IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

ROY E. ERWIN, RUTH ILENE ERWIN ROBERTS, et al., Plaintiffs,	§	**CIVIL ACTION NO. W:09-CA-127**
v.	§	**consolidated with**
BRYAN F. RUSS, JR., JAMES H. McCULLOUGH, et al., Defendants.	§	**CIVIL ACTION NO. W:10-CA-005**

MEMORANDUM OPINION AND ORDER

Before the Court are the Motions to Dismiss for failure to state a claim and Motions for Summary Judgment filed by the remaining Defendants in this consolidated action. After considering the motions and responses, the pleadings on file, and the applicable law, the Court finds that all the Defendants' motions are meritorious and should be granted. The claims advanced by many of the Plaintiffs have no basis in fact or law, and are connected with only the most conclusory allegations in an attempt to establish some type of ongoing conspiracy. Many of the claims are so lacking in specific facts, they rise to the level of frivolousness.

I. Introduction

An initial Complaint was originally filed in this Court, after which a broader case was filed in the Southern District of Texas (the Houston suit). That later case has now been transferred to this Court and consolidated with the original case. In

the Houston suit, Plaintiffs filed a First Amended Complaint[1] which, as the latest pleading on file, is the live pleading in this consolidated action. Throughout this Order, the Court will analyze the claims and allegations contained in the First Amended Complaint in determining whether the instant motions have merit.

Plaintiffs' First Amended Complaint contains a wide array of allegations against numerous individuals and companies, tangentially connected by overarching allegations of corruption and conspiracy between the law firm of Palmos, Russ, McCullough, & Russ, L.L.P., Judge Robert M. Stem of the 82nd District Court of Texas, covering Falls and Robertson counties, and various public officials. The motions currently before the Court argue that Plaintiffs' First Amended Complaint contains no allegations which, even if they were true, would establish any causes of action against the moving Defendants.

Motions to dismiss filed by a number of Defendants have already been granted. The claims which remain involve child custody disputes, the resignation of a Hearne City Councilwoman, a variety of property disputes, and breaches of contract. The Plaintiffs assert a variety of causes of action, including civil conspiracy, fraud, breach of fiduciary duty, conversion, tortious interference with contractual and future business relationships, abuse of process, as well as violations

[1] The First Amended Complaint, filed on September 14, 2009, was misnamed Original Complaint by Plaintiffs.

of the RICO statutes, § 1983 and the Texas Theft Liability Act. Plaintiffs additionally request an equitable accounting.

II. Prior Rulings and Residual Claims

A number of the factual allegations in the First Amended Complaint cover Plaintiffs and events which have already been dismissed, whose claims against any of the remaining Defendants are tenuous or conclusory, who have no legal right to pursue suit for any alleged improprieties, who have suffered no injury, or whose claims are barred by limitations. Therefore, to the extent there are any residual claims against the remaining Defendants, they are dismissed as they relate to the following claims: (1) the murder of Hank Johnson; (2) the murders of Chandell Lewis and Harry Munson; (3) a tax lawsuit by Hearne I.S.D., the City of Hearne, and Robertson County against Nolan Griffin; (4) the estate of Marium Oscar; (5) the claims of Brian and Madeline Moore; (6) the claims of Cindy Nichols and J.H.; (7) the claims of Cassandra Butler; (8) the claims of Alan Eppers; (9) the claims of theft from the United States Government;[2] and (10) the claims of Todd Reynolds. Additionally, the following Plaintiffs are **DISMISSED** from this suit: Steve Stokely; Brian and

[2] This is not a qui tam action on behalf of the United States. Plaintiffs' attorney, Ty Clevenger, acting as attorney and plaintiff, filed that type of action in this Court in Cause Number W-08-CA-259 against many of the same Defendants arising out of the same factual situation. The United States declined to intervene, and Defendants' Motions to Dismiss were granted in that action.

Madeline Moore; Cindy Nichols, Individually and as Next Friend of J.H.; Cassandra Butler; Alan Eppers; and Todd Reynolds.

III. Factual Allegations

The First Amended Complaint contains following factual allegations by the remaining Plaintiffs against the remaining Defendants:

Estella Scott

> 140. Estella Scott owned an interest in approximately 30 acres in Robertson County, but her interest was spread among numerous heirs. In the early 1990s, she and her elderly aunt visited Bryan F. Russ, Sr. (the father of Defendant Rusty Russ and grandfather of Defendant Trey Russ) and Defendant McCullough about locating the property and obtaining clear title. Ms. Scott's aunt was paying taxes on the property, which had been purchased [by] their heirs in the 1800s after they were released from slavery, but she was not sure of its exact location.
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> 141. The senior Mr. Russ and Defendant McCullough told the ladies that they could not locate the property because it was somewhere in Grimes County. They further told the ladies that it would not be worthwhile to try to obtain clear title because there were so many heirs. The family stopped paying taxes on the property in 1997, and it was sold at a tax sale in 2007.
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> 142. Defendant MACRU . . . purchased the land at the tax sale. Rather than distribute the proceeds to the heirs, Defendant McCullough immediately asked Judge Stem to return the money to his company, i.e., MACRU. The tax attorney for the county and the attorney ad litem for the family objected, and the matter is still pending before Judge Stem.
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> 143. Ms. Scott alleges that Mr. Russ and Defendant McCullough knew the exact location of the property belonging to her family, and they knew what it would take to clear the title, but they convinced her family to stop paying the taxes so they could purchase

> it for themselves at a tax sale. . . . [A]gents of The firm decided to deceive its clients and then wait for an opportune time to steal their land.

First Amended Complaint, p. 27.

> The Erwin Heirs
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> 144. In 1998, Plaintiff Ruthie Roberts and her sister met with Defendant Russ at his office to discuss their family's one-half mineral interests [sic] in a roughly 157-acre tract in Robertson County (the "Mineral Interest"). Defendant Russ told the ladies that there were so many heirs to the property (hereinafter "Erwin heirs") that it would not be worthwhile to try to determine their interests.
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> 145. During 2003 and 2004, gas exploration in Robertson County increased dramatically, and the value of mineral interests likewise increased dramatically.
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> 146. Travis T. Morgan, Alma Ione Morgan, and Michael T. Morgan [who have all been dismissed from this suit] collectively own the surface estate of the 157-acre Mineral Interest. On November 8, 2005, the Morgans and Defendant Russ, acting on behalf of Defendant Flare Royalties, L.P., executed a "Confirmation of Royalties" with Defendant Leor Energy, L.P. [also previously dismissed]. The document identified the Morgans and Flare Royalties as the owners of royalties attributable to slightly more than 552 acres. The 157-acre Mineral Interest belonging to the Erwin heirs was included in that tract. This document was not filed with the Robertson County Clerk, however, until August 23, 2006. The delay in filing is explained by the fact that at the time the document was executed, Defendant Flare Royalties did not own any interest whatsoever in the 157-acre tract, a fact that was known to Defendant Russ, Defendant Flare Royalties, and Defendant Leor Energy. These Defendants had conspired to steal the Mineral Interest belonging to the Erwin heirs, therefore, they hid the transaction.
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> 147. In order to create some pretense of a claim to the Mineral Estate, Defendant Russ instigated a series of sham transactions. On November 22, 2005, Defendant Deminimus, a shell company owned by Russ and McCullough, filed a deed purporting to transfer 90 percent of

the Mineral Interest to Defendant Velnon, another shell company owned by Russ and McCullough. Defendant Russ knew that Defendants Deminimus and Velnon did not own any interest in the Erwin property, but he created the sham transactions so he could ultimately purport to transfer the Erwin heirs' property to Defendant Flare Royalties.

148. On the same day, Defendant Russ filed an Original Petition for Appointment of a Receiver and for Declaratory Judgment in *Velnon, L.L.C. vs. Unknown Heirs of Elizabeth Warren*, Case No. 05-11-17388-CV, 82nd District Court of Robertson County. He also filed a Motion for Substituted Service Other Than Publication (By Posting), seeking to post notice of the lawsuit rather than publish it in the local newspaper, where some of the Erwin heirs might see it. Judge Stem granted the motion, and the notice was posted at the Hearne and Calvert city halls, and at the Robertson County Courthouse.

149. On January 9, 2006, Judge Stem appointed Mr. Harris as attorney ad litem. As usual, Mr. Harris filed a general denial but with no defenses under Rule 93 (or on any other grounds), not motions for continuance, and no other pleadings or motions on behalf of the Erwin heirs.

150. The same day, Judge Stem signed an Order Appointing Receiver, Ordering Sale of Property, and an Order Placing Funds in the Registry of the Court. Defendant Leamon was appointed receiver and also filed a notice of private sale on the same day.

151. On January 20, 2006, the Receiver's Report of Sale was filed stating that the Mineral Interest was sold to Defendant Flare Royalties, L.P., another shell company owned by Russ and McCullough. On January 30, 2006, without further effort to serve or notify the Erwin heirs, and with no objections or defenses raised by Mr. Harris, who ostensibly was representing their interests, Judge Stem signed the Decree Confirming Sale, Authorizing Payment of Fees and Costs, Placing Funds in the Registry of the Court and Authorizing Disbursement After Seven Years. Judge Stem then awarded The Firm $5,253.00 in fees and costs. Once again, Judge Stem awarded The Firm attorney fees for orchestrating a fraud.

