

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-7558-CIV-MIDDLEBROOKS/BANDSTRA

SANDRA JACKSON, et al.,

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS,
INC., d/b/a BELLSOUTH, et al.,

Defendants.

**MEMORANDUM OF LAW OF DEFENDANTS BELLSOUTH
TELECOMMUNICATIONS, INC., FRANCIS SEMMES, AND KEITH KOCHLER IN
SUPPORT OF THEIR MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**

BellSouth Telecommunications, Inc. (“BellSouth”) and two of its in-house lawyers, Francis Semmes and Keith Kochler (together, “the BellSouth defendants”), submit this memorandum of law in support of their motion to dismiss the Third Amended Complaint under Fed. R. Civ. P. 12(b)(6).

BACKGROUND

According to this Third Amended Complaint, all but four of the 56 plaintiffs in this action settled employment discrimination claims against BellSouth as part of a global settlement of a suit captioned *Adams v. BellSouth* and a related set of unfiled cases.¹ 3rd Am. Cplt. ¶¶ 7, 22, 23, 40. Plaintiffs were represented by, among others, Barry Mandelkorn and the law firm of Ruden McClosky, Smith, Schuster & Russell, P.A. (together, “Ruden McClosky”) (*id.* ¶¶ 10-14), who along with BellSouth and its two lawyers are the defendants in this action.² Plaintiffs contend that the BellSouth defendants’ conduct in connection with the settlement constituted race discrimination

^{1/} The complaint alleges that four plaintiffs refused to sign the release and received no settlement proceeds. 3rd Am. Cplt. ¶ 7.

^{2/} Plaintiffs have voluntarily dismissed from this action defendants Valerie Shea and the law firm of Heinrich Gordon Hargrove Weihe & James, P.A.

in violation of 42 U.S.C. § 1981 and violated several provisions of the federal and Florida RICO statutes. Plaintiffs also raise claims against the BellSouth defendants for common law conspiracy to defraud and tortious interference with advantageous contractual and business relationships. Plaintiffs advance several additional claims, including malpractice and breach of fiduciary duty, against their former attorneys only.

1. Procedural History. This is plaintiffs' *Third* Amended Complaint. In the initial Complaint, plaintiffs raised claims against BellSouth and Semmes under 42 U.S.C. § 1981, the federal RICO statute, and the federal mail and wire fraud statutes. In the First Amended Complaint, plaintiffs alleged that BellSouth and Semmes had violated 42 U.S.C. § 1981 and the federal mail and wire fraud statutes and had participated in an unlawful common-law conspiracy to defraud. BellSouth moved to dismiss that complaint and, in response, plaintiffs filed a Second Amended Complaint. The Second Amended Complaint alleged that BellSouth, Semmes, and Kochler had violated 42 U.S.C. § 1981 and the federal RICO statute. BellSouth again moved to dismiss and, in response, plaintiffs tendered the Third Amended Complaint.

When this Court granted plaintiffs leave to file the Third Amended Complaint, it specified that “[a]ny claim asserted in any of the prior three complaints, that has been reasserted in the third amended complaint and attacked by pre- or post-answer motion to dismiss, will be subject to dismissal with prejudice.” Order (May 14, 2001), at 1 (emphasis in original). All of the claims asserted against BellSouth in the Third Amended Complaint, except for the Florida RICO counts and the tortious interference claim, have been asserted in one or more of the three prior complaints; as explained below, all of them should be dismissed with prejudice.³

2. Factual Allegations. The Third Amended Complaint alleges that the BellSouth defendants colluded with plaintiffs' counsel to settle plaintiffs' claims for less than they were worth

^{3/} The Florida RICO counts, moreover, essentially mirror, and thus replicate, the federal RICO counts, which appeared in prior complaints.

and to prevent plaintiffs and others from suing BellSouth in the future. 3rd Am. Cplt. ¶ 15. In support of this general allegation, plaintiffs assert the following facts:

Plaintiffs became involved in the underlying lawsuit after they responded to advertisements and word-of-mouth solicitations seeking participants in an employment discrimination suit against BellSouth. *Id.* ¶¶ 24-26. On or about August 30, 1996, plaintiffs' counsel filed the *Adams* case. *Id.* ¶ 29. In August 1997, plaintiffs' attorneys told them that a settlement had been reached with BellSouth, and asked them to release their claims in exchange for payments ranging from \$500 to \$79,000. *Id.* ¶¶ 36-37. Plaintiffs' counsel allegedly did not disclose the terms of the global settlement to the individual plaintiffs. *Id.* ¶¶ 38, 41. Each settling plaintiff agreed to keep the settlement confidential, and was advised that breach of the agreement could result in his or her termination as an employee of BellSouth. *Id.* ¶ 43.

As part of the settlement agreement, plaintiffs' attorneys supposedly promised not to represent any plaintiffs in any action against BellSouth for one year. *Id.* ¶ 42. Plaintiffs' counsel also entered into a four-year "consulting agreement" with BellSouth, allegedly "for the purpose of creating a conflict of interest for PLAINTIFFS' attorneys and to prevent future representation of any plaintiffs in legal actions against BELLSOUTH." *Id.* ¶ 48. In exchange for the consulting agreement, plaintiffs' counsel received \$120,000 of the \$1.6 million settlement proceeds. *Id.* ¶¶ 49-50.

ARGUMENT

A motion to dismiss "will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Canon v. Clark*, 883 F. Supp. 718, 720 (S.D. Fla. 1995). Dismissal is justified "when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." *Ibid.* (quoting 5A Charles Alan Wright & Arthur B. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (1995)). In assessing the sufficiency of a complaint under Rule 12(b)(6), the Court may consider both "the face of the complaint and the attachments thereto." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d

1364, 1368 (11th Cir. 1997). Although well-pleaded factual allegations should be taken as true, “[c]onclusory allegations and unwarranted deductions of fact” should not. *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974).⁴

Plaintiffs here clearly do not have a claim against the BellSouth defendants. Whatever the propriety of the limited practice restriction under Florida ethics rules, the negotiation and consummation of the global settlement between BellSouth and the plaintiffs constituted neither intentional discrimination under Section 1981 nor racketeering in violation of RICO. All of plaintiffs’ state-law claims are barred by the litigation privilege, and plaintiffs’ tortious interference claim is barred for the additional reason that the tort simply does not cover cases like this one. Finally, the settling plaintiffs’ failure to rescind their settlement agreements bars their present claims.

I. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 42 U.S.C. § 1981

In Count I of the Third Amended Complaint, plaintiffs allege race discrimination under 42 U.S.C. § 1981. To state a claim under Section 1981, a plaintiff must allege facts establishing (1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute. *Mian v. Donaldson Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993) (citing *Baker v. McDonald’s Corp.*, 686 F. Supp. 1474, 1481 (S.D. Fla. 1987)). The enumerated activity at issue here is the right “to make and enforce contracts.” 42 U.S.C. § 1981; see 3rd Am. Cplt. ¶ 57.

Section 1981 “can be violated only by purposeful discrimination.” *General Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982); see also *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (March 19, 2001). “[I]n order to survive a motion to dismiss his § 1981 claim, a plaintiff must allege with specificity

^{4/} In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit prior to October 1, 1981.

facts sufficient to show or raise a plausible inference that the defendant purposefully discriminated against him because of the plaintiffs' race." *Garg v. Albany Indus. Dev. Agency*, 899 F. Supp. 961, 967 (N.D.N.Y. 1995), *aff'd mem.*, 104 F.3d 351 (2d Cir. 1996). "[M]erely juxtaposing the fact of one's race with an instance of [alleged] discrimination is insufficient to state a claim." *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989). A Section 1981 claim will not withstand a motion to dismiss without a "fact-specific allegation of a causal link between defendants' [alleged] conduct and plaintiffs' race." *Ibid.*

Although plaintiffs contend that defendants' actions with respect to the settlement "were motivated solely by the race of the PLAINTIFFS" (3rd Am. Cplt. ¶ 59), that conclusory allegation is insufficient as a matter of law to state a claim of race discrimination. See, e.g., *Dartmouth Review*, 889 F.2d at 19; *Faulk v. City of Orlando*, 731 F.2d 787, 798 (11th Cir. 1984); *Garg*, 899 F. Supp. at 967. Plaintiffs do not allege a single fact supporting a plausible inference that BellSouth's conduct was motivated by their race. Although they struggle to create the impression that they have a substantive basis for alleging racial bias (3rd Am. Cplt., ¶¶ 59-60), their allegations, like those raised by the plaintiffs in *Dartmouth Review*, are like a "ketchup bottle": the argument "looks quite full, but it is remarkably difficult to get anything useful out of it." 889 F.2d at 18.

Plaintiffs first contend that plaintiffs, "by virtue of their status as African Americans, were able to bring the race based discrimination claim against BELLSOUTH in the first instance." 3rd Am. Cplt. ¶ 59(a). But the mere fact that the *settled claims* alleged race discrimination – and that plaintiffs could bring such claims because they are African-American – does not demonstrate that BellSouth's actions *in connection with the settlement* constituted race-based discrimination. An agreement to settle a race discrimination case – like an agreement to settle any other case – is simply a contract to provide monetary or other benefits in exchange for a release of claims. Thus, misconduct in connection with an agreement to settle a race discrimination case is not, *ipso facto*, itself the product of race discrimination. Here, plaintiffs do not offer a single fact to suggest that the BellSouth defendants' conduct would have been different if, for example, the same plaintiffs'

lawyers (using the same aggressive tactics) had represented white employees suing BellSouth for breach of an implied contract to provide job benefits. In that circumstance, no one would argue that the conduct in settling the case showed intentional race discrimination; and there is no more basis for inferring discriminatory intent here. See *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 801 F. Supp. 684 (S.D. Fla. 1992) (dismissing for failure to allege purposeful discrimination § 1981 claim alleging defendants coerced and intimidated African-American plaintiffs into dropping litigation challenging construction of stadium in predominantly black neighborhood); see also *Dartmouth Review*, 889 F.2d at 18 (rejecting white plaintiffs' theory that their punishment for alleged participation in racist act constituted race discrimination); *Jaffee v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (requiring fact-specific allegation showing that "race was the reason for" the discrimination).

Plaintiffs next allege that the BellSouth defendants, "because the PLAINTIFFS are African-Americans, presumed that the PLAINTIFFS were not smart enough or sophisticated enough to inquire or insist on disclosure of the settlement terms and amounts, and could therefore be duped out of the settlement proceeds to which they were entitled and conned into entering into the Settlement Agreement and signing the releases." 3rd Am. Cplt. ¶ 59(b). This contention is simply another way of phrasing the conclusory assertion that BellSouth was motivated by racial animus.⁵ Because plaintiffs allege no *facts* supporting the inference that BellSouth viewed them as unintelligent and unsophisticated, that BellSouth held this view because of plaintiffs' race, and that this opinion motivated BellSouth's conduct, plaintiffs' offensive contention fails to satisfy the requirement of alleging purposeful discrimination. See *Minority Police Officers Ass'n v. City of South Bend*, 801 F.2d 964, 967 (7th Cir. 1986) (allegation that "whites, as a group, are inherently

^{5/} Although the allegation adds nothing to the purely conclusory claim of racial motive, it is, nevertheless, an unwarranted smear of BellSouth and its two lawyers. Because this allegation makes extraordinarily harsh, but unsupported, claims of racial bias, counsel for the BellSouth defendants asked plaintiffs' counsel by letter either to provide some factual basis for these charges or else to withdraw them. See May 14, 2000 letter from Lawrence S. Robbins to Daniel S. Rosenbaum (attached as Exhibit A). As of the date of this filing, plaintiffs' counsel has declined to respond to the request.

incapable of rating black[] [applicants] fairly” was insufficient to establish discriminatory intent under § 1981); *Dove v. Fordham Univ.*, 56 F. Supp. 2d 330, 339 (S.D.N.Y. 1999) (“It is not enough merely to assert that the defendant took adverse action against the plaintiff, and that the action was the product of racial animus”) (internal quotation marks omitted); *Simmons v. John F. Kennedy Med. Ctr.*, 727 F. Supp. 440, 442 (N.D. Ill. 1989) (allegation that employer “‘under-utilized’ its black employees” was too conclusory to support plaintiff’s § 1981 claim).

