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

WILLIAM D. DOWNING, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al.,

Defendants.

CIVIL ACTION FILE

NUMBER 3:16-cv-119-TCB

O R D E R

Plaintiff William D. Downing brings this class action lawsuit against six title insurers—Fidelity National Title Insurance Company, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Stewart Title Guaranty Company, First American Title Insurance Company, and Old Republic National Title Insurance Company—alleging that they unlawfully conspired to defraud purchasers of title insurance in Georgia by scheming to eliminate discounts (particularly reissue credits) from published premiums.

Downing brings two claims against Defendants under Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") Act. Defendants have jointly moved to dismiss his claims as barred by the doctrine of res judicata [30]. They have also filed four separate motions to dismiss for lack of standing and failure to state a claim upon which relief can be granted [32, 33, 34, 36].

I. Background[1]

Prior to 2009, when title insurance was purchased for a property covered by an existing title insurance policy, Defendants would offer the purchaser a discount of forty percent or more off the premium for the new policy. At the height of the recession in early 2009, however, Defendants—the six major title insurers in Georgia who collectively account for more than ninety percent of the market share—allegedly agreed to eliminate these reissue credits by "misrepresent[ing] to their agents that title insurers are required by law to charge list prices for title insurance in Georgia." [1] at ¶18.

[1] For purposes of this motion to dismiss, all well pled factual averments in Downing's complaint [1] are presumed to be true and viewed in the light most favorable to Downing. *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009).

Specifically, in documents attached to the complaint that were sent by Defendants to their agents over a period of more than two years, Defendants are alleged to have falsely represented that title insurers were required by statute and/or instructions from the Georgia Department of Insurance to charge their list prices. Thus, Downing avers that when he purchased a title insurance policy from Fidelity in May 2012 for his home, which was covered by an existing title insurance policy that had been issued eight years earlier, he was not offered a reissue credit and paid Fidelity's list price.

Contrary to Defendants' alleged misrepresentations, Georgia law does not prohibit title insurers from offering discounts from their published rates. The Georgia Code provides only that an insurance agent must collect no more and no less than "the premium specified by the insurer"—whatever that premium may be. *Id.* at ¶14; O.C.G.A. § 33-6-5(6)(B)(i). Downing alleges that from 2009 through the present, Defendants have represented otherwise to their agents in order to conceal the existence of a conspiracy to eliminate reissue credits and other discounts from published premiums. [1] at ¶22. Downing also

asserts that but for this alleged conspiracy, he "would have received a . . . reissue credit and paid a lower net price on his purchase of title insurance" in 2012. *Id.* at ¶28.

Downing brings claims against Defendants for violations of Georgia's RICO Act, which declares it "unlawful for any person, through a pattern of racketeering activity . . . , to acquire or maintain . . . any interest in or control of any enterprise, real property, or personal property of any nature, including money" or to conspire or endeavor to do so. O.C.G.A. § 16-14-4(a), (c). He brings his claims on behalf of all "persons who purchased title insurance in Georgia at any time from March 1, 2009 to the present . . . for a property that had an existing title insurance policy issued less than ten years before the purchase of the new title insurance policy," a class he anticipates contains more than 100,000 members. [1] at ¶¶30–31. He seeks compensatory and punitive damages and an award of attorneys' fees.

This is not the first lawsuit Downing has filed against these Defendants arising from this alleged scheme. *See Downing v. Fid. Nat'l Title Ins. Co.*, No. 3:15-cv-154-TCB (N.D. Ga. filed Oct. 2, 2015)

("*Downing I*"). In *Downing I*, he alleged only that the conspiracy caused consumers to pay artificially inflated prices; he did not allege that but for Defendants' actions he would have received a discount, nor did he allege that Defendants had engaged in price fixing. This Court ultimately dismissed *Downing I* without prejudice, reasoning that in the absence of any allegation that Defendants had actually fixed prices for title insurance, Downing had not alleged an injury that would give him standing to sue. *Downing I*, 2016 WL 3526064, at *4 (N.D. Ga. June 9, 2016).

