IN THE

Third District Court of Appeal

State of Florida

Case No.: 3D22-191
L.T. Case No.: 18-30920

MSP RECOVERY CLAIMS, SERIES LLC, ET AL.,
Appellants,

v.

COLOPLAST CORP., ET AL.,
Appellees.

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF APPELLEES

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies research, develop, and manufacture medicines that allow patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested nearly $1 trillion in the search for new treatments and cures, including an estimated $91 billion in 2020 alone—more

R&D investment than any other industry in America. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates in such cases as an *amicus curiae*.

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. The Institute has advocated practices that build faith in Florida's court system and judiciary. It represents a broad range of participants in the business community who share a substantial interest in a litigation environment that treats plaintiffs and defendants evenhandedly.

SUMMARY OF ARGUMENT

Given modern civil discovery, the need for the antiquated pure bill of discovery is greatly diminished. To the extent that a cause of action for a pure bill of discovery even remains viable at all, the circumstances that warrant its use are quite rare and narrow.

This Court has recognized the exceptional nature of the pure bill of discovery and its narrow role. This Court has warned that the device may not be used "as a fishing expedition to see if causes of action exist." *RAV Bahamas Ltd. v. Marlin Three, LLC*, 333 So. 3d 1158, 1162–63 (Fla. 3d DCA 2022). "Convenience has never been the bill's purpose, and a pure bill of discovery does not lie to preview discovery for a prospective action." *Id.* Here, the trial court properly rejected Plaintiffs' request for such a bill.

Moreover, the trial court's correct decision to disallow a pure bill of discovery is underscored by the nature of the underlying Medicare Secondary Payer Act litigation that Plaintiffs seek to pursue, which has been unsuccessful in virtually all other venues. As we show below, Plaintiffs seek to use the pure bill of discovery for strategic business reasons. And yet court after court has criticized Plaintiffs' litigation model for failing to abide by basic pre-

filing diligence and pleading requirements necessary to substantiate a cause of action. As the Seventh Circuit Court of Appeals cautioned MSP Recovery in one such case: "This lawsuit mirrors scores like it filed in federal courts throughout the country that have all the earmarks of abusive litigation and indeed have drawn intense criticism from many a federal judge. The plaintiffs should think hard before risking a third strike within our Circuit." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871 (7th Cir. 2021) ("*State Farm II*").

Courts likewise refuse to allow Plaintiffs the untrammeled discovery involving claims that they allegedly need to effectuate their business model. The pure bill of discovery is not a proper vehicle for Plaintiffs to avoid these essential requirements.

For these reasons, this Court should affirm.

ARGUMENT

I. The trial court correctly determined that Plaintiffs failed to state a cause of action for a pure bill of discovery.

The pure bill of discovery is a relic of a bygone era. Although still recognized by Florida courts, it is closely circumscribed and warranted only in exceedingly rare circumstances.

In Florida, the pure bill of discovery originated in equity before modern civil discovery. *See First Nat'l Bank of Miami v. Dade-Broward Co.*, 125 Fla. 594, 596, 171 So. 510, 511 (1936); *see also* Daniel Morman, *The Complaint for A Pure Bill of Discovery A Living, Breathing Modern Day Dinosaur?*, 78 Fla. B. J., Mar. 2004 at 50 ("The concept of discovery was unknown in the common law."). Instead of such discovery, "a litigant [was allowed] to reserve his evidential resources (tactics, documents, witnesses) until the final moment, marshaling them at the trial before his surprised and dismayed antagonist." *Id.* at 50 n.3 (quoting John Henry Wigmore, VI WIGMORE ON EVIDENCE § 1845 at 488). In turn, "trials often degenerated into sporting events[,]" "in the nature of an ambush, with neither party being required to tip his hand." *Id.* at 50 n.3.

Then, in 1927, the Florida Legislature allowed interrogatories and depositions, *see* Morman, *supra*, at 50, discovery tools intended to be a substitution for the equitable bill of discovery. "The main purpose of the [newly enacted discovery procedures] was to substitute in the place of the tedious, expensive, and complex process of an equitable bill of discovery, an easy, simple, and cheap method of interrogating at law an adverse party for purposes of discovery of essential matters of fact." *May v. Whitehurst*, 144 So. 326, 326 (Fla. 1932).