Plaintiffs next contend that “[h]ad the PLAINTIFFS in this action, excluding MCGUCKIAN, been white,” the DEFENDANTS would not have engaged in the alleged misconduct in connection with the settlement. 3rd Am. Cplt. ¶ 59(c). But, again, this is just another way of phrasing a conclusory allegation of racial motivation. Plaintiffs again offer no specific facts to give substance to their contention that plaintiffs’ race was the key determinant of defendants’ conduct. Indeed, plaintiffs’ acknowledgment in the complaint that plaintiff McGuckian, who is white, was subject to the same treatment as the African-American plaintiffs, affirmatively refutes the suggestion that race motivated BellSouth’s conduct.⁶

In short, on their fourth attempt, plaintiffs fail utterly to allege facts demonstrating that any of the BellSouth defendants acted with the intent to discriminate. Accordingly, BellSouth, Kochler, and Semmes are entitled to dismissal of the Section 1981 claim.

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE FEDERAL OR STATE RICO STATUTES

In Counts II, III, and IV, plaintiffs purport to raise claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* In Counts V, VI, and VII, they allege

^{6/} Plaintiffs also assert that defendants have not treated “similarly situated” plaintiffs in other cases like they treated plaintiffs here and have never before had a special master appointed to investigate their conduct in connection with a settlement. 3rd Am. Cplt., ¶ 60. Such a generalized allegation of disparate treatment – which in this case amounts to nothing more than an admission that the misconduct alleged here is isolated – is insufficient to create an inference of purposeful discrimination. See, *e.g.*, *Odom v. Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (“A mere factual assertion of unequal treatment * * * is insufficient to survive a Rule 12(b)(6) motion.”).

claims under the analogous provisions of Florida’s parallel statute, Fla. Stat. § 772.103(2)-(4).⁷ But plaintiffs fail to satisfy the requirements for pleading a RICO claim. They do not allege adequately that any of the BellSouth defendants engaged in a pattern of racketeering activity; they do not allege adequately the existence of a RICO enterprise; and they do not allege facts showing that any of the BellSouth defendants committed any predicate crime. This is not a RICO case, and plaintiffs’ federal and state RICO claims should be dismissed with prejudice.

A. Plaintiffs Fail To Allege A Pattern Of Racketeering Activity

First, the RICO claims fail because plaintiffs do not plead a “pattern of racketeering activity.” To meet the “pattern” requirement under RICO, a complaint must, at a minimum, allege (i) that the defendants committed two or more of the predicate crimes enumerated in the statute (18 U.S.C. §§ 1961(1), 1961(5), 1962(a)-(c)), and (ii) “that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). “It is this fact of *continuity plus relationship* which combines to produce a pattern.” *Ibid.* (internal quotation marks omitted) (emphasis in original). See also *Jones v. Childers*, 18 F.3d 899, 912 (11th Cir. 1994) (applying the federal RICO pattern jurisprudence to state RICO claim). Even assuming for present purposes that plaintiffs have adequately alleged BellSouth’s commission of predicate crimes, the complaint fails to allege that the predicate acts “amount to or pose a threat of continued criminal activity.” *H.J. Inc.*, 492 U.S. at 239.

In *H.J. Inc.*, the Supreme Court explained that “continuity” may refer either to “a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” 492 U.S. at 241. “A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of

^{7/} “The Florida RICO statute is patterned after the Federal RICO statute, and the Florida courts often look to the Federal RICO decisions for guidance in interpreting and applying the act.” *Florida Software Sys., Inc. v. Columbia/HCA Healthcare Corp.*, 46 F. Supp. 2d 1276, 1284 (M.D. Fla. 1999).

time.” *Id.* at 242. “Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement * * * .” *Ibid.* Open-ended continuity may be established by showing that the “predicates themselves involve a distinct threat of long-term racketeering activity” or that the “predicate acts or offenses are part of an ongoing entity’s regular way of doing business.” *Ibid.*

Seeking to plead a pattern of racketeering, plaintiffs point to a series of mailings between April 1997, when correspondence indicates that the parties were negotiating a settlement involving some of the plaintiffs, and January 1998, when BellSouth mailed tax forms relating to the settlement payments. 3rd Am. Cplt. ¶ 67. Even assuming that each of the cited mailings was in furtherance of a scheme to defraud – an assumption that is not supported by the innocuous correspondence between opposing counsel cited by plaintiffs – the alleged acts do not constitute a pattern of racketeering.

First, the alleged period of wrongful activity – which, even according to plaintiffs’ inflated estimate, lasted only ten months⁸ – is too short to establish continuity over a “closed period.” As a general rule, a closed-end scheme that runs its course within one year does not constitute a pattern of racketeering. See *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (predicate acts of mail and wire fraud over approximately eleven months spanned insufficient time to demonstrate closed-end continuity; Second Circuit “has never held a period of less than two years to constitute a ‘substantial period of time’”); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th

^{8/} To beef up the alleged period of racketeering, plaintiffs list as a predicate act the January 1998 mailing of tax documents relating to the earlier settlement payments. 3rd Am. Cplt. ¶ 67(f) & Composite Ex. D. However, BellSouth’s routine action to comply with the federal tax laws did not “further” the alleged scheme to defraud. See *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215 (8th Cir. 1993) (“ministerial act” of tendering payment for securities plaintiffs had already sold pursuant to fraudulent scheme was not part of alleged pattern of racketeering); *Rodriguez v. Banco Cent.*, 777 F. Supp. 1043, 1063 (D.P.R. 1991) (acceptance of payment on a note is not a separate predicate act). If BellSouth were scheming to induce plaintiffs to settle for too little, then the scheme was completed when the settlement checks were written in June and August of 1997 (see Composite Ex. D) – which, according to plaintiffs’ timeline, was only *five months* after the first predicate act in April 1997.

