IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, COAST NATIONAL INSURANCE COMPANY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY, FARMERS INSURANCE COMPANY OF WASHINGTON, FARMERS INSURANCE COMPANY OF OREGON, 21ST CENTURY PACIFIC INSURANCE COMPANY, and 21ST CENTURY INSURANCE COMPANY,

Plaintiffs,

v.

FIRST CHOICE CHIROPRACTIC & REHABILITATION, SUNITA BHASIN, DAVID PETROFF, KELLY COLEY, DAVID AVOLIO, JOEL INGERSOLL, SEAN ROBINS, PARDIS TAJIPOUR, MARCUS COOL, AARON DAVISON, and AJAY MOHABEER,

Defendants.

3:13-cv-01883-PK

FINDINGS AND RECOMMENDATION

FIRST CHOICE CHIROPRACTIC & REHABILITATION, SUNITA BHASIN, DAVID PETROFF, KELLY COLEY, and PARDIS TAJIPOUR,

Counter-Claimants,

v.

FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, COAST NATIONAL INSURANCE COMPANY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY, FARMERS INSURANCE COMPANY OF WASHINGTON, FARMERS INSURANCE COMPANY OF OREGON, 21ST CENTURY PACIFIC INSURANCE COMPANY, and 21ST CENTURY INSURANCE COMPANY,

Counter-Defendants.

PAPAK, Magistrate Judge:

Plaintiffs, a group of insurance companies, initiated the instant action on October 22, 2013, alleging that defendant First Choice Chiropractic & Rehabilitation ("First Choice") submitted fraudulent insurance claims with the aid of its staff and an outside medical doctor. Now before the court is Farmers' Motion for Partial Summary Judgment (#93) and First Choice's Cross-Motion for Partial Summary Judgment (#128) as well Farmers' Motion to Strike the Declaration of Robert Dietz. For the reasons discussed below, Farmers' Motion for Partial Summary Judgment should be granted. First Choice's Cross-Motion should be granted in part and denied in part, and Farmers' Motion to Strike should be denied.

FACTUAL BACKGROUND

Plaintiffs are nine insurance companies licensed and engaged in the business of providing automobile insurance in the State of Oregon. Defendant First Choice is a chiropractic clinic that treats patients involved in major motor vehicle accidents who are eligible for PIP benefits under Farmers' various insurance policies. Answer, #89, ¶¶ 46. Farmers alleges that, "[s]ince at least as early as 2007," First Choice instituted a practice of billing patients with PIP coverage for services that were not medically necessary or were not performed. Third Amended Complaint, #88, ¶¶ 1–2. Specifically, Farmers alleges that First Choice instituted a fraudulent protocol to maximize revenue targeting individuals who would come to First Choice clinics following a motor-vehicle accident and who had PIP coverage available through various insurance policies. *Id.*

Farmers alleges that each of the named defendants, which include First Choice and affiliated doctors (collectively "Defendants"), played a significant role in the First Choice's fraudulent scheme. Dr. Bhasin and Petroff, First Choice's co-owners, were responsible for coordinating and controlling the implementation of the different components of the scheme. *Id.* ¶¶ 25-26. Dr. Bhasin was also responsible for hiring and training all chiropractors and was "involved in directing chiropractors and staff on all aspects of examining, charting, diagnosing, treating, and communicating with patients." *Id.* ¶ 25. She was also involved in treating or supervising the treatment of patients and was "involved in decisions as to how long to treat each patient and how much should be billed for each patient." *Id.* Coley, First Choice's office manager, was responsible for training and supervising chiropractors and other First Choice staff, coordinating and implementing the scheme, and "supervis[ing] treatment, charting, billing, and

all other areas of staff involvement with each patient." *Id.* ¶ 27. Dr. Avolio, Dr. Ingersoll, Dr. Robins, Dr. Tajipour, Dr. Cool, and Dr. Davison were the chiropractors responsible for making predetermined diagnoses and ordering predetermined treatments. *Id.* ¶¶ 28-33. Finally, Dr. Mohabeer assisted in the scheme by falsifying exam findings and "'rubber stamp[ing]'" First Choice's treatment plans. *Id.* ¶ 34. In exchange for Dr. Mohabeer's cooperation, First Choice referred patients to him. *Id.*

Sometime in 2011, the Oregon Chiropractic Board began investigating First Choice, including using two individuals to act as undercover operatives. *Id.* ¶ 48. "[T]hese two operatives independently contacted First Choice and advised that they were involved in motor vehicle accidents (no such accidents ever occurred)." *Id.* The operatives were first examined by independent chiropractors, who determined that the operatives were healthy. *Id.* Thereafter, the operatives went to a First Choice clinic. *Id.* Although the first operative reported no pain, First Choice submitted to the insurance company exam findings and chart notes indicating that the operative reported that he was in pain and that his pain levels continued through several weeks of treatment. *Id.* ¶ 48. The second operative reported to First Choice that she had "very light pain in her neck only" that lasted approximately five days. *Id.* ¶ 50. However, First Choice submitted chart notes and exam findings to the insurance company indicating that the operative had thoracic pain as well as neck pain and that she was in pain for one to two months. *Id.*

Farmers alleges that First Choice submitted medical records and billing that did not actually reflect the subjective complaints of its patients, that did not properly diagnose injuries, and that First Choice billed for treatment that was not actually rendered or was not medically necessary. Darnell Decl., #105, ¶ 5.

PROCEDURAL BACKGROUND

Farmers filed this case on October 22, 2013. In the complaint (#10), Farmers pleads claims against all defendants for: (1) common-law fraud; (2) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); (3) conspiracy to violate RICO, 18 U.S.C. § 1962(d); (4) violation of the Oregon Racketeer Influenced and Corrupt Organizations Act ("ORICO"); (5) violation of the Oregon Unfair Trade Practices Act ("UTPA"); and (6) unjust enrichment. In its seventh claim for relief, Farmers requests declaratory judgment that Defendants not entitled to payment for bills currently pending.

