

IN A GENERAL COURT-MARTIAL
 SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
 FORT BRAGG, NORTH CAROLINA

UNITED STATES)	Motion to Dismiss Charge II
)	
v.)	
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	31 May 2017

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RELIEF SOUGHT

In accordance with Rule for Courts-Martial (RCM) 907(b)(2)(E), the defense moves to dismiss Charge II and its specification. Oral argument is requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion. RCM 905(c)(2)(A). Proof by a preponderance is required as to factual matters. RCM 905(c)(1).

GLOSSARY

AW	Articles of War
AWOL.....	Absence without Leave
CAAF.....	U.S. Court of Appeals for the Armed Forces
CCA.....	Court of Criminal Appeals
CMA	U.S. Court of Military Appeals
CMR	Court of Military Review
DD.....	dishonorable discharge
LIO	lesser included offense
LWOP.....	life without parole
MCM.....	Manual for Courts-Martial
M.R.E.	Military Rules of Evidence
OP.....	Observation Post
RCM.....	Rules for Courts-Martial
UCMJ	Uniform Code of Military Justice

FACTS

Charge II is laid under Article 99, Uniform Code of Military Justice (UCMJ). The sole specification reads as follows:

In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, at or near Observation Post Mest, Paktika Province, Afghanistan, on or about 30 June 2009, before the enemy, endanger the safety of Observation Post Mest and Task Force Yukon, which it was his duty to defend, by intentional misconduct in that he [1] left Observation Post Mest alone; and [2] left without authority; and [3] wrongfully caused search and recovery operations. [Bracketed numbering added.]

Article 99 covers a variety of offenses under the overall rubric of “Misbehavior before the Enemy.” The specification rests on Article 99(3), which states in pertinent part:

Any member of the armed forces^[1] who before or in the presence of the enemy—

* * *

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

* * *

shall be punished by death or such other punishment as a court-martial may direct.

Paragraph 23.b.(3) of the *Manual* sets forth the elements of the offense. These include: “(b) That the accused committed certain disobedience, neglect, or intentional misconduct.” Paragraph 23.c.(3) presents the official explanation. It reads as follows:

(a) *Neglect*. “Neglect” is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(b) *Intentional misconduct*. “Intentional misconduct” does not include a mere error in judgment.

The maximum punishment for any violation of Article 99 is death, confinement for life without parole (LWOP), a dishonorable discharge (DD), and total forfeitures. *MCM* ¶

¹ This is the language Congress enacted. See 10 U.S.C. § 899 (2012). The version found in Appendix 2 of the *Manual for Courts-Martial* (MCM) incorrectly begins “Any person subject to this chapter”. The one found in *MCM* ¶ 23.a., however, tracks the statute and is correct. References in this motion to the *Manual* are to the 2016 edition unless otherwise indicated. [Footnote added.]

23.e. The general court-martial convening authority has not authorized imposition of the death penalty. RCM 1004(b)(1)(A); Charge Sheet.

WITNESSES AND EVIDENCE

No witnesses or evidence are required for the adjudication of this motion.

LEGAL AUTHORITY

1. U.S. Const. amend. 5
2. U.S. Const. amend. 6
3. Art. 23, UCMJ
4. Art. 36(a), UCMJ
5. Art. 56, UCMJ
6. Art. 85, UCMJ
7. Art. 86, UCMJ
8. Art. 90(2), UCMJ
9. Art. 91(2), UCMJ
10. Arts. 92(1)-(2), UCMJ
11. Art. 99, UCMJ
12. Art. 99(1), UCMJ
13. Art. 99(2), UCMJ
14. Art. 99(4), UCMJ
15. Art. 99(3), UCMJ
16. Art. 99(5), UCMJ
17. Art. 99(6), UCMJ
18. Art. 99(7), UCMJ
19. Art. 105, UCMJ
20. Art. 105(1), UCMJ
21. Art. 105(2), UCMJ
22. Art. 120c, UCMJ
23. Art. 120c(d), UCMJ
24. Art. 121, UCMJ
25. Art. 122, UCMJ
26. Art. 133, UCMJ
27. Art. 134, UCMJ
28. Art. 134(1), UCMJ
29. 10 U.S.C. § 899 (2012)
30. British AW art. XII of 1774
31. Additional AW 10 of 1775
32. AW of 1776, § III, art. 12
33. AW 52 of 1806
34. AW 42 of 1878
35. AW 75 of 1916, 39 Stat. 619, 650, 662 (1916)
36. AW 75 of 1920
37. RCM 109

38. RCM 201(d) (Discussion)
39. RCM 304(c) (Discussion)
40. RCM 304(h)(2)(B)(iii)
41. RCM 305(l)
42. RCM 603(a)
43. RCM 905(c)(1)
44. RCM 905(c)(2)(A)
45. RCM 907(b)(2)
46. RCM 907(b)(2)(E)
47. RCM 916(b)(2)(B)
48. RCM 1001(g)
49. RCM 1001(f)(2)(A)
50. RCM 1004(b)(1)(A)
51. RCM 1109(c)(3) (Discussion)
52. MRE 412(d)
53. *MCM* Pt. IV (Discussion) (unnumbered ¶ 7)
54. *MCM* ¶ 10.b.(3)(a)
55. *MCM* ¶ 10.c.(3)
56. *MCM* ¶ 10.e.(5)
57. *MCM* ¶ 23.a.
58. *MCM* ¶ 23.b.(3)
59. *MCM* ¶ 23.c.(3)
60. *MCM* ¶ 23.e.
61. *MCM* ¶ 23.f.(3)
62. *MCM* ¶ 23.f.(6)
63. *MCM* ¶ 29.c.(4)(b)
64. *MCM* ¶ 60.c.(4)(c)(ii)
65. *MCM* ¶ 60.c.(5)(a)
66. *MCM* ¶ 60.c.(5)(b)
67. *MCM* ¶ 60.c.(6)(b)
68. *MCM* ¶ 62.c.(2)(i)
69. *MCM* ¶ 73
70. *MCM* ¶ 76
71. *MCM* ¶ 92.e.
72. *MCM* App. 2
73. *MCM* App. 12
74. *MCM* App. 12A
75. *MCM* 1921
76. *MCM* 1928 (updated to 1943) ¶ 141a
77. *MCM* 1949 ¶ 163a
78. *MCM* 1949 ¶ 163d
79. *MCM* 1951 ¶ 178c
80. *MCM* 1969 (Rev.) ¶ 178c
81. Dep't of the Army Pamphlet 27-9, *Military Judges' Benchbook*, 12 June 2014 (unofficial)
82. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820)

83. *Crowell v. Benson*, 285 U.S. 22 (1932)
84. *Powell v. Alabama*, 287 U.S. 45 (1932)
85. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)
86. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)
87. *Cantwell v. Connecticut*, 310 U.S. 296 (1940)
88. *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519 (1947)
89. *In re Oliver*, 333 U.S. 257 (1948)
90. *United States v. McCoy and Foshee*, 13 C.M.R. 285 (A.B.R. 1953)
91. *United States v. Carey*, 4 C.M.A. 112, 15 C.M.R. 112 (1954)
92. *United States v. Hallett*, 4 C.M.A. 378, 15 C.M.R. 378 (1954)
93. *Bell v. United States*, 349 U.S. 81 (1955)
94. *United States v. Kohlman*, 21 C.M.R. 793 (A.B.R. 1956)
95. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961)
96. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965)
97. *United States v. Sadinsky*, 14 C.M.A. 563, 34 C.M.R. 343 (1965)
98. *United States v. Ortiz*, 15 C.M.A. 505, 36 C.M.R. 3 (1965)
99. *United States v. Presley*, 18 C.M.A. 474, 40 C.M.R. 186 (1969)
100. *United States v. Harrison*, 43 C.M.R. 547 (A.C.M.R. 1971)
101. *United States v. Miller*, 44 C.M.R. 849 (A.C.M.R. 1971)
102. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)
103. *Grayned v. City of Rockford*, 408 U.S. 104 (1972)
104. *Parker v. Levy*, 417 U.S. 733 (1974)
105. *Kolender v. Lawson*, 461 U.S. 352 (1983)
106. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987)
107. *McNally v. United States*, 483 U.S. 350 (1987)
108. *Dole v. Steelworkers*, 494 U.S. 26 (1990)
109. *Crandon v. United States*, 494 U.S. 152 (1990)
110. *Beecham v. United States*, 511 U.S. 368 (1994)
111. *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)
112. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)
113. *United States v. Boyett*, 42 M.J. 150 (C.A.A.F. 1995)
114. *Loving v. United States*, 517 U.S. 748 (1996)
115. *Zurich Ins. Co. v. Lobach*, 1997 U.S. Dist. LEXIS 11709 (E.D. Pa. Aug. 5, 1997)
116. *United States v. Waters*, 158 F.3d 933 (6th Cir. 1998)
117. *Zadvydas v. Davis*, 533 U.S. 678 (2001)
118. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)
119. *United States v. Vaughan*, 58 M.J. 29 (C.A.A.F. 2003)
120. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003)
121. *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003)
122. *Clark v. Martinez*, 543 U.S. 371 (2005)
123. *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005)
124. *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006)
125. *United States v. Williams*, 553 U.S. 285 (2008)
126. *United States v. Santos*, 553 U.S. 507 (2008)

127. *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008)
128. *Skilling v. United States*, 561 U.S. 358 (2010)
129. *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010)
130. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011)
131. *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980 (S.D. Fla. Sept. 19, 2011)
132. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012)
133. *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Hum. Svcs.*, 718 F.3d 488 (5th Cir. 2013)
134. *United States v. Tucker*, 76 M.J. ____, 2017 WL 2274649 (C.A.A.F. 2017) (per curiam).
135. *United States v. Fosdyck*, ARMY 20150617 (A. Ct. Crim. App.) (pending)
136. Robert Batey, *The Vagueness Doctrine in the Roberts Court: Constitutional Orphan*, 80 UMKC L. Rev. 113 (2011)
137. EMANUEL SAMUEL, AN HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY (1816)
138. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. repr. 1920)
139. Peter B. Work, *Misbehavior Before the Enemy: A Reassessment*, 17 AM. U. L. REV. 447(1968)

QUESTIONS PRESENTED

- I. MUST INTENTIONAL MISCONDUCT BE INDEPENDENTLY CRIMINAL IN ORDER TO COME WITHIN ARTICLE 99(3)?
- II. IS THE MISCONDUCT ALLEGED IN THE SPECIFICATION TO CHARGE II CRIMINAL?
- III. IF THE INTENTIONAL MISCONDUCT CLAUSE REACHES CONDUCT THAT IS NOT CRIMINAL, IS IT VOID FOR VAGUENESS AS APPLIED HERE?

SUMMARY OF ARGUMENT

Charge II and its specification must be dismissed. The intentional misconduct clause of Article 99(3) does not reach the acts alleged in the specification because they are not independently criminal.

If, contrary to the governing case law, the clause were read to reach conduct that is not criminal, dismissal would still be required on the alternative ground that the clause is too vague to afford the fair notice required by Fifth Amendment due process and the Sixth Amendment. That vagueness also unacceptably increases the danger of arbitrary enforcement.

The Court should not reach the constitutional issue unless and until it resolves the statutory question against SGT Bergdahl. *See, e.g., United States v. Serianne*, 69

M.J. 8, 10-11 (C.A.A.F. 2010), citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). If there is any doubt as to whether the intentional misconduct clause reaches conduct that is not criminal, the Court should construe it so as to avoid the constitutional issue. *United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011), citing *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Zadvydass v. Davis*, 533 U.S. 678, 689 (2001) (“under the ‘constitutional avoidance canon,’ ‘when an Act of Congress raises “a serious doubt” as to its constitutionality, [courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided’”), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

ARGUMENT

I

CHARGE II AND ITS SPECIFICATION MUST BE DISMISSED BECAUSE THEY FAIL TO STATE AN OFFENSE

Charge II and its specification must be dismissed. They fail to state an offense because the intentional misconduct alleged is not criminal. RCM 907(b)(2)(E).