Cir. 1994) (single scheme over seventeen months insufficient to form RICO pattern); *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-1216 (8th Cir. 1993) (finding activity extending over ten or eleven months “insubstantial”); *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 922 (7th Cir. 1992) (seven to eight months insufficient); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 593 (11th Cir. 1992) (defendant’s alleged illegal activity “was accomplished in too short a period of time, approximately six months, in order to qualify as a pattern of racketeering activity”); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) (twelve months not substantial enough to show pattern); *Ganzi v. The Washington-Baltimore Reg’l 2012 Coalition*, 98 F. Supp. 2d 54, 58 (D.D.C. 2000) (“overwhelming amount of persuasive authority” indicates that “eight months is not long enough to show a RICO pattern”). Indeed, when – as here – the RICO allegations concern only a single scheme involving a discrete goal, courts have held that even significantly *longer* periods do not establish a closed-end pattern of racketeering. See, e.g., *Effron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 18 (1st Cir. 2000) (“the fact that the defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims” supports conclusion that there was no closed-end continuity), cert. denied, 121 S. Ct. 1228 (2001); *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (scheme to defraud spanning several years but having “narrow focus” and “commonplace predicate acts” did not satisfy pattern requirement; “this case is not sufficiently outside the heartland of fraud cases to warrant RICO treatment”); *Edmondson & Gallagher v. Alban Towers Tenants Ass’n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995) (three-year period over which the predicate acts occurred was insufficient to establish a pattern of racketeering where the complaint alleged a single scheme with a discrete goal); *Schnell v. Conseco, Inc.*, 43 F. Supp. 2d 438, 446 (S.D.N.Y. 1999) (predicate acts extending over 23 months were insufficient to establish pattern where plaintiff alleged a scheme to defraud having a single goal and a single class of victims, and the alleged predicate acts of mail and wire fraud “are in themselves innocuous and are not alleged to be false or misleading”).

Second, the allegations do not demonstrate continuity over an open-ended period. Plaintiffs do not allege any facts indicating that the predicate acts alleged here “involve a distinct threat of long-term racketeering activity” or that they are part of BellSouth’s “regular way of doing business.” See *H.J. Inc.*, 492 U.S. at 242. To the contrary, plaintiffs acknowledge that defendants “have never before conspired and colluded to engage in the activities” set forth in the complaint (3rd Am. Cplt. ¶ 60), and they allege no facts suggesting that the alleged RICO enterprise will ever again engage in a similar scheme — or in any other concerted activity, for that matter. See, e.g., *Aldridge*, 953 F.2d at 594 (no open-ended pattern of racketeering where the defendants’ acts after the initial fraud “did not threaten future harm or a repetition of the illegal acts”); *Efron*, 223 F.3d at 19 (no open-ended continuity where “[t]here is nothing to suggest that the defendants would seek to repeat their fraud”). Because the Third Amended Complaint clearly does not sufficiently plead a pattern of racketeering, all of the RICO counts must be dismissed.

B. Plaintiffs Fail Sufficiently To Allege the Existence of An Enterprise

To make out a RICO claim, plaintiffs also must establish the existence of an enterprise. “[A] RICO enterprise exists where a group of persons associates, formally or informally, with the purpose of conducting illegal activity.” *United States v. Hewes*, 729 F.2d 1302, 1311 (11th Cir. 1984); see also *United States v. Turkette*, 452 U.S. 576, 583 (1981) (an enterprise is “a group of persons associated together for a common purpose of engaging in a course of conduct”). “[T]he definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities * * * that furnishes a vehicle for the commission of two or more predicate crimes * * * .” *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.), *cert. denied*, 121 S. Ct. 573 (2000) (citing *United States v. Elliot*, 571 F.2d 880, 898 (5th Cir. 1978)). A RICO enterprise may be proven by “evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.” *Turkette*, 452 U.S. at 583. Plaintiffs have not alleged, nor would they be able to prove, a sufficient association among the

parties for the purposes of a RICO enterprise, nor have they adequately alleged that the so-called enterprise “function[ed] as a continuing unit.”

Plaintiffs allege that “BELLSOUTH, along with its attorneys SEMMES and KOCHLER, associated together with [Norman] Ganz, RUDEN and MANDELKORN, and functioned as a continuing unit for the common purpose” of settling *Adams* for less than its value and depriving plaintiffs of their fair share of settlement proceeds. 3rd Am. Cplt. ¶ 65. But on its very face, this conclusory allegation is absurd; to say the least, it is an “unwarranted deduction[] of fact” (*Associated Builders, Inc.*, 505 F.2d at 100). The BellSouth defendants did not “associate” with plaintiffs’ former lawyers “for the common purpose” of depriving plaintiffs of settlement proceeds; they “associated” with plaintiffs’ counsel (if “associate” is the right word to describe interaction among litigation adversaries) because the plaintiffs elected *to sue* BellSouth and *to hire* these particular lawyers to press their claim. In the course of this “association,” the prospect of settlement arose; but the suggestion that this group of strange bedfellows “associated” “for the common purpose” of engineering a low-value settlement is not only conclusory, it is preposterous. Indeed, if plaintiffs’ allegations were sufficient to plead a RICO enterprise, then any group of lawyers negotiating a settlement would be subject to claims that they had violated the RICO statute.

Finally, even if some form of “association” between these individuals did exist, plaintiffs have presented no facts to even suggest it “function[ed] as a continuing unit.” According to plaintiffs’ own allegations, the alleged association had the finite goal of settling a single set of cases in which the participants in the “association” served as opposing counsel – and they accomplished that goal within a few months. Such allegations do not establish the existence of a RICO enterprise. See *Riggs Nat’l Bank v. Freeman*, 684 F. Supp. 1086, 1088 (S.D. Fla. 1988) (no evidence that enterprise functioned as continuing unit where purpose of enterprise had an obvious terminating goal).

C. Plaintiffs Fail To Allege Adequately That The BellSouth Defendants Committed Any Predicate Acts Of Racketeering

Even assuming that the complaint did not patently fail the pattern and enterprise requirements, plaintiffs' RICO claims would have to be dismissed because the complaint does not sufficiently allege that the BellSouth defendants committed even one predicate act of racketeering. In a civil RICO action, "a party must allege two acts of racketeering with enough specificity to show that there is probable cause [to believe] the crimes were committed." *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986). Plaintiffs contend that the BellSouth defendants committed predicate acts of mail fraud, the essential elements of which are (1) intentional participation in a scheme to defraud; and (2) use of the mail in furtherance of that scheme. See 18 U.S.C. § 1341; *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991). Seeking to establish these elements, plaintiffs contend generally that defendants "intentionally participated in a scheme to defraud [plaintiffs] and to obtain money or property by means of false or fraudulent pretenses, representations, or promises." 3rd Am. Cplt. ¶ 66. They also allege that the defendants communicated with one another via mail, fax, telephone, and e-mail, and that BellSouth mailed settlement checks and tax forms to plaintiffs. *Id.* ¶ 67.