In the decades that followed, the scope of discovery expanded further. In 1947, the legislature adopted the discovery rules used by federal courts. In 1954, it established the Florida Rules of Civil Procedure. *See Fla. Gaming Corp. of Del. v. Am. Jai-Alai, Inc.*, 673 So. 2d 523, 524 (Fla. 4th DCA 1996). In 1967, Florida merged its common law courts and courts of equity, which ushered in significant changes to litigation in Florida courts, including more liberal pleading and amendment practices. *See* Richard V. Falcon & Robert C. Parker, *Merger of Law and Equity in Florida—Problems and Proposals*, 20 U. Fla. L. Rev. 173, 180 n. 54 (1967).

Given the liberal discovery allowed by modern Florida litigation practice, the pure bill of discovery has virtually no remaining role to play. *See Kirlin v. Green*, 955 So. 2d 28, 29 (Fla. 3d DCA 2007) ("Although the pure bill of discovery remains part of our legal system, its use and usefulness diminished greatly when Florida relaxed its pleading requirements to authorize liberal discovery"); *see also* Morman, *supra*, at 54 ("Most discovery needs can be satisfied through the standard rules of procedure.") Indeed, "it is rare that a party has need to invoke this equitable remedy." *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998).

In February 2022, this Court confirmed the strict limits that circumscribe the pure bill of discovery. In *RAV Bahamas Ltd.*, this Court recognized that a bill is authorized only "in the absence of an adequate legal remedy." 333 So. 3d at 1161; *see Vorbeck v. Betancourt*, 107 So. 3d 1142, 1145 (Fla. 3d DCA 2012). This Court also reiterated that "a pure bill of discovery does not lie 'to substantiate one's suspected causes of action.' " 333 So. 3d at 1161 (quoting *Vorbeck*, 107 So. 3d at 1145–46).

Nor is the pure bill of discovery "available simply to obtain a preview of discovery obtainable once suit is filed. Such a use of the bill places an undue burden on the court system." 333 So. 3d at 1162 (quoting *Mendez v. Cochran*, 700 So. 2d 46, 47 (Fla. 4th DCA 1997)).

Even before its recent *RAV Bahamas Ltd.* decision, however, this Court enforced strict limits on pure bills of discovery. This Court previously held that a bill may not be used "to determine whether evidence exists to support an allegation" or to render a cause of action "nonfrivolous." *Kirlin*, 955 So. 2d at 30; *Venezia Lakes Homeowners Ass'n v. Precious Homes at Twin Lakes Prop. Owners Ass'n*, 34 So. 3d 755, 759 (Fla. 3d DCA 2010) (pure bill of discovery not appropriate to "verify" information regarding possible cause of action).

As a result, the pure bill of discovery is an equitable tool that may be used only in very narrow circumstances where a party otherwise lacks an adequate remedy at law. In *RAV Bahamas Ltd.*, this Court identified only two potential situations when a bill of discovery may be available. First, a party might be able to use a pure bill of discovery, if it otherwise lacks an adequate remedy at

law, "to obtain information such as the identity of a proper party defendant or the appropriate legal theory for relief." 333 So. 3d at 1161. Second, a party might be able to use the bill "to obtain information necessary for meeting a condition precedent to filing suit." *Id.*

This Court was very clear, however, that a pure bill of discovery may never be justified on the basis of curiosity or ease. Specifically, this Court expressly rejected the premise that a pure bill may be used "as a fishing expedition to see if causes of action exist" and clarified that "[c]onvenience has never been the bill's purpose." *Id.* at 1162–63.

Here, the trial court correctly determined that Plaintiffs failed to state a cause of action for a pure bill of discovery. Plaintiffs failed to demonstrate that they are unable to obtain the information they seek from other sources. If this Court were to hold that Plaintiffs' allegations suffice to justify a pure bill of discovery here, the use of this unusual equitable tool would cease to be a rare event. Rather, such a determination would encourage widespread attempts to use pure bills of discovery to conduct extensive pre-suit discovery as a matter of course.

II. Plaintiffs erroneously attempt to utilize a pure bill of discovery to further their erroneous reliance upon the Medicare Secondary Payer Act in underlying litigation.