A

Only acts that are independently criminal come within the intentional misconduct clause

“Misconduct in the presence of the enemy is an extremely serious charge. If the evidence of such misconduct is equivocal, a conviction of the offense cannot stand.” *United States v. Miller*, 44 C.M.R. 849 (A.C.M.R. 1971) (reversing conviction under Article 99(3)).

Article 99 makes criminal—and potentially capital—a list of offenses that occur before or in the presence of the enemy. The list is quite specific: examples include “running away,” Art. 99(1), and “casting away arms and ammunition,” Art. 99(4). Subsection (3) is very rarely charged. It criminalizes “disobedience, neglect or intentional misconduct” before the enemy that endangers a “command, unit, place, or military property.” The subsection must be construed with equal specificity. Moreover, to constitute intentional misconduct within the meaning of Article 99(3), an act or omission must itself be a criminal offense. Thus “intentional misconduct,” is not a reference to the state of mind with which an offense is committed, but an element of the offense itself. For example, ¶ 23.b.(3) of the *Manual* provides that the elements of the offense include: “(b) That the accused *committed* certain ... *intentional misconduct*” (emphasis added).

In 1954, the Court of Military Appeals decided what has proven to be the leading case on the obscure offense proscribed by Article 99(3). In *United States v. Carey*, 4 C.M.A. 112, 15 C.M.R. 112 (1954), the court reviewed the conviction of a tank commander who was found drunk on duty in combat in Korea. The court analyzed each el-

ement of Article 99(3). For purposes of this motion, we limit our inquiry to the court's explanation of the standard of proof for the "intentional misconduct" element.

CMA explained that Article 99, like the balance of the UCMJ, had recently been enacted to legislate clear standards for criminal conduct, which previously were lacking:

It is evident that the guides thus fixed for determining guilt or innocence could be known only to one thoroughly acquainted with the decisions of military tribunals defining from time to time the standard of behavior before the enemy. Recognizing that this was an unsatisfactory method of determining the elements of a capital offense, Congress eliminated from the Uniform Code of Military Justice the general term "misbehaves himself." . . . In Article 99 of the Code, *supra*, the acts constituting misbehavior before the enemy are set out in eight categories. . . . *[T]his Article seeks to particularize the conduct proscribed and to provide clear standards by which violations may be determined.* (emphasis added).

4 C.M.A. at 115, 15 C.M.R. at 115.

The *Carey* court then specifically analyzed the "intentional misconduct" element of Article 99(3) and defined "misconduct" as "a transgression of some established and definite rule of action" and "a violation of definite law." *Id.*

Consistent with this, the court upheld the intentional misconduct element of the appellant's conviction because the listed conduct was independently criminal. "That such intoxication constitutes intentional misconduct there is no doubt, for drunkenness is a violation of Article 134 of the Code, *supra*, 50 USC § 728, and, when it occurs while on duty, it is a violation of Article 112 of the Code, 50 USC § 706." 4 C.M.A. at 116, 15 C.M.R. at 116.

Miller is to the same effect. It reiterated *Carey's* requirements for intentional misconduct in the course of reversing the conviction of a Soldier who played dead during an enemy attack. Chief Judge Hodson, one of the Army's most revered jurists, wrote for a unanimous court:

"Intentional misconduct implies a wrongful intention and not a mere error in judgment." (Para 178c, MCM, 1969 (Rev.)). It contemplates "a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; . . . a violation of a definite law." (*United States v. Carey*, 4 U.S.C.M.A. 112, 15 C.M.R. 112 (1954)), quoting from Manual for Courts-Martial, U.S. Army, 1921.

44 C.M.R. at 852.

Miller rejected the notion that conduct not prohibited by "definite law" could support an Article 99(3) conviction. Although PVT Miller was accused of "playing dead" after

the enemy overran his position, that “is not much different from ‘taking cover’; neither is misconduct, per se. Suffice it to say that we are not convinced beyond a reasonable doubt that the behavior of the accused, under the attendant circumstances, constituted intentional misconduct within the meaning of Article 99 of the Uniform Code of Military Justice (10 U.S.C. § 899).” 44 C.M.R. at 853.

Miller also emphasized the high standard for proof of misconduct in Article 99 offenses:

Misconduct in the presence of the enemy is an extremely serious charge. If the evidence of such misconduct is equivocal, a conviction of the offense cannot stand. (*Compare United States v. Presley*, 18 U.S.C.M.A. 474, 40 C.M.R. 186 (1969); *United States v. Harrison*, 43 C.M.R. 547 (A.C.M.R. 30 Jul 1971); *United States v. McCoy and Foshee*, 13 C.M.R. 285 (ABR 1953).

44 C.M.R. at 853.

Carey and *Miller* were correctly decided and are controlling. Consistent with their holdings, the only two other punitive articles in which “misconduct” appears clearly imply that punishable misconduct must be independently criminal. Thus, the term appears in the caption of Article 105 (Misconduct as prisoner), which, according to Article 105(1), requires “act[ing] without proper authority in a manner contrary to law, custom, or regulation.” According to its caption, Article 120c criminalizes “Other sexual misconduct” and in the body of the provision articulates what that entails, including specific definitions. See Art. 120c(d).

That only conduct that is independently criminal falls within Article 99(3) is also apparent from the *Manual*. Thus, the *Manual* uses the verb “commit” in describing what a member of the armed forces must do to violate any of the statute’s three categories (disobedience, neglect and intentional misconduct). “Commit” connotes the performance of a criminal act. Moreover, the *Manual* employs the term “misconduct” in a variety of contexts, the overwhelming majority of which similarly imply that conduct must be independently criminal to qualify as “misconduct.”² Its only reference to “intended misconduct”—a phrase that plainly resonates with Article 99(3)’s “intentional misconduct”—refers to pillage and plunder. *MCM* ¶ 23.f.(6). The *Manual* explains that that phrase “means to seize or appropriate public or private property unlawfully,” *MCM* ¶ 23.c.(6)(b), which is an offense under Article 121 and/or, depending on the circumstances, Article 122.

² RCM 201(d) (Discussion), 304(c) (Discussion), 304(h)(2)(B)(iii)(b) (and following unnumbered paragraph), 305(l), 1001(g); Military Rule of Evidence (MRE) 412(d); *MCM* ¶¶ 10.e.(5), 23.f.(6) (referring to plunder or pillage as “intended misconduct”), 60.b, 60.c.(4)(c)(ii), 62.c.(2)(i). Another two are unclear as to whether the misconduct to which they refer must be criminal. RCM 1001(f)(2)(A) (“other offenses or acts of misconduct”), 1109(c)(3) (Discussion). Only RCM 109 and 916(b)(2)(B) point in the other direction.

Article 99(3)'s three clauses should be read harmoniously. The first two—disobedience and neglect—both describe offenses under the Code. Arts. 90(2), 91(2), 92(1)-(2), (disobedience), 134(1) (“all disorders and neglects to the prejudice of good order and discipline in the armed forces”); see *United States v. Tucker*, 76 M.J. ___, 2017 WL 2274649 (C.A.A.F. 2017) (per curiam). Under the *noscitur a sociis* canon of construction, the intentional misconduct clause also should be understood, as *Carey* and *Miller* correctly do, to require conduct that is independently criminal.³ See *United States v. Martinelli*, 62 M.J. 52, 61 (C.A.A.F. 2005) (applying *noscitur a sociis* to interpret one clause of a criminal statute in light of two surrounding clauses); *United States v. Ortiz*, 15 C.M.A. 505, 508, 36 C.M.R. 3, 6 (1965) (applying *noscitur a sociis* to interpret Art. 23); see also cases cited in note 3 *supra*.

Were there any doubt about whether “intentional misconduct” should be limited to other penal provisions of the UCMJ, or read more broadly, the rule of lenity would oblige the Court to resolve it in SGT Bergdahl’s favor. *McNally v. United States*, 483 U.S. 350 (1987). A key canon of statutory construction in criminal cases, the rule of lenity provides that “when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language.” *Id.* at 359-60. “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” *Bell v. United States*, 349 U.S. 81, 83 (1955). The rule of lenity applies with particular force where the construction of one criminal statute is a predicate for liability under another. See *Skilling v. United States*, 561 U.S. 358 (2010) (rejecting expansive view of criminal wire fraud statute and noting that wire fraud is a predicate offence for RICO and other criminal liability). Upholding the *vacatur* of a money-laundering conviction, Justice Scalia, writing for the Court, observed that “[w]hen interpreting a criminal statute, we do not play the part of a mind reader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. ‘[P]robability is not a guide which a court, in construing a penal statute, can safely take.’ *United States v. Wiltberger*, 5 Wheat. 76, 105 (1820).” *United States v. Santos*, 553 U.S. 507, 515 (2008).

³ See, e.g., *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 378 (2006) (“The canon, *noscitur a sociis*, reminds us that ‘a word is known by the company it keeps ... and is invoked when a string of statutory terms raises the implication that the ‘words grouped in a list should be given related meaning’”), citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), and *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (the canon of *noscitur a sociis* “counsels that a word ‘gathers meaning from the words around it’”), citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well”).

In short, if the Court finds that Congress has not “spoken in clear and definite language” here, the rule of lenity would require that Article 99(3) be read to require that the government charge “a violation of a definite law.” *Miller*, 44 C.M.R. at 852.

Finally, it would be harsh and an act of legal alchemy to allow an offense that is potentially capital to turn on underlying conduct *that is not independently criminal*. Cf. *United States v. Sadinsky*, 14 C.M.A. 563, 565, 34 C.M.R. 343, 345 (1965) (Art. 134 is “not such a catchall as to make every irregular, mischievous, or improper act a court-martial offense”). To allow non-criminal acts or omissions to satisfy the intentional misconduct clause would transform Article 99(3) into a super-General Article—wrong in itself given *Carey* and *Miller*, but doubly wrong because the effect would be to expose members of the armed forces to maximum punishments far in excess of those the President has prescribed for Article 134 offenses. Compare *MCM* App. 12, at A12-2 with *id.* at A12-6 to A12-7. (The harshest maximum punishment prescribed for an Article 134 offense is the LWOP maximum for kidnapping. *MCM* ¶ 92.e.)

Carey and *Miller* had it right. If there were any textual ambiguity, their restrictive reading resolves it. Any other approach would not only offend *stare decisis* but trigger the significant vagueness issue examined in Point II *infra*. The canon of constitutional avoidance thus provides a further reason for holding that only conduct that is independently criminal can bring a case within the intentional misconduct clause. *Fosler*, *supra*, citing *Clark v. Martinez*, *supra*.

B

The acts alleged in the specification are not independently criminal

The specification alleges intentional misconduct in three respects: (1) that SGT Bergdahl left OP Mest alone; (2) that he left without authority; and (3) that he wrongfully caused search and recovery operations. These allegations—separated in the specification by semicolons—are independent of one another: There is no implication that the third was the result of the first two.⁴ Had that been the drafter’s intent, the semicolons

⁴ *E.g.*, *Elgin Nursing & Rehab. Ctr. v. U.S. Dep’t of Health & Hum. Svcs.*, 718 F.3d 488, 494-95 (5th Cir. 2013) (“Clauses separated by a semicolon are ‘presumed to be independent clauses’”) (citations omitted); *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4368980, at *1 (S.D. Fla. Sept. 19, 2011) (assigning independent meaning to words separated by a semicolon and reasoning that “[t]his is because a semicolon stops the forward movement of a statement, whereas a colon marks forward movement. Therefore, the semicolon suspends the [first] thought ... and begins a new thought”) (internal quotation and citation omitted); *Zurich Ins. Co. v. Lobach*, 1997 U.S. Dist. LEXIS 11709 at *8-9 (E.D. Pa. Aug. 5, 1997) (finding that semicolons serve to separate clauses into distinct paragraphs that must be read as separate categories); *United States v. Waters*, 158 F.3d 933, 937 (6th Cir. 1998) (noting that the title of a statute regarding the authority of magistrate judges contained a semicolon which served to separate that authority into two distinct areas).

would have been commas and the word “thereby” would have appeared before the word “wrongfully.” Even if the specification’s three allegations are read together or in combination, they would still not plead an offense under the Code or any violation of a definite law. Because, as explained in Point I(A), only conduct that is otherwise criminal—such as the drunkenness referred to in the only sample specification for Article 99(3) intentional misconduct, see *MCM* ¶¶ 73, 76—can satisfy the intentional misconduct clause, none of the three allegations states an offense. The specification and Charge must therefore be dismissed.