Downing's allegations in this case, though similar to those he made in *Downing I*, are not identical. Unlike *Downing I*, the complaint here expressly alleges that "[b]ut for the unlawful actions of Defendants, [he] would have received a discount, *i.e.*, reissue credit, and paid a lower net price on his purchase of title insurance" in May 2012. [1] at ¶28. He has abandoned any claim related to having paid an inflated list price for title insurance; the injury he asserts in this case is "the loss of the reissue credit of up to 40% of the list price for his transaction." [42] at 22. In other words, Downing alleges that but for

Defendants' conspiracy he would have been given a reissue credit of up to forty percent off the list price he paid in 2012, but he does not seek any damages based on a theory that Defendants' conspiracy caused that list price to be higher than any earlier list price(s). *See* [42] at 23.

Defendants' motions ask the Court to dismiss all of Downing's claims, arguing that they are barred by res judicata in light of the Court's dismissal of *Downing I* and that Downing's complaint in this case suffers from the same fatal flaws as his complaint in *Downing I*.

II. Res Judicata

The Court begins by analyzing Defendants' joint motion to dismiss. Under the doctrine of res judicata, a judgment in a prior action bars the same action from being litigated later if all the following elements are present: "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999).

The second and third elements of res judicata are undoubtedly satisfied in this case, as *Downing I* was dismissed by a court with competent jurisdiction and the parties in the current action are the same as those in *Downing I*. Additionally, because both cases arise out of Downing's purchase of title insurance for his home in 2012, the causes of action in the two cases are the same. *See id.* at 1239 (holding that causes of action are the same if they arise out of the same nucleus of operative fact, i.e., if they arise from the same transaction or series of transactions). Thus, the only element in contention is whether the Court's dismissal of *Downing I* for lack of jurisdiction was a decision on the merits.

Ordinarily, a dismissal for lack of subject-matter jurisdiction is not considered to be on the merits. *See Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1188 (2003); *see also* Fed. R. Civ. P. 41(b) (providing that any dismissal "except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 . . . operates as an adjudication on the merits" unless the order of dismissal states otherwise). The same is generally true when an action is dismissed for lack of standing. *See*, *e.g.*,

Arthur v. JP Morgan Chase Bank, NA, 569 F. App'x 669, 678 (11th Cir. 2014).

However, when a dismissal couched in jurisdictional terms focuses on the "substantive shortcomings" of the plaintiff's complaint, it may be considered a decision on the merits. *Davila*, 326 F.3d at 1189–90. In *Davila*, *id.* at 1188–89, the plaintiff's prior lawsuit was dismissed only after the court analyzed the merits of his claims, found that none of the limited statutory grounds for vacating an arbitration award under the Railway Labor Act ("RLA") were satisfied, and therefore concluded that the Court lacked jurisdiction under the RLA to entertain the lawsuit. "Put differently, the court said that because Davila was not entitled to relief from the [arbitrator's] judgment, it did not have jurisdiction over his claims." *Id.*

Under those circumstances, the Eleventh Circuit held that despite the lower court's use of jurisdictional language, its "analysis can only be considered a decision on the merits." *Id.* at 1189. Other courts have similarly held that when courts have jurisdiction to grant relief under only limited, statutorily specified circumstances, a dismissal based on

the plaintiff's failure to show an entitlement to relief is a decision on the merits even if it is couched in jurisdictional terms. *See*, *e.g.*, *Watson v. United States*, 86 Fed. Cl. 399, 402 (Fed. Cl. 2009) (giving res judicata effect to a prior dismissal where the dismissing court "held that [28 U.S.C. § 1494] did not provide it with jurisdiction because Plaintiff failed to meet the requirements of the statute").