Plaintiffs' misuse of the pure bill device does not stand alone. Here, the invocation of a pure bill of discovery compounds the problems inherent in their attempts to litigate their Medicare Secondary Payer Act claims *en masse*, even though the rules of litigation do not allow them to do so in the manner they seek. Plaintiffs thus attempt to use the pure bill of discovery to avoid their pleading and pre-filing due diligence obligations.

A. The Medicare Secondary Payer Act.

Medicare provides federally funded health insurance for individuals with disabilities and those 65 years of age or older. Medicare itself was originally the "primary payer" of health costs for its beneficiaries, but in 1980, Congress enacted the Medicare Secondary Payer Act ("MSP Act") to "counteract escalating healthcare costs." *Bio-Medical Applications of Tenn., Inc. v. Cent. States Se. and Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 281 (6th Cir. 2011). The MSP Act made Medicare a "secondary payer" and prohibits it from making a payment if "payment has been made or can reasonably be expected to be made" by a primary payer. 42

U.S.C. § 1395y(b)(2)(A)(ii). If the primary payer "has not made or cannot reasonably be expected to make payment," however, Medicare is permitted to make a "conditional payment." 42 U.S.C. § 1395y(b)(2)(B)(i). If such a conditional payment is made, the primary payer then reimburses Medicare. 42 U.S.C. § 1395y(b)(2)(B)(ii).

In the 1990s, Congress allowed Medicare beneficiaries to receive their benefits through private insurance companies that contract with Medicare to provide "Medicare Advantage" plans. *In re Avandia Mktg. Sales Pracs. & Prod. Liab. Litig.*, 685 F.3d 353, 355 (3d Cir. 2012). These private insurance companies are called "Medicare Advantage Organizations" ("MAOs"). Like regular Medicare, MAOs are authorized to charge primary payers for medical expenses that the MAO pays on behalf of a beneficiary when the MAO is a secondary payer and an insurance carrier, employer, or other entity is obligated to pay as a primary payer. 42 U.S.C. § 1395w-22(a)(4).

Because of "the ubiquity of insurance in the modern economy," people often have overlapping coverage through both a primary payer and an MAO. *State Farm II*, 994 F.3d at 872. As a result, MAOs sometimes make conditional payments "with

insufficient knowledge about the primary payer." *Id.* If an MAO later learns that a primary payer shouldered principal responsibility for a covered expense paid for a particular individual, the MAO may seek reimbursement from the primary payer. *Id.*

Some federal courts have recently held that an MAO can bring a private cause of action under the MSP Act. *Avandia*, 685 F.3d at 367; *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 832 F.3d 1229, 1238 (11th Cir. 2016). These courts hold that MAOs, like Medicare itself, may recover double damages on these reimbursement claims. *See* 42 U.S.C. § 1395y(b)(2)(B)(iii) (Medicare action); 42 U.S.C. § 1395y(b)(3)(A) (private right of action). But because attempting to collect these unreimbursed payments "can be tedious, costly, and uncertain," MAOs sometimes choose to "outsource this process—essentially to assign or sell [their] right to reimbursement to another party." *State Farm II*, 994 F.3d at 872. This is where Plaintiffs come in.

B. Plaintiffs' business model.

Plaintiffs are not MAOs. They provide no medical or insurance services to Medicare beneficiaries. Rather, MSP Recovery, along with its multiple affiliate companies ("MSP companies"), is an

ambitious Florida-based debt collection company.[1] As an "investor presentation" published on MSP Recovery's website asserts: MSP "is disrupting the antiquated healthcare reimbursement system, using data and analytics to identify and recover massive amounts of improper payments made by Medicare, Medicaid, and Commercial insurers from responsible parties."[2] MSP's self-proclaimed "financial

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[1] The home page of MSP Recovery's website announces: "ONE OF THE LARGEST SPAC TRANSACTIONS ANNOUNCED: $32.6 BILLION COMBINED COMPANY TO BE LISTED ON NASDAQ." https://www.msprecovery.com/. A news release on its investor page states: "MPS Recovery, Inc. Begins Trading on NASDAQ Under the Symbol 'MSPR' on May 24, 2022." https://investors.msprecovery.com/news-releases/news-release-details/msp-recovery-inc-begins-trading-nasdaq-under-symbol-mspr-may-24

A May 26, 2022, news release published on MSP Recovery's website sought to defend its business model from criticism after its stock price plunged in the opening hours of trading. https://investors.msprecovery.com/news-releases/news-release-details/msp-recovery-reaffirms-revenue-guidance-originally-set-forth. That release referenced two lawsuit settlements and MSP's extensive purchases of claims via assignment. Notwithstanding, as discussed *infra* at 19, MSP has admitted in its own SEC filings that it has not yet obtained substantial revenue from its business model.

