had to go through a little process of explaining what the consequences were to not complying with the subpoena. Do you remember that?

A. Yes.

Q. So you knew about all of that when this subpoena came, this one here that came in July of 2007. You already knew about the procedures for the subpoena and everything, and what you could do and couldn't and so forth, right?

\* \* \*

A. As far as complying with what was said on the subpoena?

Q. Complying, or not complying, or complaining, or doing anything you wanted to do, right?

A. Well, complaining didn't enter into it, but I knew that I had to turn it in as per the subpoena.

*Id.* at 276:9-25. Not only did that experience mislead Ms. Williams into apparently believing that she had no ability to object to a subpoena and had no alternative other than to comply with its terms, but also

when she learned that Mr. Wyatt would again be taking her deposition, she retained counsel. As Ms. Williams told Mr. Wyatt, “*you* were the reason I sought to have representation.” *Id.* at 278:17-18.

Second, Ms. Williams assumed that Forensic’s counsel received a copy of the subpoena and assumed that “if there was a problem with that, they would notify [her].” *Id.* at 278:24-279:2. But, of course, those assumptions were rendered void by Plaintiffs’ counsel action. Notice was *never* given.

After Ms. Williams complied with the terms of the July 2007 subpoena, Plaintiffs’ counsel forensically harvested *18.8 gigabytes* of data from her hard drive. *See* FAEC’s Oct. 25, 2007 Mem. in Support of Mot. for Protective Order, Etc. (Doc. 604-3) in *McIntosh* at 2. Data they have yet to produce.

Then engaging in a game of “hide and seek,” when Plaintiffs’ counsel suddenly sprung Forensic emails in a deposition in *McIntosh* – emails that neither Forensic’s nor any other defense counsel had previously seen – Forensic’s counsel asked him how he acquired them, but he refused to answer.

MR. CANADA: And you shouldn’t have it [*i.e.*, the email] to begin with.

MR. WYATT: We shall see.

MR. CANADA: How did you get it?

MR. WYATT: We shall see.

MR. CANADA: How did you get it?

Ex. 5 at 107:17-22. When Forensic’s counsel puzzled together the fact that Plaintiffs’ counsel improperly possessed these emails, a multi-track set of motion practice ensued.

First, Forensic moved to have the evidence suppressed and for sanctions. *See* FAEC’s Oct. 8, 2007 Mem. in Supp. of Mot. for Protective Order, Etc., (Doc. 604) in *McIntosh* at 2-3. The *next day* the court issued an Interim Order “pending full briefing on the motion,” finding there was “no notice of intent to issue a subpoena duces tecum to Williams, nor proof of service of any such subpoena” in the docket. *See* Oct. 9, 2007 Interim Order (Doc. 613) in *McIntosh* at 1-2 (attached hereto as Ex. 6). In the meantime, the court ruled “[t]hat dissemination of, or use or reference to, any information obtained from

Ms. Williams' computer is **prohibited** pending further order of this Court," *id.* at 2 (emphasis in original), and ordered Plaintiffs' counsel to "retrieve any and all forms and copies of such information," *id.*, and to "place all information, which exists in any form whatsoever (including any and all copies and the hard drive itself), which came from Williams' computer into a sealed container which shall not be opened for any purpose pending further order of this Court." *Id.*

Second, Plaintiffs initiated another track of motion practice, seeking exemption from the Interim Order because they wished to deliver the hard drive to a federal grand jury in response to a subpoena. *See* Pls.' Oct. 11, 2007 Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc., (Doc. 629) in *McIntosh* at 2. By taking this route, Plaintiffs attempted to circumvent any substantive ruling on the propriety of counsels' conduct. *See, e.g.*, FAEC's Oct. 25, 2007 Sur-Reply to Pls.' Mot. for Permission to Comply with Fed. Grand Jury Subpoena, Etc., (Doc. 721) in *McIntosh* at 1-2.

