

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

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|---|---|--------------------------------|
| THOMAS L. MOFFETT, II, ET AL |) | |
| |) | |
| Plaintiffs, |) | Civil Action No. 8:05-CV-01547 |
| |) | Hon. Peter J. Messitte |
| v. |) | |
| |) | |
| COMPUTER SCIENCES CORPORATION, ET AL |) | |
| |) | |
| Defendants. |) | |

**MEMORANDUM IN SUPPORT OF CERTAIN WRITE YOUR OWN INSURANCE COMPANY
DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT, AND FOR
MORE DEFINITE STATEMENT**

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INTRODUCTION AND EXECUTIVE SUMMARY

This case arises from claims under the National Flood Insurance Program (“NFIP”). The NFIP is a federal program pursuant to which persons can purchase Standard Flood Insurance Policies (“SFIPs”), containing terms mandated by federal law, either directly from the Federal Emergency Management Agency (“FEMA”) or from private insurance companies (called “Write Your Own” or “WYO” carriers) that are authorized by federal regulation to sell SFIPs under their own names. The WYO carriers act as “fiscal agents” of the United States because payment of SFIP claims, as well as all costs attendant to the adjustment of those claims, constitute a direct charge on the United States Treasury.

Plaintiffs are 183 individuals whose homes suffered flood damage during Hurricane Isabel in September of 2003. Seventy-eight of the Plaintiffs in thirty different households allege that their homes were covered by an SFIP issued pursuant to the NFIP either by defendant Allstate Insurance Company, State Farm Fire and Casualty Company, The Standard Fire Insurance Company (incorrectly designated in the First Amended Complaint as “Travelers Property Casualty Corporation/Travelers Property Casualty Company of America, a/k/a Standard Fire Insurance Company”), or Nationwide Mutual Fire Insurance Company (these moving defendants are collectively referred to hereinafter as “These WYO Defendants”). Only some of these approximately seventy-eight Plaintiffs could actually have been insureds under the SFIPs.¹ Dissatisfied with the amounts of federal funds that were already paid on their SFIP claims, Plaintiffs joined in filing the instant action.

¹ Revised Attachment A to the Complaint purports to list Plaintiffs “grouped by damaged household, opposite the [carrier] which issued the SFIP for the home.” (1st Am. Comp, ¶ 19.) The SFIP provides that the insured under the policy includes the persons shown on the Declarations Page of the policy and that person’s spouse, if a resident of the same household, as well as any mortgagee and loss payee

The First Amended Complaint is a rambling diatribe, pleaded in five causes of action, against 57 Defendants, whom Plaintiffs group into five different categories: (1) Computer Sciences Corporation (“CSC”) and certain of its employees; (2) FEMA and certain of its officials; (3) WYO carriers; (4) independent adjusters and adjusting companies (“Adjuster Defendants”); and (5) third-party processors and/or administrators for the WYO carriers (“Third Party Processing Defendants”). But the gravamen of Plaintiffs’ claims against These WYO Defendants is quite simple. Plaintiffs allege that These WYO Defendants breached the SFIPs by failing to pay an amount sufficient to restore Plaintiffs’ properties to their “pre-flood” condition, a claim Plaintiffs concede is governed by federal law. (Fifth Cause of Action for “Breach of Contract.”) But in an effort to expand their claims beyond what the NFIP intended, Plaintiffs also plead two state law claims against These WYO Defendants sounding in tort: “procurement fraud” (Second Cause of Action), and “interference with contract” (Fourth Cause of Action).²

As a matter of law, none of these causes of action state viable claims against any of These WYO Defendants because:

- A. The Second Cause of Action for “Procurement Fraud” is barred, as a matter of law, because: (1) to the extent that it alleges that These WYO Defendants misrepresented how claims would be handled under the SFIP, it is plainly a dispute arising from SFIP claims handling and is therefore preempted by federal law; (2) to the extent that it alleges that These WYO Defendants misrepresented the scope of coverage under the SFIP, Plaintiffs could not have reasonably relied upon any such alleged misrepresentations; (3) to the extent this cause of action constitutes a promissory fraud claim, it is barred by Maryland law; and (4) Plaintiffs have failed to plead fraud with the requisite particularity;

named in the Application and Declarations Page. *See* 44 C.R.F. pt. 61, App. A(1), art. (II)(A). Numerous individuals listed on Revised Attachment A were not the insureds’ spouses or a mortgagee or loss payee, but apparently resided with Plaintiffs who were insured under the SFIPs. As shown more fully in Section IV, none of these non-insured Plaintiffs has standing to assert the claims alleged against These WYO Defendants in Counts II, IV, and V.

² Only Counts II, IV, and V are directed at These WYO Defendants.

- B. The Fourth Cause of Action fails to state a viable claim because: (1) the claim necessarily involves a dispute arising from SFIP claims handling, and is therefore preempted by federal law; and (2) These WYO Defendants could not have interfered with their own contracts with Plaintiffs;
- C. The Fifth Cause of Action should be dismissed because it: (1) fails to plead that Plaintiffs satisfied any of the SFIP requisites for filing suit; (2) asserts claims for forms of relief not authorized by the SFIP; and (3) is indefinite as to how each WYO carrier allegedly breached the SFIP; and
- D. Plaintiffs who are not “insureds” under an SFIP lack standing to pursue any of the claims asserted against These WYO Defendants.

The attempt to plead state law claims against These WYO Defendants is troubling not only because applicable law bars such claims, but also because six of the Plaintiffs here, who are also putative class representative plaintiffs in *Howell, et al. v. State Farm Ins. Companies, et al.*, Civil Action No. 1:04-CV-01494-BEL., involving the same Hurricane Isabel claims, acknowledged in response to a motion to dismiss that action that any state law claim relating to SFIP claims handling would be preempted.³ The law does not permit Plaintiffs now to effect a Janus-like reversal of that position in this lawsuit. *See, e.g., King v. Herbert J. Thomas Mem’l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999) (“Courts are under no compulsion to heed the shifting theories of ‘chameleonic litigants’”) (internal citation omitted).

As shown more fully below, These WYO Defendants’ motion to dismiss, and for a more definite statement, should be granted.

³ *See* Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, pp. 12-13 (“The NFIA Regulations and the SFIP explicitly establish that federal law . . . exclusively governs all claims arising from the SFIP Under this scheme, numerous courts have held—and Plaintiffs do not dispute—that claims premised upon state statutes or state common law are preempted under the Supremacy Clause of the federal Constitution”). A copy of these pages is attached hereto as Exhibit A. The full brief may be found at docket number 43 in Civil Action No. 1:04-CV-01494-BEL.

BACKGROUND

A. The National Flood Insurance Program (“NFIP”)⁴

Congress enacted the National Flood Insurance Act of 1968 (the “Act”) in part in response to a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. *See* 42 U.S.C. §§ 4001(a), (b); *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 165 & n.2 (3d Cir. 1998). The Act authorized the federal government to establish the NFIP, a program with “large-scale” federal involvement, to provide affordable, but limited, flood insurance on a national basis and to discourage the construction of new structures in flood prone areas. *See* 42 U.S.C. §§ 4001(b), 4011(a); 1968 U.S. Code Cong. & Admin. News 2873, 2966-67, 2969. “The principal purpose” of the NFIP “was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing federal flood disaster assistance.” *Till v. Unifirst Fed. Sav. and Loan*, 653 F.2d 152, 159 (5th Cir. 1981).⁵

⁴ The NFIP was established and implemented pursuant to federal statute and regulations. The SFIP is itself a federal regulation. Accordingly, both the NFIP and the SFIP may be cited as legal authority. Because Plaintiffs repeatedly make reference to both the NFIP and the SFIP in the First Amended Complaint (*see, e.g.*, 1st Am. Comp., ¶¶ 2, 19), the Court could in any event consider the provisions of both in ruling upon Defendants’ motions to dismiss. *Cf. Recupito v. Prudential Secs., Inc.*, 112 F. Supp. 2d 449, 453 (D. Md. 2000) (“When a plaintiff’s complaint relies on documents not provided with that complaint, the defendant may on a motion to dismiss provide them for the court’s consideration.”) (citation omitted); *New Beckley Mining Corp. v. Int’l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994) (same).

