IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER SCHATZBERG, D.C., *et al.*	:	**CIVIL ACTION**
Plaintiffs	:	
	:	**NO. 10-2900**
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*	:	
Defendants	:	

NITZA I. QUIÑONES ALEJANDRO, J. OCTOBER 7, 2015

MEMORANDUM OPINION

INTRODUCTION

Presently before this Court is a motion for summary judgment filed pursuant to Federal Rule of Civil Procedure ("Rule") 56 by Counterclaim Defendants,[1] [ECF 178], which seeks the dismissal of the Amended Counterclaim filed by State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "Counterclaim Plaintiffs" or "State Farm"), on the basis that the claims asserted therein are barred by applicable statutes of limitations. State Farm has opposed the motion. [ECF 187]. The issues presented in the motion have been briefed by the parties and are ripe for disposition. For the reasons stated herein, the Schatzberg Entities' motion for summary judgment is granted.

BACKGROUND

Briefly, the procedural posture of this protracted matter is as follows: On June 17, 2010, Dr. Schatzberg D.C., ("Dr. Schatzberg") *only* filed a complaint against State Farm asserting

[1] Counterclaim Defendants are: Peter Schatzberg, D.C., Peter Schatzberg, D.C., P.C. d/b/a Delaware County Pain Management and Philadelphia Pain Management, Delaware Pain Management, LLC, d/b/a Delaware Pain Management & MRI, American Medical Rehabilitation, Inc., and Philadelphia Pain Management, Inc. (collectively, the "Schatzberg Entities").

claims for defamation and false light. [ECF 1]. Before a response was filed, on July 22, 2010, Dr. Schatzberg *and* Philadelphia Pain Management, Inc., filed an amended complaint and asserted claims for: defamation, false light invasion of privacy, violation of the Pennsylvania Motor Vehicle Financial Responsibility Law, statutory bad faith, violation of the civil Racketeering Influenced and Corrupt Organizations Act ("RICO"), and conspiracy to violate RICO. [ECF 9]. On August 30, 2010, State Farm filed a motion to dismiss each of these claims, [ECF 14], which the Schatzberg Entities opposed. [ECF 15]. By Order dated July 12, 2012, with its accompanying Memorandum Opinion, [ECF 24 and 23, respectively], the Honorable Gene E.K. Pratter granted State Farm's motion, *in part*, and dismissed all but the Schatzberg Entities' claim for defamation.

Thereafter, on August 9, 2012, State Farm filed an Answer and Counterclaim to the amended complaint. [ECF 28]. In the Counterclaim, State Farm asserted claims against each of the Schatzberg Entities for violations of the Pennsylvania Insurance Fraud statute, 18 Pa. C.S. §4117 *et seq*. (Count I), common law fraud (Count II), violation of RICO (Count III), unjust enrichment (Count IV), and restitution (Count V). On August 20, 2012, the Schatzberg Entities filed a motion to dismiss State Farm's counterclaims. [ECF 32]. Judge Pratter heard oral argument on the motion to dismiss on October 25, 2012. [ECF 46]. However, before the motion to dismiss was adjudicated, this matter was reassigned on July 19, 2013, to the undersigned's docket. [ECF 71]. During the interim, on November 13, 2012, State Farm filed an amended Answer and Counterclaim to the amended complaint, incorporating by reference the Counterclaim in its original answer. [ECF 47]. By Order dated February 21, 2014, this Court denied the Schatzberg Entities' motion to dismiss State Farm's counterclaims. [ECF 89].

On November 19, 2014, the Schatzberg Entities filed the instant motion for summary judgment seeking to dismiss State Farm's Amended Counterclaim which State Farm has opposed. When deciding this motion for summary judgment, this Court has considered all the relevant facts in this matter in the light most favorable to the non-moving party, *i.e.*, State Farm. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As noted, the motion for summary judgment is grounded on various statute of limitations arguments. Thus, only those facts relevant to these arguments are summarized. These facts, as summarized, have been drawn primarily from the deposition testimony of State Farm's employees, including its corporate designee, and the report of State Farm's retained expert:

> Plaintiff Peter Schatzberg, D.C., ("Dr. Schatzberg") is a licensed chiropractor and the sole owner of a large chiropractic and pain management practice established in 1998, which currently has four locations in the Delaware Valley area. (Amend. Comp. ¶7). Dr. Schatzberg is the sole owner and shareholder of the Schatzberg Entities. (*See* ECF 95, Answer and Counterclaim of Schatzberg Entities, at ¶2). A large number of the patients treated at Dr. Schatzberg's facilities have suffered injuries in motor vehicle accidents. The treatment costs for these patients were billed to insurance companies, including State Farm.
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> State Farm's investigation of the Schatzberg Entities began in 2009 when Doug Babin, a member of State Farm's Special Investigative Unit ("SIU") since 1998, noticed a pattern of standardized treatment in numerous claim files that involved patients treated at the Schatzberg Entities. (Ex. F, Babin Tr., 6:21-23; 142; 144:7-10; Ex. E, State Farm's answer to interrogatories, No. 1(b)). In a deposition, Mr. Babin testified that the SIU is charged with investigating, paying, and defending insurance claims. (Ex. F, Babin Tr., 12:10-12). Part of Mr. Babin's responsibilities within the SIU was to review claim files for "NICB indicators," using a list of approximately 100 indicators of potential fraud developed by the National Insurance Crime Bureau. (*Id.*, at 40:24-43:25).
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> According to Mr. Babin, in April of 2009, after reviewing "specials packages" which were part of his inventory, (*id.*, at p. 142-145), he began investigating "the possibility that fraud might

