UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-61119-CIV-SEITZ/MCALILEY

RISK INSURANCE AND REINSURANCE SOLUTIONS,

Plaintiff,

v.

R + V VERSICHERUNG, *et al.*

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE is before the Court upon the Motion for Partial Summary Judgment [DE-179] of Defendants' R+V Versicherung AG ("R+V") and Christian Walther ("Walther") (collectively "Defendants").[1] Defendants seek summary judgment in their favor on Counts II-X of the ten-count Second Amended Complaint ("SAC") [DE-108] filed by Plaintiff Risk Insurance and Reinsurance Solutions ("Risk Florida").[2] In its SAC, Risk Florida alleges various business-related torts against Defendants arising from a business relationship between Risk Florida and Fidelity Security Life Insurance Company ("Fidelity"). Specifically, Risk Florida alleges that R+V sent two letters to Fidelity, and Walther made oral statements at an industry conference, that were false and defamatory, that interfered with the Risk Florida-Fidelity relationship, and that caused financial harm to Risk Florida. In essence, the statements concern R+V's discovery of fraudulent conduct on the part of Risk France,

[1] Co-Defendant DZ Bank AG ("DZ Bank"), parent of R+V, joined the motion of R+V and Walther. *See* DE-209. DZ Bank's joinder is appropriate as its liability derives solely from its alleged consent to the conduct of R+V and Walther. *See* SAC ¶¶ 4-5, 12, 33. There are no allegations in the SAC of any affirmative misconduct on DZ Bank's part.

[2] Count I for breach of contract was previously stayed given that the claim at issue in that count was being litigated in the English courts. *See* DE-93. Justice Moore-Bick entered judgment in D+V's favor on the breach of contract claim and, at last notice, that decision was under appeal. *See* DE-179 (Ex. G).

a corporate entity related to Risk Florida. Risk Florida asserts tortious interference with contract and business relationships, slander, slander *per se*, slander of title, libel *per se*, breach of fiduciary duty, civil conspiracy (arising from the foregoing torts) and civil conspiracy (as an independent tort).

Defendants move for summary judgment on all nine of the aforementioned causes of action. Defendants claim entitlement to judgment in their favor on the tortious interference claims because the letters and oral statements at issue did not interfere with Risk Florida's business relationships, were justified to the extent they did interfere, and, in any event, did not result in any harm to Risk Florida. Defendants next argue that they are entitled to judgment on the defamation claims because the statements in question are true, Defendants were privilege to make the statements in order to protect their business interests and their own business relationship with Fidelity, and there is no evidence that Risk Florida was damaged. Defendants seek judgment on the breach of fiduciary duty claim, arguing that they owe no special duty to Risk Florida. And finally, Defendants argue that they are entitled to judgment on the conspiracy-based claims due to Risk Florida's failure to establish any of the underlying torts, and that R+V possessed no special coercive power over Risk Florida as needed to establish an independent tort of conspiracy.

The Court has considered Defendants' motion, the response and reply thereto, the pertinent legal authorities and the record and concludes that there are no genuine issue of material fact and that Defendants are entitled to judgment in their favor on Counts II-X of the SAC.

I. Background

Plaintiff Risk Florida and Defendant R+V are both engaged in the business of reinsurance.[3] Fisk

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[3] Reinsurance is defined as "[a] contract by which an insurer procures a third person to insure him against loss or liability by reason of original insurance.... It binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured." Black's Law Dictionary (6th Ed. 1990).

Florida is one of a group of international firms operating under the name "Risk." Risk Insurance and Reinsurance Solutions SA ("Risk France"), a member of the Risk corporate family, acts as an insurance and reinsurance intermediary. *See* Defendants' Statement of Material Facts Not in Dispute ("SOF"), [DE-180] ¶ 6.[4] Jean-Claude Chalhoub ("Chalhoub") is the Chief Executive Officer of the Risk organization. SOF ¶ 7.

Fidelity, a non-party but important figure in this action, sells what is known as substandard disability income insurance (the "SDII Program"). In 1989, Risk Florida and Fidelity entered into an agreement (the "Agreement") under which Risk Florida would market and distribute Fidelity's SDII Program using a network of brokers and agents throughout the United States. SOF ¶ 9. In return, Risk Florida was entitled to a percentage of the premiums collected on the policies issued and renewed. SOF ¶ 10. Fidelity has never discontinued or limited its relationship with Risk Florida under the Agreement. SOF ¶ 30.