The specification’s first allegation does not state any known military or civilian criminal offense. It does not claim that it was disobedient for SGT Bergdahl to leave OP Mest alone and nothing in it invokes Article 99(3)’s disobedience clause even by implication. Indeed, under the *expressio unius* canon, *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001), the specification’s explicit reliance on the intentional misconduct clause implies non-reliance on either of the others. See AE 29, at 3 ¶ 5 (“misbehavior was charged as intentional misconduct rather than some negligent act”). The government elected to plead as it did and must be held to that choice.

The second allegation, that SGT Bergdahl left without authority, similarly does not state an offense: it does not plead either the first AWOL element (SGT Bergdahl’s unit and the unit at which he was required to be) or the third (duration), both of which are essential. *MCM* ¶¶ 10.b.(3)(a), (c). It also does not assert that he was required to be at some particular place. See *United States v. Kohlman*, 21 C.M.R. 793, 794 (A.B.R. 1956), discussed in Major Wayne Anderson, *Unauthorized Absences*, *Army Lawy.*, June 1989, at 3, 7 & nn.45-47. Finally (and dispositively), because simple AWOL is not a specific intent offense, *MCM* ¶ 10.c.(3), it cannot, by definition, constitute *intentional* misconduct.

Article 99(3) is not a license to repackage (with far more severe penalties) what would otherwise be defective specifications. Just as the preemption doctrine bars the use of Article 134 to create new kinds of offenses by dispensing with some required element, see *MCM* ¶ 60.c.(5)(a), so too, the intentional misconduct clause is not a convenient way to sweep into the draconian Article 99(3) absence-type offenses beyond those expressly provided for elsewhere in Article 99. Articles 99(1), 99(2), 99(5) and 99(6) already cover those who commit before-or-in-the-presence-of-the-enemy absence offenses, whether by running away, abandoning a unit, or quitting their place of duty (limiting the latter to those who do so “to plunder or pillage”). That those offenses sound in absence (among other things) is confirmed by the fact that the *Manual* recognizes Article 85 LIOs for violations of Articles 99(1) and 99(5), as well as Article 86 LIOs for violations of Articles 99(1) and 99(6). *MCM* App. 12A, at A12A-2. The absence of either a desertion LIO or an AWOL LIO for Article 99(3) offenses, see *id.*, speaks volumes and shows that the government is attempting here to have Article 99 do significantly more and different work than Congress or the President intended. If those responsible for the *Manual* had thought unauthorized absence (or, as here, some imperfect approximation thereof) was a permissible trigger for a violation of Article 99(3), Appendix 12A would have listed it.

It is also pertinent that the President, in exercising his authority under Article 56, has not specified an aggravating factor that increases the maximum permissible punishment for AWOLs that are committed “before the enemy.” See *MCM* Pt. IV, at IV-1 (Discussion) (unnumbered ¶ 7). It would represent a grave abuse of Article 99(3) to permit the government to transform an offense for which the President has prescribed a maximum punishment of a DD and a year’s confinement (there being no allegation that the absence of which the specification to Charge II accuses SGT Bergdahl was terminated by apprehension) into one for which the death penalty (in theory) or confinement for life without parole (in fact) are permissible.

The third allegation—wrongfully causing search and recovery operations—is not an offense under any punitive article, either specifically or as a listed offense under Article 134. Nor can it stand duty as an unlisted Article 134 offense: among other things, it does not include a terminal element, and the Court cannot infer one, despite the use of the word “wrongfully” in this part of the specification. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), discussing *Fosler*, *supra*, at 234.⁵ It would be an undeserved bonanza for the government (and a “double whammy” for the defense) to permit what is in effect a new unlisted Article 134 offense to be smuggled into military jurisprudence (1) without prior notice, see *generally* Point II *infra*, (2) without a terminal element, and (3) thereby expose the accused to a higher maximum punishment than anything allowed under Article 134. The *Manual* specifically forbids imposition of the death penalty for Article 134 offenses. *MCM* ¶ 60.c.(5)(b). Allowing the third allegation would thus, on top of everything else, wreak havoc with the overall scheme of the punitive articles and the system of maximum punishments.⁶

Finally, Congress dealt with *false* alarms in Article 99(7). It would be more than a little strange if causing *un>false* alarms were dealt with by the Code all along, but elsewhere and *sub silentio*. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 422 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language”). It would also serve as an unwelcome precedent, and could adversely affect recovery operations if those operations themselves became an occasion for criminal charges against recovered personnel.

⁵ CMA long ago held, in a related context, that “[n]o room is left in this area for the application of Article 134.” *United States v. Hallett*, 4 C.M.A. 378, 382, 15 C.M.R. 378, 382 (1954). If the General Article cannot be used directly to cure an otherwise defective Article 99 specification, it should not be permitted to do the same thing through the back door of the intentional misconduct clause.

⁶ A further defect is that the specification mistakenly treats this third allegation as a distinct act of intentional misconduct when it is at worst the indirect and non-proximate fallout of the first two. The specification thus reflects a kind of intra-specification unreasonable multiplication of charges for which we have found no precedent.

The specification to Charge II simply doesn't state an offense.

II

IF MISCONDUCT NEED NOT BE INDEPENDENTLY CRIMINAL
TO COME WITHIN THE INTENTIONAL MISCONDUCT CLAUSE,
THE CLAUSE DOES NOT AFFORD FAIR NOTICE

A

Fair notice is required for criminal offenses

Courts deem criminal statutes enforceable only where the measure (1) gives the defendant adequate notice of conduct that is prohibited, and (2) is read so as to limit the risk of arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352 (1983). “[D]ue process requires that a person have fair notice that an act is criminal before being prosecuted for it.” *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003), quoted in *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).⁷ Under the Due Process Clause of the Fifth Amendment, “no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Sixth Amendment jurisprudence requires that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation. *E.g.*, *In re Oliver*, 333 U.S. 257, 273 (1948) (right to reasonable notice of charges); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (due process requires notice of essential elements).

In *Parker v. Levy*, 417 U.S. 733 (1974), the Supreme Court upheld Articles 133 and 134 against a vagueness challenge. In doing so, the majority relied on the fact that the Court of Military Appeals and other military authorities (the *Manual* and Col. Winthrop’s MILITARY LAW AND PRECEDENTS (“WINTHROP”)) had “narrowed the very broad reach” of the statutory provisions and “supplied considerable specificity by way of examples of the conduct which they cover.” *Levy, supra*, at 754. The Court observed that regardless of any imprecision, Dr. Levy’s actions doubtless fell within the two general articles, and, in fact, the government charged his misconduct properly within these punitive articles. *Id.* at 754-55. “Levy had fair notice from the language of each article that

⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . .

the *particular conduct* which he engaged in was punishable.” *Id.* at 755. (emphasis added).

Levy provides the standard for analyzing vagueness claims in military criminal law. “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.” *Id.* at 756. The Court prescribed the following standard of review: “... [B]ecause of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs...”. *Id.*

The Court of Appeals has applied the *Levy* standard to hold that vagueness challenges are overcome when an accused is on notice that certain specific conduct is prohibited. It held in 1995 that a prohibition against officers dating enlisted members was not void for vagueness because the accused’s pre-commissioning education emphasized a custom against officers dating enlisted, and he had twice been counseled by his squadron commander about potential disciplinary action for such activity. *United States v. Boyett*, 42 M.J. 150, 154 (C.A.A.F. 1995). A few years later, the court held that an order not to speak with civilians in the galley was sufficiently clear, specific, and narrowly drawn in the circumstances, and hence was not unconstitutionally vague and indefinite. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003).

Under these settled principles, the intentional misconduct clause of Article 99(c) is unconstitutional as applied.

B

The intentional misconduct clause does not provide fair notice and presents an intolerable risk of arbitrary enforcement

A “penal statute [must] define the criminal offense ... in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 357; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965). Statutes that are “so standardless that [they] authoriz[e] or encourag[e] seriously discriminatory enforcement” are unenforceable for vagueness. See *United States v. Williams*, 553 U.S. 285, 304 (2008). As the Supreme Court said in *Grayned*, “laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.” 408 U.S. at 109.

Arbitrary and discriminatory enforcement by prosecutors raises concerns that “legislatures have an incentive to draft broad criminal statutes, leaving the tough charging decisions (and any consequent political fallout) to prosecutors.” Robert Batey, *The*

Vagueness Doctrine in the Roberts Court: Constitutional Orphan, 80 UMKC L. Rev. 113, 133 & n.174 (2011). “[T]he vagueness doctrine is an important check on that tendency. So rather than being a sterile exercise in determining what Professor Jeffries calls “lawyer’s notice,” applying the vagueness doctrine is a significant aspect of maintaining even-handedness in law enforcement.” *Id.* (footnotes omitted).

Defining “intentional misconduct,” without meaningful guidance from Congress, as something less than conduct affirmatively proscribed elsewhere by the UCMJ encourages arbitrary enforcement. On the other hand, limiting “misconduct” to what clearly has been defined as misconduct in like cases might permit enforcement. See *Skilling*, 561 U.S. at 407-09 (by construing the federal mail fraud statute to be limited to “bribes and kickbacks,” statute could be deemed non-arbitrary because prosecutions would lie only where precedent clearly established that wrongdoing was present).

That the intentional misconduct clause is too vague to provide fair notice if it reaches conduct that is not independently criminal is hardly surprising. After all, it is directly descended from a provision that was a source of concern for undue vagueness as far back as 200 years ago:

The early vagueness in the law was believed by one authority to have been purposeful in order that all forms of misbehavior might be included with the task left to the court of assigning to each an appropriate sentence. This philosophy was decried from the very beginning. As Samuel put it: “It is to be wished, that the culpable behaviour, falling within the penalty of this Article, has been set forth with more particularity. For, the general manner in which the crime is here described, it is impossible to form any precise notion of the act or acts, which may be conceived to constitute it.”⁸

The specification to Charge II invokes Article 99(3)’s third category: intentional misconduct. The UCMJ does not define the term. All a reader can infer from the statutory text is that it means (1) something intentional, and, to avoid impermissible surplusage, see *Crandon v. United States*, 494 U.S. 152, 171 (1990) (“It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect”), and (2) something other than “disobedience” or “neglect.” What that “something” is Congress has never revealed.

⁸ Peter B. Work, *Misbehavior Before the Enemy: A Reassessment*, 17 AM. U. L. REV. 447, 449 & n.14 (1968) (footnotes omitted), quoting EMANUEL SAMUEL, AN HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY 593 (1816). (Judge Samuel was President of the Court of Criminal Justice in Berbice (later British Guiana). We are grateful for the intrepid research assistance of John Nann and Julian Aiken of the Yale Law Library.) The pertinent page from Judge Samuel’s book is attached, along with other cited materials to which the Court may not have ready access.

C

The Manual and case law do not provide fair notice

Unless it is read as limited to criminal offenses, the intentional misconduct clause does not provide fair notice. Whether or not the President could have cured that constitutional defect through an exercise of his rule making power, see *Loving v. United States*, 517 U.S. 748 (1996); Art. 36(a), he has not done so. Unlike the Code, the *Manual* at least pretends to explain what conduct is encompassed within Article 99(3). But that explanation is backhanded and unhelpful: it states only what kind of conduct does *not* fall within it, *i.e.*, “mere error[s] in judgment.” *MCM* ¶ 23.c.(3)(b).⁹

One could look to the sample specifications as a source of guidance, but they too are no help. The *Manual* includes the following Article 99(3) sample specifications:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20__, (before) (in the presence of) the enemy) endanger the safety of _____, which it was his/her duty to defend, by (disobeying an order from _____ to engage the enemy) (neglecting his/her duty as a sentinel by engaging in a card game while on his/her post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) (_____).

MCM ¶ 23.f.(3).