exist" in the practice of the Schatzberg Entities. (*Id.*, at p. 121). A "specials" or "demand" package refers to the submission by an attorney representing a plaintiff or claimant suing or making a claim against a State Farm insured (or State Farm directly) in which the attorney demands settlement of the lawsuit or claim. (*Id.*, at pp. 39-40). These packages consist of medical bills and records of economic damages alleged to have been suffered by the plaintiff/claimant. (*Id.*) According to Mr. Babin, every specials or demand package is supposed to be referred to SIU for review. (*Id.*, at 40:19-22). Mr. Babin testified similarly in a previous matter that "[e]very claim rep in our state is supposed to refer every specials package to the Special Investigation Unit for a review before any money is put on that file." (Ex. E). In its answer to an interrogatory, State Farm confirmed that Mr. Babin's testimony was true; *to wit*:

> Yes, that is "supposed" to happen as a goal but in practice it may not happen for a variety of reasons and settlement authority on a file and/or actual settlements are not delayed or otherwise prevented pending any SIU reviews. The purpose is to review claim documents to determine if records contained therein are associated in any way with any ongoing investigation and/or to review any new files which may need investigation. SIU has always attempted to review line unit files. (Ex. E, No. 5(A-C)).

Austin Bowles, Mr. Babin's supervisor in the SIU until 2012, confirmed that for as long as he worked at State Farm (from 1966 until 2012), it was State Farm's practice to refer every "specials" or "demand" package to the SIU for review. (Ex. G, Bowles Tr., at pp. 11, 75). Referring every specials package to the SIU "gave [State Farm's] SIU unit the opportunity to review the file to look for any particular indicators of fraud." (*Id.*, at p. 75). Mr. Babin also confirmed that the purpose of State Farm's SIU review of every specials package was to look specifically for "NICB indicators." (Ex. F, Babin Tr., 40:25-41:6).

Further, Mr. Babin testified that the NICB publishes a list of more than a hundred indicators which he looks for in the specials packages he reviews. (*Id.*, at p. 41). Mr. Babin also testified that the only reason State Farm's SIU unit reviewed specials packages was to identify NICB indicators:

> Q. Is there any other purpose to the SIU review of a specials package other than to review it for NICB indicators?
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> A. No. (*Id.*, at p. 46).

During the investigation of the Schatzberg Entities claim files and as a result of the standard review of specials packages, Mr. Babin took control over the subset of Schatzberg Entities claim files. (*Id.*, at p. 145). From his review of this subset of Schatzberg Entities claim files, he discerned a pattern he described as follows:

> The pattern that I noticed after review of the files was a lot of the claims involved standardized treatment plan, six to eight modalities in every claim. The initial reports and the discharge reports looked very similar. Again, the standard of care was virtually the same on every patient. Multiple diagnoses that were the same on patients. The doctor failed to get prior accident records, primary care doctor's records, ER records. The treatment plan never changed as through the course of time. Diagnostic testing was performed and then the results weren't gone over with the patient. The treatment never changed after the diagnostic testing was done. And it seemed like virtually everybody needed future medical care of some kind in the form of a monetary value. Transportation was involved of patients from South Philadelphia and Folsom to Delaware MRI for MRI's that were conducted on virtually 90 percent of the patients that I reviewed. 100 percent attorney involvement. Every claim that I looked at had an attorney involved in some way, shape or form. And through the course of the treatment, the treatment never changed. It was always six to eight modalities. And no prior accident records or records of any kind were obtained. (*Id.*, at 145:11-146:15).

Despite Mr. Babin's discovery in 2009 of this suspicious medical billing pattern, State Farm did not file its Counterclaim against the Schatzberg Entities until August 9, 2012. Shortly thereafter, State Farm began denying all invoices received from the Schatzberg Entities pursuant to a so-called "TIN Block."

During discovery, Mario Incollingo was designated State Farm's corporate designee to testify at a deposition to subject matters set forth in the notice of deposition, including, *inter alia,* "all of the facts in each claim which reveal the pattern of fraud alleged to exist by State Farm." (Ex. J, Incollingo Tr., pp. 18-21). In preparation for his deposition, Mr. Incollingo testified that he reviewed 110 claim files pertaining to the Schatzberg Entities that State Farm contends were part of the alleged fraudulent billing scheme. (*Id.*). He stated that he focused on the medical portion of each claim file. (*Id.*, at p. 23). Mr. Incollingo further testified as follows:

> Q. What's the overall umbrella of fraud?
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> A. The overall umbrella is ***it was clear to me in reviewing all 110 files that there's a clear boilerplate pattern*** of nonspecific, non-individualized patient treatment that goes on, not for the benefit of the patient; more so for the benefit of billing and the product, the ultimate product, which is the black book to the attorneys that represent the patients in these cases. ***To me, it was very clear*** that the customer is not the patient, and the product is not the treatment. It was more that the product was the black book and the customer was the attorney. ***That was evident in my review of the 110 [claim files]***, with the overall pattern, and then the specifics in each individual case. (*Id.*, at 20:4-18) (emphasis added).
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> Q. Are all of the facts in each claim which revealed a pattern or umbrella of fraud that you just discussed contained within the claim files?
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> A. Yes, when looking at the claim files as a whole, and then individually. I mean, I would also say that – suggest that the deposition testimony in this case, in reviewing all of the depositions that have occurred through now, that also helps to crystalize the fraud that I saw, the fraud that I could identify in each case, yes. (*Id.*, at 21:6-17).

When asked when he personally identified the alleged pattern of fraud by the Schatzberg Entities, Mr. Incollingo

answered: "[w]hen I reviewed these 110 files." (*Id.*, at 42:4-16). When asked in his role as State Farm's corporate designee to identify all facts which support State Farm's claim that none of the treatment in any of the claims provided by the Schatzberg Entities to State Farm was reasonable or necessary, Mr. Incollingo testified: "[i]t's the same answer I gave earlier, ***the fraud that exists in each of the files***." (*Id.*, at 43:21-44:2) (emphasis added). He also testified that the pattern of fraud that he identified appeared in every claim file he reviewed:

> Q. Is the fraud the same in every claim?
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> A. There are – there is an overall umbrella, I guess, for lack of a better term, of fraud that exists ***in every file***, then there are individual symptoms, I guess. If fraud is the overall disease or issue, then there are individual symptoms in each file that are different in each file. But overall, it's the same. (*Id.*, at 19:2-10) (emphasis added).

State Farm's expert, Dr. Joseph Verna, opined that the alleged pattern of fraud was evident in and identifiable from a simple review of the claim files in State Farm's possession. In his report, Dr. Verna provides the following statements and opinions:

> "***In review of these files there are clear and evident*** deviations from the professional standards of performance/practice as it relates to the actual treatment claimed as medically necessary, claimed as performed, and billed by the licensed professional doctors of chiropractic." (Ex. J, Dr. Verna's 1/6/14 Report, p. 4) (emphasis added).
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> "These deviations are gleaned from the routine pattern, in part, of monotonous subjective and objective ***findings that rest in the bulk of the above referenced files***." (*Id.*, p. 4) (emphasis added).
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> "These observations are ***clearly evidenced in the files reviewed***." (*Id.*, at p. 4) (emphasis added).
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> "The health records demonstrate ***a clear interchangeability***. . . ." (*Id.*, at p. 4) (emphasis added).

> "My observations of the predictable and non-individualized case features as described ***are seen throughout all files reviewed.***" (*Id.*, at p. 7) (emphasis added).
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> "It is my opinion that after review [of the 110 former Delaware County files] that the flaws identified in the individual cases became ***glaring in all the files.***" (*Id.*, at p. 19) (emphasis added).
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> "***[D]istinct and evident patterns*** of non-individualized reported diagnoses, treatment and clinical management." (Ex. K, Dr. Verna's 11/29/10 Report, p. 8) (emphasis added).
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> "In all cases, there is an ***evident*** pattern of billing for medically unnecessary and unsubstantiated services." (*Id.*, at p. 11) (emphasis added).
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> "***Review of the files also reveals a distinct pattern*** of misrepresentation of clinical criteria and use of MRI advanced diagnostic testing." (*Id.*, at p. 12) (emphasis added).

LEGAL STANDARD

Rule 56 governs the summary judgment motion practice. Fed. R. Civ. P. 56. Specifically, this rule provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Under Rule 56, the court must view the evidence in the light most favorable to the non-moving party. *Galena v. Leone*, 638 F.3d 186, 196 (3d Cir. 2011).

Rule 56(c) provides that the movant bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record which the movant "believes

demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden can be met by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 322.

After the moving party has met its initial burden, summary judgment is appropriate if the nonmoving party fails to rebut the moving party's claim by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" that show a genuine issue of material fact or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." *See* Fed. R. C. P. 56(c)(1)(A-B). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party may not rely on bare assertions, conclusory allegations or suspicions, *Fireman's Ins. Co. of Newark v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982), nor rest on the allegations in the pleadings. *Celotex*, 477 U.S. at 324. Rather, the nonmoving party must "go beyond the pleadings" and either by affidavits, depositions, answers to interrogatories, or admissions on file, "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.*

"[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. In such a situation, the moving party is entitled to judgment as a matter of law. *Id.*

DISCUSSION

As stated, State Farm's Counterclaim, filed on August 9, 2012, consists of five counts: statutory insurance fraud, common law fraud, RICO, unjust enrichment, and restitution. Each of

these claims is premised on State Farm's contention that every treatment and test which has ever been administered by the Schatzberg Entities and submitted to State Farm for payment, commencing in 2005 and continuing to the present, is part of a fraudulent medical billing scheme. The Schatzberg Entities seek summary judgment as to all of State Farm's counterclaims on the basis that each is arguably barred by the applicable statute of limitations. For the reasons set forth herein, this Court agrees.