To establish a predicate act of mail fraud, plaintiffs must plead that BellSouth acted with a "conscious knowing intent to defraud." *Pelletier*, 921 F.2d at 1499; see also *In re Cascade Int'l Sec. Litig.*, 840 F. Supp. 1558, 1582 (S.D. Fla. 1993) (intent to defraud is an essential element of mail fraud). "A RICO plaintiff's allegations of scienter cannot be 'merely conclusory and unsupported by any factual allegations.'" *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 949 (11th Cir. 1997) (quoting *O'Malley v. O'Neill*, 887 F.2d 1557, 1560 (11th Cir. 1989)). To survive a motion to dismiss, the complaint must allege facts that give rise to a *strong inference* that the defendants possessed the requisite intent. See *Republic of Panama*, 119 F.3d at 949 (dismissing RICO claim because plaintiff's factual allegations did not "give rise to a strong inference that [the] defendants possessed the requisite factual intent") (internal quotations omitted); *Bill Buck Chevrolet*,

Inc. v. GTE Fla., Inc., 54 F. Supp. 2d 1127, 1133 (M.D. Fla. 1999) (same), *aff'd mem.*, 216 F.3d 1092 (11th Cir. 2000); *Cascade Int'l*, 840 F. Supp. at 1583 (dismissing RICO claim where plaintiffs did not allege “sufficient facts to infer [defendant’s] knowledge of the alleged scheme to defraud”); *Banco de Desarrollo Agropecuario*, 640 F. Supp. at 1175 (dismissing RICO claim where plaintiff’s allegations “lack[ed] the necessary specificity and particularity to support a showing of probable cause of intent to defraud”).

Plaintiffs claim that they were defrauded in that, as a result of defendants’ conduct, they allegedly settled their claims for substantially less than they were worth (3rd Am. Cplt. ¶ 66(a)) and received an insufficient share of the settlement proceeds (*id.* ¶ 66(b)). Plaintiffs also contend (*id.* ¶ 66(c)) that defendants’ entry into the “consulting arrangement” was part of a scheme to defraud them. However, even if true, the simple facts that BellSouth negotiated a settlement unfavorable to plaintiffs and entered into a consulting arrangement with their counsel would not establish participation in a scheme to defraud. “Under the mail and wire fraud statutes, a plaintiff only can show a scheme to defraud if he proves that some type of deceptive conduct occurred.” *Pelletier*, 921 F.2d at 1500. To satisfy the pleading requirements, plaintiffs must allege facts giving rise to a strong inference *both* that they were deceived *and* that BellSouth was complicit in deceiving them.

The complaint does not allege that BellSouth made any affirmative misrepresentations to plaintiffs. Nor does it allege facts suggesting that BellSouth knew anything about the communications between plaintiffs’ counsel and their clients concerning the terms of the global settlement or the existence of the consulting arrangement. Accordingly, there is no basis for inferring that BellSouth participated in a scheme to injure plaintiffs by withholding material information about the settlement.⁹ The best plaintiffs can do is to allege that BellSouth knew how

^{9/} Of course, as opposing counsel, BellSouth had no duty to make any disclosures directly to plaintiffs regarding the terms of the settlement or the advisability of their accepting it. In fact, such direct communications with a represented party would have violated the ethics rules. Thus, *BellSouth’s* failure to disclose information about the settlement would not violate the federal mail and wire fraud statutes. See *Ayres v. General Motors Corp.*, 234 F.3d 514, 521 (11th Cir. 2000) (nondisclosure can violate federal fraud statutes only where a special relationship of trust, such as a fiduciary relationship, requires disclosure of material facts).

much of the settlement proceeds plaintiffs were receiving. 3rd Am. Cplt. ¶ 66(d). But that does not establish that BellSouth acted with a “conscious knowing intent to defraud” plaintiffs. Plaintiffs do not allege that BellSouth knew that the attorneys were taking more than their agreed share of the settlement funds, or were hiding relevant information from their clients. Indeed, even if BellSouth’s knowledge of how plaintiffs and their attorneys were dividing the settlement spoils should have raised suspicions that plaintiffs’ counsel were deceiving their clients, that would not establish intentional fraud. “Mere association with a RICO enterprise or even reckless disregard for the truth is not enough to establish RICO liability.” *Becks v. Emery-Richardson, Inc.*, 1990 WL 303548, at *37 (S.D. Fla. Dec. 21, 1990).

Because plaintiffs thus have failed to allege that the BellSouth defendants were knowingly involved in a fraudulent scheme, the mail fraud charges cannot serve as predicate crimes in support of plaintiffs’ RICO claims, and dismissal is required.¹⁰

III. PLAINTIFFS’ STATE-LAW CLAIMS SHOULD BE DISMISSED

A. All of Plaintiffs’ State-Law Claims Are Barred By The Litigation Privilege

As we stated in Point II, plaintiffs’ state RICO claims should be dismissed as insufficient under well-settled RICO principles. In addition to the state RICO claims, plaintiffs purport to raise two other state-law claims against BellSouth – conspiracy to defraud (Count IX), and interference with advantageous contractual and business relationships (Count XV). All of plaintiffs’ state-law claims – including the RICO claims – are barred by the absolute immunity from liability for damages afforded by Florida law to acts related to litigation.

“The law in Florida has long been that defamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be,” as long as they are relevant to the litigation. *Fridovich*

^{10/} Plaintiffs do not specifically allege which criminal offenses comprise the “pattern of criminal activity” necessary to establish a claim under the Florida’s RICO statute (Fl. Stat. § 772.103), but presumably they are relying on their allegations that BellSouth committed federal mail and wire fraud. See Fl. Stat. § 772.102(b). Because plaintiffs have failed sufficiently to allege violations of those federal statutes, their Florida RICO claims also must be dismissed.

v. *Fridovich*, 598 So. 2d 65, 66 (Fla. 1992). More recently, the Florida Supreme Court has held that absolute immunity also must be afforded “to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior * * * , so long as the act *has some relation* to the proceeding.” *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 608 (Fla. 1994) (emphasis added). In *Levin*, the Court ruled that the defendant was immune from plaintiffs’ claim that it had tortiously interfered with a business relationship by contriving to disqualify plaintiffs’ counsel by certifying (inaccurately, as it turned out) that it would be calling a lawyer from the firm as a witness at trial. The Court stated:

Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Ibid.; see also, e.g., *American Nat’l Title & Escrow of Fla. Inc. v. Guarantee Title & Trust Co.*, 748 So. 2d 1054 (Fla. Dist. Ct. App. 1999) (defendants were immune from tort claim based on allegations that they misused a court order to coerce the payment of money); *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309 (Fla. Dist. Ct. App. 1989) (per curiam) (law firm immune from claim that it committed extortion against opposing party in litigation). The litigation privilege applies to state-law claims adjudicated in federal court. See *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 2001 WL 237103 (S.D. Fla. Mar. 8, 2001) (dismissing as barred by the privilege all of plaintiffs’ pendant state-law claims, including fraud, fraudulent inducement to settle, conspiracy, interference with prospective economic advantage, and violation of the Florida Deceptive and Unfair Trade Practices Act).