⁵ The Act outlined two alternative frameworks for implementing the NFIP. Part A allows an associated pool of private insurance companies to implement a privately operated program. *See* 42 U.S.C. §§ 4051, 4052. Part B authorizes the federal government to implement an alternative program through the “facilities of the Federal Government.” 42 U.S.C. § 4071. Initially, the NFIP was implemented under Part A and administered by an associated pool of private insurance companies pursuant to an annual contract with the Department of Housing and Urban Development (“HUD”). *See* 42 U.S.C. §§ 4051, 4052; *see also Nat’l Flood Insurers Ass’n v. Harris*, 444 F. Supp. 969, 970-72 (D.D.C. 1977). In 1977, HUD decided to discontinue the private operation of the NFIP under Part A. It communicated its intent to Congress to provide flood insurance through the “facilities of the federal government” pursuant to

In 1978, HUD delegated to FEMA its authority to operate both the NFIP and the Federal Insurance Administration. *See* Reorganization Plan No. 3 of 1978, §§ 202, 304, 43 Fed. Reg. 41943-45 (1978). FEMA thereby became “statutorily authorized to provide, by regulation, not only ‘for the general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage’ under the NFIP, but also for the general method or methods by which proved and approved claims for losses under such policies may be adjusted and paid.” 42 U.S.C. §§ 4013, 4019; *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 599 (4th Cir. 2002). The National Flood Insurance Fund was established in the Treasury of the United States to pay NFIP claims and administrative expenses. *See* 42 U.S.C. §§ 4017(a), (d); *Sandia Oil Co. v. Beckton*, 889 F.2d 258, 263 (10th Cir. 1989). Pursuant to a contractual arrangement, Defendant CSC acts as a “statistical agent” that oversees the day-to-day affairs of the NFIP. (1st Am. Comp., ¶ 5.)

In 1983, FEMA exercised its regulatory authority under 42 U.S.C. § 4081(a) and created the “Write Your Own” (“WYO”) program to assist it in marketing flood insurance through the “facilities of the federal government.” 42 U.S.C. §§ 4081(a), 4071; 44 C.F.R. § 62.23-24; 48 Fed. Reg. 46789 (1983) (amending the federal regulations to establish the WYO program). Through the WYO program, insureds can purchase an SFIP either directly from FEMA or from private insurers that are authorized to write SFIPs under their own names. *See* 44 C.F.R. § 62.23. By FEMA regulation, all policies issued under the NFIP must be issued using the terms and conditions of the SFIP found in 44 C.F.R. pt. 61,

Part B of the Act. *See* 42 U.S.C. § 4071; 42 Fed. Reg. 58569 (1979). On January 1, 1978, HUD assumed full control of the program with the intention of retaining, to the extent practicable, the services of private insurers as “fiscal agents” of the United States. 42 U.S.C. § 4071; 42 Fed. Reg. 58573 (1977). At that time, all flood insurance policies were deemed issued by the Federal Insurance Administration. *See Kolner v. Dir., Fed. Emergency Mgmt. Agency*, 547 F. Supp. 828, 829 (N.D. Ill. 1982).

App. (A); 44 C.F.R. §§ 61.4(b), 61.13(d), (e), 62.23(c). The WYO companies are not authorized to vary or waive any of the SFIP terms and conditions without the express written consent of FEMA. 44 C.F.R. §§ 61.4(b); 61.13(d), (e); 62.23(c), (d). In carrying out their functions under the NFIP, WYO companies are authorized to use independent contractor resources, such as the Third-Party Processing Defendants, “as [they] would in the ordinary and necessary conduct of [their] own business affairs.” 44 C.F.R. § 62.23(e).

Premiums collected by WYO companies, after deducting fees and costs, must be deposited in the National Flood Insurance Fund in the United States Treasury. 42 U.S.C. § 4017(d); 44 C.F.R. pt. 62, App. A, arts. II(E), VII(B). Thus, premiums collected on policies written by WYO companies do not belong to those companies. *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1311 (11th Cir. 2001). Claim payments on such policies are a direct charge on the United States Treasury. *Id.*; *see also* 44 C.F.R. § 62.23(f) (relationship between the federal government and WYO companies is “one of a fiduciary nature” intended to “assure that any taxpayer funds are accounted for and appropriately expended.”). Other than a statutory policy issuance commission, WYO companies are compensated only if they actually approve an SFIP claim and authorize payment, in which case they receive a 3.3% commission on the amounts that are paid. 44 C.F.R. pt. 62, App. A, art. III (C)(1). “Therefore, not only does a WYO insurer have an incentive to approve a claim, but the greater the payment, the larger the amount the insurer recovers.” *Scherz v. South Carolina Ins. Co.*, 112 F. Supp. 2d 1000, 1004 (C.D. Cal. 2000).

B. The Standard Flood Insurance Policy And Its Prerequisites For Bringing Suit Under The Policy

Pursuant to 42 U.S.C. § 4013, Congress authorized the Executive Branch (FEMA) to determine the scope of available coverages under the NFIP. The SFIP, found at 44 C.F.R. pt. 61, App. A(1)

(Dwelling Form),⁶ is a “single risk” policy that provides coverage for “direct physical loss by or from flood,” subject to certain conditions and exclusions. The policy is divided into four parts: (a) Part A describes Property Coverage, also referred to as Dwelling Coverage; (b) Part B describes personal property coverage, also referred to as “Contents” Coverage; (c) Part C describes “Other Coverages,” including debris removal, loss avoidance measures, etc.; (d) Part D describes “Increased Cost of Compliance Coverage” that provides coverage, up to \$30,000, for the costs of complying with local flood plan requirements and/or ordinances; and (e) several pages of exclusions and “Property Not Covered.”

In 2000, FEMA amended the language of the SFIP to state:

This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968 . . . and Federal common law.

44 C.F.R. pt. 61, App. A(1), art. IX. Prior cases had already held there to be federal preemption with respect to such disputes, even absent the 2000 amendment. *See, e.g., Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 949 (6th Cir. 2002).

The SFIP also provides that “[an insured] may not sue us to recover money under this policy unless [the insured has] complied with all of the requirements of the policy.” 44 C.F.R. pt. 61., App. A(1), art. VII(R). These requirements include, among other things, that the insured: (1) give prompt written notice of loss to the insurer; (2) separate the damaged and undamaged property so that the

⁶ The Dwelling Form as set forth in 44 C.F.R. pt. 61, App. A(1) at the time of Hurricane Isabel is attached hereto as Exhibit B. (The form has not changed since that time). 44 C.F.R. pt. 61, App. A(2) and A(3), respectively, are the General Property Form and the Residential Condominium Building Association Policy versions of the SFIP. Plaintiffs here allege that their affected properties were all residences (*e.g.*, 1st Am. Comp., ¶ 2), so presumably only the Dwelling Form is at issue in this case.

insurer may examine it; (3) prepare an inventory of damaged property showing the quantity, description, actual cash value, and amount of loss, attaching all bills, receipts and related documentation; and (4) prepare a proof of loss, which is the insured's statement of the amount he is claiming under the policy, signed and sworn to by him, furnishing, among other things, information concerning the loss, repair estimates, and inventory of damaged personal property. *Id.*, art. VII(J). The SFIP expressly provides that in completing the proof of loss, "[the insured] must use [his] own judgment concerning the amount of loss and justify that amount." *Id.*

C. NFIP Claims Adjusting And The Proof Of Loss Requirement

In the event of a flood, the SFIP informs policyholders that they will be provided an adjuster's services to assist them in the submission of a claim "as a courtesy." *See Id.*, art. VII(J)(7), (8). Many WYO carriers retain the services of independent adjusting companies that provide adjusters to inspect property damaged by flood. Independent adjusters are paid for by the NFIP under a formula specified by regulation that is designed to discourage the underpayment of claims by providing for a higher fee for large claims than for small claims. *See* 44 C.F.R. § 62.23(i)(3).