Fidelity reinsures a substantial part of its SDII Program. During the relevant time period, Fidelity employed Risk France as the intermediary for the placement of its SDII Program with foreign reinsurers. SOF ¶ 11. In April of 2001, Risk France approached R+V, on behalf of Fidelity, and offered participation in a reinsurance agreement between Fidelity and R+V. SOF ¶ 12. Ultimately, R+V and Fidelity entered into a reinsurance treaty (the "Treaty"),[5] under which R+V agreed to provide reinsurance coverage to Fidelity for losses on its SDII Program. *Id.* Risk Florida had no involvement in the negotiating the Treaty, and received no benefit from it. *Id.*

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[4] Plaintiff filed no statement of material facts in dispute as required by Local Rule 7.5.B. Therefore, the Court has drawn the facts largely from Defendants' statement, confirming their accuracy against the attached source materials. For convenience, the Court will cite to the Defendants' SOF whenever possible rather than the original source materials.

[5] A "reinsurance treaty" is defined as "[a] bilateral contract containing mutual covenants which codify the ongoing process of one insurance company's transfer of risk to another." Black's Law Dictionary (6th Ed. 1991).

In September of 2001, R+V and Risk France entered an agreement (memorialized in two "London Binders") whereby Risk France was authorized to accept and bind insurance risks on behalf of R+V. SOF ¶ 13. At the time the London Binders were executed, but unknown to R+V, Chalhoub and Daniel Gerbauer (a former underwriter at R+V) entered into a separate addenda (the "Addenda") to the London Binders providing that Risk France would receive an additional commission of 40% of the gross premiums written on the London Binders, in addition to its regular commission. *Id.* In exchange, R+V received a 30% interest in an English Risk entity which had no value. *Id.*

After a series of irregularities were discovered concerning the London Binders, R+V hired external auditors to audit the relationship between R+V and Risk France, including the Treaty. SOF ¶ 15. As a result, R+V discovered the Addenda in early 2003. *Id.* Consequently, in April of 2003 R+V terminated its relationship with Risk France and initiated legal proceedings against Risk France in the High Court of Justice of England. *Id.* After an eight week trial, the lawsuit culminated in a judgment against Risk France for conspiring to defraud R+V by means of the Addenda. SOF ¶ 17. Chalhoub was subsequently added as a defendant, and judgment for costs was entered against him. *Id.*

In April of 2003, at the time the secret Addenda was discovered, Defendant Walther, an R+V underwriter, attended the annual Aviation Insurance Association conference in Florida. SOF ¶ 18. While at the conference, Walther met with Joerg Jakobs ("Jakobs"), a consultant for R+V. According to Jakobs, Walther told him that R+V "was intending to take legal action against Mr. Daniel Gebauer" the R+V underwriter involved in procuring the fraudulent Addenda. SOF ¶ 19 (Ex. M ¶¶ 3, 6). The conversation did not mention Risk Florida. SOF ¶¶ 19-21. Later that year, on November 28, 2003, R+V sent a letter through its counsel to Fidelity stating that R+V had terminated its relationship with Risk France and was initiating legal proceedings against Risk France in England. SOF ¶ 22. R+V also indicated that it might be entitled to rescind the Treaty with Fidelity due to the fraudulent conduct of Risk France. *Id.* On December 5, 2003, R+V sent a follow-up letter to Fidelity through counsel stating

that evidence had come to light suggesting that R+V had a basis to terminate the Treaty due to Fidelity's fraud on R+V through the misconduct of its agents Risk France and Risk Florida, among others. SOF ¶ 23. The letter explains that Fidelity's "audits and investigations confirmed that Risk and Chalhoub defrauded R+V by, among other things, diverting substantial amounts of premium monies properly owed to R+V." *Id.* (Ex. P, p. 2) As set forth in the SAC, it is these three communications – the oral statement of Walther and the two letters from R+V – that give rise to all of Risk Florida's claims.