152. As noted above, Defendant Russ did not file the November 8, 2005 "Confirmation of Royalties" until August 23, 2006, *i.e.*, after Judge Stem had ratified the fraudulent transfer and after Flare Royalties began receiving royalty checks from Defendant Encana [previously dismissed].

153. Defendant Leor Energy and Defendant Encana conspired with Russ and McCullough to deprive the Erwin heirs of the royalties from the Mineral Interest. Along with these Defendants, Burlington Resources owned an interest in the production unit into which the Mineral Interest was pooled. Based on its review of public records, Burlington Resources knew that the Mineral Interest belonged to the Erwin heirs and, to its credit, it held the payments in escrow. Defendant Encana, on the other hand, made payments to Russ and McCullough, via Flare Royalties, even though it knew the Mineral Interest belonged to the Erwin heirs. Both Defendant Leor Energy and Defendant Encana were warned about the fraudulent scheme, and Defendant Leor Energy even dispatched a petroleum landman to investigate. The landman met with Kenneth Lunsford, son of Mary M. Lunsford, and subsequently verified what Leor Energy already knew, *i.e.*, that the Erwin heirs were the rightful owners. Despite the warnings, Defendant Encana continued to mail royalty checks to Defendant Flare Royalties.

155. After learning about the fraud, various Erwin heirs (the "Erwin Heir Majority") filed a motion for new trial in the aforementioned *Velnon, L.L.C. vs. Unknown Heirs of Elizabeth Warren* on May 5, 2007. Most of the heirs in that action, including Plaintiff Roberts, were represented by Porter & Hedges, L.L.P., a Houston law firm. Other heirs, including Mrs. Lunsford, were represented by Wilshire, Scott, & Dyer, P.C., another Houston law firm. When asked about his participation in the fraud during a deposition, Defendant Leamon said he was only doing what Judge Stem told him to do. Defendant McCullough was present during the depositions and, according to witnesses, Defendant McCullough glared at Defendant Leamon, signaling him to quit talking. The Firm, Russ and McCullough, and the various shell companies quickly settled the claims.

156. After the motion for new trial was filed, some of the Erwin heirs, including Plaintiff Erwin, asked one of the Houston firms about joining the case. Even though there was no apparent conflict with the

interests of the other heirs, these heirs were told they would have to find their own attorneys elsewhere.

157. When asked whether Russ and McCullough, et al. could be required to pay attorney fees, attorneys from the Houston firms either told their respective clients that attorney fees could not be awarded or that Judge Stem would not award them. The Houston firms did not disclose the availability of attorney fees, multiple damages, and punitive damages if the Erwin heirs were to file a separate lawsuit bringing claims of statutory theft, racketeering, and fraud. Likewise, the Houston firms did not disclose the option of bringing suit in federal court or a state court outside of Robertson County, nor did they disclose the possibility of seeking Judge Stem's disqualification or recusal. Moreover, the Houston firms failed to disclose that Russ and McCullough would be allowed to retain ownership of the mineral interests belonging to the Erwin heirs who had not joined the motion for new trial (the "Erwin Heir Minority"), which amounted to nearly 20 percent of the overall Mineral Estate.

158. On May 16, 2007, *The Bryan-College Station Eagle* ran a front-page story about the Erwin heirs' motion for new trial. Early that morning, a Robertson County resident observed Russ, McCullough, and others removing boxes from the offices of The Firm.

159. At the time settlement was reached in the summer of 2007, it was abundantly clear to Judge Stem and all the attorneys involved – including the Houston firms – that Russ and McCullough had perpetrated an enormous fraud, and it was equally clear that, under the terms of the proposed settlement agreement, they would be allowed to retain almost 20 percent of the mineral interests they had stolen. No one, however, lifted a finger to protect the interests of the remaining victims of Russ and McCullough's fraud. Judge Stem did not appoint another attorney ad litem, and he did not order the stolen royalties placed into the registry of the court. He simply allowed the ongoing theft to continue. Plaintiff Erwin was among the heirs whose stolen interest was retained by Russ and McCullough after the settlement. Further discovery will likely reveal that Defendant Encana is still mailing Plaintiff Erwin's royalty payments to Russ and McCullough (via Flare Royalties, L.P.).

First Amended Complaint, pp. 28-32 (footnote omitted).

Ted Booher

161. During August of 2006, Plaintiff Ted Booher contracted with Defendant Zeig Enterprises, Inc. [previously dismissed], to purchase 15.4 acres of real estate in Hearne, Texas for $400,000.00. Plaintiff Booher gave $10,000.00 to The Firm to be held in escrow. After the agreement was reached, but before closing, Plaintiff Booher learned about environmental hazards on the property, and he spent approximately $150,000.00 to clean up the property. The Small Business Administration had tentatively approved a loan for the purchase, but it could not be finalized until the property was decontaminated.

162. With the permission of Defendant Zeig Enterprises, Inc., Plaintiff Booher began storing some of his equipment on the property in Hearne.

163. At some point between the initial contract and closing, Defendant McCullough, Defendant Russ, and Defendant Baxter decided they wanted the real estate, and they colluded with Defendant James Zeig [also previously dismissed], president of Defendant Zeig Enterprises, to subvert the contract. On October 4, 2007, Defendant Zeig Enterprises sent a notice scheduling the closing for October 12, 2007, even though the decontamination had not yet been completed. On October 10, 2007, Defendant McCullough, Defendant Russ, and Defendant Baxter formed Defendant Hearne Business Park, LLC. On or about October 15, 2007 Defendant Hearne Business Park, LLC purchased the property from Defendant Zeig Enterprises.[3]

164. Plaintiff Booher immediately filed suit in state court, and he filed a lis pendens with the Robertson County Clerk of the $150,000.00 in improvements he had made to the property. Shortly thereafter, the lis pendens was inexplicably set aside by Judge Stem. Plaintiff Booher filed a motion to disqualify Defendants Russ, McCullough, and The firm since The Firm was serving as escrow for the transaction, but Judge Stem denied the motion to disqualify. Judge Stem denied Plaintiff's request for a temporary restraining order and ultimately granted

[3] Although not specifically stated, Booher must not have made the closing.

summary judgment in favor of Defendants Zeig Enterprises and Hearne Business Park as well as one other defendant.

165. In 2008, The Firm filed suit on behalf of Defendant Hearne Business Park against Plaintiff Booher, seeking approximately $200,000.00 for the purported rent due because Mr. Booher's equipment had been stored on the property. Defendant McCullough was seeking to coerce Mr. Booher to abandon his claims to the disputed property. On January 28, 2009, the case went to trial before Judge Stem. Near the end of the trial, Mr. McCullough announced a surprise fact witness – none other than Trey Russ, the man who had been sitting next to Mr. McCullough throughout the trial and serving as his co-counsel. When Mr. Booher's trial attorney, Lee Giddens, asked the purpose of Mr. Russ's testimony, Mr. McCullough simply stated, "Rebuttal." When Mr. Giddens asked, "To what?", Mr. McCullough responded, "To [Mr. Booher's] lies." Notwithstanding Mr. Giddens objections, Judge Stem then permitted Trey Russ to offer a factual rebuttal to Mr. Booher's testimony.

166. Judge Stem issued a $175.000.00 lien against the equipment, allegedly attributable to 16 months worth of rent for the property, even though the entire purchase price of the property was only $400,000.00. As a result, Plaintiff Booher was unable to remove nearly $1 million worth of his equipment. Defendant McCullough, Russ, and Baxter, acting through Judge Stem, sought to extort money from Plaintiff Booher by forcing him to pay outrageous rental charges or lose the use of his equipment. After the Original Complaint was filed, the defendants permitted Mr. Booher to remove his equipment, but only after he paid $225,000.00 into the registry of the state court.

First Amended Complaint, pp. 33-35 (footnote omitted).

Phillip M. Krumnow, Jr.

171. On June 17, 2002, Plaintiff Krumnow filed an application in the Falls County Court to probate the will of his father, Phillip Krumnow, Sr. Defendants Pam Krumnow, Mendenhall, and Withhem [who were previously dismissed] retained The Firm and Defendants Russ and Hedrick to try to remove Plaintiff Krumnow as independent executor. As set forth in *Krumnow v. Krumnow*, Cause No. 34,538, 82nd

District Court of Falls County, the case was removed from county court to district court, where Judge Stem presided.

172. In April of 2003, Judge Stem removed Plaintiff Krumnow as executor without notice of a hearing and appointed Defendant Boykin to replace him. According to correspondence obtained by the undersigned, Defendant Rusty Russ was simultaneously serving as Judge Stem's personal attorney in a real estate dispute – an egregious conflict of interest that neither of them disclosed to Mr. Krumnow nor anyone else. On May 25, 2004, Judge Stem appointed Defendant Harris as receiver to sell the property of the estate. On June 17, 2005, Defendant Boykin and Defendant Harris conspired with Defendant Aiken [previously dismissed], who represented DDC [Defendant Delaware Development Company, L.L.C., and also previously dismissed], to sell 824.57 acres of estate property at a below-market price. Specifically, these defendants conspired to sell the Krumnow property to DDC for an amount lower than what had already been offered by another buyer. On June 22, 2005, Defendant Harris filed a report with the court attempting to sell the property to DDC at the below-market price, and he mailed copies of the report and fraudulent contract to at least seven people on that day.

