IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROYAL PALM VILLAGE RESIDENTS, INC.,

Plaintiff,

v. Case No. 8:19-cv-874-T-36SPF

MONICA SLIDER, et al.,

Defendants.
_____/

MOTION TO DISMISS SECOND AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT

Defendants, Monica Slider, Sheri Woodworth, Belinda Lawson, Sun Communities, Inc. ("**Sun Communities**"), Royal Palm Village, L.L.C. ("**RP Village**"), American Land Lease, Inc. ("**ALL**"), and Asset Investors Operating Partnership, L.P. ("**AIOP**"), move for dismissal of the Second Amended Complaint (Doc. 47) filed by Plaintiffs, Gene Asbury, James LeMonnier, Bonnie Lohmeyer, Fred Osier, Harry Rush, Laurie Skemp (the "**Individual Plaintiffs**"), and Royal Palm Village Residents, Inc. (the "**Association**"), for the reasons set forth in the incorporated memorandum of facts and law.

INTRODUCTION

Plaintiffs have not done as the Court instructed in its February 21, 2020 Order (Doc. 46). They have not pled RICO claims that comply with the standards of Rule 8, Rule 9(b), or the "plausibility" test. Instead, they once again use a shotgun approach. Defendants are still lumped together, the alleged misconduct of one undifferentiated from the misconduct of the others, with no requisite specification. The claims are not limited as far as practicable to a single set of circumstances. The Second Amended Complaint is no more organized than the two prior complaints – it is just shortened. Plaintiffs did not get down to the nitty-gritty of alleging precise,

plausible fraud-based RICO claims. The Court is again left to sift through the tangled, often incomprehensible allegations in an attempt to separate the meritorious claims from the unmeritorious. And the tangle hampers Defendants' ability to isolate and specifically address the deficiencies.

The alleged fraud in this case centers on the so-called "Five-Year Agreement" executed in 2015 between the park owner and the Association. The Individual Plaintiffs are *not* a party to it and lack standing to challenge it. Their imprecise, unexplained, one-word allegation of "deceit" in connection with the negotiated agreement directly contradicts the stipulated facts of this case, as *conclusively* established by Plaintiffs' answers to requests for admission served under *Fed.R.Civ.P.* 36.[1] Plaintiffs cannot alchemize a stipulated fact into a contradictory allegation to avoid dismissal.

There is no "mail or wire fraud" RICO claim stated in this third complaint because, at the end of the day, Plaintiffs left the "racketeering" out of RICO. They left out the racketeering because the left out the "fraud" in mail and wire fraud. Without fraud, no mail or wire fraud is stated. Without mail or wire fraud, no racketeering is stated. Without racketeering, no RICO is stated. Thirty-seven pages of allegations, no fraud.

[1]Answers to requests for admission have a *conclusively binding* effect on any matter admitted. They function in a manner similar to pleadings, not merely evidentiary admissions. *Fed. R. Civ. P.* 36, *Notes of Advisory Committee on Rules*; *see also, Land Fin. Co. v. Saddle Creek Farms, Inc.*, CV-05-BE-1678-E, 2006 WL 8436865, at *2 (N.D. Ala. June 23, 2006) ("Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party.") For this reason, the Court may consider the admissions in determining this motion to dismiss a complaint (see below).

MEMORANDUM OF FACTS AND LAW

The Second Amended Complaint should be dismissed, this third time with prejudice, for the following reasons:

I. The shotgun pleading again falls short of the standards of Rule 8 and Rule 9(b).

On their third try, Plaintiffs still fail to satisfy the standards of Rule 8 and Rule 9(b) of the Federal Rules of Civil Procedure. The Second Amended Complaint is another shotgun pleading in violation of Rule 8. The allegations are such that the Court would have to weed through and attempt to untangle them. And Defendants are unreasonably prejudiced in addressing the lack of merit. Plaintiffs are lumped together so the lack of standing is needlessly difficult to address. Worse, Defendants are still lumped together which deprives each of them of constitutional notice of the claim(s) against them and unreasonably hampers their ability to defend themselves.