There are other cases, too, in which the merits of the plaintiff's claims are obviously and inextricably linked to the existence of subject-matter jurisdiction. *See*, *e.g.*, *Schafler v. Indian Spring Maintenance Ass'n*, 139 F. App'x 147, 150 (11th Cir. 2005) (giving res judicata effect to prior order of dismissal that "fully analyzed the merits of [the] case" and "noted that, because [the plaintiff] failed to allege any facts that would entitle her to relief, no reasonable jury could determine that she was entitled to damages that would meet the jurisdictional amount").

This case, however, is readily distinguishable from *Davila* and others treating a jurisdictional dismissal as a merits-based decision. This Court's dismissal of *Downing I* was based on a straightforward Article III standing inquiry: the Court held only that Downing had not

pled facts showing that he suffered any cognizable injury as a result of the conspiracy alleged. The fact that this Court discussed Downing's factual averments at some length does not convert its dismissal for lack of standing into a decision on the merits, because any inquiry into injury and standing necessarily "requires careful judicial examination of a complaint's allegations." *DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1301 (11th Cir. 2008).

The Eleventh Circuit has recognized that there are only "narrow circumstances" under which a dismissal for lack of jurisdiction is "better characterized as for failure to state a claim for relief." *Griffin v. Focus Brands Inc.*, 685 F. App'x 758, 761 (11th Cir. 2017). Those circumstances were present in *Davila*, but they are not present in this case, which falls within the ambit of the general rule that a dismissal for lack of subject-matter jurisdiction "is not an adjudication on the merits that would give rise to a viable res judicata defense." *Davila*, 326 F.3d at 1188.

In the absence of a final decision on the merits of the claims in *Downing I*, a plaintiff is precluded only from relitigating "the *precise*

issue of jurisdiction . . . that led to the initial dismissal." 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4436 (2d ed. 2017) (emphasis added); *see also N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 432 (11th Cir. 1993) (noting that a dismissal for lack of jurisdiction "does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims").

A dismissal for failure to plead facts supporting federal jurisdiction does not prevent a plaintiff from attempting to cure the pleading defect through the filing of a subsequent lawsuit. *Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973); *see also GAF Corp. v. United States*, 818 F.2d 901, 912–13 (D.C. Cir. 1987) (noting that a jurisdictional deficiency may generally be cured in a second action). The pleading defects identified in the order dismissing *Downing I* were curable ones, and through this lawsuit he has attempted to plead a different injury than the one he failed to

adequately plead in *Downing I*.[2] Downing is therefore not using this lawsuit as a vehicle to relitigate the precise jurisdictional issues that were previously resolved, and thus res judicata does not prevent him from bringing this action even though his new allegations were available to him when he filed *Downing I*.

III. Failure to State a Claim

A. Legal Standard

Rule (8)(a)(2) of the Federal Rules of Civil Procedure requires a complaint to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012).

In order to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim of relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). In other words, a complaint must include "factual content that allows the court to draw the reasonable inference

[2] Whereas *Downing I* alleged a conspiracy to increase list prices, the claims in this case focus only on an alleged conspiracy to eliminate discounts from list prices.

that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, a complaint will survive a motion to dismiss only if it contains factual allegations that are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

In addition to Rule 8's general pleading standards, Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." To sufficiently plead a claim of 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 Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011); *see also Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1316 (11th Cir. 2007) (noting that Rule 9(b) applies to claims under Georgia's RICO Act).

B. Standing

Under Article III, which restricts federal courts to adjudicating only actual cases and controversies, a district court does not have subject-matter jurisdiction over claims brought by plaintiffs who lack standing. *Allen v. Wright*, 468 U.S. 737, 750 (1984); *DiMaio*, 520 F.3d at 1301. A plaintiff has standing to sue only if (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) a causal connection exists between the injury and the defendants' conduct; and (3) it is likely—not merely speculative—that a favorable judicial decision will redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).[3]

Downing alleges that were it not for Defendants' conspiracy to eliminate reissue credits, he would have received such a discount when he purchased title insurance from Fidelity in 2012. [1] at ¶28. Unlike in