II. Legal Standards

Summary judgment under Fed. R. Civ. P. 56(c) is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the initial responsibility of showing the Court, by reference to the record, that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden may be met by "showing" or "pointing out" to the Court that there are no genuine issues of material fact. *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995) (*per curiam*) (quoting *Celotex*, 447 U.S. at 325). Once the initial burden is met, the non-moving party must go beyond the pleadings and "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). In so doing, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

When deciding whether summary judgment is appropriate, the Court must view the evidence and all reasonable factual inferences therefrom in the light most favorable to the non-moving party. *Witter*

v. Delta Air Lines, Inc., 138 F.3d 1366, 1369 (11th Cir. 1998) (citations omitted). The Court must then decide whether "'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52)).

With these principles in mind, the Court turns to Defendants' Motion.

III. Analysis

Defendants' summary judgment motion argues that the words spoken by Walther to Jakobs, and the two letter sent by R+V to Fidelity, do not amount to unjustified interference with Risk Florida because they either do not mention Risk Florida or were justified to protect R+V's own business relationships. In addition, there is insufficient evidence that any interference caused damages to Risk Florida. Similarly, Defendants argue that these statements were not defamatory because they were true, Defendants were justified under the circumstances in making them, and they caused no damages to Risk Florida. Defendants also contend that they owed no fiduciary duty to Risk Florida and therefore cannot be liable for breach of such duty. Finally, owing to Risk Florida's failure to establish any underlying torts or to establish any special coercive power on R+V's part, R+V claims that it is entitled to judgment against Risk Florida on the conspiracy counts.

A. Tortious Interference With Contract and Business Relationships

To survive Defendants' motion for summary judgment on the two tortious interference claims, Risk Florida must provide sufficient evidence from which a jury could find by a preponderance of the evidence: (1) the existence of a contract or business relationship under which Risk Florida has legal rights; (2) Defendants' knowledge of that contract or relationship; (3) Defendants' intentional and unjustified interference with the contract or relationship; and (4) damage to Risk Florida resulting from the interference. *Burger King Corp. v. Ashland Equities, Inc.*, 161 F. Supp.2d 1331, 1336 (S.D. Fla. 2001) (citations omitted). There is no dispute that Risk Florida and Fidelity have a business relationship,

as evidenced by their Agreement. Additionally, Defendants do not deny knowledge of the Fidelity-Risk Florida relationship or the Agreement. Risk Florida's tortious interference claims founder, however, on Risk Florida's failure to meet the third and fourth elements: unjustified interference and damages.

First, the interference alleged in the SAC involves the transmission of the two letters to Fidelity and the oral statement Walther made at the industry conference. The oral statement is easily resolved, as Walther spoke only to Jakobs, not to anyone associated with Fidelity. There is nothing in the record to suggest that the comments made to Jakobs were communicated to Fidelity or anyone else. Therefore, the statement could not have interfered with the Fidelity-Risk Florida relationship. In fact, Fidelity's Reinsurance Director, Brenda Gordanier, testified that she had never heard of Walther or Jakobs and that no one from Fidelity attended the conference or knew of Walther's statement. *See* SOF ¶ 25. More importantly, the undisputed evidence reveals that Walther's comments only referenced possible legal action against R+V's underwriter Gerbauer. SOF ¶¶ 19-21. Risk Florida was not implicated and therefore not interfered with by Walther's statement.

As for the two letters sent to Fidelity, it is beyond dispute that the November 28, 2003 letter did not mention Risk Florida and therefore could not have interfered with its relationship with Fidelity. The letter simply states, as a matter of fact, that R+V had severed its relationship with Risk France, a different entity from Risk Florida. The December 5, 2003 letter is almost as cut-and-dried. Although the letter mentions Risk Florida by name in the opening paragraph, along with Risk France and other individuals, Risk Florida is nowhere mentioned in the body of the letter and it is clear when read in context that it was Risk France and Chalhoub who were implicated in diverting the funds from R+V, not Risk Florida. In any event, it cannot be disputed that R+V was justified in sending those letters to Fidelity, given the determination of its independent auditors that Risk France had defrauded funds from R+V. R+V was certainly entitled to explain to Fidelity the basis for its decision to rescind the Treaty with Fidelity. And, significantly, the the English court judgment confirms that R+V's decision to rescind

was legitimate.