Also, Plaintiffs fail to meet the requirements of Rule 9(b) to allege the *precise* facts "with respect to each defendants' participation in the fraud." (Order, Doc. 46 at p. 7) (*quoting Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010)). Paragraph 32 is where the fraud at the heart of the RICO claims is broached, and it is a good example of bad pleading. Plaintiffs allege:

> On or about September 16, 2015, Defendants Sun Communities, Royal Palm Village, and Monica Slider deceived the Royal Palm HOA to circumvent the normal 90 day notice, statutory disclosure, and mediation process under § 723.037, *Fla. Stat*., and to instead enter into a five year lot rental agreement increasing the lot rental . . . . The five year agreement was drafted by [Defendants] Richard Lee and the Lutz Bobo Law Firm."

(Doc. 47 at ¶ 32)(emphasis added). They lump together and make the conclusory allegation that three of the Defendants "deceived" the Association and two of the lawyer Defendants drafted the so-called "**Five-Year Agreement**," but they: (1) neglect to even generally, much less "precisely," describe the deceitful statement, (2) provide no explanation *in what manner* the deception was

perpetrated, (3) neglect to state how the Association was misled by the deceitful representation, (4) neglect to state when the lawyers drafted the Five-Year Agreement, (5) neglect to allege that drafting the agreement constituted a fraud, much less explain how, and (6) make no statement what each of the five Defendants gained. Plaintiffs have failed, for the third time, to sufficiently allege the fraud at the heart of their implausible RICO claims. Without fraud, the RICO claims predicated on mail and wire fraud fail as a matter of law (see below).

II. The Complaint does not state a RICO claim based on mail or wire fraud.

RICO outlaws "racketeering," not garden-variety disputes over the day-to-day operation of a mobile home park. A RICO claim predicated on mail or wire fraud requires fraud, pure and simple. Otherwise, no racketeering is established. No racketeering is present here because no fraud is alleged.

The substantive RICO claims (Counts One and Two) are for violation of 18 U.S.C. § 1962(c). Violation of § 1962(c) requires "(1) conduct, (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479, 496 (1985). Racketeering activity – referred to as predicate acts – are defined as any one of several federal or state offenses. 18 U.S.C § 1961(1). Here, Plaintiffs premise their RICO claims solely on the alleged predicate acts of mail and wire fraud in violation of 18 U.S.C. § 1341 and § 1343. (Compl. at ¶¶ 42 - 51). RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it. *W. Assocs. Ltd. P'ship, ex rel. Ave. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 637 (D.C. Cir. 2001)(quoting *Al–Abood ex rel. Al–Abood v. El–Shamari,* 217 F.3d 225, 238 (4th Cir. 2000)). That is the case here.

Mail or wire fraud requires a "scheme to defraud."[2] And a scheme to defraud must involve a material misrepresentation and reliance thereon.[3] *Klay v. Humana, Inc*., 382 F.3d 1241, 1257-58 (11th Cir. 2004); *see also Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1349 (11th Cir. 2016). Here, no actionable misrepresentation (or reliance) is alleged, so no fraud is stated. Without fraud, no mail or wire fraud can occur. And, in turn, without mail or wire fraud, no racketeering is present. And when no racketeering is present, no RICO claim is stated.

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[2]"Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses mails or wires in furtherance of that scheme." *Am. Dental Ass'n*, 605 F.3d at 1291.

[3]Plaintiffs may respond, as their counsel has in other cases, that reliance is not required under RICO. That is not the case. Plaintiffs' counsel has argued elsewhere the holding in *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 647-50 (2008), states that reliance is not required under RICO. *Bridge* makes no such blanket disavowal of the reliance element of fraud. That case presented the inapposite situation where the plaintiffs themselves had not received or relied upon the misrepresentations made by the defendants, but had relied on misrepresentations the defendants made to others. *Id*. at 649. The Supreme Court held that, even though plaintiffs themselves had not relied on the misrepresentations made by the defendants, they had stated a claim because *first-party* reliance is not a required element of a RICO claim predicated on mail or wire fraud. *Id*. at 650. The Court took care to note, however, that "none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." *Id*. at 658 (internal quotations omitted) (original emphasis). That is because, "[o]f course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it." *Id*. at fn 6. "In most cases, the plaintiffs will not be able to establish even but-for causation if no one relied on the misrepresentation." *Id*. at 658. *See also, Lawrie v. Ginn Dev. Co., LLC*, 2013 WL 222258, fn 18 (M.D. Fla. Jan. 9, 2013) (plaintiffs need not show they relied on the alleged misrepresentation but they must show that *someone* relied on it); *G & C TIC, LLC. v. Alabama Controls, Inc*., 2008 WL 4457876, *4 (M.D. Ga. Sept. 29, 2008)(plaintiff must allege someone relied upon a misrepresentation and the reliance directly caused harm to the plaintiffs); *Biggs v. Eaglewood Mortgage, LLC*, 636 F.Supp.2d 477, 479-80 (D. Md. 2009) (same).