[3] Similarly, because a civil remedy exists only for people "injured by reason of any violation" of Georgia's RICO Act, O.C.G.A. § 16-14-6(c), a plaintiff has standing to sue under that statute only if he alleges "a direct nexus between at least one of the predicate acts listed under the RICO Act and the injury purportedly sustained" by the plaintiff. *Rosen v. Protective Life Ins. Co.*, 817 F. Supp. 2d 1357, 1381 (N.D. Ga. 2011). In conducting this proximate-cause inquiry, "the central question [the Court] must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

Downing I, 2016 WL 3526064, at *3–4—in which Downing sought to sue for an alleged increase in list prices but failed to adequately allege that Defendants' conspiracy actually had the effect of raising list prices—the harm Downing claims to have suffered in this case precisely aligns with the object of the conspiracy alleged in the complaint. When presumed true, the averments in Downing's complaint are sufficient to show that all three elements of standing are satisfied.

Defendants' arguments to the contrary are unpersuasive. First, several Defendants argue that Downing lacks standing to sue title insurers from whom he did not purchase or attempt to purchase insurance. However, even though Downing purchased insurance from only one Defendant (Fidelity), he does not allege that an injury suffered only at Fidelity's hands gives him standing to sue the other Defendants. Instead, he contends that his injury was jointly caused by all Defendants' participation in the alleged conspiracy to eliminate reissue credits. *Cf. Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 60–61 (2d Cir. 2012) (recognizing conspiracy claims as falling outside the general rule that Article III does not permit a plaintiff to bring suit "against non-

injurious defendants as long as one of the defendants in the suit injured the plaintiff"); *see also Beck v. Prupis*, 162 F.3d 1090, 1099 (11th Cir. 1998) (noting that RICO's "conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable").

Nor does Downing's failure to ask for a reissue credit deprive him of standing to sue. Courts have long recognized that a plaintiff's failure to engage in futile acts does not deprive him of standing to sue, *see*, *e.g.*, *Loder v. McKinney*, 896 F. Supp. 2d 1116, 1121 (M.D. Ala. 2012), and Downing expressly alleges that any request for the eliminated reissue credit would have been futile. [1] at ¶19.

Even if that allegation might, standing alone, constitute a legal conclusion not entitled to a presumption of truth for purposes of a motion to dismiss,[4] Downing has provided specific factual averments supporting that contention, including averments from which it is

[4] *See*, *e.g.*, *Loder v. Reed*, No. 2:11-cv-979-WKW, 2013 WL 2566907, at *2 n.1 (M.D. Ala. June 11, 2013) (disregarding the plaintiffs' allegation of futility that found "no support in any of the amended complaint's factual allegations"); *but see also Bankers Life Ins. Co. v. Credit Suisse First Bos. Corp.*, No. 8:07-cv-690-T-17-MSS, 2008 WL 4372847, at *4 (M.D. Fla. Sept. 24, 2008) (accepting as true for purposes of a motion to dismiss the plaintiff's allegation of futility).

reasonable to infer that prior to the alleged conspiracy, reissue credits were automatically given to eligible homeowners even when no requests were made. *See*, *e.g.*, [1] at ¶15 (alleging that prior to 2009 "Defendants offered reissue credits" and making no mention of the need to request one); *id.* at ¶28 (alleging that but for the conspiracy Downing would have received a reissue credit, presumably notwithstanding his failure to expressly ask for it).

The analysis of a plaintiff's standing to sue is independent of any inquiry into the merits of the plaintiff's claims, and courts must be cautious not to conflate the two. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) ("Standing is a threshold jurisdictional question which must be addressed prior to and *independent of* the merits of a party's claims.") (emphasis added). Defendants' remaining arguments, though couched in terms of standing, more accurately speak to whether Downing has stated a viable RICO claim and are addressed below. Assuming for present purposes that Downing's claims are meritorious, the Court concludes he has standing to pursue them. *See Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc.*, 919

F.2d 1517, 1520 n.2 (11th Cir. 1990) ("For purposes of this standing analysis and to separate the standing issue from the merits of the antitrust claims, we will assume that a violation of § 1 of the Sherman Act has in fact occurred.").