At the outset, this Court observes that notwithstanding the fact that State Farm has been on notice of the Schatzberg Entities' challenge to the viability of State Farm's counterclaims on statute of limitations grounds, State Farm's lengthy 45-page memorandum of law is completely silent as to this dispositive issue. As discussed more fully below, State Farm bears the burden of demonstrating that its claims are timely and/or that it is entitled to equitable tolling of the applicable limitations periods. *See, e.g., Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005); *Dalyrymple v. Brown*, 701 A.2d 164, 167 (Pa. 1997). State Farm's complete failure to address these issues provides this Court an independent basis to grant the Schatzberg Entities' motion. Notwithstanding State Farm's chosen course of action or inaction, this Court will analyze in depth the various statute of limitations arguments and the application, if any, of the doctrine of equitable tolling.

Different statutes of limitations apply to State Farm's various claims; *to wit*: State Farm's common law fraud and statutory insurance fraud claims are subject to a two-year statute of limitations, 42 Pa. C.S. §5524(7); *Drellis v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 831 (Pa. Super. 2005); and the civil RICO claims are subject to a four-year statute of limitations, *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000), as are the common law claims for unjust enrichment and restitution. 42 Pa. C.S. §5525(a)(4); *Sevast v. Kakouras*, 915 A.2d 1147, 1153 (Pa. 2007).

As such, absent equitable tolling of the applicable statutes of limitations, State Farm's fraud claims are untimely if they accrued before August 9, 2010 (two years prior to the date State Farm filed its Counterclaim), and State Farm's RICO, unjust enrichment, and restitution claims are timed-barred if these claims accrued before August 9, 2008 (four years prior to the date State Farm filed its Counterclaim).

With the exception of the civil RICO claim, all of State Farm's counterclaims are governed by Pennsylvania's statute of limitations principles since these claims purportedly occurred in Pennsylvania; federal law governs State Farm's RICO claim. *See Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991). Regardless of which principles apply, the state and federal principles here do not differ in their application. Generally, under Pennsylvania law, a statute of limitations period begins to run as soon as the right to institute and maintain a suit arises. *Pocono Intern. Raceway, Inc. v. Pocono Produce*, 468 A.2d 468, 471 (Pa. 1983); *Drelles v. Mfrs. Life Ins. Co.*, 881 A.2d 822, 831 (Pa. Super. 2005); 42 Pa. C.S. §5502(a). The "lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations, even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy." *Pocono Intern. Raceway,* 468 A.2d at 471.

However, the statute of limitations is tolled during the time when a party who has not suffered an immediately ascertainable injury remains "reasonably unaware" of the facts and circumstances underlying the claim. *Drelles*, 881 A.2d at 831. Under these circumstances, the "discovery" rule suspends the statute of limitations until the plaintiff "knows, or reasonably should know" of the alleged injury and its cause. *Bohus*, 950 F.2d at 924 (quoting *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. 1984)). The discovery rule applies "when a plaintiff, despite the exercise of due diligence, is unable to know of the existence of the injury

and its cause." *Id.* Generally, under the discovery rule, a limitations period begins to run when the "plaintiff has discovered or, by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party's conduct." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994). When applied, the discovery rule merely excludes from the running of the statute of limitations that period of time during which a party who has not suffered an immediately ascertainable injury is reasonably unaware that it has been injured. *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040, 1043 (Pa. 1992). Thus:

> [a] court presented with an assertion of applicability of the "discovery rule" must, before applying the exception of the rule, address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action.
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> [T]he "discovery rule" exception arises from the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were ***actually*** ascertained within the period.

Pocono Intern. Raceway, 468 A.2d at 471-72 (emphasis in original).

Similarly, under federal law, to determine when the limitations period begins to run for a civil RICO claim, courts must apply the "injury discovery" rule. *Mathews v. Kidder Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (quoting *Forbes*, 228 F.3d at 484). That is, a court "must determine when the plaintiffs knew or should have known of their injury." *Id.*

Under both state and federal law, the injury/discovery rule has subjective and objective components. *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494, 507 (3d Cir. 2006). With respect to the subjective component, "a claim accrues no later than when the plaintiffs themselves discover their injuries." *Id.* (citations omitted). However, because the components are disjunctive, a court must "first perform an objective inquiry to determine when plaintiffs

should have known of the basis of their claims, which 'depends on whether [and when] they had sufficient information of possible wrongdoing to place them on 'inquiry notice' or to excite 'storm warnings' of culpable activity.'" *Id.* (citations omitted).