Here, Plaintiffs are not alleging first-party reliance on an alleged misrepresentation a Defendant made to someone else that Plaintiffs then, in turn, justifiably relied on to their detriment. Rather, Plaintiffs' RICO claims are couched such that Plaintiffs themselves are the "first parties" that were defrauded. Consequently, Plaintiffs must allege and prove *they* relied on an actionable misrepresentation.

Plaintiffs fail to plead and cannot prove mail or wire fraud because no "scheme or artifice to defraud" exists here. Wade through the surplusage, hyperbole, and moralistic condemnation, and not a single actionable misrepresentation is alleged in the complaint. The RICO claims are truly not tethered to any actionable misrepresentation. At most, they are loosely tied to an "overall fraudulent scheme" woven by Plaintiffs from whole cloth. But an "overall fraudulent scheme" cannot establish mail and wire fraud. *Braswell Wood Co., Inc. v. Waste Away, Inc*., 2010 WL 3168125 (M.D. Ala. Aug. 10, 2010), *reconsid. denied*, 2011 WL 255627 (M.D. Ala. Jan. 26, 2011)(addressed below).

III. The "Five Year Agreement" and Plaintiffs' admissions undercut any fraud.

The "Five-Year Agreement" fatally undercuts Plaintiffs' claims. And Plaintiffs' prior admissions in this case directly contradict and undercut their new allegations. Those admissions under *Fed.R.Civ.P*. 36 are conclusively binding on the matters admitted, and in determining a motion to dismiss a court may consider a party's admissions without converting the motion to one for summary judgment. *See City of Seattle v. Monsanto Company, et al.*, 2019 WL 1979316 (W.D. Wash. May 3, 2019)(taking judicial notice of admissions for consideration on motion to dismiss); *see also, Monge v. Madison County Record, Inc.*, 802 F.Supp.2d 1327, 1330 (N.D. Ga. 2011) (in granting motion to dismiss "this Court will take judicial notice of the operative conduct, statements, and admissions set forth in this Court's and other courts' records"); *United States v. Malik,* 2016 WL 1128258, at *1, n. 2 (N.D. Ind. Mar. 23, 2016) (rejecting contention that admissions could not be judicially noticed and considered on motion for judgment on the pleadings).

The Five-Year Agreement is a negotiated settlement agreement executed by the park owner and the Association in 2015 as part of the alternative dispute procedures outlined in the Florida

Mobile Home Act (the "**FMHA**"), Chapter 723, *Florida Statutes.*[4] It is a contract – now essentially fully-performed – that establishes the agreed, annual base rent increases for each calendar year from 2016 – 2020. On their third bite at the apple, the Individual Plaintiffs have now limited their challenge to a temporal issue. To the extent Defendants can follow it, the assertion seems to be that the park owner and the Association could not negotiate and mutually agree at once to rent increases for a five-year period because that foregoes the Association's (and the park owner's) rights under the FMHA to petition for mediation and, if necessary, initiate a civil lawsuit over the rent increase *every year*. (Compl. at ¶ 32). In short, the Individual Plaintiffs' federal RICO claims against these nine Defendants boil down to a grievance by six homeowners (out of hundreds in the park) that *their* Association and the park owner mutually agreed (five years ago in 2015) to a five-year term, instead of a one-year term covering just 2016. They do not bring a derivative state court action seeking a declaration whether their Association can negotiate and agree to a multi-year agreement under the FMHA. Instead, they bring baseless federal RICO claims against the park owner and its affiliated companies, employees and outside counsel alleging a criminal enterprise. It is an ill-disguised and ill-advised attempt to weaponize RICO.