Notwithstanding the assistance of an adjuster, the legal responsibility to satisfy NFIP rules rests with the insured. 44 C.F.R. pt. 61, App. A(1), art. VII(J). The SFIP expressly provides that an insured must submit a sworn proof of loss within 60 days of any flood loss, "which is [the insured's] statement of the amount [he is] claiming under the policy signed and sworn to by [the insured]." *See Id.*, art. VII(J)(4). The proof of loss is required to contain, among other information, the "specifications of damaged buildings and detailed repair estimates" and an "inventory of damaged personal property." *Id.*

A WYO carrier issuing flood insurance coverage "shall arrange for the adjustment, settlement, payment, and defense of all claims arising from policies of flood insurance it issues under the [NFIP],

based upon the terms and conditions of the [SFIP].” 44 C.F.R. § 62.23(d). The SFIP expressly provides that the WYO carrier is not authorized to waive any requirement of the policy. Any waiver of a policy provision must be in writing and can only come from FEMA. *See* 44 C.F.R. pt. 61, App. A(1), art. VII(D); *see also* 44 C.F.R. §§ 61.4(b); 61.13 (d), (e); 62.3(c), (d).

Disputes concerning the adjustment of NFIP claims can be resolved in one of several ways: (1) amicable resolution of the claim with the WYO company; (2) a binding appraisal to establish the proper claim value (but not to resolve coverage disputes) (44 C.F.R. pt. 61, App. A(1), art. VII(P)); or (3) a private right of action to sue for contractual benefits under a SFIP in the federal courts (42 U.S.C. §4072).

D. Nature Of The Action

Although pleaded in five causes of action, Plaintiffs’ claims are all based on the handling and alleged underpayment of their SFIP claims. Only the Second, Fourth, and Fifth Causes of Action assert claims against These WYO Defendants.

In the First Cause of Action (not applicable to These WYO Defendants), Plaintiffs allege that certain individual FEMA officials and employees of CSC administered the NFIP so as to deprive Plaintiffs of their constitutional rights to liberty and property without due process of law in violation of the United States Constitution.

The Second Cause of Action alleges that all Defendants owed a duty to Plaintiffs “to refrain from falsely representing...the nature and extent of benefits that would be paid to them in the event of a flood loss....” (1st Am. Comp., ¶ 72.) Plaintiffs make no specific allegations about particular Defendants, but instead allege broadly that each Defendant falsely represented “to the SFIP-purchasing Plaintiffs” that in the event of flood, the SFIP benefits “would be in an amount sufficient to return their property to its pre-

flood condition, up to the policy limits.” (*Id.*, ¶ 73.) Plaintiffs allege that at the time the alleged misrepresentation was made, each Defendant knew that the benefits paid would not be sufficient to return their property to its pre-flood condition because of “the systematic low-balling, high pressure tactics...employed to deprive the SFIP-purchasing Plaintiffs of benefits” during adjustment of claims under the SFIP. (*Id.*, ¶ 74.) Plaintiffs claim that the misrepresentations were made with the intent of defrauding the SFIP-purchasing Plaintiffs and that each SFIP-purchasing plaintiff had the right to rely upon such misrepresentations. (*Id.*, ¶¶ 75, 77.) Plaintiffs allege that they were damaged by reason of their detrimental reliance on the alleged misrepresentations when their claims were not paid in accordance with the SFIP. (*Id.*, ¶¶ 76, 78.)⁷

The Third Cause of Action seeks no relief against These WYO Defendants. Instead, it alleges that the Adjuster Defendants owed Plaintiffs a duty “to refrain from employing low-balling tactics by misrepresenting the nature and extent of Plaintiffs’ SFIP coverage and to refrain from employing high-pressure tactics by misrepresenting the consequences to the Plaintiffs if they refused to accept the low-ball offers.” (*Id.*, ¶ 79.) Plaintiffs allege that in breach of this “duty,” the Adjuster Defendants falsely represented to Plaintiffs “that SFIP benefits to which they were entitled were far less than that which...would be in an amount sufficient to return their property to its pre-flood condition, up to the policy limits.” (1st Am. Comp., ¶ 80.) Plaintiffs further allege that the Adjuster Defendants falsely represented that Plaintiffs would receive nothing if they failed to accept the amount offered. (*Id.*) Plaintiffs claim that the Adjuster Defendants knew at the time the alleged misrepresentations were made

⁷ While the Second and Fourth Causes of Action make broad allegations about “all Defendants,” each expressly excludes FEMA (but only FEMA) from the prayer for relief. *See* 1st Am. Comp., Prayers for Relief following ¶¶ 78, 88.

that Plaintiffs should receive an amount sufficient to return their property to its pre-flood condition, and that systematic “low-balling, high pressure tactics...would deprive the insured Plaintiffs of benefits necessary to make them whole....” (*Id.*, ¶ 81.) Plaintiffs allegedly relied upon the misrepresentations to their detriment and were damaged. (*Id.*, ¶ 83.)

The Fourth Cause of Action alleges that “at all times pertinent to the adjustment of the insured Plaintiffs’ flood loss claims, Defendants owed a duty . . . to refrain from interfering with the contractual relations between [Plaintiffs] and the WYOs” (*Id.*, ¶ 86.) Plaintiffs allege that “Defendants, acting outside the scope of their authority, interfered with this contractual relationship,” damaging Plaintiffs. (*Id.*, ¶ 87.)

The Fifth Cause of Action alleges that the “insured Plaintiffs” were owed benefits under their SFIPs “in an amount sufficient to return their property to its pre-flood condition, up to the policy limits.” (1st Am. Comp., ¶ 89.) Plaintiffs allege that upon sustaining flood losses, they were deprived of their SFIP benefits in breach of contract. (*Id.*, ¶ 90.) Plaintiffs claim that they are entitled to the shortfall in payment of SFIP benefits, plus delay damages, return of premiums, disgorgement of profits and compensation, and pre-judgment interest. (*Id.*, ¶ 91) There are no specific allegations as to the nature of any particular Plaintiff’s contract claim against his or her WYO carrier, such as whether the purported dispute involves a coverage issue or a valuation issue.

ARGUMENT

An action will be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) if it appears that the plaintiff can prove no set of facts that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Such is the case when the face of the complaint clearly reveals the existence of a meritorious affirmative defense, such as federal preemption of a state law claim. *See Brooks v. City of*

Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). In reviewing the legal sufficiency of the complaint, while the Court should construe the factual allegations in the light most favorable to the plaintiff, the Court is not bound by the plaintiff's legal conclusions or by allegations which conflict with the express provisions of documents, regulations, or statutes referenced in the complaint. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995). As shown more fully below, These WYO Defendants' motion to dismiss should be granted.

I.

THE SECOND CAUSE OF ACTION FOR "PROCUREMENT FRAUD" IS LEGALLY INSUFFICIENT AS A MATTER OF LAW.

Plaintiffs' "procurement fraud" claim may be read to allege two different possible "fraud" theories. On the one hand, the First Amended Complaint may be read to assert that unidentified persons at unspecified times made misrepresentations concerning how claims would actually be handled under the SFIP, e.g., that These WYO Defendants knew that "systematic low-balling" and "high pressure tactics" would be used in the claims handling phase "to deprive the SFIP-purchasing Plaintiffs of benefits," but represented that Plaintiffs would be made "whole." (1st Am. Comp., ¶¶ 74, 77.) On the other hand, the First Amended Complaint may be read to allege that unidentified persons at unspecified times made misrepresentations concerning the scope of SFIP coverage, e.g., that These WYO Defendants represented that the coverage provided by the SFIP was broader than it actually was. (*Id.*, ¶¶ 73, 76.) Under either scenario, Plaintiffs' "procurement fraud" claims fail as a matter of law.

A. If The “Procurement Fraud” Claim Asserts A Misrepresentation Concerning How SFIP Claims Would Be Handled, It Is Preempted By Federal Law.

The preemption doctrine has its roots in the Supremacy Clause, Article VI, Section 2 of the United States Constitution, which elevates federal law above that of the states. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). Preemption may occur in three ways.

First, federal law, either by statute or regulation, may expressly provide that it supplants state authority in a particular field. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *S. Blasting Svcs., Inc. v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002). Second, Congress may impliedly preempt state law when “federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted). Third, even absent an express or implied federal intent to preempt state authority in a field, state law is preempted by operation of law to the extent that it actually conflicts with federal law, either because compliance with both is a “physical impossibility,” or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

To the extent that Plaintiffs’ “procurement fraud” claim is an attempt to complain about the manner in which Plaintiffs’ claims were handled, both express and conflict preemption bar the claims asserted in the Second Cause of Action.