Third, under a misguided belief that the best defense is a strong offense, Plaintiffs then initiated another track of motion practice, seeking to depose Forensic's counsel and accusing them of misleading the court. *See* Pls.' Oct. 31, 2007 Emerg. Mot. to Permit Discovery for Ltd. Purposes (Doc. 751) in *McIntosh*. Those accusations were strongly and cogently rebuffed, revealing those vacuous stratagems for what they were. *See* FAEC's Nov. 5, 2007 Resp. in Opp. to Pls.' Emerg. Mot. to Permit Discovery For Ltd. Purposes (Doc. 776) in *McIntosh*.

A few days later on November 9, 2007, these events culminated in a global settlement with Forensic, affecting *McIntosh*, this case, and other related cases. *See* Notice of Settlement (Doc. 56) in *Shows*; Notice of Settlement (Doc. 797) in *McIntosh*. Pursuant to the (known) terms of the settlement, the prior motions challenging Plaintiffs' counsel conduct were withdrawn and the orders were abated. *See* Joint Nov. 9, 2007 Notice of Withdrawal of Mots. [524] [603] [605] [727] and [751] (Doc. 795) in *McIntosh* at 1. This sudden, and likely no-money, settlement was forged in a desperate effort by

Plaintiffs' counsel to make these issues die. But they cannot. They are clearly resurrected and implicated here.

As Plaintiffs concede, it is the *very* material wrought from Ms. Williams' improperly subpoenaed and forensically harvested hard drive that forms the basis of a significant portion of Plaintiffs' proposed amendments. *See, e.g.*, Proposed Am. Compl. at 12-13, 41 n.34, 42 n.37, Ex. 10, Ex. 29, Ex. 32. Such improperly obtained evidence may not form the basis of a good faith pleading in federal court.

As with Plaintiffs' counsel's conduct here, "[t]he mere fact that an attorney abuses the subpoena power directly implicates the Court itself and creates an embarrassment for the institution." *United States v. Santiago-Lugo*, 904 F. Supp. 43, 48 (D.P.R. 1995). Plaintiffs' counsel's conduct violated the Federal Rules and transgressed applicable ethical norms, which "have the purpose of preventing counsel from overreaching and exploiting uncounseled employees into making ill-considered statements or admissions." *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 105, 110 (M.D.N.C. 1993). Not only are allegations based on the fruits of such conduct properly excluded under Rule 15(a) as bad faith amendments, but they are also properly excluded under the Court's inherent authority to exclude evidence obtained by an ethical breach. *See, e.g., Reynolds v. Ingram*, 2000 WL 33682680 at \*2 (E.D.N.C. Mar. 21, 2000).

**C. Mischaracterized Evidence Unmistakably Evidences Bad Faith**

The proposed amended complaint continues Plaintiffs' prior practice of mischaracterizing evidence to support their theories. The mischaracterization of evidence in a proposed pleading constitutes bad faith and justifies denial of leave to amend under Fed. R. Civ. P. 15(a). Plaintiffs' serial, bad faith mischaracterizations "speak volumes about the real purpose for which [they] seek to amend." *Sathianathan v. Smith Barney*, 2006 WL 538152, at \*31 (S.D.N.Y. Feb. 24, 2006). *See also, e.g., Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180-81 (7th Cir. 1992).

For example, in the proposed amended complaint, Plaintiffs *twice* add the following allegation, regarding a draft document they attach as Exhibit 5. Plaintiffs imply that this draft document suggests that State Farm Fire was essentially paying Forensic to come back with inspection results that would justify a denial of coverage.

Robert Kochan and Forensic understood the vast amounts of money that could potentially be made through a scheme to fraudulently deny valid insurance claims. Kochan's draft acceptance letter to STATE FARM in late September of 2005 demonstrates that he knew the Enterprise's goal and he and his company's role within the Enterprise: "*We also understand that the value of these inspections are a maximum of \$2500 for each home claim that gets denied for rising water . . .*"

Proposed Am. Compl. at p. 6 (emphasis added); *see also id.* ¶ 91. Plaintiffs thus imply that State Farm Fire had agreed to pay Forensic a kickback of \$2500 to inspect homes and (fraudulently) report that the damage was caused by non-covered water damage.