Even if the letters presented enough evidence of unjustified interference to survive a motion for summary judgment – and they do not – Risk Florida has not established that it was injured thereby. Testimony from Ms. Gordanier reveals that the two letters had no impact on the relationship between Fidelity and Risk Florida. Her deposition could not be any clearer:

> Q: What impact, if any, did this letter [of November 28, 2003] have on the relationship between Risk-Florida and [Fidelity]?
> A. None. To my knowledge.
> Q. Is it fair to say that this correspondence from R+V to Fidelity on November 28, 2003 had no adverse impact on the relationship between Risk-Florida and [Fidelity].
> A. Not to my knowledge.
> Q. I'm sorry, not, it didn't have any adverse impact?
> A. No, it did not have any adverse impact on our relationship.

SOF ¶ 25. With regard to the December 5, 2003 letter, the following equally conclusive exchange took place with Ms. Gordanier:

> Q: What impact, if any, did this letter have, this December 5th, 2003 letter have on the relationship between Risk-Florida and [Fidelity], on the business relationship between the parties?
> A: I don't think that it impact – I can't recall it impacting anything with our relationship with Risk-Paris or Risk Florida.
> Q: So it didn't impact you relationship – so it's fair to say that [th]is letter had no adverse impact on the business relationship with Risk Florida under the agency agreement?
> A: Not to my ...
> Q: No, it didn't have an adverse effect?
> A: No, it didn't have an adverse effect, to the best of my knowledge.
> Q: So after December 2003, basically, Risk Florida continued to market [Fidelity's] disability program?
> A: Yes.
> Q: And the duties and compensation structure remained the same after this letter was sent?
> A: Yes.

Id. Risk Florida offers nothing to undermine Ms. Gordanier's testimony regarding its relationship with

Fidelity.[6]

In its response to Defendants' motion, Risk Florida all but concedes that the two letters sent to Fidelity, and Walther's statement to Jakobs, did not interfere with the Fidelity-Risk Florida relationship. Indeed, Risk Florida alters its theory of tortious interference entirely, instead focusing exclusively on a statement made by someone at R+V named "Strauss" to an insurance broker from New York named Michel Becher. Becher testified that sometime in late 2000 or early 2001 – before the London Binders were executed between R+V and Risk France – he heard various rumors from unnamed persons that Chalhoub was involved in unspecified fraudulent dealings. *See* DE-190, Ex. D ("Becher Dep.") pp. 15-18, 43-45.[7] The only specific source linking the rumors to R+V was a business colleague of Becher's named David Sterling. *Id.*, p. 18.[8] According to Becher, Sterling told him that the principals of Risk Florida, specifically Chalhoub, were "underhanded and crooks." Becher Dep. p. 18.[9] When Becher heard the rumors of fraud, he decided to contact R+V directly to make inquires. In his telephone call to R+V, Becher asked whether R+V could reassure him and was told by someone named Strauss that

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[6] Risk Florida cites to the delay in Fidelity's implementation of Risk Florida's Platinum Plus instrument as evidence of damages, but the Fidelity letter relied upon does not reference any interference on R+V's part as the cause for the delay, but instead expresses concerns over the judgment of Justice Moore-Bick that Risk France had defrauded R+V. *See* DE-190, Ex. F. In addition, Fidelity's letter indicates concern that Risk Florida initiated the instant lawsuit against R+V in this Court, including allegations about Fidelity, without ever mentioning the suit to Fidelity. *Id.* Ultimately, the letter states that "[Fidelity], despite requests, has not received timely, and often needed, responses from you concerning the financial arrangements that are required to be in place before the new product could be marketed." *Id.* Thus, the letter makes plain that any delay in rolling out the Platinum Plus product was not caused by Defendants.

[7] These dates are important because it defies common sense to argue, as Risk Florida does, that R+V devised a smear campaign to avoid its contractual obligations prior to even entering the agreements.

[8] Sterling was managing director of Crispin-Spear & Co., a Lloyds broker in the United Kingdom. Becher Dep. p. 16.

[9] Although Mr. Sterling would apparently be the person capable of confirming the source of the rumors, it seems that he was not deposed.

Chalhoub was "bad business" and to "stay away." Becher Dep. p. 48. Becher further testified that he believed Risk Florida lost between one and two million dollars a year in premiums due to the decline in market confidence caused by the rumors. Becher Dep. p. 80.