The Individual Plaintiffs complain the Five-Year Agreement contravenes the FMHA, but it doesn't. And even if it did, that isn't RICO. The FMHA is a civil statute with no criminal penalties. Violation of it is not an indictable crime that can constitute a predicate act under RICO

[4]Not only are settlement agreements favored, Florida law holds that once a contract is executed, it governs the contracting parties' relationships. *Dorward v. Macy's*, 2011 WL 2893118, *6 (M.D. Fla. July 20, 2011). This would be true even in a situation unlike the one presented here where one of the contracting parties is alleged to be an unsophisticated elderly mobile homeowner. *Tara Woods SPE, LLC v. Cashin*, 116 So.3d 492 (Fla. 2d DCA 2013); s*ee also*, *Rocky Creek Ret. Props. Inc. v. Estate of Fox ex rel. Bank of America, N.A.*, 19 So.3d 1105, 1108-09 (Fla. 2d DCA 2009); *Spring Lake NC, LLC v. Holloway*, 110 So.3d 916, 917 (Fla. 2d DCA 2013). Here, the Association is the party to the agreement, and no allegation is made (or plausible) that it lacked sophistication to participate in FHMA dispute resolution.

(and, bear in mind, if the Individual Plaintiffs' position held water, both the park owner *and the Association* violated the FMHA). Neither the park owner nor the Association challenged the Five-Year Agreement, and the Individual Plaintiffs lack standing to do so themselves.[5] The RICO claims are a grievance by six homeowners initiated four years after the agreement went into place complaining about an essentially fully-performed contract, which they are not a party to, that was executed by their statutory "rent committee" (specially appointed by the Association) in the sunshine with the full approval of the Association, *all under the auspices of the Association's lawyer*. This is a grievance they should have taken up with their Association five years ago, not converted into baseless RICO fraud claims in 2019 against the park owner, its employees and its outside lawyers.

Most maddening for Defendants is that no "deceit" attended the negotiation of the Five-Year Agreement. How do we know this? Because Plaintiffs have admitted it. In their Rule 36 admissions, Plaintiffs make dozens of binding admissions that directly contradict their allegations and undercut their claims.[6] For example, they admit the Association had statutory authority to execute the agreement and bind every mobile homeowner in the park. (Ex. "A" at ¶ 2; Ex. "B" at ¶ 6). They admit the two signatories from the "rent committee" authorized by statute had the authority to negotiate and execute the agreement. (Ex. "A" at ¶ 35; Ex. "B" at ¶ 52). *See also,* Fla. Admin. Code Ann. r. 61B-32.004(3). They admit the Board of Directors of the Association approved the execution of the agreement. (Ex. "A" at ¶ 13; Ex. "B" at ¶ 29). They admit the

[5]RICO claims cannot be brought derivatively. *See generally Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1349 (11th Cir. 2016).

[6]The requests served on each of the six Individual Plaintiffs and their responses are identical. The response of plaintiff Fred Osier is attached hereto at Exhibit "A" as an exemplar. The Association's responses are attached as Exhibit "B."

Association was represented by legal counsel, that the rent committee met with the lawyer to review the agreement, that the lawyer reviewed the agreement, that the lawyer suggested revisions to it *that were made*, all prior to execution. (Ex. "A" at ¶ 14-20; Ex. "B" at ¶¶ 30-36). And it gets worse. Plaintiffs admit the amounts of each of the five annual base rent increases in the five-year agreement *were proposed by the Association and a member of its appointed rent committee*. (Ex. "A" at ¶¶ 28-29; Ex. "B" at ¶¶ 45-46).

The Individual Plaintiffs have not and cannot point to any fraud. They do not even make the most basic allegation that a Defendant represented the agreement "complied with" the FMHA (it does). And even if that representation was made to the Association and its lawyer, it would constitute a non-actionable legal opinion (with which, circumstances strongly suggest, the Association's own lawyer fully agreed). This is not fraud. It cannot be RICO.

IV. The RICO claims still fail the "plausibility" test.

To withstand a motion to dismiss, the complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Here, the RICO claims fail the plausibility test.

A. Plaintiffs lack standing for any claim tied to Association's right of first refusal.

The Individual Plaintiffs complain the current park owner and other Defendants "frustrated" *the Association's* statutory "right of refusal" under the FMHA to match the price for the park when it was purchased in 2014 by misrepresenting to the Association the offer was "unsolicited." (Compl. at ¶¶ 27 - 31). They claim the offer was "not unsolicited" because it "was arranged through brokers, agents, and/or attorneys. . . ." *Id*. at ¶ 29. The Individual Plaintiffs fail to support that conclusory fraud allegation with precise allegations. They do not identify a single broker, agent or attorney that supposedly "arranged" the offer (no such person exists). They do

not allege how or in what manner the offer was arranged, when it was arranged, or even what they mean by the unclear term "arranged."