On March 21, 2014, defendants First Choice, Dr. Bhasin, Coley, Petroff, and Dr. Tajipour filed a motion to dismiss and motion to strike (#19). Thereafter, defendants Dr. Cool, Dr. Davison, Dr. Ingersoll, Dr. Robins, and Dr. Mohabeer filed motions (#22, #28, and #34), seeking to join in defendants First Choice, Dr. Bhasin, Coley, Petroff, and Dr. Tajipour's motion to dismiss and motion to strike. On May July 18, 2014, Judge Michael Simon adopted (#67) this court's Findings and Recommendation (#41) granting in part and denying in part those motions.

On September 26, 2014, Farmers filed its Third Amended Complaint (#88). Defendants filed their Amended Answer on November 11, 2014 including seven counterclaims (#91), to which Farmers replied on December 5, 2014 (#92).

On December 17, 2014, Farmers filed its Motion for Partial Summary Judgment (#93), and included therein a Motion to Strike the Declaration of Plaintiffs' proffered expert, Robert Dietz. First Choice filed its Response (#123) on February 13, 2015, after obtaining an extension of time from this court. Farmers filed its Reply brief on March 3, 2015 (#131). On March 10, 2015, Defendants filed, with leave from this court, a Sur-Reply and Opposition to Farmers'

Motion to Strike (#137).

On February 27, 2015, First Choice filed a Motion for Partial Summary Judgment ("Cross-Motion") (#128). On March 20, 2015, Farmers filed its response to First Choice's Cross-Motion (#140). On April 6, 2015, First Choice filed its Reply (#142).

The court heard oral argument on the motions on April 28, 2015. These matters are fully submitted and ready for decision.

LEGAL STANDARDS

I. Motion for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party taking the position that a material fact either "cannot be or is genuinely disputed" must support that position by citation to specific evidence of record, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials"; by showing that the evidence of record does not establish either the presence or absence of such a dispute; or by showing that an opposing party is unable to produce sufficient admissible evidence to establish the presence or absence of such a dispute. Fed. R. Civ. P. 56(c). The substantive law governing a claim or defense determines whether a fact is material. *See Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998).

Summary judgment is not proper if material factual issues exist for trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S, 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). In evaluating a

motion for summary judgment, the district courts of the United States must draw all reasonable inferences in favor of the nonmoving party, and may neither make credibility determinations nor perform any weighing of the evidence. *See, e.g ., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–55 (1990).

On cross-motions for summary judgment, the court must consider each motion separately to determine whether either party has met its burden with the facts construed in the light most favorable to the other. *See* Fed. R. Civ. P. 56; *see also, e.g., Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). A court may not grant summary judgment where the court finds unresolved issues of material fact, even where the parties allege the absence of any material disputed facts. *See Fair Hous. Council*, 249 F.3d at 1136.

II. Motion to Strike

Federal Civil Procedure Rule 12 provides that the district courts "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" on their own initiative or pursuant to a party's motion. Fed. R. Civ. P. 12(f). The disposition of a motion to strike is within the discretion of the district court. *See Federal Sav. & Loan Ins. Corp. v. Gemini Management*, 921 F.2d 241, 244 (9th Cir. 1990). Motions to strike are disfavored and infrequently granted. *See Stabilisierungsfonds Für Wein v. Kaiser, Stuhl Wind Distribs. Pty ., Ltd.*, 647 F.2d 200, 201, 201 n.1 (D.C. Cir. 1981); *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 947 (C.D. Cal. 1990), *abrogated on other grounds by Stanton Road Ass'n v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).

DISCUSSION

I. Farmers' Motion for Summary Judgment against Defamation and Tortious Interference Counterclaims

Farmers moves for summary judgment against the defamation[1] counterclaim asserted by Defendants First Choice, Sunita Bhasin, and Pardis Tajipour (collectively, "Counterclaimants"), as well as First Choice's counterclaim alleging tortious interference with contract and prospective economic advantage. Pl.'s Motion, #93, 2.

A. Defamation

In their Fourth Counterclaim, contained within the Amended Answer to Farmers' Third Amended Complaint, Counterclaimants quote at length letters sent by Farmers regarding its investigation of First Choice. The first of those letters, which was sent to Farmers' insureds who were patients of First Choice, reads, in part, as follows:

> You are advised that Farmers Insurance Company of Oregon is continuing its investigation of your insurance claim. This investigation includes, but is not limited to, analysis of billing statements and medical documentation being submitted by First Choice Chiropractic. This investigation also includes a review of other materials and evidence obtained by Farmers Insurance Company of Oregon as part of its investigation of First Choice Chiropractic on other matters.
>
> As this investigation proceeds, you are further advised that Farmers Insurance Company of Oregon reserves all of its rights and defenses under the policy. This includes the right to refuse payment for any treatment which is considered to be unreasonable and/or unnecessary

[1] Alternatively, because Defendants-Counterclaimants address in their Opposition alleged defamatory language communicated via letter to only three insured individuals, Plaintiffs argue that, "[a]t a minimum, summary judgment should be granted to dismiss First Choice's counterclaims as to all other patient-insureds." Pl.'s Reply, #131, 9. Due to the sheer number of insureds at issue in this case, I consider the defamation claim as a whole and not as applied to individual recipient of the letters in question.