[2] https://d1io3yog0oux5.cloudfront.net/lionheartacquisitioncorp/files/pages/lionheartacquisitioncorp/db/933/business_description/LCAP+2+and+MSP+Investor+Presentation+July+2021.pdf, slide 5 (accessed June 16, 2022).

opportunity" is to "discover[], quantify[], and settl[e] the billed-to-paid gap in mass financial scale," positioning MSP to "generate substantial annual recovery revenue at high profit margins."[3]

According to the MSP companies' SEC filings, MSP "is a healthcare recovery and data analytics company" that purportedly has "developed software that solves many of the issues currently being experienced by doctors, hospitals as well as other healthcare practitioners as well as payers within the healthcare system."[4] It purportedly operates "systems" that "provide a platform for providers to identify proper payers at the time of patient encounter and to collect the payment more quickly, at higher amounts."[5] It purports to have "identified systemic issues relating to police

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[3] https://d1io3yog0oux5.cloudfront.net/lionheartacquisitioncorp/files/pages/lionheartacquisitioncorp/db/933/business_description/LCAP+2+and+MSP+Investor+Presentation+July+2021.pdf, slide 5 (accessed June 16, 2022).

[4] Amendment No. 3 to Form S-4, Registration Statement Under the Securities Act of 1933, Lionheart Acquisition Corporation II, Preliminary Proxy Statement/Prospectus, https://www.sec.gov/ix?doc=/Archives/edgar/data/1802450/000114036122008991/ny20000825x6_s4a.htm#aANNEXA4, p. xii ("What is MSP's Business") (accessed June 16, 2022).

[5] *Id.*

reporting at the time of auto accidents" and is "developing software to solve these issues."[6] MSP "acquires claims from its Assignors and utilizes its data analytics services to identify improper payments for healthcare services."[7] As of March 31, 2022, MSP claims to have purchased **$1.5 trillion** in assigned recovery rights from more than 150 assignors in all 50 states.[8]

Traditionally, debt collectors in this industry seek to coordinate benefits with primary payers on a claim-by-claim basis to avoid litigation. Not the MSP companies. Their business model requires that they litigate claims in bulk.[9]

As the Seventh Circuit explained the economic incentives in *State Farm II*:

> On the demand side, entities like the plaintiffs here see financial opportunity in effectively becoming debt

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[6] *Id.*, p. 19 ("Information about MSP").

[7] *Id.*

[8] https://investors.msprecovery.com/node/7151/html ("Our Recovery Model").

[9] https://investors.msprecovery.com/node/7151/html ("By discovering, quantifying, and settling the gap between Billed Amount and Paid Amount on a large scale, we believe we are positioned to generate meaningful annual recovery revenue at high profit margins") ("The Opportunity").

> collectors for MAOs. This arrangement can be lucrative because of the Medicare Act's double damages provision. If debt collectors—or more accurately assignees of the MAO—can identify unreimbursed conditional payments and successfully bring suit under the Act, they can collect twice as much on a particular assigned receivable. But again, because it is not always clear which assigned receivables in fact reflect conditional payments, taking on this debt collection role brings with it financial uncertainty. And, just like the MAOs, a third-party assignee may not know at the time of the initial assignment which or how many conditional payments should actually be reimbursed by a primary payer.