173. In *Krumnow v. Krumnow*, the appeals court reversed Judge Stem, holding that he had no authority to appoint Defendant Boykin as a successor representative to Mr. Krumnow; the court further held that Judge Stem abused his discretion in appointing Defendant Harris as receiver on his own motion. 174 S.W.3d 820 (Tex.App. – Waco 2005).

174. Since 2002, Judge Stem has abused the power of his office egregiously, trying to force Plaintiff Krumnow to "back off" so he and his co-conspirators could parcel up the Krumnow estate. Further discovery will likely reveal that Defendants Boykin, Harris, The Firm, Russ, Hedrick, Aikens, and DDC – and possibly Judge Stem – attempted to profit from the estate and the trusts by selling estate and trust property to DDC for less than what it was worth.

First Amended Complaint, pp. 35-37.

Cheryl and Wayne Maxwell

175. On February 18, 2006, Cheryl and Wayne Maxwell signed a contract with Defendant Bielamowicz, a real estate agent working for Defendant Leamon, to purchase 10 acres in Robertson County from the estate of Adell McIntosh at $1,175.00 per acre, including the mineral estate.

176. Before closing, Defendant Bielamowicz called the Maxwells and told them they needed to retrieve their earnest money deposit, because Defendant Guaranty Title was unable to determine clear title to the land.

177. Shortly thereafter, Defendant Oaks & Diamonds purchased the 10 acres from the estate of Adell McIntosh by general warranty deed. In other words, Defendant Guaranty Title had been able to determine clear title, contrary to Defendant Bielamowicz's statement. Defendant McCullough then called the Maxwells on behalf of Oaks & Diamonds and offered to sell them the same real estate for $3,000.00 per acre, minus the mineral estate (which Oaks & Diamonds reserved for itself). The Maxwells reluctantly agreed to purchase the property at more than twice the original price.

178. Defendants McCullough, Bielamowicz, Leamon and Guaranty Title conspired to defraud both the Maxwells and the McIntosh estate. Defendants Bielamowicz and Leamon were able to "double-dip" on real estate commissions by selling the property twice. Meanwhile, the Maxwells paid more than the contract price, the McIntosh estate received less than what the property was worth, and Defendant Oaks and Diamonds got to keep the difference (as well as the mineral estate). Further discovery will likely reveal that Defendant Boykin, acting through Guaranty title, personally participated in the fraudulent scheme.

First Amended Complaint, pp. 37-38.

Jimmy Czajkowski

179. Like the Maxwells, Jimmy Czajkowski contracted with Defendant Leamon's real estate firm in 2006 to purchase property that was part of the Adell McIntosh estate. Mr. Czajkowski signed a

contract to purchase the house and the lot – variously described as 0.76 and 0.801 acres – across the street from his house for $15,000.00.

180. Before closing, Defendant Bielamowicz called Mr. Czajkowski and told him he needed to retrieve his earnest money deposit, because Defendant Guaranty title was unable to determine clear title to the land. When Mr. Czajkowski and his attorney objected, Defendant Bielamowicz told each of them they just needed to trust Defendant Leamon.

181. Shortly thereafter, Defendant Oaks & Diamonds purchased the property from the estate of Adell McIntosh by general warranty deed. In other words, Defendant Guaranty Title had been able to determine clear title, contrary to Defendant Bielamowicz's statement. Defendant McCullough then called Mr. Czajkowski on behalf of Oaks & Diamonds and offered to sell him the same real estate for the same price, minus the mineral estate (which Oaks & Diamonds reserved for itself). Someone else purchased the property and later offered it to Mr. Czajkowski for $40,000.00. He declined the offer.

182. Once again, Defendants McCullough, Bielamowicz, Leamon and Guaranty Title conspired to defraud both the McIntosh estate and the original buyer. Further discovery will likely reveal that Defendant Boykin, acting through Guaranty Title, personally participated in the fraudulent scheme.

First Amended Complaint, p. 38.

The Erickson Estate

183. In May of 1998, Leroy and Nancy Erickson drove from their home in Southern California to Robertson County to view 30 acres that Mr. Erickson had inherited from his mother. [Plaintiff] Janna Gossen, Mr. Erickson's sister, also inherited an interest in the acreage. The Ericksons were trying to decide whether to build a home and retire in Robertson County or sell the land. When they drove to the landlocked property, Defendant Dick Milstead, a neighboring landowner, greeted them and allowed them to cross his property to get to theirs. The Ericksons decided to sell the property, and they signed a sales agreement with Defendant Leamon before returning to California.

184. In December of 2000, the Ericksons learned from Defendant Leamon that Mr. Milstead had offered $200 per acre for the estate, and they declined the offer. Mr. Erickson died in May of 2003. In January of 2004, shortly after gas drilling boomed in Robertson County, Defendant Leamon called with an offer of $500 per acre from Defendant Milstead. The offer was to include the mineral estate as well as the surface estate. On January 27, 2004, Defendant Steve Boykin, acting by and through Defendant Guaranty Title, issued a title policy to Dick Milstead for $15,000.00.

185. Mrs. Erickson informed Defendant Leamon that Mr. Erickson had died without a will, and she needed to work with her in-laws to reach a decision. She also informed Mr. Leamon repeatedly that she was not interested in selling the mineral estate, only the surface estate. She also spoke with Defendant Milstead directly.

186. Since he could not purchase the property, Defendant Dick Milstead decided to steal it. On June 12, 2006, his son, Defendant Mark Milstead [previously dismissed], filed an "Original Petition for Appointment of a Receiver, for Trespass to Try Title, For Suit to Quiet Title, and for Declaratory Judgment" in Judge Stem's court. Naturally, he was represented by The Firm. Among the named defendants were Mr. Erickson and Mrs. Gossen. Defendant Mark Milstead claimed he acquired the property from his father under a 1998 deed. No such deed had been filed in the county clerk's office in 1998, and in fact the deed was forged, most likely by Defendant McCullough. Defendant Dick Milstead claimed he had obtained ownership of the 30 acres by adversely possessing it for more than 25 years, and on that basis he purported to transfer ownership to his son. This is truly remarkable, because just three years before Defendant Boykin had issued a title insurance policy to Defendant Milstead declaring Myrtle Erickson's estate to be the rightful owner of the property. Moreover, Defendants Milstead and Leamon had been actively negotiating with Nancy Erickson to purchase the property.

187. In conjunction with the filing of the lawsuit, Defendant McCullough fired an affidavit to permit service upon the defendants by publication. Defendant McCullough claimed that he was unable to locate the defendants, including Mrs. Erickson and Mrs. Gossen, despite having searched courthouse records. This was absurd, as Mrs. Erickson had been paying the taxes on the property and her contact

information was still listed in the county tax assessor-collector's office. Moreover, at least six energy companies had searched the title on the property and found contact information for Mrs. Erickson, Mrs. Gossen, and the other defendants. The Milsteads and Defendant McCullough knew the defendants resided in California, therefore they sought to publish notice in Robertson County newspapers so no one would find out about their land-stealing scheme.

188. Judge Stem once again appointed Defendant Harris to serve as attorney ad litem, ostensibly to represent the interests of the heirs. He also appointed Defendant Leamon as receiver. On November 20, 2006, Judge Stem ratified the theft and declared Defendant Mark Milstead the owner of the property. He awarded Defendants Leamon and Harris each a $1,000.00 fee. He also awarded The Firm $7,500.00 for attorney fees – roughly twice the market rate for the services they provided.

189. In August of 2007, Mrs. Erickson's daughter, Tina DeSoto, offered to help sort out the various tax bills from the properties that had originally belonged to Myrtle Erickson, the mother of Leroy Erickson and Janna Gossen. She discovered that there was no tax bill for 2007. Further research revealed that Myrtle Erickson was no longer listed as the owner. Instead, Defendant Mark Milstead, the son of Defendant Dick Milstead, was listed as the owner on county tax records.

First Amended Complaint, pp. 39-41.

Clifton Muzyka

190. In 1996, Plaintiff Clifton Muzyka's mother died, leaving him a one-third undivided interest in approximately 500 acres. Defendants Michael Muzyka and Catherine Motley, his brother and sister, each inherited an undivided one-third interest. Some time in 2004, Defendants Russ and McCullough decided they wanted the mineral estate attached to the 500 acres, and they conspired with Defendants Muzyka and Motley to take Plaintiff Muzyka's interest in the estate. Specifically, Defendants Russ and McCullough recruited Defendants Muzyka and Motley to sue their brother.

191. In early 2007, officials with the Robertson County Sheriff's Office, acting at the direction of Defendants Yezak and Davis [both previously dismissed], arrested Plaintiff Muzyka and charged him with 60 counts of animal cruelty. These defendants alleged that Mr. Muzyka was starving his livestock. The Plaintiffs are aware of other instances in which the sheriff's department refused to take action when livestock were in far worse condition. Further discovery will reveal that Defendants Yezak and Davis undertook this scheme, in conjunction with Defendants Russ, McCullough, Swick [dismissed], Paschall [dismissed] and First Star Bank [dismissed], in order to put financial pressure on Plaintiff Muzyka. The day *before* the sheriff's department arrested Plaintiff Muzyka and seized his livestock, Defendants Swick and First Star Bank initiated foreclosure proceedings on a loan secured by Plaintiff Muzyka's livestock. Moreover, Defendants Russ, McCullough and Paschal colluded with a local justice of the peace to set Mr. Muzyka's bond at $600,000.00 even though the maximum fine for the 60 *misdemeanor* counts was $240,000.00. These defendants were attempting to force Plaintiff Muzyka to relinquish his interest in the estate.