Aside from the fact that Risk Florida's theory that R+V interfered with Risk Florida's business relationship with Becher is a new one, and no reference to it appears in the operative SAC, this evidence from Becher is insufficient to defeat summary judgment for several reasons. First, the statement from Becher that R+V started the rumors is hearsay (as it comes second-hand from Sterling) and therefore cannot defeat summary judgment. *See Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) ("[I]nadmissible hearsay cannot be considered on a motion for summary judgment."). Second, focusing on the actual conversation that took place, Becher conceded that Strauss never mentioned any corporate entity and instead only mentioned Chalhoub. During his deposition, Becher was directly questioned on this point and explained:

Q: When you spoke to Mr. Strauss, what reference, if any, did he make to Risk or IMI or anybody?
A: He was talking about Chalhoub.
Q: Did he make any reference to any corporate entities or did he reference Mr. Chalhoub only?
A: He clearly indicated that anything to do with Jean Claude Chalhoub was not good.

Becher Dep. p. 66. While Becher testified that he believed the statements concerning Chalhoub implicated Risk Florida, that inference is unfounded, especially because the allegations that prompted the call came from a London broker and referred to activities in the London market. Furthermore, it is difficult to read Strauss's comments about Chalhoub as intentional interference on R+V's part, given that Becher was the one who reached out for R+V's opinion. In short, the Strauss statement about Chalhoub, even read in the light most favorable to Risk Florida, is simply too slender a reed to support a tortious interference claim on behalf of Risk Florida.

Becher's opinion that Risk Florida suffered between one and two million dollars in damages

is even less justified. Becher confirmed that he was not asked to give an expert opinion on damages in this case and, in fact, he stated that he was just a "salesman" and therefore not qualified to opine on damages. Becher Dep., pp. 81-82, 84. Moreover, Becher conceded that he reviewed no records or documents in reaching his estimate of damages. *Id.*, pp. 81-82. Indeed, he explained that he based his opinion entirely on second-hand information he received from others *Id.*, p. 82. While damages need not be proved with absolute certainty, this evidence is far too speculative to send to a jury.[10] Accordingly, for the reasons stated above, Defendants' motion for summary judgment on the tortious interference claims is granted.

B. Defamation

In its SAC, Risk Florida lodges a host of defamation claims against Defendants arising from the two letters sent from R+V to Fidelity and Walther's oral statement to Jakobs at the industry conference. Generally speaking, the law of defamation seeks to protect individuals from the harms associated with false statements. In Florida, false statements are defamatory "when they charge a person with an infamous crime or tend to subject one to hatred, distrust, ridicule, contempt or disgrace or tend to injure one in one's business or reputation." *Fortson v. Colangelo*, 434 F. Supp.2d 1369, 1378 n.11 (S.D. Fla. 2006) (quoting *Seropian v. Forman*, 652 So.2d 490, 495 (Fla. 4th DCA 1995)). Defamation encompasses the related causes of action of libel and slander. The chief distinction between libel and slander is the form of the allegedly defaming words. Slander is typically based on defamatory spoken words, while libel is based on written or other non-spoken defamatory statements. *Fortson,* 434 F. Supp.2d at 1378 n. 11 (citing *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 (11th Cir. 1999) ("Under Florida law, libel is defined as the unprivileged written publication of false statements that

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[10] Risk Florida has offered no damages expert in this case. The only other evidence of damages involves alleged losses to Risk USA. However, Risk USA is not a party to this lawsuit and Risk Florida cannot recover for alleged damages to a non-party.

cause injury.") and *Spears v. Albertson's, Inc.*, 848 So.2d 1176, 1179 (Fla. 1st DCA 2003) ("Slander may be defined as the speaking of base and defamatory words, which tend to prejudice another in his reputation, office, trade business, or means of livelihood.")).

For purposes of this action, it is important to observe that slander is divided further into two categories: slander *per quod* and slander *per se*. The difference between the two claims hinges on the nature of the alleged false statements. When words on their face, and without the aid of extrinsic proof, are injurious, they are said to be defamatory *per se* and no proof of damages is necessary to establish liability. *See Fun Spot of Florida, Inc. v. Magical Midway of Cent. Florida, Ltd.*, 242 F. Supp.2d 1183, 1197 (M.D. Fla. 2002) (citing *Hoch v. Rissman*, 742 So.2d 451 (Fla. 5th DCA 1999)). In other words, in slander *per se* claims damages are presumed from the nature of the slanderous statements in question. For example, "[a] false defamatory statement which suggests that someone has committed a dishonest or illegal act is slander *per se*." *Id.* Similarly, "[a]n oral communication that imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office is slander *per se*." *Id.* (citing *Campbell v. Jacksonville Kennel Club,* 66 So.2d 495 (Fla. 1953)). In contrast, slander *per quod* involves words not harmful on their face, and therefore requires proof that they caused special damages.