But – by stopping in mid-sentence – Plaintiffs omit the final portion of the quoted sentence from this draft, which plainly reveals no such improper kickback scheme existed.

We also understand that the value of these inspections are a maximum of \$2500 for each home claim that gets denied for rising water *and more than that if the loss can be substantiated to have been caused by wind.*

Proposed Am. Compl. Ex. 5 (emphasis added). What Plaintiffs omit to mention – in either of the two places they added this spurious allegation – undercuts their whole theory. Forensic would receive and State Farm Fire would pay *more money* – not less money, as Plaintiffs suggest – for an inspection report concluding that the cause of damage was *covered* wind damage.<sup>1</sup>

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<sup>1</sup> The actual September 26, 2005 acceptance letter signed by Forensic's principal (Compl., Ex. 5; Proposed Am. Compl., Ex. 6) states, "We also understand that the value of these inspections are a maximum of \$2500 for each home claim *investigated* for rising water and somewhat more than that if the loss can be substantiated to have been a result of wind induced damage." (Emphasis added.)

These and other such pleading tactics, of which the proposed amended complaint abounds, are improper. The Court should not approve these tactics, and should deny Plaintiffs leave to amend their complaint under Fed. R. Civ. P. 15(a).

### **III. The Proposed Amendments Are Futile**

Leave to amend should also be denied here because Plaintiffs' proposed amendments do not – and could not – save their RICO and other claims from dismissal. Where, as here, amendment would be futile, the Court can and should deny leave to amend under Fed. R. Civ. P. 15(a). *Avatar Exploration*, 933 F.2d at 320; *Palmisano v. Avis Rent A Car Sys., Inc.*, 1996 WL 249040, at \*4 (5th Cir. Apr. 12, 1996).

Perhaps the most stark examples of the futility of Plaintiffs' proposed amendment are the claims brought by at least nine Plaintiffs, *all* of whom signed unambiguous releases. *See* Glenda Shows, Compl. ¶ 210, Ex. 62; Ellen and Stephen Summers, Compl. ¶ 274; Charles and Joyce Linkey, Compl. ¶ 406, Ex. 137; Ronald and Barbara Nugent, Compl. ¶ 471, Ex. 160; Chet Carter, Compl. ¶ 488, Ex. 168; and Jeffrey Pickich, Compl. ¶ 516, Ex. 180.

After State Farm Fire filed its Rule 12 motions, explaining the many reasons why the released Plaintiffs cannot recover here, *Plaintiffs seek to “cure” this incurable defect by simply omitting the above-cited judicial admissions as to such releases and omitting the exhibits that attached the releases to the complaint.* But Plaintiffs cannot just draft those releases out of existence, which were put before this Court by Plaintiffs. To be sure, admissions made in superseded pleadings “still operate as adverse evidentiary admissions properly before the district court in its resolution of the factual issue.” *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 107 & n.5 (5th Cir. 1987). Nor are the releases going away.

Among other things, the releases provide, “Both parties release any and all Katrina claims of any kind whatsoever against one another, except that if the insured(s) discovers additional insured damage that was not known to the parties prior to this mediation, the insured(s) may file a supplemental Katrina

claim, which shall be treated as a new claim.” Plaintiffs’ attempts to avoid these clear releases – such as by baldly and generically claiming, in violation of Rule 9(b)’s strict particularity requirements, that they were procured by fraud – are defective and incurable as a matter of law.