1. The SFIP’s Choice Of Law Provision, Which Is Also A Federal Regulation, Expressly Preempts State Law Claims “Arising From The Handling Of Any Claim Under The Policy.”

Effective December 31, 2000, FEMA revised Article IX of the SFIP to expressly provide that “[t]his policy and *all disputes arising from the handling of any claim under the policy* are governed

exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended . . . and Federal common law.” 44 C.F.R. pt. 61, A(1), art. IX (emphasis added). At the same time, FEMA also revised Article VII(R) of the SFIP to make clear that the requirement that suit be filed in federal court to recover money under the SFIP “applies to any claim that [an insured] may have under this policy and to any dispute that [an insured] may have arising out of the handling of any claim under the policy.” *Id.*, art VII(R) (emphasis added).

These revisions were made in order to clarify that “the policy language pertaining to jurisdiction, venue and [the] applicable law to emphasize that *matters pertaining to the [SFIP], including issues relating to and arising out of claims handling...are governed exclusively by Federal law.*” 65 Fed. Reg. 34824, 34827 (May 31, 2000) (emphasis added); *see also Battle*, 288 F.3d at 608 n.18 (recognizing FEMA’s stated purpose in revising the SFIP). The SFIP is “more than a contract; it is also a [federal] regulation.” *Mancini v. Redland Ins. Co.*, 248 F.3d 729, 733 (8th Cir. 2001). As such, its provisions operate to expressly preempt all state law claims involving the SFIP and “disputes arising from the handling of any claim under the policy....” *See In re Cajun Elec. Power Coop, Inc.*, 109 F.3d 248, 254 (5th Cir. 1997) (“Federal regulations have no less pre-emptive effect than federal statutes”); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof”).

While no federal appellate court has yet to expressly hold that the revised Article IX is effective as an express preemption of state law tort claims, several courts have recognized that “it can obviously be so argued.” *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5th Cir. 2005) (finding state law tort claims preempted by federal law); *see also C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 269 n.6, 271 n.10 (3d Cir. 2004) (“[i]n its current form, the [SFIP] appears explicitly to preempt state

law tort suits”); *Scratchfield v. Mut. of Omaha Ins. Co.*, 341 F. Supp. 2d 675, 680 (E.D. Tex. 2004) (“It seems clear that FEMA, in revising the policy language intended to limit the scope of recovery under the SFIP. In so doing, FEMA effectively preempted all state law claims.”); *Peal v. North Carolina Farm Bureau Mut. Ins. Co., Inc.*, 212 F. Supp. 2d 508, 514 n.6 (E.D. N.C. 2002) (refusing to find express preemption “[b]ecause the plaintiff’s policy was issued prior to December 31, 2000, [and therefore] the expanded breadth of the express preemption clause is inapplicable to the instant dispute”).

To prevail under their misrepresentation of claims-handling theory, Plaintiffs would have to establish that the SFIPs were marketed as providing broad coverage, that the SFIPs in fact provided such coverage, and that Defendants knew that claims would be handled in a fashion that was not in accordance with that allegedly broad coverage. Thus, the Second Cause of Action at its core asserts “impropriety in the investigation and adjustment of their insurance claim [that] are intimately related to the disallowance of their insurance claim.” *Van Holt*, 163 F.3d at 167 (finding claims asserted as torts nonetheless arising out of the investigation or adjustment of NFIP insurance policies). The Second Cause of Action plainly constitutes a “claim you may have under the policy” and “disputes arising from the handling of any claim under the policy,” and is therefore expressly preempted by federal law. 44 C.F.R. pt. 61, App. A(1), art. IX.

2. Claims That These WYO Defendants Misrepresented How SFIP Claims Would Be Handled Are Also Preempted Because They Conflict With The Accomplishment And Execution Of The NFIP.

Even absent the revised SFIP policy language cited above, claims that These WYO Defendants misrepresented how SFIP claims would be handled are preempted because permitting them “stands as an obstacle to the accomplishment of the full purposes and objectives” of federal law. *See Silkwood v.*

Kerr-McGee Corp., 464 U.S. 238, 248 (1984.) The Third Circuit recently held that state tort claims impeded the accomplishment of the purpose of the NFIP and were therefore preempted because:

Indisputably a central purpose of the Program is to reduce fiscal pressure on federal flood relief efforts . . . State tort suits against WYO companies, which are usually expensive, undermine this goal . . . If FEMA refused to reimburse WYO carriers for their defense costs, insurers would leave the Program, driving the price of insurance higher. The alternative, remuneration for losses incurred in such suits, would directly burden the federal Treasury . . . The efficiency goals of the Program, on balance, would better be served by requiring claimants to resolve their disputes by means of the remedies FEMA provides.

C.E.R. 1988, Inc., 386 F.3d at 270-71. The Sixth Circuit also held that state law tort claims were preempted by conflict preemption, noting:

All of these claims are in essence over the disposition of the SFIP claim. They are all based on defendant's handling and denial of coverage under the SFIP. Congress and FEMA have regulated the claims adjustment process and judicial review of coverage claims under flood insurance policies. Uniformity of decision requires the application of federal law and precludes the enforcement of state laws on the same subject.

Gibson, 289 F.3d at 949. Most recently, the Fifth Circuit also held that state law tort claims arising from claims handling were preempted by federal law, finding such conclusion compelled by the fact that the NFIP is a “child of Congress, conceived to achieve policies which are national in scope, and...the federal government participates extensively in the program both in a supervisory capacity and financially.” *Wright*, 415 F.3d at 390 (citing *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979)).

Allowing state law causes of action asserting that misrepresentations were made concerning how SFIP claims would be handled would similarly stand as an obstacle to the accomplishment of the purposes of the NFIP. Virtually any breach of contract action could be transmogrified, at least at the pleading stage, into a fraud claim by simply alleging that the defendant had misrepresented its intent to

comply with the contract. Subjecting These WYO Defendants to the requirements of 50 states' laws with regard to such claims would undermine the NFIP "policies which are national in scope." *Wright*, 415 F.3d at 390. Requiring litigation of such claims would undermine "the efficiency goals of the Program." *C.E.R. 1988*, 386 F.3d at 270-71. At the end of the day, no matter how characterized, such claims are disputes over whether the proper amount has been paid under the SFIP. "Uniformity of decision requires the application of federal law and precludes the enforcement of state law on the same subject." *Gibson*, 289 F.3d at 949. Accordingly, these state law claims in Count Two are preempted.

B. Even If Not Federally Preempted, If The "Procurement Fraud" Claim Asserts A Misrepresentation Concerning How SFIP Claims Would Be Handled, It Is Also Barred Under Maryland Law.

The Second Cause of Action alleges that Plaintiffs were told by "Defendants" that "in the event of a flood loss to their primary residence, benefits *would* be paid to them which *would* make them whole (after satisfaction of the deductible), and which *would* be in an amount sufficient to return their property to its pre-flood condition" (1st Am. Comp., ¶73) (emphasis added.) Plaintiffs' claims thus sound in "promissory fraud"—e.g. a claim that These WYO Defendants sold SFIPs containing broad coverage without the present intent to adjust claims consistent with that coverage. To the extent that the Second Cause of Action can be construed as a promissory fraud claim, it is legally insufficient under Maryland law.

Maryland law recognizes that a statement that is merely promissory in nature or a failed prediction of the materialization of future events is not a statement of a **fact**. As stated by the Maryland Court of Appeals:

Ordinarily fraud cannot be predicated upon statements which are promissory in their nature, and therefore an action for deceit will not lie for the unfulfillment of promises or the failure of future events to materialize as predicted. Failure to fulfill a promise is merely a breach of contract, which must be enforced, if at all, by an action *ex contractu*.

Appel v. Hupfield, 198 Md. 374, 379, 84 A.2d 94, 96 (1951) (citing *Boulden v. Stilwell*, 100 Md. 543, 552, 60 A. 609, 610 (1905); see also *Sass v. Andrew*, 152 Md. App. 406, 438, 832 A.2d 247, 265 (2003); *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 196, 665 A.2d 1038, 1048 (1995); *Hale Trucks of Maryland, LLC v. Volvo Trucks North America, Inc.*, 224 F. Supp. 2d 1010, 1032 (D. Md. 2002). Here, too, to the extent that the Second Cause of Action asserts that These WYO Defendants sold the SFIP with the intent not to adjust claims consistent with the broad scope of coverage that Plaintiffs contend the SFIP provides, their remedy under Maryland law lies in breach of contract, not tort.