A third type of defamation-related action is slander of title, which is similar to other defamation claims but it protects different interests. *See Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 386 (Fla. 4th DCA 1999); *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So.2d 944, 948 (Fla. 3rd DCA. 1995). While defamation protects a person's character, slander of title protects property interests. *See Calaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 209 (Fla. 2d DCA 2002). In all other significant respects, slander of title claims are treated the same as other defamation claims. *Id.* With these broad principles in mind, the Court turns to Defendants' Motion.

In order to avoid summary judgment Risk Florida must present sufficient evidence from which

a reasonable jury could conclude that (1) Defendants published (either orally or in writing) a false statement about Risk Florida; (2) to a third party; and (3) that Risk Florida suffered damages as a result of the publication, unless the nature of the defamation rises to the level of a *per se* violation. *Fortson v. Colangelo*, 434 F. Supp.2d 1369, 1378 (S.D. Fla. 2006) (citations omitted); *Palmer v. Gotta Have It Collectibles*, 106 F. Supp.2d 1289, 1302 (S.D. Fla. 2000). It bears emphasizing that "[a] false statement of fact is the *sine qua non* for recovery in a defamation action." *Fortson*, 434 F. Supp.2d at 1378 (quoting *Hallmark Builders, Inc. v. Gaylord Broad., Co.*, 733 F.2d 1461, 1464 (11th Cir. 1984)). Therefore, "[t]ruth combined with a good motive is a complete defense" to defamation claims. *Palmer*, 106 F. Supp. 2d at 1302. Similarly, "[a] statement of opinion is, therefore, not actionable" as defamation. *Weight-Rite Golf Corp. v. United States Golf Ass'n*, 766 F. Supp. 1104, 1111 (M.D. Fla. 1991) (citing *Zambrano v. Devanesan*, 484 So.2d 603 (Fla. 4th DCA 1986)).

It is for the Court to decide, as a matter of law, whether the complained of words are actionable expressions of fact. *Fortson*, 434 F. Supp.2d at 1378 (citation omitted). In making this determination:

> [T]he test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality and the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Id. (quoting *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52, 57 (Fla. 1st DCA 1981)).

Along with truth as a defense to defamation claims, under Florida law a statement "made by one who has a duty or interest in the subject matter, to one who also has a corresponding duty or interest, possesses a qualified privilege to make the statement." *Weight-Rite*, 766 F. Supp. at 1112. The question of privilege is to be decided as a matter of law where the circumstances and content of the allegedly defamatory statements are undisputed or are clear under the evidence. *Cape Publications, Inc. v.*

Reakes, 840 So.2d 277, 280 (Fla. 5th DCA 2003) (citing *Nodar v. Galbreath*, 462 So.2d 803, 809 (Fla. 1984)); *see also Hager v. Venice Hosp., Inc.*, 944 F. Supp. 1530 (M.D. Fla. 1996), *aff'd,* 132 F.3d 1461 (11th Cir. 1997).

1. Slander and Slander Per Se

In its SAC Risk Florida asserts claims for slander and slander *per se* based upon the allegedly false statements Walthers made to Jakobs. However, in opposition to Defendants' motion, Risk Florida fails to address the Walther statements altogether. Even if Risk Florida had not apparently abandoned its slander claims, Defendants would be entitled to summary judgment because the particular statement was that R+V planned to institute legal action against its own underwriter, Daniel Gebauer, not against Risk Florida. Since there was no oral statement about Risk Florida, there can be no actionable slander, either *per se* or *per quod.* Additionally, with respect to slander *per quod*, there is no evidence that Walther's statement to Jakobs caused Risk Florida any damage because there is no evidence it was ever communicated to anyone else.

