IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM B. DOWNING, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, and STEWART TITLE GUARANTY COMPANY, Defendants.	CIVIL ACTION FILE NUMBER 3:15-cv-154-TCB

O R D E R

This case comes before the Court on Defendants' motions to dismiss the amended complaint. Defendants Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, and Fidelity

National Title Insurance Company filed a joint motion to dismiss [41]. The remaining Defendants all filed separate motions: First American Title Insurance Company [42], Stewart Title Guaranty Company [44] and Old Republic National Title Insurance Company [45].

I. Background[1]

Defendants are the six "major" title insurers in Georgia, who between them account for over ninety percent of the market share. Plaintiff William Downing alleges that Defendants have conspired to defraud buyers of title insurance throughout Georgia. Title insurers periodically publish list prices that inform agents of the premiums to be charged, but prior to 2009 many agents discounted from the published rates for individual policies. At the heart of Downing's claim is the allegation that, rather than lower prices for title insurance during the 2009 recession, "Defendants conspired to defraud consumers through a campaign of continuing misrepresentations to their agents that title

[1] The facts presented here are derived from the amended complaint [32] and the documents incorporated therein by reference. *See Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). At the motion-to-dismiss stage, the Court accepts as true the factual allegations in the amended complaint and construes them in the light most favorable to Downing. *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009).

insurers were required by law to charge their published prices." [32] at 2.

Georgia does not directly regulate title insurance premiums, which are specifically exempted from the regulations placed on other forms of insurance. O.C.G.A. § 33-9-3(6). Instead, "the premiums and charges for insurance . . . shall not be in excess of or less than those specified in the policy and as fixed by the insurer." O.C.G.A. § 33-6-5(6)(b)(i).

In early 2009, Defendants agreed that they would publish new list prices and refuse to discount off those list prices under the allegedly false pretense that they were required by law to charge list prices. Defendants instructed their agents of this position, which was reflected in various policy statements and press releases:

- "In accordance with instructions from the Georgia Insurance Commissioner, these charges have been filed with the Department of Insurance and are those that must be charged to the consumer." Stewart, *Georgia Residential Title Insurance Charges* (2009), [32-1] at 1.
- "[I]t is our present understanding that the Georgia Department of Insurance requires that the rates Old Republic National Title Insurance Company has published to you are the rates you must charge." Old

Republic, *State of Georgia Residential Premium Rates* (2009), [45-2] at 2.

- "These rates are published and are the rates that you are required to charge and upon which you are required to remit in accordance with O.C.G.A. § 33-6-5(6)(B)(i)." First American, *Georgia Residential Title Insurance Premium Rates*, (2009), [32-2] at 4.
- "[T]hese published rates are the rates that you are required to charge and on which your remittances must be made in accordance with O.C.G.A. § 33-6-5(6)(B)(i)." Chicago Title, *Georgia Residential Rate Schedule* (2009), [32-3] at 8.
- "[T]hese published rates are the rates that you are required to charge and on which your remittances must be made." Fidelity, *State of Georgia Residential Premium Rates* (2009), [32-4] at 1.

With these statements, Defendants failed to disclose that title insurers were not required by law to charge the published rate. As of 2012, four Defendants—Stewart, Chicago Title, Commonwealth and First American—continued to use similar language. As of the date of the complaint, none of the Defendants had repudiated or retracted the assertion that they are required to charge the list prices.

Additionally, the language used in various rate documents is identical, or nearly so, for the six Defendants. Many of their prices are identical, too.

As a result of this conspiracy, Downing alleges that consumers paid artificially inflated prices. Downing was one such consumer—he purchased title insurance from Fidelity on May 25, 2012 for his residence in Fayette County, Georgia. He paid the Fidelity list price.

Downing alleges that Defendants' actions violated the unfair trade practices provisions of O.C.G.A. § 33-6-13(a), and therefore he brings two claims under the Georgia RICO Act, O.C.G.A. § 16-14-4(a) & (c). He filed this action "on behalf of persons who purchased title insurance in Georgia" between March 1, 2009 and the filing of the complaint.

