PROBATE COURT 4

DM

DATA-ENTRY
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CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED PETITION

JURY FEE PAID

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

This Court had jurisdiction pursuant to Sections 32.002(c) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.

III. BACKGROUND

Elmer and Nelva Brunsting created the Brunsting Family Trust, and placed essentially all of their assets into this Trust, of which they were the trustees. The Trust became irrevocable and not subject to amendment upon Elmer's death in 2009, at which time Nelva became the sole trustee of the two trusts into which the Family Trust was divided: the Decedent's Trust and the Survivor's Trust. She also became the sole beneficiary of the Survivor's Trust and the primary beneficiary of the Decedent's Trust.

In 2010, Defendants Anita and Amy began taking steps to control the Trust assets and garner a larger share than their siblings. To that end, they caused Nelva to execute a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment in June of 2010 in which she exercised her power of appointment over all the property held in the Nelva E. Brunsting Survivor's Trust as well as in the Elmer H. Brunsting Decedent's Trust. The June exercise of Power of Appointment went on to ratify and confirm all the other provisions of the Trust. Two months later, they caused Nelva to execute a second Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment, in which she attempted to exercise the very same power of appointment she had exercised in June without revoking the prior exercise – instead she ratified and confirmed the June 2010 Power of Appointment. This second Qualified Beneficiary Designation purports to remove Candy and Carl as the trustees of their own trusts, while not subjecting Amy and Anita to that same fate, and contains paragraphs of self-serving no-contest provisions.

Seemingly because the future power she had obtained for herself was insufficient, Anita had Nelva resign as Trustee in December of 2010, in Anita's favor. As Trustee, Anita made numerous transfers that far exceeded the scope of her powers. She conveyed to Carole 1,325 shares of Exxon stock out of the Decedent's Trust, and gave 1,120 shares of Exxon to Amy out of the Survivor's

Trust, plus 270 shares of Chevron stock (held in the names of Amy's children). To herself she transferred 160 shares of Exxon, plus 405 shares of Chevron (270 shares she placed in the name of her children). Anita also paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole.

Carole not only received hundreds of thousands dollars worth of stock and cash distributions, she also had access to a bank account that Anita funded with Trust monies and used that bank account for her own purposes. She routinely charged this Trust account for her personal groceries, gasoline, and other expenses despite not being a present income beneficiary of the Trust.

IV. Causes of Action

Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Defendants Anita breached this duty during Nelva's life by engaging in self-dealing and taking actions not permitted by the terms of the Trust, and thus is liable to the Estate and derivatively to Plaintiff for these breaches. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest and costs of court.

Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and

her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.

Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.

Money Had and Received. Defendants Anita, Amy and Carole have taken money that belongs in equity and good conscience to the Trust and derivatively to Plaintiff, and have done so with malice and through fraud, in part by representing that transfers to them were valid reimbursements. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

Conversion. Defendants Anita, Amy and Carole have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brusting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court

costs, both individually and on behalf of the Decedent's Estate.

Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants Amy, Anita, and Carole, herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed both the June and August Qualified Beneficiary Designations and Exercises of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. The Modification Documents fail because they attempted to change the terms of the Trust. Assuming without admitting that the June Modification Document is a valid Power of Appointment, then the August Modification Document fails because Nelva had already effectively appointed all of the Trust property in June; she never revoked that Power of Appointment, but actually affirmed it. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

Declaratory Judgment Action. The Family Trust Agreement governed all of the rights and

powers that Anita held as Trustee. Those rights and powers did not allow her to transfer out the shares of Exxon and Chevron stock. Her duties as a Trustee prevented her from distributing Trust Assets to some beneficiaries to the detriment and for the purpose of harming other beneficiaries. Plaintiff seeks a declaration that the distributions of Chevron Stock and Exxon Stock to Amy, Anita and Carole are void because Anita as Trustee exceeded the scope of her power in making those gifts.

Unjust Enrichment. Defendants Amy, Anita and Carole have all been unjustly enriched by their receipt of Chevron Stock, Exxon Stock, and cash from the Trust. None were entitled to the distributions of stock, and a majority of the cash transfers were for purposes not authorized under the scope of the Trust Agreement nor of the purposes they alleged to be for. Plaintiff seeks a declaration that the Defendants were unjustly enriched, and seeks the imposition of a constructive trust on the remaining Chevron Stock and Exxon Stock that remains in their possession, as well as on any cash or proceeds from the sale of said stock and on any cash distributions from the Trust.

Conspiracy. Upon information and belief, Defendants Anita, Amy and Carole all conspired to make improper withdrawals and distributions from the Trust, to decrease Plaintiff's inheritance and interest in the Trust, to enrich themselves at the expense of the Trust and other beneficiaries, and to conceal the impropriety of their actions. They should be found jointly and severally liable for the decrease in the Trust, and should be required to disgorge their ill-gotten gains.

Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance with the Texas Property Code.

V. JURY DEMAND

Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to her and to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

ostrommorris, PLLC

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 11th day of February, 2015:

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Jason B. Ostrom/
R. Keith Morris, III

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

Defendant Neal Spielman ("Spielman") files this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) seeking the dismissal of all claims asserted by Plaintiffs against him. In support thereof, Defendant would respectfully show the Court the following:

I.
SUMMARY OF THE ARGUMENT

This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs' "claims," which are nearly incomprehensible are nothing more than incredible conspiracy theories suggesting that the Harris County Probate Court is the home of a nefarious, shadowy syndicate with designs on stealing "familial wealth." The Plaintiffs' Original Complaint has alleged Spielman and other Defendants for (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C.

§371; and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any facts which would impart standing upon the Plaintiffs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 559 (1992) (holding that plaintiff lacked standing where the failed to allege "imminent" injury-in-fact). For this reason, Plaintiffs' Original Complaint against Spielman should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, *Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.*, ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate. Rather than litigate their claims in the proper forum—Probate Court No. 4—Plaintiffs have filed this suit, naming every person remotely involved with the Probate Matter—including the judge, court personnel, Defendant Spielman, and "99 Jane and John Does"—in an apparent attempt to avoid participating in the court-ordered mediation in the Probate Matter.[1]

Prior to landing in Probate Court, Plaintiff Curtis first attempted to bring the claims that form this basis of the instant suit in federal court. In that suit, Cause No. 4:12-cv-00592, in the Southern District of Texas, Plaintiff made similar allegations as alleged in the present complaint, namely: conspiracy, fraud, elder abuse, undue influence, false instruments, breach of fiduciary duty, tortious interference with fiduciary obligations, among others. Ultimately, **at Plaintiff Curtis' request** the case was remanded to the probate proceeding in Probate Court No. 4, where it remains pending. The claims pending in the Probate Matter contain substantially the same parties and issues.

[1] In the Plaintiffs' Verified Complaint for Damages, Plaintiff Curtis has characterized the pending mediation of the probate matter as "predetermined by the personal interests of enterprise acolytes and not by law." *See* ¶¶ 113-115.

Spielman is attorney of record for Amy Brunsting in the Probate Matter. *See* Plaintiffs' Verified Complaint for Damages. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a summary judgment hearing, somehow depriving Curtis access to the courts and other due process rights. *See* Plaintiffs' Verified Complaint for Damages ¶131. Besides this one specific act, the remainder of Plaintiffs' allegations against Spielman consists of unintelligible and boilerplate criminal "conspiracy" claims and allegations against all Defendants. Without anything more, the Plaintiffs have not pleaded facts to support a claim for relief or that they even have standing to assert claims against Spielman. Therefore, the Court should dismiss this claim with prejudice. *Caroll v. Fort James Corp.* 470 F.3d 1171, 1177 (5th Cir. 2006).

III.
ARGUMENTS AND AUTHORITIES

Defendant Spielman moves to dismiss this complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs have the burden of showing subject matter jurisdiction, and this Court must determine whether it has subject matter jurisdiction before addressing the merits of the complaint. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

Plaintiffs Lack Proper Standing to Assert Their Claims.

A plaintiff will have standing to file suit if it can demonstrate (1) an "injury in fact"—a harm that is concrete and actual, not merely conjectural or hypothetical;[2] (2) causation between the injury and defendant's conduct, and (3) redressability by a favorable decision of the court. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Because these are not merely pleading requirements, but rather an indispensable part of the plaintiff's case, **each** element must be

[2] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

supported in the same way as any other matter in which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at that stage of litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990).

Here, the Plaintiffs cannot provide proof of any of the required elements of standing. Plaintiffs cannot show any injury-in-fact from the conduct alleged in their Complaint. Nor is there a showing of causation between Spielman's conduct and any injury alleged by Plaintiffs.

Plaintiff Curtis' claims suggest that as a result of some action of Spielman, she has been deprived of the "enjoyment of her beneficial interests" as a beneficiary of the Brunsting Family Trust. *See* Plaintiffs Verified Complaint for Damages, ¶ 213. Plaintiff has not pleaded any facts that can demonstrate how any action of Spielman has injured her status as a beneficiary of the Brunsting Family Trust. Spielman has had no involvement in the drafting of estate planning documents in this matter. In fact, Curtis is still entitled to collect her share of the inheritance of the Brunsting Family Trust. More so, Texas has never recognized tortious interference with inheritance as a cognizable cause of action. *See Anderson v. Archer*, 03-13-00790-CV, 2016 WL 589017 (Tex. App.—Austin Mar. 2, 2016, no pet. h.) ("In short, we agree with the Amarillo Court of Appeals that 'neither this Court, the courts in *Valdez, Clark,* and *Russell*, nor the trial court below can legitimately recognize, in the first instance, a cause of action for tortuously interfering with one's inheritance.' We also agree with the Amarillo court's assessment that neither the Legislature nor Texas Supreme Court has done so, or at least not yet. Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so.).

Plaintiff Munson's "injuries" are facially conjectural and hypothetical. Munson, who is neither a party to any of the prior lawsuits nor a beneficiary under the Brunsting Family Trust,

alleges that he has been "diverted away from other productive pursuits." *See* Plaintiffs Verified Complaint for Damages, ¶ 216. Without a demonstration of concrete, actual harm, his claims—like Curtis's claims—must fail, and Plaintiffs' claims should be dismissed.

IV.
CONCLUSION

For the reasons stated above, Defendant Neal Spielman requests that this Court grant Defendant's Motion to Dismiss on all claims with prejudice.

Respectfully submitted,

WINGET, SPADAFORA, & SCHWARTZBERG, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record through the Court's CM/ECF system on this date: October 3, 2016.

_____
Martin S. Schexnayder

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal (the "Complaint"). On September 15, 2016, Defendant Jill Young filed her Motion to Dismiss. After the filing of Ms. Young's Motion to Dismiss, Plaintiffs filed a thirty-one page long "Addendum of Memorandum in Support of Rico Complaint," with more than 1,400 pages of attached "exhibits" (the "Addendum"). *See* DKT. 26.

Ms. Young now files this Motion to Strike the Addendum, because it has no legal effect. And even if it were effective, it does not change the merits of Ms. Young's Motion to Dismiss, which should be granted.

I. The "Addendum" has no Legal Effect.

The Addendum—filed *after* Ms. Young was served with the Original Complaint and *after* she filed her 12(b)(6) Motion to Dismiss—has no legal effect. It is not a "pleading" under the Federal Rules of Civil Procedure. Specifically, Federal Rule of Civil Procedure 7(a) says:

Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

See Fed. R. Civ. P. 7(a). And although a party can amend its complaint as a matter of course after the filing of a responsive pleading, the Addendum cannot be an amended complaint, because it alleges no causes of action against Ms. Young.

Because the Addendum is not a complaint, it is not a valid pleading under the Federal Rules of Civil Procedure, and it should be struck.

II. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss.

Even if the Addendum were treated as Plaintiffs' Complaint (or some portion of Plaintiffs' Complaint), it does not change the merits of Ms. Young's Motion to Dismiss. The Addendum only refers to Ms. Young in four places, in paragraphs 96, 97, 99, and 107. *See* Addendum, at ¶¶ 96, 97, 99, and 107. In full, those paragraphs state:

> 96. The only matter properly before the court on September 10, 2015 was whether or not Mr. Lester should have the authority to retain Jill Willard Young to assist him in his administration obligations to the estate.
>
> 97. Neither individual Plaintiff Candace Curtis nor individual Plaintiff Carl Brunsting was in attendance September 10, 2015, as neither is party to the estate litigation and neither objected to Mr. Lester retaining Jill Young to assist with his fiduciary duty to evaluate the estate's claims. That was the only issue properly before the Court on September 10, 2015 and did not include the matters Mr. Spielman states were discussed and where there was apparently an agreement made to treat the Gregory Lester report as if it were a jury verdict before it was even written.

> * * *
>
> 99. The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs who were prejudiced by those discussions, involving matters not properly before the Court, wherein there were agreements made between the Court, Jill Willard Young, Neal Spielman, Bradley Featherston, Stephen Mendel and Gregory Lester to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter. First to "unentrench" Plaintiff Curtis from her stand upon rights and reliance upon the rule of law in the face of this all too obvious public corruption conspiracy and second, to deprive Plaintiff of substantive due process and access to the Court.
>
> * * *
>
> 107. Mr. Spielman confessed on March 9, 2016 that the attorneys conspired at the hearing on application to retain Jill Young, with the probate Court Judges, the Court's crony administrator Gregory Lester, and Jill Young, entering into an illicit agreement to produce a fictitious "report" and to subsequently treat the fiction as if it were the equivalent of a jury verdict, and this all occurred before the "Report" was even written.

Id.

These "allegations" fail for three reasons. First, they are so implausible that they cannot form the basis for a valid complaint. Second, the assertions—even if somehow true—fail to raise a RICO claim. Third, the allegations are barred by Texas's attorney immunity doctrine—which constitute an absolute bar on suits relating to actions taken in connection with representing a client in litigation.

A. Plaintiffs' Addendum, likes the Complaint, is too implausible to state a valid claim for relief.

Plaintiffs' Addendum, like the Complaint, fails to satisfy the plausibility requirements of Rule 12. It is also frivolous and delusional—a separate ground for dismissal.

1. Plaintiffs' Addendum fails to satisfy Rule 12.

Under Rule 12, to properly assert a well-pleaded complaint, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Plaintiffs' claim is only "facially plausible" if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Plaintiffs' Addendum states only vague, speculative, and implausible allegations against Ms. Young that are insufficient to form the basis of a well-pleaded Complaint. Plaintiffs ask the Court to infer from the fact that Plaintiffs chose not to attend a hearing that the other attendees at the hearing conspired to fabricate the report of the temporary administrator.[1] The implausible leap that Plaintiffs ask this Court merely to assume is not permitted by Rule 12.

2. Plaintiffs' Addendum, like the Complaint, is frivolous and delusional.

As stated in Ms. Young's Motion to Dismiss, this Court has "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the

[1] *See, e.g.*, Addendum, DKT. 26, at ¶ 99 ("The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs . . . to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter.").

inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)).

Like in their Complaint, Plaintiffs' Addendum alleges a bizarre conspiracy theory where practicing litigants, attorneys, and judges plotted against Plaintiffs in open court, apparently making agreements designed to diminish the value of probate estates. Other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See, e.g.*, *Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). The Addendum does nothing to remedy the fanciful allegations contained in the Complaint; it merely compounds the impropriety of Plaintiffs' delusions.

B. Plaintiffs' Addendum fails to state facts sufficient to assert a RICO claim against Ms. Young.

None of Plaintiffs' allegations against Ms. Young are sufficient to state a RICO claim.[2]

[2] As shown in Ms. Young's Motion to Dismiss, Plaintiffs have alleged numerous causes of action for which they have no private right of action. *See* Motion to Dismiss, DKT. 25, at pp. 13–15. The only cause of action they assert that they could actually pursue is their RICO claim.

First, none of the allegations actually assert that Ms. Young committed any wrongful act whatsoever. Instead, Plaintiffs complain of Ms. Young's retention as attorney for the temporary administrator. But the Plaintiffs have no right to dictate who the temporary administrator will retain as counsel.

And none of these allegations show that Plaintiffs have been injured by a violation of RICO. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (holding that a RICO plaintiff must show he has standing to sue and that, to plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury"); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

But most crucially, the Plaintiffs' Addendum still fails to assert the "pattern of racketeering activity," that is required to allege a RICO claim. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). The only assertion made in the Addendum against Ms. Young is that she somehow conspired *with the Probate Court itself* to act as attorney to a temporary administrator who submitted a false report. *See* Addendum, at ¶¶ 97, 99, and 107. This is not a "pattern of racketeering activity." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (holding that racketeering activity must "consist[] of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1)).

And even if Plaintiffs' fallacious assertions were true, Plaintiffs allege nothing more than the "garden-variety tort" of common law fraud, which is insufficient to state a RICO claim. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite

predicate *criminal* acts under RICO"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'").

C. Plaintiffs' Addendum cannot avoid Texas's attorney immunity doctrine.

Finally, Plaintiffs' Addendum makes no difference because Plaintiffs still cannot avoid the effect of Texas's attorney immunity doctrine. Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

Here, the only facts alleged by Plaintiffs relate to conduct Plaintiffs allege occurred when Ms. Young was acting as attorney for Temporary Administrator Lester. *See* Addendum, at ¶¶ 96, 97, 99, and 107. And "[e]ven conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)). And a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406). Instead, the only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was

engaging in conduct that did not involve the provision of legal services. *Id.* Thus, Plaintiffs' Addendum makes no difference, and this suit against Ms. Young should be dismissed.

III. Conclusion

For the reasons stated above, this Court should strike the Plaintiffs' Addendum. In the alternative, Plaintiffs' Addendum does not change the merits of Ms. Young's Motion to Dismiss, and the Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 3, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on October 3, 2016, I conferred with Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to withdraw the Addendum, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 3, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S MOTION TO DISMISS

Defendant Neal Spielman ("Spielman") files this Motion to Dismiss seeking the dismissal of all claims asserted by Plaintiffs against him. In support thereof, Defendant would respectfully show the Court the following:

I.
SUMMARY OF THE ARGUMENT

This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs "claims," which are nearly incomprehensible are nothing more than incredible conspiracy theories suggesting that the Harris County Probate Court is the home of a nefarious, shadowy syndicate with designs on stealing "familial wealth." The Plaintiffs Original Complaint has alleged Spielman and other Defendants for (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C.

§371; and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any facts suggesting any wrongdoing by Spielman. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). For this reason, Plaintiffs' Original Complaint against Spielman should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, *Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.*, ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate. Rather than litigate their claims in the proper forum—Probate Court No. 4—Plaintiffs have filed this suit, naming every person remotely involved with the Probate Matter—including the judge, court personnel, Defendant Spielman, and "99 Jane and John Does"—in an apparent attempt to avoid participating in the court-ordered mediation in the Probate Matter.[1]

Spielman is attorney of record for Amy Brunsting in the Probate Matter. *See* Plaintiffs' Verified Complaint for Damages. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a summary judgment hearing, somehow depriving Curtis access to the courts and other due process rights. *See* Plaintiffs' Verified Complaint for Damages ¶131. Besides this one specific act, the remainder of Plaintiffs' allegations against Spielman consists of unintelligible and boilerplate criminal "conspiracy" claims and allegations against all Defendants. Without

[1] In the Plaintiffs' Verified Complaint for Damages, Plaintiff Curtis has characterized the pending mediation of the probate matter as "predetermined by the personal interests of enterprise acolytes and not by law." *See* ¶¶ 113-115.

anything more, the Plaintiffs have not pleaded facts to support a claim for relief, nor can their claims be cured through a new pleading. Therefore, the Court should dismiss this claim with prejudice. *Caroll v. Fort James Corp.* 470 F.3d 1171, 1177 (5th Cir. 2006).

III.
ARGUMENTS AND AUTHORITIES

A. Plaintiffs' Claims Are Barred by "Attorney Immunity" Doctrine.

Plaintiffs' claims should be dismissed pursuant to the "Attorney Immunity Doctrine". *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation."). More so, in Texas, "attorney immunity is properly characterized as a true immunity from suit." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* At 346. The only exceptions to attorney immunity is if the attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduction "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482.

It is undisputed fact that Spielman was acting at all times as the attorney for Amy Brunsting. In Plaintiffs' Verified Complaint for Damages, they state "[d]efendant Amy Brunsting is proximately related to Harris County Probate Court . . . **through her attorney, Defendant Neal Spielman** and co-conspirator Defendant Candace Kuntz-Freed." *See* ¶ 27 (emphasis added). The facts the Plaintiffs allege as forming the basis of her claims against Spielman arise from the discharge of Spielman's duties in representing Amy Brunsting. There are no allegations in the Plaintiffs' pleadings that would suggest Spielman's conduct fell into any

exception to the attorney immunity doctrine. Thus, as Spielman's conduct is immune from suit, Plaintiffs' claims must be dismissed.[2]

B. Plaintiffs' Claims Should be Dismissed Pursuant to Federal Rule 12(b)(6) for Failure to State a Claim.

The remainder of Plaintiffs' claims against Spielman should be dismissed because the Complaint fails to allege facts supporting any valid claims for relief. Plaintiffs complaints are simply conclusory allegations of law, inferences unsupported by facts, or formulaic recitations of elements. These types of complaints are not sufficient to defeat a 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

In order to defeat a Rule 12(b)(6) motion, Plaintiffs must plead enough facts to "state a claim to relief that is **plausible on its face**." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is "facially plausible" if the facts plead allow the court to draw reasonable inferences about the alleged liability of the defendants. *Id.* Here, the Plaintiffs' allegations facially fail to meet this standard. In the RICO complaint against Spielman, Plaintiffs allege simply:

> **[Spielman and others] did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Section 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. §1961(1) in violation of 18 U.S.C. §1962(c) and (d) to wit[].**

Plaintiffs' Verified Complaint for Damages, ¶59.

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[2] Alternatively, Plaintiffs' claims are barred by lack of attorney-client privity. Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996).

Each of the Plaintiffs claims against Spielman follow the same formulaic pattern. *See* ¶¶ 121, 122, 124, 131, 132, 139. As the Plaintiffs' claims have not met the "fair notice" pleading standards Rule 12(b)(6), these claims should be dismissed.

C. Plaintiffs' Fail to Plead Particular Acts of Fraud.

Federal Rule 9(b) requires a heightened pleading standard when the claims allege acts of fraud. *See* FRCP 9(b). The Federal Rules requires plaintiffs to plead allegations of fraud "with particularity." *ABC Arbitrage Plaintiffs Grp. V. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "specific the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent") (internal quotations and citations omitted). The Plaintiffs plead, *inter alia*, that Spielman was part of an over-arching conspiracy, (referred to alternatively as "the Enterprise," the "Harris County Tomb Raiders," the "Probate Mafia", and the "Probate Cabal") whose purpose was to commit acts of fraud to "judicially kidnap and rob the elderly, our most vulnerable citizens of their freedom, dignity, fundamental human and civil rights and property accumulated throughout a lifetime, often also robbing heirs and beneficiaries of familiar relations and inheritance expectancies." *See* Plaintiffs' Verified Complaint for Damages ¶¶ 59-71. As these pleadings require the heightened standard, Plaintiff's allegations are facially insufficient and should be dismissed.

D. Plaintiffs' Fail to Plead Particular Conduct of the Defendant.

The pleading requirements under the Rule 9(b) also require that claimants allege specific and separate allegations against each defendant. *See Unimobil 84, Inc. v. Spurney,* 797 F.2d 214, 217 (5th Cir. 1986)(affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made"). It is "impermissible to make general allegations that

lump all defendants together, rather, the complaint must segregate the alleged wrongdoing of No. 1 from another."). *In re Parkcentral Glob. Litig.,* 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012).

Here, Plaintiffs' complaints consist of generalized allegations concerning "conspiracies" and "enterprises." The claims do not differentiate between what acts each member committed nor what role each defendant played. Nothing in the pleadings is informative enough to prepare a proper defense. Without discernible, specific acts alleged against the Defendants, the Plaintiffs have failed to meet the pleading standards required by the Federal Rules.

E. Plaintiffs Lack Privity With Defendant Spielman to Maintain a Suit.

Plaintiff's claims against Spielman arise from his role as an attorney for Amy Brunsting. Texas law dictates that an attorney only owes a duty of care to a person with whom the attorney has a professional attorney-client relationship. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). A non-client may not maintain a suit for the negligence of another's attorney. *See Gillespie v. Scherr*, 987 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Spielman and Plaintiffs have never had an attorney-client relationship; the Plaintiffs themselves do not dispute this fact. Without a relationship of "privity" between the attorney and the claimants, the claimant is not a proper party to sue. The rationale between the "privity" required to obtain standing is, that without it, attorneys would be subject to endless liability. *Barcelo*, 923 S.W.3d at 577. Texas has uniformly applied the doctrine of a "privity barrier" in estate planning contexts. *Id.* At 579.

Because Spielman and Plaintiffs never had an attorney-client relationship, nor do Plaintiffs allege an attorney-client relationship existed, they do not have standing to sue Spielman. Therefore, the Plaintiffs' claims must be dismissed.

IV.
CONCLUSION

For the reasons stated above, Defendant Neal Spielman requests that this Court grant Defendant's Motion to Dismiss on all claims with prejudice.

Respectfully submitted,

WINGET, SPADAFORA, & SCHWARTZBERG, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record through the Court's CM/ECF system on this date: October 3, 2016.

_____
Martin S. Schexnayder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT JILL WILLARD YOUNG'S MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6) AND 9(B)

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Introduction

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 14, 2016, Defendant Jill Willard Young filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 25)

3. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26)[1] as a factual supplement to the RICO complaint. (Dkt 1).

4. Plaintiffs move the Court to take judicial notice, pursuant to Federal Rule of Evidence 201, that the Addendum of Memorandum (Dkt 26) and the exhibits attached thereto and referred to therein, are docket entries 115 through 120 in closely related Case 4:12-cv-0592. (See NOTICE of Related Case this Court's Docket (Dkt 12))

5. Plaintiffs hereby incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to the Motions to Dismiss filed by Defendants Vacek & Freed (Dkts 19 & 20) as if fully restated herein.

The Issues

a. Defendant Jill Willard Young claims:

> *Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (see Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.*

b. Defendant claims:

> Plaintiffs fail to plead facts sufficient to satisfy Rule 9(b)

c. Defendant Claims:

> *In reality, their Complaint is a bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.*

d. Defendant claims Plaintiffs' Complaint reads more like "an excerpt from the DaVinci Code, rattling off fantastical assertions with no connection to plausible facts or valid causes of action".

[1] Case 4:12-cv-0592 Filed TXSD August 3, 2016 docket entry's 115, 117, 119, 120

e. Defendant takes exception to the descriptive labels acquired by plaintiffs as terms given to the complained of conduct by ordinary laypersons who have previously experienced the probate court version of the administration of justice.

f. Jill Willard Young claims that her only connection to Plaintiff Curtis involved the "estate of Nelva Brunsting".

> *The only matter in which Ms. Young was ever involved with Plaintiff Curtis was In re: Estate of Nelva E. Brunsting, No. 412.249 (Harris County Probate Court No. 4) (the "Brunsting matter"). In the Brunsting matter, Ms. Young was attorney for Greg Lester, who had been appointed by Probate Court No. 4 as temporary administrator, to assist Mr. Lester in preparing a written report to the Court.*

g. The Motion then says:

> *All of the actions taken by Ms. Young in that matter were in her role as attorney to Mr. Lester. Ms. Young never had a fiduciary relationship with either Plaintiff, and she did not represent any other party in the Brunsting matter. Plaintiffs make no allegations to the contrary.*

h. Ms. Young then claims immunity.

> *Plaintiffs' claims should be dismissed with prejudice. First, Ms. Young, as attorney only for Mr. Lester, is entitled to immunity from suit under Texas law. See Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation.") (emphasis added).*

i. Ms. Young attaches as her only exhibit (Dkt 25-A) a copy of the Order appointing Gregory Lester Temporary Administrator for the "estate of Nelva Brunsting No 412249".

Plaintiffs' Argument

6. Defendant's Rule 12(b)(6) Motion attempts to offer a set of facts inapposite to those of the complaint and although Defendant may offer a different view of the facts under Federal Rule of Civil Procedure 12(b)(1) by providing affidavits and other evidentiary support, Defendant has not done so and may not do so in a Rule12(b)(6) motion.

7. Ms. Young is charged with in-concert aiding and abetting for her role in manufacturing a vacuously fraudulent report as part of an extortion conspiracy with a primary objective of stealing assets from the Brunsting trusts under an estate litigation pretext.

8. The Privity and Texas Attorney Immunity Doctrines are regularly used as shields for the criminal racketeering alleged in the RICO complaint.

Curtis v. Brunsting in the Southern District of Texas and the Fifth Circuit

> *Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (see Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.*

9. Defendant Jill Willard Young, participated in the attempt to eliminate Curtis v Brunsting from the probate record. There is a reason for that. Plaintiffs' certificate of closely related case (Dkt 12) cites to the first filed lawsuit relating to the Brunsting trusts. Other than the case in point, 4:16-cv-01969, Curtis v Brunsting 4:12-cv-0592 is the only related lawsuit filed in a court of competent jurisdiction, as hereinafter more fully appears.

10. The events leading up to this RICO lawsuit are unique, in that the underlying unresolved federal lawsuit, Curtis v Brunsting 4:12-cv-592, is its own federal Fifth Circuit case law authority, *Curtis v Brunsting 704 F.3d 406*. The only real distinctions between Curtis v Brunsting 4:12-cv-592 and Curtis v Kunz-Freed et al., 4:16-cv-01969, are location in the chronology of events, the nature of the federal jurisdiction invoked, the number of actors involved, the volume of information available, and the remedies pursued.

11. Candace Louise Curtis v. Anita and Amy Brunsting 4:12-cv-592 was filed in the United States District Court for the Southern District of Texas on February 27, 2012, and dismissed sua sponte under the probate exception to federal diversity jurisdiction on March 8, 2012. Curtis filed a timely notice of appeal and the matter went to the Fifth Circuit for review.

12. On January 9, 2013, the Circuit Court issued a unanimous opinion with Order for Reverse and Remand, No. 12-20164, holding the probate exception to federal diversity jurisdiction does not apply to an inter vivos trust not in the custody of a state court, Curtis V. Brunsting 704 F.3d 406.

13. *On January 29, 2013,* Carl Brunsting, as Executor of the estate of Nelva Brunsting, filed suit against attorney Candace Kunz-Freed and Vacek & Freed P.L.L.C. in the Harris County District Court, raising claims exclusively related to the Brunsting trusts then in the custody of the federal court.[2]

14. Upon returned to the U.S. District Court Curtis immediately petitioned for a protective order. A hearing was held April 9, 2013 (Dkt 26-7 E289-E342) and an injunction was issued. (Dkt 26-2 E5-E9)

15. Also on April 9, 2013, after the federal injunction was issued, Defendant Bobbie Bayless filed suit in the Harris County Probate Court advancing Brunsting trust related claims similar to those already pending in the federal Court, styled "Carl Henry Brunsting individually and as Executor for the Estates of Elmer and Nelva Brunsting". (Dkt 33-9 E188-E207)

16. The Probate cases are:

a. Harris County Probate Case 412248 Carl Henry Brunsting executor of the estate of Elmer H. Brunsting, vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

b. Harris County Probate Case 412249 Carl Henry Brunsting executor of the estate of Nelva E. Brunsting, vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

[2] No. 2013-05455; Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County, TX

c. Harris County Probate Case 412249-401 Carl Henry Brunsting Individually vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

d. Harris County Probate No. 412249-402 on remand from the federal Court 4:12-cv-0592. The only docket entries in the probate court with the heading of Curtis v Brunsting are a notice of the original federal petition[3] and a notice of injunction and report of special master[4] and each is covered with a heading page of "Estate of Nelva Brunsting".

The Losing End of Fully Litigated Determinations in Texas State Court

17. Defendant alleges Plaintiffs' claims are:

> *frivolous, delusional, and implausible"… bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.*

18. Counsel violates ethics rules when he files a pleading making knowingly disingenuous claims regarding the record of state court proceedings. Defendants do not, because they cannot, point to the record in any proceeding where Plaintiffs have been on the losing end of any fully litigated state court determinations, because no such events exist in the record. There is a plausible explanation for that.

19. The state probate court absolutely refused to resolve any substantive issues on the merits, due to their awareness of a well-known phenomenon called "Complete Absence of Jurisdiction".

20. Defendant's knowledge of that simple fact explains the entire in-concert attempt to avoid ruling on the merits of any pleading and the character of the Gregory Lester Report.

[3] 2015-02-10 PBT-2015-47716
[4] 2015-02-06 PBT-2015-47630

21. Defendant would love to argue, as they do against all of the probate cabal's victims (Exhibit 1 attached), that Plaintiffs are disgruntled losers seeking vengeance, or that they are asking a federal court to review state court judgments when, in fact, no rulings were ever entered against Curtis because no state court has been invoked as a "Court of Competent Jurisdiction" and these defendant legal professionals all know it.

The Vacuously Indefensible Report of Jill Willard Young and Gregory Lester

The Order Granting Authority to Retain Counsel

22. The Order granting authority to retain Jill Young (Exhibit 2 attached) was for the sole purpose of performing the Duties defined in the Order appointing Gregory Lester Temporary Administrator. (Dkt 25-A)

> *as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities.*

23. The Report of Temporary Administrator, filed January 14, 2016, (Dkt 26-9) never mentions the Wills of Elmer or Nelva Brunsting, which is where one would logically think to begin an honest investigation into the veracity of claims brought in the name of a "decedent's estate". The Wills (Exhibits 3 and 4 attached) make clear that the only heir in fact to either estate is "the trust", a matter commented on in the Fifth Circuit Opinion. (Dkt 34-4)

24. The "Report" does not give a history of any litigation, does not mention the estate of Elmer Brunsting, Harris County Probate No. 412248 (Will filed April 2, 2012), does not mention the estate of Nelva Brunsting, Harris County Probate No. 412249 (Will filed April 2, 2012), even though the Report is filed under the 412249 case number and the Order (Dkt 25-A) specifically authorized investigation and reporting on the efficacy of the "estate" claims.

a. The "Report" also does not mention the Petition in Curtis v Brunsting 4:12-cv-00592, or Curtis v Brunsting 704 F.3d 406, or the 164th Judicial District Court of Harris County No. 2013-05455 "estate of Nelva Brunsting" v Candace Kunz-Freed and Vacek and Freed, or that Carl Brunsting brought his complaint individually and as executor of the estates of Elmer and Nelva Brunsting in the probate Court, nor that the estate claims are virtually identical to those that had been pending in the Southern District of Texas since February of 2012.

b. The "Report" does not mention the federal injunction, does not mention the gap in activity in the "estate cases between April 5, 2013's "Drop Orders" (Exhibits 5 and 6), the Inventory (Exhibit 7 attached), or the federal remand of May 2014 (Dkt 33-7 and 33-8), or the applications for letters dated October 17, 2014 (Exhibit 8 attached).

c. The "Report" does refer to Jason Ostrom's alleged "2nd Amended Complaint" filed in the probate court under the heading of "Estate of Nelva Brunsting". (Dkt 34-9)

25. Plaintiffs would again ask the Court to review Dkt 34-10 which is credible evidence of "bizarre" that actually exists, although the signed version appears to have been replaced with the unsigned version in the public record.[5] (Exhibit A9 attached)

Defendant's Exhibit A

26. Defendant's Exhibit A (Dkt 25-A) is the Order Appointing Temporary Administrator Gregory Lester. In the Order the Probate Court found that it had jurisdiction and venue over the Decedent's Estate and authorized Mr. Lester to review the claims brought by the "estate" against 1) Candace Freed 2) Anita Kay Brunsting, 3) Amy Ruth Brunsting, and 4) Carole Ann Brunsting. The Order does not grant any authority to examine the claims brought by Plaintiff Carl Brunsting or Plaintiff Candace Curtis individually. None-the-less the report states:

[5] Harris County Clerk public website case access

> *Carl Henry Brunsting and Candace Louise Curtis have filed claims against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting in the Estate of Nelva E. Brunsting, Deceased, pending in Harris County Probate Court Number Four (4) under Cause Number 412,249 (hereinafter referred to as the "Probate Court Claims").*

27. While the "Report" specifically avoids any mention of the TXSD case of Curtis v Brunsting 4:12-cv-00592, it exhibits the Report of the Special Master with the federal case number listed across the top of every page referring to it thusly:

> *"This **REPORT OF MASTER** that was prepared in the case filed in the Southern District of Texas federal court case has the details of the Trust's income, expenses and distributions of stock. A copy of this report is attached hereto as the sixth exhibit."*

28. The only exhibits in the "Report" are trust and not estate related instruments and there can be no plausible denial that the "Report" was nothing but a vehicle for threatening Plaintiff Curtis with injury to property rights if she did not agree to enter into a mediated settlement agreement. (See Dkt 26 pgs 3-31 and transcript of March 9, 2016 Dkt 26-16)

29. The Report exhibits include:

a. The 2005 Restatement to the Brunsting Family inter vivos trust, Pg 11-97;

b. The 2007 Amendment to the Brunsting Family inter vivos trust, Pg 98-99;

c. The alleged December 21, 2010 appointment of successor trustees to the Brunsting Family inter vivos trusts, Pg 100-105;

d. The June 2010 QBD to the Brunsting Family inter vivos trust, Pg 106-108;

e. One of three versions of the 8/25/2010 QBD (extortion instrument) claiming to revoke the Brunsting Family inter vivos trust (see dkt 26-4)[6], Pg 109-145 and;

f. Report of Special Master regarding the Brunsting Family inter vivos trust, Pg 146-183.

[6] Filed in the state probate court as an exhibit to Plaintiff Curtis July 13, 2015 Answer to Defendants 6/26/2015 No-evidence Motion and demand to produce evidence in 412249-401.

Probate Mafia and Harris County Tomb Raiders

30. Plaintiff Curtis' original petition filed February 27, 2012, was dismissed under the probate exception and that is what sent Plaintiff on a journey to the Fifth Circuit. Anyone researching the Probate Exception will invariably be exposed to the "Probate Mafia". (Exhibit 10 attached)

31. Harris County Tomb Raiders is a term first observed by Plaintiffs in a recorded video of a hearing before the Texas Senate Committee on the Judiciary, October 11, 2006[7], where one witness, a Robert Alpert[8], gave an account of his experience in the Harris County Probate Court. His testimony contained remarkably similar descriptions of the means and methods complained of in the present complaint, a full ten full years later, and nothing appears to have changed. Where exactly Tomb Raiders was mentioned in the testimony Plaintiffs do not recall, as there are 12 recordings available and they cover a seven and one-half hour hearing session.

In Concert Aiding and Abetting

32. As previously stated, Ms. Young is charged with in concert aiding and abetting a conspiracy to loot the Brunsting trusts, that is fully documented on the Public record. A particular participant's part in the conspiracy does not have to be of great magnitude, but only a manifest part of the symphony of sound produced by the other instruments in concert.

33. The elements of aiding and abetting are 1) that the accused had specific intent to facilitate the commission of a crime by another; 2) That the accused had the requisite intent of the

[7] Audio Recordings are available online at the Texas Senate Library
[8] Beginning at 12 minutes of Recording: 791070a, 79th Senate Jurisprudence Committee E1.016 Tape 2 of 4 Side 1 & 2, 10/11/06 10:40am Recording: 791070b

underlying substantive offense; 3) That the accused assisted or participated in the commission of the underlying substantive offense; and 4) That someone committed the underlying offense.[9]

34. Defendant Jill Willard Young does not offer exhibits to support her proclaimed vision of the facts she proffers. She does not exhibit her motion for permission for Greg Lester to retain her law firm (Exhibit 11), nor the order appointing her to "assist" Mr. Lester (Exhibit 2) and definitely not the report she assisted Mr. Lester in producing (Dkt 26-9).

Prosecuting State and Local Corruption

35. All of the states and most local governments have criminal statutes or codes which criminalize various aspects of corruption.

36. While there is no federal statute which is aimed specifically at state and local corruption, there are three statutes which have been generally utilized by federal prosecutors to prosecute state and local officials for acts of corruption. They are the mail and wire fraud statute, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Hobbs Act – 18 USC §1951

37. The Hobbs Act, by its express language, makes it a crime to obstruct, delay, or affect commerce by robbery or extortion.

38. However, the statute, by a series of judicial decisions including a United States Supreme Court decision (*See*, *United States v. Evans*, 504 U.S. 255 [1992]), has been extended to cover practices best characterized as bribery. In that regard, all that has to be shown is that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. This results in making the Hobbs Act similar to 18 USC

[9] United States Attorney's » Criminal Resource Manual » CRM 2000 - 2500 » Criminal Resource Manual 2401-2499 CRM 2474

§201, insofar as it covers bribery of a federal official. However, the statute would not cover mere receipt of gratuities, as under 18 USC §201, which is covered by the mail and wire fraud statutes.

39. While the Hobbs Act is limited to conduct that "obstructs, delays or affects interstate commerce [commerce between two or more states]," this requirement is hardly any requirement at all, since all that is needed is a small or practically negligible effect.

40. A Hobbs Act violation may serve as the foundation for RICO offenses.

Mail and Wire Fraud – 18 USC §§1341 (Mail), 1343 (Wire)

41. The mail and wire fraud statutes were enacted as anti-fraud statutes, designed to combat, as criminal, the common law crime of larceny by trick. Even though the statutes' terms do not specifically embrace corruption, they are extensively used to prosecute acts of public corruption.

42. For mail fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the mailing of a letter for the purpose of executing the scheme; and for wire fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the use of interstate wire communications in furtherance of the scheme. For purposes of the statute, the requisite mailing can be done through the postal service or a private carrier, and the requisite wire communications include radio transmissions, telephone calls and e-mails. Significantly, the requisite mailing or wiring need not itself contain any fraudulent information and may be entirely innocent. However, they must be shown to be at least a "step" in the scheme. (*Schmuck v. United States*, 489 U.S. 705, 712 [1989]).

43. With respect to the statutes' use in public corruption cases, a fraudulent scheme includes "a scheme . . . to deprive another of the intangible right of honest services." (18 USC

§1346). It is this definition which makes the statutes a flexible tool for prosecutors to prosecute public corruption at the state or local level.

44. A typical "honest services" corruption case arises in two situations. First, "bribery" where the public official was paid for a particular decision or action, which includes a pattern of gratuities over a period of time to obtain favorable action. Secondly, "failure to disclose" a conflict of interest, resulting in personal enrichment, which encompasses circumstances where the official has an express or implied duty to inform others of the official's personal relationship to the matter at hand, even though no public harm occurred or there was no misuse of office.

45. As to the "conflict of interest" situation, the basis for its condemnation is that "[w]hen an official fails to disclose a personal interest in a matter over which he has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." (*United States v. Sawyer*, 85 F3d 713, 724 [1st Cir. 1966]). Notably, a person who holds no public office but participates substantially in the operation of government, *e.g.*, a political party leader, may be subject to prosecution under an "honest services" theory. (*See, United States v. Margiotta*, 688 F.2d 108 [2d Cir. 1982]).

Federal Conspiracy Laws

46. Federal conspiracy laws rest on the belief that criminal schemes are equally or more reprehensible than are the substantive offenses to which they are devoted. The Supreme Court has explained that a "collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that

the individuals involved will depart from their path of criminality."[10] Moreover, observed the Court, "[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked."[11] Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."[12] In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."[13] Congress and the courts have fashioned federal conspiracy law accordingly.[14]

Conclusion

47. Ms. Young drafted the motion asking to be appointed to "assist Mr. Lester in his fiduciary duties" (Exhibit 11 attached) and admits to participating in the production of the "Gregory Lester Report" (Dkt 26-9 E394-E403) but seeks to hide her participation in the conduct of the affairs of the enterprise as "attorney" conduct entitling Ms. Young to impunity.

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[10] *Iannelli v. United States*, 420 U.S. 770, 778 (1975), quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).
[11] *Id.*
[12] *Id.*
[13] *Id.*
There have long been contrary views, e.g., Sayre, *Criminal Conspiracy*, 35 HARVARD LAW REVIEW 393, 393 (1922)("A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought"); *Hyde v. United States*, 222 U.S. 347, 387 (1912)(Holmes, J, with Lurton, Hughes 7 Lamarr, JJ.)(dissenting)("And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved"), both quoted in substantial part in Katyal, *Conspiracy Theory*, 112 YALE LAW JOURNAL 1307, 1310 n. 6 (2003)
[14] Federal prosecutors have used, and been encouraged to use, the law available to them, *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925)("[C]onspiracy, that darling of the modern prosecutor's nursery"); *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990)("[P]rosecutors seem to have conspiracy on their word processors as Count I"); Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 SOUTH TEXAS LAW REVIEW 669, 684 (2009)("What options do prosecutors have in the terrorism-prevention scenario when [other charges] are unavailable for lack of evidence linking the suspect to a designated foreign terrorist organization? One possibility is conspiracy liability").

48. It necessarily follows that an independent report on the efficacy of the estate claims would have revealed a complete absence of jurisdiction over the very things the report speaks to.

49. Where there is no court of competent jurisdiction, there is no judge and no litigation, and consequently Defendant's immunity claims collapse under the weight of the complete absence of jurisdiction in any state court. (See Curtis v Brunsting 704 F.3d 406, 409-410 and Lexis HN 6)

50. All of the Defendants are accused of violating 18 U.S.C. 1962(c), which prohibits participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity affecting interstate commerce, and 18 U.S.C. 1962(d), conspiracy to violate 18 U.S.C. 1962(c).

51. Jill Willard Young's participation is directly related to the fraudulent report of Gregory Lester, used to promote their substantive resolution avoidance and mediated settlement diversion scheme, which can only be explained by these Defendants' knowledge of the Court's complete want of jurisdiction.

52. Defendant Jill Willard Young was present at the September 10, 2015 hearing, that plaintiffs have been unable to obtain a transcript of.

53. However, Defendant Neal Spielman's March 9, 2016 diatribe, (Dkt 26-16) referring to the September 10, 2015 hearing, evidences the "Report" to be the product of the Defendants' own dictation and, while the report admits "I was told" as a source for information, The report never mentions who told Lester what to write.

54. These lawyer Defendants, in concert, attempted to conceal Curtis v. Brunsting in the probate record as if it was the "estate of Nelva Brunsting" and then, knowing there was no authority to determine any matters related to the Brunsting trusts they all conspired together to avoid rulings on the merits and to attempt to intimidate the non-participant into attending a

"mediation" where she could be further impressed with the threat to her property interests if she did not rollover on her rights and surrender property by settlement agreement.

55. Defendant attempts to deceive this Court into believing the underlying matter is related to an inheritance or an expectancy, but Plaintiff Curtis is an equitable property owner whose property interest was fully vested at the creation of the family trusts in 1996 and the death of Elmer Brunsting and Nelva Brunsting elevated her to a property owner with a primary right of consideration under the undisturbed terms of the irrevocable trusts.

56. Plaintiff Curtis' trust property has been withheld and that property continues to be illicitly held hostage to attorney fees and absolution ransoms Plaintiff does not owe.

57. Plaintiff Curtis and her domestic partner Plaintiff Munson have incurred substantial expense, expended efforts and suffered constant character attacks, been forced to divert quality time and capital assets away from local and domestic concerns in a productive life, to defend her property interests in Texas for more than 4 and one-half years, and the participants in the involuntary wealth redistribution scheme claim Plaintiffs have suffered no tangible injury.

58. Defendant also claims that some of the predicate acts do not provide a private right of claims, but that is not what 18 U.S.C. §1964(c) says about injury suffered as direct and proximate result of a pattern of racketeering activity involving such acts.

59. The only subject of the Jill Willard Young/Gregory Lester report is not the estate but the money cow trust, not properly in the custody of any state court.

60. There is not a single mention of the wills, the pour over provisions, the identity of the only heir, the inventory containing only an old car, or the "estate claims", and it does not mention the drop orders or any other "estate" related matters, yet seeks to legitimize "estate claims" involving only the beneficiaries of the "heir-in-fact" trust.

61. Candace Curtis and her siblings are beneficiaries of "the trust" and, therefore, derivatively the only real parties in interest.

62. In essence, the "decedent's estate" is suing "heirs in fact" (trust beneficiaries) in probate court, for trespasses committed against the "heir in fact" (trust) during the lifetime of the decedent.

63. Plaintiff Curtis' federal petition was amended by Defendant Ostrom to join Plaintiff Carl Brunsting, to pollute diversity, in order to affect a remand to state court, where Plaintiff Curtis could be consolidated as a "defendant" in the "estate" lawsuit involving only the trust.

64. Any award from the estate lawsuits would belong to the "heir in fact" (trust), minus attorney and appointee fees from years of litigation involving an estate with no assets, in a court with no subject matter jurisdiction, whose judgments would all be void ab initio and would in any event guarantee a successful reversal on appeal by either party, with no resolution in sight forever and ever, while Anita, Amy, and their attorneys hold disposition of the trust hostage.

65. This is indeed a bazaar conspiracy theory but it is not a box office thriller. It is a reality embedded in the public record and one need look no further than the public record for the evidence that supports Plaintiffs' claims.

Wherefore, Plaintiffs respectfully move this Honorable Court for an Order denying the Motion to Dismiss filed by Defendant Jill Willard Young August 14, 2016. (Dkt 25)

Respectfully submitted, October 2, 2016.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on October 2, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, the Rule 12(b)(6) Motion to Dismiss filed by Defendant Jill Young in the above styled cause on September 14, 2016 (Docket entry 25) should be Denied.

It is SO ORDERED

_____ _____

Date

The Honorable Alfred H Bennet
United Stated District Judge

Exhibit List Jill Willard Young Rule 12 Motion

1-	Defendant Jill Willard Rule 11 Notice	E1-E8
2-	Order Granting Authority to retain Jill Young	E9-E10
3-	The Will of Nelva Brunsting	E11-E22
4-	The Will of Elmer Brunsting	E23-E34
5-	Drop Order 412249 April 4, 2013	E35
6-	Drop Order 412248 April 4, 2013	E36
7-	March 27, 2013 Inventory and April 4, 2013 Order Approving Inventory	E37-E44
8-	2013-10-17 Application for Letters Testamentary	E45
9-	Agreed Order to Consolidate “estate of Nelva Brunsting with “estate of Nelva Brunsting” (See Dkt 34-10)	E46-E49
10-	Fighting the Probate Mafia (2002)	E50-E119
11-	September 1, 2015 Application to Retain Jill Young	E120-E128

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September 27, 2016

Via Certified Mail
Return Receipt Requested and
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Re: Case No. 4:16-cv-01969, *Curtis, et al v. Kunz-Freed, et al.*

Dear Ms. Curtis and Mr. Munson:

Pursuant to Federal Rule of Civil Procedure 11(c)(2), we have enclosed a copy of a Motion for Sanctions by Defendant Jill Willard Young.

As set forth in the Motion for Sanctions, Ms. Young is seeking sanctions, including attorneys' fees, from you for the wrongful filing of the above action. We will file this Motion for Sanctions on Wednesday, October 19, 2016, unless your clients nonsuit their claims against Ms. Young with prejudice before that date.

Please let me know if you have any questions.

Very truly yours,

Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION FOR SANCTIONS

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal. On September 15, 2016, Defendant Young filed her Motion to Dismiss. And on September 27, 2016, Defendant Young sent Plaintiffs a letter, informing them that, in accordance with the safe-harbor procedure of Federal Rule of Civil Procedure 11, she would be filing this Motion for Sanctions on October 19, 2016, if Plaintiffs did not dismiss their Complaint against her with prejudice. But Plaintiffs have ignored Ms. Young's letter and Motions.

Plaintiffs' frivolous pleadings meaninglessly and wrongfully denigrate the reputation of Ms. Young, a prominent, hard-working Houston lawyer. Despite opportunities to nonsuit their meritless suit, Plaintiffs have refused to do so. Thus, Plaintiffs should be required to reimburse Ms. Young's attorney's fees pursuant to Federal Rule of Civil Procedure 11.

ARGUMENT AND AUTHORITIES

Filing a RICO action in federal court is not a proper substitute for appealing an unfavorable ruling, nor is it an appropriate means of seeking revenge against opposing and court-

appointed counsel. *See Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("[I]t should be noted that an attorney's responsibility to conduct a reasonable prefiling investigation is **particularly important in RICO claims**.") (emphasis added). Because the claims asserted by Plaintiffs are both legally and factually frivolous, Ms. Young should be awarded attorneys' fees and costs under Fed. R. Civ. P. 11.

I. The Rule 11 Standard

Under Fed. R. Civ. P. 11(b), by presenting the Court a signed pleading, an "unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3). "Compliance with these affirmative duties is measured as of the time that the document is signed." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994). And whether a pleading meets this requirements is measured "by an objective, not subjective, standard of reasonableness under the circumstances." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988).

"[I]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1); *see also* Fed. R. Civ. P. 11 Advisory Committee Notes ("Even though it is the attorney whose

signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

II. Plaintiffs have violated Fed. R. Civ. P. 11(b)(2) by filing legally frivolous claims.

Plaintiffs have ignored longstanding attorney immunity doctrines, have alleged six causes of action for which they have no private cause of action, and failed to plead facts showing even the most basic elements of their RICO "claim."

A. Plaintiffs ignore attorney immunity.

Plaintiffs have ignored long-established immunity doctrines that protect attorneys from suit by opposing parties and non-clients. Indeed, the affirmative defense of immunity is apparent on the face of the Complaint.

Under Texas law, it is settled that "attorneys are immune from civil liability . . . 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). However, a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

In this case, Plaintiffs have not pled any facts showing Ms. Young, who served as counsel for the Temporary Administrator in the underlying lawsuit, took any actions outside the normal discharge of her duties in representing her client. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016) (attorney's conduct in sending a letter, participating in discovery, and

communicating with SEC about client were "classic examples of an attorney's conduct in representing his client").

B. Plaintiffs plead claims for which there exists no private right of action.

Plaintiffs allege three causes of action for "honest services," along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* Complaint, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See* Motion to Dismiss [DKT. 25], at pp. 13–16.

C. Plaintiffs' accusations are baseless and delusional.

Plaintiffs accuse Ms. Young of what can best be described as fictional acts--being a member of a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. Not surprisingly, Plaintiffs do not even try to accompany their made-up story with supporting facts. The reality is unavoidable—their complaint is a bizarre, sophomoric attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Less fantastical efforts to concoct a federal claim against judges and opposing attorneys have been routinely dismissed. *See, e.g.*, *Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to plead a racketeering activity). And other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148

(W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Thus, Plaintiffs' allegations fail to satisfy Rule 11. Specifically, Plaintiffs' Complaint against Ms. Young—devoid of any allegation of actual wrongdoing—can only be brought for improper purposes, like harassment or to needlessly increase the cost of litigation. Plaintiffs' Complaint is in no way warranted by existing law, and Plaintiffs' contentions completely lack any sort of factual or evidentiary support. *See* Fed. R. Civ. P. 11(b)(1)-(3). Ms. Young has also specifically informed Plaintiffs multiple times of the legal defects in their Complaint and the authority showing Plaintiffs' arguments are meritless, both in Ms. Young's filing of her Motion to Dismiss and by serving this Motion for Sanctions on Plaintiffs twenty-one days before filing it with the Court. But Plaintiffs have refused to dismiss their Complaint against Ms. Young. This, too, means sanctions are necessary. *See also Taylor v. C.I.R.*, 350 Fed. Appx. 913, 915 (5th Cir. 2009) ("Sanctions on pro se litigants are appropriate if they were warned that their claims are frivolous and they were aware of 'ample legal authority holding squarely against them.'").

CONCLUSION

Plaintiffs have filed a frivolous and facially-deficient lawsuit, and Ms. Young respectfully requests that the Court require Plaintiffs and their attorneys to pay her attorneys' fees in defending this suit and pursuing the relief requested herein. *See* Ex. A, Aff. of Robert S. Harrell.

Dated: September 27, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on September 27, 2016, I conferred with counsel for Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to dismiss the claims against Ms. Young, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, pursuant to Fed. R. Civ. 11(c)(2) and Fed. R. Civ. P. 5, I served copies of this Motion for Sanctions on Plaintiffs. I also certify that a true and correct copy of the above Motion for Sanctions has been served on October 19, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

DATA ENTRY
PICK UP THIS DATE

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING AUTHORITY TO RETAIN COUNSEL – MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

BE IT REMEMBERED that on this day came on for consideration the Application of Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, in connection with the Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and the Court finding that due and proper notice of the Application has been given, finds that the Application should in all respects be granted, it is accordingly,

ORDERED, ADJUDGED and DECREED by the Court that Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain JILL W. YOUNG with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP, who agrees to adhere to the billing standards set out in the court's standards for Attorney fees, as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities. The fees payable to Jill Young shall be treated as expenses of the Temporary Administrator pending contest.

IT IS FURTHER ORDERED by the Court that GREGORY A. LESTER, Administrator of the of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP pursuant to the Texas Estates Code and this Court's Order.

SIGNED this 10 day of September, 2015.

Christine Butts
JUDGE PRESIDING

FILED
2015 SEP 11 AM 11:34
Stan Stanart
COUNTY CLERK
HARRIS COUNTY TEXAS

100208 000599 0046865

APPROVED AS TO FORM:

MACINTYRE MCCULLOCH STANFIELD
& YOUNG, LLP

By: _____

JILL W. YOUNG
State Bar No. 00797670
Jill.Young@mmlawtexas.com
2900 Weslayan, Suite 150
Houston, Texas 77027
(713) 572-2900
(713) 572-2902 (Fax)

ATTORNEYS FOR APPLICANT

DATA ENTRY
PICK UP THIS DATE

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING AUTHORITY TO RETAIN COUNSEL – MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

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IT IS FURTHER ORDERED by the Court that GREGORY A. LESTER, Administrator of the of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP pursuant to the Texas Estates Code and this Court's Order.

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By: _____

JILL W. YOUNG
State Bar No. 00797670
Jill.Young@mmlawtexas.com
2900 Weslayan, Suite 150
Houston, Texas 77027
(713) 572-2900
(713) 572-2902 (Fax)

ATTORNEYS FOR APPLICANT

LAST WILL
OF
NELVA E. BRUNSTING

I, NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is ELMER H. BRUNSTING.

All references to "my spouse" in my Will are to ELMER H. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint ELMER H. BRUNSTING as my Personal Representative. In the event ELMER H. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. I direct that no action be required in the county or probate court in relation

to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law.

Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for ELMER H. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which ELMER H. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless ELMER H. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of ELMER H. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of ELMER H. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

PURPORTED WILL

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by ELMER H. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Nelva E. Brunsting
NELVA E. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by NELVA E. BRUNSTING in our presence to be her Will. We, in her presence and at her request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, NELVA E. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

WITNESS

Krysti Brull
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

April Driskell
11511 Katy Freeway, Suite 520
Houston, Texas 77079

SELF-PROVING AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared NELVA E. BRUNSTING, Kristi Brum and April Driskell, known to me to be the Testatrix and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said NELVA E. BRUNSTING, Testatrix, declared to me and to the said witnesses in my presence that said instrument is her Last Will and Testament, and that she had willingly made and executed it as her free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testatrix that the said Testatrix had declared to them that the said instrument is her Last Will and Testament, and that she executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testatrix and at her request; that she was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Nelva E. Brunsting
NELVA E. BRUNSTING

Kristi Bru
WITNESS

April Driskell
WITNESS

FILED
2012 APR -2 AM 8:36
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

Subscribed and sworn to before me by the said NELVA E. BRUNSTING, the Testatrix, and by the said Kristi Brum and April Driskell, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2005

PURPORTED WILL

412249

PURPORTED WILL

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

LAST WILL

OF

ELMER H. BRUNSTING

PROBATE COURT 4

412248

I, ELMER HENRY BRUNSTING, also known as ELMER H. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is NELVA E. BRUNSTING.

All references to "my spouse" in my Will are to NELVA E. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint NELVA E. BRUNSTING as my Personal Representative. In the event NELVA E. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. I direct that no action be required in the county or probate court in relation

to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law.

Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for NELVA E. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which NELVA E. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless NELVA E. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of NELVA E. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of NELVA E. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by NELVA E. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS. WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Elmer H Brunsting

ELMER H. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by ELMER H. BRUNSTING in our presence to be his Will. We, in his presence and at his request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, ELMER H. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

WITNESS

Krysti Brull
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

April Driskell
11511 Katy Freeway, Suite 520
Houston, Texas 77079

FILED
2012 APR -2 PM 4:31
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

SELF-PROVING AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared ELMER H. BRUNSTING, Kristi Brun and April Duske, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said ELMER H. BRUNSTING, Testator, declared to me and to the said witnesses in my presence that said instrument is his Last Will and Testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testator that the said Testator had declared to them that the said instrument is his Last Will and Testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testator and at his request; that he was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Elmer H Brunsting
ELMER H. BRUNSTING

Kristi Brun
WITNESS

April Duske
WITNESS

Subscribed and sworn to before me by the said ELMER H. BRUNSTING, the Testator, and by the said Kristi Brun and April Duske, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2006

PURPORTED WILL

412248

PURPORTED WILL

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

DROP

NO. 412,249

PROBATE COURT 4

IN THE ESTATE OF Nelva E. Brunsting	§	IN THE PROBATE COURT
	§	NUMBER FOUR OF
DECEASED	§	HARRIS COUNTY, TEXAS

DROP ORDER

On this day, it having been brought to the attention of this Court that the above entitled and numbered estate should be dropped,

IT IS THEREFORE ORDERED that the Clerk drop said estate from the Court's active docket.

IT IS FURTHER ORDERED that any costs incident to this order are hereby waived.

SIGNED this 4 day of April, 2013.

Christine Butts

JUDGE CHRISTINE BUTTS
PROBATE COURT NO. FOUR

FILED
2013 APR -5 AM 10:01
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

DROP

NO. 412248 **PROBATE COURT 4**

IN THE ESTATE OF Elmer H. Brunsting	§	IN THE PROBATE COURT
	§	NUMBER FOUR OF
DECEASED	§	HARRIS COUNTY, TEXAS

DROP ORDER

On this day, it having been brought to the attention of this Court that the above entitled and numbered estate should be dropped,

IT IS THEREFORE ORDERED that the Clerk drop said estate from the Court's active docket.

IT IS FURTHER ORDERED that any costs incident to this order are hereby waived.

SIGNED this 4 day of April, 2013.

Christine Butts
JUDGE CHRISTINE BUTTS
PROBATE COURT NO. FOUR

FILED
2013 APR -5 AM 10:01
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURT 4

NO. 412.249

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Date of Death: November 11, 2011

The following is a full, true, and complete Inventory and Appraisement of all personal property and of all real property situated in the State of Texas, together with a List of Claims due and owing to this Estate as of the date of death, which have come to the possession or knowledge of the undersigned.

INVENTORY AND APPRAISEMENT

ASSETS	VALUE	ESTATE INTEREST

1. **Real Estate:**

   See List of Claims

2. **Stocks and Bonds**

   See List of Claims

3. **Mortgages, Notes and Cash:**

   See List of Claims

4. **Insurance Payable to Estate**

   See List of Claims

5. **Jointly Owned Property**

   See List of Claims

ASSETS	VALUE	ESTATE INTEREST

6. Miscellaneous Property

6a. See List of Claims

6b. One-half (½) interest in
2000 Buick LeSabre..... $2,750.00
VIN--1G4HR54K3YU229418

TOTAL VALUE OF ESTATE..... Yet to be determined

LIST OF CLAIMS

1. Based upon the information currently available to the personal representative of the estate, it is not possible to determine with certainty what assets were in the estate at the Decedent's death. That determination will have to be made the subject of further judicial proceedings. After that judicial determination is made, to the extent it becomes necessary, this Inventory, Appraisement and List of Claims will be amended to reflect the descriptions and values of assets later determined to have been estate assets at the time of Decedent's death.

2. The estate has asserted a claim against Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC relating to actions taken and omissions made in the course of their representation of decedent and her husband which may result in additional estate assets. That case is pending under Cause No. 2013-05455, styled *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting v. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC,* in the 164th Judicial District Court of Harris County, Texas.

3. The Brunsting Family Living Trust was signed by Decedent and her husband on October 10, 1996 and was restated on January 12, 2005 (the "Family Trust"). The Family Trust purported by its terms to provide for the creation of successor and/or subsequent trusts. The Family Trust also described other documents which, if created in compliance with the terms of the Family Trust, could impact the assets and status of the Family Trust. Attempts were made by various parties to change the terms and control of the Family Trust through later instruments which have been or will be challenged. The estate also asserts claims against Anita Brunsting and Amy Brunsting, the current purported trustees of the successor trusts or trusts arising from the Family

Trust or documents allegedly created pursuant to the terms of the Family Trust. Those claims will be the subject of separate proceedings and may result in additional estate assets.

4. The estate also asserts a claim against Anita Brunsting, Amy Brunsting, and Carole Brunsting in their individual capacities for amounts paid and assets believed to also include, among other things, stocks and bonds which were removed from the Family Trust and/or the estate. This was accomplished either through the use of a power of attorney for Decedent, through their position as trustees, through their position as joint signatories on accounts and safe deposit boxes, or because they otherwise had access to the assets. Those claims will also be the subject of a separate proceeding and may result in additional estate assets.

There are no known claims due or owing to the Estate other than those shown on the foregoing Inventory and Appraisement.

The foregoing Inventory, Appraisement and List of Claims should be approved and ordered entered of record.

CARL HENRY BRUNSTING,
Independent Executor of the Estate of
Nelva E. Brunsting

BAYLESS & STOKES

By: _____
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded to the following interested parties as specified below on the 26th day of March, 2013, as follows:

Maureen Kuzik McCutchen
Mills Shirley, LLP
2228 Mechanic, Suite 400
P.O. Box 1943
Galveston, Texas 77553-1943
Houston, Texas 77056
sent via Telecopier

Carole Ann Brunsting
5822 Jason St.
Houston, Texas 77074
sent via U.S. First Class Mail

Candace Louise Curtis
1215 Ulfinian Way
Martinez, California 94553
sent via U.S. First Class Mail

BOBBIE G. BAYLESS

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, CARL HENRY BRUNSTING, having been duly sworn, hereby state on oath that the foregoing Inventory, Appraisement and List of Claims is a true and complete statement of all the property and claims of the Estate that have come to my knowledge.

Carl Henry Brunsting
CARL HENRY BRUNSTING
Independent Executor of the Estate of Nelva E. Brunsting, Deceased

SWORN TO and SUBSCRIBED BEFORE ME by the said CARL HENRY BRUNSTING, on this 26th day of March, 2013, to certify which witness my hand and seal of office.

SHAWN M. TEAGUE
MY COMMISSION EXPIRES
April 3, 2015

Shawn M. Teague
Notary Public in and for the
State of TEXAS
Printed Name: Shawn M. Teague
My Commission Expires: 4-3-2015

NO. 412.249

ESTATE OF	§	**IN PROBATE COURT**
	§	
NELVA E. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this _____ day of ______________________, 2013.

____
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: ______________________________
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

PROBATE COURT 4

NO. 412.248

ESTATE OF	§	**IN PROBATE COURT**
	§	
ELMER H. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

3930 (b)
EFF 9-1-83

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this 4 day of April, 2013.

Christine Butts
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: Bobbie G. Bayless
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

FILED
2013 APR -5 AM 10:01
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

APR 05 2013

STAN STANART
COUNTY CLERK, HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

PAID

Court No. **Probate Court No. Four (4)** Date: October 17, 2014

APPLICATION FOR LETTERS TESTAMENTARY
(Testamentary, or of Guardianship, or of Administration)

PROBATE
DOCKET NO. **412248** STYLE OF DOCKET: **ELMER H BRUNSTING , DECEASED**

FILED
2014 OCT 17 PM 3:20
COUNTY CLERK
HARRIS COUNTY, TEXAS

Name of Personal Representative: CARL HENRY BRUNSTING

Title of Personal Representative: INDEPENDENT EXECUTOR

Date Oath Filed: 08/28/2012 Order Date: 08/28/2012

Date Approved Bond Filed: Amount Of Bond: $___

LETTERS: To Be Picked Up ○ A. A.:_____
To Be Mailed (at purchaser's risk) ○ Phone No.: 713-522-2224

4/G

To: BAYLESS & STOKES Called 10/17/14 @ 11:07 A. McKinley

(Street or P.O. Box Address)

City State Zip Code

Check 25677 $10.00

Phone

Signature of Person Requesting or Attorney of Record

RECEIPT FOR PAYMENT FOR LETTERS ABOVE DESCRIBED

Received of the person, whose signature appears hereinabove, the sum of **$10.00** for issuing the **5** Letters hereinabove described.

I authorize the County Clerk to mail this order to me by regular U.S. Mail and release the County Clerk of any and all responsibility of my failure to receive same.

STAN STANART,
County Clerk and Clerk of Probate Courts
Harris County, Texas

Received by: _____

Akida McKinley
Deputy County Clerk

Date: 10-17-14 Clerk's Initials: ACH

DATA ENTRY
PICK UP THIS DATE

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

****

CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Candace Curtis

BY: _____

BOBBIE BAYLESS
(TBA #01940600)
bayless@baylessstokes.com
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Attorney for Drina Brunsting, Attorney in Fact
for Carl Brunsting

BY: _____

DARLENE PAYNE SMITH
(TBA #18643525)
dsmith@craincaton.com
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Attorney for Carole Brunsting

APPROVED AS TO FORM:

ostrommorris, PLLC

BY:_____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Candace Curtis

BY:_____

BOBBIE BAYLESS
(TBA #01940600)
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2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Attorney for Drina Brunsting, Attorney in Fact
for Carl Brunsting

BY:_____

DARLENE PAYNE SMITH
(TBA #18643525)
dsmith@craincaton.com
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Attorney for Carole Brunsting

BY: _____
BRADLEY PEATHERSTON
(TBA #24038892)
brad@mendellawfirm.com
1155 Dairy Ashford Street, Suite 104
Houston, Texas 77079
281.759.3213
281.759.3214 (Facsimile)

Attorney for Anita Brunsting

BY: _____
NEAL SPIELMAN
(TBA #00794678)
nspielman@grifmatlaw.com
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

Attorney for Amy Brunsting

FIGHTING THE PROBATE MAFIA: A DISSECTION OF THE PROBATE EXCEPTION TO FEDERAL COURT JURISDICTION

PETER NICOLAS*

I. INTRODUCTION

Imagine the following:[1] a Muslim woman with a history of chronic mental illness immigrates to the United States from Iran and settles in Colorado Springs, Colorado. At age 80, she visits a car dealership in Colorado Springs owned by a self-described Christian political activist. The woman's vulnerability is obvious, and in the course of selling the woman a car, the owner of the car dealership discovers that she lives by herself and possesses significant assets. Shortly after selling her the car, the owner of the car dealership, in concert with some local probate attorneys, persuades the Muslim woman to execute an inter vivos trust giving the owner of the car dealership the power upon the woman's death to use the entire principal of the trust at his sole discretion for "Christian/Religious purposes." The car dealer and the attorneys also persuade the woman to execute documents giving them the power to make

* Assistant Professor, University of Washington School of Law. The author would like to thank Craig Allen, Thomas Andrews, Diane Atkinson-Sanford, Ian Birk, Magdalena Cuprys, Joan Fitzpatrick, Ann Hemmens, Kate O'Neill, Chris Waraksa, Mary Whisner, and Senior Editor, Lisa Ruesch, of the Southern California Law Review for valuable research, feedback, and assistance.

1. The scenario described is based on allegations contained in a complaint filed in the United States District Court for the District of Colorado. *See* Complaint and Demand for Jury Trial at 4–31, Nicolas v. Perkins, No. 00 Civ. 1414 (D.Colo. filed July 14, 2000). The author served without pay as the attorney of record in the matter. *See id.* at 31. For additional background information on the issues inspiring this hypothetical see Cara DeGette, *Perkins, Attorneys Accused of Wrongful Death and Fraud in Federal Court Case*, COLO. SPRINGS INDEP., July 20, 2000; Erin Emery, *Perkins Named in Suit over Estate, Family Claims $2.5 Million Diverted*, DENVER POST, July 20, 2000, at B5; Dick Foster, *Suit: 5 Defrauded Mentally Ill Woman, Car Dealer, Attorneys Deny Taking Control of Estate for 'Christian Religious Purposes,'* DENVER ROCKY MOUNTAIN. NEWS, Jul. 24, 2000, at 4A.

medical decisions on her behalf. While the woman is still alive, the car dealer persuades her to withdraw large sums of money from the trust to "invest" in his "business ventures."

Shortly after the inter vivos trust and the power of attorney are executed, the woman's health begins to deteriorate in a manner consistent with neglect. She is admitted to the emergency room no fewer than twenty times where she is repeatedly diagnosed as suffering from malnutrition, dehydration, failure to thrive, weight loss, and pneumonia. The emergency room doctors repeatedly note in her chart that the inability or unwillingness of those entrusted to make medical decisions on her behalf is hampering their ability to treat her effectively. While the woman's health is deteriorating, not only do the car dealer and the attorneys fail to intervene under the power of attorney, but they also falsely communicate to members of the woman's family residing outside of the area that the woman is in perfect health. At the same time they take steps to ensure that her family cannot locate her.

Ultimately, the woman dies. Shortly thereafter, one of the attorneys files a petition in the local probate court seeking appointment as the personal representative of the woman's estate as well as a motion seeking a construction of the living trust document in a manner most favorable to the car dealer. These various filings make their way to one of the woman's daughters, a citizen of New York. In the course of the ongoing probate proceedings, the woman's daughter discovers what the car dealer and the attorneys did to her mother. While the probate proceedings are still pending, the daughter files suit against the car dealer and the attorneys in federal district court, in part because she perceives that the probate court judge's actions indicate open hostility toward her, as a resident of another state, and toward her attorneys. The federal action includes state common law claims of wrongful death and conversion, as well as a claim under the federal Racketeer Influenced and Corrupt Organizations Statute ("RICO").[2] She also seeks a declaratory judgment that the inter vivos trust is invalid.

Normally when a suit is brought in federal court, the court would determine its jurisdiction over the dispute by making a number of standard, independent inquiries. First, the court would determine whether there is a statutory grant of subject matter jurisdiction over the dispute.[3] In this

2. 18 U.S.C. §§ 1961–68 (1994).

3. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (stating that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute."); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

hypothetical there is complete diversity[4] giving the federal court subject matter jurisdiction over the state common law claims, provided the amount in controversy exceeds $75,000.[5] Additionally, since the RICO claim arises under a federal statute, there would seem to be statutory federal question jurisdiction.[6] Because a federal district court would have diversity jurisdiction over an action brought by the trustee to enforce the purported trust against the plaintiff in the federal action, the federal court likewise would have statutory subject matter jurisdiction over the declaratory judgment action.[7] Second, the court would determine whether these statutory grants of subject matter jurisdiction are among the permitted bases of subject matter jurisdiction provided for in Article III of the United States Constitution.[8] The statutory grants of jurisdiction involved here—diversity and federal question—are both firmly rooted in Article III.[9] Third, the court would determine whether the action presents a justiciable case or controversy; in other words, whether the action presents an actual dispute touching on the legal relations of parties having adverse legal interests (as contrasted with a dispute of a hypothetical or abstract character) and whether there is a substantial likelihood that a favorable

4. The statutory grant of diversity jurisdiction has been interpreted to require that no plaintiff be from the same state as *any* defendant, and that *any* overlap will defeat diversity jurisdiction. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806), *overruled on other grounds by* Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

5. *See* 28 U.S.C. § 1332(a)(1) (1994) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of different states.").

6. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Moreover, the RICO statute itself provides an independent grant of subject matter jurisdiction to the federal courts. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of [the RICO statute] by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor in any appropriate United States district court.").

7. The Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1994), provides a cause of action but does *not* expand federal court subject matter jurisdiction. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950). In order to determine whether a federal court has statutory subject matter jurisdiction over a declaratory judgment action, the court must determine whether an ordinary coercive suit brought by one of the parties would fall within the statutory subject matter jurisdiction of the federal courts. *See id.*

8. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (holding that "the statute cannot extend the jurisdiction beyond the limits of the constitution").

9. *See* U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States." *Id.* *See also* Bankers' Trust Co. v. Tex. & Pac. Ry. Co., 241 U.S. 295 (1916) (upholding constitutionality of statutory grant of federal subject matter jurisdiction).

federal court decision will bring about some change or have some effect.[10] The facts of the above-described scenario would seem to satisfy the justiciability requirement. Fourth, because there is an ongoing in rem[11] proceeding in state probate court in the above-described scenario, the federal court would need to determine whether the doctrine of *custodia legis*, or prior exclusive jurisdiction, would prevent it from adjudicating the claims raised in federal court.[12] Fifth, if the court has subject matter jurisdiction and a justiciable controversy, and the doctrine of *custodia legis* does not bar adjudication of the claims raised in the federal court proceeding, the federal court would nonetheless determine whether it should abstain under one of the many recognized doctrines of prudential abstention.[13] Finally, the district court would refer to the law of the state in which it sits to determines the existence and scope of any common law tort or contract claims.[14]

Yet, lurking in the background of this hypothetical is the "probate exception" to federal court jurisdiction. It has the effect of excluding most probate and probate-related matters from federal court and has been aptly described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."[15] The rationale for this judicially-created[16] exception is mired in confusion. It has variously been justified in Supreme Court and lower court decisions on grounds similar to those routinely used to evaluate federal jurisdiction as delineated above, including assertions that the statutory grant of subject matter jurisdiction conferred on the

10. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

11. A proceeding in rem is one in which a determination is made as to ownership of a thing or object that is binding on the whole world and not just on the parties to the proceeding. BLACK'S LAW DICTIONARY 793 (6th ed. 1991) [hereinafter BLACK'S LAW DICTIONARY].

12. Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 465–67 (1939). Under the doctrine of *custodia legis*, where in rem proceedings involving the same *res* are brought in multiple courts, the first court to assume jurisdiction over the *res* has exclusive jurisdiction over it. *Id.* at 467.

13. *E.g.*, Wilton v. Seven Falls Co., 515 U.S. 277 (1995); Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

14. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This would include the state's choice-of-law rules, which might, in turn, refer the court to the laws of yet another state. Klaxon v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941).

15. Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

16. *E.g.*, Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988).

federal courts by Congress does not extend to probate matters;[17] that because the probate of a will is a proceeding in rem, a federal court cannot exercise jurisdiction over an estate if the state probate court has already taken jurisdiction of the estate (i.e., the doctrine of *custodia legis*);[18] that probate matters are not justiciable "cases or controversies" within the meaning of Article III;[19] and the prudential desire to avoid interfering with ongoing state court proceedings.[20] In addition, courts have explained the basis of the probate exception by noting that probate matters are by state law committed to the exclusive jurisdiction of the state probate courts;[21] that because the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of "strict probate" are not within the jurisdiction of the federal courts;[22] the need for legal certainty as to the disposition of the deceased's estate;[23] the interest in judicial economy;[24] and the relative expertise of state and federal courts with respect to probate matters.[25]

This confusion over the rationale for the exception has also resulted in confusion as to its scope. First, is it a limitation on federal court subject matter jurisdiction, a discretionary doctrine of abstention, or both? Second, if it is a limitation on federal court subject matter jurisdiction, is this limitation based on Congress' statutory grants of subject matter jurisdiction to the federal courts or is it an Article III limitation? Third, does the probate exception apply only to the federal courts' grant of diversity jurisdiction, or does it also extend to other statutory grants of jurisdiction, such as federal question jurisdiction? Fourth, which types of actions fall within the exception—is it limited to the actual probate of a will, or does it

17. *E.g.*, Markham v. Allen, 326 U.S. 490, 494 (1946); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

18. *E.g.*, Sutton v. English, 246 U.S. 199, 205 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44 (1909) (citing Farrell v. O'Brien, 199 U.S. 89 (1905)); Byers v. McAuley, 149 U.S. 608, 617 (1893). *See In re Broderick's Will*, 88 U.S. (21 Wall.) at 509.

19. *E.g.*, Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958).

20. *E.g.*, *Georges*, 856 F.2d at 974; Rice v. Rice Foundation, 610 F.2d 471, 475 (7th Cir. 1979) (citing Markham v. Allen, 326 U.S. 490, 494 (1946)); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987).

21. *E.g.*, Reinhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985); Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir. 1972); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953).

22. *Sutton*, 246 U.S. at 205; *Farrell*, 199 U.S. at 110.

23. Dragan v. Miller, 679 F.2d 712, 714 (7th Cir. 1982); *Georges*, 856 F.2d at 973–74; Cenker v. Cenker, 660 F. Supp. 793, 795 (E.D. Mich. 1987); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 110–11 (D. Or. 1957).

24. *Dragan*, 679 F.2d at 714; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

25. *Dragan*, 679 F.2d at 714–15; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

extend to matters ancillary to probate? If the latter, what does "ancillary" mean? Fifth, is the scope of the exception fixed as a matter of federal law, or does it vary based on the internal division of probate jurisdiction within the court systems of each state? Finally, is the probate exception limited only to suits involving wills proper, or does it extend to suits involving will substitutes, such as inter vivos trusts? Although a close analysis of the Supreme Court's probate exception precedents reveals that the applicability of the doctrine turns on the overlapping results of the six independent inquiries delineated above,[26] the lower federal courts have instead created and applied competing, one-step formulae for determining whether a given suit falls within or without the probate exception.

Despite the complexity and confusion surrounding the probate exception to federal court jurisdiction—or perhaps because of it—it has been given scant attention in the literature.[27] This Article seeks to fill the gap. Part II of this Article sets forth the current application of the probate exception in the lower federal courts. Part III of this Article examines the statutory and constitutional constraints on the federal courts' exercise of subject matter jurisdiction over probate and probate related matters. Part III concludes that the probate exception is a mere gloss on the statutory grants of subject matter jurisdiction to the federal courts and that the extent of this limitation is not nearly as great as judicial decisions and commentators have suggested. Part IV examines the constraints placed on the federal courts' exercise of jurisdiction over probate and probate-related matters by the doctrine of *custodia legis*, and concludes that the doctrine prevents federal courts from exercising jurisdiction over certain probate-related matters not otherwise excluded from their jurisdiction by the conventional understanding of the statutory grants of subject matter jurisdiction to the federal courts. Part V examines the role of prudential abstention with respect to probate-related matters falling outside the formal scope of the probate exception, and concludes that although courts can properly invoke abstention with regard to certain probate-related claims not otherwise excluded by the limits of the statutory grants of subject matter jurisdiction or by the doctrine of *custodia legis*, some lower courts are

26. *See supra* text accompanying notes 3–14.

27. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 300–01 (3d ed. 1999) (noting domestic relations and probate exceptions to federal jurisdiction but focusing primarily on issues related to the domestic relations exception). *See also* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1333–36 (4th ed. 1996); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, 13B FEDERAL PRACTICE AND PROCEDURE § 3610 (2d ed. 1984); Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 FED. B. NEWS & J. 579 (1992).

improperly abstaining on grounds not justified under any recognized doctrine of abstention. Part VI demonstrates that what has been described by the lower federal courts as the "probate exception" to federal court subject matter jurisdiction cannot be reduced to the simplistic formulae adopted by various federal appeals courts. Instead, the probate exception is really an amalgam of five distinct rules that must be applied in tandem to determine whether a given suit falls within the probate exception: (1) the *Erie* doctrine; (2) the statutory and constitutional limitations on federal court subject matter jurisdiction; (3) the doctrine of *custodia legis*; (4) the requirement of a justiciable case or controversy; and (5) prudential abstention. This Article concludes that courts should construe the probate exception narrowly to prevent prejudice against out of state claimants and to ensure that claimants' federal statutory rights may be enforced. In addition, this Article recommends that Congress consider enacting a statutory override of the probate exception.

II. MODERN APPLICATION OF THE PROBATE EXCEPTION

A. *MARKHAM V. ALLEN*: THE SUPREME COURT'S MOST RECENT RULING ON THE PROBATE EXCEPTION

The Supreme Court last addressed the probate exception in *Markham v. Allen*.[28] There, the will of a California resident had been admitted into probate and had named as legatees[29] certain persons resident in Germany.[30] Six U.S. citizens—heirs-at-law[31] of the decedent—filed a petition in state court asserting that under state law the German legatees were ineligible as beneficiaries[32] and that the U.S. heirs were thus entitled to inherit the decedent's estate.[33] The Alien Property Custodian, acting pursuant to the Trading with the Enemy Act, purported to vest himself as Custodian with all right, title and interest of the German legatees, and brought suit in federal district court against the executor of the estate and the six U.S. heirs-at-law for a determination that the U.S. claimants had no interest in

28. 326 U.S 490 (1946).

29. A legatee is one who is named in a will to take personal property. BLACK'S LAW DICTIONARY, *supra* note 11, at 897–98.

30. *Markham*, 326 U.S. at 492.

31. An "heir-at-law" is a person who inherits a deceased person's estate under state statutes of descent and distribution in the absence of a valid testamentary disposition. BLACK'S LAW DICTIONARY, *supra* note 11, at 723.

32. The state law at issue purported to limit inheritance by non-resident aliens to nationals of countries that granted reciprocal rights of inheritance to U.S. citizens. *Markham*, 326 U.S. at 492 n.1.

33. *Id.* at 492.

the estate and that, moreover, the entire estate belonged to the Custodian.[34] The district court granted judgment for the Alien Property Custodian,[35] but the Court of Appeals reversed, holding that the suit filed in federal court was barred by the probate exception.[36]

After stating the general rule that the federal courts lack jurisdiction to probate a will or to administer an estate, the Supreme Court stated yet another, general rule:

> [F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[37]

The Court clarified somewhat the meaning of the word "interfere," holding the mere fact that the state probate court—when ultimately distributing the estate—would be bound to recognize the rights adjudicated in the federal court would not constitute an interference with the state probate proceedings.[38] Thus, the effect of the declaratory judgment sought by the Custodian in the case before the Court would not be an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court. Instead, it would merely decree the Custodian's right in the property to be distributed after its administration by the state probate court.[39]

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34. *Id.*

35. *See* Crowley v. Allen, 52 F.Supp. 850 (N.D. Cal. 1943).

36. *See* Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946).

37. *Markham*, 326 U.S. at 494 (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). *See also* Sutton v. English, 246 U.S. 199, 205 (1918) (stating that "questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy"); Hess v. Reynolds, 113 U.S. 73, 76–77 (1885) (holding that suits by an executor to enforce payment of debts owed to the decedent as well as suits against the executor on obligations contracted by the decedent fall within the federal courts' grant of diversity jurisdiction); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (noting a suit by a distributee against the administrator of the estate was within the subject matter jurisdiction of the federal courts).

38. *Markham*, 326 U.S. at 494. The debt thus established, however, "must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent." Byers v. McAuley, 149 U.S. 608, 620 (1893). *Accord Waterman*, 215 U.S. at 44.

39. *Markham*, 326 U.S. at 495.

B. DEVELOPMENT OF THE PROBATE EXCEPTION IN THE LOWER COURTS

1. Lower Court Tests for Determining What Falls Within the Exception

To be sure, *Markham* provided some guidance to the lower federal courts as to the scope of the probate exception. In the wake of *Markham*, the lower courts are in agreement that the federal courts lack subject matter jurisdiction over so-called "pure" probate matters,[40] including the actual probate of a will[41] (the "procedure by which a will is proved to be valid or invalid"),[42] the administration of the estate (the process of collecting the decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs),[43] as well as obtaining an accounting of the same[44] and appointing or removing the deceased's personal representative or the attorney representing the estate.[45] Moreover, the lower courts generally agree that creditors, legatees, heirs, and other claimants may establish their claims against the estate in federal court, with the caveat that the claims so established—whether by way of a declaratory judgment in the case of a legatee or heir establishing his or her right to a share of the estate, or in an actual suit on the merits in the case of a creditor—must then take their place and share in the estate as provided for in the probate court proceedings.[46] Yet, beyond these guideposts derived from the *Markham*

40. Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988). *See* Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987) (citing *Markham*, 326 U.S. at 494; Ellis v. Davis, 109 U.S. 485 (1883)).

41. *E.g.*, *Georges*, 856 F.2d at 973; Celentano v. Furer, 602 F. Supp. 777, 780–81 (S.D.N.Y. 1985).

42. BLACK'S LAW DICTIONARY, supra note 11, at 1202.

> The matters and things to be determined upon the probate of a will, are the mental capacity of the testator, the factum of the making of the will, and its due execution according to law. The question of a construction of the will, or any clause thereof is never properly before the court in a proceeding to establish the instrument.

3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1890, at 490 (14th ed. 1918) [hereinafter 3 STORY, COMMENTARIES].

43. *E.g.*, Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *3–*5 (4th Cir. May 17, 1999) (unpublished decision); Turton v. Turton, 644 F.2d 344, 347 (5th Cir. 1981); Galion Iron Works & Mfg. Co. v. Russell, 167 F. Supp, 304, 308 (W.D. Ark. 1958) (observing that "[i]t is a well settled rule that federal courts may not engage in the general administration of an estate or disturb the possession of property within the custody of a state court").

44. *E.g.*, Bortz v. DeGolyer, 904 F. Supp. 680, 684 (S.D. Ohio 1995); Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1068 (E.D.N.C. 1988).

45. *E.g.*, Jones v. Harper, 55 F. Supp.2d 530, 533 (S.D.W. Va. 1999) (holding that "the probate exception prevents [the district court] from . . . removing the defendant and appointing the plaintiff as personal representative" because this would interfere with the administration of the estate).

46. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank, 680 F.2d 736, 740 (11th Cir. 1982) (holding that it is permissible for a federal court to adjudicate a breach of agreement to make a mutual will because it is akin to a creditor suing for breach of contract); *Turton*, 644 F.2d at 344, 347

opinion as to the scope of the probate exception, "the contours of the exception are vague and indistinct,"[47] creating substantial uncertainty as to the sorts of actions that would "interfere" with state probate proceedings. In an attempt to fill the gap left by the Supreme Court, the lower courts have developed several competing formulae for determining whether a cause of action falls within the probate exception, "endeavor[ing] to distinguish between direct interference with or control of the *res* and adjudication of the rights of individuals who have an interest in the res . . . [a] line of distinction [that] is not always clear."[48]

a. The "Nature of Claim" Test

One lower court test for determining whether a claim is sufficiently related to probate so as to fall within the probate exception examines the nature of the plaintiff's claim, with the plaintiff's position vis-à-vis the will being the dispositive factor. Under the "nature of claim" test, if the plaintiff's claim rests upon an assertion that the will is invalid (such as where the plaintiff seeks to void the will due to undue influence or lack of testamentary capacity), then the case falls within the probate exception. This is because the federal court must rule on the validity of the will in order to resolve the claim—a ruling that would directly overlap and thus "interfere" with the state court's probate process. On the other hand, if the plaintiff acknowledges the validity of the will and merely asserts a right to share in the distribution of the estate (either as a matter of interpretation of the will or in reliance on some state law forced-share provision), the federal court is free to adjudicate the claim.[49]

(explaining that a creditor can obtain a federal judgment that he has a valid claim for a given amount against the estate, and that the judgment can be asserted as res judicata in the state probate court proceedings); Holt v. King, 250 F.2d 671, 675 (10th Cir. 1957); Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952); McClendon v. Straub, 193 F.2d 596, 598 (5th Cir. 1952) (asserting that "[j]urisdiction of the [federal] court to ascertain and declare the interest of the plaintiff in the estate . . . is clearly established by a long line of cases"); Milam v. Sol Newman Co., 205 F. Supp. 649, 650, 653–54 (N.D. Ala. 1962) (holding that the federal court can adjudicate tort action against estate for injuries plaintiff sustained in auto accident); Odom v. Travelers Ins. Co., 174 F. Supp. 426, 434 (W.D. Ark. 1959) (noting that federal court can hear controverted question of debt or no debt as against the estate); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. at 309–10 (noting that federal courts can entertain suits to establish claims against the estate, but those claims must stand in line). *But cf.* White v. White, 126 F. Supp. 924, 925–26 (S.D. Idaho 1954) (holding the statement in *Markham* that the federal courts have jurisdiction to entertain suits in favor of creditors and legatees does not apply in diversity actions, and that the court must look to whether under state law, the state courts of general jurisdiction would have jurisdiction over such suits).

47. *Georges*, 856 F.2d at 973.

48. Starr v. Rupp, 421 F.2d 999, 1005 (6th Cir. 1970). *Accord* Bassler v. Arrowood, 500 F.2d 138, 142 (8th Cir. 1974); Martz v. Braun, 266 F. Supp. 134, 138 (E.D. Pa. 1967).

49. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997) (noting that no federal court has found that it has jurisdiction to invalidate a will due to lack of testamentary capacity or undue

b. The "Route" Test

A far more common lower court test examines the route that the suit would take had it been brought in state court. Under the "route" test, if the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists (assuming, of course, that the complete diversity and amount in controversy requirements are satisfied).[50] Under

influence); *Michigan Tech. Fund*, 680 F.2d at 739–40 (holding that a challenge to a will's validity is not within the federal court's subject matter jurisdiction, but that an action seeking an interpretation of a will is within its jurisdiction); Blakeney v. Blakeney, 664 F.2d 433, 434 (5th Cir. 1981) (finding no jurisdiction where there is an attack on the deceased's testamentary capacity as that goes to the will's validity); Rice v. Rice Found., 610 F.2d 471, 476 (7th Cir. 1979) (describing but not adopting rule). *See also* Gant v. Grand Lodge, 12 F.3d 998, 1003–04 (10th Cir. 1993) (noting federal courts have jurisdiction to construe wills). While this approach is often attributed to a line of Fifth Circuit cases, *e.g.*, *Rice*, 610 F.2d at 476 (citing Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 753–54 (5th Cir. 1963)); Mitchell v. Nixon, 200 F.2d 50, 51–52 (5th Cir. 1952); *Michigan Tech Fund*, 680 F.2d at 739 (citing Kausch v. First Wichita Nat'l Bank, 470 F.2d 1068, 1070 (5th Cir. 1972)), a closer examination of these cases reveals that they were applying the "route" test, discussed *infra* Part II.B.1.b. *See Kausch*, 470 F.2d at 1069–70 (examining Texas law); *Akin*, 322 F.2d at 753–55 (examining Louisiana law, and distinguishing between suits that attack the validity of a will and suits in which parties differ only as to a will's effect or construction, and exercising jurisdiction over suit to declare plaintiff's interest as a forced heir); *Mitchell*, 200 F.2d at 51–52 (examining Alabama law). *See also* Gaines v. Chew, 43 U.S. (2 How.) 619, 647–50 (1844) (holding that although the court likely lacked jurisdiction in equity to set aside a will due to fraud, the heir could bring suit under the state's forced heirship laws, since it does not require the court either to prove or to set aside the will); Robertson v. Robertson, 803 F.2d 136, 138–39 (5th Cir. 1986) (applying Arkansas law, and concluding there is federal court jurisdiction where validity of will is not contested, and where all that is sought is a declaration decedent died a resident of Louisiana, and that the plaintiff was thus entitled to forced heirship).

50. *See* Green v. Doukas, No. 99-7733, 2000 U.S. App. LEXIS 2239, at *8–9 (2d Cir. Feb. 15, 2000) (unpublished decision) (holding that the probate-exception standard is whether under state law, the claims will be cognizable only in state probate court); Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *4 (4th Cir. May 17, 1999) (unpublished decision) (noting that federal courts have no subject matter jurisdiction over matters exclusively within the jurisdiction of state probate courts); Reinhardt v. Kelly, 164 F.3d 1296, 1299–1300 (10th Cir. 1999); McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) (stating that if a state vests its courts of equity with jurisdiction to hear contested will suits, the federal courts in the state may enforce that right); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985) (holding that the federal court had no jurisdiction over breach of fiduciary duty action by beneficiaries of estate against executor because only the probate courts of the state have jurisdiction over such disputes); Moore v. Lindsey, 662 F.2d 354, 361 (5th Cir. 1981); *Rice*, 610 F.2d at 476 (describing but not adopting rule); *Bassler*, 500 F.2d at 142 (suggesting that "[w]here a claim is enforceable in a state court of general jurisdiction, the argument becomes more persuasive that federal diversity jurisdiction should be assumed") (citing Lamberg v. Callahan, 455 F.2d 1213, 1216 (1972)); Harris v. Pollack, 480 F.2d 42, 45–46 (10th Cir. 1973); *Lamberg*, 455 F.2d at 1216 (2d Cir. 1972) (setting forth the standard); Looney v. Capital Nat'l Bank, 235 F.2d 436 (5th Cir. 1956) (holding that because a declaratory judgment action could be brought in state court to have a testamentary trust declared invalid based on the rule against perpetuities, such an action also could be maintained in a federal court); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953) (citing district court cases holding that whether an action could be maintained in a state court of general jurisdiction determines whether

this standard, the scope of the probate exception varies across the federal courts according to the internal division of jurisdiction within each state between its probate courts and its courts of general jurisdiction.

c. The "Practical" Test

Judge Posner developed yet a third test for determining whether a suit, while not a "pure matter of probate," was nonetheless barred by the probate exception because it was "ancillary" to probate.[51] Under Judge Posner's "practical" test, the question of whether a suit is "ancillary" to probate—and thus within the probate exception to federal court jurisdiction—turns on whether "allowing it to be maintained in federal court would impair the policies served by the probate exception."[52] Judge Posner identified a number of practical purposes that the probate exception was designed to serve: the promotion of legal certainty (by having all issues regarding the transfer of property at death litigated in a single forum); judicial economy; and the relative expertise of state probate court judges in adjudicating probate-related questions, such as testamentary capacity.[53] Judge Posner

federal court jurisdiction exists); Sullivan v. Title Guarantee & Trust Co., 167 F.2d 393, 395 (2d Cir. 1948) (asserting that a federal court can exercise jurisdiction only if state court of general jurisdiction would exercise jurisdiction); Cmty. Ins. Co. v. Rowe, 85 F. Supp.2d 800, 805 (S.D. Ohio 1999); Johnson v. Porter, 931 F. Supp. 761, 762 (D. Colo. 1996) (stating that the issue is whether under state law, suit would be cognizable only in state probate court); Celentano v. Furer, 602 F. Supp. 777, 779 (S.D.N.Y. 1985) (stating that the standard is whether under state law, the dispute would be cognizable only in the probate court); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252 (D. Kan. 1984) (asserting that "[t]he court must determine whether under Kansas law the claims are such as would traditionally have been cognizable only in a probate court or whether the claims are such as could be asserted in a court of general jurisdiction"); Dunaway v. Clark, 536 F. Supp. 664, 670 (S.D. Ga. 1982) (stating that an "exception to the [probate exception] is present where a state by statute or custom gives parties a right to bring an action in [state] courts of general jurisdiction"); Lightfoot v. Hartman, 292 F. Supp. 356, 357–58 (W.D. Mo. 1968) (ruling that the federal court has no jurisdiction because under state law the claim is in exclusive jurisdiction of state probate court); Eyber v. Dominion Nat'l Bank of Bristol Office, 249 F. Supp. 531, 532–33 (W.D. Va. 1966) (observing that the state legislature "has not chosen to make probate a part of the general equity jurisdiction of the courts of Virginia, and it follows that a federal court sitting in the state will be limited in the same manner as the State Equity Court"); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. 304, 311–12 (W.D. Ark. 1958) (remarking that if state law does not afford a remedy in a state court of general jurisdiction, federal courts cannot assume jurisdiction); Quinlan v. Empire Trust Co., 139 F. Supp. 168, 169–70 (S.D.N.Y. 1956) (reasoning that because state courts of general jurisdiction can declare trusts and wills invalid due to undue influence, fraud, and lack of mental capacity, the federal courts likewise have jurisdiction to do so); Illinois State Trust Co. v. Conanty, 104 F. Supp. 729, 731–32 (D.R.I. 1952).

51. Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982). The Seventh Circuit had previously noted the existence of the "nature" and "route" tests but had declined to adopt either test. *See Rice*, 610 F.2d at 476.

52. *Dragan*, 679 F.2d at 715–16.

53. *Id.* at 714–15. Taken to its logical extreme the interest in judicial economy and the relative expertise of state court judges contained in Judge Posner's practical test would provide an argument for eradicating diversity jurisdiction altogether. Federal court judges sitting in diversity must often struggle

attributed the least weight to the policy of promoting legal certainty, reasoning that it is neutralized by the policy of avoiding parochial bias in favor of in-state litigants that underlies the federal courts' grant of diversity jurisdiction.[54] Under his test, the force of the other two policies varies with state law: for example, relative expertise carries greater force in states that create a specialized cadre of probate judges than in states in which probate matters are heard in courts of general jurisdiction. Similarly, judicial economy carries more weight in states that restrict the raising of a challenge to testamentary capacity to the original probate proceeding than in states allowing the issue to be raised in separate judicial proceedings.[55]

In *Dragan*, Judge Posner applied his "practical factors" test and held there was no jurisdiction over a suit brought by the heirs-at-law of the decedent against the beneficiaries of the decedent's will for tortious interference with an expectancy of inheritance.[56] Key in Judge Posner's view was the interest in judicial economy. Under Illinois law, a challenge to the validity of a will—whether characterized as a "will contest" or as a tort claim of interference with an expectancy—could be brought only in the ongoing proceeding to probate the will and within a specified time period.[57] For a federal court to exercise jurisdiction over the tort action would

to determine the meaning of state law, and it would certainly be more efficient to eliminate diversity jurisdiction entirely and have state law decided exclusively in state courts by judges more familiar with state law. Yet, the diversity statute as drafted has struck a balance between the interest in judicial economy and fairness to litigants, and it is thus difficult to see why probate-related cases should be treated any differently from other cases involving issues of state law. Subsequent cases often make mention of the fact that the probate proceeding has closed, *see e.g.*, Loyd v. Loyd, 731 F.2d 393, 397 (7th Cir. 1984); McClain v. Anthony, No. 88 C 8503, 1989 WL 44307, at *2 (N.D. Ill. Apr. 28, 1989), but this does not appear to be a formal requirement, *see e.g.*, Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982). The Supreme Court, in discussing the analogous exception to federal court jurisdiction for domestic relations matters in *Ankenbrandt v. Richards*, indicated the exception was justified by the interests in judicial economy and the relative expertise of state family court judges. 504 U.S. 689, 703–04 (1992).

54. *Dragan*, 679 F.2d at 716.

55. *Id.* at 715.

56. *Id.* at 716–17.

57. *Id.* Under Judge Posner's test, however, the probate exception does not apply where the state relegates probate matters to its courts of general jurisdiction rather than to specialized probate courts, or provides that the specific claim is not, as a matter of state law, part of the will contest and thus need not be brought exclusively in the ongoing proceeding to probate the will. *See Loyd*, 731 F.2d at 393, 396–97 (proper to exercise jurisdiction over suit brought against the estate's administrator by the decedent's widow for fraud in connection with the sale of certain real property owned by the estate, where probate matters in the state were relegated to the courts of general jurisdiction and the specific statutory provision providing for contesting alleged frauds was not limited to probate court); Georges v. Glick, 856 F.2d 971, 972–75 (7th Cir. 1988) (finding that it is proper to exercise jurisdiction over claims of legal malpractice and breach of contract brought by the decedent's heirs against the decedent's attorney as such claims are not, as a matter of state law, part of the will contest and need not be brought exclusively in the ongoing proceeding to probate the will).

undermine the state's demonstrated interest in judicial economy.[58] Relative expertise also weighed in favor of using the probate exception: undue influence over a testator is an issue with which Illinois state judges have greater expertise.[59] But unlike courts that follow the "nature of the claim" test, Judge Posner did not hold that such challenges are categorically outside the federal courts' grant of diversity jurisdiction. Instead, he held that if Illinois state law allows an action challenging the validity of a will to be brought as a separate tort action before a different judge than the one who probated the will, then the policy of judicial economy would lose its force.[60]

2. Application of the Probate Exception

a. Inter Vivos and Testamentary Trusts

While a great deal of property is transferred at death by way of devises in a will, an increasing number of people transfer their property using "will substitutes," including trusts.[61] In a trust, property is held by a trustee at the request of the owner of the property (the settlor) for the benefit of a third party, the beneficiary.[62] In a trust relationship, the trustee holds legal title to the property, but has an equitable duty to hold the property for the benefit of the beneficiary.[63] There are, broadly speaking, two different types of trusts: inter vivos trusts and testamentary trusts. Inter vivos trusts are created and take effect during the settlor's lifetime.[64] Thus, the

58. *Dragan*, 679 F.2d at 716.

59. *Id.*

60. *Id.* at 717. In *Hamilton v. Nielsen*, 678 F.2d 709 (7th Cir. 1982), published just two weeks prior to *Dragan*, Judge Posner found that the federal courts had subject matter jurisdiction over an action brought by a beneficiary of a testamentary trust against the executors for negligent breach of fiduciary duty. *Id.* at 709–10. Judge Posner reasoned that because "such cases when brought in state courts in Illinois are brought in its courts of general jurisdiction rather than in courts with a specialized probate jurisdiction . . . retention of federal diversity jurisdiction over such cases will not interfere with a state policy of channeling all probate-related matters to specialized courts." *Id.* at 710. The court went on to hold, however, that this would not allow federal courts to probate wills, even though that is done in state courts of general jurisdiction, reasoning that "[p]robate remains a peculiarly local function which federal courts are ill equipped to perform." *Id.* The court did note that the suit did not seek to enjoin the probate proceedings, involve the validity or construction of the will, or try to change the distribution of the estate assets. *Id.*

61. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 770 (2000).

62. BLACK'S LAW DICTIONARY, *supra* note 11, at 1508.

63. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959); BLACK'S LAW DICTIONARY, *supra* note 11, at 1509.

64. BLACK'S LAW DICTIONARY, *supra* note 11, at 1511. A special kind of inter vivos trust is the "pour-over trust": it is created during the settlor's lifetime, but the settlor's assets are not immediately

property is transferred to the trustee while the settlor is still alive. In contrast, a testamentary trust is created by a will and does not take effect until the settlor dies.[65]

Legal disputes frequently arise in connection with trusts. For example, the beneficiaries might bring suit against the trustee for breach of fiduciary duty or conversion, demanding an accounting, removal of the trustee, or both.[66] Alternatively, heirs who are not named as beneficiaries in the trust instrument might bring a suit challenging the validity of the trust (usually alleging lack of capacity or undue influence),[67] alleging that the trust instrument failed to comply with the requirements of state law;[68] or alleging that the settlor had revoked the trust during her lifetime.[69]

The probate exception is frequently raised as a defense when such actions are filed in federal court. Most courts have rejected this defense, holding the probate exception does not apply to trusts.[70] Often no explanation is given for this distinction, but a few courts have relied on the fact that trusts, unlike wills, did not fall within the exclusive jurisdiction of the ecclesiastical courts in eighteenth-century England, but instead were within the jurisdiction of the High Court of Chancery, and thus fall within the statutory grant of equity jurisdiction to U.S. federal courts.[71] A few

transferred to the trustee. Rather, upon the settlor's death, the trust receives property by way of a devise from the settlor's will, usually by way of the residual estate. *Id.* at 1512.

65. BLACK'S LAW DICTIONARY, *supra* note 11 at 1513.

66. *See, e.g.*, Georges v. Glick, 856 F.2d 971, 972–73 (7th Cir. 1988); Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *1 (D. Conn. Oct. 23, 1997); Weingarten v. Warren, 753 F. Supp. 491, 492–93 (S.D.N.Y. 1990); Barnes v. Brandrup, 506 F. Supp. 396, 397–98 (S.D.N.Y. 1981); Rousseau v. U.S. Trust Co. of N.Y., 422 F. Supp. 447, 450–51 (S.D.N.Y. 1976).

67. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1007–08 (4th Cir. 1997); Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision); Davis v. Hunter, 323 F. Supp. 976, 977–78 (D. Conn. 1970); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

68. *E.g.*, Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 887–89 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992).

69. *E.g.*, Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1065 (E.D.N.C. 1988).

70. *See Schonland*, 1997 WL 695517, at *2 (stating that "the probate exception does not apply to trusts"); *Weingarten*, 753 F. Supp. at 494–95 (stating that "[t]he probate exception to diversity jurisdiction does not apply to trusts"); *Lancaster*, 752 F. Supp. at 888 (holding the probate exception does not apply to challenges to the validity of a trust); *Barnes*, 506 F. Supp. at 399 (holding the probate exception does not apply because the case "involves a probate court's jurisdiction over trusts, not wills"). *See also Turja*, 118 F.3d at 1006–09 (implicitly distinguishing between a challenge to the validity of a will and a challenge to a trust).

71. *See Barnes*, 506 F. Supp. at 399 ("Controversies concerning trusts were not in 1789 part of the exclusive jurisdiction of the ecclesiastical courts."); Knoop v. Anderson, 71 F. Supp. 832, 837–38 (N.D. Iowa 1947) ("At the time of the adoption of the Constitution of the United States, the English High Court of Chancery had jurisdiction as to the enforcement of trusts."). For a detailed discussion of

courts have also suggested that since a challenge to the validity of a trust has the effect of adding assets to a probate estate (as contrasted with a challenge to the validity of a will, which has the effect of taking assets away from the probate estate), challenges to inter vivos transfers of property do not have the effect of interfering with the probate of the estate.[72]

At least one court has expressly rejected this distinction, reasoning that a trust is little more than a will substitute and thus ought not to be treated differently.[73] Other courts, while not directly rejecting the distinction, have done so implicitly by subjecting challenges to trusts to the same tests[74] that they employ for determining whether a challenge to a will falls within the probate exception.[75] Still other courts implicitly have drawn a line between testamentary and inter vivos trusts, applying the probate exception to the former but not to the latter without providing justification for drawing such a distinction.[76]

b. Suits Arising Under Federal Law and Statutory Interpleader Actions

In the typical probate-related case, the basis for federal court subject matter jurisdiction will be diversity of citizenship,[77] as the cause of action is usually either a breach of contract claim[78] or a garden-variety state common law claim—such as fraud,[79] breach of fiduciary duty,[80]

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the relationship between U.S. federal court subject matter jurisdiction and the distribution of jurisdiction among British courts in the eighteenth century, *see infra* Part III.A.

72. *See* McKibben v. Chubb, 840 F.2d 1525, 1530–31 (10th Cir. 1988); Gearheard v. Gearheard, 406 F. Supp. 704, 705–06 (S.D. Miss. 1976).

73. *See* Georges v. Glick, 856 F.2d 971, 974 n.2 (7th Cir. 1988).

74. *See supra* Part II.B.1.

75. Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision) (applying "route" test in challenge to validity of inter vivos trust); *McKibben*, 840 F.2d at 1530–31 (applying "route" test in challenge to validity of inter vivos transfer of property); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104 (D. Or. 1957).

76. *See* Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 450–60 (S.D.N.Y. 1976). *See also Jackson*, 153 F. Supp. 104 (treating a challenge to the validity of a testamentary trust as a challenge to the validity of the will itself).

77. *See, e.g.*, Ashton v. Paul, 918 F.2d 1065, 1072 (2d Cir. 1990).

78. *See, e.g.*, *Georges*, 856 F.2d at 971, 974–75 (adjudicating breach of contract claims against the attorney who drafted will by beneficiaries); Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 740 (11th Cir. 1982) (reviewing claim of breach of contract to execute mutual wills); Lamberg v. Callahan, 455 F.2d 1213, 1214–15 (2d Cir. 1972).

79. *See, e.g.*, Green v. Doukas, 2000 U.S. App. LEXIS 2239, at *2 (2d Cir. Feb. 15, 2000) (unpublished decision); Newland v. Newland, 82 F.3d 338, 339 (10th Cir. 1996); Vizvary v. Vignati, 134 F.R.D. 28, 29 (D.R.I. 1990); Dinger v. Gulino, 661 F.Supp. 438, 443 (E.D.N.Y. 1987).

negligence,[81] conversion,[82] unjust enrichment,[83] tortious interference with expectancy of inheritance,[84] or wrongful death[85]—against the administrator (personally or in a representative capacity) or the beneficiaries named in the will. Indeed, the probate exception is frequently referred to as the probate exception to federal court *diversity* jurisdiction,[86] and it has only been in diversity cases that the Supreme Court has actually applied the probate exception to deny subject matter jurisdiction over a suit.[87]

The probate exception, however, is sometimes raised in cases where federal jurisdiction is not based on diversity. *Markham*, for example, was a federal question case—although notably one in which the Court refused to apply the probate exception. In addition to diversity cases, there are a handful of probate-related suits that fall within the subject matter jurisdiction of the federal courts either because they state a claim under federal statutory or constitutional law[88] or because they fall within the interpleader jurisdiction[89] of the federal courts.

i. Statutory Interpleader Actions

80. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2–*3; *Newland*, 182 F.3d at 339, 767 F.2d at 306; *Bortz*, 904 F. Supp. at 683–84; *Dinger*, 661 F. Supp. at 443; Tarlton v. Townsend, 337 F. Supp. 888, 892 (D. Miss. 1971); Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967).

81. *See, e.g.*, *Newland*, 82 F.3d at 339; *Georges*, 856 F.2d at 974–75; *Dinger*, 661 F. Supp. at 443.

82. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2; *Newland*, 82 F.3d at 339; Harder v. Rafferty, 709 F. Supp. 1111, 1113 (M.D. Fla. 1989).

83. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2.

84. *See, e.g.*, *id.*; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *1, *5 (N.D.Ill. Sept. 18, 1995); Beren v. Ropfogel, Civ. A. No. 91-2425-O, 1992 WL 373935, at *1 (D.Kan. Nov. 18, 1992).

85. *See, e.g.*, *Harder*, 709 F. Supp. at 1113.

86. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 739 (11th Cir. 1982).

87. Sutton v. English, 246 U.S. 199 (1918); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Ellis v. Davis, 109 U.S. 485 (1883); *In re* Broderick's Will, 88 U.S. 503 (21 Wall.) (1874); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

88. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

89. The federal interpleader statute provides the federal courts with subject matter jurisdiction over interpleader actions filed by anyone in possession of money or property exceeding $500 in value, provided that two or more adverse claimants of diverse citizenship claim or may claim to be entitled to the money or the property and that the stakeholder deposits the money or property with the court upon filing suit. 28 U.S.C. § 1335 (1994). Only minimal diversity is required: so long as at least two of the stakeholders are of different citizenship, it does not matter that there is overlap in the citizenship of the claimants. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967). The purpose of the federal interpleader statute is to "provide a forum in which a holder of money admittedly owing to someone and claimed by several parties may have the question of entitlement to the fund settled in one proceeding and be himself discharged from all further liability as to the fund." Mass. Mut. Life Ins. Co. v. Central-Penn. Nat'l Bank, 362 F. Supp. 1398, 1401 (E.D. Pa. 1973).

A probate-related interpleader action typically arises when an individual or entity is in possession of certain assets and there is dispute as to whether the assets even belong to the deceased's estate.[90] All courts considering the matter have refused to apply the probate exception in the context of federal statutory interpleader actions.[91] The primary rationale for non-application of the probate exception is that by definition the action cannot impermissibly "interfere" with the probate proceedings because the assets at issue are not yet within the possession of the state probate court; indeed, the very purpose of the action is to determine whether or not the assets belong to the estate.[92] Moreover, even if an interpleader action would "interfere" with the state probate proceedings, some courts hold that Congress' express authorization to the federal courts to issue injunctions in aid of federal interpleader actions against proceedings to adjudicate rights to the property in state court proceedings[93] justifies any such interference.[94]

ii. Suits Arising Under Federal Law

Suits grounded in the RICO statute,[95] the Ku Klux Klan Act [96] and the Foreign Judicial Assistance Statute[97] have involved what might be deemed

90. *E.g.*, *Ashton*, 918 F.2d 1065 (2d 1990) (adjudicating a case in which the executor was in possession of assets that plaintiffs claimed were part of the estate); Union Nat'l Bank of Texas v. Gutierrez, 764 F. Supp. 445, 445–46 (S.D. Tex. 1991) (denying jurisdiction over question of whether money in a bank account with a "payable on death" designation was part of probate estate or was the property of the "payable on death" designee).

91. *Ashton*, 918 F.2d at 1072 n.6 ("We have found no reported decision in which the probate exception has foreclosed a federal court from exercising interpleader jurisdiction.").

92. *Id.*; *Union National Bank of Texas*, 764 F. Supp. at 445–446. This is akin to the justification for excluding challenges to trusts from the probate exception since both interpleader actions and challenges to trusts have the effect of adding assets to the probate estate. *See supra* note 72 and accompanying text.

93. *See* 28 U.S.C. § 2361 (1994) ("In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.").

94. *Ashton*, 918 F.2d at 1072 ("In the face of such clear legislative direction on an issue of federal/state comity, there is little room for courts to infer that the murky probate exception prevents the injunction in the instant matter even at the cost of frustrating the statutory purpose.").

95. 18 U.S.C. §§ 1961–68. (1994).

96. 42 U.S.C. § 1983 (1994).

97. 28 U.S.C. § 1782(a) (1994) "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." *Id.* A suit has also arisen under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1994), but in the only case involving such an action, the court found that the action at issue did not fall within the definition of the word "probate" for purposes of the exception. *See* Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 805–06 (S.D. Ohio 1999).

to be probate-related matters. Typically, the RICO suits involve claims that some combination of the attorneys who drafted the will, the beneficiaries of the will, and the executor of the will conspired to defraud the decedent of his or her assets and to cheat the decedent's heirs out of their inheritance.[98] In contrast, the § 1983 claims usually involve allegations of wrongdoing by the state probate court judge.[99] The Foreign Judicial Assistance Statute suits involve requests for U.S. judicial assistance in obtaining evidence located in the United States for use in foreign probate proceedings.[100] Courts that have adjudicated these three kinds of claims have unanimously held that the probate exception does not apply to suits arising under federal statutes,[101] although none has provided a rationale for distinguishing such claims from those grounded in diversity jurisdiction.[102]

98. *See* Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 668 (11th Cir. 1991) ("alleging the defendants conspired to 'plunder' the assets of [the decedent] and cheat the [heirs] out of their inheritance."); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252–56 (D. Kan. 1984) (alleging the defendants "engaged in a pattern of racketeering activities . . . whereby defendants identify and target elderly rich people for the purpose of defrauding them, their heirs and legatees out of their estates").

99. *See* Williams v. Adkinson, 792 F.Supp. 755, 757 (M.D. Ala. 1992) (alleging state probate court judge denied plaintiff's rights to substantive and procedural due process and to equal protection, and that the state court decision violated the Takings Clause).

100. *See In re* Application of Horler, 799 F. Supp. 1457, 1459 (S.D.N.Y. 1992) (seeking evidence in aid of Swiss probate court proceedings).

101. *Glickstein*, 922 F.2d at 672 ("the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims"); *Cmty. Ins. Co.*, 85 F.Supp.2d at 806 ("[T]he probate exception has been applied only in the context of diversity jurisdiction. The Court's research has yielded no instances where a federal court has declined to exercise subject matter jurisdiction, under this doctrine, when based on a federal question."); *Williams*, 792 F. Supp. at 761 n.9 ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); Powell v. American Bank & Trust Co., 640 F. Supp. 1568, 1574–75 (N.D. Ind. 1986) (holding, in suits arising under RICO and the federal securities laws, "that the probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *Maxwell*, 593 F. Supp. at 252–56 (applying the probate exception to state law claims, but not to a federal RICO claim).

102. In the analogous domestic relations exception to federal court jurisdiction, it is an open question whether the exception is limited to diversity actions or whether it extends to federal question suits raising federal statutory or constitutional questions. *Compare* United States v. Bailey, 115 F.3d 1222, 1231 (5th Cir. 1997) (holding the exception applies only in diversity suits), *and* United States v. Johnson, 114 F.3d 476, 481 (4th Cir. 1997), *and* Flood v. Braaten, 727 F.2d 303, 307 (3d Cir. 1984), *with* Thompson v. Thompson, 798 F.2d 1547, 1558 (9th Cir. 1986) (holding the exception applies even to federal question cases if it would deeply involve the federal court in adjudicating domestic matters) *and* Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983) (applying the exception where a state court action concerning similar issues is pending); Hernstadt v. Hernstadt, 373 F2d 316, 318 (2d Cir. 1967) (holding the exception applies where the federal court would necessarily become enmeshed in domestic factual disputes).

C. SUMMARY

The competing shorthand formulae developed by the lower federal courts for determining the scope of the probate exception are on a collision course with one another. Suppose an heir brings an action to have a will declared invalid for lack of testamentary capacity or undue influence. The "nature of claim" test suggests that this falls within the probate exception. But what if under state law such a challenge could be brought in a state court of general jurisdiction? The "nature of claim" test would still classify such a claim as falling within the probate exception, but both the "route" test and the "practical" test would reach the opposite conclusion. And what result if the suit involved not a challenge to the validity of the will, but instead sought a declaration of the parties' rights under the will? Here, the "nature of claim" test would allow a federal court to exercise diversity jurisdiction even if such matters were by state law committed to the exclusive jurisdiction of specialized probate courts, but under the "route test"—and probably the "practical" test as well—such disputes would likely fall within the probate exception. Moreover, what result where the suit involves not a will but instead some sort of will substitute, such as an inter vivos trust, or if the suit arises under federal law? None of the tests provides answers to these questions, and the lower courts have resolved these questions on an ad hoc basis without setting forth a principled rule of decision.

These deficiencies in the lower court formulae make them unacceptable substitutes for a multi-faceted inquiry into the statutory and Article III limitations on federal court subject matter jurisdiction, the existence of a justiciable case or controversy, the applicability of the doctrine of *custodia legis* or the various doctrines of prudential abstention, and the constraints placed on federal courts by the *Erie* doctrine. Accordingly, this Article now turns to such a multi-faceted inquiry.

III. SCOPE OF FEDERAL COURT SUBJECT MATTER JURISDICTION OVER PROBATE AND PROBATE-RELATED MATTERS

A. STATUTORY LIMITATIONS ON FEDERAL COURT SUBJECT MATTER JURISDICTION

It is well-established that federal courts are courts of limited subject matter jurisdiction, subject not only to the constraints imposed by Article III,[103] but also limited to exercising subject matter jurisdiction over only those disputes for which Congress has provided a statutory grant of authority.[104] Yet many legal scholars, lawyers, and law students would be surprised to learn that federal courts lack subject matter jurisdiction over probate matters. The text of Article III contains no express limitation on the federal judicial power.[105] Moreover, neither the statutory grant of federal question jurisdiction[106] nor the grant of diversity jurisdiction[107] contains any such limitation. Thus, where the parties to a state court probate proceeding are diverse, and the value of the estate exceeds $75,000, one would expect the case could be filed in federal court or removed to federal court.

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103. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

104. Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (asserting that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute").

105. *See* U.S. CONST. art. III, § 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. Cf. Ankenbrandt v. Richards, 504 U.S. 689, 695 (1992) (noting that in the parallel context of the domestic relations exception to federal court jurisdiction the plain language of Article III, § 2 "contains no limitation on subjects of a domestic relations nature").

106. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

107. *See* 28 U.S.C. § 1332(a) (1994).

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . .as plaintiff and citizens of a State or of different States.

Id. The only mild restriction on subject matter jurisdiction over diversity suits that are related to probate matters is contained in 28 U.S.C. § 1332(c)(2), which states that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."

The genesis of the probate exception traces back to the granting of diversity jurisdiction to the federal courts by the Judiciary Act of 1789 ("1789 Act").[108] The 1789 Act gave the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought and a citizen of another State."[109] Courts have construed this language as limiting the grant of jurisdiction to those suits that would have been within the jurisdiction of the English courts of common law ("suits . . . at common law") and the English High Court of Chancery ("suits . . . in equity") in 1789.[110] Most courts have found that the probate of wills and the administration of estates were outside the jurisdiction of both the common law courts and the High Court of Chancery in eighteenth-century England and instead were vested in England's ecclesiastical, or religious, courts and thus outside the statutory grant of subject matter jurisdiction to U.S. federal courts.[111] Accepting for the moment that the scope of diversity jurisdiction under the 1789 Act was limited in this manner, one might find it strange that it would be relevant to the modern diversity statute, since the modern statute replaces the phrase "all suits of a civil nature at common law or in equity" with the seemingly more expansive phrase "all civil actions."[112] This change, however, has been described as a mere simplification of the original language in the First Judiciary Act and not an enlargement of the jurisdiction granted by the 1789 Act.[113] So it was that in *Markham v. Allen*[114] the Supreme Court set

108. Ch. 20, § 13, 1 Stat. 73 (1789).

109. *Id.* § 11 (emphasis added).

110. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990); Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988); Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979); Starr v. Rupp, 421 F.2d 999, 1004 (6th Cir. 1970); Akin v. La. Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987); Barnes v. Brandrup, 506 F. Supp. 396, 398–99 (S.D.N.Y. 1981); Martz v. Braun, 266 F. Supp. 134, 135 (E.D. Pa. 1967). *Cf.* Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982) (chronicling the historical basis of the domestic relations exception).

111. *Ashton*, 918 F.2d at 1071; *Georges*, 856 F.2d at 973; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; *Starr*, 421 F.2d at 1004; *Akin*, 322 F.2d at 751; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *4 n.3 (N.D.Ill. Sept. 18, 1995); *Hudson*, 682 F. Supp. at 1219; *Barnes*, 506 F. Supp. at 398–99; *Martz*, 266 F. Supp. at 135. *See also Lloyd*, 694 F.2d at 491 (holding the same with regard to the domestic relation's exception).

112. *See* 28 U.S.C. § 1332(a) (1994).

113. *See Lloyd*, 694 F.2d at 491–92; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 107–08 (D. Or. 1957). *See also* Reviser's Note to 28 U.S.C. § 1332 (1994) (noting the change was made for the purpose of conforming with the unification of law and equity as provided for in the Federal Rules of Civil Procedure). The statutory grant of federal question jurisdiction also uses the phrase "all civil actions," 28 U.S.C. § 1331 (1994), and while no grant of federal question jurisdiction was contained in the Judiciary Act of 1789, the predecessors to

forth the historical basis[115] for the exception, stating in dicta, "a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789, did not extend to probate matters."[116]

When examined in light of one of the principles animating Article III's grant of diversity jurisdiction—protecting out-of-state litigants from the actual or perceived prejudice of state court judges[117]—the probate exception is questionable even if it applied only to the probate of a will, and not also to matters ancillary to probate. For "[i]f there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract."[118] For the most part, probate proceedings take place before specialized state courts,[119] and there is no evidence suggesting that the potential for bias against out-of-state litigants is any less than it is in state courts of general jurisdiction. If anything, the signs point in the other direction: judges who sit in some probate courts need not even be lawyers or have legal training[120] and probate courts have a reputation for bias and corruption.[121] Thus,

§ 1331 also used the phrase "all suits of a civil nature, at common law or in equity." *See* Reviser's Note to 28 U.S.C. § 1331 (1994).

114. 326 U.S 490 (1946).

115. *See Georges*, 856 F.2d at 973.

116. *Markham*, 326 U.S. at 494. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509–11 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619, 645 (1844).

117. *See, e.g.*, Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) As Marshall observed:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id.

118. *Dragan*, 679 F.2d at 714.

119. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 993–1008 (1944) [hereinafter Simes & Basye, *Probate Court I*].

120. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 138–40 (1944) [hereinafter Simes & Basye, *Probate Court II*].

121. *See* CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 71 (1980) (noting that the New York probate courts have a history as "factories of corruption"); Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation As Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178–81 (1999) (documenting instances of bias). *Cf.* CHEMERINSKY, *supra* note 27, at 290 (discussing bias concerns in diversity jurisdiction in general and citing Jerry Goldman

relegating suits brought pursuant to complex and significant federal statutes such as RICO or § 1983 to potentially biased and untrained state probate court judges by invoking the exception seems anathematic.[122]

Moreover, one can criticize the manner in which the Court has construed the statutory grants of subject matter jurisdiction to the federal courts. First, in light of the United States' long-standing view that state and theocratic institutions should remain separate, it is unlikely that the drafters of the 1789 Act would have thought of federal jurisdiction as divided among common law, equity, and ecclesiastical law. Indeed, it is likely that they thought the latter category was subsumed by the former two.[123] Second, it is unclear why this 1789 Act language should be interpreted as referring to English court practice rather than to the practice of U.S. colonial courts regarding probate and administration in the eighteenth century.[124] Third, assuming eighteenth-century English practice is the appropriate reference point, it is not at all clear that the jurisdiction of the ecclesiastical courts over probate matters was entirely exclusive of the courts of common law and equity.[125] Accordingly, this Section of the

& Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97–99 (1980)); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965)) (discussing studies indicating that 40–60 percent of litigants who file diversity cases in federal court cite fear of local bias as a motivating factor).

122. Indeed, the "judicial economy" prong of Judge Posner's "practical" test would suggest suits raising questions of federal law should *not* be subject to the probate exception. *See supra* notes 51–60 and accompanying text.

123. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990) ("Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history and an anachronistic vestige of the Reformation."); *Dragan*, 679 F.2d at 713 (observing that "there was no ecclesiastical court in America"). *See also Lloyd*, 694 F.2d at 491–92 (noting, in the context of the domestic relations exception to federal court jurisdiction, that "it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts").

124. *See Dragan*, 679 F.2d at 713. *See also Lloyd*, 694 F.2d at 492 (noting that the justification of the domestic relations exception "assumes without discussion that the proper referent is English rather than American practice").

125. *See Dragan*, 679 F.2d at 713 (noting ecclesiastic jurisdiction did not extend beyond personal property, and that the chancery court had extensive jurisdiction over inheritance of land). *Accord Ashton*, 918 F.2d at 1071. This inquiry may be to a large degree academic because in the analogous domestic relations exception, the Court has held that even though subsequent historical discoveries have made it clear that the High Court of Chancery possessed certain jurisdiction with respect to alimony and divorce actions, this would not alter the scope of the exception. Indeed, the Court concluded that the "domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948," when Congress substantively amended the statute but did not make mention of domestic relations, with full knowledge that the Court had interpreted the current language as excluding such suits; thus, it impliedly accepted

Article examines colonial practice as well as English practice in the late eighteenth century.

1. Division of Jurisdiction over Probate-Related Matters in British Courts in the Eighteenth Century

a. Overview

Probate-related matters in eighteenth-century England were not all relegated to the ecclesiastical courts. Rather, the complete administration of an estate could and often did require judicial proceedings in three different courts:[126] the ecclesiastical, common-law, and chancery (or equity) courts.[127] With respect to some probate-related matters, these courts exercised jurisdiction exclusively of one another, whereas in some such matters they exercised concurrent jurisdiction.[128] This section examines the jurisdiction of these three types of courts over probate-related matters.

b. Probate of Wills

i. Personal and Real Estate Distinguished

In examining the probate jurisdiction of England's ecclesiastical courts, a distinction must be made between a decedent's real estate and personal estate. The ecclesiastical courts had exclusive jurisdiction to probate wills of personal property,[129] but no jurisdiction to probate wills of

the gloss on the diversity statute. Ankenbrandt v. Richards, 504 U.S. 689, 699–700 (1992). Similar reasoning apparently justifies the probate exception. *See Dragan*, 679 F.2d at 713 (noting that "Congress's failure to repeal the exception when reenacting from time to time the grant of diversity jurisdiction to the federal courts indicates congressional acquiescence").

126. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

127. *Id.* at 967.

128. Where chancery and the ecclesiastical courts had concurrent jurisdiction, once one of the courts had taken jurisdiction of a case, the other would not interfere provided that the same remedies and protections were available. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 806, at 190–91 (14th ed. 1918) [hereinafter 2 STORY, COMMENTARIES].

129. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 625 (7th ed. 1956); ROSCOE POUND, ORGANIZATION OF COURTS 78, 136 (1940); 2 R.S. DONNISON ROPER & HENRY HOPLEY WHITE, A TREATISE ON THE LAW OF LEGACIES *1791 (2d ed. 1848); 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968. While chancery would generally not allow a suit against an executor before the will was probated in the ecclesiastical court, in rare circumstances, arising out of the misconduct of the executor or for the protection of the property, it would exercise jurisdiction over suits against the executor by interested parties prior to probate. *Id.* at *1796. Thus, where the will was destroyed or concealed by the executor and spoliation or suppression was plainly proved, chancery may have had jurisdiction over a suit brought by a legatee. *Id.* at *1796–97. Moreover, where the executor engaged in misconduct, misapplied the assets, or was bankrupt or insolvent, chancery had the power to appoint a receiver after probate. *Id.* at *1797–98. In

real property.[130] Indeed, wills of real property were operative without any probate whatsoever, with title passing to the devisee[131] immediately on the death of the testator.[132] Any subsequent disputes with regard to title fell within the jurisdiction of the common law courts.[133] Where a will disposed of both personalty and realty, the ecclesiastical court's jurisdiction was effective only with respect to the personal estate.[134] Life estates were deemed to be real property, and thus within the jurisditction of the common law courts, but where the testator's interest in real property was less than freehold (such as a term of years), it was deemed to be personalty and thus within the jurisdiction of the ecclesiastical courts.[135]

c. Challenges to the Validity of Wills

As with probate, a distinction must be made between challenges to wills of personal estate and challenges to wills of real estate. The ecclesiastical courts had jurisdiction to set aside wills of personal estate that had been probated, and their jurisdiction in that regard was exclusive.[136] There was no direct method of setting aside a will of land, however. Thus, an heir or other interested party wishing to test the validity of a devise of land had to bring an action to try title—such as ejectment or trespass—against the devisee-in-possession in a common law court.[137] While the jurisdictions of the ecclesiastical and the common law courts were thus exclusive in these regards, special situations arose in which chancery at least indirectly exercised jurisdiction over actions challenging wills of both real and personal property.

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the case of fraud, chancery could appoint a receiver for the purpose of preventing the destruction of the testator's property even while the litigation over the probate of the will was pending in the ecclesiastical court. *Id.*

130. HOLDSWORTH, *supra* note 129, at 625; ROPER & WHITE, *supra* note 129, at *1791 ("The jurisdiction of the Ecclesiastical Courts [was] confined to testaments merely, or in other words to dispositions of personalty: if, therefore, real estate [were] the subject of a devise to be sold for payment of debts, or portions, these Courts [could not] hold plea in relation to such disposition."); Simes & Basye, *Probate Court II*, *supra* note 120, at 121. Where a party to a proceeding before an ecclesiastical court believed that the court had exceeded its jurisdiction, a writ of prohibition could be obtained from the common law court. Simes & Basye, *Probate Court I*, at 972.

131. A "devisee" is one who is named in a will to inherit lands or other real property. BLACK'S LAW DICTIONARY, *supra* note 11, at 453.

132. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

133. POUND, *supra* note 129, at 78. *See also infra* Part III.A.1.c.

134. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

135. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *95 n.20 (1898); ROPER & WHITE, *supra* note 129, at *1791.

136. *See* ROPER & WHITE, *supra* note 129, at *1787.

137. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

i. Quieting Title

The method for proving and challenging the validity of wills of real estate in England posed a number of problems. First, because no court had jurisdiction to admit a will of land into probate, the only means of testing the validity of such a will was by an ejectment or trespass action, yet if the devisee was in possession, he could not bring such an action against himself, but had to instead await an action brought by an heir.[138] Moreover, devisees were sometimes subject to a never-ending stream of ejectment and trespass actions brought by different heirs.[139]

Thus, it was possible for the devisees and other interested parties to bring an action in chancery to establish the validity of a will of real estate in order to avoid interminable litigation and to give security and repose to title.[140] When such suit was brought, chancery would direct an issue of *devisavit vel non*[141] to ascertain the validity of the will, and would direct new trials to be held in a common law court until it was satisfied that there was no reasonable ground for doubt. At that point it would issue a perpetual injunction against the heirs at law and others restraining them from contesting its validity in the future.[142]

ii. Estoppel

During the course of proceedings in either chancery or a common law court, a party might either admit the validity of a will or admit facts material to its validity, but would subsequently attempt to contest its validity in proceedings before the ecclesiastical court.[143] Under such circumstances, chancery would hold the party to that admission, and would permanently enjoin that party from proceeding to challenge the will in the ecclesiastical court.[144]

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138. 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1158, n.16 (5th ed. 1941) [hereinafter 4 POMEROY].

139. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

140. *Id.*

141. *Devisavit vel non* is:

> The name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will.

BLACK'S LAW DICTIONARY, *supra* note 11, at 452.

142. 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

143. *See* ROPER & WHITE, *supra* note 129, at *1788–91; 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485.

144. *See* sources cited *supra* note 143.

iii. Fraud

Although chancery lacked jurisdiction to set aside a will of personal estate probated in an ecclesiastical court where the grant of probate was obtained due to fraud, under certain circumstances chancery could either convert the person who committed the fraud into a constructive trustee with respect to such probate, or oblige him to consent to a repeal or revocation of the probate in the ecclesiastical court from which probate was granted.[145]

Intrinsic Fraud: Kerrich v. Bransby

In *Kerrich v. Bransby*, the decedent had left virtually all of his personal and real estate to Kerrich, whom he named as his executor by a will dated March 18, 1715.[146] Kerrich succeeded in having the will admitted into probate in the Prerogative Court of Canterbury[147] in common form,[148] and subsequently, in a contest over the validity of the instrument with the decedent's father in that same court, the will was determined to be valid.[149] Thereafter, the decedent's father filed a bill in chancery against, inter alia, Kerrich, in which he set forth two previously executed wills that his son had made in which he left his entire real and personal estate to his father, claimed that the March 18, 1715 will was obtained by fraud on the decedent, and asked chancery to set aside that will.[150] On appeal, the High Court of Parliament held, however, that chancery could not set aside a will for fraud. The portion of the will that dealt with personal estate could be

145. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1788 Roper and White note that there is:

> a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but the person disinherited thereby.

Id.

146. 7 Brown P.C. 437 (1727).

147. The Prerogative Court of Canterbury exercised probate jurisdiction over the estates of persons owning property located in more than one diocese within the province of Canterbury, persons owning property located in both the Provinces of Canterbury and York, and those who died overseas. BLACKSTONE, *supra* note 135, at 1076; PETER WALNE, ENGLISH WILLS: PROBATE RECORDS IN ENGLAND AND WALES WITH A BRIEF NOTE ON SCOTTISH AND IRISH WILLS 19–20 (1964).

148. When someone died testate, there were two different procedures by which the executor could have the will probated: in common (noncontentious) form, or in solemn (contentious) form. When a will was probated in common form, notice was not issued to the heirs or to other interested parties, and actual evidence of due execution of the will was not required. Within 30 years thereafter, the executor or any other interested person could seek to have the will probated in solemn form, which required notice to interested parties as well as testimony as to the due execution of the will. An order admitting a will to probate in the solemn form was binding on all parties who appeared in the proceeding or who were given notice. Simes & Basye, *Probate Court I*, *supra* note 119, at 969.

149. *Id.* at 437–38.

150. *Id.* at 438.

set aside only in the ecclesiastical court, while the portion of it dealing with real estate could be set aside in a common law court by issue of *devisavit vel non*.[151]

Extrinsic Fraud: Barnesly v. Powel

In *Barnesly v. Powel*,[152] the High Court of Chancery limited the reach of the *Kerrich* decision. In *Barnesly*, the defendants had forged the decedent's will of his real and personal estate, and by misrepresenting to the decedent's next of kin that the forgery was in fact genuine, had obtained from the next of kin a deed in which he consented to the probate of said will.[153] The defendants presented the deed to the ecclesiastical court, which admitted the will into probate as to the personal estate.[154] In a subsequent proceeding tried in a court of common law, a jury determined that the will was a forgery.[155] In chancery, while not disputing the jury's finding as to their interest in the decedent's real estate, the defendants, citing *Kerrich*, protested that only the ecclesiastical court had jurisdiction to set aside the will as to the decedent's personal estate.[156] The High Court agreed chancery lacked the power to set aside a will of personal estate for fraud, that the power to do so was lodged solely in the ecclesiastical court, and that the inconsistency between a jury at common law finding the will to be invalid as to the real estate and the ecclesiastical court having found the will to be valid as to the personal estate, although unsettling, was one which the law tolerated.[157]

Yet, the court distinguished between fraud or forgery in obtaining a will (i.e., intrinsic fraud), as was present in both *Kerrich* and *Barnesly*, and fraud in obtaining *probate* of a will (i.e., extrinsic fraud), which was present only in *Barnesly*.[158] The court reasoned that while the ecclesiastical court had jurisdiction to set aside a will, it lacked jurisdiction to determine the validity of a deed under hand and seal such as that obtained from the testator's next of kin.[159] Having thus determined that the deed was fraudulently obtained, the court reasoned that because equity could take away benefits to which a person was entitled if the person was

151. *Id.* at 437, 443. *Accord* 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 913, at 583–84 (5th ed. 1941) [hereinafter 3 POMEROY].
152. 1 Ves. Sen. 119 (1748), 1 Ves. Sen. 284 (1749).
153. 1 Ves. Sen. 119, 119–20; 1 Ves. Sen 284, 284, 287–88.
154. 1 Ves. Sen. 284, 284, 287–88.
155. *Id.* at 284.
156. *Id.* at 285–86.
157. *Id.* at 287.
158. *Id.* at 287–88.
159. *Id.* at 288.

guilty of wrongdoing, the court could declare the defendants constructive trustees for the plaintiff for an amount equal to the value of the personal estate.[160] Because there were in fact other prior wills, however, the validity of which had not yet been determined in the ecclesiastical courts, the chancery court decreed that the defendants must consent in the ecclesiastical court to a revocation of the probate of the latter will, but be given the opportunity to prove that the prior wills—which also gave them a stake in the decedent's estate—were valid.[161]

Thus, in determining whether chancery would declare the beneficiary of a fraudulent will a trustee for those who have been defrauded, the eighteenth-century British courts appear to have drawn a line between extrinsic and intrinsic fraud: Only if the fraud is extrinsic (i.e., a fraud practiced on a party to prevent the presention of that party's case in the probate proceedings) will relief be granted; intrinsic fraud, such as the use of perjured testimony or a false will in the probate proceedings, will not suffice.[162]

d. Appointment and Removal of Administrator/Personal Representative

The ecclesiastical courts had exclusive jurisdiction to appoint an administrator (or personal representative) for the estate to dispose of the decedent's personal estate.[163] And while chancery had the primary

160. *Id.* at 289. Equity's powers in this regard presumably would apply with equal force to the real estate as well, but the *Barnesly* court did not reach this issue since there was no longer a dispute between the parties as to the disposition of the real estate.

161. *Id.* at 289–90. In *Gaines v. Chew*, the Supreme Court relied on *Barnesly* in a suit alleging that the executors fraudulently set up for probate the decedent's older will and suppressed the decedent's subsequently executed will. 43 U.S. (2 How.) 619, 627 (1844). While holding that a federal court sitting in equity lacked the authority to set up the subsequent will and set aside the probate of the former, the Supreme Court nonetheless ordered the defendants to respond to the plaintiff's inquiries about the circumstances surrounding the two wills. *Id.* The Court suggested such answers could be used as evidence in the proceedings before the state probate court to establish the latter will and revoke the former. *Id.* The Court also held that the lower federal court could order the parties to go before the probate court and consent to the probate of the latter will and revocation of the former one, and suggested that the inherent powers of a federal equity court could empower it to probate the latter will. *Id.* at 646–47. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 517–19 (1874) (suggesting a federal court sitting in equity could provide a remedy in a case involving fraud if the time for challenging the will in the probate court had passed and the plaintiffs could not by that time have discovered the fraud within that time).

162. 3 POMEROY, *supra* note 151, § 913, at 583–86. *Cf.* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 985–86 (3d ed. 1996) (noting that U.S. courts distinguish between intrinsic and extrinsic fraud in deciding whether to enforce foreign judgments).

163. HOLDSWORTH, *supra* note 129, at 626–27; POUND, *supra* note 129, at 136. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

authority to appoint guardians for individuals and for the property of minors, the ecclesiastical courts had concurrent jurisdiction with respect to personalty.[164]

e. Administration of Estates

The ecclesiastical courts formally had jurisdiction to "administer" the deceased's personal estate,[165] but they did not order distribution of the estate.[166] Rather, the personal representative appointed by the ecclesiastical court would pay the debts of the deceased and then distribute the residue in accordance with the terms of the will.[167] Although the ecclesiastical courts had previously administered estates themselves and made the distributions, because their conduct in doing so had been negligent and in fact fraudulent—clergy as executors and administrators converted goods to their own use—Parliament limited their powers of administration to appointing an administrator from among the relatives of the deceased and delegating powers to that person.[168]

Unlike the power to admit wills of personal estate into probate and to appoint personal representatives, the ecclesiastical courts' jurisdiction over administration was not exclusive but was instead concurrent with chancery.[169] Chancery's jurisdiction in this regard was invoked by the filing of a bill by a creditor or a distributee seeking to have the estate administered in chancery.[170] Chancery would then issue notices to creditors, enjoin actions by creditors in common law courts, and bring in assets and distribute them to creditors and legatees or next of kin.[171]

The rationale for chancery's jurisdiction over administration in a given case was two-fold. First, the administrator of an estate was in effect a constructive trustee for the creditors, legatees and distributees of the

164. Simes & Basye, *Probate Court II* , *supra* note 120, at 130. The power in general to appoint guardians for the mentally ill, however, was within chancery's jurisdiction. *Id.* at 132.

165. *See* POUND, *supra* note 129, at 78.

166. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

167. *Id.*

168. HOLDSWORTH, *supra* note 129 at 627; William Searle Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, *in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255, 304 (Ass'n of Am. Law Sch. ed., 1908).

169. *See* ROPER & WHITE, *supra* note 129, at *1793; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery in general would not interfere if the ecclesiastical court was already engaged in administration. ROPER & WHITE, *supra* note 129, at *1793.

170. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

171. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134 n.4 ("Where equity has taken jurisdiction of an administration, it may proceed to distribution and relief as in probate."); Simes & Basye, *Probate Court I*, *supra* note 119, at 973.

deceased, and chancery, as explained below,[172] had jurisdiction to enforce trusts.[173] Second, there were often special circumstances, such as the need to take accounts and compel discovery of assets,[174] or to provide a simple, adequate, and complete remedy, that warranted chancery exercising jurisdiction.[175] In addition to chancery's jurisdiction to administer and settle the decedent's estate, it had the power to decide incidental questions relating to the construction and enforcement of wills of personal property.[176]

The procedures of chancery were thus well-suited to deal with the complicated equities that might arise in the administration of an estate,[177] and stood in sharp contrast to the limited procedures available in the ecclesiastical courts.[178] In addition, the sixteenth and seventeenth centuries witnessed a rapid decay in the jurisdiction of the ecclesiastical courts as the common law court justices, who were jealous of the ecclesiastical courts, effectively crippled them by way of issuing writs of prohibition.[179] Thus, while the ecclesiastical courts in theory retained concurrent jurisdiction over the administration of estates, with time their jurisdiction was, in practice, limited to the granting of probate and to the issuance of letters of

172. *See infra* Part III.A.1.g.

173. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, §§ 728–731, at 132–34.

174. While chancery could not act upon a testamentary instrument until proven in the ecclesiastical court, it could act on a bill for discovery of assets before the will was proven or while it was the subject of litigation in the ecclesiastical court. ROPER & WHITE, *supra* note 129, at *1792.

175. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 133. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. In common law courts, nothing more could be done than to establish the debt of the creditor: if there was any controversy as to the existence of the assets and discovery was required, or if the assets were not of a legal nature, or if a marshalling of the assets was necessary to effect due payment of the creditor's claim, resort to chancery was necessary. 2 STORY, COMMENTARIES, *supra* note 128, § 732, at 134. Moreover, while the ecclesiastical court could compel the administrator to provide an accounting, it lacked the power to require the administrator to prove or swear to the truth of it. *Id.* § 733, at 135.

176. 4 POMEROY, *supra* note 138, § 1155, at 461. Courts of equity also had the power to construe and enforce wills of real as well as personal property to the extent that they created, or their dispositions involved the creation of, trusts; however, they had no jurisdiction to interpret wills of real property that bequeath purely legal estate, as that fell within the jurisdiction of the common law courts. *Id.* Chancery's jurisdiction to construe wills was incident to its general jurisdiction over trusts, and it would never entertain a suit brought solely for the purpose of interpreting the provisions of a will unless further equitable relief was also sought. *Id.* § 1156, at 462.

177. HOLDSWORTH, *supra* note 129, at 629.

178. For example, orders of the ecclesiastical court were normally enforced by excommunication; where this proved ineffective, an attachment could be sought from chancery imprisoning the party until the ecclesiastical court's order was obeyed, but it was only through chancery that the ecclesiastical court could so act. Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

179. HOLDSWORTH, *supra* note 129, at 629.

administration[180]—the actual administration of estates took place in chancery with far greater frequency.[181]

f. Suits for Legacies and Debts

As a general rule, the ecclesiastical courts[182] and chancery[183] exercised concurrent jurisdiction over suits for legacies:[184] in all instances, any legacy recoverable in an ecclesiastical court was also recoverable in chancery.[185] Certain types of legacies, however, only could be sued for in chancery. Among these were suits over legacies of land; as with other probate-related matters, the ecclesiastical courts' jurisdiction was limited to personalty.[186] Chancery also exercised jurisdiction exclusive of the ecclesiastical courts over suits in which a husband sought to obtain payment of his wife's legacy and suits which involved a legacy to a child, for only chancery had the power to ensure that the interests of the wife and the child, respectively, were adequately protected.[187] In addition, chancery's jurisdiction was also exclusive where the bequest of the legacy

180. *Id.*

181. Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery would not interfere if the ecclesiastical court was first possessed of the administration. ROPER & WHITE, *supra* note 129, at *1793.

182. In those cases where the ecclesiastical court had jurisdiction, and a common law defense was raised (such as payment as a defense in a suit for a legacy), the ecclesiastical court was required to proceed according to the rules of the common law (i.e., one witness would suffice instead of the two required under ecclesiastical practice), or a prohibition could have been be obtained in the common law courts. ROPER & WHITE, *supra* note 129, at *1792.

183. When suit was brought in chancery to recover on a legacy, chancery had the power to interpret the language effecting the gift in question, although frequently chancery would send the case out of chancery for an opinion of the courts of common law where a question of mere law arose, but this was within the discretion of chancery and certainly was not done if the construction was clear. *Id.* at *1803–04.

184. BLACKSTONE, *supra* note 135, at *98; 2 STORY, COMMENTARIES, *supra* note 128, § 797, at 186.

185. ROPER & WHITE, *supra* note 129, at *1793; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 187–88. The same rationales that justified chancery's exercise of jurisdiction over the administration of estates justify chancery's exercise of jurisdiction over suits by legatees. *See supra* text accompanying notes 172–75. *See also* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 188.

186. 2 STORY, COMMENTARIES, *supra* note 128, § 809, at 191. Where a testator devised that the executor should sell his lands and that the legatee should be given a portion of the proceeds, and the executor failed to do so, the ecclesiastical court lacked jurisdiction over a suit by the legatee for payment of the legacy as it was considered to be not a legacy testamentary but rather one out of land. ROPER & WHITE, *supra* note 128, at *1791.

187. BLACKSTONE, *supra* note 135, at *95 n.20; 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, §§ 805, 807, at 190–91.

involved the execution of express or implied trusts[188] (including charitable trusts),[189] where the assets were equitable, or where the remedy could only be enforced under the process of chancery, such as where a full discovery of assets was required.[190] In all such cases, chancery had the power to grant injunctions to protect its exclusive jurisdiction.[191]

Under certain circumstances, a legacy could be sued upon in a court of common law. First, if a legatee altered the nature of his demand by changing it into a debt or a duty (such as by accepting a bond from the executor for payment of the legacy), the legatee had the option to sue either in the ecclesiastical court on the legacy or in a common law court on the debt.[192] Second, although a specific legacy[193] contained in a will could normally be sued upon only in the ecclesiastical courts or in chancery,[194] once the executor "accepted" the legacy by performing some overt act[195] indicating that the property was set aside for the legatee, legal title vested in the legatee at law irrevocably, and he could bring a replevin or trover action in a common law court to assert his rights to the property.[196] The

188. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188. Chancery's jurisdiction to enforce the execution of trusts was exclusive not only of the ecclesiastical courts, but also of the common law courts. 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188–89.

189. ROPER & WHITE, *supra* note 129, at *1796.

190. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 808, at 191.

191. ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189. Chancery would, as a general matter, issue an injunction in any case involving a legacy in which the ecclesiastical courts could not exercise jurisdiction in a manner adequate to protect the just rights of all the parties concerned. *Id.* § 804, at 189–90.

192. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1799 (stating that "the obligee might sue for the legacy in the Ecclesiastical Court, or at Common Law upon the bond . . . the acceptance of the bond for payment of the legacy, had not totally destroyed the nature of it").

193. A specific legacy is:

> A legacy or gift by will of a particular specified thing . . . . In a strict sense, a legacy of a particular chattel, which is specified and distinguished from all other chattels of the testator of the same kind . . . . A legacy is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other.

BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

194. 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186.

195. In some instances, the law would presume assent by the executor based on certain facts. In the case of a legacy of real property, where a devisee had possessed land for 39 years, it was presumed to be with the assent of the executor, and thus a suit over that legacy was cognizable in a court of common law. *Id.* § 800, at 187 n.1.

196. Simes & Basye, *Probate Court I*, *supra* note 119, at 971. *See* ROPER & WHITE, *supra* note 129, at *1799–*1802; 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186–87. If it subsequently appeared that there was a deficiency in the assets to pay the creditors, chancery had jurisdiction to interfere and make the legatee refund in the proportion required, whether the bequest was real or

rule was otherwise where a general legacy[197] was at issue, however, and remedy could only be had by way of an action in chancery[198] or an ecclesiastical court.[199]

Finally, contract actions that survived the death of the decedent could be brought either on behalf of or against the decedent in a common law court, with the personal representative having the capacity to sue and be sued on the decedent's behalf.[200]

g. Trusts

In eighteenth-century England, the entire system of trusts[201] was within the exclusive jurisdiction of chancery,[202] and chancery would thus

personal. *See* ROPER & WHITE, *supra* note 129, at *1801; 2 STORY, COMMENTARIES, *supra* note 128, § 804, at 190.

197. A general legacy is a "pecuniary legacy which is payable out of general assets of estate of testator, being bequest of money or other thing in quantity and not separated or distinguished from others of the same kind." BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

198. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

199. *Id.* For a time, it was thought that an action of assumpsit could be brought in a court of common law, but it was later determined that such actions could not be maintained. *Id. See also* 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 187 (noting that "though they have not been directly overturned in England, they have been doubted and disapproved by judges as well as by elementary writers"). As Blackstone noted:

> Cases have occurred in which *courts of common law* have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumpsit* or undertaking by the executor to pay them. But it seems to be the opinion of modern judges that this jurisdiction extends to cases of *specific* legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. It seems to be the better opinion that when the legacy is not specific, but merely a gift out of the *general* assets, and particularly when a *married woman* is the legatee, a court of common law will not entertain jurisdiction to compel payment of such a legacy, upon the ground that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit, of doing.

BLACKSTONE, *supra* note 135, at *95 n.20 (citations omitted) (emphasis in original). The general concern with allowing such actions at law appears to have been that common law courts lacked the power that chancery had to impose terms on the parties, such as in a suit by a husband for a legacy given to his wife, where there was a need to ensure that he made provisions for her and her family. *See* ROPER & WHITE, *supra* note 129, at *1797–98.

200. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

201. A trust is:

> An equitable right, title, or interest in property real or personal, distinct from the legal ownership thereof . . . the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute trusts which Courts of Equity will compel the legal owner as trustee to perform in favor of the cestui que trust or beneficiary.

2 STORY, COMMENTARIES, *supra* note 128, § 1304, at 648–49. In Roman law, trusts were not enforceable at law, but depended solely on the honor of those to whom they were entrusted, thus making chancery the appropriate court to exercise jurisdiction over their enforcement. *Id.* §§ 1305–06, at 649.

never refuse to adjudicate matters relating to trusts.[203] In addition to exercising jurisdiction over express trusts, chancery would impress and exercise jurisdiction over constructive trusts in certain situations.

In some instances, a person would die intestate relying on a promise by an heir or next of kin that he would hold the property devolving on him for the benefit of a third person or convey it to such person.[204] Similarly, a person might procure from the testator a devise or bequest through fraudulent representations that he would carry out the true purpose of the testator and apply the devise or bequest for the benefit of a third person.[205] In such instances, chancery would enforce the obligation by impressing a constructive trust on the purported beneficiary.[206]

If someone died intestate, the ecclesiastical court had the power to compel a distribution.[207] But if the testator drafted a will yet made no disposition of the residue of his personal estate, the executor was entitled at law to the surplus of the personal estate.[208] Under such circumstances, it was chancery, and only chancery, that could decree the executor to be the trustee for the next of kin and to distribute the residue of the estate among them.[209]

2. Colonial Practice

Early in the colonial period, it was not uncommon for the colonies to probate wills and administer estates legislatively rather than judicially.[210] Probate jurisdiction would often be vested in the colonial governors and their councils or the General Court,[211] which would often act as the highest tribunal for probate matters, and the governor of the colony was often made the "ordinary" or "supreme ordinary."[212] The governor as ordinary would sometimes delegate this authority to deputies or "surrogates;"[213] such was

202. BLACKSTONE, *supra* note 135, at *439; 1 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 151, at 206 (5th ed. 1941); 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134; §§ 1300–03, at 647–48.

203. BLACKSTONE, *supra* note 135, at *95.

204. 4 POMEROY, *supra* note 138, § 1054, at 122.

205. *Id.*

206. *See id.*

207. *See* ROPER & WHITE, *supra* note 129, at *1795.

208. 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

209. *See* ROPER & WHITE, *supra* note 129, at *1795; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

210. POUND, *supra* note 129, at 79.

211. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

212. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

213. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

the case in New Hampshire,[214] Massachusetts,[215] Maryland,[216] New Jersey,[217] and New York.[218] In Virginia[219] and Connecticut,[220] the power was exercised by the General Court. In Rhode Island, the jurisdiction was also exercised legislatively, but by the individual town councils instead of the state legislative body.[221] A few of the colonies, however, including North Carolina,[222] South Carolina,[223] and Georgia,[224] vested probate and administrative authority in their established superior or inferior courts,

214. POUND, *supra* note 129, at 79.

215. In 1691, the royal charter put the power over probate and administration in the colony governor who appointed surrogates to perform this function. *See* Wales v. Willard, 2 Mass. 120, 124 (1806) (Parsons, C.J.). *See also* Sean M. Dumphy, 21 MASS. PRAC. PROBATE LAW & PRACTICE § 1.1 (2d ed. 1997).

216. Under the system in place in Maryland in the early eighteenth century, Commissioners or Delegates of the governor were responsible for taking probate. *See* Act of 1715, ch. 39, §§ 2, 29 (Md.); Smith's Lessee v. Steele, 1 H. & McH. 419 (Md. Prov. 1771). *See also* POUND, *supra* note 129, at 79.

217. New Jersey had a Prerogative Court held by the provincial governor as ordinary with surrogates appointed throughout the state. POUND, *supra* note 129, at 79.

218. *Id.* at 80. New York had a Prerogative Court held by the governor as ordinary or to delegated surrogates. *See In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. 1862); Weston v. Weston, 14 Johns 428 (NY.Sup. 1817). Its jurisdiction, however, was not entirely exclusive: The Court of Common Pleas had jurisdiction to probate wills and grant letters of administration in remote areas of the state and where the size of the estate was minimal. *See In re* Brick's Estate, 15 Abb. Pr. at 12; POUND, *supra* note 129, at 80.

219. Virginia's statute provided:

> That the said General court shall take cognisance of, and are hereby declared to have power and jurisdiction to hear and determine, all causes, matters and things whatsoever, relating to or concerning any person or persons, ecclesiastical or civil, or to any persons or things of what nature so ever the same shall be, whether brought before them by original process, appeal from any inferior court, or by any other ways or means whatsoever.

Act of Assembly, ch. 6 (Va. 1748). *See* Bagwell v. Elliot, 23 Va. 190 (1824) (noting the general court exercised all jurisdiction, including ecclesiastical jurisdiction); Godwin v. Lunan, Jeff. 96 (Va.Gen. 1771) (holding the General Court of Virginia possessed general ecclesiastical jurisdiction); Spicer v. Pope, Jeff. 43 (Va.Gen. 1736) (noting the General Court has "a three fold jurisdiction, as a court of equity, a court of law, and it has also a jurisdiction of testamentary matters").

220. *See* STATE OF CONNECTICUT JUDICIAL BRANCH WEBSITE, PROBATE COURT HISTORY, *available at* http://www.jud.state.ct.us/probate/history.html (last visited Sept. 24, 2001) [hereinafter PROBATE COURT HISTORY].

221. *See* Williams v. Herrick, 25 A. 1099, 1101 (R.I. 1893) (noting King Charles' charter gave each town council the power "as judges of probate, to take the probate of wills and testaments, and grant administration, and all other matters relating thereto"). *See also* POUND, *supra* note 129, at 80.

222. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. The jurisdiction was concurrent with the Inferior Court of Pleas and the Quarter Sessions with appeal either to the Court of Chancery or to the Superior Court. POUND, *supra* note 129, at 80 & n.3.

223. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978.

224. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (noting Georgia had only common law courts).

while Pennsylvania[225] and Delaware[226] created Orphans' Courts vested with probate jurisdiction.

Toward the end of the colonial period, virtually all of the colonies that had not already done so vested probate and administration jurisdiction in some sort of specialized court separate from their courts of equity and common law.[227] New Hampshire,[228] Massachusetts,[229] and Connecticut[230] developed specialized probate courts. The system by which the governor appointed surrogates in New York[231] and New Jersey[232] resulted in the

225. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79; Act of 1713 § 1, 1 St. Laws 98; Good v. Good, 7 Watts. 195 (Pa. 1838); App. v. Dreisbach, 2 Rawle 287 (Pa. 1830); McPherson v. Cunliff, 11 Serg. & Rawle 422 (Pa. 1824).

226. POUND, *supra* note 133, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79.

227. Nonetheless, in many instances the general courts continued to exercise some probate jurisdiction even where separate courts were created. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

228. By act of the legislature, probate courts were given exclusive jurisdiction over probate in 1789. *See* Act of Feb. 3, 1789, Laws of N.H. In 1793, the state constitution was amended to so state. *See* N.H. CONST. art. 80 (stating that "[a]ll matters relating to the probate of wills, and granting letters of administration, shall be exercised by the judges of probate"). Following this early practice of the governor appointing commissioners to probate wills, probate judges in New Hampshire continued to be appointed by the governor. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

229. POUND, *supra* note 129, at 79; George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 204, 209 (David H. Flaherty ed. 1969); Simes & Basye, *Probate Court I*, *supra* note 119, at 1002. Appeal from these probate judges, however, was still to the governor and council. 21 SEAN M. DUMPHY, MASSACHUSETTS PRACTICE SERIES, PROBATE LAW AND PRACTICE § 1, 1 (2d ed. 1997). In 1784, in reliance on a provision in the 1780 Constitution, the legislature enacted a statute providing for the appointment of judges of probate courts with appeal to the Supreme Judicial Court. *See* MASS. CONST., art. V (establishing probate courts and providing that "all . . . appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provision"); Peters v. Peters, 62 Mass. (8 Cush.) 529, 541–42 (1851); DUMPHY, *supra* note 229, at § 1.1.

230. THE FEDERALIST NO. 83 (Alexander Hamilton); POUND, *supra* note 129, at 79. In 1666 Connecticut lodged the probate power in county courts, but created separate probate courts within each county in 1698. In the early eighteenth century, Connecticut created separate probate districts throughout the state. Judge F. Paul Kurmay, *Connecticut's Probate Courts*, QUINNIPIAC PROB. L.J. 379, 379–80 (1999). Appeals from the probate districts were made to the superior courts. *See* POUND, *supra* note 129, at 79.

231. In 1778, the power over probates and administration was vested by the legislature exclusively in a single judge of the Court of Probate, equal to that of the colonial governor as judge of the Prerogative Court under prior practice, but without the power to appoint surrogates. Act of Mar. 16, 1778, ch. 12, 1 LAWS OF NEW YORK (1886). *See generally In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. 1862); Weston v. Weston, 14 Johns 428 (NY. Sup. Ct. 1817); Goodrich v. Pendleton, 4 Johns. Ch. 549 (N.Y. Ch. 1820). In 1787, the legislature passed an act providing that the governor, with the consent of council, could commission a surrogate for each county with the power over probate and administration, and providing that appeals could be brought from the surrogates to the Court of Probates. Act of Feb. 20, 1787 ch. 38, 2 LAWS OF N.Y. (1886). *See generally Brick's Estate*, 15 Abb. Pr. at 12; *Goodrich*, 4 Johns. Ch. at 549. In the post-colonial era, the practice of appointing surrogates

development of surrogates' courts in both of those states, with New Jersey also creating a separate orphans' court and New York a separate court of probate. Maryland[233] established a system of separate orphans' courts. Virginia[234] and North Carolina[235] vested their county courts with jurisdiction over probate. South Carolina[236] created separate courts of ordinary and vested them with probate jurisdiction; eventually, Georgia[237] did as well, although not until 1799. Rhode Island,[238] however, maintained

was replaced in most places with popular elections in each county. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

232. The 1776 state constitution constituted the governor as the Ordinary or Surrogate-general. N.J. CONST. of 1776, ¶ VIII; ALFRED C. CLAPP & DOROTHY G. BLACK, 7A NEW JERSEY PRACTICE, WILLS AND ADMINISTRATION § 1915 (Rev. 3d ed. 1984) [hereinafter CLAPP] who continued to appoint deputies or surrogates until 1784, when an act was passed directing the governor as ordinary to appoint one surrogate in each county, and limiting the authority of the surrogate to the county in which the surrogate was appointed to serve. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; CLAPP, *supra* note 232, §1915. The 1784 Act also created the separate Orphan's courts and limited the surrogates to granting probate of wills and administering estates where there was no dispute; once a dispute arose, only the Orphans' courts adjudicated the dispute. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; *In re* Whitehead's Estate, 94 A. 796, 797–98 (N.J.Prerog. Ct. 1915); *In re* Coursen's Will, 4 N.J. Eq. 408, 412–15 (N.J. Prerog. Ct. 1843). The Orphan's court was vested with both chancery and prerogative jurisdiction, and was created to remedy defects in the power of the Prerogative court with respect to the accountability of executors, administrators, and guardians. Wood v. Tallman's Ex'rs, 1 N.J.L. 153 (N.J. 1793). The Orphan's court had jurisdiction over all disputes relating to wills, administration, accounting. *Id.*; Act of Dec. 15, 1784, ch. 19 § 15, Patt. Laws 135, 139. Appeal from the Orphan's court was to the governor as ordinary with respect to errors of fact; judicial review was available, however, as to questions of law. *Wood*, 1 N.J.L. at 153.

233. Act. of Feb., 1777, ch. 8, 1 LAWS OF MARYLAND (1799); Simes & Basye, *Probate Court I*, *supra* note 119, at 979. Initially, the Orphan's court had the power to direct any disputed issue to be tried in a plenary proceeding and to call a jury to assist it in determining any issue. *See* Act of Feb., 1777, ch.8, § 9, 1 LAWS OF MARYLAND (1799). In 1798 the law was revised to require that, at the request of any party before the Orphans' court, an issue be tried in a court of common law. *See* Act of 1798, ch. 101, 2 LAWS OF MARYLAND (William Kilty ed., 1800).

234. Act of 1661, Act 64, 2 LAWS OF VIRGINIA 90 (William Waller Hening ed. 1823); Act of 1645, Act 9, 1 LAWS OF VIRGINIA 302–03 (William Waller Hening ed. 1823); Act of 1711, ch. 2, 4 LAWS OF VIRGINIA 12, 12–13 (William Waller Hening ed. 1814).

235. Act of 1789, ch. 308, § 1, 1 LAWS OF THE STATE OF NORTH CAROLINA 611, 611–12 (Hen. Potter, J.L. Taylor, & Burt Yancey eds., 1821); Williams v. Baker, 4 N.C. 401 (N.C. 1817). While the superior courts for a brief period of time had original jurisdiction over probate, Simes & Basye, *Probate Court I*, *supra* note 119, at 981, by the end of the colonial period its jurisdiction over probate was strictly appellate. Act of 1777, ch. 2, §§ 62, 63.

236. Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. Gen. Sess. 1794). In 1721, before vesting the probate power in the Courts of Ordinary, South Carolina conferred probate jurisdiction upon it county and precinct courts. Simes & Basye, *Probate Court I*, *supra* note 119, at 981. Although the probate of wills as to personalty was exclusively in the courts of ordinary, while validity as to lands was in the common law courts, the parties could agree to have both questions tried in a common law court. Heyward v. Hazard, 1 S.C.L. (1 Bay) 335 (S.C. Ct. Com. Pl. Gen. Sess. 1794).

237. *See* GA. CONST. of 1798, art. III, § 6; Harrell v. Hamilton, 6 Ga. 37, 38 (Ga. 1849). In 1778 Georgia conferred this jurisdiction on its superior courts, although probate powers were also vested in a register of probate for each county in 1777. Simes & Basye, *Probate Court I*, *supra* note 119, at 981.

probate jurisdiction in its town councils, a practice that continues to the present.[239]

The influence of England and the ecclesiastical courts on colonial practice is evident. The very names of the various colonial courts responsible for probate—prerogative, surrogate, and ordinary—show the influence of the Church of England.[240] Indeed, many of these courts regarded themselves as ecclesiastical courts,[241] and they generally applied ecclesiastical law and followed ecclesiastical procedural rules.[242] Moreover, at least in the early stages of colonial development, the colonial courts of probate were merely given the power to probate wills and grant administration, following the English practice with respect to the ecclesiastical courts. Resort had to be made to the equity or common law courts to sell land to pay debts, to partition land in connection with distribution, to contest or to consture wills, or to adjudicate contested claims against an estate.[243]

Yet, while the English model influenced the early development of U.S. probate courts, mixed with these influences were attempts to establish single courts that possessed the combined powers of the English ecclesiastical, common law, and chancery courts.[244] One such example is the Confederate Congress' enactment of The Northwest Ordinance of 1787, which allowed for wills of real estate located in the Northwest Territory,[245]

238. *See* Act of Mar. 5, 1663, ACTS AND LAWS OF RHODE ISLAND 5 (James Franklin ed., 1730); Act of June, 1768, ACTS AND LAWS OF RHODE ISLAND 8 (Solomon Southwick ed., 1772). They also had the power to appoint guardians. *See* Tillinghast v. Holbrook, 7 R.I. 230, 248–50 (1862) (discussing the 1742 act).

239. Today the town councils have the option of appointing a lawyer to serve as a judge of probate. R.I. GEN. LAWS, §§ 8–9–2. 8–9–4 (1956); Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

240. *See, e.g.*, *In re* Roth's Estate, 52 A.2d 811, 815 (N.J. Pregrog. Ct. 1947) (noting the term "Prerogative Court" was the title of one of the courts of the Archbishop of Canterbury, and that "ordinary" refers to one who exercised ecclesiastical jurisdiction in the Church of England); BLACKSTONE, *supra* note 135, at 1076; REMBAR, *supra* note 121, at 71; WALNE, *supra* note 147, at 19; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

241. *See* Kao v. Hsia, 524 A.2d 70, 73 n.7 (Md. 1987); *In re* Roth's Estate 52 A.2d at 815. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (describing the probate court in New York as "analogous in certain matters to the spiritual courts in England").

242. *E.g.*, Finch v. Finch, 14 Ga. 362, 366–68 (Ga. 1853); Lewis v. Maris, 1 Dall. 278, 279–80 (Pa. 1788).

243. Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79. *See, e.g.*, Act of Oct. 1785, ch. 61, § 11, 12 LAWS OF VIRGINIA 140, 142 (William Waller Hening ed., 1823) (providing the validity of a will admitted to probate could be challenged in chancery up to seven years later).

244. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

245. The "Northwest Territory" referred to the area directly northwest of the Ohio River. *See* ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, preamble (July 13, 1787).

with the caveat that "such wills be duly proved,"[246] a rejection of the English distinction between personal and real property with respect to the requirement of probate. Indeed, the practice growing out of the Northwest Ordinance gave much more weight to the probate process with respect to devises of land;[247] and today, virtually all states provide that wills of land, as well as personal property, must be admitted to probate, with the probate courts now having jurisdiction over both the decedent's land and personal estate.[248]

3. Summary

If one accepts the historical gloss on Congress' statutory grant of diversity jurisdiction to the federal courts, then anything that fell within the exclusive jurisdiction of England's ecclesiastical courts in 1789 falls outside the federal courts' grant of diversity jurisdiction. Because the probate of wills of personal estate and actions to set aside the same, as well as the appointment and removal of a decedent's personal representative, fell within the exclusive jurisdiction of the British ecclesiastical courts in 1789, the refusal of federal courts to undertake either of these activities is consistent with the historical interpretation of Congress' statutory grant of diversity jurisdiction. Similarly, the fact that chancery, and at times the courts of common law, exercised jurisdiction over suits for legacies and debts in eighteenth-century England is consistent with the modern practice, endorsed in *Markham*, of allowing federal courts to "entertain suits 'in favor of creditors, legatees, and heirs' and other claimants against a decedent's estate."[249]

Fidelity to the historical interpretation of Congress' statutory grant of subject matter jurisdiction to the federal courts, however, compels the conclusion that the federal courts have jurisdiction to entertain challenges to the validity of wills of real property, since those fell within the exclusive jurisdiction of England's common law courts in 1789. Likewise, federal courts should possess jurisdiction over suits involving trusts, as those fell within the exclusive jurisdiction of chancery in eighteenth-century England. Moreover, suits involving allegations of extrinsic fraud in obtaining probate of a will should be actionable in federal court proceedings. Finally, federal courts should be able to administer estates,

246. *Id.* § 2.

247. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 249 (2d. ed. 1985).

248. 4 POMEROY, *supra* note 138, § 1158 at 471 n.16; Simes & Basye, *Probate Court II*, *supra* note 120, at 122–23.

249. Markham v. Allen, 326 U.S. 490, 494 (1946).

given that chancery exercised concurrent jurisdiction over administration in England in 1789. Thus, even if one accepts the use of historical English practice as a guide, the scope of the probate exception is much narrower than many courts and commentators have assumed.

B. CONSTITUTIONAL LIMITATIONS ON SUBJECT MATTER JURISDICTION

The Supreme Court has not directly addressed the question whether the probate exception is merely a gloss on Congress' statutory grants of subject matter jurisdiction to the federal courts or if it is constitutionally mandated by Article III. The Court's decisions with respect to both the domestic relations exception to federal court jurisdiction—the only other implied exception to federal court jurisdiction[250]—as well as the now-defunct Act of March 2, 1867 ("1867 Act"),[251] however, provide strong support for the conclusion that the probate exception is merely a statutory gloss and is not constitutionally mandated.

1. Domestic Relations Exception

In *Ankenbrandt v. Richards*, a mother brought suit on behalf of her children against her ex-husband and his girlfriend, seeking monetary damages for alleged sexual and physical abuse of the children.[252] The district court concluded that it lacked subject matter jurisdiction over the suit based on the domestic relations exception to diversity jurisdiction, and the court of appeals affirmed.[253]

The Supreme Court rejected the argument that the domestic relations exception was constitutionally mandated.[254] In so holding, the Court relied on the plain language of Article III, § 2 of the Constitution, which "contains no limitation on subjects of a domestic relations nature,"[255] and concluded that the "domestic relations exception exists as a matter of statutory construction."[256] Since the domestic relations exception to federal

250. Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1840 (1983).

251. Act of March 2, 1867, ch. 196, 14 Stat. 558.

252. 504 U.S. 689, 691 (1992).

253. *Id.* at 692.

254. *Id.* at 699–700.

255. *Id.* at 695. Moreover, it reasoned that since it had previously found that it had jurisdiction over appeals from territorial courts involving divorce, and that it had upheld the exercise of original jurisdiction by federal courts in the District of Columbia over divorce actions, the power to hear such cases must be within Article III's grant of subject matter jurisdiction. *Id.* at 696–97.

256. *Id.* at 699–700. In his concurring opinion, Justice Blackmun expressed skepticism about the majority's conclusion, writing that:

court jurisdiction, like the probate exception, is based on the understanding that historically such matters were vested exclusively in the ecclesiastical courts, it would seem to follow that the probate exception is likewise not constitutionally mandated.[257]

2. Act of 1867

Section 11 of the Judiciary Act of 1789 provided the federal circuit courts[258] with original jurisdiction over "suits of a civil nature at common law or in equity" between a citizen of the state in which the suit is brought and a citizen of another state, if the amount in controversy exceeded five hundred dollars.[259] Parallel to this was Section 12, which provided that if a plaintiff from one state filed suit against a defendant from another state in a state court located in the plaintiff's home state, and the amount in controversy exceeded $500, the defendant could remove the action to federal court provided he filed a petition for removal upon his first appearance in state court.[260] This system of giving the plaintiff the option

> Like the diversity statute, the federal-question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal-question cases to 'Cases, in Law and Equity.' Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal-question jurisdiction . . . on the federal courts in any matters involving divorces, alimony, and child custody.

Id. at 715 n.8 (Blackmun, J., concurring).

257. *See Ankenbrandt*, 504 U.S. at 699–700; Ohio *ex rel* Popovici v. Agler, 280 U.S. 379, 383–84 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 591–93 (1859).

258. Historically, the federal circuit courts were very different from the modern federal circuit courts of appeals. Under the Judiciary Act of 1789 there were two levels of trial courts: the district courts (one for each state or a portion thereof), each with its own district judge, and the circuit courts (one for each region of the country), which lacked judges of their own and sat twice each year in each district within the circuit, with panels consisting of two Justices of the Supreme Court (who would "ride circuit") and a district court judge from within the circuit. In addition to having appellate jurisdiction over certain cases tried in the district courts, the circuit courts had concurrent jurisdiction with the state courts over diversity actions where the amount in controversy exceeded $500. *See* POUND, *supra* note 129, at 103–06. While a panel of the circuit court officially consisted of three members, only two were required to hear a case, so it would not be unusual for a circuit court to be equally divided. *See id.* at 104.

259. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

> [T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id.

260. *See id.* § 12.

> [I]f a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court . . . the cause shall there proceed in the same manner as if it had been brought there by original process.

of choosing at the outset whether to bring suit in state or federal court and then giving the out-of-state defendant a similar option if suit was initially filed in state court was long believed to be adequate to protect out-of-state plaintiffs and defendants from local state prejudices.[261] But bitter cross-state animosity engendered by the Civil War led Congress to believe the existing scheme did not adequately protect out-of-state litigants.[262] Accordingly, Congress passed the 1867 Act which provided that if at *any* time prior to the final hearing or trial of a suit, the out-of-state party had reason to believe that, due to prejudice or local influence, justice could not be obtained in state court, the out-of-state party could remove the action to federal court.[263]

In *Gaines v. Fuentes* the Supreme Court considered the impact of the 1867 Act on probate matters.[264] Citizens of Louisiana filed a petition in a Louisiana state probate court seeking revocation of a decree of probate of a will on the ground that the testimony upon which it was admitted was false and insufficient.[265] One of the decedent's heirs, a citizen of New York, was served the petition and subsequently sought to remove the action to federal circuit court pursuant to both Section 12 of the 1789 Act as well as to the 1867 Act, but the state court denied the applications and subsequently revoked the probate of the will.[266] The decision was affirmed by the Louisiana Supreme Court.[267]

The U.S. Supreme Court reversed.[268] The dissent reasoned that although Section 12, the removal provision of the 1789 Act, referred only

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Id.

261. *See* Chicago & N.W. R. Co. v. Whitton, 80 U.S. (13 Wall.) 270, 289 (1871).

262. *See* Gaines v. Fuentes, 92 U.S. 10, 19 (1875).

263. Act of March 2, 1867, ch. 196, 14 Stat. 558. The statute declared:

> That where a suit is now pending, or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court . . . the suit shall there proceed in the same manner as if it had been brought there by original process.

Id.

264. 92 U.S. 10 (1875).

265. *Id.* at 11.

266. *Id.* at 11–12.

267. *Id.* As to both applications, the state court reasoned that the federal court would lack jurisdiction over the subject matter of the dispute. *See id.*

268. *Id.* at 22.

to "a *suit* . . . by a citizen of the State in which the suit is brought against a citizen of another State," it had to be read *in pari materia* with Section 11, the provision vesting the circuit courts with original jurisdiction over "all *suits of a civil nature, at common law or in equity* . . . between a citizen of the State where the suit is brought and a citizen of another State."[269] When read in conjunction with the provision of Section 12 providing that a removed action would 'proceed [in the circuit court] in the same manner as if it had been brought there by original process," the dissent concluded only those actions that could have been originally brought in the circuit court could be removed from the state court.[270] Since the probate of wills did not fall within the jurisdiction of the courts of law or equity in England, the dissent reasoned such an action could not be removed to federal court, since it could not be brought in federal court as an original matter.[271]

The majority appeared to accept this interpretation of Section 12, but ruled that removal would nonetheless be appropriate under the 1867 Act.[272] The majority noted that the scope of the federal judicial power under Article III is broader than the scope of jurisdiction in Section 12 of the 1789 Act, extending to "*controversies* between citizens of different States."[273] The majority—in apparent reliance on the broader language of the 1867 Act providing for removal of any "suit . . . in which there is a *controversy* between a citizen of the State in which the suit is brought and a citizen of another State"[274]—reasoned that the "act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States." The Court concluded the scope of cases that could be *removed* to federal court under the 1867 Act was broader than the scope of cases that could have been initially brought in federal court pursuant to Section 11 of the 1789 Act.[275] Accordingly, even if a suit was not one at law or in equity, such as an action to revoke probate, it could nonetheless be removed to federal court under the 1867 Act. The dissent, while disagreeing with the construction of the 1867 Act nonetheless conceded that Congress had the power under Article III to provide for jurisdiction over such suits.[276]

269. *Id.* at 22–23 (Bradley, J., dissenting).
270. *Id.* at 23–24.
271. *Id.* at 24–25.
272. *Id.* at 18.
273. *Id.* at 17 (quoting U.S. CONST. art. III, § 2).
274. 1867 Act, *supra* note 263.
275. *Gaines*, 92 U.S. at 19–20.
276. *Id.* at 26 (Bradley, J., dissenting).

Thus, both the majority and the dissent agreed Congress had the constitutional authority to vest the federal courts with subject matter jurisdiction over probate-related matters, and indeed the majority thought that Congress had done so in the 1867 Act. Therefore, while the 1867 Act was seldom invoked and has since been repealed,[277] its scope as interpreted and approved by the Court in *Gaines* provides strong support for the conclusion that the exception is only a statutory limitation rather than a constitutional one.

IV. DOCTRINE OF *CUSTODIA LEGIS*

Courts have held generally that the probate exception does not apply to inter vivos trusts and possibly not to testamentary trusts either. This means that a federal court not only may adjudicate the validity of a trust where the requirements of diversity jurisdiction are satisfied, but may also administer the trust, including ordering an accounting, removing and appointing trustees, and demanding that funds be distributed.[278] Yet because this is an exercise of diversity jurisdiction, state courts, whether courts of probate or courts of general jurisdiction, will have concurrent jurisdiction over such actions, raising the possibility that two courts—one state and one federal—will simultaneously attempt to administer the same trust.

The Supreme Court addressed this situation in *Princess Lida of Thurn & Taxis v. Thompson*.[279] The case dealt with a trust created in 1906 for the benefit of Princess Lida and her children by her ex-husband.[280] In 1910, the ex-husband repudiated the agreement.[281] Princess Lida, her children,

277. In 1875, Congress enacted a comprehensive removal statute, *see* Act of March 3, 1875, 18 Stat. 470, but the statute was subsequently held not to rescind the Act of March 2, 1867. *See* Hess v. Reynolds, 113 U.S. 73, 79–80 (1885). In 1887, Congress passed yet another comprehensive removal statute, *see* Act of March 3, 1887, 24 Stat. 553, and while not intending to repeal the Act of March 2, 1867, *see* 18 CONG. REC. (1887) (reporting statement of Representative David Culberson that "[t]he bill does not propose to repeal the act of 1867"), the 1887 act did have the effect of limiting removal to actions that could originally be brought in federal court. *See* Cochran & the Fid. & Deposit Co. v. Montgomery County, 199 U.S. 260, 269 (1905).

> [U]nder the judiciary act of 1789 such cases were only liable to removal from a state to the Circuit Court 'as might . . . have been brought before the Circuit Court by original process' [and] it was ruled that this was otherwise under the act of March 2, 1867.
>
> But the act of 1887 restored the rule of 1789, and, as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction.

Id. Nonetheless, it was not until 1948 that the right to remove a case due to prejudice or local influence was eliminated. *See* 28 U.S.C. § 1441 (1948).

278. *See supra* Part II.B.2.a.

279. 305 U.S. 456 (1939).

280. *Id.* at 457–58.

281. *Id.* at 58.

and one of the trustees brought suit in the state Court of Common Pleas in Pennsylvania to enforce the trust.[282] After a hearing, the state court entered a decree sustaining the agreement and ordering the ex-husband to perform accordingly.[283] The court approved a modification of the agreement in 1915, and in 1925 ultimately entered in the record that the decree had been satisfied.[284]

On July 7, 1930, the trustees filed a partial account of the trust in the same court.[285] The following day, Princess Lida and one of her children filed a suit in equity in federal district court against the two living trustees and the administrator of the deceased trustee, alleging mismanagement of trust funds and requesting that the trustees be removed and that all defendants be made to account for and repay the losses of the estate.[286] The defendants asked the state court to enjoin the plaintiffs from pursuing their claim in federal court.[287] While that request was pending, the federal court temporarily enjoined the defendants from further prosecuting the state court action.[288] Nonetheless, the Pennsylvania Supreme Court affirmed an order of the state court enjoining the plaintiffs from further pursuing their federal court action.[289]

Thus, the U.S. Supreme Court was "confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from proceeding in the other."[290] The Court held that although the trust *res* was unquestionably within the state court's jurisdiction when the action was brought to compel the ex-husband's compliance with the agreement, jurisdiction terminated once the decree in equity had been satisfied by the ex-husband.[291] It then addressed whether the subsequent filing of the trustees' account gave the state court jurisdiction over the trust, and if so, the nature and extent of that jurisdiction.[292] The Court noted that as a matter of state law, the state Court of Common Pleas for the county in which any trustee is located is vested with jurisdiction over any matter that concerns the integrity of the trust *res*.[293] Additionally, the Court stated that

282. *Id.*
283. *Id.*
284. *Id.* at 459.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 460.
289. *Id.*
290. *Id.* at 461.
291. *Id.*
292. *Id.* at 462.
293. *Id.* at 462–63.

jurisdiction is invoked either by a petition by a trustee or upon application of an interested person,[294] and that the state court cannot effectively exercise such jurisdiction without having a substantial measure of control over the trust funds.[295]

The Court concluded that if the federal court action had been one in which the plaintiffs merely sought adjudication of their right to participate in the *res* or as to the quantum of their interest in it, the federal action could proceed.[296] "[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."[297] Yet, "if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other."[298] According to the Court, where both proceedings are in rem, the first one assuming jurisdiction had jurisdiction over the *res*.[299] Because the federal action related solely to administration and restoration of the corpus, it was a proceeding in rem and thus had to yield to the pre-existing state court proceedings with respect to the same *res*.[300]

This doctrine, known as *custodia legis*, or the doctrine of prior exclusive jurisdiction,[301] is "nothing more than a practical 'first come, first serve' method of resolving jurisdictional disputes between two courts with concurrent jurisdiction"[302] that prevents the problems that could arise from inconsistent orders with respect to the same property. In considering the application of the doctrine, lower courts have identified several elements that must be present before the doctrine can be invoked to divest the federal court of jurisdiction.

294. *Id.* at 463.
295. *Id.* at 467.
296. *Id.* at 466–67.
297. *Id.*
298. *Id.* (citing Penn. Gen. Cas. Co. v. Pennsylvania, 294 U.S. 189, 195 (1935)).
299. *Id.*
300. *Id.* at 467.
301. *E.g.*, Espat v. Espat, 56 F. Supp.2d 1377, 1381 (M.D. Fla. 1999).
302. BLACK'S LAW DICTIONARY, *supra* note 11, at 384 (citing Coastal Prod. Credit Ass'n v. Oil Screw "Santee," 51 B.R. 1018, 1020 (S.D. Ga. 1985)).

First, the state court action must have been filed before the federal court action,[303] whether by virtue of a specific action filed in the state court with regard to the administration of the trust that is pending[304] at the time the federal suit is filed, such as an accounting,[305] or because as a matter of state law the state court exercised continuing jurisdiction over the corpus of a trust once its jurisdiction has been initially invoked.[306] Second, the doctrine only applies if both actions are in rem or quasi in rem.[307] Thus, even if the state court exercises continuing jurisdiction over the administration of the trust, the doctrine of *custodia legis* poses no bar to the federal court entertaining, say, a suit for damages by the trust beneficiaries against the trustees personally.[308] Third, the state court must have the power to adjudicate all of the claims effectively.[309] This means that if one of the claims raised in the federal proceeding falls outside the jurisdiction of the state court in which the pre-existing action is pending, the doctrine would not bar the federal court from exercising jurisdiction over the claim.[310] A few courts have held the doctrine applies only if, as a matter of state law, the specialized state court in which the prior action was filed had

303. *See* Reichman v. Pittsburgh Nat'l Bank, 465 F.2d 16, 18 (3d Cir. 1972); Schonland v. Schonland, No. Civ. 397CV558 (AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 888 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992); Barnes v. Brandrup, 506 F. Supp. 396, 399–400 (S.D.N.Y. 1981). Even if the state court action is filed subsequent to the federal court action, however, it has been suggested that the federal court may have discretion to dismiss the action in favor of the state court. *See* Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952).

304. Thus, the mere fact that accountings have previously been filed and approved in state court proceedings does not mean that those proceedings have been first filed, as those proceedings terminate once the court approves the accountings. *See Barnes*, 506 F. Supp. at 401. *See also Holt*, 198 F.2d at 915–16 (stating that doctrine does not apply if the prior state court action was dismissed without prejudice before the federal action was filed).

305. *See* Weingarten v. Warren, 753 F. Supp. 491, 495 (S.D.N.Y. 1990).

306. *See id.*; *Barnes*, 506 F. Supp. at 400–01; Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

307. *See* Starr v. Rupp, 421 F.2d 999, 1004–06 (6th Cir. 1970).

308. *See* Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967). *See also Holt*, 198 F.2d at 915.

> The rule is otherwise in actions strictly in personam . . . . Nor does the rule . . . apply where the purpose of the action in the second court is merely to establish the right or interest of the plaintiff in property within the possession or control of the first court, so long as the second court does not interfere with the proceedings in the first court or with the control of the property in its custody.

Id.

309. *See* Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); *Barnes*, 506 F. Supp. at 399–400.

310. *See* Akrotirianakis v. Burroughs, , 262 F. Supp. 918, 921–25 (D. Md. 1967) (holding that doctrine does not apply where the state probate court with jurisdiction over the ongoing administration of the trust would not have jurisdiction over an action, as such an action is committed to the state courts of equity).

jurisdiction exclusive of the state courts of general jurisdiction.[311] Other courts have held this has no effect on the doctrine's applicability.[312] Finally, while the doctrine would not appear to bar a party from removing such a proceeding from state court to federal court,[313] one court has denied jurisdiction over a removed case where the state court had already issued a temporary restraining order on the property at issue before the timely notice of removal had been filed.[314]

V. PRUDENTIAL ABSTENTION

While the probate exception excludes most probate and probate-related matters from federal court, some arguably probate-related matters, such as those involving trusts or arising under federal statutes, would still seem to fall within the federal courts' subject matter jurisdiction. Yet even if a claim survives the probate exception proper, it is far from certain that the federal court will adjudicate the claim. For "[e]ven where a particular probate-like case is found to be outside the scope of the probate exception, the district court may, in its discretion, decline to exercise its jurisdiction,"[315] particularly for matters that are "on the verge" of the probate exception.[316] This is because the federal courts have at their disposal a variety of abstention doctrines including *Pullman*,[317] *Burford*,[318] *Thibodaux*,[319] *Younger*,[320] *Colorado River*,[321] *Brillhart-Wilton*,[322] as well

311. *See Schonland*, 1997 WL 695517 at *2 (holding that the doctrine is inapplicable because under state law the probate courts have concurrent (rather than exclusive) jurisdiction over trusts with the ordinary courts of equity); *Barnes*, 506 F. Supp. at 401–02 (distinguishing *Princess Lida* from the instant case because in Princess Lida the state probate court jurisdiction was exclusive, whereas the state probate court jurisdiction in the instant case is concurrent with the state courts of general jurisdiction).

312. *See* Beach v. Rome Trust Co., 269 F.2d 367, 371–72 (2d Cir. 1959); Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

313. *E.g.*, *Schonland*, 1997 WL 695517 at *1–*2.

314. *See In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 149–51 (S.D.N.Y. 1991).

315. Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979) (stating that "the scope of the probate exception does not necessarily define the area in which the exercise of federal judicial power is appropriate").

316. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (asserting that "there is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them'"). *Accord* Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985).

317. R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

318. Burford v. Sun Oil Co., 319 U.S. 315, 316–34 (1943).

319. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29–31 (1959).

320. Younger v. Harris, 401 U.S. 37 (1971).

321. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–19 (1976).

as the *Rooker-Feldman*[323] doctrine and the principle that equity can only "do justice completely" and not "by halves."[324] Each of these doctrines has directly or indirectly been addressed, and in some cases applied, by the federal courts in considering probate-related claims falling outside of the probate exception. This Section briefly describes each of these doctrines, and examines the manner and extent to which the federal courts have applied them to probate-related claims.

A. *PULLMAN* ABSTENTION

Pullman abstention provides that where a suit presents an unsettled question of state law and a given interpretation of that state law would allow the court to avoid reaching a federal constitutional question raised in the suit, the federal district court should suspend the federal court action and allow the parties to resolve the unsettled question of state law in state court.[325] Thus, where the validity of a state statute is challenged on federal constitutional grounds and the meaning of the statute is sufficiently uncertain that a narrow interpretation of it by the state courts could avoid reaching the constitutional question, *Pullman* abstention is warranted.[326] It is likewise warranted if a suit alleges that the defendant's conduct violated the U.S. constitution as well as a provision of state law.[327] Moreover, *Pullman* abstention applies even when suit is brought pursuant to § 1983.[328] But where the state law being challenged is sufficiently clear, or the plaintiff opts to challenge the defendant's conduct only on federal constitutional grounds (leaving out state law claims), *Pullman* abstention does not apply.[329] *Pullman* abstention is likewise inapplicable where only non-constitutional federal issues, such as the interpretation of a federal statute, can be avoided.[330] Although typically invoked in suits for

322. Wilton v. Seven Falls Co., 515 U.S. 277, 282–288 (1995); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494–97 (1942).

323. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482–87 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

324. *See* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117–18 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

325. *See* R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

326. *See* Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970).

327. *See Pullman*, 312 U.S. at 498. *See also* Siler v. Louisvillle & Nashville R.R. Co., 213 U.S. 175 (1909).

328. *See* Askew v. Hargrave, 401 U.S. 476, 477–78 (1971).

329. *Compare* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971), *with id.* at 440–43 (Burger, C.J., dissenting).

330. *See* Propper v. Clark, 337 U.S. 472, 490 (1949).

injunctive relief, it can also be raised in suits where money damages are sought.[331]

Under *Pullman* abstention, the federal court does not usually[332] dismiss the proceedings, but rather stays them pending the outcome of the proceedings in state court.[333] While the federal court plaintiff is required to inform the state court of the federal constitutional challenges pending in the federal court proceedings so that the state court can interpret the state law at issue in light of the constitutional challenge,[334] the plaintiff has the right to return to federal court after the state court has resolved the state law question to have the constitutional questions resolved in federal court, unless the plaintiff voluntarily submits the constitutional claims to the state court.[335]

Although courts have considered *Pullman* abstention in the context of probate-related proceedings, they have been reluctant to apply it in the probate context. Usually this is because such claims do not typically involve unsettled questions of state law coupled with the possibility of avoiding a federal constitutional question.[336]

B. *THIBODAUX* AND *BURFORD* ABSTENTION

Thibodaux abstention is applicable where the suit raises difficult questions of state law bearing on substantial public policy matters that are more important than the result of the case before the court.[337] Thus, for example, a suit challenging a municipality's authority to exercise eminent domain as a matter of state law raises a question of sufficient public import to justify *Thibodaux* abstention,[338] but abstention appears to be justified only where the issue of state law is unclear.[339] Courts that have considered

331. *E.g.*, *Fornaris*, 400 U.S. at 41–44; United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135–36 (1962).

332. In some instances, a state court will refuse to decide the issue of state law so long as the federal action is pending. In those circumstances, the federal district court must dismiss the case, but without prejudice, and the plaintiff is free to return to federal court after the state court proceedings have concluded. *See* Harris County Comm'rs v. Moore, 420 U.S. 77, 78 (1975).

333. *See Pullman*, 312 U.S. at 501–02.

334. *See* Gov't & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364, 366 (1957).

335. *See* England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 435 (1964) (Douglas, J., concurring).

336. Bergeron v. Loeb, 777 F.2d 792, 798 n.7 (1st Cir. 1985); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985); Martz v. Braun, 266 F. Supp. 134, 139 (E.D. Pa. 1967).

337. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959)).

338. *See Thibodaux*, 360 U.S. at 42–44 (Brennan, J., dissenting).

339. *See* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188–90 (1959).

Thibodaux abstention in probate-related proceedings have found it inapplicable, either because there is no difficult question of state law,[340] or because no issue transcends the importance of the case.[341] Indeed, one court has held that any case raising difficult issues of state law bearing on policy problems of substantial public import would likely invoke the probate exception and if it did not, it probably would not qualify for *Thibodaux* abstention.[342]

Burford abstention is related to but distinct from *Thibodaux* abstention. Unlike *Thibodaux* abstention, for *Burford* abstention to apply the question of state law need not itself be determinative of state policy (like a determination of the scope of a city's eminent domain powers), and thus the resolution of the specific question before the court need not transcend the result in the case before the court.[343] Rather, the question is whether the very act of a federal court adjudicating a case would itself in some way be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[344]

Burford v. Sun Oil Co. was a challenge to the granting of four permits by a state regulatory commission to drill oil wells.[345] Because the state believed that the regulation of natural resources such as oil could not effectively be accomplished piecemeal but had to be centralized to be effective, it had vested a single state district court with authority to review the commission's decisions for "reasonableness," which was itself subject to review by a single court of appeals and ultimately the state supreme court. Thus the state avoided the problem of having conflicting determinations by individual district and appellate courts across the state.[346] While the determination of whether it was reasonable to issue any given permit would not likely have a transcendent effect on the state, the very fact of federal courts determining the reasonableness of the issuance of permits "where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields."[347] Unlike *Pullman* abstention, the *Burford*

340. *See* Beach v. Rome Trust Co., 269 F.2d 367, 374 (2d Cir. 1959); *Martz*, 266 F. Supp. at 139.

341. *Martz*, 266 F. Supp. at 139.

342. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D. Ill. Sept. 18, 1995) (describing *Thibodaux* abstention without directly citing *Thibodaux*).

343. *See Colorado River Water Conservation Dist.*, 424 U.S. at 814–15.

344. *See id.* at 814.

345. 319 U.S. 315, 317 (1943).

346. *Id.* at 326–27.

347. *Colorado River Water Conservation Dist*, 424 U.S. at 815.

abstention plaintiff has no right to return to federal district court to have her federal claims adjudicated, but is instead entitled only to review in a federal court by way of a writ of certiorari by the U.S. Supreme Court.[348]

There are a number of limitations on the use of *Burford* abstention. First, while not an explicit limitation, the Supreme Court has considered the doctrine only in the context of state-regulated industries.[349] Second, *Burford* abstention can be used only when there is a difficult, uncertain question of state law.[350] Finally, *Burford* abstention is available only where plaintiffs seek injunctive or declaratory relief.[351]

Courts that have considered *Burford* directly have rejected its application in the context of probate-related matters, usually finding either no difficult question of state law, no overarching state policy with respect to settling such claims, or both.[352] One court has found that few cases would likely present such a question without also invoking the probate exception to federal subject matter jurisdiction.[353]

In *Ankenbrandt v. Richards* the Court considered the applicability of *Burford* abstention in the analogous context of the domestic relations exception.[354] The Court stated, in dicta, that *Burford* abstention *might* be relevant in cases outside the domestic relations exception where, say, the federal case was filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the *status* of the parties.[355] Yet even in such cases, the Court reasoned that the federal court should retain jurisdiction, rather than abstain permanently, to ensure prompt and just disposition of the matter upon the determination by the

348. *See Burford*, 319 U.S. at 334.

349. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (reviewing utility rate regulation); Alabama Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341 (1951) (considering local train service regulation); *Burford*, 319 U.S. 315 (1943) (evaluating regulation of oil drilling rights).

350. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 726–27 (1996); *Colorado River Water Conservation Dist*, 424 U.S. at 814; *Burford*, 319 U.S. at 327–28; Johnson v. Rodrigues, 226 F.3d 1103, 1112 (10th Cir. 2000).

351. *Quackenbush*, 517 U.S. at 731. The Supreme Court has, however, left open the possibility that *Burford* might support a federal court's decision to postpone adjudication of a damages claim pending resolution by the state courts of an unsettled question of state law. *See Quackenbush*, 517 U.S. at 730–31.

352. *See* Bergeron v. Loeb, 777 F.2d 792, 800 (1st Cir. 1985); Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 807 n.10 (S.D. Ohio 1999); Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D.Ill. Sept. 18, 1995); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985).

353. *See Seay*, 1995 WL 557361, at *7.

354. *Ankenbrandt*, 504 U.S. 689 (1992).

355. *Id.* at 705–06.

state court of the relevant issue,[356] making it more akin to *Pullman* abstention. Thus, where a federal court is adjudicating a probate-related matter, *Ankenbrandt* might suggest that if a suit is filed on behalf of or against an estate, and the proper adjudication of such suit depends upon the state probate court appointing a personal representative for the estate with the capacity to sue and be sued on behalf of the estate, the federal court should retain jurisdiction of the suit pending the state court's action.[357]

C. *YOUNGER* ABSTENTION

The *Younger* abstention doctrine initially was directed only at suits that might interfere with ongoing state criminal proceedings. It provided that the federal courts would not, absent special circumstances,[358] entertain jurisdiction over suits seeking either an injunction against pending[359] state criminal proceedings[360] or a declaratory judgment against a state criminal statute under which prosecutions are pending.[361] The rationales behind this form of abstention are that equity need not act in such instances since an adequate remedy exists by way of a defense in the state criminal proceedings,[362] as well as respect for the distinct sovereignty of the states.[363] An exception to *Younger* abstention exists where the state tribunal cannot or will not entertain the federal constitutional claims.[364]

356. *Id.* at 706 n.6. *See also Quackenbush*, 517 U.S. at 730–31 (noting that although a dismissal under *Burford* is not appropriate in a damages action, a stay pending a determination by the state court on a disputed question of state law might be warranted).

357. *Cf. Seay*, 1995 WL 557361 at *7–*8.

358. These special circumstances were limited to cases where the prosecution was in bad faith or done to harass the defendant, or where the statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger v. Harris, 401 U.S. 37, 52–54 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

359. The Supreme Court subsequently expanded the doctrine to cover not only pending criminal proceedings, but also those that are commenced against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court. *See* Hicks v. Miranda, 422 U.S. 332, 349 (1975).

360. *See Younger*, 401 U.S. at 53.

361. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971). The Supreme Court has reserved the question whether *Younger* applies in suits for money damages, although the Court has held that such suits should be stayed pending the resolution of the state prosecutions. *See* Deakins v. Monaghan, 484 U.S. 193, 202 (1988).

362. *See Younger*, 401 U.S. at 43–44; Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

363. *See Younger*, 401 U.S. at 43–44.

364. *See* Moore v. Sims, 442 U.S. 415, 425–26 (1979).

Subsequent decisions have expanded *Younger* to cover civil enforcement proceedings brought by the state,[365] including those prosecuted in administrative tribunals that are judicial in nature.[366] In a few instances, *Younger* abstention has been applied in suits involving purely private parties where the "State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[367] While such cases had the potential to expand greatly the reach of *Younger* abstention, the Supreme Court has subsequently limited the application of *Younger* where only private persons are parties to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[368]

Almost all[369] courts that have considered *Younger* abstention in the context of probate-related matters have held it to be inapplicable.[370]

D. *COLORADO RIVER* ABSTENTION

In *Colorado River Water Conservation District v. United States*,[371] the Supreme Court set forth the general principle that "[a]bstention from the

365. *See id.* at 417 (holding that the court should abstain from hearing state custody claim for children allegedly abused by parents); Trainor v. Hernandez, 431 U.S. 434, 493 (1977) (holding that the court should abstain from state claim to recover welfare payments obtained by fraud); Huffman v. Pursue, Ltd., 420 U.S. 592, 595, 607 (1975) (directing the court to apply *Younger* abstention principles in a state action to declare an obscene movie a nuisance).

366. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (holding that district court should have abstained from reviewing an administrative complaint for employment discrimination); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432–44 (1982) (holding that federal court should abstain from reviewing an attorney disciplinary proceeding).

367. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (refusing to enjoin successful plaintiff in state court proceeding from exercising its right to demand that the defendant post a bond as a condition of prosecuting an appeal where the state court defendant was claiming that it could not afford a bond and that the rule denied it due process). *See also* Juidice v. Vail, 430 U.S. 327, 337–39 (1977) (refusing to enjoin state court judges from using their statutory contempt procedures on the ground that they denied due process).

368. New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 367 (1989).

369. One court has applied it in the context of a purely private probate-related dispute, yet the court seemed completely to misunderstand the *Younger* doctrine. *See* Williams v. Adkinson, 792 F.Supp. 755, 766 (M.D. Ala. 1992) (reasoning that *Younger* applied because such suits involve the "important state interest in the 'orderly and just distribution of a decedent's property at death.'").

370. *See* Reinhardt v. Kelly, 164 F.3d 1296, 1302 (10th Cir. 1999); Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985). In the related area of domestic relations matters, the Supreme Court in *Ankenbrandt v. Richards* held *Younger* abstention would not apply unless there were pending state proceedings and a valid assertion that there were important state interests at stake. 504 U.S. 689, 705 (1992).

371. 424 U.S. 800 (1976).

exercise of federal jurisdiction is the exception, not the rule,"[372] and that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[373] The court, however, found abstention is in some instances appropriate where there are parallel federal and state proceedings involving substantially the same parties and the same issues.[374]

The Court in *Colorado River* identified four factors that counsel in favor of a federal court abstaining in favor of a state forum: (1) where maintaining both actions would require the state and federal courts to exercise simultaneous jurisdiction over a single *res*; (2) if the state court forum is more convenient for the parties; (3) where the concurrent state proceedings were initiated before the federal proceedings; and (4) where doing so would avoid piecemeal litigation.[375] The Court has since added two factors weighing *against* abstention: (1) where federal law provides the rule of decision on the merits[376]; and (2) where the state court proceedings will probably be inadequate to protect the plaintiff's rights.[377]

In probate related matters, avoiding piecemeal litigation tends to be the focal point, and is most easily rejected if there are no pending state court proceedings,[378] if the plaintiff in the federal action is not party to the state probate proceedings,[379] or if the issues in the probate proceeding are different from those raised in the federal action.[380] In addition, since state probate courts often have jurisdiction only over the probate of the will and the administration of the estate, common law and statutory claims among parties will often need to be filed in some other court, such as a state court of general jurisdiction, and thus, declining jurisdiction will not avoid piecemeal litigation.[381] Moreover, in such circumstances, it seems the

372. *Id.* at 813.
373. *Id.* at 817.
374. *See id.* at 818.
375. *See id.* at 818–19.
376. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23, 26 (1983).
377. *Id.* at 26.
378. *See Bergeron*, 777 F.2d at 799.
379. *See* Celentano v. Furer, 602 F. Supp. 777, 782 (S.D.N.Y. 1985).
380. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *8, *9 (N.D.Ill. Sept. 18, 1995). There is, however, authority suggesting that the federal and state actions need not be precisely identical: it is enough that "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700 (7th Cir. 1992).
381. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 (holding that under such circumstances, "a decision to allow [such claims] to be decided in federal rather than state court does not *cause* piecemeal resolution of the parties' underlying disputes," making abstention unwarranted) (emphasis added); Giardina v. Fontana, 733 F.2d 1047, 1053 (2d Cir. 1984). *See also Caminiti*, 962 F.2d at 703 (noting that where the probate court lacks jurisdiction over a particular claim as against a particular party, it

federal forum is, strictly speaking, the first concurrent forum in which jurisdiction was obtained, since the only other forum with concurrent jurisdiction would be a state court of general jurisdiction, in which a new action would have to be filed.[382] Where the issues raised in the federal action are the same as those raised in the state court action, however, the desire to avoid piecemeal litigation weighs in favor of abstention.[383]

E. *BRILLHART-WILTON* ABSTENTION

Under the Federal Declaratory Judgments Act ("FDJA"),[384] where an actual controversy exists, the federal courts have the authority to declare the rights of the parties vis-à-vis one another or vis-à-vis a piece of property. Such a declaration has the effect of a final judgment[385] and may have a preclusive effect in subsequent proceedings where the declaratory judgment involved a question of federal law.[386] Where suit is brought pursuant to the FDJA, federal courts have substantially greater discretion to abstain in favor of pending state court proceedings than is permitted under the *Colorado River* standard[387] because of the permissive wording of the FDJA.[388] Unlike *Colorado River* abstention, the Court has neither enumerated comprehensive factors for guiding the district court's abstention discretion with respect to suits brought pursuant to the FDJA, nor has it set forth the outer boundaries of the abstention discretion.[389] Rather, the Court has suggested only that the decision be guided by "considerations of practicality and wise judicial administration,"[390] and that

weighs against abstaining under *Colorado River*); United States v. Pikna, 880 F.2d 1578, 1582 (2d Cir. 1989) (holding a dismissal of a suit over which the state probate court would likely lack jurisdiction an abuse of discretion).

382. *Giardina*, 733 F.2d at 1053.

383. *Caminiti*, 962 F.2d at 701–02; Estate of Groper by Groper v. County of Santa Cruz, No. C-93-20925 RPA, 1994 WL 680041, at *4–*5 (N.D.Cal. Dec. 1, 1994).

384. 28 U.S.C. § 2201 (1994).

385. *See id.*

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id.

386. Steffel v. Thompson, 415 U.S. 452, 476–78 (1974) (White, J., concurring); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW.U. L. REV. 759, 764, 769 (1979).

387. Wilton v. Seven Falls Co., 515 U.S. 277, 286–88 (1995).

388. *Id.* at 286 (quoting 28 U.S.C. § 2201(a) (1988 ed. Supp. V) providing the court "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added)).

389. *See id.* at 290; Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

390. *Wilton*, 515 U.S. at 288.

the district court examine the scope of the pending state court proceeding, the nature of the available defenses, and whether the claims of all interested parties could satisfactorily be adjudicated.[391] All of these considerations are subject to review only for abuse of discretion.[392] As with *Pullman* abstention, the appropriate course is to stay the proceedings rather than dismiss them outright to protect against the possibility that the state court case might fail to resolve the controversy.[393]

While probate proceedings are pending, a party will sometimes file suit under the FDJA, based on the diversity of the parties, seeking a declaration as to the validity of a trust or other similar instrument, even though the validity of the instrument can or is being litigated in the probate proceedings.[394] In such instances, federal courts generally exercise their broad, unbounded discretion to decline jurisdiction, usually reasoning it would be vexatious and uneconomical for the federal court to proceed where a parallel state court suit is addressing the exact same question.[395]

F. ROOKER-FELDMAN DOCTRINE

The *Rooker-Feldman* doctrine holds that the federal district courts lack jurisdiction over collateral attacks on judgments rendered in state court proceedings.[396] The rationale for the doctrine is that the statutory grant of subject matter jurisdiction to the federal district courts is strictly original, and for district courts to entertain actions to reverse or modify the judgments of state courts due to errors, even constitutional errors, would be an exercise of appellate jurisdiction, and only the Supreme Court has been granted appellate jurisdiction over judgments rendered by the states' highest courts.[397] This doctrine is thus invoked if a litigant attempts directly to challenge the judgment of a state probate court in an independent federal court action.[398]

391. *Id.* at 282–83; *Brillhart*, 316 U.S. at 495.

392. *Wilton*, 515 U.S. at 289–90.

393. *Id.* at 288 n.2.

394. *E.g.*, Fay v. Fitzgerald, 478 F.2d 181 (2d Cir. 1973); *In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 152 (S.D.N.Y. 1991) (requesting declaration as to the validity of a reciprocal agreement to execute mirror image wills); Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970) (requesting declaration that inter vivos trust is invalid).

395. *Fay*, 478 F.2d at 183. *Accord In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d at 153–54; Cenker v. Cenker, 660 F. Supp. 793, 796 (E.D. MI 1987); DiTinno v. DiTinno, 554 F. Supp. 996, 1000 (D. Mass. 1983).

396. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

397. *Rooker*, 263 U.S. at 415–16.

398. *See* Williams v. Adkinson, 792 F.Supp. 755, 761–62 (M.D. Ala. 1992).

G. EQUITY CAN ONLY "DO JUSTICE COMPLETELY"

A well-established principle dictates that "a court of equity ought to do justice completely and not by halves."[399] Thus, where an equity court has jurisdiction over only one aspect of a suit but not another, it will decline jurisdiction. Accordingly, some federal courts have declined jurisdiction over probate-related matters falling outside the probate exception when there are related matters to be decided that fall within the probate exception. Thus, where the decedent's capacity to execute a will as well as an inter vivos trust is in dispute, courts have invoked this principle to decline jurisdiction over the validity of the inter vivos trust, even though that is outside of the probate exception, since the validity of the will must be adjudicated in another forum.[400] Additionally, where there is a dispute over the validity of a testamentary instrument as well as its interpretation, federal courts have declined to construe the terms of the instrument on the ground that its validity is still being adjudicated in ongoing probate proceedings.[401]

H. "JAMBALAYA" ABSTENTION

A number of courts adjudicating probate-related matters have either abstained or suggested they could abstain on grounds other than those contained in the recognized categories of abstention. These courts frequently rely on the greater expertise of state courts in dealing with such issues based on the state courts' daily experience,[402] familiarity with the litigation,[403] and the greater interest of the states in the outcome of the litigation.[404] Abstaining courts also cite judicial economy,[405] federalism,[406] and the intertwining of federal and state court proceedings.[407] Abstaining

399. Camp v. Boyd, 229 U.S. 530, 551 (1913). *Accord* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

400. Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970).

401. *Jackson*, 153 F. Supp. at 116–18.

402. *See* Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979); Bassler v. Arrowood, 500 F.2d 138, 142–43 (8th Cir. 1974); *Cenker*, 660 F. Supp. at 795–96; Rousseau v. United States Trust Co. of NY, 422 F. Supp. 447, 459 (S.D.N.Y. 1976).

403. *See Rice*, 610 F.2d at 478; Pappas v. Travlos, 662 F. Supp. 1149, 1150 (N.D. Ill. 1987); *Cenker*, 660 F. Supp. at 795–96.

404. *See Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

405. *Reichman*, 465 F.2d at 18; Jones v. Harper, 55 F. Supp. 2d 530, 534 (S.D.W. Va. 1999); *Rousseau*, 422 F. Supp. at 459.

406. *Jones*, 55 F. Supp. 2d at 534.

407. *See Rice*, 610 F.2d at 478; *Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

courts, however, provide little basis for determining their authority to abstain under these circumstances.

I. ABSTENTION INVOLVING SPECIALIZED STATUTORY GRANTS OF JURISDICTION

In *Markham v. Allen*,[408] the Supreme Court, after holding that the suit did not fall within the probate exception, considered whether the federal court should nonetheless have abstained in light of ongoing state court proceedings, and the fact that the suit involved issues of state law.[409] The Court rejected the argument that the mere need to interpret state law was a sufficient basis for abstention,[410] and held that where a substantive federal statute specially confers jurisdiction on the district court independent of the statutes generally governing federal court jurisdiction, abstention is not appropriate.[411]

Thus, under *Markham*, abstention in a probate-related matter would not be appropriate where suit is brought under a federal substantive statute for which the federal courts have subject matter jurisdiction independent of the general grant of federal question jurisdiction contained in § 1331. Accordingly, civil rights actions brought pursuant to §§ 1983, 1985 and 1986,[412] suits brought under the RICO statute,[413] and statutory interpleader actions[414]—the provisions under which most non-diversity probate-related

408. 326 U.S 490 (1946).

409. *Id.* at 495.

410. *Id.*

411. *Id.* at 495–96.

412. *See* 28 U.S.C. § 1343(a) (1994).

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Id.

413. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court.").

414. *See* 28 U.S.C. § 1335 (1994) ("The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader.").

suits arise[415]—would seem to present situations where abstention would not be warranted under *Markham*.

VI. PARSING THE PROBATE EXCEPTION

The various formulae established by the federal appeals courts for determining whether a suit falls within the probate exception[416] provide a rough guide for determining when the probate exception applies. As shown above, however, the formulae fail to provide courts with an accurate means of determining whether a given probate-related suit falls within the exception.

While no court has explicitly broken down the probate exception into its component parts, one can infer from the Supreme Court's precedents that the exception ought to be viewed as an amalgam of five distinct rules: the *Erie* doctrine, the limits on Congress' grant of subject matter jurisdiction to the federal courts, *custodia legis* (the doctrine of prior exclusive jurisdiction), the Case or Controversy requirement, and prudential abstention. Only by applying these five rules in tandem can one determine whether a given suit falls within the probate exception.

A. STEP 1: THE *ERIE* DOCTRINE

The Supreme Court's probate exception precedents have not directly considered the *Erie* aspect of the exception because all but one of the Court's probate exception precedents pre-date the 1938 *Erie* decision.[417] Prior to *Erie* and its progeny, the federal courts' equity jurisdiction was uniform throughout the country,[418] and thus it was unnecessary for the federal courts to consider whether a given equitable or legal remedy was provided for under state law. Consequently, the Court's probate exception precedents do not address this issue.

Yet today it goes without saying that when a federal court exercises diversity jurisdiction over a claim, it must apply the law of the state in

415. *See supra* Part II.B.2.b.

416. *See supra* Part II.B.1.

417. *Markham v. Allen* is the only post-*Erie* probate-exception precedent. Sutton v. English, 246 U.S. 199 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Hess v. Reynolds, 113 U.S. 73 (1885); Gaines v. Fuentes, 92 U.S. 10 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

418. *E.g.*, *Payne*, 74 U.S. (7 Wall.) at 430 (noting the equity power of the federal courts is uniform throughout the country and equal to that of the English high court of chancery).

which it sits as the rule of decision for that claim.[419] Accordingly, in determining whether a federal court can entertain a probate-related cause of action, reference to state law is often necessary. For example, if an heir files a diversity suit alleging an independent common law tort claim for intentional interference with an expectation of an inheritance, the first step is to determine whether state law recognizes such a cause of action.[420] If there is no such cause of action under state law, the suit is not dismissed for lack of subject matter jurisdiction, but rather for failure to state a claim for which relief can be granted.[421]

B. STEP 2: SCOPE OF THE FEDERAL COURTS' SUBJECT MATTER JURISDICTION

The mere existence of a legal or equitable remedy under state law is not enough for a federal court to exercise diversity jurisdiction over a probate-related cause of action. For there to be statutory federal court subject matter jurisdiction, the legal or equitable remedy must fall within the traditional scope of the English courts of chancery and common law in 1789.[422] Thus, if a state abolishes its probate courts and vests its courts of general jurisdiction with jurisdiction over the probate of wills, a federal court sitting in diversity would not, under the current interpretation of the statutory grant of subject matter jurisdiction, be able to exercise jurisdiction over an action to probate the will.[423]

The various formulae developed by the federal courts fail to capture this step in the probate exception analysis. Because the "route" test allows

419. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

420. *See generally* Allen v. Hall, 139 F.3d 716 (9th Cir. 1998); Firestone v. Galbreath, 25 F.3d 323 (6th Cir. 1994); Moore v. Graybeal, 843 F.2d 706, 710 (3d Cir. 1988); DeWitt v. Duce, 675 F.2d 670 (5th Cir. 1982).

421. *Compare* FED. R. CIV. P. 12(b)(1) (action dismissed for lack of jurisdiction over the subject matter), *with* FED. R. CIV. P. 12(b)(6) (action dismissed for failure to state a claim upon which relief can be granted because no cause of action existed under federal statute). *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

422. *See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) The Court in *Guaranty Trust Co. of N.Y.* held that notwithstanding the *Erie* doctrine and its applicability to suits in equity, it is not the case:

> that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court . . . . Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.

Id.

423. *Cf.* Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982) ("This is not to say, of course, that federal courts can now probate wills in Illinois because the state has abolished its specialized probate courts. Probate remains a peculiarly local function which federal courts are ill equipped to perform.").

federal court jurisdiction where a remedy is available in a state court of general jurisdiction, it would incorrectly conclude that the federal court has subject matter jurisdiction over challenges to the validity of a will where state law provided such a legal or equitable cause of action. Under the "practical" test, where the state has eliminated its separate probate courts, federal court jurisdiction would be appropriate under the "relative expertise" prong of the test. Where the state provides for an independent action to challenge the validity of a will, federal court jurisdiction would be appropriate under the "judicial economy" prong of the test. To be sure, the "nature of claim" test would prevent the federal court from adjudicating a state-created equitable or legal action challenging the validity of a will admitted to probate, as that would go to the "validity" of the instrument. Yet it would fail to capture the various exceptions to the ecclesiastical courts' exclusive jurisdiction over such challenges in eighteenth-century England.

Since the historical limitation on federal court subject matter jurisdiction is a mere gloss on the general statutory grants of subject matter jurisdiction and is not a constitutional limitation, where Congress creates a federal legal or equitable remedy and specifically provides for federal court subject matter jurisdiction over such actions, as with the RICO statute, this step in the analytical framework of the probate exception would be inapplicable.[424]

C. STEP 3: *CUSTODIA LEGIS*

The "route" test for determining when the probate exception applies turns on whether the particular action could be heard in a state court of general jurisdiction, or if it is cognizable only in a state probate court. If the latter, federal court diversity jurisdiction does not exist.[425] To be sure, even some of the older Supreme Court cases have made reference to there being federal jurisdiction where an action can be brought in the state courts of general jurisdiction.[426]

424. *Cf*. Markham v. Allen, 326 U.S. 490, 495–96 (1946) (holding where a federal substantive statute specially confers subject matter jurisdiction on the federal district courts independently of the statutes governing generally the jurisdiction of the federal courts, prudential abstention is not appropriate); *Ashton*, 918 F.2d at 1072 (holding the probate exception inapplicable to suits brought under the federal interpleader statute).

425. *See supra* Part II.B.1.b.

426. *See* Gaines v. Fuentes, 92 U.S. 10, 20–21 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 519–20 (1874).

Yet this would fly in the face of firmly established precedent holding that the states cannot defeat the federal constitutional and statutory right of a diverse party to remove a suit to federal court (or to file it there as an original matter) by mere internal arrangement of the distribution of jurisdiction between their probate courts and their courts of general jurisdiction.[427]

What the "route" test is really trying to capture is nothing more than a short-hand approximation of the *custodia legis* doctrine, under which two courts cannot exercise concurrent jurisdiction over a proceeding in rem. As a general rule, when a controversy is relegated by state law to the state probate courts (as opposed to the state courts of general jurisdiction), it is usually because it is part of the ongoing in rem proceeding and not an independent in personam action. But since a state could choose to vest its probate courts with jurisdiction over independent in personam actions, such as wrongful death suits or actions by creditors, the "route" test works only as a close approximation of the doctrine of *custodia legis*, and cannot always be correct.

427. *See* Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43–44 (1909) (holding a federal court has subject matter jurisdiction to adjudicate suits by creditors, legatees, and heirs to establish their claims against an estate, notwithstanding state statutes giving state probate courts exclusive jurisdiction over such suits); Clark v. Bever, 139 U.S. 96, 102–03 (1891); Hess v. Reynolds, 113 U.S. 73, 77 (1885) ("[T]he controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by State statutes enacted for the more convenient settlement of estates of decedents."); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (holding the constitutional and statutory right of a citizen of one state to have their suit against a citizen of another state heard in a federal tribunal would be abrogated if diversity jurisdiction were subject to the internal distribution of judicial power within a state); Greyhound Lines, Inc. v. Lexington State Bank & Trust Co., 604 F.2d 1151, 1154–55 (8th Cir. 1979) (holding the decision of state to give county courts exclusive jurisdiction over claims against the estates of decedents does not act as a restriction on federal court diversity jurisdiction); Swan v. Estate of Monette, 400 F.2d 274, 276 (8th Cir. 1968) (citing Yonley v. Lavender, 88 U.S. (21 Wall.) 276 (1874); *Beach*, 269 F.2d at 372–73 (citing McClellan v. Carland, 217 U.S. 268, 281–82 (1910)); Borer v. Chapman, 119 U.S. 587 (1887); *Hess*, 113 U.S. at 76–77; *Gaines*, 92 U.S. at 10 (holding if something is not deemed to be a "purely probate matter" the federal court's jurisdiction is not ousted by the mere internal arrangement of the state courts by way of putting a matter within the exclusive jurisdiction of the probate courts); Barnes v. Brandrup, 506 F. Supp. 396, 399 (S.D.N.Y. 1981) (citing Beach v. Rome Trust Co., 269 F.2d 367, 373 (2d Cir. 1959) for the proposition that controversies that were not regarded as probate matters in 1789 could not be kept from federal court jurisdiction based on internal arrangements of the state courts); Bryden v. Davis, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981) (noting states cannot impose restraints on federal jurisdiction by creating probate courts and vesting them with exclusive jurisdiction); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 111–12 (D. Or. 1957) (holding the states cannot limit federal court jurisdiction, and that if a right was enforceable in the English High Court of Chancery in 1789 and could be enforced in personam in some state court – any court in the state, even a probate court, then there can still be federal court jurisdiction).

Indeed, the *custodia legis* rule underlies the principle that while a federal court sitting in diversity can establish the debts against the estate, the debt established must take the place and share of the estate as administered by the probate court. The debt established cannot be enforced by process directly against the property of the decedent, since for the federal court to order the distribution of the assets of an estate that is being administered by a state probate court would mean that both courts were exercising jurisdiction over the same *res*.[428]

Accordingly, the issue is not in what court the action can be brought, but whether it is an independent *inter partes* action. The Supreme Court has explained that "action or suit *inter partes*" refers:

> only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by state law is a mere continuation of the probate proceeding.[429]

Under this step of the probate exception inquiry, the key is to examine the state's statutory scheme to determine whether the suit is a mere continuation of the proceedings to probate the will or is instead an independent *inter partes* action.[430] For example, where state law requires a suit challenging the will be brought before the same judge who is exercising jurisdiction over the probate of the will and the administration of the estate, the action will be considered to be a mere continuation of the

428. *See* Byers v. McAuley, 149 U.S. 608, 614 (1893). The Court reasoned "where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court." *Id.* Hence the statement in *Markham* that

> federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Markham, 326 U.S. at 494.

429. Farrell v. O'Brien, 199 U.S. 89, 110 (1905) (emphasis in original). *See generally id.* at 114–16 (holding that where a proceeding to contest a will under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); Sutton v. English, 246 U.S. 199, 207–08 (1918) (holding that where a suit to challenge a will must be brought in the court in which it was probated, and where the state courts of general jurisdiction have no original jurisdiction over actions to annul a will, a suit to annul a will is merely supplemental to the probate of the will, and there is thus no federal court jurisdiction); *Waterman*, 215 U.S. at 44 (noting that there is no federal court jurisdiction when the proceedings are in rem and are thus purely probate in character).

430. *See Sutton*, 246 U.S. at 205–06 (analyzing the statutory scheme for challenging a will in Texas); *Farrell*, 199 U.S. at 111–14 (analyzing the statutory scheme for challenging a will in Washington).

probate proceeding and not an independent *inter partes* action.[431] Moreover, if the result of the judgment arising from a challenge to the validity of a will were binding as against the whole world and not merely the parties to the suit, it would be a suit in rem rather than a suit *inter partes* and the federal court would lack jurisdiction over the suit. Even assuming the historical limitation on the scope of the statutory grant of subject matter jurisdiction does not bar adjudication of an independent action to challenge the validity of a will in federal court, the *custodia legis* doctrine might, depending on the state's statutory scheme. But since the *custodia legis* doctrine is basically a rule of first-come, first-served, the federal court would not be barred from exercising jurisdiction over an action challenging the validity of a will—even if such an action is deemed to be part of the ongoing probate proceedings—if the federal action is filed prior to the commencement of any state probate proceedings.

D. STEP 4: CASE OR CONTROVERSY

Some courts have questioned whether probate matters are justiciable "cases or controversies" within the meaning of Article III.[432] In *Gaines v. Fuentes*,[433] however, the Supreme Court distinguished an action to probate a will from an action challenging a will. The Court reasoned that the mere probate of a will is an action in rem, which does not necessarily, and in fact seldom does, involve any case or controversy between parties within the meaning of Article III.[434] But once a dispute arises concerning the validity or construction of a will, an Article III controversy arises.[435] Accordingly, once a will has been probated, an action by a legatee, heir or other claimant against an executor is a case or controversy within the meaning of Article III,[436] as is a suit seeking a declaration as to heirship or the construction or validity of a will.[437]

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431. *See Sutton*, 246 U.S. at 207–08; *Farrell*, 199 U.S. at 114–16.

432. *E.g.*, Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946); Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979).

433. 92 U.S. 10 (1875).

434. *Id.* at 21–22.

435. *Id.* at 22.

> [J]urisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

Ellis v. Davis, 109 U.S. 485, 496–97 (1883).

436. Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963).

437. Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

Thus, although the historical limitation on federal court subject matter jurisdiction is not constitutionally mandated and can easily be overruled by Congress, at least a small part of the exception has constitutional underpinnings. Yet in most probate exception cases, an Article III controversy will have arisen. The inquiry into whether a case or controversy exists, however, must be separated from the question of whether the controversy is a "civil action" within the meaning of the statutory grants of subject matter jurisdiction to the federal courts,[438] which is subject to the historical gloss discussed above.

E. STEP 5: ABSTENTION

Finally, assuming a suit involving a probate-related matter survives the four steps discussed above, the court must consider whether it should nonetheless abstain in accordance with the parameters of the prudential abstention doctrines discussed in Part V.

VII. CONCLUSION

In the fourteenth century King Edward III of England stripped the ecclesiastical courts of the power directly to administer estates because the church clergy were converting the deceaseds' estates for their own use.[439] Although the modern-day, U.S. equivalent of the ecclesiastical courts—the probate courts—are not controlled by churches, ironically enough, the scenario discussed in the introduction illustrates how our present system of relegating probate and probate-related matters to state probate courts can permit religious groups to pillage the assets of the deceased in a manner reminiscent of pre-fourteenth century ecclesiastical practice.

The validity of the historical gloss on the statutory grant of subject matter jurisdiction to the federal courts is dubious, and when coupled with the expansive use of prudential abstention, seems little more than an effort by the federal courts to dump unwanted cases from their docket. With respect to diversity, the result is to relegate out-of-state litigants to a type of state court in which the risk of prejudice against out-of-state litigants presents the paradigmatic example of a suit that ought to be heard in federal court. When courts apply the probate exception to probate-related suits filed under RICO and other federal statutes, litigants are denied important federal rights.

438. *See id.*

439. *See* HOLDSWORTH, *supra* note 129, at 627.

If the federal courts will not reconsider the historical gloss on the diversity statute, they should actually follow eighteenth-century English practice, which as demonstrated in this Article allowed the courts of equity and common law to exercise jurisdiction over a great deal of probate-related matters, including any suit related to trusts, wills of land, and even some challenges to the validity of wills. Additionally, where an action falls within the historic scope of law or equity jurisdiction, the federal courts should limit their use of prudential abstention to the existing categories of abstention rather than creating new, result-oriented ones.

Finally, this Article illustrates that if the courts will not reverse course, Congress has the authority under Article III to do so, and concludes that fidelity to the principles underlying the establishment of a federal judiciary necessitate such a change.

DV

PROBATE COURT 4

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NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

APPLICATION FOR AUTHORITY TO RETAIN COUNSEL - MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Gregory A. Lester, Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, ("Applicant"), and files this his Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and in support of such Application, would respectfully show unto the Court the following:

1.

Applicant was appointed Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, by Order of this Court signed on July 23, 2015. A true and correct copy of the Order Appointing Temporary Administrator Pending Contest is attached hereto as **Exhibit "A."** Applicant qualified by taking the Oath on July 24, 2015 and filing a Bond on July 27, 2015.

2.

Applicant requests permission to retain the services of JILL W. YOUNG, an attorney with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP located in Houston, Harris County, Texas, as well as other members of that firm that specialize in probate litigation. Counsel will represent Mr. Lester in the matters filed herein, which involve the Temporary Administrator Pending Contest and those items enumerated in the Court's Order.

3.

Applicant wishes to formally retain Counsel on behalf of the Estate. Applicant alleges and believes retaining Counsel for the purpose of representation in the aforementioned Estate is in the best interest of the Estate.

4.

Additionally, Applicant requests the services of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP to assist Applicant with his fiduciary responsibilities pursuant to the Texas Estates Code and this Court's Order. Applicant believes that it would be in the best interest of the Estate to retain counsel to assist him with such fiduciary responsibilities in the Estate on file herein.

WHEREFORE, PREMISES CONSIDERED, Applicant GREGORY A. LESTER, Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, requests that this Court allow him to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP to represent him in his capacity as Temporary Administrator Pending Contest of the Estate of the Decedent, and for such other and further relief which the Court may deem proper.

Respectfully submitted,

GREGORY A. LESTER, TEMPORARY ADMINISTRATOR OF THE ESTATE OF NELVA E. BRUNSTING, DECEASED

MacINTYRE, McCULLOCH, STANFIELD & YOUNG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent by e-mail, e-serve, facsimile, and/or United States certified mail, return receipt requested, on this the 15th day of September, 2015, to the following parties:

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JILL W. YOUNG

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator

EXHIBIT "A"

Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

FILED
2015 JUL 24 AM 10:39
COUNTY CLERK
HARRIS COUNTY, TEXAS

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING AUTHORITY TO RETAIN COUNSEL – MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

BE IT REMEMBERED that on this day came on for consideration the Application of Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, in connection with the Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and the Court finding that due and proper notice of the Application has been given, finds that the Application should in all respects be granted, it is accordingly,

ORDERED, ADJUDGED and DECREED by the Court that Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain JILL W. YOUNG with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities.

IT IS FURTHER ORDERED by the Court that GREGORY A. LESTER, Administrator of the of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP pursuant to the Texas Estates Code and this Court's Order.

SIGNED this _____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

MACINTYRE MCCULLOCH STANFIELD
& YOUNG, LLP

By: _____

JILL W YOUNG
State Bar No. 00797670
Jill.Young@mmlawtexas.com
2900 Weslayan, Suite 150
Houston, Texas 77027
(713) 572-2900
(713) 572-2902 (Fax)

ATTORNEYS FOR APPLICANT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S
CERTIFICATE OF INTERESTED PARTIES

Defendant Jill Willard Young, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiff Candace Louise Curtis, pro se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020
   occurtis@sbcglobal.net

2. Plaintiff Rik Wayne Munson, pro se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348
   blowintough@att.net

3. Defendant Jill Willard Young
   c/o Robert S. Harrell
   Rafe A. Schaefer
   Norton Rose Fulbright US LLP
   1301 McKinney St., Suite 5100
   Houston, Texas 77010
   robert.harrell@nortonrosefulbright.com
   rafe.schaefer@nortonrosefulbright.com

4. Defendant Candace Kunz-Freed
   c/o Cory S Reed

Thompson Coe Cousins Irons
One Riverway, Suite 1600
Houston, TX 77056
713-403-8213
creed@thompsoncoe.com

5. Defendant Albert Vacek, Jr.
c/o Cory S Reed
Thompson Coe Cousins Irons
One Riverway, Suite 1600
Houston, TX 77056
713-403-8213
creed@thompsoncoe.com

6. Defendant Bernard Lyle Matthews
2000 S. Dairy Ashford Rd, Suite 520
Houston, Texas 77077

7. Defendant Anita Kay Brunsting, pro se
203 Bloomingdale Circle
Victoria, TX 77904

8. Defendant Amy Ruth Brunsting, pro se
2582 Country Ledge Drive
New Braunfels, TX 78132

9. Defendant Neal Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079

10. Defendant Bradley Featherston
Featherston Tran P.L.L.C.
20333 State Highway 249, Suite 200
Houston, Texas 77070

11. Defendant Stephen Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

12. Defendant Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010

13. Defendant Jason Ostrom
Ostrom Sain LLP
5020 Montrose Blvd

Suite 310
Houston, TX 77006
713-863-8891
jason@ostromsain.com

14. Defendant Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, TX 77079

15. Defendant Bobbie Bayless
Bayless Stokes
2931 Ferndale
Houston, TX 77098
713-522-2224
Fax: 713-522-2218
Email: bayless@baylessstokes.com

16. Defendant The Honorable Christine Riddle Butts
c/o Laura Beckman Hedge
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
713-274-5137
laura.hedge@cao.hctx.net

17. Defendant Clarinda Comstock
c/o Laura Beckman Hedge
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
713-274-5137
laura.hedge@cao.hctx.net

18. Defendant Toni Biamonte
c/o Laura Beckman Hedge
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
713-274-5137
laura.hedge@cao.hctx.net

Dated: October 6, 2016

Respectfully submitted,
/s/ Robert S. Harrell

Robert S. Harrell
Attorney-in-charge
State Bar No. 09041350
Federal ID No. 6690
robert.harrell@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

OF COUNSEL:
Rafe A. Schaefer
State Bar No. 24077700
Federal ID No. 1743273
rafe.schaefer@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Certificate of Interested Parties has been served on October 6, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Candace Louise Curtis	§	
Rik Wayne Munson	§	
Private Attorneys General Plaintiffs	§	
	§	
vs.	§	
	§	Civil Action No._____
Candace Kunz-Freed	§	
Albert Vacek, Jr.	§	
Bernard Lyle Mathews III	§	
Neal Spielman	§	
Bradley Featherston	§	
Stephen A. Mendel	§	
Darlene Payne Smith	§	
Jason Ostrom	§	
Gregory Lester	§	
Jill Willard Young	§	
Christine Riddle Butts	§	
Clarinda Comstock	§	
Toni Biamonte	§	Demand for Jury Trial
Bobbie Bayless	§	
Anita Brunsting	§	
Amy Brunsting	§	
Does 1-99	§	
Defendants in their individual capacities	§	

VERIFIED COMPLAINT FOR DAMAGES

1. 18 U.S.C. §1962 (c) Violations of the Racketeer Influenced Corrupt Organization Act involving multiple predicate acts that include both spoke and hub, and chain conspiracies.
2. 18 U.S.C. §1962 (d) Conspiracy to violate 18 U.S.C. §1962 (c)
3. 42 U.S.C. §1983 Substantive Due Process State Actor Conspiracy Against Civil Rights;
4. 42 U.S.C. §1985 Conspiracy to Deny Equal Protection of Law;
5. 18 U.S.C. §242 Conspiracy to deprive plaintiff of impartial forum;
6. Breach of Fiduciary to the Public Trust;
7. In Concert Aiding and Abetting Breach of Fiduciary both Public and Private;
8. In Concert Aiding and Abetting Misapplication of Fiduciary; and,
9. The right of claims provided at 42 U.S.C. §1988(a), 18 U.S.C. §1964 (c) and Rule 10b-5 Securities Exchange act of 1934 (17 C.F.R. §240.10b-5) and the right of private claims implied therefrom.

This lawsuit raises concerns affecting the public interest

I. Verified Complaint

1. COMES NOW Rik Wayne Munson and Candace Louise Curtis, Plaintiffs in the above-styled and numbered cause, filing this Complaint against Defendants: Candace Kuntz-Freed, Albert Vacek Jr., Bernard Lyle Mathews III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, Toni Biamonte, Bobbie Bayless, Anita Brunsting, Amy Brunsting and Does 1-99 (collectively, "Defendants") and in support thereof would show unto the Court the following matters and facts. Plaintiffs have personal knowledge and are also informed and believe and therefore aver that:

II. Jurisdiction

2. Jurisdiction of this Honorable Court is invoked pursuant to 28 USC §1331 and 18 U.S.C. 1964 (c), as the substantive claims in this action raise federal questions arising under the Racketeering Influenced Corrupt Organizations Act (RICO) 18 U.S.C. §1961–1968 and the right of claims at 18 U.S.C. §1964(c) (civil remedy for RICO violations) and under 42 U.S.C. §§1983 and 1985 (remedies for color of official right and other Civil Rights violations).

3. This Court has supplemental jurisdiction over the state law and common law tort claims under 28 U. S. C. §1367(a), because the claims arise out of the same controversy, transactions and occurrences.

4. This Court has supplemental jurisdiction pursuant to the Federal Declaratory Judgment Act of 1946: Title 28 United States Code §§2201-2202, RICO 18 U.S.C. § 1965(a), (b), and (d); and Rules 57 and 65 of the Federal Rules of Civil Procedure; and pursuant to the general legal and equitable powers of this Court.

5. This Court also has supplemental jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act[1] (15 U.S.C. §78aa) and exclusive jurisdiction over these claims, as this action also arises under Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) and the right of private claims implied therefrom.

6. Venue is proper in the Southern District of Texas under 28 USC §1391(a)(1), because all of the events herein complained of occurred in the Southern District of Texas and elsewhere within the jurisdiction of the Court.

III. Parties

7. Plaintiffs incorporate by reference herein all allegations set forth above, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth.

DEFENDANTS

8. Defendant Candace Kuntz-Freed is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Candace Kuntz-Freed
9545 Katy Freeway, Suite 390,
Houston, Texas 77024

At all times material to this complaint Defendant Candace Kunz-Freed was a person, attorney with the Vacek Law firm, a partner in Vacek & Freed PLLC and also a Texas Notary Public, engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079-9545.

9. Defendant Albert Vacek Jr. is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

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[1] Securities Exchange Act of 1934, 15 U.S.C. §§78a-78kk (1982)

Albert Vacek, Jr.
11777 Katy Freeway, Suite 300 South
Houston, Texas 77079

At all times material to this complaint Defendant Albert Vacek Jr. was a person, attorney with the Vacek Law firm and a partner in Vacek & Freed PLLC engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079.

10. Defendant Bernard Lyle Mathews III. is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bernard Lyle Mathews III
11777 Katy Freeway, Suite 300 South
Houston, Texas 77079

At all times relevant to this complaint Defendant Bernard Lyle Mathews III was a person, an attorney with the Vacek Law firm a.k.a. Vacek & Freed PLLC, engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079.

11. Defendant Neal E. Spielman is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Neal E. Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079

At all times material to this complaint Defendant Neal E. Spielman was a person engaged in the practice of law at 1155 Dairy Ashford, Suite 300, Houston, Texas 77079.

12. Defendant Bradley Featherston is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bradley E. Featherston
Featherston Tran PLLC
20333 State Highway 249, Suite 200
Houston, Texas 77070

At all times material to this complaint Defendant Bradley Featherston was a person engaged in the practice of law at The Mendel Law Firm, L.P., 1155 Dairy Ashford, Suite 104, Houston, Texas 77079.

13. Defendant Stephen A. Mendel is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, Texas 77079

At all times material to this complaint Defendant Stephen A. Mendel was a person engaged in the practice of law at 1155 Dairy Ashford, Suite 104 Houston, Texas 77079

14. Defendant Darlene Payne Smith is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Darlene Payne Smith
Crain, Caton & James
Five Houston Center, 17th Floor
1401 McKinney, Suite 1700
Houston, Texas 77010

At all times material to this complaint, Defendant Darlene Payne Smith was a person engaged in the practice of law at 1401 McKinney, Suite 1700, Houston, Texas 77010.

15. Defendant Jason Ostrom is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Jason Ostrom
Ostrom Morris, PLLC
6363 Woodway, Suite 300
Houston, Texas 77057

At all times relevant to this complaint, Defendant Jason Ostrom was a person engaged in the practice of law at 5020 Montrose Blvd., Suite 310, Houston, Texas 77079.

16. Defendant Gregory Lester is an adult resident citizen of Texas with a principal place of business in Harris County, Texas and may be served with process at:

Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, Texas 77079

At all times material to this complaint Defendant Gregory Lester was a person engaged in the practice of law at 955 N Dairy Ashford Rd # 220, Houston, Texas 77079.

17. Defendant Jill Willard Young is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Jill Willard Young
MacIntyre, McCulloch, Stanfield and Young LLP
2900 Weslayan, Suite 150
Houston, Texas 77027

At all times material to this complaint Defendant Jill Willard Young was a person engaged in the practice of law at 2900 Weslayan, Suite 150, Houston, Texas 77027.

18. Defendant Christine Riddle Butts is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Christine Riddle Butts
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At all times material to this complaint, Defendant Christine Riddle Butts was a person, an elected State official occupying the office of Judge of Harris County's Probate Court No. 4, a position of public trust charged with the preservation of public justice, liable in her individual capacity for the non-judicial acts complained of herein.