In determining whether State Farm was on inquiry notice, the burden is on the Schatzberg Entities to show the existence of "storm warnings." *Id.* "Storm warnings" are "essentially any information or accumulation of data 'that would alert a reasonable person to the probability that misleading statements or significant omissions had been made." *Id.* (citations omitted). If the Schatzberg Entities can show the presence of storm warnings, the burden shifts to State Farm to show that it acted diligently to discover its injuries, but that despite its efforts, the injuries remained undiscoverable. *Borah v. Monumental Life Ins. Co.*, 2007 WL 1030477, at *2 (E.D. Pa. Apr. 2, 2007). Where storm warnings exist but the plaintiff fails to investigate, the plaintiff is deemed on inquiry notice of its claims. *Mathews*, 260 F.3d at 252 n. 16. "Inquiry notice is the term used for knowledge of facts that would lead a reasonable person to begin investigating the possibility that his legal rights had been infringed." *Merck & Co. v. Reynolds*, 559 U.S. 633, 650-51 (2010).

As the party seeking to invoke the discovery rule, State Farm bears the burden of proving its applicability. *See Fine*, 870 A.2d at 858. Therefore, State Farm must demonstrate that despite its "reasonable diligence," it was unable to discover its injury. *Wilson v. El-Daief*, 964 A.2d 354, 363, 366 n. 12 (Pa. 2009). Whether the statute of limitations is two years or four years (depending on the claim asserted), the analysis for determining when the applicable limitations period begins to run is the same. Thus, as to each claim asserted by State Farm, the limitations period began to run as soon as State Farm either knew or reasonably should have known of the alleged injur[ies] underlying its claims.

With these principles in mind, this Court's inquiry centers on whether State Farm knew or reasonably should have known of (or discovered) the Schatzberg Entities' alleged misconduct and the resultant injury prior to August 9, 2008 – the latest possible discovery date from which all of State Farm's claims could be deemed timely since State Farm filed its Counterclaim on August 9, 2012.

It is undisputed that "storm warnings" of the Schatzberg Entities' alleged fraud existed. As stated by Mr. Babin, when he reviewed claim files from the Schatzberg Entities in 2009, he discovered a pattern of standardized treatment and discharge plans provided to numerous patient/claimants involved in motor vehicle accidents by employees of the Schatzberg Entities, which caused him to suspect fraudulent activity, *i.e.*, the storm warnings. State Farm essentially concedes that these "storm warnings" were apparent in the Schatzberg Entities' claim files reviewed by Mr. Babin in April of 2009. (*See* State Farm Response at ¶283: "[State Farm] was put on notice of possible fraudulent actions in April of 2009."). According to State Farm, these storm warnings led Mr. Babin and others at State Farm to further investigate all of the claims submitted by the Schatzberg Entities, to eventually assert the counterclaims in this matter, and to withhold *all* payments on invoices submitted. In light of State Farm's unequivocal concession, this Court finds that sufficient storm warnings existed by April 2009. Therefore, this Court's inquiry now centers on whether State Farm, by acting diligently, could and should have discovered these same storm warnings prior to August 9, 2008, and whether despite its reasonable efforts, the injuries remained undiscoverable.

As stated, State Farm's counterclaims against the Schatzberg Entities are premised on an alleged pattern of non-individualized treatment and discharge plans rendered to their patients; plans that State Farm concluded were "pre-determined" and virtually identical in every request

for payment submitted by the Schatzberg Entities. Specifically, State Farm alleges that every bill for payment submitted by the Schatzberg Entities to State Farm from 2005 to the present was, and is, fraudulent. (Ex. E, State Farm Answers to Interrogatories, No. 16). State Farm's assertion relies almost, if not entirely, on evidence obtained from the claim files contemporarily submitted by the Schatzberg Entities with their invoices for payment.

State Farm contends that it first identified the alleged fraudulent billing scheme in April of 2009, when Mr. Babin reviewed claim files of the Schatzberg Entities in his inventory. State Farm admits that the discovery of the alleged fraudulent billing scheme underlying State Farm's injuries was made by simply reviewing the claim files which were at all times in State Farm's possession. In addition, State Farm contends, and its own witnesses and experts confirm, that these same fraud indicators, that Mr. Babin discovered in 2009, appeared in claim files submitted by the Schatzberg Entities to State Farm since 2005, and continuing to the present.

Indeed, through the testimony of its own employees, including its lead SIU investigator, Mr. Babin, its corporate designee, Mr. Incollingo, and its own expert, Dr. Verna, State Farm contends that this pattern is present in every claim file submitted by the Schatzberg Entities to State Farm since at least 2005. For example, Mr. Babin testified that he discovered the alleged fraud when he noticed a suspicious billing "pattern" in claim files in State Farm's possession relating to claims for reimbursement submitted by the Schatzberg Entities. (Ex. F, Babin Tr. 145:11-146:15). Mr. Incollingo, State Farm's corporate designee, confirmed that the alleged fraud was evident from simply reviewing the claim files in State Farm's possession. (Ex. J, Incollingo Tr. 19:2-10; 20:4-18; 21:6-17; 42:4-16; 43:21-44:2). State Farm concedes as much in its response: "the pattern of fraud became evident to Mr. Incollingo after his review of the 110 Delaware county files." (State Farm Response at p. 29). He further testified that the pattern of

fraud appeared "in every file." Finally, State Farm's own expert, Dr. Verna, opined that the alleged fraud was "clear," "evident," and "glaring" from merely reviewing the claim files in State Farm's possession. (Ex. J, Dr. Verna's 1/6/14 Report, pp. 4, 7, 19; Ex. K, Dr. Verna's 11/29/10 Report, pp. 8, 11, 12). As such, according to State Farm's own evidence and concessions, the fraudulent billing scheme underlying each of State Farm's counterclaims was evident and apparent in the Schatzberg Entities' claim files which were in State Farm's actual possession and control since at least 2005. Had State Farm exercised the same level of diligence that it exercised in April of 2009, when Mr. Babin discovered the alleged fraudulent scheme, State Farm would have discovered the same alleged fraudulent scheme in 2005, and long before August 2008.