As a threshold matter, the Plaintiffs who signed releases are indisputably precluded by their failure to return the payments they accepted from State Farm Fire in settlement of their claims. “Under binding Mississippi law, Plaintiffs are not allowed to ... retain the financial benefits of their settlement contract with [the defendant] on the one hand, and on the other hand ... avoid the non-beneficial aspects of the settlement agreement based on the purported fraudulent conduct of [the defendant].” *Bogy v. Ford Motor Co.*, 417 F. Supp. 2d 807, 810 (S.D. Miss. 2006). But even if Plaintiffs had returned the amounts they received (which they have not), then their claims would still be barred as a matter of law because they cannot show reasonable reliance.

First, where a plaintiff has an opportunity to investigate the allegedly misrepresented or omitted facts, there can be no reasonable reliance as a matter of law. In *Taylor v. Southern Farm Bureau Cas. Co.*, 954 So. 2d 1045 (Miss. Ct. App. 2007), the Mississippi Court of Appeals squarely held that an insured may not avoid a release on grounds of fraud where the insured had the opportunity to investigate.

[W]e hold as a matter of law that Taylor cannot establish the element of reasonable reliance, a necessary element to establish a claim of common law fraud. Courts in Mississippi have held that where a plaintiff has an opportunity to investigate the statements upon which she allegedly relied, the plaintiff cannot be said to have reasonably relied on those statements. Taylor had ample opportunity to investigate the valuation of her automobile prior to her acceptance of Farm Bureau’s offer. As demonstrated by Taylor’s reliance on the NADA value for her automobile in her brief to this Court, there are numerous valuation services which provide easily ascertainable valuations against which Taylor could have compared the valuation arrived at by CCCIS for Farm Bureau. Instead, Taylor chose not to investigate the value of her car and accepted the settlement offered by Farm Bureau. Therefore, we hold that Taylor failed to present a prima facie case in her Complaint establishing her reasonable reliance on the representations of Farm Bureau or CCCIS.

*Id.* at 1050 (citations omitted). As amply demonstrated in the Rule 12 motions, the same is true here.

Second, one may not reasonably rely upon another who is in an adversarial or “untrusting” position. *Cf. Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 685 (N.D. Miss. 2004) (blind defendant could not justifiably rely on plaintiff’s representations; “[s]urely, if the Defendant, a blind man, was going to rely and trust someone regarding the transactions it would have been his companion and not the Plaintiffs”); *see Mergens v. Dreyfoos*, 166 F.3d 1114, 1118-19 (11th Cir. 1999) (no justifiable reliance where plaintiffs already in an “untrusting relationship” with defendants).

In light of the foregoing, and as set forth in additional detail in State Farm Fire’s Rule 12 motions, it is clear that the Plaintiffs that signed releases cannot possible recover from State Farm Fire here, no matter what a proposed pleading may claim (or, in this instance, omit).

The proposed amended complaint also fails to cure other incurable flaws of the original complaint. Just by way of example: once again, Plaintiffs do not – and could never – adequately plead even the basic “enterprise” element of any RICO claim. (In the event that Plaintiffs’ motion for leave to file the amended complaint is granted, State Farm Fire will move under Rules 8, 10, and 12 against those allegations.)

First, because “[s]hort-term criminal conduct is not the concern of RICO,” *Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1464 (5th Cir. 1991), the statute requires that the alleged RICO “enterprise” have some purpose or existence beyond simply the commission of the criminal conduct at issue. As the Fifth Circuit has repeatedly held, “plaintiff[s] must plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts.... The mere fact that individuals might have joined together to defraud [plaintiffs] is insufficient.” *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). *See also, e.g., Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir. 1988) (“The association as alleged has one short-term goal ... and presumably will disband upon attainment of that goal. There is, as a result, nothing linking the members of the association to one another except the commission of the predicate criminal acts.”).