Plaintiffs’ state-law claims against BellSouth clearly fall within the litigation privilege. BellSouth’s misconduct allegedly consists of (1) unfairly extracting a bargain settlement from plaintiffs; and (2) negotiating settlement terms that allowed plaintiffs’ counsel to keep too large a share of the settlement proceeds. There can be no question that these acts “occurr[ed] during the

course of a judicial proceeding * * * [and] ha[d] some relation to the proceeding.” 639 So. 2d at 608.¹¹ Indeed, although (to our knowledge), no Florida court has decided whether the litigation privilege applies to settlement-related actions,¹² other jurisdictions recognizing privileges applicable to judicial proceedings uniformly have applied those privileges to settlement of ongoing litigation. See, e.g., *Wentner v. Ridgewood Energy Corp.*, 1995 WL 470866, at *11 (9th Cir. Aug. 9, 1995) (applying California law) (attorney’s statement in settlement negotiations that “we’ll destroy you” was immune from claim of intentional infliction of emotional distress because it was “an attempt to achieve the objects of the litigation”); *Arochem Int’l Inc. v. Buirkle*, 968 F.2d 266, 273 (2nd Cir. 1992) (applying California law) (statements made to encourage settlement of litigation absolutely privileged); *Petty v. General Accident Fire & Life Assurance Corp.*, 365 F.2d 419 (3d Cir. 1966) (applying New Jersey law) (statements made by non-party insurer at settlement conference absolutely immune from defamation claim); *Joseph A. Saunders, P.C. v. Weissburg & Aronson*, 87 Cal. Rptr. 2d 405, 408 (Cal. Ct. App. 1999) (statements made in the course of settlement absolutely privileged); *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. Ct. App. Div. 1995) (threats of criminal prosecution made by attorney during settlement conference, even if tortious, were protected by the absolute privilege afforded to judicial proceedings), cited with approval in *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995) (absolute privilege “covers statements made during settlement negotiations”). As the courts applying the privilege have recognized, “the negotiation of a settlement is part of a judicial proceeding”; in fact, “the termination of litigation through settlement is a judicially favored way of disposing of litigation.” *Petty*, 365 F.2d at 421. See also, e.g., *Hoover*

^{11/} It might be said, in fact, that this Court’s exercise of sanctioning authority over the ethical infractions at issue in this case rested on the fundamental understanding that the settlement process was part and parcel to “a judicial proceeding,” albeit the final stage of that proceeding.

^{12/} In *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323, 1326-28 (Fla. Dist. Ct. App. 1983), the court held that *pre-litigation* settlement discussions were subject only to a qualified privilege. That holding is consistent with the general principle of Florida law that pre-litigation activity that is not a “necessary preliminary act to judicial proceedings” does not fall within the absolute privilege (see e.g., *Silver v. Levinson*, 648 So. 2d 240, 244 (Fla. Dist. Ct. App. 1994)), and does not bear on whether actions in conjunction with settlement of ongoing litigation are absolutely privileged.

v. *Van Stone*, 540 F. Supp. 1118, 1112 (D. Del. 1982) (applying Delaware law) (“events taking place outside the courtroom during discovery or settlement discussions are no less an integral part of the judicial process, and thus deserving of the protection of the [absolute] privilege, than in-court proceedings”). There is no basis for concluding that the Florida courts would exclude from the broad litigation privilege the negotiation of a settlement agreement that terminated ongoing litigation.

Finding that BellSouth’s conduct is immune from state tort and RICO liability does not leave plaintiffs without recourse for any settlement-related misconduct by BellSouth. As the Court observed in *Levin*, “[j]ust as [r]emedies for perjury, slander and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state, other tortious conduct occurring during ongoing litigation is equally susceptible to that same discipline.” 639 So. 2d at 608 (internal citation and quotation marks omitted). That observation clearly is correct: as plaintiffs allege (and the Court is well aware), this Court has *already* used its inherent power to investigate and remedy the very conduct upon which plaintiffs’ state-law theories are premised, and it ruled that plaintiffs were free to rescind the settlement. See *Adams v. BellSouth Telecomms., Inc.*, C.A. No. 96-2473-CIV-MIDDLEBROOKS, Omnibus Order on Magistrate’s Reports and Recommendations, at 26 (S.D. Fla. Jan. 29, 2001). Plaintiffs did not elect to take that course – but that does not entitle them to file a new lawsuit arising from conduct protected by the litigation privilege. Accordingly, all of their state-law claims should be dismissed with prejudice.¹³

B. Plaintiffs Fail To State A Tortious Interference Claim

Plaintiffs’ claim for tortious interference with advantageous contractual and business relationships should be dismissed for the independent reason that the theory has no application to the facts alleged in the complaint. “The type of injury alleged in an action for tortious interference with business relationship is *damage to one’s business or occupation.*” *Garrison v. Thomas Mem.*

^{13/} Although plaintiffs have not previously raised their tortious interference claim, any amendment would be futile, because no amendment would defeat the litigation privilege.