192. After arresting Mr. Muzyka, the sheriff's department did not feed Mr. Muzyka's livestock for days. The sheriff's department took 25 horses belonging to Mr. Muzyka and allegedly gave them away to a non-profit organization, but in fact Defendant Davis kept several mares for himself. Moreover, two witnesses observed Defendant Davis and Defendant Box [dismissed] loading 57 head of cattle into trailers, and those cattle remain unaccounted for to this day. In total, the sheriff's department cannot account for nearly 130 head of cattle that belonged to Mr. Muzyka.

193. Plaintiff Muzyka was later convicted of three counts of animal cruelty. He sought to appeal the conviction, but County Judge Jan Roe told him he would be jailed immediately if he did not waive his right to appeal. Under duress, Plaintiff Muzyka waived his right to appeal. He subsequently filed a motion for new trial after learning that Defendant Davis had withheld exculpatory videotape evidence and tampered with the videotape evidence that was presented at his trial. Judge Roe denied the motion for new trial.

194. In late June of 2007, Plaintiff Muzyka evicted a surveyor from the 500-acre estate. The surveyor claimed that Plaintiff Muzyka

threatened him with a sledgehammer, and the Robertson County Sheriff's Department charged Plaintiff Muzyka with aggravated assault with a deadly weapon. Defendants Russ, McCullough, and Paschal again conspired with a local justice of the peace, this time setting Plaintiff Muzyka's bond at $1 million, all for the purpose of pressuring Mr. Muzyka to relinquish his interest in the estate. While Mr. Muzyka was still in jail, Defendants Russ & McCullough sent him documents trying to get him to sign away most of his interest in the estate.

195. The Muzyka estate was put into receivership, with none other than Defendant Leamon serving as receiver. Plaintiff Muzyka and his wife, Plaintiff Fitzpatrick, sought a $25,000 loan to purchase the home in which they were living on the estate property, and they were approved for the loan. Ms. Fitzpatrick needed various documents from Mr. Leamon to secure the loan, but Mr. Leamon refused to provide them. As a result, Plaintiffs Muzyka and Fitzpatrick could not get the loan, and Defendant Leamon sold the property to someone else. Judge Stem then ordered Plaintiffs and Muzyka out of the house within 30 days. Further discovery will reveal that Defendant Leamon colluded with Defendants Muzyka, Motley, Russ, McCullough, Swick, Paschal and First Star Bank to force Plaintiffs Muzyka and Fitzpatrick from the home.

196. On February 4, 2008, Mr. Muzyka signed a deed of trust securing a $122,500.00 loan against his interest in the 500-acre estate. To avoid further persecution in Robertson County's Third World justice system, Mr. Muzyka agreed to pay his brother and sister $122,500.00 to settle their bogus claim that the share of the estate he received was worth more than the shares they received. The defendants are now trying to foreclose on Mr. Muzyka's interest in the real estate, and Mr. Muzyka seeks to void the deed and the settlement agreement.

First Amended Complaint, pp. 41-43 (emphasis in original).

IV. Relevant Law

A. Motion to Dismiss. When considering a dismissal for failure to state a claim upon which relief may be granted, the Court accepts as true "all well-pleaded

facts" and views them in the light most favorable to the plaintiff. *See Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). However, a plaintiff must allege specific facts, not conclusory allegations. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989). Conclusory allegations, as well as unwarranted deductions of fact, are not admitted as true. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead "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) (emphasis added); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). "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 v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009).

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. 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*.

"Factual allegations must be 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)." *In re Katrina*, 495 F.3d at 205 (quoting *Twombly*).

However, the Court need not accept as true legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Ashcroft v. Iqbal*, at 1949. Only those complaints which state a plausible claim for relief survive a motion to dismiss. *Id*. at 1950. In making this determination, the reviewing court must "draw on its judicial experience and common sense." *Id*. at 1950.

The pleading requirements of a "short and plain statement" found in Rule 8 of the Federal Rules of Civil Procedure do not override the specificity required in pleading "fraud or mistake" in Rule 9. "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid–though still operative–strictures of Rule 8." *Id*. at 1954. "And Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id*.

B. Motion for Summary Judgment. Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a

genuine issue concerning any material fact is on the moving party. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). This burden can be satisfied by pointing out to the district court that there is an absence of evidence to support an essential element of the non-moving party's case. *Id.* Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. *Id.* at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

C. Claims under 42 U.S.C. § 1983. Title 42, United States Code, Section 1983 ("§ 1983") is not a source of substantive rights, but simply provides a "method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). Section 1983 creates a cause of action against any person who, while acting under color of state law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . 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. . . .

Section 1983 was promulgated to prevent ". . .[a government official's] [m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986). *See also Whitley v. Albers*, 475 U.S. 312 (1986) (8th Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (14th Amendment); *Daniels v. Williams*, 474 U.S. 327 (1986) (14th Amendment). Only two allegations are required in order to state a cause of action under § 1983. "First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988). *See also Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252-53 (5th Cir. 2005).

Under § 1983, government officials "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, at 1948; *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). The Plaintiff must plead, therefore, "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 129 S.Ct. at 1948.

D. Claims under RICO. Plaintiffs assert a claim under the Racketeer Influence and Corrupt Organizations Act ("RICO"). The purpose of the Act was to eradicate organized crime in the United States. *Beck v. Prupis*, 529 U.S. 494, 496 (2000).

"RICO attempts to accomplish [this goal] by providing severe criminal penalties . . . and also by means of a civil cause of action for any person 'injured in his business or property by reason of a violation of section 1962.'" *Id*., citing § 1964(c). In their simplest terms, the subsections of § 1962 prohibit the following:

> (a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;
>
> (b) a person cannot acquire or maintain an interest in an enterprise through a pattern of racketeering activity;
>
> (c) a person who is employed by or associated with an enterprise cannot conduct the affairs of the enterprise through a pattern of racketeering activity; and
>
> (d) a person cannot conspire to violate subsections (a), (b), or (c).

Crowe v. Henry, 43 F.3d 198, 203 (5th Cir. 1995). Plaintiffs have not specifically identified which subsection or subsections of § 1962 are applicable to this case. However, regardless of the subsection, RICO claims under § 1962 have the following common elements: "(1) a *person* who engages in (2) a *pattern of racketeering activity* (3) connected to the acquisition, establishment, conduct, or control of an *enterprise*." *Abraham v. Singh*, 480 F.3d at 355, quoting *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). *See also St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000). If the plaintiff's complaint fails to satisfy any one of those three elements, the substantive requirements of the respective RICO subsections need not be analyzed.

The definition of a RICO person "includes any individual or entity capable of holding a legal or beneficial interest in property; . . . ." 18 U.S.C. § 1961(3). The Fifth Circuit has held that "the RICO person and the RICO enterprise must be distinct." *Crowe v. Henry*, 43 F.3d at 205-206, quoting *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986). "A RICO person is the defendant, while a RICO enterprise can be either a legal entity or an association in fact." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d at 440. The RICO person "must be one that either poses or has posed a continuous threat of engaging in acts of racketeering.. . . . The continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts." *Crowe v. Henry*, 43 F.3d at 204, quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989).

A RICO "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." § 1961(4). In other words, as previously noted, the RICO enterprise "can be either a legal entity or an association-in-fact." *Crowe v. Henry*, 43 F.3d at 198. An association-in-fact consists of "an ongoing organization, formal or informal . . . ." *Crowe v. Henry*, 43 F.3d at 205, quoting *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 440 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987). In order to exhibit the continuity required under RICO, an

association-in-fact enterprise must function "as a continuing unit over time through a hierarchical or consensual decision-making structure." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d at 441. The enterprise must also "have an existence separate and apart from the pattern of racketeering." *Crow v. Henry*, 43 F.3d at 205, quoting *Delta Truck*, 855 F.2d at 242.

A "pattern of racketeering activity" "requires at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activities, commonly known as "predicate acts," are defined as acts or threats involving a variety of listed serious offenses,[4] and a "pattern" is defined as two or more acts of racketeering within 10 years, which are *related* and which pose *a threat of continued criminal activity*. *See Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139-40 (5th Cir. 1992). Or, in other words, "'[r]acketeering 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.'"*Abraham v. Singh*, 480 F.3d at 355, quoting *Word of Faith*, 90 F.3d at 122. The predicate acts may be federal or state crimes, but they must be criminal acts. *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009).

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[4] The list includes numerous acts, including murder, kidnaping, gambling, arson, robbery, bribery, sports bribery, extortion, pornography, felony drug offenses, counterfeiting, embezzlement from pension and welfare funds, mail fraud, wire fraud, and numerous other illegal activities. 18 U.S.C. § 1961(1).

The continuity required for a pattern of racketeering activity "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or past conduct that by its nature projects into the future with a threat of repetition." *Abraham v. Singh*, 480 F.3d at 355, quoting *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989). Open-ended continuity can be shown by either demonstrating "that the predicate acts establish a 'specific threat of repetition extending indefinitely into the future' or 'that the predicates are a regular way of conducting the defendant's ongoing legitimate business.'" *Abraham v. Singh*, 480 F.3d at 355, quoting *Word of Faith*, 90 F.3d at 122. It is unnecessary to attempt to differentiate between closed-end or open-ended continuity in those cases "'where alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction,' for in such cases, 'a "pattern of racketeering activity" has not been shown.'" *Id*.