As this Court has stated, despite its burden to invoke the discovery rule and to show that it exercised reasonable diligence but was "unable to discover their injuries," *see Mathews*, 260 F.3d at 252, State Farm has made little effort to present evidence of its diligence to timely discover the Schatzberg Entities' alleged misconduct. In fact, State Farm's only effort to meet its burden on this issue is its sparse attempt to show that it exercised due diligence ***after*** it discovered the alleged fraud in April of 2009. (State Farm Response at pp. 43-47). State Farm makes no attempt, however, to show its exercise of due diligence between 2005 and April of 2009, when it allegedly first discovered the fraudulent scheme. To the contrary, State Farm merely suggests that the fraudulent billing underlying its counterclaims was reasonably undiscoverable because it "was a relatively small needle in a very large haystack." (State Farm Response, at p. 38). State Farm does not offer any evidence or reason why any of its adjusters or SIU employees who handled and reviewed the hundreds of claim files and/or "specials packages" involving the Schatzberg Entities could not have done, at any time before August of

2008, what Mr. Babin did in April of 2009. Regardless, State Farm's own pleadings, witnesses and experts demonstrate that the facts underlying the alleged medical billing fraud discovered in April of 2009 were equally and readily discoverable by State Farm before August 2008. Having waited until April of 2009 to exercise the reasonable diligence expected and required of such an insurance carrier, and until August 9, 2012, to file its Counterclaim, this Court finds that State Farm is precluded by the applicable statutes of limitations from asserting any of its claims.

Though providing very little by way of argument, State Farm suggests that its claims are timely because the applicable statutes of limitations should be equitably tolled for fraudulent concealment. On the record presented, however, this argument is without merit.

It is undisputed that State Farm has the burden of proving fraudulent concealment. *Forbes*, 228 F.3d at 486-87; *Fine*, 870 A.2d at 860. "Fraudulent concealment is an equitable doctrine that is read into every federal statute of limitations." *Cetel*, 460 F.3d at 508 (citations omitted). To benefit from this equitable tolling, State Farm must show that: (1) the Schatzberg Entities actively misled State Farm; (2) such conduct prevented State Farm from recognizing the validity of its claims within the limitations period; and (3) State Farm's ignorance of the claim is not attributable to its lack of reasonable due diligence in attempting to uncover the underlying facts. *Cetel*, 460 F.3d at 509; *Oshiver*, 38 F.3d at 1390-91. Thus, for the fraudulent concealment exception to apply, there must have been an "affirmative independent act of concealment" by the Schatzberg Entities upon which State Farm justifiably relied, causing State Farm to relax its vigilance. *Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270, 278 (Pa. 2005). State Farm must show that it was "misled . . . into thinking that [it] did not have a cause of action." *Davis v. Grusemeyer*, 996 F.2d 617, 624 (3d Cir. 1993). The same "reasonable

diligence" standard used to determine the applicability of the discovery rule applies to the fraudulent concealment exception. *Fine*, 870 A.2d at 861.

Similarly, in the RICO context, "a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment.'" *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997). Tolling only lasts "until the plaintiff knows, or should reasonably be expected to know, the concealed facts supporting the cause of action. . . ." *Forbes*, 228 F.3d at 486-87. The Third Circuit summed up the standard to be applied on summary judgment as follows:

> Thus, ordinarily when plaintiffs seek to demonstrate a case for equitable tolling, and defendants seek summary judgment on the issue, a court must determine (1) whether there is sufficient evidence to support a finding that defendants engaged in affirmative acts of concealment designed to mislead the plaintiffs regarding facts supporting their [ ] claim, (2) whether there is sufficient evidence to support a finding that plaintiffs exercised reasonable diligence, and (3) whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint. Absent evidence to support these findings there is no genuine dispute of material fact on the issue and the defendants are entitled to summary judgment.

Id. at 487.

From the record, it is clear that State Farm does not offer any facts or evidence that could lead a reasonable juror to conclude or infer that the Schatzberg Entities did anything to prevent State Farm from identifying, prior to August of 2008, the alleged pattern of fraudulent medical billing that Mr. Babin identified in April of 2009. Rather, State Farm merely argues that the sheer volume of claims submitted to State Farm by its many insureds in any given year prevented State Farm from discovering the fraudulent pattern that was otherwise evident on the face of the claim files it possessed and controlled. State Farm offers no legal support, and this Court is unaware of any, for its suggestion that a party's excessive business burdens and practices

excuses it from exercising reasonable diligence to discover its injuries. Notably, State Farm provides no explanation or rationale for why it was able to discover the underlying fraud in April of 2009, but was unable to do so anytime between 2005 and August 9, 2008. Moreover, as established by State Farm's own witnesses and expert, everything that Mr. Babin contends to have identified in his review of the claim files in April of 2009 was equally and readily identifiable in the claim files in State Farm's possession from at least 2005 to August 8, 2008.