Thus, the only guidance the sample specifications provide for the intentional misconduct subset of Article 99(3) offenses is that the clause applies to personnel who become drunk and fire flares, thus revealing the location of their unit, and the utterly open-ended “(_____).” See also note 10 *infra*. By not mentioning the mandate of *Carey* and *Miller* that intentional misconduct must be independently criminal, the sample specification could mislead prosecutors who look no further than the *Manual* when drafting charges into believing that they are only limited by their ingenuity in charging intentional misconduct under Article 99(3). The *Manual* is just one source of several for guidance on the punitive articles and does not take the place of case law or historical practice. “The Government also argues that the silence of the *MCM* should be interpreted to constitute adoption of historical practices. However, there is no clear indication from Con-

⁹ *MCM* 1951 ¶ 178c explained that “[i]ntentional misconduct implies a wrongful intention and not a mere error in judgment.” See also *MCM* 1949 ¶ 163d (“mere error of judgment”) (emphasis added). Even if, despite the precedents, the intentional misconduct clause were read to cover noncriminal conduct, and—contrary to what we have argued—were found to afford fair notice, SGT Bergdahl’s actions would come within the “error in judgment” exception and preclude a finding of guilty to the specification to Charge II. That question is not before the Court. We respectfully reserve the right to submit a specially-drafted instruction concerning the exception in the event this motion is denied.

gress--expressed in the text of the UCMJ or otherwise--that it intended to do so.” *Fosler, supra*, at 231-32. Nor is it possible to tease some inferential meaning out of the single LIO the *Manual* identifies for Article 99(3) offenses, since it makes no reference to intentional misconduct, referring instead simply to Article 92. See *MCM* at A12A-2. Article 92 covers orders violations and dereliction, thus connecting with the other two clauses of Article 99(3), but not the one of interest here.

Even if the *Military Judges’ Benchbook* were deemed an effective source of notice to military personnel—a proposition that is highly doubtful since the publication is directed at military judges and counsel rather than non-legal personnel. In any event, it offers no additional guidance to anyone—judge, lawyer or layperson—on the meaning of the intentional misconduct clause. Similarly, Col. Winthrop’s respected 19th century treatise is limited help, for two reasons. First, the “misconduct” clause did not find its way into American military justice legislation on misbehavior before the enemy until 1920. Second, the word “intentional” was not added until Congress enacted the UCMJ in 1950. As a result, it is impossible to draw any clarifying comfort from some age-old body of criminal law of which all military personnel, even junior enlisted personnel such as SGT Bergdahl (a Private at the time of the alleged offenses), are deemed to be on notice.

Nonetheless, the history is instructive. Article of War 75 of 1920 (the antecedent of Article 99) referred to “any misconduct, disobedience or neglect.” Earlier versions referred even more broadly to misbehaving before the enemy. British AW art. XII of 1774; Additional AW 10 of 1775; AW of 1776, § III, art. 12; AW 52 of 1806; AW 42 of 1878 (WINTHROP 940, 960, 966, 981, 989); see also AW 75 of 1916, 39 Stat. 619, 650, 662 (1916) (“misbehaves”). When the UCMJ was under consideration, the Judge Advocate General of the Army attempted without success to preserve the old (and indefensibly vague) language. Work, *supra*, at 449. But the fact that the legislative trend over the last 200 years has been one of narrowing¹⁰ does not mean that the intentional misconduct clause invoked in the specification to Charge II meets constitutional standards. These too have changed over time, and despite minor progress in 1920 and again in 1950, Article 99(3) has not caught up with those standards. Even as narrowed over time, the misconduct clause still does not provide the requisite notice if the acts included therein need not be independently criminal.

¹⁰ Although the caption of Article 99 continues to refer broadly to misbehavior, it is the text of Article 99(3) that controls, *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528 (1947) (“headings and titles are not meant to take the place of the detailed provisions of the text”); *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008) (“section headings . . . are not part of the statute”), and the text narrows and channels the predecessor endangerment provision. This is confirmed by pre-Code Army *Manuals*. See *MCM* 1949 ¶ 163a (misbehavior “is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms”); *MCM* 1928 (updated to 1943) ¶ 141a (same).

Pre-UCMJ case law does not illuminate the meaning of intentional misconduct because the Articles of War never employed that term, and Article 99 cases of any kind are rare; Article 99(3) has been invoked even less frequently; and intentional misconduct clause cases are essentially unheard of.¹¹

Writing in the 19th century, Col. Winthrop assembled a considerable list of acts by officers and Soldiers that came within AW 52 of 1806:

[1] refusing or failing to advance with the command when ordered forward to meet the enemy; [2] going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; [3] hiding or seeking shelter when properly required to be exposed to fire; [4] feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; [5] refusing to do duty or to perform some particular service when before the enemy.

WINTHROP at 623 (footnotes omitted; bracketed numbering added). Nothing in this litany corresponds even remotely to the three matters the specification pleads as intentional misconduct.

In sum, neither the sparse cases since 1951 nor those arising under the AWs can plausibly be said to have afforded SGT Bergdahl fair notice that the conduct cited in the specification to Charge II violated Article 99(3). That charge—one that was never suggested in MG Dahl's AR 15-6 report but suddenly appeared in the Charge Sheet—goes beyond mere aggressive pleading in a case that has been highly politicized from Day One. The government unfairly invoked a virtually unheard of clause tucked into a rarely invoked paragraph of an obscure punitive article that, viewed as a whole, seeks to punish entirely different kinds of conduct. In doing so, it failed to follow the rule of *Carey* and *Miller* that intentional misconduct must be independently criminal in order to fall within Article 99(3). Fair notice and the danger of arbitrary application become especially critical where the potential sanctions are draconian. That is certainly the case with

¹¹ A 1968 survey of 45 Article 99 cases from the Korean War turned up only one—involving drunkenness on duty—that arose under Article 99(3). Work, *supra*, at 452. Capt. Work's article properly stresses the capricious use of Article 99 in general and the fact that because of the varieties of conduct that can be charged under Article 99, the risk of unfairly stigmatizing an offender as a coward is high. *Id.* at 451-53. The Court of Appeals' *Opinion Digest*, http://www.armfor.uscourts.gov/newcaaf/opinions_digest.htm, which covers decisions since 2 October 1998, includes not a single case arising under any part of Article 99. An intentional misconduct clause case is currently in briefing before the Army Court. The Article 99(3) specification in *United States v. Fosdyck*, ARMY 20150617 (A. Ct. Crim. App.) (pending), is, as far as we can determine, similarly defective. In any event, *Fosdyck* is not a source of fair notice for this case since the bespoke non-offense at issue there did not even occur until years after the one pleaded in the specification to Charge II.

Article 99. But even if the standard for fair notice were precisely the same for simple disorders and potential capital cases, the intentional misconduct clause in particular, and as used in this case, does not afford that notice. Since it is the sole basis for the specification to Charge II, that specification and Charge should be dismissed.

CONCLUSION

For the foregoing reasons, Charge II and its specification should be dismissed.



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Civilian Defense Counsel

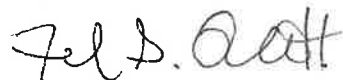
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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Motion to Dismiss to the Court and Trial Counsel on 31 May 2017.



LTC FRANKLIN D. ROSENBLATT

Zurich Ins. Co. v. Lobach

United States District Court for the Eastern District of Pennsylvania

August 4, 1997, Decided ; August 5, 1997, FILED

C.A. NO. 97-3281

Reporter

1997 U.S. Dist. LEXIS 11709 *; 1997 WL 535185

ZURICH INSURANCE COMPANY VS. TAMMY
LOBACH

Disposition: [*1] Motion of the defendant for summary judgment GRANTED. Judgment entered in favor of the defendant and against the plaintiff.

Counsel: For ZURICH INSURANCE COMPANY,
PLAINTIFF: JAMES C. HAGGERTY, SWARTZ,
CAMPBELL & DETWEILER, PHILADELPHIA, PA USA.

For TAMMY LOBACH, DEFENDANT: JAMES T.
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Judges: WEINER, J.

Opinion by: CHARLES R. WEINER

Opinion

MEMORANDUM OPINION AND ORDER

WEINER, J.

AUGUST 4, 1997

The plaintiff brought this declaratory judgment action, seeking a declaration that it is not obligated to provide underinsured motorist benefits to defendant in connection with the injuries she sustained in a motor vehicle accident which occurred on August 3, 1990. Presently before the Court is the motion of the defendant to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Since resolution of the motion requires us to consider matters beyond the pleadings, we will construe the motion as one for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons which follow, the motion is granted.

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most [*2] favorable to the non-moving

party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340-41 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Williams v. Borough of Chester*, 891 F.2d 458, 460 (3d Cir. 1989). To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins.*, 824 F.2d 277, 280 (3d Cir. 1987). Following such a showing, the non-moving party must present [*3] evidence through affidavits or depositions and admissions on file which comprise of a showing sufficient to establish the existence of every element essential to that party's case. *Celotex*, 477 U.S. at 323. If that evidence is, however, "'merely colorable' or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co. v. C.I.T. Financial Corp.* 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 477 U.S. at 249-50).

Defendant seeks underinsured benefits pursuant to an Antique and Classic Auto Policy ("the Policy") issued by the plaintiff to Charles F. Lobach. Charles Lobach is the father of defendant. The Policy provides coverage for underinsured motorist benefits for injuries arising out of the maintenance or use of an antique or classic automobile insured under plaintiff's Antique and Classic Auto Policy. Plaintiff contends that defendant is not entitled to underinsured motorist benefits under the Policy because her injuries did not arise from any operation, maintenance or use of any antique or classic automobile insured by the plaintiff to Charles Lobach.

In her motion to dismiss, defendant argues that this action must [*4] be dismissed because the issue of whether she is

entitled to underinsured motorist benefits must be submitted to arbitration pursuant to an arbitration clause in the policy. That clause provides:

If we and an "insured" do not agree:

1. whether that person is legally entitled to recover damages from the owner or operator of an "underinsured motor vehicle"; or
 2. As to the amount of damages;
- either party may make a written demand for arbitration. Arbitration shall be conducted in accordance with the provisions of the Pennsylvania Uniform Arbitration Act...

Complaint, Exhibit A, Underinsured Motorist Coverage-Pennsylvania (Stacked) Schedule, Page 4 of 5.

The parties agree that Pennsylvania law governs. "Under Pennsylvania law, the determination of whether an issue must be submitted to arbitration depends on two factors: (1) whether the parties entered into an agreement to arbitrate, and (2) whether the dispute falls within the scope of that agreement." *Nationwide Insurance Company of Columbus, Ohio v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991). The only issue in dispute here is whether the dispute between plaintiff and defendant over defendant's entitlement [*5] to underinsured benefits falls within the scope of the arbitration agreement.

In interpreting a clause substantially similar to the one at issue here ¹, our Court of Appeals in *Patterson*, stated:

In sum, under the current state of Pennsylvania law, the arbitration provision at issue here includes the dispute over whether Patterson is entitled to underinsured motorist coverage under her insurance contract with Nationwide. We reach this conclusion based on the Pennsylvania Supreme Court's decision in *Brennan [v. General Accident Fire and Life Assurance Corporation*, 524 Pa. 542, 574 A.2d 580 (1990)] which, in interpreting an arbitration clause very similar to the one here, stated "[a] review of the language of the arbitration clause reveals that arbitration is mandated whenever the insured and the insurer disagree as to when a party is legally entitled to recover damages." 574 A.2d at 583.

Patterson, 953 F.2d at 49.

[*6] Plaintiff contends that *Patterson* and *Brennan* are inapplicable because there was no dispute that the person

seeking benefits was either a "covered person" or an "insured". Plaintiff argues that defendant in this case is not an "insured" since she was not occupying a vehicle covered under the antique and classic auto policy at the time of the accident. Since defendant is not an "insured", plaintiff contends that the arbitration clause is inapplicable.

The Policy, however, defines an "insured" as

1. You or any "family member";
2. Any other person "occupying" "your covered auto".
3. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.

Complaint, Exhibit A, Underinsured Motorist Coverage Pennsylvania (Stacked) Schedule, Page 1 of 5.

The parties do not dispute that defendant is the daughter of policy holder Charles Lobach. As the daughter of policy holder Charles Lobach, defendant clearly is a "family member" and therefore an "insured" under paragraph one of the definition of an "insured" in Charles Lobach's policy with plaintiff. Since the [*7] insurer (plaintiff) and the insured (defendant) disagree as to whether the insured is entitled to underinsured motorist coverage under defendant's father's contract with plaintiff, the tenets of *Patterson* and *Brennan* mandate that this matter must proceed to arbitration.