19. Defendant Clarinda Comstock is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Clarinda Comstock
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At all times material to this complaint, Defendant Clarinda Comstock was a person, an Associate Judge of Harris County Probate Court No. 4, a position of public trust charged with the preservation of public justice, liable in her individual capacity for the non-judicial acts complained of herein.

20. Defendant Toni Biamonte is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At various times relevant to this Complaint, Defendant Toni Biamonte was a person, employed as an Official Court Reporter at the Harris County Civil Courthouse, 201 Caroline, Houston, Texas 77002.

21. Defendant Bobbie Bayless is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bobbie G. Bayless
2931 Ferndale
Houston, Texas 77098

At all times material to this complaint, Defendant Bobbie G. Bayless was a person engaged in the practice of law at 2931 Ferndale Houston, Texas 77098.

22. Defendant Anita Brunsting is an individual person, resident citizen of Victoria County, Texas, not a state actor, and may be served with process at:

Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904

23. Defendant Anita Brunsting owes fiduciary obligations to Plaintiff Curtis and has breached those fiduciary duties. Each of the above named Defendants were fully aware of the fiduciary duties Anita Brunsting owed to Plaintiff Curtis when they aided and abetted Anita's breach of those fiduciary duties.

24. Defendant Anita Brunsting is proximately related to Harris County Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, through her attorneys: Co-Defendants, Bradley Featherston and Stephen Mendel and co-conspirator Defendant Candace Kuntz-Freed.

25. Defendant Amy Brunsting is an individual person, resident citizen of Comal County, Texas, not a state actor, and may be served with process at:

Amy Ruth Brunsting
2582 Country Ledge
New Braunfels, Texas 78132

26. Defendant Amy Brunsting owes fiduciary obligations to Plaintiff Curtis. Each of the above named Defendants was fully aware of the fiduciary duties owed to Plaintiff Curtis by Amy Brunsting when they aided and abetted Amy's breach of those fiduciary duties.

27. Defendant Amy Brunsting is proximately related to Harris County Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, through her attorney, Defendant Neal Spielman and co-conspirator Defendant Candace Kuntz-Freed.

28. At all relevant times, each RICO Defendant above-named was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

PLAINTIFFS

29. Plaintiff Candace Louise Curtis (Curtis) is a citizen resident of California and, as set forth in the following paragraphs of this Complaint, Plaintiff Curtis has standing to bring this action as provided at 18 U.S.C. 1964(c) because she has suffered concrete financial injury to her business and property rights proximately caused by the Defendants' conspiracy to violate 18 U.S.C. §1962(c) as set forth in this Complaint.

30. At all times material to this complaint Plaintiff Curtis was a citizen resident of California and, as set forth in the following paragraphs of this Complaint, is actively engaged in defending her property interests in Harris County Texas Probate Court No. 4, an enterprise which engages in and the activities of which affect interstate and foreign commerce, and has standing to bring this action as provided at 18 U.S.C. 1964(c) and 42 U.S.C. §§1983, 1985 and 1988(a) having suffered tangible injury to business and property as the actual and proximate result of Defendants' color of law criminal conduct.

31. Plaintiff Curtis is a member of the body politic of this nation, entitled to and having a property interest in honest government and, because the issues raised herein affect the public interest at large, Plaintiff Curtis also has standing to bring this action on behalf of the public trust as a Private Attorney General, under the Racketeer Influenced Corrupt Organization Statutes, codified at 18 U.S.C. §§1961-1968 as hereinafter more fully appears.

32. At all times material to this complaint Plaintiff Rik Wayne Munson (Munson) was a citizen resident of California. Plaintiffs Munson and Curtis have been domestic partners for nine years, with overlapping business activities. Munson has also suffered tangible harm to his business and property proximately caused by Defendants' criminal color of law conduct.

33. Munson is a member of the body politic of this nation, entitled to and having a property interest in honest government and, because the issues raised herein affect the public interest at large, Munson also has standing to bring this action on behalf of the public trust as a Private Attorney General, under the Racketeer Influenced Corrupt Organization Statutes, codified at 18 U.S.C. §§1961-1968 as hereinafter more fully appears.

34. Plaintiffs can be served at 218 Landana Street, American Canyon, California 94503-1050.

IV. CLAIM 1
18 U.S.C. §1962(d) the Enterprise

Harris County Probate Court No. 4

35. At all times material to this Complaint:

36. Harris County Probate Court No. 4 constituted an "enterprise" within the meaning of Title 18 United States Code Section 1961(4), (hereinafter, "the enterprise"), a legal entity, which was engaged in, and the activities of which affected interstate and foreign commerce.

37. Harris County Probate Court was created by statute to administer, apply, and interpret the laws of the State of Texas in a fair and unbiased manner without favoritism, extortion, improper influence, personal self-enrichment, self-dealing, concealment, or conflicts of interest.

38. As a statutory state probate court the Harris County Probate Court was involved in various aspects of interstate and foreign commerce including, but not limited to, the adjudication of lawsuits involving parties residing or based outside the state of Texas; lawsuits involving properties in other states and in foreign nations; lawsuits involving property under the control of corporations, insurance companies, and other large business entities that conduct national and international business and pay litigation costs, judgments, and settlements, out of

funds derived from doing national and international business affecting interstate and foreign commerce.

39. As a statutory state probate court the Harris County Probate Court has original jurisdiction in cases involving the settling of estates that include titles to land, control over securities, control of large monetary sums, and other matters in which jurisdiction was not placed in another trial court.

40. As a statutory state probate court the Harris County Probate Court was involved in various aspects of interstate and foreign commerce including, but not limited to the settling of estates and the distribution of assets that included real property located in foreign states and countries, along with securities traded under the laws of the United States, and assets held by federally insured banks and brokerage companies.

The Vacek Law Firm a.k.a. Vacek & Freed PLLC

41. The Vacek Law Firm, also known as Vacek & Freed PLLC constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

42. Defendants Albert Vacek Jr. and Candace Kuntz-Freed were employed by or associated with The Vacek Law Firm.

The Mendel Law Firm, LP

43. The Mendel Law Firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

44. Defendants Bradley Featherston and Stephen Mendel were employed by or associated with The Mendel Law Firm.

Griffin & Matthews

45. The Griffin & Matthews law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

46. Defendant Neal Spielman was employed by or associated with the Griffin & Matthews law firm.

Crain, Caton & James

47. The Crain, Caton & James law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

48. Defendant Darlene Payne Smith was employed by or associated with the Crain, Caton & James law firm.

Bayless & Stokes

49. The Bayless & Stokes law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4) a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

50. Defendant Bobbie Bayless was employed by or associated with the Bayless & Stokes law firm.

MacIntyre, McCulluch, Stanfied & Young LLP

51. The MacIntyre, McCulluch, Stanfied & Young L.L.P Law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4) a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

52. Defendant Jill Willard Young was employed by or associated with the MacIntyre, McCulluch, Stanfied & Young LLP law firm.

V. Enterprise in Fact Association

53. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth.

54. At all times material to this complaint:

55. Defendants Candace Kuntz-Freed, Albert Vacek Jr., Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, and Bobbie Bayless, were attorneys and officers of the Court practicing in the Harris County Probate Court, a legal entity, which was engaged in, and the activities of which affected interstate and foreign commerce in the Southern District of Texas and elsewhere within the Jurisdiction of the Court and were thus state actors within the meaning of 42 U.S.C. §1983 and 18 U.S.C. §1951, liable in their individual capacities.

56. At various times material to this complaint Defendants Candace Kuntz-Freed, Albert Vacek Jr., Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, and Bobbie Bayless, were persons associated together in fact for the common purpose

of carrying out an ongoing criminal enterprise, as described in this Complaint; namely, through a multi-faceted campaign of lies, fraud, threats and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity, constituting various "enterprise in fact associations" as defined in Title 18 United States Code Section 1961(4), which engaged in, and the activities of which affected interstate and foreign commerce. (See Boyle v. United States, 129 S. Ct. 2237, (2009)).

Harris County Tomb Raiders a.k.a. The Probate Mafia

57. At all times material to this complaint the "Harris County Tomb Raiders" (HCTR) was a secret society of persons, both known and unknown to Plaintiffs, associated together in fact for the common purpose of carrying out an ongoing criminal theft enterprise, as described in this Complaint; namely, through a multi-faceted campaign of lies, fraud, threats, and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity as hereinafter more fully appears.

58. All Public Actor Defendants are believed to be regular participants in this secret society.

CLAIM 2
The Racketeering Conspiracy 18 U.S.C. 1962(C)

59. From various unknown dates, and continuing thereafter up to and including July 2008, and continuing thereafter up to and including March 9, 2016 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, the Defendants: Candace Kuntz-Freed, Albert Vacek Jr., Bernard Lyle Mathews III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, Toni Biamonte, Bobbie Bayless, Anita Brunsting, and Amy Brunsting, together with others known and unknown to Plaintiffs,

being persons employed by or associated with Harris County Probate Court, an enterprise which engaged in, and the activities of which affected interstate and foreign commerce, did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Sections 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. §1961(1) in violation of 18 U.S.C. §1962(c) and (d) to wit:

a. Conspiracy to deprive the citizens of Texas and other litigants of the honest services of elected officials, 18 U.S.C. §§1341, 1343, & 1346.

i. 18 U.S.C. §1341 (Property Mail Fraud);

ii. 18 U.S.C. §§1341 and 1346 (Honest Services Mail Fraud);

iii. 18 U.S.C. §1343 (Property Wire Fraud);

iv. 18 U.S.C. §§1343 and 1346 (Honest Services Wire Fraud);

b. State Law Theft - Texas Penal Codes 31.02 and 31.03 and Hobbs Act Extortion 18 USCS §1951(b)(2) and 2;

c. Tampering with a federal judicial proceeding by false affidavit, 18 U.S.C. §§402, 1001 and 2 (overlap with 18 U.S.C. §§1503, 1505, 1512, 1621. 1622 and 1623; perjury, subornation of perjury, and false declarations).

d. Obstruction of Justice and conspiracy to obstruct Justice, 18 U.S.C. §371--conspiracy to injure or intimidate any citizen on account of his or her exercise or possibility of exercise of Federal right (overlap with 18 U.S.C. §§1503, 1510, 1512, and 1513)

e. Suborning perjury, 18 U.S.C. §1622, may also be an 18 U.S.C. §1503 omnibus clause offense.

f. Spoliation: Destruction or concealment of evidence or attempts to do so, 18 U.S.C. §1512(c) conspiracy (18 U.S.C. §1512(k)

g. Misapplication of fiduciary in excess of $300,000 Texas Penal Codes §§32.45, theft 31.02, 31.03

h. Illegal Wiretapping in violation of Texas Penal Code §16.02 and 18 U.S.C. §2511 (§§2510-22), as amended by the Electronic Communications Privacy Act (ECPA) (Pub. L. 99-508; 10/21/86) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (Pub. L. 90-351; 6/19/68), also known as the "Wiretap Act"

i. Identity Theft 18 U.S.C. §1028(a)(7)

j. False Instruments used to commit Banking Fraud 18 U.S.C. §1344

k. False Instruments used to commit Sections 18 U.S.C. §§1341, 1343 & 1346 (Property and Honest Services Mail and Wire Fraud)

l. False Instruments used to commit Extortion 18 U.S.C. §1951(b)(2) and 2

m. Aiding and abetting each of the above, (all actors, all counts) 18. U.S.C. §371

n. Conspiring to promote, conceal and protect predicate activities (a-m above) from discovery, investigation and prosecution by legitimate governmental interests.

60. The above enumerated "RICO Defendants" did unlawfully, willfully, and knowingly combine, conspire, and agree with each other and with other persons known and

unknown to Plaintiffs to violate 18 U.S.C. §1962(c) as described herein, in violation of 18 U.S.C. §1962(d).

61. In connection with the acts and omissions alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the internet, the mails, interstate public switched telephone network wire and cellular telephone communications, and the facilities of the national securities exchange.

62. Upon information and belief, these Defendants knew that they were engaged in a conspiracy to commit the predicate acts, and they knew that the predicate acts were part of such racketeering activity, and that the participation and agreement of each of them was necessary to facilitate the commission of this pattern of racketeering activity.

63. Upon information and belief, each above-named RICO Defendant agreed to conduct or participate, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S. C. §1962(c) and (d).

64. Each RICO Defendant knew about and agreed to facilitate the Enterprise's scheme to obtain property from Plaintiffs.

65. It was part of the conspiracy that the RICO Defendants and their co-conspirators would commit a pattern of racketeering activity in the conduct of the affairs of the Enterprise, including aiding, abetting, promoting and concealing the racketeering activity and predicate acts hereinafter set forth.

66. It was part of the racketeering conspiracy that through the use of estate plan instruments Defendants, acting in concert both individually and severally, would and did

intercept assets intended for the heirs of estates that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce.

67. It was part of the racketeering conspiracy that through the use of trust instruments Defendants, acting in concert, both individually and severally, would and did intercept assets intended for beneficiaries of trusts that pass through the Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce.

68. It was part of the racketeering conspiracy that "trust and estate plan attorneys" would use the "Doctrine of Privity" to shield their part in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

69. It was part of the racketeering conspiracy that attorneys participating in the scheme and artifice to deprive would use the Texas Attorney Immunity Doctrine to shield their part in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

70. It was part of the racketeering conspiracy that judges participating in the scheme and artifice to deprive would use the doctrines of Judicial, Qualified and Absolute Immunity to shield their participation in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

71. It was part of the racketeering conspiracy that through the use of guardianship actions Defendants, acting in concert, both individually and severally, would and did use the

Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce, to judicially kidnap and rob the elderly, our most vulnerable citizens, of their freedom, dignity, fundamental human and civil rights and property accumulated throughout a lifetime, often also robbing heirs and beneficiaries of familial relations and inheritance expectancies.

72. It was part of the racketeering conspiracy that Defendants would commit violations of constitutionally protected rights under the disguise of a statutory scheme.

73. It was understood that each conspirator would participate in the commission of at least two acts of racketeering activity in the conduct of the affairs of the enterprise, as part of the racketeering conspiracy.

74. It was also a part of the racketeering conspiracy that Defendants, acting in concert, both individually and severally, would and did promote, conceal, and otherwise protect the purposes of the racketeering activity from possible criminal investigation and prosecution as hereinafter more fully appears.

VI. Purposes of the Racketeering Activity

75. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth and alleges that:

76. From an unknown date and continuing thereafter up to and including the specific events complained of herein, these Defendants, in concert with persons both known and unknown to Plaintiffs, individually and severally, conspired to participate and did participate in an organized criminal consortium for the purpose of actively redirecting trust, estate and other

third party property into the state probate courts, where Defendants operate to convert third party property to their own unjust self-enrichment.

77. It was a purpose of the racketeering activity that Defendants, acting in concert, both individually and severally, would and did loot assets held by private trusts and estates against the will of the victims, family members, and friends, through the use of guardianship protection statutes and other schemes.

78. It was a purpose for the racketeering activity that trust and estate plan attorneys acting in concert with other attorneys and with persons both known and unknown to Plaintiffs, would and did exploit the elders of our society for the purpose of syphoning off the assets of our eldest and most vulnerable citizens through the aforementioned schemes and artifices, as exemplified herein and elsewhere in the public domain and as hereinafter more fully appears.

79. The purpose for the racketeering activity was to facilitate the looting of wealth, also known as **Involuntary Redistribution of Assets** (IRA) from its rightful owners, for the unjust enrichment of attorneys and other legal professionals operating out of state probate courts, including but not limited to Harris County Probate Court No. 4 and these co-conspirator Defendants.

80. The specific quid pro quo method of profit sharing is unknown to Plaintiffs but appears to include political aspiration, judicial favors, campaign contributions, bribes and kickbacks, cronyism and "Good Ole Boy" networking.

81. The conclusion that there is a reciprocal stream-of-benefits necessarily flows from the facts of the in-concert illegal activities of the co-conspirators, as exemplified herein.

82. Based upon personal knowledge and upon information and belief Plaintiffs allege that:

83. The above enumerated "RICO Defendants" unlawfully, knowingly and willfully combined, conspired, confederated and agreed together and with others to violate 18 U.S.C. §1962(c) as described herein, in violation of 18 U.S.C. § 1962(d).

84. Upon information and belief, Each RICO Defendant knew about and agreed to facilitate the Enterprise's scheme to obtain property from Plaintiff and others, and to participate, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

85. The RICO Defendants knew that they were engaged in a conspiracy to commit the predicate acts, and they knew that the predicate acts were part of such racketeering activity, and that the participation and agreement of each of them was necessary to allow the commission of this pattern of racketeering activity. This conduct constitutes a conspiracy to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. §1962(d).

86. Each of the above named RICO Defendants conducted or participated, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961 (5) and in violation of 18 U.S.C. § 1962(c) & (d), to wit:

Commercial Purpose

87. The constituent members comprising each ENTERPRISE are engaged in a concerted campaign to extort, defraud, trick, deceive and corruptly persuade their client victims (probate court litigants) to exercise proprietary control over, and extract maximum value from,

the target trust and/or estate, in much the same way a bankruptcy trustee operates to control a bankruptcy estate.

88. Further, in unfairly protecting their commercial purposes, each ENTERPRISE operative works with the others to harass, threaten, abuse, denigrate, impugn, threaten, and intimidate litigants, competitors, critics, reformers, and others.

89. The various ENTERPRISES operate as a "cabal", a semi-private, sometimes secret, informal affiliation of entities with public presence and identity that is wholly or partially inaccurate and misleading as to the true goals, affiliations, and processes of the cabal.

90. The ENTERPRISES achieve their respective purposes by collusion among operators and affiliates, who in their COMMERCIAL SPEECH represent to their clients that the relationships among the members are in compliance with legal and ethical PROFESSIONAL DUTIES when they, in fact, are not.

91. Funded by fraudulent exploitation of the parties, ENTERPRISE operators and affiliates engage in bribery, exchanging value, emoluments, patronage, nepotism, and/or kickback schemes within their networks to assure system-wide "cash flow" and continued viability and vitality of the ENTERPRISES.

92. ENTERPRISES refuse such cooperation with non-affiliates, thereby baring potential competitors. These bars include fraudulently manipulated referrals, representations, certifications, nepotism, illegal antitrust tactics, and manufactured pitfalls to support the pervasive "who you know" method the cabal uses in defiance of the rule of law.

93. Probate Mafia operators, like the attorney Defendants here, regularly breach one or more of their PROFESSIONAL DUTIES of loyalty, zealous advocacy, fiduciary

responsibility, and professional competence through one or more "false flag" frauds to induce, deprive, or deceive clients and other litigants not schooled in the law. These "False Flag" maneuvers involve one or more COMMERCIAL SPEECH misrepresentations to unsophisticated layperson parties, thereby depriving them of the benefits of legitimate legal professional services and perpetrating fraud upon the Court.

94. Probate Mafia operatives have developed numerous pernicious tools to maximize their benefits from the wealth redistribution. A prominent artifice is the "independent" appointee that appears in virtually every case.

95. Probate Mafia schemes and artifices also include such practices as Poser Advocacy. "Poser Advocacy" is the practice and sale of what appears to be the practice of law to inexperienced parties. Attorneys engaging in poser advocacy act to appeal to their client's emotions, greed, or other untoward ends to generate fees, with no beneficial legal work performed.

96. Poser Advocates write angry letters, exchange worthless formwork discovery, and repeatedly file baseless amendments and motions with no hope of productive benefit, for the sole purpose of generating a bill.

97. In the more sophisticated commercial legal marketplace poser advocacy is not tolerated, as clients insist upon, and attorneys abide by, legitimate practice and ethical standards.

98. Because of the unique nature of the clients and market, Probate Mafia members like these are generally able to pass off Poser Advocacy as if it was real legal work. It is not.

99. In the Probate Mafia enterprise scheme of things the familial wealth hijacker represents an exploitation opportunity and, as such, receives special attention.

VII. Means and Methods of the Racketeering Conspiracy

100. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth and alleges that:

101. It was a part of the racketeering conspiracy that a modern day criminal cabal through a network of probate lawyers, judges, court appointed administrators, guardians, social workers, doctors and "care facilities" would use county courtrooms relying upon the judicially created and judicially enlarged doctrine of absolute judicial immunity, the Texas Attorney Immunity Doctrine, the Doctrine of Privity and the Probate Exception to federal diversity jurisdiction as a license to steal money and other liquid assets and to liquidate their victims' real and other property for their own unjust self-enrichment, all without their victim's consent and over their objections.

102. This looting has been given the appearance of legitimacy under the health and welfare label of "guardianship protection" stealing not only assets, but also the due process rights, liberty, and human dignity of their victims.

103. It was a part of the conspiracy that Defendants would and did use the Harris County Probate Courts and the offices of Judge to deprive the citizens of Texas and other litigants, of their right to the honest services of elected officials, while promoting, concealing, and otherwise protecting the purposes of the racketeering activity from possible criminal investigation and prosecution.

104. It was part of the racketeering conspiracy that Defendants would and did use the various probate instruments and legal artifice and that acting in concert, both individually and severally, Defendants would and did siphon off assets rightfully belonging to others.

105. It was part of the racketeering conspiracy that the various probate instruments would be and were designed to facilitate falsifications and alterations and that the enterprise participants would be selectively blind to the obvious inconsistencies, avoiding any questions of forgery or fraud appearing in the public record.

106. It was part of the racketeering conspiracy that Defendants acting individually and in concert would and did use the Harris County Probate Courts and the offices of Judge to trap litigant victims in an endless cycle of delay and expense until the victims were forced to settle for the least injustice in order to walk away with even a meager portion of what rightfully belongs to them from the onset.

107. It was part of the racketeering conspiracy that Defendants acting individually and in concert would obtain and did attempt to obtain improper dominion over the property of Plaintiff Curtis and others, attempting to obtain consent induced by the wrongful use of actual and threatened force, violence and fear of economic harm to Plaintiff Curtis' rights in property, using the 8/25/2010 extortion instrument, hereinafter more fully described.

108. It was part of the racketeering conspiracy that unscrupulous attorneys who market trust and estate plan instruments promising to provide asset protection, minimize taxes, avoid probate, and avoid guardianship, acting individually and in concert, would engage in the redirection of family trusts into the hands of the "Probate Cabal" by undermining those products when the aging client weakens and by generating conflicts amongst the beneficiaries, thus delivering their client's prosperity to the exact evil that victims were guaranteed protection from.

109. It was part of the racketeering conspiracy that Defendants, for their own unjust self-enrichment, acting individually and in concert, would use the Harris County Probate Court and the appearance of legitimacy that attaches to public offices and officers to manipulate and

game the legal process in ways that deprived citizens who came before the court of rights guaranteed and protected by our state and federal constitutions.

110. In the matter from which these RICO claims arise, "Curtis v Brunsting", both the estate instruments and the inter vivos family trust agreements were the vehicles used by Defendant enterprise acolytes to foster and maintain the estate and trust looting probate litigation that Decedents were promised the trust would, but did not, provide protection from.

111. As an actual consequence and proximate result of the actions of the very people who sold the Brunstings "Peace of Mind", promising that their products and services would provide protection from probate, the Brunsting trust and estate are caught in probate stasis.

112. Defendants, in concert, have maintained the litigation and are holding the Brunsting trusts hostage to a settlement agreement that will include the attorneys' fees getting paid from the trust corpus, in direct opposition to the Grantors express intentions.

113. In the case in point, Plaintiff/Beneficiary Curtis was at the precipice of legal victory and the enterprise stepped in to redirect the outcome away from the public record to a mediation/ADR bait-and-switch, in which the outcome is predetermined by the personal interests of enterprise acolytes and not by law.

114. In pursuit of that plan Plaintiff Curtis is being coerced into a staged mediation, with Defendants who have demonstrated no intention of honoring any legal or moral obligations.

115. It is also part of the conspiracy that the true purpose of mediation is to convert the controversy from breach of the trust agreement and the drafting of false instruments, into discussions regarding breach of a mediated settlement agreement which, like the family trust agreement and remand agreement, is certain to also not be honored by the acolytes.

116. In this way enterprise acolytes maximize the take while preventing the dirt from floating to the surface of the public record, and promoting, concealing, and otherwise protecting the purposes of the racketeering activity from possible criminal investigation and prosecution.

117. In the case in point, the probate Court judges and the attorneys are holding settlement of the Brunsting family of trusts hostage to the payment of attorneys' fees.

118. The controversy is over on the pleadings and Plaintiff Curtis prevails as a matter of law, but the lawyers and judges will not allow any resolution that does not have the lawyers walking away with the lion's share of the family inheritance, nor any solution that allows the facts to be compiled on the public record.

119. Defendant Candace Freed is neatly sequestered in the District Court so that she will never be confronted by a legitimate plaintiff and there is no executor occupying the office. There is no docket control order or trial date, and summary judgment motions were swept off the table on the very last day in which summary judgment motions were to be heard and the summary judgment motion hearing became a hearing on a motion for protective order regarding dissemination of illegally obtained wiretap recordings, in furtherance of a pattern of racketeering activity as hereinafter more fully appears.

VIII. Predicate Acts and Actors

120. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth:

CLAIM 3 (Honest Services) 18 U.S.C. §1346 and 2

121. From an unknown date, known to be on or before July 21, 2015 and continuing thereafter up to and including September 10, 2015 and continuing thereafter up to and including March 9, 2016 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, Defendants Neal Spielman, Bradley Featherston, Stephen Mendel, Greg Lester, Christine Butts, Clarinda Comstock, Jill Young, and Toni Biamonte, being "persons" employed by or associated with Harris County Texas Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, together with persons both known and unknown to Plaintiffs, individually and severally, did unlawfully, willfully and knowingly conspire to alter the course of justice under color of official right, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, in that Defendants conspired to redirect civil litigation away from the public record to a staged mediation planned for the purpose of obtaining Plaintiff Curtis' property by consent, using disinheritance threats, that in order to get any of her property at all she will have to agree to "settle", for the purpose of adding delay and increasing expense, for bringing further extortion pressure to bear, to intimidate, for the purpose of holding the money cow trust hostage for attorney fee ransoms, for the purpose of avoiding summary judgment hearings thus preventing evidence of the racketeering conspiracy from reaching the public record, for the purpose of diverting the discussion away from breach of the ruptured and looted trust agreement to argument over breach of a mediated settlement agreement, all in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in that:[2]

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[2] Also violations of 18 U.S.C. §242 and 42 U.S.C. §§1983, 1985 and right of claims under §1988 also including in concert aiding and abetting public and private breach of fiduciary and misapplication of fiduciary.

CLAIM 4 - (Honest Services) 18 U.S.C. §1346 and 2

122. On or about September 10, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Bradley Featherston, Greg Lester, Christine Riddle Butts, Clarinda Comstock, Jill Willard Young, and Toni Biamonte, did unlawfully, willfully and knowingly conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in violation of 18 U.S.C. §1346:

CLAIM 5 - (Honest Services) 18 U.S.C. §1346 and 2;
CLAIM 6 - (Wire Fraud) 18 U.S.C. §1343 and 2;
CLAIM 7 - (Fraud) 18 U.S.C. §1001 and 2;
CLAIM 8 (Theft/ Hobbs Act Extortion) Texas Penal Codes 31.02 & 31.03 and 18 U.S.C. §1951(b)(2) and 2;
CLAIM 9 (Conspiracy to Obstruct Justice) 18 USAC §371;[3]

123. On or about January 14, 2016, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Gregory Lester and Jill Willard Young did unlawfully, willfully and knowingly conspire to alter the course of justice for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive by electronically filing a fictitious report into the Harris County Probate Court No. 4, an enterprise which engages in and the activities of which affect interstate and foreign commerce, as part of the conspiracy entered into on or before September 10, 2015 and in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in violation of 18 U.S.C. §§371, 1001, 1346, 1343, 1951(b)(2) and 2 – Texas Penal Codes 31.02 and 31.03.

[3] Also violations of 18 U.S.C. §242 and 42 U.S.C. §§1983, 1985 and right of claims under §1988 also including in concert aiding and abetting public and private breach of fiduciary and misapplication of fiduciary.

CLAIM 10 - (Honest Services) 18 U.S.C. §1346 and 2;
CLAIM 11 - (Fraud) 18 U.S.C. §1001 and 2;
CLAIM 12 (Theft) Texas Penal Codes 31.02 & 31.03/ Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2;
CLAIM 13 (Conspiracy) 18 USAC §371 and 2;

124. On or about March 9, 2016, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Stephen A. Mendel, Gregory Lester, Bobbie Bayless, and Clarinda Comstock did unlawfully conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, entered into on or before July 2015, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce involving violations of 18 U.S.C. §§371, 1001, 1346, 1343, 1951(b)(2) and 2, and 42 U.S.C. §§242, 1983 and 1985 and Texas Penal Codes §§31.02 and 31.03. 32.21.

125. As part of the racketeering conspiracy Defendants, acting in concert, both individually and severally, acted together to promote, conceal, and otherwise protect the purposes of the racketeering activity from possible criminal investigation and prosecution.

CLAIM 14 (Illegal Wiretap) Texas Penal Code 16.02 and 18 U.S.C. §2511 and 2[4]

126. From an unknown date, including but not limited to March and April of 2011, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Amy Brunsting acting individually and in concert with persons both known and unknown to Plaintiff Curtis, conspired to unlawfully,

[4] Texas Penal Code 16.02 and 18 U.S.C. §2511 (§§2510-22) Texas Civil Wire Tap Act found at Tex. Civ. Prac. & Rem. Code, Title 123 as amended by the Electronic Communications Privacy Act (ECPA)(Pub. L. 99-508; 10/21/86) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (Pub. L. 90-351; 6/19/68), also known as the "Wiretap Act".

willfully and knowingly intercept and did unlawfully intercept, record, possess, conceal, manipulate and selectively disseminate illegal wiretap recordings of private telephone conversations intercepted by use of an electronic recording device attached to the telephone line of Nelva Brunsting, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in that:

CLAIM 15 - Dissemination of illegal wiretap Recordings by mail 18 U.S.C. §§1341 and 2

127. On or about July 1, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Bradley Featherston, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly cause illegal wiretap recordings of private telephone conversations between Carl Brunsting and his wife Drina Brunsting, to be delivered by certified mail to Plaintiff Curtis and the third party attorneys for parties in multiple pending lawsuits, in violation of 18 U.S.C. §2511(1)(c) and Texas Penal Code 16.02. The illegal wiretap recordings selectively disseminated on CD-ROM, are believed to have been made on or about March and April 2011. The CD contained items which were Bates numbered 5814 to 5840. Included among those items were the following four audio recordings:[5]

CLAIM 16 - Illegal Wiretap (Tampering and Manipulation)

(1) a 43 second phone conversation between Carl and his mother which, according to the file properties, was both created and modified on February 27, 2015 (Brunsting 5836.wav);

[5] Excerpted from Carl Brunstings Motion for Protective Order filed July 17, 2015.

CLAIM 17 - Illegal Wiretap (Tampering and Manipulation)

(2) a phone conversation lasting 6 minutes and 44 seconds between Carl and Drina which, according to the file properties, was both created and modified on February 27, 2015 (Brunsting 5837.wav);

CLAIM 18 - Illegal Wiretap (Manipulation)

(3) a telephone conversation lasting 19 minutes and 18 seconds between Carl and Drina which, according to the file properties, was both created and modified on April 22, 2011 (Brunsting 5838.wav); and

CLAIM 19 - illegal wiretap (Manipulation)

(4) a telephone conversation lasting 8 minutes and 53 seconds between Carl and Drina which, according to the file properties, was both created and modified on March 21, 2011 (Brunsting 5839.wav).

CLAIMS 20 and 21 Illegal Wiretap, in Concert Aiding and Abetting: Spoliation, Destruction or Concealing Evidence 18 U.S.C/ §§1512(c) conspiracy 1512(k) & 1519 and 2

128. On July 21, 2015 in the southern district of Texas and elsewhere within the jurisdiction of the Court, Counsel for Anita Brunsting - Bradley Featherston, Counsel for Amy Brunsting - Neal Spielman, and Counsel for Carole Anne Brunsting - Darlene Payne Smith, filed in-concert objections to the application for protective orders filed by Carl Brunsting, and while objecting to the protective order and arguing the recordings contained relevant and admissible evidence, Defendants Bradley Featherston, Neal Spielman, and Darlene Payne Smith simultaneously objected to qualifying the recordings in any way and just like the infamous

8/25/2010 extortion instrument, when confronted with demands for a show of proof they are unwilling to bring forth any evidence, and none of them claim to know anything individually.

129. Implicit in the assertion the recordings were relevant and the content admissible, Defendants claimed to possess personal knowledge that: "(1) the recording device was capable of recording the events offered in evidence; (2) the operator was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers on the tape are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement."

130. Defendants have obtained, possessed, manipulated and disseminated illegal wiretap recordings and are now concealing:

a. The device used

b. The original wiretap media

c. Other wiretap recordings

d. The chain of custody

CLAIM 22 - Conspiracy to Obstruct Justice

131. On or about July 22, 2015 in the southern district of Texas and elsewhere within the jurisdiction of the Court, Defendants Bobbie Bayless, Clarinda Comstock, and Neal Spielman, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly combine, conspire and agree with each other to obstruct and conceal evidence and engage in predicate acts including but not limited to 18 U.S.C. §§1512(c) conspiracy 1512(k), 1519 and 18

U.S.C. §§1951(b)(2) and 2, Extortion and Texas Penal Codes §§31.02, 31.03 and 32.21 (theft/extortion) by removing Summary Judgment Motions from Calendar and creating stasis, as part of a conspiracy to deprive Plaintiff Curtis of an impartial forum (18 USC §§242) , access to the Courts (42 U.S.C. §1983) substantive due process, (42 U.S.C. §1985) equal protection, and (Texas Penal Code §§31.02 and 31.03) property rights.[6]

CLAIM 23 – Conspiracy Re: State Law Theft/ Extortion - in Concert Aiding and Abetting

132. From an unknown date and continuing thereafter up to and including July 21, 2015 and continuing thereafter up to and including September 10, 2015 and March 9, 2016 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Bradley Featherston, Stephen A. Mendel, Gregory Lester, Christine Riddle Butts, Clarinda Comstock, Jill Willard Young, and Toni Biamonte, together with persons both known and unknown to Plaintiffs, individually and severally, did unlawfully, willfully and knowingly conspire to obstruct, delay and affect, and did attempt to obstruct, delay and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by extortion under color of official right, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that Defendants conspired to obtain and did attempt to obtain the property of Plaintiff Candace Louise Curtis, endeavoring to obtain consent induced by the wrongful use of actual and threatened force, violence and fear, in that the Defendants did conspire to use a fictional report, a staged mediation, an extortionist thug mediator, acts obstructing and delaying justice, and the forged extortion instrument, to make threats with the intention of instilling fear of economic

[6] 18 U.S.C. §2: In concert aiding and abetting: Public Services Fraud, Breach of Fiduciary, Misapplication of Fiduciary, Concealing evidence of forgery (Texas Penal Code §32.21) and racketeering.

harm in Plaintiff Curtis in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce.

CLAIM 24 - State Law Theft/ Hobbs Act Extortion 18 U.S.C. 1951(b)(2) and 2

133. On or about August 25, 2010, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Candace Freed and Anita Brunsting did unlawfully, knowingly and intentionally further a conspiracy to obstruct, delay and affect, and did attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in such commerce, by extortion under color of official right, as that term is defined in Texas Penal Codes 31.02 and 31.03 and Title 18, United States Code, Section 1951, in that Defendant Candace Freed, with persons both known and unknown to Plaintiffs, did conspire to obtain improper dominion over the assets of the Brunsting family of trusts and the expected property of Plaintiff Curtis, by collaborating to obtain consent induced by the wrongful use of threatened force, violence and fear, in that Defendant Candace Freed did implement the Vacek design in drafting the heinous 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (hereinafter the "8/25/2010 QBD" or "Extortion Instrument"). Such instrument was, in fact, used to make threats and to instill fear of economic harm in the victims of the inheritance theft conspiracy, for which the extortion instrument was created, along with other intended illicit purposes as hereinafter more fully appears.

CLAIM 25 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 26 – Wire Fraud 18 U.S.C. §§1343

134. On or about October 23, 2010, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting knowingly and intentionally

furthered the extortion conspiracy by emailing the extortion instrument (8/25/2010 QBD) to Plaintiff Curtis, along with trust instruments, in violation of 18 U.S.C. §§1343 and 1951.

CLAIM 27 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 28 – Mail Fraud 18 U.S.C. §§1341

135. On or about June 4, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting knowingly and intentionally furthered the extortion conspiracy in her response to Plaintiff Curtis' first interrogatories. At item number 15 page 6, Anita uses the heinous extortion instrument to threaten Carl and Candace, both of whom are victims of Anita's felony thefts in violation of 18 U.S.C. §§1951.

136. Defendants Anita Brunsting and Bradley Featherston placed the June 4, 2015 response to interrogatories containing extortion threats for delivery with the U.S. Postal Service in violation of 18 U.S.C. §1341.

CLAIM 29 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 30 – Wire Fraud 18 U.S.C. §§1341

137. On or about February 18, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Amy Brunsting knowingly and intentionally furthered the extortion conspiracy in her response to Plaintiff Curtis' second application for distribution. On page 7, Amy Brunsting and her Counsel Neal Spielman advance threats using the heinous extortion instrument in violation of 18 U.S.C. §1951(b)(2) and 2, knowing full well that it is not a legitimate instrument by any measure.

138. Defendants Amy Brunsting and Neal Spielman placed the June 4, 2015 response to interrogatories containing extortion threats for delivery with the U.S. Postal Service in violation of 18 U.S.C. §1341, 1951(b)(2) and 2.

CLAIM 31 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 32 – Mail Fraud 18 U.S.C. §§1341

139. On or about June 25, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Amy Brunsting and her Counsel, Defendant Neal Spielman unlawfully, willfully and knowingly advanced threats using the heinous extortion instrument in Amy's response to Plaintiff Curtis' Request for Production, delivered USPS in violation of 18 USC §§1341, 1951.

CLAIM 33 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 34 – Mail Fraud 18 U.S.C. §§1341

140. On or about December 5, 2014, Defendant Anita Brunsting through her Counsel, Defendant Bradley Featherston, advanced and furthered the extortion conspiracy when Featherston filed Anita's objection to Carl Brunsting and Plaintiff Curtis' applications for distribution. In section F on page 6 Anita uses the extortion instrument to allege that both theft victims Carl and Candace had violated the in terrorem clause in the extortion instrument by defending their beneficial interests, in violation of 18 U.S.C. §1951 and 1341.

> *"4. If the Court finds the in terrorem clause is enforceable, then Candace and Carl have no right to any distribution from the trust".*

CLAIM 35 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 36 - Mail Fraud 18 U.S.C. §1341

141. On or about June 4, 2015 in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, in response to Plaintiff Curtis' first interrogatories, at item number 15 page 6, again used the heinous extortion instrument to threaten Carl and Candace, both of whom are victims of Anita's first degree felony thefts, delivered USPS in violation of 18 USC §§1341 and 1951.

CLAIM 37 – Tampering with Federal Judicial Proceeding by False Affidavit 18 U.S.C. §371, 1621 and 2

142. On March 6, 2012, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Amy Brunsting and Bernard Lyle Mathews III, aided and abetted by others unknown to Plaintiff and aiding and abetting others unknown to Plaintiff, did corruptly, unlawfully, knowingly, and willfully obstruct, influence, and impede an official proceeding, and did attempt to do so, that proceeding being Candace Louise Curtis v. Anita Brunsting et al., No. 4:12-CV-00592 the United States District Court for the Southern District of Texas, Houston Division, by filing a false affidavit In violation of Title 18, United States Code, Sections 1001, 1512(c)(2), 1623, and 18 U.S.C. §402 and F.R.C.P. Rule 11(b).

CLAIM 38 - Spoliation, Destruction or Concealing Evidence 18 U.S.C. §§1512(c) Conspiracy 1512(k) and 1519 and 2

143. On or about September 10, 2015 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Toni Biamonte as an official court reporter did unlawfully, knowingly and willfully spoliate, destroy or otherwise conceal material evidence of a racketeering conspiracy in violation of 18 U.S.C. §§1512(c) conspiracy 1512(k) and 1519, aiding and abetting the racketeering conspiracy and is, thus, a principal in acts in furtherance of the aforementioned and described conspiracy to violate 18 U.S.C. §1962(c) in violation of 18 U.S.C. §1962(d).

CLAIM 39 - Forgery on Internal Revenue forms 18 U.S.C. §§287, 371, and 1001 and 2

144. On or about June 7, 2011, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive did unlawfully, knowingly

and willfully apply the Social Security Number, the record identifier used to ensure proper payment of benefits in both the Title II and Title XVI programs, and did forge the signature of Plaintiff Curtis on stock transfer forms, to facilitate the improper transfer of securities by Computershare, an investment services corporation.

CLAIM 40(a-d) - Forgery & False Instruments, Aiding and Abetting Theft, Banking, Wire, Mail and Securities Fraud (Texas Penal Codes 31.02 & 31.03 & 18 U.S.C. §§1001 and 2)

Conspiracy to commit securities, mail, wire and banking fraud,

a. False Instruments used to trade in Securities 18 USC §§1348/1349 – Securities Fraud, 15 U.S.C. §78aa and 15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) and the right of claims implied therefrom. (fraudulent trading in securities is civilly and criminally actionable but are not predicate acts)

b. False Instruments used to commit Banking Fraud 18 U.S.C. §1344

c. False Instruments used to commit Sections 18 U.S.C. §§1341, 1343 and 1346 (Property Mail and Wire Fraud)

d. False Instruments used to commit 18 U.S.C. §1951 Hobbs Act Extortion

145. From an unknown date, known to be before July 1, 2008, and continuing thereafter up to and including August 25, 2010 and continuing thereafter up to and including December 21, 2010 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Candace Kuntz-Freed drafted false instruments, undermining the trust instrument products and estate plan services marketed by Vacek & Freed

PLLC, to facilitate the theft of trust assets by Anita Brunsting, as part of a racketeering conspiracy in that:

146. Anita Brunsting used the illicit July 1, 2008 Appointment of Successor Trustees drafted by Candace Freed to commit acts complained of herein.

147. Anita Brunsting used the illicit August 25, 2010 appointment of successor co-trustees to commit acts complained of herein.

148. Anita Brunsting used the illicit December 21, 2010 appointment of successor trustee to commit acts complained of herein.

149. Freed drafted the illicit 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (The Extortion Instrument) in concert with Anita Brunsting, and not at the behest of her client Nelva Brunsting.

150. Anita Brunsting used the illicit 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (The Extortion Instrument), in concert with others known and unknown to Plaintiff, to commit the acts of theft and extortion complained of herein.

151. Plaintiff Curtis was damaged in her property rights by Anita Brunsting's improper use of the illicit instruments drafted by Candace Freed.

CLAIM 41 - Misapplication of fiduciary in excess of $300,000.00 Texas Penal Code Thefts §§31.02, 31.03, 32.45 (against elderly person Tex. Pen. Cd. 32.45(d))
CLAIMS 42(a–q) Wire, Mail, and Banking Fraud 18 USC §§1341, 1343, 1344 and 2

152. From an unknown date, known to be on or before December 21, 2010 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, aided and abetted by persons known and unknown to

Plaintiff and aiding and abetting persons known and unknown to Plaintiff, did unlawfully, willfully and knowingly, misapply fiduciary assets in excess of $300,000 (Texas Penal Code theft §§32.45, 31.02, 31.03) in that:

153. Defendant Anita Brunsting paid her personal credit card debts and made other improper transfers from a trust bank account, in violation of provisions of the family trust, the common law and the Texas trust code. These comingling and misapplication transactions were perfected by electronic funds transfer and the use of the mails.[7]

IX. Non-Predicate Act Civil Claims for Damages

CLAIMS 43 (a-j) Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5)

154. From an unknown date, believed to be on or before December 21, 2010, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting did unlawfully, willfully and knowingly misapply fiduciary assets in excess of $300,000 (Texas Penal Code theft §§32.45, 31.02, 31.03). Many of the transactions involved Electronic Funds Transfers and others involved the use of the mails. Many transactions also involved banking and/or securities fraud 18 USC §§1341, 1343, 1344 and 2 and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) in that:

155. May 11, 2011, using the illicit instruments drafted by Defendant Candace Freed, Defendant Anita Brunsting, acting trustee de son tort, unlawfully, knowingly and willfully

[7] Please see Appendix A attached hereto for a chart of events, dates, transactions and mediums employed. (Securities fraud is not considered a Predicate Act and the securities theft transactions are herein pled in the alternative as misapplications of fiduciary involving wire, mail and banking fraud)

misappropriated and misapplied fiduciary assets by improperly transferring 1120 Shares of Exxon and Chevron securities valued at $90,854.00 in violation of 18 U.S.C. §1343 (Wire Fraud) and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5)

156. June 15, 2011 using the illicit instruments drafted by Defendant Candace Freed, Defendant Anita Brunsting, acting trustee de son tort, unlawfully, knowingly and willfully misappropriated and misapplied fiduciary assets by improperly transferring 2320 shares of Exxon and Chevron securities valued at $208,122.80 in violation of 18 U.S.C. §1343 (Wire Fraud) and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

157. Between April 20, 2012 and April 2, 2013 using the illicit instruments drafted by Defendant Candace Freed, Defendants Anita Brunsting, and Amy Brunsting, acting trustees de son tort, unlawfully, knowingly and willfully misappropriated and misapplied fiduciary assets in excess of $38,000 by paying personal legal liabilities with trust funds from a trust bank account in violation of 18 U.S.C. §1344 (Banking Fraud) and 18 U.S.C. §1343 (Wire Fraud) and §2 (aiding and abetting).[8]

158. Plaintiff Curtis, as a beneficiary and the de jure trustee for the Brunsting trusts, has fiduciary duties interfered with and prevented by the racketeering activity, has beneficial

[8] Please see appendix A attached here to for a chart of event dates, transactions and mediums employed

property interests in the assets so misapplied and has suffered tangible injury to business and property as a direct and proximate result of all the tortious acts herein claimed.

CLAIM 44 - Conspiracy to violate 18 USC §§242 and 2, & 42 U.S.C. §§1983 and 1985

159. From an unknown date and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, each of the Defendants herein named, individually and severally, aided and abetted by persons known and unknown to Plaintiff and aiding and abetting persons known and unknown to Plaintiff, did unlawfully, willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice to deprive Plaintiff Curtis of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, under color of law and color of official right, statute, ordinance, regulation, custom and policy, in violation of 18 USC §§242 and 2, and 42 U.S.C. §§1983 and 1985.

CLAIM 45 - Aiding and Abetting Breach of Fiduciary, Defalcation and Scienter

160. The RICO Defendants understood that Anita and Amy Brunsting owed fiduciary duties to Plaintiff Curtis and that the acts and omissions of Anita and Amy Brunsting were torts and breaches of those duties, and the RICO Defendants aided and abetted Anita and Amy Brunsting's torts and breaches in pursuit of their own unjust self-enrichment anyway.

161. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting breach of fiduciary both before and after the fact, in an exact amount to be proven at trial.

162. Plaintiff is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting breach of fiduciary both before and after the fact.

CLAIM 46 - Aiding and Abetting Misapplication of Fiduciary, Defalcation and Scienter

163. The RICO Defendants understood that Anita and Amy Brunsting owed fiduciary duties to Plaintiff Curtis and that Anita and Amy Brunsting had misapplied fiduciary in excess of $300,000 and that Plaintiff Curtis had an inheritance expectancy interest in those assets. The RICO Defendants aided and abetted Anita and Amy Brunsting's continued misapplications of fiduciary anyway.

164. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting misapplications of fiduciary both before and after the fact, in an exact amount to be proven at trial.

CLAIM 47 - Tortious Interference with Inheritance Expectancy

165. The RICO Defendants understood that Plaintiff Curtis had an expectancy of an inheritance right. The RICO Defendants intentionally interfered with Plaintiff Curtis' expectancy. The interference was through acts of fraud and duress and the interference was, thus, tortious.

166. As an actual consequence and proximate result, Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting tortious interference with Plaintiff Curtis' inheritance expectancy, both before and after the fact, in an exact amount to be proven at trial.

IX. Continuity

167. The law and economics of development focuses its attention on the effects that well-functioning legal and judicial systems have on economic efficiency in the development of nations. As studies have shown, a factor that has greatly retarded commerce in developing nations is the imperfection of the law and the uncertainty in its application. Entrenched corrupt practices within the public sector (i.e., official systemic corruption) hamper the clear definition and enforcement of laws, and therefore commerce is impeded.

168. Systemic corruption within the public sector can be defined as the systematic use of public office for private benefit that results in a reduction in the quality or availability of public goods and services (Buscaglia 1997a). In these cases, corruption is systemic when a government agency only supplies a public good or service if an otherwise unwilling transfer of wealth takes place from an individual or firm to the public sector through bribery, extortion, fraud, or embezzlement.[9]

169. Widespread corruption is a symptom that the state is functioning poorly. In fact, the entrenched characteristic of official corrupt practices is rooted in the abuse of market or organizational power by public sector officials. Many studies have already shown that the presence of perceived corruption retards economic growth, lowers investment, decreases private savings, and hampers political stability. Moreover, foreign direct investment has demonstrated a special negative reaction to the presence of corruption within the public sectors in developing countries showing that the degree of corruption in importing developing countries also affects the trade structure of exporting countries.

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[9] Although published in a 1999 the Hoover Institute Article written by Eduardo Buscaglia describes the Harris County Probate Court racketeering enterprise operations with this statement and is on all fours with the facts of the case in point.

170. The multi-billion dollar Probate industry is an illicit wealth redistribution empire run by morally bankrupt judges and attorneys, supported by an army of tax-dollar fed "judicial administrators," and social workers that George Orwell would marvel at.

171. Harris County Probate Court has become the enterprise out of which public corruption operates an institutionalized theft cartel, involved in redistributing the assets of our elderly, and most vulnerable citizens, amongst a cabal of corrupt judges, lawyers and "board certified professionals".

172. The very people who occupy offices of public trust charged with the preservation of public justice, with the advent of absolute judicial impunity from civil claims, have become the worst organized cartel of predatory criminals in the history of this nation. Genovese, Luciano, Bonanno, Gambino, Lucchese, Capone, Cohen, Nitty, and the Krays would be drooling with envy and admiration, as they could never have built such an invasive and successful criminal empire in the private sector.

173. Judicial Corruption Enterprise activities involve kidnap, carjack, assault, murder, armed robbery, extortion, false arrest, malicious prosecution, denial of due process and false imprisonment, amounting to color of law human trafficking and domestic terrorism. The root cause for all of this institutionalized organized criminal and terrorist activity can be traced to more than one scheme to defraud, but those schemes are but variations on a limited number of known artifices.

174. Amongst the main culprits is the perversion and expansion of the 17th Century English common law doctrine of limited judicial immunity, into a doctrine of absolute criminal impunity where public corruption flourishes because there are no deterrent consequences.

175. Once having crossed the solid demarcation between right and wrong, the line begins to grey until, one day, it becomes completely invisible.

176. The notion that these people can operate with criminal impunity has led to an environment where the appearance of legitimacy is no longer of any real importance and the displays of criminal intent have become more than blatant. It has become a trade practice in the state Courts of this nation.

177. Plaintiff Curtis is one of those victims, as were Elmer and Nelva Brunsting, Carl Brunsting, Willie Jo Mills, Ruby Peterson, Helen Hale, Olga De Francesca, Doris Conte and countless others both known and unknown to Plaintiffs.[10] The Estate of Nelva Brunsting, the Brunsting Trusts and the Brunsting heirs and trust beneficiaries were among the victims.

X. Jurisdiction over Conduct Affecting Interstate Commerce

178. All federal crimes are treated as commercial[11]. Pursuant to Article 1, Section 8, Clause 3 of the federal Constitution, the United States Congress has exclusive jurisdiction over commerce amongst the states (the Commerce Clause).

179. Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States … shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

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[10] These names are well known to anyone who ever heard the phrase "Probate Mafia" and bothered to do a google type search to find out what is meant by the phrase.

[11] 27 C.F.R. 72.11

180. The RICO statutes were designed by Congress to combat organized crime in both the public and the private sectors and specifically provides a civil right of claims for injuries to business or property as a result of a pattern of activity involving two (2) or more of the listed predicate acts. That criterion has been satisfied as herein delineated.

XI. Affirmative Pleading on Doctrines of Immunity

181. Fraus Omnia Vitiat.

182. There is no judicial immunity to civil liability for non-judicial acts, anti-judicial acts or RICO Predicate Acts forming a pattern of racketeering activity, as none of these types of conduct can be said to be judicial functions even when disguised as such.

183. Article III, Section 1 of the Constitution for the United States of America, specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts. Congress used this power to establish 13 U.S. Courts of Appeals, 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade.

184. The U.S. Supreme Court is the only court of general jurisdiction in the federal system, all other federal courts are courts of limited jurisdiction created and empowered by Congressional statute.

185. Chief Justice Marshall, writing for the Court in Cohens, 19 U.S. at 404 observed:

> *It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot, "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."*

186. The list of predicate acts specifically enumerated at 18 U.S.C. §1961(1) includes §§371, 1346 and 1951 each of which requires a public corruption/color of law element.

187. To argue that a judge is immune from a public corruption statute if acting within the four walls of a court room and exempt if not acting in his public capacity is a very precise statement that judges are above the law and that the victims of public corruption related deprivations of rights have no remedy and, thus, no rights.

188. 42 U.S.C. §1983 clearly states an exception to actions brought against judicial officers. That one exception provides pre-requisites to injunctive relief in actions brought against judicial officers. To conclude that Congress did not intend a private right of claims against judges under §1983 is to render the language of the statute superfluous, which the rules governing statutory construction will not allow.

42 U.S.C. §1983 Civil Action for Deprivation of Civil Rights (emphasis added)

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,* ***except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*** *For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*
>
> *(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)*

189. There is no privity defense, no attorney immunity defense and no judicial immunity exception to the federal Racketeer Influenced Corrupt Organization statutes. The

language of the Act differentiates between criminal and civil liability and explicitly provides private parties with civil remedy for injuries to property and business caused by a pattern of racketeering activity involving two (2) or more of the predicate acts defined at 18 USC §1961(1). The RICO Act provides for criminal penalties in Section 1963 and provides private litigants with civil remedy in section 1964(c).

190. Several predicate act statutes, mostly codified in Title 18 of the United States Code, provide for federal prosecution of public corruption. Among these are the Hobbs Act (18 USC §1951), the mail and wire fraud statutes (18 USC §§1341 & 1343), the honest services fraud provision (18 USC §1346), the Travel Act (18 USC §1952), the federal official bribery and gratuity statute, (18 U.S.C. § 201 enacted 1962), the Foreign Corrupt Practices Act (FCPA) (enacted 1977), the federal program bribery statute, 18 U.S.C. § 666 (enacted 1984) and the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC §§1961-1968 enacted in 1970). Each statute directly addresses public corruption and most of these are specifically identified as RICO predicate acts at 18 U.S.C. 1961(1).

191. The recent plea bargain and sentencing of Texas State 404th District Court Judge Abel Limas to six years in federal prison for violating 18 U.S.C. §§1343 (Honest Services Wire Fraud), §1346 (Honest Services Fraud) and §1951 and 2 (Hobbs Act Extortion), clearly verifies that these public corruption statutes apply to judges by operation of the RICO statutes[12].

192. According to the Indictment, Limas accepted paltry sums as bribes, in return for ad litem appointments and other favorable judicial treatments. Counts 1-8 were that Limas:

[12] Case 1:11-cr-00296 Filed in TXSD on 03/29/11

a. Accepted $600 for the continuation and subsequent termination of a probation revocation proceeding in violation of Texas Penal Code 36.02(a)(2) (bribery).

b. Accepted $700 in exchange for changing the terms of a criminal defendant's appearance bond in violation of Title 18 United States code sections 1951 and 2.

c. Accepted $1,500 for changing the terms of a criminal defendant's conditions of probation to permit the defendant to report by mail rather than in person in violation of Texas Penal Code section 36.02(a)(2) (bribery).

d. Accepted $1,800 in a scheme or artifice to defraud in violation of title 18, United States Code, sections 1343 and 1346.

e. Accepted $8,000 for favorable judicial rulings on motions, case transfers, and other matters in civil cases for the benefit of participating attorneys in violation of Title 18, United States code, section 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2) (bribery).

f. Accepted $4,500 for an ad litem appointment in a civil case in violation of Texas Penal Code section 36.02(a)(2) (bribery).

g. Accepted $5,000 for denial of a motion for sanctions and other judicial acts in violation of Title 18 United States Code sections 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2).

h. Accepted $2,000 for the modification of the terms of probation and dismissal of charges against a criminal defendant in violation of Title 18 United States Code sections 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2).

193. This cancerous judicial black market plague has spread like wildfire throughout the state court systems whether family law court, juvenile, traffic, probate or any other municipal level judicial arena on the state wide level. They have all become criminal racketeering enterprises and the root cause for each of these obscenities is "impunity" by any other name.

194. The cases of convicted Judge Abel Limas (6 years), convicted attorney Marc Rosenthal (26 years) and convicted Texas State Senator Jim Solis (47 months) are not isolated specific instances of public corruption, but limited examples of a national public corruption pandemic. Congress, in drafting the RICO statutes, determined public prosecutorial resources were insufficient to address this problem and specifically provided for private civil remedy.

195. Imposition of an enlarged version of the judicially created English common law doctrine of limited Judicial Immunity to foreclose private claims for civil remedy against judges under the RICO and civil rights statutes, has nurtured a contagion of public corruption throughout all three branches of government, is in direct opposition to the clearly expressed intentions of Congress in providing such remedy, is a violation of the separation of powers doctrine and, as the learned Chief Justice Marshall expressed, "*treason to the constitution*".

196. Article I Section 8 Clause 3 of the federal Constitution grants exclusive jurisdiction over interstate and foreign commerce to Congress. Given that all federal crimes are commercial the nexus with interstate commerce is inarguable and the notion that state court judges are absolutely immune from 42 U.S.C. §1983 or 18 U.S.C. §1964(c) actions ignores the very clear language of those sections and violates the supremacy clause.

XII. Aiding and Abetting, Fraud, and the Texas Attorney Immunity Doctrine

197. "Attorney Immunity" is a vague expression. Any civil immunity an attorney has is strictly limited to the litigation context and does not include actively engaging in an organized criminal color of law enterprise involving RICO predicate act conduct.

198. The RICO Defendant attorneys understood that the conduct of their clients was tortious and criminal and the lawyers helped the clients with the conduct thinking only to stuff their own pockets, showing no regard for ethics or law.

199. Conduct sufficient to state a claim of a racketeering conspiracy including predicate acts of extortion §1951, Obstruction §371, Honest Services §1346, Impartial Forum §242, Illegal Wiretap §2511, Mail Fraud §1341, Wire Fraud §1343, Banking Fraud §1344 and Securities Fraud 15 U.S.C. 78 et seq., is not within the scope of legal representation and cannot be excused as part of the attorney's discharge of his duties to his client, even when masqueraded under the litigation umbrella. (The Litigation Privilege)

200. Acts constituting knowing substantial assistance, sufficient to state a claim for in-concert aiding and abetting RICO predicate act crimes, torts and breaches of fiduciary committed by the client, are sufficient to establish in-concert liability of the attorney. There are no exceptions.

201. In reading the text and legislative history of the RICO act, the Fifth Circuit has interpreted that Congress intended the act to strike at criminal conduct characterized by at least two consequential dimensions. The offenses must be of a degree sufficiently serious not only to inflict injury upon its immediate private victims, but also to cause harm to significant public processes or institutions, or otherwise pose threats to larger societal interests worthy of the severe punitive and deterrent purposes embodied in the statute.

202. These aims and structure are somewhat akin to those reflected in the Clayton Act, 15 U.S.C. §15, after which RICO civil remedies were patterned.

203. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed "inadequate"; see also

Sedima, 473 U.S. at 489; Genty v. Resolution Trust Co., 937 F.2d 899, 912 (3d Cir. 1991) ("Congress obviously had much more in mind than merely providing compensation for individual RICO victims when it authorized RICO civil actions. Indeed, the harm of racketeering is dispersed among the public at large, including draining resources from the economy, subverting the democratic process and undermining the general welfare.")

204. This construction accords with the legislative intent of RICO. As explained by the Supreme Court, the purpose of the Act was to address a problem which Congress perceived "was of national dimensions." Turkette, 452 U.S. at 586. Specifically, in the Statement of Findings and Purpose of the Organized Crime Control Act of 1970, Title IX of which encompassed RICO, Congress declared that the activities of organized crime that prompted the legislation "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commence, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

205. Congress did not distinguish between public and private Organized Crime. Public corruption and criminal abuse of the state judicial office has become the number one threat to the security of the people of this nation. The creation of the RICO act as exemplified by the "Statement of Findings and Purpose" and the inclusion of public corruption requisite statutes among the list of predicate acts at 18 U.S.C. §1961(1) clearly indicates a congressional intention to curb public corruption and abuse of the doctrines of immunity, by a dishonest self-protection criminal racketeering industry.

206. The protection for criminal conduct in Texas has also been expanded to include wrongful conduct by attorneys under the Texas Attorney Immunity Doctrine, which has also led to the corruption and criminal takeover of our state judicial institutions.

207. Congress never intended to immunize state-court judges from federal civil rights suits nor from federal Racketeering suits and a doctrine of judicial immunity implemented by the judiciary to protect a corrupt judiciary from legislation designed to protect the public interest from corruption violates the Separation of Powers Doctrine and undermines the public's confidence in the legitimacy of the government of this Nation.

XIII. Affirmative Pleading on Conspiracy and Statutes of Limitations

208. Before the Court are allegations of public corruption involving a conspiracy to deprive the People of Texas and others of the honest services of elected public officers. The conduct complained of is only a small part of a complex multi-layered, multi-faceted criminal industry run by state court judges, who act with impunity with the full collusion, cooperation and participation of attorneys, court appointed administrators, social workers and others.

209. Federal conspiracy laws rest on the belief that criminal schemes are equally, or even more reprehensible than are the substantive offenses to which they are devoted. The Supreme Court has explained that a "collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."[13] Moreover,

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[13] Zacarias Moussaoui was convicted of conspiring to commit the terrorist attacks that occurred on September 11, 2001, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); Wadih El-Hage was convicted of conspiring to bomb the U.S. embassies in Kenya and Tanzania, In re Terrorist Bombings, 552 F.3d 93, 107 (2d Cir. 2008).

Members of an Atlanta street gang were convicted of conspiring to engage in drug trafficking, among other offenses, United States v. Flores, 572 F.3d 1254, 1258 (11th Cir. 2009); motorcycle gang members were convicted of conspiracy to traffic in drugs, United States v. Deitz, 577 F.3d 672, 675-76 (6th Cir. 2009).

observed the Court, "[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked." Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."

210. Conspiracies and acts in furtherance are considered a single continuing act for limitations purposes. The equitable doctrines of tolling and estopple apply to these claims.

XIV. Affirmative Pleading on Public Corruption

211. Public corruption involves a breach of public trust and/or abuse of position by federal, state, or local officials and their private sector accomplices. By broad definition, a government official, whether elected, appointed or hired, may violate federal law when he/she asks, demands, solicits, accepts, or agrees to receive anything of value in return for being influenced in the performance of their official duties.

212. Public corruption poses a fundamental threat to our national security and way of life. It impacts everything from how well our borders are secured and our neighborhoods protected…to verdicts handed down in courts…to the quality of our roads, schools, and other

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Dominick Pizzponia was convicted on racketeering conspiracy charges in connection with the activities of the "Gambino organized crime family of La Cosa Nostra," United States v. Pizzonia, 577 F.3d 455, 459 (2d Cir. 2009); Michael Yannotti was also convicted on racketeering conspiracy in connection with activities of the "Gambino Crime Family," United States v. Yannotti, 541 F.3d 112, 115-16 (2d Cir. 2008).

Jeffrey Skilling, a former Enron Corporation executive, was convicted of conspiracy to commit securities fraud and mail fraud, United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009); Bernard Ebbers, a former WorldCom, Inc. executive, was likewise convicted of conspiracy to commit securities fraud, United States v. Ebbers, 458 F.3d 110, 112 (2d Cir. 2006)

government services. And it takes a significant toll on our pocketbooks, wasting billions in tax dollars every year.[14]

XV. DAMAGES

213. Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expenses and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering activity herein delineated with a particularity.

214. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.

215. Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.

216. As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interests in an amount to be proven at trial.

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[14] https://www.fbi.gov/about-us/investigate/corruption

XVI. Prayers for Relief

217. Plaintiffs incorporate by reference herein all allegations set forth above, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth below.

WHEREFORE, Plaintiff prays for judgment against Defendants, each and every one of them, for the following:

I. An award of compensatory, punitive, exemplary, and enhanced damages in an amount sufficient to make Plaintiffs whole and to deter such future conduct by these Defendants, others of their kind and those who may be so disposed in future;

II. For prejudgment and post judgment interest thereon at the maximum legal rate according to proof at trial;

III. An award of reasonable costs and expenses incurred in this action, including counsel fees and expert fees as allowable under the Title 15, 18, 28, and 42 sections asserted;

IV. An award of treble damages consistent with 18 U.S.C. §1964(c);

V. Such other legal and equitable relief as the Court may deem Plaintiffs entitled to receive, including a referral of the acts found to be unethical or unlawful herein to appropriate authorities.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all issues so triable.

Plaintiff Candace Louise Curtis respectfully signs this complaint under penalty of perjury pursuant to the laws of the United States and declares that it is consistent with the Federal Rules requirement for candor.

Respectfully submitted,

7/2/2016

CANDACE L CURTIS Date
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
occurtis@sbcglobal.net

Plaintiff Rik Wayne Munson respectfully signs this complaint under penalty of perjury pursuant to the laws of the United States and declares that it is consistent with the Federal Rules requirement for candor.

Respectfully submitted,

7/2/2016

RIK WAYNE MUNSON Date
218 Landana Street
American Canyon, CA 94503
(925) 349-8348
blowintough@att.net

Appendix A

APPENDIX A

Misapplication of Fiduciary Wire and Banking Fraud Selected Violations of 18 USC §§1343 & 1344

From	To	Date	Format	Purpose
Anita Brunsting	Anita Brunsting	5/27/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $461
Anita Brunsting	Anita Brunsting	6/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2358.75
Anita Brunsting	Anita Brunsting	6/27/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2364.34
Anita Brunsting	Anita Brunsting	7/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2976.35
Anita Brunsting	Anita Brunsting	7/15/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $7242.83
Anita Brunsting	Anita Brunsting	7/18/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $1998.19
Anita Brunsting	Anita Brunsting	9/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $999
Anita Brunsting	Anita Brunsting	9/23/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $4767.00
Anita Brunsting	Anita Brunsting	10/4/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $2930.00
Anita Brunsting	Anita Brunsting	10/19/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $2033.00
Anita Brunsting	Anita Brunsting	11/3/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $102.52
Anita Brunsting	Anita Brunsting	11/7/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Amy Brunsting	11/7/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Anita Brunsting	11/8/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $3224.51
Anita Brunsting	Anita Brunsting	3/13/2012	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Amy Brunsting	3/13/2012	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Anita Brunsting	5/25/2012	EFT 18 USC §§ 1343, 1344	Misapplication of Fiduciary $5000

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Candace Louise Curtis	§	
Rik Wayne Munson	§	
Private Attorneys General Plaintiffs	§	
	§	
vs.	§	
	§	Civil Action No._____
Candace Kunz-Freed	§	
Albert Vacek, Jr.	§	
Bernard Lyle Mathews III	§	
Neal Spielman	§	
Bradley Featherston	§	
Stephen A. Mendel	§	
Darlene Payne Smith	§	
Jason Ostrom	§	
Gregory Lester	§	
Jill Willard Young	§	
Christine Riddle Butts	§	
Clarinda Comstock	§	
Toni Biamonte	§	Demand for Jury Trial
Bobbie Bayless	§	
Anita Brunsting	§	
Amy Brunsting	§	
Does 1-99	§	
Defendants in their individual capacities	§	

VERIFIED COMPLAINT FOR DAMAGES

1. 18 U.S.C. §1962 (c) Violations of the Racketeer Influenced Corrupt Organization Act involving multiple predicate acts that include both spoke and hub, and chain conspiracies.
2. 18 U.S.C. §1962 (d) Conspiracy to violate 18 U.S.C. §1962 (c)
3. 42 U.S.C. §1983 Substantive Due Process State Actor Conspiracy Against Civil Rights;
4. 42 U.S.C. §1985 Conspiracy to Deny Equal Protection of Law;
5. 18 U.S.C. §242 Conspiracy to deprive plaintiff of impartial forum;
6. Breach of Fiduciary to the Public Trust;
7. In Concert Aiding and Abetting Breach of Fiduciary both Public and Private;
8. In Concert Aiding and Abetting Misapplication of Fiduciary; and,
9. The right of claims provided at 42 U.S.C. §1988(a), 18 U.S.C. §1964 (c) and Rule 10b-5 Securities Exchange act of 1934 (17 C.F.R. §240.10b-5) and the right of private claims implied therefrom.

This lawsuit raises concerns affecting the public interest

I. Verified Complaint

1. COMES NOW Rik Wayne Munson and Candace Louise Curtis, Plaintiffs in the above-styled and numbered cause, filing this Complaint against Defendants: Candace Kuntz-Freed, Albert Vacek Jr., Bernard Lyle Mathews III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, Toni Biamonte, Bobbie Bayless, Anita Brunsting, Amy Brunsting and Does 1-99 (collectively, "Defendants") and in support thereof would show unto the Court the following matters and facts. Plaintiffs have personal knowledge and are also informed and believe and therefore aver that:

II. Jurisdiction

2. Jurisdiction of this Honorable Court is invoked pursuant to 28 USC §1331 and 18 U.S.C. 1964 (c), as the substantive claims in this action raise federal questions arising under the Racketeering Influenced Corrupt Organizations Act (RICO) 18 U.S.C. §1961–1968 and the right of claims at 18 U.S.C. §1964(c) (civil remedy for RICO violations) and under 42 U.S.C. §§1983 and 1985 (remedies for color of official right and other Civil Rights violations).

3. This Court has supplemental jurisdiction over the state law and common law tort claims under 28 U. S. C. §1367(a), because the claims arise out of the same controversy, transactions and occurrences.

4. This Court has supplemental jurisdiction pursuant to the Federal Declaratory Judgment Act of 1946: Title 28 United States Code §§2201-2202, RICO 18 U.S.C. § 1965(a), (b), and (d); and Rules 57 and 65 of the Federal Rules of Civil Procedure; and pursuant to the general legal and equitable powers of this Court.

5. This Court also has supplemental jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act[1] (15 U.S.C. §78aa) and exclusive jurisdiction over these claims, as this action also arises under Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) and the right of private claims implied therefrom.

6. Venue is proper in the Southern District of Texas under 28 USC §1391(a)(1), because all of the events herein complained of occurred in the Southern District of Texas and elsewhere within the jurisdiction of the Court.

III. Parties

7. Plaintiffs incorporate by reference herein all allegations set forth above, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth.

DEFENDANTS

8. Defendant Candace Kuntz-Freed is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Candace Kuntz-Freed
9545 Katy Freeway, Suite 390,
Houston, Texas 77024

At all times material to this complaint Defendant Candace Kunz-Freed was a person, attorney with the Vacek Law firm, a partner in Vacek & Freed PLLC and also a Texas Notary Public, engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079-9545.

9. Defendant Albert Vacek Jr. is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

---

[1] Securities Exchange Act of 1934, 15 U.S.C. §§78a-78kk (1982)

Albert Vacek, Jr.
11777 Katy Freeway, Suite 300 South
Houston, Texas 77079

At all times material to this complaint Defendant Albert Vacek Jr. was a person, attorney with the Vacek Law firm and a partner in Vacek & Freed PLLC engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079.

10. Defendant Bernard Lyle Mathews III. is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bernard Lyle Mathews III
11777 Katy Freeway, Suite 300 South
Houston, Texas 77079

At all times relevant to this complaint Defendant Bernard Lyle Mathews III was a person, an attorney with the Vacek Law firm a.k.a. Vacek & Freed PLLC, engaged in the practice of law at 11777 Katy Freeway, Suite 300 South, Houston, Texas 77079.

11. Defendant Neal E. Spielman is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Neal E. Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079

At all times material to this complaint Defendant Neal E. Spielman was a person engaged in the practice of law at 1155 Dairy Ashford, Suite 300, Houston, Texas 77079.

12. Defendant Bradley Featherston is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bradley E. Featherston
Featherston Tran PLLC
20333 State Highway 249, Suite 200
Houston, Texas 77070

At all times material to this complaint Defendant Bradley Featherston was a person engaged in the practice of law at The Mendel Law Firm, L.P., 1155 Dairy Ashford, Suite 104, Houston, Texas 77079.

13. Defendant Stephen A. Mendel is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, Texas 77079

At all times material to this complaint Defendant Stephen A. Mendel was a person engaged in the practice of law at 1155 Dairy Ashford, Suite 104 Houston, Texas 77079

14. Defendant Darlene Payne Smith is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Darlene Payne Smith
Crain, Caton & James
Five Houston Center, 17th Floor
1401 McKinney, Suite 1700
Houston, Texas 77010

At all times material to this complaint, Defendant Darlene Payne Smith was a person engaged in the practice of law at 1401 McKinney, Suite 1700, Houston, Texas 77010.

15. Defendant Jason Ostrom is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Jason Ostrom
Ostrom Morris, PLLC
6363 Woodway, Suite 300
Houston, Texas 77057

At all times relevant to this complaint, Defendant Jason Ostrom was a person engaged in the practice of law at 5020 Montrose Blvd., Suite 310, Houston, Texas 77079.

16. Defendant Gregory Lester is an adult resident citizen of Texas with a principal place of business in Harris County, Texas and may be served with process at:

Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, Texas 77079

At all times material to this complaint Defendant Gregory Lester was a person engaged in the practice of law at 955 N Dairy Ashford Rd # 220, Houston, Texas 77079.

17. Defendant Jill Willard Young is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Jill Willard Young
MacIntyre, McCulloch, Stanfield and Young LLP
2900 Weslayan, Suite 150
Houston, Texas 77027

At all times material to this complaint Defendant Jill Willard Young was a person engaged in the practice of law at 2900 Weslayan, Suite 150, Houston, Texas 77027.

18. Defendant Christine Riddle Butts is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Christine Riddle Butts
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At all times material to this complaint, Defendant Christine Riddle Butts was a person, an elected State official occupying the office of Judge of Harris County's Probate Court No. 4, a position of public trust charged with the preservation of public justice, liable in her individual capacity for the non-judicial acts complained of herein.

19. Defendant Clarinda Comstock is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Clarinda Comstock
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At all times material to this complaint, Defendant Clarinda Comstock was a person, an Associate Judge of Harris County Probate Court No. 4, a position of public trust charged with the preservation of public justice, liable in her individual capacity for the non-judicial acts complained of herein.

20. Defendant Toni Biamonte is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline
Houston, Texas 77002

At various times relevant to this Complaint, Defendant Toni Biamonte was a person, employed as an Official Court Reporter at the Harris County Civil Courthouse, 201 Caroline, Houston, Texas 77002.

21. Defendant Bobbie Bayless is an adult resident citizen of Texas, with a principal place of business in Harris County, Texas and may be served with process at:

Bobbie G. Bayless
2931 Ferndale
Houston, Texas 77098

At all times material to this complaint, Defendant Bobbie G. Bayless was a person engaged in the practice of law at 2931 Ferndale Houston, Texas 77098.

22. Defendant Anita Brunsting is an individual person, resident citizen of Victoria County, Texas, not a state actor, and may be served with process at:

Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904

23. Defendant Anita Brunsting owes fiduciary obligations to Plaintiff Curtis and has breached those fiduciary duties. Each of the above named Defendants were fully aware of the fiduciary duties Anita Brunsting owed to Plaintiff Curtis when they aided and abetted Anita's breach of those fiduciary duties.

24. Defendant Anita Brunsting is proximately related to Harris County Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, through her attorneys: Co-Defendants, Bradley Featherston and Stephen Mendel and co-conspirator Defendant Candace Kuntz-Freed.

25. Defendant Amy Brunsting is an individual person, resident citizen of Comal County, Texas, not a state actor, and may be served with process at:

Amy Ruth Brunsting
2582 Country Ledge
New Braunfels, Texas 78132

26. Defendant Amy Brunsting owes fiduciary obligations to Plaintiff Curtis. Each of the above named Defendants was fully aware of the fiduciary duties owed to Plaintiff Curtis by Amy Brunsting when they aided and abetted Amy's breach of those fiduciary duties.

27. Defendant Amy Brunsting is proximately related to Harris County Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, through her attorney, Defendant Neal Spielman and co-conspirator Defendant Candace Kuntz-Freed.

28. At all relevant times, each RICO Defendant above-named was a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

PLAINTIFFS

29. Plaintiff Candace Louise Curtis (Curtis) is a citizen resident of California and, as set forth in the following paragraphs of this Complaint, Plaintiff Curtis has standing to bring this action as provided at 18 U.S.C. 1964(c) because she has suffered concrete financial injury to her business and property rights proximately caused by the Defendants' conspiracy to violate 18 U.S.C. §1962(c) as set forth in this Complaint.

30. At all times material to this complaint Plaintiff Curtis was a citizen resident of California and, as set forth in the following paragraphs of this Complaint, is actively engaged in defending her property interests in Harris County Texas Probate Court No. 4, an enterprise which engages in and the activities of which affect interstate and foreign commerce, and has standing to bring this action as provided at 18 U.S.C. 1964(c) and 42 U.S.C. §§1983, 1985 and 1988(a) having suffered tangible injury to business and property as the actual and proximate result of Defendants' color of law criminal conduct.

31. Plaintiff Curtis is a member of the body politic of this nation, entitled to and having a property interest in honest government and, because the issues raised herein affect the public interest at large, Plaintiff Curtis also has standing to bring this action on behalf of the public trust as a Private Attorney General, under the Racketeer Influenced Corrupt Organization Statutes, codified at 18 U.S.C. §§1961-1968 as hereinafter more fully appears.

32. At all times material to this complaint Plaintiff Rik Wayne Munson (Munson) was a citizen resident of California. Plaintiffs Munson and Curtis have been domestic partners for nine years, with overlapping business activities. Munson has also suffered tangible harm to his business and property proximately caused by Defendants' criminal color of law conduct.

33. Munson is a member of the body politic of this nation, entitled to and having a property interest in honest government and, because the issues raised herein affect the public interest at large, Munson also has standing to bring this action on behalf of the public trust as a Private Attorney General, under the Racketeer Influenced Corrupt Organization Statutes, codified at 18 U.S.C. §§1961-1968 as hereinafter more fully appears.

34. Plaintiffs can be served at 218 Landana Street, American Canyon, California 94503-1050.

IV. CLAIM 1
18 U.S.C. §1962(d) the Enterprise

Harris County Probate Court No. 4

35. At all times material to this Complaint:

36. Harris County Probate Court No. 4 constituted an "enterprise" within the meaning of Title 18 United States Code Section 1961(4), (hereinafter, "the enterprise"), a legal entity, which was engaged in, and the activities of which affected interstate and foreign commerce.

37. Harris County Probate Court was created by statute to administer, apply, and interpret the laws of the State of Texas in a fair and unbiased manner without favoritism, extortion, improper influence, personal self-enrichment, self-dealing, concealment, or conflicts of interest.

38. As a statutory state probate court the Harris County Probate Court was involved in various aspects of interstate and foreign commerce including, but not limited to, the adjudication of lawsuits involving parties residing or based outside the state of Texas; lawsuits involving properties in other states and in foreign nations; lawsuits involving property under the control of corporations, insurance companies, and other large business entities that conduct national and international business and pay litigation costs, judgments, and settlements, out of

funds derived from doing national and international business affecting interstate and foreign commerce.

39. As a statutory state probate court the Harris County Probate Court has original jurisdiction in cases involving the settling of estates that include titles to land, control over securities, control of large monetary sums, and other matters in which jurisdiction was not placed in another trial court.

40. As a statutory state probate court the Harris County Probate Court was involved in various aspects of interstate and foreign commerce including, but not limited to the settling of estates and the distribution of assets that included real property located in foreign states and countries, along with securities traded under the laws of the United States, and assets held by federally insured banks and brokerage companies.

The Vacek Law Firm a.k.a. Vacek & Freed PLLC

41. The Vacek Law Firm, also known as Vacek & Freed PLLC constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

42. Defendants Albert Vacek Jr. and Candace Kuntz-Freed were employed by or associated with The Vacek Law Firm.

The Mendel Law Firm, LP

43. The Mendel Law Firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

44. Defendants Bradley Featherston and Stephen Mendel were employed by or associated with The Mendel Law Firm.

Griffin & Matthews

45. The Griffin & Matthews law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

46. Defendant Neal Spielman was employed by or associated with the Griffin & Matthews law firm.

Crain, Caton & James

47. The Crain, Caton & James law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4), a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

48. Defendant Darlene Payne Smith was employed by or associated with the Crain, Caton & James law firm.

Bayless & Stokes

49. The Bayless & Stokes law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4) a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

50. Defendant Bobbie Bayless was employed by or associated with the Bayless & Stokes law firm.

MacIntyre, McCulluch, Stanfied & Young LLP

51. The MacIntyre, McCulluch, Stanfied & Young L.L.P Law firm constituted an "enterprise," as defined in Title 18, United States Code, Section 1961(4) a legal entity associated with Harris County Probate Court, an enterprise engaged in, and the activities of which affected interstate and foreign commerce.

52. Defendant Jill Willard Young was employed by or associated with the MacIntyre, McCulluch, Stanfied & Young LLP law firm.

V. Enterprise in Fact Association

53. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth.

54. At all times material to this complaint:

55. Defendants Candace Kuntz-Freed, Albert Vacek Jr., Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, and Bobbie Bayless, were attorneys and officers of the Court practicing in the Harris County Probate Court, a legal entity, which was engaged in, and the activities of which affected interstate and foreign commerce in the Southern District of Texas and elsewhere within the Jurisdiction of the Court and were thus state actors within the meaning of 42 U.S.C. §1983 and 18 U.S.C. §1951, liable in their individual capacities.

56. At various times material to this complaint Defendants Candace Kuntz-Freed, Albert Vacek Jr., Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, and Bobbie Bayless, were persons associated together in fact for the common purpose

of carrying out an ongoing criminal enterprise, as described in this Complaint; namely, through a multi-faceted campaign of lies, fraud, threats and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity, constituting various "enterprise in fact associations" as defined in Title 18 United States Code Section 1961(4), which engaged in, and the activities of which affected interstate and foreign commerce. (See Boyle v. United States, 129 S. Ct. 2237, (2009)).

Harris County Tomb Raiders a.k.a. The Probate Mafia

57. At all times material to this complaint the "Harris County Tomb Raiders" (HCTR) was a secret society of persons, both known and unknown to Plaintiffs, associated together in fact for the common purpose of carrying out an ongoing criminal theft enterprise, as described in this Complaint; namely, through a multi-faceted campaign of lies, fraud, threats, and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity as hereinafter more fully appears.

58. All Public Actor Defendants are believed to be regular participants in this secret society.

CLAIM 2
The Racketeering Conspiracy 18 U.S.C. 1962(C)

59. From various unknown dates, and continuing thereafter up to and including July 2008, and continuing thereafter up to and including March 9, 2016 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, the Defendants: Candace Kuntz-Freed, Albert Vacek Jr., Bernard Lyle Mathews III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Darlene Payne Smith, Jason Ostrom, Gregory Lester, Jill Willard Young, Christine Riddle Butts, Clarinda Comstock, Toni Biamonte, Bobbie Bayless, Anita Brunsting, and Amy Brunsting, together with others known and unknown to Plaintiffs,

being persons employed by or associated with Harris County Probate Court, an enterprise which engaged in, and the activities of which affected interstate and foreign commerce, did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Sections 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. §1961(1) in violation of 18 U.S.C. §1962(c) and (d) to wit:

a. Conspiracy to deprive the citizens of Texas and other litigants of the honest services of elected officials, 18 U.S.C. §§1341, 1343, & 1346.

i. 18 U.S.C. §1341 (Property Mail Fraud);

ii. 18 U.S.C. §§1341 and 1346 (Honest Services Mail Fraud);

iii. 18 U.S.C. §1343 (Property Wire Fraud);

iv. 18 U.S.C. §§1343 and 1346 (Honest Services Wire Fraud);

b. State Law Theft - Texas Penal Codes 31.02 and 31.03 and Hobbs Act Extortion 18 USCS §1951(b)(2) and 2;

c. Tampering with a federal judicial proceeding by false affidavit, 18 U.S.C. §§402, 1001 and 2 (overlap with 18 U.S.C. §§1503, 1505, 1512, 1621. 1622 and 1623; perjury, subornation of perjury, and false declarations).

d. Obstruction of Justice and conspiracy to obstruct Justice, 18 U.S.C. §371--conspiracy to injure or intimidate any citizen on account of his or her exercise or possibility of exercise of Federal right (overlap with 18 U.S.C. §§1503, 1510, 1512, and 1513)

e. Suborning perjury, 18 U.S.C. §1622, may also be an 18 U.S.C. §1503 omnibus clause offense.

f. Spoliation: Destruction or concealment of evidence or attempts to do so, 18 U.S.C. §1512(c) conspiracy (18 U.S.C. §1512(k)

g. Misapplication of fiduciary in excess of $300,000 Texas Penal Codes §§32.45, theft 31.02, 31.03

h. Illegal Wiretapping in violation of Texas Penal Code §16.02 and 18 U.S.C. §2511 (§§2510-22), as amended by the Electronic Communications Privacy Act (ECPA) (Pub. L. 99-508; 10/21/86) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (Pub. L. 90-351; 6/19/68), also known as the "Wiretap Act"

i. Identity Theft 18 U.S.C. §1028(a)(7)

j. False Instruments used to commit Banking Fraud 18 U.S.C. §1344

k. False Instruments used to commit Sections 18 U.S.C. §§1341, 1343 & 1346 (Property and Honest Services Mail and Wire Fraud)

l. False Instruments used to commit Extortion 18 U.S.C. §1951(b)(2) and 2

m. Aiding and abetting each of the above, (all actors, all counts) 18. U.S.C. §371

n. Conspiring to promote, conceal and protect predicate activities (a-m above) from discovery, investigation and prosecution by legitimate governmental interests.

60. The above enumerated "RICO Defendants" did unlawfully, willfully, and knowingly combine, conspire, and agree with each other and with other persons known and

unknown to Plaintiffs to violate 18 U.S.C. §1962(c) as described herein, in violation of 18 U.S.C. §1962(d).

61. In connection with the acts and omissions alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the internet, the mails, interstate public switched telephone network wire and cellular telephone communications, and the facilities of the national securities exchange.

62. Upon information and belief, these Defendants knew that they were engaged in a conspiracy to commit the predicate acts, and they knew that the predicate acts were part of such racketeering activity, and that the participation and agreement of each of them was necessary to facilitate the commission of this pattern of racketeering activity.

63. Upon information and belief, each above-named RICO Defendant agreed to conduct or participate, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S. C. §1962(c) and (d).

64. Each RICO Defendant knew about and agreed to facilitate the Enterprise's scheme to obtain property from Plaintiffs.

65. It was part of the conspiracy that the RICO Defendants and their co-conspirators would commit a pattern of racketeering activity in the conduct of the affairs of the Enterprise, including aiding, abetting, promoting and concealing the racketeering activity and predicate acts hereinafter set forth.

66. It was part of the racketeering conspiracy that through the use of estate plan instruments Defendants, acting in concert both individually and severally, would and did

intercept assets intended for the heirs of estates that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce.

67. It was part of the racketeering conspiracy that through the use of trust instruments Defendants, acting in concert, both individually and severally, would and did intercept assets intended for beneficiaries of trusts that pass through the Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce.

68. It was part of the racketeering conspiracy that "trust and estate plan attorneys" would use the "Doctrine of Privity" to shield their part in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

69. It was part of the racketeering conspiracy that attorneys participating in the scheme and artifice to deprive would use the Texas Attorney Immunity Doctrine to shield their part in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

70. It was part of the racketeering conspiracy that judges participating in the scheme and artifice to deprive would use the doctrines of Judicial, Qualified and Absolute Immunity to shield their participation in the pattern of racketeering activity from possible culpability or any liability to the intended victims of the inheritance expectancy interception scheme.

71. It was part of the racketeering conspiracy that through the use of guardianship actions Defendants, acting in concert, both individually and severally, would and did use the

Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce, to judicially kidnap and rob the elderly, our most vulnerable citizens, of their freedom, dignity, fundamental human and civil rights and property accumulated throughout a lifetime, often also robbing heirs and beneficiaries of familial relations and inheritance expectancies.

72. It was part of the racketeering conspiracy that Defendants would commit violations of constitutionally protected rights under the disguise of a statutory scheme.

73. It was understood that each conspirator would participate in the commission of at least two acts of racketeering activity in the conduct of the affairs of the enterprise, as part of the racketeering conspiracy.

74. It was also a part of the racketeering conspiracy that Defendants, acting in concert, both individually and severally, would and did promote, conceal, and otherwise protect the purposes of the racketeering activity from possible criminal investigation and prosecution as hereinafter more fully appears.

VI. Purposes of the Racketeering Activity

75. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth and alleges that:

76. From an unknown date and continuing thereafter up to and including the specific events complained of herein, these Defendants, in concert with persons both known and unknown to Plaintiffs, individually and severally, conspired to participate and did participate in an organized criminal consortium for the purpose of actively redirecting trust, estate and other

third party property into the state probate courts, where Defendants operate to convert third party property to their own unjust self-enrichment.

77. It was a purpose of the racketeering activity that Defendants, acting in concert, both individually and severally, would and did loot assets held by private trusts and estates against the will of the victims, family members, and friends, through the use of guardianship protection statutes and other schemes.

78. It was a purpose for the racketeering activity that trust and estate plan attorneys acting in concert with other attorneys and with persons both known and unknown to Plaintiffs, would and did exploit the elders of our society for the purpose of syphoning off the assets of our eldest and most vulnerable citizens through the aforementioned schemes and artifices, as exemplified herein and elsewhere in the public domain and as hereinafter more fully appears.

79. The purpose for the racketeering activity was to facilitate the looting of wealth, also known as **Involuntary Redistribution of Assets** (IRA) from its rightful owners, for the unjust enrichment of attorneys and other legal professionals operating out of state probate courts, including but not limited to Harris County Probate Court No. 4 and these co-conspirator Defendants.

80. The specific quid pro quo method of profit sharing is unknown to Plaintiffs but appears to include political aspiration, judicial favors, campaign contributions, bribes and kickbacks, cronyism and "Good Ole Boy" networking.

81. The conclusion that there is a reciprocal stream-of-benefits necessarily flows from the facts of the in-concert illegal activities of the co-conspirators, as exemplified herein.

82. Based upon personal knowledge and upon information and belief Plaintiffs allege that:

83. The above enumerated "RICO Defendants" unlawfully, knowingly and willfully combined, conspired, confederated and agreed together and with others to violate 18 U.S.C. §1962(c) as described herein, in violation of 18 U.S.C. § 1962(d).

84. Upon information and belief, Each RICO Defendant knew about and agreed to facilitate the Enterprise's scheme to obtain property from Plaintiff and others, and to participate, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

85. The RICO Defendants knew that they were engaged in a conspiracy to commit the predicate acts, and they knew that the predicate acts were part of such racketeering activity, and that the participation and agreement of each of them was necessary to allow the commission of this pattern of racketeering activity. This conduct constitutes a conspiracy to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. §1962(d).

86. Each of the above named RICO Defendants conducted or participated, directly or indirectly, in the conduct, management, or operation of the Enterprise's affairs through a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961 (5) and in violation of 18 U.S.C. § 1962(c) & (d), to wit:

Commercial Purpose

87. The constituent members comprising each ENTERPRISE are engaged in a concerted campaign to extort, defraud, trick, deceive and corruptly persuade their client victims (probate court litigants) to exercise proprietary control over, and extract maximum value from,

the target trust and/or estate, in much the same way a bankruptcy trustee operates to control a bankruptcy estate.

88. Further, in unfairly protecting their commercial purposes, each ENTERPRISE operative works with the others to harass, threaten, abuse, denigrate, impugn, threaten, and intimidate litigants, competitors, critics, reformers, and others.

89. The various ENTERPRISES operate as a "cabal", a semi-private, sometimes secret, informal affiliation of entities with public presence and identity that is wholly or partially inaccurate and misleading as to the true goals, affiliations, and processes of the cabal.

90. The ENTERPRISES achieve their respective purposes by collusion among operators and affiliates, who in their COMMERCIAL SPEECH represent to their clients that the relationships among the members are in compliance with legal and ethical PROFESSIONAL DUTIES when they, in fact, are not.

91. Funded by fraudulent exploitation of the parties, ENTERPRISE operators and affiliates engage in bribery, exchanging value, emoluments, patronage, nepotism, and/or kickback schemes within their networks to assure system-wide "cash flow" and continued viability and vitality of the ENTERPRISES.

92. ENTERPRISES refuse such cooperation with non-affiliates, thereby baring potential competitors. These bars include fraudulently manipulated referrals, representations, certifications, nepotism, illegal antitrust tactics, and manufactured pitfalls to support the pervasive "who you know" method the cabal uses in defiance of the rule of law.

93. Probate Mafia operators, like the attorney Defendants here, regularly breach one or more of their PROFESSIONAL DUTIES of loyalty, zealous advocacy, fiduciary

responsibility, and professional competence through one or more "false flag" frauds to induce, deprive, or deceive clients and other litigants not schooled in the law. These "False Flag" maneuvers involve one or more COMMERCIAL SPEECH misrepresentations to unsophisticated layperson parties, thereby depriving them of the benefits of legitimate legal professional services and perpetrating fraud upon the Court.

94. Probate Mafia operatives have developed numerous pernicious tools to maximize their benefits from the wealth redistribution. A prominent artifice is the "independent" appointee that appears in virtually every case.

95. Probate Mafia schemes and artifices also include such practices as Poser Advocacy. "Poser Advocacy" is the practice and sale of what appears to be the practice of law to inexperienced parties. Attorneys engaging in poser advocacy act to appeal to their client's emotions, greed, or other untoward ends to generate fees, with no beneficial legal work performed.

96. Poser Advocates write angry letters, exchange worthless formwork discovery, and repeatedly file baseless amendments and motions with no hope of productive benefit, for the sole purpose of generating a bill.

97. In the more sophisticated commercial legal marketplace poser advocacy is not tolerated, as clients insist upon, and attorneys abide by, legitimate practice and ethical standards.

98. Because of the unique nature of the clients and market, Probate Mafia members like these are generally able to pass off Poser Advocacy as if it was real legal work. It is not.

99. In the Probate Mafia enterprise scheme of things the familial wealth hijacker represents an exploitation opportunity and, as such, receives special attention.

VII. Means and Methods of the Racketeering Conspiracy

100. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth and alleges that:

101. It was a part of the racketeering conspiracy that a modern day criminal cabal through a network of probate lawyers, judges, court appointed administrators, guardians, social workers, doctors and "care facilities" would use county courtrooms relying upon the judicially created and judicially enlarged doctrine of absolute judicial immunity, the Texas Attorney Immunity Doctrine, the Doctrine of Privity and the Probate Exception to federal diversity jurisdiction as a license to steal money and other liquid assets and to liquidate their victims' real and other property for their own unjust self-enrichment, all without their victim's consent and over their objections.

102. This looting has been given the appearance of legitimacy under the health and welfare label of "guardianship protection" stealing not only assets, but also the due process rights, liberty, and human dignity of their victims.

103. It was a part of the conspiracy that Defendants would and did use the Harris County Probate Courts and the offices of Judge to deprive the citizens of Texas and other litigants, of their right to the honest services of elected officials, while promoting, concealing, and otherwise protecting the purposes of the racketeering activity from possible criminal investigation and prosecution.

104. It was part of the racketeering conspiracy that Defendants would and did use the various probate instruments and legal artifice and that acting in concert, both individually and severally, Defendants would and did siphon off assets rightfully belonging to others.

105. It was part of the racketeering conspiracy that the various probate instruments would be and were designed to facilitate falsifications and alterations and that the enterprise participants would be selectively blind to the obvious inconsistencies, avoiding any questions of forgery or fraud appearing in the public record.

106. It was part of the racketeering conspiracy that Defendants acting individually and in concert would and did use the Harris County Probate Courts and the offices of Judge to trap litigant victims in an endless cycle of delay and expense until the victims were forced to settle for the least injustice in order to walk away with even a meager portion of what rightfully belongs to them from the onset.

107. It was part of the racketeering conspiracy that Defendants acting individually and in concert would obtain and did attempt to obtain improper dominion over the property of Plaintiff Curtis and others, attempting to obtain consent induced by the wrongful use of actual and threatened force, violence and fear of economic harm to Plaintiff Curtis' rights in property, using the 8/25/2010 extortion instrument, hereinafter more fully described.

108. It was part of the racketeering conspiracy that unscrupulous attorneys who market trust and estate plan instruments promising to provide asset protection, minimize taxes, avoid probate, and avoid guardianship, acting individually and in concert, would engage in the redirection of family trusts into the hands of the "Probate Cabal" by undermining those products when the aging client weakens and by generating conflicts amongst the beneficiaries, thus delivering their client's prosperity to the exact evil that victims were guaranteed protection from.

109. It was part of the racketeering conspiracy that Defendants, for their own unjust self-enrichment, acting individually and in concert, would use the Harris County Probate Court and the appearance of legitimacy that attaches to public offices and officers to manipulate and

game the legal process in ways that deprived citizens who came before the court of rights guaranteed and protected by our state and federal constitutions.

110. In the matter from which these RICO claims arise, "Curtis v Brunsting", both the estate instruments and the inter vivos family trust agreements were the vehicles used by Defendant enterprise acolytes to foster and maintain the estate and trust looting probate litigation that Decedents were promised the trust would, but did not, provide protection from.

111. As an actual consequence and proximate result of the actions of the very people who sold the Brunstings "Peace of Mind", promising that their products and services would provide protection from probate, the Brunsting trust and estate are caught in probate stasis.

112. Defendants, in concert, have maintained the litigation and are holding the Brunsting trusts hostage to a settlement agreement that will include the attorneys' fees getting paid from the trust corpus, in direct opposition to the Grantors express intentions.

113. In the case in point, Plaintiff/Beneficiary Curtis was at the precipice of legal victory and the enterprise stepped in to redirect the outcome away from the public record to a mediation/ADR bait-and-switch, in which the outcome is predetermined by the personal interests of enterprise acolytes and not by law.

114. In pursuit of that plan Plaintiff Curtis is being coerced into a staged mediation, with Defendants who have demonstrated no intention of honoring any legal or moral obligations.

115. It is also part of the conspiracy that the true purpose of mediation is to convert the controversy from breach of the trust agreement and the drafting of false instruments, into discussions regarding breach of a mediated settlement agreement which, like the family trust agreement and remand agreement, is certain to also not be honored by the acolytes.

116. In this way enterprise acolytes maximize the take while preventing the dirt from floating to the surface of the public record, and promoting, concealing, and otherwise protecting the purposes of the racketeering activity from possible criminal investigation and prosecution.

117. In the case in point, the probate Court judges and the attorneys are holding settlement of the Brunsting family of trusts hostage to the payment of attorneys' fees.

118. The controversy is over on the pleadings and Plaintiff Curtis prevails as a matter of law, but the lawyers and judges will not allow any resolution that does not have the lawyers walking away with the lion's share of the family inheritance, nor any solution that allows the facts to be compiled on the public record.

119. Defendant Candace Freed is neatly sequestered in the District Court so that she will never be confronted by a legitimate plaintiff and there is no executor occupying the office. There is no docket control order or trial date, and summary judgment motions were swept off the table on the very last day in which summary judgment motions were to be heard and the summary judgment motion hearing became a hearing on a motion for protective order regarding dissemination of illegally obtained wiretap recordings, in furtherance of a pattern of racketeering activity as hereinafter more fully appears.

VIII. Predicate Acts and Actors

120. Plaintiffs incorporate by reference herein all allegations set forth above and below, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth:

CLAIM 3 (Honest Services) 18 U.S.C. §1346 and 2

121. From an unknown date, known to be on or before July 21, 2015 and continuing thereafter up to and including September 10, 2015 and continuing thereafter up to and including March 9, 2016 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, Defendants Neal Spielman, Bradley Featherston, Stephen Mendel, Greg Lester, Christine Butts, Clarinda Comstock, Jill Young, and Toni Biamonte, being "persons" employed by or associated with Harris County Texas Probate Court, an enterprise which engages in and the activities of which affect interstate and foreign commerce, together with persons both known and unknown to Plaintiffs, individually and severally, did unlawfully, willfully and knowingly conspire to alter the course of justice under color of official right, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, in that Defendants conspired to redirect civil litigation away from the public record to a staged mediation planned for the purpose of obtaining Plaintiff Curtis' property by consent, using disinheritance threats, that in order to get any of her property at all she will have to agree to "settle", for the purpose of adding delay and increasing expense, for bringing further extortion pressure to bear, to intimidate, for the purpose of holding the money cow trust hostage for attorney fee ransoms, for the purpose of avoiding summary judgment hearings thus preventing evidence of the racketeering conspiracy from reaching the public record, for the purpose of diverting the discussion away from breach of the ruptured and looted trust agreement to argument over breach of a mediated settlement agreement, all in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in that:[2]

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[2] Also violations of 18 U.S.C. §242 and 42 U.S.C. §§1983, 1985 and right of claims under §1988 also including in concert aiding and abetting public and private breach of fiduciary and misapplication of fiduciary.

CLAIM 4 - (Honest Services) 18 U.S.C. §1346 and 2

122. On or about September 10, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Bradley Featherston, Greg Lester, Christine Riddle Butts, Clarinda Comstock, Jill Willard Young, and Toni Biamonte, did unlawfully, willfully and knowingly conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in violation of 18 U.S.C. §1346:

CLAIM 5 - (Honest Services) 18 U.S.C. §1346 and 2;
CLAIM 6 - (Wire Fraud) 18 U.S.C. §1343 and 2;
CLAIM 7 - (Fraud) 18 U.S.C. §1001 and 2;
CLAIM 8 (Theft/ Hobbs Act Extortion) Texas Penal Codes 31.02 & 31.03 and 18 U.S.C. §1951(b)(2) and 2;
CLAIM 9 (Conspiracy to Obstruct Justice) 18 USAC §371;[3]

123. On or about January 14, 2016, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Gregory Lester and Jill Willard Young did unlawfully, willfully and knowingly conspire to alter the course of justice for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive by electronically filing a fictitious report into the Harris County Probate Court No. 4, an enterprise which engages in and the activities of which affect interstate and foreign commerce, as part of the conspiracy entered into on or before September 10, 2015 and in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in violation of 18 U.S.C. §§371, 1001, 1346, 1343, 1951(b)(2) and 2 – Texas Penal Codes 31.02 and 31.03.

[3] Also violations of 18 U.S.C. §242 and 42 U.S.C. §§1983, 1985 and right of claims under §1988 also including in concert aiding and abetting public and private breach of fiduciary and misapplication of fiduciary.

CLAIM 10 - (Honest Services) 18 U.S.C. §1346 and 2;
CLAIM 11 - (Fraud) 18 U.S.C. §1001 and 2;
CLAIM 12 (Theft) Texas Penal Codes 31.02 & 31.03/ Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2;
CLAIM 13 (Conspiracy) 18 USAC §371 and 2;

124. On or about March 9, 2016, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Stephen A. Mendel, Gregory Lester, Bobbie Bayless, and Clarinda Comstock did unlawfully conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, entered into on or before July 2015, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce involving violations of 18 U.S.C. §§371, 1001, 1346, 1343, 1951(b)(2) and 2, and 42 U.S.C. §§242, 1983 and 1985 and Texas Penal Codes §§31.02 and 31.03. 32.21.

125. As part of the racketeering conspiracy Defendants, acting in concert, both individually and severally, acted together to promote, conceal, and otherwise protect the purposes of the racketeering activity from possible criminal investigation and prosecution.

CLAIM 14 (Illegal Wiretap) Texas Penal Code 16.02 and 18 U.S.C. §2511 and 2[4]

126. From an unknown date, including but not limited to March and April of 2011, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Amy Brunsting acting individually and in concert with persons both known and unknown to Plaintiff Curtis, conspired to unlawfully,

[4] Texas Penal Code 16.02 and 18 U.S.C. §2511 (§§2510-22) Texas Civil Wire Tap Act found at Tex. Civ. Prac. & Rem. Code, Title 123 as amended by the Electronic Communications Privacy Act (ECPA)(Pub. L. 99-508; 10/21/86) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (Pub. L. 90-351; 6/19/68), also known as the "Wiretap Act".

willfully and knowingly intercept and did unlawfully intercept, record, possess, conceal, manipulate and selectively disseminate illegal wiretap recordings of private telephone conversations intercepted by use of an electronic recording device attached to the telephone line of Nelva Brunsting, in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce in that:

CLAIM 15 - Dissemination of illegal wiretap Recordings by mail 18 U.S.C. §§1341 and 2

127. On or about July 1, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Bradley Featherston, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly cause illegal wiretap recordings of private telephone conversations between Carl Brunsting and his wife Drina Brunsting, to be delivered by certified mail to Plaintiff Curtis and the third party attorneys for parties in multiple pending lawsuits, in violation of 18 U.S.C. §2511(1)(c) and Texas Penal Code 16.02. The illegal wiretap recordings selectively disseminated on CD-ROM, are believed to have been made on or about March and April 2011. The CD contained items which were Bates numbered 5814 to 5840. Included among those items were the following four audio recordings:[5]

CLAIM 16 - Illegal Wiretap (Tampering and Manipulation)

(1) a 43 second phone conversation between Carl and his mother which, according to the file properties, was both created and modified on February 27, 2015 (Brunsting 5836.wav);

[5] Excerpted from Carl Brunstings Motion for Protective Order filed July 17, 2015.

CLAIM 17 - Illegal Wiretap (Tampering and Manipulation)

(2) a phone conversation lasting 6 minutes and 44 seconds between Carl and Drina which, according to the file properties, was both created and modified on February 27, 2015 (Brunsting 5837.wav);

CLAIM 18 - Illegal Wiretap (Manipulation)

(3) a telephone conversation lasting 19 minutes and 18 seconds between Carl and Drina which, according to the file properties, was both created and modified on April 22, 2011 (Brunsting 5838.wav); and

CLAIM 19 - illegal wiretap (Manipulation)

(4) a telephone conversation lasting 8 minutes and 53 seconds between Carl and Drina which, according to the file properties, was both created and modified on March 21, 2011 (Brunsting 5839.wav).

CLAIMS 20 and 21 Illegal Wiretap, in Concert Aiding and Abetting: Spoliation, Destruction or Concealing Evidence 18 U.S.C/ §§1512(c) conspiracy 1512(k) & 1519 and 2

128. On July 21, 2015 in the southern district of Texas and elsewhere within the jurisdiction of the Court, Counsel for Anita Brunsting - Bradley Featherston, Counsel for Amy Brunsting - Neal Spielman, and Counsel for Carole Anne Brunsting - Darlene Payne Smith, filed in-concert objections to the application for protective orders filed by Carl Brunsting, and while objecting to the protective order and arguing the recordings contained relevant and admissible evidence, Defendants Bradley Featherston, Neal Spielman, and Darlene Payne Smith simultaneously objected to qualifying the recordings in any way and just like the infamous

8/25/2010 extortion instrument, when confronted with demands for a show of proof they are unwilling to bring forth any evidence, and none of them claim to know anything individually.

129. Implicit in the assertion the recordings were relevant and the content admissible, Defendants claimed to possess personal knowledge that: "(1) the recording device was capable of recording the events offered in evidence; (2) the operator was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers on the tape are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement."

130. Defendants have obtained, possessed, manipulated and disseminated illegal wiretap recordings and are now concealing:

a. The device used

b. The original wiretap media

c. Other wiretap recordings

d. The chain of custody

CLAIM 22 - Conspiracy to Obstruct Justice

131. On or about July 22, 2015 in the southern district of Texas and elsewhere within the jurisdiction of the Court, Defendants Bobbie Bayless, Clarinda Comstock, and Neal Spielman, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly combine, conspire and agree with each other to obstruct and conceal evidence and engage in predicate acts including but not limited to 18 U.S.C. §§1512(c) conspiracy 1512(k), 1519 and 18

U.S.C. §§1951(b)(2) and 2, Extortion and Texas Penal Codes §§31.02, 31.03 and 32.21 (theft/extortion) by removing Summary Judgment Motions from Calendar and creating stasis, as part of a conspiracy to deprive Plaintiff Curtis of an impartial forum (18 USC §§242) , access to the Courts (42 U.S.C. §1983) substantive due process, (42 U.S.C. §1985) equal protection, and (Texas Penal Code §§31.02 and 31.03) property rights.[6]

CLAIM 23 – Conspiracy Re: State Law Theft/ Extortion - in Concert Aiding and Abetting

132. From an unknown date and continuing thereafter up to and including July 21, 2015 and continuing thereafter up to and including September 10, 2015 and March 9, 2016 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Neal Spielman, Bradley Featherston, Stephen A. Mendel, Gregory Lester, Christine Riddle Butts, Clarinda Comstock, Jill Willard Young, and Toni Biamonte, together with persons both known and unknown to Plaintiffs, individually and severally, did unlawfully, willfully and knowingly conspire to obstruct, delay and affect, and did attempt to obstruct, delay and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by extortion under color of official right, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that Defendants conspired to obtain and did attempt to obtain the property of Plaintiff Candace Louise Curtis, endeavoring to obtain consent induced by the wrongful use of actual and threatened force, violence and fear, in that the Defendants did conspire to use a fictional report, a staged mediation, an extortionist thug mediator, acts obstructing and delaying justice, and the forged extortion instrument, to make threats with the intention of instilling fear of economic

[6] 18 U.S.C. §2: In concert aiding and abetting: Public Services Fraud, Breach of Fiduciary, Misapplication of Fiduciary, Concealing evidence of forgery (Texas Penal Code §32.21) and racketeering.

harm in Plaintiff Curtis in furtherance of a pattern of racketeering activity affecting interstate and foreign commerce.

CLAIM 24 - State Law Theft/ Hobbs Act Extortion 18 U.S.C. 1951(b)(2) and 2

133. On or about August 25, 2010, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Candace Freed and Anita Brunsting did unlawfully, knowingly and intentionally further a conspiracy to obstruct, delay and affect, and did attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in such commerce, by extortion under color of official right, as that term is defined in Texas Penal Codes 31.02 and 31.03 and Title 18, United States Code, Section 1951, in that Defendant Candace Freed, with persons both known and unknown to Plaintiffs, did conspire to obtain improper dominion over the assets of the Brunsting family of trusts and the expected property of Plaintiff Curtis, by collaborating to obtain consent induced by the wrongful use of threatened force, violence and fear, in that Defendant Candace Freed did implement the Vacek design in drafting the heinous 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (hereinafter the "8/25/2010 QBD" or "Extortion Instrument"). Such instrument was, in fact, used to make threats and to instill fear of economic harm in the victims of the inheritance theft conspiracy, for which the extortion instrument was created, along with other intended illicit purposes as hereinafter more fully appears.

CLAIM 25 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 26 – Wire Fraud 18 U.S.C. §§1343

134. On or about October 23, 2010, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting knowingly and intentionally

furthered the extortion conspiracy by emailing the extortion instrument (8/25/2010 QBD) to Plaintiff Curtis, along with trust instruments, in violation of 18 U.S.C. §§1343 and 1951.

CLAIM 27 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 28 – Mail Fraud 18 U.S.C. §§1341

135. On or about June 4, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting knowingly and intentionally furthered the extortion conspiracy in her response to Plaintiff Curtis' first interrogatories. At item number 15 page 6, Anita uses the heinous extortion instrument to threaten Carl and Candace, both of whom are victims of Anita's felony thefts in violation of 18 U.S.C. §§1951.

136. Defendants Anita Brunsting and Bradley Featherston placed the June 4, 2015 response to interrogatories containing extortion threats for delivery with the U.S. Postal Service in violation of 18 U.S.C. §1341.

CLAIM 29 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 30 – Wire Fraud 18 U.S.C. §§1341

137. On or about February 18, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Amy Brunsting knowingly and intentionally furthered the extortion conspiracy in her response to Plaintiff Curtis' second application for distribution. On page 7, Amy Brunsting and her Counsel Neal Spielman advance threats using the heinous extortion instrument in violation of 18 U.S.C. §1951(b)(2) and 2, knowing full well that it is not a legitimate instrument by any measure.

138. Defendants Amy Brunsting and Neal Spielman placed the June 4, 2015 response to interrogatories containing extortion threats for delivery with the U.S. Postal Service in violation of 18 U.S.C. §1341, 1951(b)(2) and 2.

CLAIM 31 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 32 – Mail Fraud 18 U.S.C. §§1341

139. On or about June 25, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Amy Brunsting and her Counsel, Defendant Neal Spielman unlawfully, willfully and knowingly advanced threats using the heinous extortion instrument in Amy's response to Plaintiff Curtis' Request for Production, delivered USPS in violation of 18 USC §§1341, 1951.

CLAIM 33 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 34 – Mail Fraud 18 U.S.C. §§1341

140. On or about December 5, 2014, Defendant Anita Brunsting through her Counsel, Defendant Bradley Featherston, advanced and furthered the extortion conspiracy when Featherston filed Anita's objection to Carl Brunsting and Plaintiff Curtis' applications for distribution. In section F on page 6 Anita uses the extortion instrument to allege that both theft victims Carl and Candace had violated the in terrorem clause in the extortion instrument by defending their beneficial interests, in violation of 18 U.S.C. §1951 and 1341.

> *"4. If the Court finds the in terrorem clause is enforceable, then Candace and Carl have no right to any distribution from the trust".*

CLAIM 35 - State Law Theft/Hobbs Act Extortion 18 U.S.C. §1951(b)(2) and 2
CLAIM 36 - Mail Fraud 18 U.S.C. §1341

141. On or about June 4, 2015 in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, in response to Plaintiff Curtis' first interrogatories, at item number 15 page 6, again used the heinous extortion instrument to threaten Carl and Candace, both of whom are victims of Anita's first degree felony thefts, delivered USPS in violation of 18 USC §§1341 and 1951.

CLAIM 37 – Tampering with Federal Judicial Proceeding by False Affidavit 18 U.S.C. §371, 1621 and 2

142. On March 6, 2012, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendants Amy Brunsting and Bernard Lyle Mathews III, aided and abetted by others unknown to Plaintiff and aiding and abetting others unknown to Plaintiff, did corruptly, unlawfully, knowingly, and willfully obstruct, influence, and impede an official proceeding, and did attempt to do so, that proceeding being Candace Louise Curtis v. Anita Brunsting et al., No. 4:12-CV-00592 the United States District Court for the Southern District of Texas, Houston Division, by filing a false affidavit In violation of Title 18, United States Code, Sections 1001, 1512(c)(2), 1623, and 18 U.S.C. §402 and F.R.C.P. Rule 11(b).

CLAIM 38 - Spoliation, Destruction or Concealing Evidence 18 U.S.C. §§1512(c) Conspiracy 1512(k) and 1519 and 2

143. On or about September 10, 2015 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Toni Biamonte as an official court reporter did unlawfully, knowingly and willfully spoliate, destroy or otherwise conceal material evidence of a racketeering conspiracy in violation of 18 U.S.C. §§1512(c) conspiracy 1512(k) and 1519, aiding and abetting the racketeering conspiracy and is, thus, a principal in acts in furtherance of the aforementioned and described conspiracy to violate 18 U.S.C. §1962(c) in violation of 18 U.S.C. §1962(d).

CLAIM 39 - Forgery on Internal Revenue forms 18 U.S.C. §§287, 371, and 1001 and 2

144. On or about June 7, 2011, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive did unlawfully, knowingly

and willfully apply the Social Security Number, the record identifier used to ensure proper payment of benefits in both the Title II and Title XVI programs, and did forge the signature of Plaintiff Curtis on stock transfer forms, to facilitate the improper transfer of securities by Computershare, an investment services corporation.

CLAIM 40(a-d) - Forgery & False Instruments, Aiding and Abetting Theft, Banking, Wire, Mail and Securities Fraud (Texas Penal Codes 31.02 & 31.03 & 18 U.S.C. §§1001 and 2)

Conspiracy to commit securities, mail, wire and banking fraud,

a. False Instruments used to trade in Securities 18 USC §§1348/1349 – Securities Fraud, 15 U.S.C. §78aa and 15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) and the right of claims implied therefrom. (fraudulent trading in securities is civilly and criminally actionable but are not predicate acts)

b. False Instruments used to commit Banking Fraud 18 U.S.C. §1344

c. False Instruments used to commit Sections 18 U.S.C. §§1341, 1343 and 1346 (Property Mail and Wire Fraud)

d. False Instruments used to commit 18 U.S.C. §1951 Hobbs Act Extortion

145. From an unknown date, known to be before July 1, 2008, and continuing thereafter up to and including August 25, 2010 and continuing thereafter up to and including December 21, 2010 and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Candace Kuntz-Freed drafted false instruments, undermining the trust instrument products and estate plan services marketed by Vacek & Freed

PLLC, to facilitate the theft of trust assets by Anita Brunsting, as part of a racketeering conspiracy in that:

146. Anita Brunsting used the illicit July 1, 2008 Appointment of Successor Trustees drafted by Candace Freed to commit acts complained of herein.

147. Anita Brunsting used the illicit August 25, 2010 appointment of successor co-trustees to commit acts complained of herein.

148. Anita Brunsting used the illicit December 21, 2010 appointment of successor trustee to commit acts complained of herein.

149. Freed drafted the illicit 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (The Extortion Instrument) in concert with Anita Brunsting, and not at the behest of her client Nelva Brunsting.

150. Anita Brunsting used the illicit 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (The Extortion Instrument), in concert with others known and unknown to Plaintiff, to commit the acts of theft and extortion complained of herein.

151. Plaintiff Curtis was damaged in her property rights by Anita Brunsting's improper use of the illicit instruments drafted by Candace Freed.

CLAIM 41 - Misapplication of fiduciary in excess of $300,000.00 Texas Penal Code Thefts §§31.02, 31.03, 32.45 (against elderly person Tex. Pen. Cd. 32.45(d))
CLAIMS 42(a–q) Wire, Mail, and Banking Fraud 18 USC §§1341, 1343, 1344 and 2

152. From an unknown date, known to be on or before December 21, 2010 and continuing thereafter, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting, aided and abetted by persons known and unknown to

Plaintiff and aiding and abetting persons known and unknown to Plaintiff, did unlawfully, willfully and knowingly, misapply fiduciary assets in excess of $300,000 (Texas Penal Code theft §§32.45, 31.02, 31.03) in that:

153. Defendant Anita Brunsting paid her personal credit card debts and made other improper transfers from a trust bank account, in violation of provisions of the family trust, the common law and the Texas trust code. These comingling and misapplication transactions were perfected by electronic funds transfer and the use of the mails.[7]

IX. Non-Predicate Act Civil Claims for Damages

CLAIMS 43 (a-j) Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5)

154. From an unknown date, believed to be on or before December 21, 2010, and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, Defendant Anita Brunsting did unlawfully, willfully and knowingly misapply fiduciary assets in excess of $300,000 (Texas Penal Code theft §§32.45, 31.02, 31.03). Many of the transactions involved Electronic Funds Transfers and others involved the use of the mails. Many transactions also involved banking and/or securities fraud 18 USC §§1341, 1343, 1344 and 2 and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5) in that:

155. May 11, 2011, using the illicit instruments drafted by Defendant Candace Freed, Defendant Anita Brunsting, acting trustee de son tort, unlawfully, knowingly and willfully

[7] Please see Appendix A attached hereto for a chart of events, dates, transactions and mediums employed. (Securities fraud is not considered a Predicate Act and the securities theft transactions are herein pled in the alternative as misapplications of fiduciary involving wire, mail and banking fraud)

misappropriated and misapplied fiduciary assets by improperly transferring 1120 Shares of Exxon and Chevron securities valued at $90,854.00 in violation of 18 U.S.C. §1343 (Wire Fraud) and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5)

156. June 15, 2011 using the illicit instruments drafted by Defendant Candace Freed, Defendant Anita Brunsting, acting trustee de son tort, unlawfully, knowingly and willfully misappropriated and misapplied fiduciary assets by improperly transferring 2320 shares of Exxon and Chevron securities valued at $208,122.80 in violation of 18 U.S.C. §1343 (Wire Fraud) and Section 27 of the Exchange Act (15 U.S.C. §78aa) and Section 10(b) of the Exchange Act (15 U.S.C. §§78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

157. Between April 20, 2012 and April 2, 2013 using the illicit instruments drafted by Defendant Candace Freed, Defendants Anita Brunsting, and Amy Brunsting, acting trustees de son tort, unlawfully, knowingly and willfully misappropriated and misapplied fiduciary assets in excess of $38,000 by paying personal legal liabilities with trust funds from a trust bank account in violation of 18 U.S.C. §1344 (Banking Fraud) and 18 U.S.C. §1343 (Wire Fraud) and §2 (aiding and abetting).[8]

158. Plaintiff Curtis, as a beneficiary and the de jure trustee for the Brunsting trusts, has fiduciary duties interfered with and prevented by the racketeering activity, has beneficial

[8] Please see appendix A attached here to for a chart of event dates, transactions and mediums employed

property interests in the assets so misapplied and has suffered tangible injury to business and property as a direct and proximate result of all the tortious acts herein claimed.

CLAIM 44 - Conspiracy to violate 18 USC §§242 and 2, & 42 U.S.C. §§1983 and 1985

159. From an unknown date and continuing thereafter in the Southern District of Texas and elsewhere within the jurisdiction of the Court, each of the Defendants herein named, individually and severally, aided and abetted by persons known and unknown to Plaintiff and aiding and abetting persons known and unknown to Plaintiff, did unlawfully, willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice to deprive Plaintiff Curtis of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States, under color of law and color of official right, statute, ordinance, regulation, custom and policy, in violation of 18 USC §§242 and 2, and 42 U.S.C. §§1983 and 1985.

CLAIM 45 - Aiding and Abetting Breach of Fiduciary, Defalcation and Scienter

160. The RICO Defendants understood that Anita and Amy Brunsting owed fiduciary duties to Plaintiff Curtis and that the acts and omissions of Anita and Amy Brunsting were torts and breaches of those duties, and the RICO Defendants aided and abetted Anita and Amy Brunsting's torts and breaches in pursuit of their own unjust self-enrichment anyway.

161. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting breach of fiduciary both before and after the fact, in an exact amount to be proven at trial.

162. Plaintiff is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting breach of fiduciary both before and after the fact.

CLAIM 46 - Aiding and Abetting Misapplication of Fiduciary, Defalcation and Scienter

163. The RICO Defendants understood that Anita and Amy Brunsting owed fiduciary duties to Plaintiff Curtis and that Anita and Amy Brunsting had misapplied fiduciary in excess of $300,000 and that Plaintiff Curtis had an inheritance expectancy interest in those assets. The RICO Defendants aided and abetted Anita and Amy Brunsting's continued misapplications of fiduciary anyway.

164. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting misapplications of fiduciary both before and after the fact, in an exact amount to be proven at trial.

CLAIM 47 - Tortious Interference with Inheritance Expectancy

165. The RICO Defendants understood that Plaintiff Curtis had an expectancy of an inheritance right. The RICO Defendants intentionally interfered with Plaintiff Curtis' expectancy. The interference was through acts of fraud and duress and the interference was, thus, tortious.

166. As an actual consequence and proximate result, Plaintiff Curtis has been injured in her business and property and is entitled to damages from all Defendants as joint tortfeasers, for in-concert aiding and abetting tortious interference with Plaintiff Curtis' inheritance expectancy, both before and after the fact, in an exact amount to be proven at trial.

IX. Continuity

167. The law and economics of development focuses its attention on the effects that well-functioning legal and judicial systems have on economic efficiency in the development of nations. As studies have shown, a factor that has greatly retarded commerce in developing nations is the imperfection of the law and the uncertainty in its application. Entrenched corrupt practices within the public sector (i.e., official systemic corruption) hamper the clear definition and enforcement of laws, and therefore commerce is impeded.

168. Systemic corruption within the public sector can be defined as the systematic use of public office for private benefit that results in a reduction in the quality or availability of public goods and services (Buscaglia 1997a). In these cases, corruption is systemic when a government agency only supplies a public good or service if an otherwise unwilling transfer of wealth takes place from an individual or firm to the public sector through bribery, extortion, fraud, or embezzlement.[9]

169. Widespread corruption is a symptom that the state is functioning poorly. In fact, the entrenched characteristic of official corrupt practices is rooted in the abuse of market or organizational power by public sector officials. Many studies have already shown that the presence of perceived corruption retards economic growth, lowers investment, decreases private savings, and hampers political stability. Moreover, foreign direct investment has demonstrated a special negative reaction to the presence of corruption within the public sectors in developing countries showing that the degree of corruption in importing developing countries also affects the trade structure of exporting countries.

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[9] Although published in a 1999 the Hoover Institute Article written by Eduardo Buscaglia describes the Harris County Probate Court racketeering enterprise operations with this statement and is on all fours with the facts of the case in point.

170. The multi-billion dollar Probate industry is an illicit wealth redistribution empire run by morally bankrupt judges and attorneys, supported by an army of tax-dollar fed "judicial administrators," and social workers that George Orwell would marvel at.

171. Harris County Probate Court has become the enterprise out of which public corruption operates an institutionalized theft cartel, involved in redistributing the assets of our elderly, and most vulnerable citizens, amongst a cabal of corrupt judges, lawyers and "board certified professionals".

172. The very people who occupy offices of public trust charged with the preservation of public justice, with the advent of absolute judicial impunity from civil claims, have become the worst organized cartel of predatory criminals in the history of this nation. Genovese, Luciano, Bonanno, Gambino, Lucchese, Capone, Cohen, Nitty, and the Krays would be drooling with envy and admiration, as they could never have built such an invasive and successful criminal empire in the private sector.

173. Judicial Corruption Enterprise activities involve kidnap, carjack, assault, murder, armed robbery, extortion, false arrest, malicious prosecution, denial of due process and false imprisonment, amounting to color of law human trafficking and domestic terrorism. The root cause for all of this institutionalized organized criminal and terrorist activity can be traced to more than one scheme to defraud, but those schemes are but variations on a limited number of known artifices.

174. Amongst the main culprits is the perversion and expansion of the 17th Century English common law doctrine of limited judicial immunity, into a doctrine of absolute criminal impunity where public corruption flourishes because there are no deterrent consequences.

175. Once having crossed the solid demarcation between right and wrong, the line begins to grey until, one day, it becomes completely invisible.

176. The notion that these people can operate with criminal impunity has led to an environment where the appearance of legitimacy is no longer of any real importance and the displays of criminal intent have become more than blatant. It has become a trade practice in the state Courts of this nation.

177. Plaintiff Curtis is one of those victims, as were Elmer and Nelva Brunsting, Carl Brunsting, Willie Jo Mills, Ruby Peterson, Helen Hale, Olga De Francesca, Doris Conte and countless others both known and unknown to Plaintiffs.[10] The Estate of Nelva Brunsting, the Brunsting Trusts and the Brunsting heirs and trust beneficiaries were among the victims.

X. Jurisdiction over Conduct Affecting Interstate Commerce

178. All federal crimes are treated as commercial[11]. Pursuant to Article 1, Section 8, Clause 3 of the federal Constitution, the United States Congress has exclusive jurisdiction over commerce amongst the states (the Commerce Clause).

179. Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States … shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

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[10] These names are well known to anyone who ever heard the phrase "Probate Mafia" and bothered to do a google type search to find out what is meant by the phrase.

[11] 27 C.F.R. 72.11

180. The RICO statutes were designed by Congress to combat organized crime in both the public and the private sectors and specifically provides a civil right of claims for injuries to business or property as a result of a pattern of activity involving two (2) or more of the listed predicate acts. That criterion has been satisfied as herein delineated.

XI. Affirmative Pleading on Doctrines of Immunity

181. Fraus Omnia Vitiat.

182. There is no judicial immunity to civil liability for non-judicial acts, anti-judicial acts or RICO Predicate Acts forming a pattern of racketeering activity, as none of these types of conduct can be said to be judicial functions even when disguised as such.

183. Article III, Section 1 of the Constitution for the United States of America, specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts. Congress used this power to establish 13 U.S. Courts of Appeals, 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade.

184. The U.S. Supreme Court is the only court of general jurisdiction in the federal system, all other federal courts are courts of limited jurisdiction created and empowered by Congressional statute.

185. Chief Justice Marshall, writing for the Court in Cohens, 19 U.S. at 404 observed:

> *It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot, "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."*

186. The list of predicate acts specifically enumerated at 18 U.S.C. §1961(1) includes §§371, 1346 and 1951 each of which requires a public corruption/color of law element.

187. To argue that a judge is immune from a public corruption statute if acting within the four walls of a court room and exempt if not acting in his public capacity is a very precise statement that judges are above the law and that the victims of public corruption related deprivations of rights have no remedy and, thus, no rights.

188. 42 U.S.C. §1983 clearly states an exception to actions brought against judicial officers. That one exception provides pre-requisites to injunctive relief in actions brought against judicial officers. To conclude that Congress did not intend a private right of claims against judges under §1983 is to render the language of the statute superfluous, which the rules governing statutory construction will not allow.

42 U.S.C. §1983 Civil Action for Deprivation of Civil Rights (emphasis added)

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,* ***except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*** *For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*
>
> *(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)*

189. There is no privity defense, no attorney immunity defense and no judicial immunity exception to the federal Racketeer Influenced Corrupt Organization statutes. The

language of the Act differentiates between criminal and civil liability and explicitly provides private parties with civil remedy for injuries to property and business caused by a pattern of racketeering activity involving two (2) or more of the predicate acts defined at 18 USC §1961(1). The RICO Act provides for criminal penalties in Section 1963 and provides private litigants with civil remedy in section 1964(c).

190. Several predicate act statutes, mostly codified in Title 18 of the United States Code, provide for federal prosecution of public corruption. Among these are the Hobbs Act (18 USC §1951), the mail and wire fraud statutes (18 USC §§1341 & 1343), the honest services fraud provision (18 USC §1346), the Travel Act (18 USC §1952), the federal official bribery and gratuity statute, (18 U.S.C. § 201 enacted 1962), the Foreign Corrupt Practices Act (FCPA) (enacted 1977), the federal program bribery statute, 18 U.S.C. § 666 (enacted 1984) and the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC §§1961-1968 enacted in 1970). Each statute directly addresses public corruption and most of these are specifically identified as RICO predicate acts at 18 U.S.C. 1961(1).

191. The recent plea bargain and sentencing of Texas State 404th District Court Judge Abel Limas to six years in federal prison for violating 18 U.S.C. §§1343 (Honest Services Wire Fraud), §1346 (Honest Services Fraud) and §1951 and 2 (Hobbs Act Extortion), clearly verifies that these public corruption statutes apply to judges by operation of the RICO statutes[12].

192. According to the Indictment, Limas accepted paltry sums as bribes, in return for ad litem appointments and other favorable judicial treatments. Counts 1-8 were that Limas:

[12] Case 1:11-cr-00296 Filed in TXSD on 03/29/11

a. Accepted $600 for the continuation and subsequent termination of a probation revocation proceeding in violation of Texas Penal Code 36.02(a)(2) (bribery).

b. Accepted $700 in exchange for changing the terms of a criminal defendant's appearance bond in violation of Title 18 United States code sections 1951 and 2.

c. Accepted $1,500 for changing the terms of a criminal defendant's conditions of probation to permit the defendant to report by mail rather than in person in violation of Texas Penal Code section 36.02(a)(2) (bribery).

d. Accepted $1,800 in a scheme or artifice to defraud in violation of title 18, United States Code, sections 1343 and 1346.

e. Accepted $8,000 for favorable judicial rulings on motions, case transfers, and other matters in civil cases for the benefit of participating attorneys in violation of Title 18, United States code, section 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2) (bribery).

f. Accepted $4,500 for an ad litem appointment in a civil case in violation of Texas Penal Code section 36.02(a)(2) (bribery).

g. Accepted $5,000 for denial of a motion for sanctions and other judicial acts in violation of Title 18 United States Code sections 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2).

h. Accepted $2,000 for the modification of the terms of probation and dismissal of charges against a criminal defendant in violation of Title 18 United States Code sections 1951 and 2, and in violation of Texas Penal Code section 36.02(a)(2).

193. This cancerous judicial black market plague has spread like wildfire throughout the state court systems whether family law court, juvenile, traffic, probate or any other municipal level judicial arena on the state wide level. They have all become criminal racketeering enterprises and the root cause for each of these obscenities is "impunity" by any other name.

194. The cases of convicted Judge Abel Limas (6 years), convicted attorney Marc Rosenthal (26 years) and convicted Texas State Senator Jim Solis (47 months) are not isolated specific instances of public corruption, but limited examples of a national public corruption pandemic. Congress, in drafting the RICO statutes, determined public prosecutorial resources were insufficient to address this problem and specifically provided for private civil remedy.

195. Imposition of an enlarged version of the judicially created English common law doctrine of limited Judicial Immunity to foreclose private claims for civil remedy against judges under the RICO and civil rights statutes, has nurtured a contagion of public corruption throughout all three branches of government, is in direct opposition to the clearly expressed intentions of Congress in providing such remedy, is a violation of the separation of powers doctrine and, as the learned Chief Justice Marshall expressed, "*treason to the constitution*".

196. Article I Section 8 Clause 3 of the federal Constitution grants exclusive jurisdiction over interstate and foreign commerce to Congress. Given that all federal crimes are commercial the nexus with interstate commerce is inarguable and the notion that state court judges are absolutely immune from 42 U.S.C. §1983 or 18 U.S.C. §1964(c) actions ignores the very clear language of those sections and violates the supremacy clause.

XII. Aiding and Abetting, Fraud, and the Texas Attorney Immunity Doctrine

197. "Attorney Immunity" is a vague expression. Any civil immunity an attorney has is strictly limited to the litigation context and does not include actively engaging in an organized criminal color of law enterprise involving RICO predicate act conduct.

198. The RICO Defendant attorneys understood that the conduct of their clients was tortious and criminal and the lawyers helped the clients with the conduct thinking only to stuff their own pockets, showing no regard for ethics or law.

199. Conduct sufficient to state a claim of a racketeering conspiracy including predicate acts of extortion §1951, Obstruction §371, Honest Services §1346, Impartial Forum §242, Illegal Wiretap §2511, Mail Fraud §1341, Wire Fraud §1343, Banking Fraud §1344 and Securities Fraud 15 U.S.C. 78 et seq., is not within the scope of legal representation and cannot be excused as part of the attorney's discharge of his duties to his client, even when masqueraded under the litigation umbrella. (The Litigation Privilege)

200. Acts constituting knowing substantial assistance, sufficient to state a claim for in-concert aiding and abetting RICO predicate act crimes, torts and breaches of fiduciary committed by the client, are sufficient to establish in-concert liability of the attorney. There are no exceptions.

201. In reading the text and legislative history of the RICO act, the Fifth Circuit has interpreted that Congress intended the act to strike at criminal conduct characterized by at least two consequential dimensions. The offenses must be of a degree sufficiently serious not only to inflict injury upon its immediate private victims, but also to cause harm to significant public processes or institutions, or otherwise pose threats to larger societal interests worthy of the severe punitive and deterrent purposes embodied in the statute.

202. These aims and structure are somewhat akin to those reflected in the Clayton Act, 15 U.S.C. §15, after which RICO civil remedies were patterned.

203. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed "inadequate"; see also

Sedima, 473 U.S. at 489; Genty v. Resolution Trust Co., 937 F.2d 899, 912 (3d Cir. 1991) ("Congress obviously had much more in mind than merely providing compensation for individual RICO victims when it authorized RICO civil actions. Indeed, the harm of racketeering is dispersed among the public at large, including draining resources from the economy, subverting the democratic process and undermining the general welfare.")

204. This construction accords with the legislative intent of RICO. As explained by the Supreme Court, the purpose of the Act was to address a problem which Congress perceived "was of national dimensions." Turkette, 452 U.S. at 586. Specifically, in the Statement of Findings and Purpose of the Organized Crime Control Act of 1970, Title IX of which encompassed RICO, Congress declared that the activities of organized crime that prompted the legislation "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commence, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

205. Congress did not distinguish between public and private Organized Crime. Public corruption and criminal abuse of the state judicial office has become the number one threat to the security of the people of this nation. The creation of the RICO act as exemplified by the "Statement of Findings and Purpose" and the inclusion of public corruption requisite statutes among the list of predicate acts at 18 U.S.C. §1961(1) clearly indicates a congressional intention to curb public corruption and abuse of the doctrines of immunity, by a dishonest self-protection criminal racketeering industry.

206. The protection for criminal conduct in Texas has also been expanded to include wrongful conduct by attorneys under the Texas Attorney Immunity Doctrine, which has also led to the corruption and criminal takeover of our state judicial institutions.

207. Congress never intended to immunize state-court judges from federal civil rights suits nor from federal Racketeering suits and a doctrine of judicial immunity implemented by the judiciary to protect a corrupt judiciary from legislation designed to protect the public interest from corruption violates the Separation of Powers Doctrine and undermines the public's confidence in the legitimacy of the government of this Nation.

XIII. Affirmative Pleading on Conspiracy and Statutes of Limitations

208. Before the Court are allegations of public corruption involving a conspiracy to deprive the People of Texas and others of the honest services of elected public officers. The conduct complained of is only a small part of a complex multi-layered, multi-faceted criminal industry run by state court judges, who act with impunity with the full collusion, cooperation and participation of attorneys, court appointed administrators, social workers and others.

209. Federal conspiracy laws rest on the belief that criminal schemes are equally, or even more reprehensible than are the substantive offenses to which they are devoted. The Supreme Court has explained that a "collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."[13] Moreover,

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[13] Zacarias Moussaoui was convicted of conspiring to commit the terrorist attacks that occurred on September 11, 2001, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); Wadih El-Hage was convicted of conspiring to bomb the U.S. embassies in Kenya and Tanzania, In re Terrorist Bombings, 552 F.3d 93, 107 (2d Cir. 2008).

Members of an Atlanta street gang were convicted of conspiring to engage in drug trafficking, among other offenses, United States v. Flores, 572 F.3d 1254, 1258 (11th Cir. 2009); motorcycle gang members were convicted of conspiracy to traffic in drugs, United States v. Deitz, 577 F.3d 672, 675-76 (6th Cir. 2009).

observed the Court, "[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked." Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."

210. Conspiracies and acts in furtherance are considered a single continuing act for limitations purposes. The equitable doctrines of tolling and estopple apply to these claims.

XIV. Affirmative Pleading on Public Corruption

211. Public corruption involves a breach of public trust and/or abuse of position by federal, state, or local officials and their private sector accomplices. By broad definition, a government official, whether elected, appointed or hired, may violate federal law when he/she asks, demands, solicits, accepts, or agrees to receive anything of value in return for being influenced in the performance of their official duties.

212. Public corruption poses a fundamental threat to our national security and way of life. It impacts everything from how well our borders are secured and our neighborhoods protected…to verdicts handed down in courts…to the quality of our roads, schools, and other

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Dominick Pizzponia was convicted on racketeering conspiracy charges in connection with the activities of the "Gambino organized crime family of La Cosa Nostra," United States v. Pizzonia, 577 F.3d 455, 459 (2d Cir. 2009); Michael Yannotti was also convicted on racketeering conspiracy in connection with activities of the "Gambino Crime Family," United States v. Yannotti, 541 F.3d 112, 115-16 (2d Cir. 2008).

Jeffrey Skilling, a former Enron Corporation executive, was convicted of conspiracy to commit securities fraud and mail fraud, United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009); Bernard Ebbers, a former WorldCom, Inc. executive, was likewise convicted of conspiracy to commit securities fraud, United States v. Ebbers, 458 F.3d 110, 112 (2d Cir. 2006)

government services. And it takes a significant toll on our pocketbooks, wasting billions in tax dollars every year.[14]

XV. DAMAGES

213. Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expenses and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering activity herein delineated with a particularity.

214. As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.

215. Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.

216. As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interests in an amount to be proven at trial.

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[14] https://www.fbi.gov/about-us/investigate/corruption

XVI. Prayers for Relief

217. Plaintiffs incorporate by reference herein all allegations set forth above, and by this reference incorporate the same herein and makes each a part hereof as though fully set forth below.

WHEREFORE, Plaintiff prays for judgment against Defendants, each and every one of them, for the following:

I. An award of compensatory, punitive, exemplary, and enhanced damages in an amount sufficient to make Plaintiffs whole and to deter such future conduct by these Defendants, others of their kind and those who may be so disposed in future;

II. For prejudgment and post judgment interest thereon at the maximum legal rate according to proof at trial;

III. An award of reasonable costs and expenses incurred in this action, including counsel fees and expert fees as allowable under the Title 15, 18, 28, and 42 sections asserted;

IV. An award of treble damages consistent with 18 U.S.C. §1964(c);

V. Such other legal and equitable relief as the Court may deem Plaintiffs entitled to receive, including a referral of the acts found to be unethical or unlawful herein to appropriate authorities.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all issues so triable.

Plaintiff Candace Louise Curtis respectfully signs this complaint under penalty of perjury pursuant to the laws of the United States and declares that it is consistent with the Federal Rules requirement for candor.

Respectfully submitted,

7/2/2016

CANDACE L CURTIS Date
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
occurtis@sbcglobal.net

Plaintiff Rik Wayne Munson respectfully signs this complaint under penalty of perjury pursuant to the laws of the United States and declares that it is consistent with the Federal Rules requirement for candor.

Respectfully submitted,

7/2/2016

RIK WAYNE MUNSON Date
218 Landana Street
American Canyon, CA 94503
(925) 349-8348
blowintough@att.net

Appendix A

APPENDIX A

Misapplication of Fiduciary Wire and Banking Fraud Selected Violations of 18 USC §§1343 & 1344

From	To	Date	Format	Purpose
Anita Brunsting	Anita Brunsting	5/27/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $461
Anita Brunsting	Anita Brunsting	6/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2358.75
Anita Brunsting	Anita Brunsting	6/27/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2364.34
Anita Brunsting	Anita Brunsting	7/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $2976.35
Anita Brunsting	Anita Brunsting	7/15/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $7242.83
Anita Brunsting	Anita Brunsting	7/18/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $1998.19
Anita Brunsting	Anita Brunsting	9/6/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $999
Anita Brunsting	Anita Brunsting	9/23/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $4767.00
Anita Brunsting	Anita Brunsting	10/4/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $2930.00
Anita Brunsting	Anita Brunsting	10/19/2011	EFT 18 USC 18 USC §§1343, 1344	Misapplication of Fiduciary $2033.00
Anita Brunsting	Anita Brunsting	11/3/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $102.52
Anita Brunsting	Anita Brunsting	11/7/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Amy Brunsting	11/7/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Anita Brunsting	11/8/2011	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $3224.51
Anita Brunsting	Anita Brunsting	3/13/2012	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Amy Brunsting	3/13/2012	EFT 18 USC §§1343, 1344	Misapplication of Fiduciary $10,000
Anita Brunsting	Anita Brunsting	5/25/2012	EFT 18 USC §§ 1343, 1344	Misapplication of Fiduciary $5000

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:16−cv−01969
Curtis et al v. Kunz−Freed et al

ORDER FOR CONFERENCE AND
DISCLOSURE OF INTERESTED PARTIES

1. Counsel and all parties appearing *pro se* shall appear for an initial pretrial and scheduling conference before

JUDGE ALFRED H. BENNETT
on October 28, 2016 at 09:00 AM
at United States Courthouse
Courtroom 8B, 8th Floor
515 Rusk Avenue
Houston, Texas 77002

2. Counsel shall file with the clerk within fifteen days from receipt of this order a certificate listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation. If a group can be specified by a general description, individual listing is not necessary. Underline the name of each corporation whose securities are publicly traded. If new parties are added or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, then each counsel shall promptly file an amended certificate with the clerk.

3. After the parties confer (in person or by telephone) as required by FED. R. CIV. P. 26(f), counsel and all parties appearing *pro se* shall prepare and file not less than 10 days before the conference a joint discovery/case management plan containing the information as required by FED. R. CIV. P. 26(f) using the form available at http://www.txs.uscourts.gov/sites/txs/files/ahb_jdcmp.pdf.

4. The court will enter a Docket Control Order and may rule on any pending motions at the conference.

5. Counsel and all parties appearing *pro se* who file or remove an action must serve a copy of this order with the summons and complaint or with the notice of removal.

6. Attendance by an attorney who has authority to bind each represented party is required at the conference.

7. Counsel and all parties appearing *pro se* shall discuss whether alternative dispute resolution is appropriate and at the conference advise the court of the results of their discussions.

8. Counsel and all parties appearing *pro se* will deliver to chambers copies of all instruments filed within 7 days of the conference and within 7 days of any future court hearing or conference. Unless this rule is complied with the court will not consider any instrument filed within 7 days of any court appearance.

9. FED. R. CIV. P. 4(m) requires defendant(s) to be served within 90 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 90 days after the filing of the complaint may result in dismissal of this action by the court on its own initiative.

10. Counsel will deliver to chambers copies of all instruments filed under seal regardless of their length.

11. Failure to comply with this order may result in sanctions, including dismissal of the action and assessment of fees and costs.

By Order of the Court

Court Procedures: Information on the court's practices and procedures and how to reach court personnel may be obtained at the Clerk's website at www.txs.uscourts.gov or from the intake desk of the Clerk's office.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
	§	
vs.	§	
	§	Civil Action No.4:16-cv-01969
Kunz-Freed et al.,	§	

CERTIFICATE OF INTERESTED PERSONS

Pursuant to this Court's Order of July 6, 2016, Plaintiffs provide the following list of persons financially interested in the outcome of this litigation.

1.	Candace Louise Curtis	Plaintiff
2.	Rik Munson	Plaintiff
3.	Candace Kunz-Freed	Defendant
4.	Albert Vacek Jr.	Defendant
5.	Bernard Lyle Mathews	Defendant
6.	Anita Brunsting	Defendant
7.	Amy Brunsting	Defendant
8.	Neal Spielman	Defendant
9.	Bradley Featherston	Defendant
10.	Stephen A. Mendel	Defendant
11.	Darlene Payne Smith	Defendant
12.	Jason Ostrom	Defendant
13.	Gregory Lester	Defendant
14.	Jill Willard Young	Defendant
15.	Bobbie Bayless	Defendant

16. Christine Riddle Butts Defendant

17. Clarinda Comstock Defendant

18. Toni Biamonte Defendant

19. People of the State of Texas, of the United States, and anyone forced to seek declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, are persons financially interested in this litigation.

20. Every honest legal professional whose legitimate work product is rendered worthless by judicial corruption is a person financially interested in this litigation.

21. Every dishonest legal professional that uses the court systems as a front for organized crime is a person potentially financially interested in this litigation.

Respectfully submitted,

Rik Wayne Munson 7/19/2016 Date

Candace Louise Curtis 7/19/2016 Date

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
	§	
vs.	§	
	§	Civil Action No.4:16-cv-01969
Kunz-Freed et al.,	§	

CERTIFICATE OF INTERESTED PERSONS

Pursuant to this Court's Order of July 6, 2016, Plaintiffs provide the following list of persons financially interested in the outcome of this litigation.

1.	Candace Louise Curtis	Plaintiff
2.	Rik Munson	Plaintiff
3.	Candace Kunz-Freed	Defendant
4.	Albert Vacek Jr.	Defendant
5.	Bernard Lyle Mathews	Defendant
6.	Anita Brunsting	Defendant
7.	Amy Brunsting	Defendant
8.	Neal Spielman	Defendant
9.	Bradley Featherston	Defendant
10.	Stephen A. Mendel	Defendant
11.	Darlene Payne Smith	Defendant
12.	Jason Ostrom	Defendant
13.	Gregory Lester	Defendant
14.	Jill Willard Young	Defendant
15.	Bobbie Bayless	Defendant

16. Christine Riddle Butts Defendant

17. Clarinda Comstock Defendant

18. Toni Biamonte Defendant

19. People of the State of Texas, of the United States, and anyone forced to seek declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, are persons financially interested in this litigation.

20. Every honest legal professional whose legitimate work product is rendered worthless by judicial corruption is a person financially interested in this litigation.

21. Every dishonest legal professional that uses the court systems as a front for organized crime is a person potentially financially interested in this litigation.

Respectfully submitted,

Rik Wayne Munson 7/19/2016 Date

Candace Louise Curtis 7/19/2016 Date

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
	§	
vs.	§	
	§	Civil Action No.4:16-cv-01969
Kunz-Freed et al.,	§	

CERTIFICATE OF INTERESTED PERSONS

Pursuant to this Court's Order of July 6, 2016, Plaintiffs provide the following list of persons financially interested in the outcome of this litigation.

1.	Candace Louise Curtis	Plaintiff
2.	Rik Munson	Plaintiff
3.	Candace Kunz-Freed	Defendant
4.	Albert Vacek Jr.	Defendant
5.	Bernard Lyle Mathews	Defendant
6.	Anita Brunsting	Defendant
7.	Amy Brunsting	Defendant
8.	Neal Spielman	Defendant
9.	Bradley Featherston	Defendant
10.	Stephen A. Mendel	Defendant
11.	Darlene Payne Smith	Defendant
12.	Jason Ostrom	Defendant
13.	Gregory Lester	Defendant
14.	Jill Willard Young	Defendant
15.	Bobbie Bayless	Defendant

16. Christine Riddle Butts Defendant

17. Clarinda Comstock Defendant

18. Toni Biamonte Defendant

19. People of the State of Texas, of the United States, and anyone forced to seek declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, are persons financially interested in this litigation.

20. Every honest legal professional whose legitimate work product is rendered worthless by judicial corruption is a person financially interested in this litigation.

21. Every dishonest legal professional that uses the court systems as a front for organized crime is a person potentially financially interested in this litigation.

Respectfully submitted,

Rik Wayne Munson 7/19/2016 Date

Candace Louise Curtis 7/19/2016 Date

AO 399 (01/09) Waiver of the Service of Summons

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al
Plaintiff

v.

Kunz-Freed et al
Defendant

Civil Action No. 4:16-cv-01969

WAIVER OF THE SERVICE OF SUMMONS

To: Candace Kunz-Freed
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 07/09/2016, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 7/22/16

Signature of the attorney or unrepresented party

CANDACE KUNZ-FREED
Printed name of party waiving service of summons

Cory S. Reed
Printed name

ONE RIVERWAY, SUITE 1400 HOUSTON, TX 77056
Address

CREED@THOMPSONCOE.COM
E-mail address

(713) 403-8213
Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	Civil Action No. 4:16-cv-001969
Plaintiffs	§	
	§	] ORDER GRANTING
v	§	MOTION FOR PERMISSION FOR
	§	ELECTRONIC CASE FILING
Kunz-Freed, et al	§	
Defendants	§	DATE:
	§	TIME:
	§	COURTROOM:
	§	JUDGE:

The Court has considered the Motion for Permission for Electronic Case Filing. Finding that good cause exists, the Motion is GRANTED.

IT IS SO ORDERED

AUG 12 2016

DATED: _____

_____
United States District Judge

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Amy Ruth Brunsting
2582 Country Ledge
New Braunfels, TX 78132

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Amy Ruth Brunsting was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Anita Kay Brunsting was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Bernard Lyle Mathews III
2000 S. Dairy Ashford Rd, Suite 520
Houston, Texas 77077

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Bernard Lyle Mathews III was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Bradley E. Featherston
Featherdston Tran P.L.L.C.
20333 State Highway 249 suite 200
Houston, Texas 77070

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Bradley E. Featherston was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Darlene Payne Smith
1401 McKinney, 17TH Floor
Houston, Texas 77010

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Darlene Payne Smith was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Gregory Lester was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jill Willard Young
2900 Weslayan, Suite 150
Houston, TX 77027

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Jill Willard Young
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Neal E. Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Neal E. Spielman was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Stephen A. Mendel was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Tony Baiamonte III
1608 Victor Street
Houston, TX 77019

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 4:16-cv-01969

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Tony Baiamonte III was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	Civil Action No. 4:16-cv-001969
Plaintiffs	§	
	§	] ORDER GRANTING
v	§	MOTION FOR PERMISSION FOR
	§	ELECTRONIC CASE FILING
Kunz-Freed, et al	§	
Defendants	§	DATE:
	§	TIME:
	§	COURTROOM:
	§	JUDGE:

The Court has considered the Motion for Permission for Electronic Case Filing. Finding that good cause exists, the Motion is GRANTED.

IT IS SO ORDERED

AUG 12 2016

DATED: _____

_____
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUIS CURTIS	§	
RICK WAYNE MUNSON	§	
Plaintiffs	§	
	§	
VS.	§	
	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED., *ET AL.*	§	
Defendants	§	

CERTIFICATE OF INTERESTED PARTIES

Pursuant to this Court's Order for Conference and Disclosure of Interested Parties [Dkt. No.3] and Federal Rule of Civil procedure 7.1, Defendant Jason Ostrom disclose the following persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations and/or other entities that are financially interested in the outcome of this litigation:

1. Candace Louise Curtis, Plaintiff
2. Rik Munson, Plaintiff
3. Candace Kunz-Freed, Defendant
4. Albert Vacek Jr., Defendant
5. Bernard Lyle Mathews, Defendant
6. Anita Brunsting, Defendant
7. Amy Brunsting, Defendant
8. Neal Spielman, Defendant
9. Bradley Featherston, Defendant
10. Stephen A. Mendel, Defendant
11. Darlene Payne Smith, Defendant

12. Jason Ostrom, Defendant

13. Gregory Lester, Defendant

14. Jill Willard Young, Defendant

15. Bobbie Bayless, Defendant

16. Christine Riddle Butts, Defendant

17. Clarinda Comstock, Defendant

18. Toni Biamonte, Defendant

Respectfully submitted,

ostrommorris, PLLC

By: _____

R. KEITH MORRIS, III
(TBN #24032879)
KEITH@OSTROMMORRIS.COM
STACY L. KELLY
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jason@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

ATTORNEYS FOR JASON OSTROM

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above pleading has been served on this 24th day of August, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

Stacy L. Kelly

AO 399 (01/09) Waiver of the Service of Summons

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

Curtis et al
Plaintiff
v.
Kunz-Freed et al
Defendant

Civil Action No. 4:16-cv-01969

WAIVER OF THE SERVICE OF SUMMONS

To: Tony Baiamonte
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 07/~~09~~/2016 8/8/16 the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

See attached postal envelope

Date: 8/16/16

Tony Baiamonte
Printed name of party waiving service of summons

Signature of the attorney or unrepresented party

Laura Beckman Hedge
Printed name

Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, TX 77002
Address

laura.hedge@cao.hctx
E-mail address

(713) 274-5137
Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUIS CURTIS	§	
RICK WAYNE MUNSON	§	
Plaintiffs	§	
	§	
VS.	§	
	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED., *ET AL.*	§	
Defendants	§	

UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSIVE PLEADING

Defendant Jason B. Ostrom respectfully requests that the Court extend his responsive pleading deadline to Monday, November 7, 2016. Plaintiffs have consented to this Motion. Pursuant to Section B(5)(B) of the Court's Procedures and Practices, Jason B. Ostrom also submits a proposed order.

Respectfully submitted,

ostrommorris, PLLC

By: 

R. KEITH MORRIS, III
(TBN #24032879)
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STACY L. KELLY
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6363 Woodway, Suite 300
Houston, Texas 77057

713.863.8891
713.863.1051 (Facsimile)

ATTORNEYS FOR JASON B. OSTROM

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Plaintiffs, and they are unopposed to the relief sought herein.

Stacy L. Kelly

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above pleading has been served on this 2nd day of September, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

Stacy L. Kelly

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUIS CURTIS	§	
RICK WAYNE MUNSON	§	
Plaintiffs	§	
	§	
VS.	§	
	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED., *ET AL.*	§	
Defendants	§	

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Respectfully submitted,

ostrommorris, PLLC

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ATTORNEYS FOR JASON B. OSTROM

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Stacy L. Kelly

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above pleading has been served on this 2nd day of September, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

Stacy L. Kelly

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Motion to Dismiss for Failure to State a Claim and would respectfully show the Court the following:

I.
BACKGROUND

1. For the purpose of this motion, V&F incorporates the detailed background contained in their Motion to Dismiss for Lack of Subject Matter Jurisdiction.

II.
BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW

2. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiff's complaint lacks "direct allegations on every material point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED. R. CIV. P. 12(b)(6); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." *See, e.g.*, *Tuchman v. DSC Communications*, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint." *Id.* For the reasons set forth in more detail below, Plaintiffs' claims should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

III.
ARGUMENTS AND AUTHORITIES

A. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A VIOLATION OF THE RICO ACT.

3. To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must allege the following:

> (1) that a "person" within the scope of the statute (2) has utilized a "pattern of racketeering activity" or the proceeds thereof (3) to infiltrate an interstate "enterprise" (4) by [violations of § 1962 subsections] (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts.

Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.02 (2006); *see also Delta Truck & Tractor, Inc. v. J.I.* Case Co., 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991).

4. Each of these elements is a "term of art which carries its own inherent requirements of particularity." *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Thus, "[u]nlike other claims, a RICO claim must be plead with specific facts, not mere conclusions, which establish the elements of a claim under the statute." *Andrade v. Chojnacki,* 65 F. Supp. 2d 431, 450 (W.D. Tex. 1999) (dismissing RICO claims for failure to include "specific facts" in complaints). Plaintiffs are not entitled to submit a conclusory, barebones complaint that fails to provide fair notice of the facts on which they rely. Likewise, including paragraph after paragraph of irrelevant allegations will not satisfy Plaintiffs pleading burden. The onus of asserting clear and understandable allegations falls squarely on Plaintiffs, who cannot avoid that obligation by filing a confusing complaint that requires the court or the defendant to strain in an attempt to comprehend the incomprehensible. *See, e.g., Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989) (dismissing RICO allegations and stating "[i]t is perhaps not impossible that a RICO claim may lie hidden or buried somewhere in [plaintiff's] complaints and the Standing Order case statement. [Plaintiff's] pleadings do not unequivocally negate such a possibility. However, they also do not state a RICO claim against defendants with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is.").

1. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

5. Plaintiffs have brought their RICO action under 18 U.S.C. § 1962(c) and (d). To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant

engaged in a prohibited pattern of racketeering activity or "predicate acts." *Cadle Co.,* 779 F. Supp. at 397 (citing *Elliott,* 867 F.2d at 882). The only "facts" cited by Plaintiffs regarding V&F's predicate acts are contained in paragraphs 133 and 145 – 151. The RICO Act defines "racketeering activity" by reference to various state and federal offenses, "each of which subsumes additional constituent elements that the plaintiff must plead." *Id.* at 398. As demonstrated below, Plaintiffs have failed to adequately plead these necessary predicate acts.

a. PLAINTIFFS HAVE FAILED TO ALLEGE AN UNLAWFUL ACT AGAINST V&F.

6. With respect to V&F, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by V&F. *Elliott*, 867 F.2d at 880. Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts, Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that V&F violated the statute. However, these allegations are baseless on its face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

b. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD WITH PARTICULARITY THEIR FRAUD-BASED PREDICATE ACTS AS REQUIRED BY FEDERAL RULE 9(B).

7. Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity." *Walsh v. America's Tele-Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake,

the circumstances constituting fraud or mistake shall be stated with particularity."). Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiff's claim and how and why they are fraudulent." *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016). Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP*, No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004). When pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs. *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.,* 975 F.2d at 1138.

8. Here, Plaintiffs have failed to allege the contents of *any* of the purported false representations made by V&F, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

c. PLAINTIFFS HAVE FAILED TO PLEAD RELIANCE IN CONNECTION WITH THEIR FRAUD RELATED CLAIMS.

9. RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff. *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts); *Sherman v. Main Event, Inc.*, No. 3:02-CV-1314-G, 2003 U.S. Dist. LEXIS

1571, *16 (N.D. Tex. Feb. 3, 2003) (Fish, J.) (unpublished) (dismissing RICO claims for mail, wire, and bankruptcy fraud where plaintiff failed to allege reliance). This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003); *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling"). But, despite this firmly established requirement, Plaintiffs in this case have asserted *no* allegations—indeed, not even a conclusory allegation—detailing *how* they purportedly relied upon V&F's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

2. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE.

a. PLAINTIFFS ENTERPRISE ALLEGATIONS ARE TOO VAGUE AND CONCLUSORY.

10. An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881. The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise." *Elliott*, 867 F.2d at 881.

11. To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence

that the various associates function as a continuing unit.'" *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)). The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure." *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).

12. "[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity." *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987). However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO." *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

13. Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless conclusions.

14. Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind—when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these or *any* other supporting facts, Plaintiffs' pleadings are simply insufficient.

15. Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations. *See Fitzgerald v. Chrysler Corp.,* 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank,* 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly"). Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, *at a bare minimum*, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged." *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit"). Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

b. PLAINTIFFS ALLEGED ENTERPRISE LACKS CONTINUITY.

16. Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements. *See*, *e.g.*, *Delta Truck,* 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962."). Specifically, "[a]n association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a

continuing unit as shown by a hierarchical or consensual decision making structure." *Crowe v. Henry,* 43 F.3d 198, 205 (5th Cir. 1995). These requirements limit the application of the RICO Act, and serve to prevent an overly-broad application to general commercial conduct that was never really the intended focus of the Act. *Delta Truck,* 855 F.2d at 242-43.

17. Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

3. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

18. Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts. *See In re Burzynski*, 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43). To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other *and* that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity." *In re Burzynski*, 989 F.2d

at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity). Such 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." *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241).

19. Here, Plaintiffs alleges several times throughout their Complaint that V&F engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

4. PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED A CONSPIRACY CLAIM UNDER § 1962(d).

20. A claim under § 1962(d) necessarily relies upon a properly pleaded claim brought under subsections (a), (b), or (c). Because Plaintiffs have failed to adequately plead violations of those other subsections, the § 1962(d) conspiracy allegation fails to state a claim. *Nolen v. Nucentrix Broadband Networks,* 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims). Plaintiffs' conspiracy allegations are conclusory and lack supporting factual details. *See Lovick v. Ritemoney Ltd*, 378 F.3d 433, 437 (5th Cir. 2004) (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss); *see also Crowe*, 43 F.3d at 206 (dismissing § 1962(d) claim because plaintiff's allegations were conclusory and failed to allege adequate supporting facts). Plaintiffs mere insistence that V&F conspired to participate in a criminal enterprise is insufficient to support a RICO claim. As a result, this claim too should be dismissed.

C. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS' ALLEGATIONS DO NOT SATISFY RICO'S PROXIMATE CAUSE STANDARD.

21. To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of" a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury. *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004) (citing *Holmes*, 503 U.S. at 279). That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed. *Ocean Energy II v. Alexander & Alexander, Inc.,* 868 F.2d 740, 744 (5th Cir. 1989). A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct. N*avigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 289 (5th Cir. 2007). More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation." *Sedima,* 473 U.S. at 496.

22. Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged." *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219. These allegations must include specific facts; conclusory and generalized allegations are insufficient. *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries." *Anza*, 547 U.S. at 452.

23. The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp*. In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors." *Id.* If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. *Id.*

24. Applying the above-referenced strict proximate-cause requirements in this case, it becomes clear that the required direct relationship between the injury asserted and the alleged injurious conduct is simply lacking. Plaintiffs' Complaint contains the following allegations regarding Plaintiffs' alleged injuries, which fail to meet the required pleading standards:

- Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expense and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering, activity herein delineated with a particularity.

- As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.

- Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v. Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.

- As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interest in an amount to be proven at trial.

25. Clearly, these allegations are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs has alleged a similar disjunctive causation pattern with respect to their claims against V&F. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

D. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE A VIOLATION OF THE HOBBS ACT DOES NOT CREATE A PRIVATE CAUSE OF ACTION.

27. On its face, the Hobbs Act is a criminal statute which contains no reference to any private civil right of action. 18 U.S.C. § 1851. While the Fifth Circuit has not specifically spoken to this issue, other courts, have specifically held that the Hobbs Act creates no private right of action. *See, e.g.,*, *Trevino v. Pechero*, 592 F.Supp.2d 939, 946-47 (S.D. Tex. 2008); *Decker v. Dunbar*, No. 5:06-cv-210, 2008 WL 4500650, *43 (E.D. Tex Sept. 29, 2008). Because the Hobbs Act cannot support an independent civil action, Plaintiffs' Hobbs Act claim should be dismissed for failure to state a claim.

E. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE V&F CANNOT BE CIVILLY LIABLE FOR AIDING AND ABETTING

28. There is no statutory provision holding persons civilly liable for aiding and abetting violations of the RICO statute, and thus this claim must be dismissed as it is not a viable cause of action against V&F. *See Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

F. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A VIOLATION OF PLAINTIFFS' CIVIL RIGHTS.

1. Plaintiffs HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER § 1983.

29. Section 1983 "provides a federal cause of action for the deprivation, under the color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). To state a claim under § 1983, a plaintiff must allege facts that show that he has been deprived of a right secured by the Constitution and laws of the United States and that the deprivation occurred under color of state law. *See Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). Plaintiffs cannot meet the essential element of this claim – identify a specific constitutionally protected right that has been infringed. *See Graham v. Connor*, 490, U.S. 386, 394 (1989). The requirement that the deprivation occur under color of state law is also known as the "state action" requirement. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999). A private party, like V&F, will be considered in a state action for § 1983 purposes only in rare circumstances. *See Gordon v. Neugebauer*, 57 F.Supp.3d 766, 773 (N.D. Tex. 2014). V&F requests the Court dismiss Plaintiffs' § 1983 claims because Plaintiffs' Complaint fail to allege facts that, if true, would amount to a violation of § 1983.

30. There are two ways that a private actor can be considered a state actor for purposes of imposing § 1983 liability. First, the plaintiff can show that the private actor was implementing an official government policy. *See Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 312 (5th Cir. 2011). Plaintiffs have included no facts in their Complaint which, if true, would show that any of the governmental units sued by Plaintiffs had an official policy that caused the alleged constitutional violations—much less that V&F implemented that policy.

31. The second method for proving state action under § 1983 is a showing that the private entity's actions are fairly attributable to the government. *See Rundus*, 634 F.3d at 312. This is also known as the "attribution test." The Supreme Court has articulated a two-part inquiry for determining whether a private party's actions are fairly attributable to the government: (1) "the deprivation [of plaintiff's constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Bass*, 180 F.3d at 241. Here, V&F are private citizens. Thus, V&F can only be liable under § 1983 if their conduct that forms the basis of this lawsuit is fairly attributable to the state of Texas or one of its political subdivisions.

32. The Supreme Court utilizes three different tests for determining whether the conduct of a private actor can be fairly attributable to a state actor under the second prong of the attribution test: (1) the nexus or joint-action test, (2) the public function test, and (3) the state coercion or encouragement test. *See Richard v. Hoechst Celanese Chem. Grp., Inc.*, 355 F.3d 345, 352 (5th Cir. 2003); *Lewis v. Law–Yone*, 813 F.Supp. 1247, 1254 (N.D. Tex. 1993) (describing the three tests as applicable to the resolution of the second prong of the attribution test articulated by the Supreme Court in *Lugar*).

a. NEXUS/JOINT-ACTION TEST

33. Under the nexus test, a private party will be considered a state actor "where the government has 'so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise,'" and the actions of the private party can be treated as that of the state itself. *Bass*, 180 F.3d at 242; *see also Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982). Plaintiffs have pled no facts which would suggest that any state governmental entity has "insinuated itself into a position of interdependence" with V&F. Indeed, Plaintiffs fail to plead any facts which would show that V&F ever interacted or communicated with the any state governmental entity regarding the estate planning documents. Plaintiffs have failed to plead facts that would satisfy the nexus test for state action under § 1983.

b. PUBLIC FUNCTION TEST

34. Under the public function test, a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *Bass*, 180 F.3d at 241–42. Here, Plaintiffs' Complaint is devoid of any facts showing that V&F was performing a function that was traditionally the exclusive province of the state when they drafted the estate planning documents.

c. STATE COERCION OR ENCOURAGEMENT TEST

35. Under the state coercion test, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass*, 180 F.3d at 242. State coercion or compulsion can be found where the plaintiff establishes that the private defendants were engaged in a conspiracy with state officials. *See Tebo v. Tebo*, 550 F.3d 492, 496 (5th Cir. 2008).

36. To establish such a conspiracy, the plaintiff must show that the private and public actors entered into an agreement to commit an illegal act. *Id.* At the motion to dismiss stage, the plaintiff must "allege specific facts to show an agreement." *See id.* (quoting *Priester v. Lowndes*

Cnty., 354 F.3d 414, 421 (5th Cir. 2004)). Here, Plaintiffs have included no facts in their Complaint which would suggest that V&F entered into an agreement or was acting at the direction of any government official when they drafted the estate planning documents. There are simply no facts which would, if true, show the existence of an illegal agreement between V&F and a governmental entity. Plaintiffs have thus failed to plead facts showing that V&F was coerced or encouraged by any governmental entity with respect to drafting of the estate planning documents. *Priester*, 354 F.3d at 420 (conspiracy alleges that are "merely conclusory, without reference to specific facts," will not survive a motion to dismiss).

37. In sum, Plaintiffs' Complaint is devoid of the factual allegations necessary to plead state action under the nexus test, the public function test, or the state coercion or encouragement test. Plaintiffs have failed to establish the necessary state action required to hold a private actor liable under § 1983. Accordingly, Plaintiffs' § 1983 claims against V&F should be dismissed for failure to state a claim upon which relief can be granted.

2. Plaintiffs HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER § 1985

38. To state a § 1985 claim, a plaintiff must plead: (1) a conspiracy involving two or more persons, (2) to deprive, directly or indirectly, a person or class of persons of equal protection of the laws, (3) that one or more of the conspirators committed an act in furtherance of that conspiracy, (4) which causes injury to another in his person or property or a deprivation of any right or privilege he has as a citizen of the United States, and (5) the conspirators' action is motivated by "discriminatory animus." *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989).

39. Plaintiffs' § 1985 claim fails for several reasons. First, a viable § 1985 claim requires an underlying violation of constitutional rights or privileges secured elsewhere. *See Griffin v. Breckenridge*, 403 US. 88, 102-04 (1971).

40. Plaintiffs' § 1985 claim also fails because Plaintiffs failed to properly identify facts sufficient to support the elements of a § 1985 claim. Plaintiffs' Complaint, as to this cause of action, is very brief and does not contain any factual averments from which a neutral fact finder could conclude that a conspiracy existed, that it was race-based, that Plaintiffs are in a protected class, or that it involved obstruction of justice or denial of equal protection of the laws.

41. Finally, Plaintiffs' § 1985 claim fails because they have provided no evidence whatsoever of class-based animus. Nor do Plaintiffs allege that they are members of a protected class. As such, Plaintiffs' § 1985 claims against V&F should be dismissed for failure to state a claim upon which relief can be granted.

F. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS IS NOT A RECOGNIZED CAUSE OF ACTION IN TEXAS

42. Neither the Texas Legislature nor the Texas Supreme Court have recognized a cause of action for tortious interference with inheritance rights. *See Anderson v. Archer*, 490 S.W.3d 175, 176 (Tex. App.—Austin 2016, pet. filed May 18, 2016); *Walker v. Kinsel*, No. 07-13-00130-CV, 2015 WL 2085220, *3 (Tex. App.—Amarillo Apr. 10, 2015, pet. filed Aug. 19, 2015). Because this is not a viable cause of action, Plaintiffs claim for tortious interference with inheritance rights should be dismissed for failure to state a claim.

IV.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that their Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

Candace L. Curtis
Rik Wayne Munson
218 Landana Street
American Canyon, California 94503

/s/ Cory S. Reed
Cory S. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Motion to Dismiss for Lack of Subject Matter Jurisdiction and would respectfully show the Court the following:

I.
SUMMARY OF MOTION

1. This is the most recent lawsuit filed in the "Brunsting Sibling Saga" and Plaintiff Candace Louise Curtis second attempt to have a federal judge consider these issues. In addition, similar claims are currently pending against V&F in Harris County, Texas. This Court does not

have subject matter jurisdiction over this case because Plaintiffs do not have standing to assert the present claims. Simply, Plaintiffs do not have an actual case or controversy with V&F. Plaintiffs cannot articulate any action traceable to V&F, which has caused any injury under any of the theoretical approaches taken by Plaintiffs. Additionally, V&F cannot be held liable to Plaintiffs. Accordingly, V&F requests that this Court dismiss Plaintiffs' claim for lack of subject matter jurisdiction.

II.
BACKGROUND

A. V&F HANDLED ESTATE PLANNING FOR THE BRUNSTING FAMILY.

2. Prior to their deaths, V&F had performed general estate planning legal services for Elmer and Nelva Brunsting beginning in 1997. On February 12, 1997, Elmer and Nelva created a living trust (the "Brunsting Family Living Trust") for their benefit and for the benefit of their five children. The stated co-successor beneficiary distribution was to be equal, 1/5 for each of the five Brunsting children[1]. Elmer and Nelva restated the Brunsting Family Living Trust in 2005, and amended it for the first time in 2007. The 2007 amendment replaced Amy with Curtis as co-successor trustee with Carl Brunsting (the only son of the family). After being diagnosed with Alzheimer's and Dementia, Elmer died in 2009. Thereafter, Nelva made all the decisions with respect to the Brunsting Family Living Trust until she resigned as trustee in December of 2010. She later died in November of 2011. Since the death of Nelva there have been numerous lawsuits filed by Curtis and her brother Carl against the rest of the Brunsting siblings.

B. CURTIS FIRST FEDERAL LAWSUIT ALLEGED SIMILAR ALLEGATIONS.

3. On February 27, 2012 Curtis originally filed an Original Complaint and Application for Ex Parte Temporary Restraining Order, Asset Freeze, Temporary and Permanent

[1] The beneficiary distribution has never been changed.

Injunction against Anita and Amy ("the Current Trustees") in the United States District Court for the Southern District of Texas[2] alleging breach of fiduciary duty, fraud, and intentional infliction of emotional distress. Generally, Curtis argued that the Current Trustees failed to meet their obligations under the Brunsting Family Living Trust.

4. Specifically with regards to the breach of fiduciary duty claim, Curtis alleged that Anita and Amy were acting jointly as co-trustees for the Brunsting Family Living Trust, of which she is a beneficiary and named successor beneficiary. Curtis claimed as the Current Trustees, they owed a fiduciary duty to Curtis to provide all beneficiaries and successor beneficiaries of the Brunsting Family Living Trust with information concerning trust administration, copies of trust documents, and semi-annual accounting. Curtis further contended that as the Current Trustees, they owed a fiduciary duty to provide notice to all beneficiaries prior to any changes to the trust that would affect their beneficiary interest. Curtis also alleged that the Current Trustees exercised all of the powers of trustees while refusing or otherwise failing to meet their first obligations under that power.

5. As to Curtis' fraud claim, she alleged that the Current Trustees refused or otherwise failed to meet their obligations to provide full, accurate, complete and timely accounting or provide copies of material documents or notification of material facts relating to trust administration which constitutes fraud. Curtis also alleged that there was a conflict of interest between the Current Trustees and the beneficiaries or successor beneficiaries of the Brunsting Family Living Trust. In particular, Anita held the general power of attorney for Nelva, but at some point required her to resign making Anita her successor trustee. Curtis contended that Anita transgressed the limitation placed upon her authority by the Brunsting Family Living

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[2] *See* Cause No. 4:-12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting, et al*; In the United States District Court for the Southern District of Texas.

Trust by refusing or otherwise failing to meet her obligations to provide full, accurate, complete and timely accounting or provide copies of material documents and facts relating to trust administration, the concealing of which coupled with multiple conflicts of interest constitute manifests acts of fraud.

6. Curtis' intentional infliction of emotional distress claim stemmed from the Current Trustees failure to provide her with information related to the Brunsting Family Living Trust and the trust's administration.

C. CURTIS ATTEMPTED TO SUE V&F IN THE ORIGINAL FEDERAL LAWSUIT FOR SIMILAR CLAIMS.

7. On April 29, 2013 Curtis filed her First Amended Complaint attempting to add V&F as named Defendants to the Federal Court Suit[3]. As to Curtis specific allegations against V&F she had alleged conspiracy, fraud, elder abuse, undue influence, false instruments, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortuous interference with fiduciary obligations, conversion, and violations of the Deceptive Trade Practices Act. She claimed she was informed and believed V&F assisted the Current Trustees in "rupturing the Brunsting family trusts" by creating documents improperly disrupting the dispositive provisions of Elmer and Nelva's estate plan. Further, V&F provided substantial assistance in such conspiracy resulting in the transfer of assets for the benefit of one or more of the Current Trustees, and did so knowingly, willfully and with reckless indifference to the rights of Curtis and did receive compensation for their participation in said conspiracy.

8. Ultimately, on May 15, 2015, at Curtis' request the case was remanded to the pending probate proceeding in Harris County, Texas. That case is still pending before Judge

[3] V&F was not added as a party to the lawsuit, because the Court denied Curtis' Motion for Leave to File the Amended Complaint.

Butts and most definitely involves similar questions of law and fact as the present lawsuit filed before this Court.

D. SIMILAR CLAIMS ARE CURRENTLY PENDING IN A MALPRACTICE LAWSUIT.

9. On March 9, 2012, Carl Henry Brunsting ("Carl") filed a Verified Petition to take Depositions Before Suit in Cause No. 2012-14538; *In re Carl Brunsting*; In the 80th Judicial District Court of Harris County, Texas. In that proceeding Carl conducted extensive written discovery and deposed at least one individual. On August 24, 2012 Carl and V&F entered into a Tolling Agreement Regarding Statute of Limitations, which tolled the applicable statute of limitations until December 31, 2012[4]. On January 29, 2013 [almost a year after filing the presuit petition], arguably past the applicable statute of limitations, Carl Henry Brunsting as the Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting brought a legal malpractice case against V&F for negligence, negligent misrepresentation, breach of fiduciary duty, aiding and abetting the current trustees' breaches of fiduciary duty, fraud, conversion, conspiracy, and violations of the Texas Deceptive Trade and Practices Act stemming from their representation of Elmer and Nelva, both individually and in their capacities as trustees of the Family Trust[5].

10. Specifically, Carl alleged that V&F assisted the Current Trustees in implementing a scheme to change the terms of the Brunsting Family Living Trust, to ultimately remove Nelva from her position as trustee of the Brunsting Family Living Trust, and to improperly remove assets from Elmer and Nelva's estates and from the Brunsting Family Living Trust. Carl contended because of the actions of V&F, the Current Trustees were able to alter Elmer and

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4 The presuit litigation was dismissed for want of prosecution on October 23, 2012.

5 See Cause No. 2013-05455; *Carl Henry Brunsting, et al v. Candace L. Kunz-Freed, et al*; In the 164th Judicial District Court of Harris County, Texas.

Nelva's wishes, resulting in an improper transfer of assets to Anita, Amy, and Carole, all to Carl and Curtis' detriment.

11. Carl further alleged that despite V&F's representations to Elmer and Nelva that the Brunsting Family Living Trust would preserve their plans for the estate, V&F took direction from the Current Trustees, with the result being just the opposite. Carl believed that V&F not only failed to inform Nelva that they had established a relationship with the Current Trustees, which put them in a conflict of interest with regard to their representation of Nelva's interest, but that V&F actually ignored the terms of the Brunsting Family Living Trust in ways which it is believed that Nelva did not have capacity to change and/or did not understand or want. In his petition, Carl pleaded that V&F took steps to undermine and even remove Nelva's control of her own assets, of the assets of Elmer's estate, and of the Family Trust assets, thereby placing those assets at risk of loss to Anita, Amy, and Carole and facilitating the loss which actually occurred.

12. Moreover, Carl alleged that V&F assisted the Current Trustees in various ways intended to prevent Nelva from even understanding that documents were being prepared by V&F at the Current Trustee's request, why those documents were being prepared, and what legal impact those documents had. Carl amended his petition three times.

13. On February 3, 2015, V&F took Carl's deposition in that proceeding. During the deposition, Carl could not provide any testimony to support the allegations he asserted against V&F. The next day, Carl's lawyer contacted V&F and said she thought Carl was acting strange during his deposition and she believed he might be incapacitated. Over one month later on March 5, 2015, Carl's counsel sent V&F a letter explaining that Carl's deposition testimony was without value because Carl lacked capacity during the deposition. On February 19, 2015, in the Probate Proceeding, Carl filed an application to resign as executor. The Probate Court granted

the application in March 2015. Until a successor executor is appointed, the malpractice lawsuit sits in limbo.

E. THE PENDING PROBATE PROCEEDING.

14. 70 days after filing the Malpractice Lawsuit and while the Federal Lawsuit was pending, on April 10, 2013, Carl filed suit against Anita, Amy, Carole Ann Brunsting, and Curtis[6] seeking a Declaratory Judgment, an Accounting, and for the Imposition of a Constructive Trust. *See* Cause No. 412.249-401; *Carl Henry Brunsting, et al v. Anita Kay Brunsting, et al*; In the Number Four Probate Court of Harris County, Texas. Similar to every lawsuit involving the Brunsting family, that lawsuit has drawn on with numerous filings, including motions for summary judgment (but no rulings).

15. On July 24, 2015 Judge Butts appointed Greg Lester ("Lester"), as a temporary administrator, to determine the merits of the claims asserted in the various lawsuits. On January 20, 2016 Lester provided a report, wherein he concluded:

- All of the legal actions taken by Nelva were within her authority;
- Any damages for unequal distribution can be resolved by equalizing the distributions to all siblings; and
- Recommended that the Probate Court should uphold the "No Contest" Clause.

16. On March 9, 2016 the parties were ordered to mediate the case with the Honorable Mark Davidson. The parties were scheduled to mediate on July 12, 2016, however the mediation was canceled at the last minute.

III.
BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW

17. Rule 12(b)(1) permits the dismissal of an action for lack of subject matter jurisdiction when the district court lacks authority to hear the dispute. *See generally, U.S. v.*

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[6] V&F is not a party to the Probate Proceeding.

Morton, 467 U.S. 822 (1984). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). To establish subject matter jurisdiction, a party must show than an actual case or controversy exists between himself and the party from whom relief is sought. Standing is an essential element in the determination of whether a true case or controversy exists. A motion to dismiss for lack of subject matter jurisdiction should be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Id.*

IV.
ARGUMENTS AND AUTHORITIES

A. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE THEY DO NOT MEET THE STANDING REQUIREMENTS.

18. Under Article III, the Federal Judiciary is vested with the "power" to resolve not questions and issues, but "cases" or "controversies." This language restricts the federal judicial power "to the traditional role of the Anglo-American courts." *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009). To state a case or controversy under Article III, a plaintiff must establish standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The minimum constitutional requirements for standing were explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, nor "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 560-61.

19. Plaintiffs in this case do not satisfy the requisite elements of standing. Plaintiffs have not suffered an injury in fact that was caused by V&F's conduct. Plaintiffs' Complaint fails

to identify or correlate the direct relationship between the injury asserted and the alleged injurious conduct. Plaintiffs' Complaint does not allege facts which show that, "but for" V&F's conduct, they would not have suffered the injuries claimed. *Ocean Energy II v. Alexander & Alexander, Inc.,* 868 F.2d 740, 744 (5th Cir. 1989); *see* N*avigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 289 (5th Cir. 2007) (a plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct).

20. In general, Curtis cannot demonstrate that she has been injured as a result of V&F's conduct. Curtis is still entitled to collect 1/5 of her inheritance under the Brunsting Family Living Trust. To the extent she has incurred any expense or fees it is because she has filed numerous frivolous lawsuits and attempted to fight her other siblings at every turn. Moreover, Munson is not a party to any of the prior lawsuits nor is he a beneficiary under to the Brunsting Family Living Trust. It is inconceivable that he could injured as a result of V&F's drafting of the estate planning documents. Plaintiffs' Original Complaint contains the following allegations regarding Plaintiffs' alleged injuries:

- Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expense and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering, activity herein delineated with a particularity.

- As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.

- Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v. Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.

- As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods

employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interest in an amount to be proven at trial.

21. Clearly, these allegations are insufficient to demonstrate a "conclusive financial loss." *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (per curiam); *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 (5th Cir. 2003) (a plaintiff does not have standing unless they can show concrete financial loss). Plaintiffs cannot demonstrate that they have been harmed by V&F. In this case, there is not a direct relation between the injury asserted and the injurious conduct alleged. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high standing standard, this case should be dismissed.

B. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE V&F CANNOT BE LIABLE TO PLAINTIFFS.

22. Plaintiffs do not have standing to bring the suit against V&F. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). While Plaintiffs attempt to cloak their claims against V&F as violations of the Racketeer Influenced Corruption Organization Act (amongst others), they are truly allegations of malpractice. *i.e.* V&F did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess.

23. Legal malpractice is a tort cause of action based on negligence. *See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006). The elements of a claim for negligence by an attorney are: (1) the attorney owed the plaintiff a duty; (2) the attorney's negligence act or omission breached that duty; (3) the breach proximately caused the plaintiff's injury; and (4) the plaintiff suffered damages. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009).

24. In most lawsuits against an attorney, the existence of the attorney-client relationship is not in dispute. However, in this case the existence of the attorney-client

relationship is a principal defense. As a rule, an attorney owes a duty of care only to a person with whom the attorney has a professional attorney-client relationship. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996).

25. It has long been the law that an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client. *See Savings Bank v. Ward*, 100 U.S. 195, 200 (1879); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *FinServ Cas. Corp. v. Settlement Funding, LLC*, 724 F. Supp. 2d 662, 671 (S.D. Tex. 2010); *Lewis v. Am. Expl. Co.*, 4 F. Supp. 2d 673, 676 (S.D. Tex. 1998); *F.D.I.C. v. Howse*, 802 F. Supp. 1554, 1563 (S.D. Tex. 1992); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006); *McCamish, Martin Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999); *Barcelo*, 923 S.W.2d at 577; *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see also Stancu v. Stalcup*, 127 S.W.3d 429, 432 (Tex. App.—Dallas 2004, no pet.) (an attorney only owes a duty of care to his clients and not to third parties, even if they may have been damaged by the attorney's representation of the client). Non-clients who are injured by the negligence of someone else's attorney are not permitted to sue the attorney. *See Swank v. Cunningham*, 258 S.W.3d 647, 666 (Tex. App.—Eastland 2008, pet. denied); *Gillespie v. Scherr*, 987 S.W.2d 129 (Tex. App. —Houston [14th Dist.] 1998, pet. denied).

26. Because an attorney does not represent a trust beneficiary they do not owe a professional duty to them. *Barcelo*, 923 S.W.2d at 576; *see Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (it would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trust's attorney, is the real client). Without this "privity barrier," the

rationale goes, clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability. *Barcelo*, 923 S.W.2d at 577. Courts have uniformly applied the privity barrier in the estate planning context. *See Brown v. Green*, 302 S.W.3d 1, 16 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621–22 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Thomas v. Pryor*, 847 S.W.2d 303, 304–05 (Tex. App.—Dallas 1992), *writ dism'd by agr.*, 863 S.W.2d 462 (Tex.1993); *Dickey v. Jansen*, 731 S.W.2d 581, 582–83 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716, 718–19 (Tex. App.—San Antonio 1986), *writ dism'd by agr.*, 729 S.W.2d 690 (Tex.1987). A lawyer's professional duty should never extend to persons whom the lawyer never represented. *Barcelo*, 923 S.W.3d at 579.

27. In *Barcelo*, the court considered whether beneficiaries dissatisfied with the distribution of estate assets could sue an estate-planning attorney for legal malpractice after a client's death. *Id.* at 576. In that case, the intended beneficiaries of a trust, which was declared invalid after the client's death, sued the attorney who drafted the trust agreement. *Id.* The court concluded that the non-client beneficiaries could not maintain a suit against the decedent's estate planner because "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." *Id.* at 578.

28. Several policy considerations supported the *Barcelo* holding. First, the threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney's representation. *Id.* at 578. The court also noted that suits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove

how a decedent intended to distribute the estate, creating a "host of difficulties." *Id.* The *Barcelo* court subsequently held that barring a cause of action for estate-planning malpractice by beneficiaries would help ensure that estate planners "zealously represent[ed]" their clients. *Id.* at 578–79.

29. Because Plaintiffs were not a client of V&F they do not have standing to assert the present claims. *See Brown*, 302 S.W.3d at 16. As such, this Court must grant V&F's Motion to Dismiss.

V.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that their Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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ATTORNEYS FOR DEFENDANTS CANDACE KUNTZ-FREED AND ALBERT VACEK, JR.

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

Candace L. Curtis
Rik Wayne Munson
218 Landana Street
American Canyon, California 94503

/s/ Cory S. Reed
Cory S. Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS,	§	
RIK WAYNE MUNSON	§	
	§	
Plaintiffs	§	
	§	**CASE NO. 4:16-cv-01969**
vs.	§	
	§	
CANDACE KUNZ-FREED, et al.,	§	
	§	
Defendants	§	

DISCLOSURE OF INTERESTED PARTIES

COMES NOW Defendant, Bobbie G. Bayless, and hereby certifies that the following persons or entities have a financial interest in the outcome of this litigation.

1. Candace Louise Curtis, Plaintiff
   218 Landana Street
   American Canyon, CA 94503
   Telephone: 925.759.9020

2. Rik Wayne Munson, Plaintiff
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   American Canyon, CA 94503
   Telephone: 925.349.8348

3. Candace Kunz-Freed, Defendant
   c/o Zandra Foley
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4. Albert Vacek, Jr., Defendant
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5. Bernard Lyle Mathews, III, Defendant
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6. Anita Kay Brunsting, Defendant
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Victoria, Texas 77904

7. Amy Ruth Brunsting, Defendant
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New Braunfels, Texas 78132

8. Neal Spielman, Defendant
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10. Stephen A. Mendel, Defendant
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11. Darlene Payne Smith, Defendant
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12. Jason Ostrom, Defendant
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13. Gregory Lester, Defendant
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14. Jill Willard Young, Defendant
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Houston, Texas 77027
Telephone: 713.572.2900

15. Bobbie G. Bayless, Defendant
Bayless & Stokes
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Telephone: 713.522.2224

16. Christine Riddle Butts, Defendant
Presiding Judge
Harris County Probate Court Number 4
Harris County Civil Courthouse
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Houston, Texas 77002
Telephone: 713.368.6767

17. Clarinda Comstock, Defendant
Associate Judge
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18. Toni Biamonte, Defendant
c/o Laura Beckman Hedge
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Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

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Attorneys for Bobbie G. Bayless

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument has been served on this 7th day of September, 2016, through the Court's CM/ECF system.

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S CERTIFICATE OF INTERESTED PARTIES

Defendants Candace Kunz-Freed and Albert Vacek Jr. respectfully submits their Certificate of Interested Parties listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation pursuant to the Court's Order for Conference and Disclosure of Interested Parties:

1. Candace Louise Curtis
   218 Landana Street
   American Canyon, California 94503

2. Rick Wayne Munson
   218 Landana Street
   American Canyon, California 94503

3. Candace Kunz-Freed
C/o Zandra E. Foley
Cory S. Reed
Thompson Coe Cousins & Irons, LLP
One Riverway, Suite 1400
Houston, Texas 77056

4. Albert Vacek Jr.
C/o Zandra E. Foley
Cory S. Reed
Thompson Coe Cousins & Irons, LLP
One Riverway, Suite 1400
Houston, Texas 77056

5. Bernard Lyle Mathews

6. Anita Brunsting

7. Amy Brunsting

8. Neal Spielman

9. Bradley Featherston

10. Stephen A. Mendel

11. Darlene Payne Smith

12. Jason Ostrom
C/o R. Keith Morris, III
Stacy L. Kelly
Ostrom Morris, PLLC
6363 Woodway, Suite 300
Houston, Texas 77057

13. Gregory Lester

14. Jill Willard Young

15. Bobbie Bayless

16. Christine Riddle Butts

17. Clarinda Comstock

18. Toni Biamonte

In accordance with this Court's Order, if new parties are added, or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, counsel will promptly file an amended certificate with the clerk.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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ATTORNEYS FOR DEFENDANTS CANDACE KUNTZ-FREED AND ALBERT VACEK, JR.

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

Candace L. Curtis
Rik Wayne Munson
218 Landana Street
American Canyon, California 94503

/s/ Cory S. Reed
Cory S. Reed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, RIK WAYNE MUNSON	§	
	§	
Plaintiffs	§	
	§	**CASE NO. 4:16-cv-01969**
vs.	§	
	§	
CANDACE KUNZ-FREED, et al.,	§	
	§	
Defendants	§	

BOBBIE G. BAYLESS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW Bobbie G. Bayless ("Bayless"), one of the Defendants in the above entitled and numbered cause, and files her Motion to Dismiss for Failure to State a Claim, and in support thereof would respectfully show the Court as follows:

1. Plaintiffs filed an Original Complaint ("Complaint") purporting to assert causes of action against Bayless and numerous other Defendants for what Plaintiffs describe as: (1) violations of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §1962(c); (2) conspiracy to violate 18 U.S.C. §1962(c); (3) conspiracy to violate due process rights; (4) conspiracy to deny equal protection of law; (5) conspiracy to deprive plaintiffs of an impartial forum; (6) breach of the public trust; (7) aiding and abetting public and private fiduciary breaches; (8) aiding and abetting fiduciary misapplications; and (9) claims allowed by 42 U.S.C. §1988(a), 18 U.S.C. §1964(c) and Rule 10b-5 Securities Exchange act of 1934 (17 C.F.R. §240.10b-5), including the right of private claims implied therefrom.

2. This case is related to a case pending in Harris County Probate Court Number 4 in Cause No. 412.249-401, styled *Carl Henry Brunsting, et al. v. Anita Kay Brunsting, et al.* in which Bayless represents Carl Henry Brunsting who is the brother of Plaintiff, Candace Louise Curtis. The action in the Harris County Probate Court involves disputes concerning a trust created by the parents of the five Brunsting siblings. Plaintiffs' Complaint in this Court, which even names the judge, associate judge, and a visiting court reporter of Harris County Probate Court Number 4, was filed days before a mediation was scheduled in the probate proceeding. The allegations, though difficult to follow, leave little question that the goal of this proceeding is to avoid that probate court mediation and the jurisdiction of Harris County Probate Court Number 4 over this dispute.[1]

3. The allegations relating to Bayless are minimal. The information identifying Bayless as a defendant is contained in paragraphs 21, 49, and 50 of the Complaint.[2] Paragraph 55 of the Complaint alleges that Bayless is an attorney who has practiced law in the Harris County Probate courts. Paragraph 56 alleges, without any facts to support it, that Bayless and the other named parties have engaged in a criminal enterprise somehow being conducted through Harris County Probate Court Number 4. Paragraph 59 makes a similar allegation, again without one shred of factual support. Bayless' name only otherwise appears at paragraph 124 of the Complaint, where an undefined conspiracy to alter the course of justice is alleged, and paragraph 131 of the Complaint, which contains only the factual basis for Plaintiffs' claim against Bayless. That so-called claim is one, however, which fails on its face.

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[1] *See* paragraphs 113-115 of the Complaint which specifically complain about mediation being required in the probate proceeding.

[2] Paragraph 21 names Bayless as a Defendant. Paragraph 49 alleges the law firm of Bayless & Stokes to be an enterprise and a "legal entity associated with Harris County Probate Court...."

4. Plaintiffs' entire claim, as articulated in paragraph 131 of the Complaint, is based on Bayless' postponement of a hearing on the Motion for Partial Summary Judgment Bayless filed in the probate proceeding on behalf of her client, Carl Brunsting. That action is not wrongful and can not support a cause of action which can be asserted by these Plaintiffs under any circumstances. Nevertheless, that is Plaintiffs' only factual assertion supporting Plaintiffs' claims against Bayless. Bayless' postponement of the hearing on her own motion is not something that has any relationship to the Plaintiffs[3], and Plaintiffs have no standing to even complain about it. Nor have Plaintiffs alleged any causal relationship between any alleged injury, which they do not bother to define, and Bayless' postponement of the hearing on her own motion.

5. Bayless certainly did postpone the hearing on her own Motion for Partial Summary Judgment, but Plaintiffs have no right to even complain about Bayless' actions in representing her client, Carl Brunsting, much less sue Bayless for it. Thus, Plaintiffs' attempts to allege facts to support a claim against Bayless fall woefully short. Pursuant to Fed. R. Civ. P. 12(b)(6), Bayless asks this Court to dismiss Plaintiffs' action against her because it fails to state a claim upon which relief can be granted. Thus, even though Bayless admits she postponed her own hearing, Plaintiffs have no right to relief based on that fact. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995).

6. Indeed, this Court could dismiss this entire case on its own initiative because Plaintiffs can not possibly prevail on what has been asserted, and it does not apepar to be something that can be cured by a new pleading. *Caroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). Plaintiffs who are pro se parties have long and loudly made their disdain for lawyers known.

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[3] The allegation is even more amazing in light of the fact that one of the Plaintiffs has no relationship whatsoever to the Brunsting probate proceeding.

But that disdain does not support these outlandish claims. Plaintiffs have not provided one single fact to support their apparent position that Bayless is a person who is engaged in a pattern of racketeering activity connected to the acquisition, establishment, conduct, or control of an enterprise, and that Bayless participated in the operation or management of that enterprise. The fact that Bayless practices law and, in the course of her practice has represented another party involved in litigation with one of the Plaintiffs in Probate Court Number 4, does not even come close to supporting any cause of action, even if Plaintiffs do not like actions taken by Bayless in the course of her representation of her client, Carl Brunsting.

WHEREFORE, PREMISES CONSIDERED, Bayless prays that this motion be in all things granted and sustained; that the Court dismiss this action for failure to state a claim upon which relief can be granted; and that Bayless have such other and further relief, both general and special, legal and equitable, to which she may show herself entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

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Attorneys for Bobbie G. Bayless

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument has been served on this 7th day of September, 2016 via Telecopier or U.S. First Class Mail as follows:

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
sent via U.S. First Class Mail

Rik Wayne Munson
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sent via U.S. First Class Mail

Cory Reed
Thompson Coe Cousins & Irons, LLP
One Riverway, Suite 1400
Houston, Texas 77056
sent via telecopier

Jason Ostrom
Ostrom Morris PLLC
6363 Woodway, Suite 300
Houston, Texas 77057
sent via telecopier

Laura Beckman Hedge
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002
sent via telecopier

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUIS CURTIS	§	
RICK WAYNE MUNSON	§	
Plaintiffs	§	
	§	
VS.	§	
	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED., *ET AL.*	§	
Defendants	§	

[PROPOSED] ORDER

Before the Court is the Unopposed Motion to File Responsive Pleading, filed by Defendant Jason B. Ostrom. The Motion is **GRANTED**. The deadline for Jason B. Ostrom to file a responsive pleading is hereby extended up to and including November 7, 2016. All other deadlines remain in full force and effect.

SO ORDERED.

Date: September 8, 2016.

ALFRED H. BENNETT
UNITED SATTES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's Motion for Access to Electronic Filing

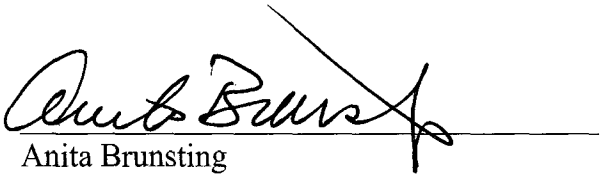
TO THE HONORABLE JUDGE OF SAID COURT:

I, Anita Brunsting, am a Pro Se defendant in the above-styled case. I am aware that non-attorneys are not approved for accounts in the Court's electronic filing system. I request that the Court waive this requirement and approve my use of a PACER account to enable me to electronically file documents in this case. I hereby affirm that:

1. I have reviewed the requirements for e-filing and agree to abide by them.
2. I understand that once I register for e-filing, I will receive notices and documents only by email in this case and not by regular mail.
3. I have regular access to the technical requirements necessary to e-file sucessfully:
    a. A computer with internet access.
    b. An email account on a daily basis to receive notifiications from the Court and notices from the e-filing system.
    c. A scanner to convert documents that are only in paper format into electronic files.
    d. A printer or copier to create documents.
    e. A word-processing program to create documents.

f. A pdf reader and a pdf writer to convert word processing documents into pdf format, the only electronic format in which documents can be e-filed.

Respectfully submitted,



Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

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2. Rik Wayne Munson — Plaintiff, Pro Se
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   925-349-8348

3. Candace Kuntz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, Texas 77056

4. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, Texas 77056

5. Bernard Lyle Matthews III — Defendant
   11777 Katy Freeway, Suite 300 South
   Houston, Texas 77079

6. Amy Ruth Brunsting — Defendant
   2582 Country Ledge
   New Braunfels, Texas 78132

7. Neal E. Spielman — Defendant
   Griffin & Matthews
   1155 Dairy Ashford, Suite 300
   Houston, Texas 77079

8. Bradley Featherston — Defendant
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9. Stephen A. Mendel — Defendant
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281-759-3213

10. Darlene Payne Smith — Defendant
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1401 McKinney, Suite 1700
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11. Jason B. Ostrom — Defendant
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6363 Woodway, Suite 300
Houston, Texas 77056
713-863-8891

12. Gregory Lester — Defendant
955 N. Dairy Ashford, Suite 220
Houston, Texas 777079

13. Jill Willard Young — Defendant
MacIntyre, McCulloch, Stanfield
and Young, L.L.P.
2900 Weslayan, Suite 150
Houston, Texas 77027

14. Bobbie Bayless — Defendant
Bayless & Stokes
2931 Ferndale
Houston, Texas 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 770002

17. Toni Biamonte — Defendant
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

on this 9TH day of September 2016.

Anita Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Order Garnating Defendant Anita Brunsting's Motion for Access to Electronic Filing

The Court considered defendant Anita Brunsting's Motion for Access to Electronic Filing. Finding that good cause exists, the motion is GRANTED.

IT IS SO ORDERED.

SIGNED on this _____ day of _____, 2016.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
	§	(Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's
Certificate of Interested Parties

Defendant, Anita Brunsting, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

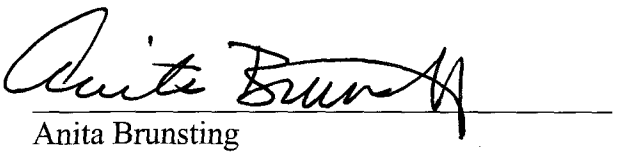
1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Brunsting
   E. Amy Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen A. Mendel
   I. Darlene Payne Smith
   J. Jason Ostrom
   K. Gregory Lester
   L. Jill Willard Young
   M. Bobbie Bayless
   N. Christine Riddle Butts
   O. Clarinda Comstock
   P. Toni Biamonte

Respectfully submitted,



Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020

2. Rik Wayne Munson — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348

3. Candace Kuntz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, Texas 77056

4. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
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5. Bernard Lyle Matthews III — Defendant
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on this 9TH day of September 2016.

Anita Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Order Garnating Defendant Anita Brunsting's Motion for Access to Electronic Filing

The Court considered defendant Anita Brunsting's Motion for Access to Electronic Filing. Finding that good cause exists, the motion is GRANTED.

IT IS SO ORDERED.

SIGNED on this _____ day of _____, 2016.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S RULE 12(B)(6) MOTION TO DISMISS

Defendant Jill Willard Young files this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) seeking the dismissal of all claims asserted by Plaintiffs against her.

Plaintiffs' pro se Complaint purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court No. 4. But those "claims" consist of fantastical allegations that some or all of the defendants are members in a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. In reality, their Complaint is a bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Against, Ms. Young, Plaintiffs allege "causes of action" for:

- "18 U.S.C. § 1962(d) the Enterprise" (*see* Complaint, at § IV, ¶¶ 35–58);
- "The Racketeering Conspiracy 18 U.S.C. § 1962(c)" (*see id.* at ¶¶ 59–120);

- Three claims for "Honest Services 18 U.S.C. § 1346 and 2" (*see id.* at ¶¶ 121, 122, 123);
- "Wire Fraud 18 U.S.C. § 1343 and 2" (*see id.* at ¶ 123);
- "Fraud 18 U.S.C. § 1001 and 2" (*see id.* at ¶ 123);
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. § 1951(b)(2) and 2" (*see id* at ¶ 123); and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.A.C. § 371" (*see id* at ¶ 123); "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting" (*see id.* at ¶ 132); and "Conspiracy to Violate 18 USC §§242 and 2, & 42 U.S.C. §§983 and 1985) (*see id.* at ¶ 159).

But despite pleading more than ten "claims" against Ms. Young, Plaintiffs make no assertion that she performed even a single wrongful act. And instead of pleading the elements of legal causes of action and supporting those elements with allegations of fact—the minimum standard of pleading required by Rule 8—Plaintiffs' Complaint reads more like an excerpt from *The DaVinci Code*, rattling off fantastical assertions with no connection to plausible facts or valid causes of action. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added); *Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional").

Plaintiffs assert no factual content sufficient to maintain any cause of action against Ms. Young. Instead, Plaintiffs' allegations are implausible, fanciful, and delusional. The Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (*see* Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.

The only matter in which Ms. Young was ever involved with Plaintiff Curtis was *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4) (the "*Brunsting* matter"). Plaintiff Munson was not party to that matter. In the *Brunsting* matter, Ms. Young was attorney for Greg Lester, who had been appointed by Probate Court No. 4 as temporary administrator,[1] to assist Mr. Lester in preparing a written report to the Court.

All of the actions taken by Ms. Young in that matter were in her role as attorney to Mr. Lester. Ms. Young never had a fiduciary relationship with either Plaintiff, and she did not represent any other party in the *Brunsting* matter. Plaintiffs make no allegations to the contrary.

ARGUMENT

Plaintiffs' claims should be dismissed with prejudice. First, Ms. Young, as attorney only for Mr. Lester, is entitled to immunity from suit under Texas law. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("**[A]ttorneys are immune from civil liability to non-clients** for actions taken in connection with representing a client in litigation.") (emphasis added).

Second, Plaintiffs' RICO claims fail for two independent reasons:

(1) The injuries Plaintiffs allegedly suffered were not proximately caused by a violation of RICO, as is required to bring a civil RICO action under 18 U.S.C. § 1964(c);

[1] *See* Exhibit A, Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code § 452.051, *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4 Jul. 24, 2015).

(2) Plaintiffs have failed to plead a "racketeering activity," namely by not pleading the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b);

Third, Plaintiffs' Complaint should be dismissed because they have not pleaded a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added).

Fourth, Plaintiffs' Complaint should be denied because it is frivolous, delusional, and implausible. *See Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional").

Fifth, Plaintiffs' "Hobbs Act," "Wire Fraud," "Fraud under 18 U.S.C. § 1001," and "Honest Services" claims fail because those statutes do not create private causes of action. *See Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005).

Sixth, Plaintiffs attempt to impermissibly plead collectively does not satisfy the federal pleading requirements.

I. Under Texas law, Ms. Young is immune from suit.

Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

"Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)); *see also Highland*

Capital Mgmt., LP v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. filed) (dismissing conspiracy and breach of fiduciary claims asserted by party against opposing attorneys because actions alleged were "kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation" (citing *Byrd*, 467 S.W.3d at 482)).

Instead, in Texas, "attorney immunity is properly characterized as a true immunity from suit," and not merely "a defense to liability." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346–48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* at 346.

The only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). But a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was engaging in conduct that did not involve the provision of legal services. *Id.* Indeed, Plaintiffs do not allege **any** conduct of Ms. Young that they claim was wrongful. Thus, Ms. Young is protected by Texas's doctrine of attorney immunity, and this suit against her must be dismissed.

II. Plaintiffs' RICO claims fail.

Plaintiffs' RICO claims, alleging violations of § 1962, should be dismissed under Fed. R. Civ. 12(b)(6) for two independent reasons:

(1) The injuries Plaintiffs allegedly suffered were not proximately caused by a violation of RICO, as is required to bring a civil RICO action under 18 U.S.C. § 1964(c);

(2) Plaintiffs have failed to plead a "racketeering activity," namely by not pleading the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b);

Each reason is discussed below.

A. Plaintiffs have not shown they have standing under § 1964(c) to assert civil RICO claims against Ms. Young.

Plaintiffs' RICO claims should be dismissed under Fed. R. Civ. P. 12(b)(6) because Plaintiffs have not pled facts showing they have standing under § 1964(c) to assert a civil RICO claim.

The RICO statute states "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). And a RICO plaintiff must show he has standing to sue. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). To plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury." *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (citing *Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639, 654 (2008)); *Holmes v. Securities Investor Protection Corp.*, 559 U.S. 1, 9-10 (1992) ("[P]roximate cause is thus required," which means there must be "some direct relation between the injury asserted and the injurious conduct alleged."). The focus of proximate cause analysis is "directness"—whether "the injury or damage was either a direct result or a reasonably probable consequence of the act." *Plambeck*, 802 F.3d at 676; *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Plaintiffs do not plead facts showing

they suffered any financial loss that directly resulted from any alleged RICO violation by Ms. Young. *See Gil Ramirez Grp., L.L.C.*, 786 F.3d at 408.

In *Firestone*, the beneficiaries of the Firestone family estate and trust asserted RICO claims against the executor and trustee. *Firestone v. Galbreath*, 976 F.2d 279, 282 (6th Cir. 1992). The court affirmed the district court's dismissal of the RICO claims for lack of standing, noting that the estate, not the beneficiaries, suffered the direct harm. *Id.* at 285 (citing *Holmes*, 559 U.S. at 9-10). The alleged harm inflicted by the executor and trustee flowed only indirectly to the beneficiaries through the harms inflicted upon the decedent and her estate. *Id.* (reasoning that the beneficiaries were similar to shareholders who sue for acts aimed at a corporation—"the shareholder's injury is only indirect because the decrease in the value of the corporation precipitates the drop in the value of the stock") (citing *Gaff v. FDIC*, 814 F.2d 311 (6th Cir. 1987); *Warren v. Manufacturer's Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985)). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

Like the aggrieved beneficiaries in *Firestone*, Plaintiffs here could, at most, only suffer indirect harm through their allegations of "poser advocacy" by some secret society that allegedly includes Ms. Young. The rationale underlying the direct relationship requirement is plainly applicable here, as the estates "can be expected to vindicate the laws by pursuing their own claims." *See Holmes*, 503 U.S. at 269–70 (holding broker dealers could be relied upon to bring suit against alleged securities fraud co-conspirators); *Anza*, 547 U.S. at 460 ("If the allegations are true [that defendants are defrauding the State of New York], the State can be expected to pursue appropriate remedies."). In short, by alleging that Ms. Young caused harm to the estates through "poser advocacy," which in turn caused harm to Plaintiffs, Plaintiffs improperly ask the

Court to go "beyond the first step."[2] *See Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.").

Because Plaintiffs' have not shown their injuries were directly caused by a violation of RICO, they have failed to satisfy the proximate causation requirement necessary to establish RICO standing. Thus, Plaintiffs' RICO claims should be dismissed.

B. Plaintiffs have not satisfied Rule 9(b) because they have not pleaded facts showing Ms. Young engaged in a "racketeering activity."

Plaintiffs' RICO claims should also be dismissed under Fed. R. Civ. P. 9(b) because the allegations do not show Ms. Young engaged in any "racketeering activities" sufficient to trigger the RICO statute.

Under Rule 9(b), fraud claims must meet the heightened pleading requirements of Rule 9(b), which requires a plaintiff to plead allegations of fraud "with particularity." FED. R. CIV. P. 9(b); *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) (per curiam) ("Rule 9(b) requires the 'who, what, when, where, and how' to be laid out.") (citation omitted); *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent") (internal quotation marks and citations omitted).

By imposing a "higher, or more strict, standard than . . . basic notice pleading" on fraud claims, *Sushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993), Rule 9(b) ensures that a defendant "has sufficient information to formulate a defense; it protects defendants from harm to

[2] It is worth noting that, although Plaintiffs allege that Defendants somehow "hijacked" estates by recouping attorneys' fees for time that was merely spent as sham advocacy, Ms. Young has yet to be paid a single cent for her representation of Temporary Administrator Lester.

their reputation and goodwill; it reduces the number of frivolous suits; and, it prevents plaintiffs from filing a claim and then attempting to uncover unknown wrongs through discovery." *United States ex. rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008).

RICO claims require that a defendant commit a "pattern of racketeering activity." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). A "[r]acketeering activity consists of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1). *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (citation omitted); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 559 (5th Cir. 2015). The predicate acts can be certain state or federal crimes. *See* 18 U.S.C. § 1961(1). But theft, common law fraud, and other garden-variety torts are not racketeering activities. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite predicate *criminal* acts under RICO"); *Toms v. Pizzo*, 4 F. Supp. 2d 178, 183 (W.D.N.Y.), *aff'd*, 172 F.3d 38 (2d Cir. 1998) ("[S]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'"); *Stangel v. A-1 Freeman N. Am., Inc.*, No. CIV.A. 3:01-CV-2198M, 2001 WL 1669387, at *1 (N.D. Tex. Dec. 27, 2001) ("breach of a settlement agreement, interference with a contract, conversion of property, and intentional infliction of emotional distress" are not racketeering activities).

Plaintiffs have made no assertion of any predicate acts of Ms. Young they claim constitute RICO predicate acts, although they vaguely assert "causes of action" for wire fraud,

mail fraud, and Hobbs Act violations.[3] But to adequately plead mail fraud, wire fraud, or violations of the Hobbs Act, Plaintiffs must allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic*, 975 F.2d at 1139 (emphasis added) (citing Fed. R. Civ. P. 9(b)). RICO claims must be dismissed when they rest on predicate fraud claims that are not pled with particularity. *See id.*; *Elliott*, 867 F.2d 877, 882 (5th Cir. 1989); *St. Germain*, 556 F.3d at 263. Here, Plaintiffs have not pled the time, place, or content of any alleged misrepresentations by Ms. Young, nor have they pled what Ms. Young obtained by making the alleged misrepresentation.

In sum, Plaintiffs fail to state even a single individualized fraud allegation against Ms. Young. *See Del Castillo*, 2015 WL 3833447, at *6 ("A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct."); *Dimas*, 2010 WL 1875803, at *8 (dismissing RICO claims, in part, because the complaint failed to specify the role each Defendant played in the alleged scheme). Thus, because Plaintiffs have failed to plead facts showing Ms. Young engaged in a "racketeering activity," their RICO claims should be dismissed.

III. Plaintiffs have not satisfied Rule 12(b) because they have not pleaded a plausible claim for relief.

Plaintiffs' RICO claims should also be denied because the Complaint fails to state a plausible, valid claim for relief under the RICO statute.[4] Plaintiffs rely on implausible and conclusory allegations, unsupported by any factual assertions whatsoever. *Ashcroft v. Iqbal*, 556

[3] As shown in Section C, Plaintiffs' wire fraud, mail fraud, and Hobbs Act claims fail, because they cannot be asserted as private causes of action.

[4] As shown in Part V of this Section, all of the "causes of action" Plaintiffs assert other than RICO do not afford a private right of action. Thus, this section focuses on Plaintiffs' failure plead a valid RICO claim.

U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added). Plaintiffs' Complaint pleads no factual content to support any of their fantastical allegations.

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Plaintiffs' claim is "facially plausible" only if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679. In other words:

> A legally sufficient complaint must establish more than a "sheer possibility" that plaintiffs' claim is true. It need not contain detailed factual allegations, but it must go beyond labels, legal conclusions, or formulaic recitations of the elements of a cause of action. . . . . If there are insufficient factual allegations to raise a right to relief above the speculative level, . . . the claim must be dismissed.

Martin v. Magee, CIV.A. 10-2786, 2011 WL 2413473, at *4 (E.D. La. June 10, 2011) (internal quotations and citations omitted) (citing *Iqbal* and *Twombly*).

Plaintiffs' Complaint does not plead enough facts to state a plausible claim for relief against Ms. Young. Other Courts in this jurisdiction have rejected identical claims. *See Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.). In *Freeman*, two pro se plaintiffs alleged:

> Plaintiff claims a probate court enterprise comprised of judges and lawyers who conspired against pro se litigants, including himself. He claims that this enterprise has "virtually looted" his mother's homestead through the guardianship proceeding and denied him due process of law. Even if true, these allegations fail to state a "racketeering activity" because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred. In light of the absence of any allegation that raises the possibility of a RICO violation, Plaintiff's claim under RICO must be DISMISSED.

Id. at *2 (internal footnotes omitted). Here, Plaintiffs' Complaint—devoid of any well-pleaded facts—consists of nothing more than conclusory conspiracy theories. It should be dismissed.

IV. Plaintiffs' Complaint is frivolous and delusional.

Plaintiffs' Complaint should also be denied because it is frivolous and delusional. This is a wholly separate basis on which the Court should dismiss the Complaint, through this Court's "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992)).

Here, Plaintiffs' Complaint resorts to concocting conspiracy theories and hypothesizing the existence of shadow organizations engaging in "poser advocacy" through a cabal of probate mafiosos. Other courts in this Circuit have held that almost identical allegations made by pro se

litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Plaintiffs' allegations are fanciful, fantastic, and delusional—at best. They also appear to constitute an attempt by Plaintiffs to seek revenge for being on the losing end of trust and estate determinations that were already fully litigated in Texas state court. But whether Plaintiffs' motivations in filing the Complaint are one or the other (or anything in between), their allegations should be dismissed.

V. Plaintiffs' claims for "Hobbs Act," "Wire Fraud," "Fraud under 18 U.S.C. §1001," and "Honest Services" fail because those statutes do not create private causes of action.

The Plaintiffs purport to assert claims against Ms. Young for violation of the Hobbs Act, Wire Fraud, "Fraud under 18 U.S.C. § 1001," and "Honest Services," but those acts do not create private causes of action. Thus, those claims should all be dismissed.

A. The Hobbs Act does not create a private cause of action.

The Hobbs Act does not create a private cause of action. *Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005) ("Nor does the Hobbs Act create a private cause of action") (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999)). This is settled law. *See, e.g., Campbel v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 72 (W.D.N.Y. September 29, 2005) ("[F]ederal courts have consistently found that the Hobbs Act does not support a private cause of action."); *Barge v. Apple Computer*, No. 95 CIV. 9715 (KMW), 1997 WL 394935, at *1 (S.D.N.Y. July 15, 1997), *aff'd*, 164 F.3d 617 (2nd Cir. 1998) ("[C]ourts that have considered this question have consistently found that the Hobbs Act does

not support a private cause of action."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("There is no implied private cause of action under the Hobbs Act.").

Thus, Plaintiffs' Hobbs Act claim against Ms. Young fails.

B. The Wire Fraud statute does not create a private cause of action.

The wire fraud statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) (citing *Napper v. Anderson, Hensley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) for its holding that there is "no private cause of action under the mail-and wire-fraud statutes, 18 U.S.C. §§ 1341 and 1343"); *see also Morse v. Stanley*, 4:11CV230, 2012 WL 1014996, at *2 (E.D. Tex. Mar. 23, 2012) ("18 U.S.C. § 1343 is a criminal statute pertaining to wire fraud and does not provide Plaintiff with a private cause of action."); *Benitez v. Rumage*, CIV.A. C-11-208, 2011 WL 3236199, at *1 (S.D. Tex. July 27, 2011) (the wire fraud statute "do[es] not provide a private cause of action").

Thus, Plaintiffs' Wire Fraud act claim against Ms. Young fails.

C. The claim for "Fraud under 18 U.S.C. §1001" is not a private cause of action.

Plaintiffs' claim for "Fraud 18 U.S.C. § 1001" fails, as well, because that statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) ("The Thompsons assert causes of action under **18 U.S.C. §§ 1001**, 1010, 1014, 1341, 1343, and 1344. **These federal criminal statutes do not provide a private cause of action**.") (emphasis added). Again, this is settled law. *See Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987) ("Finding no congressional intent to create a private right of action under § 1001(b), Blaze has failed to state a claim upon which relief could be granted, and the district court's grant of summary judgment was proper."); *Grant*

v. CPC Logistics Inc., 3:12-CV-200-L BK, 2012 WL 601149, at *1 (N.D. Tex. Feb. 1, 2012), *report and recommendation adopted*, 3:12-CV-200-L, 2012 WL 601128 (N.D. Tex. Feb. 23, 2012) ("Federal courts have repeatedly held that **violations of criminal statutes, such as 18 U.S.C. §§ 1001**, 1505 and 1621, **do not give rise to a private right of action**.") (emphasis added); *Parker v. Blake*, CIV. A. 08-184, 2008 WL 4092070, at *3 (W.D. La. Aug. 29, 2008) ("Section 1001 provides criminal penalties for persons convicted of fraud or false statements during the course of certain dealings with the federal government . . . . As above, this criminal statute, were it applicable to allegations made by plaintiff still would not create a private civil cause of action or entitlement to monetary relief thereunder."); *Doyon v. U.S.*, No. A-07-CA-977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (holding that there is "no private cause of action under 18 U.S.C. §§ 1001").

Thus, Plaintiffs' claim for "Fraud 18 U.S.C. § 1001" fails.

D. The claim for "Honest Services" is not a private cause of action.

Plaintiffs allege three claims for "honest services," based on 18 U.S.C. § 1346. *See* Complaint, at ¶¶ 121, 122, 123. But 18 U.S.C. § 1346 does not create a private cause of action, either. *See Eberhardt v. Braud*, 16-CV-3153, 2016 WL 3620709, at *3 (C.D. Ill. June 29, 2016) ("Plaintiff attempts to bring a private right of action under 18 U.S.C. § 1346 and 18 U.S.C. § 1951, but those criminal statutes do not contain an express or implied private right of action."); Alford v. S. Gen. Ins., 7:12-CV-00273-BR, 2013 WL 1010584, at *2 (E.D.N.C. Mar. 14, 2013) (holding that a "claim for honest services fraud under 18 U.S.C. § 1346" must be dismissed "pursuant to Rule 12(b)(6) because a private right of action for a violation of that law does not exist"); *Hooten v. Greggo & Ferrara Co.*, CIV. 10-776-RGA, 2012 WL 4718648, at *6 (D. Del. Oct. 3, 2012) ("18 U.S.C. § 1341 and § 1346 . . . are found in the federal criminal code. Neither § 1341 or § 1346 allow for a private cause of action.").

Thus, Plaintiffs' three claims against Ms. Young for "Honest Services" fail.

VI. Plaintiffs rely on impermissible collective pleading.

"A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct." *In re Parkcentral Glob. Litig.*, 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012) ("It is impermissible to make general allegations that lump all defendants together; rather, the complaint must segregate the alleged wrongdoing of No. 1 from another."). And the pleading requirements of Rule 9(b) likewise demand **specific** and **separate** allegations against each defendant. *See Dimas v. Vanderbilt Mortg. & Fin., Inc.*, No. C-10-68, 2010 WL 1875803, at *8 (S.D. Tex. May 6, 2010) ("[W]hile the Complaint makes several general allegations of fraud, it often fails to specify the role each Defendant played in the alleged scheme."); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made").

Here, Plaintiffs offer no individualized allegations about any wrongful conduct they allege against Ms. Young. Instead, Plaintiffs' vague and fanciful pleadings are lobbed at all Defendants, with no discernible specific or separate allegations for Ms. Young. This is insufficient to state a claim.

CONCLUSION

For the reasons stated above, this Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: September 15, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Motion to Dismiss has been served on September 15, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

EXHIBIT A

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator

Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

FILED
2015 JUL 24 AM 10: 35
COUNTY CLERK
HARRIS COUNTY TEXAS

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Signed July 23, 2015.

Christine Butts
Christine Butts, Judge
Harris County Probate Court No. 4

FILED
2015 JUL 24 AM 10: 35
COUNTY CLERK
HARRIS COUNTY TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S RULE 12(B)(6) MOTION TO DISMISS

Defendant Jill Willard Young files this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) seeking the dismissal of all claims asserted by Plaintiffs against her.

Plaintiffs' pro se Complaint purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court No. 4. But those "claims" consist of fantastical allegations that some or all of the defendants are members in a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. In reality, their Complaint is a bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Against, Ms. Young, Plaintiffs allege "causes of action" for:

- "18 U.S.C. § 1962(d) the Enterprise" (*see* Complaint, at § IV, ¶¶ 35–58);
- "The Racketeering Conspiracy 18 U.S.C. § 1962(c)" (*see id.* at ¶¶ 59–120);

- Three claims for "Honest Services 18 U.S.C. § 1346 and 2" (*see id.* at ¶¶ 121, 122, 123);
- "Wire Fraud 18 U.S.C. § 1343 and 2" (*see id.* at ¶ 123);
- "Fraud 18 U.S.C. § 1001 and 2" (*see id.* at ¶ 123);
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. § 1951(b)(2) and 2" (*see id* at ¶ 123); and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.A.C. § 371" (*see id* at ¶ 123); "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting" (*see id.* at ¶ 132); and "Conspiracy to Violate 18 USC §§242 and 2, & 42 U.S.C. §§983 and 1985) (*see id.* at ¶ 159).

But despite pleading more than ten "claims" against Ms. Young, Plaintiffs make no assertion that she performed even a single wrongful act. And instead of pleading the elements of legal causes of action and supporting those elements with allegations of fact—the minimum standard of pleading required by Rule 8—Plaintiffs' Complaint reads more like an excerpt from *The DaVinci Code*, rattling off fantastical assertions with no connection to plausible facts or valid causes of action. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added); *Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional").

Plaintiffs assert no factual content sufficient to maintain any cause of action against Ms. Young. Instead, Plaintiffs' allegations are implausible, fanciful, and delusional. The Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (*see* Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.

The only matter in which Ms. Young was ever involved with Plaintiff Curtis was *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4) (the "*Brunsting* matter"). Plaintiff Munson was not party to that matter. In the *Brunsting* matter, Ms. Young was attorney for Greg Lester, who had been appointed by Probate Court No. 4 as temporary administrator,[1] to assist Mr. Lester in preparing a written report to the Court.

All of the actions taken by Ms. Young in that matter were in her role as attorney to Mr. Lester. Ms. Young never had a fiduciary relationship with either Plaintiff, and she did not represent any other party in the *Brunsting* matter. Plaintiffs make no allegations to the contrary.

ARGUMENT

Plaintiffs' claims should be dismissed with prejudice. First, Ms. Young, as attorney only for Mr. Lester, is entitled to immunity from suit under Texas law. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("**[A]ttorneys are immune from civil liability to non-clients** for actions taken in connection with representing a client in litigation.") (emphasis added).

Second, Plaintiffs' RICO claims fail for two independent reasons:

(1) The injuries Plaintiffs allegedly suffered were not proximately caused by a violation of RICO, as is required to bring a civil RICO action under 18 U.S.C. § 1964(c);

[1] *See* Exhibit A, Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code § 452.051, *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4 Jul. 24, 2015).

(2) Plaintiffs have failed to plead a "racketeering activity," namely by not pleading the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b);

Third, Plaintiffs' Complaint should be dismissed because they have not pleaded a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added).

Fourth, Plaintiffs' Complaint should be denied because it is frivolous, delusional, and implausible. *See Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional").

Fifth, Plaintiffs' "Hobbs Act," "Wire Fraud," "Fraud under 18 U.S.C. § 1001," and "Honest Services" claims fail because those statutes do not create private causes of action. *See Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005).

Sixth, Plaintiffs attempt to impermissibly plead collectively does not satisfy the federal pleading requirements.

I. Under Texas law, Ms. Young is immune from suit.

Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

"Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)); *see also Highland*

Capital Mgmt., LP v. Looper Reed & McGraw, P.C., No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. filed) (dismissing conspiracy and breach of fiduciary claims asserted by party against opposing attorneys because actions alleged were "kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation" (citing *Byrd*, 467 S.W.3d at 482)).

Instead, in Texas, "attorney immunity is properly characterized as a true immunity from suit," and not merely "a defense to liability." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346–48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* at 346.

The only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). But a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was engaging in conduct that did not involve the provision of legal services. *Id.* Indeed, Plaintiffs do not allege **any** conduct of Ms. Young that they claim was wrongful. Thus, Ms. Young is protected by Texas's doctrine of attorney immunity, and this suit against her must be dismissed.

II. Plaintiffs' RICO claims fail.

Plaintiffs' RICO claims, alleging violations of § 1962, should be dismissed under Fed. R. Civ. 12(b)(6) for two independent reasons:

(1) The injuries Plaintiffs allegedly suffered were not proximately caused by a violation of RICO, as is required to bring a civil RICO action under 18 U.S.C. § 1964(c);

(2) Plaintiffs have failed to plead a "racketeering activity," namely by not pleading the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b);

Each reason is discussed below.

A. Plaintiffs have not shown they have standing under § 1964(c) to assert civil RICO claims against Ms. Young.

Plaintiffs' RICO claims should be dismissed under Fed. R. Civ. P. 12(b)(6) because Plaintiffs have not pled facts showing they have standing under § 1964(c) to assert a civil RICO claim.

The RICO statute states "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). And a RICO plaintiff must show he has standing to sue. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). To plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury." *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (citing *Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639, 654 (2008)); *Holmes v. Securities Investor Protection Corp.*, 559 U.S. 1, 9-10 (1992) ("[P]roximate cause is thus required," which means there must be "some direct relation between the injury asserted and the injurious conduct alleged."). The focus of proximate cause analysis is "directness"—whether "the injury or damage was either a direct result or a reasonably probable consequence of the act." *Plambeck*, 802 F.3d at 676; *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Plaintiffs do not plead facts showing

they suffered any financial loss that directly resulted from any alleged RICO violation by Ms. Young. *See Gil Ramirez Grp., L.L.C.*, 786 F.3d at 408.

In *Firestone*, the beneficiaries of the Firestone family estate and trust asserted RICO claims against the executor and trustee. *Firestone v. Galbreath*, 976 F.2d 279, 282 (6th Cir. 1992). The court affirmed the district court's dismissal of the RICO claims for lack of standing, noting that the estate, not the beneficiaries, suffered the direct harm. *Id.* at 285 (citing *Holmes*, 559 U.S. at 9-10). The alleged harm inflicted by the executor and trustee flowed only indirectly to the beneficiaries through the harms inflicted upon the decedent and her estate. *Id.* (reasoning that the beneficiaries were similar to shareholders who sue for acts aimed at a corporation—"the shareholder's injury is only indirect because the decrease in the value of the corporation precipitates the drop in the value of the stock") (citing *Gaff v. FDIC*, 814 F.2d 311 (6th Cir. 1987); *Warren v. Manufacturer's Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985)). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

Like the aggrieved beneficiaries in *Firestone*, Plaintiffs here could, at most, only suffer indirect harm through their allegations of "poser advocacy" by some secret society that allegedly includes Ms. Young. The rationale underlying the direct relationship requirement is plainly applicable here, as the estates "can be expected to vindicate the laws by pursuing their own claims." *See Holmes*, 503 U.S. at 269–70 (holding broker dealers could be relied upon to bring suit against alleged securities fraud co-conspirators); *Anza*, 547 U.S. at 460 ("If the allegations are true [that defendants are defrauding the State of New York], the State can be expected to pursue appropriate remedies."). In short, by alleging that Ms. Young caused harm to the estates through "poser advocacy," which in turn caused harm to Plaintiffs, Plaintiffs improperly ask the

Court to go "beyond the first step."[2] *See Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.").

Because Plaintiffs' have not shown their injuries were directly caused by a violation of RICO, they have failed to satisfy the proximate causation requirement necessary to establish RICO standing. Thus, Plaintiffs' RICO claims should be dismissed.

B. Plaintiffs have not satisfied Rule 9(b) because they have not pleaded facts showing Ms. Young engaged in a "racketeering activity."

Plaintiffs' RICO claims should also be dismissed under Fed. R. Civ. P. 9(b) because the allegations do not show Ms. Young engaged in any "racketeering activities" sufficient to trigger the RICO statute.

Under Rule 9(b), fraud claims must meet the heightened pleading requirements of Rule 9(b), which requires a plaintiff to plead allegations of fraud "with particularity." FED. R. CIV. P. 9(b); *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) (per curiam) ("Rule 9(b) requires the 'who, what, when, where, and how' to be laid out.") (citation omitted); *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent") (internal quotation marks and citations omitted).

By imposing a "higher, or more strict, standard than . . . basic notice pleading" on fraud claims, *Sushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993), Rule 9(b) ensures that a defendant "has sufficient information to formulate a defense; it protects defendants from harm to

[2] It is worth noting that, although Plaintiffs allege that Defendants somehow "hijacked" estates by recouping attorneys' fees for time that was merely spent as sham advocacy, Ms. Young has yet to be paid a single cent for her representation of Temporary Administrator Lester.

their reputation and goodwill; it reduces the number of frivolous suits; and, it prevents plaintiffs from filing a claim and then attempting to uncover unknown wrongs through discovery." *United States ex. rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008).

RICO claims require that a defendant commit a "pattern of racketeering activity." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). A "[r]acketeering activity consists of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1). *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (citation omitted); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 559 (5th Cir. 2015). The predicate acts can be certain state or federal crimes. *See* 18 U.S.C. § 1961(1). But theft, common law fraud, and other garden-variety torts are not racketeering activities. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite predicate *criminal* acts under RICO"); *Toms v. Pizzo*, 4 F. Supp. 2d 178, 183 (W.D.N.Y.), *aff'd*, 172 F.3d 38 (2d Cir. 1998) ("[S]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'"); *Stangel v. A-1 Freeman N. Am., Inc.*, No. CIV.A. 3:01-CV-2198M, 2001 WL 1669387, at *1 (N.D. Tex. Dec. 27, 2001) ("breach of a settlement agreement, interference with a contract, conversion of property, and intentional infliction of emotional distress" are not racketeering activities).

Plaintiffs have made no assertion of any predicate acts of Ms. Young they claim constitute RICO predicate acts, although they vaguely assert "causes of action" for wire fraud,

mail fraud, and Hobbs Act violations.[3] But to adequately plead mail fraud, wire fraud, or violations of the Hobbs Act, Plaintiffs must allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic*, 975 F.2d at 1139 (emphasis added) (citing Fed. R. Civ. P. 9(b)). RICO claims must be dismissed when they rest on predicate fraud claims that are not pled with particularity. *See id.*; *Elliott*, 867 F.2d 877, 882 (5th Cir. 1989); *St. Germain*, 556 F.3d at 263. Here, Plaintiffs have not pled the time, place, or content of any alleged misrepresentations by Ms. Young, nor have they pled what Ms. Young obtained by making the alleged misrepresentation.

In sum, Plaintiffs fail to state even a single individualized fraud allegation against Ms. Young. *See Del Castillo*, 2015 WL 3833447, at *6 ("A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct."); *Dimas*, 2010 WL 1875803, at *8 (dismissing RICO claims, in part, because the complaint failed to specify the role each Defendant played in the alleged scheme). Thus, because Plaintiffs have failed to plead facts showing Ms. Young engaged in a "racketeering activity," their RICO claims should be dismissed.

III. Plaintiffs have not satisfied Rule 12(b) because they have not pleaded a plausible claim for relief.

Plaintiffs' RICO claims should also be denied because the Complaint fails to state a plausible, valid claim for relief under the RICO statute.[4] Plaintiffs rely on implausible and conclusory allegations, unsupported by any factual assertions whatsoever. *Ashcroft v. Iqbal*, 556

[3] As shown in Section C, Plaintiffs' wire fraud, mail fraud, and Hobbs Act claims fail, because they cannot be asserted as private causes of action.

[4] As shown in Part V of this Section, all of the "causes of action" Plaintiffs assert other than RICO do not afford a private right of action. Thus, this section focuses on Plaintiffs' failure plead a valid RICO claim.

U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "**plead[] factual content** that allows the court **to draw the reasonable inference** that the defendant is liable for the misconduct alleged") (emphasis added). Plaintiffs' Complaint pleads no factual content to support any of their fantastical allegations.

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). Plaintiffs' claim is "facially plausible" only if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679. In other words:

> A legally sufficient complaint must establish more than a "sheer possibility" that plaintiffs' claim is true. It need not contain detailed factual allegations, but it must go beyond labels, legal conclusions, or formulaic recitations of the elements of a cause of action. . . . . If there are insufficient factual allegations to raise a right to relief above the speculative level, . . . the claim must be dismissed.

Martin v. Magee, CIV.A. 10-2786, 2011 WL 2413473, at *4 (E.D. La. June 10, 2011) (internal quotations and citations omitted) (citing *Iqbal* and *Twombly*).

Plaintiffs' Complaint does not plead enough facts to state a plausible claim for relief against Ms. Young. Other Courts in this jurisdiction have rejected identical claims. *See Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.). In *Freeman*, two pro se plaintiffs alleged:

> Plaintiff claims a probate court enterprise comprised of judges and lawyers who conspired against pro se litigants, including himself. He claims that this enterprise has "virtually looted" his mother's homestead through the guardianship proceeding and denied him due process of law. Even if true, these allegations fail to state a "racketeering activity" because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred. In light of the absence of any allegation that raises the possibility of a RICO violation, Plaintiff's claim under RICO must be DISMISSED.

Id. at *2 (internal footnotes omitted). Here, Plaintiffs' Complaint—devoid of any well-pleaded facts—consists of nothing more than conclusory conspiracy theories. It should be dismissed.

IV. Plaintiffs' Complaint is frivolous and delusional.

Plaintiffs' Complaint should also be denied because it is frivolous and delusional. This is a wholly separate basis on which the Court should dismiss the Complaint, through this Court's "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992)).

Here, Plaintiffs' Complaint resorts to concocting conspiracy theories and hypothesizing the existence of shadow organizations engaging in "poser advocacy" through a cabal of probate mafiosos. Other courts in this Circuit have held that almost identical allegations made by pro se

litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Plaintiffs' allegations are fanciful, fantastic, and delusional—at best. They also appear to constitute an attempt by Plaintiffs to seek revenge for being on the losing end of trust and estate determinations that were already fully litigated in Texas state court. But whether Plaintiffs' motivations in filing the Complaint are one or the other (or anything in between), their allegations should be dismissed.

V. Plaintiffs' claims for "Hobbs Act," "Wire Fraud," "Fraud under 18 U.S.C. §1001," and "Honest Services" fail because those statutes do not create private causes of action.

The Plaintiffs purport to assert claims against Ms. Young for violation of the Hobbs Act, Wire Fraud, "Fraud under 18 U.S.C. § 1001," and "Honest Services," but those acts do not create private causes of action. Thus, those claims should all be dismissed.

A. The Hobbs Act does not create a private cause of action.

The Hobbs Act does not create a private cause of action. *Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005) ("Nor does the Hobbs Act create a private cause of action") (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999)). This is settled law. *See, e.g., Campbel v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 72 (W.D.N.Y. September 29, 2005) ("[F]ederal courts have consistently found that the Hobbs Act does not support a private cause of action."); *Barge v. Apple Computer*, No. 95 CIV. 9715 (KMW), 1997 WL 394935, at *1 (S.D.N.Y. July 15, 1997), *aff'd*, 164 F.3d 617 (2nd Cir. 1998) ("[C]ourts that have considered this question have consistently found that the Hobbs Act does

not support a private cause of action."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("There is no implied private cause of action under the Hobbs Act.").

Thus, Plaintiffs' Hobbs Act claim against Ms. Young fails.

B. The Wire Fraud statute does not create a private cause of action.

The wire fraud statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) (citing *Napper v. Anderson, Hensley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) for its holding that there is "no private cause of action under the mail-and wire-fraud statutes, 18 U.S.C. §§ 1341 and 1343"); *see also Morse v. Stanley*, 4:11CV230, 2012 WL 1014996, at *2 (E.D. Tex. Mar. 23, 2012) ("18 U.S.C. § 1343 is a criminal statute pertaining to wire fraud and does not provide Plaintiff with a private cause of action."); *Benitez v. Rumage*, CIV.A. C-11-208, 2011 WL 3236199, at *1 (S.D. Tex. July 27, 2011) (the wire fraud statute "do[es] not provide a private cause of action").

Thus, Plaintiffs' Wire Fraud act claim against Ms. Young fails.

C. The claim for "Fraud under 18 U.S.C. §1001" is not a private cause of action.

Plaintiffs' claim for "Fraud 18 U.S.C. § 1001" fails, as well, because that statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) ("The Thompsons assert causes of action under **18 U.S.C. §§ 1001**, 1010, 1014, 1341, 1343, and 1344. **These federal criminal statutes do not provide a private cause of action**.") (emphasis added). Again, this is settled law. *See Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987) ("Finding no congressional intent to create a private right of action under § 1001(b), Blaze has failed to state a claim upon which relief could be granted, and the district court's grant of summary judgment was proper."); *Grant*

v. CPC Logistics Inc., 3:12-CV-200-L BK, 2012 WL 601149, at *1 (N.D. Tex. Feb. 1, 2012), *report and recommendation adopted*, 3:12-CV-200-L, 2012 WL 601128 (N.D. Tex. Feb. 23, 2012) ("Federal courts have repeatedly held that **violations of criminal statutes, such as 18 U.S.C. §§ 1001**, 1505 and 1621, **do not give rise to a private right of action**.") (emphasis added); *Parker v. Blake*, CIV. A. 08-184, 2008 WL 4092070, at *3 (W.D. La. Aug. 29, 2008) ("Section 1001 provides criminal penalties for persons convicted of fraud or false statements during the course of certain dealings with the federal government . . . . As above, this criminal statute, were it applicable to allegations made by plaintiff still would not create a private civil cause of action or entitlement to monetary relief thereunder."); *Doyon v. U.S.*, No. A-07-CA-977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (holding that there is "no private cause of action under 18 U.S.C. §§ 1001").

Thus, Plaintiffs' claim for "Fraud 18 U.S.C. § 1001" fails.

D. The claim for "Honest Services" is not a private cause of action.

Plaintiffs allege three claims for "honest services," based on 18 U.S.C. § 1346. *See* Complaint, at ¶¶ 121, 122, 123. But 18 U.S.C. § 1346 does not create a private cause of action, either. *See Eberhardt v. Braud*, 16-CV-3153, 2016 WL 3620709, at *3 (C.D. Ill. June 29, 2016) ("Plaintiff attempts to bring a private right of action under 18 U.S.C. § 1346 and 18 U.S.C. § 1951, but those criminal statutes do not contain an express or implied private right of action."); Alford v. S. Gen. Ins., 7:12-CV-00273-BR, 2013 WL 1010584, at *2 (E.D.N.C. Mar. 14, 2013) (holding that a "claim for honest services fraud under 18 U.S.C. § 1346" must be dismissed "pursuant to Rule 12(b)(6) because a private right of action for a violation of that law does not exist"); *Hooten v. Greggo & Ferrara Co.*, CIV. 10-776-RGA, 2012 WL 4718648, at *6 (D. Del. Oct. 3, 2012) ("18 U.S.C. § 1341 and § 1346 . . . are found in the federal criminal code. Neither § 1341 or § 1346 allow for a private cause of action.").

Thus, Plaintiffs' three claims against Ms. Young for "Honest Services" fail.

VI. Plaintiffs rely on impermissible collective pleading.

"A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct." *In re Parkcentral Glob. Litig.*, 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012) ("It is impermissible to make general allegations that lump all defendants together; rather, the complaint must segregate the alleged wrongdoing of No. 1 from another."). And the pleading requirements of Rule 9(b) likewise demand **specific** and **separate** allegations against each defendant. *See Dimas v. Vanderbilt Mortg. & Fin., Inc.*, No. C-10-68, 2010 WL 1875803, at *8 (S.D. Tex. May 6, 2010) ("[W]hile the Complaint makes several general allegations of fraud, it often fails to specify the role each Defendant played in the alleged scheme."); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made").

Here, Plaintiffs offer no individualized allegations about any wrongful conduct they allege against Ms. Young. Instead, Plaintiffs' vague and fanciful pleadings are lobbed at all Defendants, with no discernible specific or separate allegations for Ms. Young. This is insufficient to state a claim.

CONCLUSION

For the reasons stated above, this Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: September 15, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Motion to Dismiss has been served on September 15, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

EXHIBIT A

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator

Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's Rule 12(b)(6)
Motion to Dismiss for Plaintiffs' Failure to State a Claim

Plaintiffs sued me, defendant, Anita Brunsting, along with eleven (11) attorneys, two (2) judges, and a court reporter for alleged RICO violations. The complaint should be dismissed because the plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs allege that I am involved in a racketeering enterprise in a probate case pending in Harris County Probate Court No. 4, under C.A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased.* Plaintiffs refer to this alleged racketeering entity as the "Harris County Tomb Raiders, a.k.a. the Probate Mafia." Plaintiffs allege, among other things, that I engaged in illegal wiretapping, theft/extortion, forgery of internal revenue forms, wire fraud, and fraudulent transfer of securities in furtherance of a county-wide conspiracy that negatively effected the plaintiffs.

As an example of the lack of specificity of their claims as to myself or my attorneys, the plaintiffs claim that I and one of my attorneys engaged in illegal wiretapping merely because there were recordings of phone messages from the decedent's (my mother's) answering machine produced during the course of discovery and produced as required by law. In addition, their claim fails to explain how I could cause a wiretap on my mother's phone, or how my attorneys could be involved

in obtaining recordings that predate their involvement in the case.