994 F.3d at 872.

The Seventh Circuit then continued by observing some realities associated with these economic incentives:

> Note the financial realities that exist for the debt collectors and MAOs alike. Both have financial incentives to expend as little as possible on the front end of these assignment arrangements. This is so because it is often unclear at the time of the initial assignment what, if any, value exists in the assigned receivables.
>
> We see this reality play out in the assignment contracts in the record before us in the following way: MAOs agree to assign their collection rights to large baskets of potential conditional payments in exchange for a percentage of anything recovered. For their part, the debt collectors agree to this fee sharing arrangement but do not pay much, if anything, up front for the assignation of collection rights. It is then on the assignee—effectively the debt collector—to do its best to collect and thereby realize value on the assignment. If the assignee is successful in recovering double damages through litigation, there is sufficient revenue to make the

> litigation and collection effort worth the collector's while, with proceeds remaining to share with the MAO. If nothing is recovered, the assignee loses only its litigation costs.

Id.

Plaintiffs have filed over 385 cases, many of them class actions, since 2016. The MSP companies sue insurance carriers as well as medical device and pharmaceutical companies.[10] They pursue lien actions and "other claims based generally on issues such as fraud, products liability, antitrust, and RICO violations." And of relevance here, they have also been filing "[s]tate [c]ourt [p]ure [b]ills of [d]iscovery and [d]eclaratory [a]ctions" seeking to "obtain the disclosure of facts within the defendant's knowledge to support prosecution or defense at court."[11] *Amici* have located 81

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10 https://d1io3yog0oux5.cloudfront.net/lionheartacquisitioncorp/files/pages/lionheartacquisitioncorp/db/933/business_description/LCAP+2+and+MSP+Investor+Presentation+July+2021.pdf, slide 19 (Accessed June 16, 2022).

11 https://d1io3yog0oux5.cloudfront.net/lionheartacquisitioncorp/files/pages/lionheartacquisitioncorp/db/933/business_description/LCAP+2+and+MSP+Investor+Presentation+July+2021.pdf, slide 20 (Accessed June 16, 2022).

pure bill cases filed by various MSP Recovery companies in the Eleventh Judicial Circuit.

Notably, most lawsuits the MSP companies filed have been dismissed at the pleading stage. As their SEC filings acknowledge, the MSP companies "historically" have received "adverse rulings" such as dismissals (i) for failure to file within the applicable statute of limitations, (ii) because an assignment did not include the claim that was brought or was found to be invalid, (iii) for lack of standing, (iv) for lack of personal jurisdiction, (v) for lack of subject matter jurisdiction, and (vi) for pleading deficiencies.[12] MSP further has admitted to sometimes pursuing claims that were already assigned to other "recovery agents" – *that is, claims that were not assigned to MSP, which MSP has no legal right to pursue* – and acknowledged that "***due to the nature and volume of data, it***

[12] Amendment No. 3 to Form S-4, Registration Statement Under the Securities Act of 1933, Lionheart Acquisition Corporation II, Preliminary Proxy Statement/Prospectus, https://www.sec.gov/ix?doc=/Archives/edgar/data/1802450/000114036122008991/ny20000825x6_s4a.htm#aANNEXA4, p. 30 ("Risks Related to MSP's Business and Industry") (accessed June 16, 2022).

may not be possible to identify with precision all such claims."[13]

In addition, despite their assertion of generating substantial annual recovery revenue at high profit margins, the MSP companies admitted in their SEC filings that they "have a history of net losses and no substantial revenue to date." They have a "limited history of actual recoveries to date" and a "limited track record of generating actual recoveries and related revenue from the claims that we have purchased or otherwise been assigned."[14]

C. Plaintiffs' approach to litigation: file first, ask questions later.

As the MSP companies' business model requires, their *modus operandi* has been to file cases in bulk under the principle of file first and ask questions later. *State Farm II* is illustrative. The MSP

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[13] *Id.*, p. 31 (emphasis supplied).

[14] https://www.sec.gov/ix?doc=/Archives/edgar/data/1802450/000114036122008991/ny20000825x6_s4a.htm#aANNEXA4, p. 28-29 (filed March 11, 2022; "Risk Factors" – "Risks Related to MSP's Business and Industry"). These same admissions are repeated in MSP's May 27, 2022 Form 8-K, which was filed the day after MSP's May 26, 2022 news release. https://investors.msprecovery.com/node/7151/html

companies sued State Farm for violating the MSP Act, but their first complaint contained no specifics of any purported violation. They accordingly "found themselves unable in the district court to do more than show an assigned right to recover *potentially* unreimbursed payments." 994 F.3d at 873. They only "could identify baskets of possible receivables arising from payments MAOs made for healthcare provided to someone enrolled in Medicare but could go no further." *Id.* They sought to use the litigation process itself as their "pathway to identifying any value in the assigned receivables and then pursuing any available collections." *Id.*

The district court demanded more specificity. The MSP companies therefore filed an amended complaint naming a "specific illustrative beneficiary" who allegedly suffered injuries in a car accident and incurred accident-related expenses that State Farm purportedly failed to pay. The district court granted summary judgment on this claim, however, because the payment in question had no connection to the beneficiary's car accident. *Id.* at 873–4.