Simply stated, had State Farm exercised the same diligence exercised by Mr. Babin in April 2009, State Farm would have and reasonably should have discovered the same alleged fraudulent medical billing pattern from simply reviewing claim files in its possession prior to August 9, 2008. Having failed to present evidence from which a reasonable factfinder could conclude or infer that State Farm exercised due diligence to discover its injury, or that the Schatzberg Entities fraudulently concealed the facts underlying the alleged scheme, State Farm cannot benefit from equitable tolling provided by either the discovery rule or the fraudulent concealment exception.

State Farm also suggests that its counterclaims are timely under the so-called "continuing violation theory," because at least one of the innumerable fraudulent acts falls within the applicable statutes of limitations.[2] State Farm's suggestion is misplaced. The continuing violations doctrine "is an equitable exception to a strict application of a statute of limitations where the conduct complained of consists of a pattern that has only become cognizable as illegal

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[2] It bears repeating that despite being on notice that the primary issue raised by the underlying motion for summary judgment is whether State Farm's claims are time-barred, State Farm makes no argument whatsoever in its memorandum of law in opposition to the Schatzberg Entities' summary judgment motion, [ECF 187-2], with respect to the statute of limitations or the inherent issues of equitable tolling, fraudulent concealment, or continuing violations doctrine. Because State Farm bears the burden on these issues, its complete failure to address these issues provides an independent basis to grant the motion for summary judgment. *See* Fed. R. Civ. P. 56.

over time." *Foster v. Morris*, 208 F. App'x 174, 177 (3d Cir. 2006); *see also R&J Holding Co. v. Redevelopment Auth.*, 165 F. App'x 175, 181 (3d Cir. 2006). The doctrine "should not provide a means for relieving plaintiffs from their duty to exercise reasonable diligence in pursuing their claims." *Cowell v. Palmer Twp.*, 263 F.3d 286, 295 (3d Cir. 2001). To the contrary, "if prior events should have alerted a reasonable person to act at that time the continuing violation theory will not overcome the relevant statute of limitations." *King v. Township of E. Lambert*, 17 F. Supp. 2d 394, 416 (E.D. Pa. 1998), *aff'd*, 182 F.3d 903 (3d Cir. 1999); *see also R&J Holding Co.*, 165 F. App'x at 181. State Farm bears the burden of demonstrating that the continuing violations doctrine applies and saves its claims. *Davis v. Malitzki*, 2009 WL 3467770, at *5 (E.D. Pa. Oct. 27, 2009) ("Plaintiff bears the burden of demonstrating that the continuing violation doctrine applies to his case.").

To the extent State Farm intended to argue that its RICO claim did not accrue until the final predicate act occurred, the Supreme Court has expressly rejected the argument. Prior to the Supreme Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), the United States Court of Appeals for the Third Circuit applied a "last predicate act" exception to the commonly utilized "injury and pattern discovery rule" for determining the accrual date of RICO claims. *Prudential Insurance Co. v. United States Gypsum Co.*, 359 F.3d 226, 233 (3d Cir. 2004).[3] The Supreme Court rejected that exception, however, recognizing that it would result in a limitations period longer than that which Congress contemplated and would permit plaintiffs to recover for injuries well outside the limitations period by merely "boot strapping" them on to later and independent acts. *Id.* In rejecting the last predicate act rule, the Supreme Court held:

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[3] Subsequently, in *Rotella v. Wood*, 528 U.S. 549 (2000), the Supreme Court also rejected the "injury and pattern discovery rule" in favor of the injury discovery rule discussed and applied above.

> We conclude that the Third Circuit's rule is not a proper interpretation of the law. We have two basic reasons. First, as several other Circuits have pointed out, the last predicate act rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts (including acts occurring at up to 10-year intervals) can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective – repose – that underlies limitations periods. Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, "sleeping on their rights," as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the "memories of witnesses have faded or evidence is lost." We cannot find in civil RICO a compensatory objective that would warrant so significant an extension of the limitations period, and civil RICO's further purpose – encouraging potential private plaintiffs diligently to investigate.

Klehr, 521 U.S. at 187.

Here, State Farm has done exactly what the Supreme Court has said it cannot do: sleep on its rights as the fraudulent billing scheme on which its claims are based continued for more than seven years. Further, despite raising the possible application of the continuing violations doctrine, State Farm provides little argument and no authority to support the application of this doctrine to its civil RICO claims. Notably, courts which have considered this doctrine's application in the RICO context have only applied it to a plaintiff's RICO conspiracy claims. *See, e.g., Z Technologies Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599 (6th Cir. 2014) (noting doctrine's application only in "conspiracy and monopolization cases."); *Concord Boat Corp. v. Brunswck Corp.*, 207 F.3d 1039, 1052 (8th Cir. 2000) (same). This Court has not found a case, nor has State Farm cited one, in which the continuing violations doctrine has been applied in a civil RICO claim like the non-conspiracy based claim herein asserted by State Farm. Regardless, allowing State Farm to prosecute its seven-year-old claims as argued would essentially reward it

for sleeping on its rights, an outcome the Supreme Court expressly rejected in *Klehr*, 521 U.S. at 187.