C. Failure to Adequately Plead a Predicate Act

Turning next to the substance of Downing's claims, to state a claim under Georgia's RICO Act, O.C.G.A. § 16-14-4(a) & (c), Downing must allege that Defendants engaged in at least two interrelated acts of racketeering activity. *Mbigi v. Wells Fargo Home Mortg.*, 785 S.E.2d 8, 16 (Ga. Ct. App. 2016). Downing's RICO claims are predicated on alleged acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 and residential mortgage fraud in violation of O.C.G.A. §§ 16-8-100–106. *See* O.C.G.A. § 16-4-3(5)(A)(xv) & (C); 18 U.S.C. § 1961(1); *see also Brown v. First Tenn. Bank Nat'l Ass'n*, 753 F. Supp. 2d 1249, 1264 (N.D. Ga. 2009) (noting that a Georgia RICO claim can be "predicated on federal mail and wire fraud as well as on residential mortgage fraud").

Each of these predicate acts requires Downing to plead facts showing, among other things, that Defendants made misrepresentations or omissions that caused him to suffer harm. *See United States v. Hasson*, 333 F.3d 1264, 1270–71 (11th Cir. 2003) (noting that the wire and mail fraud statutes "require[] proof of material misrepresentations, or the omission or concealment of material facts"); *Mbigi*, 785 S.E.2d at 17 (noting that a claim of residential mortgage fraud under Georgia law requires allegations that a person filed a document known to "contain a deliberate misstatement, misrepresentation, or omission"). As noted above, Downing's averments in this regard "must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal* but also with Fed. R. Civ. P. 9(b)'s heightened pleading standard." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010).

Defendants contend that Downing has not pled his claims with the specificity required by Rule 9(b). The Court disagrees. The flaw in Downing's complaint is not his failure to allege with particularity "the circumstances surrounding [Defendants'] allegedly false statements."

C&C Fam. Tr. 04/04/05 ex rel. Cox-Ott v. AXA Equitable Life Ins. Co., 44 F. Supp. 3d 1247, 1255 (N.D. Ga. 2014). Instead, Downing's complaint is due to be dismissed because he has failed to plausibly allege that Defendants made any actionable misrepresentation at all or that any such misrepresentation was a proximate cause of Downing's harm.

The alleged misrepresentations giving rise to Downing's claims are as follows:

1. Stewart's statement that "[i]n 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." [1] at ¶21; [1-1] at 1; [1-8] at 7.

2. Old Republic's statement that "it is our present understanding that the Georgia Department of Insurance requires that the rates Old Republic . . . has published to you are the rates you must charge." [1] at ¶21; [1-2] at 2, 12.

3. First American's statement that "[t]hese 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(B)(i)." [1] at ¶21; [1-3] at 4; *see also* [1-6] at 4 (substantially identical statement).

4. The joint statement by Chicago Title and Commonwealth that "these 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)." [1] at ¶21; [1-4] at 8; [1-7] at 1.

5. Fidelity's statement that "these published rates are the rates that you are required to charge and on which your remittances must be made." [1] at ¶21; [1-5] at 1.

Downing alleges that these specific statements were made as part of "a campaign of continuing misrepresentations to [Defendants'] agents that title insurers were required by law to charge their published prices." [1] at 2; *see also id.* at ¶¶17–18 (alleging that Defendants falsely represented that they were "required by law to charge list prices").

It is well settled that fraud is actionable only where it is premised on an alleged misrepresentation of fact. *Neder v. United States*, 527 U.S. 1, 22 (1999). "[A] claim of fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." *Capitol Materials, Inc. v. Kellogg & Kimsey, Inc.*, 530 S.E.2d 488, 490 (Ga. Ct. App. 2000).