The Seventh Circuit affirmed. It ruled that the "evidentiary details" supported the district court's conclusion that the claimed

injury had nothing to do with the car accident. *Id.* at 875–6. It also rejected the MSP companies' argument that they "did not need to present an exemplar claim to establish standing at the summary judgment stage." *Id.* at 875. "Federal courts do not possess infinite patience, nor are the discovery tools of litigation meant to substitute for some modicum of pre-suit diligence." *Id.* at 878. The court noted its impression that the MSP companies "pull the litigation trigger before doing their homework"; "[t]hey sue to collect on receivables they paid little or nothing for and then rely on the discovery process to show they acquired something of value and thus have an enforceable right to collect." *Id.* at 878. But "at the critical put up or shut up moment of summary judgment," they "once again failed to establish standing." *Id.*

The *State Farm II* court added that the MSP companies' approach to litigation was "not sitting well with many judges, and multiple district courts have already commented on what they perceive as [the MSP companies'] rush to file litigation in the hope that discovery will show whether an actual case or controversy exists." *Id.* (citing *MSP Recovery Claims, Series LLC v. AIG Prop. Cas., Inc.*, 2021 WL 1164091, at *1 (S.D.N.Y. Mar. 26, 2021)); *MSP*

Recovery Claims, Series LLC v. New York Cent. Mut. Fire Ins. Co., 2019 WL 4222654, at *6 (N.D.N.Y. Sept. 5, 2019); *MSP Recovery Claims, Series LLC v. USAA Gen. Indem. Co.*, 2018 WL 5112998, at *13 (S.D. Fla. Oct. 19, 2018)).

Indeed, in case after case, courts have criticized MSP for failing to abide by basic pre-filing diligence and pleading requirements. In *USAA Gen. Indem.*, for example, the MSP companies claimed an assignment of claims, not from an MAO, but from an administrative company that provided services to an MAO. The court dismissed the final iteration of the complaint with prejudice, stating: "In light of the ever-shifting allegations Plaintiff has presented in its four versions of its pleading, it is evident Plaintiff has played fast and loose with facts, corporate entities, and adverse judicial rulings." 2018 WL 5112998, at *13. The MSP companies "sought to rewrite history with a convoluted story . . . that there was an MAO all along that properly assigned those rights," yet "that is not so." *Id.*

In *New York Central Mut. Fire Ins.*, the court noted that the case before it was "one of dozens of putative class action suits filed in federal courts across the United States by" an MSP company,

and that the plaintiffs' strategy was "to throw their allegations into as many federal courts as possible and see what sticks." In these cases, the MSP companies filed "deficient complaints, rel[ied] on courts to point out the problems, and then repeatedly amend[ed] their pleadings until they get it right." 2019 WL 4222654, at *6.

In *AIG Prop. Cas.*, the MSP company plaintiff candidly admitted it was "not in possession of claims information for each such instance" that the defendants purportedly should have paid but did not pay its assignors. To "fill that factual gap," it offered several "exemplar claims" and argued that it had standing on those exemplars and a "greater universe" of cases. 2021 WL 1164091, at *2. But it was not able to show on a factual standing inquiry that the MAOs had incurred reimbursable costs in connection with the exemplar claims, that the MAOs had assigned claims related to the exemplar patients to an MSP company, or even that the medical care provided to the exemplar patients was for injuries covered by the insurance policies or settlement agreements. *Id.* at *7–*14.