II. Legal Standard

To survive a 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a

> "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012). Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level," and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Under Rule 9(b), a plaintiff "must state with particularity the circumstances constituting fraud or mistake." In this way, Rule 9(b) supplements rather than abrogates the notice-pleading requirements of Rule 8. To sufficiently plead a claim for fraud, the plaintiff must specify in the complaint

> (1) precisely what statements or omissions were made in which documents or oral representations; (2) the time and place of each such statement and the person responsible for

> making (or, in the case of omissions, not making) them; (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendant obtained as a consequence of the fraud.

FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011), *cert. denied,* 133 S. Ct. 109 (2012). Rule 9(b) applies not only to explicit claims of fraud, but also where the conduct alleged "sounds in fraud." *See McGee v. JP Morgan Chase Bank, NA*, 520 F. App'x 829, 831 (11th Cir. 2013) (applying Rule 9(b) to Florida negligent misrepresentation claim because it "sounds in fraud").

III. Analysis

A. Motions to Dismiss the Initial Complaint

All Defendants filed motions to dismiss the initial complaint [18, 21, 24 and 26]. On December 23, 2015, Downing filed an amended complaint [32]. The amended complaint "supersedes the initial complaint and becomes the operative pleading in the case." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219-20 (11th Cir. 2007). Therefore, those motions to dismiss the initial complaint are now moot. Defendants have moved to dismiss the amended complaint [41, 42, 44 & 45], which the Court will now consider.

B. Standing

Standing is a jurisdictional requirement. *Stalley v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (per curiam). The three constitutional requirements for standing are that (1) the plaintiff have suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the challenged conduct of the defendant; and (3) it be likely, and not merely speculative, that a favorable judicial decision will redress the injury. *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003). The plaintiff bears the burden of establishing these requirements. *Id.*

Multiple Defendants have argued that Downing failed to allege an injury because he never sought a discount, nor did he allege that but for Defendants' actions he could have received a discount. In response, Downing explicitly rejected the argument that his injury is based on any inability to negotiate for a discount: "Mr. Downing is seeking damages based on paying an inflated list price. . . . Therefore, it does

not matter whether Mr. Downing tried to negotiate a lower price." [49 at 18-19].

This means the only possible source of injury to Downing would be if Defendants' actions created artificially high prices. *See* [32] at ¶17 ("As a result, consumers are all paying artificially inflated prices."). A conspiracy to fix prices between or among competitors constitutes horizontal price-fixing, which is harmful to consumers. *See E.T. Barwick Indus. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1341 (N.D. Ga. 1997) ("A horizontal price fixing conspiracy is a conspiracy to fix prices between or among competitors."); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342–345 (1990) (documenting cases under federal antitrust laws where consumers were harmed by horizontal price-fixing).

However, the complaint lacks allegations of price-fixing. Downing never directly alleges that the Defendants conspired to set list prices. Instead, he alleges that "[t]his scheme [to eliminate discounts] has resulted in higher list prices" and that "Defendants have used the

scheme to raise list prices." [32] at 2 & ¶17.[2] In other words, Downing alleges that higher prices are the natural consequence of eliminating discounts.

The closest Downing comes to directly alleging price-fixing is the allegation that "[b]y issuing the new list prices on the false pretense that title insurers were prohibited by law from discounting off their published prices, the Defendants concealed the fact that they had an understanding with other title insurance companies to *raise prices* and eliminate discounts." [32] at ¶19. The Court cannot simply parse out the words "raise prices," but instead must read the allegation in whole, in light of the rest of the complaint. Taken in context, this allegation reinforces Downing's core complaint that the Defendants agreed to eliminate discounts *that resulted in* higher prices, rather than a standalone accusation that Defendants conspired to raise list prices. Moreover, this short reference to price-fixing, amidst a broader complaint concerning the propriety of discounts, would not satisfy

[2] *See also id.* ("Defendants have . . . eliminate[d] discounts that would drive down those list prices.").