Similarly, although Risk Florida did not expressly plead or argue that the Strauss statements constitute slander, they would not be actionable in this case in any event because the statements concerned Chalhoub's conduct, not Risk Florida's.[11] And the English court judgment that Chalhoub and Risk France did defraud R+V confirms the truth of the statement, which is a complete defense to defamation. *See Cape*, 840 So.2d at 280 (defendant's statement that plaintiff was fired for violating the law, even though not actually convicted, was not actionable defamation where the conduct described by the allegedly defaming statement did occur and was in fact unlawful).

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[11] Additionally, in Florida to state an actionable defamation claim, one must plead with specificity who made the statement and to whom it was spoken. *See Jackson v. North Broward County Hosp. Dist.*, 766 So.2d 256, 257 (Fla. 4th DCA 2000) (citations omitted). Here, the SAC makes no mention of any statements made by Strauss to Becher. Moreover, because Strauss made the alleged statement in 2001, more than two years before the first complaint was filed in 2004, this claim would be barred by the two year statute of limitations. *See Molenda v. Hoechst Celanese Corp.*, 60 F. Supp. 2d 1294, 1302 (S.D. Fla. 1999) (citing § 95.11(4)(g), Fla Stat.).

2. Libel Per Se

Risk Florida's libel claim is based upon the two written letters sent by R+V, though counsel, to Fidelity. Defendants seek summary judgment in their favor on the grounds that the statements in these letters were true, that R+V was justified in sending them to Fidelity, and that Risk Florida was not damaged by them in any event. The Court agrees. First, the November 28, 2003 letter to Fidelity states that R+V had terminated its relationship with Risk France and had commenced a legal action against Risk France in England to recover outstanding premiums based on the fraud associated with the secret Addenda.[12] These statements are true. The letter also notifies Fidelity that R+V may have a legal basis for rescinding its Treaty with Fidelity based on the fraudulent conduct uncovered by its auditors. To the extent this is even a factual statement, and not simply a legal opinion, it also is true. Moreover, fairly read in context, this letter does not even address Risk Florida but merely describes the impact of Risk France's conduct on the relationship between Fidelity and R + V. It therefore cannot constitute an actionable defamatory statement against Risk Florida.

As for the December 5, 2003 follow-up letter, it too falls short of actionable defamation. To be sure, the letter states that Fidelity may have defrauded R+V through the actions of Risk France, Risk Florida and various other individuals. However, it is clear from the body of the letter that the fraudulent conduct in question involved Risk France and Chalhoub, not Risk Florida. Taking into account the context of the two letters – notice of R+V's legal position and the bases for it – as well as the language and tone used to convey the message, there is no way to construe the letter as defamatory. Indeed, given that the statements concern an ongoing business relationship between Fidelity and R+V, R+V was amply justified in communicating with Fidelity about any conduct that impacted that relationship. And given

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[12] Although R+V uses the term "Risk" in this letter, it is clear from the context that "Risk" means Risk France and not Risk Florida, given that R+V had no relationship with Risk Florida to terminate. Furthermore, since Risk France was the intermediary between Fidelity and R+V, it is plain that it was Risk France's fraudulent inducement which might give rise to rescission of the R+V-Fidelity relationship.

that the judgment of the English courts confirms the truth of the allegations of misconduct, Risk Florida can hardly meet its burden of establishing that R+V made false statements in the letter.

3. Slander of Title

Defendants are entitled to summary judgment on the slander of title claims for the same reasons they are entitled to judgment on the slander and libel claims, as they are based on the same evidence. *See Banyon Lakes*, 831 So.2d at 209.

C. Fiduciary Duty

A cause of action for breach of fiduciary duty is founded upon the existence of a fiduciary relationship between the parties. *Behrman v. Allstate Life Insur. Co.*, 388 F. Supp.2d 1346, 1351 n.6 (S.D. Fla. 2005). "[A] fiduciary relationship is one built upon the trust and confidence between the parties where confidence is reposed by the weaker party and a trust accepted by the party in a position of superiority and influence." *Id.* (citing *Argonaut Dev. Group v. SWH Funding Corp.*, 150 F. Supp.2d 1357, 1363 (S.D. Fla. 2001) and *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp., Etc.*, 850 So.2d 536 (Fla. 5th DCA 2003)). Here, there is no basis in the record to support the existence of any fiduciary relationship between Risk Florida and Defendants. Risk Florida never explains how it placed confidence in Defendants, or where, when or how Defendants accepted such confidences. Indeed, Risk Florida essentially abandons its claim by failing to make any opposition to Defendants' motion. Accordingly, summary judgment will be granted on Risk Florida's breach of fiduciary duty claim.