Hosp. Ass'n, 438 S.E. 2d 6, 14 (W. Va. 1993) (emphasis added). A tortious interference action “protects the right to pursue one’s business, calling, or occupation, free from undue influence or molestation.” *Lamorte Burns & Co. v. Walters*, 2001 WL 502464, at *10 (N.J. May 14, 2001). “What is actionable is the luring away, by devious, improper and unrighteous means, of the customer of another.” *Energex Lighting Indus., Inc. v. North Am. Philips Lighting Corp.*, 765 F. Supp. 93, 109 (S.D.N.Y. 1991) (citation and internal quotation omitted).¹⁴ The plaintiffs here do not allege that they are in the “business, calling or occupation” of bringing lawsuits against their employer; nor do they allege that BellSouth has interfered with their rights to pursue their chosen occupations, whatever they may be. Accordingly, plaintiffs fail to state a tortious interference claim.

Plaintiffs will likely point out that Florida courts have recognized a cause of action for tortious interference with attorney-client relationships, and that the claim in this case therefore should at least survive the pleading stage. However, each of the Florida cases in which such claims have been allowed to proceed was brought by a *law firm* (not a client), suing in its capacity as a business enterprise. The plaintiff law firm’s theory of recovery in these cases was either (i) that another law firm had stolen a client and the client’s business from the plaintiff firm (see *Brown v. Larkin & Shea, P.A.*, 522 So. 2d 500 (Fla. Dist. Ct. App. 1988); *Thomas v. Ratiner*, 462 So. 2d 1157 (Fla. Dist. Ct. App. 1984); *Agudo, Pineiro & Kates, P.A. v. Harbert Constr. Co.*, 476 So. 2d 1311 (Fla. Dist. Ct. App. 1984)); or (ii) that a liability insurer had induced the client to settle or drop a pending lawsuit, thereby depriving the plaintiff law firm of legal fees (see *Farish v. Bankers Multiple Line Ins. Co.*, 425 So. 2d 12 (Fla. Dist. Ct. App. 1982); *State Farm Mut. Auto. Ins. Co. v. Ganz*, 119 So. 2d 319 (Fla. Dist. Ct. App. 1960)). In substance, these claims are no different from tortious interference claims brought by any other type of business venture.

^{14/} The elements of a claim of tortious interference with a business relationship are (1) the existence of a business relationship; (2) the defendant’s knowledge of the relationship; (3) the defendant’s intentional and unjustified interference with the relationship; and (4) damage to the plaintiff as a result of the breach of the relationship. *Gossard v. Adia Servs., Inc.*, 723 So. 2d 182, 184 (Fla. 1998); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994); *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985).

But as far as we are aware, there is *no* reported case in Florida *or in any other jurisdiction* sustaining a claim of tortious interference with an attorney-client relationship that was brought by the *client* against a third party. See 90 A.L.R. 4th 621 (1991 and Sept. 2000 Supp.), LIABILITY IN TORT FOR INTERFERENCE WITH ATTORNEY-CLIENT RELATIONSHIP (discussing more than 100 cases from 34 states; none sustaining a tortious interference claim brought by the client). This Court should decline the invitation to make this case the first one.

IV. BECAUSE PLAINTIFFS HAVE ELECTED NOT TO RESCIND THE SETTLEMENT AGREEMENTS, THEIR CLAIMS ARE BARRED

In resolving the ethics issues raised by *Adams* settlement, this Court ruled that plaintiffs were entitled to set aside their settlements and litigate their claims, so long as they “first disgorge[d] all benefits either already received or due to be received under the terms of the settlement.” See *Adams v. BellSouth Telecomms., Inc.*, C.A. No. 96-2473-CIV-MIDDLEBROOKS, Omnibus Order on Magistrate’s Report and Recommendations, at 26 (S.D. Fla. Jan. 29, 2001). Plaintiffs here did not elect rescission; instead, they seek to retain the proceeds of their settlements and sue BellSouth for additional damages, comprised substantially of additional money they supposedly would have recovered in *Adams* absent the alleged misconduct. See, e.g., 3rd Am. Cplt., ¶¶ 15, 58a-b, 65, 149. Having elected neither to rescind the settlements nor to disturb the final judgments that rest on them, however, plaintiffs may not seek additional damages from BellSouth.

A. Plaintiffs’ Claims Are Barred By The Releases

Each of the plaintiffs who settled their employment discrimination claims against BellSouth signed a Settlement Agreement and Full and Final Release of Claims (the “Release”) waiving “all claims against BELLSOUTH.” See 2nd Am. Cplt. ¶¶ 36, 40 & Att. I, ¶ 1.¹⁵ By suing for damages,

^{15/} The BellSouth defendants relied on these attachments to the Second Amended Complaint in their motion to dismiss that pleading, and, not surprisingly, plaintiffs have now omitted them from the attachments to the Third Amended Complaint. In resolving this motion to dismiss, however, the Court may take notice of documents filed by plaintiffs with their earlier complaints – not least because the Court itself has made mention of the Settlements in its Orders in the related *Adams* case. *Cf. Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44, 47-48 (2d Cir. 1991) (on a motion to dismiss, court could consider documents of which plaintiffs had notice; plaintiffs could not evade

rather than seeking rescission of the settlement agreement, plaintiffs have affirmed the contract and are bound by all of its terms, including the terms of the Release. See *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000); *Hauser v. Van Zile*, 269 So. 2d 396, 398-399 (Fla. Dist. Ct. App. 1972); see also *Fineberg v. Kline*, 542 So. 2d 1002, 1004 (Fla. Dist. Ct. App. 1988) (“Based on equitable principles, once a party accepts the proceeds and benefits of a contract, that party is estopped from renouncing the burdens the contract places upon him.”).

Under Florida law, “a general release will ordinarily be regarded as embracing all claims which have matured at the time of its execution.” *Mergens v. Dreyfoos*, 1997 WL 611576, at *4 (S.D. Fla. July 18, 1997), *aff’d*, 166 F.3d 1114 (11th Cir. 1999). “[T]he language used in the release is the best evidence of the parties’ intent.” *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 433 (Fla. 1980). “When that language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning.” *Ibid.*

In the Release at issue here, plaintiffs clearly and unambiguously waive

all claims against BellSouth, whether or not actually asserted and whether *known or unknown*, as a result of *actions or omissions occurring through the date of this Release*, including all claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq.*, the Florida Civil Rights Act of 1992, F.S.A. §§ 760.10, *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq.*, and *any other federal, state or local law*.