The factor most important in analyzing any of the three elements is continuity – there is no RICO claim without continuous, criminal behavior performed in the past or extending into the future. A continuous pattern of non-criminal acts is insufficient, as is "a limited number of predicate racketeering acts." *Crowe v. Henry*, 43 F.3d at 204, quoting *Delta Truck*, 844 F.2d at 242.

E. Claims for Civil Conspiracy and Fraud. In Texas, a common law claim for civil conspiracy must be premised upon some underlying tort, for which at least one of the co-conspirators is alleged to be responsible. *See Tifford v. Tandem Energy*

Corp., 562 F.3d 699, 709 (5th Cir. 2009); *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). More critically, any claim of civil conspiracy requires a showing of a meeting of the minds on an end to be accomplished, in other words an agreement between co-conspirators. *See Tifford*, 562 F.3d at 709. A plaintiff must provide some factual allegations tending to show that the alleged co-conspirators actually conspired to commit the underlying tort. In order to establish a claim for a civil conspiracy, the plaintiff must prove the following: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Michael v. Dyke*, 41 S.W.3d 746, 753 (Tex.App.–Corpus Christi, 200 1).

Federal Rule of Civil Procedure 9(b) requires that a party claiming fraud "must state with particularity the circumstances constituting fraud." *See* Fed. R. Civ. Pro. 9(b); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 362 (5th Cir. 2002). In Texas, a claim for fraud requires proof of the following elements: (1) a material representation, (2) which was false, (3) the speaker either knew it was false or the representation was a positive assertion made with reckless disregard for the truth, (4) the speaker intended the other party to act upon it, (5) the other party did act in reliance upon it, and (6) the other party suffered an injury. *See Matis v. Golden*, 228 S.W.3d 301, 305-306 (Tex. App.—Waco 2007, no pet.) (citing *Johnson v. Brewer & Prichard, P.C.*, 73 S.W.3d 193, 211 n. 45 (Tex. 2002)).

> Fraud may also occur when (1) a party conceals or fails to disclose a material fact within their knowledge, (2) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, (3) the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and (4) the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Falcon Headwear, Inc., 2006 WL 626381 *1, citing *Bradford v. Vento*, 48 S.W.3d 749, 755-56 (Tex. 2001). However, as a general rule, "a failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Thus, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent." *Bradford v. Vento*, 48 S.W.3d at 755 (citations omitted).

F. Claims for Breach of Fiduciary Duty. The elements of a breach of fiduciary claim under Texas law consist of the following: "(1) a fiduciary relationship must exist between the plaintiff and the defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex.App.–Dallas 2010, no pet.). A third party can be liable for a breach of fiduciary duty when he "knowingly participates in the breach." *Id*. The third party thereby "becomes a joint tortfeasor and liable as such." *Id*., quoting *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex.App.–Dallas 2007, no pet.). Whether a fiduciary duty exists is a question of law for the Court. *Dernick*

Resources, Inc. v. Wilstein, 312 S.W.3d 864, (Tex.App.–Houston[1st Dist.], 2009, no pet.).

G. Claims for Theft and Conversion. While the wrongful acquisition of real property is not a proper subject for Texas conversion claims, the Court is not aware of such a limitation as to the Texas Theft Liability Act. *See Lighthouse Church v. Texas Bank*, 889 S.W.2d 595, 599 n.4 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (no cause of action under Texas law for conversion of realty).

The Texas Theft Liability Act is found at § 134.003 of the Texas Civil Practice and Remedies Code. It provides, "A person who commits theft is liable for the damages resulting from the theft." Tex.Civ.Prac. & Rem.Code Ann. § 134.003(a) (Vernon 2005). The definition of theft under the act includes "unlawfully appropriating property . . . as described by Section 31.03, . . . Penal Code." Tex.Civ.Prac. & Rem.Code Ann. § 134.002(1). The Penal Code provides, in relevant part, "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." Tex.Penal Code Ann. § 31.03(a) (Vernon Supp. 2008). "Appropriate" under § 31.03 means "to acquire or otherwise exercise control over property other than real property." Tex.Penal Code Ann. § 31.01(4)(B) (Vernon Supp. 2008). *See also Ashburn v. Caviness*, 298 S.W.3d 401, 403 (Tex.App.–Amarillo, 2009, no pet.) (No cause of action under Texas law for conversion of realty).

"'Conversion' is the wrongful exercise of dominion and control over another's personal property to the exclusion of or inconsistent with the rights of the owner." *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 599 n.4 (Tex.App.–Houston [14th Dist.], 1994). In order to establish a cause of action for conversion, a plaintiff must prove: "(1) they owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiffs' rights as owners; (3) the plaintiffs demanded return of the property; and (4) the defendant refused to return the property." *J.P. Morgan Chase Bank, N.A. v. Texas Contract Carpet, Inc.*, 302 S.W.3d 515, 536 (Tex.App.–Austin, 2009, no pet.).

H. Claim for Abuse of Process. To establish an abuse of process claim, a plaintiff must show that the "process," while its issuance was originally justified, was later used for an unintended purpose. *See Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 897 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.). The specific elements include (1) an illegal, improper, or perverted use of the process, neither warranted nor authorized by the process, (2) an ulterior motive or purpose in exercising such use, and (3) damages. *See id.*

I. Claim for Equitable Accounting. "An action for accounting may be a suit in equity, or it may be a particular remedy sought in conjunction with another cause of action." *Michael v. Dyke*, 41 S.W.3d 746, 754 (Tex.App.–Corpus Christi, 2001). "An

equitable accounting is proper when the facts and accounts presented are so complex that adequate relief may not be obtained at law." *Id*. *Also T.F.W. Management, Inc. v. Westwood Shores Property Owners Ass'n*, 79 S.W.3d 712, 717. "A suit for an accounting is generally founded in equity. To be entitled to an accounting, a plaintiff usually must have a contractual or fiduciary relationship with the party from which the plaintiff seeks the accounting." *T.F.W. Management, Inc. v. Westwood Shores Property Owners Ass'n*, 79 S.W.3d 712, 717 (Tex.App.–Houston [14th Dist.], 2002) (citations omitted).

J. Limitations.[5] Many of the claims asserted by Plaintiffs are barred by limitations. State law claims for conversion or under the Theft Liability Act are subject to a two year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a) and *Pollard v. Hanschen*, 315 S.W.3d 636, 641 (Tex. App. – Dallas, 2010); *Hoffart v. Wiggins*, No.1:08-CV-46, 2010 WL 816863 (E.D. Tex. 2010). Claims under § 1983 are also subject to a two-year period of limitations. *Whitt v. Stephens County*, 529 F.3d 278, 282 (5th Cir. 2008). As are claims for civil

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[5] Not all Defendants have raised limitations in their motions to dismiss. However, the district court has the authority to dismiss a complaint *sua sponte* for failure to state a claim when the inadequacy of the complaint if apparent as a matter of law. *See Shawnee Intern., N.V. v. Hondo Drilling Co.*, 742 F.2d 234 (5th Cir. 1984). Dismissal in such a circumstance is permissible if the parties are given notice and an opportunity to respond. *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). In this case Plaintiffs were on notice that limitations was an issue because it was raised in some of the Defendants' motions. Also, Plaintiffs have had adequate opportunity to state their "best case," as original complaints were filed in two separate lawsuits and an amended complaint was filed in one. *See Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir.), *cert. denied sub nom. Bazrowx v. Johnson*, 525 U.S. 865 (1998).

conspiracy, *Navarro v. Grant Thornton, LLP*, ___ S.W.3d ___, 2010 WL 2573548 (Tex. App. – Houston [14th Dist.], 2010); TEX CIV. PRAC. & REM. CODE § 16.003; tortious interference with prospective business relationships, *First Nat'l Bank v. Levine*, 721 S.W.2d 287, 288-289 (Tex. 1996) (holding that tortious interference falls within the definition of "trespass" under TEX. CIV. PRAC. & REM. CODE § 16.003(a)); tortious interference with contract, *Gambrinus Co. v. Galveston Beverage, Ltd.*, 264 S.W.3d 283, 289 (Tex. App. – San Antonio, 2008, review denied), citing *Snell v. Sepulveda*, 75 S.W.3d 142, 144 (Tex. App. – San Antonio 2002, no pet.); and abuse of process, *Wohlfahrt v. Holloway*, No. 01-99-00205-CV, 2001 WL 84212 *4 (Tex. App. – Houston [1st Dist.], 2001, review denied), TEX. CIV. PRAC. & REM. CODE § 16.003(a).

Civil RICO claims are subject to a four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). The Fifth Circuit has adopted the "separate accrual" rule for application to limitations in civil RICO actions. "When a pattern of RICO activity causes a continuing series of separate injuries, the 'separate accrual' rule allows a civil RICO claim to accrue for each injury when the plaintiff discovers, or should have discovered, that injury." *Love v. National Medical Enterprises*, 230 F.3d 765, 773 (5th Cir. 2000). Also subject to a four-year limitations period are claims based upon fraud and breach of fiduciary duty; TEX. CIV. PRAC. & REM. CODE § 16.004; as well as

claims for equitable accounting; *Chorman v. McCormick*, 172 S.W.3d 22, 25 (Tex. App. – Amarillo, 2005), TEX. CIV. PRAC. & REM. CODE § 16.051.