Another example comes from plaintiffs' theft/extortion claims, which state that my attorneys and I used an "extortion instrument" to defend against plaintiff Curtis' demand for a disbursement. There are at least two problems with this allegation: (1) the alleged "extortion instrument" was created by my mother's attorney and executed before I became a trustee; and (2) there are no facts to show how, where, when, what, or why I used this alleged "extortion instrument" to harm the plaintiffs. Nor do the plaintiffs' explain the type of harm I supposedly caused.

The alleged "extortion instrument" is a qualified beneficiary trust (QBT) prepared by defendant Alfred Vacek, Jr. at the request of his client (my mother), Nelva Brunsting, years before the alleged act of extortion. Neither I, nor Mr. Mendel, nor Mr. Featherston, or anyone else associated with the Mendel Law Firm were involved in drafting the QBT. Without an explanation of how I participated in the creation of the instrument, or knew that the QBT could be used to extort the plaintiffs, there is not sufficient information in the complaint to allow me to defend against this claim. In addition, the term "extortion" generally means taking something of value by force or threats, and there are no facts to show that I took anything by force or threat.

In short, plaintiffs' claims are vague, conclusory, and based entirely on inference and speculation.

I incorporate by reference as though set forth in full herein the arguments and legal authorities found in Defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Failure to State a Claim (Docket Entry 19, 09/07/16) and Bobbie G. Bayless' Motion to Dismiss for Failure to State a Claim (Docket Entry 23, 09/07/16), as they apply to the claims against me.

Prayer

I pray that the Court grant my motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which I may be entitled to receive.

Respectfully submitted,

Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1.	Candace L. Curtis 218 Landana Street American Canyon, CA 94503 925-759-9020	Plaintiff, Pro Se
2.	Rik Wayne Munson 218 Landana Street American Canyon, CA 94503 925-349-8348	Plaintiff, Pro Se
3.	Candace Kuntz-Freed c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
4.	Albert Vacek, Jr. c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
5.	Bernard Lyle Matthews III 11777 Katy Freeway, Suite 300 South Houston, Texas 77079	Defendant
6.	Amy Ruth Brunsting 2582 Country Ledge New Braunfels, Texas 78132	Defendant
7.	Neal E. Spielman Griffin & Matthews 1155 Dairy Ashford, Suite 300 Houston, Texas 77079	Defendant
8.	Bradley Featherston Featherston Tran PLLC 20333 State Highway 249, Suite 200 Houston, Texas 77070	Defendant

9.	Stephen A. Mendel The Mendel Law Firm, L.P. 1155 Dairy Ashford, Suite 104 Houston, Texas 77079 281-759-3213	Defendant
10.	Darlene Payne Smith Crain, Caton & James Five Houston Center, 17th Floor 1401 McKinney, Suite 1700 Houston, Texas 77010	Defendant
11.	Jason B. Ostrom Ostrom Morris, P.L.L.C 6363 Woodway, Suite 300 Houston, Texas 77056 713-863-8891	Defendant
12.	Gregory Lester 955 N. Dairy Ashford, Suite 220 Houston, Texas 777079	Defendant
13.	Jill Willard Young MacIntyre, McCulloch, Stanfield and Young, L.L.P. 2900 Weslayan, Suite 150 Houston, Texas 77027	Defendant
14.	Bobbie Bayless Bayless & Stokes 2931 Ferndale Houston, Texas 77098	Defendant
15.	Christine Riddle Butts Harris County Civil Courthouse 201 Caroline, 7TH floor Houston, Texas 77002	Defendant
16.	Clarinda Comstock Harris County Civil Courthouse 201 Caroline, 7TH floor Houston, Texas 770002	Defendant

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

Defendant

on this 15TH day of September 2016.

Anita Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Defendant Amy Brunsting's Motion for Access to Electronic Filing

TO THE HONORABLE JUDGE OF SAID COURT:

I, Amy Brunsting, am a Pro Se defendant in the above-style case. I am aware that non-attorneys are not approved for accounts in the Court's electronic filing system. I request that the Court waive this requirement and approve my use of a PACER account to enable me to electronically file documents in this case. I hereby affirm that:

1. I have reviewed the requirements for e-filing and agree to abide by them.
2. I understand that once I register for e-filing, I will receive notices and documents only by email in this case and not by regular mail.
3. I have regular access to the technical requirements necessary to e-file successfully:
    a. A computer with internet access.
    b. An email account on a daily basis to receive notifications from the Court and notices from the e-filing system.
    c. A scanner to convert documents that are only in paper format into electronic files.
    d. A printer or copier to create documents.
    e. A word-processing program to create documents.

f. A pdf reader and a pdf writer to convert word processing documents into pdf format, the only electronic format in which documents can be e-filed.

Respectfully submitted,

//s// Amy Brunsting

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020

2. Rik Wayne Munson — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348

3. Candace Kunz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

4. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

5. Bernard Lyle Matthews III — Defendant
   11777 Katy Freeway, Suite 300 South
   Houston, TX 77079

6. Anita Kay Brunsting — Defendant
   203 Bloomingdale Circle
   Victoria, TX 77904

7. Neal E. Spielman — Defendant
   Griffin & Matthews
   1155 Dairy Ashford, Suite 300
   Houston, TX 77079

8. Bradley Featherston — Defendant
   Featherston Tran PLLC
   20333 State Highway 249, Suite 200
   Houston, TX 77070

9. Stephen A. Mendel — Defendant
The Mendel Law Firm, L. P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

10. Darlene Payne Smith — Defendant
Crain, Caton & James
Five Houston Center, 17th Floor
1401 McKinney, Suite 1700
Houston, TX 77010

11. Jason B. Ostrom — Defendant
Ostrom Morris, P. L. L. C.
6363 Woodway, Suite 300
Houston, TX 77056

12. Gregory Lester — Defendant
955 N. Dairy Ashford, Suite 220
Houston, TX 77079

13. Jill Willard Young — Defendant
MacIntyre, McCulloch, Stanfield
and Young, L. L. P.
2900 Weslayan, Suite 150
Houston, TX 77027

14. Bobbie Bayless — Defendant
Bayless & Stokes
2931 Ferndale
Houston, TX 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

Defendant

on this 14th day of September 2016.

//s// Amy Brunsting

Amy Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Order Granting Defendant Amy Brunsting's Motion for Access to Electronic Filing

The Court considered defendant Amy Brunsting's Motion for Access to Electronic Filing. Finding that good cause exists, the motion is GRANTED.

IT IS SO ORDERED,

SIGNED on this _____ day of _____, 2016.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's Rule 12(b)(6)
Motion to Dismiss for Plaintiffs' Failure to State a Claim

Plaintiffs sued me, defendant, Anita Brunsting, along with eleven (11) attorneys, two (2) judges, and a court reporter for alleged RICO violations. The complaint should be dismissed because the plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs allege that I am involved in a racketeering enterprise in a probate case pending in Harris County Probate Court No. 4, under C.A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased.* Plaintiffs refer to this alleged racketeering entity as the "Harris County Tomb Raiders, a.k.a. the Probate Mafia." Plaintiffs allege, among other things, that I engaged in illegal wiretapping, theft/extortion, forgery of internal revenue forms, wire fraud, and fraudulent transfer of securities in furtherance of a county-wide conspiracy that negatively effected the plaintiffs.

As an example of the lack of specificity of their claims as to myself or my attorneys, the plaintiffs claim that I and one of my attorneys engaged in illegal wiretapping merely because there were recordings of phone messages from the decedent's (my mother's) answering machine produced during the course of discovery and produced as required by law. In addition, their claim fails to explain how I could cause a wiretap on my mother's phone, or how my attorneys could be involved

in obtaining recordings that predate their involvement in the case.

Another example comes from plaintiffs' theft/extortion claims, which state that my attorneys and I used an "extortion instrument" to defend against plaintiff Curtis' demand for a disbursement. There are at least two problems with this allegation: (1) the alleged "extortion instrument" was created by my mother's attorney and executed before I became a trustee; and (2) there are no facts to show how, where, when, what, or why I used this alleged "extortion instrument" to harm the plaintiffs. Nor do the plaintiffs' explain the type of harm I supposedly caused.

The alleged "extortion instrument" is a qualified beneficiary trust (QBT) prepared by defendant Alfred Vacek, Jr. at the request of his client (my mother), Nelva Brunsting, years before the alleged act of extortion. Neither I, nor Mr. Mendel, nor Mr. Featherston, or anyone else associated with the Mendel Law Firm were involved in drafting the QBT. Without an explanation of how I participated in the creation of the instrument, or knew that the QBT could be used to extort the plaintiffs, there is not sufficient information in the complaint to allow me to defend against this claim. In addition, the term "extortion" generally means taking something of value by force or threats, and there are no facts to show that I took anything by force or threat.

In short, plaintiffs' claims are vague, conclusory, and based entirely on inference and speculation.

I incorporate by reference as though set forth in full herein the arguments and legal authorities found in Defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Failure to State a Claim (Docket Entry 19, 09/07/16) and Bobbie G. Bayless' Motion to Dismiss for Failure to State a Claim (Docket Entry 23, 09/07/16), as they apply to the claims against me.

Prayer

I pray that the Court grant my motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which I may be entitled to receive.

Respectfully submitted,

Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1.	Candace L. Curtis 218 Landana Street American Canyon, CA 94503 925-759-9020	Plaintiff, Pro Se
2.	Rik Wayne Munson 218 Landana Street American Canyon, CA 94503 925-349-8348	Plaintiff, Pro Se
3.	Candace Kuntz-Freed c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
4.	Albert Vacek, Jr. c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
5.	Bernard Lyle Matthews III 11777 Katy Freeway, Suite 300 South Houston, Texas 77079	Defendant
6.	Amy Ruth Brunsting 2582 Country Ledge New Braunfels, Texas 78132	Defendant
7.	Neal E. Spielman Griffin & Matthews 1155 Dairy Ashford, Suite 300 Houston, Texas 77079	Defendant
8.	Bradley Featherston Featherston Tran PLLC 20333 State Highway 249, Suite 200 Houston, Texas 77070	Defendant

9.	Stephen A. Mendel The Mendel Law Firm, L.P. 1155 Dairy Ashford, Suite 104 Houston, Texas 77079 281-759-3213	Defendant
10.	Darlene Payne Smith Crain, Caton & James Five Houston Center, 17th Floor 1401 McKinney, Suite 1700 Houston, Texas 77010	Defendant
11.	Jason B. Ostrom Ostrom Morris, P.L.L.C 6363 Woodway, Suite 300 Houston, Texas 77056 713-863-8891	Defendant
12.	Gregory Lester 955 N. Dairy Ashford, Suite 220 Houston, Texas 777079	Defendant
13.	Jill Willard Young MacIntyre, McCulloch, Stanfield and Young, L.L.P. 2900 Weslayan, Suite 150 Houston, Texas 77027	Defendant
14.	Bobbie Bayless Bayless & Stokes 2931 Ferndale Houston, Texas 77098	Defendant
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16.	Clarinda Comstock Harris County Civil Courthouse 201 Caroline, 7TH floor Houston, Texas 770002	Defendant

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

Defendant

on this 15TH day of September 2016.

Anita Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Order Granting Defendant Anita Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim

The Court considered defendant Anita Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim.

Finding that the plaintiffs' failed to state a claim for which relief may be granted, the defendant's motion is GRANTED and the plaintiffs' suit is dismissed.

SIGNED on this _____ day of _____, 2016.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's Rule 12(b)(6)
Motion to Dismiss for Plaintiffs' Failure to State a Claim

Plaintiffs sued me, defendant, Anita Brunsting, along with eleven (11) attorneys, two (2) judges, and a court reporter for alleged RICO violations. The complaint should be dismissed because the plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs allege that I am involved in a racketeering enterprise in a probate case pending in Harris County Probate Court No. 4, under C.A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased.* Plaintiffs refer to this alleged racketeering entity as the "Harris County Tomb Raiders, a.k.a. the Probate Mafia." Plaintiffs allege, among other things, that I engaged in illegal wiretapping, theft/extortion, forgery of internal revenue forms, wire fraud, and fraudulent transfer of securities in furtherance of a county-wide conspiracy that negatively effected the plaintiffs.

As an example of the lack of specificity of their claims as to myself or my attorneys, the plaintiffs claim that I and one of my attorneys engaged in illegal wiretapping merely because there were recordings of phone messages from the decedent's (my mother's) answering machine produced during the course of discovery and produced as required by law. In addition, their claim fails to explain how I could cause a wiretap on my mother's phone, or how my attorneys could be involved

in obtaining recordings that predate their involvement in the case.

Another example comes from plaintiffs' theft/extortion claims, which state that my attorneys and I used an "extortion instrument" to defend against plaintiff Curtis' demand for a disbursement. There are at least two problems with this allegation: (1) the alleged "extortion instrument" was created by my mother's attorney and executed before I became a trustee; and (2) there are no facts to show how, where, when, what, or why I used this alleged "extortion instrument" to harm the plaintiffs. Nor do the plaintiffs' explain the type of harm I supposedly caused.

The alleged "extortion instrument" is a qualified beneficiary trust (QBT) prepared by defendant Alfred Vacek, Jr. at the request of his client (my mother), Nelva Brunsting, years before the alleged act of extortion. Neither I, nor Mr. Mendel, nor Mr. Featherston, or anyone else associated with the Mendel Law Firm were involved in drafting the QBT. Without an explanation of how I participated in the creation of the instrument, or knew that the QBT could be used to extort the plaintiffs, there is not sufficient information in the complaint to allow me to defend against this claim. In addition, the term "extortion" generally means taking something of value by force or threats, and there are no facts to show that I took anything by force or threat.

In short, plaintiffs' claims are vague, conclusory, and based entirely on inference and speculation.

I incorporate by reference as though set forth in full herein the arguments and legal authorities found in Defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Failure to State a Claim (Docket Entry 19, 09/07/16) and Bobbie G. Bayless' Motion to Dismiss for Failure to State a Claim (Docket Entry 23, 09/07/16), as they apply to the claims against me.

Prayer

I pray that the Court grant my motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which I may be entitled to receive.

Respectfully submitted,

Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1.	Candace L. Curtis 218 Landana Street American Canyon, CA 94503 925-759-9020	Plaintiff, Pro Se
2.	Rik Wayne Munson 218 Landana Street American Canyon, CA 94503 925-349-8348	Plaintiff, Pro Se
3.	Candace Kuntz-Freed c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
4.	Albert Vacek, Jr. c/o Cory S. Reed Thompson, Coe, Cousins & Irons, L.L.P. One Riverway, Suite 1400 Houston, Texas 77056	Defendant
5.	Bernard Lyle Matthews III 11777 Katy Freeway, Suite 300 South Houston, Texas 77079	Defendant
6.	Amy Ruth Brunsting 2582 Country Ledge New Braunfels, Texas 78132	Defendant
7.	Neal E. Spielman Griffin & Matthews 1155 Dairy Ashford, Suite 300 Houston, Texas 77079	Defendant
8.	Bradley Featherston Featherston Tran PLLC 20333 State Highway 249, Suite 200 Houston, Texas 77070	Defendant

9.	Stephen A. Mendel The Mendel Law Firm, L.P. 1155 Dairy Ashford, Suite 104 Houston, Texas 77079 281-759-3213	Defendant
10.	Darlene Payne Smith Crain, Caton & James Five Houston Center, 17th Floor 1401 McKinney, Suite 1700 Houston, Texas 77010	Defendant
11.	Jason B. Ostrom Ostrom Morris, P.L.L.C 6363 Woodway, Suite 300 Houston, Texas 77056 713-863-8891	Defendant
12.	Gregory Lester 955 N. Dairy Ashford, Suite 220 Houston, Texas 777079	Defendant
13.	Jill Willard Young MacIntyre, McCulloch, Stanfield and Young, L.L.P. 2900 Weslayan, Suite 150 Houston, Texas 77027	Defendant
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15.	Christine Riddle Butts Harris County Civil Courthouse 201 Caroline, 7TH floor Houston, Texas 77002	Defendant
16.	Clarinda Comstock Harris County Civil Courthouse 201 Caroline, 7TH floor Houston, Texas 770002	Defendant

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

Defendant

on this 15TH day of September 2016.

Anita Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Order Granting Defendant Anita Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim

The Court considered defendant Anita Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim.

Finding that the plaintiffs' failed to state a claim for which relief may be granted, the defendant's motion is GRANTED and the plaintiffs' suit is dismissed.

SIGNED on this _____ day of _____, 2016.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Defendant Amy Brunsting's Rule 12(b)(6)
Motion to Dismiss for Plaintiff's Failure to State a Claim

Plaintiffs sued me, defendant, Amy Brunsting, along with two state judges, a court reporter, and eleven attorneys for alleged RICO violations. The complaint should be dismissed because the plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs allege that I am involved in a racketeering enterprise in a probate case pending in Harris County Probate Court No. 4, under C. A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased.* Nelva Brunsting was my mother. Plaintiffs allege that I conspired with two state judges, a court reporter, numerous attorneys (including attorney Jason Ostrom who was hired by the plaintiff Candace Brunsting) in a "secret society" to engage in illegal wiretapping, theft, extortion, forgery, wire fraud, and fraudulent transfer of securities as part of a racketeering group they refer to as "Harris County Tomb Raiders" and "the Probate Mafia". Plaintiffs claim that they were harmed by this alleged conspiracy. I know of no conspiracy, nor have I ever conspired with anyone regarding any of these matters. Plaintiffs have provided no facts to support their complaints.

Plaintiffs claim that I intercepted, recorded, possessed, concealed, manipulated, and disseminated illegal wiretap recordings of conversations made on my mother's telephone line. I

have been told that these are recorded phone messages that were found on my mother's answering machine. It is my understanding that these recordings were made while my mother was alive. I have never heard any of these recordings and my mother never discussed them with me. I have never possessed any of these recordings. Plaintiffs fail to provide facts to show that I possessed or in any way handled these recordings.

Plaintiffs claim that my answers to Plaintiff Curtis' interrogatories posed in her lawsuit against me in the Harris County Probate Court contained extortion threats. I have no idea what she is referring to. I made no threats against Plaintiff Curtis or anyone else in my replies to her questions.

Plaintiffs refer to a "heinous extortion instrument", but I believe they are referring to the qualified beneficiary trust (QBT) agreement that was executed by my mother, not by me. This document was executed before I became a trustee. I did not become a trustee until after the death of my mother, and I had no involvement with or authority over my mother's financial or trust matters while she was living. I had no involvement in the preparation of the QBT. After reading the QBT, I could not find any language in the document that could be used to extort the plaintiffs. There are no facts to show that I took or extorted anything from the plaintiffs.

Plaintiffs allege that attorney Bernard Matthews and I filed a false affidavit in a suit that Candace Curtis filed against me and others (Candace Louise Curtis v. Anita Brunsting et al., No. 4:12-cv-00592). The suit was a *lis pendens* filed by Plaintiff Curtis to prevent the sale of our mother's home. Mother passed away on November 11, 2011. After her death, her home was appraised and put up for sale. In 2012 a buyer offered us more than the appraised value, so we accepted the offer. The transaction was handled by a reputable title company. I did not file any

false affidavits during this proceeding or any other proceeding. Plaintiffs provide no information of the document in question, and they provide no facts regarding this claim.

Finally, I have never met nor spoken to one of the plaintiffs, Rik Munson. I have never corresponded with him prior to the filing of this suit. I have no business or personal contracts with or obligations to Rik Munson. Said plaintiff has not provided an explanation of how I caused him any harm.

Plaintiffs' claims are vague, conclusory, and based entirely on inference and speculation.

Prayer

I pray that the Court grant my motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and specific, legal and equitable, to which I may be entitled to receive.

Respectfully submitted,

//s// Amy Brunsting

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020

2. Rik Wayne Munson — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348

3. Candace Kunz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

4. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

5. Bernard Lyle Matthews III — Defendant
   11777 Katy Freeway, Suite 300 South
   Houston, TX 77079

6. Anita Kay Brunsting — Defendant
   203 Bloomingdale Circle
   Victoria, TX 77904

7. Neal E. Spielman — Defendant
   Griffin & Matthews
   1155 Dairy Ashford, Suite 300
   Houston, TX 77079

8. Bradley Featherston — Defendant
   Featherston Tran PLLC
   20333 State Highway 249, Suite 200
   Houston, TX 77070

9. Stephen A. Mendel — Defendant
The Mendel Law Firm, L. P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

10. Darlene Payne Smith — Defendant
Crain, Caton & James
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1401 McKinney, Suite 1700
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Ostrom Morris, P. L. L. C.
6363 Woodway, Suite 300
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12. Gregory Lester — Defendant
955 N. Dairy Ashford, Suite 220
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13. Jill Willard Young — Defendant
MacIntyre, McCulloch, Stanfield
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2900 Weslayan, Suite 150
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14. Bobbie Bayless — Defendant
Bayless & Stokes
2931 Ferndale
Houston, TX 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

Defendant

on this 19th day of September 2016.

//s// Amy Brunsting

Amy Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Defendant Amy Brunsting's Rule 12(b)(6)
Motion to Dismiss for Plaintiff's Failure to State a Claim

Plaintiffs sued me, defendant, Amy Brunsting, along with two state judges, a court reporter, and eleven attorneys for alleged RICO violations. The complaint should be dismissed because the plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs allege that I am involved in a racketeering enterprise in a probate case pending in Harris County Probate Court No. 4, under C. A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased.* Nelva Brunsting was my mother. Plaintiffs allege that I conspired with two state judges, a court reporter, numerous attorneys (including attorney Jason Ostrom who was hired by the plaintiff Candace Brunsting) in a "secret society" to engage in illegal wiretapping, theft, extortion, forgery, wire fraud, and fraudulent transfer of securities as part of a racketeering group they refer to as "Harris County Tomb Raiders" and "the Probate Mafia". Plaintiffs claim that they were harmed by this alleged conspiracy. I know of no conspiracy, nor have I ever conspired with anyone regarding any of these matters. Plaintiffs have provided no facts to support their complaints.

Plaintiffs claim that I intercepted, recorded, possessed, concealed, manipulated, and disseminated illegal wiretap recordings of conversations made on my mother's telephone line. I

have been told that these are recorded phone messages that were found on my mother's answering machine. It is my understanding that these recordings were made while my mother was alive. I have never heard any of these recordings and my mother never discussed them with me. I have never possessed any of these recordings. Plaintiffs fail to provide facts to show that I possessed or in any way handled these recordings.

Plaintiffs claim that my answers to Plaintiff Curtis' interrogatories posed in her lawsuit against me in the Harris County Probate Court contained extortion threats. I have no idea what she is referring to. I made no threats against Plaintiff Curtis or anyone else in my replies to her questions.

Plaintiffs refer to a "heinous extortion instrument", but I believe they are referring to the qualified beneficiary trust (QBT) agreement that was executed by my mother, not by me. This document was executed before I became a trustee. I did not become a trustee until after the death of my mother, and I had no involvement with or authority over my mother's financial or trust matters while she was living. I had no involvement in the preparation of the QBT. After reading the QBT, I could not find any language in the document that could be used to extort the plaintiffs. There are no facts to show that I took or extorted anything from the plaintiffs.

Plaintiffs allege that attorney Bernard Matthews and I filed a false affidavit in a suit that Candace Curtis filed against me and others (Candace Louise Curtis v. Anita Brunsting et al., No. 4:12-cv-00592). The suit was a *lis pendens* filed by Plaintiff Curtis to prevent the sale of our mother's home. Mother passed away on November 11, 2011. After her death, her home was appraised and put up for sale. In 2012 a buyer offered us more than the appraised value, so we accepted the offer. The transaction was handled by a reputable title company. I did not file any

false affidavits during this proceeding or any other proceeding. Plaintiffs provide no information of the document in question, and they provide no facts regarding this claim.

Finally, I have never met nor spoken to one of the plaintiffs, Rik Munson. I have never corresponded with him prior to the filing of this suit. I have no business or personal contracts with or obligations to Rik Munson. Said plaintiff has not provided an explanation of how I caused him any harm.

Plaintiffs' claims are vague, conclusory, and based entirely on inference and speculation.

Prayer

I pray that the Court grant my motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and specific, legal and equitable, to which I may be entitled to receive.

Respectfully submitted,

//s// Amy Brunsting

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020

2. Rik Wayne Munson — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348

3. Candace Kunz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

4. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, TX 77056

5. Bernard Lyle Matthews III — Defendant
   11777 Katy Freeway, Suite 300 South
   Houston, TX 77079

6. Anita Kay Brunsting — Defendant
   203 Bloomingdale Circle
   Victoria, TX 77904

7. Neal E. Spielman — Defendant
   Griffin & Matthews
   1155 Dairy Ashford, Suite 300
   Houston, TX 77079

8. Bradley Featherston — Defendant
   Featherston Tran PLLC
   20333 State Highway 249, Suite 200
   Houston, TX 77070

9. Stephen A. Mendel — Defendant
The Mendel Law Firm, L. P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

10. Darlene Payne Smith — Defendant
Crain, Caton & James
Five Houston Center, 17th Floor
1401 McKinney, Suite 1700
Houston, TX 77010

11. Jason B. Ostrom — Defendant
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6363 Woodway, Suite 300
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12. Gregory Lester — Defendant
955 N. Dairy Ashford, Suite 220
Houston, TX 77079

13. Jill Willard Young — Defendant
MacIntyre, McCulloch, Stanfield
and Young, L. L. P.
2900 Weslayan, Suite 150
Houston, TX 77027

14. Bobbie Bayless — Defendant
Bayless & Stokes
2931 Ferndale
Houston, TX 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

Defendant

on this 19th day of September 2016.

//s// Amy Brunsting

Amy Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Defendant Amy Brunsting's
Certificate of Interested Parties

Defendant Amy Brunsting, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Wayne Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Kay Brunsting
   E. Amy Ruth Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen Mendel
   I. Darlene Payne Smith
   J. Jason Ostrom
   K. Gregory Lester
   L. Jill Willard Young
   M. Bobbie Bayless
   N. Christine Riddle Butts
   O. Clarinda Comstock
   P. Toni Biamonte

Respectfully submitted,

//s// Amy Brunsting

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

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   218 Landana Street
   American Canyon, CA 94503
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   — Plaintiff, Pro Se

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   925-349-8348
   — Plaintiff, Pro Se

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   Houston, TX 77056
   — Defendant

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   — Defendant

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Houston, TX 77002

Defendant

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

Defendant

on this 14th day of September 2016.

//s// Amy Brunsting

Amy Brunsting

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969 (Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

Defendant Amy Brunsting's
Certificate of Interested Parties

Defendant Amy Brunsting, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Wayne Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Kay Brunsting
   E. Amy Ruth Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen Mendel
   I. Darlene Payne Smith
   J. Jason Ostrom
   K. Gregory Lester
   L. Jill Willard Young
   M. Bobbie Bayless
   N. Christine Riddle Butts
   O. Clarinda Comstock
   P. Toni Biamonte

Respectfully submitted,

//s// Amy Brunsting

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132
Pro Se Defendant

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Defendant

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7th floor
Houston, TX 77002

Defendant

on this 14th day of September 2016.

//s// Amy Brunsting

Amy Brunsting

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-CV-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

Plaintiffs' Joint Answer to Defendant Albert Vacek, Jr. and Defendant Candace Kunz-Freed's Motions to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9(b)

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I. INTRODUCTION

1. This is a private interest as well as a public interest lawsuit as the subject matter relates to the legitimate administration of justice.

2. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act (RICO) at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c).

3. On September 7, 2016, Defendants Albert Vacek, Jr. and Candace Kunz-Freed, collectively V&F, filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), (Dkt 19), and Federal Rule of Civil Procedure 12(b)(1) (Dkt 20).

4. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement to the RICO complaint. (Dkt 1)

5. Plaintiffs hereby incorporate the Addendum in response to Defendants' claim of a want of specific allegations against Vacek & Freed and the other affirmative defenses.

II. STANDARDS OF REVIEW

Federal Rule 12(b)(6)

6. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc., 693 F.3d 1317, 1321–22 (11th Cir. 2012).* To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)*). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

7. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo , and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh, 480 F.3d 438, 443 (6th Cir. 2007)*; *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005).*

Federal Rule 12(b)(1)

8. Whether or not a court has subject matter jurisdiction over a party is a question of law reviewed de novo; thus, a decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is an issue of law

reviewed de novo. *Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1325, 47 U.S.P.Q.2d 1769, 1772 (Fed. Cir. 1998)*.

9. On a Rule 12(b)(1) Facial Attack the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1335 (11th Cir. 2013*).

10. In contrast to a facial attack on subject matter jurisdiction, a Rule 12(b)(1) factual attack "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings such as testimony and affidavits are considered." *Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)* (internal quotation marks omitted).

11. When the attack is factual "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Therefore, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

12. The Denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. *Data Gen. Corp. v. Cnty. of Durham, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001).*

III. ISSUES PRESENTED

13. Plaintiffs have not adequately pled the necessary predicate acts.

14. Plaintiffs have failed to allege an unlawful act against V & F.

15. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

16. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

17. Plaintiffs have failed to plead a cognizable RICO enterprise.

a. Plaintiffs' enterprise allegations are too vague and conclusory.

b. Plaintiffs' alleged enterprise lacks continuity.

c. Plaintiffs have failed to adequately plead a pattern of racketeering activity.

d. Plaintiffs have not adequately alleged a conspiracy claim under § 1962(d).

e. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

f. Plaintiffs' claims should be dismissed because a violation of the Hobbs act does not create a private cause of action.

g. Plaintiffs' claims should be dismissed because V & F cannot be civilly liable for aiding and abetting.

h. Plaintiffs' claims should be dismissed because Plaintiffs have not adequately pled a violation of Plaintiffs' civil rights.

i. Plaintiffs have not adequately pled a claim under § 1983.

j. Plaintiffs have not met the Nexus/joint-action test.

k. Plaintiffs have not met the public function/state coercion or encouragement tests.

l. Plaintiffs have not adequately pled a claim under § 1985.

m. Tortious interference with inheritance rights is not a recognized cause of action in Texas.

IV. CONTEXTUAL SUMMARY

18. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff

Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

19. Plaintiff Curtis is not an heir to any estate and has no inheritance expectancy, is not party to any estate litigation and does not believe there is any estate litigation as a matter of law.

20. This RICO lawsuit is a culmination of 4 and one-half years of multi- jurisdictional litigation that began in the federal court as a simple breach of fiduciary under diversity jurisdiction[1] seeking accounting and fiduciary disclosures, went to the Fifth Circuit[2] and back to the TXSD and then to Harris County Probate (where no one has heard of it since[3]), and the controversy is now back in an honorable federal Court under federal question jurisdiction.

21. In response to Rule 12(b)(6) motions to dismiss, on September 15, 2016, Plaintiffs filed the Rule 11(b) and Rule 60 Motions previously filed in Judge Hoyt's Court,[4] as an Addendum of Memorandum (Dkt 26), supplementing the original RICO complaint in this case.

V. HISTORY OF THE CONTROVERSY

According to the record:

22. In 1996, Elmer Brunsting and his wife Nelva Brunsting created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue, as well as for the remaindermen grandchildren and great grandchildren. (Exhibit A1 – Art. I Sec. (c) attached E1-E61)

23. The Brunstings restated their Trust in 2005 (A2 attached E62-E148) and amended the restatement in 2007 (A3 attached E149-E151).

24. Elmer Brunsting was declared incompetent in June 2008 and passed on April 1, 2009.

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012
[2] Curtis v Brunsting 704 F.3d 406 (2013)
[3] Dkt 25 Motion to Dismiss filed by Jill Young wondering "What is Curtis v Brunsting?"
[4] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012

25. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and divided its assets among an irrevocable decedent's trust and a revocable survivor's trust.

26. Nelva Brunsting passed on November 11, 2011 and a number of illicit instruments surfaced that had been drafted after Elmer Brunsting became incompetent and after he passed, that claim to have effected changes that could not have been made under the law of the trust. (Dkt 26-14)

27. The acting trustees, Anita and Amy Brunsting, refused to answer, account or provide disclosures and after two unsuccessful demand letters[5] advising Defendants Anita and Amy Brunsting to do the right thing, Plaintiff Curtis brought suit.

VI. HISTORY OF THE LITIGATION

28. Plaintiff Curtis filed a Petition in the United States District Court for the Southern District of Texas, Houston Division, under Diversity Jurisdiction on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting[6] and other lawful and equitable relief.

29. On March 6, 2012, Vacek & Freed staff attorney Defendant Bernard Mathews, appearing under the letterhead "Green and Mathews" filed a motion for an emergency order, accompanied by a false affidavit signed and verified by Defendant Amy Brunsting (A4 attached E152-E155), in which Mathews implied the existence of a probate exception to Plaintiff's claims, knowing full well he had filed a nearly identical claim on behalf of plaintiff Reginald Parr, not in the probate court but in the Harris County District Court, only 3 days earlier.[7]

[5] Exhibits 17 and 20 in the original federal complaint at pages 67-68, and 71-79 respectively.
[6] Case 4:12-cv-592 Candace Louise Curtis v Anita and Amy Brunsting filed TXSD 2/27/2012
[7] Parr v Dunegan 2012 13022 (190th Judicial District)

30. On March 8, 2012, in reliance upon the material misrepresentations contained in Defendants' Motion and Affidavit, Judge Hoyt dismissed Plaintiff Curtis' Pro se Petition sua sponte, under the probate exception to federal diversity jurisdiction. Plaintiff Curtis filed a timely notice of appeal and was forced to endure the delay and expense of that effort.

31. Then on March 9, 2012, Bobbie Bayless filed a petition for deposition before suit on behalf of Carl Brunsting in Harris County District Court.[8]

32. *On January 9, 2013,* the Fifth Circuit Court of Appeals, in a unanimous decision, reversed and remanded back to the Southern District of Texas clearly verifying that the Brunsting trust is not the estate of Nelva Brunsting.[9]

33. Plaintiff Curtis immediately filed for a protective order.

34. *On January 29, 2013,* Carl Brunsting, as Executor of the estate of Nelva Brunsting, filed suit against trust attorney Candace Kunz-Freed and Vacek & Freed P.L.L.C. in the Harris County District Court raising claims exclusively related to the Brunsting trusts then in the custody of the federal court.[10]

35. On April 9, 2013, in response to Plaintiff Curtis' application for a protective order, the Honorable Kenneth Hoyt issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's approval and commanding specific performance. (A5 attached E156-E160)

36. Also on April 9, 2013 Bobbie Bayless filed claims against Amy, Anita and Carole Brunsting in Harris County Probate Court No. 4, in the name of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) and after trailing and

[8] 201214538 - (Court 080)
[9] Curtis v Brunsting 704 F.3d 406
[10] No. 2013-05455; Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County, TX

dogging Plaintiff Curtis' litigation always one step behind, Bayless named federal Plaintiff Curtis a "Nominal Defendant" while alleging no claims. (A6 attached E161-E180)

37. Due to a change of circumstances in late 2013, Plaintiff Curtis retained Houston attorney Jason Ostrom to assist with her federal lawsuit.

38. Upon appearing in the matter Mr. Ostrom conceived of an arrangement by which Defendants agreed to modification of Plaintiff's Petition to include her brother Carl Henry Brunsting as an involuntary plaintiff, thus polluting diversity and facilitating a remand to Harris County Probate Court on May 22, 2014.(A7 attached E181-E185)

39. In exchange, Defendants agreed to abide by the federal injunction and all orders of the federal Court and on that basis the Court approved the amended complaint and entered an Order for Remand to the Harris County Probate Court. (A8 attached E186-E187)

40. The Motion granting Plaintiff Curtis' remand was filed in the estate of Nelva Brunsting, No. 412249 on June 6, 2014, and the Harris County Clerk assigned Curtis v Brunsting auxiliary number 412249-402.

41. The Defendants ask the Court to believe Plaintiffs are responsible for a myriad of lawsuits, but Probate No. 4 has three cases on record and Harris County District Court has two more. Only one of these suits was filed by Plaintiff Curtis and it was filed in the federal court on February 27, 2012. The state court cases are:

a. No. 201214538 – 80th Judicial District Court of Harris County Texas, Carl Henry Brunsting and the estate of Nelva Brunsting Petition to take depositions before suit.
b. No. 412249 Carl Henry Brunsting executor of the estate of Nelva Brunsting, vs Amy, Anita and Carole Brunsting.
c. No. 412249-401 Carl Henry Brunsting Individually vs Amy, Anita and Carole Brunsting, and

d. No. 412249-402 Candace Curtis v Anita and Amy Brunsting, filed TXSD February 27, 2012, remanded from the federal court to the state probate court May 9, 2014.

e. No. 2013-05455 - Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County Texas. (A9 attached E188-E207)

VII. THE HEINOUS EXTORTION INSTRUMENT

42. An instrument called "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (QBD) allegedly signed by Nelva Brunsting and notarized by Candace Kunz-Freed on August 25, 2010, was propped up as an amendment to the irrevocable trust agreement after Elmer's death, when the trust agreement could only be amended or revoked by a court of competent jurisdiction. (Exhibit A2 @ E69) (See also Dkt26-4 QBD signature page anomalies)

43. The record shows the QBD was drafted and notarized by Defendant Candace Freed. This instrument has been the object of numerous unresolved motions for summary and declaratory judgment in the state probate court (Dkt 26-5, 26-11, 26-14) and those motions remain unresolved because the probate court refused to rule on any substantive issues. There would be a logical reason for that, albeit not an ethical one.

44. Plaintiffs hereby incorporate the Addendum of Memorandum filed September 15, 2016 (Docket entry 26) as if fully restated and would ask the Court to review (Dkt 26-5 E20-E28), (Dkt 26-8 E343-E393), (Dkt 26-11 E406-E452), (Dkt 26-14 E497-E1187), and (Dkt 26-19 E1252-E1253) as follows:

a. Dkt 26-5 is Defendant(s) Anita and Amy Brunsting's joint no evidence motion for partial summary judgment, filed in the state probate court June 26, 2015, claiming the Plaintiffs could produce no evidence of the invalidity of the extortion

instrument also known as the August 25, 2010 QBD. That motion was scheduled to be heard on the last day set for summary judgment motions, August 3, 2015 but has never been heard. (Dkt 26-19)

b. Dkt 26-11 (E406-E452) is Plaintiff Curtis' answer to Exhibit 26-5, along with motion and demand to produce the QBD and qualify it as evidence so one could discuss its efficacy or the lack thereof. Those motions have never been heard.

c. Dkt 26-7 (E289-E342) is the federal Injunction Hearing Transcript

d. Dkt 26-8 is Carl Brunsting's Motion for Protective Order (E343-E393) regarding wiretap recordings.

e. Dkt 26-14 (E497-E1187) is an unresolved motion for partial summary and declaratory judgment that expressly seeks to have the illicit instruments, drafted by Candace Freed, at the request of Anita Brunsting, including the heinous extortion instrument, declared invalid. The probate court has refused to set these motions for hearing.

f. Dkt 26-16 (E1189-E1242) March 9, 2016 ambush hearing transcript.

g. Dkt 26-19, the agreed upon Docket Control Order.

45. As the Rule 60 Motion states (Dkt 26 pgs 3-31) Defendant(s)' Amy and Anita Brunstings' joint No-Evidence motion was removed from the calendar along with Bayless' "Carl Brunsting" Motion for Partial Summary Judgement and Curtis' Motion and demand to produce evidence, allegedly to hear an emergency motion for protective order (Dkt 26-8 E343-E393 and transcript of hearing Dkt 26-12 E453-E494) regarding wiretap recordings disseminated by Anita Brunsting's counsel, Defendant Bradley Featherston, via certified mail on or about July 1, 2015.

46. All of the motions regarding the legitimacy of instruments and actions were kicked to the curb along with the Docket Control Order (Dkt 26-19 E1252-E1253) and the scheduled trial date, while Plaintiff Curtis was on an airplane home from the July 22, 2015 hearing appointing Temporary Administrator Gregory Lester. (Dkt 25-A). There is no order in the probate record that would explain any changes to the docket scheduling Order.

47. Plaintiff Curtis then filed her motion for partial summary and declaratory judgment (Dkt 26-14) and asked to have dispositive motion hearings placed back on the Calendar (Dkt 26-15 E1188) asking, as well, to have the case of Anita and Amy Brunsting's co-conspirator Defendant Candace Freed, transferred from the Harris County District Court and consolidated in the probate Court with the rest of the co-conspirators.

VIII. DEFENDANTS' RULE 12(B)(6) AND 9(B) ARGUMENTS

48. Defendants Vacek and Freed (V&F), in support of their Rule 12(b)(6) Motion to Dismiss (Dkt 19) offer the detailed background statement from their accompanying Rule 12(b)(1) Motion (Dkt 20) claiming facts inapposite to those of the complaint and whereas an alternative set of facts may be pled and considered under a Rule 12(b)(1) factual attack, no such authority exists with a Rule 12(b)(6) challenge.

49. Defendants seek to incorporate their alternate claim of facts presented under Rule 12(b)(1) but do not support those claims by affidavit, exhibits or specific reference to any evidentiary hearings in which such matters were judicially determined, because there have not been any evidentiary hearings or substantive issues decided since the injunction hearing, April 9, 2013, in the federal Court (Dkt 26-7 E289-E342).

50. After 2 and one-half years in the Probate Court, the only place in the record of any related proceeding where one can actually see findings of fact and conclusions of law is in the federal injunction issued by the Honorable District Judge Kenneth Hoyt April 9, 2013.

51. In Section A of Defendants' Arguments and Authorities V&F claim Plaintiffs have not adequately pled a violation of the RICO Act and in support they cite to the elements necessary to plead 18 U.S.C. 1962(b). Plaintiffs agree they have not pled a violation of 1962(b), as Plaintiffs plead 1962(c) claims, which are substantially different from the 1962(b) claims filed against several judges of the Harris County Probate Court in the Sheshtawy, Peterson, Rizk RICO suit filed March 18, 2016[11]. The motions to dismiss in that case were taken under advisement by that Court September 12, 2016, and this case is related by continuity.

52. Defendants use RICO as a blanket general term when the RICO statutes are each very narrow and prohibit four separate and specific kinds of activity. The elements of 18 U.S.C. §1962(a), §1962(b) and §1962(c) are distinguishable, and elements of one cannot be merged with those of another under the generalized term RICO.

53. Ultimately Defendants insist Plaintiffs are pleading claims not contained within the four corners of the RICO complaint, such as malpractice, or that Plaintiffs failed to meet the evidentiary particulars that concatenate each Defendant's conduct to a pattern of racketeering activity.

54. Defendants ask the court to view the complaint in a vacuum, while simultaneously asking the court to assume a contrary view of the facts by proxy under their unsupported companion Rule 12(b)(1) factual challenge (Dkt 20).

[11] Case 4:16-cv-00733 filed TXSD 3/18/2016

IX. DEFENDANTS' RULE 12(B)(1) ARGUMENTS

55. Defendants' first allegory is that the matter before the court is merely the latest lawsuit filed in some "Brunsting Sibling Saga" and "Plaintiff Candace Louise Curtis' second attempt to have a federal judge consider these issues".

56. Defendants fail to mention that the first federal Court issued an injunction in response to Plaintiff Curtis' application, finding the four necessary criteria to have been met, including a likelihood of prevailing on the merits. That hearing was held before the Honorable Kenneth Hoyt, April 9, 2013, and represents the only evidentiary hearing amongst a plethora of state court lawsuits filed by Bobbie Bayless in name of Carl Brunsting and the estate of Nelva Brunsting.

57. When Plaintiffs filed this RICO suit there was no docket control order in any state court, no trial date, the probate Court refused to set hearings on the pending dispositive motions, and Plaintiff Curtis was, and is, continually being threatened with deprivation of property, under the illicit QBD instrument drafted by Defendant Candace Kunz-Freed, that Defendants Amy and Anita Brunsting perpetually refuse to produce and qualify as evidence. (Dkt 26-7)

58. Defendants V&F at page 2 plead that Curtis' first federal lawsuit alleged similar claims, but fail to mention that nothing substantive has been resolved in the original suit 4:12-cv-592, and that those unresolved claims are subsumed within the RICO matter that is currently before this Court, because the state court has refused Plaintiff Curtis access to the court and due process of law, refusing to exercise jurisdiction while pretending they had it to begin with.

59. Plaintiff will admit that both suits arise from a common set of facts and that the facts necessary for the pending RICO complaint were developed over the course of the Defendants' perpetual efforts to avoid evidentiary hearings and especially any situation where they would

have to actually produce the archetype of the QBD instrument, drafted and notarized by Candace Freed, and qualify it as evidence.

60. Defendants assert at item 15 that:

> *On July 24, 2015 Judge Butts appointed Greg Lester ("Lester"), as a temporary administrator, to determine the merits of the claims asserted in the various lawsuits.*

61. On January 20, 2016 Lester provided a report, (Dkt 26-9) wherein he concluded:

- *All of the legal actions taken by Nelva were within her authority;*
- *Any damages for unequal distribution can be resolved by equalizing the distributions to all siblings; and*
- *Recommended that the Probate Court should uphold the "No Contest" Clause*

62. What the Lester Report actually says is "All of the legal actions taken by Nelva were within her authority under the broad language of the restatement." Mr. Lester fails to list the actions allegedly taken by Nelva Brunsting which he concludes to have been "legal actions" nor does he cite to any specific language in any trust instrument in support of his vague assertions, while ignoring the specific language of the trust and the existing record.

63. Defendants V&F also cite that Mr. Lester "Recommended that the Probate Court should uphold the "No Contest" Clause." Plaintiffs are certain V&F and Lester each refer to the "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (the alleged 8/25/2010 QBD a.k.a. the extortion instrument).

64. Rather than argue over facts not in evidence, Plaintiffs will simply quote the closing paragraph of Plaintiffs' Addendum of Memorandum at line 120[12]. (Dkt 26)

[12] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16 Page 1 of 27 and as an Addendum to the Complaint filed in 4:16-cv-1969 in TXSD 7/05/2016

> *120. If there is such a magical document as this 8/25/2010 QBD, that trumps federal injunctions and the Orders of a federal Judge, renders remand agreements nugatory, removes fiduciary obligations, forecloses beneficial interests, taints the blood of innocent remaindermen, amends what can only be amended by a court of competent jurisdiction and revokes what can only be revoked by a court of competent jurisdiction, the Defendants and their attorneys should be brought before an honorable Court where they will actually be compelled to produce the supernatural thing and qualify it as evidence.*

65. If any Defendant could have produced the instrument and qualified it as evidence, they would have done so long ago. Instead, they pull their joint no evidence motion from calendar on the very last day for summary judgement hearings and negate the agreed upon docket control order, and then show up March 9, 2016 acting as if the thing had been held to be valid. (Dkt 26-16)

66. Defendants argue that similar claims are currently pending in a malpractice suit in state court, but no state court ever had the capacity to assume in rem jurisdiction over the Brunsting trust res in the custody of a federal court.

67. Whether or not the facts are common, professional carelessness is not an element of a racketeering lawsuit and Defendants cling to their claim of professional negligence because it is the only thing that gives them any hope of hiding their enterprise participation behind the Doctrine of Privity.

X. STANDING

68. Defendants' Motion seeks to down-play participation in a lawyer-run wealth redistribution enterprise, asking the Court to believe the matter at issue is no more than a family dispute, as if the betrayal of fiduciary obligations and the violation of property laws was a mere soap opera. Nothing could be further removed from reality. Every Judge in the Harris County

Probate Court is being sued in the Southern District of Texas, under either racketeering or civil rights, or both, and that does not appear to be a coincidence.

69. One thing Plaintiffs and Defendants appear to agree on is that Munson is not a party to any of the prior lawsuits nor is he a beneficiary of the Brunsting Family of Trusts, and that: "It is inconceivable that he could be injured as a result of V&F's drafting of the estate planning documents." Unfortunately Defendants seek to discolor the facts while omitting the obvious.

70. Plaintiffs filed as Private Attorneys General under the Racketeer Influenced Corrupt Organization statutes, individually and on behalf of the public interest.

71. A recent Carnegie report (Exhibit A10 attached E208-E245) cites judicial corruption as a major factor affecting domestic security and international trade, because companies are reluctant to invest in foreign trade or set up foreign offices in nations with low human rights ratings because of the inability to depend on the protections of law.

72. Because Plaintiff Munson's standing has been specifically challenged, the following information is in order. Munson is also a victim of public corruption in his local environment and believes public corruption conspiracies are infectious social diseases, and that the single greatest threat to the security of a free state comes from a corrupt judiciary as the judiciary is the final vestige for seeking remedy within the established system.

73. There are three variations on the private attorney general and those are the substitute, the simulated and the supplemental. A supplemental private attorney general is generally a private attorney who acts to supplement the public prosecutorial function, which is what Congress envisioned in fashioning 18 U.S.C. 1964(c) after the 1914 Clayton Act. The RICO statutes are an example of the Private Attorney General as a "Supplemental Law Enforcer", and the only place

in our law where a private citizen can be a private attorney general without also being an attorney.

74. In claiming Munson lacks standing, Defendants' motion claims that he has suffered no tangible injury to his business or property but, unlike Defendants, Plaintiff Munson does not so easily put a dollar and cents price tag on public justice nor is required to do so. Conspiracies involving public corruption of this type, adversely affects not only the public interest generally but also individual claimants and the efficacy of the work product of honest legal professionals.

75. The People are offended by the mere notion that the public suffers no tangible injury as a direct and proximate result of public corruption and do not accept the idea that public offenses do not injure the morals of the society or that members of the public have no standing to prosecute public corruption. A tangible injury need not be significant for standing purposes and every member of the body politic has a property interest in honest government. Any conduct that injures trade is also injurious to the public trust. Congress created the private right of remedy at 18 U.S.C. 1964(c) specifically for the purposes stated herein.

76. All of these Defendants are converting our court rooms, institutions, and resources intended for the administration of public justice, into a place of conducting illicit private business for personal gain, thus diminishing and often eliminating the availability of those resources for the honest administration of public justice, while also injuring individual members of the public as part of their enterprise operations.

77. Curtis v Brunsting is not the estate of Nelva Brunsting,[13] a beneficiary of a trust is not an heir and a racketeering conspiracy is not malpractice.

[13] Curtis v Brunsting 704 F.3d 406

XI. CONCLUSION

78. Curtis v Brunsting is not an isolated specific instance but merely one example of a variation on a shakedown practiced over and over again against elder, disadvantaged and familial victims.

79. Each of these Defendants will claim that Plaintiffs failed to plead a particular act that implicates them in a conspiracy, but Candace Kunz-Freed was the architect of this entire fiasco (Dkt 26-11 and 26-14) and the very real fact here is that Defendant Candace Kunz-Freed is accused of using the Vacek Design in drafting and notarizing the illicit documents that provided Anita Brunsting with the appearance of authority used to commit numerous specifically alleged predicate acts.

80. Another very real fact is that without those falsified and illicitly drafted documents, none of these other Defendants would have had the opportunity to perform their part in the color of litigation racketeering conspiracy.

81. It would be improper for the Court to dismiss a Petition unless the claimant can prove no set of facts that would entitle it to relief. That is clearly not the case here. Plaintiff Curtis' original complaint made a prima facia claim by affidavit and 46 attached exhibits, (4:12-cv-592 filed TXSD 2/27/2010), and each has maintained its veracity throughout. The fiduciaries in that earlier action, Anita and Amy Brunsting, have yet to meet their burden of bringing forth evidence.

82. The notion that Vacek & Freed can betray Privity, enter into and cultivate conflicting interests undermining the efficacy of the products and services sold to Elmer and Nelva Brunsting, and still cling to the protection of the doctrine of privacy, is an interesting concept that begs an audience.

Wherefore Plaintiffs move this Honorable Court for an Order denying the Motions to Dismiss filed by Defendants Albert Vacek, Jr. and Candace Kunz-Freed, August 7, 2016. (Dkt 19 and 20).

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 27th day of September, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants Rule 12(b)(1) and 12(b)(6) Motions to Dismiss filed on August 7. 2016 by Defendants Albert Vacek Jr. & Candace Kunz-Freed in the above styled cause (Dkt #19 & 20) should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

Attached Exhibits

A1 - Original 1996 Trust	E1-E61
A2 - 2005 Restatement	E62-E148
A3 - 2007 Amendment	E149-E151
A4 – Amy March 6, 2012 Affidavit	E152-E155
A5 - 2013-04-09 Preliminary Federal Injunction	E156-E160
A6 - PBT-2013-115617 Bayless Probate Petition filed 4/9/2013	E161-E180
A7 - 2014-05-09 Ostrom Motion for Remand	E181-E185
A8 - 2014-05-22 PBT-2014-170812 Federal Order Granting Remand	E186-E187
A9 – Bayless District Court Petition filed 1/29/2013	E188-E207
A10 - Carnegie Corruption and Security Report	E208-E245

NORTON ROSE FULBRIGHT

September 27, 2016

Via Certified Mail
Return Receipt Requested and
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Re: Case No. 4:16-cv-01969, *Curtis, et al v. Kunz-Freed, et al.*

Dear Ms. Curtis and Mr. Munson:

Pursuant to Federal Rule of Civil Procedure 11(c)(2), we have enclosed a copy of a Motion for Sanctions by Defendant Jill Willard Young.

As set forth in the Motion for Sanctions, Ms. Young is seeking sanctions, including attorneys' fees, from you for the wrongful filing of the above action. We will file this Motion for Sanctions on Wednesday, October 19, 2016, unless your clients nonsuit their claims against Ms. Young with prejudice before that date.

Please let me know if you have any questions.

Very truly yours,

Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION FOR SANCTIONS

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal. On September 15, 2016, Defendant Young filed her Motion to Dismiss. And on September 27, 2016, Defendant Young sent Plaintiffs a letter, informing them that, in accordance with the safe-harbor procedure of Federal Rule of Civil Procedure 11, she would be filing this Motion for Sanctions on October 19, 2016, if Plaintiffs did not dismiss their Complaint against her with prejudice. But Plaintiffs have ignored Ms. Young's letter and Motions.

Plaintiffs' frivolous pleadings meaninglessly and wrongfully denigrate the reputation of Ms. Young, a prominent, hard-working Houston lawyer. Despite opportunities to nonsuit their meritless suit, Plaintiffs have refused to do so. Thus, Plaintiffs should be required to reimburse Ms. Young's attorney's fees pursuant to Federal Rule of Civil Procedure 11.

ARGUMENT AND AUTHORITIES

Filing a RICO action in federal court is not a proper substitute for appealing an unfavorable ruling, nor is it an appropriate means of seeking revenge against opposing and court-

appointed counsel. *See Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("[I]t should be noted that an attorney's responsibility to conduct a reasonable prefiling investigation is **particularly important in RICO claims**.") (emphasis added). Because the claims asserted by Plaintiffs are both legally and factually frivolous, Ms. Young should be awarded attorneys' fees and costs under Fed. R. Civ. P. 11.

I. The Rule 11 Standard

Under Fed. R. Civ. P. 11(b), by presenting the Court a signed pleading, an "unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3). "Compliance with these affirmative duties is measured as of the time that the document is signed." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994). And whether a pleading meets this requirements is measured "by an objective, not subjective, standard of reasonableness under the circumstances." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988).

"[I]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1); *see also* Fed. R. Civ. P. 11 Advisory Committee Notes ("Even though it is the attorney whose

signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

II. Plaintiffs have violated Fed. R. Civ. P. 11(b)(2) by filing legally frivolous claims.

Plaintiffs have ignored longstanding attorney immunity doctrines, have alleged six causes of action for which they have no private cause of action, and failed to plead facts showing even the most basic elements of their RICO "claim."

A. Plaintiffs ignore attorney immunity.

Plaintiffs have ignored long-established immunity doctrines that protect attorneys from suit by opposing parties and non-clients. Indeed, the affirmative defense of immunity is apparent on the face of the Complaint.

Under Texas law, it is settled that "attorneys are immune from civil liability . . . 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). However, a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

In this case, Plaintiffs have not pled any facts showing Ms. Young, who served as counsel for the Temporary Administrator in the underlying lawsuit, took any actions outside the normal discharge of her duties in representing her client. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016) (attorney's conduct in sending a letter, participating in discovery, and

communicating with SEC about client were "classic examples of an attorney's conduct in representing his client").

B. Plaintiffs plead claims for which there exists no private right of action.

Plaintiffs allege three causes of action for "honest services," along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* Complaint, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See* Motion to Dismiss [DKT. 25], at pp. 13–16.

C. Plaintiffs' accusations are baseless and delusional.

Plaintiffs accuse Ms. Young of what can best be described as fictional acts--being a member of a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. Not surprisingly, Plaintiffs do not even try to accompany their made-up story with supporting facts. The reality is unavoidable—their complaint is a bizarre, sophomoric attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Less fantastical efforts to concoct a federal claim against judges and opposing attorneys have been routinely dismissed. *See, e.g.*, *Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to plead a racketeering activity). And other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148

(W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Thus, Plaintiffs' allegations fail to satisfy Rule 11. Specifically, Plaintiffs' Complaint against Ms. Young—devoid of any allegation of actual wrongdoing—can only be brought for improper purposes, like harassment or to needlessly increase the cost of litigation. Plaintiffs' Complaint is in no way warranted by existing law, and Plaintiffs' contentions completely lack any sort of factual or evidentiary support. *See* Fed. R. Civ. P. 11(b)(1)-(3). Ms. Young has also specifically informed Plaintiffs multiple times of the legal defects in their Complaint and the authority showing Plaintiffs' arguments are meritless, both in Ms. Young's filing of her Motion to Dismiss and by serving this Motion for Sanctions on Plaintiffs twenty-one days before filing it with the Court. But Plaintiffs have refused to dismiss their Complaint against Ms. Young. This, too, means sanctions are necessary. *See also Taylor v. C.I.R.*, 350 Fed. Appx. 913, 915 (5th Cir. 2009) ("Sanctions on pro se litigants are appropriate if they were warned that their claims are frivolous and they were aware of 'ample legal authority holding squarely against them.'").

CONCLUSION

Plaintiffs have filed a frivolous and facially-deficient lawsuit, and Ms. Young respectfully requests that the Court require Plaintiffs and their attorneys to pay her attorneys' fees in defending this suit and pursuing the relief requested herein. *See* Ex. A, Aff. of Robert S. Harrell.

Dated: September 27, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on September 27, 2016, I conferred with counsel for Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to dismiss the claims against Ms. Young, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, pursuant to Fed. R. Civ. 11(c)(2) and Fed. R. Civ. P. 5, I served copies of this Motion for Sanctions on Plaintiffs. I also certify that a true and correct copy of the above Motion for Sanctions has been served on October 19, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-CV-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

Plaintiffs' Joint Answer to Defendant Albert Vacek, Jr. and Defendant Candace Kunz-Freed's Motions to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9(b)

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Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1325, 47 U.S.P.Q.2d 1769,1772 (Fed. Cir. 1998) 4

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Federal Rule of Civil Procedure 9(b) 5, 13

I. INTRODUCTION

1. This is a private interest as well as a public interest lawsuit as the subject matter relates to the legitimate administration of justice.

2. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act (RICO) at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c).

3. On September 7, 2016, Defendants Albert Vacek, Jr. and Candace Kunz-Freed, collectively V&F, filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), (Dkt 19), and Federal Rule of Civil Procedure 12(b)(1) (Dkt 20).

4. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement to the RICO complaint. (Dkt 1)

5. Plaintiffs hereby incorporate the Addendum in response to Defendants' claim of a want of specific allegations against Vacek & Freed and the other affirmative defenses.

II. STANDARDS OF REVIEW

Federal Rule 12(b)(6)

6. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc., 693 F.3d 1317, 1321–22 (11th Cir. 2012).* To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)*). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

7. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo , and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh, 480 F.3d 438, 443 (6th Cir. 2007)*; *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005).*

Federal Rule 12(b)(1)

8. Whether or not a court has subject matter jurisdiction over a party is a question of law reviewed de novo; thus, a decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is an issue of law

reviewed de novo. *Hunter Douglas, Inc. v. Harmonic Design, Inc., 153 F.3d 1318, 1325, 47 U.S.P.Q.2d 1769, 1772 (Fed. Cir. 1998)*.

9. On a Rule 12(b)(1) Facial Attack the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1335 (11th Cir. 2013*).

10. In contrast to a facial attack on subject matter jurisdiction, a Rule 12(b)(1) factual attack "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings such as testimony and affidavits are considered." *Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)* (internal quotation marks omitted).

11. When the attack is factual "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Therefore, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

12. The Denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. *Data Gen. Corp. v. Cnty. of Durham, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001).*

III. ISSUES PRESENTED

13. Plaintiffs have not adequately pled the necessary predicate acts.

14. Plaintiffs have failed to allege an unlawful act against V & F.

15. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

16. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

17. Plaintiffs have failed to plead a cognizable RICO enterprise.

a. Plaintiffs' enterprise allegations are too vague and conclusory.

b. Plaintiffs' alleged enterprise lacks continuity.

c. Plaintiffs have failed to adequately plead a pattern of racketeering activity.

d. Plaintiffs have not adequately alleged a conspiracy claim under § 1962(d).

e. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

f. Plaintiffs' claims should be dismissed because a violation of the Hobbs act does not create a private cause of action.

g. Plaintiffs' claims should be dismissed because V & F cannot be civilly liable for aiding and abetting.

h. Plaintiffs' claims should be dismissed because Plaintiffs have not adequately pled a violation of Plaintiffs' civil rights.

i. Plaintiffs have not adequately pled a claim under § 1983.

j. Plaintiffs have not met the Nexus/joint-action test.

k. Plaintiffs have not met the public function/state coercion or encouragement tests.

l. Plaintiffs have not adequately pled a claim under § 1985.

m. Tortious interference with inheritance rights is not a recognized cause of action in Texas.

IV. CONTEXTUAL SUMMARY

18. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff

Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

19. Plaintiff Curtis is not an heir to any estate and has no inheritance expectancy, is not party to any estate litigation and does not believe there is any estate litigation as a matter of law.

20. This RICO lawsuit is a culmination of 4 and one-half years of multi- jurisdictional litigation that began in the federal court as a simple breach of fiduciary under diversity jurisdiction[1] seeking accounting and fiduciary disclosures, went to the Fifth Circuit[2] and back to the TXSD and then to Harris County Probate (where no one has heard of it since[3]), and the controversy is now back in an honorable federal Court under federal question jurisdiction.

21. In response to Rule 12(b)(6) motions to dismiss, on September 15, 2016, Plaintiffs filed the Rule 11(b) and Rule 60 Motions previously filed in Judge Hoyt's Court,[4] as an Addendum of Memorandum (Dkt 26), supplementing the original RICO complaint in this case.

V. HISTORY OF THE CONTROVERSY

According to the record:

22. In 1996, Elmer Brunsting and his wife Nelva Brunsting created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue, as well as for the remaindermen grandchildren and great grandchildren. (Exhibit A1 – Art. I Sec. (c) attached E1-E61)

23. The Brunstings restated their Trust in 2005 (A2 attached E62-E148) and amended the restatement in 2007 (A3 attached E149-E151).

24. Elmer Brunsting was declared incompetent in June 2008 and passed on April 1, 2009.

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012
[2] Curtis v Brunsting 704 F.3d 406 (2013)
[3] Dkt 25 Motion to Dismiss filed by Jill Young wondering "What is Curtis v Brunsting?"
[4] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012

25. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and divided its assets among an irrevocable decedent's trust and a revocable survivor's trust.

26. Nelva Brunsting passed on November 11, 2011 and a number of illicit instruments surfaced that had been drafted after Elmer Brunsting became incompetent and after he passed, that claim to have effected changes that could not have been made under the law of the trust. (Dkt 26-14)

27. The acting trustees, Anita and Amy Brunsting, refused to answer, account or provide disclosures and after two unsuccessful demand letters[5] advising Defendants Anita and Amy Brunsting to do the right thing, Plaintiff Curtis brought suit.

VI. HISTORY OF THE LITIGATION

28. Plaintiff Curtis filed a Petition in the United States District Court for the Southern District of Texas, Houston Division, under Diversity Jurisdiction on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting[6] and other lawful and equitable relief.

29. On March 6, 2012, Vacek & Freed staff attorney Defendant Bernard Mathews, appearing under the letterhead "Green and Mathews" filed a motion for an emergency order, accompanied by a false affidavit signed and verified by Defendant Amy Brunsting (A4 attached E152-E155), in which Mathews implied the existence of a probate exception to Plaintiff's claims, knowing full well he had filed a nearly identical claim on behalf of plaintiff Reginald Parr, not in the probate court but in the Harris County District Court, only 3 days earlier.[7]

[5] Exhibits 17 and 20 in the original federal complaint at pages 67-68, and 71-79 respectively.
[6] Case 4:12-cv-592 Candace Louise Curtis v Anita and Amy Brunsting filed TXSD 2/27/2012
[7] Parr v Dunegan 2012 13022 (190th Judicial District)

30. On March 8, 2012, in reliance upon the material misrepresentations contained in Defendants' Motion and Affidavit, Judge Hoyt dismissed Plaintiff Curtis' Pro se Petition sua sponte, under the probate exception to federal diversity jurisdiction. Plaintiff Curtis filed a timely notice of appeal and was forced to endure the delay and expense of that effort.

31. Then on March 9, 2012, Bobbie Bayless filed a petition for deposition before suit on behalf of Carl Brunsting in Harris County District Court.[8]

32. *On January 9, 2013,* the Fifth Circuit Court of Appeals, in a unanimous decision, reversed and remanded back to the Southern District of Texas clearly verifying that the Brunsting trust is not the estate of Nelva Brunsting.[9]

33. Plaintiff Curtis immediately filed for a protective order.

34. *On January 29, 2013,* Carl Brunsting, as Executor of the estate of Nelva Brunsting, filed suit against trust attorney Candace Kunz-Freed and Vacek & Freed P.L.L.C. in the Harris County District Court raising claims exclusively related to the Brunsting trusts then in the custody of the federal court.[10]

35. On April 9, 2013, in response to Plaintiff Curtis' application for a protective order, the Honorable Kenneth Hoyt issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's approval and commanding specific performance. (A5 attached E156-E160)

36. Also on April 9, 2013 Bobbie Bayless filed claims against Amy, Anita and Carole Brunsting in Harris County Probate Court No. 4, in the name of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) and after trailing and

[8] 201214538 - (Court 080)
[9] Curtis v Brunsting 704 F.3d 406
[10] No. 2013-05455; Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County, TX

dogging Plaintiff Curtis' litigation always one step behind, Bayless named federal Plaintiff Curtis a "Nominal Defendant" while alleging no claims. (A6 attached E161-E180)

37. Due to a change of circumstances in late 2013, Plaintiff Curtis retained Houston attorney Jason Ostrom to assist with her federal lawsuit.

38. Upon appearing in the matter Mr. Ostrom conceived of an arrangement by which Defendants agreed to modification of Plaintiff's Petition to include her brother Carl Henry Brunsting as an involuntary plaintiff, thus polluting diversity and facilitating a remand to Harris County Probate Court on May 22, 2014.(A7 attached E181-E185)

39. In exchange, Defendants agreed to abide by the federal injunction and all orders of the federal Court and on that basis the Court approved the amended complaint and entered an Order for Remand to the Harris County Probate Court. (A8 attached E186-E187)

40. The Motion granting Plaintiff Curtis' remand was filed in the estate of Nelva Brunsting, No. 412249 on June 6, 2014, and the Harris County Clerk assigned Curtis v Brunsting auxiliary number 412249-402.

41. The Defendants ask the Court to believe Plaintiffs are responsible for a myriad of lawsuits, but Probate No. 4 has three cases on record and Harris County District Court has two more. Only one of these suits was filed by Plaintiff Curtis and it was filed in the federal court on February 27, 2012. The state court cases are:

a. No. 201214538 – 80th Judicial District Court of Harris County Texas, Carl Henry Brunsting and the estate of Nelva Brunsting Petition to take depositions before suit.
b. No. 412249 Carl Henry Brunsting executor of the estate of Nelva Brunsting, vs Amy, Anita and Carole Brunsting.
c. No. 412249-401 Carl Henry Brunsting Individually vs Amy, Anita and Carole Brunsting, and

d. No. 412249-402 Candace Curtis v Anita and Amy Brunsting, filed TXSD February 27, 2012, remanded from the federal court to the state probate court May 9, 2014.

e. No. 2013-05455 - Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County Texas. (A9 attached E188-E207)

VII. THE HEINOUS EXTORTION INSTRUMENT

42. An instrument called "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (QBD) allegedly signed by Nelva Brunsting and notarized by Candace Kunz-Freed on August 25, 2010, was propped up as an amendment to the irrevocable trust agreement after Elmer's death, when the trust agreement could only be amended or revoked by a court of competent jurisdiction. (Exhibit A2 @ E69) (See also Dkt26-4 QBD signature page anomalies)

43. The record shows the QBD was drafted and notarized by Defendant Candace Freed. This instrument has been the object of numerous unresolved motions for summary and declaratory judgment in the state probate court (Dkt 26-5, 26-11, 26-14) and those motions remain unresolved because the probate court refused to rule on any substantive issues. There would be a logical reason for that, albeit not an ethical one.

44. Plaintiffs hereby incorporate the Addendum of Memorandum filed September 15, 2016 (Docket entry 26) as if fully restated and would ask the Court to review (Dkt 26-5 E20-E28), (Dkt 26-8 E343-E393), (Dkt 26-11 E406-E452), (Dkt 26-14 E497-E1187), and (Dkt 26-19 E1252-E1253) as follows:

a. Dkt 26-5 is Defendant(s) Anita and Amy Brunsting's joint no evidence motion for partial summary judgment, filed in the state probate court June 26, 2015, claiming the Plaintiffs could produce no evidence of the invalidity of the extortion

instrument also known as the August 25, 2010 QBD. That motion was scheduled to be heard on the last day set for summary judgment motions, August 3, 2015 but has never been heard. (Dkt 26-19)

b. Dkt 26-11 (E406-E452) is Plaintiff Curtis' answer to Exhibit 26-5, along with motion and demand to produce the QBD and qualify it as evidence so one could discuss its efficacy or the lack thereof. Those motions have never been heard.

c. Dkt 26-7 (E289-E342) is the federal Injunction Hearing Transcript

d. Dkt 26-8 is Carl Brunsting's Motion for Protective Order (E343-E393) regarding wiretap recordings.

e. Dkt 26-14 (E497-E1187) is an unresolved motion for partial summary and declaratory judgment that expressly seeks to have the illicit instruments, drafted by Candace Freed, at the request of Anita Brunsting, including the heinous extortion instrument, declared invalid. The probate court has refused to set these motions for hearing.

f. Dkt 26-16 (E1189-E1242) March 9, 2016 ambush hearing transcript.

g. Dkt 26-19, the agreed upon Docket Control Order.

45. As the Rule 60 Motion states (Dkt 26 pgs 3-31) Defendant(s)' Amy and Anita Brunstings' joint No-Evidence motion was removed from the calendar along with Bayless' "Carl Brunsting" Motion for Partial Summary Judgement and Curtis' Motion and demand to produce evidence, allegedly to hear an emergency motion for protective order (Dkt 26-8 E343-E393 and transcript of hearing Dkt 26-12 E453-E494) regarding wiretap recordings disseminated by Anita Brunsting's counsel, Defendant Bradley Featherston, via certified mail on or about July 1, 2015.

46. All of the motions regarding the legitimacy of instruments and actions were kicked to the curb along with the Docket Control Order (Dkt 26-19 E1252-E1253) and the scheduled trial date, while Plaintiff Curtis was on an airplane home from the July 22, 2015 hearing appointing Temporary Administrator Gregory Lester. (Dkt 25-A). There is no order in the probate record that would explain any changes to the docket scheduling Order.

47. Plaintiff Curtis then filed her motion for partial summary and declaratory judgment (Dkt 26-14) and asked to have dispositive motion hearings placed back on the Calendar (Dkt 26-15 E1188) asking, as well, to have the case of Anita and Amy Brunsting's co-conspirator Defendant Candace Freed, transferred from the Harris County District Court and consolidated in the probate Court with the rest of the co-conspirators.

VIII. DEFENDANTS' RULE 12(B)(6) AND 9(B) ARGUMENTS

48. Defendants Vacek and Freed (V&F), in support of their Rule 12(b)(6) Motion to Dismiss (Dkt 19) offer the detailed background statement from their accompanying Rule 12(b)(1) Motion (Dkt 20) claiming facts inapposite to those of the complaint and whereas an alternative set of facts may be pled and considered under a Rule 12(b)(1) factual attack, no such authority exists with a Rule 12(b)(6) challenge.

49. Defendants seek to incorporate their alternate claim of facts presented under Rule 12(b)(1) but do not support those claims by affidavit, exhibits or specific reference to any evidentiary hearings in which such matters were judicially determined, because there have not been any evidentiary hearings or substantive issues decided since the injunction hearing, April 9, 2013, in the federal Court (Dkt 26-7 E289-E342).

50. After 2 and one-half years in the Probate Court, the only place in the record of any related proceeding where one can actually see findings of fact and conclusions of law is in the federal injunction issued by the Honorable District Judge Kenneth Hoyt April 9, 2013.

51. In Section A of Defendants' Arguments and Authorities V&F claim Plaintiffs have not adequately pled a violation of the RICO Act and in support they cite to the elements necessary to plead 18 U.S.C. 1962(b). Plaintiffs agree they have not pled a violation of 1962(b), as Plaintiffs plead 1962(c) claims, which are substantially different from the 1962(b) claims filed against several judges of the Harris County Probate Court in the Sheshtawy, Peterson, Rizk RICO suit filed March 18, 2016[11]. The motions to dismiss in that case were taken under advisement by that Court September 12, 2016, and this case is related by continuity.

52. Defendants use RICO as a blanket general term when the RICO statutes are each very narrow and prohibit four separate and specific kinds of activity. The elements of 18 U.S.C. §1962(a), §1962(b) and §1962(c) are distinguishable, and elements of one cannot be merged with those of another under the generalized term RICO.

53. Ultimately Defendants insist Plaintiffs are pleading claims not contained within the four corners of the RICO complaint, such as malpractice, or that Plaintiffs failed to meet the evidentiary particulars that concatenate each Defendant's conduct to a pattern of racketeering activity.

54. Defendants ask the court to view the complaint in a vacuum, while simultaneously asking the court to assume a contrary view of the facts by proxy under their unsupported companion Rule 12(b)(1) factual challenge (Dkt 20).

[11] Case 4:16-cv-00733 filed TXSD 3/18/2016

IX. DEFENDANTS' RULE 12(B)(1) ARGUMENTS

55. Defendants' first allegory is that the matter before the court is merely the latest lawsuit filed in some "Brunsting Sibling Saga" and "Plaintiff Candace Louise Curtis' second attempt to have a federal judge consider these issues".

56. Defendants fail to mention that the first federal Court issued an injunction in response to Plaintiff Curtis' application, finding the four necessary criteria to have been met, including a likelihood of prevailing on the merits. That hearing was held before the Honorable Kenneth Hoyt, April 9, 2013, and represents the only evidentiary hearing amongst a plethora of state court lawsuits filed by Bobbie Bayless in name of Carl Brunsting and the estate of Nelva Brunsting.

57. When Plaintiffs filed this RICO suit there was no docket control order in any state court, no trial date, the probate Court refused to set hearings on the pending dispositive motions, and Plaintiff Curtis was, and is, continually being threatened with deprivation of property, under the illicit QBD instrument drafted by Defendant Candace Kunz-Freed, that Defendants Amy and Anita Brunsting perpetually refuse to produce and qualify as evidence. (Dkt 26-7)

58. Defendants V&F at page 2 plead that Curtis' first federal lawsuit alleged similar claims, but fail to mention that nothing substantive has been resolved in the original suit 4:12-cv-592, and that those unresolved claims are subsumed within the RICO matter that is currently before this Court, because the state court has refused Plaintiff Curtis access to the court and due process of law, refusing to exercise jurisdiction while pretending they had it to begin with.

59. Plaintiff will admit that both suits arise from a common set of facts and that the facts necessary for the pending RICO complaint were developed over the course of the Defendants' perpetual efforts to avoid evidentiary hearings and especially any situation where they would

have to actually produce the archetype of the QBD instrument, drafted and notarized by Candace Freed, and qualify it as evidence.

60. Defendants assert at item 15 that:

> *On July 24, 2015 Judge Butts appointed Greg Lester ("Lester"), as a temporary administrator, to determine the merits of the claims asserted in the various lawsuits.*

61. On January 20, 2016 Lester provided a report, (Dkt 26-9) wherein he concluded:

- *All of the legal actions taken by Nelva were within her authority;*
- *Any damages for unequal distribution can be resolved by equalizing the distributions to all siblings; and*
- *Recommended that the Probate Court should uphold the "No Contest" Clause*

62. What the Lester Report actually says is "All of the legal actions taken by Nelva were within her authority under the broad language of the restatement." Mr. Lester fails to list the actions allegedly taken by Nelva Brunsting which he concludes to have been "legal actions" nor does he cite to any specific language in any trust instrument in support of his vague assertions, while ignoring the specific language of the trust and the existing record.

63. Defendants V&F also cite that Mr. Lester "Recommended that the Probate Court should uphold the "No Contest" Clause." Plaintiffs are certain V&F and Lester each refer to the "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (the alleged 8/25/2010 QBD a.k.a. the extortion instrument).

64. Rather than argue over facts not in evidence, Plaintiffs will simply quote the closing paragraph of Plaintiffs' Addendum of Memorandum at line 120[12]. (Dkt 26)

[12] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16 Page 1 of 27 and as an Addendum to the Complaint filed in 4:16-cv-1969 in TXSD 7/05/2016

> *120. If there is such a magical document as this 8/25/2010 QBD, that trumps federal injunctions and the Orders of a federal Judge, renders remand agreements nugatory, removes fiduciary obligations, forecloses beneficial interests, taints the blood of innocent remaindermen, amends what can only be amended by a court of competent jurisdiction and revokes what can only be revoked by a court of competent jurisdiction, the Defendants and their attorneys should be brought before an honorable Court where they will actually be compelled to produce the supernatural thing and qualify it as evidence.*

65. If any Defendant could have produced the instrument and qualified it as evidence, they would have done so long ago. Instead, they pull their joint no evidence motion from calendar on the very last day for summary judgement hearings and negate the agreed upon docket control order, and then show up March 9, 2016 acting as if the thing had been held to be valid. (Dkt 26-16)

66. Defendants argue that similar claims are currently pending in a malpractice suit in state court, but no state court ever had the capacity to assume in rem jurisdiction over the Brunsting trust res in the custody of a federal court.

67. Whether or not the facts are common, professional carelessness is not an element of a racketeering lawsuit and Defendants cling to their claim of professional negligence because it is the only thing that gives them any hope of hiding their enterprise participation behind the Doctrine of Privity.

X. STANDING

68. Defendants' Motion seeks to down-play participation in a lawyer-run wealth redistribution enterprise, asking the Court to believe the matter at issue is no more than a family dispute, as if the betrayal of fiduciary obligations and the violation of property laws was a mere soap opera. Nothing could be further removed from reality. Every Judge in the Harris County

Probate Court is being sued in the Southern District of Texas, under either racketeering or civil rights, or both, and that does not appear to be a coincidence.

69. One thing Plaintiffs and Defendants appear to agree on is that Munson is not a party to any of the prior lawsuits nor is he a beneficiary of the Brunsting Family of Trusts, and that: "It is inconceivable that he could be injured as a result of V&F's drafting of the estate planning documents." Unfortunately Defendants seek to discolor the facts while omitting the obvious.

70. Plaintiffs filed as Private Attorneys General under the Racketeer Influenced Corrupt Organization statutes, individually and on behalf of the public interest.

71. A recent Carnegie report (Exhibit A10 attached E208-E245) cites judicial corruption as a major factor affecting domestic security and international trade, because companies are reluctant to invest in foreign trade or set up foreign offices in nations with low human rights ratings because of the inability to depend on the protections of law.

72. Because Plaintiff Munson's standing has been specifically challenged, the following information is in order. Munson is also a victim of public corruption in his local environment and believes public corruption conspiracies are infectious social diseases, and that the single greatest threat to the security of a free state comes from a corrupt judiciary as the judiciary is the final vestige for seeking remedy within the established system.

73. There are three variations on the private attorney general and those are the substitute, the simulated and the supplemental. A supplemental private attorney general is generally a private attorney who acts to supplement the public prosecutorial function, which is what Congress envisioned in fashioning 18 U.S.C. 1964(c) after the 1914 Clayton Act. The RICO statutes are an example of the Private Attorney General as a "Supplemental Law Enforcer", and the only place

in our law where a private citizen can be a private attorney general without also being an attorney.

74. In claiming Munson lacks standing, Defendants' motion claims that he has suffered no tangible injury to his business or property but, unlike Defendants, Plaintiff Munson does not so easily put a dollar and cents price tag on public justice nor is required to do so. Conspiracies involving public corruption of this type, adversely affects not only the public interest generally but also individual claimants and the efficacy of the work product of honest legal professionals.

75. The People are offended by the mere notion that the public suffers no tangible injury as a direct and proximate result of public corruption and do not accept the idea that public offenses do not injure the morals of the society or that members of the public have no standing to prosecute public corruption. A tangible injury need not be significant for standing purposes and every member of the body politic has a property interest in honest government. Any conduct that injures trade is also injurious to the public trust. Congress created the private right of remedy at 18 U.S.C. 1964(c) specifically for the purposes stated herein.

76. All of these Defendants are converting our court rooms, institutions, and resources intended for the administration of public justice, into a place of conducting illicit private business for personal gain, thus diminishing and often eliminating the availability of those resources for the honest administration of public justice, while also injuring individual members of the public as part of their enterprise operations.

77. Curtis v Brunsting is not the estate of Nelva Brunsting,[13] a beneficiary of a trust is not an heir and a racketeering conspiracy is not malpractice.

[13] Curtis v Brunsting 704 F.3d 406

XI. CONCLUSION

78. Curtis v Brunsting is not an isolated specific instance but merely one example of a variation on a shakedown practiced over and over again against elder, disadvantaged and familial victims.

79. Each of these Defendants will claim that Plaintiffs failed to plead a particular act that implicates them in a conspiracy, but Candace Kunz-Freed was the architect of this entire fiasco (Dkt 26-11 and 26-14) and the very real fact here is that Defendant Candace Kunz-Freed is accused of using the Vacek Design in drafting and notarizing the illicit documents that provided Anita Brunsting with the appearance of authority used to commit numerous specifically alleged predicate acts.

80. Another very real fact is that without those falsified and illicitly drafted documents, none of these other Defendants would have had the opportunity to perform their part in the color of litigation racketeering conspiracy.

81. It would be improper for the Court to dismiss a Petition unless the claimant can prove no set of facts that would entitle it to relief. That is clearly not the case here. Plaintiff Curtis' original complaint made a prima facia claim by affidavit and 46 attached exhibits, (4:12-cv-592 filed TXSD 2/27/2010), and each has maintained its veracity throughout. The fiduciaries in that earlier action, Anita and Amy Brunsting, have yet to meet their burden of bringing forth evidence.

82. The notion that Vacek & Freed can betray Privity, enter into and cultivate conflicting interests undermining the efficacy of the products and services sold to Elmer and Nelva Brunsting, and still cling to the protection of the doctrine of privacy, is an interesting concept that begs an audience.

Wherefore Plaintiffs move this Honorable Court for an Order denying the Motions to Dismiss filed by Defendants Albert Vacek, Jr. and Candace Kunz-Freed, August 7, 2016. (Dkt 19 and 20).

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 27th day of September, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants Rule 12(b)(1) and 12(b)(6) Motions to Dismiss filed on August 7. 2016 by Defendants Albert Vacek Jr. & Candace Kunz-Freed in the above styled cause (Dkt #19 & 20) should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

Attached Exhibits

A1 - Original 1996 Trust	E1-E61
A2 - 2005 Restatement	E62-E148
A3 - 2007 Amendment	E149-E151
A4 – Amy March 6, 2012 Affidavit	E152-E155
A5 - 2013-04-09 Preliminary Federal Injunction	E156-E160
A6 - PBT-2013-115617 Bayless Probate Petition filed 4/9/2013	E161-E180
A7 - 2014-05-09 Ostrom Motion for Remand	E181-E185
A8 - 2014-05-22 PBT-2014-170812 Federal Order Granting Remand	E186-E187
A9 – Bayless District Court Petition filed 1/29/2013	E188-E207
A10 - Carnegie Corruption and Security Report	E208-E245

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-CV-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendants Mendel's & Featherston's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim

I. Summary of the Argument

1.1. The Texas doctrine of attorney immunity bars plaintiffs' claims. It is undisputed that defendants Mendel and Featherston have: (a) never had an attorney/client relationship with either of the plaintiffs; and (b) only served as attorneys in the defense of co-trustee Anita Brunsting. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5TH Cir. 2016).

1.2. The complaint does not provide defendants with fair notice of plaintiffs' claims. Plaintiffs allege that defendants were part of an entity that violated the RICO statute and enumerate several predicate acts allegedly engaged in by defendants, but do so through inference, speculation, and conclusive statements. Such vague statements fail to place defendants on notice of how the entity is alleged to have operated, how the predicate acts furthered the larger conspiracy, or how the defendants knew that these acts would further any conspiracy. By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping, the occurrence of which was inferred by the plaintiffs based on the production of voicemail recordings and nothing more. One problem, among others, is that Mr. Featherston's alleged wiretaps predate his involvement with the case.

II. Nature of the Case

2.1. The pro se plaintiffs are Candace Louise Curtis and Rik Wayne Munson. Defendants are Stephen A. Mendel and Bradley E. Featherston, among others. Messrs. Mendel and Featherston are attorneys licensed by the State Bar of Texas. Mr. Mendel is current counsel for Co-Trustee Anita

Brunsting. Mr. Featherston is a former associate attorney of Mr. Mendel, and previously assisted Mr. Mendel with the defense of Co-Trustee Anita Brunsting.

2.2. In addition to suing Messrs. Mendel and Featherston, plaintiffs sued nine (9) other attorneys, two (2) probate judges, and a court reporter for violations of the Racketeer Influenced Corrupt Organization Act (RICO).

2.3. Plaintiffs alleged that all of the defendants were part of a conspiracy in which several Houston area law firms and Harris County Probate Court No. 4 worked in concert to defraud heirs of their inheritances in order to enrich themselves. Plaintiffs' dubbed this alleged entity as the "Harris County Tomb Raiders, a/k/a the Probate Mafia."

2.4. Plaintiffs allege that they were harmed by the Tomb Raiders through its involvement in a related probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, *Estate of Nelva Brunsting, Deceased*. In particular, Mr. Featherston allegedly committed acts of illegal wiretapping and extortion in furtherance of the conspiracy. Both Messrs. Mendel and Featherston were allegedly involved in a conspiracy within the larger conspiracy to induce plaintiff Curtis to sign away valuable trust interests through extortion by way of a "sham mediation."

2.5. For the Court's benefit, plaintiff Curtis and her siblings participated in a mediation in August 2014. No other mediation has occurred. Since Messrs. Mendel and Featherston did not make an appearance as counsel of record until November 2014, it is impossible for them to be involved in a "sham mediation."

2.6. In Spring 2016, the Probate Court ordered a mediation among the parties, and that mediation was scheduled for July 2016, but the mediation never occurred. As such, assuming arguendo that a mediation is a course of conduct not protected by the Texas attorney immunity

doctrine, it is impossible for Messrs. Mendel and Featherston to participate in a sham mediation that never occurred.

III. Argument

3.1. A court has the authority to dismiss a suit for failure to state a claim upon which relief can be granted if the complaint does not provide fair notice of the claim and does not state factual allegations showing the right to relief is plausible. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Alt. Corp. v. Twombly,* 550 U.S. 544, 555-56 & n.3 (2007).

3.2. A careful reading of the plaintiffs claims against Messrs. Mendel and Featherston show that those claims are all related to their roles as attorneys in the defense of Co-Trustee Anita Brunsting. As such, the claims are barred as a matter of law by the Texas attorney immunity doctrine. *Troice*, 816 F.3d at 348. The Texas attorney immunity doctrine provides true immunity from suit and is not merely an affirmative defense. *Id*. at 346. Dismissal is, therefore, warranted regardless of the merits of the alleged conduct. *Id*. at 348-49.

3.3. More specifically, the plaintiffs' allege that Mr. Featherston engaged in wiretapping and theft/extortion, and that both Messrs. Mendel and Featherston were involved in a conspiracy to commit theft/extortion, all of which were done in furtherance of the larger RICO conspiracy. However, the actions underlying these claims are: (1) arguing in the probate court or through judicially filed instruments for the admissibility of voicemail recordings, which is alleged as "wiretapping;" (2) arguing in the probate court or through judicially filed instruments that claims for trust distributions violated the no-contest clause of the Qualified Beneficiary Trust ("QBT"), which is alleged as "theft/extortion;" and (3) arguing in the probate court or through judicially filed instruments that the parties should mediate, which is the "conspiracy to commit theft/extortion."

3.4. Each alleged act as to Messrs. Mendel and Featherston is the kind of conduct that an attorney normally engages and is expected to engage when representing a client and is entirely covered by attorney immunity. *See Troice*, 816 F.3d at 348 (the defendant attorney sent letters to the SEC regarding jurisdiction, communicated with the SEC about document discovery and the legitimacy of his client's business, stated that certain witnesses would provide more relevant testimony than others in a deposition, and represented one of his client's executives in a deposition). Because all of the plaintiffs' claims derive from conduct covered by attorney immunity, the complaint fails to state a claim for which relief may be granted and should be dismissed for this reason alone.

3.5. Yet, the plaintiffs' claims can be dismissed for a second reason, which is that the claims fail to provide Messrs. Mendel and Featherston with fair notice of what they allegedly did wrong. *Ruvio v. Wells Fargo Bank N.A.,* 766 F.3d 87, 90-91 (1ST Cir. 2014); *Brooks v. Ross,* 578 F.3d 574, 581-82 (7TH Cir. 2009). A complaint that provides only labels and conclusions or formulaic recitation of the elements of a cause of action is insufficient to show grounds for the plaintiff to be entitled to relief. *Iqbal,* 556 U.S. at 678; *Twombly*, 550 U.S. at 555 & n.3; *Brooks*, 578 F.3d at 581.

3.6. In addressing their claim that a broad RICO type conspiracy exists between the defendant law firms and the probate court, the plaintiffs describe the alleged "entity" as "a secret society . . . associated together for the purpose of carrying out an ongoing criminal theft enterprise . . . through a multi-faceted campaign of lies, fraud, threats, and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity . . . ." This description is repeated with slight variations throughout the complaint and appears to have been crafted by combining several definitions taken from 18 U.S.C. § 1961, and a vague list of types of alleged actions taken by those

involved in the conspiracy in furtherance of the same. There is not a single fact of what Messrs. Mendel and Featherston said that were lies or threats, no facts to show fraud, nor any factual explanation as to how Messrs. Mendel and Featherston could commit official corruption when neither is a government official.

3.7. Likewise, the plaintiffs cannot describe a single fact as to how Messrs. Mendel and Featherston used the "entity" to syphon "off the assets of our elders . . . through . . . schemes and artifices" as part of a plan which they refer to as "Involuntary Redistribution of Assets." There are no facts to show how this alleged scheme works, whom are the elders, the types of assets that are being syphoned off, the value of the assets allegedly being syphoned, nor how much Messrs. Mendel and Featherston wrongfully received.

3.8. The plaintiffs admit that "the specific quid pro quo profit sharing is unknown" to them, but insist that proof of "a reciprocal stream-of-benefits necessarily flows from the fact of the in-concert activities of the co-conspirators." Nebulous rhetoric, conclusory statements, and unsupported presumptions do not constitute facts and, therefore, are insufficient to sustain a claim against Messrs. Mendel and Featherston.

3.9. When plaintiffs attempt to describe overt acts in furtherance of the conspiracy by particular defendants they are similarly vague and conclusory. As previously indicated, the plaintiffs claim that Mr. Featherston engaged in illegal wiretapping in furtherance of the conspiracy. The basis for this claim is that Mr. Featherston argued in court or through judicial instruments for the admissibility of recordings of telephone conversations between Curtis' brother, Carl Brunsting and their mother, Nelva Brunsting.

3.10. The plaintiffs' main argument that these recordings were obtained via an illegal

wiretapping device seems to be the existence of the recordings of private conversations that, they believe, could only be obtained by wiretapping Carl's telephone. However, in reality, the recordings are nothing more than recorded messages from Nelva Brunsting's answering machine that were produced during discovery in the underlying probate case. Producing 2011 recordings made by others as required the Texas Rules of Civil Procedure does not mean the attorney producing the recordings in 2014 or thereafter engaged in wiretapping.

3.11. Plaintiffs further allege that Mr. Featherston, along with other defendant attorneys, provided evidence that such wiretapping occurred by arguing that the recordings were admissible. Plaintiffs argue that Mr. Featherston implied that he knew the nature of the "device," its ability to record accurately, and the qualifications of its operator by arguing for the recordings' admissibility. What the plaintiffs fail to explain is why any "device" attached to Carl Brunsting's telephone would be necessary when the recordings were available from the decedent's answering machine, or how Mr. Featherston was involved with the use of such a device.

3.12. Plaintiffs also fail to account for the fact that the recordings in question were made in Spring 2011, more than three (3) years before Mr. Featherston was even involved with the probate case. Absent any facts, much less specific facts, the plaintiffs' claims are based entirely on speculation and inference and do not state a claim to which the defendants may or should have to respond.

3.13. Plaintiffs also claim that Mr. Featherston engaged in state law theft and/or federal law extortion by asserting that plaintiff Curtis' and Carl Brunsting's applications for interim distributions violated the no-contest clause of the QBT. The QBT was prepared by defendant Alfred Vacek, Jr. in August 2010 at the request of his now deceased client, Nelva Brunsting. Neither Mr. Featherston,

nor Mr. Mendel, nor their client, Co-Trustee Anita Brunsting, were involved with the drafting of the QBT in any way. As such, unless a court of competent jurisdiction declares the QBT invalid, Messrs. Mendel and Featherston and their client have the right to make any argument they so desire with regard to the enforceability of the provisions of the QBT, and such arguments cannot, as a matter of law, constitute predicate RICO acts.

3.14. Notwithstanding the fact that the plaintiffs lack a judicial determination that the no-contest clause is not enforceable, the plaintiffs claim the QBT is an "extortion instrument" being used to "instill fear of economic harm" in plaintiff Curtis and Carl Brunsting. Plaintiffs' description of both the purpose of the "extortion instrument" and its alleged use to harm plaintiffs is vague and conclusory in that it does not explain how or when any threats were made, the nature of the threats, which specific defendants made the threats, or give any indication as to how Mr. Featherston was supposed to have known of the threats so that his objection would become part of a wider conspiracy to extort anything from plaintiffs. Without such additional information, the complaint fails to state a claim to which the defendant can provide an answer.

3.15. Finally, plaintiffs' allege that Messrs. Mendel and Featherston, along with several other attorneys, engaged in a conspiracy, in support of the larger conspiracy, to commit theft and extortion through a "sham mediation" in which plaintiff Curtis was coerced into signing away valuable inheritance rights. Leaving aside whether the mediation in question was or was not a "sham," the plaintiffs only make a bare assertion that it was.

3.16. The larger problem with this claim is that there were two (2) mediations in the case in question. The plaintiffs argue that the first mediation was tainted by threats, intimidation, and a "thug mediator," but never explain how the first mediation was a "sham mediation." Furthermore,

the plaintiffs fail to explain how a second mediation that never occurred was a sham mediation, or how there can be liability for something that never occurred.

IV. Prayer

Defendants Mendel and Featherston pray that the Court grant their motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which it may be entitled to receive.

Respectfully Submitted,

// s // Stephen A. Mendel

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Fax: 281-759-3214
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Attorney for Defendants Mendel & Featherston

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via e-service, email, or first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-759-9020

2. Rik Wayne Munson — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
   925-349-8348

3. Anita Brunsting — Defendant, Pro Se
   203 Bloomingdale Circle
   Victoria, Texas 77904

4. Candace Kuntz-Freed — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, Texas 77056

5. Bernard Lyle Matthews III — Defendant
   11777 Katy Freeway, Suite 300 South
   Houston, Texas 77079

6. Albert Vacek, Jr. — Defendant
   c/o Cory S. Reed
   Thompson, Coe, Cousins & Irons, L.L.P.
   One Riverway, Suite 1400
   Houston, Texas 77056

7. Amy Ruth Brunsting — Defendant
   2582 Country Ledge
   New Braunfels, Texas 78132

8. Neal E. Spielman — Defendant
   Griffin & Matthews
   1155 Dairy Ashford, Suite 300
   Houston, Texas 77079

9. Bradley Featherston — Defendant
Featherston Tran P.L.L.C.
20333 State Highway 249, Suite 200
Houston, Texas 77070

10. Darlene Payne Smith — Defendant
Crain, Caton & James
Five Houston Center, 17th Floor
1401 McKinney, Suite 1700
Houston, Texas 77010

11. Jason B. Ostrom — Defendant
Ostrom Morris, P.L.L.C.
6363 Woodway, Suite 300
Houston, Texas 77056
713-863-8891

12. Gregory Lester — Defendant
955 N. Dairy Ashford, Suite 220
Houston, Texas 777079

13. Jill Willard Young — Defendant
MacIntyre, McCulloch, Stanfield
and Young, L.L.P.
2900 Weslayan, Suite 150
Houston, Texas 77027

14. Bobbie Bayless — Defendant
Bayless & Stokes
2931 Ferndale
Houston, Texas 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 770002

17. Toni Biamonte
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

Defendant

on this September 30, 2016.

// s // Stephen A. Mendel

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IN THE UNITED STATES DISTRICT COURT
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CANDACE LOUISE CURTIS	§	
&	§	
RIK WAYNE MUNSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, et al.	§	

Defendants Mendel's & Featherston's
Certificate of Interested Parties

Defendants, Stephen A. Mendel and Bradley E. Featherston, file this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Brunsting
   E. Amy Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen A. Mendel
   I. Darlene Payne Smith
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1.2. The complaint does not provide defendants with fair notice of plaintiffs' claims. Plaintiffs allege that defendants were part of an entity that violated the RICO statute and enumerate several predicate acts allegedly engaged in by defendants, but do so through inference, speculation, and conclusive statements. Such vague statements fail to place defendants on notice of how the entity is alleged to have operated, how the predicate acts furthered the larger conspiracy, or how the defendants knew that these acts would further any conspiracy. By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping, the occurrence of which was inferred by the plaintiffs based on the production of voicemail recordings and nothing more. One problem, among others, is that Mr. Featherston's alleged wiretaps predate his involvement with the case.

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3.2. A careful reading of the plaintiffs claims against Messrs. Mendel and Featherston show that those claims are all related to their roles as attorneys in the defense of Co-Trustee Anita Brunsting. As such, the claims are barred as a matter of law by the Texas attorney immunity doctrine. *Troice*, 816 F.3d at 348. The Texas attorney immunity doctrine provides true immunity from suit and is not merely an affirmative defense. *Id*. at 346. Dismissal is, therefore, warranted regardless of the merits of the alleged conduct. *Id*. at 348-49.

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nor Mr. Mendel, nor their client, Co-Trustee Anita Brunsting, were involved with the drafting of the QBT in any way. As such, unless a court of competent jurisdiction declares the QBT invalid, Messrs. Mendel and Featherston and their client have the right to make any argument they so desire with regard to the enforceability of the provisions of the QBT, and such arguments cannot, as a matter of law, constitute predicate RICO acts.

3.14. Notwithstanding the fact that the plaintiffs lack a judicial determination that the no-contest clause is not enforceable, the plaintiffs claim the QBT is an "extortion instrument" being used to "instill fear of economic harm" in plaintiff Curtis and Carl Brunsting. Plaintiffs' description of both the purpose of the "extortion instrument" and its alleged use to harm plaintiffs is vague and conclusory in that it does not explain how or when any threats were made, the nature of the threats, which specific defendants made the threats, or give any indication as to how Mr. Featherston was supposed to have known of the threats so that his objection would become part of a wider conspiracy to extort anything from plaintiffs. Without such additional information, the complaint fails to state a claim to which the defendant can provide an answer.

3.15. Finally, plaintiffs' allege that Messrs. Mendel and Featherston, along with several other attorneys, engaged in a conspiracy, in support of the larger conspiracy, to commit theft and extortion through a "sham mediation" in which plaintiff Curtis was coerced into signing away valuable inheritance rights. Leaving aside whether the mediation in question was or was not a "sham," the plaintiffs only make a bare assertion that it was.

3.16. The larger problem with this claim is that there were two (2) mediations in the case in question. The plaintiffs argue that the first mediation was tainted by threats, intimidation, and a "thug mediator," but never explain how the first mediation was a "sham mediation." Furthermore,

the plaintiffs fail to explain how a second mediation that never occurred was a sham mediation, or how there can be liability for something that never occurred.

IV. Prayer

Defendants Mendel and Featherston pray that the Court grant their motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which it may be entitled to receive.

Respectfully Submitted,

// s // Stephen A. Mendel

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Fax: 281-759-3214
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Attorney for Defendants Mendel & Featherston

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Defendant

on this September 30, 2016.

// s // Stephen A. Mendel

Stephen A. Mendel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-CV-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendants Mendel's & Featherston's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim

I. Summary of the Argument

1.1. The Texas doctrine of attorney immunity bars plaintiffs' claims. It is undisputed that defendants Mendel and Featherston have: (a) never had an attorney/client relationship with either of the plaintiffs; and (b) only served as attorneys in the defense of co-trustee Anita Brunsting. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5TH Cir. 2016).

1.2. The complaint does not provide defendants with fair notice of plaintiffs' claims. Plaintiffs allege that defendants were part of an entity that violated the RICO statute and enumerate several predicate acts allegedly engaged in by defendants, but do so through inference, speculation, and conclusive statements. Such vague statements fail to place defendants on notice of how the entity is alleged to have operated, how the predicate acts furthered the larger conspiracy, or how the defendants knew that these acts would further any conspiracy. By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping, the occurrence of which was inferred by the plaintiffs based on the production of voicemail recordings and nothing more. One problem, among others, is that Mr. Featherston's alleged wiretaps predate his involvement with the case.

II. Nature of the Case

2.1. The pro se plaintiffs are Candace Louise Curtis and Rik Wayne Munson. Defendants are Stephen A. Mendel and Bradley E. Featherston, among others. Messrs. Mendel and Featherston are attorneys licensed by the State Bar of Texas. Mr. Mendel is current counsel for Co-Trustee Anita

Brunsting. Mr. Featherston is a former associate attorney of Mr. Mendel, and previously assisted Mr. Mendel with the defense of Co-Trustee Anita Brunsting.

2.2. In addition to suing Messrs. Mendel and Featherston, plaintiffs sued nine (9) other attorneys, two (2) probate judges, and a court reporter for violations of the Racketeer Influenced Corrupt Organization Act (RICO).

2.3. Plaintiffs alleged that all of the defendants were part of a conspiracy in which several Houston area law firms and Harris County Probate Court No. 4 worked in concert to defraud heirs of their inheritances in order to enrich themselves. Plaintiffs' dubbed this alleged entity as the "Harris County Tomb Raiders, a/k/a the Probate Mafia."

2.4. Plaintiffs allege that they were harmed by the Tomb Raiders through its involvement in a related probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, *Estate of Nelva Brunsting, Deceased.* In particular, Mr. Featherston allegedly committed acts of illegal wiretapping and extortion in furtherance of the conspiracy. Both Messrs. Mendel and Featherston were allegedly involved in a conspiracy within the larger conspiracy to induce plaintiff Curtis to sign away valuable trust interests through extortion by way of a "sham mediation."

2.5. For the Court's benefit, plaintiff Curtis and her siblings participated in a mediation in August 2014. No other mediation has occurred. Since Messrs. Mendel and Featherston did not make an appearance as counsel of record until November 2014, it is impossible for them to be involved in a "sham mediation."

2.6. In Spring 2016, the Probate Court ordered a mediation among the parties, and that mediation was scheduled for July 2016, but the mediation never occurred. As such, assuming arguendo that a mediation is a course of conduct not protected by the Texas attorney immunity

doctrine, it is impossible for Messrs. Mendel and Featherston to participate in a sham mediation that never occurred.

III. Argument

3.1. A court has the authority to dismiss a suit for failure to state a claim upon which relief can be granted if the complaint does not provide fair notice of the claim and does not state factual allegations showing the right to relief is plausible. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Alt. Corp. v. Twombly,* 550 U.S. 544, 555-56 & n.3 (2007).

3.2. A careful reading of the plaintiffs claims against Messrs. Mendel and Featherston show that those claims are all related to their roles as attorneys in the defense of Co-Trustee Anita Brunsting. As such, the claims are barred as a matter of law by the Texas attorney immunity doctrine. *Troice*, 816 F.3d at 348. The Texas attorney immunity doctrine provides true immunity from suit and is not merely an affirmative defense. *Id.* at 346. Dismissal is, therefore, warranted regardless of the merits of the alleged conduct. *Id.* at 348-49.

3.3. More specifically, the plaintiffs' allege that Mr. Featherston engaged in wiretapping and theft/extortion, and that both Messrs. Mendel and Featherston were involved in a conspiracy to commit theft/extortion, all of which were done in furtherance of the larger RICO conspiracy. However, the actions underlying these claims are: (1) arguing in the probate court or through judicially filed instruments for the admissibility of voicemail recordings, which is alleged as "wiretapping;" (2) arguing in the probate court or through judicially filed instruments that claims for trust distributions violated the no-contest clause of the Qualified Beneficiary Trust ("QBT"), which is alleged as "theft/extortion;" and (3) arguing in the probate court or through judicially filed instruments that the parties should mediate, which is the "conspiracy to commit theft/extortion."

3.4. Each alleged act as to Messrs. Mendel and Featherston is the kind of conduct that an attorney normally engages and is expected to engage when representing a client and is entirely covered by attorney immunity. *See Troice*, 816 F.3d at 348 (the defendant attorney sent letters to the SEC regarding jurisdiction, communicated with the SEC about document discovery and the legitimacy of his client's business, stated that certain witnesses would provide more relevant testimony than others in a deposition, and represented one of his client's executives in a deposition). Because all of the plaintiffs' claims derive from conduct covered by attorney immunity, the complaint fails to state a claim for which relief may be granted and should be dismissed for this reason alone.

3.5. Yet, the plaintiffs' claims can be dismissed for a second reason, which is that the claims fail to provide Messrs. Mendel and Featherston with fair notice of what they allegedly did wrong. *Ruvio v. Wells Fargo Bank N.A.*, 766 F.3d 87, 90-91 (1ST Cir. 2014); *Brooks v. Ross,* 578 F.3d 574, 581-82 (7TH Cir. 2009). A complaint that provides only labels and conclusions or formulaic recitation of the elements of a cause of action is insufficient to show grounds for the plaintiff to be entitled to relief. *Iqbal,* 556 U.S. at 678; *Twombly*, 550 U.S. at 555 & n.3; *Brooks*, 578 F.3d at 581.

3.6. In addressing their claim that a broad RICO type conspiracy exists between the defendant law firms and the probate court, the plaintiffs describe the alleged "entity" as "a secret society . . . associated together for the purpose of carrying out an ongoing criminal theft enterprise . . . through a multi-faceted campaign of lies, fraud, threats, and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity . . . ." This description is repeated with slight variations throughout the complaint and appears to have been crafted by combining several definitions taken from 18 U.S.C. § 1961, and a vague list of types of alleged actions taken by those

involved in the conspiracy in furtherance of the same. There is not a single fact of what Messrs. Mendel and Featherston said that were lies or threats, no facts to show fraud, nor any factual explanation as to how Messrs. Mendel and Featherston could commit official corruption when neither is a government official.

3.7. Likewise, the plaintiffs cannot describe a single fact as to how Messrs. Mendel and Featherston used the "entity" to syphon "off the assets of our elders . . . through . . . schemes and artifices" as part of a plan which they refer to as "Involuntary Redistribution of Assets." There are no facts to show how this alleged scheme works, whom are the elders, the types of assets that are being syphoned off, the value of the assets allegedly being syphoned, nor how much Messrs. Mendel and Featherston wrongfully received.

3.8. The plaintiffs admit that "the specific quid pro quo profit sharing is unknown" to them, but insist that proof of "a reciprocal stream-of-benefits necessarily flows from the fact of the in-concert activities of the co-conspirators." Nebulous rhetoric, conclusory statements, and unsupported presumptions do not constitute facts and, therefore, are insufficient to sustain a claim against Messrs. Mendel and Featherston.

3.9. When plaintiffs attempt to describe overt acts in furtherance of the conspiracy by particular defendants they are similarly vague and conclusory. As previously indicated, the plaintiffs claim that Mr. Featherston engaged in illegal wiretapping in furtherance of the conspiracy. The basis for this claim is that Mr. Featherston argued in court or through judicial instruments for the admissibility of recordings of telephone conversations between Curtis' brother, Carl Brunsting and their mother, Nelva Brunsting.

3.10. The plaintiffs' main argument that these recordings were obtained via an illegal

wiretapping device seems to be the existence of the recordings of private conversations that, they believe, could only be obtained by wiretapping Carl's telephone. However, in reality, the recordings are nothing more than recorded messages from Nelva Brunsting's answering machine that were produced during discovery in the underlying probate case. Producing 2011 recordings made by others as required the Texas Rules of Civil Procedure does not mean the attorney producing the recordings in 2014 or thereafter engaged in wiretapping.

3.11. Plaintiffs further allege that Mr. Featherston, along with other defendant attorneys, provided evidence that such wiretapping occurred by arguing that the recordings were admissible. Plaintiffs argue that Mr. Featherston implied that he knew the nature of the "device," its ability to record accurately, and the qualifications of its operator by arguing for the recordings' admissibility. What the plaintiffs fail to explain is why any "device" attached to Carl Brunsting's telephone would be necessary when the recordings were available from the decedent's answering machine, or how Mr. Featherston was involved with the use of such a device.

3.12. Plaintiffs also fail to account for the fact that the recordings in question were made in Spring 2011, more than three (3) years before Mr. Featherston was even involved with the probate case. Absent any facts, much less specific facts, the plaintiffs' claims are based entirely on speculation and inference and do not state a claim to which the defendants may or should have to respond.

3.13. Plaintiffs also claim that Mr. Featherston engaged in state law theft and/or federal law extortion by asserting that plaintiff Curtis' and Carl Brunsting's applications for interim distributions violated the no-contest clause of the QBT. The QBT was prepared by defendant Alfred Vacek, Jr. in August 2010 at the request of his now deceased client, Nelva Brunsting. Neither Mr. Featherston,

nor Mr. Mendel, nor their client, Co-Trustee Anita Brunsting, were involved with the drafting of the QBT in any way. As such, unless a court of competent jurisdiction declares the QBT invalid, Messrs. Mendel and Featherston and their client have the right to make any argument they so desire with regard to the enforceability of the provisions of the QBT, and such arguments cannot, as a matter of law, constitute predicate RICO acts.

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Defendants Mendel and Featherston pray that the Court grant their motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which it may be entitled to receive.

Respectfully Submitted,

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Attorney for Defendants Mendel & Featherston

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Defendant

on this September 30, 2016.

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Stephen A. Mendel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§ § §	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
CANDACE KUNZ-FREED, et al.	§	

Defendants Mendel's & Featherston's
Certificate of Interested Parties

Defendants, Stephen A. Mendel and Bradley E. Featherston, file this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Brunsting
   E. Amy Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen A. Mendel
   I. Darlene Payne Smith
   J. Jason Ostrom
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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&	§	
RIK WAYNE MUNSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, et al.	§	

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   C. Bernard Lyle Matthews
   D. Anita Brunsting
   E. Amy Brunsting
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on this September 30, 2016.

// s // Stephen A. Mendel

Stephen A. Mendel

PROBATE COURT 4

DM

DATA-ENTRY
PICK UP THIS DATE

CAUSE NO. 412,249

~~IN RE: ESTATE OF~~	§	IN THE PROBATE COURT
	§	
~~NELVA E. BRUNSTING,~~	§	NUMBER FOUR (4) OF
	§	
~~DECEASED~~	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED PETITION

JURY FEE PAID

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as ~~Executor of the Estate of Nelva Brunsting~~, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

~~This Court had jurisdiction pursuant to Sections 32.002(e) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.~~

III. BACKGROUND

Elmer and Nelva Brunsting created the Brunsting Family Trust, and placed essentially all of their assets into this Trust, of which they were the trustees. The Trust became irrevocable and not subject to amendment upon Elmer's death in 2009, at which time Nelva became the sole trustee of the two trusts into which the Family Trust was divided: the Decedent's Trust and the Survivor's Trust. She also became the sole beneficiary of the Survivor's Trust and the primary beneficiary of the Decedent's Trust.

In 2010, Defendants Anita and Amy began taking steps to control the Trust assets and garner a larger share than their siblings. To that end, they caused Nelva to execute a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment in June of 2010 in which she exercised her power of appointment over all the property held in the Nelva E. Brunsting Survivor's Trust as well as in the Elmer H. Brunsting Decedent's Trust. The June exercise of Power of Appointment went on to ratify and confirm all the other provisions of the Trust. Two months later, they caused Nelva to execute a second Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment, in which she attempted to exercise the very same power of appointment she had exercised in June without revoking the prior exercise – instead she ratified and confirmed the June 2010 Power of Appointment. This second Qualified Beneficiary Designation purports to remove Candy and Carl as the trustees of their own trusts, while not subjecting Amy and Anita to that same fate, and contains paragraphs of self-serving no-contest provisions.

Seemingly because the future power she had obtained for herself was insufficient, Anita had Nelva resign as Trustee in December of 2010, in Anita's favor. As Trustee, Anita made numerous transfers that far exceeded the scope of her powers. She conveyed to Carole 1,325 shares of Exxon stock out of the Decedent's Trust, and gave 1,120 shares of Exxon to Amy out of the Survivor's

Trust, plus 270 shares of Chevron stock (held in the names of Amy's children). To herself she transferred 160 shares of Exxon, plus 405 shares of Chevron (270 shares she placed in the name of her children). Anita also paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole.

Carole not only received hundreds of thousands dollars worth of stock and cash distributions, she also had access to a bank account that Anita funded with Trust monies and used that bank account for her own purposes. She routinely charged this Trust account for her personal groceries, gasoline, and other expenses despite not being a present income beneficiary of the Trust.

IV. CAUSES OF ACTION

Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Defendants Anita breached this duty during Nelva's life by engaging in self-dealing and taking actions not permitted by the terms of the Trust, and thus is liable to the ~~Estate and derivatively to~~ Plaintiff for these breaches. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest and costs of court.

Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and

her right to receive both information and Trust assets. ~~On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate.~~ Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest ~~both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.~~

Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to ~~both Nelva Brunsting's Estate and~~ Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages ~~individually and on behalf of Nelva Brunsting's Estate.~~

Money Had and Received. Defendants Anita, Amy and Carole have taken money that belongs in equity and good conscience to the Trust and derivatively to Plaintiff, and have done so with malice and through fraud, in part by representing that transfers to them were valid reimbursements. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

Conversion. Defendants Anita, Amy and Carole have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, ~~and assets that belonged to Nelva Brunsting and that should be a part of her Estate.~~ Defendants have wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, ~~as well as the Estate of Nelva Brusting~~ by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court

costs, ~~both individually and on behalf of the Decedent's Estate~~.

Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants Amy, Anita, and Carole, herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed both the June and August Qualified Beneficiary Designations and Exercises of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. The Modification Documents fail because they attempted to change the terms of the Trust. Assuming without admitting that the June Modification Document is a valid Power of Appointment, then the August Modification Document fails because Nelva had already effectively appointed all of the Trust property in June; she never revoked that Power of Appointment, but actually affirmed it. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

Declaratory Judgment Action. The Family Trust Agreement governed all of the rights and

powers that Anita held as Trustee. Those rights and powers did not allow her to transfer out the shares of Exxon and Chevron stock. Her duties as a Trustee prevented her from distributing Trust Assets to some beneficiaries to the detriment and for the purpose of harming other beneficiaries. Plaintiff seeks a declaration that the distributions of Chevron Stock and Exxon Stock to Amy, Anita and Carole are void because Anita as Trustee exceeded the scope of her power in making those gifts.

Unjust Enrichment. Defendants Amy, Anita and Carole have all been unjustly enriched by their receipt of Chevron Stock, Exxon Stock, and cash from the Trust. None were entitled to the distributions of stock, and a majority of the cash transfers were for purposes not authorized under the scope of the Trust Agreement nor of the purposes they alleged to be for. Plaintiff seeks a declaration that the Defendants were unjustly enriched, and seeks the imposition of a constructive trust on the remaining Chevron Stock and Exxon Stock that remains in their possession, as well as on any cash or proceeds from the sale of said stock and on any cash distributions from the Trust.

Conspiracy. Upon information and belief, Defendants Anita, Amy and Carole all conspired to make improper withdrawals and distributions from the Trust, to decrease Plaintiff's inheritance and interest in the Trust, to enrich themselves at the expense of the Trust and other beneficiaries, and to conceal the impropriety of their actions. They should be found jointly and severally liable for the decrease in the Trust, and should be required to disgorge their ill-gotten gains.

Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance with the Texas Property Code.

V. JURY DEMAND

Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to her ~~and to the Estate of Nelva Brunsting~~, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

ostrommorris, PLLC

BY: _____

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~~Attorneys for Plaintiff~~

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 11th day of February, 2015:

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Ms. Darlene Payne Smith
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Jason B. Ostrom/
R. Keith Morris, III

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION FOR SANCTIONS

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal. On September 15, 2016, Defendant Young filed her Motion to Dismiss. And on September 27, 2016, Defendant Young sent Plaintiffs a letter, informing them that, in accordance with the safe-harbor procedure of Federal Rule of Civil Procedure 11, she would be filing this Motion for Sanctions on October 19, 2016, if Plaintiffs did not dismiss their Complaint against her with prejudice. But Plaintiffs have ignored Ms. Young's letter and Motions.

Plaintiffs' frivolous pleadings meaninglessly and wrongfully denigrate the reputation of Ms. Young, a prominent, hard-working Houston lawyer. Despite opportunities to nonsuit their meritless suit, Plaintiffs have refused to do so. Thus, Plaintiffs should be required to reimburse Ms. Young's attorney's fees pursuant to Federal Rule of Civil Procedure 11.

ARGUMENT AND AUTHORITIES

Filing a RICO action in federal court is not a proper substitute for appealing an unfavorable ruling, nor is it an appropriate means of seeking revenge against opposing and court-

appointed counsel. *See Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("[I]t should be noted that an attorney's responsibility to conduct a reasonable prefiling investigation is **particularly important in RICO claims**.") (emphasis added). Because the claims asserted by Plaintiffs are both legally and factually frivolous, Ms. Young should be awarded attorneys' fees and costs under Fed. R. Civ. P. 11.

I. The Rule 11 Standard

Under Fed. R. Civ. P. 11(b), by presenting the Court a signed pleading, an "unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3). "Compliance with these affirmative duties is measured as of the time that the document is signed." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994). And whether a pleading meets this requirements is measured "by an objective, not subjective, standard of reasonableness under the circumstances." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988).

"[I]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1); *see also* Fed. R. Civ. P. 11 Advisory Committee Notes ("Even though it is the attorney whose

signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

II. Plaintiffs have violated Fed. R. Civ. P. 11(b)(2) by filing legally frivolous claims.

Plaintiffs have ignored longstanding attorney immunity doctrines, have alleged six causes of action for which they have no private cause of action, and failed to plead facts showing even the most basic elements of their RICO "claim."

A. Plaintiffs ignore attorney immunity.

Plaintiffs have ignored long-established immunity doctrines that protect attorneys from suit by opposing parties and non-clients. Indeed, the affirmative defense of immunity is apparent on the face of the Complaint.

Under Texas law, it is settled that "attorneys are immune from civil liability . . . 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). However, a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

In this case, Plaintiffs have not pled any facts showing Ms. Young, who served as counsel for the Temporary Administrator in the underlying lawsuit, took any actions outside the normal discharge of her duties in representing her client. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016) (attorney's conduct in sending a letter, participating in discovery, and

communicating with SEC about client were "classic examples of an attorney's conduct in representing his client").

B. Plaintiffs plead claims for which there exists no private right of action.

Plaintiffs allege three causes of action for "honest services," along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* Complaint, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See* Motion to Dismiss [DKT. 25], at pp. 13–16.

C. Plaintiffs' accusations are baseless and delusional.

Plaintiffs accuse Ms. Young of what can best be described as fictional acts--being a member of a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. Not surprisingly, Plaintiffs do not even try to accompany their made-up story with supporting facts. The reality is unavoidable—their complaint is a bizarre, sophomoric attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Less fantastical efforts to concoct a federal claim against judges and opposing attorneys have been routinely dismissed. *See, e.g.*, *Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to plead a racketeering activity). And other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148

(W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Thus, Plaintiffs' allegations fail to satisfy Rule 11. Specifically, Plaintiffs' Complaint against Ms. Young—devoid of any allegation of actual wrongdoing—can only be brought for improper purposes, like harassment or to needlessly increase the cost of litigation. Plaintiffs' Complaint is in no way warranted by existing law, and Plaintiffs' contentions completely lack any sort of factual or evidentiary support. *See* Fed. R. Civ. P. 11(b)(1)-(3). Ms. Young has also specifically informed Plaintiffs multiple times of the legal defects in their Complaint and the authority showing Plaintiffs' arguments are meritless, both in Ms. Young's filing of her Motion to Dismiss and by serving this Motion for Sanctions on Plaintiffs twenty-one days before filing it with the Court. But Plaintiffs have refused to dismiss their Complaint against Ms. Young. This, too, means sanctions are necessary. *See also Taylor v. C.I.R.*, 350 Fed. Appx. 913, 915 (5th Cir. 2009) ("Sanctions on pro se litigants are appropriate if they were warned that their claims are frivolous and they were aware of 'ample legal authority holding squarely against them.'").

CONCLUSION

Plaintiffs have filed a frivolous and facially-deficient lawsuit, and Ms. Young respectfully requests that the Court require Plaintiffs and their attorneys to pay her attorneys' fees in defending this suit and pursuing the relief requested herein. *See* Ex. A, Aff. of Robert S. Harrell.

Dated: September 27, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on September 27, 2016, I conferred with counsel for Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to dismiss the claims against Ms. Young, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, pursuant to Fed. R. Civ. 11(c)(2) and Fed. R. Civ. P. 5, I served copies of this Motion for Sanctions on Plaintiffs. I also certify that a true and correct copy of the above Motion for Sanctions has been served on October 19, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

NORTON ROSE FULBRIGHT

September 27, 2016

Via Certified Mail
Return Receipt Requested and
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Re: Case No. 4:16-cv-01969, *Curtis, et al v. Kunz-Freed, et al.*

Dear Ms. Curtis and Mr. Munson:

Pursuant to Federal Rule of Civil Procedure 11(c)(2), we have enclosed a copy of a Motion for Sanctions by Defendant Jill Willard Young.

As set forth in the Motion for Sanctions, Ms. Young is seeking sanctions, including attorneys' fees, from you for the wrongful filing of the above action. We will file this Motion for Sanctions on Wednesday, October 19, 2016, unless your clients nonsuit their claims against Ms. Young with prejudice before that date.

Please let me know if you have any questions.

Very truly yours,

Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S MOTION TO DISMISS

Defendant Neal Spielman ("Spielman") files this Motion to Dismiss seeking the dismissal of all claims asserted by Plaintiffs against him. In support thereof, Defendant would respectfully show the Court the following:

I.
SUMMARY OF THE ARGUMENT

This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs "claims," which are nearly incomprehensible are nothing more than incredible conspiracy theories suggesting that the Harris County Probate Court is the home of a nefarious, shadowy syndicate with designs on stealing "familial wealth." The Plaintiffs Original Complaint has alleged Spielman and other Defendants for (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C.

§371; and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any facts suggesting any wrongdoing by Spielman. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). For this reason, Plaintiffs' Original Complaint against Spielman should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, *Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.*, ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate. Rather than litigate their claims in the proper forum—Probate Court No. 4—Plaintiffs have filed this suit, naming every person remotely involved with the Probate Matter—including the judge, court personnel, Defendant Spielman, and "99 Jane and John Does"—in an apparent attempt to avoid participating in the court-ordered mediation in the Probate Matter.[1]

Spielman is attorney of record for Amy Brunsting in the Probate Matter. *See* Plaintiffs' Verified Complaint for Damages. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a summary judgment hearing, somehow depriving Curtis access to the courts and other due process rights. *See* Plaintiffs' Verified Complaint for Damages ¶131. Besides this one specific act, the remainder of Plaintiffs' allegations against Spielman consists of unintelligible and boilerplate criminal "conspiracy" claims and allegations against all Defendants. Without

[1] In the Plaintiffs' Verified Complaint for Damages, Plaintiff Curtis has characterized the pending mediation of the probate matter as "predetermined by the personal interests of enterprise acolytes and not by law." *See* ¶¶ 113-115.

anything more, the Plaintiffs have not pleaded facts to support a claim for relief, nor can their claims be cured through a new pleading. Therefore, the Court should dismiss this claim with prejudice. *Caroll v. Fort James Corp.* 470 F.3d 1171, 1177 (5th Cir. 2006).

III.
ARGUMENTS AND AUTHORITIES

A. Plaintiffs' Claims Are Barred by "Attorney Immunity" Doctrine.

Plaintiffs' claims should be dismissed pursuant to the "Attorney Immunity Doctrine". *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation."). More so, in Texas, "attorney immunity is properly characterized as a true immunity from suit." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* At 346. The only exceptions to attorney immunity is if the attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduction "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482.

It is undisputed fact that Spielman was acting at all times as the attorney for Amy Brunsting. In Plaintiffs' Verified Complaint for Damages, they state "[d]efendant Amy Brunsting is proximately related to Harris County Probate Court . . . **through her attorney, Defendant Neal Spielman** and co-conspirator Defendant Candace Kuntz-Freed." *See* ¶ 27 (emphasis added). The facts the Plaintiffs allege as forming the basis of her claims against Spielman arise from the discharge of Spielman's duties in representing Amy Brunsting. There are no allegations in the Plaintiffs' pleadings that would suggest Spielman's conduct fell into any

exception to the attorney immunity doctrine. Thus, as Spielman's conduct is immune from suit, Plaintiffs' claims must be dismissed.[2]

B. Plaintiffs' Claims Should be Dismissed Pursuant to Federal Rule 12(b)(6) for Failure to State a Claim.

The remainder of Plaintiffs' claims against Spielman should be dismissed because the Complaint fails to allege facts supporting any valid claims for relief. Plaintiffs complaints are simply conclusory allegations of law, inferences unsupported by facts, or formulaic recitations of elements. These types of complaints are not sufficient to defeat a 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

In order to defeat a Rule 12(b)(6) motion, Plaintiffs must plead enough facts to "state a claim to relief that is **plausible on its face**." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is "facially plausible" if the facts plead allow the court to draw reasonable inferences about the alleged liability of the defendants. *Id.* Here, the Plaintiffs' allegations facially fail to meet this standard. In the RICO complaint against Spielman, Plaintiffs allege simply:

> **[Spielman and others] did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Section 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. §1961(1) in violation of 18 U.S.C. §1962(c) and (d) to wit[].**

Plaintiffs' Verified Complaint for Damages, ¶59.

---

[2] Alternatively, Plaintiffs' claims are barred by lack of attorney-client privity. Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996).

Each of the Plaintiffs claims against Spielman follow the same formulaic pattern. *See* ¶¶ 121, 122, 124, 131, 132, 139. As the Plaintiffs' claims have not met the "fair notice" pleading standards Rule 12(b)(6), these claims should be dismissed.

C. Plaintiffs' Fail to Plead Particular Acts of Fraud.

Federal Rule 9(b) requires a heightened pleading standard when the claims allege acts of fraud. *See* FRCP 9(b). The Federal Rules requires plaintiffs to plead allegations of fraud "with particularity." *ABC Arbitrage Plaintiffs Grp. V. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "specific the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent") (internal quotations and citations omitted). The Plaintiffs plead, *inter alia*, that Spielman was part of an over-arching conspiracy, (referred to alternatively as "the Enterprise," the "Harris County Tomb Raiders," the "Probate Mafia", and the "Probate Cabal") whose purpose was to commit acts of fraud to "judicially kidnap and rob the elderly, our most vulnerable citizens of their freedom, dignity, fundamental human and civil rights and property accumulated throughout a lifetime, often also robbing heirs and beneficiaries of familiar relations and inheritance expectancies." *See* Plaintiffs' Verified Complaint for Damages ¶¶ 59-71. As these pleadings require the heightened standard, Plaintiff's allegations are facially insufficient and should be dismissed.

D. Plaintiffs' Fail to Plead Particular Conduct of the Defendant.

The pleading requirements under the Rule 9(b) also require that claimants allege specific and separate allegations against each defendant. *See Unimobil 84, Inc. v. Spurney,* 797 F.2d 214, 217 (5th Cir. 1986)(affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made"). It is "impermissible to make general allegations that

lump all defendants together, rather, the complaint must segregate the alleged wrongdoing of No. 1 from another."). *In re Parkcentral Glob. Litig.,* 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012).

Here, Plaintiffs' complaints consist of generalized allegations concerning "conspiracies" and "enterprises." The claims do not differentiate between what acts each member committed nor what role each defendant played. Nothing in the pleadings is informative enough to prepare a proper defense. Without discernible, specific acts alleged against the Defendants, the Plaintiffs have failed to meet the pleading standards required by the Federal Rules.

E. Plaintiffs Lack Privity With Defendant Spielman to Maintain a Suit.

Plaintiff's claims against Spielman arise from his role as an attorney for Amy Brunsting. Texas law dictates that an attorney only owes a duty of care to a person with whom the attorney has a professional attorney-client relationship. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). A non-client may not maintain a suit for the negligence of another's attorney. *See Gillespie v. Scherr*, 987 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Spielman and Plaintiffs have never had an attorney-client relationship; the Plaintiffs themselves do not dispute this fact. Without a relationship of "privity" between the attorney and the claimants, the claimant is not a proper party to sue. The rationale between the "privity" required to obtain standing is, that without it, attorneys would be subject to endless liability. *Barcelo*, 923 S.W.3d at 577. Texas has uniformly applied the doctrine of a "privity barrier" in estate planning contexts. *Id.* At 579.

Because Spielman and Plaintiffs never had an attorney-client relationship, nor do Plaintiffs allege an attorney-client relationship existed, they do not have standing to sue Spielman. Therefore, the Plaintiffs' claims must be dismissed.

IV.
CONCLUSION

For the reasons stated above, Defendant Neal Spielman requests that this Court grant Defendant's Motion to Dismiss on all claims with prejudice.

Respectfully submitted,

WINGET, SPADAFORA, & SCHWARTZBERG, L.L.P.

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record through the Court's CM/ECF system on this date: October 3, 2016.

_____
Martin S. Schexnayder

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

Defendant Neal Spielman ("Spielman") files this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) seeking the dismissal of all claims asserted by Plaintiffs against him. In support thereof, Defendant would respectfully show the Court the following:

I.
SUMMARY OF THE ARGUMENT

This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs' "claims," which are nearly incomprehensible are nothing more than incredible conspiracy theories suggesting that the Harris County Probate Court is the home of a nefarious, shadowy syndicate with designs on stealing "familial wealth." The Plaintiffs' Original Complaint has alleged Spielman and other Defendants for (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C.

§371; and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any facts which would impart standing upon the Plaintiffs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 559 (1992) (holding that plaintiff lacked standing where the failed to allege "imminent" injury-in-fact). For this reason, Plaintiffs' Original Complaint against Spielman should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, *Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.*, ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate. Rather than litigate their claims in the proper forum—Probate Court No. 4—Plaintiffs have filed this suit, naming every person remotely involved with the Probate Matter—including the judge, court personnel, Defendant Spielman, and "99 Jane and John Does"—in an apparent attempt to avoid participating in the court-ordered mediation in the Probate Matter.[1]

Prior to landing in Probate Court, Plaintiff Curtis first attempted to bring the claims that form this basis of the instant suit in federal court. In that suit, Cause No. 4:12-cv-00592, in the Southern District of Texas, Plaintiff made similar allegations as alleged in the present complaint, namely: conspiracy, fraud, elder abuse, undue influence, false instruments, breach of fiduciary duty, tortious interference with fiduciary obligations, among others. Ultimately, **at Plaintiff Curtis' request** the case was remanded to the probate proceeding in Probate Court No. 4, where it remains pending. The claims pending in the Probate Matter contain substantially the same parties and issues.

[1] In the Plaintiffs' Verified Complaint for Damages, Plaintiff Curtis has characterized the pending mediation of the probate matter as "predetermined by the personal interests of enterprise acolytes and not by law." *See* ¶¶ 113-115.

Spielman is attorney of record for Amy Brunsting in the Probate Matter. *See* Plaintiffs' Verified Complaint for Damages. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a summary judgment hearing, somehow depriving Curtis access to the courts and other due process rights. *See* Plaintiffs' Verified Complaint for Damages ¶131. Besides this one specific act, the remainder of Plaintiffs' allegations against Spielman consists of unintelligible and boilerplate criminal "conspiracy" claims and allegations against all Defendants. Without anything more, the Plaintiffs have not pleaded facts to support a claim for relief or that they even have standing to assert claims against Spielman. Therefore, the Court should dismiss this claim with prejudice. *Caroll v. Fort James Corp.* 470 F.3d 1171, 1177 (5th Cir. 2006).

III.
ARGUMENTS AND AUTHORITIES

Defendant Spielman moves to dismiss this complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs have the burden of showing subject matter jurisdiction, and this Court must determine whether it has subject matter jurisdiction before addressing the merits of the complaint. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 104 (1998).

Plaintiffs Lack Proper Standing to Assert Their Claims.

A plaintiff will have standing to file suit if it can demonstrate (1) an "injury in fact"—a harm that is concrete and actual, not merely conjectural or hypothetical;[2] (2) causation between the injury and defendant's conduct, and (3) redressability by a favorable decision of the court. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Because these are not merely pleading requirements, but rather an indispensable part of the plaintiff's case, **each** element must be

[2] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

supported in the same way as any other matter in which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at that stage of litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990).

Here, the Plaintiffs cannot provide proof of any of the required elements of standing. Plaintiffs cannot show any injury-in-fact from the conduct alleged in their Complaint. Nor is there a showing of causation between Spielman's conduct and any injury alleged by Plaintiffs.

Plaintiff Curtis' claims suggest that as a result of some action of Spielman, she has been deprived of the "enjoyment of her beneficial interests" as a beneficiary of the Brunsting Family Trust. *See* Plaintiffs Verified Complaint for Damages, ¶ 213. Plaintiff has not pleaded any facts that can demonstrate how any action of Spielman has injured her status as a beneficiary of the Brunsting Family Trust. Spielman has had no involvement in the drafting of estate planning documents in this matter. In fact, Curtis is still entitled to collect her share of the inheritance of the Brunsting Family Trust. More so, Texas has never recognized tortious interference with inheritance as a cognizable cause of action. *See Anderson v. Archer*, 03-13-00790-CV, 2016 WL 589017 (Tex. App.—Austin Mar. 2, 2016, no pet. h.) ("In short, we agree with the Amarillo Court of Appeals that 'neither this Court, the courts in *Valdez, Clark,* and *Russell*, nor the trial court below can legitimately recognize, in the first instance, a cause of action for tortuously interfering with one's inheritance.' We also agree with the Amarillo court's assessment that neither the Legislature nor Texas Supreme Court has done so, or at least not yet. Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so.).

Plaintiff Munson's "injuries" are facially conjectural and hypothetical. Munson, who is neither a party to any of the prior lawsuits nor a beneficiary under the Brunsting Family Trust,

alleges that he has been "diverted away from other productive pursuits." *See* Plaintiffs Verified Complaint for Damages, ¶ 216. Without a demonstration of concrete, actual harm, his claims—like Curtis's claims—must fail, and Plaintiffs' claims should be dismissed.

IV.
CONCLUSION

For the reasons stated above, Defendant Neal Spielman requests that this Court grant Defendant's Motion to Dismiss on all claims with prejudice.

Respectfully submitted,

WINGET, SPADAFORA, & SCHWARTZBERG, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record through the Court's CM/ECF system on this date: October 3, 2016.

_____
Martin S. Schexnayder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT JILL WILLARD YOUNG'S MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6) AND 9(B)

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Introduction

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 14, 2016, Defendant Jill Willard Young filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 25)

3. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26)[1] as a factual supplement to the RICO complaint. (Dkt 1).

4. Plaintiffs move the Court to take judicial notice, pursuant to Federal Rule of Evidence 201, that the Addendum of Memorandum (Dkt 26) and the exhibits attached thereto and referred to therein, are docket entries 115 through 120 in closely related Case 4:12-cv-0592. (See NOTICE of Related Case this Court's Docket (Dkt 12))

5. Plaintiffs hereby incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to the Motions to Dismiss filed by Defendants Vacek & Freed (Dkts 19 & 20) as if fully restated herein.

The Issues

a. Defendant Jill Willard Young claims:

> *Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (see Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.*

b. Defendant claims:

> Plaintiffs fail to plead facts sufficient to satisfy Rule 9(b)

c. Defendant Claims:

> *In reality, their Complaint is a bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.*

d. Defendant claims Plaintiffs' Complaint reads more like "an excerpt from the DaVinci Code, rattling off fantastical assertions with no connection to plausible facts or valid causes of action".

[1] Case 4:12-cv-0592 Filed TXSD August 3, 2016 docket entry's 115, 117, 119, 120

e. Defendant takes exception to the descriptive labels acquired by plaintiffs as terms given to the complained of conduct by ordinary laypersons who have previously experienced the probate court version of the administration of justice.

f. Jill Willard Young claims that her only connection to Plaintiff Curtis involved the "estate of Nelva Brunsting".

> *The only matter in which Ms. Young was ever involved with Plaintiff Curtis was In re: Estate of Nelva E. Brunsting, No. 412.249 (Harris County Probate Court No. 4) (the "Brunsting matter"). In the Brunsting matter, Ms. Young was attorney for Greg Lester, who had been appointed by Probate Court No. 4 as temporary administrator, to assist Mr. Lester in preparing a written report to the Court.*

g. The Motion then says:

> *All of the actions taken by Ms. Young in that matter were in her role as attorney to Mr. Lester. Ms. Young never had a fiduciary relationship with either Plaintiff, and she did not represent any other party in the Brunsting matter. Plaintiffs make no allegations to the contrary.*

h. Ms. Young then claims immunity.

> *Plaintiffs' claims should be dismissed with prejudice. First, Ms. Young, as attorney only for Mr. Lester, is entitled to immunity from suit under Texas law. See Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation.") (emphasis added).*

i. Ms. Young attaches as her only exhibit (Dkt 25-A) a copy of the Order appointing Gregory Lester Temporary Administrator for the "estate of Nelva Brunsting No 412249".

Plaintiffs' Argument

6. Defendant's Rule 12(b)(6) Motion attempts to offer a set of facts inapposite to those of the complaint and although Defendant may offer a different view of the facts under Federal Rule of Civil Procedure 12(b)(1) by providing affidavits and other evidentiary support, Defendant has not done so and may not do so in a Rule12(b)(6) motion.

7. Ms. Young is charged with in-concert aiding and abetting for her role in manufacturing a vacuously fraudulent report as part of an extortion conspiracy with a primary objective of stealing assets from the Brunsting trusts under an estate litigation pretext.

8. The Privity and Texas Attorney Immunity Doctrines are regularly used as shields for the criminal racketeering alleged in the RICO complaint.

Curtis v. Brunsting in the Southern District of Texas and the Fifth Circuit

> *Plaintiffs' allegations appear to relate to a probate matter in Harris County Probate Court, which the Plaintiffs call "Curtis v. Brunsting" (see Complaint ¶ 110), although no cause number is ever mentioned and no court is ever identified.*

9. Defendant Jill Willard Young, participated in the attempt to eliminate Curtis v Brunsting from the probate record. There is a reason for that. Plaintiffs' certificate of closely related case (Dkt 12) cites to the first filed lawsuit relating to the Brunsting trusts. Other than the case in point, 4:16-cv-01969, Curtis v Brunsting 4:12-cv-0592 is the only related lawsuit filed in a court of competent jurisdiction, as hereinafter more fully appears.

10. The events leading up to this RICO lawsuit are unique, in that the underlying unresolved federal lawsuit, Curtis v Brunsting 4:12-cv-592, is its own federal Fifth Circuit case law authority, *Curtis v Brunsting 704 F.3d 406*. The only real distinctions between Curtis v Brunsting 4:12-cv-592 and Curtis v Kunz-Freed et al., 4:16-cv-01969, are location in the chronology of events, the nature of the federal jurisdiction invoked, the number of actors involved, the volume of information available, and the remedies pursued.

11. Candace Louise Curtis v. Anita and Amy Brunsting 4:12-cv-592 was filed in the United States District Court for the Southern District of Texas on February 27, 2012, and dismissed sua sponte under the probate exception to federal diversity jurisdiction on March 8, 2012. Curtis filed a timely notice of appeal and the matter went to the Fifth Circuit for review.

12. On January 9, 2013, the Circuit Court issued a unanimous opinion with Order for Reverse and Remand, No. 12-20164, holding the probate exception to federal diversity jurisdiction does not apply to an inter vivos trust not in the custody of a state court, Curtis V. Brunsting 704 F.3d 406.

13. *On January 29, 2013,* Carl Brunsting, as Executor of the estate of Nelva Brunsting, filed suit against attorney Candace Kunz-Freed and Vacek & Freed P.L.L.C. in the Harris County District Court, raising claims exclusively related to the Brunsting trusts then in the custody of the federal court.[2]

14. Upon returned to the U.S. District Court Curtis immediately petitioned for a protective order. A hearing was held April 9, 2013 (Dkt 26-7 E289-E342) and an injunction was issued. (Dkt 26-2 E5-E9)

15. Also on April 9, 2013, after the federal injunction was issued, Defendant Bobbie Bayless filed suit in the Harris County Probate Court advancing Brunsting trust related claims similar to those already pending in the federal Court, styled "Carl Henry Brunsting individually and as Executor for the Estates of Elmer and Nelva Brunsting". (Dkt 33-9 E188-E207)

16. The Probate cases are:

a. Harris County Probate Case 412248 Carl Henry Brunsting executor of the estate of Elmer H. Brunsting, vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

b. Harris County Probate Case 412249 Carl Henry Brunsting executor of the estate of Nelva E. Brunsting, vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

[2] No. 2013-05455; Carl Henry Brunsting v. Candace Freed & Vacek & Freed; 164th Judicial District Court of Harris County, TX

c. Harris County Probate Case 412249-401 Carl Henry Brunsting Individually vs Amy, Anita and Carole Brunsting, filed April 9, 2013.

d. Harris County Probate No. 412249-402 on remand from the federal Court 4:12-cv-0592. The only docket entries in the probate court with the heading of Curtis v Brunsting are a notice of the original federal petition[3] and a notice of injunction and report of special master[4] and each is covered with a heading page of "Estate of Nelva Brunsting".

The Losing End of Fully Litigated Determinations in Texas State Court

17. Defendant alleges Plaintiffs' claims are:

> *frivolous, delusional, and implausible"… bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.*

18. Counsel violates ethics rules when he files a pleading making knowingly disingenuous claims regarding the record of state court proceedings. Defendants do not, because they cannot, point to the record in any proceeding where Plaintiffs have been on the losing end of any fully litigated state court determinations, because no such events exist in the record. There is a plausible explanation for that.

19. The state probate court absolutely refused to resolve any substantive issues on the merits, due to their awareness of a well-known phenomenon called "Complete Absence of Jurisdiction".

20. Defendant's knowledge of that simple fact explains the entire in-concert attempt to avoid ruling on the merits of any pleading and the character of the Gregory Lester Report.

[3] 2015-02-10 PBT-2015-47716
[4] 2015-02-06 PBT-2015-47630

21. Defendant would love to argue, as they do against all of the probate cabal's victims (Exhibit 1 attached), that Plaintiffs are disgruntled losers seeking vengeance, or that they are asking a federal court to review state court judgments when, in fact, no rulings were ever entered against Curtis because no state court has been invoked as a "Court of Competent Jurisdiction" and these defendant legal professionals all know it.

The Vacuously Indefensible Report of Jill Willard Young and Gregory Lester

The Order Granting Authority to Retain Counsel

22. The Order granting authority to retain Jill Young (Exhibit 2 attached) was for the sole purpose of performing the Duties defined in the Order appointing Gregory Lester Temporary Administrator. (Dkt 25-A)

> *as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities.*

23. The Report of Temporary Administrator, filed January 14, 2016, (Dkt 26-9) never mentions the Wills of Elmer or Nelva Brunsting, which is where one would logically think to begin an honest investigation into the veracity of claims brought in the name of a "decedent's estate". The Wills (Exhibits 3 and 4 attached) make clear that the only heir in fact to either estate is "the trust", a matter commented on in the Fifth Circuit Opinion. (Dkt 34-4)

24. The "Report" does not give a history of any litigation, does not mention the estate of Elmer Brunsting, Harris County Probate No. 412248 (Will filed April 2, 2012), does not mention the estate of Nelva Brunsting, Harris County Probate No. 412249 (Will filed April 2, 2012), even though the Report is filed under the 412249 case number and the Order (Dkt 25-A) specifically authorized investigation and reporting on the efficacy of the "estate" claims.

a. The "Report" also does not mention the Petition in Curtis v Brunsting 4:12-cv-00592, or Curtis v Brunsting 704 F.3d 406, or the 164th Judicial District Court of Harris County No. 2013-05455 "estate of Nelva Brunsting" v Candace Kunz-Freed and Vacek and Freed, or that Carl Brunsting brought his complaint individually and as executor of the estates of Elmer and Nelva Brunsting in the probate Court, nor that the estate claims are virtually identical to those that had been pending in the Southern District of Texas since February of 2012.

b. The "Report" does not mention the federal injunction, does not mention the gap in activity in the "estate cases between April 5, 2013's "Drop Orders" (Exhibits 5 and 6), the Inventory (Exhibit 7 attached), or the federal remand of May 2014 (Dkt 33-7 and 33-8), or the applications for letters dated October 17, 2014 (Exhibit 8 attached).

c. The "Report" does refer to Jason Ostrom's alleged "2nd Amended Complaint" filed in the probate court under the heading of "Estate of Nelva Brunsting". (Dkt 34-9)

25. Plaintiffs would again ask the Court to review Dkt 34-10 which is credible evidence of "bizarre" that actually exists, although the signed version appears to have been replaced with the unsigned version in the public record.[5] (Exhibit A9 attached)

Defendant's Exhibit A

26. Defendant's Exhibit A (Dkt 25-A) is the Order Appointing Temporary Administrator Gregory Lester. In the Order the Probate Court found that it had jurisdiction and venue over the Decedent's Estate and authorized Mr. Lester to review the claims brought by the "estate" against 1) Candace Freed 2) Anita Kay Brunsting, 3) Amy Ruth Brunsting, and 4) Carole Ann Brunsting. The Order does not grant any authority to examine the claims brought by Plaintiff Carl Brunsting or Plaintiff Candace Curtis individually. None-the-less the report states:

[5] Harris County Clerk public website case access

> *Carl Henry Brunsting and Candace Louise Curtis have filed claims against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting in the Estate of Nelva E. Brunsting, Deceased, pending in Harris County Probate Court Number Four (4) under Cause Number 412,249 (hereinafter referred to as the "Probate Court Claims").*

27. While the "Report" specifically avoids any mention of the TXSD case of Curtis v Brunsting 4:12-cv-00592, it exhibits the Report of the Special Master with the federal case number listed across the top of every page referring to it thusly:

> *"This **REPORT OF MASTER** that was prepared in the case filed in the Southern District of Texas federal court case has the details of the Trust's income, expenses and distributions of stock. A copy of this report is attached hereto as the sixth exhibit."*

28. The only exhibits in the "Report" are trust and not estate related instruments and there can be no plausible denial that the "Report" was nothing but a vehicle for threatening Plaintiff Curtis with injury to property rights if she did not agree to enter into a mediated settlement agreement. (See Dkt 26 pgs 3-31 and transcript of March 9, 2016 Dkt 26-16)

29. The Report exhibits include:

a. The 2005 Restatement to the Brunsting Family inter vivos trust, Pg 11-97;

b. The 2007 Amendment to the Brunsting Family inter vivos trust, Pg 98-99;

c. The alleged December 21, 2010 appointment of successor trustees to the Brunsting Family inter vivos trusts, Pg 100-105;

d. The June 2010 QBD to the Brunsting Family inter vivos trust, Pg 106-108;

e. One of three versions of the 8/25/2010 QBD (extortion instrument) claiming to revoke the Brunsting Family inter vivos trust (see dkt 26-4)[6], Pg 109-145 and;

f. Report of Special Master regarding the Brunsting Family inter vivos trust, Pg 146-183.

[6] Filed in the state probate court as an exhibit to Plaintiff Curtis July 13, 2015 Answer to Defendants 6/26/2015 No-evidence Motion and demand to produce evidence in 412249-401.

Probate Mafia and Harris County Tomb Raiders

30. Plaintiff Curtis' original petition filed February 27, 2012, was dismissed under the probate exception and that is what sent Plaintiff on a journey to the Fifth Circuit. Anyone researching the Probate Exception will invariably be exposed to the "Probate Mafia". (Exhibit 10 attached)

31. Harris County Tomb Raiders is a term first observed by Plaintiffs in a recorded video of a hearing before the Texas Senate Committee on the Judiciary, October 11, 2006[7], where one witness, a Robert Alpert[8], gave an account of his experience in the Harris County Probate Court. His testimony contained remarkably similar descriptions of the means and methods complained of in the present complaint, a full ten full years later, and nothing appears to have changed. Where exactly Tomb Raiders was mentioned in the testimony Plaintiffs do not recall, as there are 12 recordings available and they cover a seven and one-half hour hearing session.

In Concert Aiding and Abetting

32. As previously stated, Ms. Young is charged with in concert aiding and abetting a conspiracy to loot the Brunsting trusts, that is fully documented on the Public record. A particular participant's part in the conspiracy does not have to be of great magnitude, but only a manifest part of the symphony of sound produced by the other instruments in concert.

33. The elements of aiding and abetting are 1) that the accused had specific intent to facilitate the commission of a crime by another; 2) That the accused had the requisite intent of the

[7] Audio Recordings are available online at the Texas Senate Library
[8] Beginning at 12 minutes of Recording: 791070a, 79th Senate Jurisprudence Committee E1.016 Tape 2 of 4 Side 1 & 2, 10/11/06 10:40am Recording: 791070b

underlying substantive offense; 3) That the accused assisted or participated in the commission of the underlying substantive offense; and 4) That someone committed the underlying offense.[9]

34. Defendant Jill Willard Young does not offer exhibits to support her proclaimed vision of the facts she proffers. She does not exhibit her motion for permission for Greg Lester to retain her law firm (Exhibit 11), nor the order appointing her to "assist" Mr. Lester (Exhibit 2) and definitely not the report she assisted Mr. Lester in producing (Dkt 26-9).

Prosecuting State and Local Corruption

35. All of the states and most local governments have criminal statutes or codes which criminalize various aspects of corruption.

36. While there is no federal statute which is aimed specifically at state and local corruption, there are three statutes which have been generally utilized by federal prosecutors to prosecute state and local officials for acts of corruption. They are the mail and wire fraud statute, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Hobbs Act – 18 USC §1951

37. The Hobbs Act, by its express language, makes it a crime to obstruct, delay, or affect commerce by robbery or extortion.

38. However, the statute, by a series of judicial decisions including a United States Supreme Court decision (*See*, *United States v. Evans*, 504 U.S. 255 [1992]), has been extended to cover practices best characterized as bribery. In that regard, all that has to be shown is that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts. This results in making the Hobbs Act similar to 18 USC

[9] United States Attorney's » Criminal Resource Manual » CRM 2000 - 2500 » Criminal Resource Manual 2401-2499 CRM 2474

§201, insofar as it covers bribery of a federal official. However, the statute would not cover mere receipt of gratuities, as under 18 USC §201, which is covered by the mail and wire fraud statutes.

39. While the Hobbs Act is limited to conduct that "obstructs, delays or affects interstate commerce [commerce between two or more states]," this requirement is hardly any requirement at all, since all that is needed is a small or practically negligible effect.

40. A Hobbs Act violation may serve as the foundation for RICO offenses.

Mail and Wire Fraud – 18 USC §§1341 (Mail), 1343 (Wire)

41. The mail and wire fraud statutes were enacted as anti-fraud statutes, designed to combat, as criminal, the common law crime of larceny by trick. Even though the statutes' terms do not specifically embrace corruption, they are extensively used to prosecute acts of public corruption.

42. For mail fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the mailing of a letter for the purpose of executing the scheme; and for wire fraud, the prosecutor must prove only (a) a scheme to defraud, and (b) the use of interstate wire communications in furtherance of the scheme. For purposes of the statute, the requisite mailing can be done through the postal service or a private carrier, and the requisite wire communications include radio transmissions, telephone calls and e-mails. Significantly, the requisite mailing or wiring need not itself contain any fraudulent information and may be entirely innocent. However, they must be shown to be at least a "step" in the scheme. (*Schmuck v. United States*, 489 U.S. 705, 712 [1989]).

43. With respect to the statutes' use in public corruption cases, a fraudulent scheme includes "a scheme . . . to deprive another of the intangible right of honest services." (18 USC

§1346). It is this definition which makes the statutes a flexible tool for prosecutors to prosecute public corruption at the state or local level.

44. A typical "honest services" corruption case arises in two situations. First, "bribery" where the public official was paid for a particular decision or action, which includes a pattern of gratuities over a period of time to obtain favorable action. Secondly, "failure to disclose" a conflict of interest, resulting in personal enrichment, which encompasses circumstances where the official has an express or implied duty to inform others of the official's personal relationship to the matter at hand, even though no public harm occurred or there was no misuse of office.

45. As to the "conflict of interest" situation, the basis for its condemnation is that "[w]hen an official fails to disclose a personal interest in a matter over which he has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." (*United States v. Sawyer*, 85 F3d 713, 724 [1st Cir. 1966]). Notably, a person who holds no public office but participates substantially in the operation of government, *e.g.*, a political party leader, may be subject to prosecution under an "honest services" theory. (*See, United States v. Margiotta*, 688 F.2d 108 [2d Cir. 1982]).

Federal Conspiracy Laws

46. Federal conspiracy laws rest on the belief that criminal schemes are equally or more reprehensible than are the substantive offenses to which they are devoted. The Supreme Court has explained that a "collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that

the individuals involved will depart from their path of criminality."[10] Moreover, observed the Court, "[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked."[11] Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."[12] In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."[13] Congress and the courts have fashioned federal conspiracy law accordingly.[14]

Conclusion

47. Ms. Young drafted the motion asking to be appointed to "assist Mr. Lester in his fiduciary duties" (Exhibit 11 attached) and admits to participating in the production of the "Gregory Lester Report" (Dkt 26-9 E394-E403) but seeks to hide her participation in the conduct of the affairs of the enterprise as "attorney" conduct entitling Ms. Young to impunity.

---

[10] *Iannelli v. United States*, 420 U.S. 770, 778 (1975), quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).
[11] *Id.*
[12] *Id.*
[13] *Id.*
There have long been contrary views, e.g., Sayre, *Criminal Conspiracy*, 35 HARVARD LAW REVIEW 393, 393 (1922)("A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought"); *Hyde v. United States*, 222 U.S. 347, 387 (1912)(Holmes, J, with Lurton, Hughes 7 Lamarr, JJ.)(dissenting)("And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved"), both quoted in substantial part in Katyal, *Conspiracy Theory*, 112 YALE LAW JOURNAL 1307, 1310 n. 6 (2003)
[14] Federal prosecutors have used, and been encouraged to use, the law available to them, *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925)("[C]onspiracy, that darling of the modern prosecutor's nursery"); *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990)("[P]rosecutors seem to have conspiracy on their word processors as Count I"); Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 SOUTH TEXAS LAW REVIEW 669, 684 (2009)("What options do prosecutors have in the terrorism-prevention scenario when [other charges] are unavailable for lack of evidence linking the suspect to a designated foreign terrorist organization? One possibility is conspiracy liability").

48. It necessarily follows that an independent report on the efficacy of the estate claims would have revealed a complete absence of jurisdiction over the very things the report speaks to.

49. Where there is no court of competent jurisdiction, there is no judge and no litigation, and consequently Defendant's immunity claims collapse under the weight of the complete absence of jurisdiction in any state court. (See Curtis v Brunsting 704 F.3d 406, 409-410 and Lexis HN 6)

50. All of the Defendants are accused of violating 18 U.S.C. 1962(c), which prohibits participation in the conduct of the affairs of an enterprise through a pattern of racketeering activity affecting interstate commerce, and 18 U.S.C. 1962(d), conspiracy to violate 18 U.S.C. 1962(c).

51. Jill Willard Young's participation is directly related to the fraudulent report of Gregory Lester, used to promote their substantive resolution avoidance and mediated settlement diversion scheme, which can only be explained by these Defendants' knowledge of the Court's complete want of jurisdiction.

52. Defendant Jill Willard Young was present at the September 10, 2015 hearing, that plaintiffs have been unable to obtain a transcript of.

53. However, Defendant Neal Spielman's March 9, 2016 diatribe, (Dkt 26-16) referring to the September 10, 2015 hearing, evidences the "Report" to be the product of the Defendants' own dictation and, while the report admits "I was told" as a source for information, The report never mentions who told Lester what to write.

54. These lawyer Defendants, in concert, attempted to conceal Curtis v. Brunsting in the probate record as if it was the "estate of Nelva Brunsting" and then, knowing there was no authority to determine any matters related to the Brunsting trusts they all conspired together to avoid rulings on the merits and to attempt to intimidate the non-participant into attending a

"mediation" where she could be further impressed with the threat to her property interests if she did not rollover on her rights and surrender property by settlement agreement.

55. Defendant attempts to deceive this Court into believing the underlying matter is related to an inheritance or an expectancy, but Plaintiff Curtis is an equitable property owner whose property interest was fully vested at the creation of the family trusts in 1996 and the death of Elmer Brunsting and Nelva Brunsting elevated her to a property owner with a primary right of consideration under the undisturbed terms of the irrevocable trusts.

56. Plaintiff Curtis' trust property has been withheld and that property continues to be illicitly held hostage to attorney fees and absolution ransoms Plaintiff does not owe.

57. Plaintiff Curtis and her domestic partner Plaintiff Munson have incurred substantial expense, expended efforts and suffered constant character attacks, been forced to divert quality time and capital assets away from local and domestic concerns in a productive life, to defend her property interests in Texas for more than 4 and one-half years, and the participants in the involuntary wealth redistribution scheme claim Plaintiffs have suffered no tangible injury.

58. Defendant also claims that some of the predicate acts do not provide a private right of claims, but that is not what 18 U.S.C. §1964(c) says about injury suffered as direct and proximate result of a pattern of racketeering activity involving such acts.

59. The only subject of the Jill Willard Young/Gregory Lester report is not the estate but the money cow trust, not properly in the custody of any state court.

60. There is not a single mention of the wills, the pour over provisions, the identity of the only heir, the inventory containing only an old car, or the "estate claims", and it does not mention the drop orders or any other "estate" related matters, yet seeks to legitimize "estate claims" involving only the beneficiaries of the "heir-in-fact" trust.

61. Candace Curtis and her siblings are beneficiaries of "the trust" and, therefore, derivatively the only real parties in interest.

62. In essence, the "decedent's estate" is suing "heirs in fact" (trust beneficiaries) in probate court, for trespasses committed against the "heir in fact" (trust) during the lifetime of the decedent.

63. Plaintiff Curtis' federal petition was amended by Defendant Ostrom to join Plaintiff Carl Brunsting, to pollute diversity, in order to affect a remand to state court, where Plaintiff Curtis could be consolidated as a "defendant" in the "estate" lawsuit involving only the trust.

64. Any award from the estate lawsuits would belong to the "heir in fact" (trust), minus attorney and appointee fees from years of litigation involving an estate with no assets, in a court with no subject matter jurisdiction, whose judgments would all be void ab initio and would in any event guarantee a successful reversal on appeal by either party, with no resolution in sight forever and ever, while Anita, Amy, and their attorneys hold disposition of the trust hostage.

65. This is indeed a bazaar conspiracy theory but it is not a box office thriller. It is a reality embedded in the public record and one need look no further than the public record for the evidence that supports Plaintiffs' claims.

Wherefore, Plaintiffs respectfully move this Honorable Court for an Order denying the Motion to Dismiss filed by Defendant Jill Willard Young August 14, 2016. (Dkt 25)

Respectfully submitted, October 2, 2016.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on October 2, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, the Rule 12(b)(6) Motion to Dismiss filed by Defendant Jill Young in the above styled cause on September 14, 2016 (Docket entry 25) should be Denied.

It is SO ORDERED

_____ _____

Date

The Honorable Alfred H Bennet
United Stated District Judge

Exhibit List Jill Willard Young Rule 12 Motion

1-	Defendant Jill Willard Rule 11 Notice	E1-E8
2-	Order Granting Authority to retain Jill Young	E9-E10
3-	The Will of Nelva Brunsting	E11-E22
4-	The Will of Elmer Brunsting	E23-E34
5-	Drop Order 412249 April 4, 2013	E35
6-	Drop Order 412248 April 4, 2013	E36
7-	March 27, 2013 Inventory and April 4, 2013 Order Approving Inventory	E37-E44
8-	2013-10-17 Application for Letters Testamentary	E45
9-	Agreed Order to Consolidate “estate of Nelva Brunsting with “estate of Nelva Brunsting” (See Dkt 34-10)	E46-E49
10-	Fighting the Probate Mafia (2002)	E50-E119
11-	September 1, 2015 Application to Retain Jill Young	E120-E128

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September 27, 2016

Via Certified Mail
Return Receipt Requested and
Electronic Mail

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Re: Case No. 4:16-cv-01969, *Curtis, et al v. Kunz-Freed, et al.*

Dear Ms. Curtis and Mr. Munson:

Pursuant to Federal Rule of Civil Procedure 11(c)(2), we have enclosed a copy of a Motion for Sanctions by Defendant Jill Willard Young.

As set forth in the Motion for Sanctions, Ms. Young is seeking sanctions, including attorneys' fees, from you for the wrongful filing of the above action. We will file this Motion for Sanctions on Wednesday, October 19, 2016, unless your clients nonsuit their claims against Ms. Young with prejudice before that date.

Please let me know if you have any questions.

Very truly yours,

Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION FOR SANCTIONS

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal. On September 15, 2016, Defendant Young filed her Motion to Dismiss. And on September 27, 2016, Defendant Young sent Plaintiffs a letter, informing them that, in accordance with the safe-harbor procedure of Federal Rule of Civil Procedure 11, she would be filing this Motion for Sanctions on October 19, 2016, if Plaintiffs did not dismiss their Complaint against her with prejudice. But Plaintiffs have ignored Ms. Young's letter and Motions.

Plaintiffs' frivolous pleadings meaninglessly and wrongfully denigrate the reputation of Ms. Young, a prominent, hard-working Houston lawyer. Despite opportunities to nonsuit their meritless suit, Plaintiffs have refused to do so. Thus, Plaintiffs should be required to reimburse Ms. Young's attorney's fees pursuant to Federal Rule of Civil Procedure 11.

ARGUMENT AND AUTHORITIES

Filing a RICO action in federal court is not a proper substitute for appealing an unfavorable ruling, nor is it an appropriate means of seeking revenge against opposing and court-

appointed counsel. *See Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("[I]t should be noted that an attorney's responsibility to conduct a reasonable prefiling investigation is **particularly important in RICO claims**.") (emphasis added). Because the claims asserted by Plaintiffs are both legally and factually frivolous, Ms. Young should be awarded attorneys' fees and costs under Fed. R. Civ. P. 11.

I. The Rule 11 Standard

Under Fed. R. Civ. P. 11(b), by presenting the Court a signed pleading, an "unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3). "Compliance with these affirmative duties is measured as of the time that the document is signed." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994). And whether a pleading meets this requirements is measured "by an objective, not subjective, standard of reasonableness under the circumstances." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988).

"[I]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1); *see also* Fed. R. Civ. P. 11 Advisory Committee Notes ("Even though it is the attorney whose

signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

II. Plaintiffs have violated Fed. R. Civ. P. 11(b)(2) by filing legally frivolous claims.

Plaintiffs have ignored longstanding attorney immunity doctrines, have alleged six causes of action for which they have no private cause of action, and failed to plead facts showing even the most basic elements of their RICO "claim."

A. Plaintiffs ignore attorney immunity.

Plaintiffs have ignored long-established immunity doctrines that protect attorneys from suit by opposing parties and non-clients. Indeed, the affirmative defense of immunity is apparent on the face of the Complaint.

Under Texas law, it is settled that "attorneys are immune from civil liability . . . 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). However, a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

In this case, Plaintiffs have not pled any facts showing Ms. Young, who served as counsel for the Temporary Administrator in the underlying lawsuit, took any actions outside the normal discharge of her duties in representing her client. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016) (attorney's conduct in sending a letter, participating in discovery, and

communicating with SEC about client were "classic examples of an attorney's conduct in representing his client").

B. Plaintiffs plead claims for which there exists no private right of action.

Plaintiffs allege three causes of action for "honest services," along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* Complaint, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See* Motion to Dismiss [DKT. 25], at pp. 13–16.

C. Plaintiffs' accusations are baseless and delusional.

Plaintiffs accuse Ms. Young of what can best be described as fictional acts--being a member of a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. Not surprisingly, Plaintiffs do not even try to accompany their made-up story with supporting facts. The reality is unavoidable—their complaint is a bizarre, sophomoric attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Less fantastical efforts to concoct a federal claim against judges and opposing attorneys have been routinely dismissed. *See, e.g.*, *Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to plead a racketeering activity). And other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148

(W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Thus, Plaintiffs' allegations fail to satisfy Rule 11. Specifically, Plaintiffs' Complaint against Ms. Young—devoid of any allegation of actual wrongdoing—can only be brought for improper purposes, like harassment or to needlessly increase the cost of litigation. Plaintiffs' Complaint is in no way warranted by existing law, and Plaintiffs' contentions completely lack any sort of factual or evidentiary support. *See* Fed. R. Civ. P. 11(b)(1)-(3). Ms. Young has also specifically informed Plaintiffs multiple times of the legal defects in their Complaint and the authority showing Plaintiffs' arguments are meritless, both in Ms. Young's filing of her Motion to Dismiss and by serving this Motion for Sanctions on Plaintiffs twenty-one days before filing it with the Court. But Plaintiffs have refused to dismiss their Complaint against Ms. Young. This, too, means sanctions are necessary. *See also Taylor v. C.I.R.*, 350 Fed. Appx. 913, 915 (5th Cir. 2009) ("Sanctions on pro se litigants are appropriate if they were warned that their claims are frivolous and they were aware of 'ample legal authority holding squarely against them.'").

CONCLUSION

Plaintiffs have filed a frivolous and facially-deficient lawsuit, and Ms. Young respectfully requests that the Court require Plaintiffs and their attorneys to pay her attorneys' fees in defending this suit and pursuing the relief requested herein. *See* Ex. A, Aff. of Robert S. Harrell.

Dated: September 27, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on September 27, 2016, I conferred with counsel for Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to dismiss the claims against Ms. Young, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, pursuant to Fed. R. Civ. 11(c)(2) and Fed. R. Civ. P. 5, I served copies of this Motion for Sanctions on Plaintiffs. I also certify that a true and correct copy of the above Motion for Sanctions has been served on October 19, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

DATA ENTRY
PICK UP THIS DATE

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING AUTHORITY TO RETAIN COUNSEL – MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

BE IT REMEMBERED that on this day came on for consideration the Application of Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, in connection with the Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and the Court finding that due and proper notice of the Application has been given, finds that the Application should in all respects be granted, it is accordingly,

ORDERED, ADJUDGED and DECREED by the Court that Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain JILL W. YOUNG with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP, who agrees to adhere to the billing standards set out in the courts standards for Attorney fees, as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities. The fees payable to Jill Young shall be treated as expenses of the Temporary Administrator pending contest.

IT IS FURTHER ORDERED by the Court that GREGORY A. LESTER, Administrator of the of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP pursuant to the Texas Estates Code and this Court's Order.

SIGNED this 10 day of September, 2015.

[signature]
JUDGE PRESIDING

FILED
2015 SEP 11 AM 11:34
Stan Stanart
COUNTY CLERK
HARRIS COUNTY TEXAS

100208 000599 0046865

APPROVED AS TO FORM:

MACINTYRE MCCULLOCH STANFIELD
& YOUNG, LLP

By: _____

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(713) 572-2900
(713) 572-2902 (Fax)

ATTORNEYS FOR APPLICANT

DATA ENTRY
PICK UP THIS DATE

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
DECEASED	§	HARRIS COUNTY, TEXAS

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SIGNED this 10 day of September, 2015.

Christine Butts
JUDGE PRESIDING

FILED
2015 SEP 11 AM 11:34
Stan Stanart
COUNTY CLERK
HARRIS COUNTY TEXAS

100208 000599 0046865

APPROVED AS TO FORM:

MACINTYRE MCCULLOCH STANFIELD
& YOUNG, LLP

By: _____

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ATTORNEYS FOR APPLICANT

LAST WILL
OF
NELVA E. BRUNSTING

I, NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is ELMER H. BRUNSTING.

All references to "my spouse" in my Will are to ELMER H. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint ELMER H. BRUNSTING as my Personal Representative. In the event ELMER H. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. I direct that no action be required in the county or probate court in relation

to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law.

Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for ELMER H. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which ELMER H. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless ELMER H. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of ELMER H. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of ELMER H. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

PURPORTED WILL

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by ELMER H. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Nelva E. Brunsting
NELVA E. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by NELVA E. BRUNSTING in our presence to be her Will. We, in her presence and at her request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, NELVA E. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

WITNESS

Krysti Brull
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

April Driskell
11511 Katy Freeway, Suite 520
Houston, Texas 77079

SELF-PROVING AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared NELVA E. BRUNSTING, Kristi Bru and April Driskell, known to me to be the Testatrix and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said NELVA E. BRUNSTING, Testatrix, declared to me and to the said witnesses in my presence that said instrument is her Last Will and Testament, and that she had willingly made and executed it as her free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testatrix that the said Testatrix had declared to them that the said instrument is her Last Will and Testament, and that she executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testatrix and at her request; that she was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Nelva E. Brunsting
NELVA E. BRUNSTING

Kristi Bru
WITNESS

April Driskell
WITNESS

FILED
2012 APR -2 AM 8:36
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

Subscribed and sworn to before me by the said NELVA E. BRUNSTING, the Testatrix, and by the said Kristi Bru and April Driskell, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2005

PBT-2012-122649

PURPORTED WILL

412249

PURPORTED WILL

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

LAST WILL
OF
ELMER H. BRUNSTING

PROBATE COURT 4

412248

I, ELMER HENRY BRUNSTING, also known as ELMER H. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is NELVA E. BRUNSTING.

All references to "my spouse" in my Will are to NELVA E. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint NELVA E. BRUNSTING as my Personal Representative. In the event NELVA E. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. I direct that no action be required in the county or probate court in relation

to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law.

Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for NELVA E. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which NELVA E. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless NELVA E. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of NELVA E. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of NELVA E. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

PURPORTED WILL

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by NELVA E. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS. WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Elmer H Brunsting

ELMER H. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by ELMER H. BRUNSTING in our presence to be his Will. We, in his presence and at his request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, ELMER H. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

WITNESS

Krysti Brull
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

April Driskell
11511 Katy Freeway, Suite 520
Houston, Texas 77079

FILED
2012 APR -2 PM 4:31
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

SELF-PROVING AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared ELMER H. BRUNSTING, Kristi Brun and April Duske, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said ELMER H. BRUNSTING, Testator, declared to me and to the said witnesses in my presence that said instrument is his Last Will and Testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testator that the said Testator had declared to them that the said instrument is his Last Will and Testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testator and at his request; that he was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Elmer H Brunsting
ELMER H. BRUNSTING

Kristi Brun
WITNESS

April Duske
WITNESS

Subscribed and sworn to before me by the said ELMER H. BRUNSTING, the Testator, and by the said Kristi Brun and April Duske, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2006

PURPORTED WILL

412248

PURPORTED WILL

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

DROP

NO. 412248 **PROBATE COURT 4**

IN THE ESTATE OF Elmer H. Brunsting	§	IN THE PROBATE COURT
	§	NUMBER FOUR OF
DECEASED	§	HARRIS COUNTY, TEXAS

DROP ORDER

On this day, it having been brought to the attention of this Court that the above entitled and numbered estate should be dropped,

IT IS THEREFORE ORDERED that the Clerk drop said estate from the Court's active docket.

IT IS FURTHER ORDERED that any costs incident to this order are hereby waived.

SIGNED this 4 day of April, 2013.

Christine Butts
JUDGE CHRISTINE BUTTS
PROBATE COURT NO. FOUR

FILED
2013 APR -5 AM 10:01
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURT 4

NO. 412.249

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Date of Death: November 11, 2011

The following is a full, true, and complete Inventory and Appraisement of all personal property and of all real property situated in the State of Texas, together with a List of Claims due and owing to this Estate as of the date of death, which have come to the possession or knowledge of the undersigned.

INVENTORY AND APPRAISEMENT

ASSETS	VALUE	ESTATE INTEREST

1. **Real Estate:**

   See List of Claims

2. **Stocks and Bonds**

   See List of Claims

3. **Mortgages, Notes and Cash:**

   See List of Claims

4. **Insurance Payable to Estate**

   See List of Claims

5. **Jointly Owned Property**

   See List of Claims

ASSETS	VALUE	ESTATE INTEREST

6. Miscellaneous Property

6a. See List of Claims

6b. One-half (½) interest in
2000 Buick LeSabre..... $2,750.00
VIN--1G4HR54K3YU229418

TOTAL VALUE OF ESTATE..... Yet to be determined

LIST OF CLAIMS

1. Based upon the information currently available to the personal representative of the estate, it is not possible to determine with certainty what assets were in the estate at the Decedent's death. That determination will have to be made the subject of further judicial proceedings. After that judicial determination is made, to the extent it becomes necessary, this Inventory, Appraisement and List of Claims will be amended to reflect the descriptions and values of assets later determined to have been estate assets at the time of Decedent's death.

2. The estate has asserted a claim against Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC relating to actions taken and omissions made in the course of their representation of decedent and her husband which may result in additional estate assets. That case is pending under Cause No. 2013-05455, styled *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting v. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC,* in the 164th Judicial District Court of Harris County, Texas.

3. The Brunsting Family Living Trust was signed by Decedent and her husband on October 10, 1996 and was restated on January 12, 2005 (the "Family Trust"). The Family Trust purported by its terms to provide for the creation of successor and/or subsequent trusts. The Family Trust also described other documents which, if created in compliance with the terms of the Family Trust, could impact the assets and status of the Family Trust. Attempts were made by various parties to change the terms and control of the Family Trust through later instruments which have been or will be challenged. The estate also asserts claims against Anita Brunsting and Amy Brunsting, the current purported trustees of the successor trusts or trusts arising from the Family

Trust or documents allegedly created pursuant to the terms of the Family Trust. Those claims will be the subject of separate proceedings and may result in additional estate assets.

4. The estate also asserts a claim against Anita Brunsting, Amy Brunsting, and Carole Brunsting in their individual capacities for amounts paid and assets believed to also include, among other things, stocks and bonds which were removed from the Family Trust and/or the estate. This was accomplished either through the use of a power of attorney for Decedent, through their position as trustees, through their position as joint signatories on accounts and safe deposit boxes, or because they otherwise had access to the assets. Those claims will also be the subject of a separate proceeding and may result in additional estate assets.

There are no known claims due or owing to the Estate other than those shown on the foregoing Inventory and Appraisement.

The foregoing Inventory, Appraisement and List of Claims should be approved and ordered entered of record.

CARL HENRY BRUNSTING,
Independent Executor of the Estate of
Nelva E. Brunsting

BAYLESS & STOKES

By: _____
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded to the following interested parties as specified below on the 26th day of March, 2013, as follows:

Maureen Kuzik McCutchen
Mills Shirley, LLP
2228 Mechanic, Suite 400
P.O. Box 1943
Galveston, Texas 77553-1943
Houston, Texas 77056
sent via Telecopier

Carole Ann Brunsting
5822 Jason St.
Houston, Texas 77074
sent via U.S. First Class Mail

Candace Louise Curtis
1215 Ulfinian Way
Martinez, California 94553
sent via U.S. First Class Mail

BOBBIE G. BAYLESS

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, CARL HENRY BRUNSTING, having been duly sworn, hereby state on oath that the foregoing Inventory, Appraisement and List of Claims is a true and complete statement of all the property and claims of the Estate that have come to my knowledge.

Carl Henry Brunsting
CARL HENRY BRUNSTING
Independent Executor of the Estate of Nelva E. Brunsting, Deceased

SWORN TO and SUBSCRIBED BEFORE ME by the said CARL HENRY BRUNSTING, on this 26th day of March, 2013, to certify which witness my hand and seal of office.

SHAWN M. TEAGUE
MY COMMISSION EXPIRES
April 3, 2015

Shawn M. Teague
Notary Public in and for the
State of TEXAS
Printed Name: Shawn M. Teague
My Commission Expires: 4-3-2015

NO. 412.249

ESTATE OF	§	**IN PROBATE COURT**
	§	
NELVA E. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this _____ day of _______________________, 2013.

____
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: _______________________
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

PROBATE COURT 4

NO. 412.248

ESTATE OF	§	**IN PROBATE COURT**
	§	
ELMER H. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

3930 (b)
EFF 9-1-83

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this 4 day of April, 2013.

Christine Butts
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: Bobbie G. Bayless
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

FILED
2013 APR -5 AM 10:01
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

APR 05 2013

STAN STANART
COUNTY CLERK, HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

PAID

Court No. **Probate Court No. Four (4)** Date: October 17, 2014

APPLICATION FOR LETTERS TESTAMENTARY
(Testamentary, or of Guardianship, or of Administration)

PROBATE
DOCKET NO. **412248** STYLE OF DOCKET: **ELMER H BRUNSTING , DECEASED**

FILED
2014 OCT 17 PM 3:20
COUNTY CLERK
HARRIS COUNTY, TEXAS

Name of Personal Representative: CARL HENRY BRUNSTING

Title of Personal Representative: INDEPENDENT EXECUTOR

Date Oath Filed: 08/28/2012 Order Date: 08/28/2012

Date Approved Bond Filed: Amount Of Bond: $___

LETTERS: To Be Picked Up ○ A. A.:_____
To Be Mailed (at purchaser's risk) ○ Phone No.: 713-522-2224

4/G

To: BAYLESS & STOKES Called 10/17/14 @ 11:07 A. McKinley

(Street or P.O. Box Address)

City State Zip Code

Check 25677 $10.00

Phone

Signature of Person Requesting or Attorney of Record

RECEIPT FOR PAYMENT FOR LETTERS ABOVE DESCRIBED

Received of the person, whose signature appears hereinabove, the sum of **$10.00** for issuing the **5** Letters hereinabove described.

I authorize the County Clerk to mail this order to me by regular U.S. Mail and release the County Clerk of any and all responsibility of my failure to receive same.

STAN STANART,
County Clerk and Clerk of Probate Courts
Harris County, Texas

Received by: _____

Akida McKinley
Deputy County Clerk

Date: 10-17-14 Clerk's Initials: ACH

DATA ENTRY
PICK UP THIS DATE

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

****

CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
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BY: _____

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2931 Ferndale
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713.522.2218 (Facsimile)

Attorney for Drina Brunsting, Attorney in Fact
for Carl Brunsting

BY: _____

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Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Attorney for Carole Brunsting

APPROVED AS TO FORM:

ostrommorris, PLLC

BY:_____

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Attorneys for Candace Curtis

BY:_____

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Attorney for Drina Brunsting, Attorney in Fact
for Carl Brunsting

BY:_____

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BY: _____
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281.759.3213
281.759.3214 (Facsimile)

Attorney for Anita Brunsting

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Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

Attorney for Amy Brunsting

FIGHTING THE PROBATE MAFIA: A DISSECTION OF THE PROBATE EXCEPTION TO FEDERAL COURT JURISDICTION

PETER NICOLAS*

I. INTRODUCTION

Imagine the following:[1] a Muslim woman with a history of chronic mental illness immigrates to the United States from Iran and settles in Colorado Springs, Colorado. At age 80, she visits a car dealership in Colorado Springs owned by a self-described Christian political activist. The woman's vulnerability is obvious, and in the course of selling the woman a car, the owner of the car dealership discovers that she lives by herself and possesses significant assets. Shortly after selling her the car, the owner of the car dealership, in concert with some local probate attorneys, persuades the Muslim woman to execute an inter vivos trust giving the owner of the car dealership the power upon the woman's death to use the entire principal of the trust at his sole discretion for "Christian/Religious purposes." The car dealer and the attorneys also persuade the woman to execute documents giving them the power to make

* Assistant Professor, University of Washington School of Law. The author would like to thank Craig Allen, Thomas Andrews, Diane Atkinson-Sanford, Ian Birk, Magdalena Cuprys, Joan Fitzpatrick, Ann Hemmens, Kate O'Neill, Chris Waraksa, Mary Whisner, and Senior Editor, Lisa Ruesch, of the Southern California Law Review for valuable research, feedback, and assistance.

1. The scenario described is based on allegations contained in a complaint filed in the United States District Court for the District of Colorado. *See* Complaint and Demand for Jury Trial at 4–31, Nicolas v. Perkins, No. 00 Civ. 1414 (D.Colo. filed July 14, 2000). The author served without pay as the attorney of record in the matter. *See id.* at 31. For additional background information on the issues inspiring this hypothetical see Cara DeGette, *Perkins, Attorneys Accused of Wrongful Death and Fraud in Federal Court Case*, COLO. SPRINGS INDEP., July 20, 2000; Erin Emery, *Perkins Named in Suit over Estate, Family Claims $2.5 Million Diverted*, DENVER POST, July 20, 2000, at B5; Dick Foster, *Suit: 5 Defrauded Mentally Ill Woman, Car Dealer, Attorneys Deny Taking Control of Estate for 'Christian Religious Purposes,'* DENVER ROCKY MOUNTAIN. NEWS, Jul. 24, 2000, at 4A.

medical decisions on her behalf. While the woman is still alive, the car dealer persuades her to withdraw large sums of money from the trust to "invest" in his "business ventures."

Shortly after the inter vivos trust and the power of attorney are executed, the woman's health begins to deteriorate in a manner consistent with neglect. She is admitted to the emergency room no fewer than twenty times where she is repeatedly diagnosed as suffering from malnutrition, dehydration, failure to thrive, weight loss, and pneumonia. The emergency room doctors repeatedly note in her chart that the inability or unwillingness of those entrusted to make medical decisions on her behalf is hampering their ability to treat her effectively. While the woman's health is deteriorating, not only do the car dealer and the attorneys fail to intervene under the power of attorney, but they also falsely communicate to members of the woman's family residing outside of the area that the woman is in perfect health. At the same time they take steps to ensure that her family cannot locate her.

Ultimately, the woman dies. Shortly thereafter, one of the attorneys files a petition in the local probate court seeking appointment as the personal representative of the woman's estate as well as a motion seeking a construction of the living trust document in a manner most favorable to the car dealer. These various filings make their way to one of the woman's daughters, a citizen of New York. In the course of the ongoing probate proceedings, the woman's daughter discovers what the car dealer and the attorneys did to her mother. While the probate proceedings are still pending, the daughter files suit against the car dealer and the attorneys in federal district court, in part because she perceives that the probate court judge's actions indicate open hostility toward her, as a resident of another state, and toward her attorneys. The federal action includes state common law claims of wrongful death and conversion, as well as a claim under the federal Racketeer Influenced and Corrupt Organizations Statute ("RICO").[2] She also seeks a declaratory judgment that the inter vivos trust is invalid.

Normally when a suit is brought in federal court, the court would determine its jurisdiction over the dispute by making a number of standard, independent inquiries. First, the court would determine whether there is a statutory grant of subject matter jurisdiction over the dispute.[3] In this

2. 18 U.S.C. §§ 1961–68 (1994).

3. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (stating that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute."); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

hypothetical there is complete diversity[4] giving the federal court subject matter jurisdiction over the state common law claims, provided the amount in controversy exceeds $75,000.[5] Additionally, since the RICO claim arises under a federal statute, there would seem to be statutory federal question jurisdiction.[6] Because a federal district court would have diversity jurisdiction over an action brought by the trustee to enforce the purported trust against the plaintiff in the federal action, the federal court likewise would have statutory subject matter jurisdiction over the declaratory judgment action.[7] Second, the court would determine whether these statutory grants of subject matter jurisdiction are among the permitted bases of subject matter jurisdiction provided for in Article III of the United States Constitution.[8] The statutory grants of jurisdiction involved here—diversity and federal question—are both firmly rooted in Article III.[9] Third, the court would determine whether the action presents a justiciable case or controversy; in other words, whether the action presents an actual dispute touching on the legal relations of parties having adverse legal interests (as contrasted with a dispute of a hypothetical or abstract character) and whether there is a substantial likelihood that a favorable

4. The statutory grant of diversity jurisdiction has been interpreted to require that no plaintiff be from the same state as *any* defendant, and that *any* overlap will defeat diversity jurisdiction. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806), *overruled on other grounds by* Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

5. *See* 28 U.S.C. § 1332(a)(1) (1994) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of different states.").

6. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Moreover, the RICO statute itself provides an independent grant of subject matter jurisdiction to the federal courts. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of [the RICO statute] by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor in any appropriate United States district court.").

7. The Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1994), provides a cause of action but does *not* expand federal court subject matter jurisdiction. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950). In order to determine whether a federal court has statutory subject matter jurisdiction over a declaratory judgment action, the court must determine whether an ordinary coercive suit brought by one of the parties would fall within the statutory subject matter jurisdiction of the federal courts. *See id.*

8. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (holding that "the statute cannot extend the jurisdiction beyond the limits of the constitution").

9. *See* U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States." *Id.* *See also* Bankers' Trust Co. v. Tex. & Pac. Ry. Co., 241 U.S. 295 (1916) (upholding constitutionality of statutory grant of federal subject matter jurisdiction).

federal court decision will bring about some change or have some effect.[10] The facts of the above-described scenario would seem to satisfy the justiciability requirement. Fourth, because there is an ongoing in rem[11] proceeding in state probate court in the above-described scenario, the federal court would need to determine whether the doctrine of *custodia legis*, or prior exclusive jurisdiction, would prevent it from adjudicating the claims raised in federal court.[12] Fifth, if the court has subject matter jurisdiction and a justiciable controversy, and the doctrine of *custodia legis* does not bar adjudication of the claims raised in the federal court proceeding, the federal court would nonetheless determine whether it should abstain under one of the many recognized doctrines of prudential abstention.[13] Finally, the district court would refer to the law of the state in which it sits to determines the existence and scope of any common law tort or contract claims.[14]

Yet, lurking in the background of this hypothetical is the "probate exception" to federal court jurisdiction. It has the effect of excluding most probate and probate-related matters from federal court and has been aptly described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."[15] The rationale for this judicially-created[16] exception is mired in confusion. It has variously been justified in Supreme Court and lower court decisions on grounds similar to those routinely used to evaluate federal jurisdiction as delineated above, including assertions that the statutory grant of subject matter jurisdiction conferred on the

10. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

11. A proceeding in rem is one in which a determination is made as to ownership of a thing or object that is binding on the whole world and not just on the parties to the proceeding. BLACK'S LAW DICTIONARY 793 (6th ed. 1991) [hereinafter BLACK'S LAW DICTIONARY].

12. Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 465–67 (1939). Under the doctrine of *custodia legis*, where in rem proceedings involving the same *res* are brought in multiple courts, the first court to assume jurisdiction over the *res* has exclusive jurisdiction over it. *Id.* at 467.

13. *E.g.*, Wilton v. Seven Falls Co., 515 U.S. 277 (1995); Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

14. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This would include the state's choice-of-law rules, which might, in turn, refer the court to the laws of yet another state. Klaxon v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941).

15. Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

16. *E.g.*, Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988).

federal courts by Congress does not extend to probate matters;[17] that because the probate of a will is a proceeding in rem, a federal court cannot exercise jurisdiction over an estate if the state probate court has already taken jurisdiction of the estate (i.e., the doctrine of *custodia legis*);[18] that probate matters are not justiciable "cases or controversies" within the meaning of Article III;[19] and the prudential desire to avoid interfering with ongoing state court proceedings.[20] In addition, courts have explained the basis of the probate exception by noting that probate matters are by state law committed to the exclusive jurisdiction of the state probate courts;[21] that because the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of "strict probate" are not within the jurisdiction of the federal courts;[22] the need for legal certainty as to the disposition of the deceased's estate;[23] the interest in judicial economy;[24] and the relative expertise of state and federal courts with respect to probate matters.[25]

This confusion over the rationale for the exception has also resulted in confusion as to its scope. First, is it a limitation on federal court subject matter jurisdiction, a discretionary doctrine of abstention, or both? Second, if it is a limitation on federal court subject matter jurisdiction, is this limitation based on Congress' statutory grants of subject matter jurisdiction to the federal courts or is it an Article III limitation? Third, does the probate exception apply only to the federal courts' grant of diversity jurisdiction, or does it also extend to other statutory grants of jurisdiction, such as federal question jurisdiction? Fourth, which types of actions fall within the exception—is it limited to the actual probate of a will, or does it

17. *E.g.*, Markham v. Allen, 326 U.S. 490, 494 (1946); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

18. *E.g.*, Sutton v. English, 246 U.S. 199, 205 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44 (1909) (citing Farrell v. O'Brien, 199 U.S. 89 (1905)); Byers v. McAuley, 149 U.S. 608, 617 (1893). *See In re Broderick's Will*, 88 U.S. (21 Wall.) at 509.

19. *E.g.*, Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958).

20. *E.g.*, *Georges*, 856 F.2d at 974; Rice v. Rice Foundation, 610 F.2d 471, 475 (7th Cir. 1979) (citing Markham v. Allen, 326 U.S. 490, 494 (1946)); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987).

21. *E.g.*, Reinhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985); Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir. 1972); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953).

22. *Sutton*, 246 U.S. at 205; *Farrell*, 199 U.S. at 110.

23. Dragan v. Miller, 679 F.2d 712, 714 (7th Cir. 1982); *Georges*, 856 F.2d at 973–74; Cenker v. Cenker, 660 F. Supp. 793, 795 (E.D. Mich. 1987); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 110–11 (D. Or. 1957).

24. *Dragan*, 679 F.2d at 714; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

25. *Dragan*, 679 F.2d at 714–15; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

extend to matters ancillary to probate? If the latter, what does "ancillary" mean? Fifth, is the scope of the exception fixed as a matter of federal law, or does it vary based on the internal division of probate jurisdiction within the court systems of each state? Finally, is the probate exception limited only to suits involving wills proper, or does it extend to suits involving will substitutes, such as inter vivos trusts? Although a close analysis of the Supreme Court's probate exception precedents reveals that the applicability of the doctrine turns on the overlapping results of the six independent inquiries delineated above,[26] the lower federal courts have instead created and applied competing, one-step formulae for determining whether a given suit falls within or without the probate exception.

Despite the complexity and confusion surrounding the probate exception to federal court jurisdiction—or perhaps because of it—it has been given scant attention in the literature.[27] This Article seeks to fill the gap. Part II of this Article sets forth the current application of the probate exception in the lower federal courts. Part III of this Article examines the statutory and constitutional constraints on the federal courts' exercise of subject matter jurisdiction over probate and probate related matters. Part III concludes that the probate exception is a mere gloss on the statutory grants of subject matter jurisdiction to the federal courts and that the extent of this limitation is not nearly as great as judicial decisions and commentators have suggested. Part IV examines the constraints placed on the federal courts' exercise of jurisdiction over probate and probate-related matters by the doctrine of *custodia legis*, and concludes that the doctrine prevents federal courts from exercising jurisdiction over certain probate-related matters not otherwise excluded from their jurisdiction by the conventional understanding of the statutory grants of subject matter jurisdiction to the federal courts. Part V examines the role of prudential abstention with respect to probate-related matters falling outside the formal scope of the probate exception, and concludes that although courts can properly invoke abstention with regard to certain probate-related claims not otherwise excluded by the limits of the statutory grants of subject matter jurisdiction or by the doctrine of *custodia legis*, some lower courts are

26. *See supra* text accompanying notes 3–14.

27. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 300–01 (3d ed. 1999) (noting domestic relations and probate exceptions to federal jurisdiction but focusing primarily on issues related to the domestic relations exception). *See also* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1333–36 (4th ed. 1996); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, 13B FEDERAL PRACTICE AND PROCEDURE § 3610 (2d ed. 1984); Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 FED. B. NEWS & J. 579 (1992).

improperly abstaining on grounds not justified under any recognized doctrine of abstention. Part VI demonstrates that what has been described by the lower federal courts as the "probate exception" to federal court subject matter jurisdiction cannot be reduced to the simplistic formulae adopted by various federal appeals courts. Instead, the probate exception is really an amalgam of five distinct rules that must be applied in tandem to determine whether a given suit falls within the probate exception: (1) the *Erie* doctrine; (2) the statutory and constitutional limitations on federal court subject matter jurisdiction; (3) the doctrine of *custodia legis*; (4) the requirement of a justiciable case or controversy; and (5) prudential abstention. This Article concludes that courts should construe the probate exception narrowly to prevent prejudice against out of state claimants and to ensure that claimants' federal statutory rights may be enforced. In addition, this Article recommends that Congress consider enacting a statutory override of the probate exception.

II. MODERN APPLICATION OF THE PROBATE EXCEPTION

A. *MARKHAM V. ALLEN*: THE SUPREME COURT'S MOST RECENT RULING ON THE PROBATE EXCEPTION

The Supreme Court last addressed the probate exception in *Markham v. Allen*.[28] There, the will of a California resident had been admitted into probate and had named as legatees[29] certain persons resident in Germany.[30] Six U.S. citizens—heirs-at-law[31] of the decedent—filed a petition in state court asserting that under state law the German legatees were ineligible as beneficiaries[32] and that the U.S. heirs were thus entitled to inherit the decedent's estate.[33] The Alien Property Custodian, acting pursuant to the Trading with the Enemy Act, purported to vest himself as Custodian with all right, title and interest of the German legatees, and brought suit in federal district court against the executor of the estate and the six U.S. heirs-at-law for a determination that the U.S. claimants had no interest in

28. 326 U.S 490 (1946).

29. A legatee is one who is named in a will to take personal property. BLACK'S LAW DICTIONARY, *supra* note 11, at 897–98.

30. *Markham*, 326 U.S. at 492.

31. An "heir-at-law" is a person who inherits a deceased person's estate under state statutes of descent and distribution in the absence of a valid testamentary disposition. BLACK'S LAW DICTIONARY, *supra* note 11, at 723.

32. The state law at issue purported to limit inheritance by non-resident aliens to nationals of countries that granted reciprocal rights of inheritance to U.S. citizens. *Markham*, 326 U.S. at 492 n.1.

33. *Id.* at 492.

the estate and that, moreover, the entire estate belonged to the Custodian.[34] The district court granted judgment for the Alien Property Custodian,[35] but the Court of Appeals reversed, holding that the suit filed in federal court was barred by the probate exception.[36]

After stating the general rule that the federal courts lack jurisdiction to probate a will or to administer an estate, the Supreme Court stated yet another, general rule:

> [F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[37]

The Court clarified somewhat the meaning of the word "interfere," holding the mere fact that the state probate court—when ultimately distributing the estate—would be bound to recognize the rights adjudicated in the federal court would not constitute an interference with the state probate proceedings.[38] Thus, the effect of the declaratory judgment sought by the Custodian in the case before the Court would not be an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court. Instead, it would merely decree the Custodian's right in the property to be distributed after its administration by the state probate court.[39]

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34. *Id.*

35. *See* Crowley v. Allen, 52 F.Supp. 850 (N.D. Cal. 1943).

36. *See* Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946).

37. *Markham*, 326 U.S. at 494 (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). *See also* Sutton v. English, 246 U.S. 199, 205 (1918) (stating that "questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy"); Hess v. Reynolds, 113 U.S. 73, 76–77 (1885) (holding that suits by an executor to enforce payment of debts owed to the decedent as well as suits against the executor on obligations contracted by the decedent fall within the federal courts' grant of diversity jurisdiction); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (noting a suit by a distributee against the administrator of the estate was within the subject matter jurisdiction of the federal courts).

38. *Markham*, 326 U.S. at 494. The debt thus established, however, "must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent." Byers v. McAuley, 149 U.S. 608, 620 (1893). *Accord Waterman*, 215 U.S. at 44.

39. *Markham*, 326 U.S. at 495.

B. DEVELOPMENT OF THE PROBATE EXCEPTION IN THE LOWER COURTS

1. Lower Court Tests for Determining What Falls Within the Exception

To be sure, *Markham* provided some guidance to the lower federal courts as to the scope of the probate exception. In the wake of *Markham*, the lower courts are in agreement that the federal courts lack subject matter jurisdiction over so-called "pure" probate matters,[40] including the actual probate of a will[41] (the "procedure by which a will is proved to be valid or invalid"),[42] the administration of the estate (the process of collecting the decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs),[43] as well as obtaining an accounting of the same[44] and appointing or removing the deceased's personal representative or the attorney representing the estate.[45] Moreover, the lower courts generally agree that creditors, legatees, heirs, and other claimants may establish their claims against the estate in federal court, with the caveat that the claims so established—whether by way of a declaratory judgment in the case of a legatee or heir establishing his or her right to a share of the estate, or in an actual suit on the merits in the case of a creditor—must then take their place and share in the estate as provided for in the probate court proceedings.[46] Yet, beyond these guideposts derived from the *Markham*

40. Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988). *See* Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987) (citing *Markham*, 326 U.S. at 494; Ellis v. Davis, 109 U.S. 485 (1883)).

41. *E.g.*, *Georges*, 856 F.2d at 973; Celentano v. Furer, 602 F. Supp. 777, 780–81 (S.D.N.Y. 1985).

42. BLACK'S LAW DICTIONARY, supra note 11, at 1202.

> The matters and things to be determined upon the probate of a will, are the mental capacity of the testator, the factum of the making of the will, and its due execution according to law. The question of a construction of the will, or any clause thereof is never properly before the court in a proceeding to establish the instrument.

3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1890, at 490 (14th ed. 1918) [hereinafter 3 STORY, COMMENTARIES].

43. *E.g.*, Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *3–*5 (4th Cir. May 17, 1999) (unpublished decision); Turton v. Turton, 644 F.2d 344, 347 (5th Cir. 1981); Galion Iron Works & Mfg. Co. v. Russell, 167 F. Supp, 304, 308 (W.D. Ark. 1958) (observing that "[i]t is a well settled rule that federal courts may not engage in the general administration of an estate or disturb the possession of property within the custody of a state court").

44. *E.g.*, Bortz v. DeGolyer, 904 F. Supp. 680, 684 (S.D. Ohio 1995); Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1068 (E.D.N.C. 1988).

45. *E.g.*, Jones v. Harper, 55 F. Supp.2d 530, 533 (S.D.W. Va. 1999) (holding that "the probate exception prevents [the district court] from . . . removing the defendant and appointing the plaintiff as personal representative" because this would interfere with the administration of the estate).

46. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank, 680 F.2d 736, 740 (11th Cir. 1982) (holding that it is permissible for a federal court to adjudicate a breach of agreement to make a mutual will because it is akin to a creditor suing for breach of contract); *Turton*, 644 F.2d at 344, 347

opinion as to the scope of the probate exception, "the contours of the exception are vague and indistinct,"[47] creating substantial uncertainty as to the sorts of actions that would "interfere" with state probate proceedings. In an attempt to fill the gap left by the Supreme Court, the lower courts have developed several competing formulae for determining whether a cause of action falls within the probate exception, "endeavor[ing] to distinguish between direct interference with or control of the *res* and adjudication of the rights of individuals who have an interest in the res . . . [a] line of distinction [that] is not always clear."[48]

a. The "Nature of Claim" Test

One lower court test for determining whether a claim is sufficiently related to probate so as to fall within the probate exception examines the nature of the plaintiff's claim, with the plaintiff's position vis-à-vis the will being the dispositive factor. Under the "nature of claim" test, if the plaintiff's claim rests upon an assertion that the will is invalid (such as where the plaintiff seeks to void the will due to undue influence or lack of testamentary capacity), then the case falls within the probate exception. This is because the federal court must rule on the validity of the will in order to resolve the claim—a ruling that would directly overlap and thus "interfere" with the state court's probate process. On the other hand, if the plaintiff acknowledges the validity of the will and merely asserts a right to share in the distribution of the estate (either as a matter of interpretation of the will or in reliance on some state law forced-share provision), the federal court is free to adjudicate the claim.[49]

(explaining that a creditor can obtain a federal judgment that he has a valid claim for a given amount against the estate, and that the judgment can be asserted as res judicata in the state probate court proceedings); Holt v. King, 250 F.2d 671, 675 (10th Cir. 1957); Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952); McClendon v. Straub, 193 F.2d 596, 598 (5th Cir. 1952) (asserting that "[j]urisdiction of the [federal] court to ascertain and declare the interest of the plaintiff in the estate . . . is clearly established by a long line of cases"); Milam v. Sol Newman Co., 205 F. Supp. 649, 650, 653–54 (N.D. Ala. 1962) (holding that the federal court can adjudicate tort action against estate for injuries plaintiff sustained in auto accident); Odom v. Travelers Ins. Co., 174 F. Supp. 426, 434 (W.D. Ark. 1959) (noting that federal court can hear controverted question of debt or no debt as against the estate); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. at 309–10 (noting that federal courts can entertain suits to establish claims against the estate, but those claims must stand in line). *But cf.* White v. White, 126 F. Supp. 924, 925–26 (S.D. Idaho 1954) (holding the statement in *Markham* that the federal courts have jurisdiction to entertain suits in favor of creditors and legatees does not apply in diversity actions, and that the court must look to whether under state law, the state courts of general jurisdiction would have jurisdiction over such suits).

47. *Georges*, 856 F.2d at 973.

48. Starr v. Rupp, 421 F.2d 999, 1005 (6th Cir. 1970). *Accord* Bassler v. Arrowood, 500 F.2d 138, 142 (8th Cir. 1974); Martz v. Braun, 266 F. Supp. 134, 138 (E.D. Pa. 1967).

49. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997) (noting that no federal court has found that it has jurisdiction to invalidate a will due to lack of testamentary capacity or undue

b. The "Route" Test

A far more common lower court test examines the route that the suit would take had it been brought in state court. Under the "route" test, if the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists (assuming, of course, that the complete diversity and amount in controversy requirements are satisfied).[50] Under

influence); *Michigan Tech. Fund*, 680 F.2d at 739–40 (holding that a challenge to a will's validity is not within the federal court's subject matter jurisdiction, but that an action seeking an interpretation of a will is within its jurisdiction); Blakeney v. Blakeney, 664 F.2d 433, 434 (5th Cir. 1981) (finding no jurisdiction where there is an attack on the deceased's testamentary capacity as that goes to the will's validity); Rice v. Rice Found., 610 F.2d 471, 476 (7th Cir. 1979) (describing but not adopting rule). *See also* Gant v. Grand Lodge, 12 F.3d 998, 1003–04 (10th Cir. 1993) (noting federal courts have jurisdiction to construe wills). While this approach is often attributed to a line of Fifth Circuit cases, *e.g.*, *Rice*, 610 F.2d at 476 (citing Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 753–54 (5th Cir. 1963)); Mitchell v. Nixon, 200 F.2d 50, 51–52 (5th Cir. 1952); *Michigan Tech Fund*, 680 F.2d at 739 (citing Kausch v. First Wichita Nat'l Bank, 470 F.2d 1068, 1070 (5th Cir. 1972)), a closer examination of these cases reveals that they were applying the "route" test, discussed *infra* Part II.B.1.b. *See Kausch*, 470 F.2d at 1069–70 (examining Texas law); *Akin*, 322 F.2d at 753–55 (examining Louisiana law, and distinguishing between suits that attack the validity of a will and suits in which parties differ only as to a will's effect or construction, and exercising jurisdiction over suit to declare plaintiff's interest as a forced heir); *Mitchell*, 200 F.2d at 51–52 (examining Alabama law). *See also* Gaines v. Chew, 43 U.S. (2 How.) 619, 647–50 (1844) (holding that although the court likely lacked jurisdiction in equity to set aside a will due to fraud, the heir could bring suit under the state's forced heirship laws, since it does not require the court either to prove or to set aside the will); Robertson v. Robertson, 803 F.2d 136, 138–39 (5th Cir. 1986) (applying Arkansas law, and concluding there is federal court jurisdiction where validity of will is not contested, and where all that is sought is a declaration decedent died a resident of Louisiana, and that the plaintiff was thus entitled to forced heirship).

50. *See* Green v. Doukas, No. 99-7733, 2000 U.S. App. LEXIS 2239, at *8–9 (2d Cir. Feb. 15, 2000) (unpublished decision) (holding that the probate-exception standard is whether under state law, the claims will be cognizable only in state probate court); Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *4 (4th Cir. May 17, 1999) (unpublished decision) (noting that federal courts have no subject matter jurisdiction over matters exclusively within the jurisdiction of state probate courts); Reinhardt v. Kelly, 164 F.3d 1296, 1299–1300 (10th Cir. 1999); McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) (stating that if a state vests its courts of equity with jurisdiction to hear contested will suits, the federal courts in the state may enforce that right); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985) (holding that the federal court had no jurisdiction over breach of fiduciary duty action by beneficiaries of estate against executor because only the probate courts of the state have jurisdiction over such disputes); Moore v. Lindsey, 662 F.2d 354, 361 (5th Cir. 1981); *Rice*, 610 F.2d at 476 (describing but not adopting rule); *Bassler*, 500 F.2d at 142 (suggesting that "[w]here a claim is enforceable in a state court of general jurisdiction, the argument becomes more persuasive that federal diversity jurisdiction should be assumed") (citing Lamberg v. Callahan, 455 F.2d 1213, 1216 (1972)); Harris v. Pollack, 480 F.2d 42, 45–46 (10th Cir. 1973); *Lamberg*, 455 F.2d at 1216 (2d Cir. 1972) (setting forth the standard); Looney v. Capital Nat'l Bank, 235 F.2d 436 (5th Cir. 1956) (holding that because a declaratory judgment action could be brought in state court to have a testamentary trust declared invalid based on the rule against perpetuities, such an action also could be maintained in a federal court); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953) (citing district court cases holding that whether an action could be maintained in a state court of general jurisdiction determines whether

this standard, the scope of the probate exception varies across the federal courts according to the internal division of jurisdiction within each state between its probate courts and its courts of general jurisdiction.

c. The "Practical" Test

Judge Posner developed yet a third test for determining whether a suit, while not a "pure matter of probate," was nonetheless barred by the probate exception because it was "ancillary" to probate.[51] Under Judge Posner's "practical" test, the question of whether a suit is "ancillary" to probate—and thus within the probate exception to federal court jurisdiction—turns on whether "allowing it to be maintained in federal court would impair the policies served by the probate exception."[52] Judge Posner identified a number of practical purposes that the probate exception was designed to serve: the promotion of legal certainty (by having all issues regarding the transfer of property at death litigated in a single forum); judicial economy; and the relative expertise of state probate court judges in adjudicating probate-related questions, such as testamentary capacity.[53] Judge Posner

federal court jurisdiction exists); Sullivan v. Title Guarantee & Trust Co., 167 F.2d 393, 395 (2d Cir. 1948) (asserting that a federal court can exercise jurisdiction only if state court of general jurisdiction would exercise jurisdiction); Cmty. Ins. Co. v. Rowe, 85 F. Supp.2d 800, 805 (S.D. Ohio 1999); Johnson v. Porter, 931 F. Supp. 761, 762 (D. Colo. 1996) (stating that the issue is whether under state law, suit would be cognizable only in state probate court); Celentano v. Furer, 602 F. Supp. 777, 779 (S.D.N.Y. 1985) (stating that the standard is whether under state law, the dispute would be cognizable only in the probate court); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252 (D. Kan. 1984) (asserting that "[t]he court must determine whether under Kansas law the claims are such as would traditionally have been cognizable only in a probate court or whether the claims are such as could be asserted in a court of general jurisdiction"); Dunaway v. Clark, 536 F. Supp. 664, 670 (S.D. Ga. 1982) (stating that an "exception to the [probate exception] is present where a state by statute or custom gives parties a right to bring an action in [state] courts of general jurisdiction"); Lightfoot v. Hartman, 292 F. Supp. 356, 357–58 (W.D. Mo. 1968) (ruling that the federal court has no jurisdiction because under state law the claim is in exclusive jurisdiction of state probate court); Eyber v. Dominion Nat'l Bank of Bristol Office, 249 F. Supp. 531, 532–33 (W.D. Va. 1966) (observing that the state legislature "has not chosen to make probate a part of the general equity jurisdiction of the courts of Virginia, and it follows that a federal court sitting in the state will be limited in the same manner as the State Equity Court"); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. 304, 311–12 (W.D. Ark. 1958) (remarking that if state law does not afford a remedy in a state court of general jurisdiction, federal courts cannot assume jurisdiction); Quinlan v. Empire Trust Co., 139 F. Supp. 168, 169–70 (S.D.N.Y. 1956) (reasoning that because state courts of general jurisdiction can declare trusts and wills invalid due to undue influence, fraud, and lack of mental capacity, the federal courts likewise have jurisdiction to do so); Illinois State Trust Co. v. Conanty, 104 F. Supp. 729, 731–32 (D.R.I. 1952).

51. Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982). The Seventh Circuit had previously noted the existence of the "nature" and "route" tests but had declined to adopt either test. *See Rice*, 610 F.2d at 476.

52. *Dragan*, 679 F.2d at 715–16.

53. *Id.* at 714–15. Taken to its logical extreme the interest in judicial economy and the relative expertise of state court judges contained in Judge Posner's practical test would provide an argument for eradicating diversity jurisdiction altogether. Federal court judges sitting in diversity must often struggle

attributed the least weight to the policy of promoting legal certainty, reasoning that it is neutralized by the policy of avoiding parochial bias in favor of in-state litigants that underlies the federal courts' grant of diversity jurisdiction.[54] Under his test, the force of the other two policies varies with state law: for example, relative expertise carries greater force in states that create a specialized cadre of probate judges than in states in which probate matters are heard in courts of general jurisdiction. Similarly, judicial economy carries more weight in states that restrict the raising of a challenge to testamentary capacity to the original probate proceeding than in states allowing the issue to be raised in separate judicial proceedings.[55]

In *Dragan*, Judge Posner applied his "practical factors" test and held there was no jurisdiction over a suit brought by the heirs-at-law of the decedent against the beneficiaries of the decedent's will for tortious interference with an expectancy of inheritance.[56] Key in Judge Posner's view was the interest in judicial economy. Under Illinois law, a challenge to the validity of a will—whether characterized as a "will contest" or as a tort claim of interference with an expectancy—could be brought only in the ongoing proceeding to probate the will and within a specified time period.[57] For a federal court to exercise jurisdiction over the tort action would

to determine the meaning of state law, and it would certainly be more efficient to eliminate diversity jurisdiction entirely and have state law decided exclusively in state courts by judges more familiar with state law. Yet, the diversity statute as drafted has struck a balance between the interest in judicial economy and fairness to litigants, and it is thus difficult to see why probate-related cases should be treated any differently from other cases involving issues of state law. Subsequent cases often make mention of the fact that the probate proceeding has closed, *see e.g.*, Loyd v. Loyd, 731 F.2d 393, 397 (7th Cir. 1984); McClain v. Anthony, No. 88 C 8503, 1989 WL 44307, at *2 (N.D. Ill. Apr. 28, 1989), but this does not appear to be a formal requirement, *see e.g.*, Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982). The Supreme Court, in discussing the analogous exception to federal court jurisdiction for domestic relations matters in *Ankenbrandt v. Richards*, indicated the exception was justified by the interests in judicial economy and the relative expertise of state family court judges. 504 U.S. 689, 703–04 (1992).

54. *Dragan*, 679 F.2d at 716.

55. *Id.* at 715.

56. *Id.* at 716–17.

57. *Id.* Under Judge Posner's test, however, the probate exception does not apply where the state relegates probate matters to its courts of general jurisdiction rather than to specialized probate courts, or provides that the specific claim is not, as a matter of state law, part of the will contest and thus need not be brought exclusively in the ongoing proceeding to probate the will. *See Loyd*, 731 F.2d at 393, 396–97 (proper to exercise jurisdiction over suit brought against the estate's administrator by the decedent's widow for fraud in connection with the sale of certain real property owned by the estate, where probate matters in the state were relegated to the courts of general jurisdiction and the specific statutory provision providing for contesting alleged frauds was not limited to probate court); Georges v. Glick, 856 F.2d 971, 972–75 (7th Cir. 1988) (finding that it is proper to exercise jurisdiction over claims of legal malpractice and breach of contract brought by the decedent's heirs against the decedent's attorney as such claims are not, as a matter of state law, part of the will contest and need not be brought exclusively in the ongoing proceeding to probate the will).

undermine the state's demonstrated interest in judicial economy.[58] Relative expertise also weighed in favor of using the probate exception: undue influence over a testator is an issue with which Illinois state judges have greater expertise.[59] But unlike courts that follow the "nature of the claim" test, Judge Posner did not hold that such challenges are categorically outside the federal courts' grant of diversity jurisdiction. Instead, he held that if Illinois state law allows an action challenging the validity of a will to be brought as a separate tort action before a different judge than the one who probated the will, then the policy of judicial economy would lose its force.[60]

2. Application of the Probate Exception

a. Inter Vivos and Testamentary Trusts

While a great deal of property is transferred at death by way of devises in a will, an increasing number of people transfer their property using "will substitutes," including trusts.[61] In a trust, property is held by a trustee at the request of the owner of the property (the settlor) for the benefit of a third party, the beneficiary.[62] In a trust relationship, the trustee holds legal title to the property, but has an equitable duty to hold the property for the benefit of the beneficiary.[63] There are, broadly speaking, two different types of trusts: inter vivos trusts and testamentary trusts. Inter vivos trusts are created and take effect during the settlor's lifetime.[64] Thus, the

58. *Dragan*, 679 F.2d at 716.

59. *Id.*

60. *Id.* at 717. In *Hamilton v. Nielsen*, 678 F.2d 709 (7th Cir. 1982), published just two weeks prior to *Dragan*, Judge Posner found that the federal courts had subject matter jurisdiction over an action brought by a beneficiary of a testamentary trust against the executors for negligent breach of fiduciary duty. *Id.* at 709–10. Judge Posner reasoned that because "such cases when brought in state courts in Illinois are brought in its courts of general jurisdiction rather than in courts with a specialized probate jurisdiction . . . retention of federal diversity jurisdiction over such cases will not interfere with a state policy of channeling all probate-related matters to specialized courts." *Id.* at 710. The court went on to hold, however, that this would not allow federal courts to probate wills, even though that is done in state courts of general jurisdiction, reasoning that "[p]robate remains a peculiarly local function which federal courts are ill equipped to perform." *Id.* The court did note that the suit did not seek to enjoin the probate proceedings, involve the validity or construction of the will, or try to change the distribution of the estate assets. *Id.*

61. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 770 (2000).

62. BLACK'S LAW DICTIONARY, *supra* note 11, at 1508.

63. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959); BLACK'S LAW DICTIONARY, *supra* note 11, at 1509.

64. BLACK'S LAW DICTIONARY, *supra* note 11, at 1511. A special kind of inter vivos trust is the "pour-over trust": it is created during the settlor's lifetime, but the settlor's assets are not immediately

property is transferred to the trustee while the settlor is still alive. In contrast, a testamentary trust is created by a will and does not take effect until the settlor dies.[65]

Legal disputes frequently arise in connection with trusts. For example, the beneficiaries might bring suit against the trustee for breach of fiduciary duty or conversion, demanding an accounting, removal of the trustee, or both.[66] Alternatively, heirs who are not named as beneficiaries in the trust instrument might bring a suit challenging the validity of the trust (usually alleging lack of capacity or undue influence),[67] alleging that the trust instrument failed to comply with the requirements of state law;[68] or alleging that the settlor had revoked the trust during her lifetime.[69]

The probate exception is frequently raised as a defense when such actions are filed in federal court. Most courts have rejected this defense, holding the probate exception does not apply to trusts.[70] Often no explanation is given for this distinction, but a few courts have relied on the fact that trusts, unlike wills, did not fall within the exclusive jurisdiction of the ecclesiastical courts in eighteenth-century England, but instead were within the jurisdiction of the High Court of Chancery, and thus fall within the statutory grant of equity jurisdiction to U.S. federal courts.[71] A few

transferred to the trustee. Rather, upon the settlor's death, the trust receives property by way of a devise from the settlor's will, usually by way of the residual estate. *Id.* at 1512.

65. BLACK'S LAW DICTIONARY, *supra* note 11 at 1513.

66. *See, e.g.*, Georges v. Glick, 856 F.2d 971, 972–73 (7th Cir. 1988); Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *1 (D. Conn. Oct. 23, 1997); Weingarten v. Warren, 753 F. Supp. 491, 492–93 (S.D.N.Y. 1990); Barnes v. Brandrup, 506 F. Supp. 396, 397–98 (S.D.N.Y. 1981); Rousseau v. U.S. Trust Co. of N.Y., 422 F. Supp. 447, 450–51 (S.D.N.Y. 1976).

67. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1007–08 (4th Cir. 1997); Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision); Davis v. Hunter, 323 F. Supp. 976, 977–78 (D. Conn. 1970); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

68. *E.g.*, Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 887–89 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992).

69. *E.g.*, Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1065 (E.D.N.C. 1988).

70. *See Schonland*, 1997 WL 695517, at *2 (stating that "the probate exception does not apply to trusts"); *Weingarten*, 753 F. Supp. at 494–95 (stating that "[t]he probate exception to diversity jurisdiction does not apply to trusts"); *Lancaster*, 752 F. Supp. at 888 (holding the probate exception does not apply to challenges to the validity of a trust); *Barnes*, 506 F. Supp. at 399 (holding the probate exception does not apply because the case "involves a probate court's jurisdiction over trusts, not wills"). *See also Turja*, 118 F.3d at 1006–09 (implicitly distinguishing between a challenge to the validity of a will and a challenge to a trust).

71. *See Barnes*, 506 F. Supp. at 399 ("Controversies concerning trusts were not in 1789 part of the exclusive jurisdiction of the ecclesiastical courts."); Knoop v. Anderson, 71 F. Supp. 832, 837–38 (N.D. Iowa 1947) ("At the time of the adoption of the Constitution of the United States, the English High Court of Chancery had jurisdiction as to the enforcement of trusts."). For a detailed discussion of

courts have also suggested that since a challenge to the validity of a trust has the effect of adding assets to a probate estate (as contrasted with a challenge to the validity of a will, which has the effect of taking assets away from the probate estate), challenges to inter vivos transfers of property do not have the effect of interfering with the probate of the estate.[72]

At least one court has expressly rejected this distinction, reasoning that a trust is little more than a will substitute and thus ought not to be treated differently.[73] Other courts, while not directly rejecting the distinction, have done so implicitly by subjecting challenges to trusts to the same tests[74] that they employ for determining whether a challenge to a will falls within the probate exception.[75] Still other courts implicitly have drawn a line between testamentary and inter vivos trusts, applying the probate exception to the former but not to the latter without providing justification for drawing such a distinction.[76]

b. Suits Arising Under Federal Law and Statutory Interpleader Actions

In the typical probate-related case, the basis for federal court subject matter jurisdiction will be diversity of citizenship,[77] as the cause of action is usually either a breach of contract claim[78] or a garden-variety state common law claim—such as fraud,[79] breach of fiduciary duty,[80]

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the relationship between U.S. federal court subject matter jurisdiction and the distribution of jurisdiction among British courts in the eighteenth century, *see infra* Part III.A.

72. *See* McKibben v. Chubb, 840 F.2d 1525, 1530–31 (10th Cir. 1988); Gearheard v. Gearheard, 406 F. Supp. 704, 705–06 (S.D. Miss. 1976).

73. *See* Georges v. Glick, 856 F.2d 971, 974 n.2 (7th Cir. 1988).

74. *See supra* Part II.B.1.

75. Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision) (applying "route" test in challenge to validity of inter vivos trust); *McKibben*, 840 F.2d at 1530–31 (applying "route" test in challenge to validity of inter vivos transfer of property); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104 (D. Or. 1957).

76. *See* Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 450–60 (S.D.N.Y. 1976). *See also Jackson*, 153 F. Supp. 104 (treating a challenge to the validity of a testamentary trust as a challenge to the validity of the will itself).

77. *See, e.g.*, Ashton v. Paul, 918 F.2d 1065, 1072 (2d Cir. 1990).

78. *See, e.g.*, *Georges*, 856 F.2d at 971, 974–75 (adjudicating breach of contract claims against the attorney who drafted will by beneficiaries); Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 740 (11th Cir. 1982) (reviewing claim of breach of contract to execute mutual wills); Lamberg v. Callahan, 455 F.2d 1213, 1214–15 (2d Cir. 1972).

79. *See, e.g.*, Green v. Doukas, 2000 U.S. App. LEXIS 2239, at *2 (2d Cir. Feb. 15, 2000) (unpublished decision); Newland v. Newland, 82 F.3d 338, 339 (10th Cir. 1996); Vizvary v. Vignati, 134 F.R.D. 28, 29 (D.R.I. 1990); Dinger v. Gulino, 661 F.Supp. 438, 443 (E.D.N.Y. 1987).

negligence,[81] conversion,[82] unjust enrichment,[83] tortious interference with expectancy of inheritance,[84] or wrongful death[85]—against the administrator (personally or in a representative capacity) or the beneficiaries named in the will. Indeed, the probate exception is frequently referred to as the probate exception to federal court *diversity* jurisdiction,[86] and it has only been in diversity cases that the Supreme Court has actually applied the probate exception to deny subject matter jurisdiction over a suit.[87]

The probate exception, however, is sometimes raised in cases where federal jurisdiction is not based on diversity. *Markham*, for example, was a federal question case—although notably one in which the Court refused to apply the probate exception. In addition to diversity cases, there are a handful of probate-related suits that fall within the subject matter jurisdiction of the federal courts either because they state a claim under federal statutory or constitutional law[88] or because they fall within the interpleader jurisdiction[89] of the federal courts.

i. Statutory Interpleader Actions

80. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2–*3; *Newland*, 182 F.3d at 339, 767 F.2d at 306; *Bortz*, 904 F. Supp. at 683–84; *Dinger*, 661 F. Supp. at 443; Tarlton v. Townsend, 337 F. Supp. 888, 892 (D. Miss. 1971); Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967).

81. *See, e.g.*, *Newland*, 82 F.3d at 339; *Georges*, 856 F.2d at 974–75; *Dinger*, 661 F. Supp. at 443.

82. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2; *Newland*, 82 F.3d at 339; Harder v. Rafferty, 709 F. Supp. 1111, 1113 (M.D. Fla. 1989).

83. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2.

84. *See, e.g.*, *id.*; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *1, *5 (N.D.Ill. Sept. 18, 1995); Beren v. Ropfogel, Civ. A. No. 91-2425-O, 1992 WL 373935, at *1 (D.Kan. Nov. 18, 1992).

85. *See, e.g.*, *Harder*, 709 F. Supp. at 1113.

86. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 739 (11th Cir. 1982).

87. Sutton v. English, 246 U.S. 199 (1918); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Ellis v. Davis, 109 U.S. 485 (1883); *In re* Broderick's Will, 88 U.S. 503 (21 Wall.) (1874); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

88. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

89. The federal interpleader statute provides the federal courts with subject matter jurisdiction over interpleader actions filed by anyone in possession of money or property exceeding $500 in value, provided that two or more adverse claimants of diverse citizenship claim or may claim to be entitled to the money or the property and that the stakeholder deposits the money or property with the court upon filing suit. 28 U.S.C. § 1335 (1994). Only minimal diversity is required: so long as at least two of the stakeholders are of different citizenship, it does not matter that there is overlap in the citizenship of the claimants. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967). The purpose of the federal interpleader statute is to "provide a forum in which a holder of money admittedly owing to someone and claimed by several parties may have the question of entitlement to the fund settled in one proceeding and be himself discharged from all further liability as to the fund." Mass. Mut. Life Ins. Co. v. Central-Penn. Nat'l Bank, 362 F. Supp. 1398, 1401 (E.D. Pa. 1973).

A probate-related interpleader action typically arises when an individual or entity is in possession of certain assets and there is dispute as to whether the assets even belong to the deceased's estate.[90] All courts considering the matter have refused to apply the probate exception in the context of federal statutory interpleader actions.[91] The primary rationale for non-application of the probate exception is that by definition the action cannot impermissibly "interfere" with the probate proceedings because the assets at issue are not yet within the possession of the state probate court; indeed, the very purpose of the action is to determine whether or not the assets belong to the estate.[92] Moreover, even if an interpleader action would "interfere" with the state probate proceedings, some courts hold that Congress' express authorization to the federal courts to issue injunctions in aid of federal interpleader actions against proceedings to adjudicate rights to the property in state court proceedings[93] justifies any such interference.[94]

ii. Suits Arising Under Federal Law

Suits grounded in the RICO statute,[95] the Ku Klux Klan Act [96] and the Foreign Judicial Assistance Statute[97] have involved what might be deemed

90. *E.g.*, *Ashton*, 918 F.2d 1065 (2d 1990) (adjudicating a case in which the executor was in possession of assets that plaintiffs claimed were part of the estate); Union Nat'l Bank of Texas v. Gutierrez, 764 F. Supp. 445, 445–46 (S.D. Tex. 1991) (denying jurisdiction over question of whether money in a bank account with a "payable on death" designation was part of probate estate or was the property of the "payable on death" designee).

91. *Ashton*, 918 F.2d at 1072 n.6 ("We have found no reported decision in which the probate exception has foreclosed a federal court from exercising interpleader jurisdiction.").

92. *Id.*; *Union National Bank of Texas*, 764 F. Supp. at 445–446. This is akin to the justification for excluding challenges to trusts from the probate exception since both interpleader actions and challenges to trusts have the effect of adding assets to the probate estate. *See supra* note 72 and accompanying text.

93. *See* 28 U.S.C. § 2361 (1994) ("In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.").

94. *Ashton*, 918 F.2d at 1072 ("In the face of such clear legislative direction on an issue of federal/state comity, there is little room for courts to infer that the murky probate exception prevents the injunction in the instant matter even at the cost of frustrating the statutory purpose.").

95. 18 U.S.C. §§ 1961–68. (1994).

96. 42 U.S.C. § 1983 (1994).

97. 28 U.S.C. § 1782(a) (1994) "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." *Id.* A suit has also arisen under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1994), but in the only case involving such an action, the court found that the action at issue did not fall within the definition of the word "probate" for purposes of the exception. *See* Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 805–06 (S.D. Ohio 1999).

to be probate-related matters. Typically, the RICO suits involve claims that some combination of the attorneys who drafted the will, the beneficiaries of the will, and the executor of the will conspired to defraud the decedent of his or her assets and to cheat the decedent's heirs out of their inheritance.[98] In contrast, the § 1983 claims usually involve allegations of wrongdoing by the state probate court judge.[99] The Foreign Judicial Assistance Statute suits involve requests for U.S. judicial assistance in obtaining evidence located in the United States for use in foreign probate proceedings.[100] Courts that have adjudicated these three kinds of claims have unanimously held that the probate exception does not apply to suits arising under federal statutes,[101] although none has provided a rationale for distinguishing such claims from those grounded in diversity jurisdiction.[102]

98. *See* Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 668 (11th Cir. 1991) ("alleging the defendants conspired to 'plunder' the assets of [the decedent] and cheat the [heirs] out of their inheritance."); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252–56 (D. Kan. 1984) (alleging the defendants "engaged in a pattern of racketeering activities . . . whereby defendants identify and target elderly rich people for the purpose of defrauding them, their heirs and legatees out of their estates").

99. *See* Williams v. Adkinson, 792 F.Supp. 755, 757 (M.D. Ala. 1992) (alleging state probate court judge denied plaintiff's rights to substantive and procedural due process and to equal protection, and that the state court decision violated the Takings Clause).

100. *See In re* Application of Horler, 799 F. Supp. 1457, 1459 (S.D.N.Y. 1992) (seeking evidence in aid of Swiss probate court proceedings).

101. *Glickstein*, 922 F.2d at 672 ("the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims"); *Cmty. Ins. Co.*, 85 F.Supp.2d at 806 ("[T]he probate exception has been applied only in the context of diversity jurisdiction. The Court's research has yielded no instances where a federal court has declined to exercise subject matter jurisdiction, under this doctrine, when based on a federal question."); *Williams*, 792 F. Supp. at 761 n.9 ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); Powell v. American Bank & Trust Co., 640 F. Supp. 1568, 1574–75 (N.D. Ind. 1986) (holding, in suits arising under RICO and the federal securities laws, "that the probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *Maxwell*, 593 F. Supp. at 252–56 (applying the probate exception to state law claims, but not to a federal RICO claim).

102. In the analogous domestic relations exception to federal court jurisdiction, it is an open question whether the exception is limited to diversity actions or whether it extends to federal question suits raising federal statutory or constitutional questions. *Compare* United States v. Bailey, 115 F.3d 1222, 1231 (5th Cir. 1997) (holding the exception applies only in diversity suits), *and* United States v. Johnson, 114 F.3d 476, 481 (4th Cir. 1997), *and* Flood v. Braaten, 727 F.2d 303, 307 (3d Cir. 1984), *with* Thompson v. Thompson, 798 F.2d 1547, 1558 (9th Cir. 1986) (holding the exception applies even to federal question cases if it would deeply involve the federal court in adjudicating domestic matters) *and* Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983) (applying the exception where a state court action concerning similar issues is pending); Hernstadt v. Hernstadt, 373 F2d 316, 318 (2d Cir. 1967) (holding the exception applies where the federal court would necessarily become enmeshed in domestic factual disputes).

C. SUMMARY

The competing shorthand formulae developed by the lower federal courts for determining the scope of the probate exception are on a collision course with one another. Suppose an heir brings an action to have a will declared invalid for lack of testamentary capacity or undue influence. The "nature of claim" test suggests that this falls within the probate exception. But what if under state law such a challenge could be brought in a state court of general jurisdiction? The "nature of claim" test would still classify such a claim as falling within the probate exception, but both the "route" test and the "practical" test would reach the opposite conclusion. And what result if the suit involved not a challenge to the validity of the will, but instead sought a declaration of the parties' rights under the will? Here, the "nature of claim" test would allow a federal court to exercise diversity jurisdiction even if such matters were by state law committed to the exclusive jurisdiction of specialized probate courts, but under the "route test"—and probably the "practical" test as well—such disputes would likely fall within the probate exception. Moreover, what result where the suit involves not a will but instead some sort of will substitute, such as an inter vivos trust, or if the suit arises under federal law? None of the tests provides answers to these questions, and the lower courts have resolved these questions on an ad hoc basis without setting forth a principled rule of decision.

These deficiencies in the lower court formulae make them unacceptable substitutes for a multi-faceted inquiry into the statutory and Article III limitations on federal court subject matter jurisdiction, the existence of a justiciable case or controversy, the applicability of the doctrine of *custodia legis* or the various doctrines of prudential abstention, and the constraints placed on federal courts by the *Erie* doctrine. Accordingly, this Article now turns to such a multi-faceted inquiry.

III. SCOPE OF FEDERAL COURT SUBJECT MATTER JURISDICTION OVER PROBATE AND PROBATE-RELATED MATTERS

A. STATUTORY LIMITATIONS ON FEDERAL COURT SUBJECT MATTER JURISDICTION

It is well-established that federal courts are courts of limited subject matter jurisdiction, subject not only to the constraints imposed by Article III,[103] but also limited to exercising subject matter jurisdiction over only those disputes for which Congress has provided a statutory grant of authority.[104] Yet many legal scholars, lawyers, and law students would be surprised to learn that federal courts lack subject matter jurisdiction over probate matters. The text of Article III contains no express limitation on the federal judicial power.[105] Moreover, neither the statutory grant of federal question jurisdiction[106] nor the grant of diversity jurisdiction[107] contains any such limitation. Thus, where the parties to a state court probate proceeding are diverse, and the value of the estate exceeds $75,000, one would expect the case could be filed in federal court or removed to federal court.

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103. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

104. Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (asserting that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute").

105. *See* U.S. CONST. art. III, § 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. Cf. Ankenbrandt v. Richards, 504 U.S. 689, 695 (1992) (noting that in the parallel context of the domestic relations exception to federal court jurisdiction the plain language of Article III, § 2 "contains no limitation on subjects of a domestic relations nature").

106. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

107. *See* 28 U.S.C. § 1332(a) (1994).

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . .as plaintiff and citizens of a State or of different States.

Id. The only mild restriction on subject matter jurisdiction over diversity suits that are related to probate matters is contained in 28 U.S.C. § 1332(c)(2), which states that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."

The genesis of the probate exception traces back to the granting of diversity jurisdiction to the federal courts by the Judiciary Act of 1789 ("1789 Act").[108] The 1789 Act gave the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought and a citizen of another State."[109] Courts have construed this language as limiting the grant of jurisdiction to those suits that would have been within the jurisdiction of the English courts of common law ("suits . . . at common law") and the English High Court of Chancery ("suits . . . in equity") in 1789.[110] Most courts have found that the probate of wills and the administration of estates were outside the jurisdiction of both the common law courts and the High Court of Chancery in eighteenth-century England and instead were vested in England's ecclesiastical, or religious, courts and thus outside the statutory grant of subject matter jurisdiction to U.S. federal courts.[111] Accepting for the moment that the scope of diversity jurisdiction under the 1789 Act was limited in this manner, one might find it strange that it would be relevant to the modern diversity statute, since the modern statute replaces the phrase "all suits of a civil nature at common law or in equity" with the seemingly more expansive phrase "all civil actions."[112] This change, however, has been described as a mere simplification of the original language in the First Judiciary Act and not an enlargement of the jurisdiction granted by the 1789 Act.[113] So it was that in *Markham v. Allen*[114] the Supreme Court set

108. Ch. 20, § 13, 1 Stat. 73 (1789).

109. *Id.* § 11 (emphasis added).

110. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990); Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988); Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979); Starr v. Rupp, 421 F.2d 999, 1004 (6th Cir. 1970); Akin v. La. Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987); Barnes v. Brandrup, 506 F. Supp. 396, 398–99 (S.D.N.Y. 1981); Martz v. Braun, 266 F. Supp. 134, 135 (E.D. Pa. 1967). *Cf.* Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982) (chronicling the historical basis of the domestic relations exception).

111. *Ashton*, 918 F.2d at 1071; *Georges*, 856 F.2d at 973; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; *Starr*, 421 F.2d at 1004; *Akin*, 322 F.2d at 751; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *4 n.3 (N.D.Ill. Sept. 18, 1995); *Hudson*, 682 F. Supp. at 1219; *Barnes*, 506 F. Supp. at 398–99; *Martz*, 266 F. Supp. at 135. *See also Lloyd*, 694 F.2d at 491 (holding the same with regard to the domestic relation's exception).

112. *See* 28 U.S.C. § 1332(a) (1994).

113. *See Lloyd*, 694 F.2d at 491–92; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 107–08 (D. Or. 1957). *See also* Reviser's Note to 28 U.S.C. § 1332 (1994) (noting the change was made for the purpose of conforming with the unification of law and equity as provided for in the Federal Rules of Civil Procedure). The statutory grant of federal question jurisdiction also uses the phrase "all civil actions," 28 U.S.C. § 1331 (1994), and while no grant of federal question jurisdiction was contained in the Judiciary Act of 1789, the predecessors to

forth the historical basis[115] for the exception, stating in dicta, "a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789, did not extend to probate matters."[116]

When examined in light of one of the principles animating Article III's grant of diversity jurisdiction—protecting out-of-state litigants from the actual or perceived prejudice of state court judges[117]—the probate exception is questionable even if it applied only to the probate of a will, and not also to matters ancillary to probate. For "[i]f there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract."[118] For the most part, probate proceedings take place before specialized state courts,[119] and there is no evidence suggesting that the potential for bias against out-of-state litigants is any less than it is in state courts of general jurisdiction. If anything, the signs point in the other direction: judges who sit in some probate courts need not even be lawyers or have legal training[120] and probate courts have a reputation for bias and corruption.[121] Thus,

§ 1331 also used the phrase "all suits of a civil nature, at common law or in equity." *See* Reviser's Note to 28 U.S.C. § 1331 (1994).

114. 326 U.S 490 (1946).

115. *See Georges*, 856 F.2d at 973.

116. *Markham*, 326 U.S. at 494. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509–11 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619, 645 (1844).

117. *See, e.g.*, Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) As Marshall observed:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id.

118. *Dragan*, 679 F.2d at 714.

119. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 993–1008 (1944) [hereinafter Simes & Basye, *Probate Court I*].

120. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 138–40 (1944) [hereinafter Simes & Basye, *Probate Court II*].

121. *See* CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 71 (1980) (noting that the New York probate courts have a history as "factories of corruption"); Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation As Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178–81 (1999) (documenting instances of bias). *Cf.* CHEMERINSKY, *supra* note 27, at 290 (discussing bias concerns in diversity jurisdiction in general and citing Jerry Goldman

relegating suits brought pursuant to complex and significant federal statutes such as RICO or § 1983 to potentially biased and untrained state probate court judges by invoking the exception seems anathematic.[122]

Moreover, one can criticize the manner in which the Court has construed the statutory grants of subject matter jurisdiction to the federal courts. First, in light of the United States' long-standing view that state and theocratic institutions should remain separate, it is unlikely that the drafters of the 1789 Act would have thought of federal jurisdiction as divided among common law, equity, and ecclesiastical law. Indeed, it is likely that they thought the latter category was subsumed by the former two.[123] Second, it is unclear why this 1789 Act language should be interpreted as referring to English court practice rather than to the practice of U.S. colonial courts regarding probate and administration in the eighteenth century.[124] Third, assuming eighteenth-century English practice is the appropriate reference point, it is not at all clear that the jurisdiction of the ecclesiastical courts over probate matters was entirely exclusive of the courts of common law and equity.[125] Accordingly, this Section of the

& Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97–99 (1980)); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965)) (discussing studies indicating that 40–60 percent of litigants who file diversity cases in federal court cite fear of local bias as a motivating factor).

122. Indeed, the "judicial economy" prong of Judge Posner's "practical" test would suggest suits raising questions of federal law should *not* be subject to the probate exception. *See supra* notes 51–60 and accompanying text.

123. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990) ("Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history and an anachronistic vestige of the Reformation."); *Dragan*, 679 F.2d at 713 (observing that "there was no ecclesiastical court in America"). *See also Lloyd*, 694 F.2d at 491–92 (noting, in the context of the domestic relations exception to federal court jurisdiction, that "it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts").

124. *See Dragan*, 679 F.2d at 713. *See also Lloyd*, 694 F.2d at 492 (noting that the justification of the domestic relations exception "assumes without discussion that the proper referent is English rather than American practice").

125. *See Dragan*, 679 F.2d at 713 (noting ecclesiastic jurisdiction did not extend beyond personal property, and that the chancery court had extensive jurisdiction over inheritance of land). *Accord Ashton*, 918 F.2d at 1071. This inquiry may be to a large degree academic because in the analogous domestic relations exception, the Court has held that even though subsequent historical discoveries have made it clear that the High Court of Chancery possessed certain jurisdiction with respect to alimony and divorce actions, this would not alter the scope of the exception. Indeed, the Court concluded that the "domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948," when Congress substantively amended the statute but did not make mention of domestic relations, with full knowledge that the Court had interpreted the current language as excluding such suits; thus, it impliedly accepted

Article examines colonial practice as well as English practice in the late eighteenth century.

1. Division of Jurisdiction over Probate-Related Matters in British Courts in the Eighteenth Century

a. Overview

Probate-related matters in eighteenth-century England were not all relegated to the ecclesiastical courts. Rather, the complete administration of an estate could and often did require judicial proceedings in three different courts:[126] the ecclesiastical, common-law, and chancery (or equity) courts.[127] With respect to some probate-related matters, these courts exercised jurisdiction exclusively of one another, whereas in some such matters they exercised concurrent jurisdiction.[128] This section examines the jurisdiction of these three types of courts over probate-related matters.

b. Probate of Wills

i. Personal and Real Estate Distinguished

In examining the probate jurisdiction of England's ecclesiastical courts, a distinction must be made between a decedent's real estate and personal estate. The ecclesiastical courts had exclusive jurisdiction to probate wills of personal property,[129] but no jurisdiction to probate wills of

the gloss on the diversity statute. Ankenbrandt v. Richards, 504 U.S. 689, 699–700 (1992). Similar reasoning apparently justifies the probate exception. *See Dragan*, 679 F.2d at 713 (noting that "Congress's failure to repeal the exception when reenacting from time to time the grant of diversity jurisdiction to the federal courts indicates congressional acquiescence").

126. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

127. *Id.* at 967.

128. Where chancery and the ecclesiastical courts had concurrent jurisdiction, once one of the courts had taken jurisdiction of a case, the other would not interfere provided that the same remedies and protections were available. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 806, at 190–91 (14th ed. 1918) [hereinafter 2 STORY, COMMENTARIES].

129. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 625 (7th ed. 1956); ROSCOE POUND, ORGANIZATION OF COURTS 78, 136 (1940); 2 R.S. DONNISON ROPER & HENRY HOPLEY WHITE, A TREATISE ON THE LAW OF LEGACIES *1791 (2d ed. 1848); 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968. While chancery would generally not allow a suit against an executor before the will was probated in the ecclesiastical court, in rare circumstances, arising out of the misconduct of the executor or for the protection of the property, it would exercise jurisdiction over suits against the executor by interested parties prior to probate. *Id.* at *1796. Thus, where the will was destroyed or concealed by the executor and spoliation or suppression was plainly proved, chancery may have had jurisdiction over a suit brought by a legatee. *Id.* at *1796–97. Moreover, where the executor engaged in misconduct, misapplied the assets, or was bankrupt or insolvent, chancery had the power to appoint a receiver after probate. *Id.* at *1797–98. In

real property.[130] Indeed, wills of real property were operative without any probate whatsoever, with title passing to the devisee[131] immediately on the death of the testator.[132] Any subsequent disputes with regard to title fell within the jurisdiction of the common law courts.[133] Where a will disposed of both personalty and realty, the ecclesiastical court's jurisdiction was effective only with respect to the personal estate.[134] Life estates were deemed to be real property, and thus within the jurisditction of the common law courts, but where the testator's interest in real property was less than freehold (such as a term of years), it was deemed to be personalty and thus within the jurisdiction of the ecclesiastical courts.[135]

c. Challenges to the Validity of Wills

As with probate, a distinction must be made between challenges to wills of personal estate and challenges to wills of real estate. The ecclesiastical courts had jurisdiction to set aside wills of personal estate that had been probated, and their jurisdiction in that regard was exclusive.[136] There was no direct method of setting aside a will of land, however. Thus, an heir or other interested party wishing to test the validity of a devise of land had to bring an action to try title—such as ejectment or trespass—against the devisee-in-possession in a common law court.[137] While the jurisdictions of the ecclesiastical and the common law courts were thus exclusive in these regards, special situations arose in which chancery at least indirectly exercised jurisdiction over actions challenging wills of both real and personal property.

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the case of fraud, chancery could appoint a receiver for the purpose of preventing the destruction of the testator's property even while the litigation over the probate of the will was pending in the ecclesiastical court. *Id.*

130. HOLDSWORTH, *supra* note 129, at 625; ROPER & WHITE, *supra* note 129, at *1791 ("The jurisdiction of the Ecclesiastical Courts [was] confined to testaments merely, or in other words to dispositions of personalty: if, therefore, real estate [were] the subject of a devise to be sold for payment of debts, or portions, these Courts [could not] hold plea in relation to such disposition."); Simes & Basye, *Probate Court II*, *supra* note 120, at 121. Where a party to a proceeding before an ecclesiastical court believed that the court had exceeded its jurisdiction, a writ of prohibition could be obtained from the common law court. Simes & Basye, *Probate Court I*, at 972.

131. A "devisee" is one who is named in a will to inherit lands or other real property. BLACK'S LAW DICTIONARY, *supra* note 11, at 453.

132. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

133. POUND, *supra* note 129, at 78. *See also infra* Part III.A.1.c.

134. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

135. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *95 n.20 (1898); ROPER & WHITE, *supra* note 129, at *1791.

136. *See* ROPER & WHITE, *supra* note 129, at *1787.

137. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

i. Quieting Title

The method for proving and challenging the validity of wills of real estate in England posed a number of problems. First, because no court had jurisdiction to admit a will of land into probate, the only means of testing the validity of such a will was by an ejectment or trespass action, yet if the devisee was in possession, he could not bring such an action against himself, but had to instead await an action brought by an heir.[138] Moreover, devisees were sometimes subject to a never-ending stream of ejectment and trespass actions brought by different heirs.[139]

Thus, it was possible for the devisees and other interested parties to bring an action in chancery to establish the validity of a will of real estate in order to avoid interminable litigation and to give security and repose to title.[140] When such suit was brought, chancery would direct an issue of *devisavit vel non*[141] to ascertain the validity of the will, and would direct new trials to be held in a common law court until it was satisfied that there was no reasonable ground for doubt. At that point it would issue a perpetual injunction against the heirs at law and others restraining them from contesting its validity in the future.[142]

ii. Estoppel

During the course of proceedings in either chancery or a common law court, a party might either admit the validity of a will or admit facts material to its validity, but would subsequently attempt to contest its validity in proceedings before the ecclesiastical court.[143] Under such circumstances, chancery would hold the party to that admission, and would permanently enjoin that party from proceeding to challenge the will in the ecclesiastical court.[144]

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138. 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1158, n.16 (5th ed. 1941) [hereinafter 4 POMEROY].

139. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

140. *Id.*

141. *Devisavit vel non* is:

> The name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will.

BLACK'S LAW DICTIONARY, *supra* note 11, at 452.

142. 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

143. *See* ROPER & WHITE, *supra* note 129, at *1788–91; 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485.

144. *See* sources cited *supra* note 143.

iii. Fraud

Although chancery lacked jurisdiction to set aside a will of personal estate probated in an ecclesiastical court where the grant of probate was obtained due to fraud, under certain circumstances chancery could either convert the person who committed the fraud into a constructive trustee with respect to such probate, or oblige him to consent to a repeal or revocation of the probate in the ecclesiastical court from which probate was granted.[145]

Intrinsic Fraud: Kerrich v. Bransby

In *Kerrich v. Bransby*, the decedent had left virtually all of his personal and real estate to Kerrich, whom he named as his executor by a will dated March 18, 1715.[146] Kerrich succeeded in having the will admitted into probate in the Prerogative Court of Canterbury[147] in common form,[148] and subsequently, in a contest over the validity of the instrument with the decedent's father in that same court, the will was determined to be valid.[149] Thereafter, the decedent's father filed a bill in chancery against, inter alia, Kerrich, in which he set forth two previously executed wills that his son had made in which he left his entire real and personal estate to his father, claimed that the March 18, 1715 will was obtained by fraud on the decedent, and asked chancery to set aside that will.[150] On appeal, the High Court of Parliament held, however, that chancery could not set aside a will for fraud. The portion of the will that dealt with personal estate could be

145. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1788 Roper and White note that there is:

> a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but the person disinherited thereby.

Id.

146. 7 Brown P.C. 437 (1727).

147. The Prerogative Court of Canterbury exercised probate jurisdiction over the estates of persons owning property located in more than one diocese within the province of Canterbury, persons owning property located in both the Provinces of Canterbury and York, and those who died overseas. BLACKSTONE, *supra* note 135, at 1076; PETER WALNE, ENGLISH WILLS: PROBATE RECORDS IN ENGLAND AND WALES WITH A BRIEF NOTE ON SCOTTISH AND IRISH WILLS 19–20 (1964).

148. When someone died testate, there were two different procedures by which the executor could have the will probated: in common (noncontentious) form, or in solemn (contentious) form. When a will was probated in common form, notice was not issued to the heirs or to other interested parties, and actual evidence of due execution of the will was not required. Within 30 years thereafter, the executor or any other interested person could seek to have the will probated in solemn form, which required notice to interested parties as well as testimony as to the due execution of the will. An order admitting a will to probate in the solemn form was binding on all parties who appeared in the proceeding or who were given notice. Simes & Basye, *Probate Court I*, *supra* note 119, at 969.

149. *Id.* at 437–38.

150. *Id.* at 438.

set aside only in the ecclesiastical court, while the portion of it dealing with real estate could be set aside in a common law court by issue of *devisavit vel non*.[151]

Extrinsic Fraud: Barnesly v. Powel

In *Barnesly v. Powel*,[152] the High Court of Chancery limited the reach of the *Kerrich* decision. In *Barnesly*, the defendants had forged the decedent's will of his real and personal estate, and by misrepresenting to the decedent's next of kin that the forgery was in fact genuine, had obtained from the next of kin a deed in which he consented to the probate of said will.[153] The defendants presented the deed to the ecclesiastical court, which admitted the will into probate as to the personal estate.[154] In a subsequent proceeding tried in a court of common law, a jury determined that the will was a forgery.[155] In chancery, while not disputing the jury's finding as to their interest in the decedent's real estate, the defendants, citing *Kerrich*, protested that only the ecclesiastical court had jurisdiction to set aside the will as to the decedent's personal estate.[156] The High Court agreed chancery lacked the power to set aside a will of personal estate for fraud, that the power to do so was lodged solely in the ecclesiastical court, and that the inconsistency between a jury at common law finding the will to be invalid as to the real estate and the ecclesiastical court having found the will to be valid as to the personal estate, although unsettling, was one which the law tolerated.[157]

Yet, the court distinguished between fraud or forgery in obtaining a will (i.e., intrinsic fraud), as was present in both *Kerrich* and *Barnesly*, and fraud in obtaining *probate* of a will (i.e., extrinsic fraud), which was present only in *Barnesly*.[158] The court reasoned that while the ecclesiastical court had jurisdiction to set aside a will, it lacked jurisdiction to determine the validity of a deed under hand and seal such as that obtained from the testator's next of kin.[159] Having thus determined that the deed was fraudulently obtained, the court reasoned that because equity could take away benefits to which a person was entitled if the person was

151. *Id.* at 437, 443. *Accord* 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 913, at 583–84 (5th ed. 1941) [hereinafter 3 POMEROY].
152. 1 Ves. Sen. 119 (1748), 1 Ves. Sen. 284 (1749).
153. 1 Ves. Sen. 119, 119–20; 1 Ves. Sen 284, 284, 287–88.
154. 1 Ves. Sen. 284, 284, 287–88.
155. *Id.* at 284.
156. *Id.* at 285–86.
157. *Id.* at 287.
158. *Id.* at 287–88.
159. *Id.* at 288.

guilty of wrongdoing, the court could declare the defendants constructive trustees for the plaintiff for an amount equal to the value of the personal estate.[160] Because there were in fact other prior wills, however, the validity of which had not yet been determined in the ecclesiastical courts, the chancery court decreed that the defendants must consent in the ecclesiastical court to a revocation of the probate of the latter will, but be given the opportunity to prove that the prior wills—which also gave them a stake in the decedent's estate—were valid.[161]

Thus, in determining whether chancery would declare the beneficiary of a fraudulent will a trustee for those who have been defrauded, the eighteenth-century British courts appear to have drawn a line between extrinsic and intrinsic fraud: Only if the fraud is extrinsic (i.e., a fraud practiced on a party to prevent the presention of that party's case in the probate proceedings) will relief be granted; intrinsic fraud, such as the use of perjured testimony or a false will in the probate proceedings, will not suffice.[162]

d. Appointment and Removal of Administrator/Personal Representative

The ecclesiastical courts had exclusive jurisdiction to appoint an administrator (or personal representative) for the estate to dispose of the decedent's personal estate.[163] And while chancery had the primary

160. *Id.* at 289. Equity's powers in this regard presumably would apply with equal force to the real estate as well, but the *Barnesly* court did not reach this issue since there was no longer a dispute between the parties as to the disposition of the real estate.

161. *Id.* at 289–90. In *Gaines v. Chew*, the Supreme Court relied on *Barnesly* in a suit alleging that the executors fraudulently set up for probate the decedent's older will and suppressed the decedent's subsequently executed will. 43 U.S. (2 How.) 619, 627 (1844). While holding that a federal court sitting in equity lacked the authority to set up the subsequent will and set aside the probate of the former, the Supreme Court nonetheless ordered the defendants to respond to the plaintiff's inquiries about the circumstances surrounding the two wills. *Id.* The Court suggested such answers could be used as evidence in the proceedings before the state probate court to establish the latter will and revoke the former. *Id.* The Court also held that the lower federal court could order the parties to go before the probate court and consent to the probate of the latter will and revocation of the former one, and suggested that the inherent powers of a federal equity court could empower it to probate the latter will. *Id.* at 646–47. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 517–19 (1874) (suggesting a federal court sitting in equity could provide a remedy in a case involving fraud if the time for challenging the will in the probate court had passed and the plaintiffs could not by that time have discovered the fraud within that time).

162. 3 POMEROY, *supra* note 151, § 913, at 583–86. *Cf.* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 985–86 (3d ed. 1996) (noting that U.S. courts distinguish between intrinsic and extrinsic fraud in deciding whether to enforce foreign judgments).

163. HOLDSWORTH, *supra* note 129, at 626–27; POUND, *supra* note 129, at 136. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

authority to appoint guardians for individuals and for the property of minors, the ecclesiastical courts had concurrent jurisdiction with respect to personalty.[164]

e. Administration of Estates

The ecclesiastical courts formally had jurisdiction to "administer" the deceased's personal estate,[165] but they did not order distribution of the estate.[166] Rather, the personal representative appointed by the ecclesiastical court would pay the debts of the deceased and then distribute the residue in accordance with the terms of the will.[167] Although the ecclesiastical courts had previously administered estates themselves and made the distributions, because their conduct in doing so had been negligent and in fact fraudulent—clergy as executors and administrators converted goods to their own use—Parliament limited their powers of administration to appointing an administrator from among the relatives of the deceased and delegating powers to that person.[168]

Unlike the power to admit wills of personal estate into probate and to appoint personal representatives, the ecclesiastical courts' jurisdiction over administration was not exclusive but was instead concurrent with chancery.[169] Chancery's jurisdiction in this regard was invoked by the filing of a bill by a creditor or a distributee seeking to have the estate administered in chancery.[170] Chancery would then issue notices to creditors, enjoin actions by creditors in common law courts, and bring in assets and distribute them to creditors and legatees or next of kin.[171]

The rationale for chancery's jurisdiction over administration in a given case was two-fold. First, the administrator of an estate was in effect a constructive trustee for the creditors, legatees and distributees of the

164. Simes & Basye, *Probate Court II* , *supra* note 120, at 130. The power in general to appoint guardians for the mentally ill, however, was within chancery's jurisdiction. *Id.* at 132.

165. *See* POUND, *supra* note 129, at 78.

166. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

167. *Id.*

168. HOLDSWORTH, *supra* note 129 at 627; William Searle Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, *in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255, 304 (Ass'n of Am. Law Sch. ed., 1908).

169. *See* ROPER & WHITE, *supra* note 129, at *1793; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery in general would not interfere if the ecclesiastical court was already engaged in administration. ROPER & WHITE, *supra* note 129, at *1793.

170. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

171. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134 n.4 ("Where equity has taken jurisdiction of an administration, it may proceed to distribution and relief as in probate."); Simes & Basye, *Probate Court I*, *supra* note 119, at 973.

deceased, and chancery, as explained below,[172] had jurisdiction to enforce trusts.[173] Second, there were often special circumstances, such as the need to take accounts and compel discovery of assets,[174] or to provide a simple, adequate, and complete remedy, that warranted chancery exercising jurisdiction.[175] In addition to chancery's jurisdiction to administer and settle the decedent's estate, it had the power to decide incidental questions relating to the construction and enforcement of wills of personal property.[176]

The procedures of chancery were thus well-suited to deal with the complicated equities that might arise in the administration of an estate,[177] and stood in sharp contrast to the limited procedures available in the ecclesiastical courts.[178] In addition, the sixteenth and seventeenth centuries witnessed a rapid decay in the jurisdiction of the ecclesiastical courts as the common law court justices, who were jealous of the ecclesiastical courts, effectively crippled them by way of issuing writs of prohibition.[179] Thus, while the ecclesiastical courts in theory retained concurrent jurisdiction over the administration of estates, with time their jurisdiction was, in practice, limited to the granting of probate and to the issuance of letters of

172. *See infra* Part III.A.1.g.

173. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, §§ 728–731, at 132–34.

174. While chancery could not act upon a testamentary instrument until proven in the ecclesiastical court, it could act on a bill for discovery of assets before the will was proven or while it was the subject of litigation in the ecclesiastical court. ROPER & WHITE, *supra* note 129, at *1792.

175. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 133. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. In common law courts, nothing more could be done than to establish the debt of the creditor: if there was any controversy as to the existence of the assets and discovery was required, or if the assets were not of a legal nature, or if a marshalling of the assets was necessary to effect due payment of the creditor's claim, resort to chancery was necessary. 2 STORY, COMMENTARIES, *supra* note 128, § 732, at 134. Moreover, while the ecclesiastical court could compel the administrator to provide an accounting, it lacked the power to require the administrator to prove or swear to the truth of it. *Id.* § 733, at 135.

176. 4 POMEROY, *supra* note 138, § 1155, at 461. Courts of equity also had the power to construe and enforce wills of real as well as personal property to the extent that they created, or their dispositions involved the creation of, trusts; however, they had no jurisdiction to interpret wills of real property that bequeath purely legal estate, as that fell within the jurisdiction of the common law courts. *Id.* Chancery's jurisdiction to construe wills was incident to its general jurisdiction over trusts, and it would never entertain a suit brought solely for the purpose of interpreting the provisions of a will unless further equitable relief was also sought. *Id.* § 1156, at 462.

177. HOLDSWORTH, *supra* note 129, at 629.

178. For example, orders of the ecclesiastical court were normally enforced by excommunication; where this proved ineffective, an attachment could be sought from chancery imprisoning the party until the ecclesiastical court's order was obeyed, but it was only through chancery that the ecclesiastical court could so act. Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

179. HOLDSWORTH, *supra* note 129, at 629.

administration[180]—the actual administration of estates took place in chancery with far greater frequency.[181]

f. Suits for Legacies and Debts

As a general rule, the ecclesiastical courts[182] and chancery[183] exercised concurrent jurisdiction over suits for legacies:[184] in all instances, any legacy recoverable in an ecclesiastical court was also recoverable in chancery.[185] Certain types of legacies, however, only could be sued for in chancery. Among these were suits over legacies of land; as with other probate-related matters, the ecclesiastical courts' jurisdiction was limited to personalty.[186] Chancery also exercised jurisdiction exclusive of the ecclesiastical courts over suits in which a husband sought to obtain payment of his wife's legacy and suits which involved a legacy to a child, for only chancery had the power to ensure that the interests of the wife and the child, respectively, were adequately protected.[187] In addition, chancery's jurisdiction was also exclusive where the bequest of the legacy

180. *Id.*

181. Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery would not interfere if the ecclesiastical court was first possessed of the administration. ROPER & WHITE, *supra* note 129, at *1793.

182. In those cases where the ecclesiastical court had jurisdiction, and a common law defense was raised (such as payment as a defense in a suit for a legacy), the ecclesiastical court was required to proceed according to the rules of the common law (i.e., one witness would suffice instead of the two required under ecclesiastical practice), or a prohibition could have been be obtained in the common law courts. ROPER & WHITE, *supra* note 129, at *1792.

183. When suit was brought in chancery to recover on a legacy, chancery had the power to interpret the language effecting the gift in question, although frequently chancery would send the case out of chancery for an opinion of the courts of common law where a question of mere law arose, but this was within the discretion of chancery and certainly was not done if the construction was clear. *Id.* at *1803–04.

184. BLACKSTONE, *supra* note 135, at *98; 2 STORY, COMMENTARIES, *supra* note 128, § 797, at 186.

185. ROPER & WHITE, *supra* note 129, at *1793; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 187–88. The same rationales that justified chancery's exercise of jurisdiction over the administration of estates justify chancery's exercise of jurisdiction over suits by legatees. *See supra* text accompanying notes 172–75. *See also* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 188.

186. 2 STORY, COMMENTARIES, *supra* note 128, § 809, at 191. Where a testator devised that the executor should sell his lands and that the legatee should be given a portion of the proceeds, and the executor failed to do so, the ecclesiastical court lacked jurisdiction over a suit by the legatee for payment of the legacy as it was considered to be not a legacy testamentary but rather one out of land. ROPER & WHITE, *supra* note 128, at *1791.

187. BLACKSTONE, *supra* note 135, at *95 n.20; 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, §§ 805, 807, at 190–91.

involved the execution of express or implied trusts[188] (including charitable trusts),[189] where the assets were equitable, or where the remedy could only be enforced under the process of chancery, such as where a full discovery of assets was required.[190] In all such cases, chancery had the power to grant injunctions to protect its exclusive jurisdiction.[191]

Under certain circumstances, a legacy could be sued upon in a court of common law. First, if a legatee altered the nature of his demand by changing it into a debt or a duty (such as by accepting a bond from the executor for payment of the legacy), the legatee had the option to sue either in the ecclesiastical court on the legacy or in a common law court on the debt.[192] Second, although a specific legacy[193] contained in a will could normally be sued upon only in the ecclesiastical courts or in chancery,[194] once the executor "accepted" the legacy by performing some overt act[195] indicating that the property was set aside for the legatee, legal title vested in the legatee at law irrevocably, and he could bring a replevin or trover action in a common law court to assert his rights to the property.[196] The

188. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188. Chancery's jurisdiction to enforce the execution of trusts was exclusive not only of the ecclesiastical courts, but also of the common law courts. 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188–89.

189. ROPER & WHITE, *supra* note 129, at *1796.

190. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 808, at 191.

191. ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189. Chancery would, as a general matter, issue an injunction in any case involving a legacy in which the ecclesiastical courts could not exercise jurisdiction in a manner adequate to protect the just rights of all the parties concerned. *Id.* § 804, at 189–90.

192. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1799 (stating that "the obligee might sue for the legacy in the Ecclesiastical Court, or at Common Law upon the bond . . . the acceptance of the bond for payment of the legacy, had not totally destroyed the nature of it").

193. A specific legacy is:

> A legacy or gift by will of a particular specified thing . . . . In a strict sense, a legacy of a particular chattel, which is specified and distinguished from all other chattels of the testator of the same kind . . . . A legacy is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other.

BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

194. 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186.

195. In some instances, the law would presume assent by the executor based on certain facts. In the case of a legacy of real property, where a devisee had possessed land for 39 years, it was presumed to be with the assent of the executor, and thus a suit over that legacy was cognizable in a court of common law. *Id.* § 800, at 187 n.1.

196. Simes & Basye, *Probate Court I*, *supra* note 119, at 971. *See* ROPER & WHITE, *supra* note 129, at *1799–*1802; 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186–87. If it subsequently appeared that there was a deficiency in the assets to pay the creditors, chancery had jurisdiction to interfere and make the legatee refund in the proportion required, whether the bequest was real or

rule was otherwise where a general legacy[197] was at issue, however, and remedy could only be had by way of an action in chancery[198] or an ecclesiastical court.[199]

Finally, contract actions that survived the death of the decedent could be brought either on behalf of or against the decedent in a common law court, with the personal representative having the capacity to sue and be sued on the decedent's behalf.[200]

g. Trusts

In eighteenth-century England, the entire system of trusts[201] was within the exclusive jurisdiction of chancery,[202] and chancery would thus

personal. *See* ROPER & WHITE, *supra* note 129, at *1801; 2 STORY, COMMENTARIES, *supra* note 128, § 804, at 190.

197. A general legacy is a "pecuniary legacy which is payable out of general assets of estate of testator, being bequest of money or other thing in quantity and not separated or distinguished from others of the same kind." BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

198. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

199. *Id.* For a time, it was thought that an action of assumpsit could be brought in a court of common law, but it was later determined that such actions could not be maintained. *Id. See also* 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 187 (noting that "though they have not been directly overturned in England, they have been doubted and disapproved by judges as well as by elementary writers"). As Blackstone noted:

> Cases have occurred in which *courts of common law* have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumpsit* or undertaking by the executor to pay them. But it seems to be the opinion of modern judges that this jurisdiction extends to cases of *specific* legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. It seems to be the better opinion that when the legacy is not specific, but merely a gift out of the *general* assets, and particularly when a *married woman* is the legatee, a court of common law will not entertain jurisdiction to compel payment of such a legacy, upon the ground that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit, of doing.

BLACKSTONE, *supra* note 135, at *95 n.20 (citations omitted) (emphasis in original). The general concern with allowing such actions at law appears to have been that common law courts lacked the power that chancery had to impose terms on the parties, such as in a suit by a husband for a legacy given to his wife, where there was a need to ensure that he made provisions for her and her family. *See* ROPER & WHITE, *supra* note 129, at *1797–98.

200. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

201. A trust is:

> An equitable right, title, or interest in property real or personal, distinct from the legal ownership thereof . . . the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute trusts which Courts of Equity will compel the legal owner as trustee to perform in favor of the cestui que trust or beneficiary.

2 STORY, COMMENTARIES, *supra* note 128, § 1304, at 648–49. In Roman law, trusts were not enforceable at law, but depended solely on the honor of those to whom they were entrusted, thus making chancery the appropriate court to exercise jurisdiction over their enforcement. *Id.* §§ 1305–06, at 649.

never refuse to adjudicate matters relating to trusts.[203] In addition to exercising jurisdiction over express trusts, chancery would impress and exercise jurisdiction over constructive trusts in certain situations.

In some instances, a person would die intestate relying on a promise by an heir or next of kin that he would hold the property devolving on him for the benefit of a third person or convey it to such person.[204] Similarly, a person might procure from the testator a devise or bequest through fraudulent representations that he would carry out the true purpose of the testator and apply the devise or bequest for the benefit of a third person.[205] In such instances, chancery would enforce the obligation by impressing a constructive trust on the purported beneficiary.[206]

If someone died intestate, the ecclesiastical court had the power to compel a distribution.[207] But if the testator drafted a will yet made no disposition of the residue of his personal estate, the executor was entitled at law to the surplus of the personal estate.[208] Under such circumstances, it was chancery, and only chancery, that could decree the executor to be the trustee for the next of kin and to distribute the residue of the estate among them.[209]

2. Colonial Practice

Early in the colonial period, it was not uncommon for the colonies to probate wills and administer estates legislatively rather than judicially.[210] Probate jurisdiction would often be vested in the colonial governors and their councils or the General Court,[211] which would often act as the highest tribunal for probate matters, and the governor of the colony was often made the "ordinary" or "supreme ordinary."[212] The governor as ordinary would sometimes delegate this authority to deputies or "surrogates;"[213] such was

202. BLACKSTONE, *supra* note 135, at *439; 1 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 151, at 206 (5th ed. 1941); 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134; §§ 1300–03, at 647–48.

203. BLACKSTONE, *supra* note 135, at *95.

204. 4 POMEROY, *supra* note 138, § 1054, at 122.

205. *Id.*

206. *See id.*

207. *See* ROPER & WHITE, *supra* note 129, at *1795.

208. 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

209. *See* ROPER & WHITE, *supra* note 129, at *1795; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

210. POUND, *supra* note 129, at 79.

211. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

212. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

213. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

the case in New Hampshire,[214] Massachusetts,[215] Maryland,[216] New Jersey,[217] and New York.[218] In Virginia[219] and Connecticut,[220] the power was exercised by the General Court. In Rhode Island, the jurisdiction was also exercised legislatively, but by the individual town councils instead of the state legislative body.[221] A few of the colonies, however, including North Carolina,[222] South Carolina,[223] and Georgia,[224] vested probate and administrative authority in their established superior or inferior courts,

214. POUND, *supra* note 129, at 79.

215. In 1691, the royal charter put the power over probate and administration in the colony governor who appointed surrogates to perform this function. *See* Wales v. Willard, 2 Mass. 120, 124 (1806) (Parsons, C.J.). *See also* Sean M. Dumphy, 21 MASS. PRAC. PROBATE LAW & PRACTICE § 1.1 (2d ed. 1997).

216. Under the system in place in Maryland in the early eighteenth century, Commissioners or Delegates of the governor were responsible for taking probate. *See* Act of 1715, ch. 39, §§ 2, 29 (Md.); Smith's Lessee v. Steele, 1 H. & McH. 419 (Md. Prov. 1771). *See also* POUND, *supra* note 129, at 79.

217. New Jersey had a Prerogative Court held by the provincial governor as ordinary with surrogates appointed throughout the state. POUND, *supra* note 129, at 79.

218. *Id.* at 80. New York had a Prerogative Court held by the governor as ordinary or to delegated surrogates. *See In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. 1862); Weston v. Weston, 14 Johns 428 (NY.Sup. 1817). Its jurisdiction, however, was not entirely exclusive: The Court of Common Pleas had jurisdiction to probate wills and grant letters of administration in remote areas of the state and where the size of the estate was minimal. *See In re* Brick's Estate, 15 Abb. Pr. at 12; POUND, *supra* note 129, at 80.

219. Virginia's statute provided:

> That the said General court shall take cognisance of, and are hereby declared to have power and jurisdiction to hear and determine, all causes, matters and things whatsoever, relating to or concerning any person or persons, ecclesiastical or civil, or to any persons or things of what nature so ever the same shall be, whether brought before them by original process, appeal from any inferior court, or by any other ways or means whatsoever.

Act of Assembly, ch. 6 (Va. 1748). *See* Bagwell v. Elliot, 23 Va. 190 (1824) (noting the general court exercised all jurisdiction, including ecclesiastical jurisdiction); Godwin v. Lunan, Jeff. 96 (Va.Gen. 1771) (holding the General Court of Virginia possessed general ecclesiastical jurisdiction); Spicer v. Pope, Jeff. 43 (Va.Gen. 1736) (noting the General Court has "a three fold jurisdiction, as a court of equity, a court of law, and it has also a jurisdiction of testamentary matters").

220. *See* STATE OF CONNECTICUT JUDICIAL BRANCH WEBSITE, PROBATE COURT HISTORY, *available at* http://www.jud.state.ct.us/probate/history.html (last visited Sept. 24, 2001) [hereinafter PROBATE COURT HISTORY].

221. *See* Williams v. Herrick, 25 A. 1099, 1101 (R.I. 1893) (noting King Charles' charter gave each town council the power "as judges of probate, to take the probate of wills and testaments, and grant administration, and all other matters relating thereto"). *See also* POUND, *supra* note 129, at 80.

222. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. The jurisdiction was concurrent with the Inferior Court of Pleas and the Quarter Sessions with appeal either to the Court of Chancery or to the Superior Court. POUND, *supra* note 129, at 80 & n.3.

223. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978.

224. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (noting Georgia had only common law courts).

while Pennsylvania[225] and Delaware[226] created Orphans' Courts vested with probate jurisdiction.

Toward the end of the colonial period, virtually all of the colonies that had not already done so vested probate and administration jurisdiction in some sort of specialized court separate from their courts of equity and common law.[227] New Hampshire,[228] Massachusetts,[229] and Connecticut[230] developed specialized probate courts. The system by which the governor appointed surrogates in New York[231] and New Jersey[232] resulted in the

225. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79; Act of 1713 § 1, 1 St. Laws 98; Good v. Good, 7 Watts. 195 (Pa. 1838); App. v. Dreisbach, 2 Rawle 287 (Pa. 1830); McPherson v. Cunliff, 11 Serg. & Rawle 422 (Pa. 1824).

226. POUND, *supra* note 133, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79.

227. Nonetheless, in many instances the general courts continued to exercise some probate jurisdiction even where separate courts were created. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

228. By act of the legislature, probate courts were given exclusive jurisdiction over probate in 1789. *See* Act of Feb. 3, 1789, Laws of N.H. In 1793, the state constitution was amended to so state. *See* N.H. CONST. art. 80 (stating that "[a]ll matters relating to the probate of wills, and granting letters of administration, shall be exercised by the judges of probate"). Following this early practice of the governor appointing commissioners to probate wills, probate judges in New Hampshire continued to be appointed by the governor. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

229. POUND, *supra* note 129, at 79; George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 204, 209 (David H. Flaherty ed. 1969); Simes & Basye, *Probate Court I*, *supra* note 119, at 1002. Appeal from these probate judges, however, was still to the governor and council. 21 SEAN M. DUMPHY, MASSACHUSETTS PRACTICE SERIES, PROBATE LAW AND PRACTICE § 1, 1 (2d ed. 1997). In 1784, in reliance on a provision in the 1780 Constitution, the legislature enacted a statute providing for the appointment of judges of probate courts with appeal to the Supreme Judicial Court. *See* MASS. CONST., art. V (establishing probate courts and providing that "all . . . appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provision"); Peters v. Peters, 62 Mass. (8 Cush.) 529, 541–42 (1851); DUMPHY, *supra* note 229, at § 1.1.

230. THE FEDERALIST NO. 83 (Alexander Hamilton); POUND, *supra* note 129, at 79. In 1666 Connecticut lodged the probate power in county courts, but created separate probate courts within each county in 1698. In the early eighteenth century, Connecticut created separate probate districts throughout the state. Judge F. Paul Kurmay, *Connecticut's Probate Courts*, QUINNIPIAC PROB. L.J. 379, 379–80 (1999). Appeals from the probate districts were made to the superior courts. *See* POUND, *supra* note 129, at 79.

231. In 1778, the power over probates and administration was vested by the legislature exclusively in a single judge of the Court of Probate, equal to that of the colonial governor as judge of the Prerogative Court under prior practice, but without the power to appoint surrogates. Act of Mar. 16, 1778, ch. 12, 1 LAWS OF NEW YORK (1886). *See generally In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. 1862); Weston v. Weston, 14 Johns 428 (NY. Sup. Ct. 1817); Goodrich v. Pendleton, 4 Johns. Ch. 549 (N.Y. Ch. 1820). In 1787, the legislature passed an act providing that the governor, with the consent of council, could commission a surrogate for each county with the power over probate and administration, and providing that appeals could be brought from the surrogates to the Court of Probates. Act of Feb. 20, 1787 ch. 38, 2 LAWS OF N.Y. (1886). *See generally Brick's Estate*, 15 Abb. Pr. at 12; *Goodrich*, 4 Johns. Ch. at 549. In the post-colonial era, the practice of appointing surrogates

development of surrogates' courts in both of those states, with New Jersey also creating a separate orphans' court and New York a separate court of probate. Maryland[233] established a system of separate orphans' courts. Virginia[234] and North Carolina[235] vested their county courts with jurisdiction over probate. South Carolina[236] created separate courts of ordinary and vested them with probate jurisdiction; eventually, Georgia[237] did as well, although not until 1799. Rhode Island,[238] however, maintained

was replaced in most places with popular elections in each county. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

232. The 1776 state constitution constituted the governor as the Ordinary or Surrogate-general. N.J. CONST. of 1776, ¶ VIII; ALFRED C. CLAPP & DOROTHY G. BLACK, 7A NEW JERSEY PRACTICE, WILLS AND ADMINISTRATION § 1915 (Rev. 3d ed. 1984) [hereinafter CLAPP] who continued to appoint deputies or surrogates until 1784, when an act was passed directing the governor as ordinary to appoint one surrogate in each county, and limiting the authority of the surrogate to the county in which the surrogate was appointed to serve. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; CLAPP, *supra* note 232, §1915. The 1784 Act also created the separate Orphan's courts and limited the surrogates to granting probate of wills and administering estates where there was no dispute; once a dispute arose, only the Orphans' courts adjudicated the dispute. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; *In re* Whitehead's Estate, 94 A. 796, 797–98 (N.J.Prerog. Ct. 1915); *In re* Coursen's Will, 4 N.J. Eq. 408, 412–15 (N.J. Prerog. Ct. 1843). The Orphan's court was vested with both chancery and prerogative jurisdiction, and was created to remedy defects in the power of the Prerogative court with respect to the accountability of executors, administrators, and guardians. Wood v. Tallman's Ex'rs, 1 N.J.L. 153 (N.J. 1793). The Orphan's court had jurisdiction over all disputes relating to wills, administration, accounting. *Id.*; Act of Dec. 15, 1784, ch. 19 § 15, Patt. Laws 135, 139. Appeal from the Orphan's court was to the governor as ordinary with respect to errors of fact; judicial review was available, however, as to questions of law. *Wood*, 1 N.J.L. at 153.

233. Act. of Feb., 1777, ch. 8, 1 LAWS OF MARYLAND (1799); Simes & Basye, *Probate Court I*, *supra* note 119, at 979. Initially, the Orphan's court had the power to direct any disputed issue to be tried in a plenary proceeding and to call a jury to assist it in determining any issue. *See* Act of Feb., 1777, ch.8, § 9, 1 LAWS OF MARYLAND (1799). In 1798 the law was revised to require that, at the request of any party before the Orphans' court, an issue be tried in a court of common law. *See* Act of 1798, ch. 101, 2 LAWS OF MARYLAND (William Kilty ed., 1800).

234. Act of 1661, Act 64, 2 LAWS OF VIRGINIA 90 (William Waller Hening ed. 1823); Act of 1645, Act 9, 1 LAWS OF VIRGINIA 302–03 (William Waller Hening ed. 1823); Act of 1711, ch. 2, 4 LAWS OF VIRGINIA 12, 12–13 (William Waller Hening ed. 1814).

235. Act of 1789, ch. 308, § 1, 1 LAWS OF THE STATE OF NORTH CAROLINA 611, 611–12 (Hen. Potter, J.L. Taylor, & Burt Yancey eds., 1821); Williams v. Baker, 4 N.C. 401 (N.C. 1817). While the superior courts for a brief period of time had original jurisdiction over probate, Simes & Basye, *Probate Court I*, *supra* note 119, at 981, by the end of the colonial period its jurisdiction over probate was strictly appellate. Act of 1777, ch. 2, §§ 62, 63.

236. Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. Gen. Sess. 1794). In 1721, before vesting the probate power in the Courts of Ordinary, South Carolina conferred probate jurisdiction upon it county and precinct courts. Simes & Basye, *Probate Court I*, *supra* note 119, at 981. Although the probate of wills as to personalty was exclusively in the courts of ordinary, while validity as to lands was in the common law courts, the parties could agree to have both questions tried in a common law court. Heyward v. Hazard, 1 S.C.L. (1 Bay) 335 (S.C. Ct. Com. Pl. Gen. Sess. 1794).

237. *See* GA. CONST. of 1798, art. III, § 6; Harrell v. Hamilton, 6 Ga. 37, 38 (Ga. 1849). In 1778 Georgia conferred this jurisdiction on its superior courts, although probate powers were also vested in a register of probate for each county in 1777. Simes & Basye, *Probate Court I*, *supra* note 119, at 981.

probate jurisdiction in its town councils, a practice that continues to the present.[239]

The influence of England and the ecclesiastical courts on colonial practice is evident. The very names of the various colonial courts responsible for probate—prerogative, surrogate, and ordinary—show the influence of the Church of England.[240] Indeed, many of these courts regarded themselves as ecclesiastical courts,[241] and they generally applied ecclesiastical law and followed ecclesiastical procedural rules.[242] Moreover, at least in the early stages of colonial development, the colonial courts of probate were merely given the power to probate wills and grant administration, following the English practice with respect to the ecclesiastical courts. Resort had to be made to the equity or common law courts to sell land to pay debts, to partition land in connection with distribution, to contest or to consture wills, or to adjudicate contested claims against an estate.[243]

Yet, while the English model influenced the early development of U.S. probate courts, mixed with these influences were attempts to establish single courts that possessed the combined powers of the English ecclesiastical, common law, and chancery courts.[244] One such example is the Confederate Congress' enactment of The Northwest Ordinance of 1787, which allowed for wills of real estate located in the Northwest Territory,[245]

238. *See* Act of Mar. 5, 1663, ACTS AND LAWS OF RHODE ISLAND 5 (James Franklin ed., 1730); Act of June, 1768, ACTS AND LAWS OF RHODE ISLAND 8 (Solomon Southwick ed., 1772). They also had the power to appoint guardians. *See* Tillinghast v. Holbrook, 7 R.I. 230, 248–50 (1862) (discussing the 1742 act).

239. Today the town councils have the option of appointing a lawyer to serve as a judge of probate. R.I. GEN. LAWS, §§ 8–9–2. 8–9–4 (1956); Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

240. *See, e.g.*, *In re* Roth's Estate, 52 A.2d 811, 815 (N.J. Pregrog. Ct. 1947) (noting the term "Prerogative Court" was the title of one of the courts of the Archbishop of Canterbury, and that "ordinary" refers to one who exercised ecclesiastical jurisdiction in the Church of England); BLACKSTONE, *supra* note 135, at 1076; REMBAR, *supra* note 121, at 71; WALNE, *supra* note 147, at 19; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

241. *See* Kao v. Hsia, 524 A.2d 70, 73 n.7 (Md. 1987); *In re* Roth's Estate 52 A.2d at 815. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (describing the probate court in New York as "analogous in certain matters to the spiritual courts in England").

242. *E.g.*, Finch v. Finch, 14 Ga. 362, 366–68 (Ga. 1853); Lewis v. Maris, 1 Dall. 278, 279–80 (Pa. 1788).

243. Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79. *See, e.g.*, Act of Oct. 1785, ch. 61, § 11, 12 LAWS OF VIRGINIA 140, 142 (William Waller Hening ed., 1823) (providing the validity of a will admitted to probate could be challenged in chancery up to seven years later).

244. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

245. The "Northwest Territory" referred to the area directly northwest of the Ohio River. *See* ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, preamble (July 13, 1787).

with the caveat that "such wills be duly proved,"[246] a rejection of the English distinction between personal and real property with respect to the requirement of probate. Indeed, the practice growing out of the Northwest Ordinance gave much more weight to the probate process with respect to devises of land;[247] and today, virtually all states provide that wills of land, as well as personal property, must be admitted to probate, with the probate courts now having jurisdiction over both the decedent's land and personal estate.[248]

3. Summary

If one accepts the historical gloss on Congress' statutory grant of diversity jurisdiction to the federal courts, then anything that fell within the exclusive jurisdiction of England's ecclesiastical courts in 1789 falls outside the federal courts' grant of diversity jurisdiction. Because the probate of wills of personal estate and actions to set aside the same, as well as the appointment and removal of a decedent's personal representative, fell within the exclusive jurisdiction of the British ecclesiastical courts in 1789, the refusal of federal courts to undertake either of these activities is consistent with the historical interpretation of Congress' statutory grant of diversity jurisdiction. Similarly, the fact that chancery, and at times the courts of common law, exercised jurisdiction over suits for legacies and debts in eighteenth-century England is consistent with the modern practice, endorsed in *Markham*, of allowing federal courts to "entertain suits 'in favor of creditors, legatees, and heirs' and other claimants against a decedent's estate."[249]

Fidelity to the historical interpretation of Congress' statutory grant of subject matter jurisdiction to the federal courts, however, compels the conclusion that the federal courts have jurisdiction to entertain challenges to the validity of wills of real property, since those fell within the exclusive jurisdiction of England's common law courts in 1789. Likewise, federal courts should possess jurisdiction over suits involving trusts, as those fell within the exclusive jurisdiction of chancery in eighteenth-century England. Moreover, suits involving allegations of extrinsic fraud in obtaining probate of a will should be actionable in federal court proceedings. Finally, federal courts should be able to administer estates,

246. *Id.* § 2.

247. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 249 (2d. ed. 1985).

248. 4 POMEROY, *supra* note 138, § 1158 at 471 n.16; Simes & Basye, *Probate Court II*, *supra* note 120, at 122–23.

249. Markham v. Allen, 326 U.S. 490, 494 (1946).

given that chancery exercised concurrent jurisdiction over administration in England in 1789. Thus, even if one accepts the use of historical English practice as a guide, the scope of the probate exception is much narrower than many courts and commentators have assumed.

B. CONSTITUTIONAL LIMITATIONS ON SUBJECT MATTER JURISDICTION

The Supreme Court has not directly addressed the question whether the probate exception is merely a gloss on Congress' statutory grants of subject matter jurisdiction to the federal courts or if it is constitutionally mandated by Article III. The Court's decisions with respect to both the domestic relations exception to federal court jurisdiction—the only other implied exception to federal court jurisdiction[250]—as well as the now-defunct Act of March 2, 1867 ("1867 Act"),[251] however, provide strong support for the conclusion that the probate exception is merely a statutory gloss and is not constitutionally mandated.

1. Domestic Relations Exception

In *Ankenbrandt v. Richards*, a mother brought suit on behalf of her children against her ex-husband and his girlfriend, seeking monetary damages for alleged sexual and physical abuse of the children.[252] The district court concluded that it lacked subject matter jurisdiction over the suit based on the domestic relations exception to diversity jurisdiction, and the court of appeals affirmed.[253]

The Supreme Court rejected the argument that the domestic relations exception was constitutionally mandated.[254] In so holding, the Court relied on the plain language of Article III, § 2 of the Constitution, which "contains no limitation on subjects of a domestic relations nature,"[255] and concluded that the "domestic relations exception exists as a matter of statutory construction."[256] Since the domestic relations exception to federal

250. Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1840 (1983).

251. Act of March 2, 1867, ch. 196, 14 Stat. 558.

252. 504 U.S. 689, 691 (1992).

253. *Id.* at 692.

254. *Id.* at 699–700.

255. *Id.* at 695. Moreover, it reasoned that since it had previously found that it had jurisdiction over appeals from territorial courts involving divorce, and that it had upheld the exercise of original jurisdiction by federal courts in the District of Columbia over divorce actions, the power to hear such cases must be within Article III's grant of subject matter jurisdiction. *Id.* at 696–97.

256. *Id.* at 699–700. In his concurring opinion, Justice Blackmun expressed skepticism about the majority's conclusion, writing that:

court jurisdiction, like the probate exception, is based on the understanding that historically such matters were vested exclusively in the ecclesiastical courts, it would seem to follow that the probate exception is likewise not constitutionally mandated.[257]

2. Act of 1867

Section 11 of the Judiciary Act of 1789 provided the federal circuit courts[258] with original jurisdiction over "suits of a civil nature at common law or in equity" between a citizen of the state in which the suit is brought and a citizen of another state, if the amount in controversy exceeded five hundred dollars.[259] Parallel to this was Section 12, which provided that if a plaintiff from one state filed suit against a defendant from another state in a state court located in the plaintiff's home state, and the amount in controversy exceeded $500, the defendant could remove the action to federal court provided he filed a petition for removal upon his first appearance in state court.[260] This system of giving the plaintiff the option

> Like the diversity statute, the federal-question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal-question cases to 'Cases, in Law and Equity.' Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal-question jurisdiction . . . on the federal courts in any matters involving divorces, alimony, and child custody.

Id. at 715 n.8 (Blackmun, J., concurring).

257. *See Ankenbrandt*, 504 U.S. at 699–700; Ohio *ex rel* Popovici v. Agler, 280 U.S. 379, 383–84 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 591–93 (1859).

258. Historically, the federal circuit courts were very different from the modern federal circuit courts of appeals. Under the Judiciary Act of 1789 there were two levels of trial courts: the district courts (one for each state or a portion thereof), each with its own district judge, and the circuit courts (one for each region of the country), which lacked judges of their own and sat twice each year in each district within the circuit, with panels consisting of two Justices of the Supreme Court (who would "ride circuit") and a district court judge from within the circuit. In addition to having appellate jurisdiction over certain cases tried in the district courts, the circuit courts had concurrent jurisdiction with the state courts over diversity actions where the amount in controversy exceeded $500. *See* POUND, *supra* note 129, at 103–06. While a panel of the circuit court officially consisted of three members, only two were required to hear a case, so it would not be unusual for a circuit court to be equally divided. *See id.* at 104.

259. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

> [T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id.

260. *See id.* § 12.

> [I]f a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court . . . the cause shall there proceed in the same manner as if it had been brought there by original process.

of choosing at the outset whether to bring suit in state or federal court and then giving the out-of-state defendant a similar option if suit was initially filed in state court was long believed to be adequate to protect out-of-state plaintiffs and defendants from local state prejudices.[261] But bitter cross-state animosity engendered by the Civil War led Congress to believe the existing scheme did not adequately protect out-of-state litigants.[262] Accordingly, Congress passed the 1867 Act which provided that if at *any* time prior to the final hearing or trial of a suit, the out-of-state party had reason to believe that, due to prejudice or local influence, justice could not be obtained in state court, the out-of-state party could remove the action to federal court.[263]

In *Gaines v. Fuentes* the Supreme Court considered the impact of the 1867 Act on probate matters.[264] Citizens of Louisiana filed a petition in a Louisiana state probate court seeking revocation of a decree of probate of a will on the ground that the testimony upon which it was admitted was false and insufficient.[265] One of the decedent's heirs, a citizen of New York, was served the petition and subsequently sought to remove the action to federal circuit court pursuant to both Section 12 of the 1789 Act as well as to the 1867 Act, but the state court denied the applications and subsequently revoked the probate of the will.[266] The decision was affirmed by the Louisiana Supreme Court.[267]

The U.S. Supreme Court reversed.[268] The dissent reasoned that although Section 12, the removal provision of the 1789 Act, referred only

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Id.

261. *See* Chicago & N.W. R. Co. v. Whitton, 80 U.S. (13 Wall.) 270, 289 (1871).

262. *See* Gaines v. Fuentes, 92 U.S. 10, 19 (1875).

263. Act of March 2, 1867, ch. 196, 14 Stat. 558. The statute declared:

> That where a suit is now pending, or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court . . . the suit shall there proceed in the same manner as if it had been brought there by original process.

Id.

264. 92 U.S. 10 (1875).

265. *Id.* at 11.

266. *Id.* at 11–12.

267. *Id.* As to both applications, the state court reasoned that the federal court would lack jurisdiction over the subject matter of the dispute. *See id.*

268. *Id.* at 22.

to "a *suit* . . . by a citizen of the State in which the suit is brought against a citizen of another State," it had to be read *in pari materia* with Section 11, the provision vesting the circuit courts with original jurisdiction over "all *suits of a civil nature, at common law or in equity* . . . between a citizen of the State where the suit is brought and a citizen of another State."[269] When read in conjunction with the provision of Section 12 providing that a removed action would 'proceed [in the circuit court] in the same manner as if it had been brought there by original process," the dissent concluded only those actions that could have been originally brought in the circuit court could be removed from the state court.[270] Since the probate of wills did not fall within the jurisdiction of the courts of law or equity in England, the dissent reasoned such an action could not be removed to federal court, since it could not be brought in federal court as an original matter.[271]

The majority appeared to accept this interpretation of Section 12, but ruled that removal would nonetheless be appropriate under the 1867 Act.[272] The majority noted that the scope of the federal judicial power under Article III is broader than the scope of jurisdiction in Section 12 of the 1789 Act, extending to "*controversies* between citizens of different States."[273] The majority—in apparent reliance on the broader language of the 1867 Act providing for removal of any "suit . . . in which there is a *controversy* between a citizen of the State in which the suit is brought and a citizen of another State"[274]—reasoned that the "act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States." The Court concluded the scope of cases that could be *removed* to federal court under the 1867 Act was broader than the scope of cases that could have been initially brought in federal court pursuant to Section 11 of the 1789 Act.[275] Accordingly, even if a suit was not one at law or in equity, such as an action to revoke probate, it could nonetheless be removed to federal court under the 1867 Act. The dissent, while disagreeing with the construction of the 1867 Act nonetheless conceded that Congress had the power under Article III to provide for jurisdiction over such suits.[276]

269. *Id.* at 22–23 (Bradley, J., dissenting).
270. *Id.* at 23–24.
271. *Id.* at 24–25.
272. *Id.* at 18.
273. *Id.* at 17 (quoting U.S. CONST. art. III, § 2).
274. 1867 Act, *supra* note 263.
275. *Gaines*, 92 U.S. at 19–20.
276. *Id.* at 26 (Bradley, J., dissenting).

Thus, both the majority and the dissent agreed Congress had the constitutional authority to vest the federal courts with subject matter jurisdiction over probate-related matters, and indeed the majority thought that Congress had done so in the 1867 Act. Therefore, while the 1867 Act was seldom invoked and has since been repealed,[277] its scope as interpreted and approved by the Court in *Gaines* provides strong support for the conclusion that the exception is only a statutory limitation rather than a constitutional one.

IV. DOCTRINE OF *CUSTODIA LEGIS*

Courts have held generally that the probate exception does not apply to inter vivos trusts and possibly not to testamentary trusts either. This means that a federal court not only may adjudicate the validity of a trust where the requirements of diversity jurisdiction are satisfied, but may also administer the trust, including ordering an accounting, removing and appointing trustees, and demanding that funds be distributed.[278] Yet because this is an exercise of diversity jurisdiction, state courts, whether courts of probate or courts of general jurisdiction, will have concurrent jurisdiction over such actions, raising the possibility that two courts—one state and one federal—will simultaneously attempt to administer the same trust.

The Supreme Court addressed this situation in *Princess Lida of Thurn & Taxis v. Thompson*.[279] The case dealt with a trust created in 1906 for the benefit of Princess Lida and her children by her ex-husband.[280] In 1910, the ex-husband repudiated the agreement.[281] Princess Lida, her children,

277. In 1875, Congress enacted a comprehensive removal statute, *see* Act of March 3, 1875, 18 Stat. 470, but the statute was subsequently held not to rescind the Act of March 2, 1867. *See* Hess v. Reynolds, 113 U.S. 73, 79–80 (1885). In 1887, Congress passed yet another comprehensive removal statute, *see* Act of March 3, 1887, 24 Stat. 553, and while not intending to repeal the Act of March 2, 1867, *see* 18 CONG. REC. (1887) (reporting statement of Representative David Culberson that "[t]he bill does not propose to repeal the act of 1867"), the 1887 act did have the effect of limiting removal to actions that could originally be brought in federal court. *See* Cochran & the Fid. & Deposit Co. v. Montgomery County, 199 U.S. 260, 269 (1905).

> [U]nder the judiciary act of 1789 such cases were only liable to removal from a state to the Circuit Court 'as might . . . have been brought before the Circuit Court by original process' [and] it was ruled that this was otherwise under the act of March 2, 1867.
>
> But the act of 1887 restored the rule of 1789, and, as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction.

Id. Nonetheless, it was not until 1948 that the right to remove a case due to prejudice or local influence was eliminated. *See* 28 U.S.C. § 1441 (1948).

278. *See supra* Part II.B.2.a.

279. 305 U.S. 456 (1939).

280. *Id.* at 457–58.

281. *Id.* at 58.

and one of the trustees brought suit in the state Court of Common Pleas in Pennsylvania to enforce the trust.[282] After a hearing, the state court entered a decree sustaining the agreement and ordering the ex-husband to perform accordingly.[283] The court approved a modification of the agreement in 1915, and in 1925 ultimately entered in the record that the decree had been satisfied.[284]

On July 7, 1930, the trustees filed a partial account of the trust in the same court.[285] The following day, Princess Lida and one of her children filed a suit in equity in federal district court against the two living trustees and the administrator of the deceased trustee, alleging mismanagement of trust funds and requesting that the trustees be removed and that all defendants be made to account for and repay the losses of the estate.[286] The defendants asked the state court to enjoin the plaintiffs from pursuing their claim in federal court.[287] While that request was pending, the federal court temporarily enjoined the defendants from further prosecuting the state court action.[288] Nonetheless, the Pennsylvania Supreme Court affirmed an order of the state court enjoining the plaintiffs from further pursuing their federal court action.[289]

Thus, the U.S. Supreme Court was "confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from proceeding in the other."[290] The Court held that although the trust *res* was unquestionably within the state court's jurisdiction when the action was brought to compel the ex-husband's compliance with the agreement, jurisdiction terminated once the decree in equity had been satisfied by the ex-husband.[291] It then addressed whether the subsequent filing of the trustees' account gave the state court jurisdiction over the trust, and if so, the nature and extent of that jurisdiction.[292] The Court noted that as a matter of state law, the state Court of Common Pleas for the county in which any trustee is located is vested with jurisdiction over any matter that concerns the integrity of the trust *res*.[293] Additionally, the Court stated that

282. *Id.*
283. *Id.*
284. *Id.* at 459.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 460.
289. *Id.*
290. *Id.* at 461.
291. *Id.*
292. *Id.* at 462.
293. *Id.* at 462–63.

jurisdiction is invoked either by a petition by a trustee or upon application of an interested person,[294] and that the state court cannot effectively exercise such jurisdiction without having a substantial measure of control over the trust funds.[295]

The Court concluded that if the federal court action had been one in which the plaintiffs merely sought adjudication of their right to participate in the *res* or as to the quantum of their interest in it, the federal action could proceed.[296] "[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."[297] Yet, "if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other."[298] According to the Court, where both proceedings are in rem, the first one assuming jurisdiction had jurisdiction over the *res*.[299] Because the federal action related solely to administration and restoration of the corpus, it was a proceeding in rem and thus had to yield to the pre-existing state court proceedings with respect to the same *res*.[300]

This doctrine, known as *custodia legis*, or the doctrine of prior exclusive jurisdiction,[301] is "nothing more than a practical 'first come, first serve' method of resolving jurisdictional disputes between two courts with concurrent jurisdiction"[302] that prevents the problems that could arise from inconsistent orders with respect to the same property. In considering the application of the doctrine, lower courts have identified several elements that must be present before the doctrine can be invoked to divest the federal court of jurisdiction.

294. *Id.* at 463.
295. *Id.* at 467.
296. *Id.* at 466–67.
297. *Id.*
298. *Id.* (citing Penn. Gen. Cas. Co. v. Pennsylvania, 294 U.S. 189, 195 (1935)).
299. *Id.*
300. *Id.* at 467.
301. *E.g.*, Espat v. Espat, 56 F. Supp.2d 1377, 1381 (M.D. Fla. 1999).
302. BLACK'S LAW DICTIONARY, *supra* note 11, at 384 (citing Coastal Prod. Credit Ass'n v. Oil Screw "Santee," 51 B.R. 1018, 1020 (S.D. Ga. 1985)).

First, the state court action must have been filed before the federal court action,[303] whether by virtue of a specific action filed in the state court with regard to the administration of the trust that is pending[304] at the time the federal suit is filed, such as an accounting,[305] or because as a matter of state law the state court exercised continuing jurisdiction over the corpus of a trust once its jurisdiction has been initially invoked.[306] Second, the doctrine only applies if both actions are in rem or quasi in rem.[307] Thus, even if the state court exercises continuing jurisdiction over the administration of the trust, the doctrine of *custodia legis* poses no bar to the federal court entertaining, say, a suit for damages by the trust beneficiaries against the trustees personally.[308] Third, the state court must have the power to adjudicate all of the claims effectively.[309] This means that if one of the claims raised in the federal proceeding falls outside the jurisdiction of the state court in which the pre-existing action is pending, the doctrine would not bar the federal court from exercising jurisdiction over the claim.[310] A few courts have held the doctrine applies only if, as a matter of state law, the specialized state court in which the prior action was filed had

303. *See* Reichman v. Pittsburgh Nat'l Bank, 465 F.2d 16, 18 (3d Cir. 1972); Schonland v. Schonland, No. Civ. 397CV558 (AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 888 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992); Barnes v. Brandrup, 506 F. Supp. 396, 399–400 (S.D.N.Y. 1981). Even if the state court action is filed subsequent to the federal court action, however, it has been suggested that the federal court may have discretion to dismiss the action in favor of the state court. *See* Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952).

304. Thus, the mere fact that accountings have previously been filed and approved in state court proceedings does not mean that those proceedings have been first filed, as those proceedings terminate once the court approves the accountings. *See Barnes*, 506 F. Supp. at 401. *See also Holt*, 198 F.2d at 915–16 (stating that doctrine does not apply if the prior state court action was dismissed without prejudice before the federal action was filed).

305. *See* Weingarten v. Warren, 753 F. Supp. 491, 495 (S.D.N.Y. 1990).

306. *See id.*; *Barnes*, 506 F. Supp. at 400–01; Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

307. *See* Starr v. Rupp, 421 F.2d 999, 1004–06 (6th Cir. 1970).

308. *See* Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967). *See also Holt*, 198 F.2d at 915.

> The rule is otherwise in actions strictly in personam . . . . Nor does the rule . . . apply where the purpose of the action in the second court is merely to establish the right or interest of the plaintiff in property within the possession or control of the first court, so long as the second court does not interfere with the proceedings in the first court or with the control of the property in its custody.

Id.

309. *See* Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); *Barnes*, 506 F. Supp. at 399–400.

310. *See* Akrotirianakis v. Burroughs, , 262 F. Supp. 918, 921–25 (D. Md. 1967) (holding that doctrine does not apply where the state probate court with jurisdiction over the ongoing administration of the trust would not have jurisdiction over an action, as such an action is committed to the state courts of equity).

jurisdiction exclusive of the state courts of general jurisdiction.[311] Other courts have held this has no effect on the doctrine's applicability.[312] Finally, while the doctrine would not appear to bar a party from removing such a proceeding from state court to federal court,[313] one court has denied jurisdiction over a removed case where the state court had already issued a temporary restraining order on the property at issue before the timely notice of removal had been filed.[314]

V. PRUDENTIAL ABSTENTION

While the probate exception excludes most probate and probate-related matters from federal court, some arguably probate-related matters, such as those involving trusts or arising under federal statutes, would still seem to fall within the federal courts' subject matter jurisdiction. Yet even if a claim survives the probate exception proper, it is far from certain that the federal court will adjudicate the claim. For "[e]ven where a particular probate-like case is found to be outside the scope of the probate exception, the district court may, in its discretion, decline to exercise its jurisdiction,"[315] particularly for matters that are "on the verge" of the probate exception.[316] This is because the federal courts have at their disposal a variety of abstention doctrines including *Pullman*,[317] *Burford*,[318] *Thibodaux*,[319] *Younger*,[320] *Colorado River*,[321] *Brillhart-Wilton*,[322] as well

311. *See Schonland*, 1997 WL 695517 at *2 (holding that the doctrine is inapplicable because under state law the probate courts have concurrent (rather than exclusive) jurisdiction over trusts with the ordinary courts of equity); *Barnes*, 506 F. Supp. at 401–02 (distinguishing *Princess Lida* from the instant case because in Princess Lida the state probate court jurisdiction was exclusive, whereas the state probate court jurisdiction in the instant case is concurrent with the state courts of general jurisdiction).

312. *See* Beach v. Rome Trust Co., 269 F.2d 367, 371–72 (2d Cir. 1959); Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

313. *E.g.*, *Schonland*, 1997 WL 695517 at *1–*2.

314. *See In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 149–51 (S.D.N.Y. 1991).

315. Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979) (stating that "the scope of the probate exception does not necessarily define the area in which the exercise of federal judicial power is appropriate").

316. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (asserting that "there is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them'"). *Accord* Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985).

317. R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

318. Burford v. Sun Oil Co., 319 U.S. 315, 316–34 (1943).

319. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29–31 (1959).

320. Younger v. Harris, 401 U.S. 37 (1971).

321. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–19 (1976).

as the *Rooker-Feldman*[323] doctrine and the principle that equity can only "do justice completely" and not "by halves."[324] Each of these doctrines has directly or indirectly been addressed, and in some cases applied, by the federal courts in considering probate-related claims falling outside of the probate exception. This Section briefly describes each of these doctrines, and examines the manner and extent to which the federal courts have applied them to probate-related claims.

A. *PULLMAN* ABSTENTION

Pullman abstention provides that where a suit presents an unsettled question of state law and a given interpretation of that state law would allow the court to avoid reaching a federal constitutional question raised in the suit, the federal district court should suspend the federal court action and allow the parties to resolve the unsettled question of state law in state court.[325] Thus, where the validity of a state statute is challenged on federal constitutional grounds and the meaning of the statute is sufficiently uncertain that a narrow interpretation of it by the state courts could avoid reaching the constitutional question, *Pullman* abstention is warranted.[326] It is likewise warranted if a suit alleges that the defendant's conduct violated the U.S. constitution as well as a provision of state law.[327] Moreover, *Pullman* abstention applies even when suit is brought pursuant to § 1983.[328] But where the state law being challenged is sufficiently clear, or the plaintiff opts to challenge the defendant's conduct only on federal constitutional grounds (leaving out state law claims), *Pullman* abstention does not apply.[329] *Pullman* abstention is likewise inapplicable where only non-constitutional federal issues, such as the interpretation of a federal statute, can be avoided.[330] Although typically invoked in suits for

322. Wilton v. Seven Falls Co., 515 U.S. 277, 282–288 (1995); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494–97 (1942).

323. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482–87 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

324. *See* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117–18 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

325. *See* R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

326. *See* Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970).

327. *See Pullman*, 312 U.S. at 498. *See also* Siler v. Louisvillle & Nashville R.R. Co., 213 U.S. 175 (1909).

328. *See* Askew v. Hargrave, 401 U.S. 476, 477–78 (1971).

329. *Compare* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971), *with id.* at 440–43 (Burger, C.J., dissenting).

330. *See* Propper v. Clark, 337 U.S. 472, 490 (1949).

injunctive relief, it can also be raised in suits where money damages are sought.[331]

Under *Pullman* abstention, the federal court does not usually[332] dismiss the proceedings, but rather stays them pending the outcome of the proceedings in state court.[333] While the federal court plaintiff is required to inform the state court of the federal constitutional challenges pending in the federal court proceedings so that the state court can interpret the state law at issue in light of the constitutional challenge,[334] the plaintiff has the right to return to federal court after the state court has resolved the state law question to have the constitutional questions resolved in federal court, unless the plaintiff voluntarily submits the constitutional claims to the state court.[335]

Although courts have considered *Pullman* abstention in the context of probate-related proceedings, they have been reluctant to apply it in the probate context. Usually this is because such claims do not typically involve unsettled questions of state law coupled with the possibility of avoiding a federal constitutional question.[336]

B. *THIBODAUX* AND *BURFORD* ABSTENTION

Thibodaux abstention is applicable where the suit raises difficult questions of state law bearing on substantial public policy matters that are more important than the result of the case before the court.[337] Thus, for example, a suit challenging a municipality's authority to exercise eminent domain as a matter of state law raises a question of sufficient public import to justify *Thibodaux* abstention,[338] but abstention appears to be justified only where the issue of state law is unclear.[339] Courts that have considered

331. *E.g.*, *Fornaris*, 400 U.S. at 41–44; United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135–36 (1962).

332. In some instances, a state court will refuse to decide the issue of state law so long as the federal action is pending. In those circumstances, the federal district court must dismiss the case, but without prejudice, and the plaintiff is free to return to federal court after the state court proceedings have concluded. *See* Harris County Comm'rs v. Moore, 420 U.S. 77, 78 (1975).

333. *See Pullman*, 312 U.S. at 501–02.

334. *See* Gov't & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364, 366 (1957).

335. *See* England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 435 (1964) (Douglas, J., concurring).

336. Bergeron v. Loeb, 777 F.2d 792, 798 n.7 (1st Cir. 1985); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985); Martz v. Braun, 266 F. Supp. 134, 139 (E.D. Pa. 1967).

337. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959)).

338. *See Thibodaux*, 360 U.S. at 42–44 (Brennan, J., dissenting).

339. *See* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188–90 (1959).

Thibodaux abstention in probate-related proceedings have found it inapplicable, either because there is no difficult question of state law,[340] or because no issue transcends the importance of the case.[341] Indeed, one court has held that any case raising difficult issues of state law bearing on policy problems of substantial public import would likely invoke the probate exception and if it did not, it probably would not qualify for *Thibodaux* abstention.[342]

Burford abstention is related to but distinct from *Thibodaux* abstention. Unlike *Thibodaux* abstention, for *Burford* abstention to apply the question of state law need not itself be determinative of state policy (like a determination of the scope of a city's eminent domain powers), and thus the resolution of the specific question before the court need not transcend the result in the case before the court.[343] Rather, the question is whether the very act of a federal court adjudicating a case would itself in some way be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[344]

Burford v. Sun Oil Co. was a challenge to the granting of four permits by a state regulatory commission to drill oil wells.[345] Because the state believed that the regulation of natural resources such as oil could not effectively be accomplished piecemeal but had to be centralized to be effective, it had vested a single state district court with authority to review the commission's decisions for "reasonableness," which was itself subject to review by a single court of appeals and ultimately the state supreme court. Thus the state avoided the problem of having conflicting determinations by individual district and appellate courts across the state.[346] While the determination of whether it was reasonable to issue any given permit would not likely have a transcendent effect on the state, the very fact of federal courts determining the reasonableness of the issuance of permits "where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields."[347] Unlike *Pullman* abstention, the *Burford*

340. *See* Beach v. Rome Trust Co., 269 F.2d 367, 374 (2d Cir. 1959); *Martz*, 266 F. Supp. at 139.

341. *Martz*, 266 F. Supp. at 139.

342. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D. Ill. Sept. 18, 1995) (describing *Thibodaux* abstention without directly citing *Thibodaux*).

343. *See Colorado River Water Conservation Dist.*, 424 U.S. at 814–15.

344. *See id.* at 814.

345. 319 U.S. 315, 317 (1943).

346. *Id.* at 326–27.

347. *Colorado River Water Conservation Dist*, 424 U.S. at 815.

abstention plaintiff has no right to return to federal district court to have her federal claims adjudicated, but is instead entitled only to review in a federal court by way of a writ of certiorari by the U.S. Supreme Court.[348]

There are a number of limitations on the use of *Burford* abstention. First, while not an explicit limitation, the Supreme Court has considered the doctrine only in the context of state-regulated industries.[349] Second, *Burford* abstention can be used only when there is a difficult, uncertain question of state law.[350] Finally, *Burford* abstention is available only where plaintiffs seek injunctive or declaratory relief.[351]

Courts that have considered *Burford* directly have rejected its application in the context of probate-related matters, usually finding either no difficult question of state law, no overarching state policy with respect to settling such claims, or both.[352] One court has found that few cases would likely present such a question without also invoking the probate exception to federal subject matter jurisdiction.[353]

In *Ankenbrandt v. Richards* the Court considered the applicability of *Burford* abstention in the analogous context of the domestic relations exception.[354] The Court stated, in dicta, that *Burford* abstention *might* be relevant in cases outside the domestic relations exception where, say, the federal case was filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the *status* of the parties.[355] Yet even in such cases, the Court reasoned that the federal court should retain jurisdiction, rather than abstain permanently, to ensure prompt and just disposition of the matter upon the determination by the

348. *See Burford*, 319 U.S. at 334.

349. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (reviewing utility rate regulation); Alabama Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341 (1951) (considering local train service regulation); *Burford*, 319 U.S. 315 (1943) (evaluating regulation of oil drilling rights).

350. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 726–27 (1996); *Colorado River Water Conservation Dist*, 424 U.S. at 814; *Burford*, 319 U.S. at 327–28; Johnson v. Rodrigues, 226 F.3d 1103, 1112 (10th Cir. 2000).

351. *Quackenbush*, 517 U.S. at 731. The Supreme Court has, however, left open the possibility that *Burford* might support a federal court's decision to postpone adjudication of a damages claim pending resolution by the state courts of an unsettled question of state law. *See Quackenbush*, 517 U.S. at 730–31.

352. *See* Bergeron v. Loeb, 777 F.2d 792, 800 (1st Cir. 1985); Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 807 n.10 (S.D. Ohio 1999); Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D.Ill. Sept. 18, 1995); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985).

353. *See Seay*, 1995 WL 557361, at *7.

354. *Ankenbrandt*, 504 U.S. 689 (1992).

355. *Id.* at 705–06.

state court of the relevant issue,[356] making it more akin to *Pullman* abstention. Thus, where a federal court is adjudicating a probate-related matter, *Ankenbrandt* might suggest that if a suit is filed on behalf of or against an estate, and the proper adjudication of such suit depends upon the state probate court appointing a personal representative for the estate with the capacity to sue and be sued on behalf of the estate, the federal court should retain jurisdiction of the suit pending the state court's action.[357]

C. *YOUNGER* ABSTENTION

The *Younger* abstention doctrine initially was directed only at suits that might interfere with ongoing state criminal proceedings. It provided that the federal courts would not, absent special circumstances,[358] entertain jurisdiction over suits seeking either an injunction against pending[359] state criminal proceedings[360] or a declaratory judgment against a state criminal statute under which prosecutions are pending.[361] The rationales behind this form of abstention are that equity need not act in such instances since an adequate remedy exists by way of a defense in the state criminal proceedings,[362] as well as respect for the distinct sovereignty of the states.[363] An exception to *Younger* abstention exists where the state tribunal cannot or will not entertain the federal constitutional claims.[364]

356. *Id.* at 706 n.6. *See also Quackenbush*, 517 U.S. at 730–31 (noting that although a dismissal under *Burford* is not appropriate in a damages action, a stay pending a determination by the state court on a disputed question of state law might be warranted).

357. *Cf. Seay*, 1995 WL 557361 at *7–*8.

358. These special circumstances were limited to cases where the prosecution was in bad faith or done to harass the defendant, or where the statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger v. Harris, 401 U.S. 37, 52–54 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

359. The Supreme Court subsequently expanded the doctrine to cover not only pending criminal proceedings, but also those that are commenced against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court. *See* Hicks v. Miranda, 422 U.S. 332, 349 (1975).

360. *See Younger*, 401 U.S. at 53.

361. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971). The Supreme Court has reserved the question whether *Younger* applies in suits for money damages, although the Court has held that such suits should be stayed pending the resolution of the state prosecutions. *See* Deakins v. Monaghan, 484 U.S. 193, 202 (1988).

362. *See Younger*, 401 U.S. at 43–44; Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

363. *See Younger*, 401 U.S. at 43–44.

364. *See* Moore v. Sims, 442 U.S. 415, 425–26 (1979).

Subsequent decisions have expanded *Younger* to cover civil enforcement proceedings brought by the state,[365] including those prosecuted in administrative tribunals that are judicial in nature.[366] In a few instances, *Younger* abstention has been applied in suits involving purely private parties where the "State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[367] While such cases had the potential to expand greatly the reach of *Younger* abstention, the Supreme Court has subsequently limited the application of *Younger* where only private persons are parties to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[368]

Almost all[369] courts that have considered *Younger* abstention in the context of probate-related matters have held it to be inapplicable.[370]

D. *COLORADO RIVER* ABSTENTION

In *Colorado River Water Conservation District v. United States*,[371] the Supreme Court set forth the general principle that "[a]bstention from the

365. *See id.* at 417 (holding that the court should abstain from hearing state custody claim for children allegedly abused by parents); Trainor v. Hernandez, 431 U.S. 434, 493 (1977) (holding that the court should abstain from state claim to recover welfare payments obtained by fraud); Huffman v. Pursue, Ltd., 420 U.S. 592, 595, 607 (1975) (directing the court to apply *Younger* abstention principles in a state action to declare an obscene movie a nuisance).

366. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (holding that district court should have abstained from reviewing an administrative complaint for employment discrimination); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432–44 (1982) (holding that federal court should abstain from reviewing an attorney disciplinary proceeding).

367. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (refusing to enjoin successful plaintiff in state court proceeding from exercising its right to demand that the defendant post a bond as a condition of prosecuting an appeal where the state court defendant was claiming that it could not afford a bond and that the rule denied it due process). *See also* Juidice v. Vail, 430 U.S. 327, 337–39 (1977) (refusing to enjoin state court judges from using their statutory contempt procedures on the ground that they denied due process).

368. New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 367 (1989).

369. One court has applied it in the context of a purely private probate-related dispute, yet the court seemed completely to misunderstand the *Younger* doctrine. *See* Williams v. Adkinson, 792 F.Supp. 755, 766 (M.D. Ala. 1992) (reasoning that *Younger* applied because such suits involve the "important state interest in the 'orderly and just distribution of a decedent's property at death.'").

370. *See* Reinhardt v. Kelly, 164 F.3d 1296, 1302 (10th Cir. 1999); Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985). In the related area of domestic relations matters, the Supreme Court in *Ankenbrandt v. Richards* held *Younger* abstention would not apply unless there were pending state proceedings and a valid assertion that there were important state interests at stake. 504 U.S. 689, 705 (1992).

371. 424 U.S. 800 (1976).

exercise of federal jurisdiction is the exception, not the rule,"[372] and that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[373] The court, however, found abstention is in some instances appropriate where there are parallel federal and state proceedings involving substantially the same parties and the same issues.[374]

The Court in *Colorado River* identified four factors that counsel in favor of a federal court abstaining in favor of a state forum: (1) where maintaining both actions would require the state and federal courts to exercise simultaneous jurisdiction over a single *res*; (2) if the state court forum is more convenient for the parties; (3) where the concurrent state proceedings were initiated before the federal proceedings; and (4) where doing so would avoid piecemeal litigation.[375] The Court has since added two factors weighing *against* abstention: (1) where federal law provides the rule of decision on the merits[376]; and (2) where the state court proceedings will probably be inadequate to protect the plaintiff's rights.[377]

In probate related matters, avoiding piecemeal litigation tends to be the focal point, and is most easily rejected if there are no pending state court proceedings,[378] if the plaintiff in the federal action is not party to the state probate proceedings,[379] or if the issues in the probate proceeding are different from those raised in the federal action.[380] In addition, since state probate courts often have jurisdiction only over the probate of the will and the administration of the estate, common law and statutory claims among parties will often need to be filed in some other court, such as a state court of general jurisdiction, and thus, declining jurisdiction will not avoid piecemeal litigation.[381] Moreover, in such circumstances, it seems the

372. *Id.* at 813.
373. *Id.* at 817.
374. *See id.* at 818.
375. *See id.* at 818–19.
376. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23, 26 (1983).
377. *Id.* at 26.
378. *See Bergeron*, 777 F.2d at 799.
379. *See* Celentano v. Furer, 602 F. Supp. 777, 782 (S.D.N.Y. 1985).
380. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *8, *9 (N.D.Ill. Sept. 18, 1995). There is, however, authority suggesting that the federal and state actions need not be precisely identical: it is enough that "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700 (7th Cir. 1992).
381. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 (holding that under such circumstances, "a decision to allow [such claims] to be decided in federal rather than state court does not *cause* piecemeal resolution of the parties' underlying disputes," making abstention unwarranted) (emphasis added); Giardina v. Fontana, 733 F.2d 1047, 1053 (2d Cir. 1984). *See also Caminiti*, 962 F.2d at 703 (noting that where the probate court lacks jurisdiction over a particular claim as against a particular party, it

federal forum is, strictly speaking, the first concurrent forum in which jurisdiction was obtained, since the only other forum with concurrent jurisdiction would be a state court of general jurisdiction, in which a new action would have to be filed.[382] Where the issues raised in the federal action are the same as those raised in the state court action, however, the desire to avoid piecemeal litigation weighs in favor of abstention.[383]

E. *BRILLHART-WILTON* ABSTENTION

Under the Federal Declaratory Judgments Act ("FDJA"),[384] where an actual controversy exists, the federal courts have the authority to declare the rights of the parties vis-à-vis one another or vis-à-vis a piece of property. Such a declaration has the effect of a final judgment[385] and may have a preclusive effect in subsequent proceedings where the declaratory judgment involved a question of federal law.[386] Where suit is brought pursuant to the FDJA, federal courts have substantially greater discretion to abstain in favor of pending state court proceedings than is permitted under the *Colorado River* standard[387] because of the permissive wording of the FDJA.[388] Unlike *Colorado River* abstention, the Court has neither enumerated comprehensive factors for guiding the district court's abstention discretion with respect to suits brought pursuant to the FDJA, nor has it set forth the outer boundaries of the abstention discretion.[389] Rather, the Court has suggested only that the decision be guided by "considerations of practicality and wise judicial administration,"[390] and that

weighs against abstaining under *Colorado River*); United States v. Pikna, 880 F.2d 1578, 1582 (2d Cir. 1989) (holding a dismissal of a suit over which the state probate court would likely lack jurisdiction an abuse of discretion).

382. *Giardina*, 733 F.2d at 1053.

383. *Caminiti*, 962 F.2d at 701–02; Estate of Groper by Groper v. County of Santa Cruz, No. C-93-20925 RPA, 1994 WL 680041, at *4–*5 (N.D.Cal. Dec. 1, 1994).

384. 28 U.S.C. § 2201 (1994).

385. *See id.*

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id.

386. Steffel v. Thompson, 415 U.S. 452, 476–78 (1974) (White, J., concurring); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW.U. L. REV. 759, 764, 769 (1979).

387. Wilton v. Seven Falls Co., 515 U.S. 277, 286–88 (1995).

388. *Id.* at 286 (quoting 28 U.S.C. § 2201(a) (1988 ed. Supp. V) providing the court "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added)).

389. *See id.* at 290; Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

390. *Wilton*, 515 U.S. at 288.

the district court examine the scope of the pending state court proceeding, the nature of the available defenses, and whether the claims of all interested parties could satisfactorily be adjudicated.[391] All of these considerations are subject to review only for abuse of discretion.[392] As with *Pullman* abstention, the appropriate course is to stay the proceedings rather than dismiss them outright to protect against the possibility that the state court case might fail to resolve the controversy.[393]

While probate proceedings are pending, a party will sometimes file suit under the FDJA, based on the diversity of the parties, seeking a declaration as to the validity of a trust or other similar instrument, even though the validity of the instrument can or is being litigated in the probate proceedings.[394] In such instances, federal courts generally exercise their broad, unbounded discretion to decline jurisdiction, usually reasoning it would be vexatious and uneconomical for the federal court to proceed where a parallel state court suit is addressing the exact same question.[395]

F. ROOKER-FELDMAN DOCTRINE

The *Rooker-Feldman* doctrine holds that the federal district courts lack jurisdiction over collateral attacks on judgments rendered in state court proceedings.[396] The rationale for the doctrine is that the statutory grant of subject matter jurisdiction to the federal district courts is strictly original, and for district courts to entertain actions to reverse or modify the judgments of state courts due to errors, even constitutional errors, would be an exercise of appellate jurisdiction, and only the Supreme Court has been granted appellate jurisdiction over judgments rendered by the states' highest courts.[397] This doctrine is thus invoked if a litigant attempts directly to challenge the judgment of a state probate court in an independent federal court action.[398]

391. *Id.* at 282–83; *Brillhart*, 316 U.S. at 495.

392. *Wilton*, 515 U.S. at 289–90.

393. *Id.* at 288 n.2.

394. *E.g.*, Fay v. Fitzgerald, 478 F.2d 181 (2d Cir. 1973); *In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 152 (S.D.N.Y. 1991) (requesting declaration as to the validity of a reciprocal agreement to execute mirror image wills); Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970) (requesting declaration that inter vivos trust is invalid).

395. *Fay*, 478 F.2d at 183. *Accord In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d at 153–54; Cenker v. Cenker, 660 F. Supp. 793, 796 (E.D. MI 1987); DiTinno v. DiTinno, 554 F. Supp. 996, 1000 (D. Mass. 1983).

396. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

397. *Rooker*, 263 U.S. at 415–16.

398. *See* Williams v. Adkinson, 792 F.Supp. 755, 761–62 (M.D. Ala. 1992).

G. EQUITY CAN ONLY "DO JUSTICE COMPLETELY"

A well-established principle dictates that "a court of equity ought to do justice completely and not by halves."[399] Thus, where an equity court has jurisdiction over only one aspect of a suit but not another, it will decline jurisdiction. Accordingly, some federal courts have declined jurisdiction over probate-related matters falling outside the probate exception when there are related matters to be decided that fall within the probate exception. Thus, where the decedent's capacity to execute a will as well as an inter vivos trust is in dispute, courts have invoked this principle to decline jurisdiction over the validity of the inter vivos trust, even though that is outside of the probate exception, since the validity of the will must be adjudicated in another forum.[400] Additionally, where there is a dispute over the validity of a testamentary instrument as well as its interpretation, federal courts have declined to construe the terms of the instrument on the ground that its validity is still being adjudicated in ongoing probate proceedings.[401]

H. "JAMBALAYA" ABSTENTION

A number of courts adjudicating probate-related matters have either abstained or suggested they could abstain on grounds other than those contained in the recognized categories of abstention. These courts frequently rely on the greater expertise of state courts in dealing with such issues based on the state courts' daily experience,[402] familiarity with the litigation,[403] and the greater interest of the states in the outcome of the litigation.[404] Abstaining courts also cite judicial economy,[405] federalism,[406] and the intertwining of federal and state court proceedings.[407] Abstaining

399. Camp v. Boyd, 229 U.S. 530, 551 (1913). *Accord* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

400. Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970).

401. *Jackson*, 153 F. Supp. at 116–18.

402. *See* Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979); Bassler v. Arrowood, 500 F.2d 138, 142–43 (8th Cir. 1974); *Cenker*, 660 F. Supp. at 795–96; Rousseau v. United States Trust Co. of NY, 422 F. Supp. 447, 459 (S.D.N.Y. 1976).

403. *See Rice*, 610 F.2d at 478; Pappas v. Travlos, 662 F. Supp. 1149, 1150 (N.D. Ill. 1987); *Cenker*, 660 F. Supp. at 795–96.

404. *See Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

405. *Reichman*, 465 F.2d at 18; Jones v. Harper, 55 F. Supp. 2d 530, 534 (S.D.W. Va. 1999); *Rousseau*, 422 F. Supp. at 459.

406. *Jones*, 55 F. Supp. 2d at 534.

407. *See Rice*, 610 F.2d at 478; *Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

courts, however, provide little basis for determining their authority to abstain under these circumstances.

I. ABSTENTION INVOLVING SPECIALIZED STATUTORY GRANTS OF JURISDICTION

In *Markham v. Allen*,[408] the Supreme Court, after holding that the suit did not fall within the probate exception, considered whether the federal court should nonetheless have abstained in light of ongoing state court proceedings, and the fact that the suit involved issues of state law.[409] The Court rejected the argument that the mere need to interpret state law was a sufficient basis for abstention,[410] and held that where a substantive federal statute specially confers jurisdiction on the district court independent of the statutes generally governing federal court jurisdiction, abstention is not appropriate.[411]

Thus, under *Markham*, abstention in a probate-related matter would not be appropriate where suit is brought under a federal substantive statute for which the federal courts have subject matter jurisdiction independent of the general grant of federal question jurisdiction contained in § 1331. Accordingly, civil rights actions brought pursuant to §§ 1983, 1985 and 1986,[412] suits brought under the RICO statute,[413] and statutory interpleader actions[414]—the provisions under which most non-diversity probate-related

408. 326 U.S 490 (1946).

409. *Id.* at 495.

410. *Id.*

411. *Id.* at 495–96.

412. *See* 28 U.S.C. § 1343(a) (1994).

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Id.

413. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court.").

414. *See* 28 U.S.C. § 1335 (1994) ("The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader.").

suits arise[415]—would seem to present situations where abstention would not be warranted under *Markham*.

VI. PARSING THE PROBATE EXCEPTION

The various formulae established by the federal appeals courts for determining whether a suit falls within the probate exception[416] provide a rough guide for determining when the probate exception applies. As shown above, however, the formulae fail to provide courts with an accurate means of determining whether a given probate-related suit falls within the exception.

While no court has explicitly broken down the probate exception into its component parts, one can infer from the Supreme Court's precedents that the exception ought to be viewed as an amalgam of five distinct rules: the *Erie* doctrine, the limits on Congress' grant of subject matter jurisdiction to the federal courts, *custodia legis* (the doctrine of prior exclusive jurisdiction), the Case or Controversy requirement, and prudential abstention. Only by applying these five rules in tandem can one determine whether a given suit falls within the probate exception.

A. STEP 1: THE *ERIE* DOCTRINE

The Supreme Court's probate exception precedents have not directly considered the *Erie* aspect of the exception because all but one of the Court's probate exception precedents pre-date the 1938 *Erie* decision.[417] Prior to *Erie* and its progeny, the federal courts' equity jurisdiction was uniform throughout the country,[418] and thus it was unnecessary for the federal courts to consider whether a given equitable or legal remedy was provided for under state law. Consequently, the Court's probate exception precedents do not address this issue.

Yet today it goes without saying that when a federal court exercises diversity jurisdiction over a claim, it must apply the law of the state in

415. *See supra* Part II.B.2.b.

416. *See supra* Part II.B.1.

417. *Markham v. Allen* is the only post-*Erie* probate-exception precedent. Sutton v. English, 246 U.S. 199 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Hess v. Reynolds, 113 U.S. 73 (1885); Gaines v. Fuentes, 92 U.S. 10 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

418. *E.g.*, *Payne*, 74 U.S. (7 Wall.) at 430 (noting the equity power of the federal courts is uniform throughout the country and equal to that of the English high court of chancery).

which it sits as the rule of decision for that claim.[419] Accordingly, in determining whether a federal court can entertain a probate-related cause of action, reference to state law is often necessary. For example, if an heir files a diversity suit alleging an independent common law tort claim for intentional interference with an expectation of an inheritance, the first step is to determine whether state law recognizes such a cause of action.[420] If there is no such cause of action under state law, the suit is not dismissed for lack of subject matter jurisdiction, but rather for failure to state a claim for which relief can be granted.[421]

B. STEP 2: SCOPE OF THE FEDERAL COURTS' SUBJECT MATTER JURISDICTION

The mere existence of a legal or equitable remedy under state law is not enough for a federal court to exercise diversity jurisdiction over a probate-related cause of action. For there to be statutory federal court subject matter jurisdiction, the legal or equitable remedy must fall within the traditional scope of the English courts of chancery and common law in 1789.[422] Thus, if a state abolishes its probate courts and vests its courts of general jurisdiction with jurisdiction over the probate of wills, a federal court sitting in diversity would not, under the current interpretation of the statutory grant of subject matter jurisdiction, be able to exercise jurisdiction over an action to probate the will.[423]

The various formulae developed by the federal courts fail to capture this step in the probate exception analysis. Because the "route" test allows

419. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

420. *See generally* Allen v. Hall, 139 F.3d 716 (9th Cir. 1998); Firestone v. Galbreath, 25 F.3d 323 (6th Cir. 1994); Moore v. Graybeal, 843 F.2d 706, 710 (3d Cir. 1988); DeWitt v. Duce, 675 F.2d 670 (5th Cir. 1982).

421. *Compare* FED. R. CIV. P. 12(b)(1) (action dismissed for lack of jurisdiction over the subject matter), *with* FED. R. CIV. P. 12(b)(6) (action dismissed for failure to state a claim upon which relief can be granted because no cause of action existed under federal statute). *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

422. *See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) The Court in *Guaranty Trust Co. of N.Y.* held that notwithstanding the *Erie* doctrine and its applicability to suits in equity, it is not the case:

> that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court . . . . Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.

Id.

423. *Cf.* Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982) ("This is not to say, of course, that federal courts can now probate wills in Illinois because the state has abolished its specialized probate courts. Probate remains a peculiarly local function which federal courts are ill equipped to perform.").

federal court jurisdiction where a remedy is available in a state court of general jurisdiction, it would incorrectly conclude that the federal court has subject matter jurisdiction over challenges to the validity of a will where state law provided such a legal or equitable cause of action. Under the "practical" test, where the state has eliminated its separate probate courts, federal court jurisdiction would be appropriate under the "relative expertise" prong of the test. Where the state provides for an independent action to challenge the validity of a will, federal court jurisdiction would be appropriate under the "judicial economy" prong of the test. To be sure, the "nature of claim" test would prevent the federal court from adjudicating a state-created equitable or legal action challenging the validity of a will admitted to probate, as that would go to the "validity" of the instrument. Yet it would fail to capture the various exceptions to the ecclesiastical courts' exclusive jurisdiction over such challenges in eighteenth-century England.

Since the historical limitation on federal court subject matter jurisdiction is a mere gloss on the general statutory grants of subject matter jurisdiction and is not a constitutional limitation, where Congress creates a federal legal or equitable remedy and specifically provides for federal court subject matter jurisdiction over such actions, as with the RICO statute, this step in the analytical framework of the probate exception would be inapplicable.[424]

C. STEP 3: *CUSTODIA LEGIS*

The "route" test for determining when the probate exception applies turns on whether the particular action could be heard in a state court of general jurisdiction, or if it is cognizable only in a state probate court. If the latter, federal court diversity jurisdiction does not exist.[425] To be sure, even some of the older Supreme Court cases have made reference to there being federal jurisdiction where an action can be brought in the state courts of general jurisdiction.[426]

424. *Cf*. Markham v. Allen, 326 U.S. 490, 495–96 (1946) (holding where a federal substantive statute specially confers subject matter jurisdiction on the federal district courts independently of the statutes governing generally the jurisdiction of the federal courts, prudential abstention is not appropriate); *Ashton*, 918 F.2d at 1072 (holding the probate exception inapplicable to suits brought under the federal interpleader statute).

425. *See supra* Part II.B.1.b.

426. *See* Gaines v. Fuentes, 92 U.S. 10, 20–21 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 519–20 (1874).

Yet this would fly in the face of firmly established precedent holding that the states cannot defeat the federal constitutional and statutory right of a diverse party to remove a suit to federal court (or to file it there as an original matter) by mere internal arrangement of the distribution of jurisdiction between their probate courts and their courts of general jurisdiction.[427]

What the "route" test is really trying to capture is nothing more than a short-hand approximation of the *custodia legis* doctrine, under which two courts cannot exercise concurrent jurisdiction over a proceeding in rem. As a general rule, when a controversy is relegated by state law to the state probate courts (as opposed to the state courts of general jurisdiction), it is usually because it is part of the ongoing in rem proceeding and not an independent in personam action. But since a state could choose to vest its probate courts with jurisdiction over independent in personam actions, such as wrongful death suits or actions by creditors, the "route" test works only as a close approximation of the doctrine of *custodia legis*, and cannot always be correct.

427. *See* Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43–44 (1909) (holding a federal court has subject matter jurisdiction to adjudicate suits by creditors, legatees, and heirs to establish their claims against an estate, notwithstanding state statutes giving state probate courts exclusive jurisdiction over such suits); Clark v. Bever, 139 U.S. 96, 102–03 (1891); Hess v. Reynolds, 113 U.S. 73, 77 (1885) ("[T]he controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by State statutes enacted for the more convenient settlement of estates of decedents."); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (holding the constitutional and statutory right of a citizen of one state to have their suit against a citizen of another state heard in a federal tribunal would be abrogated if diversity jurisdiction were subject to the internal distribution of judicial power within a state); Greyhound Lines, Inc. v. Lexington State Bank & Trust Co., 604 F.2d 1151, 1154–55 (8th Cir. 1979) (holding the decision of state to give county courts exclusive jurisdiction over claims against the estates of decedents does not act as a restriction on federal court diversity jurisdiction); Swan v. Estate of Monette, 400 F.2d 274, 276 (8th Cir. 1968) (citing Yonley v. Lavender, 88 U.S. (21 Wall.) 276 (1874); *Beach*, 269 F.2d at 372–73 (citing McClellan v. Carland, 217 U.S. 268, 281–82 (1910)); Borer v. Chapman, 119 U.S. 587 (1887); *Hess*, 113 U.S. at 76–77; *Gaines*, 92 U.S. at 10 (holding if something is not deemed to be a "purely probate matter" the federal court's jurisdiction is not ousted by the mere internal arrangement of the state courts by way of putting a matter within the exclusive jurisdiction of the probate courts); Barnes v. Brandrup, 506 F. Supp. 396, 399 (S.D.N.Y. 1981) (citing Beach v. Rome Trust Co., 269 F.2d 367, 373 (2d Cir. 1959) for the proposition that controversies that were not regarded as probate matters in 1789 could not be kept from federal court jurisdiction based on internal arrangements of the state courts); Bryden v. Davis, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981) (noting states cannot impose restraints on federal jurisdiction by creating probate courts and vesting them with exclusive jurisdiction); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 111–12 (D. Or. 1957) (holding the states cannot limit federal court jurisdiction, and that if a right was enforceable in the English High Court of Chancery in 1789 and could be enforced in personam in some state court – any court in the state, even a probate court, then there can still be federal court jurisdiction).

Indeed, the *custodia legis* rule underlies the principle that while a federal court sitting in diversity can establish the debts against the estate, the debt established must take the place and share of the estate as administered by the probate court. The debt established cannot be enforced by process directly against the property of the decedent, since for the federal court to order the distribution of the assets of an estate that is being administered by a state probate court would mean that both courts were exercising jurisdiction over the same *res*.[428]

Accordingly, the issue is not in what court the action can be brought, but whether it is an independent *inter partes* action. The Supreme Court has explained that "action or suit *inter partes*" refers:

> only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by state law is a mere continuation of the probate proceeding.[429]

Under this step of the probate exception inquiry, the key is to examine the state's statutory scheme to determine whether the suit is a mere continuation of the proceedings to probate the will or is instead an independent *inter partes* action.[430] For example, where state law requires a suit challenging the will be brought before the same judge who is exercising jurisdiction over the probate of the will and the administration of the estate, the action will be considered to be a mere continuation of the

428. *See* Byers v. McAuley, 149 U.S. 608, 614 (1893). The Court reasoned "where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court." *Id.* Hence the statement in *Markham* that

> federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Markham, 326 U.S. at 494.

429. Farrell v. O'Brien, 199 U.S. 89, 110 (1905) (emphasis in original). *See generally id.* at 114–16 (holding that where a proceeding to contest a will under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); Sutton v. English, 246 U.S. 199, 207–08 (1918) (holding that where a suit to challenge a will must be brought in the court in which it was probated, and where the state courts of general jurisdiction have no original jurisdiction over actions to annul a will, a suit to annul a will is merely supplemental to the probate of the will, and there is thus no federal court jurisdiction); *Waterman*, 215 U.S. at 44 (noting that there is no federal court jurisdiction when the proceedings are in rem and are thus purely probate in character).

430. *See Sutton*, 246 U.S. at 205–06 (analyzing the statutory scheme for challenging a will in Texas); *Farrell*, 199 U.S. at 111–14 (analyzing the statutory scheme for challenging a will in Washington).

probate proceeding and not an independent *inter partes* action.[431] Moreover, if the result of the judgment arising from a challenge to the validity of a will were binding as against the whole world and not merely the parties to the suit, it would be a suit in rem rather than a suit *inter partes* and the federal court would lack jurisdiction over the suit. Even assuming the historical limitation on the scope of the statutory grant of subject matter jurisdiction does not bar adjudication of an independent action to challenge the validity of a will in federal court, the *custodia legis* doctrine might, depending on the state's statutory scheme. But since the *custodia legis* doctrine is basically a rule of first-come, first-served, the federal court would not be barred from exercising jurisdiction over an action challenging the validity of a will—even if such an action is deemed to be part of the ongoing probate proceedings—if the federal action is filed prior to the commencement of any state probate proceedings.

D. STEP 4: CASE OR CONTROVERSY

Some courts have questioned whether probate matters are justiciable "cases or controversies" within the meaning of Article III.[432] In *Gaines v. Fuentes*,[433] however, the Supreme Court distinguished an action to probate a will from an action challenging a will. The Court reasoned that the mere probate of a will is an action in rem, which does not necessarily, and in fact seldom does, involve any case or controversy between parties within the meaning of Article III.[434] But once a dispute arises concerning the validity or construction of a will, an Article III controversy arises.[435] Accordingly, once a will has been probated, an action by a legatee, heir or other claimant against an executor is a case or controversy within the meaning of Article III,[436] as is a suit seeking a declaration as to heirship or the construction or validity of a will.[437]

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431. *See Sutton*, 246 U.S. at 207–08; *Farrell*, 199 U.S. at 114–16.

432. *E.g.*, Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946); Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979).

433. 92 U.S. 10 (1875).

434. *Id.* at 21–22.

435. *Id.* at 22.

> [J]urisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

Ellis v. Davis, 109 U.S. 485, 496–97 (1883).

436. Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963).

437. Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

Thus, although the historical limitation on federal court subject matter jurisdiction is not constitutionally mandated and can easily be overruled by Congress, at least a small part of the exception has constitutional underpinnings. Yet in most probate exception cases, an Article III controversy will have arisen. The inquiry into whether a case or controversy exists, however, must be separated from the question of whether the controversy is a "civil action" within the meaning of the statutory grants of subject matter jurisdiction to the federal courts,[438] which is subject to the historical gloss discussed above.

E. STEP 5: ABSTENTION

Finally, assuming a suit involving a probate-related matter survives the four steps discussed above, the court must consider whether it should nonetheless abstain in accordance with the parameters of the prudential abstention doctrines discussed in Part V.

VII. CONCLUSION

In the fourteenth century King Edward III of England stripped the ecclesiastical courts of the power directly to administer estates because the church clergy were converting the deceaseds' estates for their own use.[439] Although the modern-day, U.S. equivalent of the ecclesiastical courts—the probate courts—are not controlled by churches, ironically enough, the scenario discussed in the introduction illustrates how our present system of relegating probate and probate-related matters to state probate courts can permit religious groups to pillage the assets of the deceased in a manner reminiscent of pre-fourteenth century ecclesiastical practice.

The validity of the historical gloss on the statutory grant of subject matter jurisdiction to the federal courts is dubious, and when coupled with the expansive use of prudential abstention, seems little more than an effort by the federal courts to dump unwanted cases from their docket. With respect to diversity, the result is to relegate out-of-state litigants to a type of state court in which the risk of prejudice against out-of-state litigants presents the paradigmatic example of a suit that ought to be heard in federal court. When courts apply the probate exception to probate-related suits filed under RICO and other federal statutes, litigants are denied important federal rights.

438. *See id.*

439. *See* HOLDSWORTH, *supra* note 129, at 627.

If the federal courts will not reconsider the historical gloss on the diversity statute, they should actually follow eighteenth-century English practice, which as demonstrated in this Article allowed the courts of equity and common law to exercise jurisdiction over a great deal of probate-related matters, including any suit related to trusts, wills of land, and even some challenges to the validity of wills. Additionally, where an action falls within the historic scope of law or equity jurisdiction, the federal courts should limit their use of prudential abstention to the existing categories of abstention rather than creating new, result-oriented ones.

Finally, this Article illustrates that if the courts will not reverse course, Congress has the authority under Article III to do so, and concludes that fidelity to the principles underlying the establishment of a federal judiciary necessitate such a change.

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

APPLICATION FOR AUTHORITY TO RETAIN COUNSEL - MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Gregory A. Lester, Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, ("Applicant"), and files this his Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and in support of such Application, would respectfully show unto the Court the following:

1.

Applicant was appointed Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, by Order of this Court signed on July 23, 2015. A true and correct copy of the Order Appointing Temporary Administrator Pending Contest is attached hereto as **Exhibit "A."** Applicant qualified by taking the Oath on July 24, 2015 and filing a Bond on July 27, 2015.

2.

Applicant requests permission to retain the services of JILL W. YOUNG, an attorney with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP located in Houston, Harris County, Texas, as well as other members of that firm that specialize in probate litigation. Counsel will represent Mr. Lester in the matters filed herein, which involve the Temporary Administrator Pending Contest and those items enumerated in the Court's Order.

3.

Applicant wishes to formally retain Counsel on behalf of the Estate. Applicant alleges and believes retaining Counsel for the purpose of representation in the aforementioned Estate is in the best interest of the Estate.

4.

Additionally, Applicant requests the services of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP to assist Applicant with his fiduciary responsibilities pursuant to the Texas Estates Code and this Court's Order. Applicant believes that it would be in the best interest of the Estate to retain counsel to assist him with such fiduciary responsibilities in the Estate on file herein.

WHEREFORE, PREMISES CONSIDERED, Applicant GREGORY A. LESTER, Temporary Administrator Pending Contest of the Estate of Nelva E. Brunsting, Deceased, requests that this Court allow him to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP to represent him in his capacity as Temporary Administrator Pending Contest of the Estate of the Decedent, and for such other and further relief which the Court may deem proper.

Respectfully submitted,

GREGORY A. LESTER, TEMPORARY
ADMINISTRATOR OF THE ESTATE OF
NELVA E. BRUNSTING, DECEASED

MacINTYRE, McCULLOCH, STANFIELD
& YOUNG, LLP

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ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent by e-mail, e-serve, facsimile, and/or United States certified mail, return receipt requested, on this the 15th day of September, 2015, to the following parties:

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JILL W. YOUNG

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator

EXHIBIT "A"

Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

FILED
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COUNTY CLERK
HARRIS COUNTY, TEXAS

NO. 412,249

ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING AUTHORITY TO RETAIN COUNSEL – MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP

BE IT REMEMBERED that on this day came on for consideration the Application of Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, in connection with the Application for Authority to Retain Counsel – MacIntyre, McCulloch, Stanfield & Young, LLP, and the Court finding that due and proper notice of the Application has been given, finds that the Application should in all respects be granted, it is accordingly,

ORDERED, ADJUDGED and DECREED by the Court that Gregory A. Lester, Temporary Administrator of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain JILL W. YOUNG with the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP as Counsel for Applicant, to perform such legal services on behalf of the Estate as are necessary and reasonable, including assisting Applicant in carrying out his fiduciary responsibilities.

IT IS FURTHER ORDERED by the Court that GREGORY A. LESTER, Administrator of the of the Estate of Nelva E. Brunsting, Deceased, be and is hereby granted authority to retain the law firm of MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, LLP pursuant to the Texas Estates Code and this Court's Order.

SIGNED this _____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

MACINTYRE MCCULLOCH STANFIELD
& YOUNG, LLP

By: _____

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ATTORNEYS FOR APPLICANT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S
CERTIFICATE OF INTERESTED PARTIES

Defendant Jill Willard Young, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiff Candace Louise Curtis, pro se
   218 Landana Street
   American Canyon, CA 94503
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   occurtis@sbcglobal.net

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3. Defendant Jill Willard Young
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4. Defendant Candace Kunz-Freed
   c/o Cory S Reed

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5. Defendant Albert Vacek, Jr.
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6. Defendant Bernard Lyle Matthews
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7. Defendant Anita Kay Brunsting, pro se
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Victoria, TX 77904

8. Defendant Amy Ruth Brunsting, pro se
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New Braunfels, TX 78132

9. Defendant Neal Spielman
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1155 Dairy Ashford, Suite 300
Houston, Texas 77079

10. Defendant Bradley Featherston
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20333 State Highway 249, Suite 200
Houston, Texas 77070

11. Defendant Stephen Mendel
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Houston, TX 77079

12. Defendant Darlene Payne Smith
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13. Defendant Jason Ostrom
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14. Defendant Gregory Lester
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15. Defendant Bobbie Bayless
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16. Defendant The Honorable Christine Riddle Butts
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Dated: October 6, 2016

Respectfully submitted,
/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Certificate of Interested Parties has been served on October 6, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal (the "Complaint"). On September 15, 2016, Defendant Jill Young filed her Motion to Dismiss. After the filing of Ms. Young's Motion to Dismiss, Plaintiffs filed a thirty-one page long "Addendum of Memorandum in Support of Rico Complaint," with more than 1,400 pages of attached "exhibits" (the "Addendum"). *See* DKT. 26.

Ms. Young now files this Motion to Strike the Addendum, because it has no legal effect. And even if it were effective, it does not change the merits of Ms. Young's Motion to Dismiss, which should be granted.

I. The "Addendum" has no Legal Effect.

The Addendum—filed *after* Ms. Young was served with the Original Complaint and *after* she filed her 12(b)(6) Motion to Dismiss—has no legal effect. It is not a "pleading" under the Federal Rules of Civil Procedure. Specifically, Federal Rule of Civil Procedure 7(a) says:

Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

See Fed. R. Civ. P. 7(a). And although a party can amend its complaint as a matter of course after the filing of a responsive pleading, the Addendum cannot be an amended complaint, because it alleges no causes of action against Ms. Young.

Because the Addendum is not a complaint, it is not a valid pleading under the Federal Rules of Civil Procedure, and it should be struck.

II. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss.

Even if the Addendum were treated as Plaintiffs' Complaint (or some portion of Plaintiffs' Complaint), it does not change the merits of Ms. Young's Motion to Dismiss. The Addendum only refers to Ms. Young in four places, in paragraphs 96, 97, 99, and 107. *See* Addendum, at ¶¶ 96, 97, 99, and 107. In full, those paragraphs state:

> 96. The only matter properly before the court on September 10, 2015 was whether or not Mr. Lester should have the authority to retain Jill Willard Young to assist him in his administration obligations to the estate.
>
> 97. Neither individual Plaintiff Candace Curtis nor individual Plaintiff Carl Brunsting was in attendance September 10, 2015, as neither is party to the estate litigation and neither objected to Mr. Lester retaining Jill Young to assist with his fiduciary duty to evaluate the estate's claims. That was the only issue properly before the Court on September 10, 2015 and did not include the matters Mr. Spielman states were discussed and where there was apparently an agreement made to treat the Gregory Lester report as if it were a jury verdict before it was even written.

> * * *
>
> 99. The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs who were prejudiced by those discussions, involving matters not properly before the Court, wherein there were agreements made between the Court, Jill Willard Young, Neal Spielman, Bradley Featherston, Stephen Mendel and Gregory Lester to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter. First to "unentrench" Plaintiff Curtis from her stand upon rights and reliance upon the rule of law in the face of this all too obvious public corruption conspiracy and second, to deprive Plaintiff of substantive due process and access to the Court.
>
> * * *
>
> 107. Mr. Spielman confessed on March 9, 2016 that the attorneys conspired at the hearing on application to retain Jill Young, with the probate Court Judges, the Court's crony administrator Gregory Lester, and Jill Young, entering into an illicit agreement to produce a fictitious "report" and to subsequently treat the fiction as if it were the equivalent of a jury verdict, and this all occurred before the "Report" was even written.

Id.

These "allegations" fail for three reasons. First, they are so implausible that they cannot form the basis for a valid complaint. Second, the assertions—even if somehow true—fail to raise a RICO claim. Third, the allegations are barred by Texas's attorney immunity doctrine—which constitute an absolute bar on suits relating to actions taken in connection with representing a client in litigation.

A. Plaintiffs' Addendum, likes the Complaint, is too implausible to state a valid claim for relief.

Plaintiffs' Addendum, like the Complaint, fails to satisfy the plausibility requirements of Rule 12. It is also frivolous and delusional—a separate ground for dismissal.

1. Plaintiffs' Addendum fails to satisfy Rule 12.

Under Rule 12, to properly assert a well-pleaded complaint, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Plaintiffs' claim is only "facially plausible" if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Plaintiffs' Addendum states only vague, speculative, and implausible allegations against Ms. Young that are insufficient to form the basis of a well-pleaded Complaint. Plaintiffs ask the Court to infer from the fact that Plaintiffs chose not to attend a hearing that the other attendees at the hearing conspired to fabricate the report of the temporary administrator.[1] The implausible leap that Plaintiffs ask this Court merely to assume is not permitted by Rule 12.

2. Plaintiffs' Addendum, like the Complaint, is frivolous and delusional.

As stated in Ms. Young's Motion to Dismiss, this Court has "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the

[1] *See, e.g.*, Addendum, DKT. 26, at ¶ 99 ("The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs . . . to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter.").

inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)).

Like in their Complaint, Plaintiffs' Addendum alleges a bizarre conspiracy theory where practicing litigants, attorneys, and judges plotted against Plaintiffs in open court, apparently making agreements designed to diminish the value of probate estates. Other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See, e.g.*, *Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). The Addendum does nothing to remedy the fanciful allegations contained in the Complaint; it merely compounds the impropriety of Plaintiffs' delusions.

B. Plaintiffs' Addendum fails to state facts sufficient to assert a RICO claim against Ms. Young.

None of Plaintiffs' allegations against Ms. Young are sufficient to state a RICO claim.[2]

[2] As shown in Ms. Young's Motion to Dismiss, Plaintiffs have alleged numerous causes of action for which they have no private right of action. *See* Motion to Dismiss, DKT. 25, at pp. 13–15. The only cause of action they assert that they could actually pursue is their RICO claim.

First, none of the allegations actually assert that Ms. Young committed any wrongful act whatsoever. Instead, Plaintiffs complain of Ms. Young's retention as attorney for the temporary administrator. But the Plaintiffs have no right to dictate who the temporary administrator will retain as counsel.

And none of these allegations show that Plaintiffs have been injured by a violation of RICO. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (holding that a RICO plaintiff must show he has standing to sue and that, to plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury"); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

But most crucially, the Plaintiffs' Addendum still fails to assert the "pattern of racketeering activity," that is required to allege a RICO claim. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). The only assertion made in the Addendum against Ms. Young is that she somehow conspired *with the Probate Court itself* to act as attorney to a temporary administrator who submitted a false report. *See* Addendum, at ¶¶ 97, 99, and 107. This is not a "pattern of racketeering activity." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (holding that racketeering activity must "consist[] of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1)).

And even if Plaintiffs' fallacious assertions were true, Plaintiffs allege nothing more than the "garden-variety tort" of common law fraud, which is insufficient to state a RICO claim. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite

predicate *criminal* acts under RICO"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'").

C. Plaintiffs' Addendum cannot avoid Texas's attorney immunity doctrine.

Finally, Plaintiffs' Addendum makes no difference because Plaintiffs still cannot avoid the effect of Texas's attorney immunity doctrine. Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

Here, the only facts alleged by Plaintiffs relate to conduct Plaintiffs allege occurred when Ms. Young was acting as attorney for Temporary Administrator Lester. *See* Addendum, at ¶¶ 96, 97, 99, and 107. And "[e]ven conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)). And a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406). Instead, the only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was

engaging in conduct that did not involve the provision of legal services. *Id.* Thus, Plaintiffs' Addendum makes no difference, and this suit against Ms. Young should be dismissed.

III. Conclusion

For the reasons stated above, this Court should strike the Plaintiffs' Addendum. In the alternative, Plaintiffs' Addendum does not change the merits of Ms. Young's Motion to Dismiss, and the Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 3, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on October 3, 2016, I conferred with Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to withdraw the Addendum, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 3, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

Responses and Replies

4:16-cv-01969 Curtis et al v. Kunz-Freed et al

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered on 10/3/2016 at 6:54 PM CDT and filed on 10/3/2016

Case Name: Curtis et al v. Kunz-Freed et al
Case Number: 4:16-cv-01969
Filer: Candace Louise Curtis
Document Number: 41

Docket Text:
RESPONSE to [25] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Candace Louise Curtis. (Attachments: # (1) Exhibit, # (2) Exhibit, # (3) Exhibit, # (4) Exhibit, # (5) Exhibit, # (6) Exhibit, # (7) Exhibit, # (8) Exhibit, # (9) Exhibit, # (10) Exhibit, # (11) Exhibit)(Curtis, Candace)

4:16-cv-01969 Notice has been electronically mailed to:

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Responses and Replies

4:16-cv-01969 Curtis et al v. Kunz-Freed et al

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

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Document Number: 41

Docket Text:
RESPONSE to [25] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Candace Louise Curtis. (Attachments: # (1) Exhibit, # (2) Exhibit, # (3) Exhibit, # (4) Exhibit, # (5) Exhibit, # (6) Exhibit, # (7) Exhibit, # (8) Exhibit, # (9) Exhibit, # (10) Exhibit, # (11) Exhibit)(Curtis, Candace)

4:16-cv-01969 Notice has been electronically mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S ADOPTION AND JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' "Addendum of Memorandum in Support of RICO Complaint and would respectfully show the Court the following:

I.
THE COURT SHOULD STRIKE PLAINTIFFS' ADDENDUM

1. In the interest of justice and judicial economy, and pursuant to Federal Rule of Civil Procedure 10(c), V&F hereby adopts and incorporates by reference, as if recited herein the

arguments and authority contained in Jill Willard Young's Motion to Strike (Dkt. 38). This Court should strike Plaintiffs' Addendum, because it is not a valid pleading under the Federal Rules of Civil Procedure.

2. More importantly, the Court should dismiss Plaintiffs' claims against V&F. The "Addendum" does not change the merits of V&F's Motions to Dismiss. The "Addendum" sparsely references V&F. *See* Addendum, at ¶¶ 21, 23, 26, 29, 38, and 61. Of those references, none form the basis for a valid complaint or support a RICO claim against V&F.

3. Plaintiffs' claims should be dismissed because they have not adequately pleaded a violation of the RICO Act. Even assuming that Plaintiffs' Addendum is considered to be a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to meet the required pleading standards.

II.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that the Court strike Plaintiffs' Addendum.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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ATTORNEYS FOR DEFENDANTS CANDACE KUNTZ-FREED AND ALBERT VACEK, JR.

CERTIFICATE OF SERVICE

I certify that on the 4th day of October, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

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/s/ Cory S. Reed
Cory S. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal (the "Complaint"). On September 15, 2016, Defendant Jill Young filed her Motion to Dismiss. After the filing of Ms. Young's Motion to Dismiss, Plaintiffs filed a thirty-one page long "Addendum of Memorandum in Support of Rico Complaint," with more than 1,400 pages of attached "exhibits" (the "Addendum"). *See* DKT. 26.

Ms. Young now files this Motion to Strike the Addendum, because it has no legal effect. And even if it were effective, it does not change the merits of Ms. Young's Motion to Dismiss, which should be granted.

I. The "Addendum" has no Legal Effect.

The Addendum—filed *after* Ms. Young was served with the Original Complaint and *after* she filed her 12(b)(6) Motion to Dismiss—has no legal effect. It is not a "pleading" under the Federal Rules of Civil Procedure. Specifically, Federal Rule of Civil Procedure 7(a) says:

Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

See Fed. R. Civ. P. 7(a). And although a party can amend its complaint as a matter of course after the filing of a responsive pleading, the Addendum cannot be an amended complaint, because it alleges no causes of action against Ms. Young.

Because the Addendum is not a complaint, it is not a valid pleading under the Federal Rules of Civil Procedure, and it should be struck.

II. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss.

Even if the Addendum were treated as Plaintiffs' Complaint (or some portion of Plaintiffs' Complaint), it does not change the merits of Ms. Young's Motion to Dismiss. The Addendum only refers to Ms. Young in four places, in paragraphs 96, 97, 99, and 107. *See* Addendum, at ¶¶ 96, 97, 99, and 107. In full, those paragraphs state:

> 96. The only matter properly before the court on September 10, 2015 was whether or not Mr. Lester should have the authority to retain Jill Willard Young to assist him in his administration obligations to the estate.
>
> 97. Neither individual Plaintiff Candace Curtis nor individual Plaintiff Carl Brunsting was in attendance September 10, 2015, as neither is party to the estate litigation and neither objected to Mr. Lester retaining Jill Young to assist with his fiduciary duty to evaluate the estate's claims. That was the only issue properly before the Court on September 10, 2015 and did not include the matters Mr. Spielman states were discussed and where there was apparently an agreement made to treat the Gregory Lester report as if it were a jury verdict before it was even written.

> * * *
>
> 99. The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs who were prejudiced by those discussions, involving matters not properly before the Court, wherein there were agreements made between the Court, Jill Willard Young, Neal Spielman, Bradley Featherston, Stephen Mendel and Gregory Lester to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter. First to "unentrench" Plaintiff Curtis from her stand upon rights and reliance upon the rule of law in the face of this all too obvious public corruption conspiracy and second, to deprive Plaintiff of substantive due process and access to the Court.
>
> * * *
>
> 107. Mr. Spielman confessed on March 9, 2016 that the attorneys conspired at the hearing on application to retain Jill Young, with the probate Court Judges, the Court's crony administrator Gregory Lester, and Jill Young, entering into an illicit agreement to produce a fictitious "report" and to subsequently treat the fiction as if it were the equivalent of a jury verdict, and this all occurred before the "Report" was even written.

Id.

These "allegations" fail for three reasons. First, they are so implausible that they cannot form the basis for a valid complaint. Second, the assertions—even if somehow true—fail to raise a RICO claim. Third, the allegations are barred by Texas's attorney immunity doctrine—which constitute an absolute bar on suits relating to actions taken in connection with representing a client in litigation.

A. Plaintiffs' Addendum, likes the Complaint, is too implausible to state a valid claim for relief.

Plaintiffs' Addendum, like the Complaint, fails to satisfy the plausibility requirements of Rule 12. It is also frivolous and delusional—a separate ground for dismissal.

1. Plaintiffs' Addendum fails to satisfy Rule 12.

Under Rule 12, to properly assert a well-pleaded complaint, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Plaintiffs' claim is only "facially plausible" if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Plaintiffs' Addendum states only vague, speculative, and implausible allegations against Ms. Young that are insufficient to form the basis of a well-pleaded Complaint. Plaintiffs ask the Court to infer from the fact that Plaintiffs chose not to attend a hearing that the other attendees at the hearing conspired to fabricate the report of the temporary administrator.[1] The implausible leap that Plaintiffs ask this Court merely to assume is not permitted by Rule 12.

2. Plaintiffs' Addendum, like the Complaint, is frivolous and delusional.

As stated in Ms. Young's Motion to Dismiss, this Court has "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the

[1] *See, e.g.*, Addendum, DKT. 26, at ¶ 99 ("The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs . . . to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter.").

inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)).

Like in their Complaint, Plaintiffs' Addendum alleges a bizarre conspiracy theory where practicing litigants, attorneys, and judges plotted against Plaintiffs in open court, apparently making agreements designed to diminish the value of probate estates. Other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See, e.g.*, *Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). The Addendum does nothing to remedy the fanciful allegations contained in the Complaint; it merely compounds the impropriety of Plaintiffs' delusions.

B. Plaintiffs' Addendum fails to state facts sufficient to assert a RICO claim against Ms. Young.

None of Plaintiffs' allegations against Ms. Young are sufficient to state a RICO claim.[2]

[2] As shown in Ms. Young's Motion to Dismiss, Plaintiffs have alleged numerous causes of action for which they have no private right of action. *See* Motion to Dismiss, DKT. 25, at pp. 13–15. The only cause of action they assert that they could actually pursue is their RICO claim.

First, none of the allegations actually assert that Ms. Young committed any wrongful act whatsoever. Instead, Plaintiffs complain of Ms. Young's retention as attorney for the temporary administrator. But the Plaintiffs have no right to dictate who the temporary administrator will retain as counsel.

And none of these allegations show that Plaintiffs have been injured by a violation of RICO. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (holding that a RICO plaintiff must show he has standing to sue and that, to plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury"); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

But most crucially, the Plaintiffs' Addendum still fails to assert the "pattern of racketeering activity," that is required to allege a RICO claim. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). The only assertion made in the Addendum against Ms. Young is that she somehow conspired *with the Probate Court itself* to act as attorney to a temporary administrator who submitted a false report. *See* Addendum, at ¶¶ 97, 99, and 107. This is not a "pattern of racketeering activity." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (holding that racketeering activity must "consist[] of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1)).

And even if Plaintiffs' fallacious assertions were true, Plaintiffs allege nothing more than the "garden-variety tort" of common law fraud, which is insufficient to state a RICO claim. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite

predicate *criminal* acts under RICO"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'").

C. Plaintiffs' Addendum cannot avoid Texas's attorney immunity doctrine.

Finally, Plaintiffs' Addendum makes no difference because Plaintiffs still cannot avoid the effect of Texas's attorney immunity doctrine. Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

Here, the only facts alleged by Plaintiffs relate to conduct Plaintiffs allege occurred when Ms. Young was acting as attorney for Temporary Administrator Lester. *See* Addendum, at ¶¶ 96, 97, 99, and 107. And "[e]ven conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)). And a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406). Instead, the only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was

engaging in conduct that did not involve the provision of legal services. *Id.* Thus, Plaintiffs' Addendum makes no difference, and this suit against Ms. Young should be dismissed.

III. Conclusion

For the reasons stated above, this Court should strike the Plaintiffs' Addendum. In the alternative, Plaintiffs' Addendum does not change the merits of Ms. Young's Motion to Dismiss, and the Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 3, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on October 3, 2016, I conferred with Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to withdraw the Addendum, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 3, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

Responses and Replies

4:16-cv-01969 Curtis et al v. Kunz-Freed et al

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

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Responses and Replies

4:16-cv-01969 Curtis et al v. Kunz-Freed et al

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered on 10/3/2016 at 6:54 PM CDT and filed on 10/3/2016

Case Name: Curtis et al v. Kunz-Freed et al
Case Number: 4:16-cv-01969
Filer: Candace Louise Curtis
Document Number: 41

Docket Text:
RESPONSE to [25] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Candace Louise Curtis. (Attachments: # (1) Exhibit, # (2) Exhibit, # (3) Exhibit, # (4) Exhibit, # (5) Exhibit, # (6) Exhibit, # (7) Exhibit, # (8) Exhibit, # (9) Exhibit, # (10) Exhibit, # (11) Exhibit)(Curtis, Candace)

4:16-cv-01969 Notice has been electronically mailed to:

Bobbie G Bayless bayless@baylessstokes.com

Candace Louise Curtis occurtis@sbcglobal.net

Cory S Reed creed@thompsoncoe.com, RGonzalez@thompsoncoe.com

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Rafe A Schaefer rafe.schaefer@nortonrosefulbright.com, donna.jackson@nortonrosefulbright.com

Rik Wayne Munson blowintough@att.net

4:16-cv-01969 Notice has not been electronically mailed to:

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, TX 78132

Anita Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

The following document(s) are associated with this transaction:

Document description: Main Document
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Electronic document Stamp:
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DROP

NO. 412,249

PROBATE COURT 4

IN THE ESTATE OF Nelva E. Brunsting	§	IN THE PROBATE COURT
	§	NUMBER FOUR OF
DECEASED	§	HARRIS COUNTY, TEXAS

DROP ORDER

On this day, it having been brought to the attention of this Court that the above entitled and numbered estate should be dropped,

IT IS THEREFORE ORDERED that the Clerk drop said estate from the Court's active docket.

IT IS FURTHER ORDERED that any costs incident to this order are hereby waived.

SIGNED this 4 day of April, 2013.

Christine Butts

JUDGE CHRISTINE BUTTS
PROBATE COURT NO. FOUR

FILED
2013 APR -5 AM 10:01
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S ADOPTION AND JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' "Addendum of Memorandum in Support of RICO Complaint and would respectfully show the Court the following:

I.
THE COURT SHOULD STRIKE PLAINTIFFS' ADDENDUM

1. In the interest of justice and judicial economy, and pursuant to Federal Rule of Civil Procedure 10(c), V&F hereby adopts and incorporates by reference, as if recited herein the

arguments and authority contained in Jill Willard Young's Motion to Strike (Dkt. 38). This Court should strike Plaintiffs' Addendum, because it is not a valid pleading under the Federal Rules of Civil Procedure.

2. More importantly, the Court should dismiss Plaintiffs' claims against V&F. The "Addendum" does not change the merits of V&F's Motions to Dismiss. The "Addendum" sparsely references V&F. *See* Addendum, at ¶¶ 21, 23, 26, 29, 38, and 61. Of those references, none form the basis for a valid complaint or support a RICO claim against V&F.

3. Plaintiffs' claims should be dismissed because they have not adequately pleaded a violation of the RICO Act. Even assuming that Plaintiffs' Addendum is considered to be a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to meet the required pleading standards.

II.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that the Court strike Plaintiffs' Addendum.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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ATTORNEYS FOR DEFENDANTS CANDACE KUNTZ-FREED AND ALBERT VACEK, JR.

CERTIFICATE OF SERVICE

I certify that on the 4th day of October, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

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/s/ Cory S. Reed
Cory S. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law that are plainly insufficient to survive dismissal (the "Complaint"). On September 15, 2016, Defendant Jill Young filed her Motion to Dismiss. After the filing of Ms. Young's Motion to Dismiss, Plaintiffs filed a thirty-one page long "Addendum of Memorandum in Support of Rico Complaint," with more than 1,400 pages of attached "exhibits" (the "Addendum"). *See* DKT. 26.

Ms. Young now files this Motion to Strike the Addendum, because it has no legal effect. And even if it were effective, it does not change the merits of Ms. Young's Motion to Dismiss, which should be granted.

I. The "Addendum" has no Legal Effect.

The Addendum—filed *after* Ms. Young was served with the Original Complaint and *after* she filed her 12(b)(6) Motion to Dismiss—has no legal effect. It is not a "pleading" under the Federal Rules of Civil Procedure. Specifically, Federal Rule of Civil Procedure 7(a) says:

Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

See Fed. R. Civ. P. 7(a). And although a party can amend its complaint as a matter of course after the filing of a responsive pleading, the Addendum cannot be an amended complaint, because it alleges no causes of action against Ms. Young.

Because the Addendum is not a complaint, it is not a valid pleading under the Federal Rules of Civil Procedure, and it should be struck.

II. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss.

Even if the Addendum were treated as Plaintiffs' Complaint (or some portion of Plaintiffs' Complaint), it does not change the merits of Ms. Young's Motion to Dismiss. The Addendum only refers to Ms. Young in four places, in paragraphs 96, 97, 99, and 107. *See* Addendum, at ¶¶ 96, 97, 99, and 107. In full, those paragraphs state:

> 96. The only matter properly before the court on September 10, 2015 was whether or not Mr. Lester should have the authority to retain Jill Willard Young to assist him in his administration obligations to the estate.
>
> 97. Neither individual Plaintiff Candace Curtis nor individual Plaintiff Carl Brunsting was in attendance September 10, 2015, as neither is party to the estate litigation and neither objected to Mr. Lester retaining Jill Young to assist with his fiduciary duty to evaluate the estate's claims. That was the only issue properly before the Court on September 10, 2015 and did not include the matters Mr. Spielman states were discussed and where there was apparently an agreement made to treat the Gregory Lester report as if it were a jury verdict before it was even written.

> * * *
>
> 99. The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs who were prejudiced by those discussions, involving matters not properly before the Court, wherein there were agreements made between the Court, Jill Willard Young, Neal Spielman, Bradley Featherston, Stephen Mendel and Gregory Lester to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter. First to "unentrench" Plaintiff Curtis from her stand upon rights and reliance upon the rule of law in the face of this all too obvious public corruption conspiracy and second, to deprive Plaintiff of substantive due process and access to the Court.
>
> * * *
>
> 107. Mr. Spielman confessed on March 9, 2016 that the attorneys conspired at the hearing on application to retain Jill Young, with the probate Court Judges, the Court's crony administrator Gregory Lester, and Jill Young, entering into an illicit agreement to produce a fictitious "report" and to subsequently treat the fiction as if it were the equivalent of a jury verdict, and this all occurred before the "Report" was even written.

Id.

These "allegations" fail for three reasons. First, they are so implausible that they cannot form the basis for a valid complaint. Second, the assertions—even if somehow true—fail to raise a RICO claim. Third, the allegations are barred by Texas's attorney immunity doctrine—which constitute an absolute bar on suits relating to actions taken in connection with representing a client in litigation.

A. Plaintiffs' Addendum, likes the Complaint, is too implausible to state a valid claim for relief.

Plaintiffs' Addendum, like the Complaint, fails to satisfy the plausibility requirements of Rule 12. It is also frivolous and delusional—a separate ground for dismissal.

1. Plaintiffs' Addendum fails to satisfy Rule 12.

Under Rule 12, to properly assert a well-pleaded complaint, Plaintiffs must plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Plaintiffs' claim is only "facially plausible" if they plead facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the Court is not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Plaintiffs' Addendum states only vague, speculative, and implausible allegations against Ms. Young that are insufficient to form the basis of a well-pleaded Complaint. Plaintiffs ask the Court to infer from the fact that Plaintiffs chose not to attend a hearing that the other attendees at the hearing conspired to fabricate the report of the temporary administrator.[1] The implausible leap that Plaintiffs ask this Court merely to assume is not permitted by Rule 12.

2. Plaintiffs' Addendum, like the Complaint, is frivolous and delusional.

As stated in Ms. Young's Motion to Dismiss, this Court has "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the

[1] *See, e.g.*, Addendum, DKT. 26, at ¶ 99 ("The inescapable conclusion here is that there were improper discussions outside of the presence of the Plaintiffs . . . to produce a fictitious report. They all apparently agreed to follow the as of yet unwritten report as if it were factual, that the false report would be used to further the extortion plot, that mediation would be forced upon Plaintiffs, that the costs of litigation for Plaintiff Curtis would be exacerbated, that there would be extended delay and, that another crony had been hand selected to act first as mediator and then as arbiter.").

inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)).

Like in their Complaint, Plaintiffs' Addendum alleges a bizarre conspiracy theory where practicing litigants, attorneys, and judges plotted against Plaintiffs in open court, apparently making agreements designed to diminish the value of probate estates. Other courts in this Circuit have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See, e.g.*, *Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). The Addendum does nothing to remedy the fanciful allegations contained in the Complaint; it merely compounds the impropriety of Plaintiffs' delusions.

B. Plaintiffs' Addendum fails to state facts sufficient to assert a RICO claim against Ms. Young.

None of Plaintiffs' allegations against Ms. Young are sufficient to state a RICO claim.[2]

[2] As shown in Ms. Young's Motion to Dismiss, Plaintiffs have alleged numerous causes of action for which they have no private right of action. *See* Motion to Dismiss, DKT. 25, at pp. 13–15. The only cause of action they assert that they could actually pursue is their RICO claim.

First, none of the allegations actually assert that Ms. Young committed any wrongful act whatsoever. Instead, Plaintiffs complain of Ms. Young's retention as attorney for the temporary administrator. But the Plaintiffs have no right to dictate who the temporary administrator will retain as counsel.

And none of these allegations show that Plaintiffs have been injured by a violation of RICO. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (holding that a RICO plaintiff must show he has standing to sue and that, to plead standing, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury"); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

But most crucially, the Plaintiffs' Addendum still fails to assert the "pattern of racketeering activity," that is required to allege a RICO claim. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). The only assertion made in the Addendum against Ms. Young is that she somehow conspired *with the Probate Court itself* to act as attorney to a temporary administrator who submitted a false report. *See* Addendum, at ¶¶ 97, 99, and 107. This is not a "pattern of racketeering activity." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (holding that racketeering activity must "consist[] of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1)).

And even if Plaintiffs' fallacious assertions were true, Plaintiffs allege nothing more than the "garden-variety tort" of common law fraud, which is insufficient to state a RICO claim. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite

predicate *criminal* acts under RICO"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering activity'").

C. Plaintiffs' Addendum cannot avoid Texas's attorney immunity doctrine.

Finally, Plaintiffs' Addendum makes no difference because Plaintiffs still cannot avoid the effect of Texas's attorney immunity doctrine. Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)).

Here, the only facts alleged by Plaintiffs relate to conduct Plaintiffs allege occurred when Ms. Young was acting as attorney for Temporary Administrator Lester. *See* Addendum, at ¶¶ 96, 97, 99, and 107. And "[e]ven conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id.* (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)). And a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406). Instead, the only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)).

Here, there are no allegations that Ms. Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor do Plaintiffs allege Ms. Young was

engaging in conduct that did not involve the provision of legal services. *Id.* Thus, Plaintiffs' Addendum makes no difference, and this suit against Ms. Young should be dismissed.

III. Conclusion

For the reasons stated above, this Court should strike the Plaintiffs' Addendum. In the alternative, Plaintiffs' Addendum does not change the merits of Ms. Young's Motion to Dismiss, and the Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 3, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on October 3, 2016, I conferred with Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to withdraw the Addendum, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 3, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S MOTION TO DISMISS

Defendant Neal Spielman ("Spielman") files this Motion to Dismiss seeking the dismissal of all claims asserted by Plaintiffs against him. In support thereof, Defendant would respectfully show the Court the following:

I.
SUMMARY OF THE ARGUMENT

This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs "claims," which are nearly incomprehensible are nothing more than incredible conspiracy theories suggesting that the Harris County Probate Court is the home of a nefarious, shadowy syndicate with designs on stealing "familial wealth." The Plaintiffs Original Complaint has alleged Spielman and other Defendants for (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C.

§371; and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any facts suggesting any wrongdoing by Spielman. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). For this reason, Plaintiffs' Original Complaint against Spielman should be dismissed with prejudice.

II.
BACKGROUND

Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, *Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.*, ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate. Rather than litigate their claims in the proper forum—Probate Court No. 4—Plaintiffs have filed this suit, naming every person remotely involved with the Probate Matter—including the judge, court personnel, Defendant Spielman, and "99 Jane and John Does"—in an apparent attempt to avoid participating in the court-ordered mediation in the Probate Matter.[1]

Spielman is attorney of record for Amy Brunsting in the Probate Matter. *See* Plaintiffs' Verified Complaint for Damages. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a summary judgment hearing, somehow depriving Curtis access to the courts and other due process rights. *See* Plaintiffs' Verified Complaint for Damages ¶131. Besides this one specific act, the remainder of Plaintiffs' allegations against Spielman consists of unintelligible and boilerplate criminal "conspiracy" claims and allegations against all Defendants. Without

[1] In the Plaintiffs' Verified Complaint for Damages, Plaintiff Curtis has characterized the pending mediation of the probate matter as "predetermined by the personal interests of enterprise acolytes and not by law." *See* ¶¶ 113-115.

anything more, the Plaintiffs have not pleaded facts to support a claim for relief, nor can their claims be cured through a new pleading. Therefore, the Court should dismiss this claim with prejudice. *Caroll v. Fort James Corp.* 470 F.3d 1171, 1177 (5th Cir. 2006).

III.
ARGUMENTS AND AUTHORITIES

A. Plaintiffs' Claims Are Barred by "Attorney Immunity" Doctrine.

Plaintiffs' claims should be dismissed pursuant to the "Attorney Immunity Doctrine". *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation."). More so, in Texas, "attorney immunity is properly characterized as a true immunity from suit." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* At 346. The only exceptions to attorney immunity is if the attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduction "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482.

It is undisputed fact that Spielman was acting at all times as the attorney for Amy Brunsting. In Plaintiffs' Verified Complaint for Damages, they state "[d]efendant Amy Brunsting is proximately related to Harris County Probate Court . . . **through her attorney, Defendant Neal Spielman** and co-conspirator Defendant Candace Kuntz-Freed." *See* ¶ 27 (emphasis added). The facts the Plaintiffs allege as forming the basis of her claims against Spielman arise from the discharge of Spielman's duties in representing Amy Brunsting. There are no allegations in the Plaintiffs' pleadings that would suggest Spielman's conduct fell into any

exception to the attorney immunity doctrine. Thus, as Spielman's conduct is immune from suit, Plaintiffs' claims must be dismissed.[2]

B. Plaintiffs' Claims Should be Dismissed Pursuant to Federal Rule 12(b)(6) for Failure to State a Claim.

The remainder of Plaintiffs' claims against Spielman should be dismissed because the Complaint fails to allege facts supporting any valid claims for relief. Plaintiffs complaints are simply conclusory allegations of law, inferences unsupported by facts, or formulaic recitations of elements. These types of complaints are not sufficient to defeat a 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim should be dismissed as implausible if it does not plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

In order to defeat a Rule 12(b)(6) motion, Plaintiffs must plead enough facts to "state a claim to relief that is **plausible on its face**." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is "facially plausible" if the facts plead allow the court to draw reasonable inferences about the alleged liability of the defendants. *Id.* Here, the Plaintiffs' allegations facially fail to meet this standard. In the RICO complaint against Spielman, Plaintiffs allege simply:

> **[Spielman and others] did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Section 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. §1961(1) in violation of 18 U.S.C. §1962(c) and (d) to wit[].**

Plaintiffs' Verified Complaint for Damages, ¶59.

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[2] Alternatively, Plaintiffs' claims are barred by lack of attorney-client privity. Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996).

Each of the Plaintiffs claims against Spielman follow the same formulaic pattern. *See* ¶¶ 121, 122, 124, 131, 132, 139. As the Plaintiffs' claims have not met the "fair notice" pleading standards Rule 12(b)(6), these claims should be dismissed.

C. Plaintiffs' Fail to Plead Particular Acts of Fraud.

Federal Rule 9(b) requires a heightened pleading standard when the claims allege acts of fraud. *See* FRCP 9(b). The Federal Rules requires plaintiffs to plead allegations of fraud "with particularity." *ABC Arbitrage Plaintiffs Grp. V. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "specific the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent") (internal quotations and citations omitted). The Plaintiffs plead, *inter alia*, that Spielman was part of an over-arching conspiracy, (referred to alternatively as "the Enterprise," the "Harris County Tomb Raiders," the "Probate Mafia", and the "Probate Cabal") whose purpose was to commit acts of fraud to "judicially kidnap and rob the elderly, our most vulnerable citizens of their freedom, dignity, fundamental human and civil rights and property accumulated throughout a lifetime, often also robbing heirs and beneficiaries of familiar relations and inheritance expectancies." *See* Plaintiffs' Verified Complaint for Damages ¶¶ 59-71. As these pleadings require the heightened standard, Plaintiff's allegations are facially insufficient and should be dismissed.

D. Plaintiffs' Fail to Plead Particular Conduct of the Defendant.

The pleading requirements under the Rule 9(b) also require that claimants allege specific and separate allegations against each defendant. *See Unimobil 84, Inc. v. Spurney,* 797 F.2d 214, 217 (5th Cir. 1986)(affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made"). It is "impermissible to make general allegations that

lump all defendants together, rather, the complaint must segregate the alleged wrongdoing of No. 1 from another."). *In re Parkcentral Glob. Litig.,* 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012).

Here, Plaintiffs' complaints consist of generalized allegations concerning "conspiracies" and "enterprises." The claims do not differentiate between what acts each member committed nor what role each defendant played. Nothing in the pleadings is informative enough to prepare a proper defense. Without discernible, specific acts alleged against the Defendants, the Plaintiffs have failed to meet the pleading standards required by the Federal Rules.

E. Plaintiffs Lack Privity With Defendant Spielman to Maintain a Suit.

Plaintiff's claims against Spielman arise from his role as an attorney for Amy Brunsting. Texas law dictates that an attorney only owes a duty of care to a person with whom the attorney has a professional attorney-client relationship. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). A non-client may not maintain a suit for the negligence of another's attorney. *See Gillespie v. Scherr*, 987 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Spielman and Plaintiffs have never had an attorney-client relationship; the Plaintiffs themselves do not dispute this fact. Without a relationship of "privity" between the attorney and the claimants, the claimant is not a proper party to sue. The rationale between the "privity" required to obtain standing is, that without it, attorneys would be subject to endless liability. *Barcelo*, 923 S.W.3d at 577. Texas has uniformly applied the doctrine of a "privity barrier" in estate planning contexts. *Id.* At 579.

Because Spielman and Plaintiffs never had an attorney-client relationship, nor do Plaintiffs allege an attorney-client relationship existed, they do not have standing to sue Spielman. Therefore, the Plaintiffs' claims must be dismissed.

IV.
CONCLUSION

For the reasons stated above, Defendant Neal Spielman requests that this Court grant Defendant's Motion to Dismiss on all claims with prejudice.

Respectfully submitted,

WINGET, SPADAFORA, & SCHWARTZBERG, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record through the Court's CM/ECF system on this date: October 3, 2016.

_____
Martin S. Schexnayder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
Plaintiff,	§	
	§	Civil Action No. 4:12-cv-00592
v	§	
	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al	§	
Defendants	§	

Opposed Motion

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

Rule 42(a) Courtesy Copy

PLAINTIFF'S MOTION FOR CONSOLIDATION OF RELATED CASES PURSUANT TO 28 U.S.C. §1367, RULE 42(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 7.6 WITH SUPPORTING MEMORANDUM

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1. Above named Plaintiff respectfully moves this Court to order consolidation of the following cases pursuant to 28 U.S.C. §1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6:

a. Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592 (TXSD Filed 2/27/2012) currently pending before the Honorable Kenneth Hoyt, and

b. Civil Action No. 4:16-cv-01969 currently pending before the Honorable Alfred H. Bennett (TXSD filed 7/5/2016)

2. Plaintiff moves for consolidation of pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal. The two cases are appropriate for consolidation for the following reasons:

3. The two cases share common parties. Candace Curtis is a Plaintiff in both federal suits and Amy and Anita Brunsting are Defendants in both suits.

4. The later suit is the cumulative product of events occurring in the course of litigating the earlier matter and although the remedies requested and the jurisdictions upon which the authorities of the Court have been invoked are divergent, all the facts flow from common acts and events.

5. The two cases involve common questions of law and fact because both arise from the same factual situation; namely, the rupture and looting of the Brunsting family of trusts and injuries resulting from the Defendants' efforts to evade accountability; and thus the two cases also involve common questions of law.

6. Through a series of awkward circumstances, the earlier diversity matter was remanded to Harris County Probate Court No. 4. The probate court experience produced evidence of a sinister design, resulting in the necessity for Plaintiff to again seek remedy in this Court and, thus, Plaintiff filed a separate action into the Southern District of Texas, Case No. 4:16-cv-01969, in

concert with Federal Rule of Civil Procedure Rule 11(b) motion for sanctions and with Federal Rule of Civil Procedure 60(b) and (d) motion for vacatur in the above titled Court.

7. While the earlier suit was a simple breach of fiduciary seeking disclosures and accounting, the later filed case is a Racketeer Influenced Corrupt Organization (RICO) suit brought under federal question jurisdiction, implicating the Probate Court's officers' participation in the conduct of an enterprise through a pattern of racketeering activity.

8. Judicial convenience and economy will be enhanced by consolidation of the actions.

9. Consolidation will result in one trial under one judge, which will bind all plaintiffs and defendants for all purposes. This will save time and avoid unnecessary costs to the Defendants, to the Plaintiffs in both actions, and to the witnesses who would otherwise be required to testify in two cases.

10. Consolidation will not delay final disposition of any matter.

11. Consolidation of these two cases will promote the uniformity of decision and eliminate any potential for conflicting rulings, provide for judicial economy and the convenience of witnesses and parties, and will promote the expeditious disposal of all matters.

HISTORY AND NATURE OF THE PROCEEDINGS

12. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

13. Plaintiff Candace Curtis filed a Pro se Petition in the United States District Court for the Southern District of Texas, Houston Division, on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting.[1]

14. Plaintiff Curtis complaint was dismissed under the probate exception to federal diversity jurisdiction and Curtis appealed. The Fifth Circuit reversed and Ordered remand on January 9, 2013.

15. On January 29, 2013, attorney Bobbie Bayless filed suit against Nelva Brunsting's trust attorneys, Candace Kunz-Freed, Albert Vacek Jr. and Vacek & Freed P.L.L.C., in the Harris County District Court on behalf of Carl Brunsting as executor of the estate of Nelva Brunsting[2] raising claims only related to the Brunsting trusts then in the custody of a federal court.

16. On April 9, 2013, this Honorable Court issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's prior approval.

17. Also on April 9, 2013, Bobbie Bayless filed suit in Harris County Probate Court No. 4, on behalf of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) naming federal Plaintiff Curtis a "Nominal Defendant" in both suits.

18. Not only did Bayless advance claims exclusively related to the trusts already in the custody of the federal Court, she claimed the breaches of fiduciary against the beneficiaries of the Brunsting trusts were claims belonging to the estate of Nelva Brunsting. That theory was disposed of in the Fifth Circuit in *Curtis v Brunsting 710 F.3d 406*. The "Trust(s)" is the only heir in fact to the estate and assets in the trusts are not property of the estate of Nelva Brunsting.

[1] No. 4:12-CV-00592; Candace Louise Curtis v. Anita Kay Brunsting; USDC for the Southern District of Texas, Houston Division

[2] No. 2013-05455; Carl Henry Brunsting as Executor of the Estate of Nelva Brunsting v. Candace Freed and Vacek & Freed P.L.L.C.; 164TH Judicial District Court of Harris County, Texas.

19. At paragraph 1, page 2 of Curtis v Brunsting 710 F.3d 406:

> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*

20. Under the wills Carl Brunsting has no standing to bring claims against trustees as heir or executor of an estate. He only has standing to bring claims individually as a trustee or beneficiary of the trust and that trust was in the custody of the federal court.

21. In Curtis v Brunsting the Fifth Circuit explained the doctrine of comity by citing to the Supreme Court's clarification of the "distinctly limited scope" of the probate exception,[3] explaining:

> *[W]e comprehend the 'interference' language in Markham as essentially a reiteration of the guiding principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*[4]

22. In or about November of 2013, Pro se Plaintiff Curtis retained the services of Houston Attorney Jason Ostrom. On May 15, 2014, Attorney Jason Ostrom caused this Honorable Court to issue an Order for Remand of Curtis v Brunsting to the custody of Harris County Probate Court No. 4 (412,249-402) for consolidation with the claims of Carl Brunsting (412,249-401).

[3] Marshall v Marshall 546 U.S. 293, 310
[4] Marshall v Marshall 546 U.S. 293, 311–12

23. On July 5, 2016, Plaintiff Curtis, along with her domestic partner Rik Munson, both individually and as private attorneys general on behalf of the public trust, filed a RICO suit into the United States District Court for the Southern District of Texas, Houston Division (No. 4:16-cv-01969), accusing the Harris County Probate Court and its officers of public corruption conspiracies involving schemes and artifices to deprive Plaintiff Curtis, the People of Texas, and others, of the honest services of an elected public official.

24. The record will show the Probate Court has refused to resolve any substantive matter on the merits and the reason is clearly that no court can assume in rem jurisdiction over a res in the custody of another court. Thus, the probate court never had jurisdiction over the Brunsting trust, which renders the Order for remand to the state probate court void ab initio.

25. Rather than dismiss and return Curtis v Brunsting to the federal court, the RICO Defendants chose a less honorable course, forcing Plaintiff Curtis to respond accordingly.

26. On August 3, 2016, Plaintiff Curtis filed a F.R.C.P. Rule 11(b) motion for sanctions and F.R.C.P. Rule 60(b) and (d) motions for vacatur of the remand to state court, on the ground that the remand was obtained by fraud upon Plaintiff Curtis and upon the Court, thus vitiating the application to amend the original petition that facilitated the remand in the first instance.

27. Plaintiffs respectfully request this Honorable Court take Judicial Notice of the complaint, motions to dismiss and Plaintiffs' replies in the closely related proceedings pursuant to Federal Rules of evidence §201.[5]

STAGE OF THE PROCEEDINGS

28. The RICO suit is in the opening phase and the initial conference is set for October 28, 2016 at 9:00 a.m. before the Honorable Alfred Bennett.

[5] Case 4:16-cv-01969 TXSD Motions to dismiss Dkt 19, 20, 23, 25 and replies Dkt 33, 34, and 41

29. The earlier breach of fiduciary matter, Candace Curtis v. Anita and Amy Brunsting 4:12-cv-00592, is ripe for F.R.C.P. Rule 12(c) relief on the unresolved summary and declaratory judgment pleadings. Those motions have not been answered and the probate court refused to set the motions for hearing. A proper determination on the merits of those unresolved motions will be necessary to support the racketeering conspiracy and predicate act claims arising under the later filed RICO suit.

30. Plaintiff hereby incorporates by reference the Rule 11[6] and 60[7] motions referred to in item 18 supra, and the federal civil RICO complaint referred to in item 17 supra, as if fully restated herein, and further asks this Honorable Court to take Judicial notice of the relevant public records.

MEMORANDUM IN SUPPORT OF RULE 42(A) MOTION

31. Above named Plaintiff has moved this Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the following cases: Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, No. 4:12-CV-00592 (TXSD Filed 2/27/2012) and Curtis, et al. v Kunz-Freed, et al, No. 4:16-cv-01969 (TXSD Filed 07/05/16).

32. Plaintiffs' motion requests consolidation for the limited purposes of pre-trial proceedings and trial only, it does not request consolidation for the purposes of judgment or rights to appeal.

33. Rule 42(a) of the Federal Rules of Civil procedure provides:

> *Rule 42. Consolidation; separate trials.*
>
> *(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it*

[6] Case 4:12-cv-00592 Document 120 Filed in TXSD on 08/05/16
[7] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16

may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

34. The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Wright & A. Miller, Federal Practice and Procedure, § 2381 (1971).*

35. Local Rule 7.6 and Federal Rule of Civil Procedure 42(a) requires the motion be filed in the earlier Court and the above Court is the earlier Court. However, Federal Rule of Civil Procedure 42(b) prevents consolidation, when doing so would pollute diversity and deprive the Court of jurisdiction.

36. The earlier matter was filed under diversity with the allegation that Defendants were acting in secret and were uniquely in exclusive possession of all of the information relating to the case.

37. Plaintiff Curtis submitted a First Amended Complaint in the above Court on April 29, 2013, seeking to amend the claim to federal question jurisdiction based upon newly discovered evidence involving fraudulent securities transfers. That amendment was properly rejected by the Court due to Plaintiff's failure to provide a certificate of conference as required by local rule.

BOTH ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT

38. Rule 42(a) permits a district court to consolidate separate actions when they involve "a common question of law or fact." Fed.R.Civ.P. 42(a).

39. Even if there are some questions that are not common, consolidation is not precluded. *Batazzi v. Petroleum Helicopters, Inc., 664 F.2d 49, 50 (5th Cir. 1981); See Central Motor Co. v. United States, 583 F.2d 470 (10th Cir. 1978).*

40. Common questions of law and fact abound in these cases, as both stem from the same (long con) conspiracy and the later controversy is based upon evidence evolving out of Defendants' continued attempts to foreclose remedy in the trust suit case, aided and abetted by the state court and its officers.

41. It was the process of seeking remedy and Defendants' continued efforts to obstruct justice and evade accountability, that has produced a clear picture of a larger mosaic involving a pattern of racketeering activity targeting familial wealth.

42. Although the lawsuits were filed at separate times and in separate forums, and although multiple actions were improperly brought in state courts, all of it is, in fact, only one continuous event and therefore, it necessarily follows that the matter is particularly appropriate for consolidation.

A COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION

43. A court has broad discretion in determining whether consolidation is practical. *Atlantic States Legal Foundation Inc. v. Koch Refining Co., 681 F. Supp 609, 615 (D. Minn. 1988).* In exercising this discretion, a court should weigh the time and effort consolidation would save, with any inconvenience or delay it would cause. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985); Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984). See also Kramer v. Boeing Co., 134 F.R.D. 256 (D. Minn. 1991).*

44. Consolidation offers efficiency and convenience in this case. Consolidation will result in one trial which will bind all plaintiffs and defendants. This will save time and avoid unnecessary costs to the defendants, the plaintiffs, this Court, and the witnesses who would otherwise be required to testify in both cases.

45. Consolidation will not delay the disposition of this case. In fact, it will minimize delays. The cases are at different stages of the discovery process, but this does not bar consolidation. (*United States v. City of Chicago, 385 F. Supp. 540, 543 (N.D. Ill. 1974*).

46. The earlier case was filed under diversity, but evidence discovered in the course of pursuing remedy has produced racketeer influenced corrupt organization claims under federal question jurisdiction and the record will show No. 4:12-cv-00592 has been brought back to the federal court in direct response to the probate court's unwillingness to ensure Plaintiff's right to be heard and blatant refusal to resolve any matter on the merits.

47. Consolidation is necessary to the ends of justice and for complete resolution of all matters for all parties and, whereas, the rules will not allow all of the related cases and necessary parties to be consolidated under diversity jurisdiction, all of the related cases and necessary parties can and should be consolidated under federal question jurisdiction pursuant to 28 U.S.C. §1367.

48. Thus, whether the economy and efficiency of the Court will best be served by transferring the federal question suit to this Honorable Court or by transferring the diversity case to Judge Bennett's Honorable Court, Plaintiffs' do not presume to suggest, but do believe that justice can only be served by consolidation of all related matters under one roof for all purposes.

CONCLUSION

49. Jurisdiction of the probate court at the point in time when its jurisdiction was invoked, is a proper subject of inquiry under Rule 60. "Courts can always consider questions as to subject matter jurisdiction whenever raised and even sua sponte." *U.S. v. White, 139 F.3d 998 cert den 119 S.Ct 343, 525 U.S. 393, 142 L.Ed.2d 283 (1998).*

50. The remand Order is void ab initio for want of jurisdiction in the state court. Want of, and acts excess of, subject matter jurisdiction can never be cured after the fact. Furthermore,

Plaintiff Curtis was named a nominal defendant in the estates probate suit and simply cannot be consolidated with a plaintiff that has named her a defendant in the same lawsuit.

STANDARD OF REVIEW

51. Rule 60(b) motions are reviewed for abuse of discretion. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999); Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000).*

52. However, motions under Rule 60(b)(4), on the ground that a judgment is void are reviewed de novo. *Burke v. Smith, 252 F.3d 1260,1263 (11th Cir. 2001).*

WHEREFORE, Petitioner respectfully requests the motion for consolidation be granted.

Respectfully submitted,

October 5, 2016

Candace L. Curtis

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Defendants and they are opposed to the relief requested herein.

Candace L. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 5th day of October, 2016, on the following via email and deposit in USPS Priority Mail:

Neal E. Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
nspielman@grifmatlaw.com

Attorney for Amy Brunsting

Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, Texas 77079
steve@mendellawfirm.com

Attorney for Anita Brunsting

I hereby certify that a true and correct courtesy copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on all parties this 5th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

Candace L. Curtis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
Plaintiff	§	
	§	Civil Action No. 4:12-cv-00592
v	§	
	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al	§	
Defendants	§	

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

ORDER FOR CONSOLIDATION

Upon consideration, the Motion for Transfer and Consolidation for pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal (Doc. No.___), filed by Plaintiff in Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592, is hereby Granted.

The following actions are hereby consolidated for pre-trial proceedings and trial only: Civil Action No. 4:12-cv-00592 Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, (Filed TXSD 2/27/2012) and Civil Action No. 4:16-cv-01969 Curtis et al., v Kunz-Freed et al (Filed TXSD 7/05/2016).

All depositions, interrogatory responses, materials produced in response to requests for production, and responses to requests for admissions in any of these actions may be used in any

other action consolidated by this Order. All notices, requests, responses, motions and other filings relating to pretrial proceedings must be served on all counsel in each of these actions and bear the case caption for each action that has been consolidated pursuant to this order.

SO ORDERED

Date: _____, 2016

_____
The Honorable Kenneth Hoyt
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S RULE 7.1 CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed.R.Civ.R. 7.1, Defendant Neal Spielman ("Defendant") files this Certificate of Interested Parties. To the best of Defendant's knowledge, there are no other interested parties who may be financially interested in the outcome of this litigation, other than the named parties to the suit.

In accordance with this Court's Order, if new parties are added, or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, counsel will promptly file an amended certificate with the clerk.

Respectfully submitted,

By: /s/ Martin S. Schexnayder__
Martin S. Schexnayder
Winget, Spadafora & Schwartzberg, LLP
Two Riverway, Suite 725
Houston, Texas 77056
Telephone: (713) 343-9200
Facsimile: (713) 343-9201
State Bar No. 17745610
Federal Bar No. 15146

ATTORNEY FOR DEFENDANT NEAL SPIELMAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was forwarded to all attorneys of record in accordance with the Federal Rules, on this 6th day of October, 2016.

/s/ Martin S. Schexnayder
Martin S. Schexnayder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S *UNOPPOSED* MOTION FOR LEAVE TO FILE MOTION TO DISMISS IN EXCESS OF PAGE LIMIT

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte (collectively "Defendants"), hereby file the following Unopposed Motion for Leave to File Motion to Dismiss In Excess of Page Limit ("Motion").

Section B(5)(E) of Judge Alfred H. Bennett's Court Procedures limit the filing of documents such as Defendants' Motion to Dismiss to 20 pages without leave of Court. The Court Procedures further directs the parties to seek leave when their documents exceed the page limit. Defendants seek leave to file their Motion to Dismiss in excess of the page limit, because of the complexity of the facts and law relevant to this case, and the length of the claims asserted by Plaintiffs in their extensive 62-page, 217 paragraph Complaint, the complexity of the RICO case law relevant to this case, and the number of counts alleged against Defendants (Plaintiffs have asserted at least 16 of 47 claims against the Honorable Judges and Mr. Baiamonte).

Defendants have exercised best efforts to keep their Rule 12(b)(1) and (6) Motion to Dismiss as concise, and to the point, as possible. However, the Plaintiffs' RICO claims as currently plead are believed by Defendants, after reasonable inquiry into the relevant Supreme Court and Fifth Circuit Authority, to be so deficient (as to, *inter alia*, "RICO standing and proximate cause," "RICO standing and direct injury," "pattern," "enterprise," "conspiracy," and "predicate act nexus to direct injury"), that extensive briefing was required to adequately address the myriad pleading deficiencies requiring dismissal.

Defendants' Motion is 31 pages, *exclusive of* the certificate of service. Defendants pray the Court grant them leave to file their Motion to Dismiss. This Motion for Leave is unopposed by the Plaintiffs.

PRAYER

For the reasons set forth above, Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte respectfully request the Court grant their Motion for Leave to file Motion to Dismiss in Excess of Page Limits, and award these Defendants such other and further relief, at law or in equity, to which Defendants may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
ATTORNEY-IN-CHARGE
Texas State Bar No. 00790288
Federal Bar No. 23243
laura.hedge@cao.hctx.net
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5137
Facsimile: (713) 755-8924

ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503

Jason Ostrom
Ostrom Sain LLP
5020 Montrose Blvd., Suite 310
Houston, Texas 77006

Rik Wayne Munson
218 Landana Street
American Canyon, CA 94503

Cory S. Reed
Thompson Coe Cousins Irons
One Riverway, Suite 1600
Houston, Texas 77056

Martin Samuel Schexnayder
Winget, Spadafora & Schwartzberg LLP
Two Riverway, Suite 725
Houston, TX 77056

Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

Rafe A. Schaefer
Norton Rose Fulbright US LLP
1301 McKinney
Houston, TX 77010

Bobbie G. Bayless
Bayless Stokes
2931 Ferndale
Houston, TX 77098

Anita Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, TX 78132

/s/ Laura Beckman Hedge
Laura Beckman Hedge

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **CHRISTOPHER G SAMPA**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 5:09 pm, instructing for same to be delivered upon Young, Jill Willard.

That I delivered to : Young, Jill Willard.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 2900 Weslayan Ste 150
HOUSTON, Harris County, TX 77027

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : AUG 26, 2016 11:10 am

My name is CHRISTOPHER G SAMPA, my date of birth is MAR 12th, 1965, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 29 day of August, 2016.

CHRISTOPHER G SAMPA Declarant
953

Texas Certification#: SCH-1088 Exp. 08/31/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800443
SO Inv#: A16803303
Reference : 4:16-CV-01969

AX02A16803303

+ Service Fee: 70.00
Witness Fee: .00
Mileage Fee: .00

tomcat

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jill Willard Young
2900 Weslayan, Suite 150
Houston, TX 77027

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; ET AL

Defendant

AFFIDAVIT OF SERVICE

I, **DAVID STANFIELD**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 12:23 pm, instructing for same to be delivered upon Brunsting, Anita Kay.

That I delivered to	: Brunsting, Anita Kay.
the following	: SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)
at this address	: 203 Bloomingdale Cir VICTORIA, Victoria County, TX 77904
Manner of Delivery	: by PERSONALLY delivering the document(s) to the person above.
Delivered on	: AUG 25, 2016 6:53 pm

My name is DAVID STANFIELD, my date of birth is 7-3-66, and my address is 103 Vista View Trl #103, Spicewood, TX 78669 and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.
Executed in VICTORIA County, State of Texas, on the 25th day of August, 2016.

DAVID STANFIELD Declarant
714

Texas Certification#: SCH-9704 Exp. 05/31/18

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: A16803284

Reference : 4:16-CV-01969

AX02A16803284

+ Service Fee:	70.00
Witness Fee:	.00
Mileage Fee:	.00

tomcat

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **LINDELL CHARLES**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/26/16 9:16 pm, instructing for same to be delivered upon Lester, Gregory.

That I delivered to : Lester, Gregory.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 955 N Dairy Ashford Rd #220
HOUSTON, Harris County, TX 77079

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : September 2, 2016 1:58 pm

My name is LINDELL CHARLES, my date of birth is August 22nd, 1971, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 2 day of SEPTEMBER, 2016.

LINDELL CHARLES Declarant
928

Texas Certification#: SCH-324 Exp. 09/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800438
SO Inv#: A16803293
Reference : 4:16-CV-01969

AX02A16803293

+ Service Fee: 70.00
Witness Fee: .00
Mileage Fee: .00

serverh

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

VS

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; ET AL

Defendant

AFFIDAVIT OF SERVICE

I, KIMBERLY BARTHOLOMEW, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 10:43 am, instructing for same to be delivered upon Brusting, Amy Ruth.

That I delivered to : Brusting, Amy Ruth.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 2582 County Ledge
NEW BRAUNFELS, Comal County, TX 78132

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : August 30, 2016 7:52 am

My name is KIMBERLY BARTHOLOMEW, my date of birth is December 27th, 1978, and my address is 103 Vista View Trl #103, Spicewood, TX 78669 and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.
Executed in CALDWELL County, State of Texas, on the 31st day of August, 2016.

KIMBERLY BARTHOLOMEW Declarant
2113

Texas Certification#: SCH-10964 Exp. 06/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: A16803289

Reference : 4:16-CV-01969

+ Service Fee: 70.00
Witness Fee: .00
Mileage Fee: .00

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Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Amy Ruth Brunsting
2582 Country Ledge
New Braunfels, TX 78132

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

VS

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **LINDELL CHARLES**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/26/16 9:17 pm, instructing for same to be delivered upon Mendel, Stephen A.

That I delivered to	:	Mendel, Stephen A.
the following	:	SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)
at this address	:	1155 Dairy Asshford Ste 104 HOUSTON, Harris County, TX 77079
Manner of Delivery	:	by PERSONALLY delivering the document(s) to the person above.
Delivered on	:	September 2, 2016 2:10 pm

My name is LINDELL CHARLES, my date of birth is August 22nd, 1971, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 9 day of September 20 16

LINDELL CHARLES Declarant
928

Texas Certification#: SCH-324 Exp. 09/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800441
SO Inv#: A16803300
Reference : 4:16-CV-01969

AX02A16803300

+ Service Fee:	70.00
Witness Fee:	.00
Mileage Fee:	.00

serverh

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
Plaintiff,	§	
	§	Civil Action No. 4:12-cv-00592
v	§	
	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al	§	
Defendants	§	

Opposed Motion

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

Rule 42(a) Courtesy Copy

PLAINTIFF'S MOTION FOR CONSOLIDATION OF RELATED CASES PURSUANT TO 28 U.S.C. §1367, RULE 42(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 7.6 WITH SUPPORTING MEMORANDUM

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1. Above named Plaintiff respectfully moves this Court to order consolidation of the following cases pursuant to 28 U.S.C. §1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6:

a. Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592 (TXSD Filed 2/27/2012) currently pending before the Honorable Kenneth Hoyt, and

b. Civil Action No. 4:16-cv-01969 currently pending before the Honorable Alfred H. Bennett (TXSD filed 7/5/2016)

2. Plaintiff moves for consolidation of pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal. The two cases are appropriate for consolidation for the following reasons:

3. The two cases share common parties. Candace Curtis is a Plaintiff in both federal suits and Amy and Anita Brunsting are Defendants in both suits.

4. The later suit is the cumulative product of events occurring in the course of litigating the earlier matter and although the remedies requested and the jurisdictions upon which the authorities of the Court have been invoked are divergent, all the facts flow from common acts and events.

5. The two cases involve common questions of law and fact because both arise from the same factual situation; namely, the rupture and looting of the Brunsting family of trusts and injuries resulting from the Defendants' efforts to evade accountability; and thus the two cases also involve common questions of law.

6. Through a series of awkward circumstances, the earlier diversity matter was remanded to Harris County Probate Court No. 4. The probate court experience produced evidence of a sinister design, resulting in the necessity for Plaintiff to again seek remedy in this Court and, thus, Plaintiff filed a separate action into the Southern District of Texas, Case No. 4:16-cv-01969, in

concert with Federal Rule of Civil Procedure Rule 11(b) motion for sanctions and with Federal Rule of Civil Procedure 60(b) and (d) motion for vacatur in the above titled Court.

7. While the earlier suit was a simple breach of fiduciary seeking disclosures and accounting, the later filed case is a Racketeer Influenced Corrupt Organization (RICO) suit brought under federal question jurisdiction, implicating the Probate Court's officers' participation in the conduct of an enterprise through a pattern of racketeering activity.

8. Judicial convenience and economy will be enhanced by consolidation of the actions.

9. Consolidation will result in one trial under one judge, which will bind all plaintiffs and defendants for all purposes. This will save time and avoid unnecessary costs to the Defendants, to the Plaintiffs in both actions, and to the witnesses who would otherwise be required to testify in two cases.

10. Consolidation will not delay final disposition of any matter.

11. Consolidation of these two cases will promote the uniformity of decision and eliminate any potential for conflicting rulings, provide for judicial economy and the convenience of witnesses and parties, and will promote the expeditious disposal of all matters.

HISTORY AND NATURE OF THE PROCEEDINGS

12. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

13. Plaintiff Candace Curtis filed a Pro se Petition in the United States District Court for the Southern District of Texas, Houston Division, on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting.[1]

14. Plaintiff Curtis complaint was dismissed under the probate exception to federal diversity jurisdiction and Curtis appealed. The Fifth Circuit reversed and Ordered remand on January 9, 2013.

15. On January 29, 2013, attorney Bobbie Bayless filed suit against Nelva Brunsting's trust attorneys, Candace Kunz-Freed, Albert Vacek Jr. and Vacek & Freed P.L.L.C., in the Harris County District Court on behalf of Carl Brunsting as executor of the estate of Nelva Brunsting[2] raising claims only related to the Brunsting trusts then in the custody of a federal court.

16. On April 9, 2013, this Honorable Court issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's prior approval.

17. Also on April 9, 2013, Bobbie Bayless filed suit in Harris County Probate Court No. 4, on behalf of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) naming federal Plaintiff Curtis a "Nominal Defendant" in both suits.

18. Not only did Bayless advance claims exclusively related to the trusts already in the custody of the federal Court, she claimed the breaches of fiduciary against the beneficiaries of the Brunsting trusts were claims belonging to the estate of Nelva Brunsting. That theory was disposed of in the Fifth Circuit in *Curtis v Brunsting 710 F.3d 406*. The "Trust(s)" is the only heir in fact to the estate and assets in the trusts are not property of the estate of Nelva Brunsting.

[1] No. 4:12-CV-00592; Candace Louise Curtis v. Anita Kay Brunsting; USDC for the Southern District of Texas, Houston Division

[2] No. 2013-05455; Carl Henry Brunsting as Executor of the Estate of Nelva Brunsting v. Candace Freed and Vacek & Freed P.L.L.C.; 164TH Judicial District Court of Harris County, Texas.

19. At paragraph 1, page 2 of Curtis v Brunsting 710 F.3d 406:

> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*

20. Under the wills Carl Brunsting has no standing to bring claims against trustees as heir or executor of an estate. He only has standing to bring claims individually as a trustee or beneficiary of the trust and that trust was in the custody of the federal court.

21. In Curtis v Brunsting the Fifth Circuit explained the doctrine of comity by citing to the Supreme Court's clarification of the "distinctly limited scope" of the probate exception,[3] explaining:

> *[W]e comprehend the 'interference' language in Markham as essentially a reiteration of the guiding principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*[4]

22. In or about November of 2013, Pro se Plaintiff Curtis retained the services of Houston Attorney Jason Ostrom. On May 15, 2014, Attorney Jason Ostrom caused this Honorable Court to issue an Order for Remand of Curtis v Brunsting to the custody of Harris County Probate Court No. 4 (412,249-402) for consolidation with the claims of Carl Brunsting (412,249-401).

[3] Marshall v Marshall 546 U.S. 293, 310
[4] Marshall v Marshall 546 U.S. 293, 311–12

23. On July 5, 2016, Plaintiff Curtis, along with her domestic partner Rik Munson, both individually and as private attorneys general on behalf of the public trust, filed a RICO suit into the United States District Court for the Southern District of Texas, Houston Division (No. 4:16-cv-01969), accusing the Harris County Probate Court and its officers of public corruption conspiracies involving schemes and artifices to deprive Plaintiff Curtis, the People of Texas, and others, of the honest services of an elected public official.

24. The record will show the Probate Court has refused to resolve any substantive matter on the merits and the reason is clearly that no court can assume in rem jurisdiction over a res in the custody of another court. Thus, the probate court never had jurisdiction over the Brunsting trust, which renders the Order for remand to the state probate court void ab initio.

25. Rather than dismiss and return Curtis v Brunsting to the federal court, the RICO Defendants chose a less honorable course, forcing Plaintiff Curtis to respond accordingly.

26. On August 3, 2016, Plaintiff Curtis filed a F.R.C.P. Rule 11(b) motion for sanctions and F.R.C.P. Rule 60(b) and (d) motions for vacatur of the remand to state court, on the ground that the remand was obtained by fraud upon Plaintiff Curtis and upon the Court, thus vitiating the application to amend the original petition that facilitated the remand in the first instance.

27. Plaintiffs respectfully request this Honorable Court take Judicial Notice of the complaint, motions to dismiss and Plaintiffs' replies in the closely related proceedings pursuant to Federal Rules of evidence §201.[5]

STAGE OF THE PROCEEDINGS

28. The RICO suit is in the opening phase and the initial conference is set for October 28, 2016 at 9:00 a.m. before the Honorable Alfred Bennett.

[5] Case 4:16-cv-01969 TXSD Motions to dismiss Dkt 19, 20, 23, 25 and replies Dkt 33, 34, and 41

29. The earlier breach of fiduciary matter, Candace Curtis v. Anita and Amy Brunsting 4:12-cv-00592, is ripe for F.R.C.P. Rule 12(c) relief on the unresolved summary and declaratory judgment pleadings. Those motions have not been answered and the probate court refused to set the motions for hearing. A proper determination on the merits of those unresolved motions will be necessary to support the racketeering conspiracy and predicate act claims arising under the later filed RICO suit.

30. Plaintiff hereby incorporates by reference the Rule 11[6] and 60[7] motions referred to in item 18 supra, and the federal civil RICO complaint referred to in item 17 supra, as if fully restated herein, and further asks this Honorable Court to take Judicial notice of the relevant public records.

MEMORANDUM IN SUPPORT OF RULE 42(A) MOTION

31. Above named Plaintiff has moved this Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the following cases: Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, No. 4:12-CV-00592 (TXSD Filed 2/27/2012) and Curtis, et al. v Kunz-Freed, et al, No. 4:16-cv-01969 (TXSD Filed 07/05/16).

32. Plaintiffs' motion requests consolidation for the limited purposes of pre-trial proceedings and trial only, it does not request consolidation for the purposes of judgment or rights to appeal.

33. Rule 42(a) of the Federal Rules of Civil procedure provides:

> *Rule 42. Consolidation; separate trials.*
>
> *(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it*

[6] Case 4:12-cv-00592 Document 120 Filed in TXSD on 08/05/16
[7] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16

may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

34. The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Wright & A. Miller, Federal Practice and Procedure, § 2381 (1971).*

35. Local Rule 7.6 and Federal Rule of Civil Procedure 42(a) requires the motion be filed in the earlier Court and the above Court is the earlier Court. However, Federal Rule of Civil Procedure 42(b) prevents consolidation, when doing so would pollute diversity and deprive the Court of jurisdiction.

36. The earlier matter was filed under diversity with the allegation that Defendants were acting in secret and were uniquely in exclusive possession of all of the information relating to the case.

37. Plaintiff Curtis submitted a First Amended Complaint in the above Court on April 29, 2013, seeking to amend the claim to federal question jurisdiction based upon newly discovered evidence involving fraudulent securities transfers. That amendment was properly rejected by the Court due to Plaintiff's failure to provide a certificate of conference as required by local rule.

BOTH ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT

38. Rule 42(a) permits a district court to consolidate separate actions when they involve "a common question of law or fact." Fed.R.Civ.P. 42(a).

39. Even if there are some questions that are not common, consolidation is not precluded. *Batazzi v. Petroleum Helicopters, Inc., 664 F.2d 49, 50 (5th Cir. 1981); See Central Motor Co. v. United States, 583 F.2d 470 (10th Cir. 1978).*

40. Common questions of law and fact abound in these cases, as both stem from the same (long con) conspiracy and the later controversy is based upon evidence evolving out of Defendants' continued attempts to foreclose remedy in the trust suit case, aided and abetted by the state court and its officers.

41. It was the process of seeking remedy and Defendants' continued efforts to obstruct justice and evade accountability, that has produced a clear picture of a larger mosaic involving a pattern of racketeering activity targeting familial wealth.

42. Although the lawsuits were filed at separate times and in separate forums, and although multiple actions were improperly brought in state courts, all of it is, in fact, only one continuous event and therefore, it necessarily follows that the matter is particularly appropriate for consolidation.

A COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION

43. A court has broad discretion in determining whether consolidation is practical. *Atlantic States Legal Foundation Inc. v. Koch Refining Co., 681 F. Supp 609, 615 (D. Minn. 1988).* In exercising this discretion, a court should weigh the time and effort consolidation would save, with any inconvenience or delay it would cause. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985); Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984). See also Kramer v. Boeing Co., 134 F.R.D. 256 (D. Minn. 1991).*

44. Consolidation offers efficiency and convenience in this case. Consolidation will result in one trial which will bind all plaintiffs and defendants. This will save time and avoid unnecessary costs to the defendants, the plaintiffs, this Court, and the witnesses who would otherwise be required to testify in both cases.

45. Consolidation will not delay the disposition of this case. In fact, it will minimize delays. The cases are at different stages of the discovery process, but this does not bar consolidation. (*United States v. City of Chicago, 385 F. Supp. 540, 543 (N.D. Ill. 1974*).

46. The earlier case was filed under diversity, but evidence discovered in the course of pursuing remedy has produced racketeer influenced corrupt organization claims under federal question jurisdiction and the record will show No. 4:12-cv-00592 has been brought back to the federal court in direct response to the probate court's unwillingness to ensure Plaintiff's right to be heard and blatant refusal to resolve any matter on the merits.

47. Consolidation is necessary to the ends of justice and for complete resolution of all matters for all parties and, whereas, the rules will not allow all of the related cases and necessary parties to be consolidated under diversity jurisdiction, all of the related cases and necessary parties can and should be consolidated under federal question jurisdiction pursuant to 28 U.S.C. §1367.

48. Thus, whether the economy and efficiency of the Court will best be served by transferring the federal question suit to this Honorable Court or by transferring the diversity case to Judge Bennett's Honorable Court, Plaintiffs' do not presume to suggest, but do believe that justice can only be served by consolidation of all related matters under one roof for all purposes.

CONCLUSION

49. Jurisdiction of the probate court at the point in time when its jurisdiction was invoked, is a proper subject of inquiry under Rule 60. "Courts can always consider questions as to subject matter jurisdiction whenever raised and even sua sponte." *U.S. v. White, 139 F.3d 998 cert den 119 S.Ct 343, 525 U.S. 393, 142 L.Ed.2d 283 (1998).*

50. The remand Order is void ab initio for want of jurisdiction in the state court. Want of, and acts excess of, subject matter jurisdiction can never be cured after the fact. Furthermore,

Plaintiff Curtis was named a nominal defendant in the estates probate suit and simply cannot be consolidated with a plaintiff that has named her a defendant in the same lawsuit.

STANDARD OF REVIEW

51. Rule 60(b) motions are reviewed for abuse of discretion. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999); Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000).*

52. However, motions under Rule 60(b)(4), on the ground that a judgment is void are reviewed de novo. *Burke v. Smith, 252 F.3d 1260,1263 (11th Cir. 2001).*

WHEREFORE, Petitioner respectfully requests the motion for consolidation be granted.

Respectfully submitted,

October 5, 2016

Candace L. Curtis

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Defendants and they are opposed to the relief requested herein.

Candace L. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 5th day of October, 2016, on the following via email and deposit in USPS Priority Mail:

Neal E. Spielman
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nspielman@grifmatlaw.com

Attorney for Amy Brunsting

Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, Texas 77079
steve@mendellawfirm.com

Attorney for Anita Brunsting

I hereby certify that a true and correct courtesy copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on all parties this 5th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

Candace L. Curtis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
Plaintiff	§	
	§	Civil Action No. 4:12-cv-00592
v	§	
	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al	§	
Defendants	§	

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

ORDER FOR CONSOLIDATION

Upon consideration, the Motion for Transfer and Consolidation for pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal (Doc. No.___), filed by Plaintiff in Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592, is hereby Granted.

The following actions are hereby consolidated for pre-trial proceedings and trial only: Civil Action No. 4:12-cv-00592 Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, (Filed TXSD 2/27/2012) and Civil Action No. 4:16-cv-01969 Curtis et al., v Kunz-Freed et al (Filed TXSD 7/05/2016).

All depositions, interrogatory responses, materials produced in response to requests for production, and responses to requests for admissions in any of these actions may be used in any

other action consolidated by this Order. All notices, requests, responses, motions and other filings relating to pretrial proceedings must be served on all counsel in each of these actions and bear the case caption for each action that has been consolidated pursuant to this order.

SO ORDERED

Date: _____, 2016

_____
The Honorable Kenneth Hoyt
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT NEAL SPIELMAN'S RULE 7.1 CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed.R.Civ.R. 7.1, Defendant Neal Spielman ("Defendant") files this Certificate of Interested Parties. To the best of Defendant's knowledge, there are no other interested parties who may be financially interested in the outcome of this litigation, other than the named parties to the suit.

In accordance with this Court's Order, if new parties are added, or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time during the pendency of this litigation, counsel will promptly file an amended certificate with the clerk.

Respectfully submitted,

By: /s/ Martin S. Schexnayder__
Martin S. Schexnayder
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Telephone: (713) 343-9200
Facsimile: (713) 343-9201
State Bar No. 17745610
Federal Bar No. 15146

ATTORNEY FOR DEFENDANT NEAL SPIELMAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was forwarded to all attorneys of record in accordance with the Federal Rules, on this 6th day of October, 2016.

/s/ Martin S. Schexnayder
Martin S. Schexnayder

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S *UNOPPOSED* MOTION FOR LEAVE TO FILE MOTION TO DISMISS IN EXCESS OF PAGE LIMIT

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte (collectively "Defendants"), hereby file the following Unopposed Motion for Leave to File Motion to Dismiss In Excess of Page Limit ("Motion").

Section B(5)(E) of Judge Alfred H. Bennett's Court Procedures limit the filing of documents such as Defendants' Motion to Dismiss to 20 pages without leave of Court. The Court Procedures further directs the parties to seek leave when their documents exceed the page limit. Defendants seek leave to file their Motion to Dismiss in excess of the page limit, because of the complexity of the facts and law relevant to this case, and the length of the claims asserted by Plaintiffs in their extensive 62-page, 217 paragraph Complaint, the complexity of the RICO case law relevant to this case, and the number of counts alleged against Defendants (Plaintiffs have asserted at least 16 of 47 claims against the Honorable Judges and Mr. Baiamonte).

Defendants have exercised best efforts to keep their Rule 12(b)(1) and (6) Motion to Dismiss as concise, and to the point, as possible. However, the Plaintiffs' RICO claims as currently plead are believed by Defendants, after reasonable inquiry into the relevant Supreme Court and Fifth Circuit Authority, to be so deficient (as to, *inter alia*, "RICO standing and proximate cause," "RICO standing and direct injury," "pattern," "enterprise," "conspiracy," and "predicate act nexus to direct injury"), that extensive briefing was required to adequately address the myriad pleading deficiencies requiring dismissal.

Defendants' Motion is 31 pages, *exclusive of* the certificate of service. Defendants pray the Court grant them leave to file their Motion to Dismiss. This Motion for Leave is unopposed by the Plaintiffs.

PRAYER

For the reasons set forth above, Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte respectfully request the Court grant their Motion for Leave to file Motion to Dismiss in Excess of Page Limits, and award these Defendants such other and further relief, at law or in equity, to which Defendants may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
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ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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/s/ Laura Beckman Hedge
Laura Beckman Hedge

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; ET AL

Defendant

AFFIDAVIT OF SERVICE

I, **DAVID STANFIELD**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 12:23 pm, instructing for same to be delivered upon Brunsting, Anita Kay.

That I delivered to	: Brunsting, Anita Kay.
the following	: SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)
at this address	: 203 Bloomingdale Cir VICTORIA, Victoria County, TX 77904
Manner of Delivery	: by PERSONALLY delivering the document(s) to the person above.
Delivered on	: AUG 25, 2016 6:53 pm

My name is DAVID STANFIELD, my date of birth is 7-3-66, and my address is 103 Vista View Trl #103, Spicewood, TX 78669 and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.
Executed in VICTORIA County, State of Texas, on the 25th day of August, 2016.

DAVID STANFIELD Declarant
714

Texas Certification#: SCH-9704 Exp. 05/31/18

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: A16803284

Reference : 4:16-CV-01969

AX02A16803284

+ Service Fee:	70.00
Witness Fee:	.00
Mileage Fee:	.00

tomcat

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **CHRISTOPHER G SAMPA**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 5:09 pm, instructing for same to be delivered upon Young, Jill Willard.

That I delivered to : Young, Jill Willard.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 2900 Weslayan Ste 150
HOUSTON, Harris County, TX 77027

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : AUG 26, 2016 11:10 am

My name is CHRISTOPHER G SAMPA, my date of birth is MAR 12th, 1965, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 29 day of August, 2016.

CHRISTOPHER G SAMPA Declarant
953

Texas Certification#: SCH-1088 Exp. 08/31/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800443
SO Inv#: A16803303
Reference : 4:16-CV-01969

AX02A16803303

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Mileage Fee: .00

tomcat

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Jill Willard Young
2900 Weslayan, Suite 150
Houston, TX 77027

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

vs

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **LINDELL CHARLES**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/26/16 9:16 pm, instructing for same to be delivered upon Lester, Gregory.

That I delivered to : Lester, Gregory.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 955 N Dairy Ashford Rd #220
HOUSTON, Harris County, TX 77079

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : September 2, 2016 1:58 pm

My name is LINDELL CHARLES, my date of birth is August 22nd, 1971, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 2 day of SEPTEMBER, 2016.

LINDELL CHARLES Declarant
928

Texas Certification#: SCH-324 Exp. 09/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800438
SO Inv#: A16803293
Reference : 4:16-CV-01969

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Mileage Fee: .00

serverh

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Gregory Lester
955 N Dairy Ashford Rd # 220
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

VS

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; ET AL

Defendant

AFFIDAVIT OF SERVICE

I, KIMBERLY BARTHOLOMEW, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/25/16 10:43 am, instructing for same to be delivered upon Brusting, Amy Ruth.

That I delivered to : Brusting, Amy Ruth.

the following : SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)

at this address : 2582 County Ledge
NEW BRAUNFELS, Comal County, TX 78132

Manner of Delivery : by PERSONALLY delivering the document(s) to the person above.

Delivered on : August 30, 2016 7:52 am

My name is KIMBERLY BARTHOLOMEW, my date of birth is December 27th, 1978, and my address is 103 Vista View Trl #103, Spicewood, TX 78669 and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.
Executed in CALDWELL County, State of Texas, on the 31st day of August, 2016.

KIMBERLY BARTHOLOMEW Declarant
2113

Texas Certification#: SCH-10964 Exp. 06/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: A16803289

Reference : 4:16-CV-01969

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Mileage Fee: .00

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waultman

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Amy Ruth Brunsting
2582 Country Ledge
New Braunfels, TX 78132

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

Southern District of Texas, Texas
515 RUSK ST HOUSTON TX 77002

CASE #: 4:16-CV-01969

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON

Plaintiff

VS

CANDACE KUNZ-FREED; ALBERT VACEK JR; BERNARD LYLE MATHEWS III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A MENDEL; DARLENE

Defendant

AFFIDAVIT OF SERVICE

I, **LINDELL CHARLES**, make statement to the fact;
That I am a competent person more than 18 years of age or older and not a party to this action, nor interested in outcome of the suit. That I received the documents stated below on 08/26/16 9:17 pm, instructing for same to be delivered upon Mendel, Stephen A.

That I delivered to	:	Mendel, Stephen A.
the following	:	SUMMONS; VERIFIED COMPLAINT FOR DAMAGES; COURT PROCEDURES AND PRACTICES;CERTIFICATION OF SERVICE IN REMOVED ACTION; ORDER FOR CONFERENCE AND DISCLOSURE; NOTICE OF LAWSUIT (16)
at this address	:	1155 Dairy Asshford Ste 104 HOUSTON, Harris County, TX 77079
Manner of Delivery	:	by PERSONALLY delivering the document(s) to the person above.
Delivered on	:	September 2, 2016 2:10 pm

My name is LINDELL CHARLES, my date of birth is August 22nd, 1971, and my address is Professional Civil Process Houston, 2626 South Loop West Ste 423, Houston TX 77054, and U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 9 day of September 20 16

LINDELL CHARLES Declarant
928

Texas Certification#: SCH-324 Exp. 09/30/17

Private Process Server
Professional Civil Process Of Texas, Inc
103 Vista View Trail Spicewood TX 78669
(512) 477-3500

PCP Inv#: H16800441
SO Inv#: A16803300
Reference : 4:16-CV-01969

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Witness Fee:	.00
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serverh

Curtis, Candace L

RETURN TO CLIENT

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Texas

ORIGINAL

Curtis et al.,

Plaintiff(s)

v.

Kunz-Freed et al.,

Defendant(s)

Civil Action No. 4:16-cv-01969

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Stephen A. Mendel
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, TX 77079

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Candace Louise Curtis
218 Landana St.
American Canyon, CA9503

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT DAVID J. BRADLEY

Date: AUG 17 2016

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANTS ANITA AND AMY BRUNSTING'S MOTIONS TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)

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1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement to the RICO complaint, in response to Defendant claims of a want of specific factual allegations and other affirmative defenses.

3. On September 16, 2016, Defendant Anita Brunsting filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) (Dkt 30).

4. On September 21, 2016, Defendant Amy Brunsting filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss (Dkt 35).

I. STANDARD OF REVIEW

Federal Rule 12(b)(6)

5. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc., 693 F.3d 1317, 1321–22 (11th Cir. 2012).* To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S.*

662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

6. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo, and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh, 480 F.3d 438, 443 (6th Cir. 2007); Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005).*

II. ISSUES PRESENTED

7. Both Amy and Anita Brunsting's motions are brought pursuant to Rule 12(b)(6) and claim Plaintiffs have failed to provide sufficient factual allegations to place them on notice of the claims against them, a due process argument.

8. Defendants claim ignorance of facts, while at the same time presenting an opposing view of the facts.

9. Defendants also misstate Plaintiffs' aiding and abetting claims and then deny their misstatements, and appear not to understand the allegations themselves.

III. HISTORY OF THE CONTROVERSY

10. Plaintiffs hereby incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to the Motions to Dismiss filed by Defendants Vacek & Freed, (Dkts 19 & 20) as if fully restated herein.

IV. THE ARGUMENT

11. In a Rule 12(b)(6) motion to dismiss Defendants do not have the pleasure of arguing the facts and the only issue after the finder of fact applies the law, is whether or not Plaintiffs have sufficiently pled their claims. If Plaintiffs have not fully pled their claims, the question becomes whether the complaint could be amended to satisfy the heightened pleading standards demanded by Federal Rule of Civil Procedure Rule 9(b).

12. While offering knowledge of opposing facts, Defendants ask the Court to believe they lack sufficient notice of facts to defend the claims against them.

13. In this case Plaintiffs have responded to each previous motion to dismiss, by simply pointing to the public records of proceedings in the state and federal court, many of which are contained in the attachments to Plaintiffs' Addendum of Memorandum (Dkt 26).

14. These two Defendants' motions to dismiss share an uncanny similarity and other than an occasional detour, individualized for the particular movant, and a little transposition in the order of appearance of the words, each strike the same chords with nearly identical expressions. Plaintiffs will therefore respond to both pleadings in harmony.

Creative Pleading And Something Called A "QBT"

15. These two Motions (Dkt 30 and 35), and Mr. Mendel's subsequent Rule 12(b)(6) Motion, (Dkt 36) for the first time in any pleadings, in any related action, in any court, over a period of four and one-half years, each introduce in their alternate claim of facts, something they call a "Qualified Beneficiary Trust" (QBT) allegedly drafted by Defendant Albert Vacek, Jr.

16. These two Defendants and their carousel of lawyers have steadfastly clung to an instrument they proclaim to be "the trust", allegedly signed by Nelva Brunsting on August 25, 2010. Plaintiffs do not need to rehash these unresolved motions to respond to these assertions.

17. In answer to these "QBT" assertions, Plaintiffs incorporate by reference and respectfully request the Court take Judicial notice of, pursuant to Federal Rule of Evidence 201, 1) Defendant Anita and Amy Brunstings' No Evidence Motion for Partial Summary Judgment (Dkt 26-5), Plaintiff Curtis Answer and Demand to Produce Evidence (Dkt 26-11), The Report of Temporary Administrator Gregory Lester (Dkt 26-9), Plaintiff Curtis Motion for Partial Summary and Declaratory Judgment (Dkt 26-14), the (Request for setting A1 attached) the March 9, 2016 transcript (Dkt 26-16) and the Rule 60 Motion itself (Dkt 26)

V. FAILURE TO STATE A CLAIM

18. These Defendants state that they are litigants in estate related proceedings involving Plaintiff Curtis, profess ignorance of any wrongdoing, and claim they are not participants in any racketeering scheme.

19. In response to previous motions to dismiss for failure to state a claim, Plaintiffs have pointed only to the public record and particularly the motions and pleadings from the state court, and Defendants are clearly connected to those records, all of which have been served upon them through their respective agents.

20. Plaintiffs will continue to point to the public record in response to these two Motions.

21. A motion to dismiss is not a substitute for an answer and aside from claiming lack of knowledge and lack of notice, Defendants advance several affirmative claims of contrary facts. The substance of the motion is 1) want of sufficient information to satisfy notice requirements, 2) a general denial, and 3) an opposing view of the facts.

22. All of the facts necessary to meet Plaintiffs' burden are contained in the public record and are cited with specificity throughout Plaintiffs' original Complaint, Addendum, and Responses to Motions to Dismiss.

23. Plaintiffs' Addendum of Memorandum (Dkt 26) and Plaintiffs' prior Responses address the only relevant challenge under Rule 12(b)(6) and answers any questions of how each player fits into the enterprise operations puzzle. In response to Motions to Dismiss, Plaintiffs easily point to the record and how the individual exhibits concatenate to explain each participant's contribution to the overall mosaic.

24. The motives of the enterprise are greed and political aspirations, the means are described in the RICO complaint, and by refusing to honor any legal or moral obligations Anita and Amy Brunsting provide the opportunity for the rest of these Defendants to participate.

25. As alleged in the complaint, Anita Brunsting presents the other players with an exploitation opportunity. Anita Brunsting planned to hijack the family trust res, by improperly seizing control of the office of trustee.

26. Defendants exercised the powers of the office and refused to honor any of the duties of the office, which is how they became defendants in the first place.

27. To Plaintiffs' knowledge neither Amy nor Anita Brunsting has ever set foot inside the Harris County Probate Court #4 and apparently think hiring mercenaries to fight their battles removes them from the center of the controversy and the consequences of their attorney's acts as well. It does not.

28. The facts show Anita Brunsting violated the no contest clause in the 2005 Restatement, not when she misappropriated assets to her own benefit in violation of trust provisions, but when she advanced theories that those benefits were gifts, fees, and reimbursements thereby attempting to enlarge her share of the trust res.

29. In an exploitation game of lawyers playing the ends against the middle, as in the case at bar, this fact alone is significant.

30. On April 9, 2013, Honorable United States District Judge Kenneth Hoyt issued an injunction, not only enjoining Anita and Amy Brunsting from spending trust money or liquidating trust assets without the Court's prior approval, but also commanding specific performance. Defendants Anita and Amy are commanded by that injunction, to deposit income into an appropriate account for the beneficiary. To date, they have refused or otherwise failed to do so and continue to hold Plaintiff Curtis' property and that of siblings Carl and Carole Brunsting, without offering a single legal defense. (Dkt 26-11)

31. The absolute refusal of these two Defendants to honor any legal or moral obligations has opened the door of opportunity for the other Defendants to play their shakedown game against Plaintiff victim Candace Curtis and her victim siblings, Carl and Carole Brunsting.

Probate of the Estate of Nelva Brunsting

32. Defendants claim the matter before the Court is related to probate of the Estate of Nelva Brunsting.

33. The Fifth Circuit Court of Appeals in *Curtis v Brunsting 704 F.3d 406* properly held that assets in an inter an vivos trust are not property of a decedent's estate and that the suit filed in TXSD by Plaintiff Candace Louise Curtis February 27, 2012, No. 4:12-cv-0592, was related only to an inter vivos trust and not to an estate. The Circuit Court also noted that the wills of both Grantors bequeathed everything to "the trust" Curtis v Brunsting 704 F.3d 406, 409-410.

34. Because the only heir in fact to the Estate of Nelva Brunsting (Dkt 41-2, 41-3) is "the trust", Carl Brunsting had no standing to bring suit individually in the probate court as an heir to the Estate, as he is only a beneficiary of the heir in fact ("trust").

35. Trespass against the trust during the life of Nelva Brunsting created claims belonging to the cestui que. If Candace Freed's only liability for betraying Privity and the fiduciary duties she

owed Nelva Brunsting are to the estate, those claims belong to the injured cestui que (beneficiaries) of the heir in fact trust and are the duty of the trustees to pursue.

36. In any event, the trust res was in the in rem custody of a federal court when all of the trust related claims were filed in state courts under the disguise of the Estate of Nelva Brunsting, and those state court suits were filed after the Fifth Circuit Opinion in this case was published.

Wiretap Recordings

37. Defendants assertions of alternate facts are irrelevant under Rule 12(b)(6), but are none-the-less interesting when compared against the public record and, thus, worthy of note.

38. The RICO complaint states that Anita Brunsting's counsel of record, Bradley Featherston, disseminated private third party telephone communication recordings on or about July 1, 2015 via certified U.S. Mail signed receipt required.(see Dkt 26-8, Carl's application for Protective Order); (Dkt 26-12, Transcript of the hearing on Carl's application for Protective Order); (Attached Exhibit A2, Defendants Joint opposition to the application for protective order); and (Plaintiff Curtis wiretap brief attached as Exhibit A3 with sub-exhibits A-G).

39. These Defendants also misstate the allegations in the complaint, (Dkt 1) which alleges that Anita Brunsting's counsel, Bradley Featherston, "disseminated" wiretap recordings by certified mail more than three and one-half years after Carl Brunsting's petition to take depositions before suit was filed, and a demand for such disclosures was first made. Defendants none-the-less attempt to conceal the disruptive purpose for the dissemination, as occurring in the ordinary course of discovery. Plaintiff Curtis' wiretap brief gives the lie to these claims (A3).[1]

False Affidavit

40. Amy Brunsting claims she did not file a false affidavit in the federal court.

[1] RICO Claim numbers 14 through 20 in the complaint specifically refer to the wiretap recordings.

41. Amy's affidavit, ascribed and sworn to before one authorized to accept an oath, was filed March 6, 2012 in the Southern District of Texas Case 4:12-cv-0592, attached to a motion for emergency order[2] to remove a lis pendens filed among the papers in the federal petition. The emergency motion resulted in sua sponte dismissal March 8, 2012 (TXSD 4:12-cv-0592 Dkt 11).

42. Plaintiffs respectfully request this Honorable Court take judicial notice, pursuant to Federal Rule of Evidence 201, of Dkt 120 in TXSD case 4:12-cv-0592, which is a Rule 11 Motion for Sanctions, filed August 5, 2015, against Defendants Anita and Amy Brunsting and their counsel, for continued violation of the federal injunction issued April 9, 2013. (Dkt 26-2)

43. The Honorable Kenneth Hoyt commented at the injunction hearing that all that was necessary to resolve the controversy was to distribute the assets, and the injunction Judge Hoyt issued commands immediate specific performance regarding the deposit of "income".

44. Defendants Anita and Amy Brunsting, aided and abetted by their attorneys, continue to thumb their noses at the dignity and authority of a federal Court, while simultaneously seeking a priori relief from related claims before this Court.

45. RICO Complaint Claim 37 directly addresses Amy Brunsting's false affidavit (Dkt 26-18) regarding establishment of the personal asset trusts, and no more need be stated on that topic here.

46. Participation in a racketeering conspiracy can be both active and passive and both the active and passive participation of these two Defendants has been central. If one removes Anita Brunsting from the equation, none of this could have happened. Amy Brunsting's active and passive participation is equally incriminatory.

[2] Docket entries 10 and 10-1, Case 4:12-cv-0592 filed TXSD 2/27/2012

VI. CONCLUSION

47. All of the evidence necessary to establish Plaintiffs' case is contained in the public record. Defendants profess to have been party to those proceedings, have professed personal knowledge of a contrary set of facts and cannot possibly claim want of notice of the facts contained in the records and pleadings in those events.

48. These Defendants are more than apprised of the specific conduct amounting to their participation in the racketeering conspiracy, whether ignorant of the law or unaware of the acts of their agents.

49. Defendants Anita and Amy Brunsting, facilitated by the excellent assistance of Defendant Candace Freed, and aided and abetted by the other Defendants, have shown nothing but wanton and willful disrespect for all legal and moral obligations. Without their absolute refusal to act, the original lawsuit would not have been filed, or, in the alternative, would have been resolved and the familial litigants would have gone on with their lives. Instead, the sibling beneficiaries are mired in a continuing lawyer orchestrated soap opera, all about manipulating the judicial process in order to bust the Brunsting trusts for their own personal financial gain.

50. Defendants' Rule 12(b)(6) Motions are just another attempt to avoid accountability. The motions to dismiss should both be denied for the reasons stated and these Defendants should be held to answer under the law.

Wherefore, Plaintiffs respectfully move this Honorable Court for an Oder denying Anita and Amy Brunsting's Rule 12(b)(6) motions to dismiss.

Respectfully submitted October 6, 2016,

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on October 6, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, the Rule 12(b)(6) Motion to Dismiss filed by Defendants Anita and Amy Brunsting, docket entries 30 and 35, should be Denied.

It is SO ORDERED

_____ _____

Date

The Honorable Alfred H Bennet
United Stated District Judge

Dear Judge Comstock

I am writing today to ask for a hearing date in effort to expeditiously dispose of this case. Concurrent with this request for setting, I am filing a motion to transfer the related District Court case to Probate #4.

Because summary and declaratory judgement motions filed in the Probate Court by both Plaintiff's and Defendant's raise questions involving the validity, efficacy and applicability of instruments drawn up by District Court Defendant Candace Freed it would necessarily follow that the risk of contradictory and inconsistent rulings on the same issues of law and fact and the burden of duplicate proceedings upon the courts would mandate the transfer of the related District Court suit to the Probate Court sua sponte.

Plaintiff Curtis Motion for the transfer of the district court case was filed on 2/09/2016 (PBT-2016-44972) and there are several dispositive matters pending before the Court for which plaintiff seeks setting:

1. Defendants No-Evidence Motion for Partial Summary Judgment (PBT-2015-227757)
2. Plaintiff Curtis Answer with Motion and Demand to Produce Evidence. (PBT-2015-227757)
3. Plaintiff Carl Brunsting's Motion for Partial Summary Judgment (PBT-2015-225037)
4. Plaintiff Curtis verified motion for partial summary judgment and petitions for declaratory judgment. (PBT-2016-26242)

WHERFORE Plaintiff Curtis respectfully requests the Court set a hearing on her motion for Partial Summary and Declaratory Judgments (PBT-2016-26242) and on her Motion and Demand to Produce Evidence (PBT-2015-227757) and upon any other pending dispositive motions the Court may deem appropriate to settle at the hearing.

Respectfully

ANM

PROBATE COURT 4

FILED
7/31/2015 4:08:49 PM
Stan Stanart
County Clerk
Harris County

DATA-ENTRY
PICK UP THIS DATE

NO. 412,249-**401**

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

CARL HENRY BRUNSTING, et al	§	
	§	
v.	§	
	§	
ANITA KAY BRUNSTING, et al	§	

DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

Defendants, Anita Brunsting, Amy Brunsting, and Carole Brunsting, file their response to the Motion for Protective Order filed by Drina Brunsting, as attorney-in-fact for Carl Brunsting, and would respectfully show the Court as follows:

I. Summary of the Argument

It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee. Thus, the evidence essentially destroys most of Drina's claims in this proceeding.

Drina's "motion for protective order" is not a protective order in any sense of the term. The relief Drina seeks can fairly be summarized as follows: sworn testimony regarding the recordings; turnover to Drina's counsel of all copies of the recordings; and a ruling the recordings cannot be used in this proceeding. Thus, Drina's motion is some convuluted discovery/injunctive/admissibility relief without any legal authority, be it a statute, rule, or case law, upon which this Court could reasonably rely to grant her relief.

Finally, and most importantly, Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought. Accordingly, the Motion must be denied.

II. Argument & Authorities

A. Protective Orders

Protective Orders are described in Texas Rule of Civil Procedure 192.6, which provides:

> (a) Motion. A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.
>
> (b) Order. To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:
>
> (1) the requested discovery not be sought in whole or in part;
> (2) the extent or subject matter of discovery be limited;
> (3) the discovery not be undertaken at the time or place specified;
> (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
> (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

In the case at hand, Drina propounded discovery to Anita, in which she complied by providing discovery responses. Drina now seeks a protective order against discovery she

propounded against an opposing party. It is nonsense. There is nothing in the rules nor any other legal authority that allows a party to move for a protective order against that party's own discovery requests and the responses thereto.

With respect to the information Drina seeks regarding the recordings, Drina provides no reason why she would be unable to obtain such information through normal discovery channels such as interrogatories or deposition. Defendants were unable to find any reported cases where a Court compelled a party to create an affidavit at the opposing parties' request. Drina's motion appears to be another boondoggle Drina created to needlessly drive up litigation costs.

B. Alleged Illegal Wiretapping

The chief authority upon which Drina's motion is based is the Texas Civil Wire Tap Act, Tex. Civ. Prac. & Rem. Code, Title 123. In Texas, where one party consents, the Texas Civil Wire Tap Act is inapplicable. *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex.App.–Corpus Christi 1986, writ ref'd n.r.e). With respect to the first recording between Carl and Nelva, there is no evidence that Nelva did not consent to the recording.

With respect to the remaining conversations between Carl and Drina, at the time of the recordings Carl and Drina intended to divorce. It seems perfectly logical that Carl consented to the recordings at that time.

Further, on information and belief, Carl was aware of all of the video recordings made. Additionally, on information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the call and/or which triggered in accordance with its own operation. Either way, one – if not both – participants had full knowledge that he/she was being recorded.

Now that Carl and Drina have apparently reconciled, Carl's counsel alleges neither

consented to the recordings. There is no evidence to support the allegation. In short, Drina has not proven that both her and Carl did not consent to the recordings at the time they were made.

C. Drina's requests are merely an attempt to hide evidence that is damaging to her/Carl's claims.

One of the underlying tenets of Carl/Drina/Candace's claims is that certain actions undertaken by Nelva and/or by Anita, Amy or Carole were improperly taken. Unfounded and insupportable allegation of incompetence, undue influence, etc. abound. Yet now, we have Drina taking efforts to suppress exculpatory evidence. The evidence Drina seeks to hide constitutes evidence that adds context and color to decisions made and actions taken. It is evidence that will assist the fact-finder in confirming what Anita, Amy or Carole already know to be true. Specifically, that the actions undertaken by Nelva and/or by Anita, Amy or Carole were proper and justified in light of the circumstances as they were or appeared to be at the time.

D. Proposed Agreed Protective Order

Defendants might be willing to enter into a standard joint agreed protective order, such as the one attached hereto as Exhibit A, which would prevent the parties from distributing materials incident to this litigation to third-parties. However, thus far, Drina has not consented to proceed in this manner. Defendants otherwise oppose creating new, weird, atypical rules unfounded in Texas jurisprudence.

III. Prayer

For these reasons, Defendants, Anita Brunsting, Amy Brunsting, and Carole Brunsting pray that Carl Henry Brunsting's Motion for Protective Order be denied. Additionally, Defendants pray for such other and further relief (general and special, legal and equitable) to which they may be entitled, collectively, individually or in any of their representative capacities.

Respectfully submitted,

/s/ Brad Featherston

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ATTORNEYS FOR CAROLE ANN BRUNSTING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 31st day of July, 2015, to the following in the manner set forth below:

Candace Louise Curtis – Pro Se:

Candace Louise Curtis
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Via C.M.R.R.R. 7014 0150 0001 5384 0122

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Bobbie G. Bayless
Bayless & Stokes
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Attorneys for Carole Ann Brunsting:

Darlene Payne Smith
Alec Covey
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Attorneys for Anita Kay Brunsting:

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NEAL E. SPIELMAN

FILED
8/10/2015 12:00:00 AM
Stan Stanart
County Clerk
Harris County

NO. 412,249-401 **PROBATE COURT 4**

CANDACE LOUISE CURTIS	§	**IN PROBATE COURT**
Plaintiff,	§	
	§	
V.	§	**NUMBER FOUR (4) OF**
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	**HARRIS COUNTY, TEXAS**

RESPONSE TO DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

The Court has raised very valid issues regarding the questions before it, and has asked to be briefed. Plaintiff Curtis therefore submits the following analysis of the questions raised and, although seemingly complex at first view, the matter is really quite simple. There is only one primary premise and thus the first principles require answer to only one inquiry, which is whether or not the interception and dissemination of the challenged electronic communications was lawful.

Plaintiff will respectfully show that the greater weight of unrebutted presumptions falls in favor of the illegality of the recordings, and that judicial discretion would best be exercised with caution, as the Court cannot allow dissemination without proof of the legality of the recordings without also becoming a principal to the crime of dissemination.[1]

Summary of the Argument

1. The recordings are evidence of illegally intercepted electronic communications, a second degree felony[2] in Texas with a moderate severity level.
2. Illegally intercepted electronic communications may not be received in evidence nor exchanged under the pretext of discovery in any civil action, as unauthorized possession or dissemination of illegally intercepted electronic communications is a second degree felony which, as noted, the Court would be unwise to participate in.

[1] Collins v. Collins, 904 S.W.2d 792 (Tex. App. 1995)
[2] Texas [Penal] Code Annotated Sections 12.33, 12.35, 16.01 (West 1997); 1997 Tex. Gen. Laws 1051; Texas [Civil Practice and Remedies] Code Annotated Sections 123.002, 123.004 (West 1997); Texas Code of Criminal Procedure Annotated Article 18.20 (West 1997).

3. The burden of bringing forth evidence is on the proponents of the legality and admissibility of the recorded wiretap conversations, as the presumption that intercepted electronic communications found in the possession of third parties, meaning persons not privy to the conversations, are presumed unlawful and the burden of showing that the challenged recordings meet one of the statutory exceptions is upon the Defendant disseminators.
4. The Court is without discretion and no agreement is necessary. Under the circumstances here, the Court must issue a protective order, even if only temporary, pending resolution of the issue of whether or not interception and dissemination of the challenged electronic communications was lawful.
5. The attached exhibits in a chronology of relevant events reveals that the recordings are the fruit of an illicit conspiracy targeting Carl and Drina that did not involve Nelva Brunsting and, Defendants' unanimous claims are defeated in their own words uttered at or about the time of the recordings, as hereinafter more fully appears.

Texas Authority on Admissibility

The admissibility of evidence illegally obtained is tempered by Tex.R.Civ.Evid. 402, which provides in pertinent part that, "[a]ll relevant evidence is admissible, except as otherwise provided ... by statute." Consequently, before the recordings can be held to be inadmissible, the Plaintiff(s) must show their exclusion is required under either the federal or state statute. Section 2511(1) of the federal wiretap statute[3] prohibits the use or disclosure of communications by any person except as provided by statute. *Gelbard v. United States,* 408 U.S. 41, 51-52, 92 S.Ct. 2357, 2363, 33 L.Ed.2d 179 (1972) (witness could not be forced to disclose testimony from illegal wiretap to grand jury).

Section 123.002 of the state wiretap statute states that a party has a cause of action against any person who "divulges information" that was obtained by an illegal wiretap. TEX.CIV.PRAC. & REM.CODE § 123.002.

Section 123.004 states that a party whose communication is intercepted may ask the court for an injunction prohibiting the "divulgence or use of information obtained by an interception." TEX. CIV.PRAC. & REM.CODE § 123.004.

[3] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, more commonly known as the "Wiretap Act," is found at 18 U.S.C. §§ 2510-2522.

Although the Texas wiretap statute does not specifically provide for the exclusion of illegally obtained "communications," the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in section 123.004 are sufficient to rebut the presumption of admissibility under rule 402.

Because the tapes were illegally obtained under the federal and state statutes, the trial court should not allow their dissemination, or admit them into evidence, under the exception provided at Tex.R.Civ.Evid. 402.

The recorded conversations are not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination.

> *To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe. Gelbard, 408 U.S. at 51, 92 S.Ct. at 2362-63; Turner, 765 S.W.2d at 470.*

Exceptions

In addition to the numerous governmental or agency exceptions to the general rule, it is not unlawful to intercept any form of wire, oral or electronic communications between others if one of the persons is a party to the communication or one of the parties has given their consent to the interception. Tex. Civ. Prac. & Rem. Code §123.001(2); Tex. Pen. Code§16.02(c)(3)(A); 18 U.S.C §2511(2)(c); Kotrla v. Kotrla, 718 S.W.2d 853, 855 (Tex.. App. - CorpusChristi 1986); See also, Hall v. State, 862 S.W.2d 710(Tex. App. - Beaumont 1993, no writ); Turner v. PV International Corporation , 765 S.W.2d 455, 469-71(Tex. App. - Dallas 1988, writ denied per curiam, 778S.W.2d 865 (Tex. 1989).

Interception, Possession, and Dissemination

The Right to Privacy is the Controlling Presumption

The right to privacy is held in such high esteem that the U.S. Congress and the Texas Legislature have both made it a felony to illegally intercept, possess or disseminate electronic communications. There are very limited exceptions none of which apply here.

The mandatory but rebuttable presumptions are that the participants to these phone conversations had a reasonable expectation of privacy; that the right has been violated and; that the burden of showing the interception of those electronic communications meets one of the statutory exceptions is upon persons who were themselves not a party to the private electronic

communications, but who we find to be in possession of and disseminating the challenged recordings.

Defendants have produced no evidence tending to show that the intercepted electronic communications meet any of the lawful exceptions and the ball is in their court. If the wiretap recordings cannot be shown by the Defendants to meet one of the statutory exceptions, the recordings are prima facia unlawful, regardless of any alleged motives for their interception.

While no more than the foregoing law and fact summary is essential to the disposition of the singular issue before the Court, it seems necessary to address Defendants' unanimously disingenuous assertions and thus Plaintiff does so with the attached Memorandum.

The attached memorandum on the matter of context and color, with attached exhibits, is hereby incorporated by reference as if fully restated herein.

Plaintiff Curtis respectfully submits the following proposed order.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
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925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

Attorneys for Anita Kay Brunsting

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CANDACE L. CURTIS

No. 412,249-401

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

TEMPORARY PROTECTIVE ORDER

On August 3, 2015 the Court heard and considered CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER and Defendants' response thereto.

At issue are recordings of intercepted electronic communications between Plaintiff Carl Henry Brunsting and his wife Drina.

After hearing on the merits and reviewing briefs submitted by the parties, the Court is of the opinion that the recordings in point are "Protected Communications" as that term is defined at 18 U.S.C. §§2510(1) & 2510(12) and that a protective order is necessary to protect privacy rights pending disposition of the pending questions at issue.

IT IS THEREFORE ORDERED that any person or entity subject to this Order-including without limitation the parties to this action, their representatives, agents, experts and consultants, all third parties providing discovery in this action, and all other interested persons with actual or constructive notice of this Order -shall adhere to the following terms, upon pain of contempt and any other applicable civil or criminal penalties:

1. No person or entity shall, in response to a request for discovery or subpoena issued in this action, produce any Protected Communication for any third party or person absent further order of this Court.

2. To the extent a Protected Communication is or has already been produced in response to a request for discovery or subpoena issued in this action, any recipient of such production shall (a) immediately surrender any and all documents that contain or

reflect a Protected Communication to real party in interest Carl Henry Brunsting through his Counsel of Record and (b) destroy any copies made of such Protected Communication, as well as any derivative materials that reflect a Protected Communication on any medium of storage whatsoever.

3. Any party to this action that issues a request for discovery or subpoena calling for the production of a Protected Communication shall simultaneously provide the recipient of the discovery request or subpoena with a copy of this Protective Order. To the extent a party to this action has already issued such a request or subpoena, such party shall provide a copy of this Protective Order to the recipient within three (3) business days of the entry of this Order.

4. Any person who receives a request for discovery or subpoena in this action calling for the production of a Protected Communication shall, without revealing the substance or content of a Protected Communication, provide both the issuing party and the Court with a general description of that Protected Communication so that the issuing party can make an application to this Court for production of that Protected Communication, and that Plaintiff Carl Henry Brunsting can respond to that application.

IT IS FURTHER ORDERED that on or before _____, sworn affidavits are to be provided by Defendants Anita Brunsting, Amy Brunsting, and Carole Brunsting, stating any personal knowledge with regard to every recording made since July 1, 2010 within the following categories:

- All audio or video recordings of meetings, conversations, telephone messages, or other communications with Elmer, Nelva, or any of the Brunsting Descendants concerning Brunsting Issues,
- All audio or video recordings of Nelva's execution of any documents.
- All audio or video recordings of evaluations of Nelva's capacity,
- All other audio or video recordings of any Brunsting family member, and
- All investigations made of any Brunsting family member, including any surveillance logs or reports.

The sworn affidavits shall identify every party involved in making the recordings and specify the date, location, and means used to make the recordings, the current location of all original recordings and all copies of all recordings, all parties to whom the contents of recordings have been disclosed, and all uses which have been made of the recordings.

IT IS SO ORDERED!

Signed August, _____, 2015.

_____
Christine Butts, Judge
Harris County Probate Court No. 4

NO. 412,249-401

CANDACE LOUISE CURTIS	§	**IN PROBATE COURT**
Plaintiff,	§	
V.	§	**NUMBER FOUR (4) OF**
ANITA KAY BRUNSTING, ET AL	§	
Defendants.	§	**HARRIS COUNTY, TEXAS**

MEMORANDUM OF FACTS SUPPORTED BY DEFENDANTS' OWN DISCLOSURES

Plaintiff Candace Louise Curtis respectfully submits for the perusal of the Court this memorandum of facts adding to the inquiry context and color revealing the true nature of the intentions behind the unlawful interception and dissemination of the private electronic communications at issue.

Statement of the Issue

Recordings of private electronic telephone conversations between plaintiff Carl Brunsting and his wife Drina Brunsting have been disseminated to all of the parties to the present lawsuits. These recordings, if any, were requested by Plaintiff Brunsting to be produced by the Defendants in the Petition for Deposition Before Suit filed by Carl Brunsting March 9, 2012, when there were no other parties, however, the recordings were not disclosed until July 5, 2015.

Plaintiff Carl Henry Brunsting, along with his wife and attorney in fact Drina Brunsting, challenged the recordings as the product of the illegal interception of electronic communications, in violation of state and federal wiretap laws, and thus seek protective orders.

In DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER Defendants unanimously assume the following postures:

1. *It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee.*

2. *On information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the calls and/or which triggered in accordance with its own operation. Either way, one-if not both-participants had full knowledge that he/she was being recorded.*

3. *Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought.*

A Recital of Known Facts

1. There are known recordings of private phone communications between Carl and Nelva and between Carl and his wife Drina, which are the object of the application for protective order.

2. The recordings were disseminated by Defendant Anita Brunsting, who is not a party to any of the disclosed communications.

3. We have a claim by Carl Henry Brunsting and his wife Drina that the recordings were illegally obtained.

4. We have a unanimous response from all three Defendants asserting upon information and belief that the recordings were legally obtained but answers to interrogatories on the subject indicate that none of them know anything individually.

5. The question of admissibility hinges upon the legality of the interception and dissemination of the communications.

6. A presumption that the right of privacy has been violated is primary and stands unrebutted by competent evidence to the contrary.

7. The burden of proof as to the legality of the acquisition and dissemination of the recordings is on the proponent of the assertions that the recordings were obtained legally and are therefore admissible.

8. The proponent of the legitimacy and admissibility of the recordings objects that declaring the facts necessary to qualify the recordings as legally obtained evidence before dissemination is somehow onerous, but at the same time want carte blanch to disseminate the recordings to persons not privy to the conversations under the auspices of discovery and disclosure.

9. Unless the recordings can be qualified as legally obtained they are inadmissible and cannot be disseminated lawfully.

10. There are questions as to the recordings' origins and Defendants file a joint motion claiming the existence of specific facts while taking no individual responsibility for personal knowledge.

11. Anita Brunsting, through her counsel Brad Featherston, disseminated the recordings and, thus, Anita Brunsting would have at least some personal knowledge regarding the chain of custody and control, and both now share in the culpability and attendant civil liability.

12. Assertions that the recordings were made on an answering machine would indicate personal knowledge by one if not all of the Defendants.

13. An assertion that the recordings were authorized by Carl Brunsting requires evidentiary support from the proponent of the claim, and there has been none.

14. Assertions that Carl Brunsting installed and activated the Answering Machine are inconsistent with the Defendants' emails of the same date of the purchase of the voice recorder showing they were conspiring to get guardianship over Carl.

15. Carl was both incompetent and the proper subject of Defendants' intended guardianship effort or he was competent to install and activate the "Answering Machine" that Defendants insist he made the recordings on. Both of these things cannot be true.

16. In the Bates stamped disclosures there is a receipt for a signal activated SONY digital voice recorder purchased four days before the first dated recording on the disseminated CD. When combined with the attached email and other exhibits talking about getting guardianship over Carl, continuing the Private Investigator over the weekend, knowing where Carl and Drina were and what they were doing at that very point in time, and all of these events in the same time period as other documented activities, provides a presumption that the circumstances and intentions surrounding the acquisition of the recordings are not what Defendants claim, as hereinafter more fully appears.

The hierarchy of presumptions is as follows:

1. The participants to a private telephone conversation have a reasonable expectation of privacy against electronic eavesdropping.

2. The waiver of a known right must be a knowing and intelligent act done with sufficient knowledge of the relevant circumstance and likely consequences, and it must be both a voluntary and an overt act.

3. There is no affirmative evidence of such waiver.

4. Unless rebutted the presumption that the recordings were illegally obtained is not only controlling but the prudent course.

The True Context and Color

The only probative value these recordings could possibly have is in the fact of their very existence. Defendants argue that the content of the challenged recordings adds context and color to the events of the time showing that Nelva was preparing for Carl's alleged divorce. As in all other instances Defendants fail to provide anything but claims of Nelva's intentions based upon the strength of the honor and integrity of their word alone.

Despite all the posturing and game playing the evidence will show the Defendants are intractably disingenuous and that they illegally intercepted the private electronic communications as part of a conspiracy to steal the family inheritance. That conspiracy involved attempts to have

Nelva declared incompetent and to gather what they thought would be evidence to support guardianship over Carl.

The evidence will further show Defendants stalked Nelva through her email and banking activities online, in addition to tapping her phone and recording every conversation involving anyone who spoke with Nelva on the phone, including Plaintiff Curtis in California.

Candace Freed took her instructions from ANITA despite her claims it was Nelva who was making the requests for changes to the trust. (Exhibit A)

The October 25, 2010 phone conference called for by Candace Freed excluded Carl and Nelva and was ultimately about having Nelva declared incompetent, which they failed to achieve by mid-November. The "law firm" did not keep an audio recording of that conference.

There is no evidence Nelva even knew of these changes before Plaintiff Curtis' 10/26/2010 phone call, after which Nelva sent Candace her hand written note repudiating the alleged 8/25/2010 QBD.

Defendant Carole Brunsting sent an email about overhearing Nelva's conversation on the phone with Candace Freed. (Exhibit B)

Freed sends a follow up email regarding the failed attempt at getting Nelva declared incompetent on Nov. 17, 2010, apparently referring to this same conversation. (Exhibit C)

Despite Defendant Amy Brunsting's claims of not being involved before Nelva's death, Amy and Anita corresponded with Candace Freed December 23, 2010 and on several other dates prior to Nelva's demise. (Exhibit D)

On March 8, 2011 Anita emails Carole, Amy and Candace bragging about reminding Nelva she was no longer trustee and no longer had access to the trust. (Exhibit E)

March 17, 2011 Tino (Nelva's caregiver) buys a Sony Digital Voice Recorder, (Brunsting 004570) which shows one ICD-PX312 digital voice recorder purchased by Tino at Best Buy in Houston. (Exhibit F)

March 17 and 18, 2011 emails mention the PI and talk about getting guardianship over Carl. (Exhibit G 1-3)

March 21, 2011 is the record date of first wiretap .wav file (received from Brad on CD 7/5/2015) (See Carl Brunsting Petition for Protective Order)

On March 24 and 25, 2011 there are large trust-prohibited transfers of Exxon Mobil and Chevron Stocks labeled as "gifts". (See Report of Special Master)

On March 29, 2011 Amy and Anita communicated with Freed (Exhibit D)

April 22, 2011 is the record date of second .wav file (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order)

Then on May 11, 23 and 25, and on June 14 and 15, there are more large trust-prohibited transfers of Exxon Mobil and Chevron Stocks. (Report of Special Master)

July 27, 2011 Anita corresponds with Freed (Exhibit D)

August 16, 2011 Anita corresponds with Freed (Exhibit D)

September 20, 2011 Amy and Anita correspond with Freed (Exhibit D)

February 27, 2015 is the record date of the third and fourth .wav files (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order), indicating these two recordings had been excerpted from a master storage disk containing even more undisclosed recordings.

There is an overwhelming volume of evidence clearly showing more of the same pernicious intent, but since the matter before the Court is limited to the singular question of the legality of Protected Communications, Plaintiff Curtis will not respond to the plethora of Defendants' extemporaneous expressions of disingenuous, self-serving bias, and otherwise irrelevant assertions.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
American Canyon, California 94503
occurtis@sbcglobal.net
925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

Attorneys for Anita Kay Brunsting

Bradley E. Featherston
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
Houston, Texas 77079
brad@meddellawfirm.com

Attorneys for Amy Ruth Brunsting:

Neal E. Spielman
Griffin & Matthews
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
nspielman@grifmatlaw.com

Attorneys for Drina Brunsting as
attorney-in-fact for Carl Henry Brunsting:

Bobbie G. Bayless
Bayless & Stokes
2931 Ferndale
Houston, Texas 77098
bayless@baylessstokes.com

Attorneys for Carole Ann Brunsting

Darlene Payne Smith
Crain, Caton & James
Five Houston Center
1401 McKinney, 17th Floor
Houston, Texas 77010
dsmith@craincaton.com

CANDACE L. CURTIS

EXHIBIT A

PM TRUST REVIEW MEETING

Signing Date & Time: Wed. Aug. 4th 2 pm.
Fee: ____
Paid: ____ Mail: ____

Client Name: Brunsting, Nelva

Date: 07/30/10 **Estate Size:** 2 mil ±

IRA: Husband - N/A **Wife -** ____

Current Address/Phone: 13630 Pinerock Hou TX 77079

Date of Trust/Restatement: ____ **Previous Amendments?** Yes.

Subtrust Funding Done previously? Yes. DT & ST.

AMENDMENT: ✓ QBD(PAT)✓ ___ Other ___ Instr Ltr ✓ HCPOA✓
✓ ApptSUCCTee/HIPAA✓ ___ ExTPOA ___ ✓COT ___ ✓POA✓ ___ DIR
Anita Kay Riley & Amy Ruth... Co-tees
or Survivor of Them. Then Most

✓ **Distribution Change (QBD):**

PAT QBD

IF PAT QBD then:

Each beneficiary Trustee of Own Trust: ✓ yes ___ no

except for Carl, Anita & Aimee as Co-tees for Carl
(except they have rt to name Carl as own Succ Tee)
Distribution of PAT: need to

Same as LT except need language
about the last amend (QBD) also early distr's.

V&F 000687

_____ **Specific Distribution:**

_____

_____

_____ **Ultimate Distribution:**

_____

_____

_____ **HEALTH CARE DOCUMENTS:**

1ST Agent: Carol

2nd Agent: Anita

3rd Amy

IRA TRUST: _____ **yes** _____ **no** For whom? _____ husband _____ wife

Trustees upon disability of Trustor or spouse: _____

Each beneficiary Trustee of own trust? _____ yes _____ no

_____

_____

_____

_____

SS# of Surviving Spouse/Beneficiaries: _____

FUNDING:

Real Estate _____

Which property has NO MORTGAGE? _____

_____ Recording HS Deed

_____ Apply for HS Exemption

Tax-deferred Assets _____

_____ Bank & Brokerage Accounts
_____ Life Insurance
_____ Oil & Gas Interests
_____ Credit Union Accounts
_____ Partnership Interests
_____ CDs
_____ Safe Deposit Box
_____ Stocks and Bonds
_____ Motor Vehicles
_____ Sole Proprietorship Assets
_____ Promissory Notes & Mortgages
_____ Annuities

Additional Documents: _____

NOTES:

Needs new DFPOA -order

Anita

Carol

Amy

Any Name Changes for children? _____ **Any children Predecease?** No.

If Yes, who: _____

FEES:

QUOTED: $ _____ **(Plus Expenses)**

AMOUNT REC'D: None **DATE:** _____

BALANCE DUE: _____

DOCUBANK? _____

Cost Pat QBD 1200.
Hipaa Pkg 250 - med POA
D.F.P.O.A 150.-
Appl. of Succ TEE
New Card.

Courtesy discount $150.-

Cy

G:\PM Docs\Checklists\5-1 Checklists\PM Trust Review Mtg.wpd

Anita - called

Carl has emailed amendments to trust

Anita & Aimee as Co-Trees

Change list under ME

Carol
Anita
Aimee

Financial P.O.a

Anita
Carol
Aimee

Amend to trust /PAT's w/ Aimee to be Co-Trees. Anita to correct Supp Needs to

Sp needs?

From: Anita Brunsting
To: Candace Freed
Sent: 10/6/2010 8:19:06 PM
Subject: Brunsting Family Trust

Candace,

I spoke to mom tonight and she agreed to resign as trustee and appoint me as trustee. I told her that you would be contacting her to re-explain things and make sure she understood what was happening.

If you have any questions, my cell is 361-550-7132.

Thanks,
Anita

EXHIBIT B

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Thursday, October 28, 2010 9:00 AM
To: Candace Curtis
Subject: Re: One more

Candy,
The more I think about this the whole key is Carl. When I was listening to Mother's call with Candance, Mother told Candace that Carl was trustee, not Anita and was not following the changes Candane was telling her she had made to have Carl removed.. Legally, I wonder if what Candace did was right without consulting Carl or his power of attonery since Carl has always been present at all meetings.

--- On **Thu, 10/28/10, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: One more
To: "Carole Brunsting" <cbrunsting@sbcglobal.net>
Date: Thursday, October 28, 2010, 10:34 AM

Candace DOES know she fucked up. That's why she had such a nasty attitude towards both you and I. Anita is smug and Amy plays dumb.

I hope Carl goes home today! If he does I hope the sun is shining. 10 minutes smiling into the sunshine + coffee + the Beatles = a sharper, happy Carl. I have a strong feeling that he will recover in leaps and bounds ALL ON HIS OWN, with support from his wife and family. The fact that Daddy is looking over us gives me strength. I can feel him stronger than ever before.

My suggestion is that when Dr. White finds Mother competent the following should happen:

1. You need to complete your time-line to demonstrate that due to various factors (badgering, low oxygen, Carl's illness, her illness, pneumonia, general stress and worry due to all of this), Mother was incompetent and under extreme duress when she signed everything she signed, particularly the Power of Attorney. We can compose a letter to Candace for Mother to sign, demanding that she wants to have papers drawn up to revoke anything she agreed to between the first of July and now.

2. As Mother gathers strength over the next few weeks she will go to her MD Anderson appointments, etc. and move towards treatment and recovery. I want to stress nutrition, adequate good sleep, and stress-free living.

3. In the meantime she can sell what she needs to, to pay for Robert or Tino or whoever Drina needs to assist her with Carl (if she even needs someone - Carl may recover a lot in a few weeks at home). The cost will be minimal compared to the $100k shithead got to buy her house.

Going forward, Mother will have to tell Candace IN WRITING what she wants done with the trust. You can help her compose the letters. There can be no question when it's in writing. You can assist Mother in reviewing the paperwork before she signs (at home - at her leisure), to make sure all her wishes have been incorporated. This should never be done under the pressure and duress she was subjected to. Mother can take as much time as she needs to read and understand that everything will be as she wants it to be.

The fair and equitable solution in my mind is:

Make all five of us successor co-trustees and require a majority to make any change whatsoever. Then, if Mother steps down there will be no shenanigans. Everything will be transparent and we'll all know everything everyone else knows. That way when Anita wants to sell the farm, or move away from Edward Jones, she can put it up for a vote among us. All five of us are intelligent people and none of us can honestly say we have NEVER made a wrong choice in our lives. This way Mother will be at peace to live out her life, and she will die knowing that she has not pitted one against the other, or given control of one over the other, or played favorites, or been bullied into doing something she didn't really want to do, or would not have done in the first place.

Now this may go AGAINST the norm, or what Candace and her ilk would recommend, but fuck them. They are attorneys who get paid to do what their clients want them to do and they love having to draw up documents. Fees, fees, fees, $$$$$$$$$$$$$

If Anita succeeds in her agenda and becomes trustee, we should have her competency tested just to show her what it feels like. If everything stays the way it is right now, that's the first thing I'm going to do when the day comes that she's in charge of me. Na, Na, Na, Na, Na, Na.

Love you,

C

From: Carole Brunsting <cbrunsting@sbcglobal.net>
To: occurtis@sbcglobal.net
Sent: Wed, October 27, 2010 9:32:06 PM
Subject: One more

And do not overlook an exploration of the family's motives in requesting a competency evaluation, she cautioned. Do family members have reason for wanting their oddly behaving relative to be declared incompetent?

This is from an article about not rushing to declare and elderly person incompetent.
Mother passes the smell test and I have to make sure Tino does not let her out of the house without her clothes being ironed and SEE!!! MOTHER MADE THE APPOINTMENT TO GET HER HAIR DONE!!! CANDY THAT IS IT!!! MOTHER DOES CARE ABOUT HER APPEARANCE!! She will not go out without her makeup one and I have to get her a nail file all the time. Mother also called Edward Jones on her own and sold $10K so she would have enough money to live on.

She was temporarily incompetent when she was to low on oxygen and if they made her walk to Candace's offic I know for a fact her levels were to low because Dr. White joked about it. Tino did not take her so she had to walk from the parking lot to the office. She did not understand what she was signing because she was to short o breath and I can prove that. Candane has to know she F***ed up.

--- On **Wed, 10/27/10, Carole Brunsting** ***<cbrunsting@sbcglobal.net>*** wrote:

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Subject: Found this
To: occurtis@sbcglobal.net

Date: Wednesday, October 27, 2010, 10:38 PM

There are any number of situations that may cause you to question the competency of a family member to make sound life decisions, such as when:

- An elderly person suddenly changes a will or trust in a manner that is significantly different from all previous wills or trusts, which could result in will litigation if not appropriately handled during the elder's life.
- A family member has suspicion that the elderly person is being unduly influenced by others

Anita is unduly influencing Mother and now Amy has piled on. Mother never would have made these changes on her own. This was all done by the hand of Anita who put herself in charge of everything.

EXHIBIT C

Subject: Fw: Nelva Brunsting
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 3/11/2015 6:24 PM
To: Rik Munson <blowintough@att.net>

On Wednesday, November 17, 2010 2:38 PM, Candace Freed <candace@vacek.com> wrote:

Amy and Family, Thank you for the update on your mom, Nelva Brunsting. The purpose of the conference call and the suggestion that Ms. Brunsting be evaluated was based solely on conversations that I had with Ms. Brunsting and to let you all know that I had concerns based on those conversations. If she has been evaluated by her physician and you as a family are comfortable with his or her diagnosis, then you have addressed the concerns that I had. I appreciate your letting me know the opinion of the doctor. I hope your mom is doing well and she continues to improve.

Please let me know if I can be any further assistance.

Very truly Yours,

Candace L. Kunz-Freed
Attorney at Law

Vacek & Freed, PLLC
14800 St. Mary's Lane, Suite 230
Houston, Texas 77079
Phone: 281.531.5800
Toll-Free: 800.229.3002
Fax: 281.531.5885
E-mail: candace@vacek.com
www.vacek.com

We have moved! Our new office address is as shown above. We are one exit west of our old office building. Exit Dairy Ashford. Turn south on Dairy Ashford. St. Mary's Lane is a side street one block south of I-10 Katy Freeway. Turn west on St. Mary's Lane. Our building is in the northwest corner of the four-way stop.

EXHIBIT D

DEFENDANTS' PRIVILEGE LOG

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F ① 002054 - V&F 002057	1/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ② 002058 - V&F 002060	7/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ③ 002061 - V&F 002066	12/08/11	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ④ 002067 - V&F 002070	12/23/10	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F ⑤ 002071 - V&F 002072	3/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002073 - V&F 002075 (6)	9/20/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002076 (7)	11/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002077 - V&F 002078 (8)	12/28/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002079 (9)	1/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 0020890 (10)	1/31/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document Type	Subject Matter	Privilege
V&F 002081 (11)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (12) 002082 - V&F 002085	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (13) 002086 - V&F 002089	3/20/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (14) 002090 - V&F 002093	3/29/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (15) 002094	4/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Privilege Log No.	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002095 - V&F 002096 (16)	1/24/11	Anita Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding stock valuation.	Attorney-Client Communication
V&F 002097 (17)	1/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002098 (18)	7/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002099 (19)	8/16/11	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002100 (20)	12/8/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002101 - V&F 002102 (21)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication
V&F 002103 - V&F 002104 (22)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication

Privilege Log	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002105 - V&F 002106 (23)	12/28/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002107 (24)	1/03/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding title of the Buick.	Attorney-Client Communication
V&F 002108 (25)	1/05/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding Trust Information Sheets.	Attorney-Client Communication
V&F 002109 - V&F 002112 (26)	1/09/12	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Email string between attorney and client regarding distribution of trust funds.	Attorney-Client Communication
V&F 002113 - V&F 002114 (27)	1/22/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication
V&F 002115 - V&F 002116 (28)	1/23/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication

Bate No.	Date	Author	To	Document	Subject	Privilege
V&F 002117 - V&F 002118 (29)	1/23/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002119 - V&F 002121 (30)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust documents.	Attorney-Client Communication
V&F 002122 - V&F 002123 (31)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002124 - V&F 002125 (32)	1/31/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding Farmland LLC.	Attorney-Client Communication
V&F 002126 - V&F 002127 (33)	1/31/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002128 (34)	2/14/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002129 (35)	2/15/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding estate planning documents.	Attorney-Client Communication
V&F 002130 - V&F 002132 (36)	2/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Summer Peoples	Email	Attorney communications to client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002133 - V&F 002139 (37)	3/02/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding trust value report.	Attorney-Client Communication Attorney Work Product
V&F 002140 - V&F 002142 (38)	3/06/12	Amy Ruth Brunsting	Candace L. Kunz-Freed	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002143 - V&F 002148 (39)	3/14/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Description	Subject	Privilege
V&F 002149 (40)	3/20/12	Summer Peoples	Amy Ruth Brunsting, Anita Kay Brunsting, and Chip Mathews	Email	Attorney communications to client regarding request for wills.	Attorney-Client Communication
V&F 002150 - V&F 002151 (41)	3/20/13	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002152 (42)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed, Chip Mathews, and Amy Ruth Brunsting	Email	Attorney communications to client regarding December of 2011 accounting.	Attorney-Client Communication
V&F 002153 (43)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Attorney communications to client regarding accounting.	Attorney-Client Communication
V&F 002154 - V&F 002155 (44)	3/27/12	Anita Kay Brunsting	Chip Mathews, Amy Brunsting, Candace L. Kunz-Freed	Email	Email string between attorney and client regarding accounting.	Attorney-Client Communication
V&F 002156 - V&F 002158 (45)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Chip Mathews	Email	Email string between attorney and client regarding asset lists.	Attorney-Client Communication

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002159 (46)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding asset lists.	Attorney-Client Communication
V&F 002160 - V&F 002161 (47)	3/29/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding assets and expenses.	Attorney-Client Communication Attorney Work Product
V&F 002162 - V&F 002163 (48)	3/29/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002164 - V&F 002166 (49)	3/30/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Email string between attorney and client regarding asset list.	Attorney-Client Communication
V&F 002167 (50)	4/12/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002168 - V&F 002183 (51)		Candace L. Kunz-Freed		Chart	Attorney notes/history of representation	Attorney-Client Communication Attorney Work Product
V&F 002184 - V&F 002191 (52)	11/22/11			Document	Authorization for Release of Protected Health Information	Attorney Work Product
V&F 002192 (53)	11/22/11			Document	Authorization for Release of Information	Attorney Work Product

EXHIBIT

E

From: Candace Curtis (occurtis@sbcglobal.net)
To: occurtis@sbcglobal.net;
Date: Sat, February 18, 2012 11:29:12 AM
Cc:
Subject: Fw: New Development

----- Forwarded Message ----
From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Amy <at.home3@yahoo.com>; Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Tue, March 8, 2011 7:15:32 PM
Subject: RE: New Development

I got the same TM from Tino. I hesitate to promise them anything in writing about money. Rather than a monthly payment, I would rather grant them a certain amount each year, but only through the direct payment of their bills - for example; mom could gift Carl $13,000/year, but only if they send me the bill statements to pay directly, and only for bills for living/medical expenses - when the trust has paid $13,000 in bills for the year, that's the end of the money for that year. We could ask them to sign for this money against his inheritance, but then we'd have another form that we'd have to get them to sign (probably notarized), and as we don't know if she's had Carl declared incompetent, the validity of any form he signs might be questionable.

I do like the idea of a letter telling Drina that she may have no contact w/ mom (physical, verbal, visual, phone or electronic means) and she is not to enter mom's house. She can bring Carl to visit mom, but she must remain outside the house - any violation of this letter will be considered harassment and the police will be called if she does not comply. I would also like to add in the letter that Carl's inheritance will be put into a Personal Asset Trust for his care and living expenses - I think this information might be enough to tip her hand.

I would also like to ask Candace, what this letter would do for us legally - like if we did end up calling the police would the letter lend any credence to our case?

I won't do anything until we can come upon an agreement as what to do - I can also write this letter in the role of mom's power of attorney (which she signed last year).

I spoke w/ mom about the whole situation; she listens to reason and can understand our concerns for Carl, and will sign the changes to the trust next week. I have been very forthright in explaining the changes in the trust to her, and that they would be done in order to minimize any pathway that Drina might have to Carl's money. The changes are not to penalize Carl, but to ensure the money goes for his care. I told her to "just say No" to Carl or Drina if they brought up the trust or money and to refer them to me. I reminded her that she isn't trustee anymore and doesn't have access to the trust accounts - she seems fine w/ everything, and expressed no desire to put Carl back on as a trustee. I told her that in the event she did that, that it would not be fair to the rest of us, as we would end up having to deal w/ Drina, not Carl. Mom begrudgingly admits to knowledge of the unpleasantness of this whole situation and Drina's past behavior since Carl has been ill, but I think she is really naive regarding the lengths to which Drina may go through to get Carl's inheritance.

P-9

EXHIBIT F

TIME SHEET

Employee Name: Faustino Vaquera **Title:**

Week: March 15 — March 19

Date	Start Time	End Time	Regular Hrs.	Total Hrs.
3-15 Tues	8:30 am	12:00 am	15.30	
3-16, Wed	12:00 am	2:00 pm	14	
↓	4:00 pm	12:00 am	8	
3-17, Thur	12:00 am	9:30 am	9:30	
3-[redacted]	6:30 pm	12:00 am	5:30	
3-18 [redacted] Frid	12:00 am	6:00 pm	18	
		WEEKLY TOTALS:	70 ½	

Employee Signature: [signature] **Date:** 3-18

Supervisor Signature: **Date:**

70.5
x 15.00
= 1057.50

Groceries & Food = 126.26

Best Buy Digital Voice Recorder 64.94

191.20

Total = 1248.70

08:12:20:55 :: 0220 :: 0092247

WELCOME TO BEST BUY #216
HOUSTON, TX 77024
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MEMBER ID 0329918420

SUBTOTAL 59.99
SALES TAX AMOUNT 4.95
TOTAL 64 94

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4200223 3' 1/8' M-M PATCH CABLE 1 8.39

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Total 9.08

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Change Due 0.00

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Trans# 12887146
Auth# 161235 9.08
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EXHIBIT G

From: Amy Tschirhart <at.home3@yahoo.com>
Sent: Wednesday, August 18, 2010 12:58 PM
To: Anita Brunsting; Carole Brunsting; Candy Curtis
Subject: CPA's advice

Hi,

I talked to the CPA who does my taxes today and asked her what she would recommend. She told me that Drina should talk to an attorney who specializes in debt created by medical bills. Medical bill debt is treated differently than other debt. I did a quick check on the internet and there are several in Houston.

She said that creditors cannot touch Drina's house or cars. She also recommended not paying any of the medical bills right now. She said to wait until the dust settles, then talk with each company about a payment plan, possibly as little as $10 a month. She told me that in all likelihood, they would eventually write off her debt as a loss. She said Drina should definitely not touch any retirement or inheritance, or borrow anything against them.

I called Drina today and told her what Darlene said. She said her father had been telling her the same things. I tried to emphasize that she should not be paying any bills right now, but I don't know if she really understood why. She is overly concerned with her credit score rating. Darlene said that is not that important because they own their house and cars and are not as reliant on credit compared to younger people.

Anyhow, I know that Drina is in a hard spot right now, but I honestly think that keeping her from accessing *any* of Carl's inheritance would be in her best interest. It would be a waste to spend it on medical bills and they will need the money in the future. I don't think that is going to sit well with Drina because she's going to see it as us being tight-fisted with the money. I strongly suggest that if any of us talk to her, we do it as nicely as we can. Acknowledge that the debt is so huge it is unpayable in her lifetime. Encourage her to seek a professional to find the best way to deal with it. Remind her that we want the best for her and Carl in their future and that we are thinking of their best interests.

Love,
Amy

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 11:59 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: atty for guardianship

I think that Drina has always projected her own family issues onto ours. She was completely distanced from her own family until a year ago when her brother passed away and now she is talks about the relationship with her dad like they have been close forever which has not been the case.

She must have had some very bad things happen to her in her childhood and slowly but surely she twisted Carl's mind to go along with everything she did and said. I think you are right that this will have to play itself out to see what she does. She has been waiting for the day she and Carl get the "big" trust payout and then it will be see you later chumps!

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: atty for guardianship
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 1:49 PM

The Brunsting family has never been very demonstrative of their love for one another, but I chalk that up to being Dutch. What I cannot seem to wrap my arms around is the extreme coldness of Drina and Marta. They have always been limp when hugged and hugging is one of the best things in the world. One power hug and all my cares fly out the window. I believe it must be a genetic brain chemical imbalance in Drina's family. She has spent her life with Carl trying to distance HIM from his family and turn him into a cold fish like her. How did she ever get pregnant in the first place? Maybe we should try to get some DNA from Marta and Carl and do a paternity test. Wouldn't it be something if he wasn't her father?????????? LOL

Frankly, as long as the trust is safe, we should probably just let nature take its course and sooner or later we will get Carl out of their clutches and into ours. He might be pissed off for awhile, but I have some small faith that once he can reason better he will see that we only seek what is best for him in the long run BECAUSE WE LOVE HIM. Once he is able to reason and be reasoned with, and has regained some control of his life, if he chooses to go back to his moron wife and their moron spawn, I will mourn him as if he were dead. Until such time I will assume that, somehow, at some point in his recovery, he will realize how miserable the bitch has made his life. He might see that all she has ever cared about is money and how to avoid having to go out and earn some.

If asked, Carl would probably say no to coming out here to live with us, even though it might be the very best thing for him. He should never feel like he has been "dumped" on anyone. I think he would have a lot more stimulation out here. He does love the Bay Area and after a short time he might gain some real incentive to get well.

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>

Sent: Fri, March 18, 2011 8:59:24 AM
Subject: atty for guardianship

Ok, I think I may have found an atty who could handle the guardianship issue. She was recommended to me by the Burgower firm that Amy's lawyer had given her - the Burgower firm does not do guardianship cases. This atty's name is Ellen Yarrell; her offices are in the Galleria area; she charges an initial consult fee of $350 for 1 hr of her time, and probably requires an retainer of $2000. Her paralegal (Elizabeth) said that she's handled cases like this before (where an impaired person has been divorced by their spouse). I asked about the expense and she said that Yarrell could give us a better idea after the consult and it depends on whether the guardianship would be contested (so that depends on whether we fight Drina now, or wait to see if she'll divorce him and then we're facing Marta (if she pursues it)). I got the feeling that "expensive" meant more like $50,000 not $1 million.

I thought of another plus on our side if Drina divorces him - Drina will probably expect him to come live w/ mother - so if he's w/ us and not his daughter that lends more credence to our side for guardianship (possession is 9/10's of the law?).

I also talked to mom last night and told her what was going on. I asked her if she was ok w/ using her money to pay for Carl's legal fees and of course she said yes.

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 8:41 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: guardianship assessment form

They are there right now according to the PI. And Michael took him on Wednesday.

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: guardianship assessment form
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 10:33 AM

Do you know if he went to therapy at all this week?

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Carole Brunsting <cbrunsting@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Fri, March 18, 2011 8:26:05 AM
Subject: RE: guardianship assessment form

we're continuing the pi over the weekend or unless it looks like she's headed toward Beaumont - will also use him through next week. $750 is for the lawyer's (Cole) initial consult not a dr. If she divorces him then someone needs to sue for guardianship - Marta would be considered next in line by the law, but if she doesn't sue for it then I don't think she'd be considered. If Drina gets him to sign divorce papers that give him any less than 50% of their assets then a guardian can countersue her to recover those.

From: Candace Curtis [mailto:occurtis@sbcglobal.net]
Sent: Friday, March 18, 2011 10:20 AM
To: Anita Brunsting; Carole Brunsting; Amy Tschirhart
Subject: Re: guardianship assessment form

$750 an hour FOR WHAT? The woman is abusing him and negligent in his care. Have they been out even one time this week? Last I heard, Monday and Tuesday there was no activity other than a visit from Marta. APS said that once they confirmed she was following doctor's orders, they closed the case. If the instructions were 3 times a week and he hasn't been, or only goes once or twice, SHE IS NEGLIGENT, and they better reopen it or start a new one. Let me know if you want me to call.