Rule 9's requirement that fraudulent statements regarding a price-fixing conspiracy be pled with particularity. Thus, despite Downing's frequent repetition of this exact same language when discussing Defendants' fraudulent scheme, the complaint lacks any direct allegations of price-fixing.

Downing is then left with the allegation that "discounts . . . would drive down those list prices." That is not a factual allegation, but is instead a logical conclusion that Downing asserts. The Court is bound to construe *factual* allegations in the light most favorable to the plaintiff, *Powell* 643 F.3d at 1302, but is not bound by the plaintiff's deductions or conclusions. Thus, the Court must determine whether pleading that discounts were eliminated is sufficient to plead price-fixing.

Where discounts are eliminated, each Defendant would be bound to its published list price, but there's no reason Defendants would be stopped from lowering those list prices to compete with each other in the marketplace. One need only consider the vast number of markets that rely on list prices—for instance groceries, gasoline, and most retailers—to see that reliance on list pricing without discounts does not

axiomatically lead to price fixing. Moreover, to the extent there is an impact on prices, there is no reason to believe that banning discounts would lead to higher prices. Presumably, in the market where discounts were permitted, list prices would be *higher* to take account of the lost revenues from discounting. Once Defendants could no longer offer discounts—either by operation of law or by illegal collusion—list prices could be *lower* yet maintain revenue.

It's possible that competitors could conspire to do both things—ban discounts *and* raise list prices—but those are separate actions. Alleging that there was a conspiracy to ban discounts does not itself lead to the conclusion that prices were also fixed, or that they were artificially inflated.[3] Nor is it sufficient to allege that "in many instances, [Defendants'] list prices are now identical to the penny." [32] at ¶23. The fact that Defendants charge similar prices, or even increase their prices in similar intervals, is generally insufficient to show price-

[3] Downing alleges that in 2012 four of the six Defendants "raised their list prices by [ten to twenty percent] on most policies." [32] at ¶21. Since discounts were eliminated in 2009 and have not been re-introduced, this increase cannot have been caused by the elimination of discounts, and instead leads to an inference that prices continue to be shaped by market forces rather than collusion.

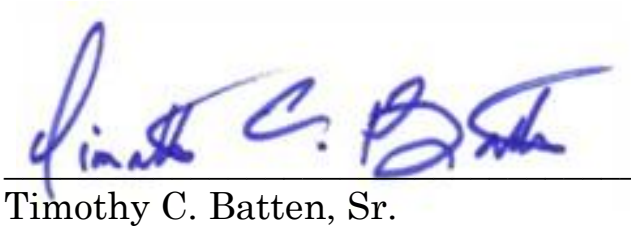
fixing. *See In re Immucor, Inc. Sec. Litig.*, No. 1:09-cv-2351-TWT, 2011 WL 2619092, at *5 (N.D. Ga. June 30, 2011) ("The Plaintiff's allegations at most amount to 'conscious parallelism' which the Eleventh Circuit has described as 'synchronous actions' that are the product of 'a rational, independent calculus by each member of the oligopoly, as opposed to collusion.' Evidence of such conscious parallelism alone is not enough to infer a price fixing conspiracy." (quoting *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003)).

Without any allegations that Defendants actually fixed prices, or created a market of inflated prices, Downing has not alleged an injury that would give him standing to bring suit. Accordingly, this Court lacks jurisdiction, and the complaint must be dismissed.

IV. Conclusion

For the foregoing reasons, Defendants' motions to dismiss the initial complaint [18, 21, 24 and 26] are denied as moot. Defendants' motions to dismiss the amended complaint [41, 42, 44 and 45] are GRANTED.

IT IS SO ORDERED this 9th day of June, 2016.



Timothy C. Batten, Sr.
United States District Judge