> with respect to your injuries sustained in the subject motor vehicle accident. This also includes the right to refuse payment for billed items submitted by First Choice Chiropractic which are shown to be fraudulent and/or improper, or otherwise do not fall within the coverage provided by your policy of insurance.
>
> Once a determination has been made by Farmers Insurance Company of Oregon regarding how it will respond to requests for payment that are submitted by First Choice Chiropractic, you will be advised, in writing. In the interim, in the event First Choice Chiropractic contacts you in any way in regard to payment, please direct them to the undersigned and we will respond accordingly.

Naude Decl., Ex. 2, #96-2 ("Reservation of Rights Letter"). The second letter, sent to First Choice only, is more concise and explains to First Choice that its claims for medical billing related to treatment of Farmers' insureds are "under investigation." Naude Decl., Ex. 1, #96-1 ("Claim Investigation Letter"). The final letter, which was sent to First Choice and some but not all of First Choice's patients who are Farmers' insureds, states, in part:

> Farmers is proceeding to make payment for certain medical expenses based upon bills submitted by First Choice. These payments are being made as an act of good faith to your client, based upon Farmers' duty to your client, as an insured, to avoid needless litigation costs and expenses.
>
> However, you are advised that all such payments for First Choice Chiropractic bills are being made under a full reservation of all rights and defenses under the policy. This includes, but is not limited to, Farmers' right to assert in the future that medical expenses incurred were not reasonable, were not necessary, and were not based upon actual injuries sustained in the subject motor vehicle accident. As part of this reservation of rights, Farmers specifically reserves all of its right to seek recovery of these payments from any party in the event it is determined that fraud occurred in the alleged treatment and/or charting and/or billing related to the bills submitted by First Choice, or in the event of false statements, misrepresentations, or other improper billing, charting, or treating by First choice.

Naude Decl., Ex. 12, #126-12 ("Good Faith Payment Letter"). Counterclaimants argue that the

language contained in these letters prejudiced and injured them by suggesting falsely that they were or are engaged in illegal or fraudulent activity. Amended Answer, #91, ¶ 116. They argue that these statements constitute defamation *per se*. *Id.* ¶ 117.

To prove their defamation claim, Oregon law requires Counterclaimants to show that Farmers published a defamatory statement that resulted in special harm, unless that statement is defamatory *per se*, in which case special harm is presumed. *Nat'l. Union Fire Ins. Co. of Pittsburgh Pennsylvania v. Starplex Corp.*, 188 P.3d 332, 347 (Or. Ct. App. 2008). At issue in this case is whether the statements in Farmers' letters are false and defamatory. Truth is a complete defense in a defamation case. *Bahr v. Statesman Journal Co.*, 51 Or. App. 177, 180 (1981). Truth must be alleged by the Defendant, or in this case the Counterdefendant, and that party has the burden of establishing the plea of truth with evidence. *Grubb v. Johnson*, 205 Or. 624, 641 (1955). "Even if a statement is capable of a defamatory meaning, there can be no viable action for defamation if the statement is substantially true." *Rycraft, Inc. v. Ribble Corp.*, Civ. No. 09–1573–KI, 1999 U.S. Dist. LEXIS 6052, at *19 (D. Or. Apr. 26, 1999), *citing Bahr v. Ettinger*, 88 Or. App. 419, 422, 745 P.2d 807 (1998).

Counterclaimants draw the crux of their defamation claim, against which Farmers now moves for summary judgment, from the Reservation of Rights Letter. Farmers argues that the defamation counterclaim fails for the following reasons: (1) the statements contained within the letters are true; (2) any implications Counterclaimants draw from the Reservation of Rights Letter are unreasonable; and (3) the statements made in the letters in question are protected by a

qualified privilege.[2]

The parties dispute whether the language in the Reservation of Rights Letter stating that Farmers was "continuing its investigation" of insurance claims is true, and Counterclaimants argue that its ostensible falseness supports a defamation claim. Counterclaimants maintain that, by the time the individual recipients of the Letters received them, Farmers had concluded its investigation. To support this position, Counterclaimants rely on an Independent Medical Examination ("IME") conducted for one of the Letters' recipients, AJ. The IME was performed at the behest of Farmers' Special Investigations Unit ("SIU") and involved an interview with AJ. Counterclaimants state that "[t]here is no indication in AJ's claim file of any 'continuing investigation' following the [letter], and in particular of any 'review of other materials and evidence obtained by Farmers . . . as part of its investigation of First Choice Chiropractic on other matters.'" Def.'s Opposition, #123, 14 (citing the Reservation of Rights Letter).

Counterclaimants concede that, in some circumstances, Farmers was in fact continuing its investigation, in accordance with the message conveyed in the Reservation of Rights Letter. *Id.* Counterclaimants argue, however, that Farmers statements were still false because the continued investigations were not conducted "by way of reviewing other materials and evidence obtained about First Choice on other matters." *Id.* (citing Dietz Decl., ¶¶ 28, 34, 37).

Thus, depending on the letter recipient they are addressing, Counterclaimants rely on the

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[2] First Choice also refers to spoken statements allegedly made by Farmers in a call to a First Choice patient, who later communicated the contents of the call to First Choice, to support its defamation claim. Def.'s Opposition, #123, 16. The subject of a defamation claim must be a publication of the defamatory material. *Neumann v. Liles*, 261 Or. App. 567, 575, 323 P.3d 521 (2014). First Choice's attempt to cite phone calls in support its defamation counterclaim is inapposite.

declaration of Robert Dietz, a former Farmers employee and proffered expert, who reviewed several claim files and stated that those files reveal an absence of evidence showing that Farmers was in fact continuing its investigation in the letter recipients' claims. Alternatively, for those claim files pursuant to which Dietz found Farmers was in fact continuing its investigations, Counterclaimants rely on the alleged absence of evidence showing that it was doing so by way of reviewing other materials and evidence obtained about First Choice, exactly as worded in the Reservation of Rights Letter.