K. Client Liability for Attorney Conduct: The allegations against many Defendants consist merely of the decision to retain the Firm or one of its lawyers. Under Texas law, attorneys are granted "limited immunity from civil liability for actions taken within the scope of their employment." *Falcon Headwear, Inc. v. Jackson*, 2006 WL 626381 *2 (S.D. Tex. March 10, 2006). Plaintiffs' Responses note a disagreement among Texas courts as to the liability of clients for the intentional torts of their attorneys, citing *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex.App.–Corpus Christi 1988), for the proposition that "generally the acts and omissions within the scope of [an attorney's] employment are regarded as the clients' acts," but acknowledging that *Bradt v. West*, 892 S.W.2d 56, 76 (Tex.App.–Houston [1st Dist.] 1994), required more than merely being represented by an attorney to be liable for that attorney's intentional wrongful conduct. This Court is inclined to follow the reasoning of *Bradt*, especially in light of a recent unpublished opinion of the Fifth Circuit Court of Appeals which employed the *Bradt* rule. *Guthrie v. Buckley*, 79 Fed.Appx. 637, 639 (5th Cir. 2003) (unpublished). This limited immunity, however, does not extend to conduct "foreign to the duties of an attorney." Falcon Headwear, 2006 WL 626381 *2, quoting Poole v. Houston & T.C. Ry. Co., 58 Tex. 134, 137 (1882). "Fraudulent conduct is of this type." *Id*.

L. Leave to Replead. In their Responses to various Motions to Dismiss, Plaintiffs almost casually request leave to replead if the Court finds that their First Amended Complaint fails to state a claim. They have also filed a separate Motion for Extension of Time to Amend or, in the Alternative, Motion to Amend and a Supplemental Motion to Amend Complaint, in which they first seek to sever and exclude some claims, but then seek to add additional claims.

Plaintiffs have already filed three separate pleadings in either this Court or the Houston Division of the Southern District, the first being filed approximately 15 months ago. Plaintiffs have had ample opportunity to state actual claims or to clarify their existing claims and have failed to do so. When a plaintiff has already filed amendments to a complaint and has had fair opportunity to make a case, a court does not abuse its discretion by denying the plaintiff further leave to replead. *See Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 566 (5th Cir. 2002); *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) ("At some point a court must decide that a plaintiff has had fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit."). The Court is satisfied that Plaintiffs have been given more than enough opportunity to present any amendments. Accordingly, the Motions to Amend Complaint filed in various responses to the Defendants' Motions to Dismiss are **DENIED** as are the Plaintiffs' Motion for Extension of Time to Amend or, in the Alternative, Motion to

Amend (Doc. #159) and Plaintiffs' Supplemental Motion to Amend Complaint (Doc. #170).

VI. Analysis

A. Purely Conclusory Claims. The Plaintiffs assert only conclusory allegations against the following Defendants, whose Motions to Dismiss are **GRANTED** and who are **DISMISSED**: Molly Hedrick (Doc. #100) ; Hollie Elliott (Doc. #77); Jerry Wayne Nichols (Doc. #77); Jerry Baxter (Doc. #120); Dick Milstead (Doc. #134);[6] and Bryan F. Russ, III (Doc. #99).

B. Motion for Summary Judgment filed by Defendants Michael Muzyka and Catherine Motley. Although the First Amended Complaint asserts claims against these Defendants by all Plaintiffs, the only Plaintiffs who have any connection with these claims are Plaintiff Clifton Muzyka and his wife, Plaintiff Carol Fitzpatrick. To the extent any other Plaintiff seeks relief against Defendants Michael Muzyka and Catherine Motley, those claims are **DISMISSED** as the First Amended Complaint fails to adequately state a cause of action on the part of any other Plaintiff.

Plaintiff Clifton Muzyka's claims against these Defendants, his brother and sister, arise out of his unhappiness with the settlement of a lawsuit between the siblings. The summary judgment proof presented by Defendants Michael Muzyka and Catherine Motley establish that Defendant Michael Muzyka filed a lawsuit

[6] Plaintiff's Motion to Strike Defendant Milstead's Motion to Dismiss, included in their Response to the Motion (Doc. #142) is **DENIED**.

against Plaintiff Clifton Muzyka and Defendant Catherine Motley, who were co-executors of their mother's will and co-trustees of Defendant Michael Muzyka's one-third share of their mother's estate. The siblings reached a settlement which required, in part, Plaintiff Clifton Muzyka to execute a note to Defendant Michael Muzyka in the amount of $122,500.00 for the rents and income Clifton had collected on the property since her death. The settlement agreement specifically precludes Defendant Michael Muzyka from selling the note to Defendant "James H. McCullough, or his partners or family members." Attachment to Exhibits, p. 5. Due to the settlement, Plaintiff's claims are barred against these Defendants. Plaintiff Fitzpatrick's claims have no independent factual standing other than the existence of her marriage to Clifton Muzyka. To the extent Plaintiff Muzyka's claims are barred, Plaintiff Fitzpatrick's claims are barred as well.

Plaintiffs argue that the affidavits of Defendants should be stricken as they are mere self-serving declarations. It is the rare affidavit from a party that is not, in some manner, self-serving. However, the affidavits do adequately establish specific facts, including the existence of the lawsuit filed by Defendant Michael Muzyka and the settlement agreement between all of the siblings. Had Plaintiffs had any summary judgment proof to the contrary, they had more than sufficient time to present their own self-serving affidavits. Even if summary judgment were not appropriate, Plaintiffs' claims would still be subject to dismissal as they have failed to state specific facts to hold either Defendant liable under any legal theory asserted.

Accordingly, it is **ORDERED** that the Motion for Summary Judgment filed by Defendants Michael Muzyka and Catherine Motley (Doc. # 131) is **GRANTED** as to the claims asserted against them by Plaintiffs Clifton Muzyka and Carol Fitzpatrick.

Additionally, the claims of these Plaintiffs against any of the remaining Defendants are not supported by the summary judgment proof, are based upon the merest conclusory allegations, and are, for the most part, barred by limitations. Accordingly, any remaining claims asserted by Plaintiffs Clifton Muzyka and Carol Fitzpatrick against any other Defendants are **DISMISSED**.

C. RICO Claims. Plaintiffs' RICO claims against each Defendant fail for the same reasons: (1) they have not identified a RICO enterprise; and (2) they have not identified specific actions which constitute a pattern of racketeering activity. It is impossible to tell from the First Amended Complaint whether Plaintiffs are attempting to use the Firm as a RICO enterprise, one of the many entities created by Defendants Russ and McCullough, or some other association. If the Firm or one of the entities is intended, that would be insufficient to establish a RICO enterprise as Fifth Circuit authority precludes a named Defendant from also being the RICO enterprise. If any other entity is to be the enterprise, Plaintiffs have failed to identify it as such in the Complaint.

Plaintiffs state that mail fraud is the predicate act upon which they base their pattern of racketeering activity. However, with each Defendant they fail to specifically identify what items were mailed, when, by whom, and for what purpose.

Plaintiffs offer nothing more than the general allegation that the Defendants must have used the mail to conduct their business. This is insufficient to establish the pattern of racketeering activity needed to state a claim under RICO. Accordingly, all of Plaintiffs' claims under RICO are **DISMISSED**.

D. § 1983. As previously noted, claims under § 1983 require the deprivation of a protected right by one acting under color of state law. As to the Defendants who have not previously been dismissed, Plaintiffs attempt to establish a claim under 1983 by asserting the Defendants conspired with Judge Stem to deprive Plaintiffs of various rights. The first problem is that Plaintiffs have failed to identify which rights are involved with each Defendant. Second, they offer no more than conclusory allegations of conspiracy. This is insufficient to state a claim under § 1983. Accordingly, all of Plaintiffs' claims under § 1983 are **DISMISSED**.

E. Conspiracy. Whether construed as a conspiracy to commit some criminal act under state law, a conspiracy under RICO, or a conspiracy to violate rights under § 1983, all of Plaintiffs' claims suffer from the same inadequacy – conclusory allegations of conspiracy rather than specific facts. To the extent there are separate causes of action based upon "conspiracy," these claims are also **DISMISSED**.

F. Defendant Shirley Bielamowicz. The extent of the allegations against this Defendant is that she called both Plaintiffs Czajkowski and the Maxwells to tell them to retrieve their earnest money because Guaranty Title was unable to determine clear title to the land. While Guaranty Title may have subsequently issued a title

policy, there is nothing in Plaintiffs' complaint to suggest that what Bielamowicz told them was untrue. Additionally, the acts involving Bielamowicz occurred in 2006. As the Maxwells and Czajkowski were added in the First Amended Complaint filed on September 14, 2009, any claims asserted by these Plaintiffs which have a two-year statute of limitations are barred. The only claims which remain, therefore, are those based on breach of fiduciary duty, and fraud. As previously noted, there is nothing in the complaint to indicate that Bielamowicz's statements to Plaintiffs were untrue, thereby failing to establish a necessary element which would support either claim. Accordingly, Defendant Bielamowicz's Motion to Dismiss (Doc. #106) is **GRANTED**.