Perhaps worse, it is not actionable by the Individual Plaintiffs. They lack standing to bring any claim based on the supposed "frustration" of *the Association's* right of first refusal under Section 723.071(1) of the FMHA. *See Ell/Cap Diversified 75 Naples Estates v. Naples Estates Homeowners Association, Inc*. 975 So.2d 577, 579 (Fla. 2d DCA 2008)(J. Altenbernd)(a class of homeowners has no standing to sue for a violation of Section 723.071(1)). That right belonged exclusively to the Association. The Association has not sued for any frustration of that right. The Individual Plaintiffs have no legal standing or right to do so.

B. Promise to spend $1 million on the Park.

The Individual Plaintiffs (again without Article III standing) complain about fraud in the inducement of the Five-Year Agreement because the park owner has subsequently failed to live up to an alleged undocumented promise to spend $1 million repairs or upgrades in the Park.[7] As a threshold matter, an unfulfilled future promise cannot be actionable as fraud. *See Sleight v. Sun & Surf Realty, Inc.,* 410 So.2d 998, 999 (Fla. 3d DCA 1982) ("A false statement amounting to a promise to do something in the future is not actionable fraud."); *see also, Maunsell v. Am. Gen. Life & Acc. Ins. Co*., 707 So.2d 916, 917 (Fla. 3d DCA 1998). Moreover, it is not alleged that the "rent committee" signatories who negotiated and signed the Five-Year Agreement were even aware of, much less relied on, the alleged undocumented promise.

[7]No precise allegations are made here either. For example, Plaintiffs do not allege precisely when and in what context the alleged promise was made (before or after the agreement was executed?). Also, no time frame or deadline is set for spending the $1 million, nor is any suggestion made of how much *has been* spent. The park manager (Tim Bias) is not identified as being involved in negotiation or execution of or the supposed deceit involving the Five-Year Agreement (*see* Compl. ¶ 32).

A covenant to spend $1 million dollars would be material, yet it is completely lacking from the Five-Year Agreement. And the agreement contains a standard merger clause providing:

> **Complete Agreement**. This Agreement constitutes the entire Agreement of the parties hereto and supersedes all prior agreements, whether written or oral, and in particular any agreement(s) regarding lot rental amount which is or may be charged in the Community during the period of January 1, 2016 – December 31, 2020. Any such prior Agreement(s) is/are hereby rendered null and void. This Agreement excludes: 1) CPI Agreements; 2) Any fixed-rate Agreements in effect during the period of January 1, 2016 – December 31, 2020.
>
> **Modifications**. This Agreement shall be modified only by the written agreement of the parties.

(Compl. at Ex. 1, ¶¶ 8 - 9). The Agreement does not mention the $1 million in promised expenditures, and fraud cannot be based upon such as a result. *See Eclipse Med., Inc. v. Am. Hydro-Surgical Instruments, Inc*., 262 F.Supp.2d 1334, 1342 (S.D. Fla. 1999), *aff'd sub nom. Eclipse Med., Inc. v. Am. Hydro-Surgical*, 235 F.3d 1344 (11th Cir. 2000) ("Indeed, fraudulent inducement claims will fail even where the subsequent contract simply says nothing about the allegedly false promise."); *see also, Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1428 (S.D. Fla. 1996)("it is a basic tenet of contract law that reliance on representations by a contracting party in a suit based on the contract is unreasonable where the representations are not contained in the subsequent written agreement between the parties."); *Cibran Enterprises, Inc. v. BP Products N. Am., Inc.,* 365 F.Supp.2d 1241, 1253 (S.D. Fla. 2005). The unsupported allegation regarding $1 million in expenditures cannot be a basis for fraud no matter which way it is cut.

C. Home Prep Fee:

The Individual Plaintiffs allege the park owner charges a "home prep fee" that violates the FMHA. (Compl. at ¶ 35). The allegations are hard to follow but, still, it is clear that a key element

of fraud is missing: a misrepresentation. The park owner is allegedly doing exactly what it *outrightly represents* it is doing, namely, charging a "home prep fee." There is no untruth.

The open and obvious imposition of a fee – even if disputed – does not involve any *mis*representation and cannot, therefore, constitute mail or wire fraud. Federal courts in this and other Florida districts have recognized this. *See*, *In re Checking Account Overdraft Litigation*, 797 F.Supp.2d 1323, 1331 (S.D. Fla. 2011); *Signeo Int'l. Ltd. v. Wade*, 2013 WL 12153590, * 7 (M.D. Fla. April 1, 2013). The acknowledged foundation for those decisions derives from *Braswell Wood Co., Inc. v. Waste Away, Inc*., 2010 WL 3168125 (M.D. Ala. Aug. 10, 2010), *reconsid. denied*, 2011 WL 255627 (M.D. Ala. Jan. 26, 2011).