On the evidence of record, the continuing violations doctrine argument cannot save State Farm's untimely claims. As previously set forth, State Farm's own allegations, witnesses, and experts establish that the claim files in State Farm's possession since at least 2005 should have alerted State Farm to act at that time. Having failed to act or exert the requisite reasonable diligence to discover its injury, State Farm cannot rely on the continuing violations doctrine to save its untimely claims.

In summary, for the reasons set forth, this Court opines that the evidence of record clearly establishes that State Farm reasonably should have known of its purported injury resulting from the alleged underlying fraudulent medical billing scheme allegedly orchestrated by the Schatzberg Entities by at least 2005, and certainly before August 9, 2008. The claim files on which State Farm relies to evidence its counterclaims have been exclusively in State Farm's possession and control since 2005. Hence, State Farm has failed to meet its burden of producing evidence from which a reasonable juror could conclude or infer that State Farm was reasonably unable to discover or was prevented in any way from discovering its claims prior to August 9, 2008. As such, there is no evidence from which a reasonable juror could find that any of State Farm's claims were timely filed or are otherwise subject to equitable tolling under either the discovery rule, the doctrine of fraudulent concealment, or the continuing violations doctrine. Therefore, summary judgment is granted in favor of the Schatzberg Entities.

Lastly, the Schatzberg Entities argue that all of State Farm's claims premised upon injuries that State Farm allegedly suffered *after* April of 2009, the date when Mr. Babin and State Farm purportedly discovered the underlying fraudulent billing scheme, must be dismissed

because State Farm cannot meet its burden of showing that it justifiably relied to its detriment on the alleged misrepresentations of the Schatzberg Entities when making reimbursement payments to the Schatzberg Entities. This Court agrees.

It is well-settled that in order to succeed on a claim for fraud, State Farm must show, *inter alia*, that it justifiably relied on the Schatzberg Entities' alleged misrepresentations to its detriment. *See Overall v. Univ. of Pa.*, 412 F.3d 492, 498 (3d Cir. 2005) (citing *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994)). State Farm must also show the same detrimental reliance for its RICO claims. *See Walter v. Palisades Collection, LLC*, 480 F. Supp.2d 797, 807-09 (E.D. Pa. 2007). However, the recipient of a fraudulent misrepresentation is not justified in relying upon the truth of the misrepresentation to the recipient's detriment if the recipient knows of its falsity. *See* Restatement (Second) of Torts §541; *see also Lundy v. Hochberg*, 79 F. App'x 503, 505 (3d Cir. 2003) (affirming dismissal of RICO claim and holding that there was no scheme to defraud where the plaintiff was aware, or should have been aware, of the misrepresentations); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 747 (3d Cir. 1996) (holding that there could be no mail fraud predicate based on the defendant's scheme to charge the plaintiff more than the contract price because the plaintiff admitted that it knew that the defendant was not complying with the contract).

Here, State Farm's own pleadings and witnesses unequivocally establish that State Farm was actually on notice of the Schatzberg Entities' alleged fraudulent medical billing scheme and the concomitant misrepresentations as of April of 2009 (although State Farm should have been aware much sooner). Notwithstanding its discovery and awareness of the alleged fraudulent billing scheme, State Farm contends it suffered injury on account of its payment of claims to the Schatzberg Entities after that date. To the extent State Farm made such payments after April of

2009, those payments cannot be said to have been made in justifiable reliance on the alleged misrepresentations by the Schatzberg Entities since State Farm was actually aware of the misrepresentations. *Cf. Dunkin Donuts Franchised Restaurants, LLC v. Claudia I, LLC*, 998 F. Supp.2d 383, 389 (E.D. Pa. 2014) (finding plaintiff could not show the requisite justifiable reliance for fraud claim where plaintiff was aware of the misrepresentation). Accordingly, State Farm's claims premised upon payments it made to the Schatzberg Entities *after* April of 2009 are dismissed.

CONCLUSION

For the foregoing reasons, Counterclaim Defendants' motion for summary judgment is granted. An Order consistent with this Memorandum Opinion follows.[4]

NITZA I. QUIÑONES ALEJANDRO, U.S.D.C. J.

[4] State Farm has a pending *motion to strike the affidavit of J'Amy Kluender*, [ECF 232], which was referred to the Honorable Carol Sandra Moore Wells for disposition by Order dated September 2, 2015. [ECF 305]. The Kluender affidavit was first filed with this Court on March 28, 2015. [ECF 214]. Because the content of that affidavit does not alter the analysis and outcome set forth in this Memorandum Opinion, this Court need not wait for the Magistrate Judge's ruling on the motion.