Particularly probative in ascertaining the truth of the Letters' assertions, which Farmers' offers as a total defense to defamation, is the fact that the Letters, including one dated July 9, 2013, concern a continued investigation of the recipients' insurance claims that led Farmers, on October 22, 2013, to file suit in this court. Complaint, #1. In a similar case from this district, *Strappini v. Sideras*, the court considered a summary judgment motion against a defamation claim that surrounded statements made by a housing authority that an individual was "the subject of a fraud investigation" and was "evicted from a . . . property." 2011 WL 1261330, at *9 (D. Or. Mar. 31, 2011). In *Strappini*, the court adopted the Findings & Recommendation of a Magistrate Judge that granted summary judgment against the party claiming defamation, basing its holding in part on the fact that "the defamation claim [was] unsupported by anything more than plaintiff's statements," as here, as well as the fact that, "[t]o the extent that a fraud inspector from [the housing authority] investigated credible information submitted about plaintiff, plaintiff *was* the subject of a fraud investigation." *Id.* Similarly, to the extent that Farmers investigated the claim files at issue in the current case for fraud, and ultimately brought this action pursuant to the review of those claim files, those files *were* the subject of a fraud investigation, rendering

letters notifying insureds of that investigation objectively true.

In support of its motion, Farmers offers testimony from its Special Investigations Manager supporting the position that it began its investigations of both First Choice and its insureds' claims after receiving information that First Choice was regularly submitting fraudulent bills. Darnell Decl., #95, ¶; Naude Decl., #96, ¶ 5. Counterclaimants simply offer Dietz's testimony that, in some claim files, Dietz found no evidence of continuing investigations. In others, however, Dietz did in fact find evidence of investigations, but the manner in which those investigations were conducted, he argues, do not comport with the exact language of the letters. Even in those situations where investigations into insureds' claim files were in fact taking place, Dietz attacks Farmers' wording in the Reservation of Rights Letter:

> I have reviewed dozens of files from the Farmers spreadsheet. Most, not all, involved reasonable investigations, while some were hardly investigated at all. Regardless, *I have seen no indication that Farmers ever considered "other materials and evidence" obtained as "part of its investigation of First Choice Chiropractic on other matters" in any claim file*. To the contrary, from my review, it appears that when Farmers investigated, it relied on its typical investigatory tools to evaluate claims. These tools include photos, statements, EUOs, bill reviews, Index searches, IMEs, peer reviews, and SIU handling.

Dietz Decl, #126, ¶ 37 (emphases added). Dietz, therefore, posits that Farmers' investigation of First Choice's claim files was (1) not at all self-referential and did not in any way "build off of itself," and (2) Farmers' ongoing investigation of the veracity of claim files attached to its insured who were patients of First Choice did not originate in Farmers investigation of First Choice. At base, these arguments rely on logical fallacies and inferences which I must, as a matter of course, draw in favor of Farmers, the non-moving party. *Reeves*, 530 U.S. at 150. Furthermore, I find that Farmers' statement regarding the tools that it employed in its own

investigation of First Choice, whether true or not, does not constitute a defamatory statement within the legal meaning of that term. *Brown v. Gatti*, 341 Or. 452, 458, 145 P.3d 130 (2006) ("a statement is defamatory if it is false and ascribes to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade, [or] profession").

Plaintiffs offer, in support of their total defense of the truth of those statements highlighted in the defamation counterclaim, both the current lawsuit regarding the files that they previously informed insureds were under investigation, as well as *actual* investigations into the same claim files for insureds who were recipients of the Letters at issue. Dietz Decl., #126, ¶ 37. It goes against logic to argue that Farmers did not conduct investigations of files for which it ultimately filed suit. I find First Choice's argument that Farmers' Reservation of Rights Letter communicated false information to its recipients similarly problematic because Farmers was, undisputedly, carrying out "reasonable investigations" into the claims files at issue, as conceded in part within First Choice's supporting declaration. Dietz. Decl., #126, ¶ 37.

I find no question of material fact as to whether the statements contained within Farmers' Reservation of Rights Letter, which generally informed individuals that their claims were under investigation and that Farmers was considering an array of evidence, were true, as investigations regarding some if not all of those files were concurrently occurring or occurred at some point with relation to this suit. Therefore, I need not reach the issue of whether Counterclaimants drew unreasonable implications from the statements, or whether those statements are protected by a qualified privilege. Due to the apparent truth of the statements regarding Farmers' ongoing investigations into claims billed by First Choice, Farmers should be granted summary judgment against the defamation claim set forth by Counterclaimants, and that claim should be dismissed

from this action.

B. Tortious Interference

Farmers next moves for summary judgment against First Choice's alleged tortious interference with contract and intentional interference with economic relations counterclaim. To support such a claim, the proponent must prove:

> (1) [T]he existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages.

Straube v. Larson, 287 Or. 357, 360–61, 600 P.2d 371 (1979); *Wampler v. Palmerton*, 250 Or. 65, 73–76, 439 P.2d 601 (1968). At issue in this case is whether Farmers "accomplished through improper means or for an improper purpose" an interference with First Choice's contracts or economic relationships. *See* Pl.'s Motion, #93, 19; Def.'s Opp., #123, 28. Wrongful or improper interference can be shown through a violation of "a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of trade or profession." *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209–10, 582 P.2d 1365 (1978).

First Choice's argument for its intentional and tortious interference counterclaim rests on the communications in question—the various Letters—being defamatory. Def.'s Opposition, #123, 29. First Choice also argues, without support, that these communications violated industry standards and were "legally and ethically unnecessary." *Id.*

Based on my findings above, and the fact that Oregon law requires insurers to communicate with insureds regarding claim coverage and investigations into claim files, ORS 746.230, I find no question of material fact as to whether Farmers' conduct in sending the Letters

at issue, and ostensible interference with First Choice's economic relationships, were accomplished through an improper means or for an improper purpose. Therefore, based on the standards articulated above, summary judgment should be granted as to First Choice's intentional and tortious interference counterclaims.

