

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.<sup>1</sup> This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations, unwarranted factual inferences, or legal conclusions as true.<sup>2</sup> It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

**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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<sup>1</sup> *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5<sup>th</sup> Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5<sup>th</sup> Cir. 1994).

<sup>2</sup> *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5<sup>th</sup> Cir. 2007).

<sup>3</sup> *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5<sup>th</sup> Cir. 2004).

<sup>4</sup> *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5<sup>th</sup> Cir. 2015).

<sup>5</sup> *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5<sup>th</sup> Cir. 1992).

#### A. FACTS INVOLVING MR. OSTROM.

 Following the hearing on October 2, 2013, Plaintiff Curtis hired Mr. Ostrom on November 27, 2013.<sup>6</sup> Mr. Ostrom then assisted in remanding the case back to Harris County Probate Number 4.<sup>7</sup> 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.<sup>8</sup> Plaintiffs then argue that once they were back in state court, Defendants immediately ignored the injunction.<sup>9</sup> However, Plaintiffs contradict their own statement by acknowledging that Probate Court Number 4 entered an Order modifying the federal injunction.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> Attached to this motion as Exhibit B is a copy of the Plaintiff's Second Amended Petition that Plaintiffs are referring to.<sup>14</sup> Nowhere within the Second Amended Petition does Mr. Ostrom raise the issue of

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<sup>6</sup> Plaintiffs' Addendum at paragraph 32.

<sup>7</sup> Plaintiffs' Addendum at paragraph 33.

<sup>8</sup> Plaintiffs' Addendum paragraph 3.

<sup>9</sup> Plaintiffs' Addendum paragraph 4.

<sup>10</sup> Plaintiffs' Addendum paragraph 42.

<sup>11</sup> Plaintiffs' Addendum paragraph 50.

<sup>12</sup> Exhibit A.

<sup>13</sup> Plaintiffs' Addendum paragraph 55.

<sup>14</sup> Exhibit B.

Nelva's capacity.<sup>15</sup> 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."<sup>16</sup> 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.<sup>17</sup> Plaintiffs fail to meet this standard.

With respect to Mr. Ostrom, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 1961(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.<sup>18</sup> Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts,

<sup>15</sup> *Id.*

<sup>16</sup> *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)

<sup>17</sup> *Elliott v. Foufas*, 867 F.2d 877, 880 (5<sup>th</sup> Cir. 1989).

<sup>18</sup> *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 their 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*.<sup>19</sup>

**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."<sup>20</sup>

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."<sup>21</sup> 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."<sup>22</sup> When

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<sup>19</sup> 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

<sup>20</sup> *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. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

<sup>21</sup> *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at \*17 (S.D. Tex. June 2, 2016).

<sup>22</sup> *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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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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<sup>23</sup> *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.*, 975 F.2d at 1138.

<sup>24</sup> *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)

<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> 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."<sup>28</sup>

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."<sup>29</sup> 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."<sup>30</sup>

"[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."<sup>31</sup> However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."<sup>32</sup>

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it

<sup>26</sup> 18 U.S.C. § 1961(4); see also *Elliott*, 867 F.2d at 881.

<sup>27</sup> *Elliott*, 867 F.2d at 881.

<sup>28</sup> *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)).

<sup>29</sup> 452 U.S. at 583.

<sup>30</sup> *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir. 1990).

<sup>31</sup> *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).

<sup>32</sup> *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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Specifically, "[a]n

<sup>33</sup> 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").

<sup>34</sup> *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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."<sup>39</sup> 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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<sup>36</sup> *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

<sup>37</sup> *Delta Truck*, 855 F.2d at 242-43.

<sup>38</sup> See *In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43).

<sup>39</sup> *H.J., 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."<sup>40</sup> 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."<sup>41</sup>

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.<sup>42</sup> A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.<sup>43</sup> Mere association with the enterprise is not actionable; agreement is essential.<sup>44</sup> 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).<sup>45</sup>

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.<sup>46</sup> The Court should additionally dismiss the claim because the Plaintiffs have not

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<sup>40</sup> *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).

<sup>41</sup> *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241).

<sup>42</sup> *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)).

<sup>43</sup> *Id.*

<sup>44</sup> *Baumer*, 8 F.3d at 1344.

<sup>45</sup> *N. Cypress Med. Ctr. Operating Co.*, 781 F.3d at 203.

<sup>46</sup> *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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.<sup>51</sup> A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.<sup>52</sup>

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<sup>47</sup> *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).

<sup>48</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

<sup>49</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

<sup>50</sup> *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).

<sup>51</sup> *Ocean Energy II. V. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).

<sup>52</sup> *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."<sup>53</sup>

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."<sup>54</sup> These allegations must include specific facts; conclusory and generalized allegations are insufficient.<sup>55</sup> "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."<sup>56</sup>

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."<sup>57</sup> 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.<sup>58</sup>

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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<sup>53</sup> *Sedima*, 473 U.S. at 496.

<sup>54</sup> 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.

<sup>55</sup> *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).

<sup>56</sup> *Anza*, 547 U.S. at 452.

<sup>57</sup> *Id.*

<sup>58</sup> *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](mailto:occurtis@sbcglobal.net)

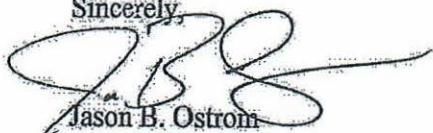
Re: Cause No. 412,249; *In Re: Estate of Nelva E. Brunsting, Deceased;* in the Probate Court Number Four (4) of Harris County, Texas

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.

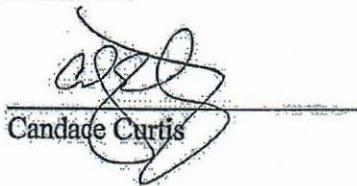
If you want to discuss this approach I am happy to have a telephone conference with you; please contact Mica DeScioli to set that up. Otherwise, if you would like for us just to proceed with asking the Court for this relief and not waste time discussing it further, simply sign this letter and return 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, §  
DECEASED § NUMBER FOUR (4) OF  
§ 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: 

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

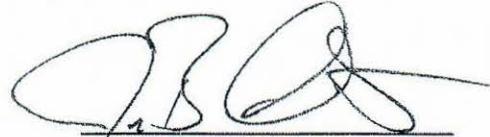
I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 11<sup>th</sup> day of February, 2015:

Ms. Bobbie Bayless  
2931 Ferndale  
Houston, Texas 77098  
713.522.2224  
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith  
1401 McKinney, 17<sup>th</sup> 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  
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281.870.1124  
281.870.1647 (Facsimile)



Jason B. Ostrom/  
R. Keith Morris, III