Plaintiff directs our attention to a decision from the Superior Court of Pennsylvania, *St. Paul Mercury Ins. Co. v. Corbett*, 428 Pa. Super. 54, 630 A.2d 28 (1993) (en banc), which involved interpretation of an antique auto policy very similar to the one in the case *sub judice*. Specifically, plaintiff directs our attention to the manner in which the Superior Court interpreted the provision in the policy which defined the term "covered person". The policy in *Corbett* defined "covered person" as follows:

"Covered person" as used in this endorsement means:

1. You or any **family member**.
2. Any other person **occupying your covered auto**.
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2 above.

630 A.2d at 31 (emphasis in original). Thus, the antique [*8] policy in *Corbett* defined the term "covered person" in the exact manner as the policy *sub judice* defines an "insured".

For some reason, however, the majority in *Corbett* ignored the punctuation in the definition of "covered person" and

¹The arbitration provision at issue in *Patterson* provided that if the insurance company and the insured "do not agree about the insured's right to recover damages or the amount of damages," the dispute will be submitted to arbitration. 953 F.2d at 46.

concluded that "paragraph one and paragraph two must be read together." 630 A.2d at 31. The majority went on to state that "in so doing, the phrase "occupying your covered auto" clarifies both "you or any family member" and "any other person." *Id.* Plaintiff urges us to follow *Corbett* and conclude that paragraphs one and two of the definition of an "insured" in the policy *sub judice* must also be read together. Reading both paragraphs together, claims plaintiff, results in the conclusion that defendant is not an "insured" since she was not occupying a covered auto at the time of the accident. Since defendant would not be an insured under this interpretation, plaintiff argues that the arbitration provision would not apply.

CHARLES R. WEINER

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We decline to follow *Corbett*. There are semi-colons after paragraphs one and two of the definition of an "insured" in the policy *sub judice* just as there were periods after paragraphs one and two of the [*9] definition of "covered person" in the policy in *Corbett*. Unlike the majority in *Corbett*, we elect not to ignore these punctuation marks. The presence of the semi-colons means that paragraphs one and two are to be considered as separate categories rather than as one category. If the drafters of the policy had intended the latter, they would have inserted commas after paragraphs one and two rather than semi-colons. In addition, as the dissent makes clear in *Corbett*, the distinct nature of paragraphs one and two is evidenced by paragraph three which states that an insured includes those persons described in 1. *or* 2. above. "If the clauses were meant to be read together,? paragraph three would state that coverage applies to persons described in both 1. *and* 2. It does not." 630 A.2d at 34.

We conclude today only that defendant is an "insured" as that term is defined in Charles Lobach's policy. The question of whether defendant is entitled to underinsured motorist benefits under that policy must be referred to arbitration. The motion of the defendant for summary judgment is granted.

ORDER

The motion of the defendant to dismiss is construed as a motion for summary [*10] judgment.

The motion of the defendant for summary judgment is GRANTED.

Judgment is entered in favor of the defendant and against the plaintiff.

The conference call scheduled for August 6, 1997 is cancelled.

IT IS SO ORDERED.

2011 WL 4368980

Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

Ray WILLIAMS, et al., Plaintiffs,

v.

WELLS FARGO BANK N.A., et al., Defendants.

No. 11-21233-CIV.

Sept. 19, 2011.

Attorneys and Law Firms

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ORDER

CECILIA M. ALTONAGA, District Judge.

*1 THIS CAUSE came before the Court on Defendants, QBE First Insurance Agency Inc.'s ("QBE First[s]") Motion to Dismiss ("QBE Motion") [ECF No. 47]; and Wells Fargo Insurance Inc.'s ("WFI[s]") Motion to Dismiss ("WF Motion") [ECF No. 48], both of which were filed on August 19, 2011. The Motions seek dismissal of the claims asserted in the Amended Complaint [ECF No. 44] filed by Plaintiffs, Ray Williams, Luis Juarez, and Migdaliah Juarez (collectively, "Plaintiffs") on behalf of

themselves and all others similarly situated. Plaintiffs filed their Response to the QBE Motion ("QBE Response") [ECF No. 58] and their Response to the Wells Fargo Motion ("WF Response") [ECF No. 57] (collectively, "Responses") on September 6, 2011. WFI [ECF No. 71] and QBE First [ECF No. 75] filed their Reply memoranda on September 16, 2011. The Court has considered the parties' written submissions and applicable law.

I. BACKGROUND¹

This putative class-action lawsuit involves "force-placed insurance." (Am.Compl. ¶ 2). Plaintiffs are homeowners whose property-insurance policies lapsed and who were subsequently charged for force-placed insurance. (*See generally id.*). Defendant, Wells Fargo Bank, N.A. ("Wells Fargo Bank"), is a national bank registered to do business in the State of Florida and is the successor in interest and/or assign of Wachovia as to all of Wachovia's home mortgages. (*See id.* ¶ 4). Defendant, WFI, is a division of Wells Fargo Bank, which Plaintiffs claim "exists only to collect kickbacks or commissions related to the force-placed insurance policies." (*Id.* ¶ 34).² Defendant, QBE Specialty Insurance Co. ("QBE Specialty"), is a surplus-line insurance provider doing business in the State of Florida. (*See id.* ¶ 6). QBE First is a "managing general agent/surplus-line insurance broker" that Plaintiffs claim "exists only to provide kickbacks and/or collect excessive commission related to the force-placed insurance policies." (*Id.* ¶ 7).³

1. General Allegations

Each mortgage at issue is owned and/or serviced by Wells Fargo and requires borrowers to maintain insurance on their real property. (*See id.* ¶ 17). If a borrower fails to maintain the requisite insurance, the mortgage servicer may forcibly place insurance on the property. (*See id.*). In other words, once an insurance policy lapses, the mortgage servicer can purchase insurance for the home, "force-place" it, and then charge the borrower the full cost of the premium. (*Id.* ¶ 18).

According to Plaintiffs, the premiums charged on the force-placed loans at issue in this case "are not

the actual amount that Wells Fargo pays, because a substantial portion of the premiums are refunded to Wells Fargo through various kickbacks and/or unwarranted commissions.” (*Id.*). To accomplish the forced placement, Wells Fargo enters into an exclusive arrangement with QBE to be the sole insurance provider for all force-placed policies. (*See id.* ¶ 19). Under this arrangement, QBE has access to and searches Wells Fargo's database to find lapsed insurance policies. (*See id.* ¶ 26). Then, QBE writes to the homeowners to notify them of the force-placed coverage and charges exorbitant rates to Plaintiffs, who have no way of refusing the force-placed charges. (*See id.*). The premiums are well in excess of those which can be obtained in the open market, generally costing at least five to six times—and up to ten times—more than what the borrower was either originally paying or what the borrower could obtain in the open market. (*See id.* ¶¶ 19, 20). Force-placed insurance is also applied retroactively for periods of time in the past where coverage has lapsed. (*See id.* ¶ 31).

*2 Wells Fargo receives commissions or kickbacks from the force-placed insurance companies or insurance brokers once one of the force-placed insurance policies is purchased. (*See id.* ¶ 23). The commission or kickback is paid by QBE to Wells Fargo in order to maintain the preexisting uncompetitive and exclusive relationship, to induce Wells Fargo to purchase excessively-priced force-placed insurance policies, and to cause Wells Fargo not to seek competitive bids in the market. (*See id.* ¶ 25). As a result of this arrangement, Wells Fargo and QBE have reaped significant profits. (*See id.* ¶ 22). Plaintiffs allege these practices constitute bad faith and are unconscionable. (*See id.* ¶ 32).

2. Plaintiff Ray Williams

Plaintiff Ray Williams (“Mr. Williams”) “obtained a mortgage from Wachovia Bank, which has a mortgage balance of approximately \$85,000” and is serviced by Wells Fargo. (*Id.* ¶ 38). From the inception of the mortgage until October 17, 2010, Mr. Williams maintained, in full force and effect, the insurance required by the mortgage contract. (*See id.* ¶ 39). On October 17, 2010, however, the insurance policy lapsed. (*See id.*).

Mr. Williams's insurance had lapsed for less than 30 days when, on November 15, 2010, Mr. Williams secured new insurance for the property. (*See id.* ¶ 40). Thereafter, Wells Fargo, “without seeking competitive bids on the open market or attempting to re-establish Mr. Williams's prior insurance,” used QBE to obtain “surplus-lines force-placed insurance” for Mr. Williams's property. (*Id.* ¶ 41). On December 27, 2010, Wells Fargo notified Mr. Williams “that it was retroactively force-placing an insurance policy on the property for the approximate 30-day lapsed period and adding the cost of the premium to his mortgage loan.” (*Id.* ¶ 42). The cost of the premium totaled approximately \$1,743.00 for the 30-day lapsed period, amounting to nearly six times the amount of the monthly premium ordinarily paid by Mr. Williams. (*See id.* ¶ 43).

3. Plaintiffs Luis Juarez and Migdaliah Juarez

Plaintiffs Luis and Migdaliah Juarez obtained a mortgage from Wachovia Bank secured by a parcel of real property, which was serviced by Wells Fargo. (*See id.* ¶ 45). Mr. and Mrs. Juarez maintained an insurance policy on the property, as required by the mortgage contract; however, the policy lapsed. (*See id.* ¶ 46). Wells Fargo, “without seeking competitive bids on the open market or attempting to re-establish [the Juarezes'] prior insurance,” contracted with QBE to obtain “surplus-line, force-placed[] insurance” for Mr. and Mrs. Juarez's property. (*Id.* ¶ 48). On July 16, 2010, Wells Fargo notified the Juarezes that it was force-placing an insurance policy on them for the period of March 3, 2010 to March 3, 2011. (*See id.* ¶ 49). Despite being purchased in July 2010, the insurance policy was backdated over four months to March 3, 2010, notwithstanding the fact that there was no damage to the property or claims arising out of the property for that four-month period. (*See id.* ¶ 50). The cost of the annual premium for that force-placed insurance policy totaled approximately \$25,000.00 which is nearly four times the amount now paid by the Juarezes. (*See id.* ¶ 51).

II. LEGAL STANDARD

*3 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ “

Ashcroft v. Iqbal, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Although this pleading standard “does not require ‘detailed factual allegations,’ ... it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.* (quoting *Twombly*, 550 U.S. at 555). Pleadings must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Indeed, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 556). To meet this “plausibility standard,” a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir.1997). A court’s analysis of a Rule 12(b)(6) motion “is limited primarily to the face of the complaint and the attachments thereto.” *Brooks*, 116 F.3d at 1368. The Court may also consider other documents to be part of the pleadings for purposes of Rule 12(b)(6) where the plaintiff refers to the documents in the complaint and those documents are central to the plaintiff’s claim. *Id.* at 1369.

III. ANALYSIS

A. Breach of Implied Covenant of Good Faith and Fair Dealing (Count I)

Count I of the Amended Complaint asserts a claim against WFI and Wells Fargo Bank for breach of the implied covenant of good faith and fair dealing. (*See Am. Compl.* ¶¶ 68–74). WFI contends this claim must be dismissed as it relates to WFI because WFI is not a party to, or in any way bound by, the mortgage contracts at issue. (*See WF Mot.* 6–7).

“Under Florida law, every contract contains an implied covenant of good faith and fair dealing.” *Centurion Air*

Cargo, Inc. v. United Parcel Serv. Co., 420 F.3d 1146, 1151 (11th Cir.2005); *see also Cnty. of Brevard v. Miorelli Eng’g, Inc.*, 703 So.2d 1049, 1050 (Fla.1997). Nonetheless, a breach of the implied covenant “is not an independent cause of action, but attaches to the performance of a specific contractual obligation.” *Centurion Air*, 420 F.3d at 1151; *see also Burger King Corp. v. Weaver*, 169 F.3d 1310, 1316 (11th Cir.1999) (“[A]n action for breach of the implied covenant of good faith cannot be maintained [under Florida law] in the absence of breach of an express contract provision.”). “To allege a breach of the implied covenant, the party must demonstrate a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.” *Shibata v. Lim*, 133 F.Supp.2d 1311, 1319 (M.D.Fla.2000) (citing *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097–98 (Fla. 1st DCA 1999)).