C. Continuance

First Choice argues that the court's consideration of Farmers' Motion for Summary Judgment as to its counterclaims should be deferred until the close of discovery and should be informed by supplemental briefing regarding findings First Choice hopes to make from (1) reviewing all claim files and letters sent by Farmers; and (2) deposing Farmers' corporate representative. Def.'s Opposition, #123, 30.

In order to obtain a continuance on a motion for summary judgment, a party must (1) set forth the specific facts they hope to elicit from further discovery in an affidavit, (2) show that the specific facts exist, and (3) show those facts are "essential" to resist the summary judgment motion. *California ex rel. Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). District courts may, in their own discretion, deny continuances if parties have not diligently pursued discovery. *Hawaii Carpenters' Trust Funds v. Henry*, 906 F.2d 1349, 1352 (9th Cir. 1990), *abrogated on other grounds by Southern Cal. Painters & Allied Trade Dist. Council No. 36 v. Best Interiors, Inc.*, 359 F.3d 1127 (9th Cir. 2004).

Information that Counterclaimants seek would not contribute to whether the statements made in the Letters sent by Farmers were true, as Farmers did in fact carry out investigations of claim files related to and in furtherance of the instant action. Nor does that information dictate whether Farmers accomplished its interference with First Choice's economic relationships

through an improper means or for an improper purpose. I find no question of material fact as to whether Farmers engaged in investigations regarding the claim files at issue, because no evidence has been offered to show that Farmers has not carried out investigations, nor is there a question of material fact as to whether Farmers acted improperly by sending the Reservation of Rights Letter or other Letters. Further, the affidavit provided by First Choice in support of its request for a continuance does little more than list what First Choice has not done in terms of discovery, and falls short of showing what specific facts would be obtained through additional discovery to establish its claims. *See* Fox Decl., #125. Allowing a continuance so that First Choice may conduct additional reviews of claim files does not appear likely to yield anything in addition to what First Choice has already offered in support of its counterclaims, which is not enough to survive summary judgment. First Choice's request for a continuance should therefore be denied.

II. First Choice's Cross-Motion for Summary Judgment Regarding Reimbursed Claims and Plaintiffs' UTPA Claim

In its cross-motion for partial summary judgment, Defendant First Choice moves against "all amounts plaintiffs claim as damages for which they have already been reimbursed" under Farmers First, Second, Third, and Fourth claims for relief. Def.'s Cross-Motion, #128, 1. First Choice also moves for summary judgment against Farmers' unjust enrichment claim, as well as Farmers' UTPA claim, which are Farmers' Fifth and Sixth claims for relief, respectively. *Id.*

A. Claims for Which Farmers was Reimbursed

Throughout this litigation, two issues related to damages have dominated the parties' discussions and filings with this court. The first is, even assuming sufficient proof of the fraudulent scheme alleged in the Third Amended Complaint, whether Farmers may recover all

payments made to First Choice for services rendered[3] during the relevant period, as part of the scheme, without a particularized showing that each service rendered to each patient was medically unnecessary. The second issue is, again assuming sufficient proof of the fraudulent scheme alleged in the Third Amended Complaint, whether Farmers may recover any payments made to First Choice for which Farmers has already been reimbursed by third parties. It is on this second issue that First Choice now moves for summary judgment.

I note, initially, some misgiving about the propriety of parsing Farmers' damages calculation at summary judgment. However, recognizing that Rule 56(a) allows for summary judgment as to part of a claim, and Rule 42(b) permits the separate trial of particular issues or claims, I have concluded it is appropriate to address this issue in the interests of convenience and efficiency, and to expedite this litigation. In recommending that First Choice's partial motion for summary judgment should be granted in part, as I do below, I do not address the amount by which Farmers' damages must be reduced, as no evidence has been produced on that issue. Further, I do not address the allocation of the burden of proof as to the extent of Farmers' third-party reimbursements.

In support of its motion, First Choice explains that "the many claim files in which other insurance companies and the insureds themselves reimbursed Farmers for payments made to First Choice," after Farmers "represent[ed], sometimes under oath, that First Choice's treatments were medically reasonable and necessary." Def.'s Cross-Motion, #128, 1. First Choice argues that

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[3] Farmers also alleges that some portion of the billed services were, in fact, never provided. There appears to be no dispute that, should Farmers establish the alleged fraudulent scheme, it could recover payments made for services billed but never provided, subject to the second issue related to reimbursements, discussed below.

Farmers is "bludgeoning" it by "demanding payment for millions of dollars in expenditures for which it has already been reimbursed." *Id.* Farmers does not dispute that, in some cases, it received subrogation and reimbursement for those claims from other entities, but maintains that it expended its own resources and funds to pursue those avenues of reimbursement. Pl.'s Response, #140, 8.

Under Oregon law, automobile insurers must pay medical benefits of insureds who have been involved in an automobile accident for up to $15,000. *Providence Health v. Winchester*, 288 P.3d 13, 1 (Or. Ct. App. 2012). This process usually results in an at-fault driver's insurance carrier paying the other driver's insurance carrier through insurer reimbursement, or subrogation. *Id.* According to First Choice, this subrogation—which First Choice argues constitutes "the bulk of reimbursements for PIP insured medical payments"—occurs without the involvement of of the insureds. Def.'s Cross-Motion, #128, 3.