2nd Am. Cplt., Att. I, ¶ 1 (emphasis added). Plaintiffs specifically “agree[d] * * * not [to] institute a lawsuit or any other legal action against BellSouth relating to or arising out of any claim encompassed by [the] Release.” *Ibid.*

The express language of the Release evidences that the parties’ intent was to settle “all claims against BellSouth * * * as a result of actions or omissions occurring through the date of the Release.” *Ibid.* Plaintiffs allege that their claims arise from defendants’ conduct “[d]uring the settlement” of the *Adams* case. 3rd Am. Cplt. ¶ 15. As explained above, they base their Section

dismissal of their complaint simply by failing to attach pertinent documents they would rather avoid).

1981 claim on the contention that the alleged misconduct interfered with their right “to be free from racially biased discrimination while bargaining, negotiating, or entering into” the settlement agreements. *Id.* ¶ 57. As the acts and omissions underlying the Section 1981 claim thus necessarily occurred *before* the settlements were consummated, the claims are barred by the Release. See, e.g., *Mergens*, 1997 WL 611576, at *6-7. The “acts and omissions” underlying the RICO claims, which comprise an alleged scheme to defraud plaintiffs of a fair settlement (3rd Am. Cplt. ¶ 65), likewise took place before the agreements were signed. The same is true of plaintiffs’ claims for conspiracy to defraud and tortious interference. *Id.* ¶¶ 108, 147. Accordingly, *all* of plaintiffs’ claims are barred by the Release.

The fact that plaintiffs may not have been aware of these claims when they executed the Release is of no moment. By signing the Release, plaintiffs gave up all causes of action against BellSouth, whether “*known or unknown.*” *Id.*, Att. I, ¶ 1 (emphasis added). See *Hardage Enters., Inc., v. Fidesys Corp., N.V.*, 570 So. 2d 436, 436-438 (Fla. Dist. Ct. App. 1990) (general release barred negligence claim of which releasing party became aware only after release was executed); see also, e.g., *Kobatake v. E.I. Dupont De Nemours & Co.*, 162 F.3d 619, 625 n.5 (11th Cir. 1998) (relying on Georgia law and stating that party’s claims were barred by express language of settlement agreement releasing all unknown claims), cert. denied, 528 U.S. 921 (1999). In sum, plaintiffs’ claims against BellSouth are barred by the unambiguous language of the Release and must be dismissed.

B. Plaintiffs May Not Seek Damages For Claims That Have Been Dismissed

Even if the releases did not bar plaintiffs’ claims, plaintiffs would be precluded from seeking from BellSouth amounts they contend they would have recovered had they litigated, or settled under different circumstances, their employment discrimination claims. Under this Court’s order in the *Adams* matter, plaintiffs simply could have rescinded the allegedly unfair settlement, and either settled those claims again or litigated them to judgment. Having decided against rescission and foregone the opportunity actually to litigate their claims, however, plaintiffs should not be permitted,

under any liability theory, to obtain additional damages based on a *hypothetical* assessment of what they *would* have received had their claims been fairly handled.

First, many of the plaintiffs are parties to a final judgment dismissing their claims in *Adams*.¹⁶ Under federal law, Federal Rule of Civil Procedure 60(b)(3) is the exclusive vehicle for raising claims that a federal judgment has been obtained by “fraud * * *, misrepresentation, or other misconduct of an adverse party.” See *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 46 (1st Cir. 1995) (Rule 60(b) “prescribes the exclusive method by which federal judgments may be attacked”); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (*per curiam*) (same); *Porter v. Chicago Sch. Reform Bd. of Trs.*, 187 F.R.D. 563, 565 (N.D. Ill. 1999) (Rule 60(b) provides exclusive remedy for action to rescind on the ground of fraud a settlement embodied in a federal judgment); *Black v. Niagara Mohawk Power Corp.*, 641 F. Supp. 799, 802 n.3 (N.D.N.Y. 1986) (state-law claim that prior judgment was obtained by fraud “falls within the field of law preempted by Rule 60(b)”). Accordingly, federal courts consistently have refused to recognize collateral actions seeking damages for amounts the plaintiffs claim they *should* have received in a prior federal action; such plaintiffs must challenge the judgment directly and then, if they succeed in escaping its otherwise preclusive effect, litigate the underlying claims. See, e.g., *In re VMS Sec. Litig.*, 103 F.3d 1317, 1325 (7th Cir.1996) (affirming injunction against class members’ state-court suit for fraudulently inducing participation in class action settlement agreement as an improper “attempt[] to evade the final judgments issued by the district court below” by “trying to recover damages they *might* have received had they not participated in the class action”) (emphasis in original); *Reintjes*, 71 F.3d at 45, 46 (refusing to recognize a claim for “fraud in procurement of the settlement agreement,” and holding that plaintiffs’ “only route to relief from the settlement and underlying judgment is through application of [Rule 60(b)]”); *Villareal*, 529 F.2d at 1221 (state law

^{16/} Although plaintiffs do not expressly allege that a final judgment was entered in *Adams*, that is fairly inferred from the allegations in the complaint that the *Adams* case was filed and settled on behalf of plaintiffs. See 3rd Am. Cplt. ¶¶ 22, 40. In fact, the docket in *Adams* reflects that the Court entered a final order dismissing the *Adams* case while retaining jurisdiction over the settlement.

conversion action that was “essentially one to recover additional damages” for injuries claimed in prior federal action was “an action which attacks the order of dismissal entered by the district court in the prior suit between these parties” and was properly treated “as being within the purview” of Rule 60(b)); *Chewning v. Ford Motor Co.*, 35 F. Supp. 2d 487, 489 (D.S.C. 1998) (“this court is aware of no authority allowing an independent action for *damages*”) (emphasis in original). Because plaintiffs have elected not to reopen the *Adams* judgment, they may not bring a suit seeking damages they *might* have received had they done so.

Second, all of the settling plaintiffs are governed by the Court’s order in *Adams*, which required them to rescind their settlements and tender back the consideration had they wished to litigate their employment discrimination claims. By seeking as damages in this suit the difference between what they settled for and what they supposedly would have recovered absent the alleged misconduct, plaintiffs are seeking to avoid that order. In effect, they hope to try their employment discrimination claims *within this case*, and to obtain additional damages without returning – or even risking – their prior recoveries. Because this end-run around the Court’s order is improper, plaintiffs’ claims should be dismissed.

CONCLUSION

All claims against the BellSouth defendants alleged in the Third Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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