*4 In their Amended Complaint, Plaintiffs allege “Wells Fargo”—referring collectively to both WFI and Wells Fargo Bank—is a party to the mortgage contracts and breached the duty of good faith and fair dealing under those contracts. (*Am. Compl.* ¶¶ 72–75). Although, as WFI points out, Plaintiffs initially state that Wells Fargo Bank is the successor in interest and/or assign of Wachovia as to all of Wachovia’s home mortgages (*see WFI Reply* [ECF No. 71] (citing *Am. Compl.* ¶ 4)), Plaintiffs later indicate that *both* WFI and Wells Fargo are successors in interest to Wachovia as related to these mortgages (*see Am. Compl.* ¶¶ 38, 45). Therefore, taking Plaintiffs’ allegations as true, WFI is a party to the mortgage contract. Consequently, WFI’s argument to the contrary fails at this motion-to-dismiss stage in litigation. Admittedly, Plaintiffs seem to indicate they are not entirely sure that both Wells Fargo Defendants are actually parties to the contracts. (*See WF Resp.* 8). Nonetheless, the Court presumes Plaintiffs’ allegations are based on information and belief, rather than mere conjecture as to which entity (or entities) is a party to the mortgage contracts. Thus, it is inappropriate to resolve the factual dispute over whether WFI is actually a party to the mortgage contracts at this stage. Accordingly, Count I may proceed.

B. Violation of RESPA (Count II)

Section 2605(m) of the Real Estate Settlement and Procedure Act ("RESPA"), 12 U.S.C. §§ 2601, *et seq.*, provides that "[a]ll charges ... related to force-placed insurance imposed on the borrower by or through the services shall be bona fide and reasonable." 12 U.S.C. § 2605(m). In Count II, Plaintiffs allege that Wells Fargo Bank and WFI violated section 2605(m) because the charges related to the force-placed insurance were not "bona fide and reasonable." (Am.Compl.¶¶ 77–84) (quoting RESPA § 2605(m)).

WFI maintains this claim must be dismissed because "the law underlying [Plaintiffs] claim, including the 'bona fide and reasonable' requirement, is not yet in effect." (WF Mot. 7) (emphasis in original). Specifically, WFI contends that the statutory provisions supporting Count II "do not become effective until after the newly created Bureau of Consumer Financial Protection finalizes its implementing regulations, which will not occur for some eighteen months after the July 21, 2011 'designated transfer date.'" (*Id.*). In response, Plaintiffs assert section 2605(m) took effect on July 22, 2010—"several months before a new insurance policy was force-placed on Plaintiff Ray Williams's property and within days of the date on which a new policy was purchased for the Juarez Plaintiffs." (WF Resp. 9). The propriety of this claim turns on when section 2605(m) became effective; if that provision became effective after the force-placed insurance was purchased for Plaintiffs' properties, then the claim must fail as WFI cannot be held liable for acts proscribed by a statute that was not in effect at the time those acts were taken.

*5 Sections 2605(k)-(m) of RESPA were enacted on July 21, 2010 by section 1463 of the DoddFrank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act" or "Act"). *See* Dodd-Frank, Pub.L. No. 111-203, 124 Stat. 1376 (2010), at § 1463. Plaintiffs contend section 4 of the Dodd-Frank Act, which is titled "Effective Date," governs when the amendments enacted by section 1463—including the "bona fide and reasonable" requirement at issue here—are to become effective. Section 4 states:

Except as otherwise specifically provided in this Act or the

amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act.

Dodd-Frank Act § 4. Plaintiffs maintain there is no other effective date in the Act that is applicable to section 1463, and as a result, the provisions of section 1463—including the enactment of subsections 2605(k)-(m) of RESPA—became effective on July 22, 2010 (one day after the enactment of the Dodd-Frank Act). (*See* WF Resp. 9–11).

Conversely, WFI contends section 1400(c) of the Act sets forth a different effective date applicable to section 1463. (*See* WF Mot. 7–8). Both sections 1400(c) and 1463 are contained with Title XIV of the Act, entitled "Mortgage Reform and Anti-Predatory Lending Act." Dodd-Frank Act, Title XIV. Section 1400, the first section under Title XIV, states:

(c) Regulations; Effective Date.—

(1) Regulations.—The regulations required to be prescribed under this title or the amendments made by this title shall—

(A) be prescribed in final form before the end of the 18-month period beginning on the designated transfer date; and

(B) take effect not later than 12 months after the date of issuance of the regulations in final form.

(2) Effective date established by rule.—Except as provided in paragraph (3), a section, or provision thereof, of this title shall take effect on the date on which the final regulations implementing such section, or provision, take effect.

(3) Effective date.—A section of this title for which regulations have not been issued on the date that is 18 months after the designated transfer date ^[4] shall take effect on such date.

Id. § 1400(c). WFI contends that according to section 1400(c), section 2605(m) of RESPA has not yet become effective. (*See* WF Mot. 7–8). The Court agrees.

The language of section 1400(c) is clear that any section or provision of Title XIV shall take effect on either the date on which the final regulations implementing such section, or provision, take effect; or, if regulations are not issued for that section, on the date that is 18 months after the designated transfer date. *See* Dodd–Frank Act §§ 1400(c) (2), (3). Nonetheless, Plaintiffs maintain 1400(c) does not apply because section 2605(m)—the provision containing the bona fide and reasonable requirement—does not require the implementation of any regulations. (*See* WF Resp. 9–11). Plaintiffs suggest that section 1400(c) only applies to those sections which require regulations to be implemented. (*See id.*). Plaintiffs' narrow construction of section 1400(c) is misplaced.

*6 The title of section 1400(c) is “Regulations; Effective Date.” Dodd–Frank Act § 1400(c). Plaintiffs claim this title limits the reading of the section to address only those sections and provisions of Title XIV that require regulations to be implemented. (*See* WF Resp. 10–11). However, this interpretation does not comport with the plain language of the title. Instead, the title indicates that section 1400(c) addresses both regulations *and* effective dates. In particular, the use of a semicolon in the title, rather than a colon, indicates that “Effective Date” is not used as a subcategory of “Regulations.” This is because a “semicolon stops the forward movement of a statement, whereas a colon marks forward movement.” Bryan A. Garner, *The Oxford Dictionary of Amer. Usage & Style* (New York: Oxford Univ. Press 2000). Therefore, the semicolon suspends the thought regarding regulations and begins a new thought involving effective dates. As a result, a plain reading of the title indicates that section 1400(c) addresses both the regulations required to be implemented under Title XIV and the effective dates for all of the sections under Title XIV, and not, as Plaintiffs contend, only the effective dates of those sections of the Title that call for regulations.

A careful review of the subsections of section 1400(c) supports this reading of the statute. Section 1400(c)(1) addresses when and how regulations should be prescribed when they are required to be implemented by a section within Title XIV of the Dodd–Frank Act. *See* Dodd–Frank Act § 1400(c)(1). Sections 1400(c)(2) and (3) then discuss the effective date of any section or provision contained in Title XIV. Specifically, section 1400(c)(2)

addresses the effective date of a section when regulations concerning that section are required to be implemented. *See id.* § 1400(c)(2). In contrast, section 1400(c)(3) sets forth the applicable effective date for a section under Title XIV for which regulations have not been issued. *See id.* § 1400(c)(3). A section that does not require the implementation of regulations would therefore fall within the latter category. Thus, even if section 1463—which enacted section 2605(m) of RESPA—does not require regulations to be implemented, it still falls within the scope of section 1400(c) and consequently, does not become effective until 18 months after the designated transfer date.

This interpretation of section 1400(c) comports with the understanding of that section in both the U.S.Code Annotated, published by West Publishing, and the United States Code Service, published by Lexis Law Publishing. Both of those annotation services explicitly note that sections 2605(k)–(m) do not become effective until the time prescribed by section 1400(c) of the Dodd–Frank Act. *See* 12 U.S.C.S. § 2605 (cautioning that sections 2605(k)–(m) of RESPA are effective as provided by § 1400(c)); 12 U.S.C.A. § 2605 (noting that the enactment of sections 2605(k)–(m) are effective pursuant to the terms of § 1400(c) of the Dodd–Frank Act). Moreover, the Government Printing Office's official version of the U.S.Code, in a section titled “Effective Date of 2010 Amendment,” explicitly states:

*7 Amendment by section 1463 of Pub.L. 111–203 effective on the date on which final regulations implementing that amendment take effect, or on the date that is 18 months after the designated transfer date if such regulations have not been issued by that date, see section 1400(c) of Pub.L. 111–203, set out as a note under section 1601 of Title 15, Commerce and Trade.

12 U.S.C. § 2605 available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title12/pdf/USCODE-2010-title12-chap27-sec2605.pdf>.

Because RESPA section 2605(m) was not effective prior to the issuance of the force-placed insurance policies on Plaintiffs' property, Count II must be dismissed.

C. Unconscionability (Count III)

In Count III, Plaintiffs assert the provision in the mortgage contracts "that allows Wells Fargo to force-place high-cost insurance and charge borrowers the cost of obtaining that insurance and misrepresents why the cost of force-placed insurance is excessive, is procedurally and substantively unconscionable." (Am.Compl.¶ 87).

"To succeed on an unconscionability claim, [plaintiffs] must demonstrate both procedural and substantive unconscionability." *Bland v. Health Care & Ret. Corp. of Am.*, 927 So.2d 252, 256 (Fla. 2d DCA 2006) (emphasis in original) (citations omitted). "Procedural unconscionability relates to the manner in which a contract is made and involves consideration of issues such as the bargaining power of the parties and their ability to know and understand the disputed contract terms." *Id.* "Substantive unconscionability ... requires an assessment of whether the contract terms are 'so outrageously unfair' as 'to shock the judicial conscience.'" *Id.* (quoting *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278, 284 (Fla. 1st DCA 2003)).

WFI contends this claim must be dismissed against it for several reasons. First, WFI maintains it was not a signatory to the mortgage contracts at issue and thus cannot be responsible for any "unconscionable" provisions in those contracts. (WF Mot. 8-9). Second, WFI argues that "unconscionability" is not an affirmative cause of action under Florida law, but is merely a defense to the enforcement of a contract. (*Id.* 9). Lastly, it suggests that Plaintiffs fail to identify which provisions in their mortgage contracts are unconscionable. (*See id.*).

As to WFI's first argument, as discussed earlier, the Amended Complaint alleges that WFI is a party to the mortgage contract. (*See* Part III.A., *supra*). Although WFI asserts the contrary is true, the Court cannot resolve this factual dispute at the motion-to-dismiss stage of litigation. Accordingly, this argument fails.

With regard to WFI's second argument—that unconscionability is not a cause of action under Florida law—Florida law is somewhat unclear in this regard. Some Florida courts have recognized a common-law cause of action for unconscionability, at least in the context of condominium lease contracts. *See, e.g., Avila S. Condo. Ass'n v. Kappa Corp.*, 347 So.2d 599, 605 (Fla.1977); *Steinhardt v. Rudolph*, 422 So.2d 884, 890 (Fla. 3d DCA 1982) ("It is now recognized that a cause of action sounding in unconscionability lies against the enforceability of [99-year condominium] leases."). Other courts seem to indicate that unconscionability is generally a defense to the enforcement of a contract under Florida law rather than an affirmative cause of action. *See, e.g., In re Checking Account Overdraft Litig.*, 694 F.Supp.2d 1302, 1318 (S.D.Fla.2010) (noting "ordinarily, unconscionability is properly asserted as a defense to a contract rather than an affirmative cause of action," but allowing claim to proceed to extent it sought declaratory judgment); *see also Barakat v. Broward Cnty. Hous. Auth.*, 771 So.2d 1193, 1194 (Fla. 4th DCA 2000) ("Unconscionability is an affirmative defense which must be raised by proper pleading.").