Moreover, Plaintiffs are not entitled to rely on any representations as to how claims would be adjusted in any event. The SFIP makes clear that any adjusting services provided by the WYO carrier are provided as a courtesy only. 44 C.F.R. pt. 61 App. A(1), art. VII(J)(7). The SFIP also expressly provides that the responsibility remains with the policyholder at all times to prepare and submit a proper proof of loss using the policyholder's "own judgment concerning the amount of loss." *Id.*, art. VII(J)(5). Thus, Plaintiffs had no right to rely on the adjusting process to insure that they would receive all benefits. Moreover, as discussed below (at pages 19-23), Plaintiffs are charged with knowledge of the SFIP's provisions, and do not have the right to rely upon contrary representations. Thus, even if Plaintiffs' allegations were correct, nothing that anyone said at the time of policy sale could give rise to a fraud claim based upon misrepresentations concerning how future claims would be adjusted under the SFIP.

C. If The “Procurement Fraud” Claim Asserts A Misrepresentation As To The Scope Of SFIP Coverage, It Still Fails As A Matter of Law Because Plaintiffs Did Not Have The Right to Rely Upon Such Representations.

If the Second Cause of Action is instead read to assert that These WYO Defendants made misrepresentations as to the scope of coverage actually provided by the SFIP, such claims would be barred as a matter of law. To pursue a fraud claim under Maryland law, Plaintiffs are required to plead and prove that they relied and had the right to rely upon the alleged misrepresentations. *Edell & Assocs., P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 444-45 (4th Cir. 2001) (applying Maryland law). However, Plaintiffs’ allegations of reliance and the right to rely are in direct conflict with federal law which provides that policyholders are not entitled to rely on representations by anyone, including These WYO Defendants, pertaining to the scope of SFIP coverage to the extent such representations are inconsistent with the SFIP and NFIP.

It is well-settled that all citizens are charged with the knowledge of the law regarding federal insurance programs. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); *see also* 44 C.F.R. § 61.14(b) (enabling “[a]ny policyholder or person in privity with a policyholder [to] file a request for interpretation” of the SFIP). As the Supreme Court has admonished, “those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to [the] law.” *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). Citizens seeking to benefit from a federal benefit program are charged with the responsibility of familiarizing themselves with the requirements of that program and “may not rely on the conduct of the Government agents contrary to [the] law.” *Id.*

The terms of the SFIP are published in their entirety in the Code of Federal Regulations (“C.F.R.”) and thus are available to the public. 44 C.F.R. pt. 61, App. A(1); *see also Richmond Printing*

LLC v. Dir. Fed. Emergency Mgmt. Agency, No. 02-20223, 2003 WL 21697457, at *5 (5th Cir. July 21, 2003). Because the SFIP is both an insurance policy and a federal regulation, the policyholder is charged with the duty to read and understand the terms of the SFIP so that the policyholder may deal appropriately with the government and its appointed agents. *Id.* FEMA alleviated any doubt as to the effect of an agent's representations pertaining to scope of the SFIP coverage by preempting any such misrepresentation-based claims:

The standard flood insurance policy is authorized only under terms and conditions established by Federal statute, the program's regulations, the Administrator's interpretations and the express terms of the policy itself. Accordingly, *representations regarding the extent and scope of coverage which are not consistent with the National Flood Insurance Act of 1968, as amended, or the Program's regulations are void*

44 C.F.R. § 61.5(e) (emphasis added). Pursuant to the express terms of the SFIP, the policyholders are charged by law with constructive knowledge of the policy contents and requirements. *See generally* 44 C.F.R. pt. 61, App. A(1), art. VII(J)(5), (7), (8); *see also Merrill*, 332 U.S. at 328; *Heckler*, 467 U.S. at 63.⁸

Thus, Plaintiffs were not, as a matter of law, entitled to rely on any alleged misrepresentations concerning the scope of SFIP coverage. *See Deverant v. Selective Ins. Co.*, No. Civ. A. 02-3801, 2004 WL 1171333, at *1 (E.D. Pa. Mar. 25, 2004) (holding that an agent's representation that “[a]ny and all losses sustained as the result of flood damage would be covered by the [SFIP]” was not sufficient to

⁸ Because insureds are charged with knowledge of the terms of the SFIP, Plaintiffs' fraud claims also fail for another reason under Maryland law: in order to pursue a claim for fraud, a misrepresentation must be of a **material** fact. Maryland law makes clear that “[a] misrepresentation is generally immaterial if the party to whom it is made reasonably could have ascertained the true facts.” *Sass v. Andrew*, 152 Md. App. at 440, 832 A.2d at 266. Accordingly, any alleged representations concerning the SFIP's scope would be deemed, under Maryland law, immaterial and non-actionable.

establish fraud); *Larmann v. State Farm Ins. Co.*, No. Civ. A. 03-2993, 2005 WL 357191, at *5 (E.D. La. Feb. 11, 2005) (holding that “[a]ny reliance by the plaintiffs on the misrepresentations of the Agents [as to the amount and extent of coverage] is ‘unreasonable as a matter of law.’”). “[G]iven that the insured is doing business with the government and that the terms of the SFIP are published in the [C.F.R.], the insured has a duty to read and understand the terms of its SFIP.” *Richmond Printing LLC*, 2003 WL 21697457, at *6.⁹ Any reliance on statements made by a government agent that contradict terms of the SFIP is unreasonable as a matter of law. *Id.*¹⁰

The same result is mandated by Maryland law. Under Maryland law, a policyholder is required to read a policy that he receives from an insurer, and is deemed to accept the terms of the policy as a matter of law unless he objects to them within a reasonable time. *See Twelve Knotts Ltd. P’ship v. Fireman’s Fund Ins. Co.*, 87 Md. App. 88, 104-05, 589 A.2d 105, 113-114 (1991); *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 24-25, 810 A.2d 1045, 1057-58 (2002), *cert. denied*, 373 Md. 407, 818

⁹ *Richmond Printing*, which was an unpublished decision, reached the issue of reasonable reliance because it found that state law fraud claims against adjusters were not preempted by federal law. While *Richmond Printing*’s reasonable reliance holding remains good law, its pre-emption analysis was overturned by the Fifth Circuit in a published opinion, *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005). For the reasons discussed *supra*, at pages 13-17, *Wright*’s holding that state law tort claims regarding SFIP claims handling are preempted by federal law mandates dismissal of the Second Cause of Action to the extent this claim asserts misrepresentations concerning how SFIPs would be adjusted. As shown *infra*, at pages 26-27, *Wright*’s holding also mandates dismissal of the Fourth Cause of Action on preemption grounds.

¹⁰ Plaintiffs’ fraud claims are also legally insufficient because, according to the Complaint, there is no “but for” causation of any damage. The Complaint alleges only that as a “result of the misrepresentation,” Plaintiffs purportedly did not know what benefits would be payable in the event of a loss. (1st Am. Comp., ¶78.) But, as shown above, *Merrill* and *Heckler* both preclude this argument—Plaintiffs are presumed to know the SFIP terms. As a result, the alleged misrepresentations concerning the scope of SFIP coverage could not be the “but for” causation of the alleged damage as a matter of law. *See, e.g., Garcia v. Omaha*, 933 F. Supp. 1064, 1070 (S.D. Fla. 1995), *aff’d*, 95 F.3d 58 (11th Cir. 1996).

A.2d 1105 (2003). Plaintiffs improperly seek to rely on alleged representations—i.e., that the SFIP provides coverage that insures a return to “pre-flood condition”—which are in direct conflict with the express policy language of the SFIP. (*See* 1st Am. Comp., ¶¶ 49, 73.) The NFIP is intended to make affordable flood insurance available on a nationwide basis, to accelerate recovery from floods, mitigate future losses, save lives, and reduce personal and national costs of flood disasters. Absolute and total coverage is not expressed in any policyholder’s flood insurance policy. The SFIP provides coverage only for “direct physical loss by or from flood.” 44 C.F.R. pt. 61, App. A(1). The policies expressly enumerate the property covered by the SFIP (as well as the property not covered), exclusions thereto, and special limits pertaining to personal property losses. *Compare Id.* to SFIP Sections III (Property Covered and Special Limits), Section IV (Property Not Covered), Section V (Exclusions), and Section VII (Loss Settlement).