Georgia courts have long recognized that where "the truth of the representations would depend upon the legal effect of . . . policy provisions," the alleged misrepresentations are misrepresentations of law that are not actionable. *Brown v. Mack Trucks, Inc.*, 141 S.E.2d

208, 210 (Ga. Ct. App. 1965); *accord Seckinger-Lee Co. v. Allstate Ins. Co.*, 32 F. Supp. 2d 1348, 1353 (N.D. Ga. 1998); *Friedman v. State Farm Mut. Auto. Ins. Co.*, 341 S.E.2d 275, 275 (Ga. Ct. App. 1986).

The same result obtains where, as here, a fraud claim is premised on alleged representations about rights and responsibilities arising under statutes and government regulations. *See*, *e.g.*, *Elliott v. Liberty Mut. Fire Ins. Co.*, No. 09-178-GFVT, 2010 WL 3294417, at *4 (E.D. Ky. Aug. 19, 2010) (holding that alleged statement about the operation of statute of limitations was a misrepresentation as to law); *May v. Nygard Holdings, Ltd.*, No. 6:03-cv-1832-Orl-DAB, 2007 WL 2120269, at *2 (M.D. Fla. July 20, 2007) (noting that misrepresentations directed to the existence of a legal requirement—"such as 'You don't need a work permit to work in the Bahamas'"—are misrepresentations of law that are not actionable); *Epps Aircraft, Inc. v. Exxon Corp.*, 859 F. Supp. 533, 538 (M.D. Ala. 1993) (holding that representation as to validity of a city tax was one of law, not fact), *aff'd*, 30 F.3d 1499 (11th Cir. 1994); *Robbins v. Nat'l Bank of Ga.*, 246 S.E.2d 660, 664 (Ga. 1978) (holding that the defendants' alleged failure to advise the plaintiff about the

existence of a particular statute fell within the rule prohibiting fraud claims based on misrepresentations of law); *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 153 (Colo. 2007) (en banc) (holding that a misrepresentation that constituted "an incorrect opinion of the legal meaning and effect of [certain] regulations" was not actionable).

Downing asserts that "an opinion as to a legal matter is actionable if there is a fiduciary relationship between the Defendants and their agents." [42] at 10 (citing *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 717 F. Supp. 1565, 1576 (N.D. Ga. 1989), and *Roach v. Ga. Farm Bureau Mut. Ins. Co.*, 325 S.E.2d 797, 799 (Ga. Ct. App. 1984)). Downing's complaint, however, fails to allege any facts supporting the existence of a confidential or fiduciary relationship between Defendants and their agents; it instead alleges only the legal conclusion that such a relationship exists, which is inadequate to survive a motion to dismiss. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (affirming grant of motion to dismiss where the plaintiff "did not provide any factual basis in his amended complaint establishing that [the defendant] owes him a fiduciary duty"); *Am. Hondor Motor Co. v.*

Motorcycle Info. Network, Inc., 390 F. Supp. 2d 1170, 1180 (M.D. Fla. 2005) (holding that "[c]onclusory allegations that a confidential or fiduciary relationship existed, without any supporting factual assertions, are insufficient.").[5]

More importantly, even if misrepresentations of law were actionable under the facts alleged in Downing's complaint, Downing's claim would still fail because any misrepresentation made by Defendants is not the proximate cause of Downing's injury. If the decision whether to offer a reissue discount were up to Defendants' agents, there might be a question whether the agents relied on Defendants' alleged misrepresentations about Georgia law and therefore did not offer discounts that otherwise would have been offered to Downing and other class members.

But in this case, Downing concedes that it is Defendants—not their agents—who fix the rates to be charged for title insurance, whether or not that rate accounts for a reissue credit. [42] at 8–9 ("Mr.

[5] In addition, at least one court has expressly held that a title insurance company did not have a fiduciary or confidential relationship with its agents. *Chi. Title Ins. Co. v. Runkel Abstract & Title Co.*, 610 F. Supp. 2d 973, 978–79 (W.D. Wis. 2009).