*8 Nonetheless, what is clear, is that even where courts have recognized a cause of action for unconscionability, they have held that money damages are not recoverable as a remedy for such a claim. *See Cowin Equip. Co., Inc. v. Gen. Motors Corp.*, 734 F.2d 1581, 1582 (11th Cir.1984) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages. The Court finds that neither the common law of Florida, nor that of any other state, empowers a court addressing allegations of unconscionability to do more than refuse enforcement of the unconscionable section or sections of the contract so as to avoid an unconscionable result.") (citation omitted); *see also* 8 WILLISTON ON CONTRACTS § 18:17 (4th ed.) (noting that a court that determines a contract is unconscionable is not authorized to award damages; "rather, the court is given the power to refuse to enforce the agreement in its entirety, to delete the unconscionable clause and enforce the remainder of the contract, or to limit the unconscionable clause's application so that an unconscionable result will be avoided.").

In Count III of the Amended Complaint, Plaintiffs seek a judgment requiring Wells Fargo to “refund an amount equal to all hidden profits or other financial benefits previously collected from Plaintiffs.” (Am.Compl.¶ 91). Because the Court cannot grant this relief on an “unconscionability” claim—even if one does exist under Florida law—Count III must be dismissed.

D. Unjust Enrichment (Count IV)

In Count IV, Plaintiffs allege QBE and Wells Fargo “received from Plaintiffs and Class Members a benefit in the form of overcharges for force-placed insurance policies which are excessive and unreasonable, and are the result of overcharging and overreaching.” (Am.Compl.¶ 93). They further claim Defendants will be unjustly enriched if allowed to retain this benefit. (*See id.* ¶ 97).

To state a claim for unjust enrichment, a plaintiff must show: “(1) plaintiff has conferred [a] benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff.” *Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A.*, 667 So.2d 876, 879 (Fla. 3d DCA 1996) (quoting *Hillman Constr. Corp. v. Wainer*, 636 So.2d 576, 577 (Fla. 4th DCA 1994)). “When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails.” *Baptista v. JP Morgan Chase Bank, N.A.*, 640 F.3d 1194, 2011 WL 1772657, at *2 n. 3 (11th Cir.2011) (internal citation and quotation marks omitted). In the Motions, QBE First and WFI contend this claim must be dismissed for several reasons, each of which is discussed in turn.

1. Direct Benefit

QBE First asserts Plaintiffs fail to state a claim for unjust enrichment against it because QBE First did not receive Plaintiffs' premiums. (*See* QBE Mot. 7). QBE First maintains that it “merely received a commission from the insurance carrier, here QBE Specialty Insurance, and a tracking fee from Wells Fargo for the services provided to those two entities.” (*Id.*). It contends that the mere receipt of an indirect benefit does not amount to unjust

enrichment. (*See id.*). Similarly, WFI claims Plaintiffs “fail[] to adequately allege that Wells Fargo Insurance received any money *directly* from the Plaintiffs ... or that Wells Fargo Insurance had any relationship whatsoever with the Plaintiffs,” and asserts that “[t]hese omissions require dismissal.” (WF Mot. 11) (emphasis in original). In response, Plaintiffs maintain that they need not have direct dealings or be in contractual privity with Defendants in order to bestow a direct benefit on them for purposes of an unjust-enrichment claim. (*See* QBE Resp. 7; WF Resp. 14). Plaintiffs are correct.

*9 Although Defendants are correct that the benefit conferred under an unjust-enrichment claim must be a direct benefit, *see Century Sr. Servs. v. Consumer Health Ben. Ass'n*, 770 F.Supp.2d 1261, 1267 (S.D.Fla.2011), the mere fact that there has been no direct contact between a defendant and the plaintiff does not preclude a finding that the defendant received a direct benefit from that plaintiff. *See Romano v. Motorola, Inc.*, No. 07-CIV-60517, 2007 WL 4199781, at *2 (S.D.Fla.2007) (“Defendant is correct in stating that ‘Florida law does not support a cause of action for unjust enrichment unless the plaintiff can allege that he conferred a direct benefit on the defendant.’ ... However, Defendant erroneously equates direct *contact* with direct *benefit* in arguing that “[b]ecause plaintiff here did not purchase either his phone or his batteries from Motorola, plaintiff conferred no direct benefit on Motorola.”) (internal citations omitted) (emphasis in original); *Zaki Kulaibee Establishment v. McFlicker*, No. 08-60296-Civ, 2011 WL 1559791, at *9 (S.D.Fla. Apr.25, 2011) (no direct contact in the form of contractual relationship required to show direct benefit); *Stermer v. SCK Solutions, LLC*, No. 08-61751-CIV, 2009 WL 1849955, at *6 (S.D.Fla. June 26, 2009). *But see W. Coast Life Ins. Co. v. Life Brokerage Partners LLC*, No. 08-80897-CIV, 2009 WL 2957749, at *10-11 (S.D.Fla. Sept.9, 2009) (allegations that defendant “received compensation for its role in the transactions” was insufficient to establish that plaintiff conferred a benefit on defendant).

In other words, just because the benefit conferred by Plaintiffs on Defendants did not pass directly from Plaintiffs to Defendants—but instead passed through a third party—does not preclude an unjust-enrichment claim. Indeed to hold otherwise would be to undermine

the equitable purpose of unjust enrichment claims. *See* 11 FLA. JUR. 2d Contracts § 288 (“[I]f someone does enrich himself unjustly to the detriment of another, that person should be required to make restitution of all the benefits received, retained, or appropriated when it appears that to require it would be just and equitable.”). It would not serve the principles of justice and equity to preclude an unjust enrichment claim merely because the “benefit” passed through an intermediary before being conferred on a defendant.⁵

In their Amended Complaint, Plaintiffs have sufficiently alleged that a payment arrangement existed between QBE First and those Defendants that did have direct contact with Plaintiffs; likewise, Plaintiffs have adequately alleged that a similar arrangement existed between WFI and those Defendants. (*See* Am. Compl. ¶¶ 5, 7, 23, 25, 26). Plaintiffs allege QBE First and WFI directly benefitted from their wrongful conduct related to the force-placed insurance arrangement. In particular, Plaintiffs claim WFI and QBE First received kickbacks and/or commissions, which were taken directly from the insurance premiums paid by Plaintiffs. (*See id.* ¶¶ 6, 7, 26–28, 96–97). Therefore, although there was no direct contact between them and Plaintiffs, by paying the allegedly excessive premiums, Plaintiffs directly conferred a benefit on QBE First and WFI.

*10 In sum, drawing all reasonable inferences in favor of Plaintiffs, the Court finds these allegations sufficient to show Plaintiffs conferred a direct benefit on QBE First and WFI, and thus dismissal of the claim is unwarranted. Whether a benefit was actually conferred is a factual question that cannot be resolved on a motion to dismiss. *See Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F.Supp.2d 1213, 1229 (S.D.Fla.2009) (“Whether the [defendants] did or did not receive a direct benefit from Plaintiff is a question of fact that cannot be resolved at the motion to dismiss stage in this case.”).

2. Plaintiffs' Ability to Avoid Paying the Allegedly Excessive Premiums

Second, both QBE First and WFI contend that even if a direct benefit has been conferred on them by Plaintiffs, the unjust enrichment claim still fails because Plaintiffs could have avoided the allegedly excessive insurance

premiums. (*See* WF Mot. 11–12; QBE Mot. 8). They point out that Plaintiffs could have kept the insurance on their properties current, as they were required to do by their mortgage contracts, and note that if Plaintiffs had done so, Plaintiffs would not have been charged premiums for force-placed insurance. (*See* WF Mot. 11; QBE Mot. 8). Essentially, QBE First and WFI's argument is that the unjust-enrichment claim fails because the force-placed insurance process was provided for in the Plaintiffs' mortgage contracts, and Plaintiffs could have avoided that process by keeping their insurance current. This argument fails to persuade.

Plaintiffs do not allege that the force-placed insurance process, in and of itself, supports a claim for unjust enrichment. Instead, Plaintiffs allege that Defendants' manipulation of that process, in order to maximize their profits, supports the unjust-enrichment claim. (*See* Am. Compl. ¶ 35). The fact that Plaintiffs, had they maintained insurance coverage on their properties, could have avoided being subject to this manipulation does not render the claim insufficient, nor would such an argument serve the principles of equity and justice that the unjust-enrichment claim is intended to promote.

Furthermore, Defendants' reliance on *Lass v. Bank of America, N.A.*, NO. 11–10570–NMG, 2011 WL 3567280 (D.Mass. Aug.11, 2011), is misplaced. In *Lass*, the plaintiff's claims were premised on the defendant-bank's lack of authority to force-place insurance on the plaintiff's property and to collect a commission on the purchase of that insurance. *See id.* at *2. Specifically, the plaintiff in that case challenged the bank's authority to force-place insurance coverage *at all*. *See id.* Thus, the court found the contract's inclusion of the force-placed insurance provision, combined with the plaintiff's ability to avoid that process, precluded the plaintiff's claim for unjust enrichment. *See id.* at *7. In contrast, Plaintiffs' claim here is premised on abuse and manipulation of the force-placed insurance process, rather than the mere use of the process. Unlike in *Lass*, Plaintiffs' claim is not based on the mere fact that the force-placed premiums were higher than those which Plaintiffs could have obtained on the market, but that they were *unreasonably* higher as a result of Defendants' *bad faith* conduct. Indeed, Plaintiffs make it clear in their Amended Complaint that they “do not seek to prevent or significantly interfere

with Defendants' ability to force place insurance coverage pursuant to the mortgage contracts. Rather, Plaintiffs demand that [Defendants] perform their practices in good faith." (Am.Compl.¶ 34). Consequently, this argument fails to persuade as well.

3. Adequate Consideration

*11 Next, QBE First and WFI assert the unjust-enrichment claim fails because Plaintiffs admit they received a benefit for the premiums that were charged, and thus adequate consideration was given for any benefit received. (See QBE Mot. 7-8; WF Mot. 12). This argument necessarily fails. The entire crux of Plaintiffs' Amended Complaint is that any consideration they received for the benefit conferred on Defendants was grossly inadequate. They allege the insurance policies were "unreasonably, uncompetitively, and excessively priced" for the sole purpose of maximizing profits and kickbacks to Defendants. (Am.Compl.¶ 32). Whether the consideration received was in fact adequate is not an appropriate question for the Court to resolve at this stage.

4. Mortgage Contracts

Fourth, WFI contends Plaintiffs' unjust-enrichment claim is barred by Plaintiffs' mortgage contracts. (See WF Mot. 12). Specifically, WFI argues that the lender-placed insurance and charges related to it are governed by the Plaintiffs' mortgage contract, and therefore Plaintiffs' quasi-contractual claim of unjust enrichment fails as a matter of law. (See *id.* 13).

Florida courts have held that " 'a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter.' " *1021018 Alberta Ltd. v. Netpaying, Inc.*, 8:10-CV-568-T-27MAP, 2011 WL 1103635, at *5 (M.D.Fla. March 24, 2011) (quoting *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So.2d 696, 697 (Fla. 1st DCA 2008) (collecting cases)); see also *Zarrella v. Pac. Life Ins. Co.*, 755 F.Supp.2d 1218, 1227 (S.D.Fla.2010). However, a party may plead in the alternative for relief under an express contract and for unjust enrichment. See *ThunderWave, Inc. v. Carnival Corp.*, 954 F.Supp. 1562, 1566 (S.D.Fla.1997) (citing *Hazen v. Cobb-Vaughan Motor Co.*, 96 Fla. 151, 117 So. 853, 857-58 (Fla.1928)).

But unjust enrichment may only be pleaded in the alternative where one of the parties asserts that the contract governing the dispute is invalid. See *Zarrella*, 2010 WL 4663296, at *7 (quoting *In re Managed Care Litig.*, 185 F.Supp.2d 1310, 1337-38 (S.D.Fla.2002)).

In its Motion, WFI contends it was not a party to the mortgage contract. (See WF Mot. 7). In other words, WFI maintains there is no contract governing *its* relationship with Plaintiffs, and that any argument to the contrary is baseless. By doing so, WFI is essentially asserting that, to the extent the mortgage contract governs the relationship between WFI and Plaintiffs, it is invalid. Accordingly, WFI's argument that the unjust enrichment claim fails because of the existence of that contract is unavailing.