Plaintiffs' original complaint was fatally defective because it alleged no purpose served by the "enterprise" beyond the fraudulent processing of Katrina property insurance claims. *See* State Farm Fire Mem. (Doc. 26) at 6-7. Likewise, and incurably, the proposed RICO claims suffer the same fatal flaw. The only "meaningful" difference is that now Plaintiffs studiously avoid describing the purpose of the alleged enterprise as "Katrina"-oriented. Rather, Plaintiffs speak vaguely of a purpose "to defraud Katrina claimants and claimants with property damage that has occurred since that time." Proposed Am. Compl. ¶ 73. But Plaintiffs cannot, with such vague allegations devoid of supporting facts, plead that the alleged "enterprise" had an identifiable purpose beyond the purported scheme to defraud Katrina claimants.

As the Fifth Circuit has repeatedly held, "plaintiff[s] must plead *specific facts*, not mere conclusory allegations, which establish the enterprise." *Montesano v. Seafirst Comm'l Corp.*, 818 F.2d 423, 427 (5th Cir. 1987) (emphasis added). As the Supreme Court recently cautioned, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citation and internal quotation marks omitted).

Second, it is axiomatic that a RICO "enterprise" may not consist merely of a company and its agents and employees, nor of a company and its uninvolved corporate parent. As the Fifth Circuit itself observed in a situation analogous to that here: "Can a 'RICO person,' in this case Aetna, [its outside law firm], [its outside litigation consultant], or [the consultant's company], employ or associate with itself? The answer appears to be 'no' with respect to a section 1962(c) claim." *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993).

The "enterprise" proposed here – just like that alleged in the operative complaint – impermissibly consists of (a) State Farm Fire, (b) its alleged agents, Forensic and Renfroe, and (c) its corporate parent, State Farm Mutual. *See* Proposed RICO Case Statement at 56-57. The proposed

amended complaint changes nothing in this respect from the prior pleading, *see, e.g.*, Compl. ¶¶ 22, 69, 74, 86-91, 533 – the parties that Plaintiffs allege were involved in these events are still State Farm Fire’s agents and its corporate parent.

Likewise, an enterprise may not exist between a subsidiary, such as State Farm Fire, and its parent, such as State Farm Mutual, unless Plaintiffs allege facts demonstrating that each entity played a distinct role in the alleged pattern of racketeering activity. *See, e.g., Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 154-56 (5th Cir. 1997), *vacated as moot*, 525 U.S. 979 (1998); *Brown v. Coleman Invs., Inc.*, 993 F. Supp. 416, 428 (M.D. La. 1998). As in the original complaint, the proposed amended pleading does not even attempt to do so. To the contrary, just as in the original complaint, Plaintiffs simply lump them together as “State Farm.” Beyond noting that State Farm Fire marketed their policies, *see id.* ¶¶ 52, 57, Plaintiffs have never established or even suggested any distinction between the roles allegedly played by State Farm Fire and State Farm Mutual, but rather repeatedly refer to them collectively as “State Farm.” Yet, as the court has stated, “It will not be acceptable for Plaintiffs to treat ‘State Farm’ collectively in any future pleadings ....” *Perkins v. State Farm Gen’l Ins. Co.*, No. 1:07-cv-116-LTS-RHW (S.D. Miss. Dec. 12, 2007) (Doc. 78) at 2.

In light of Plaintiffs’ allegations that the enterprise was State Farm Fire, its alleged agents, and its corporate parent, it is clear that Plaintiffs have not pleaded – and cannot plead – facts establishing an RICO “enterprise.”

These, and many other, defects are not only uncured in the proposed amended complaint, but incurable. Given the futility of the proposed amendments, this Court should decide the Rule 12 motions first in order to dispose of incurable matter, provide important guidance to the parties in the event leave to re-plead is granted, and avoid the compound delay that will inevitably be introduced into this case in the event the pleading cycle simply starts anew at this point without any of the threshold Rule 12 issues having been addressed.

**CONCLUSION**

For the foregoing reasons, Plaintiffs' motion to amend should be denied at this time and State Farm Fire's long-pending Rule 12 motions should first be decided by the Court.

Dated: December 14, 2007

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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