Downing agrees . . . that O.C.G.A. § 33-6-5(6)(B)(i) requires that the insurer—and not the agent—fixes the rate to be specified on a policy. . . . That makes perfect sense."). Defendants did just that when they published their premiums and instructed their agents to collect those list prices. It matters not what justification Defendants offered, because the only statements their agents could rely on are the ones instructing the agents what premiums to charge.

As noted above, Downing has not brought any claim in this case that the premiums actually charged by Defendants resulted from unlawful price fixing or were otherwise unlawfully high.[6] *Cf. Mitchell Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d 826, 833, 845 (D. Md. 2013) (finding that plaintiffs adequately pled predicate acts of mail and wire fraud where the allegation was that the failure to offer a reissue discount resulted in premiums in excess of those permitted by state

[6] Because Downing has disavowed any claim that Defendants engaged in price-fixing, his reliance on O.C.G.A. § 33-6-13(a)(1)—which prohibits conspiracies to "control[] the rates to be charged for insuring any risk or class of risks in this state"—is perplexing. As noted at length in the Court's Order dismissing *Downing I*, a conspiracy to ban discounts is not tantamount to one to raise list prices. Merely eliminating discounts does not have the effect of "controlling the rates to be charged" for title insurance.

law); *Schwartz v. Lawyers Title Ins. Co.*, 680 F. Supp. 2d 690, 697 (E.D. Pa. 2010 (same); *Coleman v. Commonwealth Land Title Ins. Co.*, 684 F. Supp. 2d 595, 603, 616 (E.D. Pa. 2010) (same).

Similarly absent from Downing's complaint is any allegation that Defendants misrepresented the applicable charges for title insurance, *cf. Knight v. Stewart Title Guar. Co.*, No. 07-87-DLB, 2014 WL 4986676, at *13 (E.D. Ky. Oct. 6, 2014), or that the reissue discount Defendants allegedly conspired to eliminate was ever mandatory under Georgia law *Cf. Mims v. Stewart Title Guar. Co.*, 521 F. Supp. 2d 568, 571 (N.D. Tex. 2007) (denying motion to dismiss claim against title insurer for failing to offer a reissue credit where the plaintiffs sufficiently alleged that the reissue discount was mandatory under applicable state law); *see also Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 442 (D.C. Cir. 1999) (holding that plaintiff did not suffer a redressable injury because plaintiff was not legally entitled to receive the discount at issue).

Downing instead contends that Defendants engaged in a conspiracy to eliminate a discount that they were never obligated to offer in the first place. He further alleges this conspiracy was carried

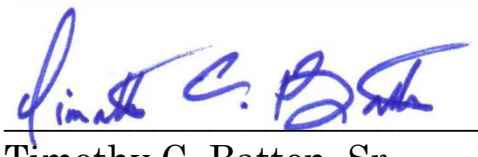
out through misrepresentations to Defendants' agents about the legal requirements imposed by the Georgia Code and the Georgia Insurance Commissioner. But under Georgia law, whether an individual receives a reissue credit is not left to the agents; it is a decision made by the title insurer. Once Defendants decided to eliminate reissue credits, there was no room for their agents to rely on any representations (false or otherwise) about the reasons for doing so. The agents had to charge the premiums set by Defendants. They did just that.

In the absence of any claim that Defendants misrepresented the actual premiums to be charged, that Defendants' list prices were the result of an unlawful price-fixing conspiracy, or that the reissue credit was mandatory under Georgia law, there is simply no causal connection between any of Defendants' alleged misrepresentations to their agents and the harm Downing complains of. Downing has failed to plead any predicate act, and thus he has failed to state a claim under Georgia's RICO Act that is plausible on its face. His claims must therefore be dismissed under Rule 12(b)(6).

IV. Conclusion

For the foregoing reasons, Defendants' joint motion to dismiss on res judicata grounds [30] is denied, but their individual motions to dismiss [32, 33, 34, & 36] for failure to state a claim are granted. Plaintiff's claims are dismissed with prejudice, and the Clerk is directed to close this case.

IT IS SO ORDERED this 13th day of September, 2017.



Timothy C. Batten, Sr.
United States District Judge