5. Class Allegations

WFI also argues the claim should be dismissed because "Plaintiffs do not explain how they intend to establish unjust enrichment damages related to the reasonableness of each putative class member's insurance premium on a class-wide basis." (WF Mot. 13). In doing so, WFI is essentially challenging "the class aspects of this litigation, solely on the basis of what is alleged in the complaint and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification." *Bryant v. Food Lion, Inc.*, 774 F.Supp. 1484, 1495 (D.S.C.1991). WFI, in challenging the class certification at this stage, has " 'the burden of demonstrating from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.' " *Romano*, 2007 WL 4199781, at *2 (quoting *Bryant*, 774 F.Supp. at 1495). WFI has not demonstrated that determining class-wide damages under this theory is impossible.

*12 Based on the foregoing, Count IV may proceed.

E. Tortious Interference with a Business Relationship (Count V)

In Count V, Plaintiffs claim QBE First tortiously interfered with Plaintiffs' contractual relationship with their loan servicer, Wells Fargo. (See Am. Compl. ¶¶ 100-03). To state a claim for tortious interference, a plaintiff

must show: (1) the existence of a business relationship; (2) that defendant had knowledge of the relationship; (3) the defendant intentionally and unjustifiably interfered with the relationship; and (4) the plaintiff suffered damage as a result. *See Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1473 (11th Cir.1989); *Tamiami Trail Tours, Inc. v. J.C. Cotton*, 463 So.2d 1126, 1127 (Fla.1985). QBE First suggests Plaintiffs have failed to allege facts sufficient to support the third and fourth elements of this claim. (*See* Mot. 9–12).

In particular, QBE First maintains Plaintiffs have failed to articulate any actions taken by QBE First that could constitute direct or intentional interference with Plaintiffs' business relationship with Wells Fargo, and that they have failed to plead sufficient facts to show QBE First acted with malice or other bad motive. (*See id.* 9). Plaintiffs respond that they do present factual allegations regarding actions taken by QBE First that interfered with that relationship, and that they repeatedly allege these actions were taken in bad faith. (*See* QBE Resp. 14). Additionally, they argue that a plaintiff is not required to plead malice to state a claim for tortious interference. (*See id.*).

Accepting the allegations in the Amended Complaint as true, the Court finds Plaintiffs do state a claim for tortious interference. Plaintiffs repeatedly allege that QBE First acted in bad faith when charging *excessive* and *unwarranted* fees and when paying/receiving *improper* commissions and kickbacks; they claim that by doing so, QBE First interfered with Plaintiffs' contractual relationships with Wells Fargo. (*See* Am. Compl. ¶¶ 25, 26, 102, 103). Plaintiffs claim QBE First was involved in paying kickbacks to Wells Fargo in order to obtain an exclusive arrangement with Wells Fargo whereby borrowers would be charged exorbitant premiums, and a substantial portion of these were then used to pay kickbacks and commissions to the various entities involved. (*See id.* ¶¶ 7, 19, 25, 102, 103). Plaintiffs allege that in doing so, QBE First wrongfully interfered with Plaintiffs' contractual relationship with their loan servicer, Wells Fargo, and as a result, Plaintiffs were damaged in having to pay excessive premiums. (*See id.* ¶ 102, 103). These allegations, viewed in the light most favorable to Plaintiffs, adequately state a claim for tortious interference.

F. Rule 8(a)

Finally, WFI asserts Plaintiffs fail to meet the pleading requirements of Federal Rule of Civil Procedure 8(a) because they improperly lump Defendants together. (*See* WF Mot. 5). Specifically, WFI takes issue with Plaintiffs' grouping together of Wells Fargo Bank and WFI, and referring to the two collectively as "Wells Fargo." (*Id.*).

*13 Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). "Under this rule, when a complaint alleges that multiple defendants are liable for multiple claims, courts must determine whether the complaint gives adequate notice to each defendant." *Pro Image Installers, Inc. v. Dillon*, No. 3:08cv273/MCR/MD, 2009 WL 112953, at *1 (N.D.Fla. Jan.15, 2009) (citing *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir.2001)). Although a complaint against multiple defendants is usually read as making the same allegation against each defendant individually, *see Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir.1997), "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Accordingly, at times, a plaintiff's "grouping" of defendants in a complaint may require a more definite statement. *See Yeltmann v. Walpole Pharmacy, Inc.*, 928 F.Supp. 1161, 1164 (M.D.Fla.1996).

For example, the court in *Yeltmann* found a complaint insufficient where it grouped its allegations against *all* named defendants, making it very difficult to determine which defendant committed which act:

Plaintiffs' Complaint makes general allegations against all of the named defendants. The complaint fails to separate each alleged act by each defendant into individually numbered paragraphs. It is virtually impossible to ascertain from the Complaint which defendant committed which alleged act.

This particular defect in pleading would be enough to grant a motion to dismiss with leave to amend, or, more properly perhaps, grant a motion for more definite statement pursuant to [Rule] 12(e)....

Id. Normally, however, "when multiple defendants are named in a complaint, the allegations can and usually

are to be read in such a way that each defendant is having the allegation made about him individually.’ “*Duran v. City of Satellite Beach*, No. 6:05-CV-906-PCF-KRS, 2005 WL 2129300, at *6 (M.D.Fla. Sept.2, 2005) (quoting *Crowe*, 113 F.3d at 1539); see also *Sams v. Prison Health Servs., Inc.*, No. 8:06-cv-862-T-24 MAP, 2007 WL 788365, at *3 (M.D.Fla. Mar.14, 2007) (“[D]espite Defendants’ arguments, the Plaintiff’s lumping together categories of Defendants in her allegations is permissible under Rules 8(a) and 12(b) (6).”); *Freshwater v. Shiver*, No. 6:05-CV-756-ORL19DAB, 2005 WL 2077306, at *2 (M.D.Fla. Aug.29, 2005).

In the Amended Complaint, Plaintiffs group Defendants into two separate groups, the Wells Fargo Defendants (Wells Fargo Bank and WFI) and the QBE Defendants (QBE First and QBE Specialty Insurance). (See generally Am. Compl.). The Amended Complaint then identifies which claims are against which group of Defendants. From these allegations it can be reasonably inferred that both WFI and Wells Fargo Bank were involved in the conduct attributed to “Wells Fargo.” In other words, where claims are asserted against the collective Wells Fargo Defendants, the claims should be read as alleging all acts against both WFI and Wells Fargo Bank individually. When read in this manner, the allegations provide notice to both WFI and Wells Fargo Bank of the claims against them. Plaintiffs’ grouping together categories of Defendants in their allegations is permissible under Rules 8(a) and 12(b)(6). See *Sams*, 2007 WL 788365, at *3; see also *Crowe*, 113 F.3d at 1539 (stating that where the complaint alleges claims against multiple defendants in a single count, the allegations can and should be read in such a way that each defendant is having the allegation made about him personally); *In re Polaroid ERISA Litig.*, 362 F.Supp.2d 461, 471 (S.D.N.Y.2005) (“Rule 8 does not require Plaintiffs to identify each of the [] Defendants by name each time the Complaint makes an allegation that applies equally to all.”). Moreover, the Complaint pleads

specific facts regarding the relationship between WFI and Wells Fargo Bank, providing an additional factual basis to aid these Defendants in understanding the allegations asserted against them. See *In re Polaroid*, 362 F.Supp.2d at 471 (“The Complaint is sufficient because it pleads specific facts about the relationship between Morgans Management and the other Defendants.”).

*14 In sum, this is not a case where *no* distinctions are made between the Defendants; Plaintiffs break the Defendants into two groups. See *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir.2001). Nor is this a “shotgun pleading” where every claim incorporates by reference all previous allegations and paragraphs. See, e.g., *id.* Reading the Complaint as alleging all claims against “Wells Fargo” to be claims against both WFI and Wells Fargo Bank allows these Defendants to meaningfully respond.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED as follows:

1. The Motions [ECF Nos. 47, 48] are **GRANTED in part and DENIED in part**.
2. The Motions are **DENIED** with respect to Counts I, IV, and V.
3. The Motions are **GRANTED** with respect to Counts II and III.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 4368980

Footnotes

- 1 The allegations of Plaintiffs’ Amended Complaint are taken as true.
- 2 WFI and Wells Fargo Bank are referred to collectively as “Wells Fargo” by Plaintiffs, and thus the Court uses this term as well.
- 3 QBE Specialty and QBE First are referred to collectively as “QBE” by Plaintiffs, and thus the Court uses this term as well.
- 4 “Designated transfer date” is defined in Section 1062 of the Dodd-Frank Act.

- 5 To find otherwise would mean that a company could set up a shell parent company without any funds, funnel money through that shell company, and essentially launder the "benefit," thereby defeating any unjust enrichment claim.

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AN
HISTORICAL ACCOUNT
OF
THE BRITISH ARMY,
AND OF THE
Law Military,
AS DECLARED BY THE
Ancient and Modern Statutes, and Articles of War
FOR ITS GOVERNMENT :
WITH A FREE
COMMENTARY ON THE MUTINY ACT,
AND THE
Rules and Articles of War ;
ILLUSTRATED BY
VARIOUS DECISIONS OF COURTS MARTIAL.
BY E. SAMUEL.

Si quid auctoritatis in me est, ea apud eos utar, qui eam mihi dederunt.
CICERO.

London :
PRINTED AND SOLD BY WILLIAM CLOWES,
NORTHUMBERLAND-COURT, STRAND.

1816.

should be given, in the heat of pursuit by the enemy, for the retreating army to lighten itself of any extraordinary stores, or even common instruments of offence (for extreme cases sometimes warrant the most painful sacrifices), the casting them away in such a case would become a matter of necessity, in obedience to the will of a superior, and therefore free from offence. But the special circumstances of justification in either case, it will be for the accused to prove in his plea or defence.

ARTICLE 20th.—This Article awards the like punishment as the preceding one, to any officer or soldier,

I. “ Who shall misbehave himself before the enemy :

II. “ Or shall shamefully abandon or deliver up any garrison, fortress, post, or guard, committed to his charge, or “ which he shall be commanded to defend.”

The several crimes described in this Article import cowardice, or a composite of cowardice with treachery.

1.—The misbehaviour, mentioned in the first branch of the Article, in order to attach to it the grievous penalty of death, or other appportionate punishment, must be a misbehaviour in the *face* or *presence* of the enemy; and then not a general, but a military misconduct.

It is to be wished, that the culpable behaviour, falling within the penalty of the Article, had been set forth with more particularity than it is therein at present described; that officers or soldiers should have warning of the species of crime, for which, by possibility, they might be called upon to answer; or, that being so called upon, they might the better be able to resist the accusation in the first instance, or shape a direct and specific defence against it. For from the general manner in which the crime is here described, it is impossible to form any precise notion of the act or acts, which may be conceived to constitute it; and from the indefinite way in which charges on this Article are usually

drawn up, it is impracticable to judge from them, or the sentence, which is all that is commonly published for the information of the army, of what specific act the accused was either acquitted or found guilty. It surely is as necessary here, where a conviction may be followed with such dreadful consequences, that the fact or facts, whereon the charge is grounded, should be clearly specified, as they are required to be by the 28th Article of the 16th Section, in respect to other misbehaviour of the same general and unspecified kind with that which is the object of the present Article. If this specification be requisite, when a minor punishment may ensue, it is doubly so where it may be the highest.

As the Article is so deficient in the description of the offence, it comes more incumbent on him who is desirous of explaining it, to shew what has been deemed to amount to it, both in its aggravated and mildest character, so as to call forth the greatest or a qualified or moderated measure of punishment.

To forsake the ensigns, to desert the ranks, or to fly before the enemy, has been from the earliest times considered among the worst crimes of which a soldier can be guilty: and there are numerous instances where such defection has been punished by Generals of old, in a summary way, and by their own swords*, as well as by the hands of the execu-

* *Antonius Pr.* one of the centurions in the army of *Vespasian*, perceiving that a standard bearer was turning his back to the enemy, immediately pierced him with his javelin.

On the descent of a British force in *Jamaica*, somewhat about the year 1653, *General Venables* issued orders, that if any man should be found to run away, the next man to him should put him to death; which if he failed to do, he should be liable to the severest punishment by a court martial.

This order was occasioned, as it is hinted by *M^r Arthur*, by a very memorable instance of cowardice, exhibited by a British adjutant-general, in the first operations against the island of *Hispaniola*. Be this as it may it has been imitated in similar cases; and may be considered as a justifica-