First Choice seizes upon the fact that Farmers' fraud theory covers "each and every claim submitted to Farmers between 2007 and present," and its resulting damages assessment is based on the full extent of those claims. Third Amended Complaint, #88, ¶ 59. To rebut the damages claim, First Choice conducted a sample review of fifty-one of the claim files at issue in this case and found that thirty-two of those files "include actual subrogation or potential/pending subrogation." Def.'s Motion, #128, 4 (citing Dietz Decl. ¶¶ 8–12). First Choice argues, therefore, that Farmers' pursuit and receipt of inter-insurer reimbursement for "full, or at least partial, reimbursement for the payments it makes to First Choice Clinic" undercuts Farmers' current attempt, through its fraud and RICO claims, "to recover the same money again, this time from First Choice." Def.'s Motion, #128, 5–6.

a. RICO Claims and Actual Injury

The RICO Act, 18 U.S.C. 1964, under which Farmers asserts its second, third and fourth causes of action, requires "proof of concrete financial loss." *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994). Absent a showing of actual injury, summary judgment is required. *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990). Additionally, Oregon's RICO statute "is interpreted consistent with the federal RICO state," and a parallel analysis therefore applies. Def.'s Motion, #128, 9 (quoting *Ius v. Butcher*, 680 F. Supp. 343, 346, n.1 (D. Or. 1987); *see also Taylor v. Hender*, 116 Or. App. 42 (1992) (requiring a showing of personal damage to sustain an ORICO action).

First Choice argues, and I agree, that Farmers' claims suffer the same maladies as those in *Berg* and *Steele*. Def.'s Motion, #128, 8. In *Steele*, patients of a psychiatric hospital brought an action against the hospital and a psychiatrist for a conspiracy to "bill insurance companies for services that were not provided or were inappropriate." *Steele*, 36 F.3d at 70. Because the billed insurance companies, rather than the patients themselves, were made to pay based on the fraudulent services, the Ninth Circuit found no financial loss supporting the patients' RICO claims. *Id.* Similarly, in *Berg*, the Ninth Circuit found no financial loss for terminated Texaco board members whose insurance policies were canceled but who were later compensated by Texaco and provided with replacement policies. *Berg*, 915 F.2d at 462. The Second Circuit, citing *Berg*, stated the following proposition:

> In determining fraud damages, any amount recovered by the fraudulently induced lender necessarily reduces the damages that can be claimed as a result of the fraud. Because the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained-for remedies available to it can the lender assert that it was damaged by

the fraud, and then only to the extent of the deficiency.

First Nat. Bank v. Gelt Funding Corp., 27 F.3d 763 (2nd Cir. 1994). I find this approach to limiting those for which Farmers can now claim damages pursuant to RICO and ORICO persuasive.

For these reasons, Farmers' receipt of reimbursement from third-parties for payments it made to First Choice should count squarely against Farmers' RICO and ORICO claims, as Farmers cannot and does not show concrete financial loss under those statutes for those claims for which Farmers has been made whole or partially whole through the process of insurer reimbursement or subrogation. Thus, First Choice's motion should be granted as it applies to Farmers' Second, Third, and Fourth causes of action, to the extent those claims seek recovery for payments for which Farmers has received partial or full reimbursement.

b. Common Law Fraud Claims and the Collateral Source Rule

First Choice next moves against those reimbursed claims files for which Farmers brings its common-law fraud claim, under its First cause of action. Farmers does not dispute that it has received subrogation for payments made to First Choice, but highlights the fact that the initial, pre-subrogation payments were made based on fraudulent information provided by First Choice. Pl.'s Response, #140, 10. Farmers argues that it is therefore insulated from Plaintiffs' Motion against its compensated claims based on the collateral source rule.[4] *Id.* 11. The collateral source rule "permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third

[4] Farmers argues, without support, that "[a]ny additional subrogation issues regarding recovery of fraudulently induced payments to First Choice are properly addressed by the Court as a post-judgment issue." Pl.'s Response, #140, 10. Oregon law does require post-judgment consideration for deduction of collateral benefits in the context of death and bodily injury. ORS 31.580. That statutory requirement, however, is inapplicable to this case.

party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits." *White v. Jubitz Corp.*, 347 Or. 212, 221 (2009) (*en banc*). The collateral source rule, as adopted from the Restatement (Second) of Torts § 920A (1979), does, in some situations, allow "double recovery" to compensate for a single harm. *White*, 347 Or. at 220. This rule operates, in part, because "[a] plaintiff who receives life or medical insurance benefits," following an injury triggering those benefits, "generally will have paid premiums for those . . . or will have earned them as compensation for employment." *Id.*

First Choice contends that the collateral source rule is not triggered "when payments were made for a reason apart from a desire to compensate for an injury caused by the tortfeasor." Def.'s Motion, #128, 13. Instead, First Choice posits that the rule applies only if "the payment by the collateral source would not have been made 'but for' an injury caused by the tortfeasor," rather than compelled by some other source. *Id.* (citing *Amtel Corp. v. St. Paul Fire & Marine Ins. Co.*, 430 F. Supp. 2d 984, 987 (N.D. Cal. 2006)).

First Choice argues that Farmers "did not receive payments for a supposed injury to Farmers by First Choice." Def.'s Motion, #128, 14. In response, Farmers alleges that First Choice's fraudulent misrepresentations caused it to incur significant damages. Third Amended Complaint, #88, ¶ 67. I agree with Farmers insofar as receipt of subrogation payments and inter-insurer reimbursement does not alter the fact that Farmers now brings action for damages, suffered in the form of fraudulently induced payments to First Choice, but I am troubled by the source and motivation of those payments in determining whether the collateral source rule applies to the current circumstances.