If, for example, a policyholder experiences a flood loss to a primary residence with outdated electrical and plumbing systems that do not conform to current building codes, the SFIP does not cover the cost of the required code updates when the residence is rebuilt. 44 C.F.R. pt. 61, App. A(1), arts. III(D)(5)(f), V(A)(6). If a policyholder is required to bring his insured structures into compliance with local flood plain management ordinances as a result of being substantially damaged by a flood, the coverage provided for the cost of such compliance is expressly limited to \$30,000. *Id.*, art. III(D)(2).¹¹

¹¹ This Increased Cost of Compliance (“ICC”) coverage was added in 1996 in accordance with the National Flood Insurance Reform Act of 1994. PL 103-325, Sept. 23, 1994, 108 Stat 2160 (made effective in 42 U.S.C. §4011(b)). Originally, it was limited to \$15,000. It was subsequently increased to \$20,000 in 2000, and to \$30,000 in 2003. The fact that the ICC coverage was not mandated by Congress until 1994 undercuts Plaintiffs’ suggestion that Congress intended in 1968 that all NFIP participants be restored to their pre-flood condition. The fact that the coverage is capped at a certain level indicates

By the express terms of the SFIP, the policy thus provides limited coverage, and is not intended to cover *all* losses and replace *all* damaged items, or completely restore Plaintiffs to pre-flood status. Based on the inconsistency between the alleged fraudulent representations and the express terms of the SFIP, Plaintiffs are unable to satisfy the “reasonable reliance” element under Maryland law. *See, e.g., Cooper*, 148 Md. App. 41 at 58-64, 810 A.2d at 1055-58 (in fraud action, plaintiff cannot reasonably rely on oral statements that contradict the terms of the insurance policy he was purchasing).

D. Plaintiffs’ Conspiracy Allegations Cannot Save The Procurement Fraud Claim.

Plaintiffs’ conclusory allegations of conspiracy cannot save Plaintiffs’ procurement fraud claim. Under Maryland law, “[c]onspiracy is not a tort of its own, but is dependent on some underlying tort that caused injury to the plaintiff.” *Hill v. Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 821 (D. Md. 2005). Stated differently, unless one of the defendants makes an actionable misrepresentation, allegations that other defendants “conspired” or “acted in concert” adds nothing to the claim. Here Plaintiffs have no actionable fraud claim. Absent that predicate, allegations that there was a “conspiracy” does not alter the analysis and Plaintiffs cannot succeed on their conspiracy claim without proof of the underlying fraud. After all, civil conspiracy “is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff.” *Alleco*, 340 Md. App. at 189, 665 A.2d at 1045 (quoting *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 336 Md. 635, 645 n.8, 650 A.2d 260, 265 n.8 (1994)).

Congress’ continuing recognition that not all costs associated with flood damage repair are covered by the SFIP.

E. The Procurement Fraud Claim Should Be Dismissed For Failure To Plead Fraud With Particularity.

Even if this Court were to conclude that the Second Cause of Action is not pre-empted by federal law and survives the application of state law principles, the claim would still be insufficient as a matter of law. Federal Rule of Civil Procedure 9(b) makes clear that “[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be set forth with particularity.” Courts have repeatedly emphasized that these pleading requirements are designed to: (1) ensure that the defendants have sufficient information for the formulation of a defense by putting them on notice of the alleged fraudulent conduct; (2) protect defendants from frivolous suits; (3) eliminate fraud claims based on facts learned only after discovery; and (4) protect defendants’ reputations. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th. Cir. 1999) (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1056-57 (S.D. Ga. 1990)). Accordingly, a plaintiff must plead with particularity “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what was obtained thereby.” *Id.* (citing 5 Wright and Miller, *Federal Practice and Procedure: Civil* § 1297, at 590 (2d ed. 1990)).

Where, as here, multiple defendants are named, the information required by Rule 9(b) must be alleged with particularity as to *each* Defendant. *See Hirschler v. GMD Investments Ltd. P’ship*, Civ. A. No. 90-1289-N, 1990 WL 263438, at *5 (E.D. Va. Dec. 18, 1990) (“[w]here multiple defendants are involved, the complaint must state with sufficient particularity the specific nature of each defendant’s participation in the alleged fraud”) (citing *DiVittorio v. Equidyne Extractive Industries, Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987)). Despite these requirements, in the Second Cause of Action, all 183 Plaintiffs, allegedly representing 77 separate households and flood insurance policies issued by 16

different WYO carriers and FEMA, claim fraud against 56 Defendants (all Defendants but FEMA) with respect to the procurement of each of these 77 policies. (1st Am. Comp., ¶¶ 72-78, Rev. Att. A.) Plaintiffs, however, do not even mention by name most of the Defendants after the “Parties” section of the First Amended Complaint, much less plead the specific information required under Rule 9(b). For example:

- Rather than identifying the persons alleged to have made the claimed misrepresentations, Plaintiffs make the sweeping allegation that the purported statements were made (apparently to each Plaintiff purchasing an SFIP) by “each of the Defendants or their agents, servants and employees, or by one or more of the Defendants or their agents, servants and employees conspiring or acting in concert with each Defendant” (1st Am. Comp., ¶ 73.) There is no identification of which Defendants, which agents, which servants, or which employees purportedly made statements to which Plaintiffs.
- Plaintiffs make no attempt to plead the time of the alleged misrepresentations, other than to suggest that they took place at “times pertinent to the procurement” of the policies. Given that there are 77 separate policies at issue, which were undoubtedly purchased at many different times, this allegation provides no meaningful notice to Defendants.
- There is no allegation at all as to the alleged place of the misrepresentations.
- Plaintiffs also fail to plead the specific misrepresentation each Defendant is alleged to have made, instead alleging a single misrepresentation as to all of the Defendants, notwithstanding the fact that 77 separate policies issued at different times and in different places by 16 different WYO carriers and FEMA are at issue. (*Id.*, ¶ 73.)

Plaintiffs’ attempt to mass-plead their fraud claim in this fashion does not meet the requirements or purposes of Rule 9(b). The court in *Hirschler* dismissed fraud claims where the claims were similarly pled “against ‘defendants’ in a vague, conclusory fashion,” where the connection of each defendant to each specific alleged misrepresentation was “missing,” and where the complaint failed to allege the role of each defendant in the alleged fraudulent scheme. 1990 WL 263438, at *6. The court observed that “[g]uilt by association is not sufficient to meet the strict requirements of Rule 9(b).” *Id.* Plaintiffs’ fraud claims here likewise should be dismissed for failure to comply with Rule 9(b).

Plaintiffs' failure to plead fraud with particularity is not excused by their inclusion of conspiracy allegations. To the contrary, claims of conspiracy to commit fraud not only must satisfy the particularity requirements of Rule 9(b), but also must include allegations as to the agreement (including its time and place), the identity of the co-conspirators, and what each defendant allegedly did to carry the conspiracy into effect. *Hill*, 383 F. Supp. 2d at 824-25.

II.

THE FOURTH CAUSE OF ACTION FAILS TO STATE A VIABLE CAUSE OF ACTION.

The "interference with contract" claim asserted in the Fourth Cause of Action is legally insufficient because it is preempted by federal law, and, in any event, insufficient under Maryland law because a party may not interfere with its own contractual relationship.

A. The Fourth Cause of Action's "Interference" Claim Arises From The Handling of SFIP Claims And Thus Is Preempted By Federal Law.

The Fourth Cause of Action alleges that "[a]t all time pertinent *to the adjustment of the insured Plaintiffs' flood loss claims*, Defendants owed a duty to the insured Plaintiffs to refrain from interfering with the contractual relations between them and the WYOs...." (1st Am. Comp., ¶86) (emphasis added.) In order to prevail on this theory, Plaintiffs will have to prove that improper adjustment of claims tortiously interfered with their ability to receive SFIP benefits to which they were entitled. Thus, this cause of action requires Plaintiffs to establish both that the SFIP provides the broad coverage they claim it does, and that their claims were adjusted so as to deny them that broad coverage.