Any doctor who has seen Carl would most likely say NO to all of the questions. I would, just based on past phone conversations with Carl.

What if Drina files for divorce? Would that be abandonment? Would the trust even be an issue if SHE divorces him?

If I could have anything I wanted for Carl, I would have him assessed by the neuropsychologists at the place I found in Houston. I don't know if he could handle long periods of testing, but he has got to get some cognitive brain function back OR HE WILL NEVER EVEN BECOME CLOSE TO WHOLE AGAIN. It's a good sign that his behavior has improved, but is it because she beats him with a stick and mentally assaults him to get him to act right?

Maybe guardianship is the wrong approach. Maybe we should go after Drina and have her declared incompetent to care for him, or criminally negligent for not obtaining proper rehabilitation. There has to be a reason why she doesn't want her husband of almost 30 years to recover.

Let me know if he will be staying at Mother's again over the weekend. If so, we might want to extend the PI over the weekend so we can see what the hell she does. The more "evidence" we can amass, the better.

Love you guys,

C

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Thu, March 17, 2011 2:18:05 PM
Subject: guardianship assessment form

Just thought you'd find this interesting, this is the form that we'd have to have a physician use to assess Carl and possible a MHMR psychologist as well. I just thought it would give you an idea as to what they're looking for - Carl definitely fits the bill -

Just fyi, you may have already known this.

Anita

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANTS ANITA AND AMY BRUNSTING'S MOTIONS TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)

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1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement to the RICO complaint, in response to Defendant claims of a want of specific factual allegations and other affirmative defenses.

3. On September 16, 2016, Defendant Anita Brunsting filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) (Dkt 30).

4. On September 21, 2016, Defendant Amy Brunsting filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss (Dkt 35).

I. STANDARD OF REVIEW

Federal Rule 12(b)(6)

5. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc., 693 F.3d 1317, 1321–22 (11th Cir. 2012).* To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S.*

662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

6. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo, and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh, 480 F.3d 438, 443 (6th Cir. 2007); Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005).*

II. ISSUES PRESENTED

7. Both Amy and Anita Brunsting's motions are brought pursuant to Rule 12(b)(6) and claim Plaintiffs have failed to provide sufficient factual allegations to place them on notice of the claims against them, a due process argument.

8. Defendants claim ignorance of facts, while at the same time presenting an opposing view of the facts.

9. Defendants also misstate Plaintiffs' aiding and abetting claims and then deny their misstatements, and appear not to understand the allegations themselves.

III. HISTORY OF THE CONTROVERSY

10. Plaintiffs hereby incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to the Motions to Dismiss filed by Defendants Vacek & Freed, (Dkts 19 & 20) as if fully restated herein.

IV. THE ARGUMENT

11. In a Rule 12(b)(6) motion to dismiss Defendants do not have the pleasure of arguing the facts and the only issue after the finder of fact applies the law, is whether or not Plaintiffs have sufficiently pled their claims. If Plaintiffs have not fully pled their claims, the question becomes whether the complaint could be amended to satisfy the heightened pleading standards demanded by Federal Rule of Civil Procedure Rule 9(b).

12. While offering knowledge of opposing facts, Defendants ask the Court to believe they lack sufficient notice of facts to defend the claims against them.

13. In this case Plaintiffs have responded to each previous motion to dismiss, by simply pointing to the public records of proceedings in the state and federal court, many of which are contained in the attachments to Plaintiffs' Addendum of Memorandum (Dkt 26).

14. These two Defendants' motions to dismiss share an uncanny similarity and other than an occasional detour, individualized for the particular movant, and a little transposition in the order of appearance of the words, each strike the same chords with nearly identical expressions. Plaintiffs will therefore respond to both pleadings in harmony.

Creative Pleading And Something Called A "QBT"

15. These two Motions (Dkt 30 and 35), and Mr. Mendel's subsequent Rule 12(b)(6) Motion, (Dkt 36) for the first time in any pleadings, in any related action, in any court, over a period of four and one-half years, each introduce in their alternate claim of facts, something they call a "Qualified Beneficiary Trust" (QBT) allegedly drafted by Defendant Albert Vacek, Jr.

16. These two Defendants and their carousel of lawyers have steadfastly clung to an instrument they proclaim to be "the trust", allegedly signed by Nelva Brunsting on August 25, 2010. Plaintiffs do not need to rehash these unresolved motions to respond to these assertions.

17. In answer to these "QBT" assertions, Plaintiffs incorporate by reference and respectfully request the Court take Judicial notice of, pursuant to Federal Rule of Evidence 201, 1) Defendant Anita and Amy Brunstings' No Evidence Motion for Partial Summary Judgment (Dkt 26-5), Plaintiff Curtis Answer and Demand to Produce Evidence (Dkt 26-11), The Report of Temporary Administrator Gregory Lester (Dkt 26-9), Plaintiff Curtis Motion for Partial Summary and Declaratory Judgment (Dkt 26-14), the (Request for setting A1 attached) the March 9, 2016 transcript (Dkt 26-16) and the Rule 60 Motion itself (Dkt 26)

V. FAILURE TO STATE A CLAIM

18. These Defendants state that they are litigants in estate related proceedings involving Plaintiff Curtis, profess ignorance of any wrongdoing, and claim they are not participants in any racketeering scheme.

19. In response to previous motions to dismiss for failure to state a claim, Plaintiffs have pointed only to the public record and particularly the motions and pleadings from the state court, and Defendants are clearly connected to those records, all of which have been served upon them through their respective agents.

20. Plaintiffs will continue to point to the public record in response to these two Motions.

21. A motion to dismiss is not a substitute for an answer and aside from claiming lack of knowledge and lack of notice, Defendants advance several affirmative claims of contrary facts. The substance of the motion is 1) want of sufficient information to satisfy notice requirements, 2) a general denial, and 3) an opposing view of the facts.

22. All of the facts necessary to meet Plaintiffs' burden are contained in the public record and are cited with specificity throughout Plaintiffs' original Complaint, Addendum, and Responses to Motions to Dismiss.

23. Plaintiffs' Addendum of Memorandum (Dkt 26) and Plaintiffs' prior Responses address the only relevant challenge under Rule 12(b)(6) and answers any questions of how each player fits into the enterprise operations puzzle. In response to Motions to Dismiss, Plaintiffs easily point to the record and how the individual exhibits concatenate to explain each participant's contribution to the overall mosaic.

24. The motives of the enterprise are greed and political aspirations, the means are described in the RICO complaint, and by refusing to honor any legal or moral obligations Anita and Amy Brunsting provide the opportunity for the rest of these Defendants to participate.

25. As alleged in the complaint, Anita Brunsting presents the other players with an exploitation opportunity. Anita Brunsting planned to hijack the family trust res, by improperly seizing control of the office of trustee.

26. Defendants exercised the powers of the office and refused to honor any of the duties of the office, which is how they became defendants in the first place.

27. To Plaintiffs' knowledge neither Amy nor Anita Brunsting has ever set foot inside the Harris County Probate Court #4 and apparently think hiring mercenaries to fight their battles removes them from the center of the controversy and the consequences of their attorney's acts as well. It does not.

28. The facts show Anita Brunsting violated the no contest clause in the 2005 Restatement, not when she misappropriated assets to her own benefit in violation of trust provisions, but when she advanced theories that those benefits were gifts, fees, and reimbursements thereby attempting to enlarge her share of the trust res.

29. In an exploitation game of lawyers playing the ends against the middle, as in the case at bar, this fact alone is significant.

30. On April 9, 2013, Honorable United States District Judge Kenneth Hoyt issued an injunction, not only enjoining Anita and Amy Brunsting from spending trust money or liquidating trust assets without the Court's prior approval, but also commanding specific performance. Defendants Anita and Amy are commanded by that injunction, to deposit income into an appropriate account for the beneficiary. To date, they have refused or otherwise failed to do so and continue to hold Plaintiff Curtis' property and that of siblings Carl and Carole Brunsting, without offering a single legal defense. (Dkt 26-11)

31. The absolute refusal of these two Defendants to honor any legal or moral obligations has opened the door of opportunity for the other Defendants to play their shakedown game against Plaintiff victim Candace Curtis and her victim siblings, Carl and Carole Brunsting.

Probate of the Estate of Nelva Brunsting

32. Defendants claim the matter before the Court is related to probate of the Estate of Nelva Brunsting.

33. The Fifth Circuit Court of Appeals in *Curtis v Brunsting 704 F.3d 406* properly held that assets in an inter an vivos trust are not property of a decedent's estate and that the suit filed in TXSD by Plaintiff Candace Louise Curtis February 27, 2012, No. 4:12-cv-0592, was related only to an inter vivos trust and not to an estate. The Circuit Court also noted that the wills of both Grantors bequeathed everything to "the trust" Curtis v Brunsting 704 F.3d 406, 409-410.

34. Because the only heir in fact to the Estate of Nelva Brunsting (Dkt 41-2, 41-3) is "the trust", Carl Brunsting had no standing to bring suit individually in the probate court as an heir to the Estate, as he is only a beneficiary of the heir in fact ("trust").

35. Trespass against the trust during the life of Nelva Brunsting created claims belonging to the cestui que. If Candace Freed's only liability for betraying Privity and the fiduciary duties she

owed Nelva Brunsting are to the estate, those claims belong to the injured cestui que (beneficiaries) of the heir in fact trust and are the duty of the trustees to pursue.

36. In any event, the trust res was in the in rem custody of a federal court when all of the trust related claims were filed in state courts under the disguise of the Estate of Nelva Brunsting, and those state court suits were filed after the Fifth Circuit Opinion in this case was published.

Wiretap Recordings

37. Defendants assertions of alternate facts are irrelevant under Rule 12(b)(6), but are none-the-less interesting when compared against the public record and, thus, worthy of note.

38. The RICO complaint states that Anita Brunsting's counsel of record, Bradley Featherston, disseminated private third party telephone communication recordings on or about July 1, 2015 via certified U.S. Mail signed receipt required.(see Dkt 26-8, Carl's application for Protective Order); (Dkt 26-12, Transcript of the hearing on Carl's application for Protective Order); (Attached Exhibit A2, Defendants Joint opposition to the application for protective order); and (Plaintiff Curtis wiretap brief attached as Exhibit A3 with sub-exhibits A-G).

39. These Defendants also misstate the allegations in the complaint, (Dkt 1) which alleges that Anita Brunsting's counsel, Bradley Featherston, "disseminated" wiretap recordings by certified mail more than three and one-half years after Carl Brunsting's petition to take depositions before suit was filed, and a demand for such disclosures was first made. Defendants none-the-less attempt to conceal the disruptive purpose for the dissemination, as occurring in the ordinary course of discovery. Plaintiff Curtis' wiretap brief gives the lie to these claims (A3).[1]

False Affidavit

40. Amy Brunsting claims she did not file a false affidavit in the federal court.

[1] RICO Claim numbers 14 through 20 in the complaint specifically refer to the wiretap recordings.

41. Amy's affidavit, ascribed and sworn to before one authorized to accept an oath, was filed March 6, 2012 in the Southern District of Texas Case 4:12-cv-0592, attached to a motion for emergency order[2] to remove a lis pendens filed among the papers in the federal petition. The emergency motion resulted in sua sponte dismissal March 8, 2012 (TXSD 4:12-cv-0592 Dkt 11).

42. Plaintiffs respectfully request this Honorable Court take judicial notice, pursuant to Federal Rule of Evidence 201, of Dkt 120 in TXSD case 4:12-cv-0592, which is a Rule 11 Motion for Sanctions, filed August 5, 2015, against Defendants Anita and Amy Brunsting and their counsel, for continued violation of the federal injunction issued April 9, 2013. (Dkt 26-2)

43. The Honorable Kenneth Hoyt commented at the injunction hearing that all that was necessary to resolve the controversy was to distribute the assets, and the injunction Judge Hoyt issued commands immediate specific performance regarding the deposit of "income".

44. Defendants Anita and Amy Brunsting, aided and abetted by their attorneys, continue to thumb their noses at the dignity and authority of a federal Court, while simultaneously seeking a priori relief from related claims before this Court.

45. RICO Complaint Claim 37 directly addresses Amy Brunsting's false affidavit (Dkt 26-18) regarding establishment of the personal asset trusts, and no more need be stated on that topic here.

46. Participation in a racketeering conspiracy can be both active and passive and both the active and passive participation of these two Defendants has been central. If one removes Anita Brunsting from the equation, none of this could have happened. Amy Brunsting's active and passive participation is equally incriminatory.

[2] Docket entries 10 and 10-1, Case 4:12-cv-0592 filed TXSD 2/27/2012

VI. CONCLUSION

47. All of the evidence necessary to establish Plaintiffs' case is contained in the public record. Defendants profess to have been party to those proceedings, have professed personal knowledge of a contrary set of facts and cannot possibly claim want of notice of the facts contained in the records and pleadings in those events.

48. These Defendants are more than apprised of the specific conduct amounting to their participation in the racketeering conspiracy, whether ignorant of the law or unaware of the acts of their agents.

49. Defendants Anita and Amy Brunsting, facilitated by the excellent assistance of Defendant Candace Freed, and aided and abetted by the other Defendants, have shown nothing but wanton and willful disrespect for all legal and moral obligations. Without their absolute refusal to act, the original lawsuit would not have been filed, or, in the alternative, would have been resolved and the familial litigants would have gone on with their lives. Instead, the sibling beneficiaries are mired in a continuing lawyer orchestrated soap opera, all about manipulating the judicial process in order to bust the Brunsting trusts for their own personal financial gain.

50. Defendants' Rule 12(b)(6) Motions are just another attempt to avoid accountability. The motions to dismiss should both be denied for the reasons stated and these Defendants should be held to answer under the law.

Wherefore, Plaintiffs respectfully move this Honorable Court for an Oder denying Anita and Amy Brunsting's Rule 12(b)(6) motions to dismiss.

Respectfully submitted October 6, 2016,

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on October 6, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, the Rule 12(b)(6) Motion to Dismiss filed by Defendants Anita and Amy Brunsting, docket entries 30 and 35, should be Denied.

It is SO ORDERED

_____ _____

Date

The Honorable Alfred H Bennet
United Stated District Judge

Dear Judge Comstock

I am writing today to ask for a hearing date in effort to expeditiously dispose of this case. Concurrent with this request for setting, I am filing a motion to transfer the related District Court case to Probate #4.

Because summary and declaratory judgement motions filed in the Probate Court by both Plaintiff's and Defendant's raise questions involving the validity, efficacy and applicability of instruments drawn up by District Court Defendant Candace Freed it would necessarily follow that the risk of contradictory and inconsistent rulings on the same issues of law and fact and the burden of duplicate proceedings upon the courts would mandate the transfer of the related District Court suit to the Probate Court sua sponte.

Plaintiff Curtis Motion for the transfer of the district court case was filed on 2/09/2016 (PBT-2016-44972) and there are several dispositive matters pending before the Court for which plaintiff seeks setting:

1. Defendants No-Evidence Motion for Partial Summary Judgment (PBT-2015-227757)
2. Plaintiff Curtis Answer with Motion and Demand to Produce Evidence. (PBT-2015-227757)
3. Plaintiff Carl Brunsting's Motion for Partial Summary Judgment (PBT-2015-225037)
4. Plaintiff Curtis verified motion for partial summary judgment and petitions for declaratory judgment. (PBT-2016-26242)

WHERFORE Plaintiff Curtis respectfully requests the Court set a hearing on her motion for Partial Summary and Declaratory Judgments (PBT-2016-26242) and on her Motion and Demand to Produce Evidence (PBT-2015-227757) and upon any other pending dispositive motions the Court may deem appropriate to settle at the hearing.

Respectfully

ANM

PROBATE COURT 4

FILED
7/31/2015 4:08:49 PM
Stan Stanart
County Clerk
Harris County

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NO. 412,249-**401**

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

CARL HENRY BRUNSTING, et al	§	
	§	
v.	§	
	§	
ANITA KAY BRUNSTING, et al	§	

DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

Defendants, Anita Brunsting, Amy Brunsting, and Carole Brunsting, file their response to the Motion for Protective Order filed by Drina Brunsting, as attorney-in-fact for Carl Brunsting, and would respectfully show the Court as follows:

I. Summary of the Argument

It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee. Thus, the evidence essentially destroys most of Drina's claims in this proceeding.

Drina's "motion for protective order" is not a protective order in any sense of the term. The relief Drina seeks can fairly be summarized as follows: sworn testimony regarding the recordings; turnover to Drina's counsel of all copies of the recordings; and a ruling the recordings cannot be used in this proceeding. Thus, Drina's motion is some convuluted discovery/injunctive/admissibility relief without any legal authority, be it a statute, rule, or case law, upon which this Court could reasonably rely to grant her relief.

Finally, and most importantly, Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought. Accordingly, the Motion must be denied.

II. Argument & Authorities

A. Protective Orders

Protective Orders are described in Texas Rule of Civil Procedure 192.6, which provides:

> (a) Motion. A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.
>
> (b) Order. To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:
>
> (1) the requested discovery not be sought in whole or in part;
> (2) the extent or subject matter of discovery be limited;
> (3) the discovery not be undertaken at the time or place specified;
> (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
> (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

In the case at hand, Drina propounded discovery to Anita, in which she complied by providing discovery responses. Drina now seeks a protective order against discovery she

propounded against an opposing party. It is nonsense. There is nothing in the rules nor any other legal authority that allows a party to move for a protective order against that party's own discovery requests and the responses thereto.

With respect to the information Drina seeks regarding the recordings, Drina provides no reason why she would be unable to obtain such information through normal discovery channels such as interrogatories or deposition. Defendants were unable to find any reported cases where a Court compelled a party to create an affidavit at the opposing parties' request. Drina's motion appears to be another boondoggle Drina created to needlessly drive up litigation costs.

B. Alleged Illegal Wiretapping

The chief authority upon which Drina's motion is based is the Texas Civil Wire Tap Act, Tex. Civ. Prac. & Rem. Code, Title 123. In Texas, where one party consents, the Texas Civil Wire Tap Act is inapplicable. *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex.App.–Corpus Christi 1986, writ ref'd n.r.e). With respect to the first recording between Carl and Nelva, there is no evidence that Nelva did not consent to the recording.

With respect to the remaining conversations between Carl and Drina, at the time of the recordings Carl and Drina intended to divorce. It seems perfectly logical that Carl consented to the recordings at that time.

Further, on information and belief, Carl was aware of all of the video recordings made. Additionally, on information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the call and/or which triggered in accordance with its own operation. Either way, one – if not both – participants had full knowledge that he/she was being recorded.

Now that Carl and Drina have apparently reconciled, Carl's counsel alleges neither

consented to the recordings. There is no evidence to support the allegation. In short, Drina has not proven that both her and Carl did not consent to the recordings at the time they were made.

C. Drina's requests are merely an attempt to hide evidence that is damaging to her/Carl's claims.

One of the underlying tenets of Carl/Drina/Candace's claims is that certain actions undertaken by Nelva and/or by Anita, Amy or Carole were improperly taken. Unfounded and insupportable allegation of incompetence, undue influence, etc. abound. Yet now, we have Drina taking efforts to suppress exculpatory evidence. The evidence Drina seeks to hide constitutes evidence that adds context and color to decisions made and actions taken. It is evidence that will assist the fact-finder in confirming what Anita, Amy or Carole already know to be true. Specifically, that the actions undertaken by Nelva and/or by Anita, Amy or Carole were proper and justified in light of the circumstances as they were or appeared to be at the time.

D. Proposed Agreed Protective Order

Defendants might be willing to enter into a standard joint agreed protective order, such as the one attached hereto as Exhibit A, which would prevent the parties from distributing materials incident to this litigation to third-parties. However, thus far, Drina has not consented to proceed in this manner. Defendants otherwise oppose creating new, weird, atypical rules unfounded in Texas jurisprudence.

III. Prayer

For these reasons, Defendants, Anita Brunsting, Amy Brunsting, and Carole Brunsting pray that Carl Henry Brunsting's Motion for Protective Order be denied. Additionally, Defendants pray for such other and further relief (general and special, legal and equitable) to which they may be entitled, collectively, individually or in any of their representative capacities.

Respectfully submitted,

/s/ Brad Featherston

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ATTORNEYS FOR CAROLE ANN BRUNSTING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 31st day of July, 2015, to the following in the manner set forth below:

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Via C.M.R.R.R. 7014 0150 0001 5384 0122

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Bayless & Stokes
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Attorneys for Anita Kay Brunsting:

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NEAL E. SPIELMAN

DV

NO. 412,249-401

PROBATE COURT 4

CANDACE LOUISE CURTIS	§	IN PROBATE COURT
Plaintiff,	§	
	§	
	§	
V.	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	HARRIS COUNTY, TEXAS

RESPONSE TO DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

The Court has raised very valid issues regarding the questions before it, and has asked to be briefed. Plaintiff Curtis therefore submits the following analysis of the questions raised and, although seemingly complex at first view, the matter is really quite simple. There is only one primary premise and thus the first principles require answer to only one inquiry, which is whether or not the interception and dissemination of the challenged electronic communications was lawful.

Plaintiff will respectfully show that the greater weight of unrebutted presumptions falls in favor of the illegality of the recordings, and that judicial discretion would best be exercised with caution, as the Court cannot allow dissemination without proof of the legality of the recordings without also becoming a principal to the crime of dissemination.[1]

Summary of the Argument

1. The recordings are evidence of illegally intercepted electronic communications, a second degree felony[2] in Texas with a moderate severity level.
2. Illegally intercepted electronic communications may not be received in evidence nor exchanged under the pretext of discovery in any civil action, as unauthorized possession or dissemination of illegally intercepted electronic communications is a second degree felony which, as noted, the Court would be unwise to participate in.

[1] Collins v. Collins, 904 S.W.2d 792 (Tex. App. 1995)
[2] Texas [Penal] Code Annotated Sections 12.33, 12.35, 16.01 (West 1997); 1997 Tex. Gen. Laws 1051; Texas [Civil Practice and Remedies] Code Annotated Sections 123.002, 123.004 (West 1997); Texas Code of Criminal Procedure Annotated Article 18.20 (West 1997).

3. The burden of bringing forth evidence is on the proponents of the legality and admissibility of the recorded wiretap conversations, as the presumption that intercepted electronic communications found in the possession of third parties, meaning persons not privy to the conversations, are presumed unlawful and the burden of showing that the challenged recordings meet one of the statutory exceptions is upon the Defendant disseminators.
4. The Court is without discretion and no agreement is necessary. Under the circumstances here, the Court must issue a protective order, even if only temporary, pending resolution of the issue of whether or not interception and dissemination of the challenged electronic communications was lawful.
5. The attached exhibits in a chronology of relevant events reveals that the recordings are the fruit of an illicit conspiracy targeting Carl and Drina that did not involve Nelva Brunsting and, Defendants' unanimous claims are defeated in their own words uttered at or about the time of the recordings, as hereinafter more fully appears.

Texas Authority on Admissibility

The admissibility of evidence illegally obtained is tempered by Tex.R.Civ.Evid. 402, which provides in pertinent part that, "[a]ll relevant evidence is admissible, except as otherwise provided ... by statute." Consequently, before the recordings can be held to be inadmissible, the Plaintiff(s) must show their exclusion is required under either the federal or state statute. Section 2511(1) of the federal wiretap statute[3] prohibits the use or disclosure of communications by any person except as provided by statute. *Gelbard v. United States,* 408 U.S. 41, 51-52, 92 S.Ct. 2357, 2363, 33 L.Ed.2d 179 (1972) (witness could not be forced to disclose testimony from illegal wiretap to grand jury).

Section 123.002 of the state wiretap statute states that a party has a cause of action against any person who "divulges information" that was obtained by an illegal wiretap. TEX.CIV.PRAC. & REM.CODE § 123.002.

Section 123.004 states that a party whose communication is intercepted may ask the court for an injunction prohibiting the "divulgence or use of information obtained by an interception." TEX. CIV.PRAC. & REM.CODE § 123.004.

[3] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, more commonly known as the "Wiretap Act," is found at 18 U.S.C. §§ 2510-2522.

Although the Texas wiretap statute does not specifically provide for the exclusion of illegally obtained "communications," the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in section 123.004 are sufficient to rebut the presumption of admissibility under rule 402.

Because the tapes were illegally obtained under the federal and state statutes, the trial court should not allow their dissemination, or admit them into evidence, under the exception provided at Tex.R.Civ.Evid. 402.

The recorded conversations are not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination.

> *To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe. Gelbard, 408 U.S. at 51, 92 S.Ct. at 2362-63; Turner, 765 S.W.2d at 470.*

Exceptions

In addition to the numerous governmental or agency exceptions to the general rule, it is not unlawful to intercept any form of wire, oral or electronic communications between others if one of the persons is a party to the communication or one of the parties has given their consent to the interception. Tex. Civ. Prac. & Rem. Code §123.001(2); Tex. Pen. Code§16.02(c)(3)(A); 18 U.S.C §2511(2)(c); Kotrla v. Kotrla, 718 S.W.2d 853, 855 (Tex.. App. - CorpusChristi 1986); See also, Hall v. State, 862 S.W.2d 710(Tex. App. - Beaumont 1993, no writ); Turner v. PV International Corporation , 765 S.W.2d 455, 469-71(Tex. App. - Dallas 1988, writ denied per curiam, 778S.W.2d 865 (Tex. 1989).

Interception, Possession, and Dissemination

The Right to Privacy is the Controlling Presumption

The right to privacy is held in such high esteem that the U.S. Congress and the Texas Legislature have both made it a felony to illegally intercept, possess or disseminate electronic communications. There are very limited exceptions none of which apply here.

The mandatory but rebuttable presumptions are that the participants to these phone conversations had a reasonable expectation of privacy; that the right has been violated and; that the burden of showing the interception of those electronic communications meets one of the statutory exceptions is upon persons who were themselves not a party to the private electronic

communications, but who we find to be in possession of and disseminating the challenged recordings.

Defendants have produced no evidence tending to show that the intercepted electronic communications meet any of the lawful exceptions and the ball is in their court. If the wiretap recordings cannot be shown by the Defendants to meet one of the statutory exceptions, the recordings are prima facia unlawful, regardless of any alleged motives for their interception.

While no more than the foregoing law and fact summary is essential to the disposition of the singular issue before the Court, it seems necessary to address Defendants' unanimously disingenuous assertions and thus Plaintiff does so with the attached Memorandum.

The attached memorandum on the matter of context and color, with attached exhibits, is hereby incorporated by reference as if fully restated herein.

Plaintiff Curtis respectfully submits the following proposed order.

Respectfully submitted,

Candace L. Curtis, *Pro se*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

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CANDACE L. CURTIS

No. 412,249-401

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

TEMPORARY PROTECTIVE ORDER

On August 3, 2015 the Court heard and considered CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER and Defendants' response thereto.

At issue are recordings of intercepted electronic communications between Plaintiff Carl Henry Brunsting and his wife Drina.

After hearing on the merits and reviewing briefs submitted by the parties, the Court is of the opinion that the recordings in point are "Protected Communications" as that term is defined at 18 U.S.C. §§2510(1) & 2510(12) and that a protective order is necessary to protect privacy rights pending disposition of the pending questions at issue.

IT IS THEREFORE ORDERED that any person or entity subject to this Order-including without limitation the parties to this action, their representatives, agents, experts and consultants, all third parties providing discovery in this action, and all other interested persons with actual or constructive notice of this Order -shall adhere to the following terms, upon pain of contempt and any other applicable civil or criminal penalties:

1. No person or entity shall, in response to a request for discovery or subpoena issued in this action, produce any Protected Communication for any third party or person absent further order of this Court.

2. To the extent a Protected Communication is or has already been produced in response to a request for discovery or subpoena issued in this action, any recipient of such production shall (a) immediately surrender any and all documents that contain or

reflect a Protected Communication to real party in interest Carl Henry Brunsting through his Counsel of Record and (b) destroy any copies made of such Protected Communication, as well as any derivative materials that reflect a Protected Communication on any medium of storage whatsoever.

3. Any party to this action that issues a request for discovery or subpoena calling for the production of a Protected Communication shall simultaneously provide the recipient of the discovery request or subpoena with a copy of this Protective Order. To the extent a party to this action has already issued such a request or subpoena, such party shall provide a copy of this Protective Order to the recipient within three (3) business days of the entry of this Order.

4. Any person who receives a request for discovery or subpoena in this action calling for the production of a Protected Communication shall, without revealing the substance or content of a Protected Communication, provide both the issuing party and the Court with a general description of that Protected Communication so that the issuing party can make an application to this Court for production of that Protected Communication, and that Plaintiff Carl Henry Brunsting can respond to that application.

IT IS FURTHER ORDERED that on or before _____, sworn affidavits are to be provided by Defendants Anita Brunsting, Amy Brunsting, and Carole Brunsting, stating any personal knowledge with regard to every recording made since July 1, 2010 within the following categories:

- All audio or video recordings of meetings, conversations, telephone messages, or other communications with Elmer, Nelva, or any of the Brunsting Descendants concerning Brunsting Issues,
- All audio or video recordings of Nelva's execution of any documents.
- All audio or video recordings of evaluations of Nelva's capacity,
- All other audio or video recordings of any Brunsting family member, and
- All investigations made of any Brunsting family member, including any surveillance logs or reports.

The sworn affidavits shall identify every party involved in making the recordings and specify the date, location, and means used to make the recordings, the current location of all original recordings and all copies of all recordings, all parties to whom the contents of recordings have been disclosed, and all uses which have been made of the recordings.

IT IS SO ORDERED!

Signed August, _____, 2015.

_____
Christine Butts, Judge
Harris County Probate Court No. 4

NO. 412,249-401

CANDACE LOUISE CURTIS	§	**IN PROBATE COURT**
Plaintiff,	§	
V.	§	**NUMBER FOUR (4) OF**
ANITA KAY BRUNSTING, ET AL	§	
Defendants.	§	**HARRIS COUNTY, TEXAS**

MEMORANDUM OF FACTS SUPPORTED BY DEFENDANTS' OWN DISCLOSURES

Plaintiff Candace Louise Curtis respectfully submits for the perusal of the Court this memorandum of facts adding to the inquiry context and color revealing the true nature of the intentions behind the unlawful interception and dissemination of the private electronic communications at issue.

Statement of the Issue

Recordings of private electronic telephone conversations between plaintiff Carl Brunsting and his wife Drina Brunsting have been disseminated to all of the parties to the present lawsuits. These recordings, if any, were requested by Plaintiff Brunsting to be produced by the Defendants in the Petition for Deposition Before Suit filed by Carl Brunsting March 9, 2012, when there were no other parties, however, the recordings were not disclosed until July 5, 2015.

Plaintiff Carl Henry Brunsting, along with his wife and attorney in fact Drina Brunsting, challenged the recordings as the product of the illegal interception of electronic communications, in violation of state and federal wiretap laws, and thus seek protective orders.

In DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER Defendants unanimously assume the following postures:

1. *It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee.*

2. *On information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the calls and/or which triggered in accordance with its own operation. Either way, one-if not both-participants had full knowledge that he/she was being recorded.*

3. *Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought.*

A Recital of Known Facts

1. There are known recordings of private phone communications between Carl and Nelva and between Carl and his wife Drina, which are the object of the application for protective order.

2. The recordings were disseminated by Defendant Anita Brunsting, who is not a party to any of the disclosed communications.

3. We have a claim by Carl Henry Brunsting and his wife Drina that the recordings were illegally obtained.

4. We have a unanimous response from all three Defendants asserting upon information and belief that the recordings were legally obtained but answers to interrogatories on the subject indicate that none of them know anything individually.

5. The question of admissibility hinges upon the legality of the interception and dissemination of the communications.

6. A presumption that the right of privacy has been violated is primary and stands unrebutted by competent evidence to the contrary.

7. The burden of proof as to the legality of the acquisition and dissemination of the recordings is on the proponent of the assertions that the recordings were obtained legally and are therefore admissible.

8. The proponent of the legitimacy and admissibility of the recordings objects that declaring the facts necessary to qualify the recordings as legally obtained evidence before dissemination is somehow onerous, but at the same time want carte blanch to disseminate the recordings to persons not privy to the conversations under the auspices of discovery and disclosure.

9. Unless the recordings can be qualified as legally obtained they are inadmissible and cannot be disseminated lawfully.

10. There are questions as to the recordings' origins and Defendants file a joint motion claiming the existence of specific facts while taking no individual responsibility for personal knowledge.

11. Anita Brunsting, through her counsel Brad Featherston, disseminated the recordings and, thus, Anita Brunsting would have at least some personal knowledge regarding the chain of custody and control, and both now share in the culpability and attendant civil liability.

12. Assertions that the recordings were made on an answering machine would indicate personal knowledge by one if not all of the Defendants.

13. An assertion that the recordings were authorized by Carl Brunsting requires evidentiary support from the proponent of the claim, and there has been none.

14. Assertions that Carl Brunsting installed and activated the Answering Machine are inconsistent with the Defendants' emails of the same date of the purchase of the voice recorder showing they were conspiring to get guardianship over Carl.

15. Carl was both incompetent and the proper subject of Defendants' intended guardianship effort or he was competent to install and activate the "Answering Machine" that Defendants insist he made the recordings on. Both of these things cannot be true.

16. In the Bates stamped disclosures there is a receipt for a signal activated SONY digital voice recorder purchased four days before the first dated recording on the disseminated CD. When combined with the attached email and other exhibits talking about getting guardianship over Carl, continuing the Private Investigator over the weekend, knowing where Carl and Drina were and what they were doing at that very point in time, and all of these events in the same time period as other documented activities, provides a presumption that the circumstances and intentions surrounding the acquisition of the recordings are not what Defendants claim, as hereinafter more fully appears.

The hierarchy of presumptions is as follows:

1. The participants to a private telephone conversation have a reasonable expectation of privacy against electronic eavesdropping.

2. The waiver of a known right must be a knowing and intelligent act done with sufficient knowledge of the relevant circumstance and likely consequences, and it must be both a voluntary and an overt act.

3. There is no affirmative evidence of such waiver.

4. Unless rebutted the presumption that the recordings were illegally obtained is not only controlling but the prudent course.

The True Context and Color

The only probative value these recordings could possibly have is in the fact of their very existence. Defendants argue that the content of the challenged recordings adds context and color to the events of the time showing that Nelva was preparing for Carl's alleged divorce. As in all other instances Defendants fail to provide anything but claims of Nelva's intentions based upon the strength of the honor and integrity of their word alone.

Despite all the posturing and game playing the evidence will show the Defendants are intractably disingenuous and that they illegally intercepted the private electronic communications as part of a conspiracy to steal the family inheritance. That conspiracy involved attempts to have

Nelva declared incompetent and to gather what they thought would be evidence to support guardianship over Carl.

The evidence will further show Defendants stalked Nelva through her email and banking activities online, in addition to tapping her phone and recording every conversation involving anyone who spoke with Nelva on the phone, including Plaintiff Curtis in California.

Candace Freed took her instructions from ANITA despite her claims it was Nelva who was making the requests for changes to the trust. (Exhibit A)

The October 25, 2010 phone conference called for by Candace Freed excluded Carl and Nelva and was ultimately about having Nelva declared incompetent, which they failed to achieve by mid-November. The "law firm" did not keep an audio recording of that conference.

There is no evidence Nelva even knew of these changes before Plaintiff Curtis' 10/26/2010 phone call, after which Nelva sent Candace her hand written note repudiating the alleged 8/25/2010 QBD.

Defendant Carole Brunsting sent an email about overhearing Nelva's conversation on the phone with Candace Freed. (Exhibit B)

Freed sends a follow up email regarding the failed attempt at getting Nelva declared incompetent on Nov. 17, 2010, apparently referring to this same conversation. (Exhibit C)

Despite Defendant Amy Brunsting's claims of not being involved before Nelva's death, Amy and Anita corresponded with Candace Freed December 23, 2010 and on several other dates prior to Nelva's demise. (Exhibit D)

On March 8, 2011 Anita emails Carole, Amy and Candace bragging about reminding Nelva she was no longer trustee and no longer had access to the trust. (Exhibit E)

March 17, 2011 Tino (Nelva's caregiver) buys a Sony Digital Voice Recorder, (Brunsting 004570) which shows one ICD-PX312 digital voice recorder purchased by Tino at Best Buy in Houston. (Exhibit F)

March 17 and 18, 2011 emails mention the PI and talk about getting guardianship over Carl. (Exhibit G 1-3)

March 21, 2011 is the record date of first wiretap .wav file (received from Brad on CD 7/5/2015) (See Carl Brunsting Petition for Protective Order)

On March 24 and 25, 2011 there are large trust-prohibited transfers of Exxon Mobil and Chevron Stocks labeled as "gifts". (See Report of Special Master)

On March 29, 2011 Amy and Anita communicated with Freed (Exhibit D)

April 22, 2011 is the record date of second .wav file (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order)

Then on May 11, 23 and 25, and on June 14 and 15, there are more large trust-prohibited transfers of Exxon Mobil and Chevron Stocks. (Report of Special Master)

July 27, 2011 Anita corresponds with Freed (Exhibit D)

August 16, 2011 Anita corresponds with Freed (Exhibit D)

September 20, 2011 Amy and Anita correspond with Freed (Exhibit D)

February 27, 2015 is the record date of the third and fourth .wav files (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order), indicating these two recordings had been excerpted from a master storage disk containing even more undisclosed recordings.

There is an overwhelming volume of evidence clearly showing more of the same pernicious intent, but since the matter before the Court is limited to the singular question of the legality of Protected Communications, Plaintiff Curtis will not respond to the plethora of Defendants' extemporaneous expressions of disingenuous, self-serving bias, and otherwise irrelevant assertions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

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CANDACE L. CURTIS

EXHIBIT A

PM TRUST REVIEW MEETING

Signing Date & Time: Wed. Aug. 4th 2 pm.
Fee: ____
Paid: ____ Mail: ____

Client Name: Brunsting, Nelva

Date: 07/30/10 **Estate Size:** 2 mil ±

IRA: Husband - N/A **Wife -** ____

Current Address/Phone: 13630 Pinerock Hou TX 77079

Date of Trust/Restatement: ____ **Previous Amendments?** Yes.

Subtrust Funding Done previously? Yes. DT & ST.

AMENDMENT: ✓ QBD(PAT)✓ ___ Other ___ Instr Ltr ✓ HCPOA✓
✓ ApptSUCCTee/HIPAA✓ ___ ExTPOA ___ ✓COT ___ ✓POA✓ ___ DIR
Anita Kay Riley & Amy Ruth... Co-tees
or Survivor of Them. Then Most

✓ **Distribution Change (QBD):**

PAT QBD

IF PAT QBD then:

Each beneficiary Trustee of Own Trust: ✓ yes ___ no

except for Carl, Anita & Aimee as Co-tees for Carl
(except they have rt to name Carl as own Succ Tee)
Distribution of PAT: need to

Same as LT except need language
about the last amend (QBD) also early distr's.

V&F 000687

_____ **Specific Distribution:**

_____

_____

_____ **Ultimate Distribution:**

_____

_____

_____ **HEALTH CARE DOCUMENTS:**

1ST Agent: Carol

2nd Agent: Anita

3rd Amy

IRA TRUST: _____ **yes** _____ **no** For whom? _____ husband _____ wife

Trustees upon disability of Trustor or spouse: _____

Each beneficiary Trustee of own trust? _____ yes _____ no

_____

_____

_____

_____

SS# of Surviving Spouse/Beneficiaries: _____

FUNDING:

Real Estate _____

Which property has NO MORTGAGE? _____

_____ Recording HS Deed

_____ Apply for HS Exemption

Tax-deferred Assets _____

_____ Bank & Brokerage Accounts
_____ Life Insurance
_____ Oil & Gas Interests
_____ Credit Union Accounts
_____ Partnership Interests
_____ CDs
_____ Safe Deposit Box
_____ Stocks and Bonds
_____ Motor Vehicles
_____ Sole Proprietorship Assets
_____ Promissory Notes & Mortgages
_____ Annuities

Additional Documents: _____

NOTES:

Needs new DFPOA -order

Anita

Carol

Amy

Any Name Changes for children? _____ **Any children Predecease?** No.

If Yes, who: _____

FEES:

QUOTED: $ _____ **(Plus Expenses)**

AMOUNT REC'D: None **DATE:** _____

BALANCE DUE: _____

DOCUBANK? _____

Cost Pat QBD 1200.
Hipaa Pkg 250 - med POA
D.F.P.O.A 150.-
Appl. of Succ TEE
New Card.

Courtesy discount $150.-

Cy

G:\PM Docs\Checklists\5-1 Checklists\PM Trust Review Mtg.wpd

Anita - called

Carl has emailed amendments to trust

Anita & Aimee as Co-Trees

Change list under ME

Carol
Anita
Aimee

Financial P.O.a

Anita
Carol
Aimee

Amend to trust /PAT's w/ Aimee to be Co-Trees. Anita to correct Supp Needs to

Sp needs?

From: Anita Brunsting
To: Candace Freed
Sent: 10/6/2010 8:19:06 PM
Subject: Brunsting Family Trust

Candace,

I spoke to mom tonight and she agreed to resign as trustee and appoint me as trustee. I told her that you would be contacting her to re-explain things and make sure she understood what was happening.

If you have any questions, my cell is 361-550-7132.

Thanks,
Anita

EXHIBIT B

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Thursday, October 28, 2010 9:00 AM
To: Candace Curtis
Subject: Re: One more

Candy,
The more I think about this the whole key is Carl. When I was listening to Mother's call with Candance, Mother told Candace that Carl was trustee, not Anita and was not following the changes Candane was telling her she had made to have Carl removed.. Legally, I wonder if what Candace did was right without consulting Carl or his power of attonery since Carl has always been present at all meetings.

--- On **Thu, 10/28/10, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: One more
To: "Carole Brunsting" <cbrunsting@sbcglobal.net>
Date: Thursday, October 28, 2010, 10:34 AM

Candace DOES know she fucked up. That's why she had such a nasty attitude towards both you and I. Anita is smug and Amy plays dumb.

I hope Carl goes home today! If he does I hope the sun is shining. 10 minutes smiling into the sunshine + coffee + the Beatles = a sharper, happy Carl. I have a strong feeling that he will recover in leaps and bounds ALL ON HIS OWN, with support from his wife and family. The fact that Daddy is looking over us gives me strength. I can feel him stronger than ever before.

My suggestion is that when Dr. White finds Mother competent the following should happen:

1. You need to complete your time-line to demonstrate that due to various factors (badgering, low oxygen, Carl's illness, her illness, pneumonia, general stress and worry due to all of this), Mother was incompetent and under extreme duress when she signed everything she signed, particularly the Power of Attorney. We can compose a letter to Candace for Mother to sign, demanding that she wants to have papers drawn up to revoke anything she agreed to between the first of July and now.

2. As Mother gathers strength over the next few weeks she will go to her MD Anderson appointments, etc. and move towards treatment and recovery. I want to stress nutrition, adequate good sleep, and stress-free living.

3. In the meantime she can sell what she needs to, to pay for Robert or Tino or whoever Drina needs to assist her with Carl (if she even needs someone - Carl may recover a lot in a few weeks at home). The cost will be minimal compared to the $100k shithead got to buy her house.

Going forward, Mother will have to tell Candace IN WRITING what she wants done with the trust. You can help her compose the letters. There can be no question when it's in writing. You can assist Mother in reviewing the paperwork before she signs (at home - at her leisure), to make sure all her wishes have been incorporated. This should never be done under the pressure and duress she was subjected to. Mother can take as much time as she needs to read and understand that everything will be as she wants it to be.

The fair and equitable solution in my mind is:

Make all five of us successor co-trustees and require a majority to make any change whatsoever. Then, if Mother steps down there will be no shenanigans. Everything will be transparent and we'll all know everything everyone else knows. That way when Anita wants to sell the farm, or move away from Edward Jones, she can put it up for a vote among us. All five of us are intelligent people and none of us can honestly say we have NEVER made a wrong choice in our lives. This way Mother will be at peace to live out her life, and she will die knowing that she has not pitted one against the other, or given control of one over the other, or played favorites, or been bullied into doing something she didn't really want to do, or would not have done in the first place.

Now this may go AGAINST the norm, or what Candace and her ilk would recommend, but fuck them. They are attorneys who get paid to do what their clients want them to do and they love having to draw up documents. Fees, fees, fees, $$$$$$$$$$$$$

If Anita succeeds in her agenda and becomes trustee, we should have her competency tested just to show her what it feels like. If everything stays the way it is right now, that's the first thing I'm going to do when the day comes that she's in charge of me. Na, Na, Na, Na, Na, Na.

Love you,

C

From: Carole Brunsting <cbrunsting@sbcglobal.net>
To: occurtis@sbcglobal.net
Sent: Wed, October 27, 2010 9:32:06 PM
Subject: One more

And do not overlook an exploration of the family's motives in requesting a competency evaluation, she cautioned. Do family members have reason for wanting their oddly behaving relative to be declared incompetent?

This is from an article about not rushing to declare and elderly person incompetent.
Mother passes the smell test and I have to make sure Tino does not let her out of the house without her clothes being ironed and SEE!!! MOTHER MADE THE APPOINTMENT TO GET HER HAIR DONE!!! CANDY THAT IS IT!!! MOTHER DOES CARE ABOUT HER APPEARANCE!! She will not go out without her makeup one and I have to get her a nail file all the time. Mother also called Edward Jones on her own and sold $10K so she would have enough money to live on.

She was temporarily incompetent when she was to low on oxygen and if they made her walk to Candace's offic I know for a fact her levels were to low because Dr. White joked about it. Tino did not take her so she had to walk from the parking lot to the office. She did not understand what she was signing because she was to short o breath and I can prove that. Candane has to know she F***ed up.

--- On **Wed, 10/27/10, Carole Brunsting** ***<cbrunsting@sbcglobal.net>*** wrote:

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Subject: Found this
To: occurtis@sbcglobal.net

Date: Wednesday, October 27, 2010, 10:38 PM

There are any number of situations that may cause you to question the competency of a family member to make sound life decisions, such as when:

- An elderly person suddenly changes a will or trust in a manner that is significantly different from all previous wills or trusts, which could result in will litigation if not appropriately handled during the elder's life.
- A family member has suspicion that the elderly person is being unduly influenced by others

Anita is unduly influencing Mother and now Amy has piled on. Mother never would have made these changes on her own. This was all done by the hand of Anita who put herself in charge of everything.

EXHIBIT C

Subject: Fw: Nelva Brunsting
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 3/11/2015 6:24 PM
To: Rik Munson <blowintough@att.net>

On Wednesday, November 17, 2010 2:38 PM, Candace Freed <candace@vacek.com> wrote:

Amy and Family, Thank you for the update on your mom, Nelva Brunsting. The purpose of the conference call and the suggestion that Ms. Brunsting be evaluated was based solely on conversations that I had with Ms. Brunsting and to let you all know that I had concerns based on those conversations. If she has been evaluated by her physician and you as a family are comfortable with his or her diagnosis, then you have addressed the concerns that I had. I appreciate your letting me know the opinion of the doctor. I hope your mom is doing well and she continues to improve.

Please let me know if I can be any further assistance.

Very truly Yours,

Candace L. Kunz-Freed
Attorney at Law

Vacek & Freed, PLLC
14800 St. Mary's Lane, Suite 230
Houston, Texas 77079
Phone: 281.531.5800
Toll-Free: 800.229.3002
Fax: 281.531.5885
E-mail: candace@vacek.com
www.vacek.com

We have moved! Our new office address is as shown above. We are one exit west of our old office building. Exit Dairy Ashford. Turn south on Dairy Ashford. St. Mary's Lane is a side street one block south of I-10 Katy Freeway. Turn west on St. Mary's Lane. Our building is in the northwest corner of the four-way stop.

EXHIBIT D

DEFENDANTS' PRIVILEGE LOG

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F ① 002054 - V&F 002057	1/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ② 002058 - V&F 002060	7/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ③ 002061 - V&F 002066	12/08/11	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F ④ 002067 - V&F 002070	12/23/10	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F ⑤ 002071 - V&F 002072	3/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002073 - V&F 002075 (6)	9/20/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002076 (7)	11/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002077 - V&F 002078 (8)	12/28/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002079 (9)	1/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 0020890 (10)	1/31/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document Type	Subject Matter	Privilege
V&F 002081 (11)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (12) 002082 - V&F 002085	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (13) 002086 - V&F 002089	3/20/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (14) 002090 - V&F 002093	3/29/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F (15) 002094	4/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Privilege Log No.	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002095 - V&F 002096 (16)	1/24/11	Anita Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding stock valuation.	Attorney-Client Communication
V&F 002097 (17)	1/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002098 (18)	7/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002099 (19)	8/16/11	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002100 (20)	12/8/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002101 - V&F 002102 (21)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication
V&F 002103 - V&F 002104 (22)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication

Privilege Log	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002105 - V&F 002106 (23)	12/28/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002107 (24)	1/03/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding title of the Buick.	Attorney-Client Communication
V&F 002108 (25)	1/05/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding Trust Information Sheets.	Attorney-Client Communication
V&F 002109 - V&F 002112 (26)	1/09/12	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Email string between attorney and client regarding distribution of trust funds.	Attorney-Client Communication
V&F 002113 - V&F 002114 (27)	1/22/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication
V&F 002115 - V&F 002116 (28)	1/23/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication

Bate No.	Date	Author	To	Document	Subject	Privilege
V&F 002117 - V&F 002118 (29)	1/23/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002119 - V&F 002121 (30)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust documents.	Attorney-Client Communication
V&F 002122 - V&F 002123 (31)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002124 - V&F 002125 (32)	1/31/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding Farmland LLC.	Attorney-Client Communication
V&F 002126 - V&F 002127 (33)	1/31/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002128 (34)	2/14/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002129 (35)	2/15/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding estate planning documents.	Attorney-Client Communication
V&F 002130 - V&F 002132 (36)	2/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Summer Peoples	Email	Attorney communications to client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002133 - V&F 002139 (37)	3/02/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding trust value report.	Attorney-Client Communication Attorney Work Product
V&F 002140 - V&F 002142 (38)	3/06/12	Amy Ruth Brunsting	Candace L. Kunz-Freed	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002143 - V&F 002148 (39)	3/14/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Description	Subject	Privilege
V&F 002149 (40)	3/20/12	Summer Peoples	Amy Ruth Brunsting, Anita Kay Brunsting, and Chip Mathews	Email	Attorney communications to client regarding request for wills.	Attorney-Client Communication
V&F 002150 - V&F 002151 (41)	3/20/13	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002152 (42)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed, Chip Mathews, and Amy Ruth Brunsting	Email	Attorney communications to client regarding December of 2011 accounting.	Attorney-Client Communication
V&F 002153 (43)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Attorney communications to client regarding accounting.	Attorney-Client Communication
V&F 002154 - V&F 002155 (44)	3/27/12	Anita Kay Brunsting	Chip Mathews, Amy Brunsting, Candace L. Kunz-Freed	Email	Email string between attorney and client regarding accounting.	Attorney-Client Communication
V&F 002156 - V&F 002158 (45)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Chip Mathews	Email	Email string between attorney and client regarding asset lists.	Attorney-Client Communication

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002159 (46)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding asset lists.	Attorney-Client Communication
V&F 002160 - V&F 002161 (47)	3/29/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding assets and expenses.	Attorney-Client Communication Attorney Work Product
V&F 002162 - V&F 002163 (48)	3/29/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002164 - V&F 002166 (49)	3/30/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Email string between attorney and client regarding asset list.	Attorney-Client Communication
V&F 002167 (50)	4/12/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002168 - V&F 002183 (51)		Candace L. Kunz-Freed		Chart	Attorney notes/history of representation	Attorney-Client Communication Attorney Work Product
V&F 002184 - V&F 002191 (52)	11/22/11			Document	Authorization for Release of Protected Health Information	Attorney Work Product
V&F 002192 (53)	11/22/11			Document	Authorization for Release of Information	Attorney Work Product

EXHIBIT

E

From: Candace Curtis (occurtis@sbcglobal.net)
To: occurtis@sbcglobal.net;
Date: Sat, February 18, 2012 11:29:12 AM
Cc:
Subject: Fw: New Development

----- Forwarded Message ----
From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Amy <at.home3@yahoo.com>; Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Tue, March 8, 2011 7:15:32 PM
Subject: RE: New Development

I got the same TM from Tino. I hesitate to promise them anything in writing about money. Rather than a monthly payment, I would rather grant them a certain amount each year, but only through the direct payment of their bills - for example; mom could gift Carl $13,000/year, but only if they send me the bill statements to pay directly, and only for bills for living/medical expenses - when the trust has paid $13,000 in bills for the year, that's the end of the money for that year. We could ask them to sign for this money against his inheritance, but then we'd have another form that we'd have to get them to sign (probably notarized), and as we don't know if she's had Carl declared incompetent, the validity of any form he signs might be questionable.

I do like the idea of a letter telling Drina that she may have no contact w/ mom (physical, verbal, visual, phone or electronic means) and she is not to enter mom's house. She can bring Carl to visit mom, but she must remain outside the house - any violation of this letter will be considered harassment and the police will be called if she does not comply. I would also like to add in the letter that Carl's inheritance will be put into a Personal Asset Trust for his care and living expenses - I think this information might be enough to tip her hand.

I would also like to ask Candace, what this letter would do for us legally - like if we did end up calling the police would the letter lend any credence to our case?

I won't do anything until we can come upon an agreement as what to do - I can also write this letter in the role of mom's power of attorney (which she signed last year).

I spoke w/ mom about the whole situation; she listens to reason and can understand our concerns for Carl, and will sign the changes to the trust next week. I have been very forthright in explaining the changes in the trust to her, and that they would be done in order to minimize any pathway that Drina might have to Carl's money. The changes are not to penalize Carl, but to ensure the money goes for his care. I told her to "just say No" to Carl or Drina if they brought up the trust or money and to refer them to me. I reminded her that she isn't trustee anymore and doesn't have access to the trust accounts - she seems fine w/ everything, and expressed no desire to put Carl back on as a trustee. I told her that in the event she did that, that it would not be fair to the rest of us, as we would end up having to deal w/ Drina, not Carl. Mom begrudgingly admits to knowledge of the unpleasantness of this whole situation and Drina's past behavior since Carl has been ill, but I think she is really naive regarding the lengths to which Drina may go through to get Carl's inheritance.

P-9

EXHIBIT F

TIME SHEET

Employee Name: Faustino Vaquera **Title:**

Week: March 15 — March 19

Date	Start Time	End Time	Regular Hrs.	Total Hrs.
3-15 Tues	8:30 am	12:00 am	15.30	
3-16, Wed	12:00 am	2:00 pm	14	
↓	4:00 pm	12:00 am	8	
3-17, Thur	12:00 am	9:30 am	9:30	
3-[redacted]	6:30 pm	12:00 am	5:30	
3-18 [redacted] Frid	12:00 am	6:00 pm	18	
		WEEKLY TOTALS:	70 ½	

Employee Signature: [signature] **Date:** 3-18

Supervisor Signature: **Date:**

70.5
x 15.00
= 1057.50

Groceries & Food = 126.26

Best Buy Digital Voice Recorder 64.94

191.20

Total = 1248.70

08:12:20:55 :: 0220 :: 0092247

WELCOME TO BEST BUY #216
HOUSTON, TX 77024
(713)647-6004

Keep your receipt!

Val #: 0422-1046-6045-3089

0216 003 2499 03/17/11 18:22 00005044

1792142 ICDPX312 59 99
ICDPX312 DIGITAL VOICE RECORD
ITEM TAX 4.95
6094193 RZ SILVER 0 00 N
REWARD ZONE PREMIER SILVER
MEMBER ID 0329918420

SUBTOTAL 59.99
SALES TAX AMOUNT 4.95
TOTAL 64 94

xxxxxxxxxx4030 DEBIT 64 94
FAUSTINO VAQUERA JR
APPROVAL 132943
REFERENCE NUMBER: 0216003

ALEX,
THANKS FOR SHOPPING AT BEST BUY TODAY!
YOUR REWARD ZONE BALANCE AS OF 03/08/11
POSTED POINTS: 153
Go to MyRZ.com FOR MORE INFO

Congratulations! As an added benefit of being a Reward Zone program Premier Silver member, you may return eligible products up to 45 days from purchase date.

Dear Valued Customer,

To help keep prices low for all of our

directly or indirectly by the products listed on this receipt.

THE SHACK THANKS YOU.

RADIOSHACK 01-8020
Kroger Plaza Sc
14356 Memorial Dr
Houston, TX 77079-6704
(281) 496-9429

Order: 057553 03/17/2011 08:14P Term #002

Helped By: 001 (MAR)
Entered By. 001 (MAR)

4200223 3' 1/8' M-M PATCH CABLE 1 8.39

Subtotal 8.39
Tax 8.25% 0.69
Total 9.08

Credit Card 9.08

Change Due 0.00

Acct# xxxxxxxxxxx0307 M
Card Type VI
Trans# 12887146
Auth# 161235 9.08
Host Captured Y

The card holder identified hereon may apply the total amount shown on this receipt to the appropriate account to be paid according to its current terms.

I agree to pay above total according to card issuer agreement.

Your name, address and the original sales receipt are required for all refunds. Sales and returns are subject to the terms and conditions identified on the back.

Shop online 24/7 at
www.radioshack.com

EXHIBIT G

From: Amy Tschirhart <at.home3@yahoo.com>
Sent: Wednesday, August 18, 2010 12:58 PM
To: Anita Brunsting; Carole Brunsting; Candy Curtis
Subject: CPA's advice

Hi,

I talked to the CPA who does my taxes today and asked her what she would recommend. She told me that Drina should talk to an attorney who specializes in debt created by medical bills. Medical bill debt is treated differently than other debt. I did a quick check on the internet and there are several in Houston.

She said that creditors cannot touch Drina's house or cars. She also recommended not paying any of the medical bills right now. She said to wait until the dust settles, then talk with each company about a payment plan, possibly as little as $10 a month. She told me that in all likelihood, they would eventually write off her debt as a loss. She said Drina should definitely not touch any retirement or inheritance, or borrow anything against them.

I called Drina today and told her what Darlene said. She said her father had been telling her the same things. I tried to emphasize that she should not be paying any bills right now, but I don't know if she really understood why. She is overly concerned with her credit score rating. Darlene said that is not that important because they own their house and cars and are not as reliant on credit compared to younger people.

Anyhow, I know that Drina is in a hard spot right now, but I honestly think that keeping her from accessing *any* of Carl's inheritance would be in her best interest. It would be a waste to spend it on medical bills and they will need the money in the future. I don't think that is going to sit well with Drina because she's going to see it as us being tight-fisted with the money. I strongly suggest that if any of us talk to her, we do it as nicely as we can. Acknowledge that the debt is so huge it is unpayable in her lifetime. Encourage her to seek a professional to find the best way to deal with it. Remind her that we want the best for her and Carl in their future and that we are thinking of their best interests.

Love,
Amy

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 11:59 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: atty for guardianship

I think that Drina has always projected her own family issues onto ours. She was completely distanced from her own family until a year ago when her brother passed away and now she is talks about the relationship with her dad like they have been close forever which has not been the case.

She must have had some very bad things happen to her in her childhood and slowly but surely she twisted Carl's mind to go along with everything she did and said. I think you are right that this will have to play itself out to see what she does. She has been waiting for the day she and Carl get the "big" trust payout and then it will be see you later chumps!

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: atty for guardianship
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 1:49 PM

The Brunsting family has never been very demonstrative of their love for one another, but I chalk that up to being Dutch. What I cannot seem to wrap my arms around is the extreme coldness of Drina and Marta. They have always been limp when hugged and hugging is one of the best things in the world. One power hug and all my cares fly out the window. I believe it must be a genetic brain chemical imbalance in Drina's family. She has spent her life with Carl trying to distance HIM from his family and turn him into a cold fish like her. How did she ever get pregnant in the first place? Maybe we should try to get some DNA from Marta and Carl and do a paternity test. Wouldn't it be something if he wasn't her father?????????? LOL

Frankly, as long as the trust is safe, we should probably just let nature take its course and sooner or later we will get Carl out of their clutches and into ours. He might be pissed off for awhile, but I have some small faith that once he can reason better he will see that we only seek what is best for him in the long run BECAUSE WE LOVE HIM. Once he is able to reason and be reasoned with, and has regained some control of his life, if he chooses to go back to his moron wife and their moron spawn, I will mourn him as if he were dead. Until such time I will assume that, somehow, at some point in his recovery, he will realize how miserable the bitch has made his life. He might see that all she has ever cared about is money and how to avoid having to go out and earn some.

If asked, Carl would probably say no to coming out here to live with us, even though it might be the very best thing for him. He should never feel like he has been "dumped" on anyone. I think he would have a lot more stimulation out here. He does love the Bay Area and after a short time he might gain some real incentive to get well.

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>

Sent: Fri, March 18, 2011 8:59:24 AM
Subject: atty for guardianship

Ok, I think I may have found an atty who could handle the guardianship issue. She was recommended to me by the Burgower firm that Amy's lawyer had given her - the Burgower firm does not do guardianship cases. This atty's name is Ellen Yarrell; her offices are in the Galleria area; she charges an initial consult fee of $350 for 1 hr of her time, and probably requires an retainer of $2000. Her paralegal (Elizabeth) said that she's handled cases like this before (where an impaired person has been divorced by their spouse). I asked about the expense and she said that Yarrell could give us a better idea after the consult and it depends on whether the guardianship would be contested (so that depends on whether we fight Drina now, or wait to see if she'll divorce him and then we're facing Marta (if she pursues it)). I got the feeling that "expensive" meant more like $50,000 not $1 million.

I thought of another plus on our side if Drina divorces him - Drina will probably expect him to come live w/ mother - so if he's w/ us and not his daughter that lends more credence to our side for guardianship (possession is 9/10's of the law?).

I also talked to mom last night and told her what was going on. I asked her if she was ok w/ using her money to pay for Carl's legal fees and of course she said yes.

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 8:41 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: guardianship assessment form

They are there right now according to the PI. And Michael took him on Wednesday.

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: guardianship assessment form
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 10:33 AM

Do you know if he went to therapy at all this week?

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Carole Brunsting <cbrunsting@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Fri, March 18, 2011 8:26:05 AM
Subject: RE: guardianship assessment form

we're continuing the pi over the weekend or unless it looks like she's headed toward Beaumont - will also use him through next week. $750 is for the lawyer's (Cole) initial consult not a dr. If she divorces him then someone needs to sue for guardianship - Marta would be considered next in line by the law, but if she doesn't sue for it then I don't think she'd be considered. If Drina gets him to sign divorce papers that give him any less than 50% of their assets then a guardian can countersue her to recover those.

From: Candace Curtis [mailto:occurtis@sbcglobal.net]
Sent: Friday, March 18, 2011 10:20 AM
To: Anita Brunsting; Carole Brunsting; Amy Tschirhart
Subject: Re: guardianship assessment form

$750 an hour FOR WHAT? The woman is abusing him and negligent in his care. Have they been out even one time this week? Last I heard, Monday and Tuesday there was no activity other than a visit from Marta. APS said that once they confirmed she was following doctor's orders, they closed the case. If the instructions were 3 times a week and he hasn't been, or only goes once or twice, SHE IS NEGLIGENT, and they better reopen it or start a new one. Let me know if you want me to call.

Any doctor who has seen Carl would most likely say NO to all of the questions. I would, just based on past phone conversations with Carl.

What if Drina files for divorce? Would that be abandonment? Would the trust even be an issue if SHE divorces him?

If I could have anything I wanted for Carl, I would have him assessed by the neuropsychologists at the place I found in Houston. I don't know if he could handle long periods of testing, but he has got to get some cognitive brain function back OR HE WILL NEVER EVEN BECOME CLOSE TO WHOLE AGAIN. It's a good sign that his behavior has improved, but is it because she beats him with a stick and mentally assaults him to get him to act right?

Maybe guardianship is the wrong approach. Maybe we should go after Drina and have her declared incompetent to care for him, or criminally negligent for not obtaining proper rehabilitation. There has to be a reason why she doesn't want her husband of almost 30 years to recover.

Let me know if he will be staying at Mother's again over the weekend. If so, we might want to extend the PI over the weekend so we can see what the hell she does. The more "evidence" we can amass, the better.

Love you guys,

C

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Thu, March 17, 2011 2:18:05 PM
Subject: guardianship assessment form

Just thought you'd find this interesting, this is the form that we'd have to have a physician use to assess Carl and possible a MHMR psychologist as well. I just thought it would give you an idea as to what they're looking for - Carl definitely fits the bill -

Just fyi, you may have already known this.

Anita

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

NATURE OF CASE, STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

Plaintiffs in this case are Candice Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings. Unhappy with the current state of the probate case, Plaintiffs have falsely alleged the Honorable Judges Christine Riddle Butts and Clarinda Comstock ("Honorable Judges") and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") have engaged in a criminal and civil conspiracy with the opposing litigants and their attorneys, among others, to defraud and deprive them of the assets of Nelva Brunsting's estate and family trust.

The Harris County Defendants file this Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. #1] pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). This pleading fails to state a plausible and actionable claim against the Harris County Defendants and instead asserts numerous frivolous and wholly groundless claims which are unfounded, outrageous and sanctionable.

Plaintiffs allege the "multi-billion dollar Probate industry is an illicit wealth distribution empire run by morally bankrupt judges and attorneys". . . that is part of a "cancerous judicial black market plague" spread "throughout the state court systems" that have become "criminal racketeering enterprises."[1] Plaintiffs allege judges have become part of the "worst organized cartel of predatory criminals in the history of this nation."[2]

Turning their attention to the Harris County Defendants, Plaintiffs allege the "blatantly

[1] Complaint [Doc. 1], ¶¶ 170, 193.
[2] *Id.*, at 172.

corrupt probate court and its officers" engaged in a conspiracy to "loot assets" and "exploit the elders of our society" to unjustly enrich the attorneys and other "legal professionals" in Harris County Probate Court No. 4 ("Probate Court 4"). [3] The predicate acts alleged against the Honorable Judges include the referral of the case to mediation to an "extortionist thug mediator,"[4] and the removal of Curtis' motion for summary judgment from the Court's docket pending mediation.[5] These predicate acts are alleged under various federal statutes, including 18 U.S.C. §§ 242, 371, 1001, 1346, and 1951(b)(2), 42 U.S.C. §§ 1983, 1985, and TEX. PENAL CODE § 31.02, 31.03, 32.21.[6]

Plaintiffs additionally allege that Tony Baiamonte[7], a contract court reporter that was hired to stenographically record a *single hearing* in the underlying probate proceeding, "knowingly and willfully spoilate[d], destroy[ed] or otherwise conceal[ed]" some unidentified "material evidence" in violation of 18 U.S.C. §§ 1512(c), 1512(k) and 1519.[8] Mr. Baiamonte has destroyed nothing and the conclusory allegation is undeniably frivolous. Plaintiffs assert a total of at least 15 separate claims against the Harris County Defendants.

Harris County Defendants are entitled to dismissal as a matter of law, because the claims

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[3] *Id*. at ¶¶ 77, 78, 79, 215.

[4] Although Plaintiffs do not identify who this mediator is, Judge Mark Davidson was the mediator chosen to recently mediate this case. Based on the Motions to Dismiss filed by Candace Kunz-Freed [Doc. 20, ¶ 16] and Stephen A. Mendel and Bradley E. Featherston [Doc. 36, ¶¶ 2.5, 2.6], the mediation was cancelled and never took place.

[5] *Id*. at ¶¶ 131, 132.

[6] It does not appear Plaintiffs are asserting claims against the Harris County Defendants for any other alleged predicate acts in the Complaint, ¶ 59, since most of these claims, i.e. illegal wiretapping, misapplication of fiduciary, suborning perjury, identity theft, etc., are spelled out in separate counts against other defendants and not the Harris County Defendants. To the extent pled against the Harris County Defendants, they are denied and lack any factual basis.

[7] Mr. Baiamonte was improperly sued as "Toni Biamonte."

[8] Doc. # 1, ¶143.

against the Honorable Judges are barred by judicial, official and governmental immunity. Likewise, the claims against Tony Baiamonte are barred by governmental, qualified and official immunity.

Harris County Defendants are entitled to dismissal on these additional grounds: (1) the Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b), (2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants, (3) the Complaint fails to allege standing under RICO, (4) the Complaint fails to allege a conspiracy, (5) the Complaint is not plausible, (6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and (7) the Complaint is frivolous.

Neither Curtis nor Munson have standing to bring this lawsuit. Munson is not a party to the underlying probate proceeding and has no "private attorney general" standing. Further, his complaints that he could have pursued other work but instead spent four years providing paralegal services to Curtis and therefore lost out on other "property and business interests" is not a basis for standing.

Harris County Defendants seek to dismiss all of Plaintiffs' claims because there is no subject matter jurisdiction over the Defendants, and alternatively, for their failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure.

ARGUMENT & AUTHORITIES

1. The Court lacks subject matter jurisdiction.

FED. R. CIV. P. 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction; absent jurisdiction conferred

by statute or the Constitution, they lack the power to adjudicate claims.[9] Subject matter jurisdiction cannot be established by waiver or consent.[10] If subject matter jurisdiction is lacking, the court must dismiss the suit.[11]

When a plaintiff lacks standing, the court lacks subject matter jurisdiction.[12] "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III."[13] The constitutional requirements to establish standing are (1) injury in fact that is concrete, particularized, and actual or imminent, not hypothetical; (2) a fairly traceable causal link between the plaintiff's injury and the defendant's challenged actions; and the likelihood of redressability by the requested relief.[14] The Eleventh Amendment and sovereign immunity also restrict federal court jurisdiction.[15] "The Eleventh Amendment bars an individual from suing a state in federal court unless the state consents or Congress has clearly and validly abrogated the state's sovereign immunity."[16] A suit against a state agency or department is considered to be a suit against the state under the Eleventh Amendment.[17] In addition, the Eleventh Amendment bars suit against a state official when "'the state is the real substantial party in interest.'"[18]

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[9] *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).
[10] *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 459, 151 L.Ed.2d 377 (2001).
[11] *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir.1998).
[12] *Cadle Co. v. Neubauer*, 562 F.3d 369, 371 (5th Cir.2009).
[13] *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
[14] *Lujan*, 504 U.S. at 560–61; *Little v. KPMG LLP*, 575 F.3d 533, 520 (5th Cir.2009).
[15] *Vogt v. Board of Commissioners of the Orleans Levee Dist.*, 294 F.2d 684, 688 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002).
[16] *Fairley v. Louisiana State*, 254 Fed. Appx. 275, 276–77 (5th Cir. Sept.11, 2007), *citing* U.S. Const. Amend. XI, and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).
[17] *Id.*
[18] *Id., citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[19]

The Court lacks jurisdiction because the Plaintiffs have no standing to assert RICO claims and because the Defendants are entitled to immunity from suit.

a. Plaintiffs fail to allege standing under RICO[20]

Plaintiffs must plead and prove that they have legal standing to sue for an alleged RICO violation. The standing provision of civil RICO provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains"[21] To have standing under the RICO Act, a plaintiff must allege a tangible financial loss.[22] Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing.[23] Thus, speculative damages are not compensable under RICO.[24]

Additionally, a plaintiff may sue under § 1964(c) (civil RICO) only if the alleged RICO violations ("predicate acts") were the proximate cause of the plaintiff's injury.[25] In *Holmes v.*

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[19] *Randall D. Wolcott, MD, PA v. Sebelius*, —— F.3d ——, No. 10–10290, 635 F.3d 757, 2011 WL 870724, *4 (5th Cir. Mar.15, 2011), *citing Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001). Fed.R.Civ.P. 12(h)(3).

[20] To state a civil RICO claim under § 1962, a plaintiff must allege: (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985).

[21] *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5th Cir.1995) (quoting 18 U.S.C. § 1964(c)).

[22] *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

[23] *Id.*

[24] *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995).

[25] *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U. S. 258, 268 (1992)

Securities Investor Protection Corp., the Supreme Court held that the proximate-cause requirement necessitates the "demand for *some direct relation between the injury asserted and the injurious conduct alleged*."[26]

Thus, a RICO plaintiff must satisfy two elements to establish standing to bring a RICO claim: (1) a direct, concrete financial injury to Plaintiff's business or property; and (2) proximate causation (i.e., that the alleged injury was proximately caused by the alleged RICO predicate act(s)). The Plaintiffs herein have neither alleged nor proven that they have suffered any *direct*, personal, concrete financial injury to their business or property. Rather, Plaintiff Curtis has alleged *only indirect injury* -i.e., alleged loss to the *assets of the Brunsting family trust and estate in the underlying probate proceeding.* "[T]he plaintiff only has standing *if, and can only recover to the extent that*, he has been injured in his business or property by the conduct constituting the violation."[27] (Emphasis added). Even Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[28]

Plaintiff Munson is even further removed as he *admittedly* has no interest in the Brunsting family trust and estate and was not a party to any prior lawsuits involving the subject trust and estate.[29] His only connection to the prior lawsuits was the "paralegal services" he provided to Curtis.

i. No proximate cause.

Plaintiffs have littered their Complaint with unsubstantiated allegations that Harris County

[26] *Id.*, at 268 [Emphasis added]; *See also*, *Anza v. Ideal Steel Supply Corp*., 547 US 451, 457 (2006).
[27] *Sedima*, 473 U.S. at 496 (emphasis added).
[28] Doc. 1, ¶¶ 163, 165, 213.
[29] See Doc. 33, ¶ 69.

Defendants have committed *unspecified* acts of honest services fraud, fraud, theft, mail fraud,[30]wire fraud,[31] obstruction of justice[32], spoliation of evidence[33] and interference with commerce or extortion[34]. It appears the complaints concerning mail fraud and wire fraud is limited to the other defendants – such as the exchange of discovery responses – which does not involve the Harris County Defendants.[35]

To satisfy the stringent pleading requirements of Rule 9(b) regarding claims sounding in fraud, "the plaintiff must specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."[36] Plaintiffs must set out ***"the who, what, when, where, and how***" of the fraud.[37]

Plaintiffs' Complaint, despite its corpulence (59 pages and 217 paragraphs), wholly fails to plead "the who, what, when, where, and how" of the alleged fraud as required by Rule 9(b). This particularity requirement also applies to the pleading of mail fraud or wire fraud as predicate acts in a RICO claim.[38]

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[30] See 18 U. S. C. § 1341.
[31] See 18 U. S. C. § 1343.
[32] See 18 U. S. C. § 1503.
[33] See 18 U. S. C. § 1512.
[34] See 18 U. S. C. § 1951.
[35] See Doc. 1, ¶¶ 127, 135 – 141.
[36] *See Sullivan*, 600 F.3d at 551
[37] *See Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003)(emphasis added); *See also, Dawson v. Bank of America, NA*, No. 14-20560, Summary Calendar (5th Cir. Mar. 13, 2015). *See also Carroll v. Fort James Corp*., 470 F.3d 1171, 1174 (5th Cir. 2005) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005) (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).
[38]*See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F. 2d 1134, 1138-9 (5th Cir. 1992), citing *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 430 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *See, also, Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

Having failed to plead any facts in support of the conclusory allegations of racketeering activity based upon fraud, Plaintiffs have failed to plead and prove proximate causation as a required element of RICO standing.[39]

Likewise, Plaintiffs' "factual allegations" of proximate cause are scant to non-existent. The Complaint contains their proximate cause allegations, which are nothing but conclusory recitations, wholly devoid of the heightened level of factual pleading for fraud cases mandated by Rule 9(b) and federal law.

Dismissal for failure to plead allegations of fraud, including RICO predicate acts of alleged mail fraud and wire fraud with particularity as required by Rule 9(b), is treated the same as Rule 12(b)(6) dismissal for failure to state a claim.[40] The Fifth Circuit interprets Rule 9(b) to require "specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statement were made, and an explanation of why they were fraudulent."[41]

Further, it is clear from the Complaint that Plaintiffs have not alleged any unlawful act against the County Defendants. Plaintiffs have listed 6 federal crimes that appear in 18 U.S.C. § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simply list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead facts that, if true, would establish that each predicate act was in fact committed by the County Defendants.[42]

Plaintiff's Complaint fails to meet this standard. For the identified predicate acts, Plaintiffs

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[39] *Id.; See also, Holmes* at 268.
[40] *See Lovelace v Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).
[41] *See Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).
[42] *Elliott*, 867 F.2d at 880.

simply identify the statute, provide a general description of the conduct it prohibits (although for most the conduct is not even described), and then assert the County Defendants violated the statute. This is not sufficient to establish (1) a predicate act was committed, or (2) any damages were proximately caused by the alleged act.

In addition, Plaintiffs cite to various other purported predicate acts as a basis for RICO, but this fails too because only predicate acts of *racketeering activity* provide a basis for recovery under RICO section 1964(c).[43] The following generalized claims are not predicate acts that support a claim for racketeering activity: theft under the Texas Penal Code (Claim 12), conspiracy for "state law theft" and "aiding and abetting" (Claim 23), spoliation (Claim 38), conspiracy to violate constitutional rights (Claim 44), "aiding and abetting breach of fiduciary, defalcation and scienter" (Claim 45), "aiding and abetting misapplication of fiduciary, defalcation and scienter" (Claim 46) and "tortious interference with inheritance expectancy" (Claim 47). Further, Plaintiff's conclusory statements concerning these claims cannot support a claim against the Harris County Defendants.

ii. No direct injury.

Plaintiffs also lack RICO standing because they have failed to plead the "direct injury" ("directness") requirement.[44]

A justiciable interest is required as an element of standing under Texas law.[45] As noted by the Supreme Court, "There is no need to broaden the universe of actionable harms to permit RICO

[43] *Brandenburg v. Seidel*, 859 F.2d at 1179, 1188 (4th Cir. 1988).
[44] *See Holmes*, at 268.
[45] See also TEX. CIV. P. & REM CODE ANN. §§ 134.001-.005 (West 2011 & Supp. 2013) (Theft Liability Act); TEX. CIV. P. & REM CODE ANN. § 31.03(a) (West Supp. 2013) (claim under the Theft Liability Act requires ownership interest in the property unlawfully appropriated).

suits *by parties who have been injured only indirectly*."[46]

The Plaintiffs have failed to adequately allege *direct (i.e., personal)* concrete financial loss, as required to establish standing to sue for civil RICO or civil RICO conspiracy.[47] Rather, they have made myriad conclusory, unsubstantiated claims. Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[48] Munson has *no* such interest at all.

Because Plaintiffs have wholly failed to plead standing to bring their RICO claims (i.e., the existence of a *direct* injury to their personal business or property, which was proximately caused by a predicate act, this motion should be granted and their RICO claims dismissed with prejudice.

b. The Honorable Judges are entitled to judicial immunity.

Plaintiffs attempt to argue around judicial immunity by asserting the Honorable Judges were engaged in "non-judicial acts."[49] Despite the exceptionally lengthy Complaint, the sum and substance of *all* allegations against the Honorable Judges is the Plaintiffs' belief that the actions taken by them during the course of the pending cases were improper and/or wrong. Indeed, the acts complained of are removing a motion for summary judgment from the hearing docket and ordering the parties to mediation.

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[46] *See Anza v. Ideal Steel Supply Corp.*, 547 US 451, 460 (2006) (emphasis added).
[47] "[T]o demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss." *Chaset v. Fleer/Skybox Intern, LP*, 300 F.3d 1083, 1086-87 (9th Cir. 2002); *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 728-29 (8th Cir.2004) (same); see also *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n. 16 (5th Cir.2003) (A plaintiff lacks RICO standing "unless he can show concrete financial loss").
[48] Doc. 1, ¶¶ 163, 165, 213.
[49] Doc. 1, ¶¶ 18, 19.

It is unquestionably clear that these actions were judicial acts that were made within Probate Court 4's jurisdiction and for which the Honorable Judges are entitled to immunity. The Complaint is completely void of any facts alleging actions taken in a nonjudicial role.

The Honorable Judges are entitled to absolute judicial immunity from suit for acts undertaken in their judicial capacity even if they are done maliciously or corruptly (which Defendants emphatically deny).[50] The two exceptions to this doctrine, i.e., actions by the judge in a non-judicial role and actions, while judicial actions, taken in complete absence of jurisdiction, do not apply here as Plaintiffs have not alleged facts that would invoke either.[51] Further, as Texas judges, the Honorable Judges are entitled to Eleventh Amendment protection and governmental immunity for claims against them in their official capacity.[52] Absolute judicial immunity does not bar prospective relief against a judge, but Plaintiffs have not sought such relief against the Honorable Judges.[53]

In a similar case, Houston's First Court of Appeals affirmed the trial court's finding that two probate judges were entitled to judicial immunity. In *James v. Underwood*, two siblings were involved in a legal dispute over who had the right to manage their mother's assets.[54] Their controversy spawned multiple lawsuits filed in various district and probate courts, resulting in no less than 11 appellate decisions.[55] James sued two judges (Judge Olen Underwood and Judge

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[50] *Price v. Porter*, 351 Fed. Appx. 925, 927 (5th Cir.2009), *citing Mireles v. Waco*, 502 U.S. at 10, and *Stump v. Sparkman*, 435 U.S. at 355–57.
[51] *Id.*
[52] *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985).
[53] *Bauer v. State of Texas*, 341 F.3d 352, 357 (5th Cir.2003).
[54] *James v. Underwood*, 438 S.W.3d 704, 706-07 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
[55] *Id*. at 707.

Patrick Sebesta) who had presided over aspects of her on-going legal dispute with her sibling and an intervenor.[56] The judges filed a motion to dismiss on the basis of judicial and sovereign immunity and the motion was granted.[57] The First Court of Appeals concluded the dismissal based on judicial immunity was proper and therefore did not reach the issue of sovereign immunity.[58] The Court noted that immunity from suit "deprives a trial court of subject-matter jurisdiction."[59] "The Supreme Court has stated repeatedly that 'it is a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[60]

In a suit alleging RICO violations, the Fifth Circuit determined that three state court judges and a court secretary were entitled to absolute judicial immunity and quasi-judicial immunity, respectively.[61] The plaintiffs sued twenty individual and corporate defendants, alleging a law firm engaged in a criminal conspiracy with the other defendants to infiltrate and to control the state and federal court systems in Texas.[62] As predicate acts to the RICO violation, the plaintiffs alleged illegal campaign contributions, bribery, mail and wire fraud, and obstruction of justice.[63] The Fifth Circuit rejected as frivolous the plaintiffs' argument that there is no absolute judicial

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[56] *Id*.
[57] *Id*. at 709.
[58] *Id*.
[59] *Id*., citing *Reata Constr. Corp v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).
[60] *Id*., citing *Bradley v. Fisher*, 80 U.S. 335, 347, 13 Wall. 335, 20 L.Ed. 646 (1871), *Mireles v. Waco*, 502 U.S. at 10, *Stump v. Sparkman*, 435 U.S. at 355.
[61] *Kirkendall v. Grambling & Mounce, Inc*., 4 F.3d 989, 1993 WL 360732, *2 (5th Cir. 1993).
[62] *Id*., *1.
[63] *Id*.

immunity and quasi-judicial immunity in RICO actions.[64]

Judicial immunity provides immunity from suit, not just from the ultimate assessment of damages.[65] "Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction."[66] To determine whether an act is "judicial", the courts look at the following four factors: (1) the act complained of is one normally performed by a judge, (2) the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) the controversy centered around a case pending before the judge, and (4) the act arose out of an exchange with the judge in the judge's official capacity.[67] These factors are construed broadly in favor of immunity.[68] And, not all factors must be met for immunity to exist – in some circumstances, immunity may exist even if only one factor is met.[69] The factors are not required to be given equal weight; rather they are weighted according to the facts of the particular case.[70]

In considering whether the act complained of is normally performed by a judge, we ask whether the action is a "function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his judicial capacity."[71] The relevant inquiry is

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[64] *Id*., at *3.
[65] *James at 709* (citations omitted).
[66] *Id*., quoting *Alpert v. Gerstner*, 232 S.W.3d 117, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)(quoting *City of Houston v. W. Capital Fin. Servs. Corp*., 961 S.W.2d 687, 689 (Tex. App.—Houston [1st dist.] 1998, pet. dism'd w.o.j.)).
[67] *Id*., at 710, citing *Bradt v. West*, 892 S.W.2d 56 67 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993).
[68] *Id*., citing *Bradt*, at 67.
[69] *Id*. (citation omitted).
[70] *Id*., citing *Bradt* at 67.
[71] *Id*., citing *Mireles*, 502 U.S. at 11; *Twilligear v. Carrell*, 148 S.W.3d 502, 504 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

the "nature" and "function" of the act, not the "act" itself.[72] This distinction is necessary, otherwise any act characterized as improper would be deemed nonjudicial because "an improper or erroneous act cannot be said to be normally performed by a judge."[73]

In *Twilligear*, the Fourteenth Court of Appeals concluded that a judge accused of "negligence and gross negligence in failing to adequately oversee expenditures from a guardianship account" was exercising judicial action.[74] In the instant case, the Plaintiffs accuse the Honorable Judges of "obstruction of justice" by "removing Summary Judgment Motions from Calendar and creating stasis", and conspiring to "redirect civil litigation away from the public record to a staged mediation" for the purpose of "adding delay and increasing expense" and "holding the money cow trust hostage for attorney fee ransoms."[75] The actions Plaintiffs complain of are the rulings and Orders issued by the Honorable Judges.[76] The act of holding hearings and issuing rulings and Orders are all functions normally performed by a judge. This satisfies the first element of whether the actions were "judicial acts." The complained of actions occurred in court or in the course of handling their docket; therefore the second factor also supports a finding that the Honorable Judges' actions were judicial in nature.[77]

The third factor is whether the controversy centered around a case pending before the judge. The entirety of the allegations raised center around the underlying probate proceeding

[72] *Id*., citing *Mireles*, 502 U.S. at 13, *Stump*, 435 U.S. at 362.
[73] *Id*., citing *Mireles*, 502 U.S. at 12.
[74] *Id*., citing *Twilligear*, 148 S.W.3d at 505.
[75] Doc. 1, ¶¶ 121, 131.
[76] *Id*.
[77] *James*, at 711, citing *Bradt*, 892 S.W.2d at 67. *See also* the Complaint.

before the Honorable Judges. Accordingly, this factor supports the conclusion that the Honorable Judges' actions were judicial.[78]

The final factor is whether the act arose out of an exchange with the judge in the judge's official capacity.[79] Plaintiff Curtis, both pro se and through her former counsel, Jason Ostrom (who is also a named defendant in this lawsuit), appeared before the Honorable Judges and interacted with them in the judges' judicial capacities and not in any alternative capacities. The Honorable Judges acted in a judicial capacity in doing so, whether their rulings or decisions were correct or not (Defendants *emphatically* contend they were correct). Accordingly, this last factor supports the conclusion that the Honorable Judges' actions were judicial.

The next inquiry is whether the judges acted in a "complete absence of all jurisdiction."[80] "Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes."[81] The First Court of Appeals determined probate judges have jurisdiction to preside over probate cases, which is what Judge Sebesta had been doing at the point when his actions became "actionable" in the plaintiff's view.[82] Importantly, immunity is not lost based on an allegation that the action taken had procedural errors, even "grave" ones. *Id*., citing *Bradt*, at 68 (holding that judge had jurisdiction, for judicial immunity purposes, to sign order even if that order would be determined void because motion to recuse judge was pending). *See also In re J. B.H*., No. 14-05-00745-CV, 2006 WL 2254130, *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, pet.

[78] *Id*. at 711.
[79] *Id*.
[80] *Id*., citing *Mireles*, 502 U.S. at 12; *Bradt*, 892 S.W.2d at 68.
[81] *Id*., at 712, quoting *Malina*, 994 F.2d at 1125.
[82] *Id*.

denied)(mem.op.) (affirming dismissal of claims against judge who had judicial immunity regarding order in guardianship proceeding).

The Honorable Judges had the necessary jurisdiction to take the actions they did. Because the actions complained of by Plaintiffs are judicial in nature and because they were made within the Honorable Judges' jurisdiction, they are entitled to absolute judicial immunity on all claims brought against them.

c. Tony Baiamonte is entitled to official immunity.

To the extent Plaintiffs are asserting claims against Tony Baiamonte in his official capacity (which it appears is the case since he is only referred to in his capacity as the "Official Court Reporter"), such a claim is construed as a claim against Harris County. *See Hafer v. Melo,* 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."); *see also Bennett v. Pippin,* 74 F.3d 578, 584 (5th Cir.1996) ("When a plaintiff sues a county or municipal official in her official capacity, the county or municipality is liable for the resulting judgment and, accordingly, may control the litigation on behalf of the officer in her official capacity. A suit against the Sheriff in his official capacity is a suit against the County."). Harris County (and therefore Tony Baiamonte) cannot be liable under RICO for two independent reasons: (1) it is incapable of forming the *mens rea* required for the underlying criminal act, and (2) because RICO is punitive in nature, municipal entities enjoy common law immunity from the punitive damages.[83]

d. Harris County Defendants are entitled to qualified immunity.

[83] *Gil Ramirez Group, L.L.C. v. Houston Independent School Dist*., 786 F.3d 400, 412 (5th Cir. 2015).

The doctrine of qualified immunity shields public officials acting within the scope of their authority from civil liability.[84] "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation."[85] Plaintiffs have not presented any facts to support a constitutional violation.

In *Bagby v. King*, a litigant filed suit against two federal judges, a federal district clerk, and an appeals court clerk claiming he had been denied access to various federal district and appellate courts in California.[86] The Magistrate Judge issued a Show Cause Order explaining that the plaintiff's claims failed to overcome the doctrines of absolute judicial immunity and qualified immunity and directed plaintiff to amend his complaint to cure these defects.[87] Instead, the plaintiff filed a host of new lawsuits against a number of federal judicial officers and court staff, complaining cryptically about their handling and disposition of prior lawsuits plaintiff had filed or attempted to file.[88] The court determined the plaintiff's claims extended no further than complaints about the dispositions of previous lawsuits.[89] The court held the plaintiff's purported claims were barred by either judicial immunity, qualified immunity, or failed to state a non-frivolous claim.[90]

In the instant case, the Plaintiffs have likewise complained about actions taken by the Honorable Judges in their handling of the probate matter and appear to complain about actions taken by Tony Baiamonte acting as the Official Court Reporter. Plaintiffs contend Mr. Baiamonte

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[84] *Bilbrew v. Corona*, No. H-04-2075, 2005 WL 1515409 *2 (S.D. Tex., June 27, 2005) (J. Hittner), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[85] *Id*., quoting *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).
[86] *Bagby v. King*, No. SA-14-CA0682-XR, 2014 WL 4692479 *1 (W.D. Tex. Sept. 18, 2014).
[87] *Id*. at *2.
[88] *Id*.
[89] *Id*.
[90] *Id*.

"knowingly and willfully" spoliated, destroyed or otherwise concealed some unidentified "material evidence of a racketeering conspiracy."[91] These cryptic, conclusory complaints of all Harris County Defendants are not sufficient to identify a violation of any constitutional rights. Defendants are therefore entitled to qualified immunity and the case against them must be dismissed.

2. Plaintiffs have failed to state a claim against the Harris County Defendants.

Rule 12(b)(6) mandates dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A complaint that fails to satisfy the pleading requirements of Rule 8(a) or Rule 9(b) is subject to dismissal under Rule 12(b)(6).[92] To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[93]

A complaint must also "provide the plaintiff's grounds for entitlement to relief including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[94] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[95] "Nor does a complaint suffice if it tenders 'naked assertion[s],' devoid of 'further factual enhancement.'"[96]

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[91] Complaint, ¶ 143.
[92] *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (Rule 8(a)); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) (Rule 9(b)).
[93] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).
[94] *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555-566).
[95] *Iqbal*, 556 U.S. at 678.
[96] *Id.* (quoting, 550 U.S. at 557).

Plaintiff alleges a RICO claim under § 1962(c) and (d). To state a claim under any subsection, "a plaintiff must plead specific facts ... which establish the existence of an enterprise."[97] Plaintiffs have not pled facts that show or create a reasonable inference of a pattern of racketeering activity or the existence of any enterprise.

a. Plaintiffs fail to allege conspiracy.

In their rambling and disjointed Complaint, Plaintiffs allege the following regarding an alleged RICO conspiracy:

> The Harris County Defendants and the other Defendants "did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Sections 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. § 1961(1) in violation of 18 U.S.C. § 1962(c) and (d)" (Complaint, ¶59)
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> * * *
>
> "It was part of the racketeering conspiracy that <u>through the use of estate plan instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the heirs of estates that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 66)
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> * * *
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> "It was part of the racketeering conspiracy that <u>through the use of trust instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the beneficiaries of trusts that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 67)

Beyond this ***conclusory*** language, the Complaint contains no further factual enhancement regarding the alleged conspiracy. "[A] conclusory allegation of agreement at some unidentified

[97] *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989); *accord State Farm Mut. Auto. Ins. Co. v. Giventer*, 212 F.Supp.2d 639, 649–50 (N.D.Tex.2002).

point does not supply facts adequate to show illegality."[98] Because Plaintiffs allege no pattern of activity or the acquisition, establishment, conduct, or control of any enterprise as required under RICO, Plaintiffs have failed to state a RICO claim upon which relief may be granted.

Furthermore, civil conspiracy is a *derivative* tort; therefore, liability for a civil conspiracy depends on participation in an underlying tort.[99] Because the core of a RICO civil conspiracy is ***an agreement to commit predicate acts***, a RICO civil conspiracy complaint, at the very least, must allege *specifically* such an agreement.[100] Plaintiffs have wholly failed to allege a *specific agreement* among Defendants to commit the RICO predicate acts alleged. **There are no allegations that Judge Butts, Judge Comstock or Tony Baiamonte was a party to or principal in any such agreement.**

The Plaintiffs have pled **no facts** which would support even the existence of any conspiracy. As such, Plaintiffs have failed to establish that there is any plausibility to their conclusory allegations of conspiracy.[101]

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[98] *See Spectrum Stores Inc. v. Citgo Petroleum Corp*.,632 F.3d 938, 948 (5th. Cir., 2011), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

[99] *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402(5th. Cir., 2013), citing *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.*, 501 F.3d 398, 414 (5th Cir. 2007) (citations omitted). In order to adequately plead a claim for civil conspiracy, a plaintiff must adequately plead the underlying tort. *Id.*, citing *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 649 (5th Cir. 2007) ("If a plaintiff fails to state a separate claim on which the court may grant relief, then the claim for civil conspiracy necessarily fails.")

[100] *See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1140-1 (5th Cir. 1992)(Where complaints fail to plead specifically any agreement to commit predicate acts of racketeering, the RICO conspiracy claim was also properly dismissed.) , citing *Hecht v. Commerce Clearing House, Inc*., 897 F.2d 21, 25 (2d Cir.1990)[Emphasis added]; *see also Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir.1991) (civil RICO conspiracy claim must plead agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 47 (1st Cir.1991) (civil RICO conspiracy claim must charge that defendants knowingly entered into an agreement to commit two or more predicate crimes).

[101] *Twombly*, 127 S. Ct. at 1971-2.

As the Supreme Court held in *Twombly*[102], "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[103]

b. Plaintiffs fail to plausibly allege the existence of an "enterprise" or "association-in-fact."

In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise and association-in-fact. The Plaintiffs' Complaint does not make it plausible that either a legal enterprise or an association-in-fact existed.

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[104] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[105]

Without any legal authority cited, Plaintiffs contend Probate Court Four is an "enterprise" within the meaning of 18 U.S.C. § 1961(4) because it was "involved in various aspects of interstate and foreign commerce" by its adjudication of lawsuits involving persons or properties outside of Texas.[106] This is a conclusory recitation and purely legal conclusion, unsupported by facts. The Fifth Circuit has held that "a recitation of the elements masquerading as facts" . . . does not make

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[102] *Id.* at 1974.
[103] Plaintiffs assert § 1983 as part and parcel of their "predicate acts." It is unclear whether Plaintiffs are asserting a conspiracy to violate § 1983. However, a § 1983 claim is not actionable without an actual violation of § 1983 and Plaintiff has not alleged facts sufficient to support a claim that there was a constitutional violation under § 1983. *See Pfannsteil v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir.1990).
[104] 18 U.S.C. § 1961(4); *see also Elliott,* 867 F.2d at 881.
[105] *Elliott,* 867 F .2d at 881.
[106] Complaint, ¶ 36-38.

it any more or less probable that the listed parties have an existence separate and apart from the pattern of racketeering, are an ongoing organization, and function as a continuing unit as shown by a hierarchical or consensual decision making structure."[107]

Probate Court Four is not a legal entity. There is an abundance of case law holding that various county or city officials and departments are not separate units of government and capable of being sued. "A county is a corporate and political body." TEX. LOC. GOV'T CODE § 71.001. With respect to counties, the county as a whole constitutes the governmental unit. The commissioner's court is the governing body.[108] Plaintiff's contention that Probate Court is an "enterprise" for purposes of RICO has no basis in law or fact.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[109]

To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4), a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[110] The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[111] The Fifth Circuit has enumerated the requirements

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[107] *See Brunig v. Clark*, 560 F.3d 292, 297 (5th. Cir. 2009)(Rule 12(b)(6) dismissal of Plaintiff's RICO claims affirmed for failure to plead the plausible existence of an enterprise or association in fact).

[108] *Tarrant County v. Ashmore*, 624 S.W.2d 740 (Tex.App.—Fort Worth 1981), *rev'd on other grounds*, 635 S.W.2d 417 (Tex.1982), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 606 (1982).

[109] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[110] *Atkinson v. Anadarko Bank & Trust Co.*,808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *US. v. Turkette*, 452 U.S. 576, 583 (1981)).

[111] 452 U.S. at 583.

of an enterprise as requiring that it "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[112]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[113] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[114]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The Absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

Having failed to plausibly allege the existence of an enterprise or association-in-fact, the Plaintiffs' Complaint must be dismissed for failing to state a claim upon which relief may be granted.

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[112] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[113] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[114] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

c. Plaintiffs have failed to plead a pattern of racketeering activity.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[115] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other *and* that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[116]

When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[117] Such 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."[118]

Here, Plaintiffs allege several times throughout their Complaint that the Harris County Defendants engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary *pattern* of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

d. Plaintiffs' Complaint is not plausible.

The Supreme Court held, "[a] pleading that offers "labels and conclusions" or "a formulaic

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[115] *See In re Burzynski,* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck,* 855 F.2d at 242-43).
[116] *HJ, Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989).
[117] *In re Burzynski,* 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).
[118] *Id.*, quoting *HJ., Inc.*, 492 U.S. at 241.

recitation of the elements of a cause of action will not do." [119] Nor does a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement."[120]

Further, under Rule 8(a), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To survive dismissal, Rule 8(a) requires that a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face,"[121] and must plead those facts with enough specificity "to raise a right to relief above the speculative level."[122]

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[123] The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully."[124] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"[125]

As is the case with their allegations of conspiracy and RICO predicate acts, the Plaintiffs have "***labeled***" myriad alleged offenses including: (1) honest services mail fraud (18 U.S.C. § 1346); (2) fraud (18 U.S.C. § 1001); (3) theft (Texas Penal Code § 31.02); (4) theft (Texas Penal Code §31.03); (5) Hobbs Act extortion (18 U.S.C. § 1951(b)(2); (6) conspiracy (18 U.S.C. § 371); (7) conspiracy to obstruct justice (18 U.S.C. §§ 1512(c), 1512(k), 1519, and 1951(b)(2) and 18

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[119] *Id.* at 1965.
[120] *Id*. at 1966.
[121] *Twombly*, 550 U.S. at 570
[122] *Id*. at 555.
[123] *Iqbal*, 556 U.S. at 678.
[124] *Id.*
[125] *Id*.

U.S.C. § 242); (8) theft and extortion (Texas Penal Code § 32.21); (9) access to the Courts (42 U.S.C. § 1983); (10) substantive due process (42 U.S.C. § 1985); (11) equal protection; (12) property rights (Texas Penal Code §§ 31.02 and 31.03); (13) spoliation (18 U.S.C. § 1512(c)); (14) aiding and abetting breach of fiduciary, defalcation & scienter; (15) aiding and abetting misapplication of fiduciary, defalcation & scienter; and (16) tortious interference with inheritance expectancy -- yet Plaintiffs have failed to plead the essential elements of a cause of action for most, if not all, of the above alleged causes of action or offenses, much less pled any non-conclusory factual support. Rather, the Plaintiffs' rambling and disjointed Complaint is littered with bald, conclusory assertions, masquerading as facts.

The Plaintiffs' Complaint, standing alone, fails to meet either the Rule 12(b)(6) "plausibility" standard or the broadly similar standards announced by the Second[126] and Ninth Circuits.[127] Plaintiffs' few factual allegations are inextricably bound up with legal conclusions (e.g., Tony Baiamonte "did unlawfully, knowingly and willfully spoliated, destroy or otherwise conceal material evidence of a racketeering conspiracy in violation of 18 U.S.C. §§ 1512(c) conspiracy 1512(k) and 1419, aiding and abetting the racketeering conspiracy. . .";[128] the Harris County Defendants "did unlawfully, willfully and knowingly conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, in furtherance of a pattern of racketeering activity affecting

[126] *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 64 (2d Cir. 1971) (first alteration in original), rev'd on other grounds sub nom. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).
[127] The Ninth Circuit has held that factual allegations are not well-pleaded when they "parrot the language" of the statute creating liability. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).
[128] Complaint, ¶143.

interstate and foreign commerce in violation of 18 U.S.C. § 1346"[129]; on July 22, 2015, Judge Comstock "aided and abetted by persons known and unknown to Plaintiffs…did unlawfully, willfully and knowingly combine, conspire and agree with each other to obstruct and conceal evidence and engage in predicate acts including but not limited to 18 U.S.C. § 1512(c) conspiracy 1512(k), 1519 and 18 U.S.C. §§ 1951(b)(2) and 2, Extortion and Texas Penal Codes §§ 31.02, 31.03 and 32.21 (theft/extortion) by removing Summary Judgment Motions from Calendar and creating stasis,[130] as part of a conspiracy to deprive Plaintiff Curtis of an impartial forum."). These are but a few of countless examples.

Plaintiffs have not alleged any factual support that actions taken by the Harris County Defendants are predicate acts under 18 USC § 1961(b).

Read in its entirety, the complaint merely "parrot[s] the language" of the RICO statute,[131] and comprises a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[132] Indeed, given the lack of factual detail (as opposed to a litany of *vague and conclusory* legal conclusions masquerading as facts) in the Complaint, it is impossible to even speculate as to whether the facts "might [. . .] have been the case."[133]

To plead facial plausibility, a plaintiff must set forth **factual content** that permits the courts to draw the reasonable inference that the defendant is liable.[134] The "tenet that a court must accept

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[129] Complaint, ¶122.
[130] Complaint, ¶131.
[131] *See Wooten v. McDonald Transit Assocs., Inc.*, 775 F.3d 689, 696 (5th Cir.2015) citing *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007)
[132] *Iqbal*, 556 U.S. at 678.
[133] *Wooten* at p.696, citing *Trans World Airlines, Inc.*
[134] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. (Emphasis added).

as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[135] Although the Plaintiffs allege that the Harris County Defendants engaged in, or conspired to engage in, racketeering activity in the form of fraud and other acts aimed at depleting the assets of the trust in the underlying contested probate proceeding, their Complaint is ***devoid of facts*** to make it plausible and amounts to a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[136]

In addition to failing to plead the "***who, what where, when and how***" of mail fraud, wire fraud or state law fraud, or that *anyone* relied on such conduct, the Plaintiffs offer no "factual content allow[ing] [this] court to draw the reasonable inference" that Defendants have plausible liability such that Plaintiffs are entitled to relief for their claims.[137]

The Plaintiffs' legal conclusions are not entitled to the presumption of validity.[138] They have pled insufficient facts to establish a plausible entitlement to relief for the claims they are asserting. Because the Plaintiffs have failed to adequately plead that the alleged RICO predicate acts were a *direct and proximate cause* of injury to their personal "business or property," the Court should dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Because the Plaintiff's Complaint is not plausible, it should be dismissed.

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[135] *Id.*
[136] *Iqbal*, 556 U.S. at 678,129 S.Ct. 1937.
[137] *See Patrick v. Wal–Mart, Inc.—Store # 155*, 681 F.3d 614, 622 (5th. Cir., 2012) citing *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir.2011). (quotation marks and citation omitted). [Emphasis added]
[138] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

e. Plaintiffs' claims are frivolous.

A complaint is frivolous if it lacks an arguable basis in law or fact.[139] "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist."[140]

The claims brought against the Harris County Defendants are frivolous and brought in violation of FED. R. CIV. P. 11. There is no conspiracy to deprive the Plaintiffs of the assets of the Brunsting estate, no racketeering scheme and no use of the mail, wire or internet to further any alleged scheme or conspiracy. Perhaps the only "conspiracy" is that of the Plaintiffs and other litigants that are bringing these frivolous lawsuits against Harris County Probate Courts for RICO violations.[141]

As is patently obvious from Plaintiffs' 62-page Complaint, they were dissatisfied with the rulings and administration of the Brunsting probate case in Probate Court Four. **This is not a basis for bringing a lawsuit.** This case should be dismissed *with prejudice*. See *Boyd v. Biggers*, 31 F.3d 279 (5th Cir. 1994) at 285 (dismissing *with prejudice* the claims against Judge Biggers because the plaintiff did not complain of any actions that were nonjudicial in nature); *Lister v. Perdue*, No. 3:14-CV-715-D-BN, 2014 WL 7927823, (N.D. Tex., Aug. 27, 2014) at *3 (dismissing

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[139] See *Denton v. Hernandez*, 504 U.S. 25, 31, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Richardson v. Spurlock*, 260 F.3d 495, 498 (5th Cir.2001)(citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir.1997)).

[140] *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir.1998)(*quoting McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir.1997)).

[141] Plaintiff mentions the RICO suit filed against the judges in Probate Court One, claiming it is related by "continuity." (Case 4:16-cv-00733; pending before Judge Hoyt) [Doc. 33, ¶ 51]. This smear campaign against the Honorable Judges in Probate Court One and Probate Court Four appears to be nothing more than pure harassment by disgruntled litigants. Indeed, due to the frivolous filing in the Probate Court One case, dismissal and sanctions have been sought.

with prejudice the claims against Judge Lewis and her court staff because all actions complained of were nonjudicial in nature); *Bilbrew v. Wilkinson*, No. H-05-0130, 2005 WL 3019743 *9-10, (S.D. Tex., Nov. 10, 2005)(J. Gilmore) (dismissed *with prejudice* as frivolous and finding Judge Wilkinson entitled to absolute judicial immunity). This lawsuit is frivolous because it lacks an arguable basis in law or fact. It should be dismissed with prejudice.

CONCLUSION

The case should be dismissed with prejudice in its entirety because Plaintiffs have no actionable RICO claim against the Harris County Defendants. The Honorable Judges are entitled to judicial immunity, official immunity and governmental immunity. Likewise, Tony Baiamonte is entitled to official immunity and governmental immunity. Additionally, the Plaintiffs lack standing to bring the conspiracy/RICO claims asserted in this lawsuit – Plaintiffs have failed to allege facts sufficient to establish they suffered a tangible financial loss and that it was proximately caused by any "predicate acts" by the Harris County Defendants. Further, Plaintiffs have no state law claims against the Harris County Defendants and they should be dismissed under TEX. CIV. P. & REM. CODE § 101.106. Harris County Defendants are entitled to dismissal on the Plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(1).

The case should also be dismissed with prejudice in its entirety because Plaintiffs have failed to state a claim against the Harris County Defendants. Plaintiffs have failed to allege a conspiracy, failed to allege a RICO violation, failed to establish a pattern of racketeering activity, failed to establish an "enterprise" or "association-in-fact," their claims are not plausible on their face, and their claims are frivolous.

PRAYER

For the reasons set forth above, the Harris County Defendants request the Court grant its Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. 1] with prejudice, sanction the Plaintiffs for filing a frivolous and groundless lawsuit, and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S *UNOPPOSED* AMENDED MOTION FOR LEAVE TO FILE MOTION TO DISMISS IN EXCESS OF PAGE LIMIT

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte (collectively "Defendants"), hereby file the following Unopposed Amended Motion for Leave to File Motion to Dismiss In Excess of Page Limit ("Motion").

Section B(5)(E) of Judge Alfred H. Bennett's Court Procedures limit the filing of documents such as Defendants' Motion to Dismiss to 20 pages without leave of Court. The Court Procedures further directs the parties to seek leave when their documents exceed the page limit. Defendants seek leave to file their Motion to Dismiss in excess of the page limit, because of the complexity of the facts and law relevant to this case, and the length of the claims asserted by Plaintiffs in their extensive 62-page, 217 paragraph Complaint, the complexity of the RICO case law relevant to this case, and the number of counts alleged against Defendants (Plaintiffs have asserted at least 16 of 47 claims against the Honorable Judges and Mr. Baiamonte).

Defendants have exercised best efforts to keep their Rule 12(b)(1) and (6) Motion to Dismiss as concise, and to the point, as possible. However, the Plaintiffs' RICO claims as currently plead are believed by Defendants, after reasonable inquiry into the relevant Supreme Court and Fifth Circuit Authority, to be so deficient (as to, *inter alia*, "RICO standing and proximate cause," "RICO standing and direct injury," "pattern," "enterprise," "conspiracy," and "predicate act nexus to direct injury"), that extensive briefing was required to adequately address the myriad pleading deficiencies requiring dismissal.

Defendants' Motion is 31 pages, *exclusive of* the certificate of service. Defendants pray the Court grant them leave to file their Motion to Dismiss. This Motion for Leave is unopposed by the Plaintiffs.

PRAYER

For the reasons set forth above, Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte respectfully request the Court grant their Motion for Leave to file Motion to Dismiss in Excess of Page Limits, and award these Defendants such other and further relief, at law or in equity, to which Defendants may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that I emailed Plaintiffs Candace Curtis and Rik Wayne Munson on October 7, 2016 to inquire whether they would be opposed to the Motion for Leave to file Motion to Dismiss in Excess of Page Limit and they advised they were **unopposed**.

/s/ Laura Beckman Hedge
Laura Beckman Hedge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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NATURE OF CASE, STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

Plaintiffs in this case are Candice Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings. Unhappy with the current state of the probate case, Plaintiffs have falsely alleged the Honorable Judges Christine Riddle Butts and Clarinda Comstock ("Honorable Judges") and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") have engaged in a criminal and civil conspiracy with the opposing litigants and their attorneys, among others, to defraud and deprive them of the assets of Nelva Brunsting's estate and family trust.

The Harris County Defendants file this Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. #1] pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). This pleading fails to state a plausible and actionable claim against the Harris County Defendants and instead asserts numerous frivolous and wholly groundless claims which are unfounded, outrageous and sanctionable.

Plaintiffs allege the "multi-billion dollar Probate industry is an illicit wealth distribution empire run by morally bankrupt judges and attorneys". . . that is part of a "cancerous judicial black market plague" spread "throughout the state court systems" that have become "criminal racketeering enterprises."[1] Plaintiffs allege judges have become part of the "worst organized cartel of predatory criminals in the history of this nation."[2]

Turning their attention to the Harris County Defendants, Plaintiffs allege the "blatantly

[1] Complaint [Doc. 1], ¶¶ 170, 193.
[2] *Id.*, at 172.

corrupt probate court and its officers" engaged in a conspiracy to "loot assets" and "exploit the elders of our society" to unjustly enrich the attorneys and other "legal professionals" in Harris County Probate Court No. 4 ("Probate Court 4"). [3] The predicate acts alleged against the Honorable Judges include the referral of the case to mediation to an "extortionist thug mediator,"[4] and the removal of Curtis' motion for summary judgment from the Court's docket pending mediation.[5] These predicate acts are alleged under various federal statutes, including 18 U.S.C. §§ 242, 371, 1001, 1346, and 1951(b)(2), 42 U.S.C. §§ 1983, 1985, and TEX. PENAL CODE § 31.02, 31.03, 32.21.[6]

Plaintiffs additionally allege that Tony Baiamonte[7], a contract court reporter that was hired to stenographically record a *single hearing* in the underlying probate proceeding, "knowingly and willfully spoilate[d], destroy[ed] or otherwise conceal[ed]" some unidentified "material evidence" in violation of 18 U.S.C. §§ 1512(c), 1512(k) and 1519.[8] Mr. Baiamonte has destroyed nothing and the conclusory allegation is undeniably frivolous. Plaintiffs assert a total of at least 15 separate claims against the Harris County Defendants.

Harris County Defendants are entitled to dismissal as a matter of law, because the claims

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[3] *Id*. at ¶¶ 77, 78, 79, 215.

[4] Although Plaintiffs do not identify who this mediator is, Judge Mark Davidson was the mediator chosen to recently mediate this case. Based on the Motions to Dismiss filed by Candace Kunz-Freed [Doc. 20, ¶ 16] and Stephen A. Mendel and Bradley E. Featherston [Doc. 36, ¶¶ 2.5, 2.6], the mediation was cancelled and never took place.

[5] *Id*. at ¶¶ 131, 132.

[6] It does not appear Plaintiffs are asserting claims against the Harris County Defendants for any other alleged predicate acts in the Complaint, ¶ 59, since most of these claims, i.e. illegal wiretapping, misapplication of fiduciary, suborning perjury, identity theft, etc., are spelled out in separate counts against other defendants and not the Harris County Defendants. To the extent pled against the Harris County Defendants, they are denied and lack any factual basis.

[7] Mr. Baiamonte was improperly sued as "Toni Biamonte."

[8] Doc. # 1, ¶143.

against the Honorable Judges are barred by judicial, official and governmental immunity. Likewise, the claims against Tony Baiamonte are barred by governmental, qualified and official immunity.

Harris County Defendants are entitled to dismissal on these additional grounds: (1) the Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b), (2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants, (3) the Complaint fails to allege standing under RICO, (4) the Complaint fails to allege a conspiracy, (5) the Complaint is not plausible, (6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and (7) the Complaint is frivolous.

Neither Curtis nor Munson have standing to bring this lawsuit. Munson is not a party to the underlying probate proceeding and has no "private attorney general" standing. Further, his complaints that he could have pursued other work but instead spent four years providing paralegal services to Curtis and therefore lost out on other "property and business interests" is not a basis for standing.

Harris County Defendants seek to dismiss all of Plaintiffs' claims because there is no subject matter jurisdiction over the Defendants, and alternatively, for their failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure.

ARGUMENT & AUTHORITIES

1. The Court lacks subject matter jurisdiction.

FED. R. CIV. P. 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction; absent jurisdiction conferred

by statute or the Constitution, they lack the power to adjudicate claims.[9] Subject matter jurisdiction cannot be established by waiver or consent.[10] If subject matter jurisdiction is lacking, the court must dismiss the suit.[11]

When a plaintiff lacks standing, the court lacks subject matter jurisdiction.[12] "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III."[13] The constitutional requirements to establish standing are (1) injury in fact that is concrete, particularized, and actual or imminent, not hypothetical; (2) a fairly traceable causal link between the plaintiff's injury and the defendant's challenged actions; and the likelihood of redressability by the requested relief.[14] The Eleventh Amendment and sovereign immunity also restrict federal court jurisdiction.[15] "The Eleventh Amendment bars an individual from suing a state in federal court unless the state consents or Congress has clearly and validly abrogated the state's sovereign immunity."[16] A suit against a state agency or department is considered to be a suit against the state under the Eleventh Amendment.[17] In addition, the Eleventh Amendment bars suit against a state official when "'the state is the real substantial party in interest.'"[18]

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[9] *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).
[10] *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 459, 151 L.Ed.2d 377 (2001).
[11] *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir.1998).
[12] *Cadle Co. v. Neubauer*, 562 F.3d 369, 371 (5th Cir.2009).
[13] *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
[14] *Lujan*, 504 U.S. at 560–61; *Little v. KPMG LLP*, 575 F.3d 533, 520 (5th Cir.2009).
[15] *Vogt v. Board of Commissioners of the Orleans Levee Dist.*, 294 F.2d 684, 688 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002).
[16] *Fairley v. Louisiana State*, 254 Fed. Appx. 275, 276–77 (5th Cir. Sept.11, 2007), *citing* U.S. Const. Amend. XI, and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).
[17] *Id.*
[18] *Id., citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[19]

The Court lacks jurisdiction because the Plaintiffs have no standing to assert RICO claims and because the Defendants are entitled to immunity from suit.

a. Plaintiffs fail to allege standing under RICO[20]

Plaintiffs must plead and prove that they have legal standing to sue for an alleged RICO violation. The standing provision of civil RICO provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains"[21] To have standing under the RICO Act, a plaintiff must allege a tangible financial loss.[22] Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing.[23] Thus, speculative damages are not compensable under RICO.[24]

Additionally, a plaintiff may sue under § 1964(c) (civil RICO) only if the alleged RICO violations ("predicate acts") were the proximate cause of the plaintiff's injury.[25] In *Holmes v.*

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[19] *Randall D. Wolcott, MD, PA v. Sebelius*, —— F.3d ——, No. 10–10290, 635 F.3d 757, 2011 WL 870724, *4 (5th Cir. Mar.15, 2011), *citing Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001). Fed.R.Civ.P. 12(h)(3).

[20] To state a civil RICO claim under § 1962, a plaintiff must allege: (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985).

[21] *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5th Cir.1995) (quoting 18 U.S.C. § 1964(c)).

[22] *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

[23] *Id.*

[24] *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995).

[25] *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U. S. 258, 268 (1992)

Securities Investor Protection Corp., the Supreme Court held that the proximate-cause requirement necessitates the "demand for *some direct relation between the injury asserted and the injurious conduct alleged*."[26]

Thus, a RICO plaintiff must satisfy two elements to establish standing to bring a RICO claim: (1) a direct, concrete financial injury to Plaintiff's business or property; and (2) proximate causation (i.e., that the alleged injury was proximately caused by the alleged RICO predicate act(s)). The Plaintiffs herein have neither alleged nor proven that they have suffered any *direct*, personal, concrete financial injury to their business or property. Rather, Plaintiff Curtis has alleged *only indirect injury* -i.e., alleged loss to the *assets of the Brunsting family trust and estate in the underlying probate proceeding.* "[T]he plaintiff only has standing *if, and can only recover to the extent that*, he has been injured in his business or property by the conduct constituting the violation."[27] (Emphasis added). Even Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[28]

Plaintiff Munson is even further removed as he *admittedly* has no interest in the Brunsting family trust and estate and was not a party to any prior lawsuits involving the subject trust and estate.[29] His only connection to the prior lawsuits was the "paralegal services" he provided to Curtis.

i. No proximate cause.

Plaintiffs have littered their Complaint with unsubstantiated allegations that Harris County

[26] *Id.*, at 268 [Emphasis added]; *See also*, *Anza v. Ideal Steel Supply Corp*., 547 US 451, 457 (2006).
[27] *Sedima*, 473 U.S. at 496 (emphasis added).
[28] Doc. 1, ¶¶ 163, 165, 213.
[29] See Doc. 33, ¶ 69.

Defendants have committed *unspecified* acts of honest services fraud, fraud, theft, mail fraud,[30]wire fraud,[31] obstruction of justice[32], spoliation of evidence[33] and interference with commerce or extortion[34]. It appears the complaints concerning mail fraud and wire fraud is limited to the other defendants – such as the exchange of discovery responses – which does not involve the Harris County Defendants.[35]

To satisfy the stringent pleading requirements of Rule 9(b) regarding claims sounding in fraud, "the plaintiff must specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."[36] Plaintiffs must set out ***"the who, what, when, where, and how***" of the fraud.[37]

Plaintiffs' Complaint, despite its corpulence (59 pages and 217 paragraphs), wholly fails to plead "the who, what, when, where, and how" of the alleged fraud as required by Rule 9(b). This particularity requirement also applies to the pleading of mail fraud or wire fraud as predicate acts in a RICO claim.[38]

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[30] See 18 U. S. C. § 1341.
[31] See 18 U. S. C. § 1343.
[32] See 18 U. S. C. § 1503.
[33] See 18 U. S. C. § 1512.
[34] See 18 U. S. C. § 1951.
[35] See Doc. 1, ¶¶ 127, 135 – 141.
[36] *See Sullivan*, 600 F.3d at 551
[37] *See Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003)(emphasis added); *See also, Dawson v. Bank of America, NA*, No. 14-20560, Summary Calendar (5th Cir. Mar. 13, 2015). *See also Carroll v. Fort James Corp*., 470 F.3d 1171, 1174 (5th Cir. 2005) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005) (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).
[38]*See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F. 2d 1134, 1138-9 (5th Cir. 1992), citing *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 430 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *See, also, Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

Having failed to plead any facts in support of the conclusory allegations of racketeering activity based upon fraud, Plaintiffs have failed to plead and prove proximate causation as a required element of RICO standing.[39]

Likewise, Plaintiffs' "factual allegations" of proximate cause are scant to non-existent. The Complaint contains their proximate cause allegations, which are nothing but conclusory recitations, wholly devoid of the heightened level of factual pleading for fraud cases mandated by Rule 9(b) and federal law.

Dismissal for failure to plead allegations of fraud, including RICO predicate acts of alleged mail fraud and wire fraud with particularity as required by Rule 9(b), is treated the same as Rule 12(b)(6) dismissal for failure to state a claim.[40] The Fifth Circuit interprets Rule 9(b) to require "specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statement were made, and an explanation of why they were fraudulent."[41]

Further, it is clear from the Complaint that Plaintiffs have not alleged any unlawful act against the County Defendants. Plaintiffs have listed 6 federal crimes that appear in 18 U.S.C. § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simply list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead facts that, if true, would establish that each predicate act was in fact committed by the County Defendants.[42]

Plaintiff's Complaint fails to meet this standard. For the identified predicate acts, Plaintiffs

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[39] *Id.; See also, Holmes* at 268.
[40] *See Lovelace v Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).
[41] *See Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).
[42] *Elliott*, 867 F.2d at 880.

simply identify the statute, provide a general description of the conduct it prohibits (although for most the conduct is not even described), and then assert the County Defendants violated the statute. This is not sufficient to establish (1) a predicate act was committed, or (2) any damages were proximately caused by the alleged act.

In addition, Plaintiffs cite to various other purported predicate acts as a basis for RICO, but this fails too because only predicate acts of *racketeering activity* provide a basis for recovery under RICO section 1964(c).[43] The following generalized claims are not predicate acts that support a claim for racketeering activity: theft under the Texas Penal Code (Claim 12), conspiracy for "state law theft" and "aiding and abetting" (Claim 23), spoliation (Claim 38), conspiracy to violate constitutional rights (Claim 44), "aiding and abetting breach of fiduciary, defalcation and scienter" (Claim 45), "aiding and abetting misapplication of fiduciary, defalcation and scienter" (Claim 46) and "tortious interference with inheritance expectancy" (Claim 47). Further, Plaintiff's conclusory statements concerning these claims cannot support a claim against the Harris County Defendants.

ii. No direct injury.

Plaintiffs also lack RICO standing because they have failed to plead the "direct injury" ("directness") requirement.[44]

A justiciable interest is required as an element of standing under Texas law.[45] As noted by the Supreme Court, "There is no need to broaden the universe of actionable harms to permit RICO

[43] *Brandenburg v. Seidel*, 859 F.2d at 1179, 1188 (4th Cir. 1988).
[44] *See Holmes*, at 268.
[45] See also TEX. CIV. P. & REM CODE ANN. §§ 134.001-.005 (West 2011 & Supp. 2013) (Theft Liability Act); TEX. CIV. P. & REM CODE ANN. § 31.03(a) (West Supp. 2013) (claim under the Theft Liability Act requires ownership interest in the property unlawfully appropriated).

suits *by parties who have been injured only indirectly*."[46]

The Plaintiffs have failed to adequately allege *direct (i.e., personal)* concrete financial loss, as required to establish standing to sue for civil RICO or civil RICO conspiracy.[47] Rather, they have made myriad conclusory, unsubstantiated claims. Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[48] Munson has *no* such interest at all.

Because Plaintiffs have wholly failed to plead standing to bring their RICO claims (i.e., the existence of a *direct* injury to their personal business or property, which was proximately caused by a predicate act, this motion should be granted and their RICO claims dismissed with prejudice.

b. The Honorable Judges are entitled to judicial immunity.

Plaintiffs attempt to argue around judicial immunity by asserting the Honorable Judges were engaged in "non-judicial acts."[49] Despite the exceptionally lengthy Complaint, the sum and substance of *all* allegations against the Honorable Judges is the Plaintiffs' belief that the actions taken by them during the course of the pending cases were improper and/or wrong. Indeed, the acts complained of are removing a motion for summary judgment from the hearing docket and ordering the parties to mediation.

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[46] *See Anza v. Ideal Steel Supply Corp.*, 547 US 451, 460 (2006) (emphasis added).
[47] "[T]o demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss." *Chaset v. Fleer/Skybox Intern, LP*, 300 F.3d 1083, 1086-87 (9th Cir. 2002); *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 728-29 (8th Cir.2004) (same); see also *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n. 16 (5th Cir.2003) (A plaintiff lacks RICO standing "unless he can show concrete financial loss").
[48] Doc. 1, ¶¶ 163, 165, 213.
[49] Doc. 1, ¶¶ 18, 19.

It is unquestionably clear that these actions were judicial acts that were made within Probate Court 4's jurisdiction and for which the Honorable Judges are entitled to immunity. The Complaint is completely void of any facts alleging actions taken in a nonjudicial role.

The Honorable Judges are entitled to absolute judicial immunity from suit for acts undertaken in their judicial capacity even if they are done maliciously or corruptly (which Defendants emphatically deny).[50] The two exceptions to this doctrine, i.e., actions by the judge in a non-judicial role and actions, while judicial actions, taken in complete absence of jurisdiction, do not apply here as Plaintiffs have not alleged facts that would invoke either.[51] Further, as Texas judges, the Honorable Judges are entitled to Eleventh Amendment protection and governmental immunity for claims against them in their official capacity.[52] Absolute judicial immunity does not bar prospective relief against a judge, but Plaintiffs have not sought such relief against the Honorable Judges.[53]

In a similar case, Houston's First Court of Appeals affirmed the trial court's finding that two probate judges were entitled to judicial immunity. In *James v. Underwood*, two siblings were involved in a legal dispute over who had the right to manage their mother's assets.[54] Their controversy spawned multiple lawsuits filed in various district and probate courts, resulting in no less than 11 appellate decisions.[55] James sued two judges (Judge Olen Underwood and Judge

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[50] *Price v. Porter*, 351 Fed. Appx. 925, 927 (5th Cir.2009), *citing Mireles v. Waco*, 502 U.S. at 10, and *Stump v. Sparkman*, 435 U.S. at 355–57.
[51] *Id.*
[52] *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985).
[53] *Bauer v. State of Texas*, 341 F.3d 352, 357 (5th Cir.2003).
[54] *James v. Underwood*, 438 S.W.3d 704, 706-07 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
[55] *Id*. at 707.

Patrick Sebesta) who had presided over aspects of her on-going legal dispute with her sibling and an intervenor.[56] The judges filed a motion to dismiss on the basis of judicial and sovereign immunity and the motion was granted.[57] The First Court of Appeals concluded the dismissal based on judicial immunity was proper and therefore did not reach the issue of sovereign immunity.[58] The Court noted that immunity from suit "deprives a trial court of subject-matter jurisdiction."[59] "The Supreme Court has stated repeatedly that 'it is a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[60]

In a suit alleging RICO violations, the Fifth Circuit determined that three state court judges and a court secretary were entitled to absolute judicial immunity and quasi-judicial immunity, respectively.[61] The plaintiffs sued twenty individual and corporate defendants, alleging a law firm engaged in a criminal conspiracy with the other defendants to infiltrate and to control the state and federal court systems in Texas.[62] As predicate acts to the RICO violation, the plaintiffs alleged illegal campaign contributions, bribery, mail and wire fraud, and obstruction of justice.[63] The Fifth Circuit rejected as frivolous the plaintiffs' argument that there is no absolute judicial

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[56] *Id*.
[57] *Id*. at 709.
[58] *Id*.
[59] *Id*., citing *Reata Constr. Corp v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).
[60] *Id*., citing *Bradley v. Fisher*, 80 U.S. 335, 347, 13 Wall. 335, 20 L.Ed. 646 (1871), *Mireles v. Waco*, 502 U.S. at 10, *Stump v. Sparkman*, 435 U.S. at 355.
[61] *Kirkendall v. Grambling & Mounce, Inc*., 4 F.3d 989, 1993 WL 360732, *2 (5th Cir. 1993).
[62] *Id*., *1.
[63] *Id*.

immunity and quasi-judicial immunity in RICO actions.[64]

Judicial immunity provides immunity from suit, not just from the ultimate assessment of damages.[65] "Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction."[66] To determine whether an act is "judicial", the courts look at the following four factors: (1) the act complained of is one normally performed by a judge, (2) the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) the controversy centered around a case pending before the judge, and (4) the act arose out of an exchange with the judge in the judge's official capacity.[67] These factors are construed broadly in favor of immunity.[68] And, not all factors must be met for immunity to exist – in some circumstances, immunity may exist even if only one factor is met.[69] The factors are not required to be given equal weight; rather they are weighted according to the facts of the particular case.[70]

In considering whether the act complained of is normally performed by a judge, we ask whether the action is a "function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his judicial capacity."[71] The relevant inquiry is

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[64] *Id*., at *3.
[65] *James at 709* (citations omitted).
[66] *Id*., quoting *Alpert v. Gerstner*, 232 S.W.3d 117, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)(quoting *City of Houston v. W. Capital Fin. Servs. Corp*., 961 S.W.2d 687, 689 (Tex. App.—Houston [1st dist.] 1998, pet. dism'd w.o.j.)).
[67] *Id*., at 710, citing *Bradt v. West*, 892 S.W.2d 56 67 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993).
[68] *Id*., citing *Bradt*, at 67.
[69] *Id*. (citation omitted).
[70] *Id*., citing *Bradt* at 67.
[71] *Id*., citing *Mireles*, 502 U.S. at 11; *Twilligear v. Carrell*, 148 S.W.3d 502, 504 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

the "nature" and "function" of the act, not the "act" itself.[72] This distinction is necessary, otherwise any act characterized as improper would be deemed nonjudicial because "an improper or erroneous act cannot be said to be normally performed by a judge."[73]

In *Twilligear*, the Fourteenth Court of Appeals concluded that a judge accused of "negligence and gross negligence in failing to adequately oversee expenditures from a guardianship account" was exercising judicial action.[74] In the instant case, the Plaintiffs accuse the Honorable Judges of "obstruction of justice" by "removing Summary Judgment Motions from Calendar and creating stasis", and conspiring to "redirect civil litigation away from the public record to a staged mediation" for the purpose of "adding delay and increasing expense" and "holding the money cow trust hostage for attorney fee ransoms."[75] The actions Plaintiffs complain of are the rulings and Orders issued by the Honorable Judges.[76] The act of holding hearings and issuing rulings and Orders are all functions normally performed by a judge. This satisfies the first element of whether the actions were "judicial acts." The complained of actions occurred in court or in the course of handling their docket; therefore the second factor also supports a finding that the Honorable Judges' actions were judicial in nature.[77]

The third factor is whether the controversy centered around a case pending before the judge. The entirety of the allegations raised center around the underlying probate proceeding

[72] *Id*., citing *Mireles*, 502 U.S. at 13, *Stump*, 435 U.S. at 362.
[73] *Id*., citing *Mireles*, 502 U.S. at 12.
[74] *Id*., citing *Twilligear*, 148 S.W.3d at 505.
[75] Doc. 1, ¶¶ 121, 131.
[76] *Id*.
[77] *James*, at 711, citing *Bradt*, 892 S.W.2d at 67. *See also* the Complaint.

before the Honorable Judges. Accordingly, this factor supports the conclusion that the Honorable Judges' actions were judicial.[78]

The final factor is whether the act arose out of an exchange with the judge in the judge's official capacity.[79] Plaintiff Curtis, both pro se and through her former counsel, Jason Ostrom (who is also a named defendant in this lawsuit), appeared before the Honorable Judges and interacted with them in the judges' judicial capacities and not in any alternative capacities. The Honorable Judges acted in a judicial capacity in doing so, whether their rulings or decisions were correct or not (Defendants *emphatically* contend they were correct). Accordingly, this last factor supports the conclusion that the Honorable Judges' actions were judicial.

The next inquiry is whether the judges acted in a "complete absence of all jurisdiction."[80] "Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes."[81] The First Court of Appeals determined probate judges have jurisdiction to preside over probate cases, which is what Judge Sebesta had been doing at the point when his actions became "actionable" in the plaintiff's view.[82] Importantly, immunity is not lost based on an allegation that the action taken had procedural errors, even "grave" ones. *Id*., citing *Bradt*, at 68 (holding that judge had jurisdiction, for judicial immunity purposes, to sign order even if that order would be determined void because motion to recuse judge was pending). *See also In re J. B.H*., No. 14-05-00745-CV, 2006 WL 2254130, *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, pet.

[78] *Id*. at 711.
[79] *Id*.
[80] *Id*., citing *Mireles*, 502 U.S. at 12; *Bradt*, 892 S.W.2d at 68.
[81] *Id*., at 712, quoting *Malina*, 994 F.2d at 1125.
[82] *Id*.

denied)(mem.op.) (affirming dismissal of claims against judge who had judicial immunity regarding order in guardianship proceeding).

The Honorable Judges had the necessary jurisdiction to take the actions they did. Because the actions complained of by Plaintiffs are judicial in nature and because they were made within the Honorable Judges' jurisdiction, they are entitled to absolute judicial immunity on all claims brought against them.

c. Tony Baiamonte is entitled to official immunity.

To the extent Plaintiffs are asserting claims against Tony Baiamonte in his official capacity (which it appears is the case since he is only referred to in his capacity as the "Official Court Reporter"), such a claim is construed as a claim against Harris County. *See Hafer v. Melo,* 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."); *see also Bennett v. Pippin,* 74 F.3d 578, 584 (5th Cir.1996) ("When a plaintiff sues a county or municipal official in her official capacity, the county or municipality is liable for the resulting judgment and, accordingly, may control the litigation on behalf of the officer in her official capacity. A suit against the Sheriff in his official capacity is a suit against the County."). Harris County (and therefore Tony Baiamonte) cannot be liable under RICO for two independent reasons: (1) it is incapable of forming the *mens rea* required for the underlying criminal act, and (2) because RICO is punitive in nature, municipal entities enjoy common law immunity from the punitive damages.[83]

d. Harris County Defendants are entitled to qualified immunity.

[83] *Gil Ramirez Group, L.L.C. v. Houston Independent School Dist*., 786 F.3d 400, 412 (5th Cir. 2015).

The doctrine of qualified immunity shields public officials acting within the scope of their authority from civil liability.[84] "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation."[85] Plaintiffs have not presented any facts to support a constitutional violation.

In *Bagby v. King*, a litigant filed suit against two federal judges, a federal district clerk, and an appeals court clerk claiming he had been denied access to various federal district and appellate courts in California.[86] The Magistrate Judge issued a Show Cause Order explaining that the plaintiff's claims failed to overcome the doctrines of absolute judicial immunity and qualified immunity and directed plaintiff to amend his complaint to cure these defects.[87] Instead, the plaintiff filed a host of new lawsuits against a number of federal judicial officers and court staff, complaining cryptically about their handling and disposition of prior lawsuits plaintiff had filed or attempted to file.[88] The court determined the plaintiff's claims extended no further than complaints about the dispositions of previous lawsuits.[89] The court held the plaintiff's purported claims were barred by either judicial immunity, qualified immunity, or failed to state a non-frivolous claim.[90]

In the instant case, the Plaintiffs have likewise complained about actions taken by the Honorable Judges in their handling of the probate matter and appear to complain about actions taken by Tony Baiamonte acting as the Official Court Reporter. Plaintiffs contend Mr. Baiamonte

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[84] *Bilbrew v. Corona*, No. H-04-2075, 2005 WL 1515409 *2 (S.D. Tex., June 27, 2005) (J. Hittner), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[85] *Id*., quoting *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).
[86] *Bagby v. King*, No. SA-14-CA0682-XR, 2014 WL 4692479 *1 (W.D. Tex. Sept. 18, 2014).
[87] *Id*. at *2.
[88] *Id*.
[89] *Id*.
[90] *Id*.

"knowingly and willfully" spoliated, destroyed or otherwise concealed some unidentified "material evidence of a racketeering conspiracy."[91] These cryptic, conclusory complaints of all Harris County Defendants are not sufficient to identify a violation of any constitutional rights. Defendants are therefore entitled to qualified immunity and the case against them must be dismissed.

2. Plaintiffs have failed to state a claim against the Harris County Defendants.

Rule 12(b)(6) mandates dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A complaint that fails to satisfy the pleading requirements of Rule 8(a) or Rule 9(b) is subject to dismissal under Rule 12(b)(6).[92] To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[93]

A complaint must also "provide the plaintiff's grounds for entitlement to relief including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[94] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[95] "Nor does a complaint suffice if it tenders 'naked assertion[s],' devoid of 'further factual enhancement.'"[96]

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[91] Complaint, ¶ 143.
[92] *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (Rule 8(a)); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) (Rule 9(b)).
[93] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).
[94] *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555-566).
[95] *Iqbal*, 556 U.S. at 678.
[96] *Id.* (quoting, 550 U.S. at 557).

Plaintiff alleges a RICO claim under § 1962(c) and (d). To state a claim under any subsection, "a plaintiff must plead specific facts ... which establish the existence of an enterprise."[97] Plaintiffs have not pled facts that show or create a reasonable inference of a pattern of racketeering activity or the existence of any enterprise.

a. Plaintiffs fail to allege conspiracy.

In their rambling and disjointed Complaint, Plaintiffs allege the following regarding an alleged RICO conspiracy:

> The Harris County Defendants and the other Defendants "did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Sections 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. § 1961(1) in violation of 18 U.S.C. § 1962(c) and (d)" (Complaint, ¶59)
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> * * *
>
> "It was part of the racketeering conspiracy that <u>through the use of estate plan instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the heirs of estates that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 66)
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> * * *
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> "It was part of the racketeering conspiracy that <u>through the use of trust instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the beneficiaries of trusts that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 67)

Beyond this ***conclusory*** language, the Complaint contains no further factual enhancement regarding the alleged conspiracy. "[A] conclusory allegation of agreement at some unidentified

[97] *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989); *accord State Farm Mut. Auto. Ins. Co. v. Giventer*, 212 F.Supp.2d 639, 649–50 (N.D.Tex.2002).

point does not supply facts adequate to show illegality."[98] Because Plaintiffs allege no pattern of activity or the acquisition, establishment, conduct, or control of any enterprise as required under RICO, Plaintiffs have failed to state a RICO claim upon which relief may be granted.

Furthermore, civil conspiracy is a *derivative* tort; therefore, liability for a civil conspiracy depends on participation in an underlying tort.[99] Because the core of a RICO civil conspiracy is ***an agreement to commit predicate acts***, a RICO civil conspiracy complaint, at the very least, must allege *specifically* such an agreement.[100] Plaintiffs have wholly failed to allege a *specific agreement* among Defendants to commit the RICO predicate acts alleged. **There are no allegations that Judge Butts, Judge Comstock or Tony Baiamonte was a party to or principal in any such agreement.**

The Plaintiffs have pled **no facts** which would support even the existence of any conspiracy. As such, Plaintiffs have failed to establish that there is any plausibility to their conclusory allegations of conspiracy.[101]

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[98] *See Spectrum Stores Inc. v. Citgo Petroleum Corp*.,632 F.3d 938, 948 (5th. Cir., 2011), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

[99] *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402(5th. Cir., 2013), citing *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.*, 501 F.3d 398, 414 (5th Cir. 2007) (citations omitted). In order to adequately plead a claim for civil conspiracy, a plaintiff must adequately plead the underlying tort. *Id.*, citing *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 649 (5th Cir. 2007) ("If a plaintiff fails to state a separate claim on which the court may grant relief, then the claim for civil conspiracy necessarily fails.")

[100] *See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1140-1 (5th Cir. 1992)(Where complaints fail to plead specifically any agreement to commit predicate acts of racketeering, the RICO conspiracy claim was also properly dismissed.) , citing *Hecht v. Commerce Clearing House, Inc*., 897 F.2d 21, 25 (2d Cir.1990)[Emphasis added]; *see also Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir.1991) (civil RICO conspiracy claim must plead agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 47 (1st Cir.1991) (civil RICO conspiracy claim must charge that defendants knowingly entered into an agreement to commit two or more predicate crimes).

[101] *Twombly*, 127 S. Ct. at 1971-2.

As the Supreme Court held in *Twombly*[102], "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[103]

b. Plaintiffs fail to plausibly allege the existence of an "enterprise" or "association-in-fact."

In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise and association-in-fact. The Plaintiffs' Complaint does not make it plausible that either a legal enterprise or an association-in-fact existed.

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[104] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[105]

Without any legal authority cited, Plaintiffs contend Probate Court Four is an "enterprise" within the meaning of 18 U.S.C. § 1961(4) because it was "involved in various aspects of interstate and foreign commerce" by its adjudication of lawsuits involving persons or properties outside of Texas.[106] This is a conclusory recitation and purely legal conclusion, unsupported by facts. The Fifth Circuit has held that "a recitation of the elements masquerading as facts" . . . does not make

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[102] *Id.* at 1974.
[103] Plaintiffs assert § 1983 as part and parcel of their "predicate acts." It is unclear whether Plaintiffs are asserting a conspiracy to violate § 1983. However, a § 1983 claim is not actionable without an actual violation of § 1983 and Plaintiff has not alleged facts sufficient to support a claim that there was a constitutional violation under § 1983. *See Pfannsteil v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir.1990).
[104] 18 U.S.C. § 1961(4); *see also Elliott,* 867 F.2d at 881.
[105] *Elliott,* 867 F .2d at 881.
[106] Complaint, ¶ 36-38.

it any more or less probable that the listed parties have an existence separate and apart from the pattern of racketeering, are an ongoing organization, and function as a continuing unit as shown by a hierarchical or consensual decision making structure."[107]

Probate Court Four is not a legal entity. There is an abundance of case law holding that various county or city officials and departments are not separate units of government and capable of being sued. "A county is a corporate and political body." TEX. LOC. GOV'T CODE § 71.001. With respect to counties, the county as a whole constitutes the governmental unit. The commissioner's court is the governing body.[108] Plaintiff's contention that Probate Court is an "enterprise" for purposes of RICO has no basis in law or fact.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[109]

To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4), a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[110] The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[111] The Fifth Circuit has enumerated the requirements

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[107] *See Brunig v. Clark*, 560 F.3d 292, 297 (5th. Cir. 2009)(Rule 12(b)(6) dismissal of Plaintiff's RICO claims affirmed for failure to plead the plausible existence of an enterprise or association in fact).

[108] *Tarrant County v. Ashmore*, 624 S.W.2d 740 (Tex.App.—Fort Worth 1981), *rev'd on other grounds*, 635 S.W.2d 417 (Tex.1982), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 606 (1982).

[109] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[110] *Atkinson v. Anadarko Bank & Trust Co.*,808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *US. v. Turkette*, 452 U.S. 576, 583 (1981)).

[111] 452 U.S. at 583.

of an enterprise as requiring that it "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[112]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[113] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[114]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The Absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

Having failed to plausibly allege the existence of an enterprise or association-in-fact, the Plaintiffs' Complaint must be dismissed for failing to state a claim upon which relief may be granted.

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[112] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[113] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[114] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

c. Plaintiffs have failed to plead a pattern of racketeering activity.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[115] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other *and* that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[116]

When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[117] Such 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."[118]

Here, Plaintiffs allege several times throughout their Complaint that the Harris County Defendants engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary *pattern* of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

d. Plaintiffs' Complaint is not plausible.

The Supreme Court held, "[a] pleading that offers "labels and conclusions" or "a formulaic

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[115] *See In re Burzynski,* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck,* 855 F.2d at 242-43).
[116] *HJ, Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989).
[117] *In re Burzynski,* 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).
[118] *Id.*, quoting *HJ., Inc.*, 492 U.S. at 241.

recitation of the elements of a cause of action will not do." [119] Nor does a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement."[120]

Further, under Rule 8(a), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To survive dismissal, Rule 8(a) requires that a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face,"[121] and must plead those facts with enough specificity "to raise a right to relief above the speculative level."[122]

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[123] The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully."[124] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"[125]

As is the case with their allegations of conspiracy and RICO predicate acts, the Plaintiffs have "***labeled***" myriad alleged offenses including: (1) honest services mail fraud (18 U.S.C. § 1346); (2) fraud (18 U.S.C. § 1001); (3) theft (Texas Penal Code § 31.02); (4) theft (Texas Penal Code §31.03); (5) Hobbs Act extortion (18 U.S.C. § 1951(b)(2); (6) conspiracy (18 U.S.C. § 371); (7) conspiracy to obstruct justice (18 U.S.C. §§ 1512(c), 1512(k), 1519, and 1951(b)(2) and 18

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[119] *Id.* at 1965.
[120] *Id*. at 1966.
[121] *Twombly*, 550 U.S. at 570
[122] *Id*. at 555.
[123] *Iqbal*, 556 U.S. at 678.
[124] *Id.*
[125] *Id*.

U.S.C. § 242); (8) theft and extortion (Texas Penal Code § 32.21); (9) access to the Courts (42 U.S.C. § 1983); (10) substantive due process (42 U.S.C. § 1985); (11) equal protection; (12) property rights (Texas Penal Code §§ 31.02 and 31.03); (13) spoliation (18 U.S.C. § 1512(c)); (14) aiding and abetting breach of fiduciary, defalcation & scienter; (15) aiding and abetting misapplication of fiduciary, defalcation & scienter; and (16) tortious interference with inheritance expectancy -- yet Plaintiffs have failed to plead the essential elements of a cause of action for most, if not all, of the above alleged causes of action or offenses, much less pled any non-conclusory factual support. Rather, the Plaintiffs' rambling and disjointed Complaint is littered with bald, conclusory assertions, masquerading as facts.

The Plaintiffs' Complaint, standing alone, fails to meet either the Rule 12(b)(6) "plausibility" standard or the broadly similar standards announced by the Second[126] and Ninth Circuits.[127] Plaintiffs' few factual allegations are inextricably bound up with legal conclusions (e.g., Tony Baiamonte "did unlawfully, knowingly and willfully spoliated, destroy or otherwise conceal material evidence of a racketeering conspiracy in violation of 18 U.S.C. §§ 1512(c) conspiracy 1512(k) and 1419, aiding and abetting the racketeering conspiracy. . .";[128] the Harris County Defendants "did unlawfully, willfully and knowingly conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, in furtherance of a pattern of racketeering activity affecting

[126] *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 64 (2d Cir. 1971) (first alteration in original), rev'd on other grounds sub nom. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).
[127] The Ninth Circuit has held that factual allegations are not well-pleaded when they "parrot the language" of the statute creating liability. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).
[128] Complaint, ¶143.

interstate and foreign commerce in violation of 18 U.S.C. § 1346"[129]; on July 22, 2015, Judge Comstock "aided and abetted by persons known and unknown to Plaintiffs…did unlawfully, willfully and knowingly combine, conspire and agree with each other to obstruct and conceal evidence and engage in predicate acts including but not limited to 18 U.S.C. § 1512(c) conspiracy 1512(k), 1519 and 18 U.S.C. §§ 1951(b)(2) and 2, Extortion and Texas Penal Codes §§ 31.02, 31.03 and 32.21 (theft/extortion) by removing Summary Judgment Motions from Calendar and creating stasis,[130] as part of a conspiracy to deprive Plaintiff Curtis of an impartial forum."). These are but a few of countless examples.

Plaintiffs have not alleged any factual support that actions taken by the Harris County Defendants are predicate acts under 18 USC § 1961(b).

Read in its entirety, the complaint merely "parrot[s] the language" of the RICO statute,[131] and comprises a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[132] Indeed, given the lack of factual detail (as opposed to a litany of *vague and conclusory* legal conclusions masquerading as facts) in the Complaint, it is impossible to even speculate as to whether the facts "might [. . .] have been the case."[133]

To plead facial plausibility, a plaintiff must set forth **factual content** that permits the courts to draw the reasonable inference that the defendant is liable.[134] The "tenet that a court must accept

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[129] Complaint, ¶122.
[130] Complaint, ¶131.
[131] *See Wooten v. McDonald Transit Assocs., Inc.*, 775 F.3d 689, 696 (5th Cir.2015) citing *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007)
[132] *Iqbal*, 556 U.S. at 678.
[133] *Wooten* at p.696, citing *Trans World Airlines, Inc.*
[134] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. (Emphasis added).

as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[135] Although the Plaintiffs allege that the Harris County Defendants engaged in, or conspired to engage in, racketeering activity in the form of fraud and other acts aimed at depleting the assets of the trust in the underlying contested probate proceeding, their Complaint is ***devoid of facts*** to make it plausible and amounts to a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[136]

In addition to failing to plead the "***who, what where, when and how***" of mail fraud, wire fraud or state law fraud, or that *anyone* relied on such conduct, the Plaintiffs offer no "factual content allow[ing] [this] court to draw the reasonable inference" that Defendants have plausible liability such that Plaintiffs are entitled to relief for their claims.[137]

The Plaintiffs' legal conclusions are not entitled to the presumption of validity.[138] They have pled insufficient facts to establish a plausible entitlement to relief for the claims they are asserting. Because the Plaintiffs have failed to adequately plead that the alleged RICO predicate acts were a *direct and proximate cause* of injury to their personal "business or property," the Court should dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Because the Plaintiff's Complaint is not plausible, it should be dismissed.

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[135] *Id.*
[136] *Iqbal*, 556 U.S. at 678,129 S.Ct. 1937.
[137] *See Patrick v. Wal–Mart, Inc.—Store # 155*, 681 F.3d 614, 622 (5th. Cir., 2012) citing *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir.2011). (quotation marks and citation omitted). [Emphasis added]
[138] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

e. Plaintiffs' claims are frivolous.

A complaint is frivolous if it lacks an arguable basis in law or fact.[139] "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist."[140]

The claims brought against the Harris County Defendants are frivolous and brought in violation of FED. R. CIV. P. 11. There is no conspiracy to deprive the Plaintiffs of the assets of the Brunsting estate, no racketeering scheme and no use of the mail, wire or internet to further any alleged scheme or conspiracy. Perhaps the only "conspiracy" is that of the Plaintiffs and other litigants that are bringing these frivolous lawsuits against Harris County Probate Courts for RICO violations.[141]

As is patently obvious from Plaintiffs' 62-page Complaint, they were dissatisfied with the rulings and administration of the Brunsting probate case in Probate Court Four. **This is not a basis for bringing a lawsuit.** This case should be dismissed *with prejudice*. See *Boyd v. Biggers*, 31 F.3d 279 (5th Cir. 1994) at 285 (dismissing *with prejudice* the claims against Judge Biggers because the plaintiff did not complain of any actions that were nonjudicial in nature); *Lister v. Perdue*, No. 3:14-CV-715-D-BN, 2014 WL 7927823, (N.D. Tex., Aug. 27, 2014) at *3 (dismissing

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[139] See *Denton v. Hernandez*, 504 U.S. 25, 31, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Richardson v. Spurlock*, 260 F.3d 495, 498 (5th Cir.2001)(citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir.1997)).

[140] *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir.1998)(*quoting McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir.1997)).

[141] Plaintiff mentions the RICO suit filed against the judges in Probate Court One, claiming it is related by "continuity." (Case 4:16-cv-00733; pending before Judge Hoyt) [Doc. 33, ¶ 51]. This smear campaign against the Honorable Judges in Probate Court One and Probate Court Four appears to be nothing more than pure harassment by disgruntled litigants. Indeed, due to the frivolous filing in the Probate Court One case, dismissal and sanctions have been sought.

with prejudice the claims against Judge Lewis and her court staff because all actions complained of were nonjudicial in nature); *Bilbrew v. Wilkinson*, No. H-05-0130, 2005 WL 3019743 *9-10, (S.D. Tex., Nov. 10, 2005)(J. Gilmore) (dismissed *with prejudice* as frivolous and finding Judge Wilkinson entitled to absolute judicial immunity). This lawsuit is frivolous because it lacks an arguable basis in law or fact. It should be dismissed with prejudice.

CONCLUSION

The case should be dismissed with prejudice in its entirety because Plaintiffs have no actionable RICO claim against the Harris County Defendants. The Honorable Judges are entitled to judicial immunity, official immunity and governmental immunity. Likewise, Tony Baiamonte is entitled to official immunity and governmental immunity. Additionally, the Plaintiffs lack standing to bring the conspiracy/RICO claims asserted in this lawsuit – Plaintiffs have failed to allege facts sufficient to establish they suffered a tangible financial loss and that it was proximately caused by any "predicate acts" by the Harris County Defendants. Further, Plaintiffs have no state law claims against the Harris County Defendants and they should be dismissed under TEX. CIV. P. & REM. CODE § 101.106. Harris County Defendants are entitled to dismissal on the Plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(1).

The case should also be dismissed with prejudice in its entirety because Plaintiffs have failed to state a claim against the Harris County Defendants. Plaintiffs have failed to allege a conspiracy, failed to allege a RICO violation, failed to establish a pattern of racketeering activity, failed to establish an "enterprise" or "association-in-fact," their claims are not plausible on their face, and their claims are frivolous.

PRAYER

For the reasons set forth above, the Harris County Defendants request the Court grant its Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. 1] with prejudice, sanction the Plaintiffs for filing a frivolous and groundless lawsuit, and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

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OF COUNSEL:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S *UNOPPOSED* AMENDED MOTION FOR LEAVE TO FILE MOTION TO DISMISS IN EXCESS OF PAGE LIMIT

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte (collectively "Defendants"), hereby file the following Unopposed Amended Motion for Leave to File Motion to Dismiss In Excess of Page Limit ("Motion").

Section B(5)(E) of Judge Alfred H. Bennett's Court Procedures limit the filing of documents such as Defendants' Motion to Dismiss to 20 pages without leave of Court. The Court Procedures further directs the parties to seek leave when their documents exceed the page limit. Defendants seek leave to file their Motion to Dismiss in excess of the page limit, because of the complexity of the facts and law relevant to this case, and the length of the claims asserted by Plaintiffs in their extensive 62-page, 217 paragraph Complaint, the complexity of the RICO case law relevant to this case, and the number of counts alleged against Defendants (Plaintiffs have asserted at least 16 of 47 claims against the Honorable Judges and Mr. Baiamonte).

Defendants have exercised best efforts to keep their Rule 12(b)(1) and (6) Motion to Dismiss as concise, and to the point, as possible. However, the Plaintiffs' RICO claims as currently plead are believed by Defendants, after reasonable inquiry into the relevant Supreme Court and Fifth Circuit Authority, to be so deficient (as to, *inter alia*, "RICO standing and proximate cause," "RICO standing and direct injury," "pattern," "enterprise," "conspiracy," and "predicate act nexus to direct injury"), that extensive briefing was required to adequately address the myriad pleading deficiencies requiring dismissal.

Defendants' Motion is 31 pages, *exclusive of* the certificate of service. Defendants pray the Court grant them leave to file their Motion to Dismiss. This Motion for Leave is unopposed by the Plaintiffs.

PRAYER

For the reasons set forth above, Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte respectfully request the Court grant their Motion for Leave to file Motion to Dismiss in Excess of Page Limits, and award these Defendants such other and further relief, at law or in equity, to which Defendants may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

The undersigned counsel hereby certifies that I emailed Plaintiffs Candace Curtis and Rik Wayne Munson on October 7, 2016 to inquire whether they would be opposed to the Motion for Leave to file Motion to Dismiss in Excess of Page Limit and they advised they were **unopposed**.

/s/ Laura Beckman Hedge
Laura Beckman Hedge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S
REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' Response further highlights the infirmities of their Complaint, which should be dismissed because of the attorney–immunity doctrine, Plaintiffs' failure to plead the elements of a RICO claim, and the delusional and implausible nature of Plaintiffs' allegations.

I. Ms. Young is protected by the attorney–immunity doctrine.

Plaintiffs' Response to Defendant Young's Motion to Dismiss highlights the Complaint's inescapable—and irremediable—failure: In Texas, a Plaintiff cannot avoid the attorney immunity doctrine by "[m]erely labeling an attorney's conduct 'fraudulent.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Dixon Fin. Services, Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) ("Characterizing an attorney's action in advancing his client's rights as fraudulent does not change the rule that an attorney cannot be held liable for discharging his duties to his client."). Plaintiffs' cannot overcome Ms. Young's immunity for two reasons:

First, although Plaintiffs' Response to Ms. Young's Motion to Dismiss contains many factual assertions, those assertions are entirely absent from Plaintiffs' Complaint—*none* of the factual assertions made in the Response appears in the Complaint. And whether Ms. Young's Motion to Dismiss should be granted is based on the assertions made in Plaintiffs' Complaint—not other filings. Second, Plaintiffs fail to address the law cited in Ms. Young's Motion. Instead, they try to justify their denomination of the fictitious criminal enterprise as the "probate mafia" and "Harris County Tomb Raiders." But these arguments do not change Ms. Young's "true immunity from suit" relating to her representation of Temporary Administrator Lester. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016). And Plaintiffs have only alleged acts relating to Ms. Young's routine handling of legal tasks as counsel for Temporary Administrator Lester. Specifically, the only assertion (although regurgitated in many different

ways) made in the Response against Ms. Young is that she represented Temporary Administrator Lester in his preparation of a single report. *See* Response [DKT. 41], at ¶¶ 22–29, 32–34, 47–48, 51, 59–60 (all discussing the "report" and Ms. Young's representation of Temporary Administrator Lester).

Plaintiffs do not dispute the law cited by Ms. Young, nor do they dispute that their allegations arise only out of Ms. Young's representation of Temporary Administrator Lester. Plaintiffs' assertion that the report is somehow fraudulent or incorrect does not change Ms. Young's complete immunity from suit, because Plaintiffs have only alleged acts relating to Ms. Young's routine handling of legal tasks as counsel for Temporary Administrator Lester. *See Byrd*, 467 S.W.3d at 481–83; *see also* Order Granting Motion to Dismiss (DKT. 320), *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, at *9 (S.D. Tex. Oct. 7, 2016) (dismissing almost identical allegations because "**routine litigation conduct . . . cannot become a basis for a RICO suit**") (emphasis added). Thus, Plaintiffs' Complaint should be dismissed.

II. Plaintiffs' Complaint is too delusional to state a valid claim for relief.

In the last week, another Court has considered and rejected almost identical allegations to those made by Plaintiffs. *See* Order Granting Motion to Dismiss (DKT. 320), *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733 (S.D. Tex. Oct. 7, 2016). In *Sheshtawy*, three groups of plaintiffs alleged parties and attorneys practicing before Harris County Probate Court No. 1 were members of a RICO conspiracy, along with two judges. The *Sheshtawy* plaintiffs' alleged "proof" of conspiracy was that "Defendant Judge Loyd Wright and Defendant Associate Judge Ruth Ann Stiles always ruled against . . . the Plaintiffs." *See* Amended Complaint, *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, ¶ 359 (DKT.. 102). The Court dismissed the matter, holding that the plaintiffs' allegations were "pure zanyism." *Id.* at *9.

Here, Plaintiffs make similar allegations against the parties, attorneys, and judges in Probate Court No. 4. And as in *Sheshtawy*, the allegations are frivolous, because they are too fanciful, fantastic, and delusional to state a valid claim for relief.

III. Plaintiffs still cannot articulate the elements of a RICO claim against Ms. Young.

In Ms. Young's Motion to Dismiss, Ms. Young showed that Plaintiffs' RICO claim should be dismissed for two independent reasons—Plaintiffs have not shown they suffered any injury proximately caused by a violation of RICO by Ms. Young, and Plaintiffs have failed to plead with particularity any predicate acts of mail or wire fraud by Ms. Young. Plaintiffs address neither failure.

A. Plaintiffs have not alleged they suffered any injury proximately caused by a violation of RICO by Ms. Young.

First, Plaintiffs admit that they have not suffered any injury proximately caused by a violation of RICO by Ms. Young. Indeed, Plaintiffs admit that they were not injured by the only wrongful act of Ms. Young that they allege—Ms. Young's representation of Temporary Administrator Lester, who prepared the report. Response at ¶ 28. Specifically, Plaintiffs admit that the they were not injured by the report, and, instead, the "'Report' was nothing but a vehicle for threatening Plaintiff Curtis with injury to property rights if she did not agree to enter into a mediated settlement agreement." *Id.*

But the threat of injury is not actual injury and does not create a RICO claim. *See* 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of [RICO] may sue."). And Plaintiffs' allegations are much too tenuous to give rise to standing under RICO. Plaintiffs appear to assert that there must be some connection between Ms. Young's representation of Mr. Lester, Mr. Lester's creation of the report, the Plaintiffs' alleged fear of the "threat" of the report, and then the mediated settlement agreement that was entered

into by Plaintiffs. Response at ¶ 28. That is not sufficient under RICO. Instead, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury." *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015). Proximate cause requires "directness"—"the injury or damage was either a direct result or a reasonably probable consequence of the act." *Plambeck*, 802 F.3d at 676.

Here, Plaintiffs do not plead facts showing they suffered any financial loss that directly resulted from any alleged RICO violation by Ms. Young. *See Gil Ramirez Grp., L.L.C.*, 786 F.3d at 408. They argue only that they felt "threatened" by the report, which led them to agree to enter into a settlement. That cannot create an injury that creates standing to sue under RICO.

B. Plaintiffs have not pleaded facts that Ms. Young engaged in a "racketeering activity."

Even in Plaintiffs' Response, Plaintiffs fail to assert Ms. Young engaged in a pattern of "racketeering activities" sufficient to trigger the RICO statute. Under Rule 9(b), predicate RICO acts must be pleaded under the heightened pleading requirements of Rule 9(b), which requires a plaintiff to plead "with particularity." FED. R. CIV. P. 9(b). Plaintiffs have made no assertion of any predicate acts of Ms. Young they claim constitute RICO predicate acts.[1] Alleging simply that Ms. Young represented Mr. Lester and that Mr. Lester prepared the report is insufficient. That allegation alone can never rise to the level of mail fraud, wire fraud, or violations of the Hobbs Act. Further, that allegation can never constitute a "pattern" of racketeering acts by Ms. Young. Plaintiffs fail to allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic*, 975 F.2d at 1139. Nor have they pled what Ms. Young obtained by making the alleged misrepresentation.

[1] As shown in Ms. Young's Motion to Dismiss, Plaintiffs' wire fraud, mail fraud, and Hobbs Act claims fail, because they cannot be asserted as private causes of action. Plaintiffs do not dispute this.

IV. Plaintiffs' Complaint remains too implausible to state a valid claim for relief.

Plaintiffs try to argue their Complaint is plausible because "Defendants . . . cannot[] point to the record in any proceeding where Plaintiffs have been on the losing end of any fully litigated state court determinations . . . ." Response at ¶ 18. Plaintiffs completely miss the mark.

Plaintiffs' attempts to re-litigate as RICO claims issues decided in state court fail. If Plaintiffs desired to challenge determinations made in state court, there are appellate processes for that. Plaintiffs also ignore that Ms. Young **was not party to the underlying proceedings**. Whether Plaintiffs were on the "winning" or "losing end" of any determination in state court has nothing to do with Ms. Young, who merely acted as the attorney for Temporary Administrator Lester. Thus, Plaintiffs' Complaint remains too implausible to state a claim against Ms. Young.

V. Plaintiffs' references to a prior lawsuit are irrelevant.

Plaintiffs repeatedly reference a prior suit in this district, *Curtis v Brunsting*, No. 4:12-cv-0592, which was remanded to state court. But Plaintiffs' references make no sense and are irrelevant. That matter was remanded to Harris County **at Plaintiff Curtis's own request**. *See* Order Granting Unopposed Motion to Remand by Candace Louise Curtis, *Curtis v Brunsting*, No. 4:12-cv-0592 (DKT. 112) (S.D. Tex. May 15, 2014). Plaintiff Curtis cannot relitigate as some kind of fraudulent act something she requested from the Court. Second, Plaintiffs' references to that matter are also irrelevant to its claims against Ms. Young. Neither Ms. Young nor her state court client, Temporary Administrator Lester, had any involvement in the prior federal court matter—they were not parties to that matter, they never acted as attorneys in that matter, and they never appeared in that matter.

VI. Conclusion

For the reasons stated above and in Ms. Young's Motion to Dismiss, this Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 11, 2016

Respectfully submitted,
/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Certificate of Interested Parties has been served on October 11, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS Plaintiff,	§	Civil Action No. 4:12-cv-00592
v	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al Defendants	§	

Opposed Motion

Curtis, et al Plaintiffs	§	Civil Action No. 4:16-cv-01969
v	§	The Honorable Alfred Bennett
Kunz-Freed, et al Defendants	§	

Rule 42(a) Courtesy Copy

PLAINTIFF'S MOTION FOR CONSOLIDATION OF RELATED CASES PURSUANT TO 28 U.S.C. §1367, RULE 42(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 7.6 WITH SUPPORTING MEMORANDUM

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1. Above named Plaintiff respectfully moves this Court to order consolidation of the following cases pursuant to 28 U.S.C. §1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6:

a. Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592 (TXSD Filed 2/27/2012) currently pending before the Honorable Kenneth Hoyt, and

b. Civil Action No. 4:16-cv-01969 currently pending before the Honorable Alfred H. Bennett (TXSD filed 7/5/2016)

2. Plaintiff moves for consolidation of pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal. The two cases are appropriate for consolidation for the following reasons:

3. The two cases share common parties. Candace Curtis is a Plaintiff in both federal suits and Amy and Anita Brunsting are Defendants in both suits.

4. The later suit is the cumulative product of events occurring in the course of litigating the earlier matter and although the remedies requested and the jurisdictions upon which the authorities of the Court have been invoked are divergent, all the facts flow from common acts and events.

5. The two cases involve common questions of law and fact because both arise from the same factual situation; namely, the rupture and looting of the Brunsting family of trusts and injuries resulting from the Defendants' efforts to evade accountability; and thus the two cases also involve common questions of law.

6. Through a series of awkward circumstances, the earlier diversity matter was remanded to Harris County Probate Court No. 4. The probate court experience produced evidence of a sinister design, resulting in the necessity for Plaintiff to again seek remedy in this Court and, thus, Plaintiff filed a separate action into the Southern District of Texas, Case No. 4:16-cv-01969, in

concert with Federal Rule of Civil Procedure Rule 11(b) motion for sanctions and with Federal Rule of Civil Procedure 60(b) and (d) motion for vacatur in the above titled Court.

7. While the earlier suit was a simple breach of fiduciary seeking disclosures and accounting, the later filed case is a Racketeer Influenced Corrupt Organization (RICO) suit brought under federal question jurisdiction, implicating the Probate Court's officers' participation in the conduct of an enterprise through a pattern of racketeering activity.

8. Judicial convenience and economy will be enhanced by consolidation of the actions.

9. Consolidation will result in one trial under one judge, which will bind all plaintiffs and defendants for all purposes. This will save time and avoid unnecessary costs to the Defendants, to the Plaintiffs in both actions, and to the witnesses who would otherwise be required to testify in two cases.

10. Consolidation will not delay final disposition of any matter.

11. Consolidation of these two cases will promote the uniformity of decision and eliminate any potential for conflicting rulings, provide for judicial economy and the convenience of witnesses and parties, and will promote the expeditious disposal of all matters.

HISTORY AND NATURE OF THE PROCEEDINGS

12. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

13. Plaintiff Candace Curtis filed a Pro se Petition in the United States District Court for the Southern District of Texas, Houston Division, on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting.[1]

14. Plaintiff Curtis complaint was dismissed under the probate exception to federal diversity jurisdiction and Curtis appealed. The Fifth Circuit reversed and Ordered remand on January 9, 2013.

15. On January 29, 2013, attorney Bobbie Bayless filed suit against Nelva Brunsting's trust attorneys, Candace Kunz-Freed, Albert Vacek Jr. and Vacek & Freed P.L.L.C., in the Harris County District Court on behalf of Carl Brunsting as executor of the estate of Nelva Brunsting[2] raising claims only related to the Brunsting trusts then in the custody of a federal court.

16. On April 9, 2013, this Honorable Court issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's prior approval.

17. Also on April 9, 2013, Bobbie Bayless filed suit in Harris County Probate Court No. 4, on behalf of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) naming federal Plaintiff Curtis a "Nominal Defendant" in both suits.

18. Not only did Bayless advance claims exclusively related to the trusts already in the custody of the federal Court, she claimed the breaches of fiduciary against the beneficiaries of the Brunsting trusts were claims belonging to the estate of Nelva Brunsting. That theory was disposed of in the Fifth Circuit in *Curtis v Brunsting 710 F.3d 406*. The "Trust(s)" is the only heir in fact to the estate and assets in the trusts are not property of the estate of Nelva Brunsting.

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[1] No. 4:12-CV-00592; Candace Louise Curtis v. Anita Kay Brunsting; USDC for the Southern District of Texas, Houston Division

[2] No. 2013-05455; Carl Henry Brunsting as Executor of the Estate of Nelva Brunsting v. Candace Freed and Vacek & Freed P.L.L.C.; 164TH Judicial District Court of Harris County, Texas.

19. At paragraph 1, page 2 of Curtis v Brunsting 710 F.3d 406:

> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*

20. Under the wills Carl Brunsting has no standing to bring claims against trustees as heir or executor of an estate. He only has standing to bring claims individually as a trustee or beneficiary of the trust and that trust was in the custody of the federal court.

21. In Curtis v Brunsting the Fifth Circuit explained the doctrine of comity by citing to the Supreme Court's clarification of the "distinctly limited scope" of the probate exception,[3] explaining:

> *[W]e comprehend the 'interference' language in Markham as essentially a reiteration of the guiding principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*[4]

22. In or about November of 2013, Pro se Plaintiff Curtis retained the services of Houston Attorney Jason Ostrom. On May 15, 2014, Attorney Jason Ostrom caused this Honorable Court to issue an Order for Remand of Curtis v Brunsting to the custody of Harris County Probate Court No. 4 (412,249-402) for consolidation with the claims of Carl Brunsting (412,249-401).

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[3] Marshall v Marshall 546 U.S. 293, 310
[4] Marshall v Marshall 546 U.S. 293, 311–12

23. On July 5, 2016, Plaintiff Curtis, along with her domestic partner Rik Munson, both individually and as private attorneys general on behalf of the public trust, filed a RICO suit into the United States District Court for the Southern District of Texas, Houston Division (No. 4:16-cv-01969), accusing the Harris County Probate Court and its officers of public corruption conspiracies involving schemes and artifices to deprive Plaintiff Curtis, the People of Texas, and others, of the honest services of an elected public official.

24. The record will show the Probate Court has refused to resolve any substantive matter on the merits and the reason is clearly that no court can assume in rem jurisdiction over a res in the custody of another court. Thus, the probate court never had jurisdiction over the Brunsting trust, which renders the Order for remand to the state probate court void ab initio.

25. Rather than dismiss and return Curtis v Brunsting to the federal court, the RICO Defendants chose a less honorable course, forcing Plaintiff Curtis to respond accordingly.

26. On August 3, 2016, Plaintiff Curtis filed a F.R.C.P. Rule 11(b) motion for sanctions and F.R.C.P. Rule 60(b) and (d) motions for vacatur of the remand to state court, on the ground that the remand was obtained by fraud upon Plaintiff Curtis and upon the Court, thus vitiating the application to amend the original petition that facilitated the remand in the first instance.

27. Plaintiffs respectfully request this Honorable Court take Judicial Notice of the complaint, motions to dismiss and Plaintiffs' replies in the closely related proceedings pursuant to Federal Rules of evidence §201.[5]

STAGE OF THE PROCEEDINGS

28. The RICO suit is in the opening phase and the initial conference is set for October 28, 2016 at 9:00 a.m. before the Honorable Alfred Bennett.

[5] Case 4:16-cv-01969 TXSD Motions to dismiss Dkt 19, 20, 23, 25 and replies Dkt 33, 34, and 41

29. The earlier breach of fiduciary matter, Candace Curtis v. Anita and Amy Brunsting 4:12-cv-00592, is ripe for F.R.C.P. Rule 12(c) relief on the unresolved summary and declaratory judgment pleadings. Those motions have not been answered and the probate court refused to set the motions for hearing. A proper determination on the merits of those unresolved motions will be necessary to support the racketeering conspiracy and predicate act claims arising under the later filed RICO suit.

30. Plaintiff hereby incorporates by reference the Rule 11[6] and 60[7] motions referred to in item 18 supra, and the federal civil RICO complaint referred to in item 17 supra, as if fully restated herein, and further asks this Honorable Court to take Judicial notice of the relevant public records.

MEMORANDUM IN SUPPORT OF RULE 42(A) MOTION

31. Above named Plaintiff has moved this Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the following cases: Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, No. 4:12-CV-00592 (TXSD Filed 2/27/2012) and Curtis, et al. v Kunz-Freed, et al, No. 4:16-cv-01969 (TXSD Filed 07/05/16).

32. Plaintiffs' motion requests consolidation for the limited purposes of pre-trial proceedings and trial only, it does not request consolidation for the purposes of judgment or rights to appeal.

33. Rule 42(a) of the Federal Rules of Civil procedure provides:

> *Rule 42. Consolidation; separate trials.*
>
> *(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it*

[6] Case 4:12-cv-00592 Document 120 Filed in TXSD on 08/05/16
[7] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16

may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

34. The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Wright & A. Miller, Federal Practice and Procedure, § 2381 (1971).*

35. Local Rule 7.6 and Federal Rule of Civil Procedure 42(a) requires the motion be filed in the earlier Court and the above Court is the earlier Court. However, Federal Rule of Civil Procedure 42(b) prevents consolidation, when doing so would pollute diversity and deprive the Court of jurisdiction.

36. The earlier matter was filed under diversity with the allegation that Defendants were acting in secret and were uniquely in exclusive possession of all of the information relating to the case.

37. Plaintiff Curtis submitted a First Amended Complaint in the above Court on April 29, 2013, seeking to amend the claim to federal question jurisdiction based upon newly discovered evidence involving fraudulent securities transfers. That amendment was properly rejected by the Court due to Plaintiff's failure to provide a certificate of conference as required by local rule.

BOTH ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT

38. Rule 42(a) permits a district court to consolidate separate actions when they involve "a common question of law or fact." Fed.R.Civ.P. 42(a).

39. Even if there are some questions that are not common, consolidation is not precluded. *Batazzi v. Petroleum Helicopters, Inc., 664 F.2d 49, 50 (5th Cir. 1981); See Central Motor Co. v. United States, 583 F.2d 470 (10th Cir. 1978).*

40. Common questions of law and fact abound in these cases, as both stem from the same (long con) conspiracy and the later controversy is based upon evidence evolving out of Defendants' continued attempts to foreclose remedy in the trust suit case, aided and abetted by the state court and its officers.

41. It was the process of seeking remedy and Defendants' continued efforts to obstruct justice and evade accountability, that has produced a clear picture of a larger mosaic involving a pattern of racketeering activity targeting familial wealth.

42. Although the lawsuits were filed at separate times and in separate forums, and although multiple actions were improperly brought in state courts, all of it is, in fact, only one continuous event and therefore, it necessarily follows that the matter is particularly appropriate for consolidation.

A COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION

43. A court has broad discretion in determining whether consolidation is practical. *Atlantic States Legal Foundation Inc. v. Koch Refining Co., 681 F. Supp 609, 615 (D. Minn. 1988).* In exercising this discretion, a court should weigh the time and effort consolidation would save, with any inconvenience or delay it would cause. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985); Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984). See also Kramer v. Boeing Co., 134 F.R.D. 256 (D. Minn. 1991).*

44. Consolidation offers efficiency and convenience in this case. Consolidation will result in one trial which will bind all plaintiffs and defendants. This will save time and avoid unnecessary costs to the defendants, the plaintiffs, this Court, and the witnesses who would otherwise be required to testify in both cases.

45. Consolidation will not delay the disposition of this case. In fact, it will minimize delays. The cases are at different stages of the discovery process, but this does not bar consolidation. (*United States v. City of Chicago, 385 F. Supp. 540, 543 (N.D. Ill. 1974*).

46. The earlier case was filed under diversity, but evidence discovered in the course of pursuing remedy has produced racketeer influenced corrupt organization claims under federal question jurisdiction and the record will show No. 4:12-cv-00592 has been brought back to the federal court in direct response to the probate court's unwillingness to ensure Plaintiff's right to be heard and blatant refusal to resolve any matter on the merits.

47. Consolidation is necessary to the ends of justice and for complete resolution of all matters for all parties and, whereas, the rules will not allow all of the related cases and necessary parties to be consolidated under diversity jurisdiction, all of the related cases and necessary parties can and should be consolidated under federal question jurisdiction pursuant to 28 U.S.C. §1367.

48. Thus, whether the economy and efficiency of the Court will best be served by transferring the federal question suit to this Honorable Court or by transferring the diversity case to Judge Bennett's Honorable Court, Plaintiffs' do not presume to suggest, but do believe that justice can only be served by consolidation of all related matters under one roof for all purposes.

CONCLUSION

49. Jurisdiction of the probate court at the point in time when its jurisdiction was invoked, is a proper subject of inquiry under Rule 60. "Courts can always consider questions as to subject matter jurisdiction whenever raised and even sua sponte." *U.S. v. White, 139 F.3d 998 cert den 119 S.Ct 343, 525 U.S. 393, 142 L.Ed.2d 283 (1998).*

50. The remand Order is void ab initio for want of jurisdiction in the state court. Want of, and acts excess of, subject matter jurisdiction can never be cured after the fact. Furthermore,

Plaintiff Curtis was named a nominal defendant in the estates probate suit and simply cannot be consolidated with a plaintiff that has named her a defendant in the same lawsuit.

STANDARD OF REVIEW

51. Rule 60(b) motions are reviewed for abuse of discretion. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999); Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000).*

52. However, motions under Rule 60(b)(4), on the ground that a judgment is void are reviewed de novo. *Burke v. Smith, 252 F.3d 1260,1263 (11th Cir. 2001).*

WHEREFORE, Petitioner respectfully requests the motion for consolidation be granted.

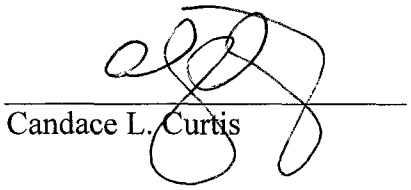
Respectfully submitted,

October 5, 2016

Candace L. Curtis

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Defendants and they are opposed to the relief requested herein.



Candace L. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 5th day of October, 2016, on the following via email and deposit in USPS Priority Mail:

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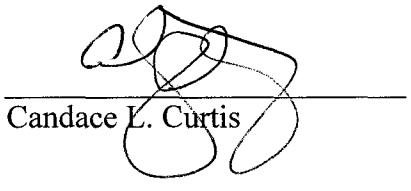
Attorney for Anita Brunsting

I hereby certify that a true and correct courtesy copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on all parties this 5th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.



Candace L. Curtis

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S
REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' Response further highlights the infirmities of their Complaint, which should be dismissed because of the attorney–immunity doctrine, Plaintiffs' failure to plead the elements of a RICO claim, and the delusional and implausible nature of Plaintiffs' allegations.

I. Ms. Young is protected by the attorney–immunity doctrine.

Plaintiffs' Response to Defendant Young's Motion to Dismiss highlights the Complaint's inescapable—and irremediable—failure: In Texas, a Plaintiff cannot avoid the attorney immunity doctrine by "[m]erely labeling an attorney's conduct 'fraudulent.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Dixon Fin. Services, Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) ("Characterizing an attorney's action in advancing his client's rights as fraudulent does not change the rule that an attorney cannot be held liable for discharging his duties to his client."). Plaintiffs' cannot overcome Ms. Young's immunity for two reasons:

First, although Plaintiffs' Response to Ms. Young's Motion to Dismiss contains many factual assertions, those assertions are entirely absent from Plaintiffs' Complaint—*none* of the factual assertions made in the Response appears in the Complaint. And whether Ms. Young's Motion to Dismiss should be granted is based on the assertions made in Plaintiffs' Complaint—not other filings. Second, Plaintiffs fail to address the law cited in Ms. Young's Motion. Instead, they try to justify their denomination of the fictitious criminal enterprise as the "probate mafia" and "Harris County Tomb Raiders." But these arguments do not change Ms. Young's "true immunity from suit" relating to her representation of Temporary Administrator Lester. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016). And Plaintiffs have only alleged acts relating to Ms. Young's routine handling of legal tasks as counsel for Temporary Administrator Lester. Specifically, the only assertion (although regurgitated in many different

ways) made in the Response against Ms. Young is that she represented Temporary Administrator Lester in his preparation of a single report. *See* Response [DKT. 41], at ¶¶ 22–29, 32–34, 47–48, 51, 59–60 (all discussing the "report" and Ms. Young's representation of Temporary Administrator Lester).

Plaintiffs do not dispute the law cited by Ms. Young, nor do they dispute that their allegations arise only out of Ms. Young's representation of Temporary Administrator Lester. Plaintiffs' assertion that the report is somehow fraudulent or incorrect does not change Ms. Young's complete immunity from suit, because Plaintiffs have only alleged acts relating to Ms. Young's routine handling of legal tasks as counsel for Temporary Administrator Lester. *See Byrd*, 467 S.W.3d at 481–83; *see also* Order Granting Motion to Dismiss (DKT. 320), *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, at *9 (S.D. Tex. Oct. 7, 2016) (dismissing almost identical allegations because "**routine litigation conduct . . . cannot become a basis for a RICO suit**") (emphasis added). Thus, Plaintiffs' Complaint should be dismissed.

II. Plaintiffs' Complaint is too delusional to state a valid claim for relief.

In the last week, another Court has considered and rejected almost identical allegations to those made by Plaintiffs. *See* Order Granting Motion to Dismiss (DKT. 320), *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733 (S.D. Tex. Oct. 7, 2016). In *Sheshtawy*, three groups of plaintiffs alleged parties and attorneys practicing before Harris County Probate Court No. 1 were members of a RICO conspiracy, along with two judges. The *Sheshtawy* plaintiffs' alleged "proof" of conspiracy was that "Defendant Judge Loyd Wright and Defendant Associate Judge Ruth Ann Stiles always ruled against . . . the Plaintiffs." *See* Amended Complaint, *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, ¶ 359 (DKT.. 102). The Court dismissed the matter, holding that the plaintiffs' allegations were "pure zanyism." *Id.* at *9.

Here, Plaintiffs make similar allegations against the parties, attorneys, and judges in Probate Court No. 4. And as in *Sheshtawy*, the allegations are frivolous, because they are too fanciful, fantastic, and delusional to state a valid claim for relief.

III. Plaintiffs still cannot articulate the elements of a RICO claim against Ms. Young.

In Ms. Young's Motion to Dismiss, Ms. Young showed that Plaintiffs' RICO claim should be dismissed for two independent reasons—Plaintiffs have not shown they suffered any injury proximately caused by a violation of RICO by Ms. Young, and Plaintiffs have failed to plead with particularity any predicate acts of mail or wire fraud by Ms. Young. Plaintiffs address neither failure.

A. Plaintiffs have not alleged they suffered any injury proximately caused by a violation of RICO by Ms. Young.

First, Plaintiffs admit that they have not suffered any injury proximately caused by a violation of RICO by Ms. Young. Indeed, Plaintiffs admit that they were not injured by the only wrongful act of Ms. Young that they allege—Ms. Young's representation of Temporary Administrator Lester, who prepared the report. Response at ¶ 28. Specifically, Plaintiffs admit that the they were not injured by the report, and, instead, the "'Report' was nothing but a vehicle for threatening Plaintiff Curtis with injury to property rights if she did not agree to enter into a mediated settlement agreement." *Id.*

But the threat of injury is not actual injury and does not create a RICO claim. *See* 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of [RICO] may sue."). And Plaintiffs' allegations are much too tenuous to give rise to standing under RICO. Plaintiffs appear to assert that there must be some connection between Ms. Young's representation of Mr. Lester, Mr. Lester's creation of the report, the Plaintiffs' alleged fear of the "threat" of the report, and then the mediated settlement agreement that was entered

into by Plaintiffs. Response at ¶ 28. That is not sufficient under RICO. Instead, a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury." *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015). Proximate cause requires "directness"—"the injury or damage was either a direct result or a reasonably probable consequence of the act." *Plambeck*, 802 F.3d at 676.

Here, Plaintiffs do not plead facts showing they suffered any financial loss that directly resulted from any alleged RICO violation by Ms. Young. *See Gil Ramirez Grp., L.L.C.*, 786 F.3d at 408. They argue only that they felt "threatened" by the report, which led them to agree to enter into a settlement. That cannot create an injury that creates standing to sue under RICO.

B. Plaintiffs have not pleaded facts that Ms. Young engaged in a "racketeering activity."

Even in Plaintiffs' Response, Plaintiffs fail to assert Ms. Young engaged in a pattern of "racketeering activities" sufficient to trigger the RICO statute. Under Rule 9(b), predicate RICO acts must be pleaded under the heightened pleading requirements of Rule 9(b), which requires a plaintiff to plead "with particularity." FED. R. CIV. P. 9(b). Plaintiffs have made no assertion of any predicate acts of Ms. Young they claim constitute RICO predicate acts.[1] Alleging simply that Ms. Young represented Mr. Lester and that Mr. Lester prepared the report is insufficient. That allegation alone can never rise to the level of mail fraud, wire fraud, or violations of the Hobbs Act. Further, that allegation can never constitute a "pattern" of racketeering acts by Ms. Young. Plaintiffs fail to allege "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Tel-Phonic*, 975 F.2d at 1139. Nor have they pled what Ms. Young obtained by making the alleged misrepresentation.

[1] As shown in Ms. Young's Motion to Dismiss, Plaintiffs' wire fraud, mail fraud, and Hobbs Act claims fail, because they cannot be asserted as private causes of action. Plaintiffs do not dispute this.

IV. Plaintiffs' Complaint remains too implausible to state a valid claim for relief.

Plaintiffs try to argue their Complaint is plausible because "Defendants . . . cannot[] point to the record in any proceeding where Plaintiffs have been on the losing end of any fully litigated state court determinations . . . ." Response at ¶ 18. Plaintiffs completely miss the mark.

Plaintiffs' attempts to re-litigate as RICO claims issues decided in state court fail. If Plaintiffs desired to challenge determinations made in state court, there are appellate processes for that. Plaintiffs also ignore that Ms. Young **was not party to the underlying proceedings**. Whether Plaintiffs were on the "winning" or "losing end" of any determination in state court has nothing to do with Ms. Young, who merely acted as the attorney for Temporary Administrator Lester. Thus, Plaintiffs' Complaint remains too implausible to state a claim against Ms. Young.

V. Plaintiffs' references to a prior lawsuit are irrelevant.

Plaintiffs repeatedly reference a prior suit in this district, *Curtis v Brunsting*, No. 4:12-cv-0592, which was remanded to state court. But Plaintiffs' references make no sense and are irrelevant. That matter was remanded to Harris County **at Plaintiff Curtis's own request**. *See* Order Granting Unopposed Motion to Remand by Candace Louise Curtis, *Curtis v Brunsting*, No. 4:12-cv-0592 (DKT. 112) (S.D. Tex. May 15, 2014). Plaintiff Curtis cannot relitigate as some kind of fraudulent act something she requested from the Court. Second, Plaintiffs' references to that matter are also irrelevant to its claims against Ms. Young. Neither Ms. Young nor her state court client, Temporary Administrator Lester, had any involvement in the prior federal court matter—they were not parties to that matter, they never acted as attorneys in that matter, and they never appeared in that matter.

VI. Conclusion

For the reasons stated above and in Ms. Young's Motion to Dismiss, this Court should dismiss Plaintiffs' claims against Ms. Young with prejudice.

Dated: October 11, 2016

Respectfully submitted,
/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Certificate of Interested Parties has been served on October 11, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS Plaintiff,	§	Civil Action No. 4:12-cv-00592
v	§	The Honorable Kenneth Hoyt
ANITA KAY BRUNSTING, et al Defendants	§	

Opposed Motion

Curtis, et al Plaintiffs	§	Civil Action No. 4:16-cv-01969
v	§	The Honorable Alfred Bennett
Kunz-Freed, et al Defendants	§	

Rule 42(a) Courtesy Copy

PLAINTIFF'S MOTION FOR CONSOLIDATION OF RELATED CASES PURSUANT TO 28 U.S.C. §1367, RULE 42(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 7.6 WITH SUPPORTING MEMORANDUM

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1. Above named Plaintiff respectfully moves this Court to order consolidation of the following cases pursuant to 28 U.S.C. §1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6:

a. Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592 (TXSD Filed 2/27/2012) currently pending before the Honorable Kenneth Hoyt, and

b. Civil Action No. 4:16-cv-01969 currently pending before the Honorable Alfred H. Bennett (TXSD filed 7/5/2016)

2. Plaintiff moves for consolidation of pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal. The two cases are appropriate for consolidation for the following reasons:

3. The two cases share common parties. Candace Curtis is a Plaintiff in both federal suits and Amy and Anita Brunsting are Defendants in both suits.

4. The later suit is the cumulative product of events occurring in the course of litigating the earlier matter and although the remedies requested and the jurisdictions upon which the authorities of the Court have been invoked are divergent, all the facts flow from common acts and events.

5. The two cases involve common questions of law and fact because both arise from the same factual situation; namely, the rupture and looting of the Brunsting family of trusts and injuries resulting from the Defendants' efforts to evade accountability; and thus the two cases also involve common questions of law.

6. Through a series of awkward circumstances, the earlier diversity matter was remanded to Harris County Probate Court No. 4. The probate court experience produced evidence of a sinister design, resulting in the necessity for Plaintiff to again seek remedy in this Court and, thus, Plaintiff filed a separate action into the Southern District of Texas, Case No. 4:16-cv-01969, in

concert with Federal Rule of Civil Procedure Rule 11(b) motion for sanctions and with Federal Rule of Civil Procedure 60(b) and (d) motion for vacatur in the above titled Court.

7. While the earlier suit was a simple breach of fiduciary seeking disclosures and accounting, the later filed case is a Racketeer Influenced Corrupt Organization (RICO) suit brought under federal question jurisdiction, implicating the Probate Court's officers' participation in the conduct of an enterprise through a pattern of racketeering activity.

8. Judicial convenience and economy will be enhanced by consolidation of the actions.

9. Consolidation will result in one trial under one judge, which will bind all plaintiffs and defendants for all purposes. This will save time and avoid unnecessary costs to the Defendants, to the Plaintiffs in both actions, and to the witnesses who would otherwise be required to testify in two cases.

10. Consolidation will not delay final disposition of any matter.

11. Consolidation of these two cases will promote the uniformity of decision and eliminate any potential for conflicting rulings, provide for judicial economy and the convenience of witnesses and parties, and will promote the expeditious disposal of all matters.

HISTORY AND NATURE OF THE PROCEEDINGS

12. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

13. Plaintiff Candace Curtis filed a Pro se Petition in the United States District Court for the Southern District of Texas, Houston Division, on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting.[1]

14. Plaintiff Curtis complaint was dismissed under the probate exception to federal diversity jurisdiction and Curtis appealed. The Fifth Circuit reversed and Ordered remand on January 9, 2013.

15. On January 29, 2013, attorney Bobbie Bayless filed suit against Nelva Brunsting's trust attorneys, Candace Kunz-Freed, Albert Vacek Jr. and Vacek & Freed P.L.L.C., in the Harris County District Court on behalf of Carl Brunsting as executor of the estate of Nelva Brunsting[2] raising claims only related to the Brunsting trusts then in the custody of a federal court.

16. On April 9, 2013, this Honorable Court issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's prior approval.

17. Also on April 9, 2013, Bobbie Bayless filed suit in Harris County Probate Court No. 4, on behalf of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) naming federal Plaintiff Curtis a "Nominal Defendant" in both suits.

18. Not only did Bayless advance claims exclusively related to the trusts already in the custody of the federal Court, she claimed the breaches of fiduciary against the beneficiaries of the Brunsting trusts were claims belonging to the estate of Nelva Brunsting. That theory was disposed of in the Fifth Circuit in *Curtis v Brunsting 710 F.3d 406*. The "Trust(s)" is the only heir in fact to the estate and assets in the trusts are not property of the estate of Nelva Brunsting.

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[1] No. 4:12-CV-00592; Candace Louise Curtis v. Anita Kay Brunsting; USDC for the Southern District of Texas, Houston Division

[2] No. 2013-05455; Carl Henry Brunsting as Executor of the Estate of Nelva Brunsting v. Candace Freed and Vacek & Freed P.L.L.C.; 164TH Judicial District Court of Harris County, Texas.

19. At paragraph 1, page 2 of Curtis v Brunsting 710 F.3d 406:

> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*

20. Under the wills Carl Brunsting has no standing to bring claims against trustees as heir or executor of an estate. He only has standing to bring claims individually as a trustee or beneficiary of the trust and that trust was in the custody of the federal court.

21. In Curtis v Brunsting the Fifth Circuit explained the doctrine of comity by citing to the Supreme Court's clarification of the "distinctly limited scope" of the probate exception,[3] explaining:

> *[W]e comprehend the 'interference' language in Markham as essentially a reiteration of the guiding principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*[4]

22. In or about November of 2013, Pro se Plaintiff Curtis retained the services of Houston Attorney Jason Ostrom. On May 15, 2014, Attorney Jason Ostrom caused this Honorable Court to issue an Order for Remand of Curtis v Brunsting to the custody of Harris County Probate Court No. 4 (412,249-402) for consolidation with the claims of Carl Brunsting (412,249-401).

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[3] Marshall v Marshall 546 U.S. 293, 310
[4] Marshall v Marshall 546 U.S. 293, 311–12

23. On July 5, 2016, Plaintiff Curtis, along with her domestic partner Rik Munson, both individually and as private attorneys general on behalf of the public trust, filed a RICO suit into the United States District Court for the Southern District of Texas, Houston Division (No. 4:16-cv-01969), accusing the Harris County Probate Court and its officers of public corruption conspiracies involving schemes and artifices to deprive Plaintiff Curtis, the People of Texas, and others, of the honest services of an elected public official.

24. The record will show the Probate Court has refused to resolve any substantive matter on the merits and the reason is clearly that no court can assume in rem jurisdiction over a res in the custody of another court. Thus, the probate court never had jurisdiction over the Brunsting trust, which renders the Order for remand to the state probate court void ab initio.

25. Rather than dismiss and return Curtis v Brunsting to the federal court, the RICO Defendants chose a less honorable course, forcing Plaintiff Curtis to respond accordingly.

26. On August 3, 2016, Plaintiff Curtis filed a F.R.C.P. Rule 11(b) motion for sanctions and F.R.C.P. Rule 60(b) and (d) motions for vacatur of the remand to state court, on the ground that the remand was obtained by fraud upon Plaintiff Curtis and upon the Court, thus vitiating the application to amend the original petition that facilitated the remand in the first instance.

27. Plaintiffs respectfully request this Honorable Court take Judicial Notice of the complaint, motions to dismiss and Plaintiffs' replies in the closely related proceedings pursuant to Federal Rules of evidence §201.[5]

STAGE OF THE PROCEEDINGS

28. The RICO suit is in the opening phase and the initial conference is set for October 28, 2016 at 9:00 a.m. before the Honorable Alfred Bennett.

[5] Case 4:16-cv-01969 TXSD Motions to dismiss Dkt 19, 20, 23, 25 and replies Dkt 33, 34, and 41

29. The earlier breach of fiduciary matter, Candace Curtis v. Anita and Amy Brunsting 4:12-cv-00592, is ripe for F.R.C.P. Rule 12(c) relief on the unresolved summary and declaratory judgment pleadings. Those motions have not been answered and the probate court refused to set the motions for hearing. A proper determination on the merits of those unresolved motions will be necessary to support the racketeering conspiracy and predicate act claims arising under the later filed RICO suit.

30. Plaintiff hereby incorporates by reference the Rule 11[6] and 60[7] motions referred to in item 18 supra, and the federal civil RICO complaint referred to in item 17 supra, as if fully restated herein, and further asks this Honorable Court to take Judicial notice of the relevant public records.

MEMORANDUM IN SUPPORT OF RULE 42(A) MOTION

31. Above named Plaintiff has moved this Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the following cases: Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, No. 4:12-CV-00592 (TXSD Filed 2/27/2012) and Curtis, et al. v Kunz-Freed, et al, No. 4:16-cv-01969 (TXSD Filed 07/05/16).

32. Plaintiffs' motion requests consolidation for the limited purposes of pre-trial proceedings and trial only, it does not request consolidation for the purposes of judgment or rights to appeal.

33. Rule 42(a) of the Federal Rules of Civil procedure provides:

> *Rule 42. Consolidation; separate trials.*
>
> *(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it*

[6] Case 4:12-cv-00592 Document 120 Filed in TXSD on 08/05/16
[7] Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16

may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

34. The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Wright & A. Miller, Federal Practice and Procedure, § 2381 (1971).*

35. Local Rule 7.6 and Federal Rule of Civil Procedure 42(a) requires the motion be filed in the earlier Court and the above Court is the earlier Court. However, Federal Rule of Civil Procedure 42(b) prevents consolidation, when doing so would pollute diversity and deprive the Court of jurisdiction.

36. The earlier matter was filed under diversity with the allegation that Defendants were acting in secret and were uniquely in exclusive possession of all of the information relating to the case.

37. Plaintiff Curtis submitted a First Amended Complaint in the above Court on April 29, 2013, seeking to amend the claim to federal question jurisdiction based upon newly discovered evidence involving fraudulent securities transfers. That amendment was properly rejected by the Court due to Plaintiff's failure to provide a certificate of conference as required by local rule.

BOTH ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT

38. Rule 42(a) permits a district court to consolidate separate actions when they involve "a common question of law or fact." Fed.R.Civ.P. 42(a).

39. Even if there are some questions that are not common, consolidation is not precluded. *Batazzi v. Petroleum Helicopters, Inc., 664 F.2d 49, 50 (5th Cir. 1981); See Central Motor Co. v. United States, 583 F.2d 470 (10th Cir. 1978).*

40. Common questions of law and fact abound in these cases, as both stem from the same (long con) conspiracy and the later controversy is based upon evidence evolving out of Defendants' continued attempts to foreclose remedy in the trust suit case, aided and abetted by the state court and its officers.

41. It was the process of seeking remedy and Defendants' continued efforts to obstruct justice and evade accountability, that has produced a clear picture of a larger mosaic involving a pattern of racketeering activity targeting familial wealth.

42. Although the lawsuits were filed at separate times and in separate forums, and although multiple actions were improperly brought in state courts, all of it is, in fact, only one continuous event and therefore, it necessarily follows that the matter is particularly appropriate for consolidation.

A COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION

43. A court has broad discretion in determining whether consolidation is practical. *Atlantic States Legal Foundation Inc. v. Koch Refining Co., 681 F. Supp 609, 615 (D. Minn. 1988).* In exercising this discretion, a court should weigh the time and effort consolidation would save, with any inconvenience or delay it would cause. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985); Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984). See also Kramer v. Boeing Co., 134 F.R.D. 256 (D. Minn. 1991).*

44. Consolidation offers efficiency and convenience in this case. Consolidation will result in one trial which will bind all plaintiffs and defendants. This will save time and avoid unnecessary costs to the defendants, the plaintiffs, this Court, and the witnesses who would otherwise be required to testify in both cases.

45. Consolidation will not delay the disposition of this case. In fact, it will minimize delays. The cases are at different stages of the discovery process, but this does not bar consolidation. (*United States v. City of Chicago, 385 F. Supp. 540, 543 (N.D. Ill. 1974*).

46. The earlier case was filed under diversity, but evidence discovered in the course of pursuing remedy has produced racketeer influenced corrupt organization claims under federal question jurisdiction and the record will show No. 4:12-cv-00592 has been brought back to the federal court in direct response to the probate court's unwillingness to ensure Plaintiff's right to be heard and blatant refusal to resolve any matter on the merits.

47. Consolidation is necessary to the ends of justice and for complete resolution of all matters for all parties and, whereas, the rules will not allow all of the related cases and necessary parties to be consolidated under diversity jurisdiction, all of the related cases and necessary parties can and should be consolidated under federal question jurisdiction pursuant to 28 U.S.C. §1367.

48. Thus, whether the economy and efficiency of the Court will best be served by transferring the federal question suit to this Honorable Court or by transferring the diversity case to Judge Bennett's Honorable Court, Plaintiffs' do not presume to suggest, but do believe that justice can only be served by consolidation of all related matters under one roof for all purposes.

CONCLUSION

49. Jurisdiction of the probate court at the point in time when its jurisdiction was invoked, is a proper subject of inquiry under Rule 60. "Courts can always consider questions as to subject matter jurisdiction whenever raised and even sua sponte." *U.S. v. White, 139 F.3d 998 cert den 119 S.Ct 343, 525 U.S. 393, 142 L.Ed.2d 283 (1998).*

50. The remand Order is void ab initio for want of jurisdiction in the state court. Want of, and acts excess of, subject matter jurisdiction can never be cured after the fact. Furthermore,

Plaintiff Curtis was named a nominal defendant in the estates probate suit and simply cannot be consolidated with a plaintiff that has named her a defendant in the same lawsuit.

STANDARD OF REVIEW

51. Rule 60(b) motions are reviewed for abuse of discretion. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999); Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000).*

52. However, motions under Rule 60(b)(4), on the ground that a judgment is void are reviewed de novo. *Burke v. Smith, 252 F.3d 1260,1263 (11th Cir. 2001).*

WHEREFORE, Petitioner respectfully requests the motion for consolidation be granted.

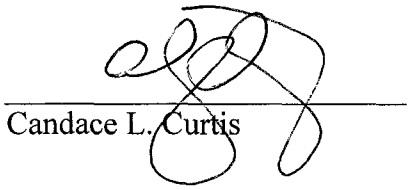
Respectfully submitted,

October 5, 2016

Candace L. Curtis

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Defendants and they are opposed to the relief requested herein.



Candace L. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 5th day of October, 2016, on the following via email and deposit in USPS Priority Mail:

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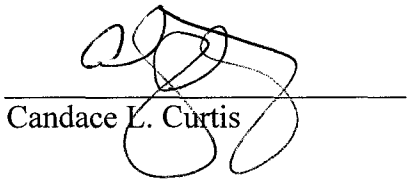
Attorney for Anita Brunsting

I hereby certify that a true and correct courtesy copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on all parties this 5th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.



Candace L. Curtis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL.*	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S ADOPTION AND JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants Honorable Judges Christine Riddle Butts and Clarinda Comstock and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' "Addendum of Memorandum in Support of RICO Complaint" and would respectfully show the Court as follows:

1. Adoption of arguments raised in the Motion to Strike [Doc. 38].

In the interest of justice and judicial economy, and pursuant to FED. R. CIV. P. 10(c), the Harris County Defendants hereby adopt and incorporate by reference as if fully set forth herein, the arguments and authority contained in Jill Young's Motion to Strike [Doc. 38]. This Court should strike Plaintiffs' Addendum [Doc. 26], because it is not a valid supplemental or amended Complaint under FED. R. CIV. P. 15. Plaintiffs appear to concede they are not amending their Complaint, while at the same time attempting to incorporate facts from other pleadings in support of their Complaint [Doc. 26, ¶ 7]. Plaintiffs attempt, by this Addendum, to incorporate facts stated

in a Motion for Sanctions and a Motion for Relief under FED. R. CIV. P. 60 filed in a *closed* federal court file. *Id.*[1] This is not a proper pleading recognized by the Federal Rules of Civil Procedure. Accordingly, this Addendum should be stricken.

2. The Addendum does not challenge the merits of the Harris County Defendants' Motion to Dismiss.

Assuming *arguendo* the Court allows the Addendum in support of Plaintiffs' Complaint, it does not state any facts that would support a claim against the Harris County Defendants. Indeed, the facts contained in the Motion for Relief attached to the Addendum merely recite the facts previously complained of in the Complaint. Plaintiffs complain about being ordered to mediation with "another crony" [Doc. 26, ¶¶ 43, 99] and delay created by removing summary judgment motions from the docket [*Id.*, ¶¶ 39-42]. Plaintiffs' pleadings (Addendum included) fail to confer subject matter jurisdiction and fail to state a claim against the Harris County Defendants.

CONCLUSION & PRAYER

The Addendum filed is an improper pleading and should be stricken. Even assuming the Addendum is considered a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to establish the Court has subject matter jurisdiction or that they have properly stated a claim against the Harris County Defendants.

For the reasons set forth above, the Harris County Defendants request the Court grant the Motion to Strike the Plaintiffs' Addendum [Doc. 26], and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly

[1] *Candace Louise Curtis v. Anita Kay Brunsting*, ***closed*** Case No. 4:12-cv-00592 (J. Hoyt), [Doc. 112].

entitled.

Dated: October 13, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
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OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF CONFERENCE

The undersigned certifies that on October 12, 2016, I emailed the Plaintiffs to inquire as to whether they would withdraw their Addendum. On October 13, 2016, Rik Munson responded and did not agree to withdraw it; therefore the relief sought in this Motion is necessary.

/s/ Laura Beckman Hedge
Laura Beckman Hedge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 13th day of October, 2016, via ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
Plaintiffs,	§	
	§	Civil Action NO. 4:16-CV-01969
v.	§	
	§	The Honorable Alfred Bennett
Kunz-Freed et al.,	§	
Defendants	§	

Plaintiffs' Answer to Defendant Steven Mendel's Motions to Dismiss (Dkt 36) Pursuant to Federal Rules of Civil Procedure 12(b)(6)

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I. INTRODUCTION

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas individually and as private attorneys general alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement incorporated into the RICO complaint by reference in response to Defendants Albert Vacek, Jr. and Candace Kunz-Freed's September 7, 2016 motions to dismiss (Dkt 19 and 20) claiming a want of specific factual allegations and other affirmative defenses.

3. On September 30, 2016, Defendant Steven Mendel filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), (Dkt 36).

4. Mr. Mendel's motion also states that it is filed on behalf of Defendant Bradley Featherston. However, Mr. Featherston has refused to accept service and has not filed his waiver.

II. THE ISSUES

A. Defendant Steven Mendel advances the Texas doctrine of attorney immunity;

B. States that he never had an attorney-client relationship with either of the plaintiffs;

C. States that he only served as attorney in the defense of co-trustee Anita Brunsting involving a "*related probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, Estate of Nelva Brunsting, Deceased";*

D. States that the allegations are vague, conclusory and fail to provide him with sufficient notice;

E. That Mr. Mendel is current counsel for Co-Trustee Anita Brunsting;

F. That it is impossible for him and Mr. Featherston to have been involved in a sham mediation because no mediation occurred.

G. Mendel, like Anita and Amy Brunsting, introduces a new appellation for the "extortion instrument" not previously found in any pleadings called a Qualified Beneficiary Trust or "QBT".

III. SUMMARY OF THE ARGUMENT

Jurisdiction

5. Each Defendant's motion to dismiss has thus far argued that the case before the court arises from a "probate matter" involving administration of an estate.

6. Plaintiffs challenge any claim of state court jurisdiction over Brunsting trust related matters. All of these Defendants' claims, including immunity, turn on inquiry into subject matter jurisdiction.

Metamorphosis

7. Plaintiff Candace Louise Curtis began this journey in the Southern District of Texas February 27, 2012 (4:12-cv-592). From there it evolved into a Fifth Circuit Appeal (12-20164) and returned to the Southern District of Texas January 9, 2013 (704 F.3d 406).

8. From there, Defendant Jason Ostrom arranged a remand to Harris County Probate Court No. 4, (first as 412249-402, then as 412249-401). Once in the probate court the Curtis v Brunsting trust litigation was mysteriously transformed into the "Estate of Nelva Brunsting" (Exhibit 1 and Dkt 34-9) and thereafter completely dissolved into the abyss like the docket control order and the scheduled trial that disappeared just as mysteriously.

IV. CURTIS V BRUNSTING SURVIVED THE PROBATE EXCEPTION, IS NOT A PROBATE MATTER AND HAS NOTHING TO DO WITH THE ADMINISTRATION OF ANY ESTATE

9. The Fifth Circuit Court of Appeals in *Curtis v Brunsting 704 F.3d 406*, 409-410, held,

> *No. 12-20164*
>
> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At*

> *the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust.*
>
> *Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*
>
> *HN6 Assets placed in an inter vivos trust generally avoid probate, since such assets are owned by the trust, not the decedent, and therefore are not part of the decedent's estate. In other words, because the assets in a living or inter vivos trust are not property of the estate at the time of the decedent's death, having been transferred to the trust years before, the trust is not in the custody of the probate court and as such the probate exception is inapplicable to disputes concerning administration of the trust.*
>
> *HN7 Any property held in a revocable living trust is not considered a probate asset. Avoidance of probate perhaps is the most publicized advantage of the revocable living trust. Assets in a living trust are not subject to probate administration*

10. Curtis v Brunsting has been held not to be litigation related to the Estates of Elmer or Nelva Brunsting. Plaintiff Curtis is a beneficiary of inter vivos trusts and not an heir to either Estate, to which "The Trust" is the only heir in fact (Dkt 41-2 and 41-3).

Immunity

11. All immunity defense claims turn on the question of subject matter jurisdiction.

12. Mendel claims he only served as an attorney in the defense of "co-trustee" Anita Brunsting, in litigation involving a "*probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, Estate of Nelva Brunsting, Deceased"* and, thus, claims the protection of the Texas Attorney Immunity Doctrine.

13. While refusing resolution on the merits, these Defendants, in concert, attempted to intimidate Plaintiff Curtis into agreeing to mediate, to avoid rendering unfavorable determinations that would have subjected the Court's want of jurisdiction to scrutiny.

14. The effort to avoid the obvious want of jurisdiction in the probate court, and the deliberate attempts to imposter jurisdiction while avoiding determination on the merits, cannot rationally be denied as is firmly evidenced in the transcript of March 9, 2016. (Dkt 26-16)

15. Defendants portray this conduct as judicial and litigious, but it is neither and the conduct is evidenced by the various, self-authenticating, court records.

16. Defendants have attempted to overturn the federal Fifth Circuit after being on the losing end of a fully litigated federal appellate determination and have since attempted to erase the federal court rulings and the federal injunction, by subterfuge.

17. "The Trust" was inarguably under the in rem jurisdiction of a federal Court when related claims were filed in state courts in Harris County Texas in the name of the Estates of Elmer and Nelva Brunsting. (Dkt 34-5 and 34-7)

18. Mr. Mendel does not provide any exhibits to support his claims and Plaintiffs are unaware of any instance in which Mr. Mendel or anyone associated with his firm filed an appearance, filed a motion or filed a responsive pleading in "Curtis v Brunsting".

19. Defendants can only show they filed motions and pleadings in the "Estate of Nelva Brunsting" and even when cases are consolidated for all purposes they do not lose their separate identities. What happened to Curtis v Brunsting after the remand to state probate court?

"Curtis v Brunsting" vs. "Estate of Nelva Brunsting"

20. There are neither trustees nor beneficiaries involved in any "Estate" litigation and there are neither heirs nor executors nor inheritance expectancies involved in any "trust" related litigation. The alleged co-trustees only exist in the context of "the trust" and, as it relates to the estate, the trust is the only heir in fact.[1]

21. As previously shown (Dkt 41, ln 25) Candace Curtis' breach of fiduciary lawsuit against Anita and Amy Brunsting filed in the federal court on February 27, 2012, involves only the Brunsting trusts Curtis v Brunsting 704 F.3d 406, 409-410 (Dkt 26-17). Defendant Mendel cannot show where he ever responded to a Curtis v Brunsting motion (Dkt, 26-11, 26-14) even though all they ever addressed in the "estate of Nelva Brunsting" pleadings were the money cow trusts (Dkt 26-5, 6, 8, 9, 10, 13, 20).

22. The pleadings filed by Jason Ostrom in the probate court all bear the heading of "Estate of Nelva Brunsting" except notices of the federal pleadings and each of those bears an "Estate of Nelva Brunsting" cover page.

Jurisdiction

23. Because the trust res was under the in rem jurisdiction of a federal court when the estate lawsuit was filed in Harris County Probate 4, none of the Trust related claims were properly placed before that court.

24. As noted, the trust is the only heir to either estate and Carl Brunsting has no individual standing to bring any estate claims other than to challenge the wills, which he did not.

[1] Dkt 41-2 and 41-3 Wills of Elmer and Nelva Brunsting

25. When we strip away Trust related claims from Bayless' "Estate" complaint nothing remains of the estate lawsuit. All of Bayless probate court claims involve the Trust and nothing but the Trust.

26. Even the District Court suit against Freed was filed in a court that could not take cognizance of a res in the custody of the federal Court and although an argument could validly be made against Vacek and Freed in the name of Elmer and Nelva Brunsting's Estates, they would none-the-less need to have been brought in the court having jurisdiction over the res. The question of whether or not the heir-in-fact Trust was the real party in interest and not the Estates would also need to be resolved.

27. A proper consolidation motion would have Curtis v Brunsting at the top in the heading, with the later filed cases each listed separately below that, one atop the other. Defendants instead chose to play the trust buster game of dissolving the distinctions between trust and estate.

28. They claim there was no conspiracy, but how do they explain the inarguable existence of public records evidencing these facts?

29. Want of subject matter jurisdiction in the probate court over any trust related matters strips these defendants of their attorney immunity defense and their conduct is subject to scrutiny in these proceedings, unclothed in the a priori illusion of legitimacy.

Notice and Meaningful Opportunity to Be Heard

30. The cornerstone of Due Process is fundamental fairness. Inherent in the notion of fairness is the right to know the nature and cause of an action, to be apprised of the claims and to have a meaningful opportunity to defend by way of answer or explanation. This is the essence of Rule

12(b)(6). It is not necessary that Defendant understand the law or the elements of a RICO claim, but need only be apprised of the facts that Plaintiff relies upon for their claim.

31. In his Rule 12(b)(6) motion Mendel claims the complaint fails to apprise him of sufficient facts to provide him with notice, while at the same time claiming to act as counsel for opposing litigants with extensive knowledge of contrary facts.

32. It is difficult to conceive of how Mr. Mendel could have insufficient notice of facts when Plaintiffs, in response to motions making similar claims, simply point to public records in the very same actions Mr. Mendel claims to have been involved in as an attorney.

Creative Pleading and Something Called a "QBT"

33. Mr. Mendel's Rule 12(b)(6) Motion, like Anita and Amy Brunsting's, introduces for the first time in any pleadings, in any related action in any court, over a period of nearly five years, introduces something they call a "Qualified Beneficiary Trust" (QBT) allegedly drafted by Defendant Albert Vacek, Jr.

34. Defendants do not provide exhibits in support of this claim of facts and Docket entries 30, 35 and 36 are the only pleadings to be found in any court containing reference to a "QBT".

35. Plaintiffs' RICO complaint defines the "extortion instrument" at Claim number 24 paragraph 133, as *"the heinous 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (hereinafter the "8/25/2010 QBD" or "Extortion Instrument")"*.

36. One of the three versions of the 8/25/2010 QBD was filed by Defendant Anita Brunsting's Counsel Bradley Featherston in the Estate of Nelva Brunsting 412249-401, on

December 8, 2014, and is included in the Addendum to Plaintiffs' RICO complaint with the other versions, Dkt 26-20 at E1349-E1386.

37. Plaintiffs' demand these Defendants produce this "QBT" and certify it for whatever it is they are claiming it to be and, while they are at it, Plaintiffs' demand they produce the 8/25/2010 QBD, the instrument referred to by Defendants Amy, Anita, Brad and Neal, in their joint June 26, 2015 no-evidence motion for partial summary judgment, and qualify it as evidence for whatever they claim it to be as well.

Intimidation with the Extortion Instrument

38. As stated in the Addendum, on June 26, 2015 Defendants Anita and Amy Brunsting, through their attorneys, Bradley Featherston and Neal Spielman, filed a "No-Evidence Motion for Partial Summary Judgment" (DKT 26-5) involving an instrument called "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" or "QBD".

39. Plaintiff Curtis responded by filing an "Answer with Motion and Demand to Produce Evidence" (Dkt 26-11). As the Addendum states, Defendants tried to make good on their "no-contest clause" extortion threats when they filed their Joint No-Evidence Motion for Partial Summary and Declaratory Judgement (Dkt 26-5) and then removed their no-evidence motion from calendar, with their tail between their legs, when Plaintiff Curtis filed her answer and demand to produce the archetype of the instrument. (Dkt 26-11).

40. Suddenly there is no more docket control order, no more dispositive motion hearings and no more trial date, allegedly because of an "emergency Motion" over the "dissemination" of illegal wiretap recordings by Anita Brunsting's counsel Bradley Featherston.

41. Neal Spielman and Stephen Mendel then show up on March 9, 2016 (Dkt 26-16 Transcript) waiving the Gregory Lester/Jill Willard Young report in the air (Dkt 26-9) and talking about how the no contest clause in the illicit QBD instrument had been held to have been validly drafted by Vacek & Freed, (according to the Gospel of Jill Willard and Gregory Lester), and that Plaintiffs Candace Curtis and Carl Brunsting would take nothing if the court were to rule on the no contest clause. It is literally impossible to view any of that as an estate matter.

42. Mr. Mendel was personally present at the September 10, 2015 hearing on Gregory Lester's application for authority to retain Jill Young and was personally present at the March 9, 2016 hearing scheduled as a result of Plaintiff Curtis request to have dispositive motions placed back on the hearing calendar (Dkt 26-15 Request for Hearing).

43. The only thing indisputable in that transcript of hearing (Dkt 26-16) is that every effort was made to pretend the court had jurisdiction, to avoid setting dispositive motions, to avoid producing the extortion instrument and determination on the merits, to avoid joinder of closely related cases, and to attempt intimidation to cause Plaintiff Curtis to think she needed to get out her check book to pay for a mediation to avoid taking nothing under the "no contest clause" of the heinous "QBD" extortion instrument Defendants refuse to produce. (Dkt 26-16)

44. It was Carole Brunsting and not Plaintiff Curtis who cancelled the scheduled mediation (Exhibit 2)

45. The Defendants have had almost five years to produce their precious "QBD" and after having refused or otherwise failed to do so, it has somehow become a "QBT".

46. The United States Attorney's Criminal Resource Manual CRM 2403 defines Extortion by Force, Violence, or Fear as follows:

> *In order to prove a violation of Hobbs Act extortion by the wrongful use of actual or threatened force, violence, or fear, the following questions must be answered affirmatively:*
>
> 1. *Did the defendant induce or attempt to induce the victim to give up property or property rights?*
> 2. *Did the defendant use or attempt to use the victim's reasonable fear of physical injury or economic harm in order to induce the victim's consent to give up property?*

47. Both of these inquiries are answered by the transcript of the March 9, 2016 status conference, set because of Plaintiffs Curtis' request for setting. (Dkt 26-15)

48. Defendants Anita and Amy Brunsting and now Stephen Mendel have all filed motions to dismiss under Rule 12(b)(6), (Dkt 30, 35, 36) claiming they "believe" the instrument referred to as the extortion instrument is some Qualified Beneficiary Trust or "QBT".

Mediation

49. The chronology of events provided in the Addendum to Plaintiffs' complaint (Dkt 26) beginning at Item VIII, ln. 62, pg. 12, shows the sequence of events compelling Plaintiffs to bring claims involving impartial forum, access to the court and other due process, civil rights, fraud and related racketeering claims.

50. As the Complaint makes clear in Claims 16-21, illegal wiretap recordings were disseminated by certified mail (July 2015), among counsel for the parties to the Brunsting related lawsuits, after Defendants filed their June 26, 2015 no evidence motion (Dkt 26-5). There was no perceivable legal relationship between those recordings and any substantive matter then pending.

51. Dissemination of the recordings was none-the-less used as the excuse for suspending the litigation after Defendants had set their no-evidence motion for hearing and after Bayless had set her summary judgment motion for hearing, but were then used as an excuse to remove summary

judgement hearings and trial, without notice, without hearing and without an order, after Plaintiff Curtis filed her Answer and Demand to Produce Evidence (Dkt 26-11).

52. Suddenly, an emergency motion involving dissemination of irrelevant and illegally obtained private telephone communications replaces meritorious resolution of the controversy, and there is no evidentiary support for any scheduling changes in the record.

Wiretap Recordings

53. All three Defendants, Anita, Amy and Mendel offer a completely different version of the facts regarding wiretap recordings from that contained in the Complaint, as verified by the probate court record. As with all of the contrary factual assertions made by these Defendants, they do not provide any form of affidavit or exhibits in support of their claims.

54. Plaintiff Curtis' wiretap brief gives the lie to these claims (Exhibit 3 attached) as does Defendant Anita and Amy Brunsting's reply to Carl Brunsting's Emergency Motion for a Protective Order (Dkt 26-8). The other exhibits in the record relating to the wiretap recordings are Dkt 26-6-Carl Brunstings motion for protective order and, Dkt 26-12- transcript of protective order hearings.

V. DEFENDANT DISPLAYS A PENCHANT FOR ARGUING HIS OWN MISSTATEMENTS

55. Defendant Mendel misstates the Complaint and then makes facially-compelling arguments against the fallacy of his own claims (Dkt 36 Pg. 1, Ln. 1.2):

> *"By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping"*

56. Mr. Mendel does not quote any part of the Complaint nor does he reference any particular provisions of the Complaint with specificity. The claims relating to wiretap activity are numbered 16-21. Claims 16-19 specifically allege "manipulation" occurring in February of 2015 regarding four different recording segments, while claims 20 and 21 allege "in Concert Aiding and Abetting: Spoliation, Destruction and/or Concealing Evidence".

57. While Mendel would lead the Court to believe the Complaint alleges Featherston was involved in the recordings themselves, the Complaint makes no such claim and no such claim is necessary to a claim of aiding and abetting.

58. The act of placing those recordings in the U.S. Mail amounts to participation, as those recordings were used in a conspiracy to deprive Plaintiff Curtis of the honest services of a court.

59. The RICO allegations include statements such as that contained in claim 21 at paragraph 129:

> *Implicit in the assertion the recordings were relevant and the content admissible, Defendants claimed to possess personal knowledge that: "(1) the recording device was capable of recording the events offered in evidence; (2) the operator was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers on the tape are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement."*

60. Mendel however, at paragraph 1.2, refers to such statements as vague, speculative, and conclusory and based upon inference, which more accurately describes the motion to dismiss than the complaint.

61. Another example of Mendel's proclivity for arguing his own misstatements is paragraph 127 as follows:

> *On or about July 1, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Bradley Featherston, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly cause illegal wiretap recordings of private telephone conversations between Carl Brunsting and his wife Drina Brunsting, to be delivered by certified mail to Plaintiff Curtis and the third party attorneys for parties in multiple pending lawsuits, in violation of 18 U.S.C. §2511(1)(c) and Texas Penal Code 16.02. The illegal wiretap recordings selectively disseminated on CD-ROM, are believed to have been made on or about March and April 2011. The CD contained items which were Bates numbered 5814 to 5840. Included among those items were the following four audio recordings:*[2]

62. One is curious to know where Mendel gets the notion Featherston is "*alleged to have engaged in illegal wiretapping"*? Dissemination of illegally obtained wiretap recordings violates the wiretap laws, and is the actual participation Mr. Featherston is accused of.

The Estate of Nelva Brunsting

63. As has been shown, the Fifth Circuit (Dkt 34-4) distinguished between the Brunsting Trust litigation and any prospective probate of the Estates of Elmer or Nelva Brunsting, using the same information available to the probate court, "the Wills of Elmer and Nelva Brunsting" (Dkt 41-2 and 41-3) and in their analysis the Fifth Circuit determined that Brunsting trust assets were not property of either estate and that the trust was in fact the only estate heir.

The Brunsting Trusts

64. Plaintiff Curtis is a beneficiary of an inter vivos trust, not an heir to any estate.

65. Plaintiff Curtis' beneficial interest is property, not an inheritance or expectancy.

66. The estate has no standing to bring claims against beneficiaries of the trust, alleging trespass against the heir in fact (trust), simply because the alleged trespass occurred during the

[2] Excerpted from Carl Brunstings Motion for Protective Order filed July 17, 2015.

lifetime of a grantor. The trust was also in the custody of the federal Court when all of the state court actions were filed.

VI. STANDARD OF REVIEW

67. Rule 12(b)(1) permits the dismissal of an action for the lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "If [a federal] court determines at any time that it lacks subject-matter jurisdiction, [it] must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Berkshire Fashions, Inc. v. M V. Hakusan II,* 954 F.2d 874, 880 n.3 (3rd Cir.1992) (citing *Rubin v. Buckman,* 727 F.2d 71, 72 (3d Cir. 1984)) (reasoning that "[t]he distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former may be asserted at any time and need not be responsive to any pleading of the other party.") Since federal courts are considered courts of limited jurisdiction, absent jurisdiction conferred by statute, they lack the power to adjudicate claims. *See, e.g., Stockman v. Fed Election Comm'n,* 138 F.3d 144, 151 (5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard,* 35 F.3d 222, 225 (5th Cir. 1994). Therefore, the party seeking to invoke the jurisdiction of a federal court carries "the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Vantage Trailers, Inc. v. Beall Corp.,* 567 F.3d 745, 748 (5th Cir. 2009) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois,* 533 F.3d 321, 327 (5th Cir. 2008); *see also Stockman,* 138 F.3d at 151.

68. In this case, jurisdiction is challenged under both Rule 12(b)(1), and the lack of sufficient factual allegations under Rule 12(b)(6). Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under the demanding strictures of a Rule 12(b)(6) motion, "[t]he plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the

allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.,* 94 F.3d 189, 194 (5th Cir. 1996) (citing *Mitchell v. McBryde,* 944 F.2d 229, 230 (5th Cir. 1991)). Dismissal is appropriate only if, the "[f]actual allegations [are not] enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007).

69. In light of Federal Rule of Civil Procedure 8(a)(2), "[s]pecific facts are not necessary; the [factual allegations] need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. at 1964. Evenso, "a plaintiffs obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555, 127 S. Ct. at 1964- 65 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986).

70. Therefore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed.2d 868 (2009) (quoting Twombly, 550 U.S. at 570, 127 S. Ct. at 1974). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556, 127 S. Ct. at 1955). "But where the well-pleaded facts do not permit the court to infer more than the mere

possibility of misconduct, the complaint has to alleged-but it does not have to 'show -'that the pleader is entitled to relief.'" Ashcroft, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

71. Nevertheless, when considering a 12(b)(6) motion to dismiss, the Court's task is limited to deciding whether the plaintiff is entitled to offer evidence in support of his or her claims, not whether the plaintiff will eventually prevail. Twombly, 550 U.S. at 563, 1969 n.8 (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed.2d 90 (1974)); see also Jones v. Greninger, 188 F.3d 322,324 (5th Cir. 1999).

VII. CONCLUSION

72. The Honorable Kenneth Hoyt stated at the injunction hearing April 9, 2013 that all that was needed to wrap the trust litigation up was to distribute the assets, and he was correct.

73. Defendants Anita and Amy Brunsting refuse to horror any of the duties of the office while their attorneys use the 8/25/2010 QBD to threaten Plaintiff Curtis and her disabled brother Carl Brunsting with loss of property rights for bringing action to protect those rights and compel specific performance. Each of these Defendant attorneys fully intended to line their own pockets with filthy lucre at the expense of Plaintiff Curtis, her sister Carole, and her disabled brother Carl.

74. Probably the most alarming aspect of all this is that in a situation where the probate court actually had jurisdiction the exact conduct complained of here would all too often be granted Judicial and Texas Attorney Immunity without resort to the canons to consider whether such conduct is in fact judicial or litigious.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Motion to Dismiss (Dkt 36) filed by Defendant Stephen Mendel, September 30, 2016.

Respectfully submitted October 14, 2016,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 13th day of October, 14 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

The purpose for creating an inter vivos trust is to keep attorneys from stealing assets under the usual probate charade. These attorneys with the blessings of the Probate Court have tried to erase those distinctions hoping to convert assets of the trust into assets involved in a controversy over the administration of an estate.

DV

DATA-ENTRY
PICK UP THIS DATE

FILED
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PROBATE COURT 4

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S APPLICATION FOR PARTIAL DISTRIBUTION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Application for Partial Distribution of Trust Funds and in support thereof would show the Court as follows:

1.

Plaintiff is a beneficiary under the Brunsting Family Trust, which is currently the subject of multiple lawsuits pending in this Court, one of which was transferred to this Court from the Federal Court where it had originally begun. That transfer was subject to a Temporary Injunction that had been ordered by the Federal Court that enjoined the distribution of Trust Funds without a court order. *See* Ex. A, Injunction.

2.

Plaintiff has a right to receive funds from this Trust as necessary for her health, education, maintenance and support. The Trust is currently subject to litigation because of the Trustees' misdeeds, and those Trustees are enjoined from exercising their discretion. *See* Ex. A, Injunction. There is no allegation that Plaintiff has breached her fiduciary duty to the Trust and thus no possibility that she will have to disgorge ill-gotten gains back to the Trust. The only question surrounding Plaintiff's ultimate distribution is how much money she will ultimately receive after the Defendant Trustees are found guilty of breaching their duties.

Because no Trustee can exercise discretion in favor of Plaintiff and make a distribution of her funds to her, Plaintiff moves this Court to make a partial distribution of her share of the Trust to her in the amount of $40,000.00. Plaintiff's interest in the Trust is well in excess of $40,000.00. Based upon the most recent bank statements available to Plaintiff, the total cash held by the Trust is $695,805.63, which makes Plaintiff's 1/5 share equal to $139,161.13. That value does not include real property or stocks which are held in addition to that cash. That value also does not include property improperly distributed to or on behalf of Defendants Anita, Amy or Carole Brunsting and which Plaintiffs anticipates will be ordered restored to the Trust. Plaintiff needs this distribution for her maintenance and support and requests that the Court authorize and order the same.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Candace Curtis respectfully prays that her Application for Partial Distribution of Trust Funds be granted, that the Trustee be ordered to distribute to Candace Curtis the sum of $40,000.00 out of the Brunsting Family Trust, and for such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

Candace Curtis

OF COUNSEL:

ostrommorris, PLLC

BY: ______________________
JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 5th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
Houston, Texas 77079
281.759.3213
281.759.3214 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

____
Jason B. Ostrom/R. Keith Morris

02062015:11:43:P0072

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER
<u>PRELIMINARY INJUNCTION</u>

I. INTRODUCTION

Before the Court is the *pro se* plaintiff's, Candace Louise Curtis, renewed application for an *ex parte* temporary restraining order, asset freeze, and preliminary and permanent injunction [Dkt. No. 35]. Also before the Court is the defendants', Anita Kay Brunsting and Amy Ruth Brunsting, memorandum and response to the plaintiff's renewed motion [Dkt. No. 39]. The Court has reviewed the documents presented, including the pleadings, response and exhibits, received testimony and arguments, and determines that the plaintiff's motion for a temporary injunction should be granted.

II. BACKGROUND

A. Procedural Background

The plaintiff filed her original petition on February 27, 2012, alleging that the defendants had breached their fiduciary obligations under the Brunsting Family Living Trust ("the Trust"). Additionally, the plaintiff claimed extrinsic fraud, constructive fraud, intentional infliction of emotional distress, and sought an accounting, as well as a

recovery of legal fees and damages. The Court denied the plaintiff's request for a temporary restraining order and for injunctive relief. However, concurrent with the Court's order denying the relief sought by the plaintiff, the defendants filed an emergency motion for the removal of a *lis pendens* notice that had been filed by the plaintiff on February 11, 2012, prior to filing her suit.

The defendants sought, by their motion, to have the *lis pendens* notice removed in order that they, as the Trustees of the Trust might sell the family residence and invest the sale proceeds in accordance with Trust instructions. After a telephone conference and consideration of the defendants' argument that the Court lacked jurisdiction, the Court concluded that it lacked jurisdiction, cancelled the *lis pendens* notice, and dismissed the plaintiff's case.

The plaintiff gave notice and appealed the Court's dismissal order. The United States Court of Appeals for the Fifth Circuit determined that the Court's dismissal constituted error. Therefore, the Fifth Circuit reversed the dismissal and remanded the case to this Court for further proceedings. This reversal gave rise to the plaintiff's renewed motion for injunctive relief that is now before the Court.

B. Contentions of the Parties

The plaintiff contends that she is a beneficiary of the Trust that the defendants, her sisters, serve as co-trustees. She asserts that, as co-trustees, the defendants owe a fiduciary duty to her to "provide [her] with information concerning trust administration, copies of trust documents and [a] semi-annual accounting." According to the plaintiff,

the defendants have failed to meet their obligation and have wrongfully rebuffed her efforts to obtain the information requested and that she is entitled.

The defendants deny any wrongdoing and assert that the plaintiff's request for injunctive relief should be denied. The defendants admit that a preliminary injunction may be entered by the Court to protect the plaintiff from irreparable harm and to preserve the Court's power to render a meaningful decision after a trial on the merits. *See Canal Auth. of State of Fla. V. Calloway*, 489, F.2d 567, 572 (5th Cir. 1974). Rather, the defendants argue that the plaintiff had not met her burden.

III. STANDARD OF REVIEW

The prerequisites for the granting of a preliminary injunction require a plaintiff to establish that: (a) a substantial likelihood exists that the plaintiff will prevail on the merits; (b) a substantial threat exists that the plaintiff will suffer irreparable injury if the injunction is not granted; (c) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may do to the defendants; and, (d) granting the injunction will not disserve the public interest. *See Calloway,* 489 F.2d at 572-73.

IV. DISCUSSION AND ANALYSIS

The evidence and pleadings before the Court establish that Elmer Henry Brunsting and Nelva Erleen Brunsting created the Brunsting Family Living Trust on October 10, 1996. The copy of the Trust presented to the Court as Exhibit 1, however, reflects an effective date of January 12, 2005. As well, the Trust reveals a total of 14 articles, yet Articles 13 and part of Article 14 are missing from the Trust document. Nevertheless, the Court will assume, for purposes of this Memorandum and Order, that the document

presented as the Trust is, in fact, part of the original Trust created by the Brunstings in 1996.

The Trust states that the Brunstings are parents of five children, all of whom are now adults: Candace Louise Curtis, Carol Ann Brunsting; Carl Henry Brunsting; Amy Ruth Tschirhart; and Anita Kay Brunsting Riley. The Trust reflects that Anita Kay Brunsting Riley was appointed as the initial Trustee and that she was so designated on February 12, 1997, when the Trust was amended. The record does not reflect that any change has since been made.

The plaintiff complains that the Trustee has failed to fulfill the duties of Trustee since her appointment. Moreover, the Court finds that there are unexplained conflicts in the Trust document presented by the defendants. For example, The Trust document [Exhibit 1] shows an execution date of January 12, 2005.[1] At that time, the defendants claim that Anita Kay served as the Trustee. Yet, other records also reflect that Anita Kay accepted the duties of Trustee on December 21, 2010, when her mother, Nelva Erleen resigned as Trustee. Nelva Erleen claimed in her resignation in December that she, not Anita Kay, was the original Trustee.

The record also reflects that the defendants have failed to provide the records requested by the plaintiff as required by Article IX-(E) of the Trust. Nor is there evidence that the Trustee has established separate trusts for each beneficiary, as required under the Trust, even though more than two years has expired since her appointment.

[1] It appears that Nelva Erleen Brunsting was the original Trustee and on January 12, 2005, she resigned and appointed Anita Brunsting as the sole Trustee.

In light of what appears to be irregularities in the documents and the failure of the Trustee to act in accordance with the duties required by the Trust, the Court ENJOINS the Trustee(s) and all assigns from disbursing any funds from any Trust accounts without prior permission of the Court. However, any income received for the benefit of the Trust beneficiary is to be deposited appropriately in an account. However, the Trustee shall not borrow funds, engage in new business ventures, or sell real property or other assets without the prior approval of the Court. In essence, all transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in this case.

The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.

It is so Ordered

SIGNED on this 19th day of April, 2013.

Kenneth M. Hoyt
United States District Judge

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING PARTIAL DISTRIBUTION OF TRUST FUNDS

On this day came to be considered the Application for Partial Distribution of Trust Funds filed by Candace Louis Curtis, and the Court is of the opinion and finds that it should be granted. It is, therefore,

ORDERED that the Trustee of the Brunsting Family Trust pay to Candace Curtis the sum of $40,000.00 within seven days of this Order. It is further,

ORDERED that this distribution shall be recorded as a partial distribution of the total value of Candace Curtis's share of the Brunsting Family Trust.

SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
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713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

Subject:	Re: Automatic reply: Cause No. 412249101 and 413249401
From:	Bobbie G Bayless (bayless@baylessstokes.com)
To:	cbrunsting@sbcglobal.net; steve@mendellawfirm.com; nspielman@grifmatlaw.com; occurtis@sbcglobal.net; zfoley@thompsoncoe.com;
Date:	Tuesday, July 5, 2016 8:56 AM

Carole--it isn't clear from your email, but are you asking to reset this to another date? If so, we need to try to see about getting on Judge Davidson's calendar with another date asap.

----- Original Message -----

From: Carole Brunsting
To: Bobbie G Bayless ; Steve Mendel ; Neal Spielman ; Candace Curtis ; Foley, Zandra
Sent: Monday, July 04, 2016 9:22 PM
Subject: Re: Automatic reply: Cause No. 412249101 and 413249401

All
As much as I want to get this case resolved I cannot make the mediation next week. The company I work for was purchased by Schlumberger a couple of months ago and it has caused a lot of changes. Last week we were informed of a company meeting that involves our division on the 12th and my boss strongly suggested I be there as they are going to begin to consolidate the finance departments.

Very sorry to have to do this but I don't really have a choice over the timing.
Thanks
Carole

On Wednesday, June 29, 2016 3:31 PM, Bobbie G Bayless <bayless@baylessstokes.com> wrote:

FYI--I got this automatic reply when I sent the email to Zelda Russell.

----- Original Message -----
From: Zelda Russell
To: Bobbie G Bayless
Sent: Wednesday, June 29, 2016 3:23 PM
Subject: Automatic reply: Cause No. 412249101 and 413249401

I will be out of the office from Monday, June 27, 2016 - Monday, July 4, 2016 returning Tuesday, July 5 16, 2016. If you need to schedule a mediation, please email me and I will reply upon my return to the office on Wednesday,July 5, 2016. Judge Davidson's calendar is full for the month of July. If you need to cancel a mediation, please email Judge Davidson at **mdljudge@yahoo.com**.

Thank you,
Zelda

DV

FILED
8/10/2015 12:00:00 AM
Stan Stanart
County Clerk
Harris County

08112015:1020:P0202

PROBATE COURT 4

NO. 412,249-401

CANDACE LOUISE CURTIS	§	IN PROBATE COURT
Plaintiff,	§	
	§	
	§	
V.	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	HARRIS COUNTY, TEXAS

RESPONSE TO DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

The Court has raised very valid issues regarding the questions before it, and has asked to be briefed. Plaintiff Curtis therefore submits the following analysis of the questions raised and, although seemingly complex at first view, the matter is really quite simple. There is only one primary premise and thus the first principles require answer to only one inquiry, which is whether or not the interception and dissemination of the challenged electronic communications was lawful.

Plaintiff will respectfully show that the greater weight of unrebutted presumptions falls in favor of the illegality of the recordings, and that judicial discretion would best be exercised with caution, as the Court cannot allow dissemination without proof of the legality of the recordings without also becoming a principal to the crime of dissemination.[1]

<u>Summary of the Argument</u>

1. The recordings are evidence of illegally intercepted electronic communications, a second degree felony[2] in Texas with a moderate severity level.
2. Illegally intercepted electronic communications may not be received in evidence nor exchanged under the pretext of discovery in any civil action, as unauthorized possession or dissemination of illegally intercepted electronic communications is a second degree felony which, as noted, the Court would be unwise to participate in.

[1] Collins v. Collins, 904 S.W.2d 792 (Tex. App. 1995)

[2] Texas [Penal] Code Annotated Sections 12.33, 12.35, 16.01 (West 1997); 1997 Tex. Gen. Laws 1051; Texas [Civil Practice and Remedies] Code Annotated Sections 123.002, 123.004 (West 1997); Texas Code of Criminal Procedure Annotated Article 18.20 (West 1997).

3. The burden of bringing forth evidence is on the proponents of the legality and admissibility of the recorded wiretap conversations, as the presumption that intercepted electronic communications found in the possession of third parties, meaning persons not privy to the conversations, are presumed unlawful and the burden of showing that the challenged recordings meet one of the statutory exceptions is upon the Defendant disseminators.
4. The Court is without discretion and no agreement is necessary. Under the circumstances here, the Court must issue a protective order, even if only temporary, pending resolution of the issue of whether or not interception and dissemination of the challenged electronic communications was lawful.
5. The attached exhibits in a chronology of relevant events reveals that the recordings are the fruit of an illicit conspiracy targeting Carl and Drina that did not involve Nelva Brunsting and, Defendants' unanimous claims are defeated in their own words uttered at or about the time of the recordings, as hereinafter more fully appears.

Texas Authority on Admissibility

The admissibility of evidence illegally obtained is tempered by Tex.R.Civ.Evid. 402, which provides in pertinent part that, "[a]ll relevant evidence is admissible, except as otherwise provided ... by statute." Consequently, before the recordings can be held to be inadmissible, the Plaintiff(s) must show their exclusion is required under either the federal or state statute. Section 2511(1) of the federal wiretap statute[3] prohibits the use or disclosure of communications by any person except as provided by statute. *Gelbard v. United States,* 408 U.S. 41, 51-52, 92 S.Ct. 2357, 2363, 33 L.Ed.2d 179 (1972) (witness could not be forced to disclose testimony from illegal wiretap to grand jury).

Section 123.002 of the state wiretap statute states that a party has a cause of action against any person who "divulges information" that was obtained by an illegal wiretap. TEX.CIV.PRAC. & REM.CODE § 123.002.

Section 123.004 states that a party whose communication is intercepted may ask the court for an injunction prohibiting the "divulgence or use of information obtained by an interception." TEX. CIV.PRAC. & REM.CODE § 123.004.

[3] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, more commonly known as the "Wiretap Act," is found at 18 U.S.C. §§ 2510-2522.

Although the Texas wiretap statute does not specifically provide for the exclusion of illegally obtained "communications," the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in section 123.004 are sufficient to rebut the presumption of admissibility under rule 402.

Because the tapes were illegally obtained under the federal and state statutes, the trial court should not allow their dissemination, or admit them into evidence, under the exception provided at Tex.R.Civ.Evid. 402.

The recorded conversations are not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination.

> *To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe. Gelbard, 408 U.S. at 51, 92 S.Ct. at 2362-63; Turner, 765 S.W.2d at 470.*

Exceptions

In addition to the numerous governmental or agency exceptions to the general rule, it is not unlawful to intercept any form of wire, oral or electronic communications between others if one of the persons is a party to the communication or one of the parties has given their consent to the interception. Tex. Civ. Prac. & Rem. Code §123.001(2); Tex. Pen. Code§16.02(c)(3)(A); 18 U.S.C §2511(2)(c); Kotrla v. Kotrla, 718 S.W.2d 853, 855 (Tex.. App. - CorpusChristi 1986); See also, Hall v. State, 862 S.W.2d 710(Tex. App. - Beaumont 1993, no writ); Turner v. PV International Corporation , 765 S.W.2d 455, 469-71(Tex. App. - Dallas 1988, writ denied per curiam, 778S.W.2d 865 (Tex. 1989).

Interception, Possession, and Dissemination

The Right to Privacy is the Controlling Presumption

The right to privacy is held in such high esteem that the U.S. Congress and the Texas Legislature have both made it a felony to illegally intercept, possess or disseminate electronic communications. There are very limited exceptions none of which apply here.

The mandatory but rebuttable presumptions are that the participants to these phone conversations had a reasonable expectation of privacy; that the right has been violated and; that the burden of showing the interception of those electronic communications meets one of the statutory exceptions is upon persons who were themselves not a party to the private electronic

communications, but who we find to be in possession of and disseminating the challenged recordings.

Defendants have produced no evidence tending to show that the intercepted electronic communications meet any of the lawful exceptions and the ball is in their court. If the wiretap recordings cannot be shown by the Defendants to meet one of the statutory exceptions, the recordings are prima facia unlawful, regardless of any alleged motives for their interception.

While no more than the foregoing law and fact summary is essential to the disposition of the singular issue before the Court, it seems necessary to address Defendants' unanimously disingenuous assertions and thus Plaintiff does so with the attached Memorandum.

The attached memorandum on the matter of context and color, with attached exhibits, is hereby incorporated by reference as if fully restated herein.