In its Reply, First Choice contends that the common justifications for applying the

collateral source rule do not apply where, as here, the party attempting to employ it received reimbursement from other entities but did not pay insurance premiums or other amounts that would balance against the "specter of a plaintiff's 'double recovery.'" Def.'s Reply, #142, 4. Payments that Farmers received, ostensibly offsetting its claims against First Choice, were obligated in part by statute, ORS 742.534(1) (requiring reimbursement for benefits paid by other insurers), rather than a voluntary insurance policy, the cost of which often serves as the logical basis for the collateral source rule's application. *See White*, 347 Or. at 220. Importantly, the *reason* for the payments that the collateral source rule protects from devaluation is a pivotal aspect of the rule. As stated by the Oregon Supreme Court when it initially adopted the collateral source rule into common law: "[d]amages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff *on account of the injury*." *Cary v. Burris*, 169 Or. 24, 28 (1942), *quoting* 1 Sedgwick on Damages, 9th Ed. § 67 (emphases added). The reimbursements paid to Farmers were necessarily payments from insurers made in accordance with Oregon law. Those reimbursements were not, in any instance, payments to offset or assist Farmers' injuries resulting from First Choice's alleged fraud. As First Choice recognizes, if the other companies from which Farmers sought subrogation were indeed aware of the alleged fraud at issue in this case, they likely would have denied reimbursement altogether. *See* Def.'s Reply, #142, 8.

I conclude that the collateral source rule does not apply to this case, as its application would result in a windfall to the extent it would allow Farmers to seek recovery for claims for which it has already received partial or full reimbursement from third-parties for reasons other than compensation for its injuries.

The injury element of fraud, therefore, while satisfied as pled by the Third Amended Complaint, cannot serve as a basis for recovery of amounts for which Farmers has already been reimbursed. For all of these reasons, First Choice's Cross-Motion should be granted as it applies to Farmers' First cause of action, to the extent its common law fraud claim seeks recovery for payments for which Farmers has received partial or full reimbursement.

B. Unjust Enrichment Claim

First Choice next moves against Farmers' Sixth cause of action for unjust enrichment, arguing that, for those files upon which Farmers actually exercised it subrogation rights, unjust enrichment is foreclosed. Def.'s Motion, #128, 12. Under Oregon law, a *prima facie* unjust enrichment claim requires the following: "a benefit conferred, awareness by the recipient that a benefit has been received and, under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it." *Edward D. Jones & Co. v. Mishler*, 161 Or. App. 544 569, 983 P.2d 1086 (1999).

First Choice maintains that Farmers "cannot recover for bills paid by the at-fault driver's insurance carrier or its own insured, because Farmers was not the party at whose expense First Choice was supposedly [unjustly] enriched." Def.'s Motion, #128, 12. First Choice cites *L.S. Henricksen Const., Inc. v. Shea*, 961 P.2d 295, 297 (Or. Ct. App. 1998), to support the proposition that Oregon courts disallow unjust enrichment claims where the party bringing such a claim has even the potential to receive payment from a "more appropriate party." Def.'s Motion, #128, 12. Specifically, First Choice argues that, for all claims for which Farmers could have exercised or did exercise its subrogation rights and recovered from contractually obligated parties, Farmers has no cause of action under the doctrine of unjust enrichment.

To rebut First Choice's motion, Farmers relies on its arguments made in support of the collateral source rule, which I find does not apply in this case. For the reasons presented by First Choice in its motion, as well as the reasons I cited above in determining that the collateral source rule is inapplicable here, First Choice's Cross-Motion should be granted as it applies to Farmers' Sixth cause of action for unjust enrichment insofar as Farmers claims damages for claims upon which Farmers has received partial or full reimbursement.

C. UTPA Claim and Standing

Finally, First Choice moves against Farmers' UTPA claim on the grounds that Farmers has no standing to sue under the UTPA, which covers "only consumer transactions." *Accident Care Specialists of Portland, Inc. v. Allstate Fire and Cas. Ins. Co.*, 2014 WL 2747632 (D. Or. June 16, 2014) (Mosman, J.). The two-part test that Oregon courts use to identify consumer transactions requires that (1) the transaction at issue is a transaction for goods or services "customarily purchased by a substantial number of people for personal, family, or household use" and (2) the transaction was actually entered into by the plaintiff "for personal, family, or household use, rather than for commercial use or resale." *Id.* (citing *Fowler v. Cooley*, 239 Or. App. 338, 344 (2010). First Choice argues that Farmers has not engaged in a consumer transaction under this framework as a function of the fact that all payments were made "as part of its insurance business." Def.'s Motion, #128, 16.

In support of its claim, Farmers cites to *State Farm Fire and Cas. Co. v. Huynh*, 92 Wash. App. 454, 470–71 (1998), a case that provided standing for an insurance company in an action under the Washington Consumer Protection Act ("WCPA"), "a nearly identical statute." Pl.'s Response, #140, 25. The court in *Huynh* found that the insurer was the direct purchaser of

chiropractic services for the benefit of its insureds. *Huynh* had a similar factual scenario to this case, as the subject of that lawsuit were allegedly fraudulent claims by the chiropractor and other acts performed solely for the purposes of increasing profits. *Huyn*h, 92 Wash. App. at 458. The court's reasoning in *Huynh* follows:

> [A] doctor submits patients' bills to an insurance company for payment. When those bills are fraudulent, the costs are passed on to consumers, who are forced to pay higher premiums. Therefore, . . . an insurance company is the logical party to be the private attorney general because it stands in the shoes of its premium-paying consumers who are affected by false billings from doctors.