For the reasons discussed above at pages 13-17, both express and conflict preemption apply to bar the Fourth Cause of Action. Although Plaintiffs have concocted a tort label to attach to the Fourth Cause of Action, at its core, the dispute concerns an alleged "impropriety in the investigation and

adjustment of their insurance claims [that] are intimately related to the disallowance of their insurance claim.” *Van Holt*, 163 F.3d at 167. Revised Article IX of the SFIP was amended to expressly make clear that “disputes arising from the handling of any claim under the policy” are preempted by federal law. 44 C.F.R. pt. 61, App. (A)(1), art. IX. As discussed above, subjecting These WYO Defendants to 50 different states’ tortious interference law would undermine the NFIP “policies which are national in scope” as well as “efficiency goals of the Program.” *Wright*, 415 F.3d at 389; *C.E.R.*, 1988, 386 F.3d at 271. Where, as here, the dispute concerns whether SFIP claims were properly handled or paid, “[u]niformity of decision requires the application of federal law and precludes the enforcement of state law on the same subject.” *Gibson*, 289 F.3d at 949.

B. Under Maryland Law, Parties Cannot Interfere With Their Own Contracts, A Rule That Cannot Be Circumvented By Conspiracy Allegations.

Even if the interference claim were not preempted, it would still be precluded by the consistent holding of Maryland courts that a defendant cannot tortiously interfere with a contract to which the defendant is a party. *See Parks v. CAI Wireless Sys., Inc.*, 85 F. Supp. 2d 549, 556 (D. Md. 2000) (“There is no cause of action for interference with a contract when suit is brought against a party to the contract.”); *Kaser v. Fin. Prot. Mktg. Inc.*, 376 Md. 621, 630, 831 A.2d 49, 54 (2003); *Travelers Indem. Co. v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 89-90 (1992). Nor can Plaintiffs’ allegations with respect to unspecified “agents” save their claim, because a plaintiff cannot recover for contractual interference against an agent of a party to a contract. *See Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638, 660 (D. Md. 2002); *Simon v. Union Hosp.*, 15 F. Supp. 2d 787, 799 (D. Md. 1998); *Byington v. Vega Biotechnologies*, 869 F. Supp. 338, 342-43 (D. Md. 1994); *Bagwell v. Peninsula Reg’l Med. Ctr.*, 106 Md. App. 470, 503, 665 A.2d 297, 313 (1995). “The reasoning behind this rule is that a suit for breach of contract is the more appropriate remedy.” *Parks*, 85 F. Supp. 2d at 556.

This result cannot be circumvented by the simple expediency of alleging in conclusory fashion that non-parties to the contract “acted in concert” or “conspired” with the defendant to breach its own contract. First, Maryland law does not recognize a cause of action based upon concert of action. *See Christian v. Minnesota Mining & Mfg. Co.*, 126 F. Supp. 2d 951, 959-60 (D. Md. 2001); *see also, Herlihy v. Ply-Gem Indus., Inc.*, 752 F. Supp. 1282, 1290 (D. Md. 1990); *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89, 94 (D. Md. 1989). Second, under Maryland law, “conspiracy” “is a parasite tort -- it cannot stand alone.” *Kramer v. Mayor and City Council of Baltimore*, 124 Md. App. 616, 642, 723 A.2d 529, 542 (1999), *cert. denied*, 354 Md. 114, 729 A.2d 405 (1999).

Courts applying Maryland law have expressly held that breach of contract claims cannot be transmogrified into tortious interference claims by simply alleging that others “conspired” with one of the contracting parties to breach the contract. *See Alexander*, 336 Md. at 645 n.8, 650 A.2d at 265 n.8 (“a party to contractual relations cannot be liable for the interference tort . . . We do not believe that this principle can be circumvented by the ‘conspiracy’ device”); *Hale Trucks of Md.*, 224 F. Supp. 2d at 1021 (“A civil conspiracy to breach a contract is not a viable claim”).

III.

COUNT V SHOULD BE DISMISSED AND A MORE DEFINITE STATEMENT SHOULD BE REQUIRED IF IT IS REPLEADED.

A. Count Five Should Be Dismissed For Failure To Allege That Each Plaintiff Has Satisfied All Of The SFIP Requirements For Filing Suit.

Under the express terms of the SFIP, an insured may not bring suit against a WYO to recover money under the policy “unless [the insured has] complied with all requirements of the policy.” 44 C.F.R. pt. 61, app. A(1), art. VII(R). Some of these requirements are detailed above at pages 7-8.

Here, Plaintiffs have not pled that they fully complied with any, much less all, of the requirements of the SFIP contract. The Complaint simply states that “[e]ach Plaintiff who was an NFIP policyholder filed a flood loss in [a] timely fashion with his/her WYO or through NFIP Direct” (1st Am. Comp., ¶ 44.) Absent an express allegation that each Plaintiff has complied with the SFIP requirements, no cognizable breach of contract claim can be asserted.

B. Plaintiffs’ Claims For Delay Damages, Refund of Premiums, Disgorgement Of Profits, And Interest Are Not Recoverable Under The SFIP And Should Be Dismissed.

In addition to seeking recovery for “shortfall in payments of benefits” under the SFIP, Plaintiffs also claim that pursuant to the Act, they are entitled to “delay damages, return of premiums, disgorgement of profits and compensation, and pre-judgment interest.” (1st Am. Comp., ¶ 91.) As a matter of law, no such relief is available under the SFIP, and Plaintiffs’ claims for such relief should be dismissed.

Pursuant to 42 U.S.C. §4013(a), Congress directed that FEMA determine, by regulation, “the nature and limits of loss or damage” that may be covered by national flood insurance. FEMA’s determination regarding the amounts that could be recovered pursuant to the NFIP is reflected in the SFIP, which is itself a federal regulation. The SFIP provides coverage only for “direct physical loss by or from flood.” 44 C.F.R. pt. 61, App. A(1), art. III(A), (B). The SFIP expressly provides that it will *not* pay insureds for, among other things, “loss of revenue or profits,” “loss of access to the insured property,” “loss of use of the insured property,” “any additional living expenses incurred while the insured building is being repaired or is unable to be occupied,” or “any other economic loss.” *Id.*, art. V(A)(1),(2),(3),(5),(7). Thus, amounts recoverable under the SFIP are “pecuniary in nature, not personal.” *West*, 573 F.2d at 883. Accordingly, consequential damages, like “delay damages” or “pre-

judgment interest” are, as a matter of law, not recoverable under the SFIP. *See, e.g. Newton*, 245 F.3d at 1309-12 (prejudgment interest not recoverable); *Sandia*, 889 F.2d at 258 (same).

Nor can Plaintiffs compel Defendants to return premiums for their policies. Premiums collected by WYO companies, after deducting fees and costs, must be deposited into the National Flood Insurance Fund in the United States Treasury. 42 U.S.C. § 4017(d); 44 C.F.R. pt. 62, App. A, arts. II(E), VII(B). “In short, premiums collected on policies written by WYO Companies do not belong to those companies.” *Battle*, 288 F.3d at 600. Federal regulation specifies the circumstances under which premiums may be refunded, and no aspect of Plaintiffs’ claims satisfy those requirements. *See* 44 C.F.R. § 61.5(c).

Plaintiffs’ claim for disgorgement of profits is likewise without merit. These WYO Defendants received whatever compensation they were paid from the federal government, not Plaintiffs. Moreover, because These WYO Defendants are compensated for claims handling based upon a percentage of the amount paid on the claim, whatever compensation has been received to date is related to the claim amounts already received by Plaintiffs. There is no basis in law or logic for any assertion that because Plaintiffs claim that they should receive additional payments under the SFIP, These WYO Defendants should be compelled to “disgorge” compensation received for the prior adjustment of the claims already paid.

C. Plaintiffs Should Be Required To Provide A More Definite Statement Of Their Respective Contract Claims.

If the Court is not inclined to dismiss Count V, or permits Plaintiffs to replead the claim, the Court should require Plaintiffs to amend their Complaint to include a more definite statement of their respective breach of contract claims.