Plaintiff Curtis respectfully submits the following proposed order.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
American Canyon, California 94503
occurtis@sbcglobal.net
925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

Attorneys for Anita Kay Brunsting

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The Mendel Law Firm, L.P.
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Griffin & Matthews
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nspielman@grifmatlaw.com

Attorneys for Drina Brunsting as
attorney-in-fact for Carl Henry Brunsting:

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Bayless & Stokes
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Attorneys for Carole Ann Brunsting

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dsmith@craincaton.com

CANDACE L. CURTIS

No. 412,249-401

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

TEMPORARY PROTECTIVE ORDER

On August 3, 2015 the Court heard and considered CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER and Defendants' response thereto.

At issue are recordings of intercepted electronic communications between Plaintiff Carl Henry Brunsting and his wife Drina.

After hearing on the merits and reviewing briefs submitted by the parties, the Court is of the opinion that the recordings in point are "Protected Communications" as that term is defined at 18 U.S.C. §§2510(1) & 2510(12) and that a protective order is necessary to protect privacy rights pending disposition of the pending questions at issue.

IT IS THEREFORE ORDERED that any person or entity subject to this Order-including without limitation the parties to this action, their representatives, agents, experts and consultants, all third parties providing discovery in this action, and all other interested persons with actual or constructive notice of this Order -shall adhere to the following terms, upon pain of contempt and any other applicable civil or criminal penalties:

1. No person or entity shall, in response to a request for discovery or subpoena issued in this action, produce any Protected Communication for any third party or person absent further order of this Court.

2. To the extent a Protected Communication is or has already been produced in response to a request for discovery or subpoena issued in this action, any recipient of such production shall (a) immediately surrender any and all documents that contain or

reflect a Protected Communication to real party in interest Carl Henry Brunsting through his Counsel of Record and (b) destroy any copies made of such Protected Communication, as well as any derivative materials that reflect a Protected Communication on any medium of storage whatsoever.

3. Any party to this action that issues a request for discovery or subpoena calling for the production of a Protected Communication shall simultaneously provide the recipient of the discovery request or subpoena with a copy of this Protective Order. To the extent a party to this action has already issued such a request or subpoena, such party shall provide a copy of this Protective Order to the recipient within three (3) business days of the entry of this Order.

4. Any person who receives a request for discovery or subpoena in this action calling for the production of a Protected Communication shall, without revealing the substance or content of a Protected Communication, provide both the issuing party and the Court with a general description of that Protected Communication so that the issuing party can make an application to this Court for production of that Protected Communication, and that Plaintiff Carl Henry Brunsting can respond to that application.

IT IS FURTHER ORDERED that on or before _____, sworn affidavits are to be provided by Defendants Anita Brunsting, Amy Brunsting, and Carole Brunsting, stating any personal knowledge with regard to every recording made since July 1, 2010 within the following categories:

- All audio or video recordings of meetings, conversations, telephone messages, or other communications with Elmer, Nelva, or any of the Brunsting Descendants concerning Brunsting Issues,
- All audio or video recordings of Nelva's execution of any documents.
- All audio or video recordings of evaluations of Nelva's capacity,
- All other audio or video recordings of any Brunsting family member, and
- All investigations made of any Brunsting family member, including any surveillance logs or reports.

The sworn affidavits shall identify every party involved in making the recordings and specify the date, location, and means used to make the recordings, the current location of all original recordings and all copies of all recordings, all parties to whom the contents of recordings have been disclosed, and all uses which have been made of the recordings.

IT IS SO ORDERED!

Signed August, _____, 2015.

_____
Christine Butts, Judge
Harris County Probate Court No. 4

NO. 412,249-401

CANDACE LOUISE CURTIS	§	**IN PROBATE COURT**
	§	
Plaintiff,	§	
	§	
V.	§	**NUMBER FOUR (4) OF**
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	**HARRIS COUNTY, TEXAS**

MEMORANDUM OF FACTS SUPPORTED BY DEFENDANTS' OWN DISCLOSURES

Plaintiff Candace Louise Curtis respectfully submits for the perusal of the Court this memorandum of facts adding to the inquiry context and color revealing the true nature of the intentions behind the unlawful interception and dissemination of the private electronic communications at issue.

Statement of the Issue

Recordings of private electronic telephone conversations between plaintiff Carl Brunsting and his wife Drina Brunsting have been disseminated to all of the parties to the present lawsuits. These recordings, if any, were requested by Plaintiff Brunsting to be produced by the Defendants in the Petition for Deposition Before Suit filed by Carl Brunsting March 9, 2012, when there were no other parties, however, the recordings were not disclosed until July 5, 2015.

Plaintiff Carl Henry Brunsting, along with his wife and attorney in fact Drina Brunsting, challenged the recordings as the product of the illegal interception of electronic communications, in violation of state and federal wiretap laws, and thus seek protective orders.

In DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER Defendants unanimously assume the following postures:

1. *It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee.*

2. *On information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the calls and/or which triggered in accordance with its own operation. Either way, one-if not both-participants had full knowledge that he/she was being recorded.*

3. *Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought.*

A Recital of Known Facts

1. There are known recordings of private phone communications between Carl and Nelva and between Carl and his wife Drina, which are the object of the application for protective order.

2. The recordings were disseminated by Defendant Anita Brunsting, who is not a party to any of the disclosed communications.

3. We have a claim by Carl Henry Brunsting and his wife Drina that the recordings were illegally obtained.

4. We have a unanimous response from all three Defendants asserting upon information and belief that the recordings were legally obtained but answers to interrogatories on the subject indicate that none of them know anything individually.

5. The question of admissibility hinges upon the legality of the interception and dissemination of the communications.

6. A presumption that the right of privacy has been violated is primary and stands unrebutted by competent evidence to the contrary.

7. The burden of proof as to the legality of the acquisition and dissemination of the recordings is on the proponent of the assertions that the recordings were obtained legally and are therefore admissible.

8. The proponent of the legitimacy and admissibility of the recordings objects that declaring the facts necessary to qualify the recordings as legally obtained evidence before dissemination is somehow onerous, but at the same time want carte blanch to disseminate the recordings to persons not privy to the conversations under the auspices of discovery and disclosure.

9. Unless the recordings can be qualified as legally obtained they are inadmissible and cannot be disseminated lawfully.

10. There are questions as to the recordings' origins and Defendants file a joint motion claiming the existence of specific facts while taking no individual responsibility for personal knowledge.

11. Anita Brunsting, through her counsel Brad Featherston, disseminated the recordings and, thus, Anita Brunsting would have at least some personal knowledge regarding the chain of custody and control, and both now share in the culpability and attendant civil liability.

12. Assertions that the recordings were made on an answering machine would indicate personal knowledge by one if not all of the Defendants.

13. An assertion that the recordings were authorized by Carl Brunsting requires evidentiary support from the proponent of the claim, and there has been none.

14. Assertions that Carl Brunsting installed and activated the Answering Machine are inconsistent with the Defendants' emails of the same date of the purchase of the voice recorder showing they were conspiring to get guardianship over Carl.

15. Carl was both incompetent and the proper subject of Defendants' intended guardianship effort or he was competent to install and activate the "Answering Machine" that Defendants insist he made the recordings on. Both of these things cannot be true.

16. In the Bates stamped disclosures there is a receipt for a signal activated SONY digital voice recorder purchased four days before the first dated recording on the disseminated CD. When combined with the attached email and other exhibits talking about getting guardianship over Carl, continuing the Private Investigator over the weekend, knowing where Carl and Drina were and what they were doing at that very point in time, and all of these events in the same time period as other documented activities, provides a presumption that the circumstances and intentions surrounding the acquisition of the recordings are not what Defendants claim, as hereinafter more fully appears.

The hierarchy of presumptions is as follows:

1. The participants to a private telephone conversation have a reasonable expectation of privacy against electronic eavesdropping.

2. The waiver of a known right must be a knowing and intelligent act done with sufficient knowledge of the relevant circumstance and likely consequences, and it must be both a voluntary and an overt act.

3. There is no affirmative evidence of such waiver.

4. Unless rebutted the presumption that the recordings were illegally obtained is not only controlling but the prudent course.

The True Context and Color

The only probative value these recordings could possibly have is in the fact of their very existence. Defendants argue that the content of the challenged recordings adds context and color to the events of the time showing that Nelva was preparing for Carl's alleged divorce. As in all other instances Defendants fail to provide anything but claims of Nelva's intentions based upon the strength of the honor and integrity of their word alone.

Despite all the posturing and game playing the evidence will show the Defendants are intractably disingenuous and that they illegally intercepted the private electronic communications as part of a conspiracy to steal the family inheritance. That conspiracy involved attempts to have

Nelva declared incompetent and to gather what they thought would be evidence to support guardianship over Carl.

The evidence will further show Defendants stalked Nelva through her email and banking activities online, in addition to tapping her phone and recording every conversation involving anyone who spoke with Nelva on the phone, including Plaintiff Curtis in California.

Candace Freed took her instructions from ANITA despite her claims it was Nelva who was making the requests for changes to the trust. (Exhibit A)

The October 25, 2010 phone conference called for by Candace Freed excluded Carl and Nelva and was ultimately about having Nelva declared incompetent, which they failed to achieve by mid-November. The "law firm" did not keep an audio recording of that conference.

There is no evidence Nelva even knew of these changes before Plaintiff Curtis' 10/26/2010 phone call, after which Nelva sent Candace her hand written note repudiating the alleged 8/25/2010 QBD.

Defendant Carole Brunsting sent an email about overhearing Nelva's conversation on the phone with Candace Freed. (Exhibit B)

Freed sends a follow up email regarding the failed attempt at getting Nelva declared incompetent on Nov. 17, 2010, apparently referring to this same conversation. (Exhibit C)

Despite Defendant Amy Brunsting's claims of not being involved before Nelva's death, Amy and Anita corresponded with Candace Freed December 23, 2010 and on several other dates prior to Nelva's demise. (Exhibit D)

On March 8, 2011 Anita emails Carole, Amy and Candace bragging about reminding Nelva she was no longer trustee and no longer had access to the trust. (Exhibit E)

March 17, 2011 Tino (Nelva's caregiver) buys a Sony Digital Voice Recorder, (Brunsting 004570) which shows one ICD-PX312 digital voice recorder purchased by Tino at Best Buy in Houston. (Exhibit F)

March 17 and 18, 2011 emails mention the PI and talk about getting guardianship over Carl. (Exhibit G 1-3)

March 21, 2011 is the record date of first wiretap .wav file (received from Brad on CD 7/5/2015) (See Carl Brunsting Petition for Protective Order)

On March 24 and 25, 2011 there are large trust-prohibited transfers of Exxon Mobil and Chevron Stocks labeled as "gifts". (See Report of Special Master)

On March 29, 2011 Amy and Anita communicated with Freed (Exhibit D)

April 22, 2011 is the record date of second .wav file (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order)

Then on May 11, 23 and 25, and on June 14 and 15, there are more large trust-prohibited transfers of Exxon Mobil and Chevron Stocks. (Report of Special Master)

July 27, 2011 Anita corresponds with Freed (Exhibit D)

August 16, 2011 Anita corresponds with Freed (Exhibit D)

September 20, 2011 Amy and Anita correspond with Freed (Exhibit D)

February 27, 2015 is the record date of the third and fourth .wav files (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order), indicating these two recordings had been excerpted from a master storage disk containing even more undisclosed recordings.

There is an overwhelming volume of evidence clearly showing more of the same pernicious intent, but since the matter before the Court is limited to the singular question of the legality of Protected Communications, Plaintiff Curtis will not respond to the plethora of Defendants' extemporaneous expressions of disingenuous, self-serving bias, and otherwise irrelevant assertions.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
American Canyon, California 94503
occurtis@sbcglobal.net
925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

Attorneys for Anita Kay Brunsting

Bradley E. Featherston
The Mendel Law Firm, L.P.
1155 Dairy Ashford, Suite 104
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brad@meddellawfirm.com

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Attorneys for Drina Brunsting as
attorney-in-fact for Carl Henry Brunsting:

Bobbie G. Bayless
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Attorneys for Carole Ann Brunsting

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Five Houston Center
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Houston, Texas 77010
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CANDACE L. CURTIS

EXHIBIT A

PM TRUST REVIEW MEETING

Signing Date & Time: Wed. Aug. 4th 2 pm.
Fee: _____
Paid: _____ Mail: _____

Client Name: Brunsting, Nelva

Date: 07/30/10 **Estate Size:** 2 mil ±

IRA: Husband - N/A **Wife -** _____

Current Address/Phone: 13630 Pinerock Hou TX 77079

Date of Trust/Restatement: _____ **Previous Amendments?** Yes.

Subtrust Funding Done previously? Yes. DT & ST.

AMENDMENT: ✓ QBD(PAT)✓ ____ Other ____ Instr Ltr ✓ HCPOA✓
✓ ApptSUCCTee/HIPAA✓ ___ ExTPOA ___ ✓COT ___ ✓POA✓ ___ DIR

Anita Kay Riley & Amy Ruth ... Co-tees
or Survivor of Them. Then Most

✓ **Distribution Change (QBD):**

PAT QBD

IF PAT QBD then:

Each beneficiary Trustee of Own Trust: ✓ yes ____ no

except for Carl, Anita & Aimee as Co-tees for Carl
(except they have rt to name Carl as own Succ Tee)
Distribution of PAT: need to

Same as LT except need language
about the last amend (QBD) ltes early distrs.

_____ **Specific Distribution:**

_____ **Ultimate Distribution:**

_____ **HEALTH CARE DOCUMENTS:**

1ST Agent: Carol

2nd Agent: Anita

3rd Amy

IRA TRUST: _____ **yes** _____ **no** For whom? _____ husband _____ wife

Trustees upon disability of Trustor or spouse: _____

Each beneficiary Trustee of own trust? _____ yes _____ no

SS# of Surviving Spouse/Beneficiaries: _____

FUNDING:

Real Estate _____

Which property has NO MORTGAGE? _____

_____ Recording HS Deed

_____ Apply for HS Exemption

Tax-deferred Assets _____

_____ Bank & Brokerage Accounts
_____ Life Insurance
_____ Oil & Gas Interests
_____ Credit Union Accounts
_____ Partnership Interests
_____ CDs
_____ Safe Deposit Box
_____ Stocks and Bonds
_____ Motor Vehicles
_____ Sole Proprietorship Assets
_____ Promissory Notes & Mortgages
_____ Annuities

Additional Documents: _____

NOTES:

Needs new DFPOA -order

Anita

Carol

Amy

Any Name Changes for children? _____ **Any children Predecease?** No.

If Yes, who: _____

FEES:

QUOTED: $ _____ **(Plus Expenses)**

AMOUNT REC'D: None **DATE:** _____

BALANCE DUE: _____

DOCUBANK? _____

Cost Pat QBD 1200.
Hipaa Pkg 250 - med POA
D.F.P.O.A 150.-
Appl. of Succ TEE
New Card.

Courtesy discount $150.-
Cy

Anita - called

Carl has emailed amendments to trust

Anita + Aimee as Co-Tees

Change list under ME

Carol
Anita
Aimee

Financial P.O.A

Anita
Carol
Aimee

Amend to trust /PAT's w/ Aimee to be Co-Tees.
to correct Supp Needs to.

Sp needs?

From: Anita Brunsting
To: Candace Freed
Sent: 10/6/2010 8:19:06 PM
Subject: Brunsting Family Trust

Candace,

I spoke to mom tonight and she agreed to resign as trustee and appoint me as trustee. I told her that you would be contacting her to re-explain things and make sure she understood what was happening.

If you have any questions, my cell is 361-550-7132.

Thanks,
Anita

EXHIBIT B

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Thursday, October 28, 2010 9:00 AM
To: Candace Curtis
Subject: Re: One more

Candy,
The more I think about this the whole key is Carl. When I was listening to Mother's call with Candance, Mother told Candace that Carl was trustee, not Anita and was not following the changes Candane was telling her she had made to have Carl removed.. Legally, I wonder if what Candace did was right without consulting Carl or his power of attonery since Carl has always been present at all meetings.

--- On **Thu, 10/28/10, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: One more
To: "Carole Brunsting" <cbrunsting@sbcglobal.net>
Date: Thursday, October 28, 2010, 10:34 AM

Candace DOES know she fucked up. That's why she had such a nasty attitude towards both you and I. Anita is smug and Amy plays dumb.

I hope Carl goes home today! If he does I hope the sun is shining. 10 minutes smiling into the sunshine + coffee + the Beatles = a sharper, happy Carl. I have a strong feeling that he will recover in leaps and bounds ALL ON HIS OWN, with support from his wife and family. The fact that Daddy is looking over us gives me strength. I can feel him stronger than ever before.

My suggestion is that when Dr. White finds Mother competent the following should happen:

1. You need to complete your time-line to demonstrate that due to various factors (badgering, low oxygen, Carl's illness, her illness, pneumonia, general stress and worry due to all of this), Mother was incompetent and under extreme duress when she signed everything she signed, particularly the Power of Attorney. We can compose a letter to Candace for Mother to sign, demanding that she wants to have papers drawn up to revoke anything she agreed to between the first of July and now.

2. As Mother gathers strength over the next few weeks she will go to her MD Anderson appointments, etc. and move towards treatment and recovery. I want to stress nutrition, adequate good sleep, and stress-free living.

3. In the meantime she can sell what she needs to, to pay for Robert or Tino or whoever Drina needs to assist her with Carl (if she even needs someone - Carl may recover a lot in a few weeks at home). The cost will be minimal compared to the $100k shithead got to buy her house.

Going forward, Mother will have to tell Candace IN WRITING what she wants done with the trust. You can help her compose the letters. There can be no question when it's in writing. You can assist Mother in reviewing the paperwork before she signs (at home - at her leisure), to make sure all her wishes have been incorporated. This should never be done under the pressure and duress she was subjected to. Mother can take as much time as she needs to read and understand that everything will be as she wants it to be.

The fair and equitable solution in my mind is:

Make all five of us successor co-trustees and require a majority to make any change whatsoever. Then, if Mother steps down there will be no shenanigans. Everything will be transparent and we'll all know everything everyone else knows. That way when Anita wants to sell the farm, or move away from Edward Jones, she can put it up for a vote among us. All five of us are intelligent people and none of us can honestly say we have NEVER made a wrong choice in our lives. This way Mother will be at peace to live out her life, and she will die knowing that she has not pitted one against the other, or given control of one over the other, or played favorites, or been bullied into doing something she didn't really want to do, or would not have done in the first place.

Now this may go AGAINST the norm, or what Candace and her ilk would recommend, but fuck them. They are attorneys who get paid to do what their clients want them to do and they love having to draw up documents. Fees, fees, fees, $$$$$$$$$$$$

If Anita succeeds in her agenda and becomes trustee, we should have her competency tested just to show her what it feels like. If everything stays the way it is right now, that's the first thing I'm going to do when the day comes that she's in charge of me. Na, Na, Na, Na, Na, Na.

Love you,

C

From: Carole Brunsting <cbrunsting@sbcglobal.net>
To: occurtis@sbcglobal.net
Sent: Wed, October 27, 2010 9:32:06 PM
Subject: One more

And do not overlook an exploration of the family's motives in requesting a competency evaluation, she cautioned. Do family members have reason for wanting their oddly behaving relative to be declared incompetent?

This is from an article about not rushing to declare and elderly person incompetent.
Mother passes the smell test and I have to make sure Tino does not let her out of the house without her clothes being ironed and SEE!!! MOTHER MADE THE APPOINTMENT TO GET HER HAIR DONE!!! CANDY THAT IS IT!!! MOTHER DOES CARE ABOUT HER APPEARANCE!! She will not go out without her makeup one and I have to get her a nail file all the time. Mother also called Edward Jones on her own and sold $10K so she would have enough money to live on.

She was temporarily incompetent when she was to low on oxygen and if they made her walk to Candace's offic I know for a fact her levels were to low because Dr. White joked about it. Tino did not take her so she had to walk from the parking lot to the office. She did not understand what she was signing because she was to short o breath and I can prove that. Candane has to know she F***ed up.

--- On **Wed, 10/27/10, Carole Brunsting** ***<cbrunsting@sbcglobal.net>*** wrote:

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Subject: Found this
To: occurtis@sbcglobal.net

Date: Wednesday, October 27, 2010, 10:38 PM

There are any number of situations that may cause you to question the competency of a family member to make sound life decisions, such as when:

- An elderly person suddenly changes a will or trust in a manner that is significantly different from all previous wills or trusts, which could result in will litigation if not appropriately handled during the elder's life.
- A family member has suspicion that the elderly person is being unduly influenced by others

Anita is unduly influencing Mother and now Amy has piled on. Mother never would have made these changes on her own. This was all done by the hand of Anita who put herself in charge of everything.

EXHIBIT C

Subject: Fw: Nelva Brunsting
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 3/11/2015 6:24 PM
To: Rik Munson <blowintough@att.net>

On Wednesday, November 17, 2010 2:38 PM, Candace Freed <candace@vacek.com> wrote:

Amy and Family, Thank you for the update on your mom, Nelva Brunsting. The purpose of the conference call and the suggestion that Ms. Brunsting be evaluated was based solely on conversations that I had with Ms. Brunsting and to let you all know that I had concerns based on those conversations. If she has been evaluated by her physician and you as a family are comfortable with his or her diagnosis, then you have addressed the concerns that I had. I appreciate your letting me know the opinion of the doctor. I hope your mom is doing well and she continues to improve.

Please let me know if I can be any further assistance.

Very truly Yours,

Candace L. Kunz-Freed
Attorney at Law

Vacek & Freed, PLLC
14800 St. Mary's Lane, Suite 230
Houston, Texas 77079
Phone: 281.531.5800
Toll-Free: 800.229.3002
Fax: 281.531.5885
E-mail: candace@vacek.com
www.vacek.com

We have moved! Our new office address is as shown above. We are one exit west of our old office building. Exit Dairy Ashford. Turn south on Dairy Ashford. St. Mary's Lane is a side street one block south of I-10 Katy Freeway. Turn west on St. Mary's Lane. Our building is in the northwest corner of the four-way stop.

EXHIBIT D

DEFENDANTS' PRIVILEGE LOG

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002054 - V&F 002057 (1)	1/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002058 - V&F 002060 (2)	7/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002061 - V&F 002066 (3)	12/08/11	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002067 - V&F 002070 (4)	12/23/10	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002071 - V&F 002072 (5)	3/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002073 - V&F 002075 (6)	9/20/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002076 (7)	11/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002077 - V&F 002078 (8)	12/28/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002079 (9)	1/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 0020890 (10)	1/31/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document Type	Subject Matter	Privilege
V&F 002081 (11)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002082 - V&F 002085 (12)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002086 - V&F 002089 (13)	3/20/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002090 - V&F 002093 (14)	3/29/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002094 (15)	4/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	From	To	Type	Subject	Privilege
V&F 002095 - V&F 002096 (16)	1/24/11	Anita Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding stock valuation.	Attorney-Client Communication
V&F 002097 (17)	1/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002098 (18)	7/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002099 (19)	8/16/11	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002100 (20)	12/8/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002101 - V&F 002102 (21)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication
V&F 002103 - V&F 002104 (22)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication

Privilege Log No.	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002105 - V&F 002106 (23)	12/28/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002107 (24)	1/03/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding title of the Buick.	Attorney-Client Communication
V&F 002108 (25)	1/05/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding Trust Information Sheets.	Attorney-Client Communication
V&F 002109 - V&F 002112 (26)	1/09/12	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Email string between attorney and client regarding distribution of trust funds.	Attorney-Client Communication
V&F 002113 - V&F 002114 (27)	1/22/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication
V&F 002115 - V&F 002116 (28)	1/23/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication

Bates No.	Date	Author	To/Recipient	Document	Subject	Privilege
V&F 002117 - V&F 002118 (29)	1/23/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002119 - V&F 002121 (30)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust documents.	Attorney-Client Communication
V&F 002122 - V&F 002123 (31)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002124 - V&F 002125 (32)	1/31/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding Farmland LLC.	Attorney-Client Communication
V&F 002126 - V&F 002127 (33)	1/31/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002128 (34)	2/14/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002129 (35)	2/15/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding estate planning documents.	Attorney-Client Communication
V&F 002130 - V&F 002132 (36)	2/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Summer Peoples	Email	Attorney communications to client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002133 - V&F 002139 (37)	3/02/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding trust value report.	Attorney-Client Communication Attorney Work Product
V&F 002140 - V&F 002142 (38)	3/06/12	Amy Ruth Brunsting	Candace L. Kunz-Freed	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002143 - V&F 002148 (39)	3/14/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Description	Subject	Privilege
V&F 002149 (40)	3/20/12	Summer Peoples	Amy Ruth Brunsting, Anita Kay Brunsting, and Chip Mathews	Email	Attorney communications to client regarding request for wills.	Attorney-Client Communication
V&F 002150 - V&F 002151 (41)	3/20/13	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002152 (42)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed, Chip Mathews, and Amy Ruth Brunsting	Email	Attorney communications to client regarding December of 2011 accounting.	Attorney-Client Communication
V&F 002153 (43)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Attorney communications to client regarding accounting.	Attorney-Client Communication
V&F 002154 - V&F 002155 (44)	3/27/12	Anita Kay Brunsting	Chip Mathews, Amy Brunsting, Candace L. Kunz-Freed	Email	Email string between attorney and client regarding accounting.	Attorney-Client Communication
V&F 002156 - V&F 002158 (45)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Chip Mathews	Email	Email string between attorney and client regarding asset lists.	Attorney-Client Communication

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002159 (46)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding asset lists.	Attorney-Client Communication
V&F 002160 - V&F 002161 (47)	3/29/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding assets and expenses.	Attorney-Client Communication Attorney Work Product
V&F 002162 - V&F 002163 (48)	3/29/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002164 - V&F 002166 (49)	3/30/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Email string between attorney and client regarding asset list.	Attorney-Client Communication
V&F 002167 (50)	4/12/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002168 - V&F 002183 (51)		Candace L. Kunz-Freed		Chart	Attorney notes/history of representation	Attorney-Client Communication Attorney Work Product
V&F 002184 - V&F 002191 (52)	11/22/11			Document	Authorization for Release of Protected Health Information	Attorney Work Product
V&F 002192 (53)	11/22/11			Document	Authorization for Release of Information	Attorney Work Product

EXHIBIT E

From: Candace Curtis (occurtis@sbcglobal.net)
To: occurtis@sbcglobal.net;
Date: Sat, February 18, 2012 11:29:12 AM
Cc:
Subject: Fw: New Development

----- Forwarded Message ----
From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Amy <at.home3@yahoo.com>; Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Tue, March 8, 2011 7:15:32 PM
Subject: RE: New Development

I got the same TM from Tino. I hesitate to promise them anything in writing about money. Rather than a monthly payment, I would rather grant them a certain amount each year, but only through the direct payment of their bills - for example; mom could gift Carl $13,000/year, but only if they send me the bill statements to pay directly, and only for bills for living/medical expenses - when the trust has paid $13,000 in bills for the year, that's the end of the money for that year. We could ask them to sign for this money against his inheritance, but then we'd have another form that we'd have to get them to sign (probably notarized), and as we don't know if she's had Carl declared incompetent, the validity of any form he signs might be questionable.

I do like the idea of a letter telling Drina that she may have no contact w/ mom (physical, verbal, visual, phone or electronic means) and she is not to enter mom's house. She can bring Carl to visit mom, but she must remain outside the house - any violation of this letter will be considered harassment and the police will be called if she does not comply. I would also like to add in the letter that Carl's inheritance will be put into a Personal Asset Trust for his care and living expenses - I think this information might be enough to tip her hand.

I would also like to ask Candace, what this letter would do for us legally - like if we did end up calling the police would the letter lend any credence to our case?

I won't do anything until we can come upon an agreement as what to do - I can also write this letter in the role of mom's power of attorney (which she signed last year).

I spoke w/ mom about the whole situation; she listens to reason and can understand our concerns for Carl, and will sign the changes to the trust next week. I have been very forthright in explaining the changes in the trust to her, and that they would be done in order to minimize any pathway that Drina might have to Carl's money. The changes are not to penalize Carl, but to ensure the money goes for his care. I told her to "just say No" to Carl or Drina if they brought up the trust or money and to refer them to me. I reminded her that she isn't trustee anymore and doesn't have access to the trust accounts - she seems fine w/ everything, and expressed no desire to put Carl back on as a trustee. I told her that in the event she did that, that it would not be fair to the rest of us, as we would end up having to deal w/ Drina, not Carl. Mom begrudgingly admits to knowledge of the unpleasantness of this whole situation and Drina's past behavior since Carl has been ill, but I think she is really naive regarding the lengths to which Drina may go through to get Carl's inheritance.

P-9

EXHIBIT F

TIME SHEET

Employee Name: Faustino Vaquera **Title:**

Week: March 15 — March 19

Date	Start Time	End Time	Regular Hrs.	Total Hrs.
3-15 Tues	8:30 am	12:00 am	15.30	
3-16, Wed	12:00 am	2:00 pm	14	
↓	4:00 pm	12:00 am	8	
3-17, Thur	12:00 am	9:30 am	9:30	
3-[redacted]	6:30 pm	12:00 am	5:30	
3-18 [redacted] Fri	12:00 am	6:00 pm	18	
	WEEKLY TOTALS:		70 ½	

Employee Signature: [signature] **Date:** 3-18

Supervisor Signature: **Date:**

70.5
x 15.00
= 1057.50

Groceries & Food = 126.26

Best Buy Digital Voice Recorder 64.94

191.20

Total = 1248.70

08:12:55 :: 0220 :: 0902247

WELCOME TO BEST BUY #216
HOUSTON, TX 77024
(713)647-6004

Keep your receipt!

Val #: 0422-1046-6045-3089

0216 003 2499 03/17/11 18:22 00005044

1792142 ICDPX312 59.99
ICDPX312 DIGITAL VOICE RECORD
ITEM TAX 4.95
6094193 RZ SILVER 0.00 N
REWARD ZONE PREMIER SILVER
MEMBER ID 0329918420

SUBTOTAL 59.99
SALES TAX AMOUNT 4.95
TOTAL 64.94

xxxxxxxxxx4030 DEBIT 64.94
FAUSTINO VAQUERA JR
APPROVAL 132943
REFERENCE NUMBER: 0216003

ALEX,
THANKS FOR SHOPPING AT BEST BUY TODAY!
YOUR REWARD ZONE BALANCE AS OF 03/08/11
POSTED POINTS: 153
Go to MyRZ.com FOR MORE INFO

Congratulations! As an added benefit of being a Reward Zone program Premier Silver member, you may return eligible products up to 45 days from purchase date.

Dear Valued Customer,

directly or indirectly by the products listed on this receipt.

THE SHACK THANKS YOU.

RADIOSHACK 01-8020
Kroger Plaza Sc
14356 Memorial Dr
Houston, TX 77079-6704
(281) 496-9429

Order: 057553 03/17/2011 08:14P Term #002

Helped By: 001 (MAR)
Entered By. 001 (MAR)

4200223 3' 1/8' M-M PATCH CABLE 1 8.39

Subtotal 8.39
Tax 8.25% 0.69
Total 9.08

Credit Card 9.08

Change Due 0.00

Acct# xxxxxxxxxxx0307 M
Card Type VI
Tran# 12687148
Auth# 161235 9.08
Host Captured Y

The card holder identified hereon may apply the total amount shown on this receipt to the appropriate account to be paid according to its current terms.

I agree to pay above total according to card issuer agreement.

Your name, address and the original sales receipt are required for all refunds. Sales and returns are subject to the terms and conditions identified on the back.

Shop online 24/7 at
www.radioshack.com

EXHIBIT G

From: Amy Tschirhart <at.home3@yahoo.com>
Sent: Wednesday, August 18, 2010 12:58 PM
To: Anita Brunsting; Carole Brunsting; Candy Curtis
Subject: CPA's advice

Hi,

I talked to the CPA who does my taxes today and asked her what she would recommend. She told me that Drina should talk to an attorney who specializes in debt created by medical bills. Medical bill debt is treated differently than other debt. I did a quick check on the internet and there are several in Houston.

She said that creditors cannot touch Drina's house or cars. She also recommended not paying any of the medical bills right now. She said to wait until the dust settles, then talk with each company about a payment plan, possibly as little as $10 a month. She told me that in all likelihood, they would eventually write off her debt as a loss. She said Drina should definitely not touch any retirement or inheritance, or borrow anything against them.

I called Drina today and told her what Darlene said. She said her father had been telling her the same things. I tried to emphasize that she should not be paying any bills right now, but I don't know if she really understood why. She is overly concerned with her credit score rating. Darlene said that is not that important because they own their house and cars and are not as reliant on credit compared to younger people.

Anyhow, I know that Drina is in a hard spot right now, but I honestly think that keeping her from accessing *any* of Carl's inheritance would be in her best interest. It would be a waste to spend it on medical bills and they will need the money in the future. I don't think that is going to sit well with Drina because she's going to see it as us being tight-fisted with the money. I strongly suggest that if any of us talk to her, we do it as nicely as we can. Acknowledge that the debt is so huge it is unpayable in her lifetime. Encourage her to seek a professional to find the best way to deal with it. Remind her that we want the best for her and Carl in their future and that we are thinking of their best interests.

Love,
Amy

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 11:59 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: atty for guardianship

I think that Drina has always projected her own family issues onto ours. She was completely distanced from her own family until a year ago when her brother passed away and now she is talks about the relationship with her dad like they have been close forever which has not been the case.

She must have had some very bad things happen to her in her childhood and slowly but surely she twisted Carl's mind to go along with everything she did and said. I think you are right that this will have to play itself out to see what she does. She has been waiting for the day she and Carl get the "big" trust payout and then it will be see you later chumps!

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: atty for guardianship
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 1:49 PM

The Brunsting family has never been very demonstrative of their love for one another, but I chalk that up to being Dutch. What I cannot seem to wrap my arms around is the extreme coldness of Drina and Marta. They have always been limp when hugged and hugging is one of the best things in the world. One power hug and all my cares fly out the window. I believe it must be a genetic brain chemical imbalance in Drina's family. She has spent her life with Carl trying to distance HIM from his family and turn him into a cold fish like her. How did she ever get pregnant in the first place? Maybe we should try to get some DNA from Marta and Carl and do a paternity test. Wouldn't it be something if he wasn't her father?????????? LOL

Frankly, as long as the trust is safe, we should probably just let nature take its course and sooner or later we will get Carl out of their clutches and into ours. He might be pissed off for awhile, but I have some small faith that once he can reason better he will see that we only seek what is best for him in the long run BECAUSE WE LOVE HIM. Once he is able to reason and be reasoned with, and has regained some control of his life, if he chooses to go back to his moron wife and their moron spawn, I will mourn him as if he were dead. Until such time I will assume that, somehow, at some point in his recovery, he will realize how miserable the bitch has made his life. He might see that all she has ever cared about is money and how to avoid having to go out and earn some.

If asked, Carl would probably say no to coming out here to live with us, even though it might be the very best thing for him. He should never feel like he has been "dumped" on anyone. I think he would have a lot more stimulation out here. He does love the Bay Area and after a short time he might gain some real incentive to get well.

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>

Sent: Fri, March 18, 2011 8:59:24 AM
Subject: atty for guardianship

Ok, I think I may have found an atty who could handle the guardianship issue. She was recommended to me by the Burgower firm that Amy's lawyer had given her - the Burgower firm does not do guardianship cases. This atty's name is Ellen Yarrell; her offices are in the Galleria area; she charges an initial consult fee of $350 for 1 hr of her time, and probably requires an retainer of $2000. Her paralegal (Elizabeth) said that she's handled cases like this before (where an impaired person has been divorced by their spouse). I asked about the expense and she said that Yarrell could give us a better idea after the consult and it depends on whether the guardianship would be contested (so that depends on whether we fight Drina now, or wait to see if she'll divorce him and then we're facing Marta (if she pursues it)). I got the feeling that "expensive" meant more like $50,000 not $1 million.

I thought of another plus on our side if Drina divorces him - Drina will probably expect him to come live w/ mother - so if he's w/ us and not his daughter that lends more credence to our side for guardianship (possession is 9/10's of the law?).

I also talked to mom last night and told her what was going on. I asked her if she was ok w/ using her money to pay for Carl's legal fees and of course she said yes.

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 8:41 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: guardianship assessment form

They are there right now according to the PI. And Michael took him on Wednesday.

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: guardianship assessment form
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 10:33 AM

Do you know if he went to therapy at all this week?

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Carole Brunsting <cbrunsting@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Fri, March 18, 2011 8:26:05 AM
Subject: RE: guardianship assessment form

we're continuing the pi over the weekend or unless it looks like she's headed toward Beaumont - will also use him through next week. $750 is for the lawyer's (Cole) initial consult not a dr. If she divorces him then someone needs to sue for guardianship - Marta would be considered next in line by the law, but if she doesn't sue for it then I don't think she'd be considered. If Drina gets him to sign divorce papers that give him any less than 50% of their assets then a guardian can countersue her to recover those.

From: Candace Curtis [mailto:occurtis@sbcglobal.net]
Sent: Friday, March 18, 2011 10:20 AM
To: Anita Brunsting; Carole Brunsting; Amy Tschirhart
Subject: Re: guardianship assessment form

$750 an hour FOR WHAT? The woman is abusing him and negligent in his care. Have they been out even one time this week? Last I heard, Monday and Tuesday there was no activity other than a visit from Marta. APS said that once they confirmed she was following doctor's orders, they closed the case. If the instructions were 3 times a week and he hasn't been, or only goes once or twice, SHE IS NEGLIGENT, and they better reopen it or start a new one. Let me know if you want me to call.

Any doctor who has seen Carl would most likely say NO to all of the questions. I would, just based on past phone conversations with Carl.

What if Drina files for divorce? Would that be abandonment? Would the trust even be an issue if SHE divorces him?

If I could have anything I wanted for Carl, I would have him assessed by the neuropsychologists at the place I found in Houston. I don't know if he could handle long periods of testing, but he has got to get some cognitive brain function back OR HE WILL NEVER EVEN BECOME CLOSE TO WHOLE AGAIN. It's a good sign that his behavior has improved, but is it because she beats him with a stick and mentally assaults him to get him to act right?

Maybe guardianship is the wrong approach. Maybe we should go after Drina and have her declared incompetent to care for him, or criminally negligent for not obtaining proper rehabilitation. There has to be a reason why she doesn't want her husband of almost 30 years to recover.

Let me know if he will be staying at Mother's again over the weekend. If so, we might want to extend the PI over the weekend so we can see what the hell she does. The more "evidence" we can amass, the better.

Love you guys,

C

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Thu, March 17, 2011 2:18:05 PM
Subject: guardianship assessment form

Just thought you'd find this interesting, this is the form that we'd have to have a physician use to assess Carl and possible a MHMR psychologist as well. I just thought it would give you an idea as to what they're looking for - Carl definitely fits the bill -

Just fyi, you may have already known this.

Anita

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL.*	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S ADOPTION AND JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' "ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT"

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants Honorable Judges Christine Riddle Butts and Clarinda Comstock and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' "Addendum of Memorandum in Support of RICO Complaint" and would respectfully show the Court as follows:

1. Adoption of arguments raised in the Motion to Strike [Doc. 38].

In the interest of justice and judicial economy, and pursuant to FED. R. CIV. P. 10(c), the Harris County Defendants hereby adopt and incorporate by reference as if fully set forth herein, the arguments and authority contained in Jill Young's Motion to Strike [Doc. 38]. This Court should strike Plaintiffs' Addendum [Doc. 26], because it is not a valid supplemental or amended Complaint under FED. R. CIV. P. 15. Plaintiffs appear to concede they are not amending their Complaint, while at the same time attempting to incorporate facts from other pleadings in support of their Complaint [Doc. 26, ¶ 7]. Plaintiffs attempt, by this Addendum, to incorporate facts stated

in a Motion for Sanctions and a Motion for Relief under FED. R. CIV. P. 60 filed in a *closed* federal court file. *Id.*[1] This is not a proper pleading recognized by the Federal Rules of Civil Procedure. Accordingly, this Addendum should be stricken.

2. The Addendum does not challenge the merits of the Harris County Defendants' Motion to Dismiss.

Assuming *arguendo* the Court allows the Addendum in support of Plaintiffs' Complaint, it does not state any facts that would support a claim against the Harris County Defendants. Indeed, the facts contained in the Motion for Relief attached to the Addendum merely recite the facts previously complained of in the Complaint. Plaintiffs complain about being ordered to mediation with "another crony" [Doc. 26, ¶¶ 43, 99] and delay created by removing summary judgment motions from the docket [*Id.*, ¶¶ 39-42]. Plaintiffs' pleadings (Addendum included) fail to confer subject matter jurisdiction and fail to state a claim against the Harris County Defendants.

CONCLUSION & PRAYER

The Addendum filed is an improper pleading and should be stricken. Even assuming the Addendum is considered a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to establish the Court has subject matter jurisdiction or that they have properly stated a claim against the Harris County Defendants.

For the reasons set forth above, the Harris County Defendants request the Court grant the Motion to Strike the Plaintiffs' Addendum [Doc. 26], and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly

[1] *Candace Louise Curtis v. Anita Kay Brunsting*, ***closed*** Case No. 4:12-cv-00592 (J. Hoyt), [Doc. 112].

entitled.

Dated: October 13, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
ATTORNEY-IN-CHARGE
Texas State Bar No. 00790288
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ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF CONFERENCE

The undersigned certifies that on October 12, 2016, I emailed the Plaintiffs to inquire as to whether they would withdraw their Addendum. On October 13, 2016, Rik Munson responded and did not agree to withdraw it; therefore the relief sought in this Motion is necessary.

/s/ Laura Beckman Hedge
Laura Beckman Hedge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 13th day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503

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/s/ Laura Beckman Hedge
Laura Beckman Hedge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
Plaintiffs,	§	
	§	Civil Action NO. 4:16-CV-01969
v.	§	
	§	The Honorable Alfred Bennett
Kunz-Freed et al.,	§	
Defendants	§	

Plaintiffs' Answer to Defendant Steven Mendel's Motions to Dismiss (Dkt 36) Pursuant to Federal Rules of Civil Procedure 12(b)(6)

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I. INTRODUCTION

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas individually and as private attorneys general alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement incorporated into the RICO complaint by reference in response to Defendants Albert Vacek, Jr. and Candace Kunz-Freed's September 7, 2016 motions to dismiss (Dkt 19 and 20) claiming a want of specific factual allegations and other affirmative defenses.

3. On September 30, 2016, Defendant Steven Mendel filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), (Dkt 36).

4. Mr. Mendel's motion also states that it is filed on behalf of Defendant Bradley Featherston. However, Mr. Featherston has refused to accept service and has not filed his waiver.

II. THE ISSUES

A. Defendant Steven Mendel advances the Texas doctrine of attorney immunity;

B. States that he never had an attorney-client relationship with either of the plaintiffs;

C. States that he only served as attorney in the defense of co-trustee Anita Brunsting involving a "*related probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, Estate of Nelva Brunsting, Deceased";*

D. States that the allegations are vague, conclusory and fail to provide him with sufficient notice;

E. That Mr. Mendel is current counsel for Co-Trustee Anita Brunsting;

F. That it is impossible for him and Mr. Featherston to have been involved in a sham mediation because no mediation occurred.

G. Mendel, like Anita and Amy Brunsting, introduces a new appellation for the "extortion instrument" not previously found in any pleadings called a Qualified Beneficiary Trust or "QBT".

III. SUMMARY OF THE ARGUMENT

Jurisdiction

5. Each Defendant's motion to dismiss has thus far argued that the case before the court arises from a "probate matter" involving administration of an estate.

6. Plaintiffs challenge any claim of state court jurisdiction over Brunsting trust related matters. All of these Defendants' claims, including immunity, turn on inquiry into subject matter jurisdiction.

Metamorphosis

7. Plaintiff Candace Louise Curtis began this journey in the Southern District of Texas February 27, 2012 (4:12-cv-592). From there it evolved into a Fifth Circuit Appeal (12-20164) and returned to the Southern District of Texas January 9, 2013 (704 F.3d 406).

8. From there, Defendant Jason Ostrom arranged a remand to Harris County Probate Court No. 4, (first as 412249-402, then as 412249-401). Once in the probate court the Curtis v Brunsting trust litigation was mysteriously transformed into the "Estate of Nelva Brunsting" (Exhibit 1 and Dkt 34-9) and thereafter completely dissolved into the abyss like the docket control order and the scheduled trial that disappeared just as mysteriously.

IV. CURTIS V BRUNSTING SURVIVED THE PROBATE EXCEPTION, IS NOT A PROBATE MATTER AND HAS NOTHING TO DO WITH THE ADMINISTRATION OF ANY ESTATE

9. The Fifth Circuit Court of Appeals in *Curtis v Brunsting 704 F.3d 406*, 409-410, held,

> *No. 12-20164*
>
> *In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At*

> *the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust.*
>
> *Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.*
>
> *HN6 Assets placed in an inter vivos trust generally avoid probate, since such assets are owned by the trust, not the decedent, and therefore are not part of the decedent's estate. In other words, because the assets in a living or inter vivos trust are not property of the estate at the time of the decedent's death, having been transferred to the trust years before, the trust is not in the custody of the probate court and as such the probate exception is inapplicable to disputes concerning administration of the trust.*
>
> *HN7 Any property held in a revocable living trust is not considered a probate asset. Avoidance of probate perhaps is the most publicized advantage of the revocable living trust. Assets in a living trust are not subject to probate administration*

10. Curtis v Brunsting has been held not to be litigation related to the Estates of Elmer or Nelva Brunsting. Plaintiff Curtis is a beneficiary of inter vivos trusts and not an heir to either Estate, to which "The Trust" is the only heir in fact (Dkt 41-2 and 41-3).

Immunity

11. All immunity defense claims turn on the question of subject matter jurisdiction.

12. Mendel claims he only served as an attorney in the defense of "co-trustee" Anita Brunsting, in litigation involving a "*probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, Estate of Nelva Brunsting, Deceased"* and, thus, claims the protection of the Texas Attorney Immunity Doctrine.

13. While refusing resolution on the merits, these Defendants, in concert, attempted to intimidate Plaintiff Curtis into agreeing to mediate, to avoid rendering unfavorable determinations that would have subjected the Court's want of jurisdiction to scrutiny.

14. The effort to avoid the obvious want of jurisdiction in the probate court, and the deliberate attempts to imposter jurisdiction while avoiding determination on the merits, cannot rationally be denied as is firmly evidenced in the transcript of March 9, 2016. (Dkt 26-16)

15. Defendants portray this conduct as judicial and litigious, but it is neither and the conduct is evidenced by the various, self-authenticating, court records.

16. Defendants have attempted to overturn the federal Fifth Circuit after being on the losing end of a fully litigated federal appellate determination and have since attempted to erase the federal court rulings and the federal injunction, by subterfuge.

17. "The Trust" was inarguably under the in rem jurisdiction of a federal Court when related claims were filed in state courts in Harris County Texas in the name of the Estates of Elmer and Nelva Brunsting. (Dkt 34-5 and 34-7)

18. Mr. Mendel does not provide any exhibits to support his claims and Plaintiffs are unaware of any instance in which Mr. Mendel or anyone associated with his firm filed an appearance, filed a motion or filed a responsive pleading in "Curtis v Brunsting".

19. Defendants can only show they filed motions and pleadings in the "Estate of Nelva Brunsting" and even when cases are consolidated for all purposes they do not lose their separate identities. What happened to Curtis v Brunsting after the remand to state probate court?

"Curtis v Brunsting" vs. "Estate of Nelva Brunsting"

20. There are neither trustees nor beneficiaries involved in any "Estate" litigation and there are neither heirs nor executors nor inheritance expectancies involved in any "trust" related litigation. The alleged co-trustees only exist in the context of "the trust" and, as it relates to the estate, the trust is the only heir in fact.[1]

21. As previously shown (Dkt 41, ln 25) Candace Curtis' breach of fiduciary lawsuit against Anita and Amy Brunsting filed in the federal court on February 27, 2012, involves only the Brunsting trusts Curtis v Brunsting 704 F.3d 406, 409-410 (Dkt 26-17). Defendant Mendel cannot show where he ever responded to a Curtis v Brunsting motion (Dkt, 26-11, 26-14) even though all they ever addressed in the "estate of Nelva Brunsting" pleadings were the money cow trusts (Dkt 26-5, 6, 8, 9, 10, 13, 20).

22. The pleadings filed by Jason Ostrom in the probate court all bear the heading of "Estate of Nelva Brunsting" except notices of the federal pleadings and each of those bears an "Estate of Nelva Brunsting" cover page.

Jurisdiction

23. Because the trust res was under the in rem jurisdiction of a federal court when the estate lawsuit was filed in Harris County Probate 4, none of the Trust related claims were properly placed before that court.

24. As noted, the trust is the only heir to either estate and Carl Brunsting has no individual standing to bring any estate claims other than to challenge the wills, which he did not.

[1] Dkt 41-2 and 41-3 Wills of Elmer and Nelva Brunsting

25. When we strip away Trust related claims from Bayless' "Estate" complaint nothing remains of the estate lawsuit. All of Bayless probate court claims involve the Trust and nothing but the Trust.

26. Even the District Court suit against Freed was filed in a court that could not take cognizance of a res in the custody of the federal Court and although an argument could validly be made against Vacek and Freed in the name of Elmer and Nelva Brunsting's Estates, they would none-the-less need to have been brought in the court having jurisdiction over the res. The question of whether or not the heir-in-fact Trust was the real party in interest and not the Estates would also need to be resolved.

27. A proper consolidation motion would have Curtis v Brunsting at the top in the heading, with the later filed cases each listed separately below that, one atop the other. Defendants instead chose to play the trust buster game of dissolving the distinctions between trust and estate.

28. They claim there was no conspiracy, but how do they explain the inarguable existence of public records evidencing these facts?

29. Want of subject matter jurisdiction in the probate court over any trust related matters strips these defendants of their attorney immunity defense and their conduct is subject to scrutiny in these proceedings, unclothed in the a priori illusion of legitimacy.

Notice and Meaningful Opportunity to Be Heard

30. The cornerstone of Due Process is fundamental fairness. Inherent in the notion of fairness is the right to know the nature and cause of an action, to be apprised of the claims and to have a meaningful opportunity to defend by way of answer or explanation. This is the essence of Rule

12(b)(6). It is not necessary that Defendant understand the law or the elements of a RICO claim, but need only be apprised of the facts that Plaintiff relies upon for their claim.

31. In his Rule 12(b)(6) motion Mendel claims the complaint fails to apprise him of sufficient facts to provide him with notice, while at the same time claiming to act as counsel for opposing litigants with extensive knowledge of contrary facts.

32. It is difficult to conceive of how Mr. Mendel could have insufficient notice of facts when Plaintiffs, in response to motions making similar claims, simply point to public records in the very same actions Mr. Mendel claims to have been involved in as an attorney.

Creative Pleading and Something Called a "QBT"

33. Mr. Mendel's Rule 12(b)(6) Motion, like Anita and Amy Brunsting's, introduces for the first time in any pleadings, in any related action in any court, over a period of nearly five years, introduces something they call a "Qualified Beneficiary Trust" (QBT) allegedly drafted by Defendant Albert Vacek, Jr.

34. Defendants do not provide exhibits in support of this claim of facts and Docket entries 30, 35 and 36 are the only pleadings to be found in any court containing reference to a "QBT".

35. Plaintiffs' RICO complaint defines the "extortion instrument" at Claim number 24 paragraph 133, as *"the heinous 8/25/2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" (hereinafter the "8/25/2010 QBD" or "Extortion Instrument")"*.

36. One of the three versions of the 8/25/2010 QBD was filed by Defendant Anita Brunsting's Counsel Bradley Featherston in the Estate of Nelva Brunsting 412249-401, on

December 8, 2014, and is included in the Addendum to Plaintiffs' RICO complaint with the other versions, Dkt 26-20 at E1349-E1386.

37. Plaintiffs' demand these Defendants produce this "QBT" and certify it for whatever it is they are claiming it to be and, while they are at it, Plaintiffs' demand they produce the 8/25/2010 QBD, the instrument referred to by Defendants Amy, Anita, Brad and Neal, in their joint June 26, 2015 no-evidence motion for partial summary judgment, and qualify it as evidence for whatever they claim it to be as well.

Intimidation with the Extortion Instrument

38. As stated in the Addendum, on June 26, 2015 Defendants Anita and Amy Brunsting, through their attorneys, Bradley Featherston and Neal Spielman, filed a "No-Evidence Motion for Partial Summary Judgment" (DKT 26-5) involving an instrument called "Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement" or "QBD".

39. Plaintiff Curtis responded by filing an "Answer with Motion and Demand to Produce Evidence" (Dkt 26-11). As the Addendum states, Defendants tried to make good on their "no-contest clause" extortion threats when they filed their Joint No-Evidence Motion for Partial Summary and Declaratory Judgement (Dkt 26-5) and then removed their no-evidence motion from calendar, with their tail between their legs, when Plaintiff Curtis filed her answer and demand to produce the archetype of the instrument. (Dkt 26-11).

40. Suddenly there is no more docket control order, no more dispositive motion hearings and no more trial date, allegedly because of an "emergency Motion" over the "dissemination" of illegal wiretap recordings by Anita Brunsting's counsel Bradley Featherston.

41. Neal Spielman and Stephen Mendel then show up on March 9, 2016 (Dkt 26-16 Transcript) waiving the Gregory Lester/Jill Willard Young report in the air (Dkt 26-9) and talking about how the no contest clause in the illicit QBD instrument had been held to have been validly drafted by Vacek & Freed, (according to the Gospel of Jill Willard and Gregory Lester), and that Plaintiffs Candace Curtis and Carl Brunsting would take nothing if the court were to rule on the no contest clause. It is literally impossible to view any of that as an estate matter.

42. Mr. Mendel was personally present at the September 10, 2015 hearing on Gregory Lester's application for authority to retain Jill Young and was personally present at the March 9, 2016 hearing scheduled as a result of Plaintiff Curtis request to have dispositive motions placed back on the hearing calendar (Dkt 26-15 Request for Hearing).

43. The only thing indisputable in that transcript of hearing (Dkt 26-16) is that every effort was made to pretend the court had jurisdiction, to avoid setting dispositive motions, to avoid producing the extortion instrument and determination on the merits, to avoid joinder of closely related cases, and to attempt intimidation to cause Plaintiff Curtis to think she needed to get out her check book to pay for a mediation to avoid taking nothing under the "no contest clause" of the heinous "QBD" extortion instrument Defendants refuse to produce. (Dkt 26-16)

44. It was Carole Brunsting and not Plaintiff Curtis who cancelled the scheduled mediation (Exhibit 2)

45. The Defendants have had almost five years to produce their precious "QBD" and after having refused or otherwise failed to do so, it has somehow become a "QBT".

46. The United States Attorney's Criminal Resource Manual CRM 2403 defines Extortion by Force, Violence, or Fear as follows:

> *In order to prove a violation of Hobbs Act extortion by the wrongful use of actual or threatened force, violence, or fear, the following questions must be answered affirmatively:*
>
> 1. *Did the defendant induce or attempt to induce the victim to give up property or property rights?*
> 2. *Did the defendant use or attempt to use the victim's reasonable fear of physical injury or economic harm in order to induce the victim's consent to give up property?*

47. Both of these inquiries are answered by the transcript of the March 9, 2016 status conference, set because of Plaintiffs Curtis' request for setting. (Dkt 26-15)

48. Defendants Anita and Amy Brunsting and now Stephen Mendel have all filed motions to dismiss under Rule 12(b)(6), (Dkt 30, 35, 36) claiming they "believe" the instrument referred to as the extortion instrument is some Qualified Beneficiary Trust or "QBT".

Mediation

49. The chronology of events provided in the Addendum to Plaintiffs' complaint (Dkt 26) beginning at Item VIII, ln. 62, pg. 12, shows the sequence of events compelling Plaintiffs to bring claims involving impartial forum, access to the court and other due process, civil rights, fraud and related racketeering claims.

50. As the Complaint makes clear in Claims 16-21, illegal wiretap recordings were disseminated by certified mail (July 2015), among counsel for the parties to the Brunsting related lawsuits, after Defendants filed their June 26, 2015 no evidence motion (Dkt 26-5). There was no perceivable legal relationship between those recordings and any substantive matter then pending.

51. Dissemination of the recordings was none-the-less used as the excuse for suspending the litigation after Defendants had set their no-evidence motion for hearing and after Bayless had set her summary judgment motion for hearing, but were then used as an excuse to remove summary

judgement hearings and trial, without notice, without hearing and without an order, after Plaintiff Curtis filed her Answer and Demand to Produce Evidence (Dkt 26-11).

52. Suddenly, an emergency motion involving dissemination of irrelevant and illegally obtained private telephone communications replaces meritorious resolution of the controversy, and there is no evidentiary support for any scheduling changes in the record.

Wiretap Recordings

53. All three Defendants, Anita, Amy and Mendel offer a completely different version of the facts regarding wiretap recordings from that contained in the Complaint, as verified by the probate court record. As with all of the contrary factual assertions made by these Defendants, they do not provide any form of affidavit or exhibits in support of their claims.

54. Plaintiff Curtis' wiretap brief gives the lie to these claims (Exhibit 3 attached) as does Defendant Anita and Amy Brunsting's reply to Carl Brunsting's Emergency Motion for a Protective Order (Dkt 26-8). The other exhibits in the record relating to the wiretap recordings are Dkt 26-6-Carl Brunstings motion for protective order and, Dkt 26-12- transcript of protective order hearings.

V. DEFENDANT DISPLAYS A PENCHANT FOR ARGUING HIS OWN MISSTATEMENTS

55. Defendant Mendel misstates the Complaint and then makes facially-compelling arguments against the fallacy of his own claims (Dkt 36 Pg. 1, Ln. 1.2):

> *"By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping"*

56. Mr. Mendel does not quote any part of the Complaint nor does he reference any particular provisions of the Complaint with specificity. The claims relating to wiretap activity are numbered 16-21. Claims 16-19 specifically allege "manipulation" occurring in February of 2015 regarding four different recording segments, while claims 20 and 21 allege "in Concert Aiding and Abetting: Spoliation, Destruction and/or Concealing Evidence".

57. While Mendel would lead the Court to believe the Complaint alleges Featherston was involved in the recordings themselves, the Complaint makes no such claim and no such claim is necessary to a claim of aiding and abetting.

58. The act of placing those recordings in the U.S. Mail amounts to participation, as those recordings were used in a conspiracy to deprive Plaintiff Curtis of the honest services of a court.

59. The RICO allegations include statements such as that contained in claim 21 at paragraph 129:

> *Implicit in the assertion the recordings were relevant and the content admissible, Defendants claimed to possess personal knowledge that: "(1) the recording device was capable of recording the events offered in evidence; (2) the operator was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers on the tape are identified; and (7) the conversation elicited was made voluntarily and in good faith, without any kind of inducement."*

60. Mendel however, at paragraph 1.2, refers to such statements as vague, speculative, and conclusory and based upon inference, which more accurately describes the motion to dismiss than the complaint.

61. Another example of Mendel's proclivity for arguing his own misstatements is paragraph 127 as follows:

> *On or about July 1, 2015, in the Southern District of Texas and elsewhere within the jurisdiction of the Court, for the purpose of executing or attempting to execute the scheme and artifice to defraud and deprive, Defendants Anita Brunsting and Bradley Featherston, aided and abetted by persons known and unknown to Plaintiffs and aiding and abetting persons known and unknown to Plaintiffs, did unlawfully, willfully and knowingly cause illegal wiretap recordings of private telephone conversations between Carl Brunsting and his wife Drina Brunsting, to be delivered by certified mail to Plaintiff Curtis and the third party attorneys for parties in multiple pending lawsuits, in violation of 18 U.S.C. §2511(1)(c) and Texas Penal Code 16.02. The illegal wiretap recordings selectively disseminated on CD-ROM, are believed to have been made on or about March and April 2011. The CD contained items which were Bates numbered 5814 to 5840. Included among those items were the following four audio recordings:*[2]

62. One is curious to know where Mendel gets the notion Featherston is "*alleged to have engaged in illegal wiretapping"*? Dissemination of illegally obtained wiretap recordings violates the wiretap laws, and is the actual participation Mr. Featherston is accused of.

The Estate of Nelva Brunsting

63. As has been shown, the Fifth Circuit (Dkt 34-4) distinguished between the Brunsting Trust litigation and any prospective probate of the Estates of Elmer or Nelva Brunsting, using the same information available to the probate court, "the Wills of Elmer and Nelva Brunsting" (Dkt 41-2 and 41-3) and in their analysis the Fifth Circuit determined that Brunsting trust assets were not property of either estate and that the trust was in fact the only estate heir.

The Brunsting Trusts

64. Plaintiff Curtis is a beneficiary of an inter vivos trust, not an heir to any estate.

65. Plaintiff Curtis' beneficial interest is property, not an inheritance or expectancy.

66. The estate has no standing to bring claims against beneficiaries of the trust, alleging trespass against the heir in fact (trust), simply because the alleged trespass occurred during the

[2] Excerpted from Carl Brunstings Motion for Protective Order filed July 17, 2015.

lifetime of a grantor. The trust was also in the custody of the federal Court when all of the state court actions were filed.

VI. STANDARD OF REVIEW

67. Rule 12(b)(1) permits the dismissal of an action for the lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "If [a federal] court determines at any time that it lacks subject-matter jurisdiction, [it] must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Berkshire Fashions, Inc. v. M V. Hakusan II,* 954 F.2d 874, 880 n.3 (3rd Cir.1992) (citing *Rubin v. Buckman,* 727 F.2d 71, 72 (3d Cir. 1984)) (reasoning that "[t]he distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former may be asserted at any time and need not be responsive to any pleading of the other party.") Since federal courts are considered courts of limited jurisdiction, absent jurisdiction conferred by statute, they lack the power to adjudicate claims. *See, e.g., Stockman v. Fed Election Comm'n,* 138 F.3d 144, 151 (5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard,* 35 F.3d 222, 225 (5th Cir. 1994). Therefore, the party seeking to invoke the jurisdiction of a federal court carries "the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Vantage Trailers, Inc. v. Beall Corp.,* 567 F.3d 745, 748 (5th Cir. 2009) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois,* 533 F.3d 321, 327 (5th Cir. 2008); *see also Stockman,* 138 F.3d at 151.

68. In this case, jurisdiction is challenged under both Rule 12(b)(1), and the lack of sufficient factual allegations under Rule 12(b)(6). Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under the demanding strictures of a Rule 12(b)(6) motion, "[t]he plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the

allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.,* 94 F.3d 189, 194 (5th Cir. 1996) (citing *Mitchell v. McBryde,* 944 F.2d 229, 230 (5th Cir. 1991)). Dismissal is appropriate only if, the "[f]actual allegations [are not] enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007).

69. In light of Federal Rule of Civil Procedure 8(a)(2), "[s]pecific facts are not necessary; the [factual allegations] need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting *Twombly,* 550 U.S. at 555, 127 S.Ct. at 1964. Evenso, "a plaintiffs obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555, 127 S. Ct. at 1964- 65 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986).

70. Therefore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed.2d 868 (2009) (quoting Twombly, 550 U.S. at 570, 127 S. Ct. at 1974). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556, 127 S. Ct. at 1955). "But where the well-pleaded facts do not permit the court to infer more than the mere

possibility of misconduct, the complaint has to alleged-but it does not have to 'show -'that the pleader is entitled to relief.'" Ashcroft, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

71. Nevertheless, when considering a 12(b)(6) motion to dismiss, the Court's task is limited to deciding whether the plaintiff is entitled to offer evidence in support of his or her claims, not whether the plaintiff will eventually prevail. Twombly, 550 U.S. at 563, 1969 n.8 (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed.2d 90 (1974)); see also Jones v. Greninger, 188 F.3d 322,324 (5th Cir. 1999).

VII. CONCLUSION

72. The Honorable Kenneth Hoyt stated at the injunction hearing April 9, 2013 that all that was needed to wrap the trust litigation up was to distribute the assets, and he was correct.

73. Defendants Anita and Amy Brunsting refuse to horror any of the duties of the office while their attorneys use the 8/25/2010 QBD to threaten Plaintiff Curtis and her disabled brother Carl Brunsting with loss of property rights for bringing action to protect those rights and compel specific performance. Each of these Defendant attorneys fully intended to line their own pockets with filthy lucre at the expense of Plaintiff Curtis, her sister Carole, and her disabled brother Carl.

74. Probably the most alarming aspect of all this is that in a situation where the probate court actually had jurisdiction the exact conduct complained of here would all too often be granted Judicial and Texas Attorney Immunity without resort to the canons to consider whether such conduct is in fact judicial or litigious.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Motion to Dismiss (Dkt 36) filed by Defendant Stephen Mendel, September 30, 2016.

Respectfully submitted October 14, 2016,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 13th day of October, 14 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

The purpose for creating an inter vivos trust is to keep attorneys from stealing assets under the usual probate charade. These attorneys with the blessings of the Probate Court have tried to erase those distinctions hoping to convert assets of the trust into assets involved in a controversy over the administration of an estate.

DV

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Harris County

PROBATE COURT 4

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S APPLICATION FOR PARTIAL DISTRIBUTION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Application for Partial Distribution of Trust Funds and in support thereof would show the Court as follows:

1.

Plaintiff is a beneficiary under the Brunsting Family Trust, which is currently the subject of multiple lawsuits pending in this Court, one of which was transferred to this Court from the Federal Court where it had originally begun. That transfer was subject to a Temporary Injunction that had been ordered by the Federal Court that enjoined the distribution of Trust Funds without a court order. *See* Ex. A, Injunction.

2.

Plaintiff has a right to receive funds from this Trust as necessary for her health, education, maintenance and support. The Trust is currently subject to litigation because of the Trustees' misdeeds, and those Trustees are enjoined from exercising their discretion. *See* Ex. A, Injunction. There is no allegation that Plaintiff has breached her fiduciary duty to the Trust and thus no possibility that she will have to disgorge ill-gotten gains back to the Trust. The only question surrounding Plaintiff's ultimate distribution is how much money she will ultimately receive after the Defendant Trustees are found guilty of breaching their duties.

Because no Trustee can exercise discretion in favor of Plaintiff and make a distribution of her funds to her, Plaintiff moves this Court to make a partial distribution of her share of the Trust to her in the amount of $40,000.00. Plaintiff's interest in the Trust is well in excess of $40,000.00. Based upon the most recent bank statements available to Plaintiff, the total cash held by the Trust is $695,805.63, which makes Plaintiff's 1/5 share equal to $139,161.13. That value does not include real property or stocks which are held in addition to that cash. That value also does not include property improperly distributed to or on behalf of Defendants Anita, Amy or Carole Brunsting and which Plaintiffs anticipates will be ordered restored to the Trust. Plaintiff needs this distribution for her maintenance and support and requests that the Court authorize and order the same.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Candace Curtis respectfully prays that her Application for Partial Distribution of Trust Funds be granted, that the Trustee be ordered to distribute to Candace Curtis the sum of $40,000.00 out of the Brunsting Family Trust, and for such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

Candace Curtis

OF COUNSEL:

ostrommorris, PLLC

BY: [signature]
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 5th day of February, 2015:

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[signature]
Jason B. Ostrom/R. Keith Morris

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
ANITA KAY BRUNSTING, *et al*,	§	
Defendants.	§	

MEMORANDUM AND ORDER
<u>PRELIMINARY INJUNCTION</u>

I. INTRODUCTION

Before the Court is the *pro se* plaintiff's, Candace Louise Curtis, renewed application for an *ex parte* temporary restraining order, asset freeze, and preliminary and permanent injunction [Dkt. No. 35]. Also before the Court is the defendants', Anita Kay Brunsting and Amy Ruth Brunsting, memorandum and response to the plaintiff's renewed motion [Dkt. No. 39]. The Court has reviewed the documents presented, including the pleadings, response and exhibits, received testimony and arguments, and determines that the plaintiff's motion for a temporary injunction should be granted.

II. BACKGROUND

A. Procedural Background

The plaintiff filed her original petition on February 27, 2012, alleging that the defendants had breached their fiduciary obligations under the Brunsting Family Living Trust ("the Trust"). Additionally, the plaintiff claimed extrinsic fraud, constructive fraud, intentional infliction of emotional distress, and sought an accounting, as well as a

recovery of legal fees and damages. The Court denied the plaintiff's request for a temporary restraining order and for injunctive relief. However, concurrent with the Court's order denying the relief sought by the plaintiff, the defendants filed an emergency motion for the removal of a *lis pendens* notice that had been filed by the plaintiff on February 11, 2012, prior to filing her suit.

The defendants sought, by their motion, to have the *lis pendens* notice removed in order that they, as the Trustees of the Trust might sell the family residence and invest the sale proceeds in accordance with Trust instructions. After a telephone conference and consideration of the defendants' argument that the Court lacked jurisdiction, the Court concluded that it lacked jurisdiction, cancelled the *lis pendens* notice, and dismissed the plaintiff's case.

The plaintiff gave notice and appealed the Court's dismissal order. The United States Court of Appeals for the Fifth Circuit determined that the Court's dismissal constituted error. Therefore, the Fifth Circuit reversed the dismissal and remanded the case to this Court for further proceedings. This reversal gave rise to the plaintiff's renewed motion for injunctive relief that is now before the Court.

B. Contentions of the Parties

The plaintiff contends that she is a beneficiary of the Trust that the defendants, her sisters, serve as co-trustees. She asserts that, as co-trustees, the defendants owe a fiduciary duty to her to "provide [her] with information concerning trust administration, copies of trust documents and [a] semi-annual accounting." According to the plaintiff,

the defendants have failed to meet their obligation and have wrongfully rebuffed her efforts to obtain the information requested and that she is entitled.

The defendants deny any wrongdoing and assert that the plaintiff's request for injunctive relief should be denied. The defendants admit that a preliminary injunction may be entered by the Court to protect the plaintiff from irreparable harm and to preserve the Court's power to render a meaningful decision after a trial on the merits. *See Canal Auth. of State of Fla. V. Calloway*, 489, F.2d 567, 572 (5th Cir. 1974). Rather, the defendants argue that the plaintiff had not met her burden.

III. STANDARD OF REVIEW

The prerequisites for the granting of a preliminary injunction require a plaintiff to establish that: (a) a substantial likelihood exists that the plaintiff will prevail on the merits; (b) a substantial threat exists that the plaintiff will suffer irreparable injury if the injunction is not granted; (c) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may do to the defendants; and, (d) granting the injunction will not disserve the public interest. *See Calloway,* 489 F.2d at 572-73.

IV. DISCUSSION AND ANALYSIS

The evidence and pleadings before the Court establish that Elmer Henry Brunsting and Nelva Erleen Brunsting created the Brunsting Family Living Trust on October 10, 1996. The copy of the Trust presented to the Court as Exhibit 1, however, reflects an effective date of January 12, 2005. As well, the Trust reveals a total of 14 articles, yet Articles 13 and part of Article 14 are missing from the Trust document. Nevertheless, the Court will assume, for purposes of this Memorandum and Order, that the document

presented as the Trust is, in fact, part of the original Trust created by the Brunstings in 1996.

The Trust states that the Brunstings are parents of five children, all of whom are now adults: Candace Louise Curtis, Carol Ann Brunsting; Carl Henry Brunsting; Amy Ruth Tschirhart; and Anita Kay Brunsting Riley. The Trust reflects that Anita Kay Brunsting Riley was appointed as the initial Trustee and that she was so designated on February 12, 1997, when the Trust was amended. The record does not reflect that any change has since been made.

The plaintiff complains that the Trustee has failed to fulfill the duties of Trustee since her appointment. Moreover, the Court finds that there are unexplained conflicts in the Trust document presented by the defendants. For example, The Trust document [Exhibit 1] shows an execution date of January 12, 2005.[1] At that time, the defendants claim that Anita Kay served as the Trustee. Yet, other records also reflect that Anita Kay accepted the duties of Trustee on December 21, 2010, when her mother, Nelva Erleen resigned as Trustee. Nelva Erleen claimed in her resignation in December that she, not Anita Kay, was the original Trustee.

The record also reflects that the defendants have failed to provide the records requested by the plaintiff as required by Article IX-(E) of the Trust. Nor is there evidence that the Trustee has established separate trusts for each beneficiary, as required under the Trust, even though more than two years has expired since her appointment.

[1] It appears that Nelva Erleen Brunsting was the original Trustee and on January 12, 2005, she resigned and appointed Anita Brunsting as the sole Trustee.

In light of what appears to be irregularities in the documents and the failure of the Trustee to act in accordance with the duties required by the Trust, the Court ENJOINS the Trustee(s) and all assigns from disbursing any funds from any Trust accounts without prior permission of the Court. However, any income received for the benefit of the Trust beneficiary is to be deposited appropriately in an account. However, the Trustee shall not borrow funds, engage in new business ventures, or sell real property or other assets without the prior approval of the Court. In essence, all transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in this case.

The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.

It is so Ordered

SIGNED on this 19th day of April, 2013.

Kenneth M. Hoyt
United States District Judge

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER GRANTING PARTIAL DISTRIBUTION OF TRUST FUNDS

On this day came to be considered the Application for Partial Distribution of Trust Funds filed by Candace Louis Curtis, and the Court is of the opinion and finds that it should be granted. It is, therefore,

ORDERED that the Trustee of the Brunsting Family Trust pay to Candace Curtis the sum of $40,000.00 within seven days of this Order. It is further,

ORDERED that this distribution shall be recorded as a partial distribution of the total value of Candace Curtis's share of the Brunsting Family Trust.

SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

Subject:	Re: Automatic reply: Cause No. 412249101 and 413249401
From:	Bobbie G Bayless (bayless@baylessstokes.com)
To:	cbrunsting@sbcglobal.net; steve@mendellawfirm.com; nspielman@grifmatlaw.com; occurtis@sbcglobal.net; zfoley@thompsoncoe.com;
Date:	Tuesday, July 5, 2016 8:56 AM

Carole--it isn't clear from your email, but are you asking to reset this to another date? If so, we need to try to see about getting on Judge Davidson's calendar with another date asap.

----- Original Message -----

From: Carole Brunsting
To: Bobbie G Bayless ; Steve Mendel ; Neal Spielman ; Candace Curtis ; Foley, Zandra
Sent: Monday, July 04, 2016 9:22 PM
Subject: Re: Automatic reply: Cause No. 412249101 and 413249401

All
As much as I want to get this case resolved I cannot make the mediation next week. The company I work for was purchased by Schlumberger a couple of months ago and it has caused a lot of changes. Last week we were informed of a company meeting that involves our division on the 12th and my boss strongly suggested I be there as they are going to begin to consolidate the finance departments.

Very sorry to have to do this but I don't really have a choice over the timing.
Thanks
Carole

On Wednesday, June 29, 2016 3:31 PM, Bobbie G Bayless <bayless@baylessstokes.com> wrote:

FYI--I got this automatic reply when I sent the email to Zelda Russell.

----- Original Message -----
From: Zelda Russell
To: Bobbie G Bayless
Sent: Wednesday, June 29, 2016 3:23 PM
Subject: Automatic reply: Cause No. 412249101 and 413249401

I will be out of the office from Monday, June 27, 2016 - Monday, July 4, 2016 returning Tuesday, July 5 16, 2016. If you need to schedule a mediation, please email me and I will reply upon my return to the office on Wednesday,July 5, 2016. Judge Davidson's calendar is full for the month of July. If you need to cancel a mediation, please email Judge Davidson at **mdljudge@yahoo.com**.

Thank you,
Zelda

DV

FILED
8/10/2015 12:00:00 AM
Stan Stanart
County Clerk
Harris County

NO. 412,249-401 PROBATE COURT 4

CANDACE LOUISE CURTIS	§	IN PROBATE COURT
Plaintiff,	§	
	§	
	§	
V.	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	HARRIS COUNTY, TEXAS

RESPONSE TO DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER

The Court has raised very valid issues regarding the questions before it, and has asked to be briefed. Plaintiff Curtis therefore submits the following analysis of the questions raised and, although seemingly complex at first view, the matter is really quite simple. There is only one primary premise and thus the first principles require answer to only one inquiry, which is whether or not the interception and dissemination of the challenged electronic communications was lawful.

Plaintiff will respectfully show that the greater weight of unrebutted presumptions falls in favor of the illegality of the recordings, and that judicial discretion would best be exercised with caution, as the Court cannot allow dissemination without proof of the legality of the recordings without also becoming a principal to the crime of dissemination.[1]

Summary of the Argument

1. The recordings are evidence of illegally intercepted electronic communications, a second degree felony[2] in Texas with a moderate severity level.
2. Illegally intercepted electronic communications may not be received in evidence nor exchanged under the pretext of discovery in any civil action, as unauthorized possession or dissemination of illegally intercepted electronic communications is a second degree felony which, as noted, the Court would be unwise to participate in.

---

[1] Collins v. Collins, 904 S.W.2d 792 (Tex. App. 1995)
[2] Texas [Penal] Code Annotated Sections 12.33, 12.35, 16.01 (West 1997); 1997 Tex. Gen. Laws 1051; Texas [Civil Practice and Remedies] Code Annotated Sections 123.002, 123.004 (West 1997); Texas Code of Criminal Procedure Annotated Article 18.20 (West 1997).

3. The burden of bringing forth evidence is on the proponents of the legality and admissibility of the recorded wiretap conversations, as the presumption that intercepted electronic communications found in the possession of third parties, meaning persons not privy to the conversations, are presumed unlawful and the burden of showing that the challenged recordings meet one of the statutory exceptions is upon the Defendant disseminators.
4. The Court is without discretion and no agreement is necessary. Under the circumstances here, the Court must issue a protective order, even if only temporary, pending resolution of the issue of whether or not interception and dissemination of the challenged electronic communications was lawful.
5. The attached exhibits in a chronology of relevant events reveals that the recordings are the fruit of an illicit conspiracy targeting Carl and Drina that did not involve Nelva Brunsting and, Defendants' unanimous claims are defeated in their own words uttered at or about the time of the recordings, as hereinafter more fully appears.

Texas Authority on Admissibility

The admissibility of evidence illegally obtained is tempered by Tex.R.Civ.Evid. 402, which provides in pertinent part that, "[a]ll relevant evidence is admissible, except as otherwise provided ... by statute." Consequently, before the recordings can be held to be inadmissible, the Plaintiff(s) must show their exclusion is required under either the federal or state statute. Section 2511(1) of the federal wiretap statute[3] prohibits the use or disclosure of communications by any person except as provided by statute. *Gelbard v. United States,* 408 U.S. 41, 51-52, 92 S.Ct. 2357, 2363, 33 L.Ed.2d 179 (1972) (witness could not be forced to disclose testimony from illegal wiretap to grand jury).

Section 123.002 of the state wiretap statute states that a party has a cause of action against any person who "divulges information" that was obtained by an illegal wiretap. TEX.CIV.PRAC. & REM.CODE § 123.002.

Section 123.004 states that a party whose communication is intercepted may ask the court for an injunction prohibiting the "divulgence or use of information obtained by an interception." TEX. CIV.PRAC. & REM.CODE § 123.004.

[3] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, more commonly known as the "Wiretap Act," is found at 18 U.S.C. §§ 2510-2522.

Although the Texas wiretap statute does not specifically provide for the exclusion of illegally obtained "communications," the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in section 123.004 are sufficient to rebut the presumption of admissibility under rule 402.

Because the tapes were illegally obtained under the federal and state statutes, the trial court should not allow their dissemination, or admit them into evidence, under the exception provided at Tex.R.Civ.Evid. 402.

The recorded conversations are not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination.

> *To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe. Gelbard, 408 U.S. at 51, 92 S.Ct. at 2362-63; Turner, 765 S.W.2d at 470.*

Exceptions

In addition to the numerous governmental or agency exceptions to the general rule, it is not unlawful to intercept any form of wire, oral or electronic communications between others if one of the persons is a party to the communication or one of the parties has given their consent to the interception. Tex. Civ. Prac. & Rem. Code §123.001(2); Tex. Pen. Code§16.02(c)(3)(A); 18 U.S.C §2511(2)(c); Kotrla v. Kotrla, 718 S.W.2d 853, 855 (Tex.. App. - CorpusChristi 1986); See also, Hall v. State, 862 S.W.2d 710(Tex. App. - Beaumont 1993, no writ); Turner v. PV International Corporation , 765 S.W.2d 455, 469-71(Tex. App. - Dallas 1988, writ denied per curiam, 778S.W.2d 865 (Tex. 1989).

Interception, Possession, and Dissemination

The Right to Privacy is the Controlling Presumption

The right to privacy is held in such high esteem that the U.S. Congress and the Texas Legislature have both made it a felony to illegally intercept, possess or disseminate electronic communications. There are very limited exceptions none of which apply here.

The mandatory but rebuttable presumptions are that the participants to these phone conversations had a reasonable expectation of privacy; that the right has been violated and; that the burden of showing the interception of those electronic communications meets one of the statutory exceptions is upon persons who were themselves not a party to the private electronic

communications, but who we find to be in possession of and disseminating the challenged recordings.

Defendants have produced no evidence tending to show that the intercepted electronic communications meet any of the lawful exceptions and the ball is in their court. If the wiretap recordings cannot be shown by the Defendants to meet one of the statutory exceptions, the recordings are prima facia unlawful, regardless of any alleged motives for their interception.

While no more than the foregoing law and fact summary is essential to the disposition of the singular issue before the Court, it seems necessary to address Defendants' unanimously disingenuous assertions and thus Plaintiff does so with the attached Memorandum.

The attached memorandum on the matter of context and color, with attached exhibits, is hereby incorporated by reference as if fully restated herein.

Plaintiff Curtis respectfully submits the following proposed order.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
American Canyon, California 94503
occurtis@sbcglobal.net
925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

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Attorneys for Amy Ruth Brunsting:

Neal E. Spielman
Griffin & Matthews
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nspielman@grifmatlaw.com

Attorneys for Drina Brunsting as
attorney-in-fact for Carl Henry Brunsting:

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Bayless & Stokes
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bayless@baylessstokes.com

Attorneys for Carole Ann Brunsting

Darlene Payne Smith
Crain, Caton & James
Five Houston Center
1401 McKinney, 17th Floor
Houston, Texas 77010
dsmith@craincaton.com

CANDACE L. CURTIS

No. 412,249-401

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

TEMPORARY PROTECTIVE ORDER

On August 3, 2015 the Court heard and considered CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER and Defendants' response thereto.

At issue are recordings of intercepted electronic communications between Plaintiff Carl Henry Brunsting and his wife Drina.

After hearing on the merits and reviewing briefs submitted by the parties, the Court is of the opinion that the recordings in point are "Protected Communications" as that term is defined at 18 U.S.C. §§2510(1) & 2510(12) and that a protective order is necessary to protect privacy rights pending disposition of the pending questions at issue.

IT IS THEREFORE ORDERED that any person or entity subject to this Order-including without limitation the parties to this action, their representatives, agents, experts and consultants, all third parties providing discovery in this action, and all other interested persons with actual or constructive notice of this Order -shall adhere to the following terms, upon pain of contempt and any other applicable civil or criminal penalties:

1. No person or entity shall, in response to a request for discovery or subpoena issued in this action, produce any Protected Communication for any third party or person absent further order of this Court.

2. To the extent a Protected Communication is or has already been produced in response to a request for discovery or subpoena issued in this action, any recipient of such production shall (a) immediately surrender any and all documents that contain or

reflect a Protected Communication to real party in interest Carl Henry Brunsting through his Counsel of Record and (b) destroy any copies made of such Protected Communication, as well as any derivative materials that reflect a Protected Communication on any medium of storage whatsoever.

3. Any party to this action that issues a request for discovery or subpoena calling for the production of a Protected Communication shall simultaneously provide the recipient of the discovery request or subpoena with a copy of this Protective Order. To the extent a party to this action has already issued such a request or subpoena, such party shall provide a copy of this Protective Order to the recipient within three (3) business days of the entry of this Order.

4. Any person who receives a request for discovery or subpoena in this action calling for the production of a Protected Communication shall, without revealing the substance or content of a Protected Communication, provide both the issuing party and the Court with a general description of that Protected Communication so that the issuing party can make an application to this Court for production of that Protected Communication, and that Plaintiff Carl Henry Brunsting can respond to that application.

IT IS FURTHER ORDERED that on or before _____, sworn affidavits are to be provided by Defendants Anita Brunsting, Amy Brunsting, and Carole Brunsting, stating any personal knowledge with regard to every recording made since July 1, 2010 within the following categories:

- All audio or video recordings of meetings, conversations, telephone messages, or other communications with Elmer, Nelva, or any of the Brunsting Descendants concerning Brunsting Issues,
- All audio or video recordings of Nelva's execution of any documents.
- All audio or video recordings of evaluations of Nelva's capacity,
- All other audio or video recordings of any Brunsting family member, and
- All investigations made of any Brunsting family member, including any surveillance logs or reports.

The sworn affidavits shall identify every party involved in making the recordings and specify the date, location, and means used to make the recordings, the current location of all original recordings and all copies of all recordings, all parties to whom the contents of recordings have been disclosed, and all uses which have been made of the recordings.

IT IS SO ORDERED!

Signed August, _____, 2015.

_____
Christine Butts, Judge
Harris County Probate Court No. 4

NO. 412,249-401

CANDACE LOUISE CURTIS	§	**IN PROBATE COURT**
	§	
Plaintiff,	§	
	§	
V.	§	**NUMBER FOUR (4) OF**
	§	
ANITA KAY BRUNSTING, ET AL	§	
	§	
Defendants.	§	**HARRIS COUNTY, TEXAS**

MEMORANDUM OF FACTS SUPPORTED BY DEFENDANTS' OWN DISCLOSURES

Plaintiff Candace Louise Curtis respectfully submits for the perusal of the Court this memorandum of facts adding to the inquiry context and color revealing the true nature of the intentions behind the unlawful interception and dissemination of the private electronic communications at issue.

Statement of the Issue

Recordings of private electronic telephone conversations between plaintiff Carl Brunsting and his wife Drina Brunsting have been disseminated to all of the parties to the present lawsuits. These recordings, if any, were requested by Plaintiff Brunsting to be produced by the Defendants in the Petition for Deposition Before Suit filed by Carl Brunsting March 9, 2012, when there were no other parties, however, the recordings were not disclosed until July 5, 2015.

Plaintiff Carl Henry Brunsting, along with his wife and attorney in fact Drina Brunsting, challenged the recordings as the product of the illegal interception of electronic communications, in violation of state and federal wiretap laws, and thus seek protective orders.

In DEFENDANTS' RESPONSE TO CARL HENRY BRUNSTING'S MOTION FOR PROTECTIVE ORDER Defendants unanimously assume the following postures:

1. *It is certainly understandable that Drina has such opposition to the recordings because it proves that Nelva was planning for Drina and Carl's divorce and that Nelva felt Carl's medical condition made him unable to serve as a trustee.*

2. *On information and belief, all audio recordings came from an answering machine which Carl either intentionally set up to record the calls and/or which triggered in accordance with its own operation. Either way, one-if not both-participants had full knowledge that he/she was being recorded.*

3. *Drina provides no evidence that both parties to the conversations did not consent to the recordings, which is a prerequisite to the relief sought.*

A Recital of Known Facts

1. There are known recordings of private phone communications between Carl and Nelva and between Carl and his wife Drina, which are the object of the application for protective order.

2. The recordings were disseminated by Defendant Anita Brunsting, who is not a party to any of the disclosed communications.

3. We have a claim by Carl Henry Brunsting and his wife Drina that the recordings were illegally obtained.

4. We have a unanimous response from all three Defendants asserting upon information and belief that the recordings were legally obtained but answers to interrogatories on the subject indicate that none of them know anything individually.

5. The question of admissibility hinges upon the legality of the interception and dissemination of the communications.

6. A presumption that the right of privacy has been violated is primary and stands unrebutted by competent evidence to the contrary.

7. The burden of proof as to the legality of the acquisition and dissemination of the recordings is on the proponent of the assertions that the recordings were obtained legally and are therefore admissible.

8. The proponent of the legitimacy and admissibility of the recordings objects that declaring the facts necessary to qualify the recordings as legally obtained evidence before dissemination is somehow onerous, but at the same time want carte blanch to disseminate the recordings to persons not privy to the conversations under the auspices of discovery and disclosure.

9. Unless the recordings can be qualified as legally obtained they are inadmissible and cannot be disseminated lawfully.

10. There are questions as to the recordings' origins and Defendants file a joint motion claiming the existence of specific facts while taking no individual responsibility for personal knowledge.

11. Anita Brunsting, through her counsel Brad Featherston, disseminated the recordings and, thus, Anita Brunsting would have at least some personal knowledge regarding the chain of custody and control, and both now share in the culpability and attendant civil liability.

12. Assertions that the recordings were made on an answering machine would indicate personal knowledge by one if not all of the Defendants.

13. An assertion that the recordings were authorized by Carl Brunsting requires evidentiary support from the proponent of the claim, and there has been none.

14. Assertions that Carl Brunsting installed and activated the Answering Machine are inconsistent with the Defendants' emails of the same date of the purchase of the voice recorder showing they were conspiring to get guardianship over Carl.

15. Carl was both incompetent and the proper subject of Defendants' intended guardianship effort or he was competent to install and activate the "Answering Machine" that Defendants insist he made the recordings on. Both of these things cannot be true.

16. In the Bates stamped disclosures there is a receipt for a signal activated SONY digital voice recorder purchased four days before the first dated recording on the disseminated CD. When combined with the attached email and other exhibits talking about getting guardianship over Carl, continuing the Private Investigator over the weekend, knowing where Carl and Drina were and what they were doing at that very point in time, and all of these events in the same time period as other documented activities, provides a presumption that the circumstances and intentions surrounding the acquisition of the recordings are not what Defendants claim, as hereinafter more fully appears.

The hierarchy of presumptions is as follows:

1. The participants to a private telephone conversation have a reasonable expectation of privacy against electronic eavesdropping.

2. The waiver of a known right must be a knowing and intelligent act done with sufficient knowledge of the relevant circumstance and likely consequences, and it must be both a voluntary and an overt act.

3. There is no affirmative evidence of such waiver.

4. Unless rebutted the presumption that the recordings were illegally obtained is not only controlling but the prudent course.

The True Context and Color

The only probative value these recordings could possibly have is in the fact of their very existence. Defendants argue that the content of the challenged recordings adds context and color to the events of the time showing that Nelva was preparing for Carl's alleged divorce. As in all other instances Defendants fail to provide anything but claims of Nelva's intentions based upon the strength of the honor and integrity of their word alone.

Despite all the posturing and game playing the evidence will show the Defendants are intractably disingenuous and that they illegally intercepted the private electronic communications as part of a conspiracy to steal the family inheritance. That conspiracy involved attempts to have

Nelva declared incompetent and to gather what they thought would be evidence to support guardianship over Carl.

The evidence will further show Defendants stalked Nelva through her email and banking activities online, in addition to tapping her phone and recording every conversation involving anyone who spoke with Nelva on the phone, including Plaintiff Curtis in California.

Candace Freed took her instructions from ANITA despite her claims it was Nelva who was making the requests for changes to the trust. (Exhibit A)

The October 25, 2010 phone conference called for by Candace Freed excluded Carl and Nelva and was ultimately about having Nelva declared incompetent, which they failed to achieve by mid-November. The "law firm" did not keep an audio recording of that conference.

There is no evidence Nelva even knew of these changes before Plaintiff Curtis' 10/26/2010 phone call, after which Nelva sent Candace her hand written note repudiating the alleged 8/25/2010 QBD.

Defendant Carole Brunsting sent an email about overhearing Nelva's conversation on the phone with Candace Freed. (Exhibit B)

Freed sends a follow up email regarding the failed attempt at getting Nelva declared incompetent on Nov. 17, 2010, apparently referring to this same conversation. (Exhibit C)

Despite Defendant Amy Brunsting's claims of not being involved before Nelva's death, Amy and Anita corresponded with Candace Freed December 23, 2010 and on several other dates prior to Nelva's demise. (Exhibit D)

On March 8, 2011 Anita emails Carole, Amy and Candace bragging about reminding Nelva she was no longer trustee and no longer had access to the trust. (Exhibit E)

March 17, 2011 Tino (Nelva's caregiver) buys a Sony Digital Voice Recorder, (Brunsting 004570) which shows one ICD-PX312 digital voice recorder purchased by Tino at Best Buy in Houston. (Exhibit F)

March 17 and 18, 2011 emails mention the PI and talk about getting guardianship over Carl. (Exhibit G 1-3)

March 21, 2011 is the record date of first wiretap .wav file (received from Brad on CD 7/5/2015) (See Carl Brunsting Petition for Protective Order)

On March 24 and 25, 2011 there are large trust-prohibited transfers of Exxon Mobil and Chevron Stocks labeled as "gifts". (See Report of Special Master)

On March 29, 2011 Amy and Anita communicated with Freed (Exhibit D)

April 22, 2011 is the record date of second .wav file (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order)

Then on May 11, 23 and 25, and on June 14 and 15, there are more large trust-prohibited transfers of Exxon Mobil and Chevron Stocks. (Report of Special Master)

July 27, 2011 Anita corresponds with Freed (Exhibit D)

August 16, 2011 Anita corresponds with Freed (Exhibit D)

September 20, 2011 Amy and Anita correspond with Freed (Exhibit D)

February 27, 2015 is the record date of the third and fourth .wav files (received from Brad 7/5/2015) (See Carl Brunsting Petition for Protective Order), indicating these two recordings had been excerpted from a master storage disk containing even more undisclosed recordings.

There is an overwhelming volume of evidence clearly showing more of the same pernicious intent, but since the matter before the Court is limited to the singular question of the legality of Protected Communications, Plaintiff Curtis will not respond to the plethora of Defendants' extemporaneous expressions of disingenuous, self-serving bias, and otherwise irrelevant assertions.

Respectfully submitted,

Candace L. Curtis, *Pro se*
218 Landana Street
American Canyon, California 94503
occurtis@sbcglobal.net
925-759-9020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 9th day of August 2015, to the following via email:

Attorneys for Anita Kay Brunsting

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Attorneys for Drina Brunsting as
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Attorneys for Carole Ann Brunsting

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Houston, Texas 77010
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CANDACE L. CURTIS

EXHIBIT A

PM TRUST REVIEW MEETING

Signing Date & Time: Wed. Aug. 4th 2 pm.
Fee: _____
Paid: _____ Mail: _____

Client Name: Brunsting, Nelva

Date: 07/30/10 **Estate Size:** 2 mil ±

IRA: Husband - N/A **Wife -** _____

Current Address/Phone: 13630 Pinerock Hou TX 77079

Date of Trust/Restatement: _____ **Previous Amendments?** Yes.

Subtrust Funding Done previously? Yes. DT & ST.

AMENDMENT: ✓ QBD(PAT)✓ ____ Other ____ Instr Ltr ✓ HCPOA✓
✓ ApptSUCCTee/HIPAA✓ ___ ExTPOA ___ ✓COT ___ ✓POA✓ ___ DIR

Anita Kay Riley & Amy Ruth ... Co-tees
or Survivor of Them. Then Most

✓ **Distribution Change (QBD):**

PAT QBD

IF PAT QBD then:

Each beneficiary Trustee of Own Trust: ✓ yes ____ no

except for Carl, Anita & Aimee as Co-tees for Carl
(except they have rt to name Carl as own Succ Tee)
Distribution of PAT: need to

Same as LT except need language
about the last amend (QBD) ltes early distrs.

_____ **Specific Distribution:**

_____ **Ultimate Distribution:**

_____ **HEALTH CARE DOCUMENTS:**

1ST Agent: Carol

2nd Agent: Anita

3rd Amy

IRA TRUST: _____ **yes** _____ **no** For whom? _____ husband _____ wife

Trustees upon disability of Trustor or spouse: _____

Each beneficiary Trustee of own trust? _____ yes _____ no

SS# of Surviving Spouse/Beneficiaries: _____

FUNDING:

Real Estate _____

Which property has NO MORTGAGE? _____

_____ Recording HS Deed

_____ Apply for HS Exemption

Tax-deferred Assets _____

_____ Bank & Brokerage Accounts
_____ Life Insurance
_____ Oil & Gas Interests
_____ Credit Union Accounts
_____ Partnership Interests
_____ CDs
_____ Safe Deposit Box
_____ Stocks and Bonds
_____ Motor Vehicles
_____ Sole Proprietorship Assets
_____ Promissory Notes & Mortgages
_____ Annuities

Additional Documents: _____

NOTES:

Needs new DFPOA -order

Anita

Carol

Amy

Any Name Changes for children? _____ **Any children Predecease?** No.

If Yes, who: _____

FEES:

QUOTED: $ _____ **(Plus Expenses)**

AMOUNT REC'D: None **DATE:** _____

BALANCE DUE: _____

DOCUBANK? _____

Cost Pat QBD 1200.
Hipaa Pkg 250 - med POA
D.F.P.O.A 150.-
Appl. of Succ TEE
New Card.

Courtesy discount $150.-
Cy

Anita - called

Carl has emailed amendments to trust

Anita + Aimee as Co-Tees

Change list under ME

Carol
Anita
Aimee

Financial P.O.A

Anita
Carol
Aimee

Amend to trust /PAT's w/ Aimee to be Co-Tees.
to correct Supp Needs to.

Sp needs?

From: Anita Brunsting
To: Candace Freed
Sent: 10/6/2010 8:19:06 PM
Subject: Brunsting Family Trust

Candace,

I spoke to mom tonight and she agreed to resign as trustee and appoint me as trustee. I told her that you would be contacting her to re-explain things and make sure she understood what was happening.

If you have any questions, my cell is 361-550-7132.

Thanks,
Anita

EXHIBIT B

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Thursday, October 28, 2010 9:00 AM
To: Candace Curtis
Subject: Re: One more

Candy,
The more I think about this the whole key is Carl. When I was listening to Mother's call with Candance, Mother told Candace that Carl was trustee, not Anita and was not following the changes Candane was telling her she had made to have Carl removed.. Legally, I wonder if what Candace did was right without consulting Carl or his power of attonery since Carl has always been present at all meetings.

--- On **Thu, 10/28/10, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: One more
To: "Carole Brunsting" <cbrunsting@sbcglobal.net>
Date: Thursday, October 28, 2010, 10:34 AM

Candace DOES know she fucked up. That's why she had such a nasty attitude towards both you and I. Anita is smug and Amy plays dumb.

I hope Carl goes home today! If he does I hope the sun is shining. 10 minutes smiling into the sunshine + coffee + the Beatles = a sharper, happy Carl. I have a strong feeling that he will recover in leaps and bounds ALL ON HIS OWN, with support from his wife and family. The fact that Daddy is looking over us gives me strength. I can feel him stronger than ever before.

My suggestion is that when Dr. White finds Mother competent the following should happen:

1. You need to complete your time-line to demonstrate that due to various factors (badgering, low oxygen, Carl's illness, her illness, pneumonia, general stress and worry due to all of this), Mother was incompetent and under extreme duress when she signed everything she signed, particularly the Power of Attorney. We can compose a letter to Candace for Mother to sign, demanding that she wants to have papers drawn up to revoke anything she agreed to between the first of July and now.

2. As Mother gathers strength over the next few weeks she will go to her MD Anderson appointments, etc. and move towards treatment and recovery. I want to stress nutrition, adequate good sleep, and stress-free living.

3. In the meantime she can sell what she needs to, to pay for Robert or Tino or whoever Drina needs to assist her with Carl (if she even needs someone - Carl may recover a lot in a few weeks at home). The cost will be minimal compared to the $100k shithead got to buy her house.

Going forward, Mother will have to tell Candace IN WRITING what she wants done with the trust. You can help her compose the letters. There can be no question when it's in writing. You can assist Mother in reviewing the paperwork before she signs (at home - at her leisure), to make sure all her wishes have been incorporated. This should never be done under the pressure and duress she was subjected to. Mother can take as much time as she needs to read and understand that everything will be as she wants it to be.

The fair and equitable solution in my mind is:

Make all five of us successor co-trustees and require a majority to make any change whatsoever. Then, if Mother steps down there will be no shenanigans. Everything will be transparent and we'll all know everything everyone else knows. That way when Anita wants to sell the farm, or move away from Edward Jones, she can put it up for a vote among us. All five of us are intelligent people and none of us can honestly say we have NEVER made a wrong choice in our lives. This way Mother will be at peace to live out her life, and she will die knowing that she has not pitted one against the other, or given control of one over the other, or played favorites, or been bullied into doing something she didn't really want to do, or would not have done in the first place.

Now this may go AGAINST the norm, or what Candace and her ilk would recommend, but fuck them. They are attorneys who get paid to do what their clients want them to do and they love having to draw up documents. Fees, fees, fees, $$$$$$$$$$$$

If Anita succeeds in her agenda and becomes trustee, we should have her competency tested just to show her what it feels like. If everything stays the way it is right now, that's the first thing I'm going to do when the day comes that she's in charge of me. Na, Na, Na, Na, Na, Na.

Love you,

C

From: Carole Brunsting <cbrunsting@sbcglobal.net>
To: occurtis@sbcglobal.net
Sent: Wed, October 27, 2010 9:32:06 PM
Subject: One more

And do not overlook an exploration of the family's motives in requesting a competency evaluation, she cautioned. Do family members have reason for wanting their oddly behaving relative to be declared incompetent?

This is from an article about not rushing to declare and elderly person incompetent.
Mother passes the smell test and I have to make sure Tino does not let her out of the house without her clothes being ironed and SEE!!! MOTHER MADE THE APPOINTMENT TO GET HER HAIR DONE!!! CANDY THAT IS IT!!! MOTHER DOES CARE ABOUT HER APPEARANCE!! She will not go out without her makeup one and I have to get her a nail file all the time. Mother also called Edward Jones on her own and sold $10K so she would have enough money to live on.

She was temporarily incompetent when she was to low on oxygen and if they made her walk to Candace's offic I know for a fact her levels were to low because Dr. White joked about it. Tino did not take her so she had to walk from the parking lot to the office. She did not understand what she was signing because she was to short o breath and I can prove that. Candane has to know she F***ed up.

--- On **Wed, 10/27/10, Carole Brunsting** ***<cbrunsting@sbcglobal.net>*** wrote:

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Subject: Found this
To: occurtis@sbcglobal.net

Date: Wednesday, October 27, 2010, 10:38 PM

There are any number of situations that may cause you to question the competency of a family member to make sound life decisions, such as when:

- An elderly person suddenly changes a will or trust in a manner that is significantly different from all previous wills or trusts, which could result in will litigation if not appropriately handled during the elder's life.
- A family member has suspicion that the elderly person is being unduly influenced by others

Anita is unduly influencing Mother and now Amy has piled on. Mother never would have made these changes on her own. This was all done by the hand of Anita who put herself in charge of everything.

EXHIBIT C

Subject: Fw: Nelva Brunsting
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 3/11/2015 6:24 PM
To: Rik Munson <blowintough@att.net>

On Wednesday, November 17, 2010 2:38 PM, Candace Freed <candace@vacek.com> wrote:

Amy and Family, Thank you for the update on your mom, Nelva Brunsting. The purpose of the conference call and the suggestion that Ms. Brunsting be evaluated was based solely on conversations that I had with Ms. Brunsting and to let you all know that I had concerns based on those conversations. If she has been evaluated by her physician and you as a family are comfortable with his or her diagnosis, then you have addressed the concerns that I had. I appreciate your letting me know the opinion of the doctor. I hope your mom is doing well and she continues to improve.

Please let me know if I can be any further assistance.

Very truly Yours,

Candace L. Kunz-Freed
Attorney at Law

Vacek & Freed, PLLC
14800 St. Mary's Lane, Suite 230
Houston, Texas 77079
Phone: 281.531.5800
Toll-Free: 800.229.3002
Fax: 281.531.5885
E-mail: candace@vacek.com
www.vacek.com

We have moved! Our new office address is as shown above. We are one exit west of our old office building. Exit Dairy Ashford. Turn south on Dairy Ashford. St. Mary's Lane is a side street one block south of I-10 Katy Freeway. Turn west on St. Mary's Lane. Our building is in the northwest corner of the four-way stop.

EXHIBIT D

DEFENDANTS' PRIVILEGE LOG

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002054 - V&F 002057 (1)	1/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002058 - V&F 002060 (2)	7/27/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002061 - V&F 002066 (3)	12/08/11	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002067 - V&F 002070 (4)	12/23/10	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002071 - V&F 002072 (5)	3/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002073 - V&F 002075 (6)	9/20/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002076 (7)	11/29/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002077 - V&F 002078 (8)	12/28/11	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002079 (9)	1/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 0020890 (10)	1/31/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document Type	Subject Matter	Privilege
V&F 002081 (11)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002082 - V&F 002085 (12)	2/14/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002086 - V&F 002089 (13)	3/20/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002090 - V&F 002093 (14)	3/29/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002094 (15)	4/12/12	Vacek & Freed, PLLC	Anita Kay Brunsting and Amy Ruth Brunsting	Statement	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	From	To	Type	Subject	Privilege
V&F 002095 - V&F 002096 (16)	1/24/11	Anita Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding stock valuation.	Attorney-Client Communication
V&F 002097 (17)	1/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002098 (18)	7/27/11	Summer Peoples	Anita Kay Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002099 (19)	8/16/11	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002100 (20)	12/8/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding representation.	Attorney-Client Communication
V&F 002101 - V&F 002102 (21)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication
V&F 002103 - V&F 002104 (22)	12/20/11	Candace L. Kuntz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding life insurance proceeds.	Attorney-Client Communication

Privilege Log No.	Date	Author	Recipient	Document Type	Subject	Privilege
V&F 002105 - V&F 002106 (23)	12/28/11	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002107 (24)	1/03/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding title of the Buick.	Attorney-Client Communication
V&F 002108 (25)	1/05/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding Trust Information Sheets.	Attorney-Client Communication
V&F 002109 - V&F 002112 (26)	1/09/12	Candace L. Kuntz-Freed	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Email string between attorney and client regarding distribution of trust funds.	Attorney-Client Communication
V&F 002113 - V&F 002114 (27)	1/22/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication
V&F 002115 - V&F 002116 (28)	1/23/12	Candace L. Kunz-Freed	Anita Kay Brunsting	Email	Email string between attorney and client regarding notice to beneficiaries.	Attorney-Client Communication

Bates No.	Date	Author	To/Recipient	Document	Subject	Privilege
V&F 002117 - V&F 002118 (29)	1/23/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002119 - V&F 002121 (30)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust documents.	Attorney-Client Communication
V&F 002122 - V&F 002123 (31)	1/24/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding trust accounting.	Attorney-Client Communication
V&F 002124 - V&F 002125 (32)	1/31/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Email string between attorney and client regarding Farmland LLC.	Attorney-Client Communication
V&F 002126 - V&F 002127 (33)	1/31/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002128 (34)	2/14/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002129 (35)	2/15/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Correspondence	Attorney communications to client regarding estate planning documents.	Attorney-Client Communication
V&F 002130 - V&F 002132 (36)	2/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Summer Peoples	Email	Attorney communications to client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002133 - V&F 002139 (37)	3/02/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding trust value report.	Attorney-Client Communication Attorney Work Product
V&F 002140 - V&F 002142 (38)	3/06/12	Amy Ruth Brunsting	Candace L. Kunz-Freed	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product
V&F 002143 - V&F 002148 (39)	3/14/12	Anita Kay Brunsting	Candace L. Kunz-Freed and Amy Ruth Brunsting	Email	Communication between attorney and client regarding promissory note.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Description	Subject	Privilege
V&F 002149 (40)	3/20/12	Summer Peoples	Amy Ruth Brunsting, Anita Kay Brunsting, and Chip Mathews	Email	Attorney communications to client regarding request for wills.	Attorney-Client Communication
V&F 002150 - V&F 002151 (41)	3/20/13	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002152 (42)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed, Chip Mathews, and Amy Ruth Brunsting	Email	Attorney communications to client regarding December of 2011 accounting.	Attorney-Client Communication
V&F 002153 (43)	3/22/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Attorney communications to client regarding accounting.	Attorney-Client Communication
V&F 002154 - V&F 002155 (44)	3/27/12	Anita Kay Brunsting	Chip Mathews, Amy Brunsting, Candace L. Kunz-Freed	Email	Email string between attorney and client regarding accounting.	Attorney-Client Communication
V&F 002156 - V&F 002158 (45)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Chip Mathews	Email	Email string between attorney and client regarding asset lists.	Attorney-Client Communication

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002159 (46)	3/28/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Brunsting, and Bernard Mathews	Email	Attorney communications to client regarding asset lists.	Attorney-Client Communication
V&F 002160 - V&F 002161 (47)	3/29/12	Anita Kay Brunsting	Candace L. Kunz-Freed	Email	Email string between attorney and client regarding assets and expenses.	Attorney-Client Communication Attorney Work Product
V&F 002162 - V&F 002163 (48)	3/29/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product
V&F 002164 - V&F 002166 (49)	3/30/12	Candace L. Kunz-Freed	Anita Kay Brunsting, Amy Ruth Brunsting, and Bernard Mathews	Email	Email string between attorney and client regarding asset list.	Attorney-Client Communication
V&F 002167 (50)	4/12/12	Summer Peoples	Anita Kay Brunsting and Amy Ruth Brunsting	Email	Attorney communications to client regarding attorneys' fees.	Attorney-Client Communication Attorney Work Product

Bates No.	Date	Author	Recipient	Document	Subject	Privilege
V&F 002168 - V&F 002183 (51)		Candace L. Kunz-Freed		Chart	Attorney notes/history of representation	Attorney-Client Communication Attorney Work Product
V&F 002184 - V&F 002191 (52)	11/22/11			Document	Authorization for Release of Protected Health Information	Attorney Work Product
V&F 002192 (53)	11/22/11			Document	Authorization for Release of Information	Attorney Work Product

EXHIBIT E

From: Candace Curtis (occurtis@sbcglobal.net)
To: occurtis@sbcglobal.net;
Date: Sat, February 18, 2012 11:29:12 AM
Cc:
Subject: Fw: New Development

----- Forwarded Message ----
From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Amy <at.home3@yahoo.com>; Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Tue, March 8, 2011 7:15:32 PM
Subject: RE: New Development

I got the same TM from Tino. I hesitate to promise them anything in writing about money. Rather than a monthly payment, I would rather grant them a certain amount each year, but only through the direct payment of their bills - for example; mom could gift Carl $13,000/year, but only if they send me the bill statements to pay directly, and only for bills for living/medical expenses - when the trust has paid $13,000 in bills for the year, that's the end of the money for that year. We could ask them to sign for this money against his inheritance, but then we'd have another form that we'd have to get them to sign (probably notarized), and as we don't know if she's had Carl declared incompetent, the validity of any form he signs might be questionable.

I do like the idea of a letter telling Drina that she may have no contact w/ mom (physical, verbal, visual, phone or electronic means) and she is not to enter mom's house. She can bring Carl to visit mom, but she must remain outside the house - any violation of this letter will be considered harassment and the police will be called if she does not comply. I would also like to add in the letter that Carl's inheritance will be put into a Personal Asset Trust for his care and living expenses - I think this information might be enough to tip her hand.

I would also like to ask Candace, what this letter would do for us legally - like if we did end up calling the police would the letter lend any credence to our case?

I won't do anything until we can come upon an agreement as what to do - I can also write this letter in the role of mom's power of attorney (which she signed last year).

I spoke w/ mom about the whole situation; she listens to reason and can understand our concerns for Carl, and will sign the changes to the trust next week. I have been very forthright in explaining the changes in the trust to her, and that they would be done in order to minimize any pathway that Drina might have to Carl's money. The changes are not to penalize Carl, but to ensure the money goes for his care. I told her to "just say No" to Carl or Drina if they brought up the trust or money and to refer them to me. I reminded her that she isn't trustee anymore and doesn't have access to the trust accounts - she seems fine w/ everything, and expressed no desire to put Carl back on as a trustee. I told her that in the event she did that, that it would not be fair to the rest of us, as we would end up having to deal w/ Drina, not Carl. Mom begrudgingly admits to knowledge of the unpleasantness of this whole situation and Drina's past behavior since Carl has been ill, but I think she is really naive regarding the lengths to which Drina may go through to get Carl's inheritance.

P-9

EXHIBIT F

TIME SHEET

Employee Name: Faustino Vaquera **Title:**

Week: March 15 — March 19

Date	Start Time	End Time	Regular Hrs.	Total Hrs.
3-15 Tues	8:30 am	12:00 am	15.30	
3-16, Wed	12:00 am	2:00 pm	14	
↓	4:00 pm	12:00 am	8	
3-17, Thur	12:00 am	9:30 am	9:30	
3-[redacted]	6:30 pm	12:00 am	5:30	
3-18 [redacted] Fri	12:00 am	6:00 pm	18	
	WEEKLY TOTALS:		70 ½	

Employee Signature: [signature] **Date:** 3-18

Supervisor Signature: **Date:**

70.5
x 15.00
= 1057.50

Groceries & Food = 126.26

Best Buy Digital Voice Recorder 64.94

191.20

Total = 1248.70

08:12:55 :: 0220 :: 0902247

WELCOME TO BEST BUY #216
HOUSTON, TX 77024
(713)647-6004

Keep your receipt!

Val #: 0422-1046-6045-3089

0216 003 2499 03/17/11 18:22 00005044

1792142 ICDPX312 59.99
ICDPX312 DIGITAL VOICE RECORD
ITEM TAX 4.95
6094193 RZ SILVER 0.00 N
REWARD ZONE PREMIER SILVER
MEMBER ID 0329918420

SUBTOTAL 59.99
SALES TAX AMOUNT 4.95
TOTAL 64.94

xxxxxxxxxx4030 DEBIT 64.94
FAUSTINO VAQUERA JR
APPROVAL 132943
REFERENCE NUMBER: 0216003

ALEX,
THANKS FOR SHOPPING AT BEST BUY TODAY!
YOUR REWARD ZONE BALANCE AS OF 03/08/11
POSTED POINTS: 153
Go to MyRZ.com FOR MORE INFO

Congratulations! As an added benefit of being a Reward Zone program Premier Silver member, you may return eligible products up to 45 days from purchase date.

Dear Valued Customer,

directly or indirectly by the products listed on this receipt.

THE SHACK THANKS YOU.

RADIOSHACK 01-8020
Kroger Plaza Sc
14356 Memorial Dr
Houston, TX 77079-6704
(281) 496-9429

Order: 057553 03/17/2011 08:14P Term #002

Helped By: 001 (MAR)
Entered By. 001 (MAR)

4200223 3' 1/8' M-M PATCH CABLE 1 8.39

Subtotal 8.39
Tax 8.25% 0.69
Total 9.08

Credit Card 9.08

Change Due 0.00

Acct# xxxxxxxxxxx0307 M
Card Type VI
Tran# 12687148
Auth# 161235 9.08
Host Captured Y

The card holder identified hereon may apply the total amount shown on this receipt to the appropriate account to be paid according to its current terms.

I agree to pay above total according to card issuer agreement.

Your name, address and the original sales receipt are required for all refunds. Sales and returns are subject to the terms and conditions identified on the back.

Shop online 24/7 at
www.radioshack.com

EXHIBIT G

From: Amy Tschirhart <at.home3@yahoo.com>
Sent: Wednesday, August 18, 2010 12:58 PM
To: Anita Brunsting; Carole Brunsting; Candy Curtis
Subject: CPA's advice

Hi,

I talked to the CPA who does my taxes today and asked her what she would recommend. She told me that Drina should talk to an attorney who specializes in debt created by medical bills. Medical bill debt is treated differently than other debt. I did a quick check on the internet and there are several in Houston.

She said that creditors cannot touch Drina's house or cars. She also recommended not paying any of the medical bills right now. She said to wait until the dust settles, then talk with each company about a payment plan, possibly as little as $10 a month. She told me that in all likelihood, they would eventually write off her debt as a loss. She said Drina should definitely not touch any retirement or inheritance, or borrow anything against them.

I called Drina today and told her what Darlene said. She said her father had been telling her the same things. I tried to emphasize that she should not be paying any bills right now, but I don't know if she really understood why. She is overly concerned with her credit score rating. Darlene said that is not that important because they own their house and cars and are not as reliant on credit compared to younger people.

Anyhow, I know that Drina is in a hard spot right now, but I honestly think that keeping her from accessing *any* of Carl's inheritance would be in her best interest. It would be a waste to spend it on medical bills and they will need the money in the future. I don't think that is going to sit well with Drina because she's going to see it as us being tight-fisted with the money. I strongly suggest that if any of us talk to her, we do it as nicely as we can. Acknowledge that the debt is so huge it is unpayable in her lifetime. Encourage her to seek a professional to find the best way to deal with it. Remind her that we want the best for her and Carl in their future and that we are thinking of their best interests.

Love,
Amy

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 11:59 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: atty for guardianship

I think that Drina has always projected her own family issues onto ours. She was completely distanced from her own family until a year ago when her brother passed away and now she is talks about the relationship with her dad like they have been close forever which has not been the case.

She must have had some very bad things happen to her in her childhood and slowly but surely she twisted Carl's mind to go along with everything she did and said. I think you are right that this will have to play itself out to see what she does. She has been waiting for the day she and Carl get the "big" trust payout and then it will be see you later chumps!

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: atty for guardianship
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 1:49 PM

The Brunsting family has never been very demonstrative of their love for one another, but I chalk that up to being Dutch. What I cannot seem to wrap my arms around is the extreme coldness of Drina and Marta. They have always been limp when hugged and hugging is one of the best things in the world. One power hug and all my cares fly out the window. I believe it must be a genetic brain chemical imbalance in Drina's family. She has spent her life with Carl trying to distance HIM from his family and turn him into a cold fish like her. How did she ever get pregnant in the first place? Maybe we should try to get some DNA from Marta and Carl and do a paternity test. Wouldn't it be something if he wasn't her father?????????? LOL

Frankly, as long as the trust is safe, we should probably just let nature take its course and sooner or later we will get Carl out of their clutches and into ours. He might be pissed off for awhile, but I have some small faith that once he can reason better he will see that we only seek what is best for him in the long run BECAUSE WE LOVE HIM. Once he is able to reason and be reasoned with, and has regained some control of his life, if he chooses to go back to his moron wife and their moron spawn, I will mourn him as if he were dead. Until such time I will assume that, somehow, at some point in his recovery, he will realize how miserable the bitch has made his life. He might see that all she has ever cared about is money and how to avoid having to go out and earn some.

If asked, Carl would probably say no to coming out here to live with us, even though it might be the very best thing for him. He should never feel like he has been "dumped" on anyone. I think he would have a lot more stimulation out here. He does love the Bay Area and after a short time he might gain some real incentive to get well.

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>

Sent: Fri, March 18, 2011 8:59:24 AM
Subject: atty for guardianship

Ok, I think I may have found an atty who could handle the guardianship issue. She was recommended to me by the Burgower firm that Amy's lawyer had given her - the Burgower firm does not do guardianship cases. This atty's name is Ellen Yarrell; her offices are in the Galleria area; she charges an initial consult fee of $350 for 1 hr of her time, and probably requires an retainer of $2000. Her paralegal (Elizabeth) said that she's handled cases like this before (where an impaired person has been divorced by their spouse). I asked about the expense and she said that Yarrell could give us a better idea after the consult and it depends on whether the guardianship would be contested (so that depends on whether we fight Drina now, or wait to see if she'll divorce him and then we're facing Marta (if she pursues it)). I got the feeling that "expensive" meant more like $50,000 not $1 million.

I thought of another plus on our side if Drina divorces him - Drina will probably expect him to come live w/ mother - so if he's w/ us and not his daughter that lends more credence to our side for guardianship (possession is 9/10's of the law?).

I also talked to mom last night and told her what was going on. I asked her if she was ok w/ using her money to pay for Carl's legal fees and of course she said yes.

From: Carole Brunsting <cbrunsting@sbcglobal.net>
Sent: Friday, March 18, 2011 8:41 AM
To: Anita Brunsting; Amy Tschirhart; Candace Curtis
Subject: Re: guardianship assessment form

They are there right now according to the PI. And Michael took him on Wednesday.

--- On **Fri, 3/18/11, Candace Curtis <*occurtis@sbcglobal.net*>** wrote:

From: Candace Curtis <occurtis@sbcglobal.net>
Subject: Re: guardianship assessment form
To: "Anita Brunsting" <akbrunsting@suddenlink.net>, "Carole Brunsting" <cbrunsting@sbcglobal.net>, "Amy Tschirhart" <at.home3@yahoo.com>
Date: Friday, March 18, 2011, 10:33 AM

Do you know if he went to therapy at all this week?

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Candace Curtis <occurtis@sbcglobal.net>; Carole Brunsting <cbrunsting@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Fri, March 18, 2011 8:26:05 AM
Subject: RE: guardianship assessment form

we're continuing the pi over the weekend or unless it looks like she's headed toward Beaumont - will also use him through next week. $750 is for the lawyer's (Cole) initial consult not a dr. If she divorces him then someone needs to sue for guardianship - Marta would be considered next in line by the law, but if she doesn't sue for it then I don't think she'd be considered. If Drina gets him to sign divorce papers that give him any less than 50% of their assets then a guardian can countersue her to recover those.

From: Candace Curtis [mailto:occurtis@sbcglobal.net]
Sent: Friday, March 18, 2011 10:20 AM
To: Anita Brunsting; Carole Brunsting; Amy Tschirhart
Subject: Re: guardianship assessment form

$750 an hour FOR WHAT? The woman is abusing him and negligent in his care. Have they been out even one time this week? Last I heard, Monday and Tuesday there was no activity other than a visit from Marta. APS said that once they confirmed she was following doctor's orders, they closed the case. If the instructions were 3 times a week and he hasn't been, or only goes once or twice, SHE IS NEGLIGENT, and they better reopen it or start a new one. Let me know if you want me to call.

Any doctor who has seen Carl would most likely say NO to all of the questions. I would, just based on past phone conversations with Carl.

What if Drina files for divorce? Would that be abandonment? Would the trust even be an issue if SHE divorces him?

If I could have anything I wanted for Carl, I would have him assessed by the neuropsychologists at the place I found in Houston. I don't know if he could handle long periods of testing, but he has got to get some cognitive brain function back OR HE WILL NEVER EVEN BECOME CLOSE TO WHOLE AGAIN. It's a good sign that his behavior has improved, but is it because she beats him with a stick and mentally assaults him to get him to act right?

Maybe guardianship is the wrong approach. Maybe we should go after Drina and have her declared incompetent to care for him, or criminally negligent for not obtaining proper rehabilitation. There has to be a reason why she doesn't want her husband of almost 30 years to recover.

Let me know if he will be staying at Mother's again over the weekend. If so, we might want to extend the PI over the weekend so we can see what the hell she does. The more "evidence" we can amass, the better.

Love you guys,

C

From: Anita Brunsting <akbrunsting@suddenlink.net>
To: Carole Brunsting <cbrunsting@sbcglobal.net>; Candace Curtis <occurtis@sbcglobal.net>; Amy Tschirhart <at.home3@yahoo.com>
Sent: Thu, March 17, 2011 2:18:05 PM
Subject: guardianship assessment form

Just thought you'd find this interesting, this is the form that we'd have to have a physician use to assess Carl and possible a MHMR psychologist as well. I just thought it would give you an idea as to what they're looking for - Carl definitely fits the bill -

Just fyi, you may have already known this.

Anita

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants, the Honorable Judges Christine Riddle Butts and Clarinda Comstock and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") file this Reply to Plaintiffs' Response to their Motion to Dismiss and would respectfully show the Court as follows:

Plaintiffs fail to controvert the facts that belie jurisdiction

Plaintiffs contend the "only facts under consideration" in the subject Motion to Dismiss are *judicial acts* -- those taken by Judge Comstock in deciding "what gets set for hearing and when, and what does not find it way to the calendar." [Doc. 57, ¶¶ 33-34]. Instead of addressing the complete lack of subject matter jurisdiction by this Court, Plaintiffs instead contend the probate court had no subject matter jurisdiction over the underlying probate proceeding. [Doc. 57, ¶¶ 37-38; 41-42]. *Plaintiff Curtis* sought remand of her prior federal suit *to the state probate court*. Plaintiffs then attempt to bootstrap this nonsensical argument to render immunity void in the

present case.

Plaintiff Munson's response to his lack of standing is he was "compelled to combat this public corruption at great personal expense in time and resources." [Doc. 57, ¶ 51]. This does not confer standing.

Lacking any evidence of any conspiracy or any injury, Plaintiffs contend the "mere fact of the attempt to extort is sufficient." [Doc. 57, ¶ 52]. This argument, unsupported by any legal authority likewise fails.

Failure to be "satisfied" with a response is not actionable

In response to the argument that Plaintiffs have failed to state a claim against substitute Court Reporter Tony Baiamonte, Plaintiffs contend that "Munson spoke with Mr. Baiamonte and *was not satisfied with the answer* to inquiries regarding unavailability of a transcript for September 10, 2015." [Doc. 57, ¶ 66] (emphasis added). Apparently, Mr. Baiamonte was sued for the singular reason that he "promised to reply with an email" and when that was not received, he was "added to this complaint." [Doc. 57, ¶ 67]. Not only are the claims against Mr. Baiamonte frivolous, they are certainly sanctionable.

Conclusion & Prayer

Plaintiffs wrongly believe that following a "form" is all they need to do to meet the stringent requirements of a RICO claim. [Doc. 57, ¶ 83]. Plaintiffs have not met the legal standard to bring a claim under RICO or any other state law. Harris County Defendants are entitled to dismissal as a matter of law, because the claims against the Honorable Judges are barred by judicial, official and governmental immunity. Likewise, the claims against Tony Baiamonte are barred by governmental, qualified and official immunity.

Harris County Defendants are entitled to dismissal on these additional grounds: (1) the Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b), (2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants, (3) the Complaint fails to allege standing under RICO, (4) the Complaint fails to allege a conspiracy, (5) the Complaint is not plausible, (6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and (7) the Complaint is frivolous.

Plaintiffs have failed to present any facts, argument or legal authority to refute these grounds for dismissal and the Harris County Defendants pray the Court grant their Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. 1] with prejudice, sanction the Plaintiffs for filing a frivolous and groundless lawsuit, and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly entitled.

Dated: October 17, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
ATTORNEY-IN-CHARGE
Texas State Bar No. 00790288
Federal Bar No. 23243
laura.hedge@cao.hctx.net
1019 Congress, 15th Floor
Houston, Texas 77002
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Facsimile: (713) 755-8924
ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 17th day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503

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5020 Montrose Blvd., Suite 310
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Amy Brunsting
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/s/ Laura Beckman Hedge
Laura Beckman Hedge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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Dated: October 17, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
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OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 17th day of October, 2016, via ECF.

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5020 Montrose Blvd., Suite 310
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2582 Country Ledge Drive
New Braunfels, Texas 78132

/s/ Laura Beckman Hedge
Laura Beckman Hedge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
	§	(Alfred H. Bennett)
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendant Anita Brunsting's
Certificate of Interested Parties

Defendant, Anita Brunsting, files this certificate of interested parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

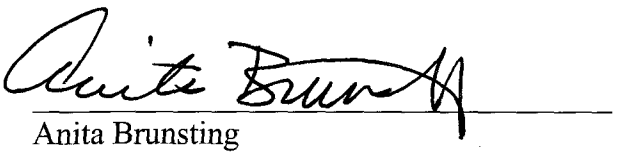
1. Plaintiffs:

   A. Candace Louise Curtis
   B. Rik Munson

2. Defendants:

   A. Candace Kunz-Freed
   B. Albert Vacek, Jr.
   C. Bernard Lyle Matthews
   D. Anita Brunsting
   E. Amy Brunsting
   F. Neal Spielman
   G. Bradley Featherston
   H. Stephen A. Mendel
   I. Darlene Payne Smith
   J. Jason Ostrom
   K. Gregory Lester
   L. Jill Willard Young
   M. Bobbie Bayless
   N. Christine Riddle Butts
   O. Clarinda Comstock
   P. Toni Biamonte

Respectfully submitted,



Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
Pro Se Defendant

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via first class mail:

1. Candace L. Curtis — Plaintiff, Pro Se
   218 Landana Street
   American Canyon, CA 94503
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12. Gregory Lester — Defendant
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13. Jill Willard Young — Defendant
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and Young, L.L.P.
2900 Weslayan, Suite 150
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14. Bobbie Bayless — Defendant
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2931 Ferndale
Houston, Texas 77098

15. Christine Riddle Butts — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

16. Clarinda Comstock — Defendant
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 770002

17. Toni Biamonte — Defendant
Office of the Court Reporter
Harris County Civil Courthouse
201 Caroline, 7TH floor
Houston, Texas 77002

on this 9TH day of September 2016.

Anita Brunsting

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
Plaintiffs,	§	
	§	Civil Action NO. 4:16-CV-01969
v.	§	
	§	The Honorable Alfred Bennett
Kunz-Freed et al.,	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT JILL WILLARD YOUNG, ALBERT VACEK JR, CANDACE KUNZ-FREED, CHRISTINE BUTTS, CLARINDA COMSTOCK AND TONY BAIAMONTES' MOTIONS TO STRIKE

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Federal Rule of Civil procedure 12(f) ..... passim
Federal Rule of Civil Procedure 15(a)(1) 3, 4, 8, 10, 14

I. Introduction

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c). (Dkt 1)

2. On September 14, 2016, Defendant Jill Willard Young filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 25)

3. On September 15, 2016, Plaintiffs filed an Addendum of Memorandum (Dkt 26) as a factual supplement to the RICO complaint. (Dkt 1).

4. On October 3, 2016 Defendant Jill Willard Young filed a Motion to Strike (Dkt 38) the Addendum to Plaintiffs' Complaint (Dkt 26).

5. On October 4, 2016 Defendants Albert Vacek, Jr. and Candace Kunz-Freed (Hereafter V&F) filed a Memorandum (Dkt 42) joining in Defendant Jill Willard Young's Motion to Strike the Addendum to Plaintiffs' Complaint.

6. On October 14, 2016 Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte filed a Motion to Strike the Addendum to Plaintiffs' Complaint (Dkt 60).

II. The Issues Presented

7. In this Motion Defendant Jill Willard Young claims:

a. The Addendum has no legal effect;

b. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss;

c. Plaintiffs' Addendum, like the Complaint, is too implausible to state a valid claim for relief;

d. Plaintiffs' Addendum fails to state facts sufficient to assert a RICO claim against Ms. Young;

e. Plaintiffs' Addendum cannot avoid the Texas Attorney Immunity Doctrine.

III. Plaintiffs' Reply to Motions to Strike

8. Federal Rule of Civil procedure 12(f) allows the Court to strike a pleading that is redundant, immaterial, impertinent, or contains scandalous matter.

9. Plaintiff's Addendum was properly filed as an appendage to the original complaint within twenty-one days of the filing of motions requiring a reply, as authorized by Federal Rule of Civil Procedure 15(a)(1).

10. The Addendum contains a short description of the chronology of the probate docket and copies of: unresolved motions from the probate court record, the preliminary federal injunction, motions and pleadings from the federal court, A Fifth Circuit opinion in this case, and transcripts of hearings. Every paragraph is numbered and every exhibit is labeled and paginated.

11. Defendants' challenge to Plaintiffs' Addendum are based entirely upon semantics and a desire to superimpose Defendants preferred definitions of the instrument over the declarations

provided by the instrument's authors. That definition is provided by the instrument itself (Dkt 26) at page one lines 4-6 as follows:

> *4. Plaintiffs, in response to these challenges, herein incorporate by reference the attached Motions as Memorandums of Points and Authorities in support of the above-referenced complaint, as if those motions had been fully set forth within the original complaint.*
>
> *5. The following motions are presented as Memorandums, to supplement the Rule 8(a) sufficient complaint.*
>
> *6. Plaintiffs hereby incorporate these motions as memorandums under authority of Federal Rule 15(a), for the purpose of satisfying the heightened factual pleading standards of Rule 9(b).*

12. Line four of the Addendum tells us that the Addendum is incorporated into the Complaint by reference as if fully expressed therein. This expression satisfies the "adoption" provisions of Federal Rule of Civil Procedure 10(c), which reads as follows:

> *c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.*

13. By definition, an "Addendum" is a thing to be added. To the extent that it is added it is an amendment authorized by Rule 15(a)(1) and, by its own language, it is an appendage that incorporates but does not alter the portions of the Complaint that precede it.

14. Federal Rule of Civil Procedure 10 governs the "form of pleadings." The Rule seeks to provide a standardized and "easy mode" of pleadings, to facilitate notice to an opposing party, judicial review of the sufficiency of the pleadings, and efficient case management. *See, e.g. Stanard v. Nygren*, 658 F.3d 792, 797 (7th Cir. 2011);

15. Federal Rule of Civil Procedure 10(b) requires paragraphs to be numbered. Defendant's Motions to Strike, is an improper attempt to continue to argue the Federal Rule of Civil

Procedure 12(b) motions already filed and answered, contains redundant, immaterial, impertinent, and scandalous allegations without a single specific reference to any numbered paragraph or exhibit, does not contain numbered paragraphs, violates Rule 12(f) and fails to comport to the pleading requisites of Federal Rule of civil Procedure 10(b).

16. The Addendum is an adopted public record, contains a motion pending in a related case, and exhibits public record pleadings from matters in the various courts that are relevant, on point, and which Plaintiffs continually refer to in answers to Defendants Rule 12 motions to dismiss.

17. These Defendants claim they participated in those proceedings in a capacity that affords them some form of immunity from civil suit.

18. Defendants' Motions to strike do not challenge the 22 exhibits attached to the Addendum as not being what the Addendum claims, but simply seek to argue their own interpretation. There are also exhibits attached to the motions and thus subsumed within the Docket 26 exhibits themselves.

19. First Defendants claim the Complaint lacks sufficient factual matter to provide adequate notice of the claims and then, when facts are added to the Complaint by way of supplement, Defendants complain and proceed to rehash their Rule 12(b) arguments under the pretext of a Rule 12(f) motion to strike.

20. The probate court Defendants have adequate notice and the record will also show that in their pleadings V&F quoted from pleadings in the probate court and responded to pleadings in that Court (Exhibit 1) as non-parties and are also fully apprised of the facts upon which the RICO complaint relies.

IV. Docket Entry Twenty-Six

21. Docket 26, pages 3-26 provides a chronology of specific docket events supported by exhibits, including transcripts, motions and pleadings.

22. The Addendum of Memorandum which Defendants seek to attack tells the story of these Defendants' efforts to game the judicial process and contains only public records exhibits from the actions these Defendants claim to have been involved in.

23. Every one of Plaintiffs' replies to Defendants' Rule 12 Motions (Dkt 33, 34, 41, 45, 57 and 62), have shown the relevance of the Addendum by constant reference to Docket entry 26.

V. Defendants claim the Addendum has no legal effect

24. This is not a Rule 12(f) related argument. The Addendum adds detail to the Complaint's factual allegations.

25. The Addendum of Memorandum includes a Motion for Vacatur of the void remand order that directly addresses the Defendants' claims of immunity.

26. Jurisdiction is a foundational issue which must be addressed before any other question, and the proper court to vacate a void order or judgment is the court that entered it.

27. Thus, for all intents and purposes, the Addendum also acts as a form of estoppel in this Court, as it raises a foundational issue that must be resolved before all others.

VI. The "Addendum" does not change the merits of Ms. Young's Motion to Dismiss

28. This is a Rule 12(b) and not a Rule 12(f) related argument.

29. Ms. Young's motion to dismiss alleges Plaintiffs failed to plead adequate facts to place her on notice of the claims against her. Ms. Young's motion contained only one exhibit.

30. In response, Plaintiffs merely attached exhibits from the public record with explanations of the significance of each of those exhibits in relation to Ms. Young's "participation".

31. In Ms. Young's Rule 12(b)(6) Motion she included as an exhibit only the Order appointing Gregory Lester. She did not exhibit her application for Gregory Lester's authority to retain her firm, she did not exhibit the order granting Gregory Lester authority to retain Jill Young and she did not include the report she "assisted" Gregory Lester in producing.

32. Thus, while claiming lack of notice as to her part in the charade, she fails to exhibit what does connect her and asks this Court to strike what is, in essence, a public record.

VII. Plaintiffs' Addendum is too implausible to state a valid claim for relief

33. This appears to be a Rule 12(f) argument that the Addendum is immaterial.

34. These Defendants appear to like using words without comprehending what they actually mean. The 28-page Motion for Vacatur contains a statement of chronology supported with reference to the public record and contains excerpts from a March 9, 2016 hearing, supported by an official transcript also attached as an exhibit. The list of exhibits can be found at page 31.

35. Plaintiffs' answers to Defendants' Rule 12 Motions exhibit documents and records these Defendants had a duty to be familiar with and cannot claim ignorance of.

36. Basically the Defendants are asking the Court to strike the facts contained in the public record, placed before it in the form of an Addendum of Memorandum, and to look elsewhere for the same information under a lengthy request for judicial notice of external records containing the same exhibits, allegedly for the "convenience of the Court".

37. Defendants do not challenge the Addendum's exhibits as not being what they are represented to be, but instead claim the Addendum is vague, implausible and fails to raise a RICO claim.

38. Ultimately, Defendants ask the Court to strike fact and listen to "We Say" while viewing the Addendum in a vacuum where the Complaint is considered a separate instrument when in fact they combine to make one Complaint under Rules 10(c) and 15(a)(1).

39. What the 27-page Addendum tells the reader is that Plaintiff Curtis could not get an evidentiary hearing set in state court while being bullied with a false instrument in order to coerce an agreement for illicit reasons.

VIII. Plaintiffs' Addendum Cannot Avoid Texas's Attorney Immunity Doctrine

40. This is not a proper subject for a motion to strike and is an improper attempt to continue arguing the previous Rule 12(b)(1) motions already filed and answered.

41. Defendants' Texas Attorney Immunity claims fail at the threshold question of probate court jurisdiction. Prevailing on a claim that the probate court could assume jurisdiction over the Brunsting trusts in this case, would require reversing a unanimous Fifth Circuit Court of Appeals Opinion in the base case and the Supreme Court opinion the Circuit Court relied upon for their decision.

42. Defendants perpetually seek to avoid the unanimous opinion of the Fifth Circuit Court of Appeals in this case, that no court can take jurisdiction over a res in the custody of another court.

43. The fact that a federal Court issued an injunction regarding the Brunsting trusts the very day probate claims were filed, effectively disposes of any argument that the probate Court could assume subject matter jurisdiction over the Brunsting Trusts.

44. Where there is no subject matter jurisdiction there is no court and no judge and where there is no judge and no court there is no litigation. Judgements entered without or in excess of jurisdiction are nullities, subject to vacatur under both direct and collateral attack. Neither doctrine of laches nor statutes of limitations apply to judgments void for want of jurisdiction and

the very question is so fundamental that it does not come under the "Not Pressed Not Passed Upon Below Rule" and can even be raised for the first time on appeal.

45. The jurisdiction issue is pivotal. None of the motions in this RICO suit can be properly resolved without addressing the want of jurisdiction in the probate court.

46. Unless Defendants overcome centuries of precedent and the Fifth Circuit Opinion "in this case", Defendants' immunity claims fail on Plaintiffs' challenge to probate court jurisdiction over any Brunsting trust related matter.

47. All of these attorneys argue that they have been involved as attorneys in "Estate litigation" yet all the "Estate" pleadings ever mention is the trust and some of these Defendants claim to represent co-trustees, while they all claim to be involved in a probate case. This question was resolved in Plaintiff Curtis favor by the Fifth Circuit Court of Appeals and the entire notion of probate jurisdiction over the Brunsting trusts is fraud.

48. When all claims related to the Brunsting Trusts are removed from Bayless Probate Court Petition and the Gregory Lester, Jill Willard Young "Report" on the efficacy of the estate claims, nothing remains of either.

IX. Memorandum

Federal Rule of Civil Procedure Rule 15: Amended and Supplemental Pleadings

49. Rule 15 allows a party to amend its pleading after it has been filed with the court. In keeping with the flexibility of the federal rules, Rule 15 is generous. The policy is that by allowing the parties to "fix" their pleadings as they go along, the merits of the case will more readily be resolved. The parties will not waste precious time and resources squabbling over the mechanics of amending their pleadings. However, Rule 15's flexibility must also be balanced with fairness concerns for the opposing party. The need to amend generally arises when a party

has made an inadvertent omission or mistake in its pleading. In that case, if the party realizes its mistake fairly quickly, the amendment will generally be allowed under the rule. But, a party may also learn of new information and want to amend its pleading to add a new party or claim accordingly. Whether an amendment is allowed in that situation often turns on whether the statute of limitations for the underlying action has run. If it has, the rule requires more complex analysis to determine whether the amendment will be allowed. If it is, the new pleading will "relate back" to the original date of filing.

50. Rule 15 has four main sections. The first section, 15(a) sets out when and how a party can amend its pleading before trial; The second section, 15(b) allows the parties to amend the pleadings during and after trial; The third section, 15(c) prescribes when a party can amend to add a new claim or party even after the statute of limitations has run; Finally, the fourth section, 15(d) explains when a party can add claims that arise out of an event that occurred after the original pleading was filed.

51. Federal Rule 15(a)(1) allows a party to amend its pleading within 21 days after a responsive pleading requiring a reply and Rule 12(b) motions are just such motions. Not only was the Addendum filed as a Rule 15(a)(1) "Addendum", the RICO complaint itself is little more than a Rule 15(d) amendment to the original petition filed in 4:12-cv-592.

52. Defendants' Motion to Strike is an improper attempt at a second Rule 12(b) Motion to Dismiss. In her first such motion, (Dkt 25) Ms. Young admits to participation in the production of the Gregory Lester "Report of Temporary Administrator", but denies that the "report" is part of any conspiracy targeting the Brunsting Trusts under the pretext of estate litigation.

53. Defendant Jill Young asserted on the first page of her unnumbered Rule 12 motion (Dkt 25),

> *In reality, their Complaint is a bizarre, conspiracy-theory-laden attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.*

54. Defendant Young did not support her claim with an exhibit or with specific reference to any state court determinations and none of the Defendants can point to such an event. Thus, while making knowingly disingenuous claims, Defendants seek to avoid the facts in the record.

X. In the Custody of a Federal Court

55. Plaintiff Candace Curtis and Plaintiff Munson are cohabitant partners. Plaintiff Candace Curtis filed her original petition in the TXSD February 27, 2012 (4:12-cv-592). That Petition was dismissed under the Probate Exception to federal Diversity Jurisdiction. The Fifth Circuit Court of appeals reversed and remanded back to TXSD on January 9, 2013[1]. The Brunsting trusts are not an asset of either "Estate" and are not subject to probate administration.

56. The Harris County District Court suit was filed January 29, 2013, raising only issues relating to the Trust then in the custody of the federal Court.

57. The state probate court suit was filed April 9, 2013, raising only issues relating to the Brunsting Trust, then in the custody of the federal Court, which is the same day Plaintiff Curtis obtained a federal injunction regarding the same Trust.

58. The probate suit raises no issues other than trust issues. Munson ended up in the hospital in a coma and Plaintiff Candace Curtis retained the assistance of a Houston attorney, Jason Ostrom, who had the federal case remanded to the probate court with no opposition from Defendants' counsel.

[1] Curtis v Brunsting 704 F.3d 406

XI. Reality Check

59. Anita Brunsting, with her silent partner Amy Brunsting, plotted and planned to steal the family trust. If not for Anita's over exuberant efforts none of the lawsuits would have been necessary. However, Anita Brunsting would have had to find another way except for the excellent assistance of Candace Kunz-Freed.

60. Candace Kunz-Freed had a fiduciary duty to Nelva Brunsting and if Nelva had asked for improper trust changes Freed had an obligation to inform Nelva that the changes she requested were not authorized under the law of the trust. There is no evidence Nelva requested those changes, but there is plenty of evidence that Anita did.

61. Without the illicit papers drafted by Candace Freed, Anita Brunsting would not have had the ability to run amok and none of the injuries and none of the litigation would have been possible.

62. If Defendant Bobbie Bayless had honorable intentions she would have filed Carl's Joinder as a beneficiary of the Trusts and that would have polluted diversity, causing a remand to the Harris County District Court where Plaintiff Curtis' suit would appear as the lead case on the Title Page. Instead Bayless filed two state court lawsuits in the name of the Estates of Elmer and Nelva Brunsting, raising only issues relating to the Trust in the custody of a federal court. If not for the illicit meddling of Bobbie Bayless and her sham state court litigation, all trust related litigation would have been resolved and everyone would have their property and gone on with their lives.

63. If Jason Ostrom had honorable intentions he would have moved for summary and declaratory judgment in the federal Court, but instead chose to facilitate a remand to a state probate court with no subject matter jurisdiction.

64. Once in probate court Ostrom immediately abandoned the Curtis v Brunsting litigation and began filing papers under the heading "Estate of Nelva Brunsting" asking for distributions from the trust to pay his "fees" while knowing full well the estate does not own any trust assets.

65. If not for Jason Ostrom's attempt to participate in Bayless' sham litigation, this case would have been resolved long ago.

66. The state probate Court had a duty to look to jurisdiction and the first place one looks for probate jurisdiction is in the Will of the Testator. The state Probate Court in looking to the Wills would have seen that the only heir in fact to either Estate is "the trust" and not being property of an "Estate" the Probate Court had a duty to dismiss trust related claims for want of jurisdiction.

67. When the remand was received by the state court the Order included reference to the federal injunction in place and all of the Defendants were aware of that injunction. The Notice of Injunction and Report of Master should have made it abundantly clear the probate court was without the jurisdiction to take cognizance of a trust in the custody of a federal court, on the very day a federal injunction was issued. Unfortunately all these Defendants were looking at was the money cow and like business as usual, were not really looking at the case with any other eyes.

68. What else would explain the absolute refusal of the probate court to set any evidentiary hearings and refusal to enter any orders at all?

69. This effort to coerce and intimidate Plaintiff Curtis with a fraudulent no contest clause threat to property interests on March 9, 2016, was an obvious effort to avoid the complete absence of jurisdiction.

70.

XII. Conclusion

71. Defendants reargue their claims of want of adequate notice, failure to state a claim, and challenge TO federal subject matter jurisdiction relying upon the various claims of immunity. None of these are Rule 12(f) arguments and while using noise words to condemn the Complaint (Dkt 1) and the Addendum (Dkt 26), Defendants to cite no paragraph numbers or exhibit numbers and refuse to number their pleadings to allow Plaintiffs to adequately and properly reply.

72. Defendants claim to have been involved in the very proceedings that Plaintiffs cite to as evidence in support of their claims, and Defendants, while claiming ignorance of facts, ask the Court to strike what is, in effect, the public record, containing the very facts they claim lack of notice of.

73. The Addendum of Memorandum is a proper supplement to the Complaint authorized by Federal Rule of Civil Procedure 15(a)(1) and 10(c) and Defendants' arguments are a non sequitur.

Wherefore, Plaintiffs respectfully move this Honorable Court for an Order denying Defendants' Motions to Strike (Dkt 38, 42, and 60).

Respectfully submitted, October 18, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 18th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis

Candace L. Curtis

/s/ Rik W. Munson

Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants' Rule 12(f) Motions to Strike, filed on October 3,, 2016, by Defendant Jill Willard Young (Dkt 38), October 4, 2016, by Defendants Albert Vacek Jr. & Candace Kunz-Freed (Dkt 42) and the Motion to Strike filed by Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte (Dkt 60) October 14, 2016, should be Denied.

It is SO ORDERED

_____ _____

Date

The Honorable Alfred H Bennet
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS &	§	
RIK WAYNE MUNSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED,	§	
ALBERT VACEK, JR., ET AL	§	

JOINT DISCOVERY/CASE MANAGEMENT PLAN
UNDER RULE 26(f)
FEDERAL RULES OF CIVIL PROCEDURE

1. State when the parties conferred as required by rule 26(f), and identify the counsel who conferred.

Response: The parties conferred via email regarding this joint case management plan during the period of October 13, 2016, through October 17, 2016. There was no conference regarding this joint case management plan. Plaintiff and Defendants were unable to come to a meeting of the minds and Defendants had difficulty coming to any kind of consensus among themselves. This is not a joint plan. Plaintiffs apologize to the court but don't know what else to do.

The participants to this plan are:

A. Candace L. Curtis, Pro Se Plaintiff.

B. Rik Wayne Munson, Pro Se Plaintiff.

C. Anita Brunsting, Pro Se Defendant.

D. Amy Ruth Brunsting, Pro Se Defendant.

E. Cory S. Reed, counsel for defendants Candace Kuntz-Freed and Albert Vacek Jr.

F. Robert S. Harrell, counsel for Jill Willard Young.

G. Laura Beckman Hedge, counsel for:

(1) Defendant Christine Riddle Butts.
(2) Defendant Clarinda Comstock.

(3) Defendant Tony Biamonte

H. Stephen A. Mendel, Pro Se Defendant
I. Bradley E. Featherston, Pro Se Defendant
J. Bobbie Bayless, Pro Se Defendant.

K. Darlene Payne Smith, Pro Se Defendant.

L. Stacy L. Kelly, counsel for

(1) Gregory Lester
(2) Jason B. Ostrom

N. Neal E. Spielman,

2. List the cases related to this one that are pending in any state or federal court with the case number and court.

Response: A. Plaintiffs allege C.A. No. 4:12-592, *Candace Louise Curtis v. Anita Katy Brunsting, Et Al*; In the U.S. District Court for the Southern District of Texas is the base case and that the present matter is an extension of the earlier case and nothing less.

B. Defendants disagree and believe the only related case is C.A. No. 412,249-401, *Estate of Nelva Brunsting, Deceased*, Probate Court No. 4, Harris County, Texas.

3. Briefly describe what the case is about.

Response: Plaintiff allege a racketeering conspiracy that includes acts of aiding and abetting RICO predicate acts, obstructing justice and other civil and other rights violations designed to bust and loot the Brunsting trusts by preventing resolution on the merits and attempting to force agreement by coercion and duress that would include violating the trust to obtain fees for fake litigation in a court without subject matter jurisdiction over any Brunsting trust related matters. All Defendants are being sued in their individual capacities only.

Defendants allege that the suit is against eleven (11) attorneys, two (2) judges, and a court reporter protected by various forms of immunity

4. Specify the allegation of federal jurisdiction.

Response: Federal question based on plaintiffs' RICO Complaint.

5. Name the parties who disagree and the reasons.

Response: Defendants contend that the Plaintiffs failure to state a claim on which relief can be granted means there are no facts that support federal question jurisdiction, or jurisdiction on any other basis.

6. List anticipated additional parties that should be included, when they can be added, and by whom they are wanted.

Response: None anticipated at this time.

7. List anticipated interventions.

Response: None anticipated at this time.

8. Describe class-action issues.

The Five Brunsting beneficiaries and their remaindermen are a limited private class.

Defendants disagree

9. State whether each party represents that it has made the initial disclosures required by Rule 26(a). If not, describe the arrangements that have been made to complete the disclosures.

Response: The parties will make initial disclosures within fourteen (14) days after the Court issues a scheduling order.

10. Describe the proposed agreed discovery plan, including:

A. Responses to all the matters raised in Rule 26(f).

1) Discovery should be completed within one hundred and twenty (120) days after **resolution of the base case.** (Defendants don't believe there is a base case.)

2) Discovery will be limited to:

a) Facts that prove or disprove any claim or cause of action in any related matter once the dispute over what those matters are and are not, has been resolved.
b) Opinions of experts, if any.

3) The parties will preserve hard copies and/or electronic copies of documents that relate in whole or in part to any issue in the case, and regardless of any claim of privilege or work product doctrine. The documents will be preserved through the date of trial or until this case is dismissed.

4) The parties will preserve any recordings of any communications by, among, or between themselves and the decedent, Nelva Brunsting, if such recordings relate in whole or in part to any issue in the case, and regardless of any claim of privilege or work product doctrine. The recordings will be preserved through the date of trial or until this case is dismissed.

5) Parties agree that oral depositions will be limited as follows:

(a) No more than four (4) hours per plaintiff.
(a) No more than four (4) hours per defendant.

6) Interrogatories will be limited to twenty five (25) questions per party, inclusive of any subparts. Interrogatories, including subparts, in excess thereof shall require leave of Court.

7) Requests for production shall not exceed _____ (__) requests. Requests in excess thereof shall require leave of Court.

8) Requests for admissions shall not exceed _____ (__) requests. Requests in excess thereof shall require leave of Court.

B. When and to whom the plaintiff anticipates it may send interrogatories.

Plaintiffs will serve interrogatories on the following persons within forty-Five (45) days after the Court issues a scheduling order:

1) Anita Brunsting.
2) Candace Kuntz-Freed.
3) Albert Vacek, Jr.
4) Amy Ruth Brunsting.
5) Neal E. Spielman.
6) Stephen A. Mendel.
7) Bradley Featherston.
8) Darlene Payne Smith.
9) Jason B. Ostrom.
10) Gregory Lester.
11) Jill Willard Young.
12) Bobbie Bayless.
13) Hon. Christine Riddle Butts.
14) Hon. Clarinda Comstock.

15) Tony Biamonte.

C. When and to whom the defendant anticipates it may send interrogatories.

Defendants will serve interrogatories on the following persons within fifteen (15) days after the Court issues a scheduling order:

1) Candace L. Curtis.
2) Rik Wayne Munson.

D. Of whom and by when the plaintiff anticipates taking oral depositions.

Plaintiffs will take oral depositions of the following persons within one hundred eighty (180) days after the Court issues a scheduling order:

1. Gregory Lester
2. Jill Willard Young
3. Candace Kunz-Freed,
4. Anita Brunsting,
5. Amy Brunsting,
6. Neal Spielman,
7. Jason Ostram,
8. Bobbie Bayless,
9. Clarinda Comstock
10. Christine Butts
11. Drina Brunsting, attorney in fact for Carl Brunsting

Plaintiff would expect Depositions to trail dispositive hearings in the base case and under no circumstances are these Defendants to be allowed to torment Carl Brunsting. Carl resigned as executor due to a lack of capacity and these defendants pleadings admit to Carl's lack of capacity. Plaintiffs will seek a protective Order. Defendants already had their deposition of Carl Brunsting and Plaintiffs are adamantly opposed to any repeat of such a horrible inhuman event.

E. Of whom and by when the defendant anticipates taking oral depositions.

Defendants will take oral depositions of the following persons within one hundred twenty (120) days after the Court issues a scheduling order:

1) Candace L. Curtis.
2) Rik Wayne Munson.
3) Carole Brunsting.

F. When the plaintiff (or other party with the burden of proof on an issue) will be able to designate experts and provide the reports required by Rule 26(a)(2)(B), and when the opposing party will be able to designate responsive experts and provide their reports.

1) Plaintiffs will designate any experts and provide the required reports within thirty (30) days after the Court issues a scheduling order.

2) Defendants do not anticipate the need for any expert testimony in this matter, other than testimony on attorneys' for sanctions for the frivolous filing. Such experts will be designated within sixty (60) days after the Court issues a scheduling order.

G. List expert depositions the plaintiff (or the party with the burden of proof on an issue) anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

Neither plaintiffs nor defendants anticipate the need for expert depositions at this time. Should the need arise, any such depositions will be completed within one hundred twenty (120) days after the Court issues a scheduling order.

H. List expert depositions the opposing party anticipates taking and their anticipated completion date. See Rule 26(a)(2)(B) (expert report).

Neither plaintiffs nor defendants anticipate the need for expert depositions at this time. Should the need arise, any such depositions will be completed within one hundred twenty (120) days after the Court issues a scheduling order.

11. If the parties are not agreed on a part of the discovery plan, describe the separate views and proposals of each party.

Response: None.

12. Specific the discovery beyond initial disclosures that has been undertaken to date.

Response: None.

13. State the date the planned discovery can be reasonably completed.

Response: Within one hundred twenty (120) days after the Court issues a scheduling order.

14. Describe the possibilities for a prompt settlement or resolution of the case that were discussed in your Rule 26(f) meeting.

Response: None. The defendants do not intend to settle.

15. Describe what each party has done or agreed to do to bring about a prompt resolution.

Response: None. The defendants do not intend to settle.

16. From the attorneys' discussion with the client, state the alternative dispute resolution techniques that are reasonably suitable, and state when such a technique may be effectively used in this case.

Response: None. The defendants do not intend to settle.

17. Magistrate judges may now hear jury and non-injury trials. Indicate the parties' joint position on a trial before a magistrate judge.

Response: Defendants object to a trial before a magistrate judge.

18. State whether a jury demand has been made and if was made on time.

Response: Plaintiffs' made jury demand in their original complaint.

19. Specify the number of hours it will take to present the evidence in this case.
Plaintiff's Response. Will be more easily determined by the number of issues remaining after 12(c) motions for remedy on the pleadings as soon as the base case has been resolved by the same method.

Defendants Response: Eighty (80) hours.

20. List pending motions that could be ruled on at the initial pretrial and scheduling conference.

Plaintiff's Response:

The Rule 60 Motion for vacatur of the void remand order (Dkt 26 this court, Dkt 115-119 in the base case) to Harris County Probate Court No. 4 issued May 14, 2014 in base case 4:12-cv-592 (Dkt106). Plaintiff's challenge to probate court jurisdiction over Brunsting trust matters is dispositive and must be resolved before any Rule 12 Motions can be considered.

Plaintiffs' Motion for Consolidation of related cases (Dkt 43) should also be resolved before any substantive issues are addressed

Defendants Response:

A. Rule 12(b)(6) Motions:

1) Defendants' Candace Kunz-Freed and Albert Vacek Jr.'s Motion to Dismiss for Failure to State a Claim [Docket No. 19].

2) Bobbie G. Bayless' Motion to Dismiss for Failure to State a Claim [Docket No. 23].

3) Defendant Jill Willard Young's Rule 12(b)(6) Motion to Dismiss [Docket No. 25].

4) Defendant Anita Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' failure to State a Claim [Docket No. 30].

5) Defendant Amy Brunsting's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' failure to State a Claim [Docket No. 35].

6) Defendants Mendel's & Featherston's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' failure to State a Claim [Docket No. 36].

7) Defendant Neal Spielman's Motion to Dismiss for Plaintiffs' failure to State a Claim [Docket No. 39].

8) Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock & Tony Biamonte's Motion to Dismiss Complaint Pursuant to FED. R. CIV. P. 12(b)(1) and (6) [Docket No. 53].

B. Defendant Jill Willard Young's Motion to Strike Plaintiffs' "Addendum of Memorandum in Support of RICO Complaint," [Docket No. 38].

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C. Rule 12(b)(1) Motion:

1) Defendants' Candace Kunz-Freed and Albert Vacek Jr.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction [Docket No. 20].

2) Defendant Neal Spielman's Motion to Dismiss Based on Lack of Subject Matter Jurisdiction [Docket No. 40].

3) Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock & Tony Biamonte's Motion to Dismiss Complaint Pursuant to FED. R. CIV. P. 12(b)(1) and (6) [Docket No. 53].

D. Plaintiff's Motion for Consolidation of Related Cases Pursuant to 28 U.S.C. § 1637, Rule 42(A) of the FED. R. CIV. P. and Local Rule 7.6 with Supporting Memorandum [Docket No. 43].

21. List other motions pending.

Response: None.

22. Indicate other matters peculiar to this case, including discovery, that deserve the special attention of the court at the conference.

Plaintiff Response: There is a Fifth Circuit Opinion, 704 F.3d 406 and a federal injunction issued April 9, 2013 in 4:12-cv-592 that directly relate to this case. The injunction remains active and is an issue directly related to the case before this Court.

Defendants say: none.

23. Certify that all parties have filed Disclosure of Interested Parties as directed in the Order for Conference and Disclosure of Interested Parties, listing the date of filing for original and any amendments.

Response: A. Rik Wayne Munson and Candace Louise Curtis, plaintiffs, Plaintiffs' Certificate of Interested Parties [Docket No. 6, filed July 20, 2016].

B. Jason B. Ostrom, defendant, Certificate of Interested Parties [Docket No. 16, filed August 24, 2016].

C. Bobbie G. Bayless, defendant, Disclosure of Interested Parties [Docket No. 21, filed September 7, 2016].

D. Candace Kunz-Freed and Albert Vacek Jr., defendants, Certificate of Interested Parties [Docket No. 22, filed September 7, 2016].

E. Anita Brunsting, defendant, Certificate of Interested Parties [Docket No. 29, filed September 12, 2016].

F. Amy Brunsting, defendant, Certificate of Interested Parties [Docket No. 32, filed September 16, 2016].

G. Stephen A. Mendel and Bradley E. Featherston, defendants, Certificate of Interested Parties [Docket No. 37, filed September 30, 2016].

H. Neal Spielman, defendant, Certificate of Interested Parties [Docket No. 44, filed October 6, 2016].

I. Jill Willard Young, defendant, Certificate of Interested Parties [Docket No. Parties, document 46, October 6, 2016].

24. List the names, bar numbers, addresses and telephone numbers of all counsel.

Response: For the Court's convenience, the list of persons below includes the Pro Se parties:

A. Pro Se Plaintiffs:

1) Candace L. Curtis
Plaintiff, Pro Se
218 Landana Street
American Canyon, CA 94503
925-759-9020

2) Rik Wayne Munson
Plaintiff, Pro Se
218 Landana Street
American Canyon, CA 94503
925-349-8348

B. Plaintiffs Represented by Counsel: None.

C. Pro Se Defendants:

1) Anita Brunsting
Defendant, Pro Se
203 Bloomingdale Circle

A Co-Trustee
Victoria, Texas 77904
361-550-7132

2) Amy Ruth Brunsting
Defendant, Pro Se
2582 Country Ledge
A Co-Trustee
New Braunfels, Texas 78132

D. Defendants Represented by Counsel:

1) Laura B. Hedge (SBN 00790288)
Harris County Attorney's Office
1019 Congress, 15TH Floor
Houston, Texas 77002
O: 713-274-5137
F: 713-755-8924
E: laura.hedge@cao.hctx.net
Def. Hon. Christine Riddle Butts
Def. Hon. Clarinda Comstock
Def. T. Biamonte, court reporter

2) Cory S. Reed (SBN 24076640)
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[SIGNATURE BLOCKS TO FOLLOW]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANTS' OBJECTION TO PLAINTIFFS' RULE 26(F) PLAN

On October 18, 2016, Plaintiffs filed a "Joint Discovery/Case Management Plan Under Rule 26(f) Federal Rules of Civil Procedure," [DKT. 66] purporting to set out Plaintiffs' and Defendants' positions following the Rule 26(f) conference. But Defendants' did not agree to such joint filing. Instead, the document was filed unilaterally by Plaintiffs without advance notice of *what*[1] or *when* they would be filing.

Crucially, the document does not accurately state Defendants' position. Far from agreeing that the parties should make initial disclosures and conduct discovery following the Rule 26(f) conference, Defendants have objected (and continue to object) to any discovery taking place in this matter until the Court rules on the Motions to Dismiss filed by Defendants. *See* Defendants' Motion to Stay Rule 26(f) Conference and All Discovery Pending Resolution of Motions to Dismiss [DKT. 59]. Defendants have also requested the Court to stay all proceedings in this matter, including the Rule 26(f) conference, pending resolution of the Motions to Dismiss filed by Defendants. *See id.*

[1] Defendants believe Plaintiffs filed a draft Rule 26(f) plan, which was circulated by one of the defendants among the parties for review and comment on October 14, 2016. But before all parties' comments could be received and assembled, the Plaintiffs unilaterally filed the draft plan. Defendants did not consent to such filing, nor did Plaintiffs inform Defendants that they would be making such a filing.

In sum, Defendants object to Plaintiffs' characterization of their filing as a "joint" plan. Defendants also object to Plaintiffs' filing of a document purporting to state Defendants' "positions." Defendants' positions have been accurately asserted in Defendants' Motion to Stay, and Plaintiffs' unilateral statements to the contrary should be disregarded by this Court.

Dated: October 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above filing has been served on October 19, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

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/s/ Robert S. Harrell
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS &	**§**	
RIK WAYNE MUNSON	**§**	
	§	
VS.	**§**	**CIVIL ACTION NO. 4:16-cv-01969**
	§	**(Alfred H. Bennett)**
CANDACE KUNZ-FREED,	**§**	
ALBERT VACEK, JR, ET AL	**§**	

UNOPPOSED MOTION TO SUBSTITUTE COUNSEL FOR STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

COMES NOW the undersigned counsel, Stephen A. Mendel, and on behalf The Mendel Law Firm, L.P., asks this Court to substitute Adraon D. Greene and David C. Deiss of the law firm of Galloway, Johnson, Tompkins, Burr & Smith, P.C. as counsel of record for Stephen A. Mendel and Bradley E. Featherston ("Mendel and Featherston"), and to allow Stephen A. Mendel of The Mendel Law Firm, L.P. to withdraw as the attorney of record for Mendel and Featherston. Mendel and Featherston represent that this substitution will in no way delay the progress of this matter. Substituting counsel's contact information is as follows:

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CONCLUSION

For these reasons, undersigned counsel asks this Court to grant this Motion to Substitute Adraon D. Greene as the attorney in charge for Stephen A. Mendel and Bradley E. Featherston and to allow Stephen A. Mendel to withdraw as counsel.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS,
STEPHEN A. MENDEL AND
BRADLEY E. FEATHERSTON

CERTIFICATE OF CONFERENCE

I certify that Adraon D. Greene has conferred with Plaintiffs on my behalf and Plaintiffs are unopposed to the filing of this Motion to Substitute Counsel.

/s/ Stephen A. Mendel
Stephen A. Mendel

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2016, a copy of the above and foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants. I also certify that I have forwarded this filing by regular U.S. Mail, postage pre-paid, this same day to all non-CM/ECF participants.

/s/ Stephen A. Mendel
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-CV-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT NEAL SPIELMAN'S MOTIONS TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6) AND 9(b)

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I. INTRODUCTION

1. Before the Court are motions to dismiss filed by Defendant Neal Spielman. Docket entry 39 is a Rule 12(b)(6) Motion and docket entry 40 is a Rule 12(b)(1) Motion.

2. Plaintiffs incorporate and adopt by this reference the Complaint (Dkt 1 and 26), the previously filed Rule 12 Motions, Dkts 19, 20, 23, 25, 30, 35, 36, 38 and 53 and Plaintiffs' replies thereto, Dkt 33, 34, 41, 45, 62, 57 and 65, as if fully restated herein.

3. Plaintiffs further request this Honorable Court take judicial notice of the following related public records:

a. Curtis v Brunsting C.A. 4:12-cv-592 TXSD 2/27/2012

b. Carl Henry Brunsting Executor for the Estates of Elmer and Nelva Brunsting v. Candace Freed & Vacek & Freed, Harris Co. District Court CA No. 2013-05455;

c. Carl Henry Brunsting Executor for the Estates of Elmer and Nelva Brunsting CA No, 2012-14538 164TH Judicial District Court of Harris County, Texas;

d. Carl Henry Brunsting Individually and as Executor for the Estates of Elmer and Nelva Brunsting, Harris Co. Probate No. 4 CA No 412248, 412249, 412249-401, 412249-402

II. CHRONOLOGICAL HISTORY

4. Plaintiffs incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to Motions to Dismiss by Defendants Vacek & Freed, (Dkt 19 & 20) as if fully restated herein. In short:

5. Curtis v Brunsting 4:12-cv-0592 was filed in the United States District Court for the Southern District of Texas on February 27, 2012 under diversity jurisdiction, was dismissed under the "Probate Exception" to federal diversity jurisdiction March 8, 2012 and went to the Fifth Circuit for review.

6. The Fifth Circuit held that Curtis v Brunsting 4:12-cv-0592 is a lawsuit related only to the Brunsting inter vivos trusts, not property of any estate but the heir in fact, and does not come within the purview of the probate exception to federal diversity jurisdiction, *Curtis v Brunsting* 710 F.3d 406 (Jan 2013).

7. A remand to Harris County Probate Court No. 4 was facilitated by Defendant Jason Ostrom and Plaintiff Curtis now returns the matter to the federal Court with a separate complaint.

III. ISSUES RAISED

Defendant argues:

A. Plaintiffs are involved in a bitterly contested "Probate Matter" involving a dispute between the Brunsting siblings over the administration of their late parents' estate. (Dkt 39 & 40 Pages 1 unnumbered paragraphs 2);

B. Plaintiffs' claims are incomprehensible conspiracy theories;

C. Plaintiff is avoiding a court ordered mediation;

D. Plaintiffs' claims are barred by Attorney Immunity;

E. Plaintiffs fail to plead particular acts of fraud;

F. Plaintiffs fail to plead particular conduct of the Defendant;

G. Plaintiffs lack Privity with Defendant;

H. Plaintiffs lack proper standing;

IV. PLAINTIFF'S REPLY

The Probate Matter

8. Defendant Spielman begins both motions with an identical summary in which he states:

> *"This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs "claims," which are nearly incomprehensible…"*

9. In his BACKGROUND section he states:

> *"Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al., ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate".*

10. Given that both motions are built entirely upon this erroneous factual ground it is unnecessary to address the supporting authorities.

11. The record will show the case before the Court involves claims against Defendants in their individual capacities, arises out of a probate court, and does not arise from a controversy over the administration of any "estate".

12. These matters were res judicata before any state court actions were even filed.[1]

13. Claims were first filed in Harris County Probate No. 4 April 9, 2013, the same day a federal judge issued an injunction against Anita and Amy Brunsting to preserve and prevent wasting of assets of the Brunsting trusts then in the custody of a federal court. (Dkt 26-2, 26-7, 33-5, 34-6)

14. The claims filed in Harris County courts by Defendant Bayless were filed on January 29, 2013 and April 9, 2013. The Harris County District Court suit No. 2013-05455 is styled:

[1] Curtis v Brunsting 704 F.3d 406

> *"CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E.BRUNSTING"*

15. Like Defendant Bayless, (Dkt 23) Defendant Spielman states in the opening sentence of his Rule 12(b)(1) motion that the "Probate Matter" is styled "*Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.," ("the Probate Matter").* The Harris County Probate suit (412249-401) is actually styled as Docket entry 34 Exhibits 5 and 7 show:

> *CARL HENRY BRUNSTING, individually and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting"*

16. It is important to note that federal Plaintiff Candace Louise Curtis is named a "Nominal Defendant" in Bayless, exclusively trust related Probate Court suit, filed on the same day Plaintiff Curtis obtained a protective Order in the federal Court regarding the same Trust.

17. Both state court petitions raise only issues related to the Brunsting trusts and both state court actions were filed while the Brunsting trust res was in the custody of a federal court.

18. The Fifth Circuit noted that the wills of both decedents (Dkt 41-3 and 41-4), bequeathed everything to one heir and that the only heir in fact to either estate was "the trust".

The Trust Matter

> *Curtis v. Brunsting*
>
> *United States Court of Appeals for the Fifth Circuit*
>
> *January 9, 2013, Filed No. 12-20164*
>
> *Reporter*
>
> *704 F.3d 406; 2013 U.S. App. LEXIS 524; 2013 WL 104918*
>
> *Procedural Posture*
>
> *Plaintiff, the beneficiary of a trust, sued defendant co-trustees of the trust, for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas dismissed the case for lack of subject matter jurisdiction, concluding that the case fell within the probate exception to federal diversity jurisdiction. The beneficiary appealed.*
>
> *Overview*

> *The court found that the case was outside the scope of the probate exception under the first step of the inquiry because the trust was not property within the custody of the probate court. Because the assets in a living or inter vivos trust were not property of the estate at the time of decedent's death, having been transferred to the trust years before, the trust was not in the custody of the probate court and as such the probate exception was inapplicable to disputes concerning administration of the trust. The record also indicated that there would be no probate of the trust's assets upon the death of the surviving spouse. Finding no evidence that the trust was subject to the ongoing probate proceedings, the case fell outside the scope of the probate exception.*
>
> *Outcome*
>
> *The district court below erred in dismissing the case for lack of subject-matter jurisdiction.*

Defendant's Challenges D, E and F

D. Plaintiffs' Claims Are Barred by "Attorney Immunity" Doctrine;

E. Plaintiffs Fail to Plead Particular Acts of Fraud;

F. Plaintiffs Fail to Plead Particular Conduct of the Defendant;

19. The United States Attorney's Resource Manual at CRM 2403 defines Extortion by Force, Violence, or Fear as follows:

> *In order to prove a violation of Hobbs Act extortion by the wrongful use of actual or threatened force, violence, or fear, the following questions must be answered affirmatively:*
>
> 1. *Did the defendant induce or attempt to induce the victim to give up property or property rights?*
> 2. *Did the defendant use or attempt to use the victim's reasonable fear of physical injury or economic harm in order to induce the victim's consent to give up property?*

20. Defendant Spielman's performance on March 9, 2016 (Dkt 26 and exhibit 26-16) inarguably answers these inquiries in the affirmative. Plaintiffs' allegations regarding Mr. Spielman are articulated in the Complaint with the specificity required by rule 9(b).

21. Mr. Spielman's specific threats of injury to property rights if Curtis did not mediate a settlement agreement, using a knowingly false instrument, is conduct entirely foreign to the

duties of an attorney and the mere attempt constitutes the tort and crime of extortion whether successful or not.

Failure to State a Claim

22. Defendant Spielman claims to have been involved in the very actions described above and claims to have been representing Defendant Amy Brunsting in a "Probate Matter".

23. Plaintiff points only to the record of those proceedings in answer to each motion to dismiss and Defendant Spielman cannot claim to have been both counsel and ignorant of the facts contained in those records.

24. If it is the interpretation of those fact records that Defendant Spielman wishes to argue, a motion to dismiss for failure to state a claim is neither the proper vehicle nor the proper stage of the proceedings for arguing his contrary facts.

Plaintiffs Lack Privity with Defendant Spielman

25. The impregnable citadel of Privity. Privity is a legal expression defining a close, mutual, or successive relationship to the same right of property or the power to enforce a promise or warranty.

26. While the Doctrine of Privity is an important concept in contract law, a deliberate intent to defraud is not a good faith error in judgement and like the Attorney Immunity Doctrine, the Privity Doctrine is intended to preserve the integrity of the client professional relationship and in the case of an attorney, to provide confidence in one's ability to be a zealous advocate for his client's position. The protection of the Doctrine of Privity does not apply as an impunity shield for conduct that is both tortious and criminal resulting in injuries to third parties.

27. Because Privity is actually a term to summarize a conclusion that one party was precluded, it may exist for the purpose of determining one legal question but not another

depending on the circumstances and legal doctrines at issue." *Meza v. General Battery Corp*., 908 F.2d 1262 (5th Cir. 1990).

V. STANDING

Plaintiff Candace Louise Curtis

28. Defendant's challenge to Plaintiff Curtis' standing relies entirely upon erroneous juristic concepts, wayward fact assertions and misplaced logic.

29. Rights are of two divisions. First are those annexed to the persons of men called Jura personarum or the rights of men and second is the right to control external objects over which man may obtain a dominion and this is called Jura rerum or the right of things[2]. Property is not the thing itself but the interest one acquires in dominion and control over the thing.

30. Plaintiff Curtis is a cestui que trust, also known as a beneficiary. Her property interest is a one-fifth part of the undiminished res of inter vivos trusts as a matter of equity.

31. A beneficial interest in the assets of an inter vivos trust is property and not inheritance expectancy. The concerted effort to deprive Plaintiff Curtis of the enjoyment of her very tangible trust property, continuing for a period of five years, is an injury in fact.

32. Plaintiff Curtis began this journey with no legal education of any kind but knew full well by the time that her mother passed that her sisters, Defendants Anita and Amy Brunsting, had been plotting and were actively engaged in trying to deprive her and her disabled brother Carl Brunsting of beneficial interests in the Brunsting trust res. It now appears Carole Brunsting was also intended to be deprived of her interest in the trust res as well.

[2] See Blackstone's Commentaries on the Laws of England, Book the First, Chapter I, Part III, Pg 134.

Plaintiff Rik Wayne Munson

33. Defendant Spielman stood before the Probate Court on March 9, 2016 talking about his fees (Dkt 26-16 pg 14 ln 20) and how *"Ms. Curtis Pro se status and her, her need to be a lawyer and her failure to appreciate what it costs, what the costs of this lawsuit are, is…"* (Dkt 26-16 page 15). Later (p. 17) Spielman talks about how it would be an insult to respond to the Motions Plaintiff Cutis filed … "*and all of the money that that's going to cost…"* and now claims to have been an attorney participating in those proceedings, immune from consequences for his mens rea motivated acts.

34. It is interesting that Mr. Spielman spoke about the cost of this litigation, as if somehow Plaintiff Curtis does not understand the war of attrition he and his co-defendants thought they would play to deprive her of her property rights.

35. Plaintiff Curtis and Plaintiff Munson have been co-habitant partners for ten years.

36. Munson's tireless labor and effort to defend his household is the only thing that has protected Plaintiff Curtis' property interests from the intended hijacking.

VI. TANGIBLE PROPERTY IS NOT THE THING ITSELF

37. Mankind is born into the world possessing only those rights inherited from nature and it is through the institution and the natural order of family that man develops into an independent and autonomous person with knowledge and ability to defend those rights.

38. The knowledge, experience, skill and labor of a man are the only property man owns in nature by which they can obtain a dominion over other things, including those required by the necessities of life and which directly affect the quality of living in a society.

39. Munson has assisted Plaintiff Curtis in obtaining a favorable appellate opinion (Dkt 34-4) and an injunction (Dkt 26-2) and continues to help protect Plaintiff Curtis' property rights while

also advancing matters of public interest. It is an insult that Defendants consider their worth so high and Plaintiff Munson's so low as to discount that knowledge, experience and the labor devoted to defending against their unholy assault as other than a property interest, rendering such activities and use of resources meaningless.

40. Munson, like Plaintiff Curtis has suffered personal injury as direct and proximate result of the intentional manipulation of the judicial process, multiplication of litigation and superficial pomposity of these Defendants' pretense of legitimacy.

41. The interference began when Defendant Bobbie Bayless filed her exclusively trust related claims in state courts in the name of the Estates of Elmer and Nelva Brunsting, knowing full well the Brunsting trusts were under the exclusive jurisdiction of a federal Court.

42. Munson's time is valuable and the application of his knowledge, experience and labor to these five years of litigation is and has been invaluable to Plaintiff Curtis' protection of her property rights. That effort has cost Munson invaluable and irreplaceable life property interests by diverting valuable time, energy and attention away from other life pursuits.

43. Our families and the communities in which we live have a property interest in the honest services of our public officials and licensed practitioners. There is no valid legal theory that shows public policy interests are not in any way implicated, or that public policy is not wounded by the conduct complained of before this Court.

44. Each Defendant has participated in the jurisdictional sham and the attempted extortion/mediation diversion scheme, using the Bayless vehicle to insinuate their personal interests into the private Brunsting controversy.

VII. IMMUNITY

45. Refusal to provide government services to the public without a transfer of wealth from the private to the public sector are neither judicial nor litigious, but the very definition of public corruption.

46. Defendants appear before this Honorable Court attempting to sell their illicit "Probate Matter" wares, claiming the protection of the judicial and litigation immunity privileges when, as a matter of law, they have been engaged in neither activity.

47. Where there is no subject matter jurisdiction, there is no court and where there is no court there is no judge and no litigation. Claims of attorney and other immunities in this case rely upon facts not in evidence and Plaintiffs demand what they could never get in Harris County Probate Court, an evidentiary hearing with findings of fact and conclusions of law after hearing.

48. For these reasons the conduct of Defendant Spielman, as exemplified by the public record, is not conduct protected by any doctrines of immunity, and reference to a *"Probate Matter"* is a fraud upon this Court.

49. Defendant's different view of the significance of facts contained in the public records in point is not plausible. Defendant does not support contrary claims with any form of competent evidence and such claims are thus not properly raised under Rules 12(b)(1) or 12(b)(6).

VIII. CONCLUSION

50. As the case in point shows, citizens who resort to the courts to enforce rights vindicate wrongs and settle their differences, are all too often confronted by judges and attorneys with an attitude that demonstrates no regard for individual rights or the rules of law.

51. These same individuals now come before this Court claiming entitlement and asking this Court to grant them the very thing they themselves refuse others, the due process and protection of law.

52. One is loath to contemplate the dangers and likely costs of continuing to deny remedy in the face of the present pandemic of public corruption, for the only remedy left to ordinary people would be governed not by reason, but by necessity.

Wherefore, Plaintiffs respectfully request this honorable court deny the Motions to Dismiss, Docket entries 39 and 40, filed by Defendant Neal Spielman on October 3, 2016, and hold Defendant to answer.

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 24th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants Rule 12(b)(1) and 12(b)(6) Motions to Dismiss filed on October 3, 2016, by Defendant Neal Spielman in the above styled cause (Dkt 39 and 40), should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-CV-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT NEAL SPIELMAN'S MOTIONS TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1), 12(b)(6) AND 9(b)

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I. INTRODUCTION

1. Before the Court are motions to dismiss filed by Defendant Neal Spielman. Docket entry 39 is a Rule 12(b)(6) Motion and docket entry 40 is a Rule 12(b)(1) Motion.

2. Plaintiffs incorporate and adopt by this reference the Complaint (Dkt 1 and 26), the previously filed Rule 12 Motions, Dkts 19, 20, 23, 25, 30, 35, 36, 38 and 53 and Plaintiffs' replies thereto, Dkt 33, 34, 41, 45, 62, 57 and 65, as if fully restated herein.

3. Plaintiffs further request this Honorable Court take judicial notice of the following related public records:

a. Curtis v Brunsting C.A. 4:12-cv-592 TXSD 2/27/2012

b. Carl Henry Brunsting Executor for the Estates of Elmer and Nelva Brunsting v. Candace Freed & Vacek & Freed, Harris Co. District Court CA No. 2013-05455;

c. Carl Henry Brunsting Executor for the Estates of Elmer and Nelva Brunsting CA No, 2012-14538 164TH Judicial District Court of Harris County, Texas;

d. Carl Henry Brunsting Individually and as Executor for the Estates of Elmer and Nelva Brunsting, Harris Co. Probate No. 4 CA No 412248, 412249, 412249-401, 412249-402

II. CHRONOLOGICAL HISTORY

4. Plaintiffs incorporate by reference the "Standards of Review", "Contextual Summary", "History of the Controversy", and "History of the Litigation" (Dkt 33 sections I, II, III and IV) from Plaintiffs' response to Motions to Dismiss by Defendants Vacek & Freed, (Dkt 19 & 20) as if fully restated herein. In short:

5. Curtis v Brunsting 4:12-cv-0592 was filed in the United States District Court for the Southern District of Texas on February 27, 2012 under diversity jurisdiction, was dismissed under the "Probate Exception" to federal diversity jurisdiction March 8, 2012 and went to the Fifth Circuit for review.

6. The Fifth Circuit held that Curtis v Brunsting 4:12-cv-0592 is a lawsuit related only to the Brunsting inter vivos trusts, not property of any estate but the heir in fact, and does not come within the purview of the probate exception to federal diversity jurisdiction, *Curtis v Brunsting* 710 F.3d 406 (Jan 2013).

7. A remand to Harris County Probate Court No. 4 was facilitated by Defendant Jason Ostrom and Plaintiff Curtis now returns the matter to the federal Court with a separate complaint.

III. ISSUES RAISED

Defendant argues:

A. Plaintiffs are involved in a bitterly contested "Probate Matter" involving a dispute between the Brunsting siblings over the administration of their late parents' estate. (Dkt 39 & 40 Pages 1 unnumbered paragraphs 2);

B. Plaintiffs' claims are incomprehensible conspiracy theories;

C. Plaintiff is avoiding a court ordered mediation;

D. Plaintiffs' claims are barred by Attorney Immunity;

E. Plaintiffs fail to plead particular acts of fraud;

F. Plaintiffs fail to plead particular conduct of the Defendant;

G. Plaintiffs lack Privity with Defendant;

H. Plaintiffs lack proper standing;

IV. PLAINTIFF'S REPLY

The Probate Matter

8. Defendant Spielman begins both motions with an identical summary in which he states:

> *"This case stems from "conspiracy" claims and other allegations against lawyers, judges, and court personnel involved in a bitterly contested probate matter in Harris County Probate Court No. 4. The Plaintiffs "claims," which are nearly incomprehensible…"*

9. In his BACKGROUND section he states:

> *"Plaintiffs' suit arises from a case pending in Harris County Probate Court Number 4, Cause No. 412.249-401, Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al., ("the Probate Matter"). The Probate Matter involves a dispute between the Brunsting siblings over the administration over their late parents' estate".*

10. Given that both motions are built entirely upon this erroneous factual ground it is unnecessary to address the supporting authorities.

11. The record will show the case before the Court involves claims against Defendants in their individual capacities, arises out of a probate court, and does not arise from a controversy over the administration of any "estate".

12. These matters were res judicata before any state court actions were even filed.[1]

13. Claims were first filed in Harris County Probate No. 4 April 9, 2013, the same day a federal judge issued an injunction against Anita and Amy Brunsting to preserve and prevent wasting of assets of the Brunsting trusts then in the custody of a federal court. (Dkt 26-2, 26-7, 33-5, 34-6)

14. The claims filed in Harris County courts by Defendant Bayless were filed on January 29, 2013 and April 9, 2013. The Harris County District Court suit No. 2013-05455 is styled:

[1] Curtis v Brunsting 704 F.3d 406

> *"CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E.BRUNSTING"*

15. Like Defendant Bayless, (Dkt 23) Defendant Spielman states in the opening sentence of his Rule 12(b)(1) motion that the "Probate Matter" is styled "*Carl Henry Brunsting et al. v. Anita Kay Brunsting, et al.," ("the Probate Matter").* The Harris County Probate suit (412249-401) is actually styled as Docket entry 34 Exhibits 5 and 7 show:

> *CARL HENRY BRUNSTING, individually and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting"*

16. It is important to note that federal Plaintiff Candace Louise Curtis is named a "Nominal Defendant" in Bayless, exclusively trust related Probate Court suit, filed on the same day Plaintiff Curtis obtained a protective Order in the federal Court regarding the same Trust.

17. Both state court petitions raise only issues related to the Brunsting trusts and both state court actions were filed while the Brunsting trust res was in the custody of a federal court.

18. The Fifth Circuit noted that the wills of both decedents (Dkt 41-3 and 41-4), bequeathed everything to one heir and that the only heir in fact to either estate was "the trust".

The Trust Matter

> *Curtis v. Brunsting*
>
> *United States Court of Appeals for the Fifth Circuit*
>
> *January 9, 2013, Filed No. 12-20164*
>
> *Reporter*
>
> *704 F.3d 406; 2013 U.S. App. LEXIS 524; 2013 WL 104918*
>
> *Procedural Posture*
>
> *Plaintiff, the beneficiary of a trust, sued defendant co-trustees of the trust, for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas dismissed the case for lack of subject matter jurisdiction, concluding that the case fell within the probate exception to federal diversity jurisdiction. The beneficiary appealed.*
>
> *Overview*

> *The court found that the case was outside the scope of the probate exception under the first step of the inquiry because the trust was not property within the custody of the probate court. Because the assets in a living or inter vivos trust were not property of the estate at the time of decedent's death, having been transferred to the trust years before, the trust was not in the custody of the probate court and as such the probate exception was inapplicable to disputes concerning administration of the trust. The record also indicated that there would be no probate of the trust's assets upon the death of the surviving spouse. Finding no evidence that the trust was subject to the ongoing probate proceedings, the case fell outside the scope of the probate exception.*
>
> *Outcome*
>
> *The district court below erred in dismissing the case for lack of subject-matter jurisdiction.*

Defendant's Challenges D, E and F

D. Plaintiffs' Claims Are Barred by "Attorney Immunity" Doctrine;

E. Plaintiffs Fail to Plead Particular Acts of Fraud;

F. Plaintiffs Fail to Plead Particular Conduct of the Defendant;

19. The United States Attorney's Resource Manual at CRM 2403 defines Extortion by Force, Violence, or Fear as follows:

> *In order to prove a violation of Hobbs Act extortion by the wrongful use of actual or threatened force, violence, or fear, the following questions must be answered affirmatively:*
>
> 1. *Did the defendant induce or attempt to induce the victim to give up property or property rights?*
> 2. *Did the defendant use or attempt to use the victim's reasonable fear of physical injury or economic harm in order to induce the victim's consent to give up property?*

20. Defendant Spielman's performance on March 9, 2016 (Dkt 26 and exhibit 26-16) inarguably answers these inquiries in the affirmative. Plaintiffs' allegations regarding Mr. Spielman are articulated in the Complaint with the specificity required by rule 9(b).

21. Mr. Spielman's specific threats of injury to property rights if Curtis did not mediate a settlement agreement, using a knowingly false instrument, is conduct entirely foreign to the

duties of an attorney and the mere attempt constitutes the tort and crime of extortion whether successful or not.

Failure to State a Claim

22. Defendant Spielman claims to have been involved in the very actions described above and claims to have been representing Defendant Amy Brunsting in a "Probate Matter".

23. Plaintiff points only to the record of those proceedings in answer to each motion to dismiss and Defendant Spielman cannot claim to have been both counsel and ignorant of the facts contained in those records.

24. If it is the interpretation of those fact records that Defendant Spielman wishes to argue, a motion to dismiss for failure to state a claim is neither the proper vehicle nor the proper stage of the proceedings for arguing his contrary facts.

Plaintiffs Lack Privity with Defendant Spielman

25. The impregnable citadel of Privity. Privity is a legal expression defining a close, mutual, or successive relationship to the same right of property or the power to enforce a promise or warranty.

26. While the Doctrine of Privity is an important concept in contract law, a deliberate intent to defraud is not a good faith error in judgement and like the Attorney Immunity Doctrine, the Privity Doctrine is intended to preserve the integrity of the client professional relationship and in the case of an attorney, to provide confidence in one's ability to be a zealous advocate for his client's position. The protection of the Doctrine of Privity does not apply as an impunity shield for conduct that is both tortious and criminal resulting in injuries to third parties.

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28. Defendant's challenge to Plaintiff Curtis' standing relies entirely upon erroneous juristic concepts, wayward fact assertions and misplaced logic.

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45. Refusal to provide government services to the public without a transfer of wealth from the private to the public sector are neither judicial nor litigious, but the very definition of public corruption.

46. Defendants appear before this Honorable Court attempting to sell their illicit "Probate Matter" wares, claiming the protection of the judicial and litigation immunity privileges when, as a matter of law, they have been engaged in neither activity.

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48. For these reasons the conduct of Defendant Spielman, as exemplified by the public record, is not conduct protected by any doctrines of immunity, and reference to a *"Probate Matter"* is a fraud upon this Court.

49. Defendant's different view of the significance of facts contained in the public records in point is not plausible. Defendant does not support contrary claims with any form of competent evidence and such claims are thus not properly raised under Rules 12(b)(1) or 12(b)(6).

VIII. CONCLUSION

50. As the case in point shows, citizens who resort to the courts to enforce rights vindicate wrongs and settle their differences, are all too often confronted by judges and attorneys with an attitude that demonstrates no regard for individual rights or the rules of law.

51. These same individuals now come before this Court claiming entitlement and asking this Court to grant them the very thing they themselves refuse others, the due process and protection of law.

52. One is loath to contemplate the dangers and likely costs of continuing to deny remedy in the face of the present pandemic of public corruption, for the only remedy left to ordinary people would be governed not by reason, but by necessity.

Wherefore, Plaintiffs respectfully request this honorable court deny the Motions to Dismiss, Docket entries 39 and 40, filed by Defendant Neal Spielman on October 3, 2016, and hold Defendant to answer.

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 24th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

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Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants Rule 12(b)(1) and 12(b)(6) Motions to Dismiss filed on October 3, 2016, by Defendant Neal Spielman in the above styled cause (Dkt 39 and 40), should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

Plaintiffs' Motion to Consolidate (the "Motion") asks this Court to consolidate this matter into case number 4:12-cv-0592, a closed case formerly pending before Judge Hoyt. But Plaintiffs' Motion should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact.

I. Consolidation Should be Denied Because the "Prior Case" Is Closed.

Plaintiffs ask this Court to consolidate this matter into case number 4:12-cv-0592, before Judge Hoyt. But case number 4:12-cv-0592 is closed, and it has been closed since May 15, 2014.

A Motion to Consolidate a pending matter into a closed matter should be denied. *See* Order Denying Motion for Leave to File Motion to Consolidate, *EP-Team, Inc. v. Aspen Infrastructure, Ltd.*, No. H-07-2549 [DKT. 17] (S. D. Tex. Jan. 10, 2008). In *EP-Team*, a court in this District was asked to consolidate a matter into an earlier-filed case that was closed. *Id.* The court denied consolidation, stating, "This case, Civil Action No. 07-2549, is the earlier case and **it is closed, therefore, the Court cannot consolidate anything with it**." *Id.* (emphasis

added); *see alsoClarke v. Dir., TDCJ-CID*, No. 4:09-CV-404, 2012 WL 4120430, at *1 & *5 (E.D. Tex. Sept. 19, 2012) (denying a motion to consolidate because the "corresponding case" was "closed"); *Hamilton v. United Healthcare of Louisiana, Inc.*, CIV.A. 01-585, 2003 WL 22779081, at *2 n.3 (E.D. La. Nov. 21, 2003) (determining that "consolidation **was done in error**" because the first-filed case "was closed" prior to consolidation) (emphasis added). And the "prior matter" is closed because Plaintiff Candace Curtis *herself* requested the court remand the matter to Harris County. *See* Order Granting Unopposed Motion to Remand by Candace Louise Curtis, *Curtis v Brunsting*, No. 4:12-cv-0592 (DKT. 112) (S.D. Tex. May 15, 2014).

Thus, Plaintiffs' Motion to Consolidate should be denied.

II. The Closed Case and This Pending Matter Should not Be Consolidated.

In determining whether to consolidate, Courts consider five factors:

> (1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, and (5) whether consolidation will conserve judicial resources and reduce the time and cost of trying the cases separately."

Zolezzi v. Celadon Trucking Services, Inc., No. Civ.A.H-08-3508, 2009 WL 736057, at *1 (S.D. Tex. Mar. 16, 2009) (citing *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, Civ. A. Nos. H–01–3624, H–04–0088, H–04–0087, H–03–5528, 2007 WL 446051, at *1 (S.D. Tex. Feb.7, 2007)). Here, those factors overwhelmingly show that the two matters should not be consolidated.

First, the actions are not **pending** before the same court. Indeed, as shown above, the "prior case" is not pending at all—it is closed.

Second, although some of the parties to the two matters are common between the two cases, several are not. As an example, Defendant Young is not a party to the prior case; nor is

Defendant Lester. Judge Butts and Judge Comstock were not parties to the prior matter, either. And Jason Ostrom, who appears on the docket sheet as counsel for Plaintiff Curtis in the now-closed "prior case," *has now been sued* by Plaintiffs in this case.

Third, there are not common questions of law or fact. This matter involves RICO assertions made by Plaintiffs, who make the novel contention that a state probate court is a conspiracy called the "Harris County Tomb Raiders" and the "Probate Mafia," who "transfer wealth" from estates by engaging in "poser advocacy." There are *no* questions of law or fact in the closed matter, because it has been remanded to state court. But even if the Court looked to the questions of law and fact in the state court matter, those questions relate merely to estate law—not alleged federal RICO statutes and criminal conspiracies.

Fourth, there is an extraordinary risk of confusion that would result from consolidation of the cases. As examples, in the RICO case, many of the probate court litigants, the attorneys, and the judges are all Defendants, who are all more-or-less aligned in opposing Plaintiffs' RICO allegations. But in the probate matter itself, the parties share no such affinities. Certainly, it would be confusing for a fact-finder to be asked to determine, on the one hand, whether Plaintiff Curtis's own counsel was involved in the criminal enterprise "Probate Mafia," when that counsel also previously represented the Plaintiff in the closed federal court matter.

Fifth, consolidation will not conserve judicial resources since the prior matter is closed.

Thus, Plaintiffs' Motion should be denied.

III. Conclusion

For the above-stated reasons, Plaintiffs' Motion should be denied.

Dated: October 25, 2016

Respectfully submitted,

/s/ Robert S. Harrell

Robert S. Harrell
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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 25, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

Plaintiffs' Motion to Consolidate (the "Motion") asks this Court to consolidate this matter into case number 4:12-cv-0592, a closed case formerly pending before Judge Hoyt. But Plaintiffs' Motion should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact.

I. Consolidation Should be Denied Because the "Prior Case" Is Closed.

Plaintiffs ask this Court to consolidate this matter into case number 4:12-cv-0592, before Judge Hoyt. But case number 4:12-cv-0592 is closed, and it has been closed since May 15, 2014.

A Motion to Consolidate a pending matter into a closed matter should be denied. *See* Order Denying Motion for Leave to File Motion to Consolidate, *EP-Team, Inc. v. Aspen Infrastructure, Ltd.*, No. H-07-2549 [DKT. 17] (S. D. Tex. Jan. 10, 2008). In *EP-Team*, a court in this District was asked to consolidate a matter into an earlier-filed case that was closed. *Id.* The court denied consolidation, stating, "This case, Civil Action No. 07-2549, is the earlier case and **it is closed, therefore, the Court cannot consolidate anything with it**." *Id.* (emphasis

added); *see alsoClarke v. Dir., TDCJ-CID*, No. 4:09-CV-404, 2012 WL 4120430, at *1 & *5 (E.D. Tex. Sept. 19, 2012) (denying a motion to consolidate because the "corresponding case" was "closed"); *Hamilton v. United Healthcare of Louisiana, Inc.*, CIV.A. 01-585, 2003 WL 22779081, at *2 n.3 (E.D. La. Nov. 21, 2003) (determining that "consolidation **was done in error**" because the first-filed case "was closed" prior to consolidation) (emphasis added). And the "prior matter" is closed because Plaintiff Candace Curtis *herself* requested the court remand the matter to Harris County. *See* Order Granting Unopposed Motion to Remand by Candace Louise Curtis, *Curtis v Brunsting*, No. 4:12-cv-0592 (DKT. 112) (S.D. Tex. May 15, 2014).

Thus, Plaintiffs' Motion to Consolidate should be denied.

II. The Closed Case and This Pending Matter Should not Be Consolidated.

In determining whether to consolidate, Courts consider five factors:

> (1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, and (5) whether consolidation will conserve judicial resources and reduce the time and cost of trying the cases separately."

Zolezzi v. Celadon Trucking Services, Inc., No. Civ.A.H-08-3508, 2009 WL 736057, at *1 (S.D. Tex. Mar. 16, 2009) (citing *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, Civ. A. Nos. H–01–3624, H–04–0088, H–04–0087, H–03–5528, 2007 WL 446051, at *1 (S.D. Tex. Feb.7, 2007)). Here, those factors overwhelmingly show that the two matters should not be consolidated.

First, the actions are not **pending** before the same court. Indeed, as shown above, the "prior case" is not pending at all—it is closed.

Second, although some of the parties to the two matters are common between the two cases, several are not. As an example, Defendant Young is not a party to the prior case; nor is

Defendant Lester. Judge Butts and Judge Comstock were not parties to the prior matter, either. And Jason Ostrom, who appears on the docket sheet as counsel for Plaintiff Curtis in the now-closed "prior case," *has now been sued* by Plaintiffs in this case.

Third, there are not common questions of law or fact. This matter involves RICO assertions made by Plaintiffs, who make the novel contention that a state probate court is a conspiracy called the "Harris County Tomb Raiders" and the "Probate Mafia," who "transfer wealth" from estates by engaging in "poser advocacy." There are *no* questions of law or fact in the closed matter, because it has been remanded to state court. But even if the Court looked to the questions of law and fact in the state court matter, those questions relate merely to estate law—not alleged federal RICO statutes and criminal conspiracies.

Fourth, there is an extraordinary risk of confusion that would result from consolidation of the cases. As examples, in the RICO case, many of the probate court litigants, the attorneys, and the judges are all Defendants, who are all more-or-less aligned in opposing Plaintiffs' RICO allegations. But in the probate matter itself, the parties share no such affinities. Certainly, it would be confusing for a fact-finder to be asked to determine, on the one hand, whether Plaintiff Curtis's own counsel was involved in the criminal enterprise "Probate Mafia," when that counsel also previously represented the Plaintiff in the closed federal court matter.

Fifth, consolidation will not conserve judicial resources since the prior matter is closed.

Thus, Plaintiffs' Motion should be denied.

III. Conclusion

For the above-stated reasons, Plaintiffs' Motion should be denied.

Dated: October 25, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on October 25, 2016, in accordance with the Federal Rules of Civil Procedure.

/s/ Robert S. Harrell
Robert S. Harrell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS &	§	
RIK WAYNE MUNSON	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:16-cv-01969**
	§	**(Alfred H. Bennett)**
CANDACE KUNZ-FREED,	§	
ALBERT VACEK, JR, ET AL	§	

DEFENDANTS MENDEL'S & FEATHERSTON'S JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants Stephen A. Mendel and Bradley E. Featherston (collectively the "Mendel & Featherston Defendants") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' Addendum of Memorandum in Support of RICO Complaint ("Addendum") and would respectfully show the Court as follows:

I.
THE COURT SHOULD STRIKE PLAINTIFFS' ADDENDUM

1. In the interests of justice and judicial economy, and pursuant to Federal Rule of Civil Procedure 10(c), the Mendel & Featherston Defendants hereby adopt and incorporate by reference, as if recited herein the arguments and authority contained in Jill Willard Young's Motion to Strike [Doc. 38]. The Court should strike Plaintiffs' Addendum, because it is not a valid pleading under the Federal Rules of Civil Procedure.

2. More importantly, the Court should dismiss Plaintiffs' claims against the Mendel & Featherston Defendants. The Addendum does not affect the merits of the Mendel & Featherston Defendants' Motions to Dismiss as none of the allegations against the Mendel &

Featherston Defendants form the basis for a valid complaint or support a RICO claim against the Mendel & Featherston Defendants.

3. Plaintiffs' claims should be dismissed because they have not adequately pleaded a violation of the RICO Act. Even assuming that Plaintiffs' Addendum is considered to be a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to meet the required pleading standards.

II.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Stephen A. Mendel and Bradley E. Featherston hereby request that the Court strike Plaintiffs' Addendum.

Respectfully submitted,

/s/ David C. Deiss
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ATTORNEYS FOR DEFENDANTS, STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 27th day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
Plaintiff, Pro Se

Rik Wayne Munson
218 Landana Street
American Canyon, CA 94503
Plaintiff, Pro Se

Defendant Neal Spielman:
c/o Martin Samuel Schexnayder
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Gregory Lester
955 N. Dairy Ashford, Suite 220
Houston, Texas 77079

/s/ David C. Deiss
Adraon D. Greene
David C. Deiss

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT JILL WILLARD YOUNG'S MOTION FOR SANCTIONS

On July 5, 2016, Plaintiffs filed a frivolous, 64-page "Verified Complaint" consisting of facially preposterous criminal accusations, blatant mischaracterizations of fact, and boilerplate recitations of law in the Complaint that are plainly insufficient to survive dismissal. On September 15, 2016, Defendant Young filed her Motion to Dismiss.[1] And on September 27, 2016, Defendant Young sent Plaintiffs a letter, informing them that, in accordance with the safe-harbor procedure of Federal Rule of Civil Procedure 11, she would be filing this Motion for Sanctions on October 19, 2016, if Plaintiffs did not dismiss their Complaint against her with prejudice. But Plaintiffs have ignored Ms. Young's letter and Motions.

Plaintiffs' frivolous pleadings meaninglessly and wrongfully denigrate the reputation of Ms. Young, a prominent, hard-working Houston lawyer. Despite opportunities to nonsuit their meritless suit, Plaintiffs have refused to do so. Thus, Plaintiffs should be required to reimburse Ms. Young's attorney's fees pursuant to Federal Rule of Civil Procedure 11.[2]

[1] Ms. Young incorporates by reference the arguments and authorities asserted in her Motion to Dismiss.

[2] Ms. Young will file proof of the amount of attorneys' fees in the event the motion is granted.

ARGUMENT AND AUTHORITIES

Filing a RICO action in federal court is not a proper substitute for appealing an unfavorable ruling, nor is it an appropriate means of seeking revenge against opposing and court-appointed counsel. *See Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989) ("[I]t should be noted that an attorney's responsibility to conduct a reasonable prefiling investigation is **particularly important in RICO claims**.") (emphasis added). Because the claims asserted by Plaintiffs are both legally and factually frivolous, Ms. Young should be awarded attorneys' fees and costs under Fed. R. Civ. P. 11.

I. The Rule 11 Standard

Under Fed. R. Civ. P. 11(b), by presenting the Court a signed pleading, an "unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3). "Compliance with these affirmative duties is measured as of the time that the document is signed." *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1024 (5th Cir. 1994). And whether a pleading meets this requirements is measured "by an objective, not subjective, standard of reasonableness under the circumstances." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988).

"[I]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1); *see also* Fed. R. Civ. P. 11 Advisory Committee Notes ("Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

II. Plaintiffs have violated Fed. R. Civ. P. 11(b)(2) by filing legally frivolous claims.

Plaintiffs have ignored longstanding attorney immunity doctrines, have alleged six causes of action for which they have no private cause of action, and failed to plead facts showing even the most basic elements of their RICO "claim."

A. Plaintiffs ignore attorney immunity.

Plaintiffs have ignored long-established immunity doctrines that protect attorneys from suit by opposing parties and non-clients. Indeed, the affirmative defense of immunity is apparent on the face of the Complaint.

Under Texas law, it is settled that "attorneys are immune from civil liability . . . 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). However, a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406).

In this case, Plaintiffs have not pled any facts showing Ms. Young, who served as counsel for the Temporary Administrator in the underlying lawsuit, took any actions outside the normal discharge of her duties in representing her client. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016) (attorney's conduct in sending a letter, participating in discovery, and communicating with SEC about client were "classic examples of an attorney's conduct in representing his client").

B. Plaintiffs plead claims for which there exists no private right of action.

Plaintiffs allege three causes of action for "honest services," along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* Complaint, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See* Motion to Dismiss [DKT. 25], at pp. 13–16.

C. Plaintiffs' accusations are baseless and delusional.

Plaintiffs accuse Ms. Young of what can best be described as fictional acts--being a member of a secret society and "cabal" known as the "Harris County Tomb Raiders," which Plaintiffs also call "The Probate Mafia." *See, e.g.*, Complaint, at ¶¶ 57, 58, 89. Plaintiffs allege the members of this purported shadow organization engage in "Poser Advocacy," supposedly an "exploitation opportunity" to "hijack" "familial wealth." *Id.* at ¶¶ 95–99. Not surprisingly, Plaintiffs do not even try to accompany their made-up story with supporting facts. The reality is unavoidable—their complaint is a bizarre attempt to seek revenge for being on the losing end of trust and estate determinations that have already been fully litigated in Texas state court.

Less fantastical efforts to concoct a federal claim against judges and opposing attorneys have been routinely dismissed. *See, e.g.*, *Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to plead a racketeering activity). And other courts in this Circuit

have held that almost identical allegations made by pro se litigants should be dismissed *and* were sanctionable. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff).

Thus, Plaintiffs' allegations fail to satisfy Rule 11. Specifically, Plaintiffs' Complaint against Ms. Young—devoid of any allegation of actual wrongdoing—can only be brought for improper purposes, like harassment or to needlessly increase the cost of litigation. Plaintiffs' Complaint is in no way warranted by existing law, and Plaintiffs' contentions completely lack any sort of factual or evidentiary support. *See* Fed. R. Civ. P. 11(b)(1)-(3). Ms. Young has also specifically informed Plaintiffs multiple times of the legal defects in their Complaint and the authority showing Plaintiffs' arguments are meritless, both in Ms. Young's filing of her Motion to Dismiss and by serving this Motion for Sanctions on Plaintiffs twenty-one days before filing it with the Court. But Plaintiffs have refused to dismiss their Complaint against Ms. Young. This, too, means sanctions are necessary. *See also Taylor v. C.I.R.*, 350 Fed. Appx. 913, 915 (5th Cir. 2009) ("Sanctions on pro se litigants are appropriate if they were warned that their claims are frivolous and they were aware of 'ample legal authority holding squarely against them.'").

CONCLUSION

Plaintiffs have filed a frivolous and facially-deficient lawsuit, and Ms. Young respectfully requests that the Court require Plaintiffs and their attorneys to pay her attorneys' fees in defending this suit and pursuing the relief requested herein.

Dated: October 27, 2016

Respectfully submitted,

/s/ Robert S. Harrell

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ATTORNEYS FOR DEFENDANT JILL WILLARD YOUNG

CERTIFICATE OF CONFERENCE

I certify that on September 27, 2016, I conferred with counsel for Plaintiffs about the relief requested in this Motion. Counsel for Plaintiffs declined to dismiss the claims against Ms. Young, requiring the submission of this Motion to the Court.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, pursuant to Fed. R. Civ. 11(c)(2) and Fed. R. Civ. P. 5, I served copies of this Motion for Sanctions on Plaintiffs. I also certify that a true and correct copy of the above Motion for Sanctions has been served on October 27, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS &	§	
RIK WAYNE MUNSON	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:16-cv-01969**
	§	**(Alfred H. Bennett)**
CANDACE KUNZ-FREED,	§	
ALBERT VACEK, JR, ET AL	§	

DEFENDANTS MENDEL'S & FEATHERSTON'S JOINDER IN JILL WILLARD YOUNG'S MOTION TO STRIKE PLAINTIFFS' ADDENDUM OF MEMORANDUM IN SUPPORT OF RICO COMPLAINT

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants Stephen A. Mendel and Bradley E. Featherston (collectively the "Mendel & Featherston Defendants") hereby file this Adoption and Joinder in Jill Willard Young's Motion to Strike Plaintiffs' Addendum of Memorandum in Support of RICO Complaint ("Addendum") and would respectfully show the Court as follows:

I.
THE COURT SHOULD STRIKE PLAINTIFFS' ADDENDUM

1. In the interests of justice and judicial economy, and pursuant to Federal Rule of Civil Procedure 10(c), the Mendel & Featherston Defendants hereby adopt and incorporate by reference, as if recited herein the arguments and authority contained in Jill Willard Young's Motion to Strike [Doc. 38]. The Court should strike Plaintiffs' Addendum, because it is not a valid pleading under the Federal Rules of Civil Procedure.

2. More importantly, the Court should dismiss Plaintiffs' claims against the Mendel & Featherston Defendants. The Addendum does not affect the merits of the Mendel & Featherston Defendants' Motions to Dismiss as none of the allegations against the Mendel &

Featherston Defendants form the basis for a valid complaint or support a RICO claim against the Mendel & Featherston Defendants.

3. Plaintiffs' claims should be dismissed because they have not adequately pleaded a violation of the RICO Act. Even assuming that Plaintiffs' Addendum is considered to be a supplement to Plaintiffs' Complaint, it does not change the fact that Plaintiffs have failed to meet the required pleading standards.

II.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Stephen A. Mendel and Bradley E. Featherston hereby request that the Court strike Plaintiffs' Addendum.

Respectfully submitted,

/s/ David C. Deiss
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ATTORNEYS FOR DEFENDANTS, STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 27th day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
Plaintiff, Pro Se

Rik Wayne Munson
218 Landana Street
American Canyon, CA 94503
Plaintiff, Pro Se

Defendant Neal Spielman:
c/o Martin Samuel Schexnayder
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/s/ David C. Deiss
Adraon D. Greene
David C. Deiss

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

NOTICE OF SETTING

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN SET FOR THE PLACE, DATE AND TIME SET FORTH BELOW.

Before the Honorable

Alfred H Bennett

PLACE: Courtroom 8C
United States District Court
515 Rusk Avenue
Houston, Texas 77002

DATE: 12/9/2016

TIME: 10:00 AM

TYPE OF PROCEEDING: Motion Hearing
Motion to Dismiss for Failure to State a Claim − #19
Motion to Dismiss − #20
Motion to Dismiss for Failure to State a Claim − #23
Motion to Dismiss for Failure to State a Claim − #25
Motion for Miscellaneous Relief − #28
Motion to Dismiss for Failure to State a Claim − #30
Motion to Dismiss for Failure to State a Claim − #35
Motion to Dismiss for Failure to State a Claim − #36
Motion to Dismiss − #39
Motion to Dismiss − #40

Date: October 28, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

NOTICE OF SETTING

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN SET FOR THE PLACE, DATE AND TIME SET FORTH BELOW.

Before the Honorable

Alfred H Bennett

PLACE: Courtroom 8C
United States District Court
515 Rusk Avenue
Houston, Texas 77002

DATE: 12/12/2016

TIME: 10:00 AM

TYPE OF PROCEEDING: Motion Hearing
Motion to Dismiss for Failure to State a Claim − #19
Motion to Dismiss − #20
Motion to Dismiss for Failure to State a Claim − #23
Motion to Dismiss for Failure to State a Claim − #25
Motion to Dismiss for Failure to State a Claim − #30
Motion to Dismiss for Failure to State a Claim − #35
Motion to Dismiss − #39
Motion to Dismiss − #40
Motion to Dismiss for Failure to State a Claim − #53

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Motion to Dismiss for Failure to State a Claim − #53

Date: October 28, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, RIK WAYNE MUNSON	§	
Plaintiffs,	§	**C.A. No. 4:16-cv-01969**
VS.	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTSS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA BRUNSTING AND AMY BRUNSTING	§	

DEFENDANT JASON OSTROM'S
MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Jason Ostrom ("Mr. Ostrom") files this Rule 12 Motion to Dismiss and shows the following:

I.
INTRODUCTION

Plaintiffs' pro se Complaint (*D.E. #1*) purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court Number 4. Plaintiffs in this case are Candace Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings.

The allegations related to Mr. Ostrom are minimal. The information identifying Mr. Ostrom as a defendant is contained in paragraphs 1, 15, 55, 56 and 59 of the Complaint. (*D.E.# 1*). Paragraph 55 of the Complaint alleges that Mr. Ostrom is an attorney who has practiced in Harris County Probate Courts. Paragraph 56 alleges, without any facts to support it, that Mr. Ostrom and the other named defendants have engaged in a criminal enterprise somehow being conducted through Harris County Probate Court Number 4. Paragraph 59 makes a similar allegation, again without any factual support. A majority of the events Plaintiffs' complain about, occurred after Mr. Ostrom was discharged by Plaintiff. The Complaint asserts no factual content sufficient to maintain any cause of action against Mr. Ostrom. (*D.E.#1*).

In response to Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6) filed by some Defendants, Plaintiffs filed their Addendum of Memorandum in Support of RICO Complaint. (*D.E. #26*). Rather than provide any specifics about how a frivolous 59-page complaint states a RICO claim against Mr. Ostrom, Plaintiffs have instead come forward with a 25-page Addendum that still does not state a claim. (*D.E.# 26*). Although the Addendum is replete with inaccuracies, it has not changed or added any additional factual allegations to support RICO claims. All the Addendum does is describe a handful of events and then conclude without explanation that the events constitute a RICO predicate act. Because the Addendum does nothing to cure the problems found in Plaintiffs' Original Complaint, the Court should grant this Motion and dismiss all claims against Mr. Ostrom.

II.
STANDARDS OF REVIEW FOR PLEADING CONSTRUCTION

In a Rule 12(b)(6) motion, the Court accepts all factual allegations in the pleadings as true and examines whether the allegations state a claim sufficient to avoid dismissal.[1] This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations, unwarranted factual inferences, or legal conclusions as true.[2] It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.[3] A Court should grant a Rule 12(b)(6) motion when it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.[4] Similarly, when a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate.[5]

III.
STATEMENT OF FACTS DERIVED EXCLUSIVELY FROM PLAINTIFFS' ORIGINAL COMPLAINT AND ADDENDUM

It is evident from the Original Complaint that Plaintiffs have underlying litigation in Probate Court Number Four with various attorneys and opposing parties. It is also evident from the Original Complaint that Plaintiffs are dissatisfied with the status of those proceedings. Beyond this, it has been extremely cumbersome to locate any specific allegations against Mr. Ostrom. In an effort to provide some clarity for the Court regarding the claims against Mr. Ostrom, Mr. Ostrom opens with a statement of facts derived exclusively from the Original Complaint and Addendum.

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1 *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5th Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).
2 *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).
3 *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004).
4 *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015).
5 *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5th Cir. 1992).

A. FACTS INVOLVING MR. OSTROM.

Following the hearing on October 2, 2013, Plaintiff Curtis hired Mr. Ostrom on November 27, 2013.[6] Mr. Ostrom then assisted in remanding the case back to Harris County Probate Number 4.[7] Plaintiffs state in their Addendum that the matter was remanded to Harris County Probate Court Number 4 pursuant to a stipulation that in turn for the remand, Defendants agreed the federal injunction issued by this Court would remain in full force and effect.[8] Plaintiffs then argue that once they were back in state court, Defendants immediately ignored the injunction.[9] However, Plaintiffs contradict their own statement by acknowledging that Probate Court Number 4 entered an Order modifying the federal injunction.[10] Obviously the federal injunction was not being ignored.

Plaintiffs complain of two actions taken by Mr. Ostrom. First, that Mr. Ostrom filed an application for distribution without Plaintiff Curtis's consent.[11] Attached to this Motion as Exhibit A is a letter from Mr. Ostrom to Plaintiff Curtis wherein he discusses the fact that she was aware of the application for distribution and indeed agreed to another application for distribution being filed.[12]

Secondly, Plaintiffs complain that Mr. Ostrom filed an amended complaint in the probate court raising questions as to the competency of a very lucid Nelva Brunsting.[13] Attached to this motion as Exhibit B is a copy of the Plaintiff's Second Amended Petition that Plaintiffs are referring to.[14] Nowhere within the Second Amended Petition does Mr. Ostrom raise the issue of

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6 Plaintiffs' Addendum at paragraph 32.
7 Plaintiffs' Addendum at paragraph 33.
8 Plaintiffs' Addendum paragraph 3.
9 Plaintiffs' Addendum paragraph 4.
10 Plaintiffs' Addendum paragraph 42.
11 Plaintiffs' Addendum paragraph 50.
12 Exhibit A.
13 Plaintiffs' Addendum paragraph 55.
14 Exhibit B.

Nelva's capacity.[15] Mr. Ostrom was then discharged as Plaintiff Curtis's attorney on or about March 28, 2015.

IV.
THE COURT SHOULD DISMISS THE PLAINTIFFS' CLAIMS AGAINST MR. OSTROM.

A. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

Based on virtually no specific allegations of a criminal enterprise beyond dissatisfaction with the public proceedings in the underlying case, the Plaintiffs have asserted two RICO claims against Mr. Ostrom. Plaintiffs have brought their RICO action under 18 U.S.C. §1962(c) AND 18 U.S.C. §1962(d).

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or "predicate acts." [16] The only facts cited by Plaintiffs regarding Mr. Ostrom are found in the Addendum paragraphs 50, 51, and 55. To successfully plead a RICO claim under §1962(c), Plaintiffs must plead specific facts, that if true, would establish that each predicate act was in fact committed by Mr. Ostrom.[17] Plaintiffs fail to meet this standard.

With respect to Mr. Ostrom, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 196l(l)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by Mr. Ostrom. [18] Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts,

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15 *Id.*
16 *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)
17 *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).
18 *Id. at 880.*

Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that Mr. Ostrom violated the statute. However, these allegations are baseless on thier face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

B. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(c).

As to the claims under § 1962(c), the Plaintiffs did not allege with the requisite factual specificity (or beyond merely conclusory statements) any predicate acts committed by Mr. Ostrom. Similarly, the Plaintiffs did not allege and the law would not sustain any assertion that Mr. Ostrom conducted, controlled, or participated in an enterprise under the standard set forth by the Supreme Court in *Reves.*[19]

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."[20]

Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiffs claim and how and why they are fraudulent."[21] Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."[22] When

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[19] 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

[20] *Walsh v. America's Tele- Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMXTechs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. C1v. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

[21] *Allstate Insurance Company v. Benhamou,* No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016).

[22] *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP,* No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).

pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.[23]

Here, Plaintiffs have failed to allege the contents of any of the purported false representations made by Mr. Ostrom, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.[24] This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiffs' injuries and the underlying RICO violation.[25] But, despite this firmly established requirement, Plaintiffs in this case have asserted no allegations-indeed, not even a conclusory allegation-detailing how they purportedly relied upon Mr. Ostrom's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

C. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE

1. Plaintiffs Enterprise Allegations Are Too Vague and Conclusory

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[23] *Elliott,* 867 F.2d at 882; *Old Time Enterprises,* 862 F.2d at 1218; *Tel-Phonic Servs.,* 975 F.2d at 1138.

[24] *Summit Properties, Inc. v. Hoechst Celanese Corp.,* 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts)

[25] *See Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.,* 319 F.3d 205,219 (5th Cir. 2003); *In re MasterCard International, Inc.,* 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling").

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[26] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[27] To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[28]

The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[29] The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(l) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[30]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[31] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[32]

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it

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[26] 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881.
[27] *Elliott*, 867 F.2d at 881.
[28] *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).
[29] 452 U.S. at 583.
[30] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[31] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[32] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 2d at 427).

operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless conclusions.

Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind- when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these, or any other supporting facts, Plaintiffs' pleadings are simply insufficient.

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.[33] Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged."[34] Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs alleged enterprise lacks continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[35] Specifically, "[a]n

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[33] *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

[34] *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

[35] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."[36] These requirements limit the application of the RICO Act, and serve to prevent an overly-broad application to general commercial conduct that was never really the intended focus of the Act.[37]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

D. Plaintiffs Have Failed to Adequately Plead a Pattern of Racketeering Activity.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[38] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other and that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[39] When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though

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[36] *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).
[37] *Delta Truck,* 855 F.2d at 242-43.
[38] *See In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck,* 855 F.2d at 242-43).
[39] *HJ., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[40] Such 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."[41]

Here, Plaintiffs alleges several times throughout their Complaint that Mr. Ostrom engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

E. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(d).

To prove a RICO conspiracy, the Plaintiffs must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.[42] A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.[43] Mere association with the enterprise is not actionable; agreement is essential.[44] Further, if a plaintiff fails to properly plead a RICO claim under §§ 1962(a), (b), or (c), it correspondingly fails to properly plead a conspiracy claim under § 1962(d).[45]

The Court should dismiss the § 1962(d) claim because the Plaintiffs failed to state a claim under §§ 1962(a-c). As a result, the conspiracy claims fail under controlling Fifth Circuit authority.[46] The Court should additionally dismiss the claim because the Plaintiffs have not

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40 *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).

41 *Id.* (quoting *HJ., Inc.*, 492 U.S. at241).

42 *TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 625 n.11 (N.D. Tex. 2007) (Fitzwater, J.) (quoting *United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005)).

43 *Id.*

44 *Baumer*, 8 F.3d at 1344.

45 *N. Cypress Med. Ctr. Operating Co*, 781 F.3d at 203.

46 *Id.*

alleged any specific facts detailing an agreement to commit a RICO offense, what the agreement was, how it was reached, and when it was entered.[47] These types of missing details are necessary to state a claim under § 1962(d). As explained in *Twombly,* allegations that a defendant acted in ways consistent with a conspiratorial agreement, but also equally well explained by legitimate economic incentives, do not suffice to show illegality.[48] So too, unsupported conclusory allegations are not entitled to be assumed true, and dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because the conduct could be compatible with or explained by, lawful, unchoreographed free-market behavior."[49] Because the Plaintiffs have failed to state a claim upon which relief may be granted, the Court should grant this Motion to Dismiss.

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury.[50] That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.[51] A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.[52]

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[47] *Lewis v. Sprock*, 612 F.Supp. 1316, 1325 (N.D. Cal. 1985); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365 (D. Hawaii 1995).

[48] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[49] *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

[50] *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004)(citing Holmes, 503 U.S. at 279).

[51] Ocean Energy II. V. Alexander & *Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).

[52] *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277,289 (5th Cir. 2007).

More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."[53]

Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."[54] These allegations must include specific facts; conclusory and generalized allegations are insufficient.[55] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries."[56]

The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp*. In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."[57] If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. [58]

Clearly, the allegations in the Complaint are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs have alleged a similar disjunctive causation pattern with respect to their claims against Mr. Ostrom. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because

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[53] *Sedima*, 473 U.S. at 496.
[54] *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219.
[55] *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).
[56] *Anza*, 547 U.S. at 452.
[57] *Id.*
[58] *Id*

Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Ostrom respectfully prays that this Court GRANT this Motion to Dismiss, dismiss all of the Plaintiffs' claims against Mr. Ostrom with prejudice, and award Mr. Ostrom all such other relief to which he may be justly entitled.

Respectfully submitted,

ostrommorris, PLLC

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ATTORNEYS FOR JASON O. OSTROM

CERTIFICATE OF SERVICE

I hereby certify that on Monday, October 31, 2016, a true and correct copy of the foregoing instrument was served on all known counsel of record through the Court's CM/ECF system, which constitutes service on all parties in accordance with the Federal Rules of Civil Procedure.

STACY L. KELLY

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January 13, 2015

Ms. Candace Curtis

Via Email; occurtis@sbcglobal.net

Re: Cause No. 412,249; *In Re: Estate of Nelva E. Brunsting, Deceased*; in the Probate Court Number Four (4) of Harris County, Texas

Dear Ms. Curtis:

As you know, we asked the Court to order a distribution of funds out of the Brunsting Family Trust in order to pay the outstanding balance on your account with us. Unfortunately, Anita opposed our application and the Court denied it. The Judge did say, however, that she would entertain an Application for Partial Distribution of your share of the Trust. We could file that on your behalf with your authorization and your agreement that you would direct the distribution to us for payment on your account. The Application would not mention our fees, and there is no guarantee that the Court would grant this Application either – in spite of the fact that she recommended it during the hearing. However, it is currently the best option that I know of to address your outstanding account balance, which needs to be reduced in order for us to continue preparing for trial – a trial that seems necessary in light of the positions that your sisters took in mediation.

If you want to discuss this approach I am happy to have a telephone conference with you; please contact Mica DeScioli to set that up. Otherwise, if you would like for us just to proceed with asking the Court for this relief and not waste time discussing it further, simply sign this letter and return it to us, and we will get the Application prepared and filed.

Sincerely,

Jason B. Ostrom

AGREED:

Candace Curtis

EXHIBIT
tabbies
A

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

This Court had jurisdiction pursuant to Sections 32.002(c) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.

III. BACKGROUND

Elmer and Nelva Brunsting created the Brunsting Family Trust, and placed essentially all of their assets into this Trust, of which they were the trustees. The Trust became irrevocable and not subject to amendment upon Elmer's death in 2009, at which time Nelva became the sole trustee of the two trusts into which the Family Trust was divided: the Decedent's Trust and the Survivor's Trust. She also became the sole beneficiary of the Survivor's Trust and the primary beneficiary of the Decedent's Trust.

In 2010, Defendants Anita and Amy began taking steps to control the Trust assets and garner a larger share than their siblings. To that end, they caused Nelva to execute a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment in June of 2010 in which she exercised her power of appointment over all the property held in the Nelva E. Brunsting Survivor's Trust as well as in the Elmer H. Brunsting Decedent's Trust. The June exercise of Power of Appointment went on to ratify and confirm all the other provisions of the Trust. Two months later, they caused Nelva to execute a second Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment, in which she attempted to exercise the very same power of appointment she had exercised in June without revoking the prior exercise – instead she ratified and confirmed the June 2010 Power of Appointment. This second Qualified Beneficiary Designation purports to remove Candy and Carl as the trustees of their own trusts, while not subjecting Amy and Anita to that same fate, and contains paragraphs of self-serving no-contest provisions.

Seemingly because the future power she had obtained for herself was insufficient, Anita had Nelva resign as Trustee in December of 2010, in Anita's favor. As Trustee, Anita made numerous transfers that far exceeded the scope of her powers. She conveyed to Carole 1,325 shares of Exxon stock out of the Decedent's Trust, and gave 1,120 shares of Exxon to Amy out of the Survivor's

Trust, plus 270 shares of Chevron stock (held in the names of Amy's children). To herself she transferred 160 shares of Exxon, plus 405 shares of Chevron (270 shares she placed in the name of her children). Anita also paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole.

Carole not only received hundreds of thousands dollars worth of stock and cash distributions, she also had access to a bank account that Anita funded with Trust monies and used that bank account for her own purposes. She routinely charged this Trust account for her personal groceries, gasoline, and other expenses despite not being a present income beneficiary of the Trust.

IV. CAUSES OF ACTION

Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Defendants Anita breached this duty during Nelva's life by engaging in self-dealing and taking actions not permitted by the terms of the Trust, and thus is liable to the Estate and derivatively to Plaintiff for these breaches. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest and costs of court.

Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and

her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.

Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.

Money Had and Received. Defendants Anita, Amy and Carole have taken money that belongs in equity and good conscience to the Trust and derivatively to Plaintiff, and have done so with malice and through fraud, in part by representing that transfers to them were valid reimbursements. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

Conversion. Defendants Anita, Amy and Carole have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brusting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court

costs, both individually and on behalf of the Decedent's Estate.

Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants Amy, Anita, and Carole, herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed both the June and August Qualified Beneficiary Designations and Exercises of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. The Modification Documents fail because they attempted to change the terms of the Trust. Assuming without admitting that the June Modification Document is a valid Power of Appointment, then the August Modification Document fails because Nelva had already effectively appointed all of the Trust property in June; she never revoked that Power of Appointment, but actually affirmed it. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

Declaratory Judgment Action. The Family Trust Agreement governed all of the rights and

powers that Anita held as Trustee. Those rights and powers did not allow her to transfer out the shares of Exxon and Chevron stock. Her duties as a Trustee prevented her from distributing Trust Assets to some beneficiaries to the detriment and for the purpose of harming other beneficiaries. Plaintiff seeks a declaration that the distributions of Chevron Stock and Exxon Stock to Amy, Anita and Carole are void because Anita as Trustee exceeded the scope of her power in making those gifts.

Unjust Enrichment. Defendants Amy, Anita and Carole have all been unjustly enriched by their receipt of Chevron Stock, Exxon Stock, and cash from the Trust. None were entitled to the distributions of stock, and a majority of the cash transfers were for purposes not authorized under the scope of the Trust Agreement nor of the purposes they alleged to be for. Plaintiff seeks a declaration that the Defendants were unjustly enriched, and seeks the imposition of a constructive trust on the remaining Chevron Stock and Exxon Stock that remains in their possession, as well as on any cash or proceeds from the sale of said stock and on any cash distributions from the Trust.

Conspiracy. Upon information and belief, Defendants Anita, Amy and Carole all conspired to make improper withdrawals and distributions from the Trust, to decrease Plaintiff's inheritance and interest in the Trust, to enrich themselves at the expense of the Trust and other beneficiaries, and to conceal the impropriety of their actions. They should be found jointly and severally liable for the decrease in the Trust, and should be required to disgorge their ill-gotten gains.

Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance with the Texas Property Code.

V. JURY DEMAND

Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to her and to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 11th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
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281.759.3213
281.759.3214 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

Jason B. Ostrom/
R. Keith Morris, III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S RESPONSE TO PLAINTIFFS' MOTION FOR CONSOLIDATION

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants, the Honorable Judges Christine Riddle Butts and Clarinda Comstock and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") file this Response to Plaintiffs' Motion for Consolidation [Doc. 61] and would respectfully show the Court as follows:

Background

On February 22, 2012, Plaintiff Curtis sued her siblings Anita and Amy Brunsting, claiming they breached fiduciary duties owed to her arising from their position as co-trustees of the Brunsting Family Trust ("Sibling Lawsuit").[1] Upon motion by Curtis, the

[1] See Curtis' Original Petition [Doc. 1] filed in Case No. 4:12-cv-0592, *Candace Louise Curtis v. Anita Kay Brunsting, et al*. Harris County Defendants ask the Court to take judicial notice of this lawsuit and its pleadings.

Sibling Lawsuit was remanded to Harris County Probate Court 4.[2] The remand occurred on May 15, 2014. Curtis subsequently sought permission to e-file and was denied.[3]

Two years later, on July 5, 2016, Plaintiffs Curtis and paralegal Rik Munson filed this lawsuit, claiming the Harris County Defendants and lawyers representing various parties (including Curtis' former lawyer Jason Ostrom) were involved in some fictitious civil and criminal RICO conspiracy.

Plaintiffs now seek to consolidate the instant lawsuit with the Sibling Lawsuit -- however, not to consolidate it with the actual case that is pending in Probate Court 4, but to consolidate it in a federal court that has remanded and closed the case.

Argument & Authorities

The Motion for Consolidation should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact. Further, the case to which they seek consolidation is currently pending before Probate Court 4 – with the judges being sued in this case.

1. Consolidation should be denied because the "prior case" is closed.

A motion to consolidate a pending matter into a closed matter should be denied. *See* Order Denying Motion for Leave to File Motion to Consolidate, *EP-Team, Inc. v. Aspen Infrastructure, Ltd.*, No. H-07-2549 [Doc. 17] (S. D. Tex. Jan. 10, 2008). In *EP-Team*, a

[2] See Sibling Lawsuit, Doc. 112.
[3] See Sibling Lawsuit, Doc. 114, Order Denying Curtis Motion for Permission for Electronic Case Filing.

court in this District was asked to consolidate a matter into an earlier-filed case that was closed. *Id.* The court denied consolidation, stating, "This case, Civil Action No. 07-2549, is the earlier case and **it is closed, therefore, the Court cannot consolidate anything with it**." *Id.* (emphasis added); *see also Clarke v. Dir., TDCJ-CID*, No. 4:09-CV-404, 2012 WL 4120430, at *1 & *5 (E.D. Tex. Sept. 19, 2012) (denying a motion to consolidate because the "corresponding case" was "closed"); *Hamilton v. United Healthcare of Louisiana, Inc.*, CIV.A. 01-585, 2003 WL 22779081, at *2 n.3 (E.D. La. Nov. 21, 2003) (determining that "consolidation **was done in error**" because the first-filed case "was closed" prior to consolidation) (emphasis added). And the "prior matter" is closed because Plaintiff Curtis *herself* requested the court remand the matter to Probate Court 4. *See* Doc. 112 in the Sibling Lawsuit. Thus, Plaintiffs' Motion for Consolidation should be denied.

2. The Sibling Lawsuit and this lawsuit should not be consolidated.

In determining whether to consolidate, Courts consider five factors:

> (1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, and (5) whether consolidation will conserve judicial resources and reduce the time and cost of trying the cases separately."

Zolezzi v. Celadon Trucking Services, Inc., No. Civ.A.H-08-3508, 2009 WL 736057, at *1 (S.D. Tex. Mar. 16, 2009) (citing *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, Civ. A. Nos. H–01–3624, H–04–0088, H–04–0087, H–03–5528, 2007 WL

446051, at *1 (S.D. Tex. Feb.7, 2007)). Here, those factors overwhelmingly show that the two cases should not be consolidated.

First, the actions are not **pending** before the same court. Indeed, as shown above, the "prior case" is not pending at all — it is closed.

Second, although some of the parties to the two matters are common between the two cases, several are not. None of the Harris County Defendants were parties to the Sibling Lawsuit. With the exception of Amy and Anita Brunsting, none of the 11 other Defendants were parties to the Sibling Lawsuit either (Jill Young, Gregory Lester, Candace Kunz-Freed, Albert Vacek, Jr., Bernard Lyle Matthews, III, Neil Spielman, Bradley Featherston, Stephen Mendel, Darlene Payne Smith, Bobbie Bayless and her attorney in the Sibling Lawsuit, Jason Ostrom).

Third, there are not common questions of law or fact. This matter involves RICO assertions made by Plaintiffs, who make the novel contention that the Judges, Court Reporter and attorneys that practice in Probate Court 4, known as the "Harris County Tomb Raiders" and the "Probate Mafia," are involved in an alleged conspiracy to "transfer wealth" from estates by engaging in "poser advocacy." There are *no* questions of law or fact in the closed matter, because it has been remanded to state court. But even if the Court looked to the questions of law and fact in the state court matter, those questions relate merely to estate law—not alleged federal RICO statutes and criminal conspiracies.

Fourth, there is an extraordinary risk of confusion that would result from consolidation of the cases. As examples, in the RICO case, many of the probate court litigants, the attorneys, and the judges are all Defendants, who are all more-or-less aligned in opposing Plaintiffs' RICO allegations. But in the probate matter itself, many of the parties share no such affinities. Certainly, it would be confusing for a fact-finder to be asked to determine, on the one hand, whether Plaintiff Curtis's own counsel was involved in the criminal enterprise "Probate Mafia," when that counsel also previously represented the Plaintiff in the closed federal court matter.

Fifth, consolidation will not conserve judicial resources since the prior matter is closed.

Conclusion & Prayer

The Motion for Consolidation should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact. For the reasons set forth above, the Harris County Defendants respectfully request the Court deny the Plaintiffs' Motion for Consolidation [Doc. 61] and award the Defendants such other and further relief to which this Court finds them to be justly entitled.

Dated: October 31, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
ATTORNEY-IN-CHARGE
Texas State Bar No. 00790288
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ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 31st day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503

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New Braunfels, Texas 78132

/s/ Laura Beckman Hedge
Laura Beckman Hedge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:16-cv-01969**
	§	**(Alfred H. Bennett)**
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

ORDER ON MOTION TO SUBSTITUTE COUNSEL FOR STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

After considering the Unopposed Motion to Substitute Counsel for Stephen A. Mendel and Bradley E. Featherston, the Court

GRANTS the Motion to Substitute, and

ORDERS the withdrawal of Stephen A. Mendel and The Mendel Law Firm, L.P. as counsel of record for Stephen A. Mendel and Bradley E. Featherston. Further, the Court

ORDERS the following counsel be substituted as attorney in charge for Stephen A. Mendel and Bradley E. Featherston:

Adraon D. Greene
Attorney-in-Charge
agreene@gallowayjohnson.com
David C. Deiss
ddeiss@gallowayjohnson.com
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
1301 McKinney St., Suite 1400
Houston, Texas 77010

SIGNED on 10/31/16, 2016.

HON. ALFRED H. BENNETT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, RIK WAYNE MUNSON	§	
Plaintiffs,	§	**C.A. No. 4:16-cv-01969**
VS.	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTSS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA BRUNSTING AND AMY BRUNSTING	§	

DEFENDANT JASON OSTROM'S
MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Jason Ostrom ("Mr. Ostrom") files this Rule 12 Motion to Dismiss and shows the following:

I.
INTRODUCTION

Plaintiffs' pro se Complaint (*D.E. #1*) purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court Number 4. Plaintiffs in this case are Candace Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings.

The allegations related to Mr. Ostrom are minimal. The information identifying Mr. Ostrom as a defendant is contained in paragraphs 1, 15, 55, 56 and 59 of the Complaint. (*D.E.# 1*). Paragraph 55 of the Complaint alleges that Mr. Ostrom is an attorney who has practiced in Harris County Probate Courts. Paragraph 56 alleges, without any facts to support it, that Mr. Ostrom and the other named defendants have engaged in a criminal enterprise somehow being conducted through Harris County Probate Court Number 4. Paragraph 59 makes a similar allegation, again without any factual support. A majority of the events Plaintiffs' complain about, occurred after Mr. Ostrom was discharged by Plaintiff. The Complaint asserts no factual content sufficient to maintain any cause of action against Mr. Ostrom. (*D.E.#1*).

In response to Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6) filed by some Defendants, Plaintiffs filed their Addendum of Memorandum in Support of RICO Complaint. (*D.E. #26*). Rather than provide any specifics about how a frivolous 59-page complaint states a RICO claim against Mr. Ostrom, Plaintiffs have instead come forward with a 25-page Addendum that still does not state a claim. (*D.E.# 26*). Although the Addendum is replete with inaccuracies, it has not changed or added any additional factual allegations to support RICO claims. All the Addendum does is describe a handful of events and then conclude without explanation that the events constitute a RICO predicate act. Because the Addendum does nothing to cure the problems found in Plaintiffs' Original Complaint, the Court should grant this Motion and dismiss all claims against Mr. Ostrom.

II.
STANDARDS OF REVIEW FOR PLEADING CONSTRUCTION

In a Rule 12(b)(6) motion, the Court accepts all factual allegations in the pleadings as true and examines whether the allegations state a claim sufficient to avoid dismissal.[1] This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations, unwarranted factual inferences, or legal conclusions as true.[2] It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.[3] A Court should grant a Rule 12(b)(6) motion when it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.[4] Similarly, when a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate.[5]

III.
STATEMENT OF FACTS DERIVED EXCLUSIVELY FROM PLAINTIFFS' ORIGINAL COMPLAINT AND ADDENDUM

It is evident from the Original Complaint that Plaintiffs have underlying litigation in Probate Court Number Four with various attorneys and opposing parties. It is also evident from the Original Complaint that Plaintiffs are dissatisfied with the status of those proceedings. Beyond this, it has been extremely cumbersome to locate any specific allegations against Mr. Ostrom. In an effort to provide some clarity for the Court regarding the claims against Mr. Ostrom, Mr. Ostrom opens with a statement of facts derived exclusively from the Original Complaint and Addendum.

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1 *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5th Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).
2 *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).
3 *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004).
4 *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015).
5 *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5th Cir. 1992).

A. FACTS INVOLVING MR. OSTROM.

Following the hearing on October 2, 2013, Plaintiff Curtis hired Mr. Ostrom on November 27, 2013.[6] Mr. Ostrom then assisted in remanding the case back to Harris County Probate Number 4.[7] Plaintiffs state in their Addendum that the matter was remanded to Harris County Probate Court Number 4 pursuant to a stipulation that in turn for the remand, Defendants agreed the federal injunction issued by this Court would remain in full force and effect.[8] Plaintiffs then argue that once they were back in state court, Defendants immediately ignored the injunction.[9] However, Plaintiffs contradict their own statement by acknowledging that Probate Court Number 4 entered an Order modifying the federal injunction.[10] Obviously the federal injunction was not being ignored.

Plaintiffs complain of two actions taken by Mr. Ostrom. First, that Mr. Ostrom filed an application for distribution without Plaintiff Curtis's consent.[11] Attached to this Motion as Exhibit A is a letter from Mr. Ostrom to Plaintiff Curtis wherein he discusses the fact that she was aware of the application for distribution and indeed agreed to another application for distribution being filed.[12]

Secondly, Plaintiffs complain that Mr. Ostrom filed an amended complaint in the probate court raising questions as to the competency of a very lucid Nelva Brunsting.[13] Attached to this motion as Exhibit B is a copy of the Plaintiff's Second Amended Petition that Plaintiffs are referring to.[14] Nowhere within the Second Amended Petition does Mr. Ostrom raise the issue of

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6 Plaintiffs' Addendum at paragraph 32.
7 Plaintiffs' Addendum at paragraph 33.
8 Plaintiffs' Addendum paragraph 3.
9 Plaintiffs' Addendum paragraph 4.
10 Plaintiffs' Addendum paragraph 42.
11 Plaintiffs' Addendum paragraph 50.
12 Exhibit A.
13 Plaintiffs' Addendum paragraph 55.
14 Exhibit B.

Nelva's capacity.[15] Mr. Ostrom was then discharged as Plaintiff Curtis's attorney on or about March 28, 2015.

IV.
THE COURT SHOULD DISMISS THE PLAINTIFFS' CLAIMS AGAINST MR. OSTROM.

A. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

Based on virtually no specific allegations of a criminal enterprise beyond dissatisfaction with the public proceedings in the underlying case, the Plaintiffs have asserted two RICO claims against Mr. Ostrom. Plaintiffs have brought their RICO action under 18 U.S.C. §1962(c) AND 18 U.S.C. §1962(d).

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or "predicate acts." [16] The only facts cited by Plaintiffs regarding Mr. Ostrom are found in the Addendum paragraphs 50, 51, and 55. To successfully plead a RICO claim under §1962(c), Plaintiffs must plead specific facts, that if true, would establish that each predicate act was in fact committed by Mr. Ostrom.[17] Plaintiffs fail to meet this standard.

With respect to Mr. Ostrom, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 196l(l)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by Mr. Ostrom. [18] Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts,

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15 *Id.*
16 *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)
17 *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).
18 *Id. at 880.*

Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that Mr. Ostrom violated the statute. However, these allegations are baseless on thier face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

B. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(c).

As to the claims under § 1962(c), the Plaintiffs did not allege with the requisite factual specificity (or beyond merely conclusory statements) any predicate acts committed by Mr. Ostrom. Similarly, the Plaintiffs did not allege and the law would not sustain any assertion that Mr. Ostrom conducted, controlled, or participated in an enterprise under the standard set forth by the Supreme Court in *Reves.*[19]

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."[20]

Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiffs claim and how and why they are fraudulent."[21] Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."[22] When

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[19] 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

[20] *Walsh v. America's Tele- Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMXTechs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. C1v. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

[21] *Allstate Insurance Company v. Benhamou,* No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016).

[22] *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP,* No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).

pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.[23]

Here, Plaintiffs have failed to allege the contents of any of the purported false representations made by Mr. Ostrom, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.[24] This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiffs' injuries and the underlying RICO violation.[25] But, despite this firmly established requirement, Plaintiffs in this case have asserted no allegations-indeed, not even a conclusory allegation-detailing how they purportedly relied upon Mr. Ostrom's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

C. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE

1. Plaintiffs Enterprise Allegations Are Too Vague and Conclusory

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[23] *Elliott,* 867 F.2d at 882; *Old Time Enterprises,* 862 F.2d at 1218; *Tel-Phonic Servs.,* 975 F.2d at 1138.