G. Defendant Dona E. Harris. In the First Amended Complaint, Defendant Dona E. Harris ("Harris") is identified as an attorney practicing in Franklin, Texas. The factual allegations against Harris revolve around his appointment by Judge Stem as an attorney ad litem or receiver in a number of transactions in which the Firm, Russ and McCullough are alleged to have falsely obtained title to various tracts of land. In each instance, Defendant Harris is alleged to have failed to adequately perform his duties as ad litem or receiver as part of a conspiracy to deprive the rightful owners of their interests in the identified property. The actions involving Defendant Harris occurred, for the most part, more than two years prior to the filing of the First Amended Complaint. The only claims that would survive limitations are those based upon fraud and breach of fiduciary duty. For the most part, the allegations against Defendant Harris establish nothing more than that he was

appointed by Judge Stem to serve as an ad litem or receive, for which he received payment. Any additional claims are based only upon the most conclusory allegations of collusion or conspiracy. Accordingly, it is **ORDERED** that the Motion to Dismiss filed by Dona E. Harris (Doc. #114) is **GRANTED**.

H. The Erwin Heir Majority Plaintiffs. The Erwin Heir Majority consists of Plaintiffs Ruth Ilene Erwin Roberts, Raymond F. Martine, Timothy R. Stone, Brenda Tunnell, Lucinda R. Warnstaff and Elizabeth Ann McKinney, as legal representative of the Estate of Mary M. Lunsford. As previously noted, they reached a settlement with a number of the named Defendants, against whom they are not seeking relief. The settling Defendants are Russ, McCullough, The Firm, Leamon, LK&P, Oaks & Diamonds, Deminimus, Velnon, Flare Royalties, L.P., and Flare Royalties, L.L.C. There being no Defendants which have not settled with these Plaintiffs or which have not already been dismissed, it is **ORDERED** that the remainder of the claims of Plaintiffs Ruth Ilene Erwin Roberts, Raymond F. Martine, Timothy R. Stone, Brenda Tunnell, Lucinda R. Warnstaff and Elizabeth Ann McKinney, as legal representative of the Estate of Mary M. Lunsford are **DISMISSED**.

I. Defendant Nester Leamon. The First Amended Complaint identifies Defendant Nester Leamon ("Leamon") as a real estate agent in Franklin, Texas. The factual allegations against Leamon revolve around his appointment by Judge Stem as a receiver in a number of transactions in which The Firm, Russ and McCullough are alleged to have falsely obtained title to various tracts of land, and

which Leamon as receiver sells to shell companies established by the Defendants to purchase the property at below-market prices.

The complaint against Defendant Leamon by Plaintiffs Czajkowski and the Maxwells involve the allegations is that a real estate agent who worked for his firm called the Plaintiffs and told them they needed to retrieve their earnest money deposit because Defendant Guaranty Title was unable to determine clear title to the land. As with Defendant Bielamowicz, there is nothing to indicate that the information was untrue.

Additionally, those events occurred in 2006 and would be all claims with a two-year statute of limitations. There are no facts to support claims of fraud or breach of fiduciary duty, and the complaint alleges only conclusory allegations. In light of the foregoing, Defendant Leamon's Motion to Dismiss (Doc. #105) is **GRANTED**.

J. Defendants Stephen Boykin and Guaranty Title of Robertson County, Inc.

Defendant Stephen Boykin ("Boykin") was named as a Defendant in the original complaint filed in Houston on June 17, 2009. Defendant Guaranty Title of Robertson County, Inc. ("Guaranty Title") was added as a Defendant in the First Amended Complaint filed in Houston on September 14, 2009. The first events involving the Defendants occurred in April of 2003, when Boykin was appointed as executor in place of Plaintiff Krumnow. Boykin is alleged to have attempted to sale the Krumnow property at below-market prices.

The next allegations against these Defendants assert that they failed to issue title insurance policies on the property sought to be purchased by the Maxwells and Czajkowski. As previously noted, the claims involve actions which occurred some time in 2006. Boykin is mentioned only in the last paragraph of each section, where it is noted that he was working through Guaranty Title. In both instances, the First Amended Complaint notes that further discovery will likely uncover further involvement on his part. The remaining factual situation involving these Defendants deals with the allegation that a title policy was issued to Dick Milstead, which occurred on January 27, 2004. The First Amended Complaint doesn't specify what property was covered by the policy, although it appears, in context, that it deals with the property inherited through Myrtle Erickson. These paragraphs mention only Defendant Guaranty Title, and allege nothing Boykin.

The factual allegations are insufficient to state a claim under any theory against either Boykin or Guaranty Title,[7] and Plaintiffs' claims that are subject to a two-year period of limitations are barred. As Guaranty Title is not mentioned in the paragraphs concerning the Krumnow property, any claims against this Defendant by any Plaintiffs involving the Krumnow property are **DISMISSED**. Any claims arising out of the Erickson property are **DISMISSED** as they occurred more than four years prior to the filing of the Original Complaint in Houston on June 17, 2009, and the

[7] Because the Court finds the First Amended Complaint is insufficient to state a claim, the Defendants' alternative Motion for Summary Judgment is moot and is hereby **DENIED**.

Erickson claims include no factual allegations against Defendant Boykin. As a result, the only remaining claims are fraud and breach of fiduciary duty arising out of the Maxwell and the Czajkowsk properties.

As Defendant Boykin notes, there is no duty under Texas law owed by him or Guaranty Bank to any of the Plaintiffs to issue a title policy. *See Boenker v. American Title Co*., 590 S.W.2d 777 (Tex. Civ. App.–Houston [14th Dist.], 1979, no writ). There is, therefore, no basis for a claim based upon breach of fiduciary duty. As to any fraud claim, Plaintiffs identify no representations or misrepresentations made by either Defendant arising out of any of the property transactions, much less any that were material, intended to be relied upon, that were actually and justifiably relied upon, and that caused damage. Accordingly, it is **ORDERED** that the Motion to Dismiss filed by Stephen Boykin and Guaranty Title (Doc. #113) is **GRANTED** and Defendants' alternative Motion for Summary Judgment (Doc. #113) is **DENIED**.

K. *Remaining Defendants*. Those Defendants remaining are the individuals and organizations which appear to be at the center of the Plaintiffs' claims regarding the allegedly fraudulent land transactions: Bryan F. Russ, Jr. ("Russ"); James McCullough ("McCullough"); Palmos, Russ, McCullough & Russ, LLP ("the Firm"); LK&P, LLC ("LK&P"); Oaks & Diamonds, LLC ("O&D"); Hearne Business Park, LLC ("Hearne"); Flare Royalties, LP ("Flare LP"); Flare Royalties General Partner, LLC ("Flare LLC"); Deminimus Management, LLC ("Deminimus"); Velnon, LLC ("Velnon"); and MACRU, LLC ("MACRU").

1. Defendant MACRU. The allegations against MACRU are found at paragraph 142 of the First Amended Complaint and allege merely that MACRU purchased the Estella Scott property at a tax sale. Plaintiffs' only response to this Defendant's Motion to Dismiss is that MACRU was owned by Defendant McCullough. However, Defendant McCullough and MACRU are separate legal entities. A cause of action against MACRU has to rise and fall on the allegations against it, not against another party. As noted, the only thing MACRU is alleged to have done is to have purchased property at a tax sale. This is insufficient to state a claim under any theory. Plaintiffs offer nothing else against MACRU other than the most conclusory allegations of conspiracy. Accordingly, Defendant MACRU's Motion to Dismiss (Doc. #103) is **GRANTED**.

2. Defendants Deminimus, Velnon, Flare Royalties, L.P.[8] The only Erwin Heir Plaintiff not settling with these Defendants is Plaintiff Roy E. Erwin. As previously noted, Defendant Deminimus, a company owned by Defendants Russ and McCullough, transferred 90% of the mineral interest in the Erwin property to Defendant Velnon. Defendant Russ then initiated a suit for the appointment of a receiver and for a declaratory judgment in Case No. 05-11-17388-CV in the 82nd Judicial District Court of Robertson County styled *Velnon, L.L.C. v. Unknown Heirs of Elizabeth Warren*. After ruling in favor of Velnon, the property was sold to

[8] While Plaintiffs also name Flare Royalties General Partner, LLC, there are no specific factual allegations made separately against this Defendant.

Defendant Flare Royalties, L.P., another company owned by Russ and McCullough. The Erwin Heir Majority Plaintiffs discovered the foregoing, and filed a motion for new trial in the *Velnon* case, which they eventually settled. Plaintiff Roy E. Erwin did not join in the motion for new trial and was not part of the settlement.

As with the previous business entities, Plaintiff Erwin has failed to allege any specific facts which would subject these Defendants to any sort of liability. While Plaintiff Erwin alleges that Defendant Russ and McCullough did various things, the only factual allegations against the business entities was their transfer of property. Additionally, Plaintiff Erwin knew or should have known about the facts giving rise to the claims against the Defendants on or before May 5, 2007 when the Erwin Heir Majority Plaintiffs filed their motion for new trial. As the Original Complaint in this case was filed on May 18, 2009, any claims with a two-year period of limitations are barred. As to the remaining claim, the factual allegations against these Defendants are not sufficient to state claims based upon fraud or breach of fiduciary duty. Accordingly, the Motions to Dismiss filed by Defendants Velnon, LLC (Doc. #104); Deminimus Management, LLC (Doc. #112); Flare Royalties, LP (Doc. #117); and Flare Royalties General Partner, LLC (Doc. #118) are **GRANTED**.