Moreover, the allegations regarding the "greater universe" of claims was even more conclusory. *Id.* at *14. The MSP company's practice of attaching a spreadsheet containing a "bare" list of

Medicare beneficiaries enrolled in an MAO was insufficient to allege standing. *Id.*

The *AIG* court also denied the MSP company's request for jurisdictional discovery. It criticized the MSP company for having "done absolutely nothing to obtain relevant information from its assignors." *Id.* at *15. The MSP company could have gathered evidence from the MAOs regarding the exemplar claims, and it had "no excuse" for failing to do so.[15] *Id.*

Other cases filed by the MSP companies reach similar ends. In *MSP Recovery Claims, Series LLC v. Travelers Cas. & Sur. Co.*, 2018 WL 3599360, at *4 (S.D. Fla. June 21, 2018), *aff'd as modified in relevant part*, *MSP Recovery Claims, Series, LLC v. ACE Am. Ins. Co.*, 974 F.3d 1305 (11th Cir. 2020), the court had to remind the MSP

[15] As courts have become more aware of the MSP companies' practices, even in cases that survive motions to dismiss, they have started limiting discovery to the "exemplar" claims. *See MSP Recovery Claims Series, LLC v. Markel Am. Ins. Co.*, 2021 WL 2644098 (S.D. Fla. June 28, 2021) (prohibiting "data matching" discovery and limiting discovery only to "exemplar" claims); *MSP Recovery Claims Series, LLC v. Tower Hill Prime Ins. Co.*, 2022 WL 1624811, at *1 (N.D. Fla. Apr. 19, 2022) (same, remarking that "Plaintiffs cannot use a single pleaded claim to recover on dozens or hundreds of claims they have not pleaded. . . .").

company plaintiff of its "duty of candor to the Court, which included a duty not to submit 'knowingly inaccurate' information." *See also MAO-MSO Recovery II, LLC v. The Farmers Ins. Exchange*, 2022 WL 1690151, *12 (C.D. Cal. May 25, 2022) (granting summary judgment to insurer on 118 claims, among other reasons, because "plaintiffs have not forth any evidence . . . showing that plaintiffs' assignors made payments to compensate medical providers for treatment").

As the *New York Central Mut. Fire Ins.* court put it, the MSP companies' tactics are "a flagrant abuse of the legal system" because "[a] pleading is not meant to be a means by which a party can discover if they actually have a case." 2019 WL 4222654, at *6.

III. The trial court correctly dismissed Plaintiffs' lawsuit.

Invoking a pure bill of discovery as their vehicle, Plaintiffs sued Coloplast and Mentor in this case and asserted that they needed pre-litigation discovery to even file their claims. Yet, in order to survive the motion to dismiss, Plaintiffs were required to plead facts explaining why this is the rare case in which a pure bill of discovery remains appropriate. They did not do so. The trial court properly determined that Plaintiffs failed to demonstrate "why they

are unable to obtain the information they seek from the patients who were allegedly harmed by Defendants' products," (R. 1282), and correctly dismissed the lawsuit.

The Florida legal system, like the federal one, requires the MSP companies to make a reasonable effort to investigate their claims before filing suit. *See* § 57.105, Fla. Stat.; *see also McHan v. Huggins*, 459 So. 2d 1172 (Fla. 5th DCA 1984) ("Reasonable efforts to ascertain parties and issues prior to trial are required, but absolute verification often is impracticable or impossible"); *Yakovonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615 (Fla. 4th DCA 2006) (awarding fees when plaintiff failed to investigate general contractor's liability prior to filing suit).

The pure bill of discovery is not intended to permit companies like MSP to avoid this obligation, especially when sensitive patient information may be at stake. This Court was exceedingly clear in *RAV Bahamas Ltd.* that a pure bill of discovery may not be used "as a fishing expedition to see if causes of action exist" and that "[c]onvenience has never been the bill's purpose." 333 So. 3d at 1162–63. Yet that is Plaintiffs' transparent goal here. Thus, a pure bill of discovery is not a proper vehicle in these circumstances.

CONCLUSION

The trial court's order of dismissal should be affirmed.

June 20, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *amici curiae* brief was filed with the Clerk of Court and served via Florida Courts ePortal email on the following this 20th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 and 9.370, counsel for *amici curiae* hereby certifies hereby certifies that the foregoing *amici curiae* brief complies with the applicable font requirements because it is written in 14-point Bookman Old Style and contains 4,977 words, excluding those parts exempted by Rule 9.045(e).

June 20, 2022

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