D. Civil Conspiracy

There are two types of actionable civil conspiracy in Florida. The first is based on underlying tortious conduct, and the second is a narrowly circumscribed independent tort itself. *See Allocco v. City of Coral Gables,* 221 F. Supp.2d 1317, 1360-61 (S.D. Fla. 2002); *see also Walters v. Blankenship*, 931 So.2d 137, 139 (Fla. 5th DCA 2006) (citations omitted) ("Generally an actionable conspiracy requires an actionable underlying tort or wrong.... However, an alternative basis for a civil conspiracy claim

exists where the plaintiff can show some 'peculiar power of coercion' possessed by the conspirators by virtue of their combination, which an individual acting alone does not possess."). Furthermore, regardless of the cause of action alleged, a conspiracy requires that the individual conspirators make up "a combination of separate economic groups or forces." *Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So.2d 1025, 1029 (Fla. 3d DCA. 1981).

Because, for the reasons set forth above, Risk Florida cannot prevail on the predicate torts alleged in the SAC, it cannot prevail on any conspiracy theory related to those torts. *See Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp.2d 1330, 1349 (M.D. Fla. 2006) (citing *Buckner,* 403 So.2d at 1027); *see also Allocco*, 221 F. Supp.2d at 1361 (citing *Posner v. Essex Insur. Co.,* 178 F.3d 1209, 1217 (11th Cir. 1999)). Risk Florida also fails to establish either type of conspiracy because the conspirators are not "a combination of separate economic groups or forces." *Buckner*, 403 So.2d at 1029. Rather the alleged conspiracy in this case is made up of R+V and its own employees and/or its corporate parent. *See Bryant Heating & Air Conditioning Corp., Inc. v. Carrier Corp.*, 597 F. Supp. 1045, 1054-55 (S.D. Fla. 1984) (finding that parent corporation, its wholly owned subsidiary and its employees and officers "cannot constitute the requisite combination of 'separate economic groups or forces' necessary to establish the Florida tort of conspiracy.") (quoting *Buckner*, supra).

Furthermore, there is insufficient evidence that R+V possessed any peculiar power of coercion over Risk Florida to establish the narrow independent tort of civil conspiracy. In its opposition, Risk Florida points out that R+V is a large corporation that collects multi-millions of dollars in premiums each year. Sheer size and wealth is not enough to establish coercive power. But in any event, there is no evidence that R+V illicitly used any perceived power to harm Risk Florida.[13] Aside from this

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[13] Notwithstanding that a corporation cannot conspire with its own employees, Risk Florida generally cites to R+V's February 4, 2003 board meeting minutes as evidence of a conspiracy. Those minutes, which took place after the independent audit and the discovery of the Addenda, discuss various strategies for dealing with Chalhoub and "Risk" (which again can only be construed to mean Risk France under the circumstances). Those strategies involved going to the press, informing business partners of

evidence, Risk Florida simply retreads the same arguments that failed to establish the underlying torts in the first place. Accordingly, the undisputed record supports the granting of summary judgment in Defendants' favor.

IV. Conclusion

For the reasons set forth above, it is hereby

ORDERED

(1) Defendants' Motion for Partial Summary Judgment [DE-179] is GRANTED;

(2) Judgment shall be entered in Defendants' favor and against Plaintiff on Counts II-X of Plaintiff's Second Amended Complaint; and

(3) The parties shall file by **June 15, 2005** a memorandum not to exceed 5 pages addressing how the Court should resolve Count I (breach of contract) previously stayed by the Court in lieu of the related English action.

DONE and ORDERED in Miami, Florida, this 6th day of June, 2007.

PATRICIA A. SEITZ
UNITED STATES DISTRICT COURT

cc:
Magistrate Judge McAliley
Counsel of Record

Chalhoub's business practices, initiating a legal action, and/or withdrawing underwriting powers or terminating the relationship with Risk France. *See* DE-190, Ex. 2. There is no evidence that R+V ever went to the press, and with respect to informing Fidelity of Chalhoub's conduct and initiating a lawsuit against Risk France, those strategies were more than justified, as described above. As such, these board meeting minutes are insufficient to establish any conspiracy to harm Risk Florida.