The court in *Braswell* dismissed (without leave to amend) a RICO "mail and wire fraud" claim alleging a scheme to double-bill for contractual surcharges and collect other improper fees and charges. *Braswell*, 2010 WL 3168125 at *3. The plaintiff argued there (as Plaintiffs will here) that it established the existence of an "overall fraudulent scheme," but the court rejected that theory because it "overstates the flexibility of the mail and wire fraud statutes." *Id*. A "scheme to defraud" for purposes of the mail and wire fraud statutes requires allegations of reliance and misrepresentation. *Id.* (*citing Klay*, 382 F.3d at 1257-58). The invoices used to collect the allegedly improper fees and charges were sent through the mail, but the court pointed out they contained no misrepresentations to establish mail or wire fraud. The invoices reflected the defendant was levying the fees and charges, which "was entirely true." *Id*. at *4. The court noted that certain fees and charges were appropriate under the parties' contract. "[B]ut every incipient billing dispute is not a 'misrepresentation' . . . even if the customer ultimately prevails on the merits of the dispute." *Id*. The court posited that if the customer had demanded an explanation and the defendant responded with a false assertion, "that would be closer to a cognizable

misrepresentation." *Id*. "But to hold that a wrongfully charged fee constitutes, in itself, a misrepresentation, would be to broaden the word's meaning, and the reach of RICO, past the point of meaning." *Id*.

In the *Overdraft* case, the Honorable James L. King dismissed (with prejudice) a RICO claim predicated on mail and wire fraud alleging the defendant bank and its consultant conspired to devise an unlawful procedure to increase overdraft fees charged to the bank's customers. *Overdraft*, 797 F.Supp.2d at 1329. The court noted that, where a plaintiff predicates a RICO claim on mail or wire fraud, the plaintiff must prove that: (1) defendants knowingly devised or participated in a scheme to defraud plaintiffs, (2) they did so willingly and with an intent to defraud, and (3) they used the U.S. mails or interstate wires for the purpose of executing the scheme. *Id*. at 1328. Analyzing the scheme "sketched" by the plaintiffs, the court determined that, "at best," they alleged the mail and wire fraud occurred when the billing statements were mailed to the customers.[8] *Id*. at 1330. "Such cannot be the basis for a RICO claim." *Id*.

The court considered *Braswell* "particularly persuasive" in the context of whether the mailed invoices containing allegedly improper charges constituted misrepresentations for purposes of RICO. *Id*. at 1331. The court noted that the Honorable W. Keith Watkins in *Braswell*, even when considering the charges in that case may not have been in accord with the parties' underlying contract, held the invoices did not constitute "misrepresentations" because the charges "were possible via the terms of the contract." *Id.* (quoting *Braswell*, 2010 WL 3168125 at *4). "Ultimately, Judge Watkins stated that 'to hold that a wrongfully charged fee constitutes, in itself, a misrepresentation, would be to broaden the word's meaning, and the reach of RICO, past the

[8]The court rejected the plaintiffs' contention they need not allege their RICO claims with specificity because they alleged "an overall scheme to defraud by Defendants replete with allegations of half-truths and omissions in furtherance of that scheme." *Id*. (citing *Braswell*).

point of meaning.'" *Id*. (quoting *Braswell*, 2010 WL 3168125 at *4). The court further noted that Judge Watkins found amendment would be futile given the nature of the allegations and dismissed the RICO claim in *Braswell* with prejudice. *Id*.

Finding that its holding should not differ from that of *Braswell*, the court in *Overdraft* likewise found the wrongful overcharges alleged there "are not synonymous with 'misrepresentation' in the context of the RICO statute." *Id*. at 1332. "Plaintiffs' RICO claims are the proverbial square peg in the round hole, and Plaintiffs should not be permitted to alchemize their claims for breach of contract into ones for civil conspiracy." *Id*. The court dismissed the RICO claim, with prejudice. *Id*.