Federal Rule of Civil Procedure 12(e) permits a defendant to move for a more definite statement if the complaint “is so vague or ambiguous that [he] cannot reasonably be required to frame a responsive pleading.” *Hodgson v. VA. Baptist Hosp.*, 482 F.2d 821, 822-23 (4th Cir. 1973). Admittedly, “[t]he class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small--the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must [not] be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.” *Lagrimas v. Gossel*, Civ. A. No. HAR 92-2262, 1993 WL 18951, at *5 (D. Md. Jan. 25, 1993) (quoting Wright & Miller, *Federal Practice and Procedure* § 1376, at 577-578).

Here, the First Amended Complaint simply states that “[u]pon sustaining their flood losses, insured Plaintiffs, in breach of their SFIP contracts, were deprived of the benefits of their contracts.” (1st Amen. Comp., ¶ 90.) Based on this language, These WYO Defendants are unable to ascertain whether Plaintiffs’ breach of contract claims are based on pricing (e.g., were they paid the proper amount for a sheet of drywall) or on coverage (e.g., was certain damage caused by flood water, or excluded by provisions of the policy). This distinction is critical because the SFIP includes an appraisal provision stating that, in the event of a dispute between an insured and its WYO carrier regarding the value of the insured’s claim, either party “may demand an appraisal of the loss.” 44 C.F.R. pt. 61, App. A(1), art. VII(P). The right to invoke the appraisal provision, however, is limited to issues involving pricing. It is not available for coverage disputes. *De La Cruz v. Bankers*, 237 F. Supp. 2d 1370, 1374 (S.D. Fla. 2002).

Because the First Amended Complaint does not specify the nature of breach that each Plaintiff claims, These WYO Defendants are unable to determine whether they should exercise their rights to

demand appraisal, which could both expedite resolution of some claims and eliminate the need for the Court to resolve such claims.

Thus, the First Amended Complaint is an “appropriate subject” for a Rule 12(e) motion. Each Plaintiff should be required to allege the specific nature of his breach of contract claim, so that each of These WYO Defendants will be able to determine whether it should, in fact, invoke its appraisal right under the SFIP. Accordingly, if Count V is not dismissed, or if it is dismissed and Plaintiffs are permitted to replead it, each Plaintiff should be required to provide a more definite statement as to his respective breach of contract claim.

IV.

ALL PLAINTIFFS WHO ARE NEITHER A NAMED INSURED NOR THE CO-RESIDENT SPOUSE OF A NAMED INSURED LACK STANDING TO PURSUE ANY CLAIMS AGAINST THESE WYO DEFENDANTS.

None of the causes of action asserted against These WYO Defendants can be maintained by Plaintiffs who are not SFIP insureds.¹² Plaintiffs who are not insureds under SFIPs were not parties to those contracts. As a result, they had no contract that could have been procured through fraud or deceit nor any contract with which any of These WYO Defendants could have tortiously interfered. The claims of those Plaintiffs who are not SFIP insureds therefore must be dismissed with prejudice.

With respect to Plaintiffs’ breach of contract claim, the SFIP clearly limits who is entitled to benefits and who may sue under the policy. The policy defines “you” or “your” to mean only “the insured(s) shown on the Declarations page of this policy and your spouse, if a resident of the same household.” 44 C.F.R. pt. 61, App. A(1), art. II(A). “Insured(s),” and thus “you” and “your,” may also

¹² Plaintiffs insured by other WYO Defendants or FEMA cannot, of course, maintain any cause of action against These WYO Defendants.

include mortgagees and loss payees. *Id.* Other residents of the insured dwelling, however, are not included in this definition. The policy provides that “[w]e will pay *you* for direct physical loss by or from flood to *your* insured property” subject to certain conditions, and further states in the provision entitled “Suits Against Us:”

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, *you* must start the suit within one year after the date of the written denial of all or part of the claim, and *you* must file the suit in the United States District Court of the district in which the covered property was located at the time of the loss. This requirement applies to any claim that you may have under this policy and to any dispute that you may have arising out of the handling of any claim under the policy.

Id., art. VII(R) (emphasis added). Accordingly, those Plaintiffs who are neither named insureds nor resident spouses of such insureds have no entitlement to benefits and no standing to bring a breach of contract claim under the SFIP.

The same analysis requires the dismissal of the claims of any Plaintiff for “procurement fraud” (Count II) who is not a named insured under an SFIP or the co-resident spouse of a named insured. Under Maryland law, in order to establish a tort action for fraud or deceit, a plaintiff must plead and prove “that the defendant made a false representation *to the plaintiff*” upon which the plaintiff relied. *Maryland Env’tl Trust v. Gaynor*, 370 Md. 89, 97, 803 A.2d 512, 516 (2002) (emphasis added). A fraudulent inducement claim requires that the plaintiff actually enter into the contract at issue. *See Erie Ins. Co. v. Ins. Com’r of State of Md.*, 84 Md. App. 317, 321, 579 A.2d 771, 773 (1990) (Maryland law “recognize[s] . . . ‘the general rule of the law of contracts that *when a party is induced to enter into a contract* by fraud or material misrepresentation, the contract is voidable as against the party making the misrepresentation’”) (emphasis added and internal quotation marks omitted). As with the breach of contract claim, a fatal hurdle to the fraud allegations with respect to the non-insured Plaintiffs is that it is

not alleged that any misrepresentations were made to them, nor is it alleged that they entered into any SFIP in reliance thereon. As such, they cannot assert a cause of action for fraud in the procurement of an SFIP.¹³

The claims for tortious interference with contract (Count IV) by Plaintiffs who are neither named insureds nor co-resident spouses also fail as a matter of law. Those Plaintiffs never entered into any SFIP contract with which there could have been any tortious interference. Under Maryland law, a necessary predicate for any tortious interference claim is the “existence of a contract between plaintiff and a third party” with which the defendant wrongfully interferes. *Fraidin v. Weitzman*, 93 Md. App. 168, 189, 611 A.2d 1046, 1057 (1992). The non-insured Plaintiffs have no contract with any of the WYO carriers. As a result, those Plaintiffs who are neither named insureds nor co-resident spouses of a named insured have no claim for tortious interference with contract as a matter of law. *Id.* at 1058-59 (finding that only where the court ultimately concludes that a party indeed had a contract does such party have legal standing to bring a tortious interference with contract claim).

Finally, because the non-insured Plaintiffs cannot establish either fraud or interference with contract, their claims for conspiracy to commit fraud or interfere with contract must also fail. Maryland state courts have made it clear that civil conspiracy claims cannot stand alone:

¹³ Because Plaintiffs who are not named insureds or otherwise procured the subject SFIPs cannot assert a cause of action for fraud in the procurement, they can neither as a matter of law prevail on a claim of conspiracy connected to fraud in the procurement. Under Maryland law, conspiracy is not a stand-alone tort; it must attach to some other cause of action. *See Hoffman v. Stamper*, 385 Md. 1, 25, 867 A.2d 276, 290 (2005) (“[c]ivil conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff”) (internal quotation marks and citations omitted). Here, since there is no cognizable claim for fraud in the procurement by the non-insured Plaintiffs, there can be no conspiracy claim by any non-insured Plaintiff either.

Civil conspiracy 'is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff.' *Alleco Inc v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 189, 665 A.2d 1038 (1995) (quoting *Alexander*, 336 Md. at 645 n.8). Civil conspiracy is a parasite tort -- it cannot stand alone.

Kramer, 124 Md. App. at 641-642, 723 A.2d at 542 (1999). Accordingly, the conspiracy claims add nothing to the analysis and create no substantive rights.

In short, Plaintiffs who had no contractual relationship with These WYO Defendants, as a matter of law, have no claims for breach of contract, fraudulent procurement, tortious interference, or civil conspiracy against any of These WYO Defendants, and such non-insured plaintiffs should be dismissed with prejudice from this action.

CONCLUSION

For the reasons set forth above, These WYO Defendants' motion to dismiss, and for a more definite statement, should be granted.

Dated: October 31, 2005

Respectfully submitted,

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State Farm Fire and Casualty Company*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Support of Certain Write Your Own Insurance Company Defendants' Motion to Dismiss the First Amended Complaint, and for More Definite Statement was served this 31st day of October, 2005, via e-filing service, on:

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