92 Wash. App at 460.

While *Huynh* had a similar factual scenario and the court provided compelling reasons for finding standing in that case, it was decided under a different statute. First Choice refers to a relevant opinion from this district penned in response to a motion for attorney fees in *Accident Care Specialists v. Allstate,* in which the court provided dicta for, but explicitly did not reach, a similar issue under Oregon's UTPA. 2014 WL 2747632. In that case, Allstate asserted a claim under the UTPA and Judge Mosman, in his opinion, indicated that the WCPA is sufficiently different from the UTPA such that *Huynh* is distinguishable and "the UTPA likely does not create standing under the circumstances alleged here." *Id.* at *5 (citing hearing transcripts). That distinction, which I also acknowledge, derives from language of the UTPA which confines the categories of protected items—real estate, goods or services—to those obtained "primarily for personal, family or household purposes." ORS 646.605(6). Conversely, "[t]he elements of a private claim under the CPA are: unfair or deceptive act or practice; occurring in trade or commerce; impacts public interest; and causes injury to plaintiff in his business or property." *Huynh*, 92 Wash. App. at 468, *citing Leingang v. Pierce Cty. Med. Bureau*, 131 Wash. 2d 133,

149 (1997). Further, "[t]he CPA is to be liberally construed to serve its purpose." *Id.* (citing RCW 19.86.920). Thus, while both statutes operate to protect consumers, the UTPA does not have the same reach as the WCPA and, importantly, specifically limits its breadth to items obtained "primarily for personal, family or household purposes." ORS 646.605(6).

No Oregon court has reached the issue whether insurers "standing in the shoes" of their insureds have standing under the UTPA. The Ninth Circuit has affirmed a district court judgment finding no standing under the UTPA where a health plan failed to allege that it was a consumer. *See Oregon Laborers-Employers Heatlh & Welfare Trust Fund v. Philip Morris, Inc.*, 17 F. Supp. 2d 1170 (D. Or. 1998) (finding that employee health benefit plan lacked standing to bring suit against tobacco companies because they were not "consumers" of defendants' products), *aff'd.* 185 F.3d 957 (9th Cir. 1998) (noting that an entity may have standing under the UTPA, but affirming district court's ruling because plaintiffs failed to allege that they are in any manner "consumers" of defendants' products), *cert. denied* 120 S. Ct. 789, 528 U.S. 1075. While the UTPA and the WCPA are distinguishable in their breadth, I find the reasoning applied by the *Huynh* court in determining standing to be highly persuasive. Individual patients, who may not deal with their chiropractor bills, save for courtesy copies after the fact, are poorly situated to act as private attorneys general for fraudulent practices. Instead, as in *Huynh* and as Farmers argues here, the insurance company, standing in the shoes of its insured and alleging that "Farmers is the actual direct consumer of these services as it is the entity that is billed and expected to pay for services," is appropriately characterized as the real party in interest. Pl.'s Response, #140, 27; *see* 185 F.3d 957 at n.9.

For these reasons, I find that Farmers has standing to bring its Fifth cause of action under the UTPA, and First Choice's Cross-Motion should therefore be denied as it applies to that claim.

III. Motion to Strike Dietz Declaration

In its Response to Defendants' Cross-Motion, Farmers moves to strike the declaration of First Choice's proffered expert, Robert Dietz. Pl.'s Response, #140, 5--6. In its Reply, as well as its Sur-Reply to Farmers' Motion for Partial Summary Judgment, First Choice argues that Farmers' motion to strike is baseless and meritless, respectively. Def.'s Reply, #142, 14; Def's Sur-Reply, #137, 6.

Farmers' primary contentions in its briefly pled motion to strike are that "Mr. Dietz declaration does not have proper foundation" and "Mr. Dietz does not have personal knowledge regarding the internal workings of Farmers during any of the relevant time period." Pl.'s Response, #140, 5. This appears to be drawn from Farmers' observation that Dietz did not work in the PIP department during his fourteen year tenure as a Claims Representative, Senior Claims Representative, Claims Management Trainee, and, his final position, a Branch Claims Supervisor at Farmers. Dietz Decl, #129, ¶ 3. Aside from attacking Dietz's personal knowledge and the fact that he did not serve at a specific time in a specific department while at Farmers, Farmers provides no basis for its assertion that Dietz's declaration "must be stricken in its entirety under ER 401–403 and ER 701–703." Pl.'s Response, #140, 5.

I reiterate that motions to strike are disfavored and infrequently granted. *See Stabilisierungsfonds Für Wein*, 647 F.2d 200, 201 n.1 (D.C. Cir. 1981). Farmers has not established that Dietz's declaration is "redundant, immaterial, impertinent, or scandalous"

pursuant to Federal Rule of Civil Procedure 12(f). Farmers' motion to strike should be therefore denied.

CONCLUSION

For the reasons set forth above, Farmers' Motion for Partial Summary Judgment (#93) should be granted and Defendants' Fourth, Sixth, and Seventh Counterclaims for defamation, tortious interference with contract, and tortious interference with prospective economic advantage should be dismissed.

Defendants' Cross-Motion for Partial Summary Judgment (#128) should be denied as it applies to Farmers' Fifth cause of action under the UTPA. Defendants' Cross-Motion should be granted in part as it applies to:

(1) Farmers' claims for violation of RICO and ORICO (Second, Third, and Fourth causes of action), to the extent Farmers seeks recovery on claims for which it has received partial or full reimbursement;

(2) Farmers' common law fraud claim (First cause of action), to the extent Farmers seeks recovery on claims for which it has received partial or full reimbursement; and

(3) Farmers' unjust enrichment claim (Sixth cause of action), to the extent Farmers seeks recovery on claims for which it has received partial or full reimbursement.

Finally, Farmers' Motion to Strike the Declaration of Robert Dietz, as articulated in its Response to First Choice's Motion for Partial Summary Judgment (#140), should be denied.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections

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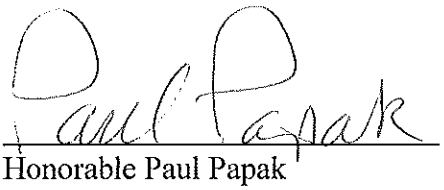
are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 10th day of June, 2015.



Honorable Paul Papak
United States Magistrate Judge