Other courts too have adopted the rationale in *Braswell.* For example, in dismissing (and denying leave to amend) a class action RICO claim based on mail and wire fraud, the court in *Almanza v. United Airlines, Inc*., 162 F.Supp.3d 1341, 1357 (S.D. Ga. 2016), quoted and relied on the rationale of *Braswell* in holding that the inclusion of allegedly improper tax fee on airline tickets "amounted only to a representation that Defendants assessed this fee as part of the purchase price – a representation that was, in fact, true." The court further concluded the charge "does not constitute a false statement that Defendants were permitted to tax plaintiffs . . . or that these passengers were obligated to pay same under Mexican law." *Id*. (citing *Braswell*, 2010 WL 3168125 at *4; *Gifford v. Don Davis Auto, Inc*., 274 S.W.3d 890, 894 (Tex. App. 2008)(inclusion of tax an itemized charge was not a misrepresentation)).

D. Lot Categories:

The Individual Plaintiffs complain that, beginning in 2016, the park owner began categorizing certain lots as "on water" or facing a "natural preserve" when, in truth, those lots

should not qualify as "on water" or facing a "natural preserve."[9] (Compl. at ¶¶ 36-40). They object that certain (unidentified) lots should not be described as "on water" because they are on "retention" ponds (they don't allege the ponds are dry, so this is a head-scratcher). *Id*. at ¶ 37. They also object that certain (unidentified) lots categorized as facing a "natural preserve" really face what they instead call "scrublands" or "wetlands."[10] *Id*. ¶ 38. These are, at best, subjective objections to the terminology used to describe the appearance and character of open and obvious land features, not allegations of fraud involving misrepresentation, deceit or concealment.

What is also missing here for purposes of Article III standing is an allegation that any Plaintiff purchased a home or rented an "on water" or "preserve" lot. More fundamentally, no allegation is made that any Plaintiff (or any other homeowner, for that matter) bought a home on or rented an "on water" or "preserve" lot sight unseen in reliance on the descriptions in the brochure or website. To the contrary, each Individual Plaintiff has admitted that they personally inspected their respective lots *prior to* entering into their respective rental agreement, so none of them relied on or suffered any detriment attributable to a disagreement over the use of the word "preserve" versus "wetland," for example. (Ex. "B," at ¶¶ 145-46). Having had *actual*, prior knowledge of the appearance of whatever water or land feature is adjacent to their chosen lots before they chose the lot and signed the contract, they cannot as a matter of law establish they were defrauded by a differing description of the appearance of the water or land feature. The appearance of the water feature adjacent to every "on water" lot is open and obvious. The same is the case

[9]Plaintiffs also mention "oversized" lots, but they make no specific allegations regarding those.

[10]Plaintiffs state that one of them (at some unstated time in some undescribed context) asked Defendant Monica Slider if Sun Communities owned the areas categorized as "natural preserve," and she replied it did. *Id.* at ¶ 40. But in the context of a RICO mail and wire fraud claim this qualifies as a "so what" allegation because the "mis" in misrepresentation is missing – nowhere is it alleged that Sun Communities does *not* own the preserve areas.

with the open land adjacent to every "preserve" lot – whatever it looks like is what it looks like, be it natural, scrubby, wet, dark, light or shiny in the eyes of the beholder. One cannot misrepresent what these two land features look like to someone who actually observed the same features unless that person's own eyes lied to them. No fraud here.

Nor is it alleged any Plaintiff was unaware of the applicable rent category when they signed their respective rental agreements (it is disclosed in the agreements). And no Plaintiff complains they paid more rent because the lot categorization subsequently changed (because that never happened). None of the Plaintiffs have Article III standing.

E. "Misleading" residents that Park facilities are ADA compliant:

The Individual Plaintiffs allege – with no required precision or support – that certain Defendants misled unidentified residents that the park facilities are legally compliant with the Americans with Disabilities Act of 1990 (the "**ADA**"). Even taken at face value, the allegation does not state an actionable fraud. A statement of opinion cannot be the basis for fraud, and a statement of *legal* opinion cannot possibly be the basis for fraud. *See Mejia v. Jurich*, 781 So.2d 1175, 1177 (Fla. 3d DCA 2001) ("An action for fraud generally may not be predicated on statements of opinion or promises of future action, but rather must be based on a statement concerning a past or existing fact."); *Wasser v. Sasoni*, 652 So.2d 411, 412 (Fla. 3d DCA 1995).