[24] *Summit Properties, Inc. v. Hoechst Celanese Corp.,* 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts)

[25] *See Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.,* 319 F.3d 205,219 (5th Cir. 2003); *In re MasterCard International, Inc.,* 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling").

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[26] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[27] To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[28]

The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[29] The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(l) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[30]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[31] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[32]

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it

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[26] 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881.
[27] *Elliott*, 867 F.2d at 881.
[28] *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).
[29] 452 U.S. at 583.
[30] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[31] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[32] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 2d at 427).

operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless conclusions.

Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind- when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these, or any other supporting facts, Plaintiffs' pleadings are simply insufficient.

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.[33] Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged."[34] Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs alleged enterprise lacks continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[35] Specifically, "[a]n

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[33] *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

[34] *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

[35] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."[36] These requirements limit the application of the RICO Act, and serve to prevent an overly-broad application to general commercial conduct that was never really the intended focus of the Act.[37]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

D. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[38] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other and that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[39] When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though

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[36] *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).
[37] *Delta Truck,* 855 F.2d at 242-43.
[38] *See In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck,* 855 F.2d at 242-43).
[39] *HJ., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[40] Such 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."[41]

Here, Plaintiffs alleges several times throughout their Complaint that Mr. Ostrom engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

E. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(d).

To prove a RICO conspiracy, the Plaintiffs must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.[42] A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.[43] Mere association with the enterprise is not actionable; agreement is essential.[44] Further, if a plaintiff fails to properly plead a RICO claim under §§ 1962(a), (b), or (c), it correspondingly fails to properly plead a conspiracy claim under § 1962(d).[45]

The Court should dismiss the § 1962(d) claim because the Plaintiffs failed to state a claim under §§ 1962(a-c). As a result, the conspiracy claims fail under controlling Fifth Circuit authority.[46] The Court should additionally dismiss the claim because the Plaintiffs have not

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40 *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).

41 *Id.* (quoting *HJ., Inc.*, 492 U.S. at241).

42 *TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 625 n.11 (N.D. Tex. 2007) (Fitzwater, J.) (quoting *United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005)).

43 *Id.*

44 *Baumer*, 8 F.3d at 1344.

45 *N. Cypress Med. Ctr. Operating Co*, 781 F.3d at 203.

46 *Id.*

alleged any specific facts detailing an agreement to commit a RICO offense, what the agreement was, how it was reached, and when it was entered.[47] These types of missing details are necessary to state a claim under § 1962(d). As explained in *Twombly,* allegations that a defendant acted in ways consistent with a conspiratorial agreement, but also equally well explained by legitimate economic incentives, do not suffice to show illegality.[48] So too, unsupported conclusory allegations are not entitled to be assumed true, and dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because the conduct could be compatible with or explained by, lawful, unchoreographed free-market behavior."[49] Because the Plaintiffs have failed to state a claim upon which relief may be granted, the Court should grant this Motion to Dismiss.

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury.[50] That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.[51] A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.[52]

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[47] *Lewis v. Sprock*, 612 F.Supp. 1316, 1325 (N.D. Cal. 1985); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365 (D. Hawaii 1995).

[48] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[49] *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

[50] *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004)(citing Holmes, 503 U.S. at 279).

[51] Ocean Energy II. V. Alexander & *Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).

[52] *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277,289 (5th Cir. 2007).

More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."[53]

Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."[54] These allegations must include specific facts; conclusory and generalized allegations are insufficient.[55] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries."[56]

The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp*. In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."[57] If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. [58]

Clearly, the allegations in the Complaint are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs have alleged a similar disjunctive causation pattern with respect to their claims against Mr. Ostrom. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because

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[53] *Sedima*, 473 U.S. at 496.
[54] *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219.
[55] *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).
[56] *Anza*, 547 U.S. at 452.
[57] *Id.*
[58] *Id*

Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Ostrom respectfully prays that this Court GRANT this Motion to Dismiss, dismiss all of the Plaintiffs' claims against Mr. Ostrom with prejudice, and award Mr. Ostrom all such other relief to which he may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR JASON O. OSTROM

CERTIFICATE OF SERVICE

I hereby certify that on Monday, October 31, 2016, a true and correct copy of the foregoing instrument was served on all known counsel of record through the Court's CM/ECF system, which constitutes service on all parties in accordance with the Federal Rules of Civil Procedure.

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January 13, 2015

Ms. Candace Curtis

Via Email; occurtis@sbcglobal.net

Re: Cause No. 412,249; *In Re: Estate of Nelva E. Brunsting, Deceased*; in the Probate Court Number Four (4) of Harris County, Texas

Dear Ms. Curtis:

As you know, we asked the Court to order a distribution of funds out of the Brunsting Family Trust in order to pay the outstanding balance on your account with us. Unfortunately, Anita opposed our application and the Court denied it. The Judge did say, however, that she would entertain an Application for Partial Distribution of your share of the Trust. We could file that on your behalf with your authorization and your agreement that you would direct the distribution to us for payment on your account. The Application would not mention our fees, and there is no guarantee that the Court would grant this Application either – in spite of the fact that she recommended it during the hearing. However, it is currently the best option that I know of to address your outstanding account balance, which needs to be reduced in order for us to continue preparing for trial – a trial that seems necessary in light of the positions that your sisters took in mediation.

If you want to discuss this approach I am happy to have a telephone conference with you; please contact Mica DeScioli to set that up. Otherwise, if you would like for us just to proceed with asking the Court for this relief and not waste time discussing it further, simply sign this letter and return it to us, and we will get the Application prepared and filed.

Sincerely,

Jason B. Ostrom

AGREED:

Candace Curtis

EXHIBIT
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CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

This Court had jurisdiction pursuant to Sections 32.002(c) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.

III. BACKGROUND

Elmer and Nelva Brunsting created the Brunsting Family Trust, and placed essentially all of their assets into this Trust, of which they were the trustees. The Trust became irrevocable and not subject to amendment upon Elmer's death in 2009, at which time Nelva became the sole trustee of the two trusts into which the Family Trust was divided: the Decedent's Trust and the Survivor's Trust. She also became the sole beneficiary of the Survivor's Trust and the primary beneficiary of the Decedent's Trust.

In 2010, Defendants Anita and Amy began taking steps to control the Trust assets and garner a larger share than their siblings. To that end, they caused Nelva to execute a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment in June of 2010 in which she exercised her power of appointment over all the property held in the Nelva E. Brunsting Survivor's Trust as well as in the Elmer H. Brunsting Decedent's Trust. The June exercise of Power of Appointment went on to ratify and confirm all the other provisions of the Trust. Two months later, they caused Nelva to execute a second Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment, in which she attempted to exercise the very same power of appointment she had exercised in June without revoking the prior exercise – instead she ratified and confirmed the June 2010 Power of Appointment. This second Qualified Beneficiary Designation purports to remove Candy and Carl as the trustees of their own trusts, while not subjecting Amy and Anita to that same fate, and contains paragraphs of self-serving no-contest provisions.

Seemingly because the future power she had obtained for herself was insufficient, Anita had Nelva resign as Trustee in December of 2010, in Anita's favor. As Trustee, Anita made numerous transfers that far exceeded the scope of her powers. She conveyed to Carole 1,325 shares of Exxon stock out of the Decedent's Trust, and gave 1,120 shares of Exxon to Amy out of the Survivor's

Trust, plus 270 shares of Chevron stock (held in the names of Amy's children). To herself she transferred 160 shares of Exxon, plus 405 shares of Chevron (270 shares she placed in the name of her children). Anita also paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole.

Carole not only received hundreds of thousands dollars worth of stock and cash distributions, she also had access to a bank account that Anita funded with Trust monies and used that bank account for her own purposes. She routinely charged this Trust account for her personal groceries, gasoline, and other expenses despite not being a present income beneficiary of the Trust.

IV. CAUSES OF ACTION

Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Defendants Anita breached this duty during Nelva's life by engaging in self-dealing and taking actions not permitted by the terms of the Trust, and thus is liable to the Estate and derivatively to Plaintiff for these breaches. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest and costs of court.

Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and

her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.

Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.

Money Had and Received. Defendants Anita, Amy and Carole have taken money that belongs in equity and good conscience to the Trust and derivatively to Plaintiff, and have done so with malice and through fraud, in part by representing that transfers to them were valid reimbursements. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

Conversion. Defendants Anita, Amy and Carole have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brusting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court

costs, both individually and on behalf of the Decedent's Estate.

Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants Amy, Anita, and Carole, herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed both the June and August Qualified Beneficiary Designations and Exercises of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. The Modification Documents fail because they attempted to change the terms of the Trust. Assuming without admitting that the June Modification Document is a valid Power of Appointment, then the August Modification Document fails because Nelva had already effectively appointed all of the Trust property in June; she never revoked that Power of Appointment, but actually affirmed it. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

Declaratory Judgment Action. The Family Trust Agreement governed all of the rights and

powers that Anita held as Trustee. Those rights and powers did not allow her to transfer out the shares of Exxon and Chevron stock. Her duties as a Trustee prevented her from distributing Trust Assets to some beneficiaries to the detriment and for the purpose of harming other beneficiaries. Plaintiff seeks a declaration that the distributions of Chevron Stock and Exxon Stock to Amy, Anita and Carole are void because Anita as Trustee exceeded the scope of her power in making those gifts.

Unjust Enrichment. Defendants Amy, Anita and Carole have all been unjustly enriched by their receipt of Chevron Stock, Exxon Stock, and cash from the Trust. None were entitled to the distributions of stock, and a majority of the cash transfers were for purposes not authorized under the scope of the Trust Agreement nor of the purposes they alleged to be for. Plaintiff seeks a declaration that the Defendants were unjustly enriched, and seeks the imposition of a constructive trust on the remaining Chevron Stock and Exxon Stock that remains in their possession, as well as on any cash or proceeds from the sale of said stock and on any cash distributions from the Trust.

Conspiracy. Upon information and belief, Defendants Anita, Amy and Carole all conspired to make improper withdrawals and distributions from the Trust, to decrease Plaintiff's inheritance and interest in the Trust, to enrich themselves at the expense of the Trust and other beneficiaries, and to conceal the impropriety of their actions. They should be found jointly and severally liable for the decrease in the Trust, and should be required to disgorge their ill-gotten gains.

Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance with the Texas Property Code.

V. JURY DEMAND

Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to her and to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 11th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith
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Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
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281.759.3213
281.759.3214 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

Jason B. Ostrom/
R. Keith Morris, III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S RESPONSE TO PLAINTIFFS' MOTION FOR CONSOLIDATION

TO THE HONORABLE JUDGE ALFRED H. BENNETT:

Defendants, the Honorable Judges Christine Riddle Butts and Clarinda Comstock and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") file this Response to Plaintiffs' Motion for Consolidation [Doc. 61] and would respectfully show the Court as follows:

Background

On February 22, 2012, Plaintiff Curtis sued her siblings Anita and Amy Brunsting, claiming they breached fiduciary duties owed to her arising from their position as co-trustees of the Brunsting Family Trust ("Sibling Lawsuit").[1] Upon motion by Curtis, the

[1] See Curtis' Original Petition [Doc. 1] filed in Case No. 4:12-cv-0592, *Candace Louise Curtis v. Anita Kay Brunsting, et al*. Harris County Defendants ask the Court to take judicial notice of this lawsuit and its pleadings.

Sibling Lawsuit was remanded to Harris County Probate Court 4.[2] The remand occurred on May 15, 2014. Curtis subsequently sought permission to e-file and was denied.[3]

Two years later, on July 5, 2016, Plaintiffs Curtis and paralegal Rik Munson filed this lawsuit, claiming the Harris County Defendants and lawyers representing various parties (including Curtis' former lawyer Jason Ostrom) were involved in some fictitious civil and criminal RICO conspiracy.

Plaintiffs now seek to consolidate the instant lawsuit with the Sibling Lawsuit -- however, not to consolidate it with the actual case that is pending in Probate Court 4, but to consolidate it in a federal court that has remanded and closed the case.

Argument & Authorities

The Motion for Consolidation should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact. Further, the case to which they seek consolidation is currently pending before Probate Court 4 – with the judges being sued in this case.

1. Consolidation should be denied because the "prior case" is closed.

A motion to consolidate a pending matter into a closed matter should be denied. *See* Order Denying Motion for Leave to File Motion to Consolidate, *EP-Team, Inc. v. Aspen Infrastructure, Ltd.*, No. H-07-2549 [Doc. 17] (S. D. Tex. Jan. 10, 2008). In *EP-Team*, a

[2] See Sibling Lawsuit, Doc. 112.
[3] See Sibling Lawsuit, Doc. 114, Order Denying Curtis Motion for Permission for Electronic Case Filing.

court in this District was asked to consolidate a matter into an earlier-filed case that was closed. *Id.* The court denied consolidation, stating, "This case, Civil Action No. 07-2549, is the earlier case and **it is closed, therefore, the Court cannot consolidate anything with it**." *Id.* (emphasis added); *see also Clarke v. Dir., TDCJ-CID*, No. 4:09-CV-404, 2012 WL 4120430, at *1 & *5 (E.D. Tex. Sept. 19, 2012) (denying a motion to consolidate because the "corresponding case" was "closed"); *Hamilton v. United Healthcare of Louisiana, Inc.*, CIV.A. 01-585, 2003 WL 22779081, at *2 n.3 (E.D. La. Nov. 21, 2003) (determining that "consolidation **was done in error**" because the first-filed case "was closed" prior to consolidation) (emphasis added). And the "prior matter" is closed because Plaintiff Curtis *herself* requested the court remand the matter to Probate Court 4. *See* Doc. 112 in the Sibling Lawsuit. Thus, Plaintiffs' Motion for Consolidation should be denied.

2. The Sibling Lawsuit and this lawsuit should not be consolidated.

In determining whether to consolidate, Courts consider five factors:

> (1) whether the actions are pending before the same court, (2) whether common parties are involved in the cases, (3) whether there are common questions of law and/or fact, (4) whether there is risk of prejudice or confusion if the cases are consolidated, and if so, is the risk outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately, and (5) whether consolidation will conserve judicial resources and reduce the time and cost of trying the cases separately."

Zolezzi v. Celadon Trucking Services, Inc., No. Civ.A.H-08-3508, 2009 WL 736057, at *1 (S.D. Tex. Mar. 16, 2009) (citing *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, Civ. A. Nos. H–01–3624, H–04–0088, H–04–0087, H–03–5528, 2007 WL

446051, at *1 (S.D. Tex. Feb.7, 2007)). Here, those factors overwhelmingly show that the two cases should not be consolidated.

First, the actions are not **pending** before the same court. Indeed, as shown above, the "prior case" is not pending at all — it is closed.

Second, although some of the parties to the two matters are common between the two cases, several are not. None of the Harris County Defendants were parties to the Sibling Lawsuit. With the exception of Amy and Anita Brunsting, none of the 11 other Defendants were parties to the Sibling Lawsuit either (Jill Young, Gregory Lester, Candace Kunz-Freed, Albert Vacek, Jr., Bernard Lyle Matthews, III, Neil Spielman, Bradley Featherston, Stephen Mendel, Darlene Payne Smith, Bobbie Bayless and her attorney in the Sibling Lawsuit, Jason Ostrom).

Third, there are not common questions of law or fact. This matter involves RICO assertions made by Plaintiffs, who make the novel contention that the Judges, Court Reporter and attorneys that practice in Probate Court 4, known as the "Harris County Tomb Raiders" and the "Probate Mafia," are involved in an alleged conspiracy to "transfer wealth" from estates by engaging in "poser advocacy." There are *no* questions of law or fact in the closed matter, because it has been remanded to state court. But even if the Court looked to the questions of law and fact in the state court matter, those questions relate merely to estate law—not alleged federal RICO statutes and criminal conspiracies.

Fourth, there is an extraordinary risk of confusion that would result from consolidation of the cases. As examples, in the RICO case, many of the probate court litigants, the attorneys, and the judges are all Defendants, who are all more-or-less aligned in opposing Plaintiffs' RICO allegations. But in the probate matter itself, many of the parties share no such affinities. Certainly, it would be confusing for a fact-finder to be asked to determine, on the one hand, whether Plaintiff Curtis's own counsel was involved in the criminal enterprise "Probate Mafia," when that counsel also previously represented the Plaintiff in the closed federal court matter.

Fifth, consolidation will not conserve judicial resources since the prior matter is closed.

Conclusion & Prayer

The Motion for Consolidation should be denied because a pending matter cannot be consolidated into a closed case, especially one that involves no common questions of law or fact. For the reasons set forth above, the Harris County Defendants respectfully request the Court deny the Plaintiffs' Motion for Consolidation [Doc. 61] and award the Defendants such other and further relief to which this Court finds them to be justly entitled.

Dated: October 31, 2016.

Respectfully Submitted,

/s/ Laura Beckman Hedge
Laura Beckman Hedge
Assistant County Attorney
ATTORNEY-IN-CHARGE
Texas State Bar No. 00790288
Federal Bar No. 23243
laura.hedge@cao.hctx.net
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Telephone: (713) 274-5137
Facsimile: (713) 755-8924
ATTORNEY FOR DEFENDANTS, JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE

OF COUNSEL:

VINCE RYAN,
HARRIS COUNTY ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 31st day of October, 2016, via ECF.

Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503

Jason Ostrom
Ostrom Morris PLLC
6363 Woodway Dr., Suite 300
Houston, Texas 77057

Rik Wayne Munson
218 Landana Street
American Canyon, CA 94503

Cory S. Reed
Thompson Coe Cousins Irons
One Riverway, Suite 1600
Houston, Texas 77056

Martin Samuel Schexnayder
Winget, Spadafora & Schwartzberg LLP
Two Riverway, Suite 725
Houston, Texas 77056

Adraon D. Greene
Galloway, Johnson, Tompkins, Burr & Smith
1301 McKinney St., Suite 1400
Houston, Texas 77010

Rafe A. Schaefer
Norton Rose Fulbright US LLP
1301 McKinney
Houston, Texas 77010

Bobbie G. Bayless
Bayless Stokes
2931 Ferndale
Houston, Texas 77098

Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132

/s/ Laura Beckman Hedge
Laura Beckman Hedge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:16-cv-01969**
	§	**(Alfred H. Bennett)**
CANDACE KUNZ-FREED, ALBERT VACEK, JR, ET AL	§	

ORDER ON MOTION TO SUBSTITUTE COUNSEL FOR STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

After considering the Unopposed Motion to Substitute Counsel for Stephen A. Mendel and Bradley E. Featherston, the Court

GRANTS the Motion to Substitute, and

ORDERS the withdrawal of Stephen A. Mendel and The Mendel Law Firm, L.P. as counsel of record for Stephen A. Mendel and Bradley E. Featherston. Further, the Court

ORDERS the following counsel be substituted as attorney in charge for Stephen A. Mendel and Bradley E. Featherston:

Adraon D. Greene
Attorney-in-Charge
agreene@gallowayjohnson.com
David C. Deiss
ddeiss@gallowayjohnson.com
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
1301 McKinney St., Suite 1400
Houston, Texas 77010

SIGNED on 10/31/16, 2016.

HON. ALFRED H. BENNETT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, et al	§	
	§	
	§	CIVIL ACTION NO. 4:16-cv-01969
	§	
vs.	§	
	§	
CANDACE KUNZ-FREED, et al	§	
	§	
	§	

MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendant Bernard Lilse Mathews, III, erroneously sued and served as "Bernard Lyle Mathews, III" (hereinafter referred to as "Mathews") hereby files this Motion to Dismiss for Failure to State a Claim and for Lack of Subject Matter Jurisdiction and would respectfully show the Court the following:

I. SUMMARY OF MOTION

1. Plaintiffs do not have an actual case or controversy with Mathews. Plaintiffs cannot articulate any action traceable to Mathews, which has caused any injury under any of the theoretical approaches taken by Plaintiffs. Additionally, Mathews cannot be held liable to Plaintiffs. Accordingly, Mathews requests that this Court dismiss Plaintiffs' claim for failure to state a claim and for lack of subject matter jurisdiction.

II. BACKGROUND

2. Mathews handled only an Emergency Motion for Removal of Lis Pendens in the case

of Candace Curtis vs. Anita and Amy Brunsting; in Civil Action 4:12-cv-00592, also file in this District Court. The purpose of the motion was to seek relief from a lis pendens to permit the trustees to consummate a fair market sale of residential real property owned by the Brunsting Family Living Trust. A telephone conference with the Judge was held on the motion with Candace Curtis participating. At the conclusion of this hearing Judge Kenneth Hoyt, on his own motion, dismissed the underlying action for lack of jurisdiction.

3. Candace Curtis appealed this dismissal, but Anita and Amy Brunsting hired new counsel who handled the appeal, the subsequent remanded action, and various other matters. Mathews had no other involvement in this case, or any other legal proceedings involving any of the parties to this case. Although acting at various times as "Of Counsel" to the firm of Vacek & Freed, Mathews never had any role in designing, drafting, administering or enforcing the provisions of the Brunsting Family Trust. Mathews has had no contact with the plaintiff's outside of the above-mentioned Motion, and has had no substantive contact with any of the co-defendants who are asserted to have engaged in various conspiracies in Plaintiff's Verified Complaint for Damages. There are no factual allegations in the Complaint that would tie Mathews to any of the fanciful theories of liability. In essence, Mathews is just an unfortunate bystander caught in the net of craziness that is the *modus operandi* of Candace Curtis and her surrogate, Rik Munson.

III. BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW

4. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiffs complaint lacks "direct allegations on every material

point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED. R. Civ. P. 12(b)(6); Campbell v. San Antonio, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." See, e.g., Tuchman v. DSC Communications, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995) "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to save a complaint." Id. For the reasons set forth in more detail below, Plaintiffs' claims should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

5. Rule 12(b)(1) permits the dismissal of an action for lack of subject matter jurisdiction when the district court lacks authority to hear the dispute. See generally, U.S. v. Morton, 467 U.S. 822 (1984). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). To establish subject matter jurisdiction, a party must show than an actual case or controversy exists between himself and the party from whom relief is sought. Standing is an essential element in the determination of whether a true case or controversy exists. A motion to dismiss for lack of subject matter jurisdiction should be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief.

Id.

IV.

ARGUMENTS AND AUTHORITIES

6. Mathews adopts the Arguments and Authorities set forth by all other Defendants in their Motions to dismiss on file herein, and adopts by reference that material as if set forth herein verbatim.

V. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Bernard Lilse Mathews, III, hereby requests that his Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs be granted.

Respectfully submitted,

/s/

BERNARD LILSE MATHEWS, III
Pro se
State Bar # 13187450
4606 FM 1960 West, Suite 400
Houston, Texas 77069
Telephone: (281) 580-8100
Facsimile: (281) 580-8104
e-mail: *texlawyer@gmail.com*

Certficate of Service

I certify that on the 6th day of November, 2016, a true and correct copy of the foregoing was served via the Court's ECF system on the Plaintiffs and all other parties of record.

/s/

Bernard Lilse Mathews, III

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

NOTICE OF SETTING

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN SET FOR THE PLACE, DATE AND TIME SET FORTH BELOW.

Before the Honorable

Alfred H Bennett

PLACE: Courtroom 8C
United States District Court
515 Rusk Avenue
Houston, Texas 77002

DATE: 12/15/2016

TIME: 11:00 AM

TYPE OF PROCEEDING: Motion Hearing

Date: November 4, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, et al	§	
	§	
	§	CIVIL ACTION NO. 4:16-cv-01969
	§	
vs.	§	
	§	
CANDACE KUNZ-FREED, et al	§	
	§	
	§	

MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendant Bernard Lilse Mathews, III, erroneously sued and served as "Bernard Lyle Mathews, III" (hereinafter referred to as "Mathews") hereby files this Motion to Dismiss for Failure to State a Claim and for Lack of Subject Matter Jurisdiction and would respectfully show the Court the following:

I. SUMMARY OF MOTION

1. Plaintiffs do not have an actual case or controversy with Mathews. Plaintiffs cannot articulate any action traceable to Mathews, which has caused any injury under any of the theoretical approaches taken by Plaintiffs. Additionally, Mathews cannot be held liable to Plaintiffs. Accordingly, Mathews requests that this Court dismiss Plaintiffs' claim for failure to state a claim and for lack of subject matter jurisdiction.

II. BACKGROUND

2. Mathews handled only an Emergency Motion for Removal of Lis Pendens in the case

of Candace Curtis vs. Anita and Amy Brunsting; in Civil Action 4:12-cv-00592, also file in this District Court. The purpose of the motion was to seek relief from a lis pendens to permit the trustees to consummate a fair market sale of residential real property owned by the Brunsting Family Living Trust. A telephone conference with the Judge was held on the motion with Candace Curtis participating. At the conclusion of this hearing Judge Kenneth Hoyt, on his own motion, dismissed the underlying action for lack of jurisdiction.

3. Candace Curtis appealed this dismissal, but Anita and Amy Brunsting hired new counsel who handled the appeal, the subsequent remanded action, and various other matters. Mathews had no other involvement in this case, or any other legal proceedings involving any of the parties to this case. Although acting at various times as "Of Counsel" to the firm of Vacek & Freed, Mathews never had any role in designing, drafting, administering or enforcing the provisions of the Brunsting Family Trust. Mathews has had no contact with the plaintiff's outside of the above-mentioned Motion, and has had no substantive contact with any of the co-defendants who are asserted to have engaged in various conspiracies in Plaintiff's Verified Complaint for Damages. There are no factual allegations in the Complaint that would tie Mathews to any of the fanciful theories of liability. In essence, Mathews is just an unfortunate bystander caught in the net of craziness that is the *modus operandi* of Candace Curtis and her surrogate, Rik Munson.

III. BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW

4. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiffs complaint lacks "direct allegations on every material

point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED. R. Civ. P. 12(b)(6); Campbell v. San Antonio, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." See, e.g., Tuchman v. DSC Communications, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995) "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to save a complaint." Id. For the reasons set forth in more detail below, Plaintiffs' claims should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

5. Rule 12(b)(1) permits the dismissal of an action for lack of subject matter jurisdiction when the district court lacks authority to hear the dispute. See generally, U.S. v. Morton, 467 U.S. 822 (1984). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). To establish subject matter jurisdiction, a party must show than an actual case or controversy exists between himself and the party from whom relief is sought. Standing is an essential element in the determination of whether a true case or controversy exists. A motion to dismiss for lack of subject matter jurisdiction should be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief.

Id.

IV.

ARGUMENTS AND AUTHORITIES

6. Mathews adopts the Arguments and Authorities set forth by all other Defendants in their Motions to dismiss on file herein, and adopts by reference that material as if set forth herein verbatim.

V. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Bernard Lilse Mathews, III, hereby requests that his Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs be granted.

Respectfully submitted,

/s/

BERNARD LILSE MATHEWS, III
Pro se
State Bar # 13187450
4606 FM 1960 West, Suite 400
Houston, Texas 77069
Telephone: (281) 580-8100
Facsimile: (281) 580-8104
e-mail: *texlawyer@gmail.com*

Certficate of Service

I certify that on the 6th day of November, 2016, a true and correct copy of the foregoing was served via the Court's ECF system on the Plaintiffs and all other parties of record.

/s/

Bernard Lilse Mathews, III

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

NOTICE OF SETTING

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN SET FOR THE PLACE, DATE AND TIME SET FORTH BELOW.

Before the Honorable

Alfred H Bennett

PLACE: Courtroom 8C
United States District Court
515 Rusk Avenue
Houston, Texas 77002

DATE: 12/15/2016

TIME: 11:00 AM

TYPE OF PROCEEDING: Motion Hearing

Date: November 4, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
RIK WAYNE MUNSON	§	
Plaintiffs,	§	
	§	
Vs.	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN MENDEL, DARLENE PAYNE SMITH JASON LESTER, GREGORY LESTER JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTSS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA BRUNSTING AND AMY BRUNSTING	§	

DEFENDANT GREGORY LESTER'S
MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Gregory Lester ("Mr. Lester") files this Rule 12 Motion to Dismiss and shows the following:

I.
INTRODUCTION

Plaintiffs' pro se Complaint (*D.E. #1*) purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court Number 4. Plaintiffs in this case are Candace Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings.

The allegations related to Mr. Lester are minimal. The information identifying Mr. Lester as a defendant is contained in paragraphs 1, 16, 55, 56 and 59 of the Complaint. (*D.E.# 1*).

Paragraph 55 of the Complaint alleges that Mr. Lester is an attorney who has practiced in Harris County Probate Courts. Paragraph 56 alleges, without any facts to support it, that Mr. Lester and the other named defendants have engaged in a criminal enterprise somehow being conducted through Harris County Probate Court Number 4. Paragraph 59 makes a similar allegation, again without any factual support. The Complaint asserts no factual content sufficient to maintain any cause of action against Mr. Lester. (*D.E.#1*).

In response to Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6) filed by some Defendants, Plaintiffs filed their Addendum of Memorandum in Support of RICO Complaint. (*D.E. #26*). Rather than provide any specifics about how a frivolous 59-page complaint states a RICO claim against Mr. Lester, Plaintiffs have instead come forward with a 25-page Addendum that still does not state a claim. (*D.E.# 26*). Although the Addendum is replete with inaccuracies, it has not changed or added any additional factual allegations to support RICO claims. All the Addendum does is describe a handful of events and then conclude without explanation that the events constitute a RICO predicate act. Because the Addendum does nothing to cure the problems found in Plaintiffs' Original Complaint, the Court should grant this Motion and dismiss all claims against Mr. Lester.

II.
STANDARDS OF REVIEW FOR PLEADING CONSTRUCTION

In a Rule 12(b)(6) motion, the Court accepts all factual allegations in the pleadings as true and examines whether the allegations state a claim sufficient to avoid dismissal.[1] This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations,

[1] *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5th Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

unwarranted factual inferences, or legal conclusions as true.[2] It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.[3] A Court should grant a Rule 12(b)(6) motion when it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.[4] Similarly, when a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate.[5]

III.
STATEMENT OF FACTS DERIVED EXCLUSIVELY FROM PLAINTIFFS' ORIGINAL COMPLAINT AND ADDENDUM

It is evident from the Original Complaint that Plaintiffs have underlying litigation in Probate Court Number Four with various attorneys and opposing parties. It is also evident from the Original Complaint that Plaintiffs are dissatisfied with the status of those proceedings. Beyond this, it has been extremely cumbersome to locate any specific allegations against Mr. Lester. In an effort to provide some clarity for the Court regarding the claims against Mr. Lester, Mr. Lester opens with a statement of facts.

A. FACTS INVOLVING MR. LESTER.

On July 23, 2015, the Honorable Christine Butts, Judge of Harris County Probate Court Number Four (4), entered its Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code 452.051.[6] That Order appointed Gregory Lester as Temporary Administrator with limited powers.7 The only powers conferred on Mr. Lester were the powers

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2 *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).
3 *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004).
4 *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015).
5 *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5th Cir. 1992).
6 Exhibit A.
7 *Id.*

to investigate all claims pending by all parties and file a report with the court regarding the merits of the claims.[8] The Order was only effective for 180 days.[9] Mr. Lester filed his Report of Temporary Administrator Pending Contest on January 14, 2016.[10]

Against Mr. Lester, Plaintiffs allege causes of action for:

- "18 U.S.C. §1962(d) the Enterprise;"[11]
- "The Racketeering Conspiracy 18 U.S.C. §1962(c);"[12]
- Three claims for "Honest Services 18 U.S.C. §1346 and 2;"[13]
- "Wire Fraud 18 U.S.C. §1343 and 2;"[14]
- "Fraud 18 U.S.C. §1001 and 2;"[15]
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. §1951(b)(2) and 2;"[16] and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.C. §371;"[17] "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting;"[18] and "Conspiracy to Violate 18 U.S.C. §§ 242 and 2, & 42 U.S.C. §§983 and 1985."[19]

But despite the many "claims", Plaintiffs complain of only one specific action taken by Mr. Lester. Plaintiffs allege that Mr. Lester filed a "fictitious report into the Harris County Probate

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8 *Id.*
9 *Id.*
10 Exhibit B.
11 *See* Complaint, at §IV, ¶¶ 35-58.
12 *Id.* at ¶¶ 59-120.
13 *Id.* at ¶¶ 121, 122, and 123.
14 *Id.* at ¶ 123
15 *Id.* at ¶123
16 *Id* at ¶123
17 *Id* at ¶123
18 *Id* at ¶132
19 *Id* at ¶159

Court No.4."[20] Plaintiffs have asserted no factual content sufficient to maintain any cause of action against Mr. Lester. The Complaint should be dismissed with prejudice.

IV.
THE COURT SHOULD DISMISS THE PLAINTIFFS' CLAIMS AGAINST MR. LESTER.

A. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

Based on virtually no specific allegations of a criminal enterprise beyond dissatisfaction with the public proceedings in the underlying case, the Plaintiffs have asserted two RICO claims against Mr. Lester. Plaintiffs have brought their RICO action under 18 U.S.C. §1962(c) AND 18 U.S.C. §1962(d).

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or "predicate acts." [21] Plaintiffs fail to meet this standard.

With respect to Mr. Lester, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by Mr. Lester. [22] Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts, Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that Mr. Lester violated the statute. However, these allegations are baseless on their face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

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[20] *See* Complaint, Paragraph 123.
[21] *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)
[22] *Id. at 880.*

B. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(c).

As to the claims under § 1962(c), the Plaintiffs did not allege with the requisite factual specificity (or beyond merely conclusory statements) any predicate acts committed by Mr. Lester. Similarly, the Plaintiffs did not allege and the law would not sustain any assertion that Mr. Lester conducted, controlled, or participated in an enterprise under the standard set forth by the Supreme Court in *Reves*.[23]

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."[24]

Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiffs claim and how and why they are fraudulent."[25] Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."[26] When pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.[27]

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[23] 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).
[24] *Walsh v. America's Tele- Network Corp.*, 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").
[25] *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016).
[26] *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP*, No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).
[27] *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.*, 975 F.2d at 1138.

Here, Plaintiffs have failed to allege the contents of any of the purported false representations made by Mr. Lester, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.[28] This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiffs' injuries and the underlying RICO violation.[29] But, despite this firmly established requirement, Plaintiffs in this case have asserted no allegations-indeed, not even a conclusory allegation-detailing how they purportedly relied upon Mr. Lester's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

C. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE

1. Plaintiffs Enterprise Allegations Are Too Vague and Conclusory

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[30] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[31] To

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[28] *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts)

[29] *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205,219 (5th Cir. 2003); *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling").

[30] 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881.

[31] *Elliott*, 867 F.2d at 881.

establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[32]

The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[33] The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(l) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[34]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[35] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[36]

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless

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[32] *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).
[33] 452 U.S. at 583.
[34] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[35] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[36] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 2d at 427).

conclusions.

Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind-when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these, or any other supporting facts, Plaintiffs' pleadings are simply insufficient.

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.[37] Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged."[38] Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs alleged enterprise lacks continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.39 Specifically, "[a]n association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."[40] These requirements limit the application of the RICO Act, and serve to prevent an overly-broad

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[37] *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

[38] *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

[39] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[40] *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

application to general commercial conduct that was never really the intended focus of the Act.[41]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

D. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[42] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other and that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[43] When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[44] Such 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."[45]

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[41] *Delta Truck*, 855 F.2d at 242-43.
[42] *See In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43).
[43] *HJ., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).
[44] *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).
[45] *Id.* (quoting *HJ., Inc.*, 492 U.S. at241).

Here, Plaintiffs alleges several times throughout their Complaint that Mr. Lester engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

E. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(d).

To prove a RICO conspiracy, the Plaintiffs must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.[46] A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.[47] Mere association with the enterprise is not actionable; agreement is essential.[48] Further, if a plaintiff fails to properly plead a RICO claim under §§ 1962(a), (b), or (c), it correspondingly fails to properly plead a conspiracy claim under § 1962(d).[49]

The Court should dismiss the § 1962(d) claim because the Plaintiffs failed to state a claim under §§ 1962(a-c). As a result, the conspiracy claims fail under controlling Fifth Circuit authority.50 The Court should additionally dismiss the claim because the Plaintiffs have not alleged any specific facts detailing an agreement to commit a RICO offense, what the agreement was, how it was reached, and when it was entered.51 These types of missing details are necessary to state a claim under § 1962(d). As explained in *Twombly,* allegations that a defendant acted in ways consistent with a conspiratorial agreement, but also equally well explained by legitimate

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46 *TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 625 n.11 (N.D. Tex. 2007) (Fitzwater, J.) (quoting *United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005)).

47 *Id.*

48 *Baumer*, 8 F.3d at 1344.

49 *N. Cypress Med. Ctr. Operating Co*, 781 F.3d at 203.

50 *Id.*

51 *Lewis v. Sprock*, 612 F.Supp. 1316, 1325 (N.D. Cal. 1985); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365 (D. Hawaii 1995).

economic incentives, do not suffice to show illegality.[52] So too, unsupported conclusory allegations are not entitled to be assumed true, and dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because the conduct could be compatible with or explained by, lawful, unchoreographed free-market behavior."[53] Because the Plaintiffs have failed to state a claim upon which relief may be granted, the Court should grant this Motion to Dismiss.

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury.[54] That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.[55] A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.[56] More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."[57]

Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."[58] These allegations must

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[52] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
[53] *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).
[54] *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004)(citing Holmes, 503 U.S. at 279).
[55] Ocean Energy II. V. Alexander & *Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).
[56] *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277,289 (5th Cir. 2007).
[57] *Sedima*, 473 U.S. at 496.
[58] *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219.

include specific facts; conclusory and generalized allegations are insufficient.[59] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries."[60] The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp.* In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."[61] If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. [62]

Clearly, the allegations in the Complaint are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs have alleged a similar disjunctive causation pattern with respect to their claims against Mr. Lester. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

F. PLAINTIFFS' CLAIMS FOR "HOBBS ACT," "WIRE FRAUD," "FRAUD UNDER 18 U.S.C. 51001," AND "HONEST SERVICES" FAIL BECAUSE THOSE STATUTES DO NOT CREATE PRIVATE CAUSES OF ACTION.

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[59] *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).
[60] *Anza*, 547 U.S. at 452.
[61] *Id.*
[62] *Id*

The Plaintiffs purport to assert claims against Mr. Lester for violation of the Hobbs Act, Wire Fraud, "Fraud under 18 U.S.C. 1001," and "Honest Services," but those acts do not create private causes of action. Thus, those claims should all be dismissed.

1. The Hobbs Act does not create a private cause of action.

The Hobbs Act does not create a private cause of action. *Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005) ("Nor does the Hobbs Act create a private cause of action") (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999)). This is settled law. *See, e.g., Campbel v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 72 (W.D.N.Y. September 29, 2005) ("[F]ederal courts have consistently found that the Hobbs Act does not support a private cause of action."); *Barge v. Apple Computer,* No. 95 CIV. 9715 (KMW), 1997 WL 394935, at *1 (S.D.N.Y. July 15, 1997), affd, 164 F.3d 617 (2nd Cir. 1998) ("[C]ourts that have considered this question have consistently found that the Hobbs Act does not support a private cause of action."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("There is no implied private cause of action under the Hobbs Act.").

Thus, Plaintiffs' Hobbs Act claim against Mr. Lester fails.

2. The Wire Fraud statute does not create a private cause of action.

The wire fraud statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) (citing *Napper v. Anderson, Hensley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) for its holding that there is "no private cause of action under the mail-and wire fraud statutes, 18 U.S.C. 1341 and 1343"); *see also Morse v. Stanley*, ICV230, 2012 WL 1014996, at *2 (E.D. Tex. Mar. 23, 2012) ("18 U.S.C. 1343 is a criminal statute pertaining to wire fraud and does

not provide Plaintiff with a private cause of action."); *Benitez v. Rumage,* CIV.A. c-11-208, 2011 WL 3236199, at *l (S.D. Tex. July 27, 201 1) (the wire fraud statute "do[es] not provide a private cause of action").

Thus, Plaintiffs' Wire Fraud act claim against Mr. Lester fails.

3. The claim for "Fraud under 18 U.S.C. 91001" is not a private cause of action.

Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails, as well, because that statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) ("The Thompsons assert causes of action under 18 U.S.C. 1001, 1010, 1014, 1341, 1343, and 1344. These federal criminal statutes do not provide a private cause of action.") (emphasis added). Again, this is settled law. *See Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987) ("Finding no congressional intent to create a private right of action under 1001 (b), Blaze has failed to state a claim upon which relief could be granted, and the district court's grant of summary judgment was proper."); *Grant v. CPC Logistics Inc.*, 3:12-CV-200-L BK, 2012 WL 601149, at *l (N.D. Tex. Feb. 1, 2012), report and recommendation adopted, 3:12-CV-200-L, 2012 WL 601128 (N.D. Tex. Feb. 23, 2012) ("Federal courts have repeatedly held that violations of criminal statutes, such as 18 U.S.C. 1001, 1505 and 1621, do not give rise to a private right of action.") (emphasis added); *Parker v. Blake*, CIV. A. 08-184, 2008 WL 4092070, at *3 (W.D. La. Aug. 29, 2008) ("Section 1001 provides criminal penalties for persons convicted of fraud or false statements during the course of certain dealings with the federal government As above, this criminal statute, were it applicable to allegations made by plaintiff still would not create a private civil cause of action or entitlement to monetary relief thereunder."); *Doyon v. U.S.*, No. A-07-CA977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (holding that there is "no private cause of action under 18 U.S.C. 1001 ").

Thus, Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails.

4. The claim for "Honest Services" is not a private cause of action.

Plaintiffs allege three claims for "honest services," based on 18 U.S.C. 1346.[63] But 18 U.S.C. §1346 does not create a private cause of action either. *See Eberhardt v. Braud*, 16-CV-3153, 2016 WL 3620709, at *3 (C.D. 111. June 29, 2016) ("Plaintiff attempts to bring a private right of action under 18 U.S.C. 1346 and 18 U.S.C. §1951, but those criminal statutes do not contain an express or implied private right of action."); *Alford v. S. Gen. Ins.*, 7:12-CV-00273-BR, 2013 WL 1010584, at *2 (E.D.N.C. Mar. 14, 2013) (holding that a "claim for honest services fraud under 18 U.S.C. 1346" must be dismissed "pursuant to Rule 12(b)(6) because a private right of action for a violation of that law does not exist"); *Hooten v. Greggo & Ferrara Co.*, CIV. 10-776-RGA, 2012 WL 4718648, at *6 (D. Del. Oct. 3, 2012) ("18 U.S.C. 1341 and 1346 . . . are found in the federal criminal code. Neither §1341 or 1346 allow for a private cause of action.").

Thus, Plaintiffs' three claims against Mr. Lester for "Honest Services" fail.

5. Plaintiffs rely on impermissible collective pleading.

"A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct."[64] And the pleading requirements of Rule 9(b) likewise demand specific and separate allegations against each defendant.[65]

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[63] See Complaint at ¶¶121-123.

[64] *In re Parkcentral Glob. Litig.*, 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012) ("It is impermissible to make general allegations that lump all defendants together; rather, the complaint must segregate the alleged wrongdoing of No. I from another.").

[65] See *Dimas v. Vanderbilt Mortg & Fin., Inc.*, No. C-10-68, 2010 WL 1875803, at *8 (S.D. Tex. May 6, 2010) ("[W]hile the Complaint makes several general allegations of fraud, it often fails to specify the role each Defendant played in the alleged scheme."); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made").

Here, Plaintiffs offer no individualized allegations about any wrongful conduct they allege against Mr. Lester. Instead, Plaintiffs' vague and fanciful pleadings are lobbed at all Defendants, with no discernible specific or separate allegations for Mr. Lester. This is insufficient to state a claim.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Lester respectfully prays that this Court GRANT this Motion to Dismiss, dismiss all of the Plaintiffs' claims against Mr. Lester with prejudice, and award Mr. Lester all such other relief to which he may be justly entitled.

Respectfully submitted,

ostrommorris, PLLC

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ATTORNEYS FOR GREGORY A. LESTER

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of the foregoing instrument was served on all known counsel of record through the Court's CM/ECF system, which constitutes service on all parties in accordance with the Federal Rules of Civil Procedure.

STACY L. KELLY

No. 412,249

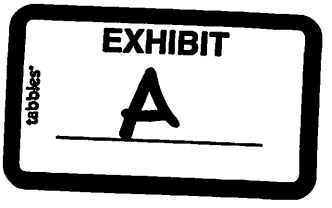
IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator



Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

DV

PROBATE COURT 4

FILED
1/14/2016 4:06:53 PM
Stan Stanart
County Clerk
Harris County

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST

On July 24, 2015 an Order of this Court, signed by Judge Christine Butts on July 23, 2015, was filed in the above styled and numbered case. In this Order the Court stated that Greg Lester was appointed Temporary Administrator Pending Contest of this estate. The Court directed that Greg Lester will report to the Court regarding the merits of the claims in this case on or before the expiration of this Order. The Order will expire on or about January 20, 2016, which is 180 days after the date that the Order was signed.

BACKGROUND

The Brunsting Family

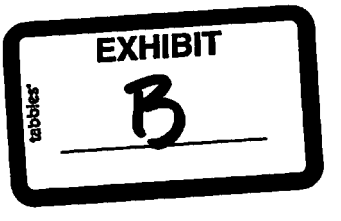
Nelva and Elmer Brunsting were married and had five (5) children: Candace Louise Curtis (" Candace"), Carol Ann Brunsting (" Carol"), Carl Henry Brunsting ("Carl"), Amy Ruth Tschirhart ("Amy") and Anita Kay Riley ("Anita").

The Brunsting Family Living Trust

Elmer Brunsting and Nelva Brunsting (herein referred to as "Settlors") created the Brunsting Family Living Trust (the "Trust") on October 10, 1996. The Trust was subsequently restated in its entirety on January 12, 2005. A copy of the Restatement of the Brunsting Family Living Trust ("Restatement") is attached hereto as the first exhibit.

The Trust could be amended during the lifetime of the original Settlors. However, once a Settlor dies, the Trust could not be amended except by court order.

Each Settlor could provide for a different disposition of their share of the Trust by executing a qualified beneficiary designation for that person's share alone.



Trustees of the Brunsting Family Living Trust

The initial trustees of the Trust were Elmer Brunsting and Nelva Brunsting. The Restatement provided that if both original Co-Trustees failed or ceased to serve, then Carl Henry Brunsting and Amy Ruth Tschirhart would serve as Co-Trustees.

Each original Trustee has the right to appoint successor trustees to serve in the event the original Trustee ceases to serve by death, disability, or for any reason, and may specify any conditions on the succession and service as may be permitted by law. The Restatement also provided that the original Trustees may each remove any trustee they have individually named as their respective successor.

On September 6, 2007, a First Amendment to the Restatement to the Brunsting Family Living Trust was executed by Settlors which changed the succession of successor trustees, a copy of which is attached hereto as the second exhibit. This document appointed Carl Henry Brunsting and Candace Louise Curtis as successor co-trustees if both original Trustees fail or cease to serve. If either Carl Henry Brunsting or Candace Louise Curtis should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then The Frost National Bank shall serve as the sole successor trustee. The First Amendment effectively removed Amy Ruth Tschirhart as the successor co-trustee and substituted Candace Louise Curtis in her place and stead.

Elmer Brunsting died on April 1, 2009, and after her husband's death, Nelva Brunsting served alone as the original trustee.

On December 21, 2010, Nelva Brunsting exercised her right to designate a successor trustee. Nelva Brunsting executed an Appointment of Successor Trustee, a copy of which is attached hereto as the third exhibit. The Appointment of Successor Trustee stated that if Nelva Brunsting resigned as Trustee, then Anita Kay Brunsting would serve as successor trustee, Amy Ruth Tschirhart would serve as the second successor, and The Frost National Bank as the third successor. If Nelva Brunsting fails or ceases to serve as trustee because of her death or disability, then Anita Kay Brunsting and Amy Ruth Tschirhart would serve as successor co-trustees.

On the same date, on December 21, 2010, Nelva Brunsting also exercised her right to resign as Trustee. Specifically, Nelva Brunsting resigned as Trustee of the Trust, the Nelva Brunsting Survivor's Trust and Elmer Brunsting's Decedent's Trust and appointed Anita Kay Brunsting as trustee of the aforementioned Trusts.

Split of Brunsting Family Living Trust into the Survivor's Trust and the Decedent's Trust

After Elmer Brunsting's death on April 1, 2009, the Trust split into two trusts—the Nelva Brunsting Survivor's Trust (the "Survivor's Trust") and the Elmer Brunsting Decedent's Trust

(the "Decedent's Trust"). Nelva Brunsting, as the original Trustee, served as Trustee over both the Survivor's and Decedent's Trusts.

There is no power of appointment related to the Trust which was exercised by Elmer Brunsting prior to his death on April 1, 2009.

Pursuant to the Restatement, the beneficiary of the Survivor's Trust, Nelva Brunsting, had an unlimited and unrestricted general power of appointment over the entire principal and any accrued but undistributed income of the Survivor's Trust. This general power of appointment was very broad, and granted the survivor the power to appoint the Survivor's Trust to anyone, outright or in trust, in equal or unequal proportions.

The Decedent's Trust would terminate at the surviving Settlor's death or on the death of Nelva Brunsting. Pursuant to the Restatement, the survivor had a limited testamentary power of appointment to appoint the undistributed principal and income to the descendants of the Settlors only. While Nelva Brunsting (as the surviving Settlor) was restricted to only appointing the assets to her descendants, the assets of the Decedent's Trust could be appointed by Nelva Brunsting (as the surviving Settlor) to her descendants in any proportion and on terms and conditions as the survivor elects.

Nelva Brunsting's June 15, 2010 Qualified Beneficiary Designation and Exercise of Power of Appointment

On June 15, 2010, Nelva Brunsting executed a Qualified Beneficiary Designation and Exercise of Power of Appointment under Living Trust Agreement, a copy of which is attached hereto as the fourth exhibit. This document exercised Nelva Brunsting's general power of appointment over the Survivor's Trust and her limited power of appointment over the Decedent's Trust.

Specifically, Nelva Brunsting's exercise appointed the Survivor's Trust and Decedent's Trust to be distributed equally among Nelva and Elmer Brunsting's five (5) children: Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley. This document also expressed Nelva Brunsting's intent that upon the death of Nelva Brunsting, any funds advanced to Nelva Brunsting's descendants would be deducted from that particular descendant's share of assets received from the Survivor's Trust and Decedent's Trust.

Nelva Brunsting's August 25, 2010 Qualified Beneficiary Designation and Exercise of Power of Appointment

On August 25, 2010, Nelva Brunsting executed a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement, a copy of which is attached hereto as the fifth exhibit. This document appears to have superseded the June 15,

2010 Qualified Beneficiary Designation and Exercise of Power of Appointment under Living Trust Agreement.

In this document, Nelva Brunsting exercised her general power of appointment over the Survivor's Trust and her limited power of appointment over the Decedent's Trust. The document stated that the Trustee would pay the balance of both the Survivor's and Decedent's Trust equally to each of her five (5) children: Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley, and such assets would be held in a separate Personal Asset Trust for the benefit of each of her children. With the exception of Carl and Candace, each descendant would be the trustee of their own Personal Asset Trust. Specifically, Amy Ruth Tschirhart, Anita Kay Brunsting and Carol Ann Brunsting would each be the trustee of their own Personal Asset Trust. Anita Kay Riley and Amy Ruth Tschirhart were appointed the co-trustees of the Personal Asset Trust for Carl Henry Brunsting and the Personal Asset Trust for Candace Louise Curtis. The document also detailed the administrative provisions relating to the Personal Asset Trusts for Nelva and Elmer Brunsting's descendants.

The major change that resulted from the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement was that Carl Henry Brunsting and Candace Louis Curtis could not elect to be the individual trustee of their own Personal Asset Trusts. The August 25, 2010 document also provided different administrative provisions for the trusts created for the descendants than those provided under Article X of the Restatement.

Notably, the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement contained a no contest clause which provided a lengthy list of prohibited actions that would fall under such no contest clause. The no contest clause provided that any beneficiary who took such prohibited actions would forfeit their share and be treated as if they predeceased Nelva and Elmer Brunsting.

The Death of Nelva Brunsting

Nelva Brunsting died on November 11, 2011, and the Survivor's Trust and Decedent's Trust terminated and were to pass to the Personal Asset Trusts for Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley. As detailed above, these Personal Asset Trusts were created pursuant to Nelva Brunsting's August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement.

CLAIMS

The Probate Court Claims Filed by Carl Henry Brunsting and Candace Louise Curtis

Carl Henry Brunsting and Candace Louise Curtis have filed claims against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting in the Estate of Nelva E. Brunsting, Deceased, pending in Harris County Probate Court Number Four (4) under Cause Number 412,249 (hereinafter referred to as the "Probate Court Claims").

Carl Henry Brunsting and Candace Louise Curtis' Probate Court Claims are twofold. First, individual tort claims have been asserted against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting for actions taken either in their fiduciary capacity or purported actions taken which have harmed Carl and Candace. The second category of Carl and Candace's Probate Court Claims relate to requests for declaratory relief in construing the Brunsting Family Living Trust.

The Probate Court Claims that include individual tort claims against Anita Kay Brunsting, Amy Ruth Brunsting and Carole Ann Brunsting contain multiple questions of fact, which are within the province of the jury. Specifically, Carl Henry Brunsting asserted the following tort claims:

1. Breach of fiduciary duty
2. Conversion
3. Tortious interference with inheritance rights
4. Constructive Trust over Trust assets
5. Fraud, specifically, misrepresentation of facts to Decedent (it is questionable whether Carl and Candace have standing to pursue these claims)
6. Civil Conspiracy
7. Demand for accounting of the Trusts and non-probate accounts
8. Liability of Anita Kay Brunsting, Amy Ruth Brunsting and Carole Ann Brunsting under Texas Property Code § 114.031
9. Removal of Trustees
10. Request for Receivership

The Probate Court Claims asserted by Candace Louise Curtis are as follows:

1. Breach of fiduciary duty
2. Fraud resulting from misrepresentation of material facts to Candace
3. Constructive fraud
4. Money had and received
5. Conversion
6. Tortious interference with inheritance rights
7. Unjust enrichment

8. Civil Conspiracy
9. Demand for accounting of the Trusts and non-probate accounts

As a result of the above Probate Court Claims containing questions of fact within the province of the jury, the Temporary Administrator has refrained from evaluating such claims.

The questions of law presented in both Carl Henry Brunsting and Candace Louise Curtis' requests for declaratory relief contained in the Probate Court Claims are as follows:

1. Was Nelva Brunsting's December 21, 2010 Resignation of Original Trustee and Appointment of Successor Trustee valid?

2. Were the June 15, 2010 and August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement an inappropriate alteration of the terms of the Trust?

3. Did the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement appoint all of the Trust property?

4. Did the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement revoke the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement?

5. Is the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement effective?

6. Do the pleadings filed by Carl and Candace violate the No Contest Clause and is the No Contest Clause void as against public policy?

Based on the powers granted to Nelva Brunsting in the Restatement, Nelva Brunsting appears to have appropriately exercised her right to resign as the original Trustee of the Trust on December 21, 2010, and appointed the successor trustee, Anita Kay Brunsting.

While the Restatement provided that the Trust could not be amended after the death of Nelva or Elmer Brunsting, this did not preclude Nelva Brunsting from exercising her general and limited power of appointments over the Survivor's Trust and Decedent's Trust. Specifically, it appears that Nelva Brunsting appropriately exercised her general power of appointment over the Survivor's Trust and her limited power of appointment over Decedent's Trust by appointing the assets to her five (5) children in trust by and through the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. The August 25, 2010 document appears to have superseded and replaced the June 15, 2010 Qualified Beneficiary

Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. The Restatement granted Nelva Brunsting the power to appoint such assets in trust and place terms and conditions upon such assets as she desired, including her choice to designate trustees of the Personal Asset Trust of Carl Henry Brunsting and Candace Louise Curtis.

NO CONTEST CLAUSE PROVISIONS

Any claim by Carl Henry Brunsting and Candace Louise Curtis that Nelva Brunsting lacked capacity and/or was subject to undue influence when she executed the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement are questions of fact that are within the province of the jury. However, the no contest clauses in the Qualified Beneficiary Designation and in the Restatement must be considered.

Section "A." of "MISCELLANEOUS PROVISIONS" of the Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement is a no contest clause that would disinherit any person who, among other things, makes the claims stated above. The provisions of this no contest clause include language that the no contest clause applies even if a court finds that the judicial proceedings in question originated in good faith and with probable cause. This Court will have to rule on the validity of this provision.

Article XI, Section C., of the Restatement is also a no contest provision. The provisions of this no contest clause are similar in result to those stated above in the Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. Therefore, a successful claim that Nelva Brunsting lacked capacity would still be subject to the no contest provisions of the Restatement. In this event the Court would have to rule on the validity of this provision of the Restatement. In both documents the provision is well written.

A decision by the Court upholding either no contest provision might resolve all other issues.

The Lawsuit of Carl Henry Brunsting in the District Court Proceeding

Carl Henry Brunsting, in his capacity as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting, filed claims against Defendants Candace L. Kunz-Freed, Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC (collectively the "Defendants"). These claims of Carl Henry Brunsting were filed in the 164th District Court of Harris County, Texas (hereinafter referred to as the "District Court Claims").

Carl Henry Brunsting asserted the following District Court Claims against Defendants in his live pleading, Plaintiff's Third Amended Petition:

1. Negligence
2. Negligent misrepresentation
3. Breach of fiduciary duty
4. Aiding and abetting

5. Fraud
6. Conspiracy
7. Deceptive Trade Practices Act ("DTPA") violations

Carl Henry Brunsting also pled tolling, fraudulent concealment and the discovery rule. Carl Henry Brunsting sought damages of actual damages, forfeiture of fees, treble damages and punitive damages, in addition to his attorney's fees.

Carl Henry Brunsting's District Court Claims center around the changes Nelva Brunsting made by and through the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement and the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement.

In response to Plaintiff's District Court Claims, Defendants filed a Motion for Traditional and No–Evidence Summary Judgment on the following bases:

1. Carl Henry Brunsting improperly fractured his legal malpractice claims against Defendants;
2. Carl Henry Brunsting's DTPA claim is barred by the professional services exemption; and
3. Carl Henry Brunsting's negligent misrepresentation claim and DTPA claim fail because Carl Henry Brunsting admits he is not aware of any misrepresentations made by Defendants.

Defendants also moved for a No-Evidence Summary Judgment on the basis that Carl Henry Brunsting has no evidence supporting one or more of the elements on the claims he has asserted.

A Notice of Vacancy of Party and Motion to Abate Proceeding was filed by counsel for Carl Henry Brunsting. Carl Henry Brunsting has filed a resignation as executor of the aforementioned estates. Until a successor executor is appointed, there is no plaintiff to pursue the action against Defendants and no plaintiff to respond to Defendants' summary judgment motions. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting must be resolved prior to resolving the claims against Defendants.

A Motion to transfer the district court matter to the probate court where both estates are pending has also been filed, but not yet ruled upon.

DAMAGES

Actual damages, of course, are disputed. However, the actual distributions from the Trust after Nelva resigned until shortly after she died seemed to be reasonably well documented. Previously an independent investigation resulted in a listing of the payments made from the trust.

This **REPORT OF MASTER** that was prepared in the case filed in the Southern District of Texas federal court case has the details of the Trust's income, expenses and distributions of stock. A copy of this report is attached hereto as the sixth exhibit.

From this and from changes in the assets of the trust during the period in question the damages can be determined and are basically in three categories.

Transfers of Stock

2,765 shares of Exxon Mobil stock were transferred as follows:

	1, 120	Amy
	160	Anita
	160	Candace
	1, 325	Carol
TOTAL	2,765	

675 shares of Chevron stock were transferred as follows:

	135	Anita
	135	Amy's daughter
	135	Amy's son
	135	Anita's daughter
	135	Anita's son
TOTAL	675	

It is easy to see that these distributions of stock were not evenly distributed to the five siblings. I have been told that the distributions were in fact early distributions of the recipients share from their future trusts. This could be resolved by giving those siblings that did not receive an equal amount at the time of the distributions an equivalent amount of money to settle the dispute. Of course the issue is further complicated by the fact that the value of the two stocks has changed since the time of the distributions. The proper way to determine the amount to be distributed might be to use the value of the stock on the date of the original distributions or the value on the date that money is paid to the damage sibling, whichever is greater.

Payments To/For Family

Approximately $108,000 were paid to or for the benefit of Amy, Anita and Carol or disputed expenses including approximately $41,000 of trustees' fees and approximately $36,000 of legal fees.

Payments To Carol for Nelva's Care

Approximately $160,000 was paid to Carol during the period in question. I was told that Carol was the primary sibling responsible for Nelva's care.

SUMMARY OF DAMAGES

It seems unwise to have made the stock distributions. However, this can be resolved by equalizing the distributions to all the siblings. The issue of trustees' fees can be resolved by comparing the fees to those that are considered as reasonable fees in similar circumstances. The legal fees are obviously justified and will surely increase. The amounts paid to Carol can be examined but should be liberally considered as attributed to Nelva's care and maintenance.

CONCLUSIONS

All of the legal actions taken by Nelva were within her authority under the broad provisions of the Restatement. Unless Nelva is found to have been incompetent at the time that her legal actions were taken all of the changes made in these documents apply in these proceedings.

If Nelva was incompetent at the time that she took these legal actions then a successor trustee would have been appointed under the terms of the Restatement. No claim of her being incompetent was made at that time.

Furthermore, if Nelva had been incompetent the plaintiff in the District Court case would likely have to show that the defendants knew that she was incompetent. For this and other reasons the case should be moved to the Probate Court.

There are damages for the unequal distribution of the shares of Exxon Mobil and Chevron stock. There may be damages for some of the expenditures for trustees' fees and for payments to Carol. These matters should be resolved by agreement. This may require mediation. The considerable legal fees involved in a trial far outweigh the expenses of a mediation and any compromises made by the parties at the mediation.

RECOMMENDATIONS

1. Remove the District Court case to the Probate Court. It is important that there not be different results for the same or similar issues that are in the cases currently in the Probate Court.
2. Require mediation. Point out the huge savings that will result from a mediation versus a trial. Possibly, inform the parties that the Court will rule on the no contest clause first if the matter is not settled in the mediation. Since this ruling could go either way both sides would have considerable incentive to settle. A ruling in favor of the no contest clause would essentially make the matters moot and the plaintiffs would take nothing and lose their inheritance.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	Civil Action No. 4:16-cv-01969
vs.	§	
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), Defendant Darlene Payne Smith (the "Defendant" or "Smith") files her Motion to Dismiss the Verified Complaint for Damages (the "Complaint") of Plaintiffs Candace Louise Curtis ("Curtis") and Rik Wayne Munson ("Munson") (collectively, the "Plaintiffs") for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and would respectfully show the Court the following:

I.
INTRODUCTION

This is the most recent in a series of lawsuits[1/] involving the Brunsting siblings, all of which emanate from a state court probate proceeding, *In re: Estate of Nelva E. Brunsting*, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting

[1] In addition to the core probate proceeding, Curtis has previously filed a similar action against her sister, and others, in the Southern District of Texas (Case No. 4:12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting, et al.*), which was ultimately remanded to the Probate Court No. 4 upon agreement of the parties. Curtis' brother, Carl, has filed both a malpractice suit in Harris County District Court against his now-deceased parents' estate planning counsel (Cause No. 2013-05455; *Carl Henry Brunsting, et al. v. Candace L. Kunz-Freed, et al.*) and a separate lawsuit against Curtis and the other Brunsting siblings in Harris County Probate Court No. 4 (Cause No. 412.249-401; *Carl Henry Brunsting, et al. v. Anita Kay Brunsting, et al.*). For a more detailed account of the Brunsting siblings' litigation history, Defendant incorporates by reference the factual recitations contained in pages 2-7 of defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction [ECF No. 20].

Probate Case"). Curtis is one of five sibling-beneficiaries in the Brunsting Probate Case and Munson is Curtis's domestic partner and paralegal. Defendant Smith is a probate attorney who previously represented one of the other sibling-beneficiaries (*i.e.*, Carole Brunsting) in the Brunsting Probate Case. *See* Complaint ("Compl.") at ¶¶32, 213 & 215. Defendant withdrew as counsel in early 2016.

Apparently dissatisfied with the rulings and administration of Harris County Probate Court Number 4, Plaintiffs have taken out their frustration by suing each Judge (*i.e.*, the Hon. Christine Riddle Butts and Hon. Clarinda Comstock) and lawyer (*i.e.,* Defendant Smith, Candace Kunz-Freed, Albert Vacek, Jr., Bernard Lyle Mathews, III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Jason Ostrom, Gregory Lester and Jill Willard Young) who has had any contact with the Brunsting Probate Case, as well as certain Probate Court No. 4 administrative personnel (*i.e.*, substitute court reporter Tony Baiamonte). Plaintiffs purport to assert claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1691 *et seq*. ("RICO") premised on 40 alleged "predicate acts" by some or all of this group of probate practitioners, Judges and court personnel, who Plaintiffs caustically describe as the "Harris County Tomb Raiders" or "Probate Mafia."[2/]

Plaintiffs also purport to assert "non-predicate act" claims for civil damages against Defendant Smith (collectively, the "Non-Predicate Act Claims") for (1) "Conspiracy to violate 18 USC §§242 and 2, & 42 U.S.C. §§1983 and 1985," (2) "Aiding and Abetting Breach of Fiduciary, Defalcation and Scienter," (3) "Aiding and Abetting Misapplication of Fiduciary, Defalcation and Scienter," and (4) "Tortious Interference with Inheritance Expectancy." *See* Compl. at ¶¶159-166.

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[2] Plaintiffs allege that the "Harris County Tomb Raiders" or "Probate Mafia" is a "secret society" of probate practitioners, court personnel, probate judges, and other elected officials who are running a "criminal theft enterprise," or "organized criminal consortium," designed to "judicially kidnap and rob the elderly" and other heirs and beneficiaries of their "familial relations and inheritance expectations." *See id*. at ¶¶57, 71, 76.

Plaintiffs' conclusory, conspiracy-theory-laden Complaint is not anchored to any cogently pleaded facts connecting Defendant Smith (or any of the defendants) to any of the myriad federal or state statutory provisions referenced therein. In fact, Plaintiffs' 59 page, 217 paragraph Complaint contains ***only one reference*** to any specific conduct by Defendant Smith – that she filed an objection to a motion for protective order on behalf of Carole Brunsting in the Brunsting Probate Case. *See* Compl. at ¶128. That is it.

The circumstances where an attorney can be liable to a non-client for litigation conduct incident to the execution of her professional duties to a client are extremely limited,[3/] and Plaintiffs have failed to allege any such facts here.

Plaintiffs' Complaint is inherently implausible, and should be dismissed for the following procedural, jurisdictional and substantive reasons:

1. **The Court Should Dismiss Plaintiffs' Claims Pursuant to FED. R. CIV. P. 12(b)(1) for Lack of Subject Matter Jurisdiction –** The Court lacks subject matter jurisdiction over Plaintiffs' claims for the following reasons:

   - Plaintiffs' Claims are Not Ripe – Ripeness is a component of subject matter jurisdiction. *See Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). Where, as is true here, a plaintiff's claimed injury is contingent upon the occurrence of uncertain future events that may not occur as anticipated (*i.e.*, an unfavorable outcome in a pending probate proceeding), "the claim is not ripe for adjudication." *Id.* at 342.

   - Munson Lacks Article III Standing – Standing is a component of subject matter jurisdiction. *Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must establish an "injury-in-fact," which entails "a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996). Munson is not a beneficiary in the Brunsting Probate Case, has no direct stake in this action and has not suffered an injury-in-fact sufficient to confer Article III standing.

   - Attorney Immunity Bars Plaintiffs' State Law Claims for Civil Damages – Immunity from suit is jurisdictional. *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787,

[3] Under Texas Law, attorneys retain complete immunity from suit for civil liability to non-clients for actions taken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Troice v. Proskauer Rose, L.L.P.,* 816 F.3d 341, 348 (5th Cir. 2016).

2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). Under Texas law, attorneys are immune from suit by non-clients (*i.e.*, the Plaintiffs) for actions taken in connection with representing a client in litigation. *Cantey Hanger, LLP*, 467 S.W.3d at 481. Because Smith is alleged only to have filed an opposition to a motion on behalf of her client in pending state court litigation, she remains immune from Plaintiffs' state law claims for civil damages (*i.e.*, Claims 45, 46 and 47).

2. **Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted, and Their Claims Should be Dismissed** – Each of Plaintiffs' claims is implausible and should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for the following reasons:

- Plaintiffs Lack RICO Statutory Standing – Plaintiffs lack statutory standing to prosecute their civil RICO claims because they have not pled, and cannot establish, (1) a direct, concrete financial injury to the their business or property, and (2) proximate causation (*i.e.*, that the alleged injury was proximately caused by the alleged RICO predicate act(s)). *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

- Plaintiffs Have Failed to Plead Facts Establishing Any of the Substantive Elements of a RICO Violation – Despite its length, Plaintiffs' Complaint consists of nothing more than a formulaic and conclusory recitation of statutory elements couched as factual allegations. *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007). Plaintiffs offer no factual support for any of their conclusions, and have failed to plausibly allege any actual (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Plaintiffs' RICO claims therefore should be dismissed. *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008) ("a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws.").

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1983 ("Section 1983") – Plaintiffs' Section 1983 claim must be dismissed because they fail to identify any Constitutionally-protected rights which have been violated, or plead any facts demonstrating that Defendant is a state actor. *See Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005).

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1985 ("Section 1985") – Plaintiffs' Complaint does nothing more than reference Section 1985 and conclusorily state that it has been violated. Because Plaintiffs have not alleged any facts which would plausibly suggest (1) that they are members of a protected class, (2) that they have been deprived of any Constitutionally-protected rights, (3) that a conspiracy existed, (4) that Defendant engaged in any overt acts in furtherance of the conspiracy, or (5) the existence of any class-based discriminatory animus, their claim should be dismissed. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983).

- 18 U.S.C. §242 ("Section 242") Does Not Provide for a Private Right of Action – Section 242 is the criminal analogue to Section 1983 and does not provide for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989).

II.
ARGUMENT AND AUTHORITIES

A. Plaintiffs' Claims Should be Dismissed for Lack of Subject Matter Jurisdiction.

1. Standard of Review.

FED. R. CIV. P. 12(b)(1) governs challenges to a court's subject-matter jurisdiction. "Under Rule 12(b)(1), a claim is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim." *In re FEMA Trailer Formaldehyde Prods. Liab. Litg.*, 668 F.3d 281, 286 (5th Cir. 2012). Plaintiffs' claims are not justiciable because (1) they are not ripe and, even if they were, (2) Munson lacks Article III standing and (3) Defendant is immune from each of Plaintiff's state law Non-Predicate Act Claims for civil damages.

2. Plaintiffs' Purported Injuries are Speculative, Contingent and Not Ripe.

"Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical," *Monk v. Huston,* 340 F.3d 279, 282 (5th Cir. 2003), or where "further factual development is required." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583, 587 (5th Cir. 1987). That is, "if the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 342 (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580–81 (1985)).

Here, Plaintiffs' alleged injuries are contingent upon what they view as the presumptive outcome of pending litigation – the Brunsting Probate Case. *See* Compl. at ¶¶213 (stating that Curtis is being deprived of her "beneficial interests" in the Brunsting Family Trusts), ¶213 (alleging that Munson's efforts to "obtain justice" in the Brunsting Probate Case have been frustrated). But the future outcome of the Brunsting Probate Case is unknown and, because Plaintiffs' purported injuries are "contingent [on] future events that may not occur as [Plaintiffs] anticipate[]," their claims are not ripe and should be dismissed. *See Lopez*, 617 F.3d at 342.

3. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing.

Standing is a component of subject matter jurisdiction. *See Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must demonstrate: (1) an injury in fact, (2) causation, and (3) redressability. *Okpalobi v. Foster,* 244 F.3d 405, 425 (5th Cir. 2001). The requirement of an "injury in fact" is intended to limit access to the courts only to those who "have a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996).

The general theory underlying the Complaint is that Defendant (and the rest of the "Probate Mafia") have engaged in conduct which has frustrated the direction and outcome of the Brunsting Probate Case. *See generally* Complaint. But Munson is not a beneficiary in the Brunsting Probate Case and admittedly lacks any tangible interest in the outcome of those proceedings. *See* ECF No. 33 at ¶69 ("One thing [the parties] appear to agree on is that Munson is not a party to any of the prior lawsuits, nor is he a beneficiary of the Brunsting Family of Trusts."). Munson's only connection to any of the conclusory events in the Complaint is that he purportedly provided "paralegal" services to Curtis in connection with other pending litigation. Munson's

disappointment or frustration with the status, or results, of litigation in which he provided paralegal services is not a concrete injury in fact, and he lacks Article III standing.

4. Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.

"Immunity from suit is jurisdictional and, therefore, is properly decided pursuant to a Rule 12(b)(1)." *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787, 2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). Under Texas law, "attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation." *Cantey Hanger, LLP*, 467 S.W.3d at 481 (internal quotations omitted). "Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id*. (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)).

Attorney immunity is not merely a defense to liability. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). Rather, "attorney immunity is properly characterized as a true immunity from suit[.]" *Id*. This is true even where a plaintiff labels an attorney's conduct as "fraudulent." *See Byrd*, 467 W.W.3d at 483. The only exceptions to an attorney's immunity from suit are if the attorney has engaged in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services . . . ." *See id.* at 482.

Here, Plaintiffs' Complaint contains only one reference to any specific conduct by Defendant Smith – that she filed an opposition to a motion for protective order on behalf of her client in the Brunsting Probate Case. *See* Compl. at ¶128. Put differently, Plaintiffs allege only that Defendant was actively discharging her duties to her client in the context of active litigation. Defendant therefore remains immune from the non-client Plaintiffs' claims for civil liability with respect to any claims arising under Texas law. For this reason, the Court lacks subject matter

jurisdiction over Plaintiffs' Non-Predicate Act Claims 45, 46 and 47, and those claims should be dismissed.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim Upon Which Relief May be Granted.

1. Standard of Review.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the formal sufficiency of the pleadings and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor, *id.*, but need "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007) (internal citations omitted).

To avoid dismissal a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). As framed by the Fifth Circuit, "a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws." *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly,* 550 U.S. at 570) (internal quotation marks omitted). "[D]ismissal

is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill,* 561 F.3d 377, 384 (5th Cir. 2009) (internal quotation marks and citation omitted).

2. Plaintiffs Lack Statutory Standing Under RICO.

The standing provision of civil RICO provides that "***any person injured*** in his business or property ***by reason of*** a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains." See 18 U.S.C. 1964(c) (emphasis added). To establish statutory standing, a RICO plaintiff must therefore establish both (1) an injury (2) that was proximately caused by a RICO violation (*i.e.*, predicate act(s)). *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998); *Sedima, S.P. R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) ("[a] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

a. Plaintiffs Lack a Direct, Concrete Injury-in-Fact.

To satisfy the requirements for RICO statutory standing, a plaintiff's injury must be "conclusive" and cannot be "speculative." *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409 (5th Cir. 2015). "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *See id*. (quoting *Pinnacle Brands*, 138 F.3d at 607).

Here, the face of the Complaint shows that Curtis has not alleged any direct, concrete financial injury to her business or property. Indeed, the Complaint identifies only "***threats*** of injury," and repeatedly and consistently characterizes Curtis' supposed "injury" in terms of her "inheritance ***expectancy***." *See, e.g.*, Compl. at ¶¶165-66, 213. Put differently, Curtis complains only that the "Probate Mafia's" alleged conduct has interfered with, or threatened, her future anticipated ***expectancy interests*** in the Brunsting Probate Case. A clearer example of a speculative

non-RICO injury is unimaginable. *See Gil Ramirez Grp., L.L.C.,* 786 F.3d at 409 ("Injury to mere ***expectancy interests*** . . . is not sufficient to confer RICO standing.")(emphasis added); *Firestone v. Galbreath*, 976 F.2d 279, 282 (6th Cir. 1992) (estate beneficiaries lacked standing under RICO because the alleged direct harm was to the estate, which flowed only indirectly to the beneficiaries).

And Munson's purported "injury" is even more attenuated, because he lacks any expectancy interest in the Brunsting Probate Case. *See* ECF No. 33 at ¶69. Munson's only claimed connection to this matter is that he purportedly provided paralegal services to Ms. Curtis over the past several years, and is dissatisfied with the results of the cases on which he worked. *See* Compl. at ¶215. This is not a concrete injury in fact under any calculus.

Because Plaintiffs have failed to plead facts plausibly showing that they incurred an injury sufficient to meet the RICO standing requirements, the Court can and should dismiss all claims against Defendant Smith.

b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."

To adequately plead standing, Plaintiffs must also establish that Defendant's "predicate acts"—here, Smith's alleged violations of 18 U.S.C. §§ 1512 and 1519[4/] – "constitute both a factual and proximate cause of the plaintiff's alleged injury." *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992). This requires Plaintiffs to show the "***directness*** of the relationship between the conduct and the harm." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)(emphasis added) (internal citations omitted). Where the "link" between the alleged injury and predicate acts "is too remote, purely contingent, or indirect," the RICO claim should be dismissed. *Id.*

18 U.S.C. §§ 1512(c) provides:

[4] Plaintiffs have identified 45 separate "predicate acts" in the Complaint but only 2 (Claims 20 and 21) appear to be directed at Defendant.

> (c) Whoever corruptly –
>
> (1) alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> (2) Otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned for not more than 20 years, or both.

18 U.S.C. §§ 1519 in turn states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Here, Plaintiffs' Complaint contains no factual allegations which could plausibly demonstrate that Smith has violated either federal statute. The only "fact" involving any conduct by Smith is that she opposed a motion for protective order in pending litigation. *See* Compl. at ¶128. But this is the type of routine advocacy that an attorney is permitted – and indeed obligated – to engage in when representing a client in litigation, and cannot rise to the level of a predicate act under RICO. *See, e.g.*, *St. Gernain v. Howard*, 556 F.3d 261, 262 (5th Cir. 2009) (attorney's alleged violation of Rules of Professional Conduct in prior litigation is insufficient to implicate RICO). Because Plaintiffs have pleaded no facts plausibly demonstrating that Smith engaged in any predicate act, they have not, and cannot, adequately plead proximate causation and lack statutory RICO standing for this additional reason.

3. Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.

Even if Plaintiffs had statutory standing to sue under RICO, which they clearly do not, their claims must still be dismissed because they have pleaded no facts plausibly supporting the substantive elements of their claim. Based only on Defendant Smith's filing of an opposition to a

motion for protective order in pending state court probate litigation, Plaintiffs have alleged violations of RICO sections 1962(c) and (d). These subsections state:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. §§ 1962(c), (d).

To plead a violation of 20 U.S.C. §§ 1962(c) or (d), Plaintiffs must demonstrate: (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima*, 473 U.S. at 496; *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Plaintiffs have not done so here.

a. Plaintiffs Have Not Alleged the Existence of an "Enterprise."

To state a claim under RICO, a plaintiff must first allege the existence of an "enterprise," which RICO defines as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4). As the definition suggests, an enterprise can be either a legal entity or association-in-fact. *See St. Paul Mercury Ins. Co.*, 224 F.3d at 445. Plaintiffs' Complaint does not plausibly allege the existence of either.

(i) "Probate Court No. 4" is Not a Legal Entity.

Plaintiffs first allege that "Probate Court No. 4" is a legal entity enterprise within the meaning of 18 U.S.C. § 1961(4). *See* Compl. at ¶36. But, as is true with the entire Complaint, Plaintiffs fail to plead facts supporting this conclusory assertion. And it is well-established that a county government department (*i.e.*, a county probate court) is not a legal entity that can sue or be sued separate and apart from the county itself. *See* TEX. LOC. GOV'T CODE § 71.001 ("A county

is a corporate and political body."); s*ee Darby v. City of Pasadena,* 939 F.2d 311, 313 (5th Cir. 1991); *Crull v. City of New Braunfels, Texas*, 267 F. App'x. 338, 341-42 (5th Cir. 2008). Because Plaintiffs' assertion of a legal entity enterprise has no basis in law or fact, dismissal is appropriate.

(ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise.

What Plaintiffs appear to be claiming is that the various individual judges, lawyers and court personnel whom they have sued (*i.e.*, the "Harris County Tomb Raiders" or "Probate Mafia") operate as an "association-in-fact" enterprise. *See* Compl. at ¶¶54-58. But this conspiracy-theory allegation is pure conjecture, and Plaintiffs again allege no facts which plausibly demonstrate the existence of the ominous "secret society" about which they complain. *See id*. at ¶58 (referencing "regular participants in this secret society.").

When the alleged enterprise is an association-in-fact enterprise, the plaintiff must show evidence of: (1) an existence separate and apart from the pattern of racketeering; (2) ongoing organization; and (3) members that function as a continuing unit as shown by a hierarchical or consensual, decision-making structure. *See Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988); *Boyle v. United States*, 556 U.S. 938, 943-45 (2009).

Again, Plaintiffs' have alleged ***no facts*** which, if true, would satisfy any of these three requirements. Plaintiffs do not allege that the "Probate Mafia" maintains any existence separate and apart from what Plaintiffs have alleged to be a pattern of racketeering. They likewise do not allege that the "Probate Mafia" is an ongoing organization or that the various alleged members operate or function as a continuing unit. Simply put, Plaintiffs have again parroted legal conclusions but failed to support them with any concretely pleaded facts. *Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). For this reason, Plaintiffs have not plausibly pled the existence of an association-in-fact enterprise.

b. Plaintiffs Have Not Alleged a "Pattern" of Racketeering Activity.

"A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain*, 556 F.3d at 263; *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989). To adequately allege a "pattern," Plaintiffs must plead both that the acts are related to each other, and that those acts either constitute or threaten long-term criminal activity – thereby reflecting "continuity." *See H.J. Inc.*, 492 U.S. at 239.

Here, Plaintiffs' Complaint conclusorily states in several instances that the Defendants have engaged in a "pattern of racketeering," but fails to set forth any facts demonstrating such a pattern. The Complaint includes no facts demonstrating how the various alleged predicate acts are germane, or that they constitute or threaten long-term criminal activity. *See, e.g.*, *Allstate Ins. Co. v. Donovan*, No. H-12-0432, 2012 U.S. Dist. LEXIS 92401, at *13 (S.D. Tex. 2012). Plaintiffs' Complaint consists of nothing more than scatter-shot references to myriad "predicate act" statutes identified in RICO, followed by repetitive and conclusory assertions that one or more of the Defendants have purportedly violated these statutes "for the purpose of executing or attempting to execute a scheme and artifice to default and deprive . . . ." *See, e.g.*, Compl. at ¶¶121-123, 125. Because Plaintiffs have alleged no facts which would plausibly demonstrate a single predicate act, let alone the required "pattern" of such acts, dismissal is appropriate.

c. Plaintiffs Have Not Plausibly Alleged a Conspiracy Under § 1692(d).

A claim under § 1962(d) is necessarily predicated upon a properly pleaded claim under subsections (a), (b), or (c). Because Plaintiffs have failed to adequately plead violations of those other subsections, the § 1962(d) conspiracy allegation fails to state a claim. *Nolen v. Nucentrix Broadband Neflvorks,* 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims). Additionally, Plaintiffs'

conspiracy allegations are conclusory and lack supporting factual details. *See Lovick v. Ritemoney Ltd,* 378 F.3d 433, 437 (5th Cir. 2004) (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss). Plaintiffs' bald insistence that Defendant Smith (or any of the defendants) conspired to participate in a criminal enterprise does not make it so, and is insufficient to support a RICO claim.

4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.

In addition to their RICO claim, Plaintiffs have also asserted four "non-predicate act" claims[5/] against Defendant for civil damages. The first such claim (Claim 44) alleges violations of Sections 1983, 1985 and 242. *See* Compl. at ¶159. Each of these claims is without merit, and is addressed in turn below.

a. Plaintiffs' Section 1983 Claim Should be Dismissed.

Section 1983 "provides a federal cause of action for the deprivation, under the color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw,* 512 U.S. 107, 132 (1994). To state a claim under Section 1983, a plaintiff must allege facts that show that he has been deprived of a right secured by the Constitution and laws of the United States and that the deprivation occurred under color of state law. *See Flagg Bros, Inc. v. Brooks,* 436 U.S. 149, 155 (1978); *Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005).

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[5] This section addresses only those causes of action listed under the "Non-Predicate Act Civil Claims for Damages." While none of these claims specifically mention Smith, in an abundance of caution, she responds to each such claim that globally references the "Defendants." To the extent Plaintiffs also seek individual liability against Smith based on their predicate act claims under 18 U.S.C. §§ 1512 and 1519 (*see* Claims 20 and 21), neither criminal statute creates a private right of action and those claims also should be dismissed. *See Gipson v. Callahan*, MO-97-CA-160, 1997 U.S. Dist. LEXIS 23139, at *17 (W.D. Tex. 1997) (no private right of action under § 1512); *Peavey v. Holder*, 657 F. Supp. 2d 180, 191 (D.D.C. 2009) (no private right of action under § 1519).

(i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights.

Plaintiffs' Section 1983 claim should be dismissed in the first instance because they have not even identified in the Complaint any particular Constitutionally-protected rights that have allegedly been violated. *See Graham v. Connor,* 490, U.S. 386, 394 (1989). True to form, Plaintiffs have instead vaguely and generally stated only that they have been deprived of unspecified "rights, privileges, and immunities secured and protected by the Constitution . . ." and leave it to the Court and the Defendant to speculate as to which one(s). *See* Compl. at ¶159. For this reason alone, Plaintiffs Section 1983 claims should be dismissed.

(ii) Plaintiffs Have Not Alleged State Action.

The requirement that a deprivation occur under color of state law is also known as the "state action" requirement – and Plaintiffs cannot meet it here. *See Bass v. Parlnvood Hasp.,* 180 F.3d 234, 241 (5th Cir. 1999). Smith is a private individual, and Plaintiffs have not alleged otherwise. A private party such as Smith will be considered a state actor for Section 1983 purposes only in rare circumstances. *See Gordon v. Neugebauer,* 57 F.Supp.3d 766, 773 (N.D. Tex. 2014). First, the plaintiff can show that the private actor was implementing an official government policy. *See Rundus v. City of Dallas, Tex.,* 634 F.3d 309, 312 (5th Cir. 2011). Plaintiffs have not identified any official government policy that caused an alleged deprivation of their civil rights, and the first narrow exception is therefore inapplicable here.

Alternatively, a plaintiff can show that a private entity's actions are fairly attributable to the government. *Id*. This is also known as the "attribution test." The Supreme Court has articulated a two-part inquiry for determining whether a private party's actions are fairly attributable to the government: (1) "the deprivation [of plaintiffs constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a

person for whom the State is responsible" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982); *see also Bass,* 180 F.3d at 241.

The Supreme Court utilizes three different tests for determining whether the conduct of a private actor can be fairly attributable to a state actor under the second prong of the attribution test: (1) the nexus or joint-action test, (2) the public function test, and (3) the state coercion or encouragement test. *See Richard v. Hoechst Celanese Chern. Grp., Inc.,* 355 F.3d 345, 352 (5th Cir. 2003); *Lewis v. Law-Yone,* 813 F.Supp. 1247, 1254 (N.D. Tex. 1993) (describing the three tests as applicable to the resolution of the second prong of the attribution test articulated by the Supreme Court in *Lugar*).

Under the "nexus test," a private party may be considered a state actor "where the government has 'so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise,'" and the actions of the private party can be treated as that of the state itself. *Bass,* 180 F.3d at 242; *see also Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982). Plaintiffs have pled no facts which would suggest that any state governmental entity has "insinuated itself into a position of interdependence" with Defendant Smith. Indeed, Plaintiffs fail to plead any facts which would show that Smith ever interacted or communicated with the any state governmental entity regarding the filing of an opposition to a motion for protective order on behalf of her client. Plaintiffs therefore have failed to plead facts that would satisfy the nexus test for state action under Section 1983.

Under the "public function test," a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *Bass,* 180 F.3d at 241-42. Here, Plaintiffs' Complaint is devoid of any facts showing that the representation

of beneficiaries in probate litigation is a function that traditionally is the exclusive province of the state, and Plaintiffs therefore have failed to plead facts that would satisfy the public function test for state action under Section 1983.

Under the "state coercion test," "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass,* 180 F.3d at 242. State coercion or compulsion can be found where the plaintiff establishes that the private defendants were engaged in a conspiracy with state officials. *See Tebo v. Tebo,* 550 F.3d 492, 496 (5th Cir. 2008).

To establish such a conspiracy, the plaintiff must show that the private and public actors entered into an agreement to commit an illegal act. *Id.* At the motion to dismiss stage, the plaintiff must "allege specific facts to show an agreement." *See id.* (quoting *Priester v. Lowndes Cnty.,* 354 F.3d 414, 421 (5th Cir. 2004)). Here, Plaintiffs have not included any facts in their Complaint which would suggest that Defendant Smith entered into any agreement with, or was acting at the behest of, any government official when she prepared an opposition to a motion for protective order on behalf of her client. There are simply no facts pleaded which would, if true, show the existence of such an agreement. Plaintiffs thus have failed to plead facts showing that Defendant Smith was coerced or encouraged by any governmental entity sufficient to satisfy the state coercion test. *Priester,* 354 F.3d at 420 (conspiracy alleges that are "merely conclusory, without reference to specific facts," will not survive a motion to dismiss).

Because Plaintiffs have failed to establish the necessary state action, their Section 1983 claim should be dismissed.

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

To state a §1985 claim, a plaintiff must plead: (1) a conspiracy involving two or more persons, (2) to deprive, directly or indirectly, a person or class of persons of equal protection of the laws, (3) that one or more of the conspirators committed an act in furtherance of that conspiracy (4) which causes injury to another in his person or property or a deprivation of any right or privilege he has as a citizen of the United States, and (5) the conspirators' action is motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983); *Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir. 1989). Plaintiffs' §1985 claim fails for several reasons.

Plaintiffs have not alleged any facts to support any of these elements. Plaintiffs identify no specific "right of privilege" that has been deprived. *See* Compl. at ¶159 (generally and vaguely alleging the deprivation of "rights, privileges, and immunities secured and protected by the Constitution and laws of the United States."). Plaintiffs likewise fail to plead with particularity a conspiracy or any overt acts. *Compare Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1346 (N.D. Tex. 1986) (plaintiff must plead existence of conspiracy and overt acts with particularity), *with* Compl. at ¶129 ("Defendants . . . did willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice . . . ."). Finally, the Complaint is devoid of any factual allegations demonstrating that Plaintiffs are members of a protected class, or that any of the alleged "conspiracy" and "overt acts" were modified by class-based discriminatory animus. Simply put, Plaintiffs have once again conclusively alleged a violation of the law, without stating the basis for the alleged violation. *See Anderson*, 554 F.3d at 528 ("a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws.").

For these reasons, Plaintiffs' Section 1985 claim should be dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

Section 242 is the criminal analogue to Section 1983 and does not provide for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989). Plaintiffs' claim that Defendant has conspired to violate Section 242 therefore should be dismissed without further inquiry.

5. Plaintiffs' Remaining Non-Predicate Act Claims (Claims 45, 46 and 47) are all Barred by Attorney Immunity.

Plaintiffs' remaining Non-Predicate Act Claims, which allege "aiding and abetting breach of fiduciary duty," "aiding and abetting misapplication of fiduciary" and "tortious interference with inheritance expectancy," all arise under Texas law and, for the reasons more fully stated in Section II(A)(4) of this Motion, are barred by attorney immunity. *See* Compl. at ¶¶160-66.

III.
CONCLUSION

Accordingly, Defendant respectfully requests that the Court grant her Motion to Dismiss and dismiss Plaintiffs' claims with prejudice, and for such other and further relief, at law or in equity, to which Defendant may show herself to be justly entitled.

Respectfully submitted,

By: */s/ Barry Abrams*

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a true and correct copy of the foregoing and/or attached instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure through the Southern District of Texas CM/ECF E-File System and as indicated below:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
RIK WAYNE MUNSON	§	
Plaintiffs,	§	
	§	
Vs.	§	**C.A. No. 4:16-cv-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN MENDEL, DARLENE PAYNE SMITH JASON LESTER, GREGORY LESTER JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTSS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA BRUNSTING AND AMY BRUNSTING	§	

DEFENDANT GREGORY LESTER'S
MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Gregory Lester ("Mr. Lester") files this Rule 12 Motion to Dismiss and shows the following:

I.
INTRODUCTION

Plaintiffs' pro se Complaint (*D.E. #1*) purports to assert almost fifty "claims" against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court Number 4. Plaintiffs in this case are Candace Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings.

The allegations related to Mr. Lester are minimal. The information identifying Mr. Lester as a defendant is contained in paragraphs 1, 16, 55, 56 and 59 of the Complaint. (*D.E.# 1*).

Paragraph 55 of the Complaint alleges that Mr. Lester is an attorney who has practiced in Harris County Probate Courts. Paragraph 56 alleges, without any facts to support it, that Mr. Lester and the other named defendants have engaged in a criminal enterprise somehow being conducted through Harris County Probate Court Number 4. Paragraph 59 makes a similar allegation, again without any factual support. The Complaint asserts no factual content sufficient to maintain any cause of action against Mr. Lester. (*D.E.#1*).

In response to Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6) filed by some Defendants, Plaintiffs filed their Addendum of Memorandum in Support of RICO Complaint. (*D.E. #26*). Rather than provide any specifics about how a frivolous 59-page complaint states a RICO claim against Mr. Lester, Plaintiffs have instead come forward with a 25-page Addendum that still does not state a claim. (*D.E.# 26*). Although the Addendum is replete with inaccuracies, it has not changed or added any additional factual allegations to support RICO claims. All the Addendum does is describe a handful of events and then conclude without explanation that the events constitute a RICO predicate act. Because the Addendum does nothing to cure the problems found in Plaintiffs' Original Complaint, the Court should grant this Motion and dismiss all claims against Mr. Lester.

II.
STANDARDS OF REVIEW FOR PLEADING CONSTRUCTION

In a Rule 12(b)(6) motion, the Court accepts all factual allegations in the pleadings as true and examines whether the allegations state a claim sufficient to avoid dismissal.[1] This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations,

[1] *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5th Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

unwarranted factual inferences, or legal conclusions as true.[2] It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.[3] A Court should grant a Rule 12(b)(6) motion when it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.[4] Similarly, when a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate.[5]

III.
STATEMENT OF FACTS DERIVED EXCLUSIVELY FROM PLAINTIFFS' ORIGINAL COMPLAINT AND ADDENDUM

It is evident from the Original Complaint that Plaintiffs have underlying litigation in Probate Court Number Four with various attorneys and opposing parties. It is also evident from the Original Complaint that Plaintiffs are dissatisfied with the status of those proceedings. Beyond this, it has been extremely cumbersome to locate any specific allegations against Mr. Lester. In an effort to provide some clarity for the Court regarding the claims against Mr. Lester, Mr. Lester opens with a statement of facts.

A. FACTS INVOLVING MR. LESTER.

On July 23, 2015, the Honorable Christine Butts, Judge of Harris County Probate Court Number Four (4), entered its Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code 452.051.[6] That Order appointed Gregory Lester as Temporary Administrator with limited powers.7 The only powers conferred on Mr. Lester were the powers

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2 *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).
3 *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004).
4 *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015).
5 *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5th Cir. 1992).
6 Exhibit A.
7 *Id.*

to investigate all claims pending by all parties and file a report with the court regarding the merits of the claims.[8] The Order was only effective for 180 days.[9] Mr. Lester filed his Report of Temporary Administrator Pending Contest on January 14, 2016.[10]

Against Mr. Lester, Plaintiffs allege causes of action for:

- "18 U.S.C. §1962(d) the Enterprise;"[11]
- "The Racketeering Conspiracy 18 U.S.C. §1962(c);"[12]
- Three claims for "Honest Services 18 U.S.C. §1346 and 2;"[13]
- "Wire Fraud 18 U.S.C. §1343 and 2;"[14]
- "Fraud 18 U.S.C. §1001 and 2;"[15]
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. §1951(b)(2) and 2;"[16] and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.C. §371;"[17] "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting;"[18] and "Conspiracy to Violate 18 U.S.C. §§ 242 and 2, & 42 U.S.C. §§983 and 1985."[19]

But despite the many "claims", Plaintiffs complain of only one specific action taken by Mr. Lester. Plaintiffs allege that Mr. Lester filed a "fictitious report into the Harris County Probate

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8 *Id.*
9 *Id.*
10 Exhibit B.
11 *See* Complaint, at §IV, ¶¶ 35-58.
12 *Id.* at ¶¶ 59-120.
13 *Id.* at ¶¶ 121, 122, and 123.
14 *Id.* at ¶ 123
15 *Id.* at ¶123
16 *Id* at ¶123
17 *Id* at ¶123
18 *Id* at ¶132
19 *Id* at ¶159

Court No.4."[20] Plaintiffs have asserted no factual content sufficient to maintain any cause of action against Mr. Lester. The Complaint should be dismissed with prejudice.

IV.
THE COURT SHOULD DISMISS THE PLAINTIFFS' CLAIMS AGAINST MR. LESTER.

A. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

Based on virtually no specific allegations of a criminal enterprise beyond dissatisfaction with the public proceedings in the underlying case, the Plaintiffs have asserted two RICO claims against Mr. Lester. Plaintiffs have brought their RICO action under 18 U.S.C. §1962(c) AND 18 U.S.C. §1962(d).

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or "predicate acts." [21] Plaintiffs fail to meet this standard.

With respect to Mr. Lester, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 196l(l)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by Mr. Lester. [22] Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts, Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that Mr. Lester violated the statute. However, these allegations are baseless on their face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

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[20] *See* Complaint, Paragraph 123.
[21] *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)
[22] *Id. at 880.*

B. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(c).

As to the claims under § 1962(c), the Plaintiffs did not allege with the requisite factual specificity (or beyond merely conclusory statements) any predicate acts committed by Mr. Lester. Similarly, the Plaintiffs did not allege and the law would not sustain any assertion that Mr. Lester conducted, controlled, or participated in an enterprise under the standard set forth by the Supreme Court in *Reves*.[23]

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."[24]

Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiffs claim and how and why they are fraudulent."[25] Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."[26] When pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.[27]

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[23] 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).
[24] *Walsh v. America's Tele- Network Corp.*, 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. C1v. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").
[25] *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016).
[26] *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP*, No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).
[27] *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.*, 975 F.2d at 1138.

Here, Plaintiffs have failed to allege the contents of any of the purported false representations made by Mr. Lester, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.[28] This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiffs' injuries and the underlying RICO violation.[29] But, despite this firmly established requirement, Plaintiffs in this case have asserted no allegations-indeed, not even a conclusory allegation-detailing how they purportedly relied upon Mr. Lester's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

C. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE

1. Plaintiffs Enterprise Allegations Are Too Vague and Conclusory

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[30] The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."[31] To

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[28] *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts)

[29] *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205,219 (5th Cir. 2003); *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling").

[30] 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881.

[31] *Elliott*, 867 F.2d at 881.

establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[32]

The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[33] The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(l) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."[34]

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."[35] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[36]

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless

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[32] *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).
[33] 452 U.S. at 583.
[34] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[35] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[36] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 2d at 427).

conclusions.

Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind-when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these, or any other supporting facts, Plaintiffs' pleadings are simply insufficient.

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.[37] Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged."[38] Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs alleged enterprise lacks continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.39 Specifically, "[a]n association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."[40] These requirements limit the application of the RICO Act, and serve to prevent an overly-broad

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[37] *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

[38] *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

[39] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[40] *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

application to general commercial conduct that was never really the intended focus of the Act.[41]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

D. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[42] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other and that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[43] When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[44] Such 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."[45]

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[41] *Delta Truck*, 855 F.2d at 242-43.
[42] *See In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43).
[43] *HJ., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).
[44] *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).
[45] *Id.* (quoting *HJ., Inc.*, 492 U.S. at241).

Here, Plaintiffs alleges several times throughout their Complaint that Mr. Lester engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

E. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(d).

To prove a RICO conspiracy, the Plaintiffs must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.[46] A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.[47] Mere association with the enterprise is not actionable; agreement is essential.[48] Further, if a plaintiff fails to properly plead a RICO claim under §§ 1962(a), (b), or (c), it correspondingly fails to properly plead a conspiracy claim under § 1962(d).[49]

The Court should dismiss the § 1962(d) claim because the Plaintiffs failed to state a claim under §§ 1962(a-c). As a result, the conspiracy claims fail under controlling Fifth Circuit authority.50 The Court should additionally dismiss the claim because the Plaintiffs have not alleged any specific facts detailing an agreement to commit a RICO offense, what the agreement was, how it was reached, and when it was entered.51 These types of missing details are necessary to state a claim under § 1962(d). As explained in *Twombly,* allegations that a defendant acted in ways consistent with a conspiratorial agreement, but also equally well explained by legitimate

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46 *TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 625 n.11 (N.D. Tex. 2007) (Fitzwater, J.) (quoting *United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005)).

47 *Id.*

48 *Baumer*, 8 F.3d at 1344.

49 *N. Cypress Med. Ctr. Operating Co*, 781 F.3d at 203.

50 *Id.*

51 *Lewis v. Sprock*, 612 F.Supp. 1316, 1325 (N.D. Cal. 1985); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365 (D. Hawaii 1995).

economic incentives, do not suffice to show illegality.[52] So too, unsupported conclusory allegations are not entitled to be assumed true, and dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because the conduct could be compatible with or explained by, lawful, unchoreographed free-market behavior."[53] Because the Plaintiffs have failed to state a claim upon which relief may be granted, the Court should grant this Motion to Dismiss.

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury.[54] That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.[55] A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.[56] More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."[57]

Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."[58] These allegations must

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[52] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
[53] *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).
[54] *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004)(citing Holmes, 503 U.S. at 279).
[55] Ocean Energy II. V. Alexander & *Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).
[56] *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277,289 (5th Cir. 2007).
[57] *Sedima*, 473 U.S. at 496.
[58] *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219.

include specific facts; conclusory and generalized allegations are insufficient.[59] "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries."[60] The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp.* In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."[61] If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. [62]

Clearly, the allegations in the Complaint are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs have alleged a similar disjunctive causation pattern with respect to their claims against Mr. Lester. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

F. PLAINTIFFS' CLAIMS FOR "HOBBS ACT," "WIRE FRAUD," "FRAUD UNDER 18 U.S.C. 51001," AND "HONEST SERVICES" FAIL BECAUSE THOSE STATUTES DO NOT CREATE PRIVATE CAUSES OF ACTION.

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[59] *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).
[60] *Anza*, 547 U.S. at 452.
[61] *Id.*
[62] *Id*

The Plaintiffs purport to assert claims against Mr. Lester for violation of the Hobbs Act, Wire Fraud, "Fraud under 18 U.S.C. 1001," and "Honest Services," but those acts do not create private causes of action. Thus, those claims should all be dismissed.

1. The Hobbs Act does not create a private cause of action.

The Hobbs Act does not create a private cause of action. *Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005) ("Nor does the Hobbs Act create a private cause of action") (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999)). This is settled law. *See, e.g., Campbel v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 72 (W.D.N.Y. September 29, 2005) ("[F]ederal courts have consistently found that the Hobbs Act does not support a private cause of action."); *Barge v. Apple Computer,* No. 95 CIV. 9715 (KMW), 1997 WL 394935, at *1 (S.D.N.Y. July 15, 1997), affd, 164 F.3d 617 (2nd Cir. 1998) ("[C]ourts that have considered this question have consistently found that the Hobbs Act does not support a private cause of action."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("There is no implied private cause of action under the Hobbs Act.").

Thus, Plaintiffs' Hobbs Act claim against Mr. Lester fails.

2. The Wire Fraud statute does not create a private cause of action.

The wire fraud statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) (citing *Napper v. Anderson, Hensley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) for its holding that there is "no private cause of action under the mail-and wire fraud statutes, 18 U.S.C. 1341 and 1343"); *see also Morse v. Stanley*, ICV230, 2012 WL 1014996, at *2 (E.D. Tex. Mar. 23, 2012) ("18 U.S.C. 1343 is a criminal statute pertaining to wire fraud and does

not provide Plaintiff with a private cause of action."); *Benitez v. Rumage,* CIV.A. c-11-208, 2011 WL 3236199, at *l (S.D. Tex. July 27, 201 1) (the wire fraud statute "do[es] not provide a private cause of action").

Thus, Plaintiffs' Wire Fraud act claim against Mr. Lester fails.

3. The claim for "Fraud under 18 U.S.C. 91001" is not a private cause of action.

Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails, as well, because that statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) ("The Thompsons assert causes of action under 18 U.S.C. 1001, 1010, 1014, 1341, 1343, and 1344. These federal criminal statutes do not provide a private cause of action.") (emphasis added). Again, this is settled law. *See Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987) ("Finding no congressional intent to create a private right of action under 1001 (b), Blaze has failed to state a claim upon which relief could be granted, and the district court's grant of summary judgment was proper."); *Grant v. CPC Logistics Inc.*, 3:12-CV-200-L BK, 2012 WL 601149, at *l (N.D. Tex. Feb. 1, 2012), report and recommendation adopted, 3:12-CV-200-L, 2012 WL 601128 (N.D. Tex. Feb. 23, 2012) ("Federal courts have repeatedly held that violations of criminal statutes, such as 18 U.S.C. 1001, 1505 and 1621, do not give rise to a private right of action.") (emphasis added); *Parker v. Blake*, CIV. A. 08-184, 2008 WL 4092070, at *3 (W.D. La. Aug. 29, 2008) ("Section 1001 provides criminal penalties for persons convicted of fraud or false statements during the course of certain dealings with the federal government As above, this criminal statute, were it applicable to allegations made by plaintiff still would not create a private civil cause of action or entitlement to monetary relief thereunder."); *Doyon v. U.S.*, No. A-07-CA977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (holding that there is "no private cause of action under 18 U.S.C. 1001 ").

Thus, Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails.

4. The claim for "Honest Services" is not a private cause of action.

Plaintiffs allege three claims for "honest services," based on 18 U.S.C. 1346.[63] But 18 U.S.C. §1346 does not create a private cause of action either. *See Eberhardt v. Braud*, 16-CV-3153, 2016 WL 3620709, at *3 (C.D. 111. June 29, 2016) ("Plaintiff attempts to bring a private right of action under 18 U.S.C. 1346 and 18 U.S.C. §1951, but those criminal statutes do not contain an express or implied private right of action."); *Alford v. S. Gen. Ins.*, 7:12-CV-00273-BR, 2013 WL 1010584, at *2 (E.D.N.C. Mar. 14, 2013) (holding that a "claim for honest services fraud under 18 U.S.C. 1346" must be dismissed "pursuant to Rule 12(b)(6) because a private right of action for a violation of that law does not exist"); *Hooten v. Greggo & Ferrara Co.*, CIV. 10-776-RGA, 2012 WL 4718648, at *6 (D. Del. Oct. 3, 2012) ("18 U.S.C. 1341 and 1346 . . . are found in the federal criminal code. Neither §1341 or 1346 allow for a private cause of action.").

Thus, Plaintiffs' three claims against Mr. Lester for "Honest Services" fail.

5. Plaintiffs rely on impermissible collective pleading.

"A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct."[64] And the pleading requirements of Rule 9(b) likewise demand specific and separate allegations against each defendant.[65]

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[63] See Complaint at ¶¶121-123.

[64] *In re Parkcentral Glob. Litig.*, 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012) ("It is impermissible to make general allegations that lump all defendants together; rather, the complaint must segregate the alleged wrongdoing of No. I from another.").

[65] See *Dimas v. Vanderbilt Mortg & Fin., Inc.*, No. C-10-68, 2010 WL 1875803, at *8 (S.D. Tex. May 6, 2010) ("[W]hile the Complaint makes several general allegations of fraud, it often fails to specify the role each Defendant played in the alleged scheme."); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made").

Here, Plaintiffs offer no individualized allegations about any wrongful conduct they allege against Mr. Lester. Instead, Plaintiffs' vague and fanciful pleadings are lobbed at all Defendants, with no discernible specific or separate allegations for Mr. Lester. This is insufficient to state a claim.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Lester respectfully prays that this Court GRANT this Motion to Dismiss, dismiss all of the Plaintiffs' claims against Mr. Lester with prejudice, and award Mr. Lester all such other relief to which he may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR GREGORY A. LESTER

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of the foregoing instrument was served on all known counsel of record through the Court's CM/ECF system, which constitutes service on all parties in accordance with the Federal Rules of Civil Procedure.

STACY L. KELLY

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER APPOINTING TEMPORARY ADMINISTRATOR PENDING CONTEST PURSUANT TO TEXAS ESTATES CODE 452.051

On March 23, 2015, the Court heard and approved Carl Henry Brunsting's Application to Resign as Independent Executor. On July 21, 2015 the Court heard and considered CARL HENRY BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND CANDACE LOUISE CURTIS' APPLICATION FOR APPOINTMENT AS SUCCESSOR PERSONAL REPRESENTATIVE; Anita Kay Brunsting's OBJECTION TO CANDACE CURTS' APPLICATION FOR APPOINTMENT AS PERSONAL REPRESENTATIVE; AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR, RESPONSE TO CARL BRUNSTING'S APPLICATION TO RESIGN AS INDEPENDENT EXECUTOR AND OBJECTION TO CANDACE CURTIS'S APPLICATION FOR APPOINTMENT AS SUCCESSOSR EXECUTOR; Carl Brunsting's OBJECTION TO AMY RUTH BRUNSTING'S APPLICATION TO BE NAMED SUCCESSOR EXECUTOR; and Candace Curtis' RESPONSE TO OBJECTIONS TO APPLICATION FOR APPOINTMENT AND OBJECTION TO AMY BRUNSTINGS APPLICATION FOR APPOINTMENT.

The Court finds that the Court has jurisdiction and venue over Decedent's Estate; that it is in the best interest of the Estate that a personal representative be immediately appointed; and that the parties have reached an agreement regarding the appointment of a Temporary Administrator Pending Contest with limited powers, which was announced on the record at said hearing, the terms of which are substantially as follows:

1. GREG LESTER would be a suitable temporary representative, is not disqualified from acting as such, and should be appointed Temporary Administrator

Pending Contest of this Estate with limited powers to evaluate all claims filed against 1) Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC, 2) Anita Kay Brunsting f/k/a Anita Kay Riley, Individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Anita Kay Brunsting Personal Asset Trust; and 3) Amy Ruth Brunsting f/k/a Amy Ruth Tschirhart, Individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedcent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust and the Amy Ruth Tschirhart Personal Asset Trust; and 4) Carole Ann Brunsting, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust. Greg Lester, Temporary Administrator Pending Contest will report to the Court regarding the merits of these claims on or before the expiration of this Order. This Order shall expire 180 days after the date that it is signed.

2. Amy Brunsting and Anita Brunsting, as the Successor Co-Trustees of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, and the Nelva E. Brunsting Survivor's Trust agree to advance funds to the Estate of Nelva E. Brunsting (the "Estate") to pay all court approved fees and expenses of the Temporary Administrator Pending Contest.

3. The Temporary Administrator Pending Contest has the authority to seek a continuance in the "District Court Case" in which the Estate is a plaintiff, of the hearing on the Motion for Summary Judgment current scheduled for July 31, 2015 and to seek continuance of the October, 2015 trial setting in that matter.

4. Amy Brunsting and Candace Louise Curtis each agree to a qualified declination to serve as Successor Independent Executor of the Estates of Nelva E. Brunsting and Elmer H. Brunsting, pursuant to the respective wills filed in each Estate, during the pendency of the Temporary Administration of this Estate.

IT IS THEREFORE ORDED that Greg Lester is hereby appointed Temporary Administrator Pending Contest of this Estate and shall give a cash Bond in the amount of $100.00 (On Hundred Dollars), conditioned as required by law; that the Temporary Administration shall continue until the expiration of 180 days after the date of this Order, or as may be further ordered by this court; that the Clerk of this Court shall issue Letters of Temporary Administration when the Temporary Administrator has qualified according to law; and that the Temporary Administrator shall have the powers enumerated by the agreement of the parties as restated above.

Signed July 23, 2015.

Christine Butts, Judge
Harris County Probate Court No. 4

DV

PROBATE COURT 4

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Harris County

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST

On July 24, 2015 an Order of this Court, signed by Judge Christine Butts on July 23, 2015, was filed in the above styled and numbered case. In this Order the Court stated that Greg Lester was appointed Temporary Administrator Pending Contest of this estate. The Court directed that Greg Lester will report to the Court regarding the merits of the claims in this case on or before the expiration of this Order. The Order will expire on or about January 20, 2016, which is 180 days after the date that the Order was signed.

BACKGROUND

The Brunsting Family

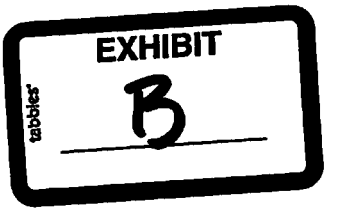
Nelva and Elmer Brunsting were married and had five (5) children: Candace Louise Curtis (" Candace"), Carol Ann Brunsting (" Carol"), Carl Henry Brunsting ("Carl"), Amy Ruth Tschirhart ("Amy") and Anita Kay Riley ("Anita").

The Brunsting Family Living Trust

Elmer Brunsting and Nelva Brunsting (herein referred to as "Settlors") created the Brunsting Family Living Trust (the "Trust") on October 10, 1996. The Trust was subsequently restated in its entirety on January 12, 2005. A copy of the Restatement of the Brunsting Family Living Trust ("Restatement") is attached hereto as the first exhibit.

The Trust could be amended during the lifetime of the original Settlors. However, once a Settlor dies, the Trust could not be amended except by court order.

Each Settlor could provide for a different disposition of their share of the Trust by executing a qualified beneficiary designation for that person's share alone.



Trustees of the Brunsting Family Living Trust

The initial trustees of the Trust were Elmer Brunsting and Nelva Brunsting. The Restatement provided that if both original Co-Trustees failed or ceased to serve, then Carl Henry Brunsting and Amy Ruth Tschirhart would serve as Co-Trustees.

Each original Trustee has the right to appoint successor trustees to serve in the event the original Trustee ceases to serve by death, disability, or for any reason, and may specify any conditions on the succession and service as may be permitted by law. The Restatement also provided that the original Trustees may each remove any trustee they have individually named as their respective successor.

On September 6, 2007, a First Amendment to the Restatement to the Brunsting Family Living Trust was executed by Settlors which changed the succession of successor trustees, a copy of which is attached hereto as the second exhibit. This document appointed Carl Henry Brunsting and Candace Louise Curtis as successor co-trustees if both original Trustees fail or cease to serve. If either Carl Henry Brunsting or Candace Louise Curtis should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then The Frost National Bank shall serve as the sole successor trustee. The First Amendment effectively removed Amy Ruth Tschirhart as the successor co-trustee and substituted Candace Louise Curtis in her place and stead.

Elmer Brunsting died on April 1, 2009, and after her husband's death, Nelva Brunsting served alone as the original trustee.

On December 21, 2010, Nelva Brunsting exercised her right to designate a successor trustee. Nelva Brunsting executed an Appointment of Successor Trustee, a copy of which is attached hereto as the third exhibit. The Appointment of Successor Trustee stated that if Nelva Brunsting resigned as Trustee, then Anita Kay Brunsting would serve as successor trustee, Amy Ruth Tschirhart would serve as the second successor, and The Frost National Bank as the third successor. If Nelva Brunsting fails or ceases to serve as trustee because of her death or disability, then Anita Kay Brunsting and Amy Ruth Tschirhart would serve as successor co-trustees.

On the same date, on December 21, 2010, Nelva Brunsting also exercised her right to resign as Trustee. Specifically, Nelva Brunsting resigned as Trustee of the Trust, the Nelva Brunsting Survivor's Trust and Elmer Brunsting's Decedent's Trust and appointed Anita Kay Brunsting as trustee of the aforementioned Trusts.

Split of Brunsting Family Living Trust into the Survivor's Trust and the Decedent's Trust

After Elmer Brunsting's death on April 1, 2009, the Trust split into two trusts—the Nelva Brunsting Survivor's Trust (the "Survivor's Trust") and the Elmer Brunsting Decedent's Trust

(the "Decedent's Trust"). Nelva Brunsting, as the original Trustee, served as Trustee over both the Survivor's and Decedent's Trusts.

There is no power of appointment related to the Trust which was exercised by Elmer Brunsting prior to his death on April 1, 2009.

Pursuant to the Restatement, the beneficiary of the Survivor's Trust, Nelva Brunsting, had an unlimited and unrestricted general power of appointment over the entire principal and any accrued but undistributed income of the Survivor's Trust. This general power of appointment was very broad, and granted the survivor the power to appoint the Survivor's Trust to anyone, outright or in trust, in equal or unequal proportions.

The Decedent's Trust would terminate at the surviving Settlor's death or on the death of Nelva Brunsting. Pursuant to the Restatement, the survivor had a limited testamentary power of appointment to appoint the undistributed principal and income to the descendants of the Settlors only. While Nelva Brunsting (as the surviving Settlor) was restricted to only appointing the assets to her descendants, the assets of the Decedent's Trust could be appointed by Nelva Brunsting (as the surviving Settlor) to her descendants in any proportion and on terms and conditions as the survivor elects.

Nelva Brunsting's June 15, 2010 Qualified Beneficiary Designation and Exercise of Power of Appointment

On June 15, 2010, Nelva Brunsting executed a Qualified Beneficiary Designation and Exercise of Power of Appointment under Living Trust Agreement, a copy of which is attached hereto as the fourth exhibit. This document exercised Nelva Brunsting's general power of appointment over the Survivor's Trust and her limited power of appointment over the Decedent's Trust.

Specifically, Nelva Brunsting's exercise appointed the Survivor's Trust and Decedent's Trust to be distributed equally among Nelva and Elmer Brunsting's five (5) children: Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley. This document also expressed Nelva Brunsting's intent that upon the death of Nelva Brunsting, any funds advanced to Nelva Brunsting's descendants would be deducted from that particular descendant's share of assets received from the Survivor's Trust and Decedent's Trust.

Nelva Brunsting's August 25, 2010 Qualified Beneficiary Designation and Exercise of Power of Appointment

On August 25, 2010, Nelva Brunsting executed a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement, a copy of which is attached hereto as the fifth exhibit. This document appears to have superseded the June 15,

2010 Qualified Beneficiary Designation and Exercise of Power of Appointment under Living Trust Agreement.

In this document, Nelva Brunsting exercised her general power of appointment over the Survivor's Trust and her limited power of appointment over the Decedent's Trust. The document stated that the Trustee would pay the balance of both the Survivor's and Decedent's Trust equally to each of her five (5) children: Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley, and such assets would be held in a separate Personal Asset Trust for the benefit of each of her children. With the exception of Carl and Candace, each descendant would be the trustee of their own Personal Asset Trust. Specifically, Amy Ruth Tschirhart, Anita Kay Brunsting and Carol Ann Brunsting would each be the trustee of their own Personal Asset Trust. Anita Kay Riley and Amy Ruth Tschirhart were appointed the co-trustees of the Personal Asset Trust for Carl Henry Brunsting and the Personal Asset Trust for Candace Louise Curtis. The document also detailed the administrative provisions relating to the Personal Asset Trusts for Nelva and Elmer Brunsting's descendants.

The major change that resulted from the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement was that Carl Henry Brunsting and Candace Louis Curtis could not elect to be the individual trustee of their own Personal Asset Trusts. The August 25, 2010 document also provided different administrative provisions for the trusts created for the descendants than those provided under Article X of the Restatement.

Notably, the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement contained a no contest clause which provided a lengthy list of prohibited actions that would fall under such no contest clause. The no contest clause provided that any beneficiary who took such prohibited actions would forfeit their share and be treated as if they predeceased Nelva and Elmer Brunsting.

The Death of Nelva Brunsting

Nelva Brunsting died on November 11, 2011, and the Survivor's Trust and Decedent's Trust terminated and were to pass to the Personal Asset Trusts for Candace Louise Curtis, Carol Ann Brunsting, Carl Henry Brunsting, Amy Ruth Tschirhart and Anita Kay Riley. As detailed above, these Personal Asset Trusts were created pursuant to Nelva Brunsting's August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement.

CLAIMS

The Probate Court Claims Filed by Carl Henry Brunsting and Candace Louise Curtis

Carl Henry Brunsting and Candace Louise Curtis have filed claims against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting in the Estate of Nelva E. Brunsting, Deceased, pending in Harris County Probate Court Number Four (4) under Cause Number 412,249 (hereinafter referred to as the "Probate Court Claims").

Carl Henry Brunsting and Candace Louise Curtis' Probate Court Claims are twofold. First, individual tort claims have been asserted against Anita Kay Brunsting, Amy Ruth Brunsting (previously Tschirhart) and Carole Ann Brunsting for actions taken either in their fiduciary capacity or purported actions taken which have harmed Carl and Candace. The second category of Carl and Candace's Probate Court Claims relate to requests for declaratory relief in construing the Brunsting Family Living Trust.

The Probate Court Claims that include individual tort claims against Anita Kay Brunsting, Amy Ruth Brunsting and Carole Ann Brunsting contain multiple questions of fact, which are within the province of the jury. Specifically, Carl Henry Brunsting asserted the following tort claims:

1. Breach of fiduciary duty
2. Conversion
3. Tortious interference with inheritance rights
4. Constructive Trust over Trust assets
5. Fraud, specifically, misrepresentation of facts to Decedent (it is questionable whether Carl and Candace have standing to pursue these claims)
6. Civil Conspiracy
7. Demand for accounting of the Trusts and non-probate accounts
8. Liability of Anita Kay Brunsting, Amy Ruth Brunsting and Carole Ann Brunsting under Texas Property Code § 114.031
9. Removal of Trustees
10. Request for Receivership

The Probate Court Claims asserted by Candace Louise Curtis are as follows:

1. Breach of fiduciary duty
2. Fraud resulting from misrepresentation of material facts to Candace
3. Constructive fraud
4. Money had and received
5. Conversion
6. Tortious interference with inheritance rights
7. Unjust enrichment

8. Civil Conspiracy
9. Demand for accounting of the Trusts and non-probate accounts

As a result of the above Probate Court Claims containing questions of fact within the province of the jury, the Temporary Administrator has refrained from evaluating such claims.

The questions of law presented in both Carl Henry Brunsting and Candace Louise Curtis' requests for declaratory relief contained in the Probate Court Claims are as follows:

1. Was Nelva Brunsting's December 21, 2010 Resignation of Original Trustee and Appointment of Successor Trustee valid?

2. Were the June 15, 2010 and August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement an inappropriate alteration of the terms of the Trust?

3. Did the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement appoint all of the Trust property?

4. Did the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement revoke the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement?

5. Is the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement effective?

6. Do the pleadings filed by Carl and Candace violate the No Contest Clause and is the No Contest Clause void as against public policy?

Based on the powers granted to Nelva Brunsting in the Restatement, Nelva Brunsting appears to have appropriately exercised her right to resign as the original Trustee of the Trust on December 21, 2010, and appointed the successor trustee, Anita Kay Brunsting.

While the Restatement provided that the Trust could not be amended after the death of Nelva or Elmer Brunsting, this did not preclude Nelva Brunsting from exercising her general and limited power of appointments over the Survivor's Trust and Decedent's Trust. Specifically, it appears that Nelva Brunsting appropriately exercised her general power of appointment over the Survivor's Trust and her limited power of appointment over Decedent's Trust by appointing the assets to her five (5) children in trust by and through the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. The August 25, 2010 document appears to have superseded and replaced the June 15, 2010 Qualified Beneficiary

Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. The Restatement granted Nelva Brunsting the power to appoint such assets in trust and place terms and conditions upon such assets as she desired, including her choice to designate trustees of the Personal Asset Trust of Carl Henry Brunsting and Candace Louise Curtis.

NO CONTEST CLAUSE PROVISIONS

Any claim by Carl Henry Brunsting and Candace Louise Curtis that Nelva Brunsting lacked capacity and/or was subject to undue influence when she executed the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement are questions of fact that are within the province of the jury. However, the no contest clauses in the Qualified Beneficiary Designation and in the Restatement must be considered.

Section "A." of "MISCELLANEOUS PROVISIONS" of the Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement is a no contest clause that would disinherit any person who, among other things, makes the claims stated above. The provisions of this no contest clause include language that the no contest clause applies even if a court finds that the judicial proceedings in question originated in good faith and with probable cause. This Court will have to rule on the validity of this provision.

Article XI, Section C., of the Restatement is also a no contest provision. The provisions of this no contest clause are similar in result to those stated above in the Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. Therefore, a successful claim that Nelva Brunsting lacked capacity would still be subject to the no contest provisions of the Restatement. In this event the Court would have to rule on the validity of this provision of the Restatement. In both documents the provision is well written.

A decision by the Court upholding either no contest provision might resolve all other issues.

The Lawsuit of Carl Henry Brunsting in the District Court Proceeding

Carl Henry Brunsting, in his capacity as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting, filed claims against Defendants Candace L. Kunz-Freed, Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC (collectively the "Defendants"). These claims of Carl Henry Brunsting were filed in the 164th District Court of Harris County, Texas (hereinafter referred to as the "District Court Claims").

Carl Henry Brunsting asserted the following District Court Claims against Defendants in his live pleading, Plaintiff's Third Amended Petition:

1. Negligence
2. Negligent misrepresentation
3. Breach of fiduciary duty
4. Aiding and abetting

5. Fraud
6. Conspiracy
7. Deceptive Trade Practices Act ("DTPA") violations

Carl Henry Brunsting also pled tolling, fraudulent concealment and the discovery rule. Carl Henry Brunsting sought damages of actual damages, forfeiture of fees, treble damages and punitive damages, in addition to his attorney's fees.

Carl Henry Brunsting's District Court Claims center around the changes Nelva Brunsting made by and through the June 15, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement and the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement.

In response to Plaintiff's District Court Claims, Defendants filed a Motion for Traditional and No–Evidence Summary Judgment on the following bases:

1. Carl Henry Brunsting improperly fractured his legal malpractice claims against Defendants;
2. Carl Henry Brunsting's DTPA claim is barred by the professional services exemption; and
3. Carl Henry Brunsting's negligent misrepresentation claim and DTPA claim fail because Carl Henry Brunsting admits he is not aware of any misrepresentations made by Defendants.

Defendants also moved for a No-Evidence Summary Judgment on the basis that Carl Henry Brunsting has no evidence supporting one or more of the elements on the claims he has asserted.

A Notice of Vacancy of Party and Motion to Abate Proceeding was filed by counsel for Carl Henry Brunsting. Carl Henry Brunsting has filed a resignation as executor of the aforementioned estates. Until a successor executor is appointed, there is no plaintiff to pursue the action against Defendants and no plaintiff to respond to Defendants' summary judgment motions. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting must be resolved prior to resolving the claims against Defendants.

A Motion to transfer the district court matter to the probate court where both estates are pending has also been filed, but not yet ruled upon.

DAMAGES

Actual damages, of course, are disputed. However, the actual distributions from the Trust after Nelva resigned until shortly after she died seemed to be reasonably well documented. Previously an independent investigation resulted in a listing of the payments made from the trust.

This **REPORT OF MASTER** that was prepared in the case filed in the Southern District of Texas federal court case has the details of the Trust's income, expenses and distributions of stock. A copy of this report is attached hereto as the sixth exhibit.

From this and from changes in the assets of the trust during the period in question the damages can be determined and are basically in three categories.

Transfers of Stock

2,765 shares of Exxon Mobil stock were transferred as follows:

	1, 120	Amy
	160	Anita
	160	Candace
	1, 325	Carol
TOTAL	2,765	

675 shares of Chevron stock were transferred as follows:

	135	Anita
	135	Amy's daughter
	135	Amy's son
	135	Anita's daughter
	135	Anita's son
TOTAL	675	

It is easy to see that these distributions of stock were not evenly distributed to the five siblings. I have been told that the distributions were in fact early distributions of the recipients share from their future trusts. This could be resolved by giving those siblings that did not receive an equal amount at the time of the distributions an equivalent amount of money to settle the dispute. Of course the issue is further complicated by the fact that the value of the two stocks has changed since the time of the distributions. The proper way to determine the amount to be distributed might be to use the value of the stock on the date of the original distributions or the value on the date that money is paid to the damage sibling, whichever is greater.

Payments To/For Family

Approximately $108,000 were paid to or for the benefit of Amy, Anita and Carol or disputed expenses including approximately $41,000 of trustees' fees and approximately $36,000 of legal fees.

Payments To Carol for Nelva's Care

Approximately $160,000 was paid to Carol during the period in question. I was told that Carol was the primary sibling responsible for Nelva's care.

SUMMARY OF DAMAGES

It seems unwise to have made the stock distributions. However, this can be resolved by equalizing the distributions to all the siblings. The issue of trustees' fees can be resolved by comparing the fees to those that are considered as reasonable fees in similar circumstances. The legal fees are obviously justified and will surely increase. The amounts paid to Carol can be examined but should be liberally considered as attributed to Nelva's care and maintenance.

CONCLUSIONS

All of the legal actions taken by Nelva were within her authority under the broad provisions of the Restatement. Unless Nelva is found to have been incompetent at the time that her legal actions were taken all of the changes made in these documents apply in these proceedings.

If Nelva was incompetent at the time that she took these legal actions then a successor trustee would have been appointed under the terms of the Restatement. No claim of her being incompetent was made at that time.

Furthermore, if Nelva had been incompetent the plaintiff in the District Court case would likely have to show that the defendants knew that she was incompetent. For this and other reasons the case should be moved to the Probate Court.

There are damages for the unequal distribution of the shares of Exxon Mobil and Chevron stock. There may be damages for some of the expenditures for trustees' fees and for payments to Carol. These matters should be resolved by agreement. This may require mediation. The considerable legal fees involved in a trial far outweigh the expenses of a mediation and any compromises made by the parties at the mediation.

RECOMMENDATIONS

1. Remove the District Court case to the Probate Court. It is important that there not be different results for the same or similar issues that are in the cases currently in the Probate Court.
2. Require mediation. Point out the huge savings that will result from a mediation versus a trial. Possibly, inform the parties that the Court will rule on the no contest clause first if the matter is not settled in the mediation. Since this ruling could go either way both sides would have considerable incentive to settle. A ruling in favor of the no contest clause would essentially make the matters moot and the plaintiffs would take nothing and lose their inheritance.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	Civil Action No. 4:16-cv-01969
vs.	§	
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Civil Action No. 4:16-cv-01969
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), Defendant Darlene Payne Smith (the "Defendant" or "Smith") files her Motion to Dismiss the Verified Complaint for Damages (the "Complaint") of Plaintiffs Candace Louise Curtis ("Curtis") and Rik Wayne Munson ("Munson") (collectively, the "Plaintiffs") for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and would respectfully show the Court the following:

I.
INTRODUCTION

This is the most recent in a series of lawsuits[1/] involving the Brunsting siblings, all of which emanate from a state court probate proceeding, *In re: Estate of Nelva E. Brunsting*, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting

[1] In addition to the core probate proceeding, Curtis has previously filed a similar action against her sister, and others, in the Southern District of Texas (Case No. 4:12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting, et al.*), which was ultimately remanded to the Probate Court No. 4 upon agreement of the parties. Curtis' brother, Carl, has filed both a malpractice suit in Harris County District Court against his now-deceased parents' estate planning counsel (Cause No. 2013-05455; *Carl Henry Brunsting, et al. v. Candace L. Kunz-Freed, et al.*) and a separate lawsuit against Curtis and the other Brunsting siblings in Harris County Probate Court No. 4 (Cause No. 412.249-401; *Carl Henry Brunsting, et al. v. Anita Kay Brunsting, et al.*). For a more detailed account of the Brunsting siblings' litigation history, Defendant incorporates by reference the factual recitations contained in pages 2-7 of defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction [ECF No. 20].

Probate Case"). Curtis is one of five sibling-beneficiaries in the Brunsting Probate Case and Munson is Curtis's domestic partner and paralegal. Defendant Smith is a probate attorney who previously represented one of the other sibling-beneficiaries (*i.e.*, Carole Brunsting) in the Brunsting Probate Case. *See* Complaint ("Compl.") at ¶¶32, 213 & 215. Defendant withdrew as counsel in early 2016.

Apparently dissatisfied with the rulings and administration of Harris County Probate Court Number 4, Plaintiffs have taken out their frustration by suing each Judge (*i.e.*, the Hon. Christine Riddle Butts and Hon. Clarinda Comstock) and lawyer (*i.e.,* Defendant Smith, Candace Kunz-Freed, Albert Vacek, Jr., Bernard Lyle Mathews, III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Jason Ostrom, Gregory Lester and Jill Willard Young) who has had any contact with the Brunsting Probate Case, as well as certain Probate Court No. 4 administrative personnel (*i.e.*, substitute court reporter Tony Baiamonte). Plaintiffs purport to assert claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1691 *et seq*. ("RICO") premised on 40 alleged "predicate acts" by some or all of this group of probate practitioners, Judges and court personnel, who Plaintiffs caustically describe as the "Harris County Tomb Raiders" or "Probate Mafia."[2/]

Plaintiffs also purport to assert "non-predicate act" claims for civil damages against Defendant Smith (collectively, the "Non-Predicate Act Claims") for (1) "Conspiracy to violate 18 USC §§242 and 2, & 42 U.S.C. §§1983 and 1985," (2) "Aiding and Abetting Breach of Fiduciary, Defalcation and Scienter," (3) "Aiding and Abetting Misapplication of Fiduciary, Defalcation and Scienter," and (4) "Tortious Interference with Inheritance Expectancy." *See* Compl. at ¶¶159-166.

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[2] Plaintiffs allege that the "Harris County Tomb Raiders" or "Probate Mafia" is a "secret society" of probate practitioners, court personnel, probate judges, and other elected officials who are running a "criminal theft enterprise," or "organized criminal consortium," designed to "judicially kidnap and rob the elderly" and other heirs and beneficiaries of their "familial relations and inheritance expectations." *See id*. at ¶¶57, 71, 76.

Plaintiffs' conclusory, conspiracy-theory-laden Complaint is not anchored to any cogently pleaded facts connecting Defendant Smith (or any of the defendants) to any of the myriad federal or state statutory provisions referenced therein. In fact, Plaintiffs' 59 page, 217 paragraph Complaint contains ***only one reference*** to any specific conduct by Defendant Smith – that she filed an objection to a motion for protective order on behalf of Carole Brunsting in the Brunsting Probate Case. *See* Compl. at ¶128. That is it.

The circumstances where an attorney can be liable to a non-client for litigation conduct incident to the execution of her professional duties to a client are extremely limited,[3] and Plaintiffs have failed to allege any such facts here.

Plaintiffs' Complaint is inherently implausible, and should be dismissed for the following procedural, jurisdictional and substantive reasons:

1. **The Court Should Dismiss Plaintiffs' Claims Pursuant to FED. R. CIV. P. 12(b)(1) for Lack of Subject Matter Jurisdiction –** The Court lacks subject matter jurisdiction over Plaintiffs' claims for the following reasons:

   - Plaintiffs' Claims are Not Ripe – Ripeness is a component of subject matter jurisdiction. *See Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). Where, as is true here, a plaintiff's claimed injury is contingent upon the occurrence of uncertain future events that may not occur as anticipated (*i.e.*, an unfavorable outcome in a pending probate proceeding), "the claim is not ripe for adjudication." *Id.* at 342.

   - Munson Lacks Article III Standing – Standing is a component of subject matter jurisdiction. *Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must establish an "injury-in-fact," which entails "a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996). Munson is not a beneficiary in the Brunsting Probate Case, has no direct stake in this action and has not suffered an injury-in-fact sufficient to confer Article III standing.

   - Attorney Immunity Bars Plaintiffs' State Law Claims for Civil Damages – Immunity from suit is jurisdictional. *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787,

[3] Under Texas Law, attorneys retain complete immunity from suit for civil liability to non-clients for actions taken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Troice v. Proskauer Rose, L.L.P.,* 816 F.3d 341, 348 (5th Cir. 2016).

2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). Under Texas law, attorneys are immune from suit by non-clients (*i.e.*, the Plaintiffs) for actions taken in connection with representing a client in litigation. *Cantey Hanger, LLP*, 467 S.W.3d at 481. Because Smith is alleged only to have filed an opposition to a motion on behalf of her client in pending state court litigation, she remains immune from Plaintiffs' state law claims for civil damages (*i.e.*, Claims 45, 46 and 47).

2. **Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted, and Their Claims Should be Dismissed** – Each of Plaintiffs' claims is implausible and should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for the following reasons:

- Plaintiffs Lack RICO Statutory Standing – Plaintiffs lack statutory standing to prosecute their civil RICO claims because they have not pled, and cannot establish, (1) a direct, concrete financial injury to the their business or property, and (2) proximate causation (*i.e.*, that the alleged injury was proximately caused by the alleged RICO predicate act(s)). *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

- Plaintiffs Have Failed to Plead Facts Establishing Any of the Substantive Elements of a RICO Violation – Despite its length, Plaintiffs' Complaint consists of nothing more than a formulaic and conclusory recitation of statutory elements couched as factual allegations. *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007). Plaintiffs offer no factual support for any of their conclusions, and have failed to plausibly allege any actual (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Plaintiffs' RICO claims therefore should be dismissed. *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008) ("a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws.").

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1983 ("Section 1983") – Plaintiffs' Section 1983 claim must be dismissed because they fail to identify any Constitutionally-protected rights which have been violated, or plead any facts demonstrating that Defendant is a state actor. *See Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005).

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1985 ("Section 1985") – Plaintiffs' Complaint does nothing more than reference Section 1985 and conclusorily state that it has been violated. Because Plaintiffs have not alleged any facts which would plausibly suggest (1) that they are members of a protected class, (2) that they have been deprived of any Constitutionally-protected rights, (3) that a conspiracy existed, (4) that Defendant engaged in any overt acts in furtherance of the conspiracy, or (5) the existence of any class-based discriminatory animus, their claim should be dismissed. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983).

- 18 U.S.C. §242 ("Section 242") Does Not Provide for a Private Right of Action – Section 242 is the criminal analogue to Section 1983 and does not provide for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989).

II.
ARGUMENT AND AUTHORITIES

A. Plaintiffs' Claims Should be Dismissed for Lack of Subject Matter Jurisdiction.

1. Standard of Review.

FED. R. CIV. P. 12(b)(1) governs challenges to a court's subject-matter jurisdiction. "Under Rule 12(b)(1), a claim is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim." *In re FEMA Trailer Formaldehyde Prods. Liab. Litg.*, 668 F.3d 281, 286 (5th Cir. 2012). Plaintiffs' claims are not justiciable because (1) they are not ripe and, even if they were, (2) Munson lacks Article III standing and (3) Defendant is immune from each of Plaintiff's state law Non-Predicate Act Claims for civil damages.

2. Plaintiffs' Purported Injuries are Speculative, Contingent and Not Ripe.

"Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical," *Monk v. Huston,* 340 F.3d 279, 282 (5th Cir. 2003), or where "further factual development is required." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583, 587 (5th Cir. 1987). That is, "if the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 342 (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580–81 (1985)).

Here, Plaintiffs' alleged injuries are contingent upon what they view as the presumptive outcome of pending litigation – the Brunsting Probate Case. *See* Compl. at ¶¶213 (stating that Curtis is being deprived of her "beneficial interests" in the Brunsting Family Trusts), ¶213 (alleging that Munson's efforts to "obtain justice" in the Brunsting Probate Case have been frustrated). But the future outcome of the Brunsting Probate Case is unknown and, because Plaintiffs' purported injuries are "contingent [on] future events that may not occur as [Plaintiffs] anticipate[]," their claims are not ripe and should be dismissed. *See Lopez*, 617 F.3d at 342.

3. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing.

Standing is a component of subject matter jurisdiction. *See Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must demonstrate: (1) an injury in fact, (2) causation, and (3) redressability. *Okpalobi v. Foster,* 244 F.3d 405, 425 (5th Cir. 2001). The requirement of an "injury in fact" is intended to limit access to the courts only to those who "have a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996).

The general theory underlying the Complaint is that Defendant (and the rest of the "Probate Mafia") have engaged in conduct which has frustrated the direction and outcome of the Brunsting Probate Case. *See generally* Complaint. But Munson is not a beneficiary in the Brunsting Probate Case and admittedly lacks any tangible interest in the outcome of those proceedings. *See* ECF No. 33 at ¶69 ("One thing [the parties] appear to agree on is that Munson is not a party to any of the prior lawsuits, nor is he a beneficiary of the Brunsting Family of Trusts."). Munson's only connection to any of the conclusory events in the Complaint is that he purportedly provided "paralegal" services to Curtis in connection with other pending litigation. Munson's

disappointment or frustration with the status, or results, of litigation in which he provided paralegal services is not a concrete injury in fact, and he lacks Article III standing.

4. Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.

"Immunity from suit is jurisdictional and, therefore, is properly decided pursuant to a Rule 12(b)(1)." *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787, 2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). Under Texas law, "attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation." *Cantey Hanger, LLP*, 467 S.W.3d at 481 (internal quotations omitted). "Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Id*. (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)).

Attorney immunity is not merely a defense to liability. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). Rather, "attorney immunity is properly characterized as a true immunity from suit[.]" *Id*. This is true even where a plaintiff labels an attorney's conduct as "fraudulent." *See Byrd*, 467 W.W.3d at 483. The only exceptions to an attorney's immunity from suit are if the attorney has engaged in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services . . . ." *See id.* at 482.

Here, Plaintiffs' Complaint contains only one reference to any specific conduct by Defendant Smith – that she filed an opposition to a motion for protective order on behalf of her client in the Brunsting Probate Case. *See* Compl. at ¶128. Put differently, Plaintiffs allege only that Defendant was actively discharging her duties to her client in the context of active litigation. Defendant therefore remains immune from the non-client Plaintiffs' claims for civil liability with respect to any claims arising under Texas law. For this reason, the Court lacks subject matter

jurisdiction over Plaintiffs' Non-Predicate Act Claims 45, 46 and 47, and those claims should be dismissed.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim Upon Which Relief May be Granted.

1. Standard of Review.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the formal sufficiency of the pleadings and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor, *id.*, but need "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007) (internal citations omitted).

To avoid dismissal a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). As framed by the Fifth Circuit, "a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws." *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly,* 550 U.S. at 570) (internal quotation marks omitted). "[D]ismissal

is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill,* 561 F.3d 377, 384 (5th Cir. 2009) (internal quotation marks and citation omitted).

2. Plaintiffs Lack Statutory Standing Under RICO.

The standing provision of civil RICO provides that "***any person injured*** in his business or property ***by reason of*** a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains." See 18 U.S.C. 1964(c) (emphasis added). To establish statutory standing, a RICO plaintiff must therefore establish both (1) an injury (2) that was proximately caused by a RICO violation (*i.e.*, predicate act(s)). *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998); *Sedima, S.P. R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) ("[a] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

a. Plaintiffs Lack a Direct, Concrete Injury-in-Fact.

To satisfy the requirements for RICO statutory standing, a plaintiff's injury must be "conclusive" and cannot be "speculative." *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409 (5th Cir. 2015). "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *See id*. (quoting *Pinnacle Brands*, 138 F.3d at 607).

Here, the face of the Complaint shows that Curtis has not alleged any direct, concrete financial injury to her business or property. Indeed, the Complaint identifies only "***threats*** of injury," and repeatedly and consistently characterizes Curtis' supposed "injury" in terms of her "inheritance ***expectancy***." *See, e.g.*, Compl. at ¶¶165-66, 213. Put differently, Curtis complains only that the "Probate Mafia's" alleged conduct has interfered with, or threatened, her future anticipated ***expectancy interests*** in the Brunsting Probate Case. A clearer example of a speculative

non-RICO injury is unimaginable. *See Gil Ramirez Grp., L.L.C.,* 786 F.3d at 409 ("Injury to mere ***expectancy interests*** . . . is not sufficient to confer RICO standing.")(emphasis added); *Firestone v. Galbreath*, 976 F.2d 279, 282 (6th Cir. 1992) (estate beneficiaries lacked standing under RICO because the alleged direct harm was to the estate, which flowed only indirectly to the beneficiaries).

And Munson's purported "injury" is even more attenuated, because he lacks any expectancy interest in the Brunsting Probate Case. *See* ECF No. 33 at ¶69. Munson's only claimed connection to this matter is that he purportedly provided paralegal services to Ms. Curtis over the past several years, and is dissatisfied with the results of the cases on which he worked. *See* Compl. at ¶215. This is not a concrete injury in fact under any calculus.

Because Plaintiffs have failed to plead facts plausibly showing that they incurred an injury sufficient to meet the RICO standing requirements, the Court can and should dismiss all claims against Defendant Smith.

b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."

To adequately plead standing, Plaintiffs must also establish that Defendant's "predicate acts"—here, Smith's alleged violations of 18 U.S.C. §§ 1512 and 1519[4/] – "constitute both a factual and proximate cause of the plaintiff's alleged injury." *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992). This requires Plaintiffs to show the "***directness*** of the relationship between the conduct and the harm." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)(emphasis added) (internal citations omitted). Where the "link" between the alleged injury and predicate acts "is too remote, purely contingent, or indirect," the RICO claim should be dismissed. *Id.*

18 U.S.C. §§ 1512(c) provides:

[4] Plaintiffs have identified 45 separate "predicate acts" in the Complaint but only 2 (Claims 20 and 21) appear to be directed at Defendant.

> (c) Whoever corruptly –
>
> (1) alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
> (2) Otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned for not more than 20 years, or both.

18 U.S.C. §§ 1519 in turn states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Here, Plaintiffs' Complaint contains no factual allegations which could plausibly demonstrate that Smith has violated either federal statute. The only "fact" involving any conduct by Smith is that she opposed a motion for protective order in pending litigation. *See* Compl. at ¶128. But this is the type of routine advocacy that an attorney is permitted – and indeed obligated – to engage in when representing a client in litigation, and cannot rise to the level of a predicate act under RICO. *See, e.g.*, *St. Gernain v. Howard*, 556 F.3d 261, 262 (5th Cir. 2009) (attorney's alleged violation of Rules of Professional Conduct in prior litigation is insufficient to implicate RICO). Because Plaintiffs have pleaded no facts plausibly demonstrating that Smith engaged in any predicate act, they have not, and cannot, adequately plead proximate causation and lack statutory RICO standing for this additional reason.

3. Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.

Even if Plaintiffs had statutory standing to sue under RICO, which they clearly do not, their claims must still be dismissed because they have pleaded no facts plausibly supporting the substantive elements of their claim. Based only on Defendant Smith's filing of an opposition to a

motion for protective order in pending state court probate litigation, Plaintiffs have alleged violations of RICO sections 1962(c) and (d). These subsections state:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. §§ 1962(c), (d).

To plead a violation of 20 U.S.C. §§ 1962(c) or (d), Plaintiffs must demonstrate: (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima*, 473 U.S. at 496; *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Plaintiffs have not done so here.

a. Plaintiffs Have Not Alleged the Existence of an "Enterprise."

To state a claim under RICO, a plaintiff must first allege the existence of an "enterprise," which RICO defines as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4). As the definition suggests, an enterprise can be either a legal entity or association-in-fact. *See St. Paul Mercury Ins. Co.*, 224 F.3d at 445. Plaintiffs' Complaint does not plausibly allege the existence of either.

(i) "Probate Court No. 4" is Not a Legal Entity.

Plaintiffs first allege that "Probate Court No. 4" is a legal entity enterprise within the meaning of 18 U.S.C. § 1961(4). *See* Compl. at ¶36. But, as is true with the entire Complaint, Plaintiffs fail to plead facts supporting this conclusory assertion. And it is well-established that a county government department (*i.e.*, a county probate court) is not a legal entity that can sue or be sued separate and apart from the county itself. *See* TEX. LOC. GOV'T CODE § 71.001 ("A county

is a corporate and political body."); s*ee Darby v. City of Pasadena,* 939 F.2d 311, 313 (5th Cir. 1991); *Crull v. City of New Braunfels, Texas*, 267 F. App'x. 338, 341-42 (5th Cir. 2008). Because Plaintiffs' assertion of a legal entity enterprise has no basis in law or fact, dismissal is appropriate.

(ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise.

What Plaintiffs appear to be claiming is that the various individual judges, lawyers and court personnel whom they have sued (*i.e.*, the "Harris County Tomb Raiders" or "Probate Mafia") operate as an "association-in-fact" enterprise. *See* Compl. at ¶¶54-58. But this conspiracy-theory allegation is pure conjecture, and Plaintiffs again allege no facts which plausibly demonstrate the existence of the ominous "secret society" about which they complain. *See id*. at ¶58 (referencing "regular participants in this secret society.").

When the alleged enterprise is an association-in-fact enterprise, the plaintiff must show evidence of: (1) an existence separate and apart from the pattern of racketeering; (2) ongoing organization; and (3) members that function as a continuing unit as shown by a hierarchical or consensual, decision-making structure. *See Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988); *Boyle v. United States*, 556 U.S. 938, 943-45 (2009).

Again, Plaintiffs' have alleged ***no facts*** which, if true, would satisfy any of these three requirements. Plaintiffs do not allege that the "Probate Mafia" maintains any existence separate and apart from what Plaintiffs have alleged to be a pattern of racketeering. They likewise do not allege that the "Probate Mafia" is an ongoing organization or that the various alleged members operate or function as a continuing unit. Simply put, Plaintiffs have again parroted legal conclusions but failed to support them with any concretely pleaded facts. *Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). For this reason, Plaintiffs have not plausibly pled the existence of an association-in-fact enterprise.

b. Plaintiffs Have Not Alleged a "Pattern" of Racketeering Activity.

"A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain*, 556 F.3d at 263; *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989). To adequately allege a "pattern," Plaintiffs must plead both that the acts are related to each other, and that those acts either constitute or threaten long-term criminal activity – thereby reflecting "continuity." *See H.J. Inc.*, 492 U.S. at 239.

Here, Plaintiffs' Complaint conclusorily states in several instances that the Defendants have engaged in a "pattern of racketeering," but fails to set forth any facts demonstrating such a pattern. The Complaint includes no facts demonstrating how the various alleged predicate acts are germane, or that they constitute or threaten long-term criminal activity. *See, e.g.*, *Allstate Ins. Co. v. Donovan*, No. H-12-0432, 2012 U.S. Dist. LEXIS 92401, at *13 (S.D. Tex. 2012). Plaintiffs' Complaint consists of nothing more than scatter-shot references to myriad "predicate act" statutes identified in RICO, followed by repetitive and conclusory assertions that one or more of the Defendants have purportedly violated these statutes "for the purpose of executing or attempting to execute a scheme and artifice to default and deprive . . . ." *See, e.g.*, Compl. at ¶¶121-123, 125. Because Plaintiffs have alleged no facts which would plausibly demonstrate a single predicate act, let alone the required "pattern" of such acts, dismissal is appropriate.

c. Plaintiffs Have Not Plausibly Alleged a Conspiracy Under § 1692(d).

A claim under § 1962(d) is necessarily predicated upon a properly pleaded claim under subsections (a), (b), or (c). Because Plaintiffs have failed to adequately plead violations of those other subsections, the § 1962(d) conspiracy allegation fails to state a claim. *Nolen v. Nucentrix Broadband Neflvorks,* 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims). Additionally, Plaintiffs'

conspiracy allegations are conclusory and lack supporting factual details. *See Lovick v. Ritemoney Ltd,* 378 F.3d 433, 437 (5th Cir. 2004) (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss). Plaintiffs' bald insistence that Defendant Smith (or any of the defendants) conspired to participate in a criminal enterprise does not make it so, and is insufficient to support a RICO claim.

4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.

In addition to their RICO claim, Plaintiffs have also asserted four "non-predicate act" claims[5/] against Defendant for civil damages. The first such claim (Claim 44) alleges violations of Sections 1983, 1985 and 242. *See* Compl. at ¶159. Each of these claims is without merit, and is addressed in turn below.

a. Plaintiffs' Section 1983 Claim Should be Dismissed.

Section 1983 "provides a federal cause of action for the deprivation, under the color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw,* 512 U.S. 107, 132 (1994). To state a claim under Section 1983, a plaintiff must allege facts that show that he has been deprived of a right secured by the Constitution and laws of the United States and that the deprivation occurred under color of state law. *See Flagg Bros, Inc. v. Brooks,* 436 U.S. 149, 155 (1978); *Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005).

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[5] This section addresses only those causes of action listed under the "Non-Predicate Act Civil Claims for Damages." While none of these claims specifically mention Smith, in an abundance of caution, she responds to each such claim that globally references the "Defendants." To the extent Plaintiffs also seek individual liability against Smith based on their predicate act claims under 18 U.S.C. §§ 1512 and 1519 (*see* Claims 20 and 21), neither criminal statute creates a private right of action and those claims also should be dismissed. *See Gipson v. Callahan*, MO-97-CA-160, 1997 U.S. Dist. LEXIS 23139, at *17 (W.D. Tex. 1997) (no private right of action under § 1512); *Peavey v. Holder*, 657 F. Supp. 2d 180, 191 (D.D.C. 2009) (no private right of action under § 1519).

(i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights.

Plaintiffs' Section 1983 claim should be dismissed in the first instance because they have not even identified in the Complaint any particular Constitutionally-protected rights that have allegedly been violated. *See Graham v. Connor,* 490, U.S. 386, 394 (1989). True to form, Plaintiffs have instead vaguely and generally stated only that they have been deprived of unspecified "rights, privileges, and immunities secured and protected by the Constitution . . ." and leave it to the Court and the Defendant to speculate as to which one(s). *See* Compl. at ¶159. For this reason alone, Plaintiffs Section 1983 claims should be dismissed.

(ii) Plaintiffs Have Not Alleged State Action.

The requirement that a deprivation occur under color of state law is also known as the "state action" requirement – and Plaintiffs cannot meet it here. *See Bass v. Parlnvood Hasp.,* 180 F.3d 234, 241 (5th Cir. 1999). Smith is a private individual, and Plaintiffs have not alleged otherwise. A private party such as Smith will be considered a state actor for Section 1983 purposes only in rare circumstances. *See Gordon v. Neugebauer,* 57 F.Supp.3d 766, 773 (N.D. Tex. 2014). First, the plaintiff can show that the private actor was implementing an official government policy. *See Rundus v. City of Dallas, Tex.,* 634 F.3d 309, 312 (5th Cir. 2011). Plaintiffs have not identified any official government policy that caused an alleged deprivation of their civil rights, and the first narrow exception is therefore inapplicable here.

Alternatively, a plaintiff can show that a private entity's actions are fairly attributable to the government. *Id*. This is also known as the "attribution test." The Supreme Court has articulated a two-part inquiry for determining whether a private party's actions are fairly attributable to the government: (1) "the deprivation [of plaintiffs constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a

person for whom the State is responsible" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982); *see also Bass,* 180 F.3d at 241.

The Supreme Court utilizes three different tests for determining whether the conduct of a private actor can be fairly attributable to a state actor under the second prong of the attribution test: (1) the nexus or joint-action test, (2) the public function test, and (3) the state coercion or encouragement test. *See Richard v. Hoechst Celanese Chern. Grp., Inc.,* 355 F.3d 345, 352 (5th Cir. 2003); *Lewis v. Law-Yone,* 813 F.Supp. 1247, 1254 (N.D. Tex. 1993) (describing the three tests as applicable to the resolution of the second prong of the attribution test articulated by the Supreme Court in *Lugar*).

Under the "nexus test," a private party may be considered a state actor "where the government has 'so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise,'" and the actions of the private party can be treated as that of the state itself. *Bass,* 180 F.3d at 242; *see also Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982). Plaintiffs have pled no facts which would suggest that any state governmental entity has "insinuated itself into a position of interdependence" with Defendant Smith. Indeed, Plaintiffs fail to plead any facts which would show that Smith ever interacted or communicated with the any state governmental entity regarding the filing of an opposition to a motion for protective order on behalf of her client. Plaintiffs therefore have failed to plead facts that would satisfy the nexus test for state action under Section 1983.

Under the "public function test," a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *Bass,* 180 F.3d at 241-42. Here, Plaintiffs' Complaint is devoid of any facts showing that the representation

of beneficiaries in probate litigation is a function that traditionally is the exclusive province of the state, and Plaintiffs therefore have failed to plead facts that would satisfy the public function test for state action under Section 1983.

Under the "state coercion test," "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass,* 180 F.3d at 242. State coercion or compulsion can be found where the plaintiff establishes that the private defendants were engaged in a conspiracy with state officials. *See Tebo v. Tebo,* 550 F.3d 492, 496 (5th Cir. 2008).

To establish such a conspiracy, the plaintiff must show that the private and public actors entered into an agreement to commit an illegal act. *Id.* At the motion to dismiss stage, the plaintiff must "allege specific facts to show an agreement." *See id.* (quoting *Priester v. Lowndes Cnty.,* 354 F.3d 414, 421 (5th Cir. 2004)). Here, Plaintiffs have not included any facts in their Complaint which would suggest that Defendant Smith entered into any agreement with, or was acting at the behest of, any government official when she prepared an opposition to a motion for protective order on behalf of her client. There are simply no facts pleaded which would, if true, show the existence of such an agreement. Plaintiffs thus have failed to plead facts showing that Defendant Smith was coerced or encouraged by any governmental entity sufficient to satisfy the state coercion test. *Priester,* 354 F.3d at 420 (conspiracy alleges that are "merely conclusory, without reference to specific facts," will not survive a motion to dismiss).

Because Plaintiffs have failed to establish the necessary state action, their Section 1983 claim should be dismissed.

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

To state a §1985 claim, a plaintiff must plead: (1) a conspiracy involving two or more persons, (2) to deprive, directly or indirectly, a person or class of persons of equal protection of the laws, (3) that one or more of the conspirators committed an act in furtherance of that conspiracy (4) which causes injury to another in his person or property or a deprivation of any right or privilege he has as a citizen of the United States, and (5) the conspirators' action is motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983); *Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir. 1989). Plaintiffs' §1985 claim fails for several reasons.

Plaintiffs have not alleged any facts to support any of these elements. Plaintiffs identify no specific "right of privilege" that has been deprived. *See* Compl. at ¶159 (generally and vaguely alleging the deprivation of "rights, privileges, and immunities secured and protected by the Constitution and laws of the United States."). Plaintiffs likewise fail to plead with particularity a conspiracy or any overt acts. *Compare Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1346 (N.D. Tex. 1986) (plaintiff must plead existence of conspiracy and overt acts with particularity), *with* Compl. at ¶129 ("Defendants . . . did willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice . . . ."). Finally, the Complaint is devoid of any factual allegations demonstrating that Plaintiffs are members of a protected class, or that any of the alleged "conspiracy" and "overt acts" were modified by class-based discriminatory animus. Simply put, Plaintiffs have once again conclusively alleged a violation of the law, without stating the basis for the alleged violation. *See Anderson*, 554 F.3d at 528 ("a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws.").

For these reasons, Plaintiffs' Section 1985 claim should be dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

Section 242 is the criminal analogue to Section 1983 and does not provide for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989). Plaintiffs' claim that Defendant has conspired to violate Section 242 therefore should be dismissed without further inquiry.

5. Plaintiffs' Remaining Non-Predicate Act Claims (Claims 45, 46 and 47) are all Barred by Attorney Immunity.

Plaintiffs' remaining Non-Predicate Act Claims, which allege "aiding and abetting breach of fiduciary duty," "aiding and abetting misapplication of fiduciary" and "tortious interference with inheritance expectancy," all arise under Texas law and, for the reasons more fully stated in Section II(A)(4) of this Motion, are barred by attorney immunity. *See* Compl. at ¶¶160-66.

III.
CONCLUSION

Accordingly, Defendant respectfully requests that the Court grant her Motion to Dismiss and dismiss Plaintiffs' claims with prejudice, and for such other and further relief, at law or in equity, to which Defendant may show herself to be justly entitled.

Respectfully submitted,

By: */s/ Barry Abrams*

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a true and correct copy of the foregoing and/or attached instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure through the Southern District of Texas CM/ECF E-File System and as indicated below:

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/s/ Barry Abrams
Barry Abrams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFF'S ANSWER TO DEFENDANT JASON OSTROM'S FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) MOTION TO DISMISS

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I. Nature and Stage of the Proceedings

1. Plaintiffs brought the above titled action pursuant to 18 U.S.C. §1964(c) alleging Racketeer Influenced Corrupt Organization Act violations of 18 U.S.C. §1962(c) and 18 U.S.C. §1962(d), both individually and as private attorneys general on behalf of the public trust, on July 5, 2016 in the Southern District of Texas.

2. On October 31, 2016, Defendant Jason Ostrom filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt 78).

II. Contextual Summary

3. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas.

4. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl Brunsting, Carole Brunsting, and Defendants Amy Brunsting and Anita Brunsting. (Dkt 33-1, 33-2 and 33-3)

5. Neither Plaintiff Curtis nor any of her siblings is an heir to, and none has inheritance expectancy, from the "Brunsting Estates" (Dkt 41-3 and 41-4)[1].

III. History of "The Trust"

6. In 1996 Elmer Brunsting and his wife Nelva Brunsting created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue, as well as for their remaindermen grandchildren and great grandchildren. (Dkt 34-1)

7. The Brunstings restated their Trust in 2005 (Dkt 33-2) removing Anita Brunsting as successor trustee and appointing Carl and Amy Brunsting as successor co-trustees, and naming Candace Curtis as alternate.

8. The Brunstings amended their restatement in 2007 (Dkt 33-3), to remove Amy Brunsting as a successor co-trustee, appointing Candace in her place, and naming Frost Bank as the alternate. It would appear from this sequence of events that Elmer and Nelva sought to prevent what has since occurred.

9. Elmer Brunsting was declared incompetent in June 2008 and on July 1, 2008 the first illicit successor trustee appointment to the Brunsting Trust was apparently drafted and notarized by Candace Kunz-Freed, claiming a change in jointly selected successor trustees had been made by Nelva Brunsting alone. (Exhibit 1) That instrument portends to have placed Anita Brunsting back in a trustee position.

10. Elmer Brunsting passed on April 1, 2009. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and its assets were divided between an irrevocable decedent's trust and a revocable survivor's trust (Dkt 34-2 Articles III & VII).

[1] See *Curtis v Brunsting* 704 F.3d 406 regarding the Brunsting inter vivos Trusts

11. First named successor co-trustee Carl Brunsting fell ill with encephalitis on or about July 3, 2010 and by August 25, 2010 the extortion instrument[2] had been drafted and notarized by Candace Freed, naming Anita and Amy Brunsting successor co-trustees.

IV. A History of the Litigation

12. Candace Curtis v Anita and Amy Brunsting is a breach of fiduciary action seeking accounting and disclosures, filed in the Southern District of Texas on February 27, 2012, (Exhibit 2) and was dismissed under the Probate exception to federal diversity jurisdiction March 8, 2012. Plaintiff Curtis filed a timely notice of appeal.

13. On March 9, 2012 Defendant Bobbie Bayless filed a Petition to take depositions before suit in the Harris County District Court styled, "In Re: Carl Henry Brunsting. (Exhibit 3)

14. On January 9, 2013 the Fifth Circuit issued a unanimous opinion with Order for Reverse and Remand published *Curtis v Brunsting 704 F.3d 406* (Dkt 34-4).

15. On January 29, 2013 Defendant Bobbie Bayless filed a suit in the Harris County District Court against Defendants Vacek & Freed, in the name of the "Estate of Nelva Brunsting" raising only trust related issues. (Dkt 34-5)

16. In late 2013 Plaintiff Curtis enlisted the assistance of Houston Attorney Jason Ostrom.

17. Immediately upon appearing as Plaintiff Curtis' representative in the federal lawsuit, Curtis v Brunsting 4:12-cv-592, Defendant Jason Ostrom arranged a remand to the Harris County Probate Court to consolidate Plaintiff Candace Curtis' lawsuit with that of her brother Plaintiff Carl Brunsting, (Dkt 26-1) allegedly to afford complete relief to the parties.

18. It should be noted that Ostrom amended Curtis' federal complaint to add Carl Henry Brunsting as an "Involuntary Plaintiff", in order to pollute diversity so he could perfect a remand

[2] The alleged August 25, 2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment Under Living Trust Agreement" a.k.a. 8/25/2010 QBD.

to state court to consolidate the first filed Plaintiff, Candace Curtis, with later filed state court Plaintiff Carl Brunsting, where federal plaintiff Curtis was named a Defendant only. (Dkt 34-7) (see also Dkt 57-1 and 57-2)

19. Defendant Ostrom thereafter abandoned "Plaintiff Curtis" and "Curtis v Brunsting" in the probate court record, pleading only under the heading of "Estate of Nelva Brunsting" (Exhibits 4 and 5 attached).

V. Statement of the Issues

1. Plaintiffs have not adequately pleaded the necessary predicate acts;
2. The plaintiffs have not stated a RICO claim under section 1962(c);
3. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b);
4. Plaintiffs have failed to plead reliance in connection with their fraud related claims;
5. Plaintiffs failed to plead a cognizable RICO enterprise;
6. Plaintiffs enterprise allegations are too vague and conclusory
7. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

VI. The Argument

20. The RICO complaint articulates, with specificity, more than 40 events, each of which is listed as a RICO predicate act at 18 U.S.C. §1961(1) and each Defendant is accused of in-concert aiding and abetting. It is unnecessary for Plaintiffs to plead that each defendant personally committed two or more predicate acts.

> *To be convicted of conspiracy to violate RICO under § 1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts, such as bribery, requisite for a substantive RICO offense under § 1962(c). Section 1962(d)-which forbids "any person to conspire to violate" § 1962(c)-is even more comprehensive than the general conspiracy provision applicable to federal crimes, § 371, since it contains no requirement of an overt or specific act to effect the conspiracy's object. Presuming Congress intended the "to conspire" phrase to have its ordinary meaning under the criminal law, see Morissette v. United States, 342 U. S. 246, 263, well-established principles and contemporary understanding demonstrate that, although a conspirator must intend to further an*

> *endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, it suffices that he adopt the goal of furthering or facilitating the criminal endeavor, and he need not agree to undertake all of the acts necessary for the crime's completion. Salinas' contrary interpretation of § 1962(c) violates the foregoing principles and is refuted by Bannon v. United States, 156 U. S. 464, 469. Its acceptance, moreover, is not required by the rule of lenity, see United States v. Shabani, 513 U. S. 10, 17. Even if Salinas did not accept or agree to accept two bribes, there was ample evidence that the sheriff committed at least two predicate acts when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme, and this is sufficient to support Salinas' conviction under § 1962(d). Pp. 61-66. United States v Salinas 654 F.2d 319*

21. It is also only necessary to show the defendant associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture successful. *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997). Jason Ostrom's conduct inarguably meets and exceeds this criterion.

22. A defendant associates with a criminal venture if he shares in the criminal intent of the principal, and the defendant participates in criminal activity if he has acted in some affirmative manner designed to aid the venture. *Landerman*, 109 F.3d at 1068 n.22. The level of participation may be of relatively slight moment. *Leos-Quijada*, 107 F.3d at 794. Also, it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established. *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996).[3]

23. Jason Ostrom's overt acts clearly intended to convert the Brunsting trusts into assets of a probate estate by masquerading Curtis v Brunsting behind an "estate" label.

VII. Res Judicata and Collateral Estoppel

1. <u>The Brunsting Trusts are not a Probate Matter</u>

24. The Brunsting Trusts are not assets belonging to the Estates of Elmer or Nelva Brunsting and are not subject to probate administration.

[3] US Attorneys' Criminal Resource Manual CRM 2474

25. That finding of fact and conclusion of law was settled by the Justices of the Fifth Circuit Court of Appeals[4] when Plaintiff Curtis' original petition survived the probate exception to federal diversity jurisdiction.

26. Moreover, the "Estate" inventory (Dkt 41-7) approved March 27, 2013, contains only an old car and the claims pending against Vacek and Freed in the Harris County District Court and was followed immediately by two drop orders. (Dkt 41-5 and 6).

27. The Fifth Circuit Court of Appeals on review held that Curtis v Brunsting was a matter relating only to an inter vivos trust not in the custody of a state court, that the assets in the inter vivos trust were not assets belonging to any "Estate" and were not subject to probate administration. (Dkt 34-4)

28. Defendant Ostrom, (Dkt 78) like Defendants Vacek & Freed (Dkt 19 and 20), Bobbie Bayless (Dkt 23), Jill Willard Young (Dkts 25, 38), Anita Brunsting (Dkt 30) Amy Brunsting (Dkt 35), Steven Mendel/Bradley Featherston (Dkt 36), Neal Spielman (Dkt 39 and 40), Christine Riddle Butts, Clarinda Comstock and Tony Baiamonte (Dkt 53), claim the Racketeer Influenced Corrupt Organization Act action before this Honorable Court arises from a "Probate Case" or "Probate Matter". However, the so called "Probate Matter" does not speak to anything but the Brunsting Trusts.

29. The Fifth Circuit found that Plaintiff Curtis' federal lawsuit was exclusively related to the Brunsting inter vivos Trusts, that those trusts were not in the custody of any state court, that trust assets were not property of any estate and that even though the wills had been since filed and there was an ongoing probate of the estate, the assets in an inter vivos trust are not property

[4] Curtis v. Brunsting 704 F.3d 406

belonging to an estate and would not be subject to probate administration. Jason Ostrom's remand to state court did not change that.

30. The Circuit Court also noted that the only heir to the Estates of Elmer and Nelva Brunsting was the Brunsting Trust.

31. The Circuit Court also reiterated the long standing doctrine of custodia legis, citing to the United States Supreme Court in Marshall v. Marshall[5] for the proposition that no court can assume in rem jurisdiction over a res in the custody of another court. (Dkt 34-4)

32. Two actions were filed in state courts subsequent to Curtis reverse and remand back to the federal Court. Both state court suits were brought in the name of the "Estate of Elmer and Nelva Brunsting" and both suits raised only claims relating to the Brunsting trusts, then in the custody of a federal Court.

33. Federal Plaintiff Curtis is not an heir to any estate and neither are the other trust beneficiaries. The trust is the only heir to any estate and alleged trespass against the trust is against the named beneficiaries, not against any estate. Plaintiff Curtis is a real party in interest in the Brunsting Trusts, but not in any estate.

34. Defendant Ostrom admits to causing the case of Curtis v Brunsting 5:12-cv-592 to be remanded to Harris County Probate Court. However, Mr. Ostrom characterizes the remand as *"remanding the case **back** to Harris County Probate Number 4"*, (Dkt 78 Page 4 of 24 unnumbered paragraph 7), as if to imply Plaintiff Curtis was some kind of escapee being returned to the custody of Harris County Probate Number 4, when Plaintiff Curtis had never been to Harris County Probate Court and had no claims pending there.

[5] 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).

35. Plaintiff Curtis retained Defendant Jason Ostrom in the federal court matter under the letterhead of Ostrom/Sain. After effecting a remand to state probate court Ostrom pled exclusively under the heading "Estate of Nelva Brunsting", which Plaintiff Curtis' lawsuit is not.

VIII. Sufficiency of the Pleadings

36. Defendant Ostrom claims Plaintiffs fail to plead a cognizable RICO claim, enterprise, fraud based acts, reliance or proximate cause.

37. Such assertions can only be ground upon an unfamiliar view of the law, as surely Defendant cannot honestly plead ignorance of his acts or the facts when his proclaimed station requires him to be knowledgeable of the records and pleadings in the cases he claims to be an attorney in.

38. Plaintiffs more than adequately plead Harris County Probate Court as both the RICO enterprise and a victim of the racketeering activity.

39. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), the Supreme Court stated:

> *The Court has held that RICO both protects a legitimate "enterprise" from those who would use unlawful acts to* ***victimize*** *it, United States v. Turkette, 452 U.S. 576, 591 (1981), and also protects the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful . . . activity is committed," National Organization for Women, Inc., 510 U.S. [249,] 259 (1994).*

40. Plaintiffs plead cognizable predicate acts with the necessary particularity and Plaintiffs plead acts demonstrative of conspiracy and of aiding and abetting with more particularity in each reply to motions to dismiss.

41. This Probate Bully Mob of RICO Defendants fully intended to trap the Brunsting siblings in a cycle of vacuous paper exchanges to maximize attorney billing profits while resolving

absolutely nothing on the public record, in order to protect the racketeering activity from discovery and investigation by legitimate law enforcement resources.

42. Each of the "RICO Defendants" aided and abetted the conspiracy in violation of 18 U.S.C. §§2 and 1962(d) and now come before this Honorable Court claiming their attempt to bust the Brunsting trusts for their own personal gain is a bitter sibling dispute over the administration of their parents' estate. Nothing could be further from the truth.

43. While real damages are difficult to calculate without fiduciary disclosures, the additional injury resulting from five years of improperly motivated "litigation" posturing, directly and proximately caused by these Defendants illicit conduct, are tangible, concrete, calculable and a matter of public record.

44. Every one of the Brunsting beneficiaries has been injured by the fraud perpetrated on the federal and state courts, upon the Brunsting family and upon Plaintiffs by these Defendants.

45. Jason Ostrom was instrumental in the plot to treat the Brunsting Trusts as if they were a probate asset and his feigned ignorance of the legal precedents set by pro se Curtis in this extended Brunsting Trusts litigation, is in direct conflict with his fiduciary obligation to know.

46. Defendant Jason Ostrom's feigned ignorance of law and fact are not defenses.

47. Defendant Ostrom also makes dubious statements regarding Plaintiff Munson's participation in protecting Plaintiff Curtis' property interest and those of the Brunsting trusts.

48. That participation is common knowledge and a matter of public record.

49. The name Rik Munson appears for the first time at Docket entry 9 in Curtis' original federal lawsuit and appears a total of ten times in the Official record on Appeal to the Fifth Circuit in 2012. (CA No. 12-20164)

IX. Amendment and Adoption by Reference

50. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and Federal Rule of Civil Procedure 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, this reply, the replies yet unfiled and the attached exhibits as if fully expressed therein;

51. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings and the claims stated therein, as exhibits in support of Plaintiffs' Complaint, as if originally attached thereto, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, 84 and those yet unfiled as if fully attached as exhibits thereto.

X. Conclusion

52. Defendant Jason Ostrom told the Honorable Judge Kenneth Hoyt in his application for approval of his First Amended Complaint that the purpose for a remand to state court was to consolidate with Plaintiff Carl Brunsting in order to afford complete relief to the parties.

53. Defendant Ostrom deprived Plaintiff Curtis of a federal judicial forum and access to the only Court of competent jurisdiction under false pretexts, by presenting unopposed motions to amend Plaintiff Curtis' federal complaint and to remand to Harris County Probate Court.

54. The Brunsting Trusts are the only heir to the "Estates of Elmer and Nelva Brunsting". Trust assets are not property belonging to the "Estates", and are not subject to probate administration, yet each of these Defendants insist this RICO lawsuit arises out of a dispute between siblings over inheritance expectancies and the administration of an estate and others

have pled Plaintiffs are disgruntled litigants seeking vengeance for being on the losing end of fully litigated state court determinations.

55. For the last five years, these Defendants have each participated in denying Plaintiff Curtis and each of the Brunsting siblings the enjoyment of their parents' benevolence. Each has engaged in gaming the judicial process, posing as advocates, to maximize fees and resolve nothing, while holding resolution of the Brunsting trusts hostage under a probate administration pretext.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) Motion to Dismiss filed by Defendant Jason Ostrom October 31, 2016, (Dkt 78) and hold this Defendant to answer.

Respectfully submitted,

November 18, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on November 18, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

7/1/08 Appt of Succ. Trustees

APPOINTMENT OF SUCCESSOR TRUSTEES

WHEREAS, NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, is a Founder of the Brunsting Family Living Trust dated October 10, 1996, as amended, (the "Trust Agreement"); and,

WHEREAS, Pursuant to Article IV, Section B, of the Brunsting Family Living Trust entitled "Our Successor Trustees," an original Trustee will have the right to appoint his or her own successor or successors to serve as Trustees in the event that such original Trustee ceases to serve by reason of death, disability or for any other reason, as well as specify conditions relevant to such appointment; and,

WHEREAS, ELMER H. BRUNSTING is no longer able to manage his financial affairs, as is evidenced by the physicians' letters attached. Therefore, pursuant to Article IV, Section B, of the Brunsting Family Living Trust Agreement, the remaining original Trustee, NELVA E. BRUNSTING, continues to serve alone

WHEREAS, the said NELVA E. BRUNSTING is desirous of her right as original Trustee to designate, name and appoint her own successors to serve as Trustees in the event that she ceases to serve by reason of death, disability or for any other reason, as well as specify conditions of such appointment;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

NELVA E. BRUNSTING makes the following appointment:

If I, NELVA E. BRUNSTING, fail or cease to serve by reason of death, disability or for any other reason, then the following individuals will serve as successor Co-Trustees:

CARL HENRY BRUNSTING and ANITA KAY BRUNSTING

CARL HENRY BRUNSTING and ANITA KAY BRUNSTING shall each have the authority to appoint his or her own successor Trustee by appointment in writing.

If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then CANDACE LOUISE CURTIS shall serve as sole successor Trustee. In the event CANDACE LOUISE CURTIS is unable or unwilling to serve, then THE FROST NATIONAL BANK shall serve as sole successor Trustee.

In order to maintain the integrity of the Trust Agreement and to meet my estate planning desires and goals, my Trustees shall comply with the directive set forth below to assure compliance with the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

1. Successor Trustee Required to Provide an Authorization For Release of Protected Health Information

Each successor Trustee (or Co-Trustee) shall be required to execute and deliver to the Co-Trustee (if any) or next successor Trustee an "Authorization for Release of Protected Health Information" pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and any other similarly applicable federal and state laws, authorizing the release of said successor's protected health and medical information to said successor's Co-Trustees (if any) and to all alternate successor Trustees (or Co-Trustees) named under this document or any subsequent documents signed by the Founders, to be used only for the purpose of determining in the future whether said successor has become incapacitated (as defined in the Trust Agreement).

If said successor is already acting in the capacity of Trustee (or Co-Trustee) and fails to so execute and deliver such Authorization within thirty (30) days of actual notice of said requirement, or if an event has occurred which triggers said successor's power to act but said successor has not yet begun to act in said capacity and fails to so execute and deliver such Authorization within thirty (30) days of actual notice of said requirement, then for purposes of the Trust Agreement, said successor shall be deemed incapacitated.

"Actual notice" shall occur when a written notice, signed by the Co-Trustees (if any) or next successor Trustee, informing said successor of the need to timely execute and deliver an authorization as set forth above (and, in the case where said successor has not yet begun to act, informing him or her of the event that has triggered said successor's power to act), is (i) deposited in the United States mail, postage prepaid, addressed to the last address of said successor known to the Co-Trustees or next successor Trustee or (ii) hand delivered to said successor, provided such delivery is witnessed by a third party independent from the Co-Trustees or next successor Trustee within the meaning of Internal Revenue Code Sections 672(c) and 674(c) and said witness signs a statement that he or she has witnessed such delivery.

2. Obtain the Release of Protected Health Information

The Trustee is empowered to request, receive and review any information, verbal or written, regarding Founder's physical or mental health, including, but not limited to, protected health and medical information, and to consent to their release or disclosure. The Founder has signed on this same date or an earlier date an "Authorization For Release of Protected Health Information," in compliance with HIPAA, immediately authorizing the release of any and all health and medical information to the Trustee (or next successor Trustee, even if not yet acting) for the purposes of determining the Founder's incapacity (or for other stated purposes therein).

In the event said authorization cannot be located, is by its own terms no longer in force or is otherwise deemed invalid in whole or in part, the Founder hereby grants the Trustee (or next successor Trustee, even if not yet acting) the power and authority, as Founder's legal representative, to execute a new authorization on Founder's behalf, immediately authorizing the release of any and all health and medical information for the purpose of determining the Founder's incapacity (and for the purpose of carrying out any of the Trustee's powers, rights, duties and obligations under this agreement), naming the Trustee (or next successor Trustee even if not yet acting) as the Founder's "Personal Representative," "Authorized Representative" and "Authorized Recipient."

3. Determination of "Incompetence" or "Incapacity"

For purposes of the Trust Agreement, and notwithstanding any other conflicting provisions contained in the Trust Agreement or any previous amendments thereto, the term "incompetency" and/or "incapacity" shall mean any physical or mental incapacity, whether by reason of accident, illness, advanced age, mental deterioration, alcohol, drug or other substance abuse, or similar cause, which in the sole and absolute discretion of the Trustee makes it impracticable for a person to give prompt, rational and prudent consideration to financial matters and, if said disabled person is a Trustee (including an appointed Trustee who has yet to act), (i) a guardian of said person or estate, or both, of said person has been appointed by a court having jurisdiction over such matters or (ii) two (2) attending physicians of said person, who are licensed to practice and who are not related by blood or marriage to such person, have stated in writing that such incompetency or incapacity exists.

If said disabled person is a Trustee (including an appointed Trustee who has yet to act), upon the court determination of the person's competency or capacity or upon the revocation of the writings of the two (2) attending physicians above or upon written determination of competency or capacity to give prompt, rational and prudent consideration to financial matters by two (2) other attending physicians, who are licensed to practice and who are not related by blood or marriage to such person, subject to written notice being given to the then acting successor Trustee, the original Trustee (including an appointed Trustee who has yet to act) removed for "incompetency" or "incapacity" shall be reinstated as Trustee.

Any third party may accept physicians' writings as proof of competency or capacity or incompetency or incapacity as set forth above without the responsibility of further investigation and shall be held harmless from any loss suffered or liability incurred as the result of good faith reliance upon such writings.

In addition to any "Authorization for Release of Protected Health Information" executed by the Founder, the Founder hereby voluntarily waives any physician-patient privilege or psychiatrist-patient privilege and authorizes physicians and psychiatrists to examine them and disclose their physical or mental condition, or other

personal health or medical information, in order to determine their competency or incompetency, or capacity or incapacity, for purposes of this document. Each person who signs this instrument or an acceptance of Trusteeship hereunder does, by so signing, waive all provisions of law relating to disclosure of confidential or protected health and medical information insofar as that disclosure would be pertinent to any inquiry under this paragraph. No Trustee shall be under any duty to institute any inquiry into a person's possible incompetency or incapacity (such as, but not limited to, by drug testing), but if the Trustee does so, the expense of any such inquiry may be paid from the Trust Estate of said person's trust or, if no such trust exists, the Trust Estate of the Trust.

It is the Founder's desire that, to the extent possible, a named successor Trustee be able to act expeditiously, without the necessity of obtaining a court determination of a Founder's incapacity or the incapacity of a preceding appointed successor Trustee (including if that preceding appointed successor Trustee has not yet acted). Therefore, if an Authorization for Release of Protected Health Information executed by a Founder, or an appointed successor Trustee (even if not yet acting), or by a "personal representative" or "authorized representative" on behalf of a Founder or such an appointed successor Trustee, is not honored in whole or in part by a third party such that physicians' writings cannot be obtained as necessitated by this subparagraph, then the Trust Protector named under the Trust Agreement (if any), or if there is no such Trust Protector provided under the Trust Agreement then the next succeeding Trustee (even if not yet acting) who is independent, that is not related to or subordinate to, said Founder or such appointed successor Trustee within the meaning of Internal Revenue Code Section 672(c), may declare in writing said Founder or such appointed successor Trustee to be incapacitated; provided, however, the Trust Protector or next succeeding Trustee making such declaration shall have first made good faith efforts to obtain the physicians' writings described above, and the provisions above relating to reinstatement upon two (2) physicians' written determination of competency or capacity shall continue to apply.

In the event the Trust Agreement does not provide for an Independent Trustee as set forth in the above paragraph, such an Independent Trustee shall be elected by a majority vote of the then current adult income beneficiaries of the trust (or by the legal guardians of all minor or disabled current income beneficiaries) and such Independent Trustee shall not be related to nor subordinate to any of the beneficiaries participating in the said vote within the meaning of Internal Revenue Code 672(c). In the event that there are only two (2) beneficiaries, one of which is acting as Trustee, the remaining beneficiary may appoint such an Independent Trustee who is neither related to nor subordinate to such beneficiary as those terms are defined in and within the meaning of Internal Revenue Code 672(c).

The Founder has signed on this same date or on an earlier date an "Authorization for Release of Protected Health Information," in compliance with HIPAA, immediately authorizing the release of health and medical information to the Trustee (or next

successor Trustee, even if not yet acting), so the Trustee may legally defend against or otherwise resist any contest or attack of any nature upon any provision of the Trust Agreement or amendment to it (or defend against or prosecute any other legal matter within his or her powers set forth in the Trust Agreement). In the event said authorization cannot be located, is by its own terms no longer in force or is otherwise deemed invalid or not accepted in whole or in part, the Founder hereby grants the Trustee (or next successor Trustee, even if not yet acting) the power and authority, as the Founder's legal representative to execute a new authorization on the Founder's behalf, even after Founder's death, immediately authorizing the release of any and all health and medical information for the purpose of determining the Founder's incapacity (and for the purpose of carrying out any of the Trustee's powers, rights, duties and obligations under the Trust Agreement naming the Trustee (or next successor Trustee, even if not yet acting) as the Founder's "Personal Representative," "Authorized Representative" and "Authorized Recipient."

This Appointment of Successor Trustees is effective immediately upon execution of this document by the Founder, with the said successor Trustees to act at such times and in such instances as provided in the Brunsting Family Living Trust dated October 10, 1996, as amended.

All other provisions contained in the Brunsting Family Living Trust October 10, 1996, as amended, are hereby ratified and confirmed and shall remain in full force and effect except to the extent that any such provisions are amended hereby or by previous amendments or appointments still in effect.

WITNESS MY HAND on July 1, 2008.

Nelva E. Brunsting

NELVA E. BRUNSTING,
Founder and Original Trustee

THE STATE OF TEXAS
COUNTY OF HARRIS

This instrument was acknowledged before me on July 1, 2008 NELVA E. BRUNSTING, as Founder and Original Trustee.

Candace L Kunz-Freed

Notary Public, State of Texas

CANDACE LYNNE KUNZ FREED
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MARCH 27, 2011

Cert of Trust

CERTIFICATE OF TRUST

The undersigned Founder hereby certifies the following:

1. This Certificate of Trust refers to a joint revocable living trust agreement executed by ELMER HENRY BRUNSTING, also known as ELMER H. BRUNSTING, and NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, Founders and original Trustees. The full legal name of the subject trust was:

   ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

2. ELMER H. BRUNSTING, died on April 1, 2009. Therefore, pursuant to Article IV, Section B, of the Brunsting Family Living Trust Agreement, the remaining original Trustee, NELVA E. BRUNSTING, continues to serve alone.

3. For purposes of asset allocation, transfer of property into the trust, holding title to assets, and conducting business for and on behalf of the trust, the full legal name of the said trust shall now be known as:

   NELVA E. BRUNSTING, Trustee, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

   The tax identification number of the BRUNSTING FAMILY LIVING TRUST is 481-30-4685.

4. Pursuant to that certain Appointment of Successor Trustees dated July 1, 2008, if the remaining original Trustee fails or ceases to serve as Trustee by reason of death, disability or for any reason, then the following individuals will serve as successor Co-Trustees:

   CARL HENRY BRUNSTING and ANITA KAY BRUNSTING

   CARL HENRY BRUNSTING and ANITA KAY BRUNSTING shall each have the authority to appoint his or her own successor Trustee by appointment in writing.

   If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then CANDACE LOUISE CURTIS shall serve as sole successor Trustee. In the event CANDACE LOUISE CURTIS is unable or unwilling to serve, then THE FROST NATIONAL BANK shall serve as sole successor Trustee.

5. The Trustee under the trust agreement is authorized to acquire, sell, convey, encumber, lease, borrow, manage and otherwise deal with interests in real and personal property in the trust name. All powers of the Trustee are fully set forth in Article XII of the trust agreement.

6. The trust has not been revoked and there have been no amendments limiting the powers of the Trustee over trust property.

7. No person or entity paying money to or delivering property to any Trustee shall be required to see to its application. All persons relying on this document regarding the Trustees and their powers over trust property shall be held harmless for any resulting loss or liability from such reliance.

A copy of this Certificate of Trust shall be just as valid as the original.

The undersigned certifies that the statements in this Certificate of Trust are true and correct and that it was executed in the County of Harris, in the State of Texas, on February 24, 2010.

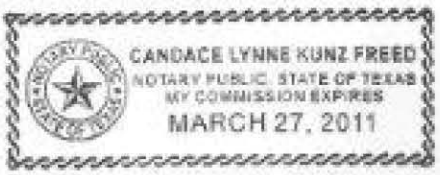
Nelva E. Brunsting

NELVA E. BRUNSTING,
Founder and Trustee

STATE OF TEXAS
COUNTY OF HARRIS

The foregoing Certificate of Trust was acknowledged before me on February 24, 2010, by NELVA E. BRUNSTING, as Founder and Trustee.

Witness my hand and official seal.



Candace Lynne Kunz Freed

Notary Public, State of Texas

2/24/10 Exhibit Dis Trust - Cert of Trust

CERTIFICATE OF TRUST
FOR THE
ELMER H. BRUNSTING **DECEDENT'S TRUST**

The undersigned Founder hereby certifies the following:

1. This Certificate of Trust refers to a joint revocable living trust agreement executed by ELMER HENRY BRUNSTING, also known as ELMER H. BRUNSTING, and NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, Founders and original Trustees. The full legal name of the original trust was:

   ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

2. ELMER H. BRUNSTING died on April 1, 2009. Therefore, pursuant to Article IV, Section B, of the Brunsting Family Living Trust agreement, the remaining original Trustee, NELVA E. BRUNSTING, continues to serve alone.

3. The BRUNSTING FAMILY LIVING TRUST authorized the creation of the subsequent irrevocable trust known as the ELMER H. BRUNSTING **DECEDENT'S TRUST**. For purposes of asset allocation, transfer of property into the Decedent's Trust, holding title to assets, and conducting business for and on behalf of the trust, the full legal name of the Decedent's Trust shall now be known as:

   NELVA E. BRUNSTING, Trustee, or the successor Trustees, of the ELMER H. BRUNSTING DECEDENT'S TRUST dated April 1, 2009, as established under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

   The tax identification number of the ELMER H. BRUNSTING **DECEDENT'S TRUST** is 27-6453100. The Trust is irrevocable and no longer qualifies as a grantor trust.

   An acceptable abbreviation for account titling is as follows:

   NELVA E. BRUNSTING, Tee of the ELMER H. BRUNSTING DECEDENT'S TR dtd 4/1/09, as est UTD 10/10/96.

4. Pursuant to that certain Appointment of Successor Trustees dated July 1, 2008, if the said NELVA E. BRUNSTING, the surviving original Trustee, fails or ceases to serve as Trustee by reason of death, disability or for any reason, then the following individuals will serve as successor Co-Trustees:

   CARL HENRY BRUNSTING and ANITA KAY BRUNSTING

CARL HENRY BRUNSTING and ANITA KAY BRUNSTING shall each have the authority to appoint his or her own successor Trustee by appointment in writing.

If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then CANDACE LOUISE CURTIS shall serve as sole successor Trustee. In the event CANDACE LOUISE CURTIS is unable or unwilling to serve, then THE FROST NATIONAL BANK shall serve as sole successor Trustee.

5. The Trustee under the trust agreement is authorized to acquire, sell, convey, encumber, lease, borrow, manage and otherwise deal with interests in real and personal property in the trust name. All powers of the Trustee are fully set forth in Article XII of the trust agreement.

6. The trust has not been revoked and there have been no amendments limiting the powers of the Trustee over trust property.

7. No person or entity paying money to or delivering property to any Trustee shall be required to see to its application. All persons relying on this document regarding the Trustees and their power over trust property shall be held harmless for any resulting loss or liability from such reliance.

A copy of this Certificate of Trust shall be just as valid as the original.

The undersigned certifies that the statements in this Certificate of Trust are true and correct and that it was executed in the County of Harris, in the State of Texas, on February 24, 2010.

Nelva E. Brunsting

NELVA E. BRUNSTING,
Founder and Trustee

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

The foregoing Certificate of Trust was acknowledged before me on February 24, 2010, by NELVA E. BRUNSTING as Founder and Trustee.

Witness my hand and official seal.

Candace Lkunz Freed

Notary Public, State of Texas

CANDACE LYNNE KUNZ FREED
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MARCH 27, 2011

United States District Court

for the

Southern District of Texas

CANDACE LOUISE CURTIS, Plaintiff,	§ § § §	
VS.	§ § §	Civil Action No._____
ANITA KAY BRUNSTING, and AMY RUTH BRUNSTING And Does 1-100 Defendants	§ § § §	Jury Trial Demanded

PLAINTIFF'S ORIGINAL PETITION, COMPLAINT AND APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER, ASSET FREEZE, TEMPORARY AND PERMANENT INJUNCTION.

I.
Parties

1. Plaintiff, Candace Louise Curtis, is a citizen of the State of California. Defendant Anita Kay Brunsting, is a citizen of the State of Texas and Defendant Amy Ruth Brunsting a citizen of the State of Texas.

II.
Jurisdiction and Venue

2. This Court has federal subject matter and diversity jurisdiction of the state law claims alleged herein pursuant to 28 USC §1332 (a) (1) - 28 USC §1332 (b) and 28 USC §1332 (C) (2) in that this action is between parties who

Pg-11

2012 14538

NO. _____

IN RE: CARL HENRY BRUNSTING	§	**IN THE DISTRICT COURT OF**
	§	
	§	**HARRIS COUNTY, TEXAS**
	§	
	§	80 **JUDICIAL DISTRICT**

CARL HENRY BRUNSTING'S
VERIFIED PETITION TO TAKE DEPOSITIONS BEFORE SUIT

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, Carl Henry Brunsting ("Petitioner"), asks the court for permission to take depositions by oral examination and/or on written questions to obtain testimony and documents to investigate his potential proceedings involving Anita Kay Brunsting **("Anita"),** Amy Ruth Brunsting **("Amy"),** Vacek & Freed, PLLC **("Vacek"),** and Candace L. Kunz-Freed ("Freed") as authorized by Tex. R. Civ. P. 202.3(a), and in support thereof would show as follows:

1. Petitioner is a resident of Harris County, Texas and is one of the heirs of the estates of his parents, Elmer and Nelva Brunsting, who both resided in Harris County, Texas until their deaths. Petitioner is also one of the beneficiaries of the Brunsting Family Living Trust (the "Family Trust") and other trusts arising therefrom, as well as other trusts and estate planning tools implemented by his parents. Petitioner held a power of attorney for his mother, is the personal representative named in his mother's will, and was previously named to become the successor trustee of the Family Trust upon his mother's death.

2. The parties sought to be deposed and the documents, if any, to be requested of the witnesses are:

A. Vacek, a professional limited liability company formed under the laws of Texas doing business in Harris County, Texas which may be served through its registered agent, Albert E. Vacek, Jr., at 11777 Katy Freeway, Suite 300,

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

CANDACE LOUISE CURTIS, PLAINTIFF	§ §	
VS.	§	CIVIL ACTION NO. 4:12-CV-00592
	§	JUDGE KENNETH M. HOYT
ANITA KAY BRUNSTING, AMY RUTH BRUNSTING, AND DOES 1-100, DEFENDANTS	§ § § §	JURY TRIAL DEMANDED

PLAINTIFF'S FIRST AMENDED PETITION

I. PARTIES

1. Plaintiff, Candice Louis Curtis is a citizen of the State of California.

2. Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has answered and appeared herein.

3. Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has answered and appeared herein.

4. Necessary Party and involuntary plaintiff is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas and is expected to waive the issuance of citation. He is being added to effectuate complete relief regarding the claims and to avoid the risk of inconsistent judgments being rendered.

5. Necessary Party is Carole Ann Brunsting, who is a citizen of the State of Texas, and who can be served with citation at 5822 Jason St., Houston, Texas 77074. She is being added to effectuate complete relief regarding the claims and to avoid the risk of inconsistent judgments being rendered.

II. JURISDICTION AND VENUE

6. This Court had jurisdiction of the state law claims alleged herein pursuant to 28 USC § 1332(a)(1) – 28 USC § 1332(b), and 28 USC § 1332(C)(2) in that this action is between parties who are citizens of different states and the amount in controversy exceeds the sum of $75,000.00, exclusive of interests and costs. Jurisdiction may be destroyed if all necessary parties are joined.

7. The Res in this matter includes assets belonging to the Brunsting Family Living Trust ("Trust") and assets belonging to the Estate of Nelva Brunsting, Deceased, under the care and control of Necessary Party Carl Brunsting.

III. NATURE OF ACTION

8. This action arises out of the misappropriate and mismanagement of assets that belonged to Nelva Brunsting during her life and of assets that belonged to the Brunsting Family Trust, and the execution of invalid documents seeking to amend the Brunsting Family Trust.

IV. CAUSES OF ACTION

9. Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff , Carl Brunsting, and Carole Brunsting, a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment

interest and costs of court.

10. Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.

11. Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.

12. Money Had and Received. Defendants have taken money that belongs in equity and good conscience to Plaintiff,and has done so with malice and through fraud. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

13. Conversion. Defendants have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have

wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brusting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court costs, both individually and on behalf of the Decedent's Estate.

14. Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

15. Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

16. Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance

with the Texas Property Code.

V. JURY DEMAND

17. Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

18. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

OSTROM/Sain
A limited Liability Partnership

BY: */s/ Jason B. Ostrom*
JASON B. OSTROM
(Fed. Id. #33680)
(TBA #24027710)
NICOLE K. SAIN THORNTON
(TBA #24043901)
5020 Montrose Blvd., Ste. 310
Houston, Texas 77006
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service on known Filing Users will be automatically accomplished through the Notice of Electronic Filing. Additionally, this document will be served by copy to any attorney-of-record for those parties in state court litigation.

/s/ Jason B. Ostrom
Jason B. Ostrom

PROBATE COURT 4

DM

DATA-ENTRY
PICK UP THIS DATE

CAUSE NO. 412,249

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

PLAINTIFF'S SECOND AMENDED PETITION

JURY FEE PAID

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

This Court had jurisdiction pursuant to Sections 32.002(c) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, Defendants Rule 12(b)(1) and 12(b)(6) Motions to Dismiss filed on October 31, 2016, by Defendant Jason Ostrom in the above styled cause (Dkt 78), should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFF'S ANSWER TO DEFENDANT JASON OSTROM'S FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) MOTION TO DISMISS

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I. Nature and Stage of the Proceedings

1. Plaintiffs brought the above titled action pursuant to 18 U.S.C. §1964(c) alleging Racketeer Influenced Corrupt Organization Act violations of 18 U.S.C. §1962(c) and 18 U.S.C. §1962(d), both individually and as private attorneys general on behalf of the public trust, on July 5, 2016 in the Southern District of Texas.

2. On October 31, 2016, Defendant Jason Ostrom filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt 78).

II. Contextual Summary

3. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas.

4. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl Brunsting, Carole Brunsting, and Defendants Amy Brunsting and Anita Brunsting. (Dkt 33-1, 33-2 and 33-3)

5. Neither Plaintiff Curtis nor any of her siblings is an heir to, and none has inheritance expectancy, from the "Brunsting Estates" (Dkt 41-3 and 41-4)[1].

III. History of "The Trust"

6. In 1996 Elmer Brunsting and his wife Nelva Brunsting created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue, as well as for their remaindermen grandchildren and great grandchildren. (Dkt 34-1)

7. The Brunstings restated their Trust in 2005 (Dkt 33-2) removing Anita Brunsting as successor trustee and appointing Carl and Amy Brunsting as successor co-trustees, and naming Candace Curtis as alternate.

8. The Brunstings amended their restatement in 2007 (Dkt 33-3), to remove Amy Brunsting as a successor co-trustee, appointing Candace in her place, and naming Frost Bank as the alternate. It would appear from this sequence of events that Elmer and Nelva sought to prevent what has since occurred.

9. Elmer Brunsting was declared incompetent in June 2008 and on July 1, 2008 the first illicit successor trustee appointment to the Brunsting Trust was apparently drafted and notarized by Candace Kunz-Freed, claiming a change in jointly selected successor trustees had been made by Nelva Brunsting alone. (Exhibit 1) That instrument portends to have placed Anita Brunsting back in a trustee position.

10. Elmer Brunsting passed on April 1, 2009. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and its assets were divided between an irrevocable decedent's trust and a revocable survivor's trust (Dkt 34-2 Articles III & VII).

[1] See *Curtis v Brunsting* 704 F.3d 406 regarding the Brunsting inter vivos Trusts

11. First named successor co-trustee Carl Brunsting fell ill with encephalitis on or about July 3, 2010 and by August 25, 2010 the extortion instrument[2] had been drafted and notarized by Candace Freed, naming Anita and Amy Brunsting successor co-trustees.

IV. A History of the Litigation

12. Candace Curtis v Anita and Amy Brunsting is a breach of fiduciary action seeking accounting and disclosures, filed in the Southern District of Texas on February 27, 2012, (Exhibit 2) and was dismissed under the Probate exception to federal diversity jurisdiction March 8, 2012. Plaintiff Curtis filed a timely notice of appeal.

13. On March 9, 2012 Defendant Bobbie Bayless filed a Petition to take depositions before suit in the Harris County District Court styled, "In Re: Carl Henry Brunsting. (Exhibit 3)

14. On January 9, 2013 the Fifth Circuit issued a unanimous opinion with Order for Reverse and Remand published *Curtis v Brunsting 704 F.3d 406* (Dkt 34-4).

15. On January 29, 2013 Defendant Bobbie Bayless filed a suit in the Harris County District Court against Defendants Vacek & Freed, in the name of the "Estate of Nelva Brunsting" raising only trust related issues. (Dkt 34-5)

16. In late 2013 Plaintiff Curtis enlisted the assistance of Houston Attorney Jason Ostrom.

17. Immediately upon appearing as Plaintiff Curtis' representative in the federal lawsuit, Curtis v Brunsting 4:12-cv-592, Defendant Jason Ostrom arranged a remand to the Harris County Probate Court to consolidate Plaintiff Candace Curtis' lawsuit with that of her brother Plaintiff Carl Brunsting, (Dkt 26-1) allegedly to afford complete relief to the parties.

18. It should be noted that Ostrom amended Curtis' federal complaint to add Carl Henry Brunsting as an "Involuntary Plaintiff", in order to pollute diversity so he could perfect a remand

[2] The alleged August 25, 2010 "Qualified Beneficiary Designation and Testamentary Power of Appointment Under Living Trust Agreement" a.k.a. 8/25/2010 QBD.

to state court to consolidate the first filed Plaintiff, Candace Curtis, with later filed state court Plaintiff Carl Brunsting, where federal plaintiff Curtis was named a Defendant only. (Dkt 34-7) (see also Dkt 57-1 and 57-2)

19. Defendant Ostrom thereafter abandoned "Plaintiff Curtis" and "Curtis v Brunsting" in the probate court record, pleading only under the heading of "Estate of Nelva Brunsting" (Exhibits 4 and 5 attached).

V. Statement of the Issues

1. Plaintiffs have not adequately pleaded the necessary predicate acts;
2. The plaintiffs have not stated a RICO claim under section 1962(c);
3. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b);
4. Plaintiffs have failed to plead reliance in connection with their fraud related claims;
5. Plaintiffs failed to plead a cognizable RICO enterprise;
6. Plaintiffs enterprise allegations are too vague and conclusory
7. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

VI. The Argument

20. The RICO complaint articulates, with specificity, more than 40 events, each of which is listed as a RICO predicate act at 18 U.S.C. §1961(1) and each Defendant is accused of in-concert aiding and abetting. It is unnecessary for Plaintiffs to plead that each defendant personally committed two or more predicate acts.

> *To be convicted of conspiracy to violate RICO under § 1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts, such as bribery, requisite for a substantive RICO offense under § 1962(c). Section 1962(d)-which forbids "any person to conspire to violate" § 1962(c)-is even more comprehensive than the general conspiracy provision applicable to federal crimes, § 371, since it contains no requirement of an overt or specific act to effect the conspiracy's object. Presuming Congress intended the "to conspire" phrase to have its ordinary meaning under the criminal law, see Morissette v. United States, 342 U. S. 246, 263, well-established principles and contemporary understanding demonstrate that, although a conspirator must intend to further an*

> *endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, it suffices that he adopt the goal of furthering or facilitating the criminal endeavor, and he need not agree to undertake all of the acts necessary for the crime's completion. Salinas' contrary interpretation of § 1962(c) violates the foregoing principles and is refuted by Bannon v. United States, 156 U. S. 464, 469. Its acceptance, moreover, is not required by the rule of lenity, see United States v. Shabani, 513 U. S. 10, 17. Even if Salinas did not accept or agree to accept two bribes, there was ample evidence that the sheriff committed at least two predicate acts when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme, and this is sufficient to support Salinas' conviction under § 1962(d). Pp. 61-66. United States v Salinas 654 F.2d 319*

21. It is also only necessary to show the defendant associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture successful. *United States v. Landerman*, 109 F.3d 1053, 1068 n.22 (5th Cir. 1997). Jason Ostrom's conduct inarguably meets and exceeds this criterion.

22. A defendant associates with a criminal venture if he shares in the criminal intent of the principal, and the defendant participates in criminal activity if he has acted in some affirmative manner designed to aid the venture. *Landerman*, 109 F.3d at 1068 n.22. The level of participation may be of relatively slight moment. *Leos-Quijada*, 107 F.3d at 794. Also, it does not take much evidence to satisfy the facilitation element once the defendant's knowledge of the unlawful purpose is established. *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996).[3]

23. Jason Ostrom's overt acts clearly intended to convert the Brunsting trusts into assets of a probate estate by masquerading Curtis v Brunsting behind an "estate" label.

VII. Res Judicata and Collateral Estoppel

1. <u>The Brunsting Trusts are not a Probate Matter</u>

24. The Brunsting Trusts are not assets belonging to the Estates of Elmer or Nelva Brunsting and are not subject to probate administration.

[3] US Attorneys' Criminal Resource Manual CRM 2474

25. That finding of fact and conclusion of law was settled by the Justices of the Fifth Circuit Court of Appeals[4] when Plaintiff Curtis' original petition survived the probate exception to federal diversity jurisdiction.

26. Moreover, the "Estate" inventory (Dkt 41-7) approved March 27, 2013, contains only an old car and the claims pending against Vacek and Freed in the Harris County District Court and was followed immediately by two drop orders. (Dkt 41-5 and 6).

27. The Fifth Circuit Court of Appeals on review held that Curtis v Brunsting was a matter relating only to an inter vivos trust not in the custody of a state court, that the assets in the inter vivos trust were not assets belonging to any "Estate" and were not subject to probate administration. (Dkt 34-4)

28. Defendant Ostrom, (Dkt 78) like Defendants Vacek & Freed (Dkt 19 and 20), Bobbie Bayless (Dkt 23), Jill Willard Young (Dkts 25, 38), Anita Brunsting (Dkt 30) Amy Brunsting (Dkt 35), Steven Mendel/Bradley Featherston (Dkt 36), Neal Spielman (Dkt 39 and 40), Christine Riddle Butts, Clarinda Comstock and Tony Baiamonte (Dkt 53), claim the Racketeer Influenced Corrupt Organization Act action before this Honorable Court arises from a "Probate Case" or "Probate Matter". However, the so called "Probate Matter" does not speak to anything but the Brunsting Trusts.

29. The Fifth Circuit found that Plaintiff Curtis' federal lawsuit was exclusively related to the Brunsting inter vivos Trusts, that those trusts were not in the custody of any state court, that trust assets were not property of any estate and that even though the wills had been since filed and there was an ongoing probate of the estate, the assets in an inter vivos trust are not property

[4] Curtis v. Brunsting 704 F.3d 406

belonging to an estate and would not be subject to probate administration. Jason Ostrom's remand to state court did not change that.

30. The Circuit Court also noted that the only heir to the Estates of Elmer and Nelva Brunsting was the Brunsting Trust.

31. The Circuit Court also reiterated the long standing doctrine of custodia legis, citing to the United States Supreme Court in Marshall v. Marshall[5] for the proposition that no court can assume in rem jurisdiction over a res in the custody of another court. (Dkt 34-4)

32. Two actions were filed in state courts subsequent to Curtis reverse and remand back to the federal Court. Both state court suits were brought in the name of the "Estate of Elmer and Nelva Brunsting" and both suits raised only claims relating to the Brunsting trusts, then in the custody of a federal Court.

33. Federal Plaintiff Curtis is not an heir to any estate and neither are the other trust beneficiaries. The trust is the only heir to any estate and alleged trespass against the trust is against the named beneficiaries, not against any estate. Plaintiff Curtis is a real party in interest in the Brunsting Trusts, but not in any estate.

34. Defendant Ostrom admits to causing the case of Curtis v Brunsting 5:12-cv-592 to be remanded to Harris County Probate Court. However, Mr. Ostrom characterizes the remand as *"remanding the case **back** to Harris County Probate Number 4"*, (Dkt 78 Page 4 of 24 unnumbered paragraph 7), as if to imply Plaintiff Curtis was some kind of escapee being returned to the custody of Harris County Probate Number 4, when Plaintiff Curtis had never been to Harris County Probate Court and had no claims pending there.

[5] 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).

35. Plaintiff Curtis retained Defendant Jason Ostrom in the federal court matter under the letterhead of Ostrom/Sain. After effecting a remand to state probate court Ostrom pled exclusively under the heading "Estate of Nelva Brunsting", which Plaintiff Curtis' lawsuit is not.

VIII. Sufficiency of the Pleadings

36. Defendant Ostrom claims Plaintiffs fail to plead a cognizable RICO claim, enterprise, fraud based acts, reliance or proximate cause.

37. Such assertions can only be ground upon an unfamiliar view of the law, as surely Defendant cannot honestly plead ignorance of his acts or the facts when his proclaimed station requires him to be knowledgeable of the records and pleadings in the cases he claims to be an attorney in.

38. Plaintiffs more than adequately plead Harris County Probate Court as both the RICO enterprise and a victim of the racketeering activity.

39. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), the Supreme Court stated:

> *The Court has held that RICO both protects a legitimate "enterprise" from those who would use unlawful acts to* ***victimize*** *it, United States v. Turkette, 452 U.S. 576, 591 (1981), and also protects the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful . . . activity is committed," National Organization for Women, Inc., 510 U.S. [249,] 259 (1994).*

40. Plaintiffs plead cognizable predicate acts with the necessary particularity and Plaintiffs plead acts demonstrative of conspiracy and of aiding and abetting with more particularity in each reply to motions to dismiss.

41. This Probate Bully Mob of RICO Defendants fully intended to trap the Brunsting siblings in a cycle of vacuous paper exchanges to maximize attorney billing profits while resolving

absolutely nothing on the public record, in order to protect the racketeering activity from discovery and investigation by legitimate law enforcement resources.

42. Each of the "RICO Defendants" aided and abetted the conspiracy in violation of 18 U.S.C. §§2 and 1962(d) and now come before this Honorable Court claiming their attempt to bust the Brunsting trusts for their own personal gain is a bitter sibling dispute over the administration of their parents' estate. Nothing could be further from the truth.

43. While real damages are difficult to calculate without fiduciary disclosures, the additional injury resulting from five years of improperly motivated "litigation" posturing, directly and proximately caused by these Defendants illicit conduct, are tangible, concrete, calculable and a matter of public record.

44. Every one of the Brunsting beneficiaries has been injured by the fraud perpetrated on the federal and state courts, upon the Brunsting family and upon Plaintiffs by these Defendants.

45. Jason Ostrom was instrumental in the plot to treat the Brunsting Trusts as if they were a probate asset and his feigned ignorance of the legal precedents set by pro se Curtis in this extended Brunsting Trusts litigation, is in direct conflict with his fiduciary obligation to know.

46. Defendant Jason Ostrom's feigned ignorance of law and fact are not defenses.

47. Defendant Ostrom also makes dubious statements regarding Plaintiff Munson's participation in protecting Plaintiff Curtis' property interest and those of the Brunsting trusts.

48. That participation is common knowledge and a matter of public record.

49. The name Rik Munson appears for the first time at Docket entry 9 in Curtis' original federal lawsuit and appears a total of ten times in the Official record on Appeal to the Fifth Circuit in 2012. (CA No. 12-20164)

IX. Amendment and Adoption by Reference

50. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and Federal Rule of Civil Procedure 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, this reply, the replies yet unfiled and the attached exhibits as if fully expressed therein;

51. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings and the claims stated therein, as exhibits in support of Plaintiffs' Complaint, as if originally attached thereto, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, 84 and those yet unfiled as if fully attached as exhibits thereto.

X. Conclusion

52. Defendant Jason Ostrom told the Honorable Judge Kenneth Hoyt in his application for approval of his First Amended Complaint that the purpose for a remand to state court was to consolidate with Plaintiff Carl Brunsting in order to afford complete relief to the parties.

53. Defendant Ostrom deprived Plaintiff Curtis of a federal judicial forum and access to the only Court of competent jurisdiction under false pretexts, by presenting unopposed motions to amend Plaintiff Curtis' federal complaint and to remand to Harris County Probate Court.

54. The Brunsting Trusts are the only heir to the "Estates of Elmer and Nelva Brunsting". Trust assets are not property belonging to the "Estates", and are not subject to probate administration, yet each of these Defendants insist this RICO lawsuit arises out of a dispute between siblings over inheritance expectancies and the administration of an estate and others

have pled Plaintiffs are disgruntled litigants seeking vengeance for being on the losing end of fully litigated state court determinations.

55. For the last five years, these Defendants have each participated in denying Plaintiff Curtis and each of the Brunsting siblings the enjoyment of their parents' benevolence. Each has engaged in gaming the judicial process, posing as advocates, to maximize fees and resolve nothing, while holding resolution of the Brunsting trusts hostage under a probate administration pretext.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) Motion to Dismiss filed by Defendant Jason Ostrom October 31, 2016, (Dkt 78) and hold this Defendant to answer.

Respectfully submitted,

November 18, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on November 18, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT BERNARD MATHEW'S FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS

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Rules

Federal Rule of Civil Procedure 12(b)(1) 3

Federal Rule of Civil Procedure 12(b)(6) 2

1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.

2. On November 2, 2016, Defendant Bernard Lisle Mathews III filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt 81)

I. INTRODUCTION

3. In its purest form this lawsuit is about property and the intentions of Elmer and Nelva Brunsting that their worldly possessions pass to their issue without conflict, complications, or excess costs. In pursuit of that goal Elmer and Nelva Brunsting purchased a trust and estate plan package as both a product and a service of Albert Vacek, Jr.

4. According to assurances that Vacek gives his customers, his trust package was supposed to avoid what Vacek calls "the three evils". Those evils include "probate", "guardianship" and "taxes".

5. Vacek partner, Candace Kunz-Freed, began drafting instruments undermining the Brunsting trust as soon as Elmer Brunsting weakened (see Dkt 26-11 and 26-14) and then continued the erosion with each subsequent "Hurrah"[1], the next being the encephalitis and coma suffered by Carl Brunsting.

[1] In legal parlance a.k.a. a "qualifying event"

II. NATURE AND STAGE OF THE PROCEEDING

6. Plaintiffs in the above titled action, brought 18 U.S.C. §1964(c) Racketeer Influenced Corrupt Organization and other claims, both individually and as private attorneys general on behalf of the public trust, on July 5, 2016 in the Southern District of Texas.

7. On November 2, 2016, Defendant Bernard Mathews filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt #81).

III. SUMMARY OF THE CASE

8. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, and Defendants Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting, et al., per stirpes.

9. In 1996, Plaintiff Curtis' parents, Elmer Brunsting and Nelva Brunsting, created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue and for the benefit of the remaindermen grandchildren and great grandchildren. (Dkt 33-1)

10. The Brunstings restated their Trust in 2005 (Dkt 33-2) and amended the restatement in 2007. (Dkt 33-3)

11. Elmer Brunsting was declared incompetent in June 2008 and passed on April 1, 2009.

12. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and divided its assets among an irrevocable decedent's trust and a revocable survivor's trust. (Dkt 33-2, Articles III and VII)

13. Nelva Brunsting passed on November 11, 2011 and a number of instruments surfaced that had been drafted after Elmer Brunsting became incompetent and after he passed, claiming changes had been made to irrevocable trusts. The 8/25/2010 QBD (Dkt 26-14)[2] (also called the extortion instrument) and the several appointments of successor trustee are just such instruments (Dkt 26-14)[3]

14. The acting trustees, Anita and Amy Brunsting, conducted themselves in complete secrecy. After Nelva Brunsting passed they refused to answer, account or provide disclosures and after two unsuccessful demand letters[4] advising Anita and Amy Brunsting to do the right thing, Plaintiff Curtis brought suit in the Southern District of Texas.

15. On March 6, 2012, Defendant Bernard Matthews filed an "emergency motion" for removal of lis pendens.[5] In the opening paragraph of his "emergency motion" Defendant Bernard Mathews states:

> *[Note: This Motion is brought subject to the Trustees contention that this Court lacks subject matter jurisdiction due to the fact that Texas Probate Code §115.001 (7) confers exclusive jurisdiction over matters related to questions "arising in the administration or distribution of a trust" to the State District Court, and by analogy this case should not be considered under the Probate Exception to Federal Court Jurisdiction, Marshall v. Marshall, 126 S.Ct. 1735, 1748 (2006). These issues will be raised by a separate Motion to Dismiss under FRCP 12(b)]*

16. Mathews also attached a perjured affidavit signed and sworn to by Amy Brunsting to his March 6, 2012 "emergency motion"[6] and on March 8, 2012, Curtis' complaint was dismissed sua

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[2] This instrument was the subject of Defendant Amy and Anita Brunsting's No-evidence Motion for Partial Summary Judgment (Dkt 26-5), and Curtis answer and demand to produce evidence. (Dkt 26-11)

[3] This is Plaintiff Curtis 20 page Motion for Partial Summary and Declaratory Judgment with numerous exhibits that remains unanswered by Defendants Anita and Amy Brunsting.

[4] Case 4:12-592 Exhibits 17 and 20 in the original federal complaint (4:12-cv-592 Dkt 1 at pages 67-68, and 71-79 respectively.

[5] Case 4:12-cv-592 Document 10 Filed in TXSD on 03/06/12

[6] Case 4:12-cv-592 Documents 10 and 10-1, Filed in TXSD on 03/06/12

sponte under the Probate Exception to Federal Diversity Jurisdiction, due to the Court's reliance upon the assertions made by officer of the Court, Bernard Mathews.

IV. STATEMENT OF THE ISSUES

1. Plaintiffs do not have an actual case or controversy with Mathews;
2. Plaintiffs do not state a claim against Mathews;
3. Mathews only handled an emergency motion for removal of lis pendens;
4. Mathews has immunity from civil accountability to his tort victims because he is an attorney.

V. PLAINTIFFS' REPLY

17. Candace Curtis v Anita and Amy Brunsting (4:12-cv-592) began in the federal Court in the Southern District of Texas on February 27, 2012, seeking equitable relief in the form of accountings, answers to information requests and monetary damages for known acts and omissions.

18. Plaintiff Curtis' original lawsuit alleged that all the information in the case was uniquely in the possession of the Defendants and included an affidavit with exhibits showing exactly where the case was at that point in time.

19. The federal Court dismissed an application for injunction filed with the original complaint due to want of service on the Defendants, and in the Order the Court expressed concern over whether or not the Court had subject matter jurisdiction. (4:12-cv-592 Dkt 8)

20. Defendant Bernard Mathews appears to have intentionally manipulated the Court's previous expression of concern over whether the Court had subject matter jurisdiction, knowingly misstating Texas Property Code §115.001 to be the Probate Code, and then

bootstrapping a Route Test theory that was very harshly reversed by the Supreme Court on the second page of the Marshall v. Marshall opinion he cited as his authority.[7]

> *"Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." 392 F.3d 1118, 1133 (2004). The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." Id., at 1136. We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception".* Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736

21. Curtis and Munson spent the next 14 months on an appeal before returning to the federal Court, more than four years ago. For this Court's perusal, Plaintiffs attach the "Appellants Opening Brief on Appeal", as it speaks directly to the root of matters presently before this Honorable Court. (Exhibit 1)

22. Defendant Mathews is currently listed as a staff attorney on the vacek.com web site (Exhibit 2) and was listed as a staff attorney with Vacek and Freed when he filed his disingenuous motion under the letterhead of Green and Mathews (4:12-cv-592 Dkt 10).

1. Not a Probate Matter

23. Plaintiff Curtis' federal appeal distinguished the Brunsting Trust from the Brunsting Estate.

24. According to the Fifth Circuit, the Brunsting Trusts are not assets belonging to any estate and are not subject to probate administration.

25. On March 2, 2012, a mere four days before his "emergency motion", Mathews filed a complaint in the Harris County District Court, on behalf of Plaintiff Reginald Parr. *Reginald D.*

[7] *Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736*

Parr vs. Sherry Evon Dunegan CA 201213022. In that case Mr. Parr was suing Ms. Dunegan for breach of fiduciary in the administration of a Texas trust drawn up by the law firm of Vacek and Freed.

26. It would necessarily follow that an attorney preparing a complaint for the Harris County District Court, involving a substantively identical case to that of Plaintiff Curtis, would know that trusts are not heard exclusively in the probate court, and would know the difference between the Property Code and the Estate Code (which Mathews called the "Probate Code").

27. If Mathews read the Supreme Court opinion in Marshall v. Marshall before citing to that authority and signing his pleading, he would also know his Route Test assertions were patently disingenuous.

2. <u>Lis Pendens</u>

28. Defendants filed their "emergency" motion claiming to be trustees; that the property to which the lis pendens related was to be liquidated in order to distribute proceeds to the heirs, and that Plaintiff's only intent was to frustrate that sale.

29. The lis pendens at issue was amongst the papers filed with the Court, but was never on file with the County Recorder as to frustrate any sale.

30. The house itself was sold like it was on fire and neither Plaintiff Curtis nor siblings Carl or Carole have ever received any distribution of proceeds from the sale of that house.

31. After Bernard Mathew's "Emergency Motion" resulted in the improper dismissal of Plaintiff Curtis' action, Mathews immediately interfered with all three of Curtis' subpoenas for records, including the email records of Nelva Brunsting, Exxon Stock transfer records from Computershare, and Bank of America transaction records, all of which loom large in rebutting Anita and Amy's fact claims.

3. Mathew's Email: "Intend to Move this to Probate"

32. Subsequent to the dismissal of Plaintiff Curtis' federal lawsuit, Mathews emailed Bobbie Bayless, Carole Brunsting and Candace Freed, providing accounting spreadsheets that were shockingly revealing.

33. This email (Exhibit 3) was the first real indication of what is later revealed to be a concerted effort, with the sole purpose of converting Plaintiff Curtis' trust related breach of fiduciary claims into estate claims.

34. Mathews, and every other defendant attorney, has actively engaged in trying to accomplish what Vacek assures his customers his estate plans will avoid, "probate".

VI. AMENDMENT AND ADOPTION BY REFERENCE

35. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85. this reply and the attached exhibits, as if fully expressed therein;

36. Plaintiffs further adopt by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

VII. CONCLUSION

37. Bernard Mathew's "Emergency Motion" was disingenuous in its expressions of both law and fact, and was filed for the improper purpose of manipulating the Court's stated hesitancy over whether or not it had subject matter jurisdiction, thus achieving an improper dismissal.

38. This conduct multiplied the litigation for Plaintiff Curtis resulting in a 14-month delay and additional costs, and has exacerbated injury to the beneficiaries and the Brunsting Trust res.

39. Bernard Mathew's participation appears innocuous in a context vacuum, however, in hindsight, that conduct would appear to be part and parcel of the scheme and artifice to deprive.

40. Plaintiffs do have an actual controversy with Vacek and Freed staff attorney Bernard Mathews and have specifically articulated adequate in-concert aiding and abetting events and conspiracy claims that include Mr. Mathews.

41. Whether or not Mr. Mathew's conduct can be regarded as conduct normally associated with his role as an attorney in the larger view, is a valid subject for judicial consideration.

42. The entire Brunsting family has been victimized by this long con scheme fashioned by Albert Vacek Jr. and furthered by a probate court protected bully mob.

43. Only attorneys stand to benefit from embroiling the Brunsting siblings in probate court where nothing can, has been, or will be resolved without an agreement involving a flow of private wealth to public actors, with no judicial resolution of any substantive issues.

44. Bernard Mathews, and every other attorney involved in this dispute since, has demonstrated an intention to interfere with the Brunsting Beneficiaries' Trust Property interests under the disguise of administering a probate estate, and have interfered with those interests.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Bernard Mathews November 2, 2016, and hold Mr. Mathews to answer.

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 23rd day of November, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT BERNARD MATHEW'S FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS

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1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.

2. On November 2, 2016, Defendant Bernard Lisle Mathews III filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt 81)

I. INTRODUCTION

3. In its purest form this lawsuit is about property and the intentions of Elmer and Nelva Brunsting that their worldly possessions pass to their issue without conflict, complications, or excess costs. In pursuit of that goal Elmer and Nelva Brunsting purchased a trust and estate plan package as both a product and a service of Albert Vacek, Jr.

4. According to assurances that Vacek gives his customers, his trust package was supposed to avoid what Vacek calls "the three evils". Those evils include "probate", "guardianship" and "taxes".

5. Vacek partner, Candace Kunz-Freed, began drafting instruments undermining the Brunsting trust as soon as Elmer Brunsting weakened (see Dkt 26-11 and 26-14) and then continued the erosion with each subsequent "Hurrah"[1], the next being the encephalitis and coma suffered by Carl Brunsting.

[1] In legal parlance a.k.a. a "qualifying event"

II. NATURE AND STAGE OF THE PROCEEDING

6. Plaintiffs in the above titled action, brought 18 U.S.C. §1964(c) Racketeer Influenced Corrupt Organization and other claims, both individually and as private attorneys general on behalf of the public trust, on July 5, 2016 in the Southern District of Texas.

7. On November 2, 2016, Defendant Bernard Mathews filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt #81).

III. SUMMARY OF THE CASE

8. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, and Defendants Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting, et al., per stirpes.

9. In 1996, Plaintiff Curtis' parents, Elmer Brunsting and Nelva Brunsting, created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue and for the benefit of the remaindermen grandchildren and great grandchildren. (Dkt 33-1)

10. The Brunstings restated their Trust in 2005 (Dkt 33-2) and amended the restatement in 2007. (Dkt 33-3)

11. Elmer Brunsting was declared incompetent in June 2008 and passed on April 1, 2009.

12. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and divided its assets among an irrevocable decedent's trust and a revocable survivor's trust. (Dkt 33-2, Articles III and VII)

13. Nelva Brunsting passed on November 11, 2011 and a number of instruments surfaced that had been drafted after Elmer Brunsting became incompetent and after he passed, claiming changes had been made to irrevocable trusts. The 8/25/2010 QBD (Dkt 26-14)[2] (also called the extortion instrument) and the several appointments of successor trustee are just such instruments (Dkt 26-14)[3]

14. The acting trustees, Anita and Amy Brunsting, conducted themselves in complete secrecy. After Nelva Brunsting passed they refused to answer, account or provide disclosures and after two unsuccessful demand letters[4] advising Anita and Amy Brunsting to do the right thing, Plaintiff Curtis brought suit in the Southern District of Texas.

15. On March 6, 2012, Defendant Bernard Matthews filed an "emergency motion" for removal of lis pendens.[5] In the opening paragraph of his "emergency motion" Defendant Bernard Mathews states:

> *[Note: This Motion is brought subject to the Trustees contention that this Court lacks subject matter jurisdiction due to the fact that Texas Probate Code §115.001 (7) confers exclusive jurisdiction over matters related to questions "arising in the administration or distribution of a trust" to the State District Court, and by analogy this case should not be considered under the Probate Exception to Federal Court Jurisdiction, Marshall v. Marshall, 126 S.Ct. 1735, 1748 (2006). These issues will be raised by a separate Motion to Dismiss under FRCP 12(b)]*

16. Mathews also attached a perjured affidavit signed and sworn to by Amy Brunsting to his March 6, 2012 "emergency motion"[6] and on March 8, 2012, Curtis' complaint was dismissed sua

---

[2] This instrument was the subject of Defendant Amy and Anita Brunsting's No-evidence Motion for Partial Summary Judgment (Dkt 26-5), and Curtis answer and demand to produce evidence. (Dkt 26-11)

[3] This is Plaintiff Curtis 20 page Motion for Partial Summary and Declaratory Judgment with numerous exhibits that remains unanswered by Defendants Anita and Amy Brunsting.

[4] Case 4:12-592 Exhibits 17 and 20 in the original federal complaint (4:12-cv-592 Dkt 1 at pages 67-68, and 71-79 respectively.

[5] Case 4:12-cv-592 Document 10 Filed in TXSD on 03/06/12

[6] Case 4:12-cv-592 Documents 10 and 10-1, Filed in TXSD on 03/06/12

sponte under the Probate Exception to Federal Diversity Jurisdiction, due to the Court's reliance upon the assertions made by officer of the Court, Bernard Mathews.

IV. STATEMENT OF THE ISSUES

1. Plaintiffs do not have an actual case or controversy with Mathews;
2. Plaintiffs do not state a claim against Mathews;
3. Mathews only handled an emergency motion for removal of lis pendens;
4. Mathews has immunity from civil accountability to his tort victims because he is an attorney.

V. PLAINTIFFS' REPLY

17. Candace Curtis v Anita and Amy Brunsting (4:12-cv-592) began in the federal Court in the Southern District of Texas on February 27, 2012, seeking equitable relief in the form of accountings, answers to information requests and monetary damages for known acts and omissions.

18. Plaintiff Curtis' original lawsuit alleged that all the information in the case was uniquely in the possession of the Defendants and included an affidavit with exhibits showing exactly where the case was at that point in time.

19. The federal Court dismissed an application for injunction filed with the original complaint due to want of service on the Defendants, and in the Order the Court expressed concern over whether or not the Court had subject matter jurisdiction. (4:12-cv-592 Dkt 8)

20. Defendant Bernard Mathews appears to have intentionally manipulated the Court's previous expression of concern over whether the Court had subject matter jurisdiction, knowingly misstating Texas Property Code §115.001 to be the Probate Code, and then

bootstrapping a Route Test theory that was very harshly reversed by the Supreme Court on the second page of the Marshall v. Marshall opinion he cited as his authority.[7]

> *"Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." 392 F.3d 1118, 1133 (2004). The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." Id., at 1136. We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception".* Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736

21. Curtis and Munson spent the next 14 months on an appeal before returning to the federal Court, more than four years ago. For this Court's perusal, Plaintiffs attach the "Appellants Opening Brief on Appeal", as it speaks directly to the root of matters presently before this Honorable Court. (Exhibit 1)

22. Defendant Mathews is currently listed as a staff attorney on the vacek.com web site (Exhibit 2) and was listed as a staff attorney with Vacek and Freed when he filed his disingenuous motion under the letterhead of Green and Mathews (4:12-cv-592 Dkt 10).

1. Not a Probate Matter

23. Plaintiff Curtis' federal appeal distinguished the Brunsting Trust from the Brunsting Estate.

24. According to the Fifth Circuit, the Brunsting Trusts are not assets belonging to any estate and are not subject to probate administration.

25. On March 2, 2012, a mere four days before his "emergency motion", Mathews filed a complaint in the Harris County District Court, on behalf of Plaintiff Reginald Parr. *Reginald D.*

[7] *Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736*

Parr vs. Sherry Evon Dunegan CA 201213022. In that case Mr. Parr was suing Ms. Dunegan for breach of fiduciary in the administration of a Texas trust drawn up by the law firm of Vacek and Freed.

26. It would necessarily follow that an attorney preparing a complaint for the Harris County District Court, involving a substantively identical case to that of Plaintiff Curtis, would know that trusts are not heard exclusively in the probate court, and would know the difference between the Property Code and the Estate Code (which Mathews called the "Probate Code").

27. If Mathews read the Supreme Court opinion in Marshall v. Marshall before citing to that authority and signing his pleading, he would also know his Route Test assertions were patently disingenuous.

2. <u>Lis Pendens</u>

28. Defendants filed their "emergency" motion claiming to be trustees; that the property to which the lis pendens related was to be liquidated in order to distribute proceeds to the heirs, and that Plaintiff's only intent was to frustrate that sale.

29. The lis pendens at issue was amongst the papers filed with the Court, but was never on file with the County Recorder as to frustrate any sale.

30. The house itself was sold like it was on fire and neither Plaintiff Curtis nor siblings Carl or Carole have ever received any distribution of proceeds from the sale of that house.

31. After Bernard Mathew's "Emergency Motion" resulted in the improper dismissal of Plaintiff Curtis' action, Mathews immediately interfered with all three of Curtis' subpoenas for records, including the email records of Nelva Brunsting, Exxon Stock transfer records from Computershare, and Bank of America transaction records, all of which loom large in rebutting Anita and Amy's fact claims.

3. Mathew's Email: "Intend to Move this to Probate"

32. Subsequent to the dismissal of Plaintiff Curtis' federal lawsuit, Mathews emailed Bobbie Bayless, Carole Brunsting and Candace Freed, providing accounting spreadsheets that were shockingly revealing.

33. This email (Exhibit 3) was the first real indication of what is later revealed to be a concerted effort, with the sole purpose of converting Plaintiff Curtis' trust related breach of fiduciary claims into estate claims.

34. Mathews, and every other defendant attorney, has actively engaged in trying to accomplish what Vacek assures his customers his estate plans will avoid, "probate".

VI. AMENDMENT AND ADOPTION BY REFERENCE

35. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85. this reply and the attached exhibits, as if fully expressed therein;

36. Plaintiffs further adopt by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

VII. CONCLUSION

37. Bernard Mathew's "Emergency Motion" was disingenuous in its expressions of both law and fact, and was filed for the improper purpose of manipulating the Court's stated hesitancy over whether or not it had subject matter jurisdiction, thus achieving an improper dismissal.

38. This conduct multiplied the litigation for Plaintiff Curtis resulting in a 14-month delay and additional costs, and has exacerbated injury to the beneficiaries and the Brunsting Trust res.

39. Bernard Mathew's participation appears innocuous in a context vacuum, however, in hindsight, that conduct would appear to be part and parcel of the scheme and artifice to deprive.

40. Plaintiffs do have an actual controversy with Vacek and Freed staff attorney Bernard Mathews and have specifically articulated adequate in-concert aiding and abetting events and conspiracy claims that include Mr. Mathews.

41. Whether or not Mr. Mathew's conduct can be regarded as conduct normally associated with his role as an attorney in the larger view, is a valid subject for judicial consideration.

42. The entire Brunsting family has been victimized by this long con scheme fashioned by Albert Vacek Jr. and furthered by a probate court protected bully mob.

43. Only attorneys stand to benefit from embroiling the Brunsting siblings in probate court where nothing can, has been, or will be resolved without an agreement involving a flow of private wealth to public actors, with no judicial resolution of any substantive issues.

44. Bernard Mathews, and every other attorney involved in this dispute since, has demonstrated an intention to interfere with the Brunsting Beneficiaries' Trust Property interests under the disguise of administering a probate estate, and have interfered with those interests.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Bernard Mathews November 2, 2016, and hold Mr. Mathews to answer.

Respectfully submitted,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 23rd day of November, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT GREGORY LESTERS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)

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I. Introduction

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§1961-1968, and the right of private claims provided for at 18 U.S.C. §1964(c). (Dkt 1)

2. On November 7, 2016, Defendant Gregory Lester filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 83)

II. The Issues

A. Plaintiffs have not adequately pleaded the necessary predicate acts.

B. The Plaintiffs have not stated a RICO claim under section 1962(c).

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

C. Plaintiffs have failed to plead a cognizable RICO enterprise.

1. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

2. Plaintiffs' enterprise allegations are too vague and conclusory.

3. Plaintiffs' alleged enterprise lacks continuity.

D. Plaintiffs have failed to adequately plead a pattern of racketeering activity.

E. The Plaintiffs have not stated a RICO claim under section 1962(d).

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

F. Plaintiffs' claims for "Hobbs Act," "wire fraud," "fraud under 18 U.S.C. §1001" and "Honest Services" fail because those statutes do not create private causes of action.

1. The Hobbs Act does not create a private cause of action.

2. The Wire Fraud statute does not create a private cause of action.

3. The claim for "Fraud under 18 U.S.C. §1001" is not a private cause of action.

4. The claim for "Honest Services" is not a private cause of action.

5. Plaintiffs rely on impermissible collective pleading.

III. Plaintiffs' Argument

3. Defendant challenges the sufficiency of the RICO Complaint on all of the usual substantive ground, in every subdivision of the nine necessary pleading elements for 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims, but fails to consider the ambit of federal "aiding and abetting" and "conspiracy" statutes.

4. Defendant asks the Court to take a disjointed view of the mosaic as if its parts were somehow unrelated, but Defendants are each charged with "participation" in the affairs of an enterprise through "in-concert aiding and abetting". Plaintiffs need only show that Defendant performed an act in furtherance of the goals of the enterprise.

Participation

5. Gregory Lester is charged with participation in the affairs of an enterprise through a pattern of racketeering activity involving the commission of two or more predicate acts. Mr. Lester's Motion admits there are almost fifty predicate acts claims, but argues that none specifically relate to him.

6. Mr. Lester's Motion actually admits to his participation and, while claiming Plaintiffs' Addendum of Memorandum is "replete with inaccuracies", Mr. Lester's introduction claims Plaintiff Candace Curtis is a disgruntled sibling in a probate case.

7. The record will show that Candace Curtis is a Plaintiff in a federal breach of fiduciary lawsuit, involving only the Brunsting Trusts[1] (Exhibit 1), that the case was dismissed under the probate exception, (Exhibit 1 entry 14) and appealed to the Fifth Circuit Court of Appeals,

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD 2/27/2012 and 704 F.3d 406.

(Exhibit 1 entry 16) where the dismissal was reversed and remanded back to the U.S.D.C. (Dkt 34-4)[2]

8. Back in the U.S.D.C. "Plaintiff Curtis" obtained a preliminary injunction to prevent wasting of trust assets.[3] On that very same day, federal Plaintiff Candace Curtis was named a "Nominal Defendant" in a state probate court suit styled "Carl Henry Brunsting Individually and as Executor for the Estates of Elmer and Nelva Brunsting", (Dkt 33-6) hereinafter "The Probate Matter".

9. "The Probate Matter" raises only claims relating to the Brunsting Trusts. It should be noted that the Brunsting Trusts were in the custody of a federal Court when the state court claims were filed.

10. The record will also show that Defendant Jason Ostrom filed an unopposed motion to remand Curtis v Brunsting to state probate court, to be consolidated with the "Estate of Nelva Brunsting" 412,249, where federal "Plaintiff Curtis" was named "Defendant Curtis".

11. Curtis v Brunsting, in the Fifth Circuit, soured the market for looting inter vivos trusts under the pretext of probate administration and these Defendant "legal professionals" are a bunch of disgruntled members of a probate bully mob seeking vengeance for being on the losing end of a fully litigated Federal Fifth Circuit determination, that inter vivos trusts are not assets of a probate estate and are not subject to their degenerate version of probate administration.[4]

12. Mr. Lester's participation involved drafting a false report for a purpose other than that for which it was authorized and Mr. Lester's participation is easily shown by the documented sequence of events and his own admissions.

[2] Also Docket entry 24 in Curtis v Brunsting 4:12-cv-592
[3] Curtis v Brunsting 4:12-cv-592 Docket entry 40 (Dkt 26-2 in this case)
[4] See the Brunsting Wills (Dkt 41-3 and 41-4)

IV. The Report of Temporary Administrator Gregory Lester

13. The "Report of Temporary Administrator Pending Contest", (Dkt 83-2) was filed in the "Estate of Nelva Brunsting" 412249 on January 14, 2016.

14. The "Report" is not a report but a caricature of the racketeering conspiracy itself. It is a confession of the intention of all of these Defendants, as exemplified by the public record, to redirect the Brunsting inter vivos trust assets into a probate court, where there is not, and has never been, in Rem jurisdiction over the Brunsting Trusts.

15. The manifest purpose for the "Report" was to further the artifice initiated by Bayless when she filed exclusively trust related lawsuits in state courts, in the name of an estate, on January 29, 2013 and April 9, 2013.

16. Gregory Lester and Jill Willard Young agreed to further that plan on and before September 10, 2015[5]. Part of that scheme was to bully the beneficiaries of the Trusts into a sham mediation, staged for the sole purpose of extracting attorney fees from the Brunsting Trusts. (Dkt 26-16)

17. The "Report", when compared to the record, displays numerous misstatements and contradictions, while merely posing as a report on the validity of "Estate" claims, as hereinafter more fully appears.

18. The "Report" never once mentions the Wills of Elmer or Nelva Brunsting and never once identifies an heir nor any assets belonging to the "Estates".

19. In evaluating the "Estate" claims, the substance of the "Report" mentions Trustees and the Brunsting Trusts one-hundred fifty-five (155) times, while the words "Estate" (7) and probate (17) appear only in non-substantive contexts.

[5] This is the hearing referred to by Defendant Neal Spielman on March 9, 2016 (Dkt 26-16) and Plaintiffs have been unable to obtain a transcript or an explanation from Mr. Baiamonte for the lack thereof.

20. It has already been shown that the approved inventories (Dkt 41-7) contain only one-half of an old car and the pending claims against Candace Freed in the District Court, but neither is mentioned in the "Report".

21. The "Report" never mentions the merits of the "Estate" claims, but focuses entirely on claims relating to beneficiaries of the heir-in-fact "Trust", which had already been held in the Fifth Circuit not to be property belonging to the "Estates". (Dkt 34-4)

22. It should also be noted that administration of both Estates had been dropped on April 4, 2013, (Dkt 41-5 and 41-6) just five days before "The Probate Matter" involving only the Brunsting Trusts was filed. (Dkt 34-7)

23. In the Addendum to the report, later filed by Mr. Lester, (Exhibit 2) he states the following (emphasis added):

> ***Trustees of the Brunsting Family Living Trust***
>
> *On July 1, 2008 an Appointment of Successor Trustees was executed by Nelva Erleen Brunsting, also known as Nelva E. Brunsting, pursuant to Article IV. Section B. of the Brunsting Family Living Trust. This document appointed Carl Henry Brunsting and Anita Kay Brunsting as successor co-trustees if Nelva E. Brunsting fails or ceases to serve. If either Carl Henry Brunsting or Anita Kay Brunsting should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then* ***The Frost National Bank*** *shall serve as the sole successor trustee. A copy of the Appointment of Successor Trustees is attached hereto as the first exhibit to first supplement.*

24. What the instrument actually says is (emphasis added):

> *"If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then* ***CANDACE LOUISE CURTIS*** *shall serve as sole successor Trustee. In the event CANDACE LOUISE CURTIS is unable or unwilling to serve, then THE FROST NATIONAL BANK shall serve as sole successor Trustee."*

Defendant Exhibit A

25. Defendant's Exhibit A (Dkt 83-1) is the Order Appointing Temporary Administrator Gregory Lester.

26. The appointment was made pursuant to Estates Code 452.051 which reads:

> *SUBCHAPTER B. TEMPORARY ADMINISTRATION PENDING CONTEST OF A WILL OR ADMINISTRATION*
>
> *Sec. 452.051. APPOINTMENT OF TEMPORARY ADMINISTRATOR. (a) If a contest related to probating a will or granting letters testamentary or of administration is pending, the court may appoint a temporary administrator, with powers limited as the circumstances of the case require.*
>
> *(b) The appointment may continue until the contest is terminated and an executor or administrator with full powers is appointed.*
>
> *(c) The power of appointment under this section is in addition to the court's power of appointment under Subchapter A.*
>
> *Added by Acts 2009, 81st Leg., R.S., Ch. 680 (H.B. 2502), Sec. 1, eff. January 1, 2014.*
>
> *Amended by:*
>
> *Acts 2015, 84th Leg., R.S., Ch. 949 (S.B. 995), Sec. 44, eff. September 1, 2015.*

27. In the Order the Probate Court found that it had jurisdiction and venue over the Decedent's Estate and appointed Mr. Lester "Temporary Administrator" with limited powers to evaluate all claims filed against 1) Candace Freed 2) Anita Kay Brunsting, 3) Amy Ruth Brunsting, and 4) Carole Ann Brunsting, (Dkt 83-1 Numbered paragraph 1) and report to the Court regarding the merits of those claims.

28. The cestui que (beneficiary) is "the Trust" and the Trust is the only heir-in-fact to the Estates. Assets in the inter vivos trusts are not property belonging to the Estates and do not come within the purview of "probate administration".[6]

[6] Curtis v Brunsting 704 F.3d 406, 410 (Jan 2-13)

29. Does the "Estate" have standing to bring claims against beneficiaries for trespass against the cestui que trust, committed during the life of a Grantor, or do those claims belong to the beneficiaries and the heir-in-fact Trust?

30. This question was settled in the Fifth Circuit in connection with the very Trusts at issue here, but was never considered in the report on the merits of any "Estate" claims.

V. The Report and the Extortion Instrument

31. The "Report" contains numerous assertions that misapplications of fiduciary are benign, justified, or can simply be "equalized" with more distributions of Brunsting Trust assets.

32. The "Report" ultimately concludes that if the Court were to rule on the "No Contest Clause" in the 8/25/2010 QBD, Curtis and her brother Carl would take nothing from the litigation.