V. The Association Fails to State a Claim Under the ADA.

Count Five purports to state a claim based upon alleged violations of the ADA. However, no disabled individuals are included as a plaintiff and standing "is (again) a threshold jurisdictional requirement." *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997). The Association is not an advocacy group for disabled individuals. It asserts no facts indicating that it has suffered an injury sufficiently tangible to

satisfy its standing burden, and it fails to allege at least one of the Plaintiffs has the standing to sue in his or her own right. *See*, *Access for the Disabled, Inc. v. First Resort, Inc.*, 2012 WL 4479005, at *6 (M.D. Fla. Sept. 28, 2012). Further, without an Individual Plaintiff alleging a specific disability, it is not possible to determine which of the laundry lists of violations alleged by the Association relate to that Plaintiff's disabilities. *Access for the Disabled, Inc*., at *6 (Doc. 47 at ¶¶ 85-86).

ADA compliance is not germane to the Association's purpose. The role of a mobile home owners' association is defined in Section 723.075(1), *Florida Statutes*:

> Upon incorporation . . . the association shall become the representative of the mobile home owners in all matters relating to *this chapter*. (The Florida Mobile Home Act) (emphasis supplied)

The resolution of ADA claims is not the purpose of a mobile home owners' association as required by the second prong of the test established by *Hunt v. Washington State Apple Advertising Com'n.*, 432 U.S. 333, 343 (1977). The Association lacks the statutory authority to file civil rights actions such as actions for the disabled under the ADA.

The Association also lacks standing because it fails to meet the third prong of *Hunt, i.e*., the proof required to sustain a claim under the ADA is individualized and requires the participation of the association's individual members in the lawsuit. *See*, *Access for the Disabled, Inc. v. Rosof,* 2005 WL 3556046, *2 (M.D. Fla. Dec. 28, 2005) holding that:

> As in this case, if the claim alleges discrimination due to an architectural barrier, the plaintiff must further show that the existing facility presents an architectural barrier that is prohibited under the ADA., the removal of which is readily achievable. *See id. citing* Colorado Cross Disability Coalition v. Hermanson Family L.P., 264 F.3d 999 (10th Cir.2001). In determining whether a plaintiff has adequately asserted a claim under Title III of the ADA, a plaintiff's particular disability and his or her encounter with the alleged barriers to access are relevant factors to be considered. Because these factors are inherently fact-specific and require individualized proof, claims brought under Title III of the ADA require the participation of individual members in the lawsuit. *See* Hunt, 432 U.S. at 343.

> Plaintiffs cite district court cases to support their position that Access has associational standing. However, as the Eleventh Circuit has not yet determined whether a group like Access meets the third prong of *Hunt,* there is no controlling precedent.

Lastly, Royal Palm is a gated mobile home park comprised of single-family residences, not a place of public accommodation subject to the ADA. Its facilities and services are provided only for mobile home owners and their guests. Residential facilities such as mobile home parks do not fall within the definition of public accommodation. 42 U.S.C. §12181(7); *Elliott v. Sherwood Manor Mobile Home Park,* 947 F.Supp. 1574, 1577 (M.D. Fla.1996) (finding mobile home park did not fall within any of the categories covered by the ADA). *See, e.g., Gragg v. Park Ridge Mobile Home Court, LLP*, 2011 WL 4459701, at *4 (C.D. Ill. Sept. 26, 2011)(finding the mobile home lot rental at issue is more akin to a residential facility than any of the specific entities described in § 12181(7)); *Walnut Grove L.L.C. v. Stecher*, 111 Wash. App. 1037, 2002 WL 974642 (Wash. Ct. App. May 13, 2002)(finding as a matter of law that residential facilities such as a mobile home park are not places of public accommodation under the ADA). *Pike v. Heron Cay Homeowners Assoc., Inc., et al.*, 2-16CV14308, (S.D. Fla. 2016) (Doc 39 at pp. 6-8) (Middlebrooks, J.) holding that occasional use of mobile home park clubhouse "insufficient to render the clubhouse open to the public" for application of the ADA.

CONCLUSION

For the reasons stated herein, the Second Amended Complaint should be dismissed, *with prejudice*, with the Court reserving jurisdiction to award Defendants their reasonable attorney fees incurred in this action and granting such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of March, 2020, I electronically filed the foregoing document with the Clerk of Court via CM/ECF, which will send Notice of Electronic Filing to counsel or parties authorized to receive electronic filings in this case.

/s/ *Ali V. Mirghahari*
Ali V. Mirghahari