33. The "Report" does not mention the controversy regarding the instrument, (Dkt 26-5 and 26-11) or which of the three alleged versions he selected for what reasons, or how it stretches beyond the limits stated in the report to reach to the irrevocable, un-amendable Trusts, or how any of that relates to property belonging to an Estate.

34. The "Report" contains warped conclusions, and while paraphrasing the irrevocable and unamendable trust provisions, the "Report" ultimately determines that changes alleged to have been made by Nelva alone were proper, "unless it can be shown Nelva was incompetent". (Dkt 83-2 page 10)

35. The facts of record are that Nelva wrote to Candace Curtis in her own hand verifying that what Anita and Amy claim Nelva said and did (through the 8/25/2010 QBD) is "not true". (Exhibit 3)

36. Nelva was not incompetent, the laws of the Trusts do not allow changes to be made by Nelva alone, no court of competent jurisdiction changed the trusts, and Nelva's state of mind at the time changes were made is irrelevant.

VI. Amendment and Adoption by Reference

37. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants' Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85, 86, this reply, and the attached exhibits, as if fully expressed therein.

38. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

VII. Conclusion

39. Plaintiffs have more than adequately pled person, enterprise, conspiracy, pattern and fraud with the necessary particularity, and with each response to Motions to Dismiss, Plaintiffs establish participation and continuity more fully.

40. Defendant may not assert opposing claims of fact under federal Rule 12(b)(6).

41. None of the Brunsting siblings are heir to the estates of Elmer or Nelva Brunsting, none have challenged either Will, and none have individual standing in the "Estates of Elmer or Nelva Brunsting". (Dkt 41-3 and 41-4)

42. Assets in the Brunsting inter vivos trusts are not assets belonging to any "Estate" and are not subject to probate administration. (Dkt 34-4) The Executor of the Estates has no standing to bring "Estate" claims relating to the inter vivos trusts in any probate court.

43. Curtis v Brunsting 4:12-cv-592 is a lawsuit involving only the Brunsting Trusts[7].

44. Upon the death of Elmer Brunsting the family trust not only became irrevocable, but it became unamendable, and the Decedent's Trust was created both irrevocable and unamendable. The only exception is "Court of Competent Jurisdiction". The Brunsting trusts could not even be decanted without court intervention and were not lawfully decanted, amended or revoked.

45. There is no 8/25/2010 QBD as a matter of law and nothing in the Lester report can be defended against the record of proceedings or the law of the trust.

46. Gregory Lester should be held to defend his "Report" under oath, just as all of these Defendants should.

WHEREFORE, Plaintiffs respectfully move this Honorable Court for an Order denying the Motion to Dismiss filed by Defendant Gregory Lester November 7, 2016. (Dkt 83)

Respectfully submitted,

November 27, 2016,

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

[7] Curtis v Brunsting 704 F.3d 406 (Jan. 2013)

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 27th day of November 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

CLOSED,REMANDED

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Houston)
CIVIL DOCKET FOR CASE #: 4:12-cv-00592

Candace Louise Curtis v. Anita Kay Brunsting et al **Case remanded to Harris County Probate Court No. 4.**
Assigned to: Judge Kenneth M. Hoyt
Cause: 28:1332 Diversity-Fraud

Date Filed: 02/27/2012
Date Terminated: 05/15/2014
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Special Master

William West
Accountant

represented by **Timothy Aaron Million**
Hughes Watters Askanase
Total Plaza
1201 Louisiana St., 28th Floor
Houston, TX 77002
713-759-0818
Fax: 713-759-6834
Email: tmillion@hwa.com
ATTORNEY TO BE NOTICED

Plaintiff

Candace Louise Curtis

represented by **Jason B Ostrom**
Ostrom Sain LLP
5020 Montrose Blvd
Ste 310
Houston, TX 77006
713-863-8891
Email: jason@ostromsain.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Carl Brunsting
Necessary Party and Involuntary Plaintiff

represented by **Carl Brunsting**
PRO SE

V.

Defendant

Anita Kay Brunsting

represented by **Bernard Lilse Mathews , III**
Green and Mathews LLP
14550 Torrey Chase Blvd
Suite 245

Houston, TX 77014
281-580-8100
Fax: 281-580-8104
Email: texlawyer@gmail.com
TERMINATED: 02/20/2013
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

George William Vie , III
Mills Shirley LLP
2228 Mechanic Street
Suite 400
Houston, TX 77550
713-571-4232
Fax: 713-893-6095
Email: gwv_order@millsshirley.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Amy Ruth Brunsting represented by **Bernard Lilse Mathews , III**
(See above for address)
TERMINATED: 02/20/2013
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

George William Vie , III
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Does 1-100

Defendant

Carole Ann Brunsting

Defendant

Candace L. Kunz-freed

Defendant

Albert E. Vacek Jr.

Defendant

Vacek & Freed, PLLC

Defendant

The Vacek Law Firm PLLC

Defendant

Bernard Lilse Mathews III

Date Filed	#	Docket Text
02/27/2012	1	PLAINTIFF'S ORIGINAL PETITION, COMPLAINT AND APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER, ASSET FREEZE, TEMPORARY AND PERMANENT INJUNCTION against Amy Ruth Brungsting, Anita Kay Brunsting (Filing fee $ 350) filed by Candace Louise Curtis. (Attachments: # 1 Continuation, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation)(dterrell,) Modified on 2/27/2012 (dterrell,). (Entered: 02/27/2012)
02/27/2012	2	PROPOSED ORDER Injunctinctive Order Temporary Restraining Order, Asset Freeze, Production of Documents and Records, Appointment of Receiver, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012	3	INITIAL DISCLOSURES by Candace Louise Curtis, filed.(dterrell,) (Entered: 02/27/2012)
02/27/2012	4	REQUEST for Production of Documents from Anita Kay Brunsting and Amy Ruth Brunsting by Candace Louise Curtis, filed.(dterrell,) (Entered: 02/27/2012)
02/27/2012	5	NOTICE by Candace Louise Curtis, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012	6	NOTICE by Candace Louise Curtis, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012		Civil Filing fee re: 1 Complaint,, : $350.00, receipt number CC003143, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012		Summons Issued as to Amy Ruth Brunsting, Anita Kay Brunsting, filed.(dterrell,) (Entered: 02/27/2012)
02/28/2012	7	ORDER for Initial Pretrial and Scheduling Conference by Telephone and Order to Disclose Interested Persons. Counsel who filed or removed the action is responsible for placing the conference call and insuring that all parties are on the line. The call shall be placed to (713)250-5613. Telephone Conference set for 5/29/2012 at 09:30 AM by telephone before Judge Kenneth M. Hoyt.(Signed by Judge Kenneth M. Hoyt) Parties notified.(ckrus,) (Entered: 02/28/2012)
03/01/2012	8	ORDER denying the application for a temporary restraining order and for injunction. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/01/2012)
03/05/2012	9	Letter from Rik Munson re: serving copies on parties, filed. (Attachments: # 1 cover letter) (saustin,) (Entered: 03/05/2012)

03/06/2012	10	EMERGENCY MOTION by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/27/2012. (Attachments: # 1 Affidavit Affidavit of Amy Brunsting, # 2 Exhibit Property Appraisal, # 3 Exhibit Sale Contract, # 4 Exhibit Tax Appraisal, # 5 Supplement Request for Hearing, # 6 Proposed Order Proposed Order) (Mathews, Bernard) (Entered: 03/06/2012)
03/06/2012	11	Corrected MOTION Removal of Lis Pendens by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/27/2012. (Mathews, Bernard) (Entered: 03/06/2012)
03/06/2012	12	NOTICE of Setting. Parties notified. Telephone Conference set for 3/7/2012 at 11:00 AM by telephone before Judge Kenneth M. Hoyt, filed. The call shall be placed to (713)250-5613. (chorace) (Entered: 03/06/2012)
03/08/2012	13	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on 3/7/12 Appearances: Candace L. Curtis, pro se, Bernard Lilse Mathews, III.. The Court will, sua sponte, dismiss the pltf's case by separate order for lack of jurisdiction. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/08/2012)
03/08/2012	14	ORDER OF DISMISSAL *(Sua Sponte)* re: 10 EMERGENCY MOTION, 11 Corrected MOTION Removal of Lis Pendens. The Court lacks jurisdiction and this case is dismissed. To the extent that a *lis pendens* has been filed among the papers in federal Court in this case, it is cancelled and held for naught. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/08/2012)
03/09/2012	15	Plaintiff's Answer to 11 Corrected MOTION Removal of Lis Pendens filed by Candace Louise Curtis. (pyebernetsky,) (Entered: 03/12/2012)
03/12/2012	16	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 14 Order of Dismissal, by Candace Louise Curtis (Filing fee $ 455), filed.(mlothmann) (Entered: 03/12/2012)
03/16/2012	17	Notice of Assignment of USCA No. 12-20164 re: 16 Notice of Appeal, filed. (sguevara,) (Entered: 03/16/2012)
03/26/2012	18	Notice of the Filing of an Appeal. DKT13 transcript order form was not mailed to appellant. Fee status: Not Paid. The following Notice of Appeal and related motions are pending in the District Court: 16 Notice of Appeal, filed. (Attachments: # 1 Order Dismissal, # 2 Notice of Appeal, # 3 Docket sheet, # 4 Motion IFP)(lfilmore,) (Entered: 03/26/2012)
03/30/2012		USCA Appeal Fees received $ 455, receipt number HOU022939 re: 16 Notice of Appeal, filed.(klove,) (Entered: 03/30/2012)
04/12/2012	19	Form 22 TRANSCRIPT ORDER FORM by Candace Louise Curtis. Transcript is unnecessary for appeal purposes. This order form relates to the following: 16 Notice of Appeal, filed.(mlothmann) (Entered: 04/16/2012)
04/26/2012		The Electronic record on appeal has now been certified to the Fifth Circuit Court of Appeals re: 16 Notice of Appeal USCA No. 12-20164, filed.(blacy,) (Entered: 04/26/2012)

08/16/2012	20	Transmittal Letter on Appeal Certified re: 16 Notice of Appeal. A paper copy of the electronic record is being transmitted to the Fifth Circuit Court of Appeals in 3 volumes. (USCA No. 12-20164), filed.(hler,) (Additional attachment(s) added on 8/17/2012: # 1 UPS Tracking #) (hler,). (Entered: 08/16/2012)
08/20/2012	21	Transmittal Letter on Appeal Certified re: 16 Notice of Appeal. CDs containing the electronic record are being sent to Bernard Lilse Mathews, III, filed.(hler,) (hler,). (Entered: 08/20/2012)
02/05/2013	22	JUDGMENT of USCA for the Fifth Circuit re: 16 Notice of Appeal ; USCA No. 12-20164. The judgment of the District Court is REVERSED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of the Court. Case reopened on 2/5/2013, filed.(jdav,) (Entered: 02/05/2013)
02/05/2013	23	Court of Appeals for the Fifth Circuit LETTER advising the record/original papers/exhibits are to be returned (USCA No. 12-20164), filed.(jdav,) (Entered: 02/05/2013)
02/05/2013	24	OPINION of USCA for the Fifth Circuit re: 16 Notice of Appeal ; USCA No. 12-20164. The district court's dismissal of the case is REVERSED and the case is REMANDED for further proceedings. REVERSED AND REMANDED., filed.(jdav,) (Entered: 02/05/2013)
02/06/2013	25	NOTICE of Setting. Parties notified. Status/Scheduling Telephone Conference set for 2/19/2013 at 08:45 AM before Judge Kenneth M. Hoyt, filed. (dpalacios,) (Entered: 02/06/2013)
02/17/2013	26	NOTICE of Appearance by George W. Vie III on behalf of Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 02/17/2013)
02/19/2013	27	ORDER FOLLOWING TELEPHONE STATUS/SCHEDULING CONFERENCE held on February 19, 2013 at 8:45 a.m. Appearances: Candace Curtis, pro se, George Vie ETT: TBA. Jury trial. Joinder of Parties due by 4/30/2013 Pltf Expert Witness List due by 9/30/2013. Pltf Expert Report due by 9/30/2013. Deft Expert Witness List due by 10/30/2013. Deft Expert Report due by 10/30/2013. Discovery due by 12/30/2013. Dispositive Motion Filing due by 12/30/2013. Docket Call set for 3/3/2014 at 11:30 AM in Courtroom 11A before Judge Kenneth M. Hoyt. The defendant's are to file an answer to the plaintiff's suit on or before March 4, 2013.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 02/19/2013)
02/20/2013	28	ORDER that George W. Vie III and the law firm of Mills Shirley L.L.P. are substituted as attorneys of record for Defendants in lieu of Bernard Lilse Mathews, III and the law firm of Green & Mathews, L.L.P.(Signed by Judge Kenneth M. Hoyt) Parties notified. (chorace) (Entered: 02/20/2013)
03/01/2013	29	ANSWER to 1 Complaint,, by Amy Ruth Brunsting, Anita Kay Brunsting, filed.(Vie, George) (Entered: 03/01/2013)
03/05/2013	30	Court of Appeals LETTER advising Electronic record has been recycled (USCA No. 12-20164), filed.(smurdock,) (Entered: 03/05/2013)

03/11/2013	31	CERTIFICATE OF INTERESTED PARTIES by Plaintiff, filed.(mmapps,) (Entered: 03/11/2013)
03/14/2013	32	REPLY to 29 Answer to Complaint, filed by Candace Louise Curtis. (sclement,) (Entered: 03/20/2013)
03/14/2013	33	CERTIFICATE OF SERVICE of 32 Reply by Candace Louise Curtis, filed.(sclement,) (Entered: 03/20/2013)
03/14/2013	34	AFFIDAVIT of Candace Louise Curtis in Support of Application for Injunction, filed. (sclement,) (Entered: 03/20/2013)
03/14/2013	35	Renewed Application for Ex Parte Temporary Restraining Order, and Asset Freeze, Temporary and Permanent Injunction by Candace Louise Curtis, filed. Motion Docket Date 4/4/2013. (sclement,) (Additional attachment(s) added on 3/20/2013: # 1 Proposed Order) (sclement,). (Entered: 03/20/2013)
03/14/2013	36	EXHIBITS re: 35 MOTION for Temporary Restraining Order by Candace Louise Curtis, filed.(sclement,) (Entered: 03/20/2013)
03/22/2013	37	NOTICE of Setting as to 35 MOTION for Temporary Restraining Order. Parties notified. Injunction Hearing set for 4/9/2013 at 09:00 AM in Courtroom 11A before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 03/22/2013)
03/29/2013		***Plaintiff's email request to appear telephonically at the Injunction hearing set for April 9, 2013 at 9:00 a.m is Denied. Candace Curtis' appearance in person is required, filed. (chorace) (Entered: 03/29/2013)
04/01/2013	38	Letter from Rik Munson re: the mailing of a copy of Rule 11 motion, filed. (mmapps,) (Entered: 04/02/2013)
04/04/2013	39	RESPONSE in Opposition to 35 MOTION for Temporary Restraining Order, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/04/2013)
04/09/2013	40	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. PRELIMINARY INJUNCTION HEARING held on 4/9/2013. Witness: 10 Anita Kay Brunsting. Pursuant to the courtroom ruling as stated on the record, the parties shall work toward resloving this matter w/i 90 days, or the Court shall appoint an independent firm or accountant to gather financial records of the Trust. The parties shall submit a name of an agreed accountant w/i one week. Defendant's shall submit a motion for approval of payment of the Trust taxes. No bond is required at this time. Appearances:Candace Curtis. George William Vie, III.(Court Reporter: F. Warner), filed.(chorace,) (Entered: 04/09/2013)
04/09/2013	42	Exhibit List by Amy Ruth Brunsting, Anita Kay Brunsting, filed.(chorace) (Entered: 04/11/2013)
04/10/2013	41	NOTICE *of filing of state court lawsuit against parties* by Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Vie, George) (Entered: 04/10/2013)
04/11/2013	43	MOTION for Approval of Tax Payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/2/2013. (Attachments: # 1 Proposed

		Order)(Vie, George) (Entered: 04/11/2013)
04/11/2013	44	ORDER granting 43 Motion for Approval of Tax Payments.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/11/2013)
04/19/2013	45	MEMORANDUM AND ORDER PRELIMINARY INJUNCTION. The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/19/2013)
04/19/2013	46	NOTICE *of Agreed CPA Firm pursuant to Court's Order for Accounting* by Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Vie, George) (Entered: 04/19/2013)
04/29/2013	47	ORDER. In light of the accusations in the pleadings and the Courts instructions, the Court is of the opinion that the best course forward is a Court appointed accountant who will be responsible to the Court. The Court, therefore, rejects the parties agreed notice as an appointment. An Order designating an accountant will be entered shortly. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) . (Entered: 04/29/2013)
05/01/2013	48	**STRICKEN Per # 57** Order. Plaintiff's First AMENDED complaint with jury demand against All Defendants filed by Candace Louise Curtis.(olindor,) (Entered: 05/01/2013)
05/01/2013	49	MOTION for Joinder of Parties And Actions Demand For Show of Proof of Standing by Candace Louise Curtis, filed. Motion Docket Date 5/22/2013. (olindor) (Entered: 05/01/2013)
05/01/2013	50	Plaintiff's Verified AFFIDAVIT In Support of Amended Complaint And In Support of Application For Joinder Candace Louise Curtis, filed. (Attachments: # 1 Exhibit, # 2 Exhibit)(olindor) (Entered: 05/01/2013)
05/01/2013	51	NOTICE of lawsuit and request to waiver service by Candace Louise Curtis, filed. (ccarnew,) (Entered: 05/08/2013)
05/01/2013	52	NOTICE of lawsuit and request to waive service by Candace Louise Curtis, filed. (ccarnew,) (Entered: 05/08/2013)
05/01/2013	53	NOTICE of a Lawsuit and Request to Waive Service of a Summons by Candace Louise Curtis, filed. (isoto) (Entered: 05/08/2013)
05/01/2013	54	Notice of Lawuit and Request for Waiver of a Summons as to Bernard Lilse Mathews III sent on 4/28/13 by Candace Louise Curtis, filed.(dgonzalez) (Entered: 05/08/2013)
05/09/2013	55	ORDER Pursuant to federal Rule of Civil Procedure 53, Appointing William G. West as Master to Perform Accounting 47 .(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 05/09/2013)
05/21/2013	56	RESPONSE in Opposition to 49 MOTION for Joinder, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 05/21/2013)

05/22/2013	57	ORDER denying 49 Motion for Joinder of Parties and Actions and Motion to Amend Complaint. The Amended Complaint 48 was filed w/o leave of Court and is therefore STRICKEN from the record.(Signed by Judge Kenneth M. Hoyt) Parties notified. (chorace) (Entered: 05/22/2013)
06/06/2013	58	MOTION for Approval of Disbursement by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 6/27/2013. (Attachments: # 1 Appendix Exhibits 1 and 2, # 2 Proposed Order)(Vie, George) (Entered: 06/06/2013)
06/10/2013	59	ORDER granting 58 Motion for Approval of Disbursements.(Signed by Judge Kenneth M. Hoyt) Parties notified.(kpicota) (Entered: 06/10/2013)
07/15/2013	60	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on July 15, 2013 at 8:15 a.m. Appearances: William G. West (Accountant). Pursuant to phone conference, the Court conferred with Mr. West concerning his report due at the end of the month. Upon receipt, a hearing date will be set to address any concerns of the parties.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 07/15/2013)
08/05/2013	61	ORDER. Before the Court is the report of the Court-appointed accountant for the Brunsting Family Living Trust for the period December 21, 2010 through May 31, 2013. Objections to the report and the accountants invoice shall be filed on or before August 27, 2013. Miscellaneous Hearing set for 9/3/2013 at 01:30 PM at Courtroom 11A before Judge Kenneth M. Hoyt(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 08/05/2013)
08/08/2013	62	NOTICE - *Report of Master - Accounting of Income/Receipts and Expenses/Distributions of the Brunsting Family Living Trust for the Period December 21, 2010 Through May 31, 2013* re: 55 Order, 61 Order, by William West, filed. (Million, Timothy) (Entered: 08/08/2013)
08/08/2013	63	Sealed Event, filed. (Entered: 08/08/2013)
08/26/2013	64	MOTION for Approval of Disbursements to Pay Property Tax Bills by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 9/16/2013. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 08/26/2013)
08/27/2013	65	MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013 by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 9/17/2013. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 08/27/2013)
08/27/2013	66	ORDER granting 64 Defendant's Motion for Approval of Disbursements to Pay Property Tax Bills.(Signed by Judge Kenneth M. Hoyt) Parties notified.(rosaldana) (Entered: 08/27/2013)
08/27/2013	67	RESPONSE *to Report of Master*, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Appendix Tab 1, # 2 Appendix Tab 2)(Vie, George) (Entered: 08/27/2013)
08/28/2013	68	ORDER for Expedited Response; Motion-related deadline set re: 65 MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013. Response to Motion due by 9/3/2013.(Signed by Judge Kenneth M. Hoyt) Parties

		notified.(chorace) (Entered: 08/28/2013)
08/29/2013	69	RESPONSE to 62 Notice - Report of Master, filed by Candace Louise Curtis. (Attachments: # 1 Proposed Order, # 2 Proposed Order). (CD filed in Clerks Office.) (sscotch,) (Entered: 08/29/2013)
08/29/2013	70	This document is a duplicate of DE 69 ; this entry was made for case management purposes. Plaintiff's Response to the Report of Master and Applications for Orders by Candace Louise Curtis, filed. (CD filed in Clerks Office). Motion Docket Date 9/19/2013. (Attachments: # 1 Proposed Order, # 2 Proposed Order)(sscotch,) (Entered: 08/29/2013)
08/30/2013	71	PROPOSED ORDER re: 67 Response, filed.(Vie, George) (Entered: 08/30/2013)
09/03/2013	72	OBJECTIONS to 65 MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013, filed by Candace Louise Curtis. (mmapps,) (Entered: 09/03/2013)
09/03/2013	73	OBJECTIONS to 62 Notice (Other), Defendants Motion for Orders to Recommit Matters to Master for Consideration, filed by Candace Louise Curtis. (mmapps,) (Entered: 09/03/2013)
09/03/2013	74	Plaintiff's Ex Parte Motion for Order to Show Cause and Application for Judgment of Civil Contempt by Candace Louise Curtis, filed. Modified on 9/3/2013 (chorace). (Entered: 09/03/2013)
09/03/2013	75	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. MISCELLANEOUS HEARING held on 9/3/2013. There were no objection's by the parties to the Master's Report. Invoices are Ordered to be paid. Any and all pending motions not ruled on are DENIED. Appearances:Candace Louise Curtis, Maureen McCutchen, William Potter, George William Vie, III, Timothy Aaron Million.(Court Reporter: S. Carlisle), filed.(chorace) (Entered: 09/03/2013)
09/03/2013	76	NOTICE of Setting as to 74 MOTION for Order to Show Cause. Parties notified. Motion Hearing set for 10/2/2013 at 11:30 AM in Courtroom 11A before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 09/03/2013)
09/03/2013	77	ORDER granting Approval of Disbursements to Special Master & Special Master's Attorney. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 09/03/2013)
09/03/2013	78	ORDER granting 65 Motion for Approval and Renewal of Farm Lease.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 09/03/2013)
09/18/2013	79	TRANSCRIPT re: TRO Hearing held on April 9, 2013 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber FWarner. Release of Transcript Restriction set for 12/17/2013., filed. (fwarner,) (Entered: 09/18/2013)
09/19/2013	80	Notice of Filing of Official Transcript as to 79 Transcript. Party notified, filed. (dhansen, 4) (Entered: 09/19/2013)
09/23/2013	81	NOTICE of Resetting. Parties notified. Motion Hearing reset for 10/2/2013 at 09:00 AM (TIME CHANGE ONLY) in Courtroom 11A before Judge Kenneth M. Hoyt,

		filed. (chorace) (Entered: 09/23/2013)
09/23/2013	82	RESPONSE in Opposition to 74 MOTION for Order to Show Cause, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Appendix)(Vie, George) (Entered: 09/23/2013)
09/23/2013	83	PROPOSED ORDER re: 82 Response in Opposition to Motion, filed.(Vie, George) (Entered: 09/23/2013)
09/27/2013	84	TRANSCRIPT re: Hearing held on September 3, 2013 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber S. Carlisle. Release of Transcript Restriction set for 12/26/2013., filed. (scarlisle) (Entered: 09/27/2013)
09/30/2013	85	Notice of Filing of Official Transcript as to 84 Transcript. Party notified, filed. (dhansen, 4) (Entered: 09/30/2013)
10/02/2013	86	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. MOTION HEARING held on 10/2/2013. Argument heard. Order to follow. Appearances:Candace Louise Curtis, Maureen Kuzik McCuchen. George William Vie, III.(Court Reporter: M. Malone), filed.(chorace) (Entered: 10/02/2013)
10/03/2013	87	ORDER denying 74 Motion for Order to Show Cause and Application for Judgment of Civil Contempt. The Court directs that the plaintiff employ counsel within 60 days so that the case may proceed according to the rules of discovery and evidence. (Signed by Judge Kenneth M. Hoyt) Parties notified.(rosaldana, 4) (Entered: 10/03/2013)
11/08/2013	88	MOTION for Approval of Disbursement to pay invoice by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 11/29/2013. (Attachments: # 1 Appendix Invoice, # 2 Proposed Order)(Vie, George) (Entered: 11/08/2013)
11/12/2013	89	ORDER granting 88 Motion for Approval of Disbursement.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 11/12/2013)
12/05/2013	90	PLAINTIFF'S MOTION for Approval of Disbursement to pay fee retainer by Candace Louise Curtis, filed. Motion Docket Date 12/26/2013. (Attachments: # 1 Proposed Order)(sbejarano, 1) (Entered: 12/06/2013)
12/12/2013	91	NOTICE of Setting as to 90 MOTION for Approval of disbursement to pay fee retainer. Parties notified. Telephone Conference set for 12/18/2013 at 08:30 AM by telephone before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 12/12/2013)
12/18/2013	92	RESPONSE to 90 MOTION for Approval of disbursement to pay fee retainer filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 12/18/2013)
12/18/2013	94	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on December 18, 2013 at 8:30 a.m. Appearances: Candace Curtis Curtis, Jason Ostrom, George Vie, III. Pursuant to phone conference, the parties agree to seek and agree upon an accommodation that satisfies the plaintiffs request for a disbursement for attorneys fees, if they can do so. The Court sanctions this process and sets December 30, 2013 as the deadline for filing any agreement.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 01/06/2014)

12/30/2013	93	Agreed PROPOSED ORDER re: 90 MOTION for Approval of disbursement to pay fee retainer, filed. (Attachments: # 1 Proposed Order Agreed proposed order)(Vie, George) (Entered: 12/30/2013)
01/06/2014	95	NOTICE of Appearance by Jason B. Ostrom on behalf of Jason Ostrom, filed. (Ostrom, Jason) (Entered: 01/06/2014)
01/06/2014	96	AGREED ORDER granting Approval of Disbursements. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 01/07/2014)
02/24/2014	97	NOTICE of Setting. Parties notified. Telephone Conference set for 2/28/2014 at 08:30 AM by telephone before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 02/24/2014)
02/28/2014	98	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on February 28, 2014 at 8:30 a.m. Appearances: Jason B. Ostrom, George William Vie, III. Pursuant to phone conference conducted this day, the plaintiff, who determines that additional parties and claims may be necessary for a complete resolution of the case, also fears loss of diversity jurisdiction on the part of the Court. In this regard, and with an eye toward resolving these concerns, the plaintiff is to report the nature and extent of this progress to the Court on or before March 30, 2014. Docket call is cancelled.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 03/02/2014)
03/08/2014	99	MOTION for Approval of Disbursements to Pay Property Tax Bills by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/31/2014. (Attachments: # 1 Appendix Exhibit A, # 2 Proposed Order)(Vie, George) (Entered: 03/08/2014)
03/10/2014	100	Order Granting Defendants Motion for Approval of Disbursements to Pay Property Tax Bills 99 Motion for Approval.(Signed by Judge Kenneth M. Hoyt) Parties notified.(sclement, 4) (Entered: 03/10/2014)
03/26/2014	101	MOTION for Approval of Tax Payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 4/16/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 03/26/2014)
03/27/2014	102	ORDER granting 101 Motion for Approval of Tax Payments.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 03/27/2014)
04/15/2014	103	MOTION for Approval of quarterly estimated income tax payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/6/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/15/2014)
04/16/2014	104	ORDER granting 103 Motion for Approval of Quarterly Estimated Income Tax Payments. (Signed by Judge Kenneth M. Hoyt) Parties notified. (rosaldana, 4) (Entered: 04/16/2014)
04/22/2014	105	MOTION for Approval of Disbursements by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/13/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/22/2014)

04/22/2014	106	ORDER granting 105 Motion for Approval of Disbursements.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/22/2014)
05/09/2014	107	Unopposed MOTION for Leave to File First Amended Petition by Candace Louise Curtis, filed. Motion Docket Date 5/30/2014. (Attachments: # 1 Exhibit Exhibit A)(Ostrom, Jason) (Entered: 05/09/2014)
05/09/2014	108	First AMENDED Complaint with Jury Demand against Amy Ruth Brunsting, Anita Kay Brunsting, Does 1-100 filed by Candace Louise Curtis.(Ostrom, Jason) (Entered: 05/09/2014)
05/09/2014	109	Unopposed MOTION to Remand by Candace Louise Curtis, filed. Motion Docket Date 5/30/2014. (Ostrom, Jason) (Entered: 05/09/2014)
05/12/2014	110	Unopposed PROPOSED ORDER *Granting Motion for Leave to File First Amended Petion* re: 107 Unopposed MOTION for Leave to File First Amended Petition, filed. (Ostrom, Jason) (Entered: 05/12/2014)
05/15/2014	111	ORDER granting 107 Motion for Leave to File First Amended Petition.(Signed by Judge Kenneth M. Hoyt) Parties notified.(glyons, 4) (Entered: 05/15/2014)
05/15/2014	112	ORDER granting 109 Motion to Remand to Harris County Probate Court No. 4.(Signed by Judge Kenneth M. Hoyt) Parties notified.(glyons, 4) (Entered: 05/15/2014)
07/25/2016	113	MOTION for Permission for Electronic Case Filing by Candace Louise Curtis, filed. Motion Docket Date 8/15/2016. (Attachments: # 1 Letter, # 2 Proposed Order) (chorace) (Entered: 07/28/2016)
07/29/2016	114	ORDER denying 113 Motion for Permission for Electronic Case Filing..(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 07/29/2016)
08/03/2016	115	Plaintiff Candace Louise Curtis' Motion for Relief from Order Pursuant to Fed. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(b)(6) and Fed. R. Civ. P. 60(d)(3) by Candace Louise Curtis, filed. Motion Docket Date 8/24/2016. (Attachments: # 1 Proposed Order) (dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	117	Other EXHIBITS re: 115 MOTION., filed. (Attachments: # 1 Continuation of Exhibits, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	118	Other EXHIBITS re: 115 MOTION by Candace Louise Curtis., filed. (Attachments: # 1 Exhibits Continue, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation, # 14 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	119	Other EXHIBITS re: 115 MOTION by Candace Louise Curtis., filed. (Attachments: # 1 Exhibits Continue, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation,

		# 10 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/05/2016	116	Other EXHIBITS re: 115 MOTION., filed. (Attachments: # 1 Exhibits, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/05/2016	120	Plaintiff Candance Louise Curtis Motion for Sanctions With Points and Authorities Preliminary Statement by Candace Louise Curtis, filed. Motion Docket Date 8/26/2016. (Attachments: # 1 Exhibit Transcript, # 2 Exhibit)(mxperez, 5) (Entered: 08/09/2016)
08/10/2016	121	PLAINTIFF'S NOTICE OF RELATED CASE (Local Rule 5.2) by Candace Louise Curtis, filed. (szellers, 7) (Entered: 08/11/2016)
08/10/2016	122	PLAINTIFF CANDACE LOUISE CURTIS' MOTION FOR PERMISSION FOR ELECTRONIC CASE FILING by Candace Louise Curtis, filed. Motion Docket Date 8/31/2016. (Attachments: # 1 Proposed Order)(szellers, 7) (Entered: 08/11/2016)

PACER Service Center

Transaction Receipt

11/14/2016 07:03:15

PACER Login:	cl4635:3890596:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	4:12-cv-00592
Billable Pages:	10	**Cost:**	1.00

Nelva Brunsting
13630 Pinerock Ln.
Houston, TX 77079

USA44

Candy Curtis,
1215 Virginia Way
Martinez, CA
94553

72

Wes Sunday

Its almost 10pm but I'm not sleepy and my computer wont cooperate tonite.

So I heard you were concerned that any money you receive after I "leave this mortal coil" will be put in a trust and Greta would have to deal it out.

That not true. You will get whatever share is yours. If you don't know how to manage money by now its too late.

I'm on okay quite a bit of the time now. Even sleep with it. The hum of the motor is rather soothing.

Had about 30 on 20 teachers the evening. Dino took care of doing the goodies out.

Our weather is still gorgeous but so very dry. Glad I'm not a farmer. Iowa farmers are doing better.

I'm watching the World Series. Looks like your guys are winning.

Aren't those odds pretty? Could get them for me.

pcw

get a lap desk. I guess I'm too lazy to sit at the desk. I usually write while watching TV at nite.

Wish I had gave lovely handwriting. I started out left handed but my 1st gr. Teacher made me write right handed so I ~~[illegible]~~ blame her.

Hallmark
STATIONERY
CNT3025
© HALLMARK LICENSING, INC.
MADE IN U.S.A.
Hallmark.com

t. I can't even read myown writing.)

Bye now. Love, Mother

PROBATE COURT 4
FILED
1/19/2016 11:19:16 AM
Stan Stanart
County Clerk
Harris County

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

FIRST SUPPLEMENT TO REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST

On January 14, 2016 the REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST (the "Report") was filed in the above styled Decedent's estate. This is the first supplement to the Report.

Trustees of the Brunsting Family Living Trust

On July 1, 2008 an Appointment of Successor Trustees was executed by Nelva Erleen Brunsting, also known as Nelva E. Brunsting, pursuant to Article IV. Section B. of the Brunsting Family Living Trust. This document appointed Carl Henry Brunsting and Anita Kay Brunsting as successor co-trustees if Nelva E. Brunsting fails or ceases to serve. If either Carl Henry Brunsting or Anita Kay Brunsting should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then The Frost National Bank shall serve as the sole successor trustee. A copy of the Appointment of Successor Trustees is attached hereto as the first exhibit to first supplement.

In all other respects the Report filed on January 14, 2016 remains the same.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' ANSWER TO DEFENDANT GREGORY LESTERS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)

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I. Introduction

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§1961-1968, and the right of private claims provided for at 18 U.S.C. §1964(c). (Dkt 1)

2. On November 7, 2016, Defendant Gregory Lester filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 83)

II. The Issues

A. Plaintiffs have not adequately pleaded the necessary predicate acts.

B. The Plaintiffs have not stated a RICO claim under section 1962(c).

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

C. Plaintiffs have failed to plead a cognizable RICO enterprise.

1. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

2. Plaintiffs' enterprise allegations are too vague and conclusory.

3. Plaintiffs' alleged enterprise lacks continuity.

D. Plaintiffs have failed to adequately plead a pattern of racketeering activity.

E. The Plaintiffs have not stated a RICO claim under section 1962(d).

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

F. Plaintiffs' claims for "Hobbs Act," "wire fraud," "fraud under 18 U.S.C. §1001" and "Honest Services" fail because those statutes do not create private causes of action.

1. The Hobbs Act does not create a private cause of action.

2. The Wire Fraud statute does not create a private cause of action.

3. The claim for "Fraud under 18 U.S.C. §1001" is not a private cause of action.

4. The claim for "Honest Services" is not a private cause of action.

5. Plaintiffs rely on impermissible collective pleading.

III. Plaintiffs' Argument

3. Defendant challenges the sufficiency of the RICO Complaint on all of the usual substantive ground, in every subdivision of the nine necessary pleading elements for 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims, but fails to consider the ambit of federal "aiding and abetting" and "conspiracy" statutes.

4. Defendant asks the Court to take a disjointed view of the mosaic as if its parts were somehow unrelated, but Defendants are each charged with "participation" in the affairs of an enterprise through "in-concert aiding and abetting". Plaintiffs need only show that Defendant performed an act in furtherance of the goals of the enterprise.

Participation

5. Gregory Lester is charged with participation in the affairs of an enterprise through a pattern of racketeering activity involving the commission of two or more predicate acts. Mr. Lester's Motion admits there are almost fifty predicate acts claims, but argues that none specifically relate to him.

6. Mr. Lester's Motion actually admits to his participation and, while claiming Plaintiffs' Addendum of Memorandum is "replete with inaccuracies", Mr. Lester's introduction claims Plaintiff Candace Curtis is a disgruntled sibling in a probate case.

7. The record will show that Candace Curtis is a Plaintiff in a federal breach of fiduciary lawsuit, involving only the Brunsting Trusts[1] (Exhibit 1), that the case was dismissed under the probate exception, (Exhibit 1 entry 14) and appealed to the Fifth Circuit Court of Appeals,

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD 2/27/2012 and 704 F.3d 406.

(Exhibit 1 entry 16) where the dismissal was reversed and remanded back to the U.S.D.C. (Dkt 34-4)[2]

8. Back in the U.S.D.C. "Plaintiff Curtis" obtained a preliminary injunction to prevent wasting of trust assets.[3] On that very same day, federal Plaintiff Candace Curtis was named a "Nominal Defendant" in a state probate court suit styled "Carl Henry Brunsting Individually and as Executor for the Estates of Elmer and Nelva Brunsting", (Dkt 33-6) hereinafter "The Probate Matter".

9. "The Probate Matter" raises only claims relating to the Brunsting Trusts. It should be noted that the Brunsting Trusts were in the custody of a federal Court when the state court claims were filed.

10. The record will also show that Defendant Jason Ostrom filed an unopposed motion to remand Curtis v Brunsting to state probate court, to be consolidated with the "Estate of Nelva Brunsting" 412,249, where federal "Plaintiff Curtis" was named "Defendant Curtis".

11. Curtis v Brunsting, in the Fifth Circuit, soured the market for looting inter vivos trusts under the pretext of probate administration and these Defendant "legal professionals" are a bunch of disgruntled members of a probate bully mob seeking vengeance for being on the losing end of a fully litigated Federal Fifth Circuit determination, that inter vivos trusts are not assets of a probate estate and are not subject to their degenerate version of probate administration.[4]

12. Mr. Lester's participation involved drafting a false report for a purpose other than that for which it was authorized and Mr. Lester's participation is easily shown by the documented sequence of events and his own admissions.

[2] Also Docket entry 24 in Curtis v Brunsting 4:12-cv-592
[3] Curtis v Brunsting 4:12-cv-592 Docket entry 40 (Dkt 26-2 in this case)
[4] See the Brunsting Wills (Dkt 41-3 and 41-4)

IV. The Report of Temporary Administrator Gregory Lester

13. The "Report of Temporary Administrator Pending Contest", (Dkt 83-2) was filed in the "Estate of Nelva Brunsting" 412249 on January 14, 2016.

14. The "Report" is not a report but a caricature of the racketeering conspiracy itself. It is a confession of the intention of all of these Defendants, as exemplified by the public record, to redirect the Brunsting inter vivos trust assets into a probate court, where there is not, and has never been, in Rem jurisdiction over the Brunsting Trusts.

15. The manifest purpose for the "Report" was to further the artifice initiated by Bayless when she filed exclusively trust related lawsuits in state courts, in the name of an estate, on January 29, 2013 and April 9, 2013.

16. Gregory Lester and Jill Willard Young agreed to further that plan on and before September 10, 2015[5]. Part of that scheme was to bully the beneficiaries of the Trusts into a sham mediation, staged for the sole purpose of extracting attorney fees from the Brunsting Trusts. (Dkt 26-16)

17. The "Report", when compared to the record, displays numerous misstatements and contradictions, while merely posing as a report on the validity of "Estate" claims, as hereinafter more fully appears.

18. The "Report" never once mentions the Wills of Elmer or Nelva Brunsting and never once identifies an heir nor any assets belonging to the "Estates".

19. In evaluating the "Estate" claims, the substance of the "Report" mentions Trustees and the Brunsting Trusts one-hundred fifty-five (155) times, while the words "Estate" (7) and probate (17) appear only in non-substantive contexts.

[5] This is the hearing referred to by Defendant Neal Spielman on March 9, 2016 (Dkt 26-16) and Plaintiffs have been unable to obtain a transcript or an explanation from Mr. Baiamonte for the lack thereof.

20. It has already been shown that the approved inventories (Dkt 41-7) contain only one-half of an old car and the pending claims against Candace Freed in the District Court, but neither is mentioned in the "Report".

21. The "Report" never mentions the merits of the "Estate" claims, but focuses entirely on claims relating to beneficiaries of the heir-in-fact "Trust", which had already been held in the Fifth Circuit not to be property belonging to the "Estates". (Dkt 34-4)

22. It should also be noted that administration of both Estates had been dropped on April 4, 2013, (Dkt 41-5 and 41-6) just five days before "The Probate Matter" involving only the Brunsting Trusts was filed. (Dkt 34-7)

23. In the Addendum to the report, later filed by Mr. Lester, (Exhibit 2) he states the following (emphasis added):

> ***Trustees of the Brunsting Family Living Trust***
>
> *On July 1, 2008 an Appointment of Successor Trustees was executed by Nelva Erleen Brunsting, also known as Nelva E. Brunsting, pursuant to Article IV. Section B. of the Brunsting Family Living Trust. This document appointed Carl Henry Brunsting and Anita Kay Brunsting as successor co-trustees if Nelva E. Brunsting fails or ceases to serve. If either Carl Henry Brunsting or Anita Kay Brunsting should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then* ***The Frost National Bank*** *shall serve as the sole successor trustee. A copy of the Appointment of Successor Trustees is attached hereto as the first exhibit to first supplement.*

24. What the instrument actually says is (emphasis added):

> *"If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then* ***CANDACE LOUISE CURTIS*** *shall serve as sole successor Trustee. In the event CANDACE LOUISE CURTIS is unable or unwilling to serve, then THE FROST NATIONAL BANK shall serve as sole successor Trustee."*

Defendant Exhibit A

25. Defendant's Exhibit A (Dkt 83-1) is the Order Appointing Temporary Administrator Gregory Lester.

26. The appointment was made pursuant to Estates Code 452.051 which reads:

> *SUBCHAPTER B. TEMPORARY ADMINISTRATION PENDING CONTEST OF A WILL OR ADMINISTRATION*
>
> *Sec. 452.051. APPOINTMENT OF TEMPORARY ADMINISTRATOR. (a) If a contest related to probating a will or granting letters testamentary or of administration is pending, the court may appoint a temporary administrator, with powers limited as the circumstances of the case require.*
>
> *(b) The appointment may continue until the contest is terminated and an executor or administrator with full powers is appointed.*
>
> *(c) The power of appointment under this section is in addition to the court's power of appointment under Subchapter A.*
>
> *Added by Acts 2009, 81st Leg., R.S., Ch. 680 (H.B. 2502), Sec. 1, eff. January 1, 2014.*
>
> *Amended by:*
>
> *Acts 2015, 84th Leg., R.S., Ch. 949 (S.B. 995), Sec. 44, eff. September 1, 2015.*

27. In the Order the Probate Court found that it had jurisdiction and venue over the Decedent's Estate and appointed Mr. Lester "Temporary Administrator" with limited powers to evaluate all claims filed against 1) Candace Freed 2) Anita Kay Brunsting, 3) Amy Ruth Brunsting, and 4) Carole Ann Brunsting, (Dkt 83-1 Numbered paragraph 1) and report to the Court regarding the merits of those claims.

28. The cestui que (beneficiary) is "the Trust" and the Trust is the only heir-in-fact to the Estates. Assets in the inter vivos trusts are not property belonging to the Estates and do not come within the purview of "probate administration".[6]

[6] Curtis v Brunsting 704 F.3d 406, 410 (Jan 2-13)

29. Does the "Estate" have standing to bring claims against beneficiaries for trespass against the cestui que trust, committed during the life of a Grantor, or do those claims belong to the beneficiaries and the heir-in-fact Trust?

30. This question was settled in the Fifth Circuit in connection with the very Trusts at issue here, but was never considered in the report on the merits of any "Estate" claims.

V. The Report and the Extortion Instrument

31. The "Report" contains numerous assertions that misapplications of fiduciary are benign, justified, or can simply be "equalized" with more distributions of Brunsting Trust assets.

32. The "Report" ultimately concludes that if the Court were to rule on the "No Contest Clause" in the 8/25/2010 QBD, Curtis and her brother Carl would take nothing from the litigation.

33. The "Report" does not mention the controversy regarding the instrument, (Dkt 26-5 and 26-11) or which of the three alleged versions he selected for what reasons, or how it stretches beyond the limits stated in the report to reach to the irrevocable, un-amendable Trusts, or how any of that relates to property belonging to an Estate.

34. The "Report" contains warped conclusions, and while paraphrasing the irrevocable and unamendable trust provisions, the "Report" ultimately determines that changes alleged to have been made by Nelva alone were proper, "unless it can be shown Nelva was incompetent". (Dkt 83-2 page 10)

35. The facts of record are that Nelva wrote to Candace Curtis in her own hand verifying that what Anita and Amy claim Nelva said and did (through the 8/25/2010 QBD) is "not true". (Exhibit 3)

36. Nelva was not incompetent, the laws of the Trusts do not allow changes to be made by Nelva alone, no court of competent jurisdiction changed the trusts, and Nelva's state of mind at the time changes were made is irrelevant.

VI. Amendment and Adoption by Reference

37. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants' Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85, 86, this reply, and the attached exhibits, as if fully expressed therein.

38. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

VII. Conclusion

39. Plaintiffs have more than adequately pled person, enterprise, conspiracy, pattern and fraud with the necessary particularity, and with each response to Motions to Dismiss, Plaintiffs establish participation and continuity more fully.

40. Defendant may not assert opposing claims of fact under federal Rule 12(b)(6).

41. None of the Brunsting siblings are heir to the estates of Elmer or Nelva Brunsting, none have challenged either Will, and none have individual standing in the "Estates of Elmer or Nelva Brunsting". (Dkt 41-3 and 41-4)

42. Assets in the Brunsting inter vivos trusts are not assets belonging to any "Estate" and are not subject to probate administration. (Dkt 34-4) The Executor of the Estates has no standing to bring "Estate" claims relating to the inter vivos trusts in any probate court.

43. Curtis v Brunsting 4:12-cv-592 is a lawsuit involving only the Brunsting Trusts[7].

44. Upon the death of Elmer Brunsting the family trust not only became irrevocable, but it became unamendable, and the Decedent's Trust was created both irrevocable and unamendable. The only exception is "Court of Competent Jurisdiction". The Brunsting trusts could not even be decanted without court intervention and were not lawfully decanted, amended or revoked.

45. There is no 8/25/2010 QBD as a matter of law and nothing in the Lester report can be defended against the record of proceedings or the law of the trust.

46. Gregory Lester should be held to defend his "Report" under oath, just as all of these Defendants should.

WHEREFORE, Plaintiffs respectfully move this Honorable Court for an Order denying the Motion to Dismiss filed by Defendant Gregory Lester November 7, 2016. (Dkt 83)

Respectfully submitted,

November 27, 2016,

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

[7] Curtis v Brunsting 704 F.3d 406 (Jan. 2013)

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 27th day of November 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis
Candace L. Curtis

/s/Rik W. Munson
Rik W. Munson

CLOSED,REMANDED

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Houston)
CIVIL DOCKET FOR CASE #: 4:12-cv-00592

Candace Louise Curtis v. Anita Kay Brunsting et al **Case remanded to Harris County Probate Court No. 4.**
Assigned to: Judge Kenneth M. Hoyt
Cause: 28:1332 Diversity-Fraud

Date Filed: 02/27/2012
Date Terminated: 05/15/2014
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Special Master

William West
Accountant

represented by **Timothy Aaron Million**
Hughes Watters Askanase
Total Plaza
1201 Louisiana St., 28th Floor
Houston, TX 77002
713-759-0818
Fax: 713-759-6834
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ATTORNEY TO BE NOTICED

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Candace Louise Curtis

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Email: jason@ostromsain.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Carl Brunsting
Necessary Party and Involuntary Plaintiff

represented by **Carl Brunsting**
PRO SE

V.

Defendant

Anita Kay Brunsting

represented by **Bernard Lilse Mathews , III**
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14550 Torrey Chase Blvd
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281-580-8100
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TERMINATED: 02/20/2013
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Amy Ruth Brunsting represented by **Bernard Lilse Mathews , III**
(See above for address)
TERMINATED: 02/20/2013
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

George William Vie , III
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Does 1-100

Defendant

Carole Ann Brunsting

Defendant

Candace L. Kunz-freed

Defendant

Albert E. Vacek Jr.

Defendant

Vacek & Freed, PLLC

Defendant

The Vacek Law Firm PLLC

Defendant

Bernard Lilse Mathews III

Date Filed	#	Docket Text
02/27/2012	1	PLAINTIFF'S ORIGINAL PETITION, COMPLAINT AND APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER, ASSET FREEZE, TEMPORARY AND PERMANENT INJUNCTION against Amy Ruth Brungsting, Anita Kay Brunsting (Filing fee $ 350) filed by Candace Louise Curtis. (Attachments: # 1 Continuation, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation)(dterrell,) Modified on 2/27/2012 (dterrell,). (Entered: 02/27/2012)
02/27/2012	2	PROPOSED ORDER Injunctinctive Order Temporary Restraining Order, Asset Freeze, Production of Documents and Records, Appointment of Receiver, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012	3	INITIAL DISCLOSURES by Candace Louise Curtis, filed.(dterrell,) (Entered: 02/27/2012)
02/27/2012	4	REQUEST for Production of Documents from Anita Kay Brunsting and Amy Ruth Brunsting by Candace Louise Curtis, filed.(dterrell,) (Entered: 02/27/2012)
02/27/2012	5	NOTICE by Candace Louise Curtis, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012	6	NOTICE by Candace Louise Curtis, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012		Civil Filing fee re: 1 Complaint,, : $350.00, receipt number CC003143, filed. (dterrell,) (Entered: 02/27/2012)
02/27/2012		Summons Issued as to Amy Ruth Brunsting, Anita Kay Brunsting, filed.(dterrell,) (Entered: 02/27/2012)
02/28/2012	7	ORDER for Initial Pretrial and Scheduling Conference by Telephone and Order to Disclose Interested Persons. Counsel who filed or removed the action is responsible for placing the conference call and insuring that all parties are on the line. The call shall be placed to (713)250-5613. Telephone Conference set for 5/29/2012 at 09:30 AM by telephone before Judge Kenneth M. Hoyt.(Signed by Judge Kenneth M. Hoyt) Parties notified.(ckrus,) (Entered: 02/28/2012)
03/01/2012	8	ORDER denying the application for a temporary restraining order and for injunction. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/01/2012)
03/05/2012	9	Letter from Rik Munson re: serving copies on parties, filed. (Attachments: # 1 cover letter) (saustin,) (Entered: 03/05/2012)

03/06/2012	10	EMERGENCY MOTION by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/27/2012. (Attachments: # 1 Affidavit Affidavit of Amy Brunsting, # 2 Exhibit Property Appraisal, # 3 Exhibit Sale Contract, # 4 Exhibit Tax Appraisal, # 5 Supplement Request for Hearing, # 6 Proposed Order Proposed Order) (Mathews, Bernard) (Entered: 03/06/2012)
03/06/2012	11	Corrected MOTION Removal of Lis Pendens by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/27/2012. (Mathews, Bernard) (Entered: 03/06/2012)
03/06/2012	12	NOTICE of Setting. Parties notified. Telephone Conference set for 3/7/2012 at 11:00 AM by telephone before Judge Kenneth M. Hoyt, filed. The call shall be placed to (713)250-5613. (chorace) (Entered: 03/06/2012)
03/08/2012	13	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on 3/7/12 Appearances: Candace L. Curtis, pro se, Bernard Lilse Mathews, III.. The Court will, sua sponte, dismiss the pltf's case by separate order for lack of jurisdiction. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/08/2012)
03/08/2012	14	ORDER OF DISMISSAL *(Sua Sponte)* re: 10 EMERGENCY MOTION, 11 Corrected MOTION Removal of Lis Pendens. The Court lacks jurisdiction and this case is dismissed. To the extent that a *lis pendens* has been filed among the papers in federal Court in this case, it is cancelled and held for naught. (Signed by Judge Kenneth M. Hoyt) Parties notified.(dpalacios,) (Entered: 03/08/2012)
03/09/2012	15	Plaintiff's Answer to 11 Corrected MOTION Removal of Lis Pendens filed by Candace Louise Curtis. (pyebernetsky,) (Entered: 03/12/2012)
03/12/2012	16	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 14 Order of Dismissal, by Candace Louise Curtis (Filing fee $ 455), filed.(mlothmann) (Entered: 03/12/2012)
03/16/2012	17	Notice of Assignment of USCA No. 12-20164 re: 16 Notice of Appeal, filed. (sguevara,) (Entered: 03/16/2012)
03/26/2012	18	Notice of the Filing of an Appeal. DKT13 transcript order form was not mailed to appellant. Fee status: Not Paid. The following Notice of Appeal and related motions are pending in the District Court: 16 Notice of Appeal, filed. (Attachments: # 1 Order Dismissal, # 2 Notice of Appeal, # 3 Docket sheet, # 4 Motion IFP)(lfilmore,) (Entered: 03/26/2012)
03/30/2012		USCA Appeal Fees received $ 455, receipt number HOU022939 re: 16 Notice of Appeal, filed.(klove,) (Entered: 03/30/2012)
04/12/2012	19	Form 22 TRANSCRIPT ORDER FORM by Candace Louise Curtis. Transcript is unnecessary for appeal purposes. This order form relates to the following: 16 Notice of Appeal, filed.(mlothmann) (Entered: 04/16/2012)
04/26/2012		The Electronic record on appeal has now been certified to the Fifth Circuit Court of Appeals re: 16 Notice of Appeal USCA No. 12-20164, filed.(blacy,) (Entered: 04/26/2012)

08/16/2012	20	Transmittal Letter on Appeal Certified re: 16 Notice of Appeal. A paper copy of the electronic record is being transmitted to the Fifth Circuit Court of Appeals in 3 volumes. (USCA No. 12-20164), filed.(hler,) (Additional attachment(s) added on 8/17/2012: # 1 UPS Tracking #) (hler,). (Entered: 08/16/2012)
08/20/2012	21	Transmittal Letter on Appeal Certified re: 16 Notice of Appeal. CDs containing the electronic record are being sent to Bernard Lilse Mathews, III, filed.(hler,) (hler,). (Entered: 08/20/2012)
02/05/2013	22	JUDGMENT of USCA for the Fifth Circuit re: 16 Notice of Appeal ; USCA No. 12-20164. The judgment of the District Court is REVERSED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of the Court. Case reopened on 2/5/2013, filed.(jdav,) (Entered: 02/05/2013)
02/05/2013	23	Court of Appeals for the Fifth Circuit LETTER advising the record/original papers/exhibits are to be returned (USCA No. 12-20164), filed.(jdav,) (Entered: 02/05/2013)
02/05/2013	24	OPINION of USCA for the Fifth Circuit re: 16 Notice of Appeal ; USCA No. 12-20164. The district court's dismissal of the case is REVERSED and the case is REMANDED for further proceedings. REVERSED AND REMANDED., filed.(jdav,) (Entered: 02/05/2013)
02/06/2013	25	NOTICE of Setting. Parties notified. Status/Scheduling Telephone Conference set for 2/19/2013 at 08:45 AM before Judge Kenneth M. Hoyt, filed. (dpalacios,) (Entered: 02/06/2013)
02/17/2013	26	NOTICE of Appearance by George W. Vie III on behalf of Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 02/17/2013)
02/19/2013	27	ORDER FOLLOWING TELEPHONE STATUS/SCHEDULING CONFERENCE held on February 19, 2013 at 8:45 a.m. Appearances: Candace Curtis, pro se, George Vie ETT: TBA. Jury trial. Joinder of Parties due by 4/30/2013 Pltf Expert Witness List due by 9/30/2013. Pltf Expert Report due by 9/30/2013. Deft Expert Witness List due by 10/30/2013. Deft Expert Report due by 10/30/2013. Discovery due by 12/30/2013. Dispositive Motion Filing due by 12/30/2013. Docket Call set for 3/3/2014 at 11:30 AM in Courtroom 11A before Judge Kenneth M. Hoyt. The defendant's are to file an answer to the plaintiff's suit on or before March 4, 2013.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 02/19/2013)
02/20/2013	28	ORDER that George W. Vie III and the law firm of Mills Shirley L.L.P. are substituted as attorneys of record for Defendants in lieu of Bernard Lilse Mathews, III and the law firm of Green & Mathews, L.L.P.(Signed by Judge Kenneth M. Hoyt) Parties notified. (chorace) (Entered: 02/20/2013)
03/01/2013	29	ANSWER to 1 Complaint,, by Amy Ruth Brunsting, Anita Kay Brunsting, filed.(Vie, George) (Entered: 03/01/2013)
03/05/2013	30	Court of Appeals LETTER advising Electronic record has been recycled (USCA No. 12-20164), filed.(smurdock,) (Entered: 03/05/2013)

03/11/2013	31	CERTIFICATE OF INTERESTED PARTIES by Plaintiff, filed.(mmapps,) (Entered: 03/11/2013)
03/14/2013	32	REPLY to 29 Answer to Complaint, filed by Candace Louise Curtis. (sclement,) (Entered: 03/20/2013)
03/14/2013	33	CERTIFICATE OF SERVICE of 32 Reply by Candace Louise Curtis, filed.(sclement,) (Entered: 03/20/2013)
03/14/2013	34	AFFIDAVIT of Candace Louise Curtis in Support of Application for Injunction, filed. (sclement,) (Entered: 03/20/2013)
03/14/2013	35	Renewed Application for Ex Parte Temporary Restraining Order, and Asset Freeze, Temporary and Permanent Injunction by Candace Louise Curtis, filed. Motion Docket Date 4/4/2013. (sclement,) (Additional attachment(s) added on 3/20/2013: # 1 Proposed Order) (sclement,). (Entered: 03/20/2013)
03/14/2013	36	EXHIBITS re: 35 MOTION for Temporary Restraining Order by Candace Louise Curtis, filed.(sclement,) (Entered: 03/20/2013)
03/22/2013	37	NOTICE of Setting as to 35 MOTION for Temporary Restraining Order. Parties notified. Injunction Hearing set for 4/9/2013 at 09:00 AM in Courtroom 11A before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 03/22/2013)
03/29/2013		***Plaintiff's email request to appear telephonically at the Injunction hearing set for April 9, 2013 at 9:00 a.m is Denied. Candace Curtis' appearance in person is required, filed. (chorace) (Entered: 03/29/2013)
04/01/2013	38	Letter from Rik Munson re: the mailing of a copy of Rule 11 motion, filed. (mmapps,) (Entered: 04/02/2013)
04/04/2013	39	RESPONSE in Opposition to 35 MOTION for Temporary Restraining Order, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/04/2013)
04/09/2013	40	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. PRELIMINARY INJUNCTION HEARING held on 4/9/2013. Witness: 10 Anita Kay Brunsting. Pursuant to the courtroom ruling as stated on the record, the parties shall work toward resloving this matter w/i 90 days, or the Court shall appoint an independent firm or accountant to gather financial records of the Trust. The parties shall submit a name of an agreed accountant w/i one week. Defendant's shall submit a motion for approval of payment of the Trust taxes. No bond is required at this time. Appearances:Candace Curtis. George William Vie, III.(Court Reporter: F. Warner), filed.(chorace,) (Entered: 04/09/2013)
04/09/2013	42	Exhibit List by Amy Ruth Brunsting, Anita Kay Brunsting, filed.(chorace) (Entered: 04/11/2013)
04/10/2013	41	NOTICE *of filing of state court lawsuit against parties* by Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Vie, George) (Entered: 04/10/2013)
04/11/2013	43	MOTION for Approval of Tax Payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/2/2013. (Attachments: # 1 Proposed

		Order)(Vie, George) (Entered: 04/11/2013)
04/11/2013	44	ORDER granting 43 Motion for Approval of Tax Payments.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/11/2013)
04/19/2013	45	MEMORANDUM AND ORDER PRELIMINARY INJUNCTION. The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/19/2013)
04/19/2013	46	NOTICE *of Agreed CPA Firm pursuant to Court's Order for Accounting* by Amy Ruth Brunsting, Anita Kay Brunsting, filed. (Vie, George) (Entered: 04/19/2013)
04/29/2013	47	ORDER. In light of the accusations in the pleadings and the Courts instructions, the Court is of the opinion that the best course forward is a Court appointed accountant who will be responsible to the Court. The Court, therefore, rejects the parties agreed notice as an appointment. An Order designating an accountant will be entered shortly. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) . (Entered: 04/29/2013)
05/01/2013	48	**STRICKEN Per # 57** Order. Plaintiff's First AMENDED complaint with jury demand against All Defendants filed by Candace Louise Curtis.(olindor,) (Entered: 05/01/2013)
05/01/2013	49	MOTION for Joinder of Parties And Actions Demand For Show of Proof of Standing by Candace Louise Curtis, filed. Motion Docket Date 5/22/2013. (olindor) (Entered: 05/01/2013)
05/01/2013	50	Plaintiff's Verified AFFIDAVIT In Support of Amended Complaint And In Support of Application For Joinder Candace Louise Curtis, filed. (Attachments: # 1 Exhibit, # 2 Exhibit)(olindor) (Entered: 05/01/2013)
05/01/2013	51	NOTICE of lawsuit and request to waiver service by Candace Louise Curtis, filed. (ccarnew,) (Entered: 05/08/2013)
05/01/2013	52	NOTICE of lawsuit and request to waive service by Candace Louise Curtis, filed. (ccarnew,) (Entered: 05/08/2013)
05/01/2013	53	NOTICE of a Lawsuit and Request to Waive Service of a Summons by Candace Louise Curtis, filed. (isoto) (Entered: 05/08/2013)
05/01/2013	54	Notice of Lawuit and Request for Waiver of a Summons as to Bernard Lilse Mathews III sent on 4/28/13 by Candace Louise Curtis, filed.(dgonzalez) (Entered: 05/08/2013)
05/09/2013	55	ORDER Pursuant to federal Rule of Civil Procedure 53, Appointing William G. West as Master to Perform Accounting 47 .(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 05/09/2013)
05/21/2013	56	RESPONSE in Opposition to 49 MOTION for Joinder, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 05/21/2013)

05/22/2013	57	ORDER denying 49 Motion for Joinder of Parties and Actions and Motion to Amend Complaint. The Amended Complaint 48 was filed w/o leave of Court and is therefore STRICKEN from the record.(Signed by Judge Kenneth M. Hoyt) Parties notified. (chorace) (Entered: 05/22/2013)
06/06/2013	58	MOTION for Approval of Disbursement by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 6/27/2013. (Attachments: # 1 Appendix Exhibits 1 and 2, # 2 Proposed Order)(Vie, George) (Entered: 06/06/2013)
06/10/2013	59	ORDER granting 58 Motion for Approval of Disbursements.(Signed by Judge Kenneth M. Hoyt) Parties notified.(kpicota) (Entered: 06/10/2013)
07/15/2013	60	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on July 15, 2013 at 8:15 a.m. Appearances: William G. West (Accountant). Pursuant to phone conference, the Court conferred with Mr. West concerning his report due at the end of the month. Upon receipt, a hearing date will be set to address any concerns of the parties.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 07/15/2013)
08/05/2013	61	ORDER. Before the Court is the report of the Court-appointed accountant for the Brunsting Family Living Trust for the period December 21, 2010 through May 31, 2013. Objections to the report and the accountants invoice shall be filed on or before August 27, 2013. Miscellaneous Hearing set for 9/3/2013 at 01:30 PM at Courtroom 11A before Judge Kenneth M. Hoyt(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 08/05/2013)
08/08/2013	62	NOTICE - *Report of Master - Accounting of Income/Receipts and Expenses/Distributions of the Brunsting Family Living Trust for the Period December 21, 2010 Through May 31, 2013* re: 55 Order, 61 Order, by William West, filed. (Million, Timothy) (Entered: 08/08/2013)
08/08/2013	63	Sealed Event, filed. (Entered: 08/08/2013)
08/26/2013	64	MOTION for Approval of Disbursements to Pay Property Tax Bills by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 9/16/2013. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 08/26/2013)
08/27/2013	65	MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013 by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 9/17/2013. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 08/27/2013)
08/27/2013	66	ORDER granting 64 Defendant's Motion for Approval of Disbursements to Pay Property Tax Bills.(Signed by Judge Kenneth M. Hoyt) Parties notified.(rosaldana) (Entered: 08/27/2013)
08/27/2013	67	RESPONSE *to Report of Master*, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Appendix Tab 1, # 2 Appendix Tab 2)(Vie, George) (Entered: 08/27/2013)
08/28/2013	68	ORDER for Expedited Response; Motion-related deadline set re: 65 MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013. Response to Motion due by 9/3/2013.(Signed by Judge Kenneth M. Hoyt) Parties

		notified.(chorace) (Entered: 08/28/2013)
08/29/2013	69	RESPONSE to 62 Notice - Report of Master, filed by Candace Louise Curtis. (Attachments: # 1 Proposed Order, # 2 Proposed Order). (CD filed in Clerks Office.) (sscotch,) (Entered: 08/29/2013)
08/29/2013	70	This document is a duplicate of DE 69 ; this entry was made for case management purposes. Plaintiff's Response to the Report of Master and Applications for Orders by Candace Louise Curtis, filed. (CD filed in Clerks Office). Motion Docket Date 9/19/2013. (Attachments: # 1 Proposed Order, # 2 Proposed Order)(sscotch,) (Entered: 08/29/2013)
08/30/2013	71	PROPOSED ORDER re: 67 Response, filed.(Vie, George) (Entered: 08/30/2013)
09/03/2013	72	OBJECTIONS to 65 MOTION for Approval of Renewal of Farm Lease under Existing Terms on August 31, 2013, filed by Candace Louise Curtis. (mmapps,) (Entered: 09/03/2013)
09/03/2013	73	OBJECTIONS to 62 Notice (Other), Defendants Motion for Orders to Recommit Matters to Master for Consideration, filed by Candace Louise Curtis. (mmapps,) (Entered: 09/03/2013)
09/03/2013	74	Plaintiff's Ex Parte Motion for Order to Show Cause and Application for Judgment of Civil Contempt by Candace Louise Curtis, filed. Modified on 9/3/2013 (chorace). (Entered: 09/03/2013)
09/03/2013	75	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. MISCELLANEOUS HEARING held on 9/3/2013. There were no objection's by the parties to the Master's Report. Invoices are Ordered to be paid. Any and all pending motions not ruled on are DENIED. Appearances:Candace Louise Curtis, Maureen McCutchen, William Potter, George William Vie, III, Timothy Aaron Million.(Court Reporter: S. Carlisle), filed.(chorace) (Entered: 09/03/2013)
09/03/2013	76	NOTICE of Setting as to 74 MOTION for Order to Show Cause. Parties notified. Motion Hearing set for 10/2/2013 at 11:30 AM in Courtroom 11A before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 09/03/2013)
09/03/2013	77	ORDER granting Approval of Disbursements to Special Master & Special Master's Attorney. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 09/03/2013)
09/03/2013	78	ORDER granting 65 Motion for Approval and Renewal of Farm Lease.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 09/03/2013)
09/18/2013	79	TRANSCRIPT re: TRO Hearing held on April 9, 2013 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber FWarner. Release of Transcript Restriction set for 12/17/2013., filed. (fwarner,) (Entered: 09/18/2013)
09/19/2013	80	Notice of Filing of Official Transcript as to 79 Transcript. Party notified, filed. (dhansen, 4) (Entered: 09/19/2013)
09/23/2013	81	NOTICE of Resetting. Parties notified. Motion Hearing reset for 10/2/2013 at 09:00 AM (TIME CHANGE ONLY) in Courtroom 11A before Judge Kenneth M. Hoyt,

		filed. (chorace) (Entered: 09/23/2013)
09/23/2013	82	RESPONSE in Opposition to 74 MOTION for Order to Show Cause, filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Appendix)(Vie, George) (Entered: 09/23/2013)
09/23/2013	83	PROPOSED ORDER re: 82 Response in Opposition to Motion, filed.(Vie, George) (Entered: 09/23/2013)
09/27/2013	84	TRANSCRIPT re: Hearing held on September 3, 2013 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber S. Carlisle. Release of Transcript Restriction set for 12/26/2013., filed. (scarlisle) (Entered: 09/27/2013)
09/30/2013	85	Notice of Filing of Official Transcript as to 84 Transcript. Party notified, filed. (dhansen, 4) (Entered: 09/30/2013)
10/02/2013	86	Minute Entry for proceedings held before Judge Kenneth M. Hoyt. MOTION HEARING held on 10/2/2013. Argument heard. Order to follow. Appearances:Candace Louise Curtis, Maureen Kuzik McCuchen. George William Vie, III.(Court Reporter: M. Malone), filed.(chorace) (Entered: 10/02/2013)
10/03/2013	87	ORDER denying 74 Motion for Order to Show Cause and Application for Judgment of Civil Contempt. The Court directs that the plaintiff employ counsel within 60 days so that the case may proceed according to the rules of discovery and evidence. (Signed by Judge Kenneth M. Hoyt) Parties notified.(rosaldana, 4) (Entered: 10/03/2013)
11/08/2013	88	MOTION for Approval of Disbursement to pay invoice by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 11/29/2013. (Attachments: # 1 Appendix Invoice, # 2 Proposed Order)(Vie, George) (Entered: 11/08/2013)
11/12/2013	89	ORDER granting 88 Motion for Approval of Disbursement.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 11/12/2013)
12/05/2013	90	PLAINTIFF'S MOTION for Approval of Disbursement to pay fee retainer by Candace Louise Curtis, filed. Motion Docket Date 12/26/2013. (Attachments: # 1 Proposed Order)(sbejarano, 1) (Entered: 12/06/2013)
12/12/2013	91	NOTICE of Setting as to 90 MOTION for Approval of disbursement to pay fee retainer. Parties notified. Telephone Conference set for 12/18/2013 at 08:30 AM by telephone before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 12/12/2013)
12/18/2013	92	RESPONSE to 90 MOTION for Approval of disbursement to pay fee retainer filed by Amy Ruth Brunsting, Anita Kay Brunsting. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 12/18/2013)
12/18/2013	94	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on December 18, 2013 at 8:30 a.m. Appearances: Candace Curtis Curtis, Jason Ostrom, George Vie, III. Pursuant to phone conference, the parties agree to seek and agree upon an accommodation that satisfies the plaintiffs request for a disbursement for attorneys fees, if they can do so. The Court sanctions this process and sets December 30, 2013 as the deadline for filing any agreement.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 01/06/2014)

12/30/2013	93	Agreed PROPOSED ORDER re: 90 MOTION for Approval of disbursement to pay fee retainer, filed. (Attachments: # 1 Proposed Order Agreed proposed order)(Vie, George) (Entered: 12/30/2013)
01/06/2014	95	NOTICE of Appearance by Jason B. Ostrom on behalf of Jason Ostrom, filed. (Ostrom, Jason) (Entered: 01/06/2014)
01/06/2014	96	AGREED ORDER granting Approval of Disbursements. (Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 01/07/2014)
02/24/2014	97	NOTICE of Setting. Parties notified. Telephone Conference set for 2/28/2014 at 08:30 AM by telephone before Judge Kenneth M. Hoyt, filed. (chorace) (Entered: 02/24/2014)
02/28/2014	98	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on February 28, 2014 at 8:30 a.m. Appearances: Jason B. Ostrom, George William Vie, III. Pursuant to phone conference conducted this day, the plaintiff, who determines that additional parties and claims may be necessary for a complete resolution of the case, also fears loss of diversity jurisdiction on the part of the Court. In this regard, and with an eye toward resolving these concerns, the plaintiff is to report the nature and extent of this progress to the Court on or before March 30, 2014. Docket call is cancelled.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 03/02/2014)
03/08/2014	99	MOTION for Approval of Disbursements to Pay Property Tax Bills by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 3/31/2014. (Attachments: # 1 Appendix Exhibit A, # 2 Proposed Order)(Vie, George) (Entered: 03/08/2014)
03/10/2014	100	Order Granting Defendants Motion for Approval of Disbursements to Pay Property Tax Bills 99 Motion for Approval.(Signed by Judge Kenneth M. Hoyt) Parties notified.(sclement, 4) (Entered: 03/10/2014)
03/26/2014	101	MOTION for Approval of Tax Payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 4/16/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 03/26/2014)
03/27/2014	102	ORDER granting 101 Motion for Approval of Tax Payments.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 03/27/2014)
04/15/2014	103	MOTION for Approval of quarterly estimated income tax payments by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/6/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/15/2014)
04/16/2014	104	ORDER granting 103 Motion for Approval of Quarterly Estimated Income Tax Payments. (Signed by Judge Kenneth M. Hoyt) Parties notified. (rosaldana, 4) (Entered: 04/16/2014)
04/22/2014	105	MOTION for Approval of Disbursements by Amy Ruth Brunsting, Anita Kay Brunsting, filed. Motion Docket Date 5/13/2014. (Attachments: # 1 Proposed Order)(Vie, George) (Entered: 04/22/2014)

04/22/2014	106	ORDER granting 105 Motion for Approval of Disbursements.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/22/2014)
05/09/2014	107	Unopposed MOTION for Leave to File First Amended Petition by Candace Louise Curtis, filed. Motion Docket Date 5/30/2014. (Attachments: # 1 Exhibit Exhibit A)(Ostrom, Jason) (Entered: 05/09/2014)
05/09/2014	108	First AMENDED Complaint with Jury Demand against Amy Ruth Brunsting, Anita Kay Brunsting, Does 1-100 filed by Candace Louise Curtis.(Ostrom, Jason) (Entered: 05/09/2014)
05/09/2014	109	Unopposed MOTION to Remand by Candace Louise Curtis, filed. Motion Docket Date 5/30/2014. (Ostrom, Jason) (Entered: 05/09/2014)
05/12/2014	110	Unopposed PROPOSED ORDER *Granting Motion for Leave to File First Amended Petion* re: 107 Unopposed MOTION for Leave to File First Amended Petition, filed. (Ostrom, Jason) (Entered: 05/12/2014)
05/15/2014	111	ORDER granting 107 Motion for Leave to File First Amended Petition.(Signed by Judge Kenneth M. Hoyt) Parties notified.(glyons, 4) (Entered: 05/15/2014)
05/15/2014	112	ORDER granting 109 Motion to Remand to Harris County Probate Court No. 4.(Signed by Judge Kenneth M. Hoyt) Parties notified.(glyons, 4) (Entered: 05/15/2014)
07/25/2016	113	MOTION for Permission for Electronic Case Filing by Candace Louise Curtis, filed. Motion Docket Date 8/15/2016. (Attachments: # 1 Letter, # 2 Proposed Order) (chorace) (Entered: 07/28/2016)
07/29/2016	114	ORDER denying 113 Motion for Permission for Electronic Case Filing..(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 07/29/2016)
08/03/2016	115	Plaintiff Candace Louise Curtis' Motion for Relief from Order Pursuant to Fed. Civ. P. 60(b)(3), Fed. R. Civ. P. 60(b)(6) and Fed. R. Civ. P. 60(d)(3) by Candace Louise Curtis, filed. Motion Docket Date 8/24/2016. (Attachments: # 1 Proposed Order) (dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	117	Other EXHIBITS re: 115 MOTION., filed. (Attachments: # 1 Continuation of Exhibits, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	118	Other EXHIBITS re: 115 MOTION by Candace Louise Curtis., filed. (Attachments: # 1 Exhibits Continue, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation, # 11 Continuation, # 12 Continuation, # 13 Continuation, # 14 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/03/2016	119	Other EXHIBITS re: 115 MOTION by Candace Louise Curtis., filed. (Attachments: # 1 Exhibits Continue, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation,

		# 10 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/05/2016	116	Other EXHIBITS re: 115 MOTION., filed. (Attachments: # 1 Exhibits, # 2 Continuation, # 3 Continuation, # 4 Continuation, # 5 Continuation, # 6 Continuation, # 7 Continuation, # 8 Continuation, # 9 Continuation, # 10 Continuation)(dgonzalez, 5) (Entered: 08/05/2016)
08/05/2016	120	Plaintiff Candance Louise Curtis Motion for Sanctions With Points and Authorities Preliminary Statement by Candace Louise Curtis, filed. Motion Docket Date 8/26/2016. (Attachments: # 1 Exhibit Transcript, # 2 Exhibit)(mxperez, 5) (Entered: 08/09/2016)
08/10/2016	121	PLAINTIFF'S NOTICE OF RELATED CASE (Local Rule 5.2) by Candace Louise Curtis, filed. (szellers, 7) (Entered: 08/11/2016)
08/10/2016	122	PLAINTIFF CANDACE LOUISE CURTIS' MOTION FOR PERMISSION FOR ELECTRONIC CASE FILING by Candace Louise Curtis, filed. Motion Docket Date 8/31/2016. (Attachments: # 1 Proposed Order)(szellers, 7) (Entered: 08/11/2016)

PACER Service Center

Transaction Receipt

11/14/2016 07:03:15

PACER Login:	cl4635:3890596:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	4:12-cv-00592
Billable Pages:	10	**Cost:**	1.00

Nelva Brunsting
13630 Pinerock Ln.
Houston, TX 77079

USA44

Candy Curtis,
1215 Virginia Way
Martinez, CA
94553

72

Wes Sunday

Its almost 10pm but I'm not sleepy and my computer wont cooperate tonite.

So I heard you were concerned that any money you receive after I "leave this mortal coil" will be put in a trust and Greta would have to deal it out.

That not true. You will get whatever share is yours. If you don't know how to manage money by now its too late.

I'm on okay quite a bit of the time now. Even sleep with it. The hum of the motor is rather soothing.

Had about 30 on 20 teachers the evening. Dino took care of doing the goodies out.

Our weather is still gorgeous but so very dry. Glad I'm not a farmer. Iowa farmers are doing better.

I'm watching the World Series. Looks like your guys are winning.

Aren't those odds pretty? Could get them for me.

pcw

get a lap desk. I guess I'm too lazy to sit at the desk. I usually write while watching TV at nite.

Wish I had gave lovely handwriting. I started out left handed but my 1st gr. Teacher made me write right handed so I ~~[illegible]~~ blame her.

Hallmark
STATIONERY
CNT3025
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MADE IN U.S.A.
Hallmark.com

t. I can't even read myown writing.)

Bye now. Love, Mother

PROBATE COURT 4
FILED
1/19/2016 11:19:16 AM
Stan Stanart
County Clerk
Harris County

No. 412,249

IN THE ESTATE OF	§	PROBATE COURT
NELVA E. BRUNSTING	§	NUMBER FOUR (4)
DECEASED	§	HARRIS COUNTY, TEXAS

FIRST SUPPLEMENT TO REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST

On January 14, 2016 the REPORT OF TEMPORARY ADMINISTRATOR PENDING CONTEST (the "Report") was filed in the above styled Decedent's estate. This is the first supplement to the Report.

Trustees of the Brunsting Family Living Trust

On July 1, 2008 an Appointment of Successor Trustees was executed by Nelva Erleen Brunsting, also known as Nelva E. Brunsting, pursuant to Article IV. Section B. of the Brunsting Family Living Trust. This document appointed Carl Henry Brunsting and Anita Kay Brunsting as successor co-trustees if Nelva E. Brunsting fails or ceases to serve. If either Carl Henry Brunsting or Anita Kay Brunsting should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then The Frost National Bank shall serve as the sole successor trustee. A copy of the Appointment of Successor Trustees is attached hereto as the first exhibit to first supplement.

In all other respects the Report filed on January 14, 2016 remains the same.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

NOTICE OF SETTING

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN SET FOR THE PLACE, DATE AND TIME SET FORTH BELOW.

Before the Honorable

Alfred H Bennett

PLACE: Courtroom 8C
United States District Court
515 Rusk Avenue
Houston, Texas 77002

DATE: 12/15/2016

TIME: 11:30 AM

TYPE OF PROCEEDING: Motion Hearing

Date: November 30, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Candace Louise Curtis, et al.

v. Case Number: 4:16−cv−01969

Candace Kunz−Freed, et al.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' RESPONSE TO DEFENDANT DARLENE PAYNE-SMITH"S FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS

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I. Introduction

1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.

2. On November 10, 2016, Defendant Darlene Payne-Smith filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt 84).

II. Defendants Issues

A. Plaintiffs' Claims Should be Dismissed for Lack of Subject Matter Jurisdiction

1. Standard of Review

2. Plaintiffs' Purported Injuries are Speculative, Contingent and Not Ripe

3. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing

4. Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim upon Which Relief May be Granted

1. Standard of Review

2. Plaintiffs Lack Statutory Standing under RICO

a. Plaintiffs Lack a Direct, Concrete Injury-in-Fact

b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."

3. Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.

a. Plaintiffs Have Not Alleged the Existence of an "Enterprise,"

(i) "Probate Court No. 4" is Not a Legal Entity

(ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise

b. Plaintiffs Have Not Alleged a "Pattern" of Racketeering Activity.

c. Plaintiffs Have Not Plausibly Alleged a Conspiracy Under § 1692(d)

4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.

a. Plaintiffs' Section 1983 Claim Should be Dismissed.

(i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights

(ii) Plaintiffs Have Not Alleged State Action

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

III. STANDARDS OF REVIEW

3. Plaintiffs incorporate and adopt by reference the Standards of Review in Section II of their Reply (Dkt 33) to the Motions to Dismiss filed by Defendants Albert Vacek Jr. and Candace Kunz-Freed. (Dkt 19 & 20)

IV. PLAINTIFFS' ARGUMENT

Summary of Plaintiffs' Argument

4. An "Estate" is an abstraction of the mind that only exists in contemplation of rights in property. An "Estate" is not a legal entity and not a proper party to litigation. An estate can only act through its legal representative.

5. Fifteen Motions to Dismiss have been filed in this case and all fifteen motions claim "Probate Matter" or "Probate Case", yet there is not a single mention of the Wills of Elmer or Nelva Brunsting.

6. On January 12, 2005, the "Brunsting Family Trust" (Dkt 33-2) was restated. The Wills, signed at the same time, devise, bequeath and transfer all right, title and interest to property of any kind to the "Brunsting Trust". (Dkt 41-3 and 41-4)

7. Article III states in part:

> *"I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law."*

8. This list of acts was completed March 27, 2013 (Dkt 41-7) and "Probate" of the "Estates" was dropped from Calendar (Dkt 41-5 and 41-6) four days before Defendant Bobbie Bayless filed her "Probate Matter". (Dkt 33-6)

9. Carl's second application for letters testamentary was filed October 17, 2014, (Dkt 41-8) fourteen months after the Drop Order (Dkt 41-5 and 41-6), and five months after the remand of the "Trust Matter" from the federal Court.

The Assertion of Contrary Facts

10. In the second unnumbered paragraph on page 1 under "Introduction" Defendant makes the following fact claims:

> *"This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting Probate Case")."*

11. Defendant goes on to add an entire paragraph in footnote 1 adopting the adverse statement of facts contained in Vacek and Freed's Rule 12(b)(1) Motion to Dismiss. (Dkt 20)

12. However, Vacek and Freed's Rule 12(b)(1) Motion to Dismiss adopts the statement of facts in their Rule 12(b)(6) Motion to Dismiss (Dkt 19), but those claims of fact are adverse to those contained in the complaint and may not be considered under 12(b)(6).

13. In order to overcome the presumptions in favor of the Plaintiffs' claim of facts under 12(b)(1), a Defendant must support their claim of conflicting facts with matters outside the pleadings such as testimony and affidavits.

14. Defendant's claims of contrary facts are not cognizable under Rule 12(b)(1), as there are no affidavits or exhibits attached to Docket entries 19, 20 or 84, and there are no references to the record of any proceedings. Defendant's claims of contrary facts are not cognizable under

Rule 12(b)(1) or 12(b)(6). Moreover, the asserted facts are patently false and cannot be defended against the public record.

V. The History and Nature of the Claims as Documented In the Public Record

15. A properly supported history of the "*Series of lawsuits involving the Brunsting siblings*" begins with:

1. Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 filed TXSD February 27, 2012. The docket sheet for that case is attached as Exhibit 1.[1] The CA 4:12-cv-592 matter was dismissed sua sponte under the "Probate Exception to Federal Diversity Jurisdiction" March 8, 2012. (Exhibit 1 entry 13)

2. On March 9, 2012, Defendant Bobbie Bayless filed a Petition to take depositions before Suit in the Harris County District Court. (Exhibit 2)

3. On January 9, 2013, The Fifth Circuit Court of Appeals in Case Number 12-20164, issued a unanimous Opinion with Reverse and Remand, published Curtis v Brunsting et al, 704 F.3d 406. (Dkt 34-4) The Circuit Court held: 1) Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 is a lawsuit relating only to the administration of inter vivos trusts, 2) assets in an inter vivos trust are not property belonging to an estate, 3) the Brunsting Trusts were not in the custody of a state court, 4) was not subject to probate administration and, 5) did not come within the purview of the probate exception to federal diversity jurisdiction. (Dkt 34-4)

4. On January 29, 2013, Defendant Bobbie Bayless filed malpractice and breach of fiduciary claims against Vacek and Freed in the Harris County District Court in the name

[1] Plaintiff Munson's name appears at entries 9 and 38.

of "Carl Henry Brunsting Independent Executor of the Estates of Elmer and Nelva Brunsting. (Dkt 33-9)

5. On April 9, 2013, the Honorable Kenneth Hoyt issued an injunction in Candace Louise Curtis vs. Anita and Amy Brunsting, CA 4:12-cv-592, (Dkt 26-2) and on the same date, April 9, 2013:

6. Defendant Bobbie Bayless filed lawsuits against Anita, Amy and Carole Brunsting, and Candace Curtis, in Harris County Probate Court Number 4. This is the phenomenon Defendants refer to as "The Probate Matter". The "Probate Matter" docket sheets are attached as Exhibits 3, 4, 5 and 6.

7. Upon being named a Defendant in Bayless "Probate Matter' Carole retained Darlene Payne-Smith and on May 6, 2013 Payne-Smith filed a Counter suit against Carl Brunsting for interfering with Carole's "Inheritance expectancy".[2]

16. Carole Ann Brunsting has never had fiduciary duties in regard to the Brunsting Trusts.

17. Carole Brunsting held Nelva Brunsting's Medical Power of Attorney and her duties were to Nelva's personal and medical care. That role and the subsequent conduct of the Defendant "legal professionals" would be consistent with the unsuspecting sibling medical POA role in the classic hustle fully explained in "How to Steal your Family Inheritance". (Exhibit 7)

18. Plaintiff Candace Curtis has been obstructed from the performance of her fiduciary duties, and the pursuit of claims belonging to the Trusts, by Trustees de son tort, Anita and Amy Brunsting and these other Defendants in concert efforts.

VI. STANDING

19. Defendant Darlene Payne-Smith argues that the matter before the Court is:

[2] Harris County Probate Document No. PBT-2013-146160

"the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting"

The Brunsting Wills

20. Every one of these Defendants argued that the RICO action before the Court stems from a "Probate Matter" pending in Harris County Probate Court No. 4, and yet not a single one of those Motions (Dkt 19, 20, 23, 25, 30, 35, 36, 39, 40, 53, 78, 81, 83 or 84) mentions the Wills of Elmer or Nelva Brunsting. (Dkt 41-3 and 41-4)

21. Not a single one of the Motions identifies an heir to any estate and not a single one of the Motions identifies any assets belonging to an "Estate".

22. The Will of Nelva Brunsting says in Articles II and III:

II.

"I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust;..."

"All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration."

III.

..."I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law."

23. Under Section H. "Protection of Beneficiaries":

"No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary."

24. The Fifth Circuit Court of Appeals did read the Wills and did determine that the only heir to the Estates of Elmer and Nelva Brunsting is "The Trust".

25. Plaintiffs find no indication that any of the Brunsting siblings have challenged either Will, and it would necessarily follow that neither Carl Brunsting, nor any Brunsting sibling, has individual standing in any administration of the "Estate of Nelva Brunsting", a.k.a. the "Brunsting Probate Matter". Let us look at that opening paragraph again.

> *"This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting Probate Case")."*

26. An "Estate", is not a legal entity but an abstraction that only exists in contemplation of rights in property, in whatever form. A Decedent's estate is the sum of the person's assets – legal rights, interests and entitlements to property of any kind' at the time of their death.

27. As noted by the Fifth Circuit and as can be seen in reading the Wills, the assets in the Brunsting Trusts are not assets belonging to either Founders Estate, and all of the Brunstings' interest in property, whether real or personal, had been appointed and transferred to the Trust at the time of the Restatement in 2005.

28. As the assets in the Brunsting Trusts are not property belonging to an estate, those Trusts are not subject to probate administration.

Gaming the Judicial Process

29. Defendant Bayless filed her suit in Harris County Probate No. 4, in the name of Carl Henry Brunsting "Individually and as Executor of the Estates of Elmer and Nelva Brunsting" raising only trust related claims, knowing the Brunsting Trusts were in the custody of a federal Court and that a federal Court had issued an injunction involving the Brunsting trusts that same day.

30. Having begun depositions before suit more than a year earlier and having read the Wills, Bayless knew or should have known that Carl Brunsting had no individual standing in the administration of any estate.

31. Bayless would also know that the trust, not being an asset belonging to any estate, would not be subject to probate and, as the Wills bequeath and direct all rights in property to "the Trust" to be disposed of under the terms of the trust, it would follow Bayless knew the estate had no right of claims relating to Trust assets. In any event, she had a duty to know.

VII. ENTER THE VEXATIOUS MULTIPLIER - DARLENE PAYNE-SMITH

32. Bayless' suit, brought in the name of Carl Brunsting individually, and in the name of the "Estate of Nelva Brunsting", involving exclusively trust related claims, names all four of the other Brunsting siblings defendants, including federal Plaintiff Curtis.

33. Carole retained Defendant Darlene Payne-Smith and rather than point out the obvious, that the "Estate" owned no property, had no property interests in the Brunsting Trusts, and that Carl, not being an heir, had no individual standing to bring any "Probate Matter", none-the-less filed a counter-suit against Carl Brunsting for tortious interference with "inheritance expectancy", which is an interest none of the Brunsting siblings have in the probate of any "estate".

34. The Brunsting trusts are the only real party in interest to all matters involving trust property, and all of the Defendants' Motion to Dismiss have confessed to what they are charged with, attempting to loot an inter vivos trust under the pretext of administering a probate estate. In the process they have multiplied the litigation and the injuries exponentially.

Motions for Distributions in "Estate of Nelva Brunsting"

35. After Defendant Jason Ostrom arranged a remand of the federal case of Curtis v Brunsting 4:12-cv-592 to Harris County Probate, he immediately filed an unauthorized "Second Amended Complaint" (Dkt 34-9) in "Estate of Nelva Brunsting" and followed with application for a distribution of $45,000 to pay his fees (Dkt 62-1), also in "Estate of Nelva Brunsting". That ridiculous excuse for litigation spawned a flurry of vexatious objections from all the other "Probate Matter' poser advocates.

36. Rather than point out the obvious, that there are no assets in the "Estate", all of the Defendant attorneys joined in with objections pointing to the trust this and the trust that, generating hundreds of pages, never once mentioning the wills, standing or identifying an heir. (Exhibits 8-10).

37. On page 1 and 2 of an objection to a second application for distribution filed by Defendant Ostrom in "Estate of Nelva Brunsting", Defendant Payne-Smith had these alleged fact assertions to offer: (Exhibit 8) (emphasis added)

> *"1. Plaintiff, acting pro se, first filed her suit against her siblings, Anita Brunsting and Amy Brunsting, regarding the Trust in United States District Court for the Southern District of Texas.*
>
> *Plaintiff's Petition was filed in federal court in bad faith, without just cause, and frivolously as Plaintiff knew there was already litigation pending in this Court on the same and/or similar Trust issues and involving the same parties and did so without representation to the detriment of everyone else involved in this case. Plaintiff's frivolous filing in federal court caused the other parties in this case to incur substantial unnecessary expenses defending against the suit, attending needless hearings in federal court on issues already before this Court, and responding to Plaintiffs relentless and unsuccessful attempts to represent herself. Plaintiff wasted so much time and money attempting to represent herself in federal court that she was ordered by federal Judge Kenneth M. Hoyt to obtain legal counsel."*
>
> *"2. On April 19,2013, Judge Hoyt enjoined the Trustees from disbursing any funds from any Trust accounts without the Court's permission. Plaintiffs suit was*

then transferred to this Court on June 4, 2014, pursuant to an Order of Remand entered by Judge Hoyt, and Plaintiff amended her Petition to include Carol Brunsting as a defendant. The injunction stands to this day."

VIII. RICO - INJURY IN FACT, PROXIMATE CAUSE AND STANDING

February 2012 to August 2014 in the Federal Court

38. Plaintiffs are informed and believe that an estimated $20,000 in fees were paid to attorneys by Brunsting interests, in connection with the federal case of Curtis v Brunsting 4:12-cv-592, between February 2012 and the August 2014 mediation.[3]

February 2012 to August 2014 in State Courts

39. Plaintiffs are informed and believe that a very rough estimate of state court claims related fees incurred during this period, based on figures thrown out at the mediation in August 2014, $225,000 to Bayless from Carl's pocket,[4] $37,000 to Mills Shirley paid from the trust – 1/5 of which was Curtis' property and, at a minimum, $30,000 more from each sibling during this same period of time, most likely on credit terms.

August 2014 to December 2016:

40. The estimated totals for state court actions between February 2012 and August 2014, as shown above, is approximately $412,000. That is approximately $13,733 per month for that thirty month period.

41. If we use that value as the basis and multiply by the 28 months between August 2014 and December 2016, our total for that period equals approximately $384,533.

[3] These numbers do not reflect the federal appeal.

[4] Carl Brunstings' Deposition testimony (Exhibit 11 Carl deposition page 78 line14)

42. Thus, the total estimated attorney fees for the "Probate Matter", which includes the Harris County District Court case, is $796,533. While grossly underestimated, this figure is more than absurd considering that nothing substantive was accomplished in any state court.

Injuries to Plaintiffs Curtis and Munson, are both Personal and Pecuniary

43. When Plaintiff Curtis was forced to file a pro se lawsuit in the Southern District of Texas to defend her rights in property from her sisters Anita and Amy Brunsting, She had to pay the filing and service of process fees. Neither Munson nor Curtis had ever filed a lawsuit in any court, but they did the best they could under the circumstances.

44. After the "breach of fiduciary" action was dismissed, Plaintiffs were forced to file a Fifth Circuit Appeal. Neither Munson nor Curtis had ever filed a federal appeal, did not know the process or the rules and neither knew anything about the probate exception. Plaintiffs thus agreed that one had to work to bring home the bacon and one would have to study, inform, write, and teach or in other words, "pull the plow".

45. Curtis agreed that she had the more dependable income and would perform the bread winner function and that Munson had the better understanding of legal concepts and was thus the better suited to the legal research and writing function.

46. Munson was working at the time as both a performing artist and as a Systems Engineer, providing network support for the same Company where Plaintiff Curtis is employed as an accountant. Munson was eventually forced to resign from the network management obligations to focus on protecting Plaintiff Curtis' property interests.

47. There are three conditions in the American system of jurisprudence where an opposing party can be awarded attorney fees under 28 U.S.C. §1927. First, a party who preserves or recovers a fund for the benefit of others (common fund) may recover attorneys' fees from the

fund or from the other parties who benefit from the fund.[5] Second, a party may recover attorneys' fees from an opposing party when the opposing party or the opposing party's attorney has disobeyed a court order,[6] and third, a party may recover attorneys' fees from an opposing party when the opposing party acts in bad faith.[7] All three of these criteria are met in this case.

48. If not for the conduct complained of against Vacek & Freed there would have been no litigation and if not for the participatory conduct of the rest of these defendants the legitimate Trust litigation would have long since been resolved.

49. The Honorable Kenneth Hoyt observed at the injunction hearing April 9, 2013, (Dkt 26-7, page 35 and 36) all that was needed to resolve the trust dispute was to distribute the assets to the beneficiaries, despite Defendants argument that the state court lawsuits were an obstacle to that end.

50. Given that Defendants, Anita and Amy Brunsting have clearly failed to honor the obligations of the office of trustee, are accused of malfeasance in the conduct of trust business, have conflicts of interest, and have refused or otherwise failed to pursue claims belonging to the Trusts, Plaintiff Curtis has assumed her proper station as successor trustee, in law and in fact.

51. Plaintiffs Curtis and Munson, through their active defense of the Brunsting Trust interests and the pursuit of claims belonging to the Brunsting Trusts have assumed the vacant office and are entitled to recover fees and costs.

IX. AMENDMENT AND ADOPTION BY REFERENCE

52. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1),

[5] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-97 (1970). The Supreme Court in Mills defined the term "common fund" as a fund for the benefit of an entire class, such as an estate.
[6] Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923); see Alyeska,421 U.S. at 258 (noting that award of attorneys' fees may be part of sanction imposed on party or party's attorney for disobeying court order).
[7] Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257-59 (1975)

the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Responses to Defendants' Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85, 86, 87 and this response, as if fully expressed therein.

53. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

X. CONCLUSION

54. As of the filing of this response, the Complaint consists of the entire record before the Court and those Public Records this Honorable Court has been respectfully requested to take judicial notice of under Federal Rule of Evidence §201.

55. The Complaint contains satisfactory allegations with sufficient evidentiary support for the court to conclude 1) predicate acts have been articulated that establish a pattern of racketeering activity, 2) the Probate Court is both the enterprise and a victim of the racketeering conspiracy, 3) Legitimizing the theft of Brunsting Trust assets was the object of the racketeering conspiracy, 4) Defendants each participated in furthering the success of the racketeering conspiracy 5) Plaintiffs were injured in their business and property interests directly and proximately caused by the racketeering conspiracy 6) the racketeering activity is ongoing and continuous and the Brunstings are only one of many families victimized by the racketeering activities, 7) without the intervention of this Court the conduct complained of will continue unabated and other members of society will suffer injury directly and proximately caused by the same persons, the same racketeering conduct and 8) Plaintiffs claims are over-ripe for remedy.

56. Plaintiffs have sufficiently pled that:

(1) defendants:

(2) through commission of two of the enumerated predicate acts,

(3) which constitute a "pattern" of

(4) "racketeering activity,"

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(6) an "enterprise,"

(7) the activities of which affect interstate or foreign commerce, and that

(8) Plaintiffs have been injured in their business and property interests by reason of such conduct.

57. It has already been shown that participants need not have personally committed any predicate acts and that aiding and abetting by providing substantial assistance to the perpetrators in furtherance of a racketeering conspiracy is sufficient.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Darlene Payne-Smith filed November 10, 2016, and hold to answer.

Respectfully submitted, December 1, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 1st day of December, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

PLAINTIFFS' RESPONSE TO DEFENDANT DARLENE PAYNE-SMITH"S FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS

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I. Introduction

1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.

2. On November 10, 2016, Defendant Darlene Payne-Smith filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt 84).

II. Defendants Issues

A. Plaintiffs' Claims Should be Dismissed for Lack of Subject Matter Jurisdiction

1. Standard of Review

2. Plaintiffs' Purported Injuries are Speculative, Contingent and Not Ripe

3. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing

4. Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim upon Which Relief May be Granted

1. Standard of Review

2. Plaintiffs Lack Statutory Standing under RICO

a. Plaintiffs Lack a Direct, Concrete Injury-in-Fact

b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."

3. Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.

a. Plaintiffs Have Not Alleged the Existence of an "Enterprise,"

(i) "Probate Court No. 4" is Not a Legal Entity

(ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise

b. Plaintiffs Have Not Alleged a "Pattern" of Racketeering Activity.

c. Plaintiffs Have Not Plausibly Alleged a Conspiracy Under § 1692(d)

4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.

a. Plaintiffs' Section 1983 Claim Should be Dismissed.

(i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights

(ii) Plaintiffs Have Not Alleged State Action

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

III. STANDARDS OF REVIEW

3. Plaintiffs incorporate and adopt by reference the Standards of Review in Section II of their Reply (Dkt 33) to the Motions to Dismiss filed by Defendants Albert Vacek Jr. and Candace Kunz-Freed. (Dkt 19 & 20)

IV. PLAINTIFFS' ARGUMENT

Summary of Plaintiffs' Argument

4. An "Estate" is an abstraction of the mind that only exists in contemplation of rights in property. An "Estate" is not a legal entity and not a proper party to litigation. An estate can only act through its legal representative.

5. Fifteen Motions to Dismiss have been filed in this case and all fifteen motions claim "Probate Matter" or "Probate Case", yet there is not a single mention of the Wills of Elmer or Nelva Brunsting.

6. On January 12, 2005, the "Brunsting Family Trust" (Dkt 33-2) was restated. The Wills, signed at the same time, devise, bequeath and transfer all right, title and interest to property of any kind to the "Brunsting Trust". (Dkt 41-3 and 41-4)

7. Article III states in part:

> *"I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law."*

8. This list of acts was completed March 27, 2013 (Dkt 41-7) and "Probate" of the "Estates" was dropped from Calendar (Dkt 41-5 and 41-6) four days before Defendant Bobbie Bayless filed her "Probate Matter". (Dkt 33-6)

9. Carl's second application for letters testamentary was filed October 17, 2014, (Dkt 41-8) fourteen months after the Drop Order (Dkt 41-5 and 41-6), and five months after the remand of the "Trust Matter" from the federal Court.

The Assertion of Contrary Facts

10. In the second unnumbered paragraph on page 1 under "Introduction" Defendant makes the following fact claims:

> *"This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting Probate Case")."*

11. Defendant goes on to add an entire paragraph in footnote 1 adopting the adverse statement of facts contained in Vacek and Freed's Rule 12(b)(1) Motion to Dismiss. (Dkt 20)

12. However, Vacek and Freed's Rule 12(b)(1) Motion to Dismiss adopts the statement of facts in their Rule 12(b)(6) Motion to Dismiss (Dkt 19), but those claims of fact are adverse to those contained in the complaint and may not be considered under 12(b)(6).

13. In order to overcome the presumptions in favor of the Plaintiffs' claim of facts under 12(b)(1), a Defendant must support their claim of conflicting facts with matters outside the pleadings such as testimony and affidavits.

14. Defendant's claims of contrary facts are not cognizable under Rule 12(b)(1), as there are no affidavits or exhibits attached to Docket entries 19, 20 or 84, and there are no references to the record of any proceedings. Defendant's claims of contrary facts are not cognizable under

Rule 12(b)(1) or 12(b)(6). Moreover, the asserted facts are patently false and cannot be defended against the public record.

V. The History and Nature of the Claims as Documented In the Public Record

15. A properly supported history of the "*Series of lawsuits involving the Brunsting siblings*" begins with:

1. Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 filed TXSD February 27, 2012. The docket sheet for that case is attached as Exhibit 1.[1] The CA 4:12-cv-592 matter was dismissed sua sponte under the "Probate Exception to Federal Diversity Jurisdiction" March 8, 2012. (Exhibit 1 entry 13)

2. On March 9, 2012, Defendant Bobbie Bayless filed a Petition to take depositions before Suit in the Harris County District Court. (Exhibit 2)

3. On January 9, 2013, The Fifth Circuit Court of Appeals in Case Number 12-20164, issued a unanimous Opinion with Reverse and Remand, published Curtis v Brunsting et al, 704 F.3d 406. (Dkt 34-4) The Circuit Court held: 1) Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 is a lawsuit relating only to the administration of inter vivos trusts, 2) assets in an inter vivos trust are not property belonging to an estate, 3) the Brunsting Trusts were not in the custody of a state court, 4) was not subject to probate administration and, 5) did not come within the purview of the probate exception to federal diversity jurisdiction. (Dkt 34-4)

4. On January 29, 2013, Defendant Bobbie Bayless filed malpractice and breach of fiduciary claims against Vacek and Freed in the Harris County District Court in the name

[1] Plaintiff Munson's name appears at entries 9 and 38.

of "Carl Henry Brunsting Independent Executor of the Estates of Elmer and Nelva Brunsting. (Dkt 33-9)

5. On April 9, 2013, the Honorable Kenneth Hoyt issued an injunction in Candace Louise Curtis vs. Anita and Amy Brunsting, CA 4:12-cv-592, (Dkt 26-2) and on the same date, April 9, 2013:

6. Defendant Bobbie Bayless filed lawsuits against Anita, Amy and Carole Brunsting, and Candace Curtis, in Harris County Probate Court Number 4. This is the phenomenon Defendants refer to as "The Probate Matter". The "Probate Matter" docket sheets are attached as Exhibits 3, 4, 5 and 6.

7. Upon being named a Defendant in Bayless "Probate Matter' Carole retained Darlene Payne-Smith and on May 6, 2013 Payne-Smith filed a Counter suit against Carl Brunsting for interfering with Carole's "Inheritance expectancy".[2]

16. Carole Ann Brunsting has never had fiduciary duties in regard to the Brunsting Trusts.

17. Carole Brunsting held Nelva Brunsting's Medical Power of Attorney and her duties were to Nelva's personal and medical care. That role and the subsequent conduct of the Defendant "legal professionals" would be consistent with the unsuspecting sibling medical POA role in the classic hustle fully explained in "How to Steal your Family Inheritance". (Exhibit 7)

18. Plaintiff Candace Curtis has been obstructed from the performance of her fiduciary duties, and the pursuit of claims belonging to the Trusts, by Trustees de son tort, Anita and Amy Brunsting and these other Defendants in concert efforts.

VI. STANDING

19. Defendant Darlene Payne-Smith argues that the matter before the Court is:

[2] Harris County Probate Document No. PBT-2013-146160

"the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting"

The Brunsting Wills

20. Every one of these Defendants argued that the RICO action before the Court stems from a "Probate Matter" pending in Harris County Probate Court No. 4, and yet not a single one of those Motions (Dkt 19, 20, 23, 25, 30, 35, 36, 39, 40, 53, 78, 81, 83 or 84) mentions the Wills of Elmer or Nelva Brunsting. (Dkt 41-3 and 41-4)

21. Not a single one of the Motions identifies an heir to any estate and not a single one of the Motions identifies any assets belonging to an "Estate".

22. The Will of Nelva Brunsting says in Articles II and III:

II.

"I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust;..."

"All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration."

III.

..."I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law."

23. Under Section H. "Protection of Beneficiaries":

"No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary."

24. The Fifth Circuit Court of Appeals did read the Wills and did determine that the only heir to the Estates of Elmer and Nelva Brunsting is "The Trust".

25. Plaintiffs find no indication that any of the Brunsting siblings have challenged either Will, and it would necessarily follow that neither Carl Brunsting, nor any Brunsting sibling, has individual standing in any administration of the "Estate of Nelva Brunsting", a.k.a. the "Brunsting Probate Matter". Let us look at that opening paragraph again.

> *"This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting Probate Case")."*

26. An "Estate", is not a legal entity but an abstraction that only exists in contemplation of rights in property, in whatever form. A Decedent's estate is the sum of the person's assets – legal rights, interests and entitlements to property of any kind' at the time of their death.

27. As noted by the Fifth Circuit and as can be seen in reading the Wills, the assets in the Brunsting Trusts are not assets belonging to either Founders Estate, and all of the Brunstings' interest in property, whether real or personal, had been appointed and transferred to the Trust at the time of the Restatement in 2005.

28. As the assets in the Brunsting Trusts are not property belonging to an estate, those Trusts are not subject to probate administration.

Gaming the Judicial Process

29. Defendant Bayless filed her suit in Harris County Probate No. 4, in the name of Carl Henry Brunsting "Individually and as Executor of the Estates of Elmer and Nelva Brunsting" raising only trust related claims, knowing the Brunsting Trusts were in the custody of a federal Court and that a federal Court had issued an injunction involving the Brunsting trusts that same day.

30. Having begun depositions before suit more than a year earlier and having read the Wills, Bayless knew or should have known that Carl Brunsting had no individual standing in the administration of any estate.

31. Bayless would also know that the trust, not being an asset belonging to any estate, would not be subject to probate and, as the Wills bequeath and direct all rights in property to "the Trust" to be disposed of under the terms of the trust, it would follow Bayless knew the estate had no right of claims relating to Trust assets. In any event, she had a duty to know.

VII. ENTER THE VEXATIOUS MULTIPLIER - DARLENE PAYNE-SMITH

32. Bayless' suit, brought in the name of Carl Brunsting individually, and in the name of the "Estate of Nelva Brunsting", involving exclusively trust related claims, names all four of the other Brunsting siblings defendants, including federal Plaintiff Curtis.

33. Carole retained Defendant Darlene Payne-Smith and rather than point out the obvious, that the "Estate" owned no property, had no property interests in the Brunsting Trusts, and that Carl, not being an heir, had no individual standing to bring any "Probate Matter", none-the-less filed a counter-suit against Carl Brunsting for tortious interference with "inheritance expectancy", which is an interest none of the Brunsting siblings have in the probate of any "estate".

34. The Brunsting trusts are the only real party in interest to all matters involving trust property, and all of the Defendants' Motion to Dismiss have confessed to what they are charged with, attempting to loot an inter vivos trust under the pretext of administering a probate estate. In the process they have multiplied the litigation and the injuries exponentially.

Motions for Distributions in "Estate of Nelva Brunsting"

35. After Defendant Jason Ostrom arranged a remand of the federal case of Curtis v Brunsting 4:12-cv-592 to Harris County Probate, he immediately filed an unauthorized "Second Amended Complaint" (Dkt 34-9) in "Estate of Nelva Brunsting" and followed with application for a distribution of $45,000 to pay his fees (Dkt 62-1), also in "Estate of Nelva Brunsting". That ridiculous excuse for litigation spawned a flurry of vexatious objections from all the other "Probate Matter' poser advocates.

36. Rather than point out the obvious, that there are no assets in the "Estate", all of the Defendant attorneys joined in with objections pointing to the trust this and the trust that, generating hundreds of pages, never once mentioning the wills, standing or identifying an heir. (Exhibits 8-10).

37. On page 1 and 2 of an objection to a second application for distribution filed by Defendant Ostrom in "Estate of Nelva Brunsting", Defendant Payne-Smith had these alleged fact assertions to offer: (Exhibit 8) (emphasis added)

> *"1. Plaintiff, acting pro se, first filed her suit against her siblings, Anita Brunsting and Amy Brunsting, regarding the Trust in United States District Court for the Southern District of Texas.*
>
> *Plaintiff's Petition was filed in federal court in bad faith, without just cause, and frivolously as Plaintiff knew there was already litigation pending in this Court on the same and/or similar Trust issues and involving the same parties and did so without representation to the detriment of everyone else involved in this case. Plaintiff's frivolous filing in federal court caused the other parties in this case to incur substantial unnecessary expenses defending against the suit, attending needless hearings in federal court on issues already before this Court, and responding to Plaintiffs relentless and unsuccessful attempts to represent herself. Plaintiff wasted so much time and money attempting to represent herself in federal court that she was ordered by federal Judge Kenneth M. Hoyt to obtain legal counsel."*
>
> *"2. On April 19,2013, Judge Hoyt enjoined the Trustees from disbursing any funds from any Trust accounts without the Court's permission. Plaintiffs suit was*

then transferred to this Court on June 4, 2014, pursuant to an Order of Remand entered by Judge Hoyt, and Plaintiff amended her Petition to include Carol Brunsting as a defendant. The injunction stands to this day."

VIII. RICO - INJURY IN FACT, PROXIMATE CAUSE AND STANDING

February 2012 to August 2014 in the Federal Court

38. Plaintiffs are informed and believe that an estimated $20,000 in fees were paid to attorneys by Brunsting interests, in connection with the federal case of Curtis v Brunsting 4:12-cv-592, between February 2012 and the August 2014 mediation.[3]

February 2012 to August 2014 in State Courts

39. Plaintiffs are informed and believe that a very rough estimate of state court claims related fees incurred during this period, based on figures thrown out at the mediation in August 2014, $225,000 to Bayless from Carl's pocket,[4] $37,000 to Mills Shirley paid from the trust – 1/5 of which was Curtis' property and, at a minimum, $30,000 more from each sibling during this same period of time, most likely on credit terms.

August 2014 to December 2016:

40. The estimated totals for state court actions between February 2012 and August 2014, as shown above, is approximately $412,000. That is approximately $13,733 per month for that thirty month period.

41. If we use that value as the basis and multiply by the 28 months between August 2014 and December 2016, our total for that period equals approximately $384,533.

[3] These numbers do not reflect the federal appeal.

[4] Carl Brunstings' Deposition testimony (Exhibit 11 Carl deposition page 78 line14)

42. Thus, the total estimated attorney fees for the "Probate Matter", which includes the Harris County District Court case, is $796,533. While grossly underestimated, this figure is more than absurd considering that nothing substantive was accomplished in any state court.

Injuries to Plaintiffs Curtis and Munson, are both Personal and Pecuniary

43. When Plaintiff Curtis was forced to file a pro se lawsuit in the Southern District of Texas to defend her rights in property from her sisters Anita and Amy Brunsting, She had to pay the filing and service of process fees. Neither Munson nor Curtis had ever filed a lawsuit in any court, but they did the best they could under the circumstances.

44. After the "breach of fiduciary" action was dismissed, Plaintiffs were forced to file a Fifth Circuit Appeal. Neither Munson nor Curtis had ever filed a federal appeal, did not know the process or the rules and neither knew anything about the probate exception. Plaintiffs thus agreed that one had to work to bring home the bacon and one would have to study, inform, write, and teach or in other words, "pull the plow".

45. Curtis agreed that she had the more dependable income and would perform the bread winner function and that Munson had the better understanding of legal concepts and was thus the better suited to the legal research and writing function.

46. Munson was working at the time as both a performing artist and as a Systems Engineer, providing network support for the same Company where Plaintiff Curtis is employed as an accountant. Munson was eventually forced to resign from the network management obligations to focus on protecting Plaintiff Curtis' property interests.

47. There are three conditions in the American system of jurisprudence where an opposing party can be awarded attorney fees under 28 U.S.C. §1927. First, a party who preserves or recovers a fund for the benefit of others (common fund) may recover attorneys' fees from the

fund or from the other parties who benefit from the fund.[5] Second, a party may recover attorneys' fees from an opposing party when the opposing party or the opposing party's attorney has disobeyed a court order,[6] and third, a party may recover attorneys' fees from an opposing party when the opposing party acts in bad faith.[7] All three of these criteria are met in this case.

48. If not for the conduct complained of against Vacek & Freed there would have been no litigation and if not for the participatory conduct of the rest of these defendants the legitimate Trust litigation would have long since been resolved.

49. The Honorable Kenneth Hoyt observed at the injunction hearing April 9, 2013, (Dkt 26-7, page 35 and 36) all that was needed to resolve the trust dispute was to distribute the assets to the beneficiaries, despite Defendants argument that the state court lawsuits were an obstacle to that end.

50. Given that Defendants, Anita and Amy Brunsting have clearly failed to honor the obligations of the office of trustee, are accused of malfeasance in the conduct of trust business, have conflicts of interest, and have refused or otherwise failed to pursue claims belonging to the Trusts, Plaintiff Curtis has assumed her proper station as successor trustee, in law and in fact.

51. Plaintiffs Curtis and Munson, through their active defense of the Brunsting Trust interests and the pursuit of claims belonging to the Brunsting Trusts have assumed the vacant office and are entitled to recover fees and costs.

IX. AMENDMENT AND ADOPTION BY REFERENCE

52. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1),

[5] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-97 (1970). The Supreme Court in Mills defined the term "common fund" as a fund for the benefit of an entire class, such as an estate.
[6] Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923); see Alyeska,421 U.S. at 258 (noting that award of attorneys' fees may be part of sanction imposed on party or party's attorney for disobeying court order).
[7] Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257-59 (1975)

the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Responses to Defendants' Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85, 86, 87 and this response, as if fully expressed therein.

53. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

X. CONCLUSION

54. As of the filing of this response, the Complaint consists of the entire record before the Court and those Public Records this Honorable Court has been respectfully requested to take judicial notice of under Federal Rule of Evidence §201.

55. The Complaint contains satisfactory allegations with sufficient evidentiary support for the court to conclude 1) predicate acts have been articulated that establish a pattern of racketeering activity, 2) the Probate Court is both the enterprise and a victim of the racketeering conspiracy, 3) Legitimizing the theft of Brunsting Trust assets was the object of the racketeering conspiracy, 4) Defendants each participated in furthering the success of the racketeering conspiracy 5) Plaintiffs were injured in their business and property interests directly and proximately caused by the racketeering conspiracy 6) the racketeering activity is ongoing and continuous and the Brunstings are only one of many families victimized by the racketeering activities, 7) without the intervention of this Court the conduct complained of will continue unabated and other members of society will suffer injury directly and proximately caused by the same persons, the same racketeering conduct and 8) Plaintiffs claims are over-ripe for remedy.

56. Plaintiffs have sufficiently pled that:

(1) defendants:

(2) through commission of two of the enumerated predicate acts,

(3) which constitute a "pattern" of

(4) "racketeering activity,"

(5) directly or indirectly participates in the conduct of

(6) an "enterprise,"

(7) the activities of which affect interstate or foreign commerce, and that

(8) Plaintiffs have been injured in their business and property interests by reason of such conduct.

57. It has already been shown that participants need not have personally committed any predicate acts and that aiding and abetting by providing substantial assistance to the perpetrators in furtherance of a racketeering conspiracy is sufficient.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Darlene Payne-Smith filed November 10, 2016, and hold to answer.

Respectfully submitted, December 1, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 1st day of December, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S CERTIFICATE OF INTERESTED PARTIES

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte file this Certificate of Interested Parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

1. Plaintiff Candace Louise Curtis, pro se
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Dated: October 12, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 12th day of October, 2016, via ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S CERTIFICATE OF INTERESTED PARTIES

Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte file this Certificate of Interested Parties pursuant to the Court's July 6, 2016 Order, ¶ 2 [Dkt. No. 3]. Persons or entities with an interest in the outcome of this case are as follows:

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CERTIFICATE OF SERVICE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
Plaintiffs,	§	
	§	Civil Action NO. 4:16-CV-01969
v.	§	
	§	The Honorable Alfred Bennett
Kunz-Freed et al.,	§	
Defendants	§	

Plaintiffs' Answer to Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9(b)

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I. INTRODUCTION

1. This is a private interest as well as a public interest lawsuit, as the subject matter relates to the legitimate administration of public justice.

2. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act (RICO) at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c).

3. On October 7, 2016, Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte filed a combined motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) (Dkt 53).

II. STANDARDS OF REVIEW

Federal Rule 12(b)(1)

4. Whether or not a court has subject matter jurisdiction over a party is a question of law reviewed de novo; thus, a decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is an issue of law reviewed de novo. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1325, 47 U.S.P.Q.2d 1769, 1772 (Fed. Cir. 1998).

5. On a Rule 12(b)(1) Facial Attack the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards

similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013).

6. In contrast to a facial attack on subject matter jurisdiction, a Rule 12(b)(1) factual attack "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings such as testimony and affidavits are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (internal quotation marks omitted).

7. When the attack is factual "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Therefore, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

8. We review de novo a district court's dismissal for lack of subject-matter jurisdiction under *Rooker–Feldman* and Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6), applying the same standards as the district court. *Truong v. Bank of Am., N.A.*, 717 F.3d 377, 381 (5th Cir. 2013). We review a dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction under the same pleading standard as a dismissal under Rule 12(b)(6). *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). In reviewing the complaint, "we take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff."

9. The denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001).

Federal Rule 12(b)(6)

10. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the

light most favorable to the plaintiff. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321–22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing Twombly, 550 U.S. at 556).

11. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo , and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 468 (6th Cir. 2005).

12. *Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) ("Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (internal quotation marks and citation omitted)).

13. We review de novo the district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Sullivan v. Leor Energy, L.L.C.*, 600 F.3d 542, 546 (5th Cir. 2010) (citation omitted). This court construes facts in the light most favorable to the nonmoving party, "as a motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (citation omitted). Dismissal is appropriate only if the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Yet, the complaint must allege enough facts to move the claim "across the line from conceivable to plausible." *Id.* Determining whether

the plausibility standard has been met is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (citation omitted).

III. ISSUES PRESENTED

14. Defendants do not number their pleadings but at page 4 Defendants list the ground for their motions.

(1) Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b);

(2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants;

(3) the Complaint fails to allege standing under RICO;

(4) the Complaint fails to allege a conspiracy;

(5) the Complaint is not plausible;

(6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and;

(7) the Complaint is frivolous;

15. Defendants claim judicial, qualified and official immunity;

16. Defendants claim a contrary view of the Facts

IV. CONTEXTUAL SUMMARY

17. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

18. Plaintiff filed suit against her siblings Anita and Amy Brunsting for breach of fiduciary and constructive fraud demanding accounting and disclosures of the assets of the various family trusts. That matter *Candace Curtis v Anita and Amy Brunsting et al*., 4:12-cv-0592 filed in the Southern District of Texas February 27, 2012, was dismissed sua sponte under the probate exception to federal diversity jurisdiction.

19. The controversy was returned to the federal District Court after review by the Fifth Circuit, *Curtis v Brunsting* 704 F.3d 406 (Jan 9, 2013).

20. On January 29, 2013, Defendant Bayless improperly filed a suit in the Harris County District Court against Defendants Albert Vacek, Jr. and Candace Kunz-Freed, in the name of the Estate of Nelva Brunsting, raising only issues relating to the Brunsting trust known to be in the custody of a federal Court.

21. Upon remand to the United States District Court, Curtis applied for a protective order and on April 9, 2013 the Honorable Judge Kenneth Hoyt, after a fully contested judicial proceeding, found that Plaintiff Curtis had met all four federal criteria and issued an injunction with findings of fact, conclusions of law, and Order after hearing, something no one has seen since!

22. On April 9, 2013 Defendant Bayless improperly filed a second suit, this time in Harris County Probate Court No. 4, again raising only issues relating to the Brunsting trust known to be in the custody of a federal Court.

23. In September of 2013, Plaintiff Munson was hospitalized and in a coma. Subsequently Munson underwent his third open heart surgery to replace his aortic trunk and valve due to an aneurysm.

24. In the interim Plaintiff Curtis retained the services of Defendant Jason Ostrom, a Houston attorney. Mr. Ostrom thereafter presented Judge Hoyt with an uncontested motion to amend

Curtis' Petition to pollute diversity in order to effect remand to the state probate court, to consolidate Plaintiff Curtis' claims with those of Plaintiff Carl Brunsting, and the matter thus finds itself in Harris County Probate Court No. 4.

The RICO Complaint

25. In response to Rule 12(b)(6) motions to dismiss, on September 15, 2016, Plaintiffs filed the Rule 11(b) and Rule 60 Motions, previously filed in Judge Hoyt's Court,[1] as an Addendum of Memorandum (Dkt 26), supplementing and incorporating by reference the original RICO complaint in this case.

26. The "pleadings" include the complaint, answer to the complaint, and "if the court orders one, a reply to an answer." Federal Rule of Civil Procedure 7(a).

27. An amended complaint supersedes earlier pleadings. See *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.").

28. The Complaint (Dkt 1) thus, also includes the Addendum (Dkt 26) and the exhibits attached thereto.

V. THE ARGUMENT

29. Defendants allege a want of subject matter jurisdiction based upon claims of judicial immunity and lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1).

30. The crux of the standing challenge is a counter claim that Plaintiffs have not been injured within the meaning of the RICO statutes and uses expressions such as "inheritance" and "expectancy" in the explanation for their reasoning.

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012

31. Defendants also seek to offer their own opinion and contrary facts, but may not do so in a Rule12(b)(6) motion and fail to support their opposing claim of facts with affidavits or exhibits, as required for a Rule 12(b)(1) factual challenge and, thus, their claim of opposing facts are not cognizable by the Court within the context of these motions.

32. At page 15 Defendants claim *"The actions Plaintiffs complain of are the rulings and Orders issued by the Honorable Judges"* however, Defendants fail to support their claims with reference to the record and that would be because there are no such events.

33. The complaint makes clear on page 12 of the Addendum (Dkt 26), beginning at line 62 and thereafter, that the Probate Court set motion hearings for lawyers and removed those motions from Calendar for the lawyers, but refused to set Curtis' Motions for hearing, and the attorneys refuse to answer. (See Dkt 26-5, 6, 8, 11, 14, 15, 17 and 19, the list of exhibits is at page 28 or 31) These records and pleadings are all attached and incorporated into the RICO complaint by reference.

34. Defendant Clarinda Comstock has exclusive control of the Docket in Probate Court No. 4, and it is Defendant Clarinda Comstock that decides what gets set for hearing and when, and what does not find its way to the calendar. Defendant Clarinda Comstock refused to set Plaintiff Curtis' Motions for hearing (Dkt 26-15 request for setting and Dkt 26-16 transcript of setting conference). Those are the facts alleged in the complaint, and under the law governing the motion to dismiss here, (Dkt 53) Plaintiff believes those are the only facts under consideration.

35. Defendants' contrary opinions have no veracity in a Rule 12(b)(6) factual challenge at all, and without evidentiary support sufficient to controvert the controlling presumption that Plaintiffs' facts are true, Defendants' contrary opinions have no veracity in a Rule 12(b)(1) factual challenge either.

36. The public record of proceedings in the state court may be subject to varying interpretations, but the evidentiary legitimacy of those records clearly outweighs any contrary claims by these Defendants.

Subject Matter Jurisdiction

37. The pivotal issue before the Court in regard to all of the motions to dismiss for want of subject matter jurisdiction is whether or not the state probate court properly assumed in rem jurisdiction over the Brunsting trust res, in the custody of a federal Court when trust related claims were filed as "Estate" claims in state courts.

38. Defendants proclaim that they are clothed in an incorporeal substance known as subject matter jurisdiction and that their illicit conduct is thus protected by "*absolute judicial immunity from suit for acts undertaken in their judicial capacity even if they are done maliciously or corruptly*"[2], but the state courts had no authority to take cognizance of matters related to the Brunsting trusts while those trusts were under the in rem custody of a federal Court. Defendat Bayless' probate suit was filed the same day the Honorable Kenneth Hoyt issued an injunction against the same Defendants, relating to the same trust and seeking similar relief.

39. The Fifth Circuit Court of Appeals' Opinion in Curtis v Brunsting 704 F.3d 406 (Dkt 26-17), properly characterized the underlying suit, (Curtis v Brunsting 4:12-cv-00592) as a lawsuit relating only to the Brunsting trusts, not falling under the probate exception to federal diversity jurisdiction.

40. The Fifth Circuit also observed that the Wills of Elmer and Nelva Brunsting bequeathed everything to the Brunsting trusts, that assets in the trust were not assets belonging to the estate and, therefore, not subject to probate administration.

[2] Dkt 53 Page 12 Ln. 4 (unnumbered)

41. The record is abundantly clear that the Brunsting trusts were in the in rem custody of another court when trust related claims were filed in state courts and that the probate court was completely without subject matter jurisdiction at all times complained of.

42. Where there is no jurisdiction there is no court, no judge and no litigation.

43. When then record is examined, it becomes abundantly clear that no one participated in Curtis v Brunsting in the probate court. Only Plaintiff Curtis pled under the heading of Curtis v Brunsting and none of the motions and pleadings have been answered or set for hearing despite Curtis' best efforts to obtain a fully litigated judicial determination in that court.

44. Defendants provide a plethora of case law relevant to their alternate claim of facts, but erroneous facts are of no value and case law built thereupon is misleading.

45. In the underlying matter, continually referred to by Defendants as a probate case, the lawsuits filed in both state courts related only to the Brunsting trust and were filed in state courts while the Brunsting trust was clearly in the custody of a federal Court.

46. Carl Brunsting had no individual standing to bring claims in probate court, as he is not an heir to either estate.

47. The suit against Candace Kunz-Freed, raises claims involving only the trust, was filed January 29, 2013 while the trust was in the custody of a federal Court, and the Harris County District Court could not take judicial cognizance of the subject matter.

48. The later probate case filed April 9, 2013, raises claims only related to the Brunsting trusts and was also improperly filed into a court that could not take judicial cognizance of the subject matter, by an individual with no standing as an heir of the estate and, as the real party in interest is the trust, Carl also had no standing to bring trust related claims as executor of the Estates.

Standing

49. Defendants base their claim that Curtis lacks standing on the misrepresentation that all Curtis has is an expectancy in an estate, but as has been shown, Curtis is not an heir to either Estate, only a beneficiary of the heir in fact trust.

50. Defendants challenge of standing against Plaintiff Munson is that Munson is not party to the underlying matters and has suffered no injury.

51. Munson however, has been compelled to combat this public corruption at great personal expense in time and resources. Over the last five years those costs have been exacerbated by the improper actions of all of these Defendants, placing unnecessary economic burdens upon Plaintiffs' household.

52. Defendants are accused of aiding and abetting a pattern of known predicate act conduct, by Anita and Amy Brunsting in pursuit of their own personal agenda, and each can be shown to have provided a necessary part to the montage. The success or failure of such a venture is not an element of these claims. The mere fact of the attempt to extort is sufficient.

Dismissal with Prejudice

53. Defendants ask for dismissal of Plaintiffs' RICO Complaint with prejudice. Such relief is drastic and operates under Federal Rule of Civil Procedure 41(b) as adjudication on the merits.

54. Factors to be weighed in considering dismissal under Rule 41(b) include: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives." *Yourish v. California Amplifier,* 191 F.3d 983, 990 (9th Cir. 1999) (quotations omitted).

55. Defendants do not even begin to approach their burden here. Without subject matter jurisdiction their judicial immunity claims fail and we are left with only the facts to consider.

Tension between Rule 8(a) and 9(b)

56. Federal Rule of Civil Procedure 8 requires that a complaint put forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rule of Civil Procedure 8(a)(2). Each allegation in a complaint must be "simple, concise, and direct." Federal Rule of Civil Procedure 8(d)(1). This court has affirmed dismissal on Rule 8 grounds where the complaint is "argumentative, prolix, replete with redundancy, and largely irrelevant," *McHenry*, 84 F.3d at 1177, 1180, and where the complaint is "verbose, confusing and conclusory," *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981).

VI. CONSPIRACY AND AIDING AND ABETTING

57. A defendant in a case charging a conspiracy may be liable for each of the substantive counts charged in an indictment under three separate theories:

1. Actual commission of the crime; 2. Participation in the crime as an aider or abettor; 3. Liability under a Pinkerton theory[3].

58. A conspiracy is an agreement between two or more people to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member. It does not matter whether or not the conspiracy was

[3] *United States v. Ailsworth, 867 F.Supp. 980, 987 (D. Kan. 1994*. The government may prove liability under any alternative theory, and the jury will not return a verdict indicating the precise manner in which the defendant committed the crime. Id. Furthermore, a jury finding that one is guilty of aiding and abetting a crime is not the equivalent of a finding of a conspiratorial agreement. United States v. Palozzale, 71 F.3d 1233, 1237 (6th Cir. 1995). There is no requirement that there be an agreement in order to convict one of aiding and abetting. United States v. Frazier, 880 F.2d 878, 886 (6th Cir. 1989), cert. denied, 493 U.S. 1053, 110 S.Ct. 1142, 107 L.Ed.2d 1046 (1990). Conspiracy to commit a crime and aiding and abetting in the commission are distinct offenses. Id. See also *United States v. Superior Growers Supply*, 982 F.2d 173, 178 (6th Cir. 1992).

successful. The essence of the offense is that two or more persons have combined, or mutually agreed, to do something illegal. *Iannelli v. United States,* 420 U.S. 770, 777 (1975)

59. The elements are FIRST: That two or more persons agreed to try to accomplish a common and unlawful plan, as charged in the indictment; and, SECOND: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

60. One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to further some object of the conspiracy. *Blumenthal v. United States,* 332 U.S. 539, 557 (1947) One may become a member of a conspiracy without knowing all of the details of the unlawful plan or the identities of all of the other alleged conspirators. If the defendant, with an understanding of the unlawful character of a plan, knowingly joins in an unlawful scheme on one occasion that is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part in the conspiracy.

61. The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods which were agreed upon were actually used or put into operation. Nor must the evidence prove that all of the persons charged were members of the conspiracy. *United States v. Falcone,* 311 U.S. 205, 210(1940).

62. Without subject matter jurisdiction over any Brunsting trust matter these Defendants are without immunity in the present suit and, without their rubber stamp immunity defense, their conduct is fully subject to scrutiny.

63. It is difficult to imagine an acceptable explanation for failure to distinguish between a trust and an estate, given the fact the wills bequeath everything to the trust. It is equally difficult to imagine a satisfactory explanation for refusal to set any of Plaintiff Curtis' motions for hearing and refusal to rule on any substantive matters. A reasonable initial question would be something like, what is the meaning of this? (Exhibits 1, 2 and 3 attached)

64. Plaintiffs point only to the public record in support of facts and these Defendants, claiming to be judges in cases involving these public records, cannot claim ignorance of those facts.

65. Plaintiffs believe they have made substantially more than a prima facia case in the Complaint (Dkt 1), in the Addendum to the Complaint (Dkt 26), in this reply, and in each reply to a motion to dismiss filed in this case to date.

66. As for Mr. Baiamonte, Plaintiff Munson spoke with Mr. Baiamonte and was not satisfied with the answer to inquiries regarding unavailability of a transcript for September 10, 2015.

67. Plaintiff Munson requested a written explanation and Mr. Baiamonte promised to reply with an email. After text message reminders failed to produce the promised statement, Mr. Baiamonte was added to this complaint.

VII. FRIVOLOUS, RULES 12(B)(6) AND 1915(D)

68. Dismissal of frivolous pleadings are governed by Federal Rule of Civil Procedure §1915(d).

> *[t]o the extent that a complaint filed in forma pauperis which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal. But the considerable common ground between these standards does not mean that the one invariably encompasses the other. When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. Accordingly, "frivolousness in the §1915(d) context refers to a more limited set of claims than does Rule*

12(b)(6)[;] ... not all unsuccessful claims are frivolous." Neitzke, 490 U.S. at 328 (footnote omitted).

69. Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending Rule 12(b)(6) motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform to the requirements of a valid legal cause of action. Plaintiffs thus added an Addendum of Memorandum under the authority of Federal Rule of Civil Procedure 15(a)(1).

The Estate of Nelva Brunsting

70. As has been shown, the Fifth Circuit (Dkt 34-4) distinguished between the Brunsting Trust litigation and any prospective probate of the Estates of Elmer or Nelva Brunsting, using the same information available to the probate court, "the Wills of Elmer and Nelva Brunsting" (Dkt 41-2 and 41-3) and in their analysis the Fifth Circuit determined that Brunsting trust assets were not property of either estate and that the trust was in fact the only estate heir.

The Brunsting Trusts

71. Plaintiff Curtis is a beneficiary of an inter vivos trust, not an heir to any estate.

72. Plaintiff Curtis' beneficial interest is property, not an inheritance or expectancy.

73. The estate has no standing to bring claims against beneficiaries of the trust, alleging trespass against the heir in fact (trust), simply because the alleged trespass occurred during the lifetime of a grantor.

VIII. SUFFICIENCY OF THE PLEADINGS

74. Each of these Defendants will claim that Plaintiffs failed to plead a particular act that implicates them individually without regard for the language of the allegations or federal aiding, abetting and conspiracy laws.

IX. CONCLUSION

75. Plaintiffs have rarely found truth to be well received by those it does not flatter.

76. These Defendants needed 10 extra pages to express their disdain for the descriptive labels given to their probate court activities by the general population, such as "Tomb Raiders" and "Probate Mafia", and to bolster their claims of immunity. Plaintiffs merely adopted the expressions because the shoe fits. The only expression Plaintiff Munson believes he may have coined is "Judicial Black Market" and, quite frankly, if someone has a better explanation for the Gregory Lester/Jill Willard Young Report, in Toto with the rest of this song and dance, Plaintiffs are all ears.

77. A Rule 12 Motion is not a substitute for an answer. Defendants none-the-less use the motion as a vehicle to deny there has been any conspiracy to loot the Brunsting Trusts. If that is true, how did Curtis v Brunsting and the Brunsting trusts completely lose their identity and become the "Estate of Nelva Brunsting" once in the clutches of the probate court?

78. The state probate court could not assume jurisdiction over the Brunsting trusts on April 9, 2013, under any theory, and each of these legal professionals have a duty to know the facts of their cases and the relevant law.

79. Plaintiffs herein respectfully request this Honorable Court take judicial notice of the public record pursuant to Federal Rule of Evidence §201, to wit: Harris County Probate Court No. 4, Case: 412248, 412249, 412249-401, 412249-402 and No. 4:12-cv-00592; Candace

Louise Curtis v. Anita Kay Brunsting; United States District Court for the Southern District of Texas, Houston Division, and the records and pleadings in this action.

80. The record will show that after Carl Brunsting resigned as executor for the "Estates of Elmer and Nelva Brunsting" February 15, 2016, Defendant Bayless filed a number of amendments and supplements to her complaint, but in no event did she change the heading nor did she sever the claims of Carl Brunsting individually from those brought as executor.

81. While the state probate court clearly has jurisdiction over any probate of the Estates of Elmer and Nelva Brunsting, it did not have the authority to take cognizance of the Brunsting trust in the custody of a federal Court.

82. When claims directly relating to the Brunsting trusts are stripped away from the claims filed in the name of the "Estate", nothing remains. The estate inventory (Dkt 41-6) shows only an old car.

83. After examining the March 9, 2016 transcript (Dkt 26-16), and the detail of events in the Addendum (Dkt 26 pgs 4-30), it is difficult for Plaintiffs to perceive how they could have possibly failed to state a RICO claim when the Complaint is based upon the U.S. Attorney's Criminal Procedures Manual and the forms provided therein.

84. It is equally difficult to perceive how these Defendants have inadequate notice of the facts when they are entirely contained in the record of the very proceedings Defendants claim to have been adjudicating.

85. The immunity portion of the Rule 12(b)(1) facial challenge fails at the test of subject matter jurisdiction for the reasons stated above, leaving the conduct itself open to examination.

86. Where does corruption get a pass merely because it is clothed in a costume resembling the judicial branch of lawful government? Such notions of immunity are clearly the equivalent of

a theory that a wolf in sheep's clothing is no longer a wolf. The Sheeple on the battle field called the streets of America are not finding that to ring true.

87. Yes, there is a pandemic of public corruption plaguing America and the root causes are all the same. Munson would be more than happy to detail the various color of law operations of lower level state courts replete with incidents and federal lawsuits currently pending from San Diego to New York with stops in such places as Houston and Ferguson. However, the very narrow issue before this Court is one of probate court corruption and this case deals with only one of many such courts.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Motion to Dismiss (Dkt 53) filed by Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte, August 7, 2016.

Respectfully submitted October 13, 2016,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

X. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 13th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

****

CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this 16 day of March, 2015.

Christine Butts
JUDGE PRESIDING

APPROVED AS TO FORM:

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for Carl Brunsting

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Attorney for Amy Brunsting

DATA ENTRY
PICK UP THIS DATE

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
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CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
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SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

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281.870.1647 (Facsimile)

Attorney for Amy Brunsting

Subject: Fw: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 6/24/2016 8:43 AM
To: Rik Munson <blowintough@att.net>

sick, sick, sick
be sure to read down to where Drina and Bobbie are talking about forwarding it to me and deleting the rest of the email...

On Wednesday, March 25, 2015 6:23 PM, Drina Brunsting <drinabrunsting@sbcglobal.net> wrote:

FYI--Judge Butts' email to the attorneys:

Sent: Wednesday, March 25, 2015 3:19 PM
Subject: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

Dear Attorneys,

As you know, we met together on Monday, March 23rd for a status conference. At that status conference we discussed: 1) the district court case and whether a consensus could be reached that it should be transferred to Probate Court 4 (no consensus was obtained); 2) the Motion to Compel (modified order signed); and 3) Carl Brunsting's Application to Resign and the appointment of a successor personal representative.

This email is to discuss the appointment of a successor personal representative considering the fact that Carl Brunsting must resign. As you all know, the Will of Nelva Brunsting provides that Amy and then Candace shall serve as alternate executors to Carl. Normally, Amy would be appointed so long as she was qualified. However, Carl in both his individual capacity and in his capacity as the Executor of the Estate has filed suit against Anita, Amy, Carole, and Candace (Petition for Declaratory Judgment, for an Accounting, for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief, Together with Request for Disclosures, filed April 9, 2013 and as amended) in Probate Court 4. Consequently, it would likely be argued that Amy is unsuitable to serve given the conflict of interest, as she would have to pursue (or choose not to pursue), as successor Executrix, a claims filed against her individually and as trustee of several trusts. Though Candace is named as a defendant in the case pending in Probate Court 4, she appears to be a defendant only because her rights may be affected. In an effort to address the need for the appointment of a successor personal representative, short-circuit the process of sorting out claims of disqualification, and efficiently proceed with the administration of the estate, may I suggest that you all agree on the appointment of an independent third party as the successor personal representative?

Even if all agree that the appointment of an independent third party as successor administrator (or independent administrator) is advisable, the matter of paying such appointee remains difficult, as I understand the Estate of Nelva Brunsting contains little if any liquid assets. It was suggested that the assets of the Brunsting Family Living Trust, originally formed in 1996, (or its progeny) could be

used to fund the appointment of a third party administrator. In the Restatement of such trust, signed in 2005, on page 8-4, Art. VIII, Sec. D, Part 1, the Trustee is specifically authorized to pay "expenses of administering the surviving Founder's estate." The Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement ("QBD"), signed by Nelva E. Brunsting in 2010, appears to ratify the Trustee's authority to pay the administration expenses of the surviving Founder's estate, as such QBD did not appear to amend such provisions of the Restatement and provided at the bottom of page 36 that, "All other provisions contained in the Brunsting Family Living Trust dated October 10, 1996, as amended, and that certain Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement dated June 15, 2010 are hereby ratified and confirmed and shall remain in full force and effect except to the extent that any such provisions are amended hereby." However, I do not have a copy of the document mentioned above in red; so, I cannot confirm that it did not amend the Trustee's authority to pay administration expenses of the surviving Founder's estate. At any rate, unless such authority was edited by the document mentioned in red, it seems clear that the Trustee may pay the administration expenses of the estate of Nelva Brunsting.

Considering that the Trustee seems to have the discretionary power to pay administration expenses directly, as far as I can see, all the talk about deemed distributions to children to pay such expenses and considerations related to spend thrift provisions (addressed by Ms. Thornton) and special needs provisions (which I brought up not knowing whether or not it could be an issue) may be moot.

I was informed that Ms. Wylie would not be an acceptable choice as administrator as far as Carl or Ms. Bayless is concerned. Ms. Bayless suggested both Fatima Breland and Sharon Stodghill as agreeable persons to serve as administrator. I am confident that both of these attorneys would make excellent administrators. It is my suggestion that the case proceed as follows:

1. The Trustee(s) agree to pay court approved fees and expenses of administrator (even if the administration in independent, the court is amenable to reviewing and approving fees if this will give the Trustee(s) more comfort in making disbursements from the trust).
2. The parties agree on the appointment of a particular person to serve as administrator and decide whether or not such person should serve independently, or the parties agree that the court shall appoint an independent third party administrator (dependent or independent).
3. The administrator would, among other things, respond to discovery requests, prepare an accounting, and evaluate and perhaps pursue claims in district court.

Thank you all for your consideration of this analysis and my suggestions. Please do not consider any of the statements herein to be an advanced ruling or finding.

Very truly yours,

Christine Butts
Judge, Harris County Probate Court 4
201 Caroline, 7th Floor
Houston, Texas 77002
(713)368-6767
http://www.co.harris.tx.us/probate/crt4/default.aspx
christine.butts@prob.hctx.net

When you do the reply, just erase everything until you get down to Judge Butts' email.

----- Original Message -----
From: Drinabrunsting
To: Bobbie Bayless
Sent: Wednesday, March 25, 2015 7:51 PM
Subject: Re: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

I would like for Candy to be able to read this but I dont want to forward your email. Should I cut and paste her email or leave Candy out?

Sent from my Samsung Epic™ 4G Touch

Bobbie Bayless <bayless@baylessstokes.com> wrote:
Just in Nelva's estate--not in the trusts.
----- Original Message -----
From: Drinabrunsting
To: Bobbie G Bayless
Sent: Wednesday, March 25, 2015 7:01 PM
Subject: RE: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

Where did she get the notion that there are no liquid assets?

Sent from my Samsung Epic™ 4G TouchBobbie G Bayless <bayless@baylessstokes.com> wrote:We finally got this email from the judge about appointing an independent person and paying for their services.

----- Original Message -----
From: Butts, Christine (Probate Courts)
To: bayless@baylessstokes.com ; brad@mendellawfirm.com ; nspielman@grifmatlaw.com ; Darlene Smith (dsmith@craincaton.com) ; Jason Ostrom (jason@ostromsain.com) ; nicole@ostromsain.com
Cc: Comstock, Clarinda (Probate Courts)
Sent: Wednesday, March 25, 2015 3:19 PM
Subject: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

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1. The Trustee(s) agree to pay court approved fees and expenses of administrator (even if the administration in independent, the court is amenable to reviewing and approving fees if this will

give the Trustee(s) more comfort in making disbursements from the trust).
2. The parties agree on the appointment of a particular person to serve as administrator and decide whether or not such person should serve independently, or the parties agree that the court shall appoint an independent third party administrator (dependent or independent).
3. The administrator would, among other things, respond to discovery requests, prepare an accounting, and evaluate and perhaps pursue claims in district court.

Thank you all for your consideration of this analysis and my suggestions. Please do not consider any of the statements herein to be an advanced ruling or finding.

Very truly yours,

Christine Butts
Judge, Harris County Probate Court 4
201 Caroline, 7th Floor
Houston, Texas 77002
(713)368-6767
http://www.co.harris.tx.us/probate/crt4/default.aspx
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis et al.,	§	
Plaintiffs,	§	
	§	Civil Action NO. 4:16-CV-01969
v.	§	
	§	The Honorable Alfred Bennett
Kunz-Freed et al.,	§	
Defendants	§	

Plaintiffs' Answer to Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9(b)

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I. INTRODUCTION

1. This is a private interest as well as a public interest lawsuit, as the subject matter relates to the legitimate administration of public justice.

2. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act (RICO) at 18 U.S.C. §§1961-1968 and the right of claims provided at 18 U.S.C. §1964(c).

3. On October 7, 2016, Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte filed a combined motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) (Dkt 53).

II. STANDARDS OF REVIEW

Federal Rule 12(b)(1)

4. Whether or not a court has subject matter jurisdiction over a party is a question of law reviewed de novo; thus, a decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is an issue of law reviewed de novo. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1325, 47 U.S.P.Q.2d 1769, 1772 (Fed. Cir. 1998).

5. On a Rule 12(b)(1) Facial Attack the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards

similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013).

6. In contrast to a facial attack on subject matter jurisdiction, a Rule 12(b)(1) factual attack "challenge[s] the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings such as testimony and affidavits are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (internal quotation marks omitted).

7. When the attack is factual "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* Therefore, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

8. We review de novo a district court's dismissal for lack of subject-matter jurisdiction under *Rooker–Feldman* and Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6), applying the same standards as the district court. *Truong v. Bank of Am., N.A.*, 717 F.3d 377, 381 (5th Cir. 2013). We review a dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction under the same pleading standard as a dismissal under Rule 12(b)(6). *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). In reviewing the complaint, "we take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff."

9. The denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001).

Federal Rule 12(b)(6)

10. When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the

light most favorable to the plaintiff. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321–22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing Twombly, 550 U.S. at 556).

11. The standard of appellate review for a motion to dismiss pursuant to Rule 12(b)(6) is de novo , and the Court will employ the same standard as the district court. *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 468 (6th Cir. 2005).

12. *Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) ("Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (internal quotation marks and citation omitted)).

13. We review de novo the district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Sullivan v. Leor Energy, L.L.C.*, 600 F.3d 542, 546 (5th Cir. 2010) (citation omitted). This court construes facts in the light most favorable to the nonmoving party, "as a motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (citation omitted). Dismissal is appropriate only if the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Yet, the complaint must allege enough facts to move the claim "across the line from conceivable to plausible." *Id.* Determining whether

the plausibility standard has been met is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (citation omitted).

III. ISSUES PRESENTED

14. Defendants do not number their pleadings but at page 4 Defendants list the ground for their motions.

(1) Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b);

(2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants;

(3) the Complaint fails to allege standing under RICO;

(4) the Complaint fails to allege a conspiracy;

(5) the Complaint is not plausible;

(6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and;

(7) the Complaint is frivolous;

15. Defendants claim judicial, qualified and official immunity;

16. Defendants claim a contrary view of the Facts

IV. CONTEXTUAL SUMMARY

17. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

18. Plaintiff filed suit against her siblings Anita and Amy Brunsting for breach of fiduciary and constructive fraud demanding accounting and disclosures of the assets of the various family trusts. That matter *Candace Curtis v Anita and Amy Brunsting et al*., 4:12-cv-0592 filed in the Southern District of Texas February 27, 2012, was dismissed sua sponte under the probate exception to federal diversity jurisdiction.

19. The controversy was returned to the federal District Court after review by the Fifth Circuit, *Curtis v Brunsting* 704 F.3d 406 (Jan 9, 2013).

20. On January 29, 2013, Defendant Bayless improperly filed a suit in the Harris County District Court against Defendants Albert Vacek, Jr. and Candace Kunz-Freed, in the name of the Estate of Nelva Brunsting, raising only issues relating to the Brunsting trust known to be in the custody of a federal Court.

21. Upon remand to the United States District Court, Curtis applied for a protective order and on April 9, 2013 the Honorable Judge Kenneth Hoyt, after a fully contested judicial proceeding, found that Plaintiff Curtis had met all four federal criteria and issued an injunction with findings of fact, conclusions of law, and Order after hearing, something no one has seen since!

22. On April 9, 2013 Defendant Bayless improperly filed a second suit, this time in Harris County Probate Court No. 4, again raising only issues relating to the Brunsting trust known to be in the custody of a federal Court.

23. In September of 2013, Plaintiff Munson was hospitalized and in a coma. Subsequently Munson underwent his third open heart surgery to replace his aortic trunk and valve due to an aneurysm.

24. In the interim Plaintiff Curtis retained the services of Defendant Jason Ostrom, a Houston attorney. Mr. Ostrom thereafter presented Judge Hoyt with an uncontested motion to amend

Curtis' Petition to pollute diversity in order to effect remand to the state probate court, to consolidate Plaintiff Curtis' claims with those of Plaintiff Carl Brunsting, and the matter thus finds itself in Harris County Probate Court No. 4.

The RICO Complaint

25. In response to Rule 12(b)(6) motions to dismiss, on September 15, 2016, Plaintiffs filed the Rule 11(b) and Rule 60 Motions, previously filed in Judge Hoyt's Court,[1] as an Addendum of Memorandum (Dkt 26), supplementing and incorporating by reference the original RICO complaint in this case.

26. The "pleadings" include the complaint, answer to the complaint, and "if the court orders one, a reply to an answer." Federal Rule of Civil Procedure 7(a).

27. An amended complaint supersedes earlier pleadings. See *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading.").

28. The Complaint (Dkt 1) thus, also includes the Addendum (Dkt 26) and the exhibits attached thereto.

V. THE ARGUMENT

29. Defendants allege a want of subject matter jurisdiction based upon claims of judicial immunity and lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1).

30. The crux of the standing challenge is a counter claim that Plaintiffs have not been injured within the meaning of the RICO statutes and uses expressions such as "inheritance" and "expectancy" in the explanation for their reasoning.

[1] Curtis v Brunsting 4:12-cv-592 filed TXSD February 27, 2012

31. Defendants also seek to offer their own opinion and contrary facts, but may not do so in a Rule12(b)(6) motion and fail to support their opposing claim of facts with affidavits or exhibits, as required for a Rule 12(b)(1) factual challenge and, thus, their claim of opposing facts are not cognizable by the Court within the context of these motions.

32. At page 15 Defendants claim *"The actions Plaintiffs complain of are the rulings and Orders issued by the Honorable Judges"* however, Defendants fail to support their claims with reference to the record and that would be because there are no such events.

33. The complaint makes clear on page 12 of the Addendum (Dkt 26), beginning at line 62 and thereafter, that the Probate Court set motion hearings for lawyers and removed those motions from Calendar for the lawyers, but refused to set Curtis' Motions for hearing, and the attorneys refuse to answer. (See Dkt 26-5, 6, 8, 11, 14, 15, 17 and 19, the list of exhibits is at page 28 or 31) These records and pleadings are all attached and incorporated into the RICO complaint by reference.

34. Defendant Clarinda Comstock has exclusive control of the Docket in Probate Court No. 4, and it is Defendant Clarinda Comstock that decides what gets set for hearing and when, and what does not find its way to the calendar. Defendant Clarinda Comstock refused to set Plaintiff Curtis' Motions for hearing (Dkt 26-15 request for setting and Dkt 26-16 transcript of setting conference). Those are the facts alleged in the complaint, and under the law governing the motion to dismiss here, (Dkt 53) Plaintiff believes those are the only facts under consideration.

35. Defendants' contrary opinions have no veracity in a Rule 12(b)(6) factual challenge at all, and without evidentiary support sufficient to controvert the controlling presumption that Plaintiffs' facts are true, Defendants' contrary opinions have no veracity in a Rule 12(b)(1) factual challenge either.

36. The public record of proceedings in the state court may be subject to varying interpretations, but the evidentiary legitimacy of those records clearly outweighs any contrary claims by these Defendants.

Subject Matter Jurisdiction

37. The pivotal issue before the Court in regard to all of the motions to dismiss for want of subject matter jurisdiction is whether or not the state probate court properly assumed in rem jurisdiction over the Brunsting trust res, in the custody of a federal Court when trust related claims were filed as "Estate" claims in state courts.

38. Defendants proclaim that they are clothed in an incorporeal substance known as subject matter jurisdiction and that their illicit conduct is thus protected by "*absolute judicial immunity from suit for acts undertaken in their judicial capacity even if they are done maliciously or corruptly*"[2], but the state courts had no authority to take cognizance of matters related to the Brunsting trusts while those trusts were under the in rem custody of a federal Court. Defendat Bayless' probate suit was filed the same day the Honorable Kenneth Hoyt issued an injunction against the same Defendants, relating to the same trust and seeking similar relief.

39. The Fifth Circuit Court of Appeals' Opinion in Curtis v Brunsting 704 F.3d 406 (Dkt 26-17), properly characterized the underlying suit, (Curtis v Brunsting 4:12-cv-00592) as a lawsuit relating only to the Brunsting trusts, not falling under the probate exception to federal diversity jurisdiction.

40. The Fifth Circuit also observed that the Wills of Elmer and Nelva Brunsting bequeathed everything to the Brunsting trusts, that assets in the trust were not assets belonging to the estate and, therefore, not subject to probate administration.

[2] Dkt 53 Page 12 Ln. 4 (unnumbered)

41. The record is abundantly clear that the Brunsting trusts were in the in rem custody of another court when trust related claims were filed in state courts and that the probate court was completely without subject matter jurisdiction at all times complained of.

42. Where there is no jurisdiction there is no court, no judge and no litigation.

43. When then record is examined, it becomes abundantly clear that no one participated in Curtis v Brunsting in the probate court. Only Plaintiff Curtis pled under the heading of Curtis v Brunsting and none of the motions and pleadings have been answered or set for hearing despite Curtis' best efforts to obtain a fully litigated judicial determination in that court.

44. Defendants provide a plethora of case law relevant to their alternate claim of facts, but erroneous facts are of no value and case law built thereupon is misleading.

45. In the underlying matter, continually referred to by Defendants as a probate case, the lawsuits filed in both state courts related only to the Brunsting trust and were filed in state courts while the Brunsting trust was clearly in the custody of a federal Court.

46. Carl Brunsting had no individual standing to bring claims in probate court, as he is not an heir to either estate.

47. The suit against Candace Kunz-Freed, raises claims involving only the trust, was filed January 29, 2013 while the trust was in the custody of a federal Court, and the Harris County District Court could not take judicial cognizance of the subject matter.

48. The later probate case filed April 9, 2013, raises claims only related to the Brunsting trusts and was also improperly filed into a court that could not take judicial cognizance of the subject matter, by an individual with no standing as an heir of the estate and, as the real party in interest is the trust, Carl also had no standing to bring trust related claims as executor of the Estates.

Standing

49. Defendants base their claim that Curtis lacks standing on the misrepresentation that all Curtis has is an expectancy in an estate, but as has been shown, Curtis is not an heir to either Estate, only a beneficiary of the heir in fact trust.

50. Defendants challenge of standing against Plaintiff Munson is that Munson is not party to the underlying matters and has suffered no injury.

51. Munson however, has been compelled to combat this public corruption at great personal expense in time and resources. Over the last five years those costs have been exacerbated by the improper actions of all of these Defendants, placing unnecessary economic burdens upon Plaintiffs' household.

52. Defendants are accused of aiding and abetting a pattern of known predicate act conduct, by Anita and Amy Brunsting in pursuit of their own personal agenda, and each can be shown to have provided a necessary part to the montage. The success or failure of such a venture is not an element of these claims. The mere fact of the attempt to extort is sufficient.

Dismissal with Prejudice

53. Defendants ask for dismissal of Plaintiffs' RICO Complaint with prejudice. Such relief is drastic and operates under Federal Rule of Civil Procedure 41(b) as adjudication on the merits.

54. Factors to be weighed in considering dismissal under Rule 41(b) include: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives." *Yourish v. California Amplifier,* 191 F.3d 983, 990 (9th Cir. 1999) (quotations omitted).

55. Defendants do not even begin to approach their burden here. Without subject matter jurisdiction their judicial immunity claims fail and we are left with only the facts to consider.

Tension between Rule 8(a) and 9(b)

56. Federal Rule of Civil Procedure 8 requires that a complaint put forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Federal Rule of Civil Procedure 8(a)(2). Each allegation in a complaint must be "simple, concise, and direct." Federal Rule of Civil Procedure 8(d)(1). This court has affirmed dismissal on Rule 8 grounds where the complaint is "argumentative, prolix, replete with redundancy, and largely irrelevant," *McHenry*, 84 F.3d at 1177, 1180, and where the complaint is "verbose, confusing and conclusory," *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981).

VI. CONSPIRACY AND AIDING AND ABETTING

57. A defendant in a case charging a conspiracy may be liable for each of the substantive counts charged in an indictment under three separate theories:

1. Actual commission of the crime; 2. Participation in the crime as an aider or abettor; 3. Liability under a Pinkerton theory[3].

58. A conspiracy is an agreement between two or more people to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member. It does not matter whether or not the conspiracy was

[3] *United States v. Ailsworth, 867 F.Supp. 980, 987 (D. Kan. 1994*. The government may prove liability under any alternative theory, and the jury will not return a verdict indicating the precise manner in which the defendant committed the crime. Id. Furthermore, a jury finding that one is guilty of aiding and abetting a crime is not the equivalent of a finding of a conspiratorial agreement. United States v. Palozzale, 71 F.3d 1233, 1237 (6th Cir. 1995). There is no requirement that there be an agreement in order to convict one of aiding and abetting. United States v. Frazier, 880 F.2d 878, 886 (6th Cir. 1989), cert. denied, 493 U.S. 1053, 110 S.Ct. 1142, 107 L.Ed.2d 1046 (1990). Conspiracy to commit a crime and aiding and abetting in the commission are distinct offenses. Id. See also *United States v. Superior Growers Supply*, 982 F.2d 173, 178 (6th Cir. 1992).

successful. The essence of the offense is that two or more persons have combined, or mutually agreed, to do something illegal. *Iannelli v. United States,* 420 U.S. 770, 777 (1975)

59. The elements are FIRST: That two or more persons agreed to try to accomplish a common and unlawful plan, as charged in the indictment; and, SECOND: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

60. One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to further some object of the conspiracy. *Blumenthal v. United States,* 332 U.S. 539, 557 (1947) One may become a member of a conspiracy without knowing all of the details of the unlawful plan or the identities of all of the other alleged conspirators. If the defendant, with an understanding of the unlawful character of a plan, knowingly joins in an unlawful scheme on one occasion that is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part in the conspiracy.

61. The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods which were agreed upon were actually used or put into operation. Nor must the evidence prove that all of the persons charged were members of the conspiracy. *United States v. Falcone,* 311 U.S. 205, 210(1940).

62. Without subject matter jurisdiction over any Brunsting trust matter these Defendants are without immunity in the present suit and, without their rubber stamp immunity defense, their conduct is fully subject to scrutiny.

63. It is difficult to imagine an acceptable explanation for failure to distinguish between a trust and an estate, given the fact the wills bequeath everything to the trust. It is equally difficult to imagine a satisfactory explanation for refusal to set any of Plaintiff Curtis' motions for hearing and refusal to rule on any substantive matters. A reasonable initial question would be something like, what is the meaning of this? (Exhibits 1, 2 and 3 attached)

64. Plaintiffs point only to the public record in support of facts and these Defendants, claiming to be judges in cases involving these public records, cannot claim ignorance of those facts.

65. Plaintiffs believe they have made substantially more than a prima facia case in the Complaint (Dkt 1), in the Addendum to the Complaint (Dkt 26), in this reply, and in each reply to a motion to dismiss filed in this case to date.

66. As for Mr. Baiamonte, Plaintiff Munson spoke with Mr. Baiamonte and was not satisfied with the answer to inquiries regarding unavailability of a transcript for September 10, 2015.

67. Plaintiff Munson requested a written explanation and Mr. Baiamonte promised to reply with an email. After text message reminders failed to produce the promised statement, Mr. Baiamonte was added to this complaint.

VII. FRIVOLOUS, RULES 12(B)(6) AND 1915(D)

68. Dismissal of frivolous pleadings are governed by Federal Rule of Civil Procedure §1915(d).

> *[t]o the extent that a complaint filed in forma pauperis which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal. But the considerable common ground between these standards does not mean that the one invariably encompasses the other. When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. Accordingly, "frivolousness in the §1915(d) context refers to a more limited set of claims than does Rule*

12(b)(6)[;] ... not all unsuccessful claims are frivolous." Neitzke, 490 U.S. at 328 (footnote omitted).

69. Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending Rule 12(b)(6) motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform to the requirements of a valid legal cause of action. Plaintiffs thus added an Addendum of Memorandum under the authority of Federal Rule of Civil Procedure 15(a)(1).

The Estate of Nelva Brunsting

70. As has been shown, the Fifth Circuit (Dkt 34-4) distinguished between the Brunsting Trust litigation and any prospective probate of the Estates of Elmer or Nelva Brunsting, using the same information available to the probate court, "the Wills of Elmer and Nelva Brunsting" (Dkt 41-2 and 41-3) and in their analysis the Fifth Circuit determined that Brunsting trust assets were not property of either estate and that the trust was in fact the only estate heir.

The Brunsting Trusts

71. Plaintiff Curtis is a beneficiary of an inter vivos trust, not an heir to any estate.

72. Plaintiff Curtis' beneficial interest is property, not an inheritance or expectancy.

73. The estate has no standing to bring claims against beneficiaries of the trust, alleging trespass against the heir in fact (trust), simply because the alleged trespass occurred during the lifetime of a grantor.

VIII. SUFFICIENCY OF THE PLEADINGS

74. Each of these Defendants will claim that Plaintiffs failed to plead a particular act that implicates them individually without regard for the language of the allegations or federal aiding, abetting and conspiracy laws.

IX. CONCLUSION

75. Plaintiffs have rarely found truth to be well received by those it does not flatter.

76. These Defendants needed 10 extra pages to express their disdain for the descriptive labels given to their probate court activities by the general population, such as "Tomb Raiders" and "Probate Mafia", and to bolster their claims of immunity. Plaintiffs merely adopted the expressions because the shoe fits. The only expression Plaintiff Munson believes he may have coined is "Judicial Black Market" and, quite frankly, if someone has a better explanation for the Gregory Lester/Jill Willard Young Report, in Toto with the rest of this song and dance, Plaintiffs are all ears.

77. A Rule 12 Motion is not a substitute for an answer. Defendants none-the-less use the motion as a vehicle to deny there has been any conspiracy to loot the Brunsting Trusts. If that is true, how did Curtis v Brunsting and the Brunsting trusts completely lose their identity and become the "Estate of Nelva Brunsting" once in the clutches of the probate court?

78. The state probate court could not assume jurisdiction over the Brunsting trusts on April 9, 2013, under any theory, and each of these legal professionals have a duty to know the facts of their cases and the relevant law.

79. Plaintiffs herein respectfully request this Honorable Court take judicial notice of the public record pursuant to Federal Rule of Evidence §201, to wit: Harris County Probate Court No. 4, Case: 412248, 412249, 412249-401, 412249-402 and No. 4:12-cv-00592; Candace

Louise Curtis v. Anita Kay Brunsting; United States District Court for the Southern District of Texas, Houston Division, and the records and pleadings in this action.

80. The record will show that after Carl Brunsting resigned as executor for the "Estates of Elmer and Nelva Brunsting" February 15, 2016, Defendant Bayless filed a number of amendments and supplements to her complaint, but in no event did she change the heading nor did she sever the claims of Carl Brunsting individually from those brought as executor.

81. While the state probate court clearly has jurisdiction over any probate of the Estates of Elmer and Nelva Brunsting, it did not have the authority to take cognizance of the Brunsting trust in the custody of a federal Court.

82. When claims directly relating to the Brunsting trusts are stripped away from the claims filed in the name of the "Estate", nothing remains. The estate inventory (Dkt 41-6) shows only an old car.

83. After examining the March 9, 2016 transcript (Dkt 26-16), and the detail of events in the Addendum (Dkt 26 pgs 4-30), it is difficult for Plaintiffs to perceive how they could have possibly failed to state a RICO claim when the Complaint is based upon the U.S. Attorney's Criminal Procedures Manual and the forms provided therein.

84. It is equally difficult to perceive how these Defendants have inadequate notice of the facts when they are entirely contained in the record of the very proceedings Defendants claim to have been adjudicating.

85. The immunity portion of the Rule 12(b)(1) facial challenge fails at the test of subject matter jurisdiction for the reasons stated above, leaving the conduct itself open to examination.

86. Where does corruption get a pass merely because it is clothed in a costume resembling the judicial branch of lawful government? Such notions of immunity are clearly the equivalent of

a theory that a wolf in sheep's clothing is no longer a wolf. The Sheeple on the battle field called the streets of America are not finding that to ring true.

87. Yes, there is a pandemic of public corruption plaguing America and the root causes are all the same. Munson would be more than happy to detail the various color of law operations of lower level state courts replete with incidents and federal lawsuits currently pending from San Diego to New York with stops in such places as Houston and Ferguson. However, the very narrow issue before this Court is one of probate court corruption and this case deals with only one of many such courts.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Motion to Dismiss (Dkt 53) filed by Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte, August 7, 2016.

Respectfully submitted October 13, 2016,

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

X. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 13th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

****

CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this 16 day of March, 2015.

Christine Butts
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

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Attorney for Amy Brunsting

DATA ENTRY
PICK UP THIS DATE

PROBATE COURT 4

CAUSE NO. 412,249 - 401

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

****

CAUSE NO. 412,249 - 402

IN RE: ESTATE OF	§	IN THE PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this ____ day of _____, 2015.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

ostrommorris, PLLC

BY: _____

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for Carl Brunsting

BY: _____

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281.870.1647 (Facsimile)

Attorney for Amy Brunsting

Subject: Fw: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249
From: Candace Curtis <occurtis@sbcglobal.net>
Date: 6/24/2016 8:43 AM
To: Rik Munson <blowintough@att.net>

sick, sick, sick
be sure to read down to where Drina and Bobbie are talking about forwarding it to me and deleting the rest of the email...

On Wednesday, March 25, 2015 6:23 PM, Drina Brunsting <drinabrunsting@sbcglobal.net> wrote:

FYI--Judge Butts' email to the attorneys:

Sent: Wednesday, March 25, 2015 3:19 PM
Subject: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

Dear Attorneys,

As you know, we met together on Monday, March 23rd for a status conference. At that status conference we discussed: 1) the district court case and whether a consensus could be reached that it should be transferred to Probate Court 4 (no consensus was obtained); 2) the Motion to Compel (modified order signed); and 3) Carl Brunsting's Application to Resign and the appointment of a successor personal representative.

This email is to discuss the appointment of a successor personal representative considering the fact that Carl Brunsting must resign. As you all know, the Will of Nelva Brunsting provides that Amy and then Candace shall serve as alternate executors to Carl. Normally, Amy would be appointed so long as she was qualified. However, Carl in both his individual capacity and in his capacity as the Executor of the Estate has filed suit against Anita, Amy, Carole, and Candace (Petition for Declaratory Judgment, for an Accounting, for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief, Together with Request for Disclosures, filed April 9, 2013 and as amended) in Probate Court 4. Consequently, it would likely be argued that Amy is unsuitable to serve given the conflict of interest, as she would have to pursue (or choose not to pursue), as successor Executrix, a claims filed against her individually and as trustee of several trusts. Though Candace is named as a defendant in the case pending in Probate Court 4, she appears to be a defendant only because her rights may be affected. In an effort to address the need for the appointment of a successor personal representative, short-circuit the process of sorting out claims of disqualification, and efficiently proceed with the administration of the estate, may I suggest that you all agree on the appointment of an independent third party as the successor personal representative?

Even if all agree that the appointment of an independent third party as successor administrator (or independent administrator) is advisable, the matter of paying such appointee remains difficult, as I understand the Estate of Nelva Brunsting contains little if any liquid assets. It was suggested that the assets of the Brunsting Family Living Trust, originally formed in 1996, (or its progeny) could be

used to fund the appointment of a third party administrator. In the Restatement of such trust, signed in 2005, on page 8-4, Art. VIII, Sec. D, Part 1, the Trustee is specifically authorized to pay "expenses of administering the surviving Founder's estate." The Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement ("QBD"), signed by Nelva E. Brunsting in 2010, appears to ratify the Trustee's authority to pay the administration expenses of the surviving Founder's estate, as such QBD did not appear to amend such provisions of the Restatement and provided at the bottom of page 36 that, "All other provisions contained in the Brunsting Family Living Trust dated October 10, 1996, as amended, and that certain Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement dated June 15, 2010 are hereby ratified and confirmed and shall remain in full force and effect except to the extent that any such provisions are amended hereby." However, I do not have a copy of the document mentioned above in red; so, I cannot confirm that it did not amend the Trustee's authority to pay administration expenses of the surviving Founder's estate. At any rate, unless such authority was edited by the document mentioned in red, it seems clear that the Trustee may pay the administration expenses of the estate of Nelva Brunsting.

Considering that the Trustee seems to have the discretionary power to pay administration expenses directly, as far as I can see, all the talk about deemed distributions to children to pay such expenses and considerations related to spend thrift provisions (addressed by Ms. Thornton) and special needs provisions (which I brought up not knowing whether or not it could be an issue) may be moot.

I was informed that Ms. Wylie would not be an acceptable choice as administrator as far as Carl or Ms. Bayless is concerned. Ms. Bayless suggested both Fatima Breland and Sharon Stodghill as agreeable persons to serve as administrator. I am confident that both of these attorneys would make excellent administrators. It is my suggestion that the case proceed as follows:

1. The Trustee(s) agree to pay court approved fees and expenses of administrator (even if the administration in independent, the court is amenable to reviewing and approving fees if this will give the Trustee(s) more comfort in making disbursements from the trust).
2. The parties agree on the appointment of a particular person to serve as administrator and decide whether or not such person should serve independently, or the parties agree that the court shall appoint an independent third party administrator (dependent or independent).
3. The administrator would, among other things, respond to discovery requests, prepare an accounting, and evaluate and perhaps pursue claims in district court.

Thank you all for your consideration of this analysis and my suggestions. Please do not consider any of the statements herein to be an advanced ruling or finding.

Very truly yours,

Christine Butts
Judge, Harris County Probate Court 4
201 Caroline, 7th Floor
Houston, Texas 77002
(713)368-6767
http://www.co.harris.tx.us/probate/crt4/default.aspx
christine.butts@prob.hctx.net

When you do the reply, just erase everything until you get down to Judge Butts' email.

----- Original Message -----
From: Drinabrunsting
To: Bobbie Bayless
Sent: Wednesday, March 25, 2015 7:51 PM
Subject: Re: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

I would like for Candy to be able to read this but I dont want to forward your email. Should I cut and paste her email or leave Candy out?

Sent from my Samsung Epic™ 4G Touch

Bobbie Bayless <bayless@baylessstokes.com> wrote:
Just in Nelva's estate--not in the trusts.
----- Original Message -----
From: Drinabrunsting
To: Bobbie G Bayless
Sent: Wednesday, March 25, 2015 7:01 PM
Subject: RE: Fw: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

Where did she get the notion that there are no liquid assets?

Sent from my Samsung Epic™ 4G TouchBobbie G Bayless <bayless@baylessstokes.com> wrote:We finally got this email from the judge about appointing an independent person and paying for their services.

----- Original Message -----
From: Butts, Christine (Probate Courts)
To: bayless@baylessstokes.com ; brad@mendellawfirm.com ; nspielman@grifmatlaw.com ; Darlene Smith (dsmith@craincaton.com) ; Jason Ostrom (jason@ostromsain.com) ; nicole@ostromsain.com
Cc: Comstock, Clarinda (Probate Courts)
Sent: Wednesday, March 25, 2015 3:19 PM
Subject: The Estate of Nelva E. Brunsting, Deceased; In Probate Court 4 of Harris County; Cause No. 412,249

Dear Attorneys,

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3. The administrator would, among other things, respond to discovery requests, prepare an accounting, and evaluate and perhaps pursue claims in district court.

Thank you all for your consideration of this analysis and my suggestions. Please do not consider any of the statements herein to be an advanced ruling or finding.

Very truly yours,

Christine Butts
Judge, Harris County Probate Court 4
201 Caroline, 7th Floor
Houston, Texas 77002
(713)368-6767
http://www.co.harris.tx.us/probate/crt4/default.aspx
christine.butts@prob.hctx.net

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	
v	§	Civil Action No. 4:16-cv-01969
	§	
Kunz-Freed, et al	§	
Defendants	§	

ORDER

Upon due consideration, the Rule 12(b)(1) and 12(b)(6) Motion to Dismiss filed by Defendants Christine Butts, Clarinda Comstock and Tony Baiamonte, on October 7, 2016, Docket entry 53, should be Denied.

It is SO ORDERED

_____
Date

_____
The Honorable Alfred H Bennet
United Stated District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

MOTION TO STAY RULE 26(F) CONFERENCE AND ALL DISCOVERY PENDING RESOLUTION OF MOTIONS TO DISMISS

Defendants[1] file this motion respectfully requesting that the Court stay all discovery and other proceedings in this action, including the Rule 26(f) conference and initial pretrial and scheduling conference, until the Court rules on the Motions to Dismiss filed by Defendants. Each of the Motions to Dismiss on file with the Court has the potential to resolve the entire case and obviate the need for discovery altogether.

Pursuant to the Federal Rules of Civil Procedure, a court has discretion to stay discovery "for good cause shown." FED. R. CIV. P. 26(c). A district court may limit discovery when a dispositive motion would preclude the need for discovery, saving the parties time and expense.

[1] "Defendants" refer to each undersigned Defendant that has been served and appeared in Case No. 4:16-cv-00733 as of October 13, 2016, except for Amy Brunsting.

See Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1304 n.13 (5th Cir. 1983) (holding it was not an abuse of discretion for district court to fully stay discovery in the early stages of the dispute when claims and defenses presented threshold legal issues). And this is particularly true for motions to dismiss under Rule 12(b)(6), which are decided solely by reference to the complaint and proper attachments. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990) (affirming entry of protective order where discovery was unnecessary to resolve pending dispositive motion).

In this case Plaintiffs have filed a 62-page Complaint with hundreds of pages of attachments alleging RICO, fraud, and other fiduciary duty claims against dozens of Defendants. *See* Dkt. No. 1. Most of the Defendants have filed Motions to Dismiss seeking the dismissal of all of Plaintiffs' claims, and additional Motions to Dismiss are expected to be on file in the near future. *See* Dkt. Nos. 19, 20, 23, 25, 26, 30, 35, 36, 39,40, and 53. Discovery is not necessary to resolve any of the Motions to Dismiss, which will be decided solely by reference to the Complaint and its attachments. *See Landry*, 901 F.2d at 436. And even if the pending Motions do not resolve all of the claims asserted, they are very likely to define and narrow the scope of discovery. *See Sai v. Dep't of Homeland Sec.*, 99 F. Supp. 3d 50, 58 (D.D.C. 2015) ("Both threshold motions raise significant issues, and their resolution will likely define the scope of discovery, if any.").

Thus, Defendants submit there is good cause to stay all discovery pending the outcome of the Motions to Dismiss and respectfully request that the Court stay all discovery, including the Rule 26(f) conference and the initial pretrial and scheduling conference, until the Court rules on the pending Motions to Dismiss.

Dated: October 13, 2016

Respectfully submitted,

/s/ Cory S. Reed
Zandra E. Foley
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/s/ Laura Beckman Hedge
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Facsimile: (713) 755-8924
Attorney for Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock and Tony Baiamonte

/s/ Martin S. Schexnayder
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Attorney for Defendant Neal Spielman

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Attorney for Defendant Jill Willard Young

/s/ Stephen A. Mendel
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steve@mendellawfirm.com
The Mendel Law Firm, L.P.
1155 Dairy Ashford, St 104
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Telephone: (713) 759-3213
Facsimile: (713) 759-3214
Attorney for Defendants Stephen A. Mendel and Bradley Featherston

/s/ Jason B. Ostrom
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Stacy L. Kelly
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Ostrommorris, PLLC
6363 Woodway Dr., Suite 300
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Telephone: (713) 863-8891
Facsimile: (713) 589-5513
Attorneys for Defendant Jason B. Ostrom

/s/ Anita Brunsting
Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904
akbrunsting@suddenlink.net
Pro se Defendant

CERTIFICATE OF CONFERENCE

On October 13, 2016 at 9:19 a.m., Rik Munson, spokesperson for Plaintiffs, stated Plaintiffs were unopposed to the proposed Motion to Stay the Rule 26(f) Conference and all discovery pending resolution of the motions to dismiss. On October 13, 2016 at 11:14 a.m., Rik Munson stated that Plaintiffs are now opposed. An attempt was made to contact Defendant Amy Brunsting, however at the time of this filing, Defendant Amy Brunsting has not expressed her position. In light of her pending Motions to Dismiss, it is presumed by the undersigned that she is unopposed.

/s/ Cory S. Reed
Cory S. Reed

CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system , which constitutes service on all parties.

/s/ Cory S. Reed
Cory S. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:16-CV-01969**
	§	
CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,	§	
	§	
Defendants.	§	

MOTION TO STAY RULE 26(F) CONFERENCE AND ALL DISCOVERY PENDING RESOLUTION OF MOTIONS TO DISMISS

Defendants[1] file this motion respectfully requesting that the Court stay all discovery and other proceedings in this action, including the Rule 26(f) conference and initial pretrial and scheduling conference, until the Court rules on the Motions to Dismiss filed by Defendants. Each of the Motions to Dismiss on file with the Court has the potential to resolve the entire case and obviate the need for discovery altogether.

Pursuant to the Federal Rules of Civil Procedure, a court has discretion to stay discovery "for good cause shown." FED. R. CIV. P. 26(c). A district court may limit discovery when a dispositive motion would preclude the need for discovery, saving the parties time and expense.

[1] "Defendants" refer to each undersigned Defendant that has been served and appeared in Case No. 4:16-cv-00733 as of October 13, 2016, except for Amy Brunsting.

See Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1304 n.13 (5th Cir. 1983) (holding it was not an abuse of discretion for district court to fully stay discovery in the early stages of the dispute when claims and defenses presented threshold legal issues). And this is particularly true for motions to dismiss under Rule 12(b)(6), which are decided solely by reference to the complaint and proper attachments. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990) (affirming entry of protective order where discovery was unnecessary to resolve pending dispositive motion).

In this case Plaintiffs have filed a 62-page Complaint with hundreds of pages of attachments alleging RICO, fraud, and other fiduciary duty claims against dozens of Defendants. *See* Dkt. No. 1. Most of the Defendants have filed Motions to Dismiss seeking the dismissal of all of Plaintiffs' claims, and additional Motions to Dismiss are expected to be on file in the near future. *See* Dkt. Nos. 19, 20, 23, 25, 26, 30, 35, 36, 39,40, and 53. Discovery is not necessary to resolve any of the Motions to Dismiss, which will be decided solely by reference to the Complaint and its attachments. *See Landry*, 901 F.2d at 436. And even if the pending Motions do not resolve all of the claims asserted, they are very likely to define and narrow the scope of discovery. *See Sai v. Dep't of Homeland Sec.*, 99 F. Supp. 3d 50, 58 (D.D.C. 2015) ("Both threshold motions raise significant issues, and their resolution will likely define the scope of discovery, if any.").

Thus, Defendants submit there is good cause to stay all discovery pending the outcome of the Motions to Dismiss and respectfully request that the Court stay all discovery, including the Rule 26(f) conference and the initial pretrial and scheduling conference, until the Court rules on the pending Motions to Dismiss.

Dated: October 13, 2016

Respectfully submitted,

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/s/ Cory S. Reed
Cory S. Reed

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON, *Plaintiffs*, vs. CANDACE KUNZ-FREED, ET AL., *Defendants*.	§ § § § § § § § § § §	Civil Action No. 4:16-cv-01969

DEFENDANT DARLENE PAYNE SMITH'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), Defendant Darlene Payne Smith (the "Defendant" or "Smith") files her Reply to Plaintiffs Candace Louise Curtis ("Curtis") and Rik Wayne Munson's ("Munson") (collectively, the "Plaintiffs") Response to Defendant's Motion to Dismiss the Verified Complaint for Damages for Lack of Subject Matter Jurisdiction and Failure to State a Claim (the "Motion"), and would respectfully show the Court the following:

I.
INTRODUCTION

On December 1, 2016, Plaintiffs filed their Response to Defendant's Motion to Dismiss. *See generally*, ECF No. 38 (the "Response"). Consistent with the Complaint under review, Plaintiffs' Response fails to provide a cogent response to ***any*** of independently dispositive bases for dismissal outlined in Defendant's Motion. The Response instead consists of nothing more than a timeline of the Brunsting siblings' various lawsuits, followed by a series of legal conclusions couched as fact.

For the following reasons, and those more fully-stated in Defendant's Motion, Plaintiffs' claims should be dismissed with prejudice.

II.
OBJECTION TO PURPORTED AMENDMENT OF COMPLAINT

Initially, Defendant objects to Plaintiffs' attempt to use the Response as a vehicle to "amend" their Complaint. Specifically, in Paragraphs 52 through 54 of the Response, Plaintiffs purport to "adopt and incorporate by reference" into the Complaint *the entire record in this case. See* Response at ¶¶52-54. FED. R. CIV. P. 10 permits, in some circumstances, the incorporation by reference of certain information. However, "an incorporation by reference is always accompanied by the requirement that it be done with a degree of specificity and clarity which would enable a responding party to easily determine the nature and extent of the incorporation." *See, e.g., Morrison v. Office of the United States Tr. (In re Morrison)*, 375 B.R. 179, 193 (Bankr. W.D. Pa. 2007). Where, as here, use of the incorporation by reference tool fails in this regard, the Court maintains authority to take appropriate action to regulate its use. *See id*.

Plaintiffs' amorphous incorporation of the "entire record before the Court," which encompasses many thousands of pages, without specifying which portions allegedly cure the numerous pleading defects highlighted by Defendants' Motion, does not comport with the purpose and function of Rule 10 and should be stricken.

III.
JURISDICTIONAL BASES FOR DISMISSAL

A. Plaintiffs' Claims are Not Ripe.

In her Motion, Defendant argued that Plaintiffs' claims must be dismissed because they are not ripe. Ripeness is a component of subject matter jurisdiction. *See Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). That is, because Plaintiffs' alleged injuries are contingent upon the occurrence of uncertain future events that may not occur as anticipated (*i.e.*, an unfavorable outcome in a pending probate proceeding), the Court lacks jurisdiction to hear those claims. *Id.* at

342. Plaintiffs have responded with only a conclusory statement that the claims are "over-ripe for remedy." *see* Response at ¶55. Because Plaintiffs have failed to offer any argument or support demonstrating *how* their claims – all of which are premised on an unfavorable future outcome in the pending Brunsting Probate Case – are ripe for adjudication, dismissal is appropriate.

B. Munson Lacks Article III Standing.

In the Response, Plaintiffs appear to argue that Munson elected to quit his job in order to focus full time on legal research and writing in connection with Curtis' multiple pending lawsuits. *See* Response at ¶¶44-46. Setting aside whether Munson is engaging in the unauthorized practice of law, his decision to do so is not a concrete "injury in fact" for standing purposes because it does not alter the fact that he is not a beneficiary of any of the Brunsting Trusts and has no direct stake in the outcome of this lawsuit. Plaintiffs have offered no authority to the contrary. Munson therefore lacks standing and all of his claims should be dismissed.

C. Attorney Immunity Bars Plaintiffs' Claims.

The Response, much like the Complaint, contains only two references to any alleged conduct by Defendant Smith[1/] – and both Defendant-specific references pertain to core litigation conduct incident to Defendant's execution of her professional duties to her client (Carole Ann Brunsting) in the Brunsting Probate Case. *See* Response at ¶¶7, 33 (alleging that Defendant, on behalf of her client, filed a counterclaim against Carl Brunsting); ¶¶36-37 (alleging that Defendant, on behalf of her client, filed an objection to Plaintiff Curtis' request to distribute Brunsting Trust funds to pay her attorney's fees for separate litigation against her siblings).[2/] As outlined in

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1 As noted in the Motion, Defendant Smith had very limited involvement in one of the Brunsting series of lawsuits. She represented Plaintiff Curtis' sister – Carole Brunsting – in the Brunsting Probate Case until she withdraw as counsel in early 2016. Defendant Smith was not involved in the remaining Brunsting lawsuits in any respect.

2 The filing at issue is attached to Plaintiffs' Response. *See* ECF No. 89-8.

Defendant's Motion, the circumstances where an attorney can be liable to a non-client for litigation conduct incident to the execution of her professional duties to a client are extremely limited. Under Texas Law, attorneys retain complete immunity from suit for civil liability to non-clients for actions taken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Troice v. Proskauer Rose, L.L.P.,* 816 F.3d 341, 348 (5th Cir. 2016). Because that is all that has been alleged here, Defendant remains immune from Plaintiffs' claims.

IV.
SUBSTANTIVE BASES FOR DISMISSAL

Defendant additionally moved for dismissal under Rule 12(b)(6) and the Response likewise does not address any of the substantive arguments raised that motion. Instead, the Response purports to "incorporate by reference" the entire record in this suit, provides a bullet-point list of the elements of Plaintiffs' RICO claim and then conclusively states that "Plaintiffs have sufficiently pled" each of those elements. *See* Response at ¶55-56. It is well established that the Court "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007). Because the Complaint (and the Response) consist of nothing more than fantastical and conclusory assertions couched as facts, the Complaint should be dismissed.

V.
CONCLUSION

Accordingly, Defendant respectfully requests that the Court grant her Motion to Dismiss and dismiss Plaintiffs' claims with prejudice, and for such other and further relief, at law or in equity, to which Defendant may show herself to be justly entitled.

Respectfully submitted,

By: */s/ Barry Abrams*

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SD Tex. Bar No. 2138
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ATTORNEYS FOR DEFENDANT DARLENE PAYNE SMITH

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I hereby certify that on December 13, 2016, a true and correct copy of the foregoing and/or attached instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure through the Southern District of Texas CM/ECF E-File System and as indicated below:

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/s/ Barry Abrams
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Respectfully submitted,

By: */s/ Barry Abrams*

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/s/ Barry Abrams
Barry Abrams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUIS CURTIS, ET AL	.	C.A. NO. H-16-1969
	.	HOUSTON, TEXAS
VS.	.	
	.	DECEMBER 15, 2016
CANDACE KUNZ-FREED, et al	.	11:50 A.M. to 1:00 P.M.

TRANSCRIPT of MOTION HEARING
BEFORE THE HONORABLE ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

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FOR DEFENDANTS CANDACE KUNZ-FREED, ALBERT VACEK, JR.:	MR. CORY S. REED MS. ZANDRA FOLEY Thompson Coe Cousins Irons One Riverway Suite 1600 Houston, Texas 77056

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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P R O C E E D I N G S

THE COURT: Cause No. 16-cv-1969, Candace Curtis, et al, versus Candace Freed, et al. Come on up.

We have a third table over here as well, with a microphone, so, please.

UNIDENTIFIED SPEAKER: This one over here?

THE COURT: Yes. And given the size, I do not mind if you take a seat on this side of the table with your back to me, I understand. I'm not going to be offended, I understand.

Having called Cause No. 16-cv-1969, I'm now going to take the appearance of counsel, starting from my right.

MR. ABRAMS: Good morning, Your Honor. Barry Abrams for the defendant Darlene Payne Smith.

MS. BAYLESS: Bobbie Bayless on my own behalf.

MR. HARRELL: Bob Harrell and Rafe Schaefer on behalf of Jill Young.

THE COURT: Wait. I didn't hear the name.

MR. HARRELL: Jill Young.

THE COURT: Very well.

MS. BECKMAN HEDGE: Hello, Your Honor. Laura Beckman Hedge. I'm here on behalf of Judge Christine Riddle Butts, Judge Clarinda Comstock and Toni Biamonte.

THE COURT: Very well.

MS. CURTIS: Candace Curtis here --

THE COURT: Use the microphone so that --

MS. CURTIS: Candace Curtis on behalf of myself.

THE COURT: Very well.

MR. MUNSON: My name is Rik Munson. I'm a private attorney general plaintiff, pro se.

THE COURT: Very well.

MR. REID: Eron Reid on behalf of Neal Spielman.

THE COURT: I'm sorry, on behalf of?

MR. REID: Neal Spielman.

THE COURT: Counsel?

MR. GREENE: Adraon Greene, Your Honor, on behalf of Stephen Mendel and Bradley Featherston.

THE COURT: Counsel? Oh, right here.

MR. SPIELMAN: Oh, Your Honor, I'm just -- I'm the client -- or the defendant, Neal Spielman.

THE COURT: Oh, very well.

UNIDENTIFIED SPEAKER: I'm likewise a client of Mr. Greene.

THE COURT: Very well.

MR. REED: Cory Reed on behalf of Candace Freed and Al Vacek.

MS. FOLEY: Zandra Foley on behalf of Candace Freed and Al Vacek.

MR. MATHEWS: Bernard Mathews. I'm representing myself, Your Honor.

MR. OSTROM: Your Honor, Jason Ostrom on behalf of my

myself and Gregory Lester.

THE COURT: You said on behalf of yourself?

MR. OSTROM: Myself and Gregory Lester.

THE COURT: Are you an attorney?

MR. OSTROM: I am.

THE COURT: Very well.

MS. ANITA BRUNSTING: Anita Brunsting on behalf of myself.

THE COURT: Very well.

MS. AMY BRUNSTING: Amy Brunsting on behalf of myself.

THE COURT: Very well.

Counsel, for today's hearing there are a number of motions to dismiss and I'm going to call them out, hopefully, and I won't miss them. Defendants Candace Freed and Albert Vacek's motion to dismiss for failure to state a claim.

MS. FOLEY: Yes, Your Honor.

THE COURT: Defendants Candace Freed and Albert Vacek's motion to dismiss for lack of subject matter jurisdiction.

MS. FOLEY: I just said yes, Your Honor.

THE COURT REPORTER: Can you state your name?

THE COURT: Oh, state your name.

MS. FOLEY: Zandra Foley.

THE COURT: Yes, when you speak, state your name again. With this cast of Spartacus before us, the court

reporter will greatly appreciate the assist.

Bobbie Bayless's motion to dismiss for failure to state a claim.

MS. BAYLESS: Bobbie Bayless, yes, Your Honor.

THE COURT: Defendant Brunsting's motion for access to electronic filing. Is that in this?

UNIDENTIFIED SPEAKER: Which one?

THE COURT: Oh, Anita.

MS. ANITA BRUNSTING: Yes.

THE COURT: Is that on today's docket?

MS. ANITA BRUNSTING: I believe that was approved.

THE COURT: Okay. Defendant Jill Willard Young's 12(b)(6) motion to dismiss.

MR. HARRELL: Bob Harrell. Yes.

THE COURT: Defendant Anita Brunsting's Rule 12(b)(6) motion to dismiss for plaintiffs' failure to state a claim.

MS. ANITA BRUNSTING: Yes.

THE COURT: And you are?

MS. ANITA BRUNSTING: I'm Anita Brunsting.

THE COURT: Very well.

Defendant Amy Brunsting's Rule 12(b)(6) motion to dismiss for plaintiffs' failure to state a claim.

MS. AMY BRUNSTING: Amy Brunsting. Yes, Your Honor.

THE COURT: Defendants Mendel and Featherston's Rule 12(b)(6) motion to dismiss for plaintiffs' failure to state a

claim.

MR. GREENE: Adraon Greene. Yes, Your Honor.

THE COURT: Defendant Jill Willard Young's motion to strike plaintiffs' addendum and memorandum in support of RICO complaint.

MR. HARRELL: Bob Harrell. Yes, Your Honor.

THE COURT: And that's on today's --

MR. HARRELL: It's part of the motion to dismiss, so, yes, Your Honor.

THE COURT: Very well.

Defendant Neal Spielman's motion to dismiss.

MR. REID: Eron Reid. Yes, Your Honor.

THE COURT: And there was also Defendant Neal Spielman's motion to dismiss based on lack of subject matter jurisdiction.

MR. REID: Eron Reid. Yes, Your Honor.

THE COURT: I also have in my folder plaintiffs' motion for consolidation of related cases pursuant to 28 U.S.C. Section 1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6 with supporting memoranda.

MS. CURTIS: Yes, Your Honor. Candace Curtis.

THE COURT: Defendant Judge Christine Butts, Judge Comstock, et al, motion to dismiss complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).

MS. BECKMAN HEDGE: Laura Beckman Hedge. Yes, Your

Honor.

THE COURT: Plaintiffs' motion for -- I covered that one.

Defendants Mendel and Featherston's joinder in Jill Willard Young's motion to strike plaintiffs' addendum to memorandum in support of RICO complaint.

MR. GREENE: Adraon Greene. Yes, Your Honor.

THE COURT: And Defendant Jill Willard Young's motion for sanctions.

MR. HARRELL: Bob Harrell. And we filed it. I don't know if it's technically on the docket today but --

THE COURT: For today. Okay. Thank you.

Defendant Jason Ostrom's motion to dismiss complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

MR. OSTROM: Yes, Your Honor. Jason Ostrom.

THE COURT: Motion to dismiss Defendant Bernard Mathews.

MR. MATHEWS: Bernard Mathews. That is correct, Your Honor.

THE COURT: Very well.

And Defendant Gregory Lester's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

MR. OSTROM: Jason Ostrom. Yes, that's correct.

THE COURT: And, finally, Defendant Darlene Payne Smith, motion to dismiss for lack of subject matter

jurisdiction and failure to state a claim.

MR. ABRAMS: Barry Abrams. Yes, Your Honor.

THE COURT: Okay. Did I miss anyone's motion to dismiss?

MS. FOLEY: Your Honor, Zandra Foley. We also had a motion to dismiss for lack of subject matter jurisdiction that was filed separately from the motion to dismiss for failure to state a claim.

THE COURT: Very well.

Anyone else on this side, did I miss your motion that was under consideration for today?

MS. BECKMAN HEDGE: Laura Beckman Hedge, Your Honor. The defendants, Judge Butts, Judge Comstock, and Toni Biamonte joined in the motion that you mentioned earlier that Jill Willard Young filed, striking -- motion to strike plaintiffs' addendum of memorandum in support of RICO complaint.

THE COURT: Very well.

MS. BECKMAN HEDGE: Thank you.

THE COURT: Well, to be most efficient, we have a lot of 12(b)(6) motions, which I assume making similar arguments. There may be individual facts for each defendant. So, why don't we pick someone to present a motion, perhaps the first one that was filed, and then we can move from that and you can tell me if there are specifics, but you do not need to reurge the essence of the legal arguments in the first motion. That

way we can save a little time.

Mr. Harrell, I see you rising to your feet.

MR. HARRELL: Yes, Your Honor. If it please the Court, we're prepared to give an overview of the motions and the law. And if it please the Court, our lawyer, Rafe Schaefer, would like to make that presentation.

THE COURT: All in accord with that? Any objections from any of the defendants? Very well.

MR. SCHAEFER: Thank you, Your Honor. My name is Rafe Schaefer with Norton Rose Fulbright, along with Bob Harrell. We represent Defendant Jill Willard Young, who is in the courtroom here today, who is an attorney with the law firm of MacIntyre, McCulloch, Stanfield and Young here in Houston. She practices probate law.

Plaintiffs in this matter have sued, as you can see, more than 15 defendants who are lawyers, judges, other legal professionals, like court reporters, and other participants in a probate matter who practice in Harris County Probate Court No. 4.

Plaintiffs' claims in their complaint consist of an allegation that the defendants collectively are members of a secret society and what plaintiffs call a cabal that they call Harris County Tomb Raiders Association. They also call it the Harris County Probate Mafia.

Plaintiffs' allegation comes down to a RICO

claim, and plaintiffs allege that the folks in this courtroom are members of a shadow organization that engage in poser advocacy. And plaintiffs appear to say that poser advocacy is the fake practice of law by the attorneys and lawyers -- or the attorneys and judges and court reporters in this room that's designed to, in plaintiffs' words, highjack familiar wealth from decedent's estates in the probate system.

Effectively, Your Honor, the best I can tell, plaintiffs allege that the folks in this room are in this probate mafia and they engage in the fake practice of law in Probate Court No. 4 to generate attorneys' fees, which plaintiffs say defund the estates in the probate court. And that's plaintiffs' theory of the case and theory of how they're entitled to damages.

Against Ms. Young, plaintiffs purport to allege ten causes of action. They allege a RICO cause of action; three claims for honest services fraud; a claim for wire fraud; a claim for fraud under 18 U.S.C. Section 1001; a Hobbs Act claim; and three conspiracy claims.

Now, those claims all fail for three very simple reasons. The first reason they fail is a reason that applies to everyone in this room; and that is, that plaintiffs have simply failed to state a claim on which relief can be granted under Twombly and Iqbal and the plausibility standard of Rule 12, but also just that plaintiffs' complaint itself is

delusional and fanciful and this Court should use its inherent powers to dismiss that complaint.

The second basis and the second reason plaintiffs' complaint should be dismissed also applies to everyone in this room, and it's that plaintiffs have failed to show they have standing to sue for RICO and the other causes of action that they've sued for are criminal causes of action that aren't privately actionable in federal court. And we've cited a lot of case law, that they can't bring it. And so the only claim that they really can bring is the RICO claim, and they've alleged no direct injury that would give them standing to sue.

The third reason why plaintiffs' complaint should be dismissed against Ms. Young is -- particularly Ms. Young and some other folks in here, but Ms. Young is protected by Texas's attorney immunity doctrine, which I'll talk about very briefly, Your Honor. I mentioned plaintiffs' allegations. They appear to relate to a probate matter in Harris County Probate Court No. 4. Plaintiffs call that the Curtis v. Brunsting matter. They don't ever mention a cause number. I think, Your Honor, since they've sued Ms. Young, the only matter Ms. Young was ever involved in that involved plaintiff Curtis is the matter of *In re: Estate of Nelva Brunsting*, which is in Probate Court No. 4.

But Plaintiff Munson wasn't a party to that matter. He wasn't a beneficiary to that estate. He doesn't

have any relationship to Ms. Young. He doesn't appear to have standing to sue at all in this matter.

In the Brunsting matter, Ms. Young, my client, was an attorney for Temporary Administrator Lester, who is also a defendant here today. Temporary Administrator Lester was appointed by Probate Court No. 4 to prepare a single written report. Ms. Young assisted him as his attorney in preparation of that single report, and that's all she did. All of the actions taken by Ms. Young in that probate matter were in her role as attorney to Ms. -- I'm sorry, to Mr. Lester. The plaintiffs don't dispute that. Ms. Young never had a fiduciary relationship with either plaintiff. Plaintiffs don't dispute that.

In fact, nowhere in their entire complaint do plaintiffs allege Ms. Young committed a single wrongful act or did anything other than act as an attorney for Temporary Administrator Lester.

So, I want to go through very briefly, Your Honor, the three bases for dismissal that I mentioned earlier. The first is that plaintiffs' complaint doesn't state a claim for relief. And that's under Twombly and Iqbal, but also just that it's delusional, Your Honor, and that this Court should use its powers to dismiss that. Under Rule 12, as this Court knows, plaintiffs' complaint must be dismissed under Twombly and Iqbal if it's too implausible to state a claim for relief.

This means that the Court should ignore all legal conclusions in the complaint, and it has to look at whether the well-pleaded facts permit the Court to infer more than the mere possibility of misconduct.

Here there is nothing in the complaint but boilerplate legal conclusions, Your Honor. There are no allegations of wrongful acts by Ms. Young. There are no allegations of wrongful acts, you know, pleaded with any sort of specificity that can identify an alleged actual wrongful act by plaintiffs, other than plaintiffs' allegation that there's this probate mafia engaging in poser advocacy, but there's no actual examples of what that is or how that took place.

THE COURT: Is the operative complaint Document No. 1?

MR. SCHAEFER: Yes, Your Honor.

THE COURT: Very well.

MR. SCHAEFER: Other courts in this district have dismissed RICO cases very similar for this exact same reason. There's a matter that we cited to in our motion to dismiss called *Freeman v. Texas*, which is a 2008 case decided by Judge Rosenthal, where Judge Rosenthal dismissed is a complaint alleging a probate court was a RICO enterprise comprised of judges who, quote, conspired against pro se litigants that virtually looted the pro se litigant's homestead through a probate proceeding. And the Court -- Judge Rosenthal held that even if all of those allegations were true, they failed to

state a racketeering activity because plaintiff hadn't alleged sufficient facts to raise a colorable claim that any violation of any of the predicate RICO acts had actually occurred. So, the Court held in light of the absence of any well-pleaded facts sufficient to state a RICO claim, that claim was dismissed.

The same is true here, Your Honor. But in addition to just being implausible on its face, the complaint is frivolous and delusional, and just a facial reading of the complaint shows the Court that that's true. And this Court has inherent authority to dismiss a pro se litigant's frivolous or malicious complaint.

To determine whether a complaint is frivolous or malicious, a court has to look at the complaint and see whether the allegations are clearly baseless, which means the allegations are fanciful, fantastical, or delusional. Here, again, plaintiffs allege that the folks in this courtroom are members of a secret society called the Harris County Tomb Raiders that defraud estates through poser advocacy by all these mafia members -- probate mafia members. Your Honor, these allegations are fanciful and delusional.

I would direct you to a very recent decision from an order from Judge Hoyt, who considered an almost identical case, called *Sheshtawy versus Conservative Club of Houston*. We have cited that. I have the order, if you would like to see a

copy of it.

There the Court was considering, you know, almost identical allegations, Your Honor, although dealing with Probate Court No. 1 instead of Probate Court No. 4. And the Court held in that order that the allegations that Probate Court No. 1 in Harris County and all the litigants and parties in that court were a RICO enterprise. The Court said that legal theory is, quote, "pure zanyism." The same is true here. We've cited the *Sheshtawy* order in our briefing. You now have a copy of it. This allegation, too, is pure zanyism. It's fanciful, it's delusional, and it fails to state a claim for relief that can be granted by this Court.

The second basis that -- for why plaintiffs' claim fails, is they don't have standing to sue on any of the causes of action they've alleged. First, I want to talk about RICO. And, again, this applies to everyone in this courtroom. Plaintiffs don't have standing to bring suit under RICO, because RICO requires a direct injury in order for a party to sue. A plaintiff can only sue if they can show some RICO violation was a direct and but for cause of the injury. The court in *Sheshtawy*, in that same order I just handed to you, Your Honor, held that plaintiffs had failed to show they had standing to bring a RICO case because, quote, "Routine litigation conduct cannot become a basis for a RICO suit."

That's all that's going on here. Ms. Young

represented Temporary Administrator Lester, who was appointed by the Court. But even if they alleged real allegations of wrongdoing, their assertion that the way there's damage is through this poser advocacy that defunds estates, it's not actionable by them individually as potential beneficiaries of the estate. There's a Sixth Circuit case that we've cited to titled *Firestone*, Your Honor. And in that case the beneficiaries of the Firestone Tire family estate asserted RICO claims against the executor of the estate and the trustee of the estate. And the Sixth Circuit affirmed the district court's dismissal, saying that those plaintiffs, the beneficiaries, didn't have standing to sue. The alleged RICO harm was that the executor of the estate and the trustee of the estate had lowered the value of the estate, such that when the estate paid out, the beneficiaries of the estate didn't get as much money as they should have.

The Court said this is basically like a corporate -- like a corporate -- corporation versus shareholder lawsuit, and there aren't derivative claims here where shareholders can bring the claims. The injury is to the estate. Like when a corporation is injured, the injury is to the corporation. The shareholders to a corporation can't bring suit for an injury that happens to the corporation, just like the beneficiaries of an estate can't bring suit for harm to the estate.

Here it couldn't be more clear. The allegation is all of these people engaged in this advocacy that lowered the value of the estate. If that is a real harm that is really actionable, it's the estate's claim. It's not these individuals' claim.

And then, again, for everyone in this room, Your Honor, the other claims asserted by plaintiffs, the Hobbs Act claim, wire fraud, fraud under 18 U.S.C. Section 1001, honest services fraud, none of those causes of action create -- I'm sorry, none of those statutes create private causes of action. They're all federal criminal statutes that can only be brought by the government. We've cited a plethora of case law in our motion to dismiss, showing that plaintiffs can't bring those claims. That hasn't been responded to. And they should be dismissed.

The third reason that is particular to Ms. Young for why plaintiffs' claims should be dismissed is that Ms. Young is protected by Texas's attorney immunity doctrine. Under Texas law, an attorney is immune from civil liability to a non-client, quote, "for actions taken in connection with representing a client in litigation even when that conduct is wrongful conduct in the underlying litigation." That's a Texas Supreme Court case that held that, *Cantey Hanger versus Byrd*. Here, again, there's no allegation that Ms. Young did anything other than assist Temporary Administrator Lester in his

preparation of this report. That is action she took as an attorney for someone else. She didn't owe a fiduciary duty to plaintiffs. She is immune from suit under Texas's attorney immunity doctrine.

Your Honor briefly mentioned earlier the motion for sanctions that we had filed. Actually in the *Sheshtawy* matter that I mentioned to you, the Court yesterday -- Judge Hoyt yesterday issued an order granting sanctions against the plaintiffs in that matter. We served plaintiffs with our motion for sanctions on September 27th, 2016. Under Rule 11, the safe harbor provision, we waited until October 27th, 2016, to file that motion. Plaintiffs haven't even bothered to respond to that motion. Thus, we ask that when this Court dismisses plaintiffs' complaint, it also grant the motion for sanctions.

THE COURT: Very well.

MR. SCHAEFER: Thank you, Your Honor.

THE COURT: Let's start from my right. Counsel, are there any individual arguments that need to be made on behalf of your client other than what have been asserted by way of this general background?

MR. ABRAMS: The only factual point --

THE COURT: Name and client.

MR. ABRAMS: Thank you, Your Honor. Barry Abrams for Darlene Payne Smith. The only factual point I want to make is

there's one -- only one paragraph in the complaint mentioning Ms. Smith. And the conduct attributed to Ms. Smith was opposing a motion for protection, which is conduct as a lawyer in a litigated matter that falls within the immunity. That's the only factual allegation with regard to Ms. Smith. I join in all the other arguments counsel has made.

THE COURT: Very well.

Ms. Bayless?

MS. BAYLESS: Yes, Your Honor. Bobbie Bayless on my own behalf.

The only point I will make is that factually the only allegation made against me -- I represent one of the Brunsting siblings. And the only allegation made against me is that I withdrew or passed a hearing on a motion for partial summary judgment that I had filed on my client's behalf when he resigned as executor. So, not only did it need to be passed, because at that point there was a vacancy in that position and it would have only been a partial hearing on a partial motion for summary judgment on only his individual claims and not the estate's claims until that vacancy could be filled, but it's also my own motion and I can pass at any time I want to. And that is the allegation against me.

THE COURT: Very well. Ms. Hedge?

MS. BECKMAN HEDGE: Yes, Your Honor. May I approach the lecturn?

THE COURT: Yes.

MS. BECKMAN HEDGE: Thank you. Laura Beckman Hedge. I represent Judge Comstock, Judge Butts, and Toni Biamonte.

Your Honor, there's -- I want to talk about some specific things to my clients and then there's just a few other additional arguments that I would like to add to what's already been discussed that hasn't actually been covered, but that I would want the Court to consider in its ruling.

The claims that have been made against the judges and against the court reporter who -- Toni Biamonte, Your Honor, was a substitute court reporter, not the one that's normally assigned to this probate judge, but actually covered a single hearing and for that has been sued in this case.

They have all been accused of being blatantly corrupt, conspiring to loot assets, exploiting the elders of society, and unjustly enriching the attorneys in this case. The predicate acts that have been alleged in this case against the judges is referral of a case to what the plaintiffs refer to Judge Davidson as an extortionist, thug mediator, and removing a motion for summary judgment from a hearing docket.

With regard to Mr. Biamonte, he has been alleged to have knowingly and willfully destroyed some unidentified material evidence. Your Honor, when a response was filed to our motion to dismiss, the grounds that were given why Mr. Biamonte was sued was because they were not satisfied with

his response concerning the unavailability of a transcript from the single hearing that he recorded. They said that he was sued because he didn't respond to their e-mail. Clearly that is frivolous, and I would argue sanctionable, Your Honor, for bringing him into this lawsuit.

The plaintiffs have sued my clients for at least 15 different claims. With respect to the subject matter jurisdiction argument, counsel's already covered the fact that there was no direct injury. You must have a tangible financial loss. Even the plaintiffs have stated in their pleadings that they are suing for threats of injury to property rights of what Ms. Curtis has, as she has defined, an expectancy interes

Mr. Munson has no expectancy interest, period. He has identified himself as the domestic partner of Ms. Curtis.

Further, Your Honor, they have alleged fraud, various counts of fraud. They are unspecified. And under Rule 9(b), it requires specificity. They have to state the who, what, when, where, and how. They have a 59-page complaint, 217 paragraphs. They have not been specific and have not met the requirements. There has not been any unlawful act alleged. There are no facts supporting any actionable predicate act. The numerous claims they've made are generalized, and they are not predicate acts of racketeering activity. The claims against my client to which I would refer, and I'm not going to

list them all by name, I'll just refer to them by number, Claims 12, 38, 23, 44, 46, and 47.

The judges, Your Honor, have a unique immunity in this case, and that is judicial immunity. There is case law cited in our motion concerning judicial immunity. The plaintiffs have attempted to get around the judicial immunity argument, because they know it's a winner, by trying to contend that the actions were nonjudicial. However, when you look at the acts they've actually complained of, they are clearly judicial. The factors that are considered are: Is the action normally performed by a judge? Did the act occur in the courtroom? Does the controversy center on a pending case before a judge? Does the act arise from an exchange with the judge in his or her official capacity?

Now, importantly, Your Honor, those factors are construed broadly in favor of immunity, and not all of them are required. In fact, just one factor alone would be sufficient for a finding of judicial -- that there was a judicial act.

The only two exceptions to judicial immunity are: Number one, if it's nonjudicial; or, number two, if the judicial act was taken in a complete absence of jurisdiction. There has been no allegation that any of the actions taken were done in a complete absence of jurisdiction. And there's certainly no facts supporting that.

Additionally, Your Honor, the judges are entitled

to the Eleventh Amendment protection and governmental immunity for claims for them acting in their official capacity. The Fifth Circuit in *Kirkendall versus Grambling* at 4 F.3d 989, that involved a case of RICO violations against three judges and the court's secretary. The court in that case found that they were entitled to judicial immunity and that the court's secretary was entitled to quasi-judicial immunity. The court in that case rejected the plaintiffs' arguments that immunity did not apply as frivolous.

The actions complained of, Your Honor, concerning the judges, that they have obstructed justice by removing the summary judgment motion from the calendar and creating what they call stasis, for conspiring to redirect the litigation away from the public record to a staged mediation, which, Your Honor, actually never took place. Those actions that I've just described, those are functions normally performed by a judge. Clearly what they are complaining about are judicial acts.

Your Honor, I want to turn now to Toni Biamonte, the substitute court reporter. He is entitled to official immunity. He is entitled to that because they have sued him as the, quote, "official court reporter for the probate court." They have not alleged that he's been sued in any individual capacity. When you sue an official in their official capacity, it is the same as suing the county. And Harris County cannot be liable for a RICO violation. And the reason for that is

because, number one, they cannot form the mens rea to commit a criminal act, and intent is required under RICO. And, number two, because RICO is punitive in nature. And municipal entities have common law immunity from punitive damages.

In fact, Your Honor, it was mentioned a minute ago that Judge Hoyt issued an order yesterday of sanctions. And I just want to direct the Court to one thing in particular. And I do have a copy of that order, if it please the Court.

And, Your Honor, I apologize. We do not have a copy of that for the plaintiffs. But I can get that for them as soon as the hearing is over.

MR. SCHAEFER: Your Honor, Rafe Schaefer. I've got a copy. I can pass one on.

MS. BECKMAN HEDGE: Your Honor, what I would just like to point the Court to, on the first page of the order granting sanctions, when the Court granted it, it said it's based on the following findings of fact and conclusions of law. And the one paragraph in here that I want to my highlight for the Court is Paragraph 18. And I just want to read two sentences out of that.

"This motion for a new trial comes on the backdrop of additional claims that were frivolous and that Mr. Cheatham and Mr. Gabel" -- those were the lawyers for the plaintiffs, Your Honor -- "should have known lacked basis. Those include the following: One, there was no basis for

breach of a fiduciary duty claim against opposing attorneys, such as CCJ attorneys; two, there is a litigation privilege in Texas for opposing attorneys like CCJ attorneys with no general fraud exception; three, that the honorable judges and court coordinator are entitled to immunity; four, Harris County, as a governmental entity, cannot be liable under RICO."

Your Honor, there is precedent. As I just read, even Judge Hoyt agrees, that there is immunity that applies and that Harris County cannot be liable. And, therefore, Toni Biamonte in this case cannot be liable.

Finally, Your Honor, there is another immunity that applies here and that is called qualified immunity. It requires the plaintiff to allege that there has been a constitutional violation. There has been no such allegation made and certainly no facts to support it. In, *Bagby versus King*, a case out of the Western District of Texas, the court there held that the claims against the judges, the district clerk, the appeals court clerk were barred by judicial or qualified immunity. In that particular case, Your Honor, there were allegations regarding the way that the case had been handled and the disposition of the cases.

Finally, Your Honor, with respect to the failure to state a claim, which is applicable to all of the defendants here, a few additional points I just want to add. One is that the plaintiffs have failed to allege a conspiracy. They have

used only conclusory language throughout their complaint. The civil conspiracy that they have alleged is a derivative tort. It requires an agreement to commit predicate acts. There are no allegations of any agreement and certainly no facts to support that.

Additionally, Your Honor, they have failed to allege the existence of an enterprise or of an association, in fact, also required for a RICO violation. They contend that Probate Court 4 is an enterprise because it's involved in various aspects of interstate and foreign commerce by a adjudicating suits involving persons and property outside of Texas. A conclusion, Your Honor. There is no facts to support that there is an enterprise in Probate Court 4. It is not a legal entity and cannot be an enterprise.

Additionally, Your Honor, they have also not pled that there has been any pattern of racketeering activity. They only make conclusory allegations.

Thank you, Your Honor. I appreciate your time.

THE COURT: Continuing to move to my left as to defendants as to specific facts or arguments that need to be articulated on behalf of the defendants that you represent -- I don't need to hear a repeat. If you want to adopt what has been said, note that; and if there's anything additional that you need to say, let me know that. So, first, counsel.

MR. REID: Your Honor, Eron Reid for Neal Spielman.

My client represented Amy Brunsting in the Probate Matter 4. The only allegations -- the specific factual allegations him are for his conduct in the March 9th status conference hearing. That's the only additional thing I would add is covered under the attorney immunity.

THE COURT: Very well. Hold it. Anything else?

MR. REID: Nothing other than I adopt everything else.

THE COURT: Very well.

Counsel?

UNIDENTIFIED SPEAKER: Yes, sir --

THE COURT: Hold on.

UNIDENTIFIED SPEAKER: I'm sorry.

THE COURT: I'm going to go here, across the front.

MR. GREENE: Your Honor, Adraon Greene for Defendants Stephen Mendel and Bradley Featherston. The only thing we would like to add, Your Honor, is our clients also represented Mrs. Anita Brunsting as of November 2014. All of the acts alleged against my clients arose from that representation, specifically disseminating -- the dissemination of voice recordings, which they're required to do under the Texas Rules of Civil Procedure, because those voice recordings are witness -- are witness statements.

The objection that was filed to trust distributions, which the court in the probate court sustained, because the court found that that request for a distribution

was not for the health, education, maintenance, and support of any trustee, instead it was for a request to pay attorney's fees.

And, finally, the last act was simply to schedule mediation, which obviously pursuant to the representation of Mr. Brunsting, they thought that was the appropriate thing to do. Otherwise, Your Honor, we adopt all the previously made arguments.

THE COURT: Very well. Coming around this way.

MS. AMY BRUNSTING: Me?

THE COURT: Yes, ma'am.

MS. AMY BRUNSTING: Amy Brunsting.

THE COURT: Why don't you have that mike -- there you go. Thank you.

MS. AMY BRUNSTING: Amy Brunsting. There are just two issues that haven't been addressed yet. The first one is regarding the recordings on the phone. The plaintiff has not shown any evidence or provided any facts that show that I had any knowledge or handling or anything to do with those recordings. Yet I'm accused of doing wiretapping and possessing these things, and I have never seen them. So, there's no basis in fact on that.

And the other one is that they refer to a heinous extortion instrument, which in reality is a qualified beneficiary trust that was prepared for my mother by her and

her attorneys. I had no authority -- I had no business doing any of the preparation of that document at all. That was done while my mother was alive. And that was her private affairs.

On my mother's death, my sister Anita and I became trustees of the Brunsting Family Trust, and that is the only reason that I'm being involved in all of this. But prior to that time, I had no fiduciary responsibility towards the plaintiff. One of the plaintiffs, I've never met before, Mr. Munson. Until this case happened, I had never met him, had any kind of dealings with him. I have no fiduciary responsibility to him that I know of. I've never had any kind of business dealings with him at all. And they cannot -- or have not explained how -- with any kind of facts, as to how I'm connected to him.

THE COURT: And you represent yourself?

MS. AMY BRUNSTING: Yes, sir.

THE COURT: Very well. Ma'am?

MS. ANITA BRUNSTING: Anita Brunsting, representing myself. And I adopt what's been said.

THE COURT: Very well.

Counselor?

MR. OSTROM: Yes, Your Honor. I've got two clients, myself and Mr. Lester. I'm going to break them out separately. With regard to myself, I'm a little different situated than the other parties to this proceeding, because I, in fact, was the

attorney for Ms. Curtis in the underlying proceeding.

The other unique part about it, is that I was terminated before most of the alleged predicate acts that she complains of. So, my termination of role and role in the case has ceased and her facts really don't go to me. To the extent that the facts do go to me, it involves the movement of the case and filing the pleading in Probate Court 4 that asserts claims as to a trust and the defects in a trust. That's important, because we're talking about damage under RICO and her claims, as I understand, still exist. The same claims that she believes she's been harmed or deprived of are still currently pending. They're active claims. The same -- the pleadings she complains that I didn't adequately represent her in support of a conspiracy with the other counsel assert the same claims, and it's still pending. So, I can't see how she can indicate that I've harmed her in any way.

With regard to Mr. Lester, we adopt, and myself, we adopt the arguments already presented. Thank you.

THE COURT: Very well.

MR. MATHEWS: Your Honor, Bernard Mathews, Your Honor. I guess I am alleged to be -- oh, I'm sorry.

THE COURT: No, no. Microphone.

MR. MATHEWS: You can't hear.

I guess I'm alleged to be one of the card carrying members of the probate mafia in Houston, which I would

have to say I would be proud to be a part of in this particular case, because all I can see is hardworking attorneys and court officials trying to bring some resolution to this very bitter dispute between the siblings of this trust.

I personally had about two months of involvement in this case back in 2012 when I represented Anita and Amy Brunsting. I made an appearance in Judge Hoyt's court with respect to a motion to lift a lis pendens so a fair market value sale could occur, and then later communicated some financial information to Ms. Bayless. I'm had no direct representation of the defendants, and I had nothing whatsoever to do with the probate proceedings in Court 4.

So, I would then, again, adopt the attorney immunity doctrine on behalf of both Ms. Brunstings here and all the other arguments which have been made.

THE COURT: Thank you, counselor.

MS. FOLEY: Zandra Foley for Candace Freed and Al Vacek. They are the lawyers who drafted the trust agreements in this case, and so they were not a part of any lawsuit in Probate Court 4. They are not a party, and they never represented any of the parties in Probate Court 4. So, I adopt the arguments that have been made everyone else. However, with respect to the immunity, that wouldn't apply to my clients. But something kind of similar would, and that is the *Barcelo* case, *Barcelo versus Elliot*, which is a Texas Supreme Court

case from 1996. And that case essentially held that beneficiaries are not permitted to sue the estate planning lawyer, simply because it relies on the age old rule of privity. Meaning you have to have privity with the lawyer in order to sue them. And so that argument is a little bit different.

The only other thing I'll mention is that specifically with respect to Mr. Munson, in response to our motion to dismiss the plaintiff, in Paragraph 69, specifically states, "One thing plaintiffs and defendants appear to agree on is that Munson is not a party to any of the prior lawsuits nor is he a beneficiary of the Brunsting family trust, and that" -- and he's quoting our motion -- "it is inconceivable that he could be injured as a result of V & F's," that's Vacek and Freed, "drafting of the estate planning documents." And based on that admission and all the other arguments, we believe that these claims should be dismissed.

THE COURT: Very well. And?

MR. FEATHESTON: Your Honor, I'm Brad Featherston.

THE COURT: Very well. And?

MR. MENDEL: I'm represented by Mr. Greene, Your Honor.

THE COURT: Very well.

All right. You heard the motions to dismiss, the presentation, Ms. Curtis; is that correct?

MS. CURTIS: Yes.

THE COURT: That gives you the opportunity to respond to any of the arguments that you've heard regarding why your case -- why your cause of action should be dismissed. If you want to stand at the table, that's fine, but just pull the mike up, so that we can hear you.

And, first of all, just to get this clear, so I understand, are you a licensed attorney?

MS. CURTIS: No, sir.

THE COURT: Okay. So, you're just an individual representing yourself and you filed this law enforcement on behalf of yourself?

MS. CURTIS: Yes, I did.

THE COURT: Very well. You may proceed.

MS. CURTIS: I'd like for Mr. Munson to respond to these, if it's okay.

THE COURT: Okay. Now, Mr. Munson, are you an attorney?

MR. MUNSON: No, sir.

THE COURT: Okay. Mr. Munson cannot represent you. He's not an attorney. And so to the extent that there is a response by you, it has to come from you. And Mr. Munson, to the extent that he has causes of action, he can assert those or respond to those on his own behalf, but he's not allowed to speak for you. Do you understand?

MS. CURTIS: Yes.

THE COURT: All right. So with that being said, do you have anything you wish to say to me?

MS. CURTIS: Okay. May I wait until he's done?

THE COURT: Yes.

MS. CURTIS: Okay.

THE COURT: And you're Mr. Munson?

MR. MUNSON: Yes, sir, I am.

THE COURT: And, Mr. Munson, you're going to come up to the podium. Very well. And you told me you're not an attorney, correct?

MR. MUNSON: No, sir.

THE COURT: And you're representing yourself in this matter?

MR. MUNSON: Yes, sir.

THE COURT: Very well.

MR. MUNSON: I'm representing myself, and I'm a private attorney general representing the public interests as well.

THE COURT: What does that mean, a private attorney general?

MR. MUNSON: Well, the RICO statutes under 1964(c) provide a private cause of action for private plaintiffs. 1963 is the cause of action for public prosecutors. The Congress when they drafted the RICO statutes mentioned in the

legislative committee reports, that they didn't believe that -- and it's in all kinds of case law, that they didn't believe that the public prosecutor resources were adequate to address organized crime. They didn't say why they didn't think they were adequate, and I'm not going to address those issues.

THE COURT: But that's what your explanation as to what private attorney general is for --

MR. MUNSON: A private attorney general is someone who advances a matter in the public interest.

THE COURT: All right. So, now in regards to the arguments articulated on behalf of the defendants who are seeking motions to dismiss, what is your response on behalf of yourself, not on behalf of Ms. Curtis, because you cannot represent --

MR. MUNSON: I'm aware of that. Okay.

THE COURT: Okay.

MR. MUNSON: But they are the same issues, technically speaking.

THE COURT: Very well.

MR. MUNSON: All of these defendants have entered plenary admissions in this matter, and you've heard them all repeat them today. They insist a probate matter, that this arises from a probate matter. *Curtis v. Brunsting* in the Fifth Circuit, that's -- I'm been in Texas for five years. And when I see the Brunsting Trust, there is no probate. If we read the

wills, which none of these defendants who claim probate even bother to do, you'll find out that everything that the will authorized to be done was completed five days before the so-called probate matter was filed. The inventory was submitted on April 4th. It was approved and filed with a drop order on April 5th. Five days later, the same day Judge Hoyt issued an injunction to Mrs. Curtis in the probate -- in the trust related case in the federal court, Bobbie Bayless filed her probate matter.

Now, nothing in the so-called probate matter addresses anything but the trust, and none of the claims contained in the so-called probate matter are contained in the list of inventory and assets. There is no probate matter. *Curtis v. Brunsting* is related to the Brunsting Trust. It is not property belonging to the estate of Nelva Brunsting or Elmer Brunsting. That was settled by the Fifth Circuit Court of Appeals. And I don't think we're going against the Fifth Circuit in regard to that judgment in this case.

I'm not here to try the case, but there is no probate matter, because there's no jurisdiction in the probate court. We have two problems with 12(b)(6) and 12(b)(1). The first one is 12(b)(6) relies upon --

THE COURT REPORTER: Can you slow down?

MR. MUNSON: Okay. Have to rely upon the statement of facts made in the complaint. All of the defendants offer a

contrary view of the facts. They're not allowed to do that under 12(b)(6). They can do that under a factual challenge under 12(b)(1), but they have to support it with affidavits and documents outside the record. They do none of those things.

So, the whole idea of immunity is based upon subject matter jurisdiction. Nothing in the probate court involved anything but the Brunsting Trust. If you were to ask these defendants to identify a probate claim pending in the probate matter, the only thing that comes out of their mouth is trust. The trust is not an asset belonging to the estate. I have no have interest in the probate. There was no probate. It was completed before the probate matter was filed. I have no interest in the trust. However, I have an interest in my household.

Plaintiff Curtis and I are domestic partners. And this case is robbing assets from my home and redirecting them to courts in Texas in order for her to defend her property interest. It is not an expectancy. It is a property right. The expectancies come from the estate. Now, I heard one of the lawyers mention Foster (phonetic). There was a will challenge in Foster. There's no will challenge in the Brunsting case. If you read the wills, none of the five Brunstings are heirs to the estate. Only the trust is an heir to the estate. The Fifth Circuit did read the will. But none of these defendants in their 200 some pages of motions to dismiss, they all say

probate matter, probate matter, probate matter. Not one of them mentions the will. The reason for that is to give the lie to the claim that it's a probate matter.

They also claim they have no idea what *Curtis v. Brunsting* is. *Curtis v. Brunsting* is the case that was in possession of the Brunsting Trust, beginning on 2-12-20 -- 2-27-2012 and continuing until this remand to the so-called probate matter. You cannot remand a plaintiff for consolidation with a case where she is a defendant. Dicey's rules of parties to action number five says that a plaintiff cannot be a defendant in the same action.

Bobbie Bayless named plaintiff Curtis a defendant in the probate matter. The whole notion that she could be remanded to probate to consolidate with Carl Brunsting in non-litigation, where she was a defendant, is a false thesis.

Under 12(b)(6) the Court is compelled to accept the facts in the complaint. Under 12(b)(1), they can't challenge those facts without support. They've done neither one of those. And yet they come in here insisting a completely different set of facts. Their immunity claims are based upon the notion of subject matter jurisdiction. There is no subject matter jurisdiction over the Brunsting Trust in the probate court. The Fifth Circuit is controlling. They address that. It's only seven pages. But I don't think any of these people

ever read it. I'm not sure they've ever read anything, because they keep repeating themselves like they're broken records. And yet, there is no probate matter.

There was never about a probate matter after the inventory and listed claims were submitted and the matter dropped. In fact, it was a year later that the Brunsting case was remanded to probate and suddenly became the estate of Nelva Brunsting, which the Fifth Circuit said it's not. It was six months later that Carl Brunsting applied for letters testamentary the second time. That's October 17th, 2014. So when it was filed, he filed it individually, but he has no standing as an heir of the estate and as executor for the estate, which was closed, and he had no letters testamentary for.

This is all just one big scam from chumming to bring in people who want to protect their assets, to promising them peace of mind, and then deciding which ones would be subject to redirection to the probate for now to be looted. And the defendants all object to the record of proceedings. But the record of proceedings is conclusive. We believe that on the record this case is subject to -- you know, is ripe for summary judgment on the pleadings, but we also know there is more that we can obtain by discovery.

There's lots of obfuscation in terms of the accounting for the Brunsting Trust. All of these lawyers have

gotten in the way. And if we look at the transcript of the March 9th, I was personally present and witnessed that little charade, I was so offended by the conduct. These grinning jackals, like we're going to rip you off and what are you going to do about it. That's what your misplaced notions of immunity have generated, a bunch of people who have no concern for the administration of justice or the rule of law, and that's what this case is about. It's about public corruption, and that's why I'm here as a private attorney general.

THE COURT: I only have one question. You stated that you were a domestic partner to Ms. Curtis?

MR. MUNSON: Yes.

THE COURT: As to a domestic partner, what legal rights under Texas law does that give you a connection with the issues in this case? I just want to -- because I assume when you say "domestic partner," you didn't use the word "husband" or --

MR. MUNSON: No, or spouse.

THE COURT: Or spouse.

MR. MUNSON: No.

THE COURT: You just said "domestic." So, what legal rights does that give you?

MR. MUNSON: I believe I addressed that in the Docket 89, where I mentioned Judiciary Rule 1927. It's codified at 28 U.S.C. 1927. And it gives you three instances in which

Mrs. Curtis is entitled to compensation for her expenses. Okay? And I have been asked by Mrs. Curtis to step in as act as the trust protector and to assist her in trying to figure out this very, very intentionally convoluted case. I mean, they made a mess of the finances, claimed to have them straightened out and then dumped everything in a big box for --

THE COURT: Hold on. Because I want to make sure we're --

MR. MUNSON: Okay.

THE COURT: -- we're on the same page.

MR. MUNSON: Okay.

THE COURT: You acknowledged early on before you began your remarks, that you cannot represent -- legally represent Ms. Curtis, only an attorney can do that or only Ms. Curtis can do that.

MR. MUNSON: Yes -- well --

THE COURT: Let me finish. In connection with your interest in -- if I heard you correctly, and correct me if I'm wrong, you stated that you were a domestic partner to Ms. Curtis. And I'm trying to get an understanding as to what you are asserting by --

MR. MUNSON: We have shared finances.

THE COURT: Don't interrupt me --

MR. MUNSON: Sorry.

THE COURT: -- by asserting that you are a domestic

partner to Ms. Curtis. So, what --

MR. MUNSON: We have a joint household. We have joined financial considerations. I don't handle any of the finances. I have renters, but I don't collect any of the rents. I have Mrs. Curtis do all of that. Okay? She's my partner. She handles that part of it. I'm a saxophone player.

THE COURT: When you say "partner" --

MR. MUNSON: Yes, domestic partner. We sleep in the same bed. We live together.

THE COURT: Well, I'm not trying to get that familiar. But partner also has a commercial context to it. So, you're not business partners?

MR. MUNSON: No, no, no, not specifically. We do have some plans that are being interfered with, but we're not able to pursue those at the moment.

THE COURT: Okay. Now I understand. Thank you, sir.

MR. MUNSON: And as far as these attorneys claiming that no one can assist without -- I think it was Docket Entry 90, the one -- the document filed untimely, just before this hearing, where they bring up the mention of this unlicensed practice of law. I would love to hear a definition of that, as well as a definition of probate from these defendants. Because my understanding is that I do have standing. And I'm relying on Supreme Court precedent. I did draft all of the drafts for all of the motions in this case, because Mrs. Curtis works in

the daytime. So, I've been involved in this for five years. I've had my time redirected to this matter, and it is all one big public corruption fraud.

THE COURT: Thank you, sir.

Ms. Curtis?

MS. CURTIS: I just know that I'm here today because all of these people are standing between me and my property. And I've been trying to get it and get information about it since right after my mother passed away on November 11th, 2011. As far as I'm concerned, all five of the Brunsting siblings are victims here, because there's attorneys here that have extended them credit to continue to avoid their responsibility.

I was directed to hire an attorney, because my domestic partner was in a coma and I could not prepare for a hearing in October of 2013 properly. So, I failed miserably, and Judge Hoyt directed me to hire an attorney so the discovery process could go forward. And after he got out of the hospital, it was a couple of months before he could even think straight. When you have open heart surgery, it's a serious matter. And we looked high and low to find an attorney to represent me, and couldn't until finally we contacted Mr. Ostrom, who convinced us that he would be the person to take this over and immediately proceeded to do things against my instructions, not keep me informed of what was going on and then somehow managed to get me out of the federal court into

the probate court where there is no jurisdiction and there wasn't.

So, I was stuck in a nightmare for two and a half years and I couldn't get out. I tried to file summary judgment and declaratory judgment motions, which I filed, but I couldn't get a hearing for those. But they could hear whether they were going to have another mediation, so that they could unentrench me from my belief that this property belonged to me and they were holding it. So, that's why I'm here today.

Mr. Munson has been helping me since the very beginning. I've known him for almost ten years now, and that was my only choice.

THE COURT: The defendants in this case have made some very specific legal arguments as to why your case should be dismissed as to their various clients, from judicial immunity to failure to state a claim and a host of issue legal issues that you heard in between. So, in regards to a response to those specific legal assertions by these defendants, judicial immunity, failure to state a claim, do you have any specific response other than what you've put on paper already?

MS. CURTIS: Well, I believe that if there's no jurisdiction, there are no judges, there are no lawyers, and there is no litigation. And if there is no litigation, then there is no immunity. And I don't believe that there is litigation relating to the trust in Probate Court No. 4.

Although, the report from Greg Lester, which was supposed to evaluate the merits of the claims in state court, said nothing about the estate of Nelva Brunsting. All they talked about is the trust and how Ms. Curtis and her brother Carl are going to be disinherited by the no contest clause in this mysterious qualified beneficiary designation, that they can't even produce the original signed document of and for which there are three different signature pages.

So, I'm here because I was at wit's end. I was stuck in probate court and being pushed towards a mediation where they were going to unentrench me from going after what belongs to me, what my parents gave to me that is mine now and they're holding it.

THE COURT: Thank you. And just by way of housekeeping, just I'm trying to get a better sense of the players on the chess board, are you related to these two ladies over here?

MS. CURTIS: These are my two youngest sisters.

THE COURT: Okay. And so --

MS. CURTIS: Carl is my brother, who was represented by Bobbie Bayless.

THE COURT: Is he here?

MS. CURTIS: No.

THE COURT: Okay. So, you have -- all right. Very well. Thank you.

What I would like to do -- what I'm going to do, I'm going to wade into the specific motions to dismiss, to get an understanding as to who is going to remain in this case, maybe none of you, maybe all of you, I don't know. I'm going to -- I wanted to hear your oral arguments. And you cited some additional considerations for me to look at, and so I'm going to do that. Once I made a determination as to what motions to dismiss -- how to dispose of them, being granted, being denied, then we can, if necessary, make a plan going forward as far as some type of managed discovery. Right now I think that would be unwielding given the number of players on this chess board and also given the fact that some of you may not be here -- some of the defendants may not be here. Some of the -- you know, one of the ones that I was troubled by, and I'm going to get a better explanation for it -- and obviously this is oral argument and everything is short-circuited to that, but the court reporter. And to the extent that someone is sitting there just taking down a record, I'm not sure of the legal causes of action to which that person may have subjected himself. And as to some of the attorneys, I'll look at that, as well as the judges, that's separate and apart. But, for instance, the court reporter, who was a substitute court reporter, as described, just sticks out, and I just wanted to see exactly what his involvement was in the case. No need to comment.

And so I just need to dive -- lawyers, representatives say something in court and my review may reveal a different determination, and so that's what I need to do. But because of that alert going off, that maybe there's someone who doesn't belong here, we're going to keep -- we're going to hold off on discovery. Because I don't want people to participate in discovery if they're not going to be here for the long-haul. I think that manages the cost for everyone and conserves resources for the individual clients. So, I think that's the best way to proceed.

Now, having said that, that puts on me a burden of being timely and making sure that these motions to dismiss are disposed of such that the plaintiffs, if this case goes forward, are entitled to some type of discovery for the remaining defendants on the causes of actions that remain. And, so, we cannot delay that process forever, if it's going to go forward. So, I will endeavor to be efficient as I can in getting these motions to dismiss disposed of, so we'll know who's left on the board, and then we can move forward with some type of managed discovery plan that makes sense. That's what I'm going to do.

I assume, before I walked out here, that that covered all of the motions to dismiss. Were there any other motions to dismiss that were not addressed today? All right.

Are there any other motions that were not

addressed today that needed to be addressed?

Mr. Munson, Ms. Curtis, any other motions, pending motions on my docket? All right.

So let me again address the motions that have been presented. Anything else that we need to address before we adjourn today, starting on my right?

MR. ABRAMS: No, Your Honor.

THE COURT: No?

MS. BAYLESS: Well, I do have this question. My name came up a lot more than I expected it to in this hearing, and some things were said which I did not realize were allegations, this allegation that there's no probate proceeding when there is. I don't know if the Court wants to entertain some brief --

THE COURT: No.

MS. BAYLESS: Okay.

THE COURT: I don't want any additional briefing.

MS. BAYLESS: All right. Well, thank you, Your Honor.

THE COURT: To the extent that I dig into this and I determine that additional briefing is necessary on a specific point, my clerk will contact you and ask for it. But as a general rule, I don't want you to submit additional briefing on what you've already briefed. There may be something that I'll dig into that I will ask for additional briefing on, but as of right now, there's no need to submit additional briefing.

Anything else from this side?

MR. HARRELL: No, Your Honor.

THE COURT: Very well.

MS. BECKMAN HEDGE: Nothing, Your Honor.

THE COURT: Ms. Curtis, anything else?

MS. CURTIS: No, Your Honor.

THE COURT: Mr. Munson?

MR. MUNSON: I would like leave, sir -- I'm sorry. I would like leave to file a brief on the public attorney general.

THE COURT: Not necessary. During your presentation you made some specific cites. We have a record. So, I will check that. If it's turns out that I have additional questions, I will have my clerk contact you for additional information. Anything else, Mr. Munson?

MR. MUNSON: Yeah, we do have a private attorney general statute in California. It's government code -- it's California Business and Professions Code 17204 and 17535, which also address the issues.

THE COURT: So, in regard -- and since you cited that to me, I'm just going to ask the question, we're sitting in a Federal District Court in Texas. How does the California statute work in this case?

MR. MUNSON: It mimics the Supreme Court on the subject.

THE COURT: Okay. Very well.

Anything else, issues from this side of the room that the Court needs to be aware of before we adjourn? Yes, ma'am.

MS. AMY BRUNSTING: Amy Brunsting. I just wanted to clarify how many siblings were involved. Candy is the oldest. There's another one --

THE COURT REPORTER: Can she use the microphone?

THE COURT: Hold on. Use the microphone.

MS. AMY BRUNSTING: Sorry. There's five siblings in our family. Candy is the oldest. Carole Brunsting is next. Carl Brunsting is the third. I'm the fourth, Amy Brunsting, and Anita Brunsting. So, we're the five siblings. I think only four of them were mentioned. Just clarity.

THE COURT: You said Candace Brunsting?

MS. AMY BRUNSTING: Candace -- Candy Curtis, I'm sorry.

THE COURT: Okay. All right. Very well. Thank you.

Any other clarifications, any other additional information that I need? Over there?

MR. MUNSON: Standing of a private attorney general under civil rights is different than under RICO. RICO is the only situation where a private attorney general does not also have to be an attorney.

THE COURT: Thank you, sir.

All right. We are adjourned. You are excused.

Happy holidays to you.

(Concluded at 1:00 p.m.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause, to the best of my ability.

/s/ Kathy L. Metzger 6-27-2017
Kathy L. Metzger Date
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHERRY LYNN JOHNSTON	§	
	§	
v.	§	CIVIL ACTION NO. 4:16-cv-03215
	§	
DAVID DEXEL, et al.	§	
	§	

DEFENDANT CLARINDA COMSTOCK'S CERTIFICATE OF INTERESTED PARTIES

Defendant Clarinda Comstock respectfully submits her Certificate of Interested Parties listing all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation pursuant to the Court's Order for Conference and Disclosure of Interested Parties:

1. Sherry Lynn Johnston;
2. David Dexel;
3. Ginger S. Lott;
4. GSL Care Management, LLC;
5. Clarinda Comstock;
6. Benson Comstock, LLP;
7. Howard Reiner;
8. Christine Butts; and
9. Sherrie Fox.

In accordance with this Court's Order, if new parties are added, or if additional persons or entities that are financially interested in the outcome of the litigation are identified at any time

during the pendency of this litigation, counsel will promptly file an amended certificate with the clerk.

Respectfully Submitted,

By:/s/ *Cory S. Reed*
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ATTORNEYS FOR DEFENDANT CLARINDA COMSTOCK

CERTIFICATE OF SERVICE

I certify that on the 22nd day of December, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system:

/s/ Cory S. Reed
Cory S. Reed

TRANSCRIPT ORDER FORM

District Court: Southern District of Texas District Court Docket No. 4:16-cv-1969

Short Case Title: Curtis et al., v Kunz-Freed et al., Court Reporter: Heather Alcaraz

ONLY ONE COURT REPORTER PER FORM

Date Notice of Appeal Filed by Clerk of District Court: 05/30/2017 Court of Appeals No.: 17-20360

PART I. (To be completed by party ordering transcript. Do not complete this form unless financial arrangements have been made.)

A. Complete the Following:

☐No Hearings ☐Transcript is unnecessary for appeal purposes ☐Transcript is already on file in the Clerk's Office

or

Check All of the Following that Apply, Enter the date of the proceeding in the blank line.

This is to Order a Transcript of the following proceedings: ☐Bail Hearing: _____ ☐Voir Dire:_____

☐Opening Statement of Plaintiff:_____ ☐Opening Statement of Defendant:_____

☐Closing Argument of Plaintiff:_____ ☐Closing Argument of Defendant:_____

☐Opinion of court:_____ ☐Jury Instructions:_____ ☐Sentencing:_____

Hearing Date(s)	Proceeding	Judge/Magistrate
10/28/2016	Rule 26(f) Conference	Hon. Alfred H. Bennett

Failure to specify in adequate detail those proceedings to be transcribed, or failure to make prompt satisfactory financial arrangements for transcript, are grounds for DISMISSAL OF APPEAL.

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Signature_____ Date Transcript Ordered 6/2/2017

Print Name Rik Munson Phone: 925-349-8348

~~Counsel for~~ Pro se

Address 218 Landana St. American Canyon CA 94503

PART II. COURT REPORTER ACKNOWLEDGEMENT (To be completed by the Court Reporter and filed with the Court of Appeals within 7 days after receipt. Read instructions on page 2 before completing.)

Date Transcript Order Received	If arrangements not yet made, date contact made w/ ordering party	Estimated Completion Date	Estimated number of Pages

☐Satisfactory Arrangements for payment were made on _____

☐ Payment Arrangements have NOT been made. Reason: ☐Deposit not received ☐Unable to contact ordering party

☐Other (Specify)_____

Date:_____ Signature of Reporter:_____ Tel._____

Address of Reporter:_____

Part III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN THE DISTRICT COURT (To be completed by court reporter on date of filing transcript in the District Court and this completed form e-filed with the Court of Appeals.)

This is to certify that the transcript has been completed and filed at the District Court today.

Actual Number of Pages: _____ Actual Number of Volumes:_____

Date: _____ Signature of Reporter:_____