3. Defendant LK&P. The allegations against LK&P deal with the theft of U.S. property, which the Court has already dismissed. Once again Plaintiffs have failed to specifically identify any fraudulent activity on the part of LK&P, or to state any other facts which would support any cause of action. Additionally, the only

injured party is the United States, and Plaintiffs have no authority to bring suit on behalf of the United States. Accordingly, Defendant LK&P, LLC's Motion to Dismiss (Doc. # 122) is **GRANTED**.

4. O&D. The only allegation against O&D is that it purchased acreage from the estate of Adell McIntosh and sold a portion of it to the Maxwells and offered to sale a portion of it to Czajkowski. These facts are insufficient to state a claim under any theory against O&D. Additionally, as the First Amended Complaint asserts that the facts underlying the claims against O&D occurred in 2006, any claims bearing a two-year statute of limitations would be barred. There are insufficient facts asserted to state a claim based upon fraud or breach of fiduciary duty. Again, Plaintiffs offer only the most conclusory allegations of conspiracy. Accordingly, the Motion to Dismiss filed by Defendant Oaks & Diamonds, LLC (Doc. #121) is **GRANTED**.

5. Defendant Hearne. The allegations against Hearne deal with the Booher property. The First Amended Complaint asserts that Hearne was formed by Defendants McCullough, Russ and Baxter to purchase 15.4 acres of real estate in Hearne, Texas from Defendants James Zeig and Zeig Enterprises, Inc. ("the Zeig Defendants"). Hearne was able to purchase the property after Booher did not close on the property, even though he spent significant amounts cleaning up the property.

The allegations against Hearne consist of nothing more than that Hearne purchased the property. Any allegations of wrongdoing were asserted against

McCullough, Russ, Baxter, the Zeig Defendants, and the Firm. As a result, there are insufficient facts asserted against Defendant Hearne to state a claim based upon any legal theory.[9] There are no factual misrepresentations made by Hearne that were relied upon to Plaintiff's detriment, nor was there any fiduciary duty owed to Booher by Hearne. Further, there is nothing to support claims based upon theft or conversion. Accordingly, the Motion to Dismiss filed by Defendant Hearne Business Park, LLC (Doc. #119) is **GRANTED**.

6. Defendants Russ, McCullough, and the Firm. The crux of Plaintiffs' lawsuit is the involvement of Defendants Russ, McCullough and the Firm in various alleged improprieties occurring in Robertson and Falls counties. In the claims which remain, these Defendants are alleged to have worked individually and together to carry out a scheme to create various entities to purchase property sold at tax sales and to then sell them for a profit or to lease the property to various energy companies. The common denominator is the participation of Russ, McCullough and the Firm in allegedly concocting the schemes and executing the steps necessary to obtain ownership to the various properties and conspiring with other named Defendants to attain success in their endeavors.

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[9] Additionally, the First Amended Complaint asserts that two law suits were filed in state court based upon the same claims – that Booher had a superior right to the property. Those suits could bar Plaintiff's claims through res judicata or collateral estoppel.

a. Estella Scott Property. There is no allegation that Defendant Russ is involved in this transaction. Plaintiff Scott asserts that she and her sister conferred with McCullough and Defendant Russ's father in the early 1990's about locating and obtaining clear title to approximately 30 acres in Robertson County in which they had inherited an interest. The First Amended Complaint alleges that the women were told that the property could not be located and that it would not be worth their while to try to obtain clear title as there were a number of heirs. The family stopped paying taxes on the property in 1997 and it was sold at a tax sale in 2007.

The machinations allegedly taken by the Defendants after the property was sold at the tax sale are irrelevant. Any damage to Plaintiff Scott arising out of the sale of the property was caused by the family failing to pay taxes on the property, not the actions of the Defendants. The allegation that Defendant McCullough convinced the family to stop paying taxes is ludicrous on its face, as it did not occur until approximately seven years after the alleged advice was given. As interest in gas exploration did not occur in Robertson County until some time in 2003 or 2004, according to the First Amended Complaint, Defendant McCullough would have needed to be psychic to have anticipated the demand for the Scott property over ten years earlier. Additionally, the heirs knew or should have known in 1997 that the taxes on the property had not been paid. As such, any claims raised by Plaintiff would be barred by limitations.

b. Erwin Heirs' Property. The only remaining Heir is Roy Erwin, Jr. who did not join in the motion which led to the settlement with these Defendants. Once again, the allegations stem from a discussion with some of the Heirs in 1998 about determining the interests of the various Heirs to a 157-acre tract of property in Robertson County. This time the Heirs were told by Defendant Russ that it would not be worthwhile to try to determine their interests. It was not until at least five years later that the interest in gas exploration suddenly made it worthwhile to determine the interests of the Heirs.[10] Again, Defendant Russ would have needed to be psychic to have anticipated the increased demand and value of the Erwin property five years down the road in order to have initiated the "conspiracy" in 1998.

Plaintiff Erwin, Jr. initiated his suit on May 18, 2009 in the Houston case. The motion for new trial was filed by the Erwin Heir Majority Plaintiffs on May 5, 2007. Erwin, Jr. knew or should have known by that date of the injury he had suffered. As a result, any claims bearing a two-year period of limitations are barred, leaving only claims for fraud and breach of fiduciary duty.[11] Plaintiff identifies no material misrepresentations made by Defendant Russ upon which he relied. Nor does he identify any fiduciary duty owed to him by Defendant Russ. Erwin, Jr.'s sister,

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[10] Although not specifically stated in the First Amended Complaint, it would make sense that the initial loss of the property was the result of a failure to pay property taxes.

[11] Even if not barred by limitations, Plaintiff's complaint includes only the most conclusory allegations to support his various claims.

Plaintiff Ruthie Roberts, was the one who retained Defendant Russ, and there is nothing to indicate that he was hired to represent the interests of all of the potential heirs.

c. Ted Booher Attempted Purchase. As noted previously, Defendants Russ, McCullough and Baxter formed Defendant Hearne Business Park, LLC in order to purchase 15.4 acres of real estate in Hearne, Texas owned by Defendants Zeig Enterprises and James Zeig (the "Zeig Defendants"). Plaintiff Booher had contracted with the Zeig Defendants to purchase the property, and had spent additional money to clean up an environmental hazard on the property prior to closing. Plaintiff Booher did not meet the closing date set by the Zeig Defendants, which was more than one year after they entered the original contract for sale. Defendant Hearne Business Park purchased the property. Booher filed suit, but summary judgment was eventually entered in favor of the Zeig Defendants and Hearne Business Park. The Firm then filed suit on behalf of Hearne against Booher, seeking rent for equipment Booher had stored on the property and had not removed. This case was also resolved against Plaintiff Booher, but he eventually was permitted to remove his equipment after paying $225,000 into the registry of the Court.

The Amended Complaint does not contain sufficient facts to establish liability against the Defendants under any theory. Booher does not specify what actions constitute fraud or tortious interference with an ongoing or potential contractual

relationship. Nor is there anything to establish theft or conversion. Finally, there is no fiduciary duty identified which was owed by any of these Defendants to Booher. The problems Booher experienced were due to his own activities – expending substantial resources to clean up property he did not own, and failing to close on the property as requested by the seller.

d. Krumnow Property. As noted, the basis for this claim is the removal of Plaintiff Phillip Krumnow, Jr. as the executor and trustee of his father's estate and the attempted sale of estate property. As previously noted, the 10th Court of Appeals reversed the trial court's appointment of the substitute executor and trustee, but did not reverse the removal of Plaintiff from those positions. There is nothing in any of the claims against Defendants Russ, McCullough or the Firm to indicate that they in any manner benefitted from the removal of Plaintiff. Their only connection with this situation was that the Firm was hired to try to remove Plaintiff Krumnow from his positions. Any other allegations against them are based only upon conclusory allegations of "conspiracy."

e. Maxwell Property and Czajkowski Property. In both cases, Defendant O&D purchased property from the estate of Adell McIntosh after the Maxwells and Czajkowski had attempted to purchase the property. The Maxwells eventually wound up buying the property for more than they originally offered and minus the mineral estate. Czajkowski declined to purchase the property he had earlier attempted to purchase at the higher price demanded of O&D. These events

occurred in 2006, barring any causes of action with a two-year statute of limitation. As to the remaining claims for fraud and breach of fiduciary duty, the complaint identifies no material misrepresentations made by the Plaintiffs and identifies no fiduciary duty owed to the Plaintiffs. Even if limitations were not a bar, the Defendants' wrongdoing is based only upon the conclusory allegation that they conspired with a real estate agent and a title company. This is insufficient to state a claim.

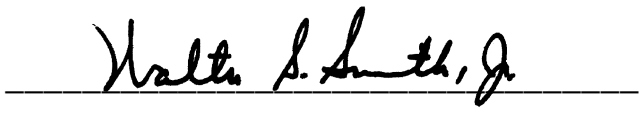
f. The Erickson Estate. The Defendants' connection with this claim is that the Firm represented Mark Milstead in his suit to quiet title and for trespass to try title in regard to property inherited by Plaintiffs Nancy Erickson and Janna Gossen. Both Plaintiffs were added to suit on September 14, 2009. They knew, or should have known, in August of 2007 that there were problems with the title to the property. Therefore, any claims bearing a two-year statute of limitations are barred, leaving only claims for fraud and breach of fiduciary duty. As with other Plaintiffs, they have identified no material misrepresentations made to them by the Defendants, and, they have identified no fiduciary duty owed to them by the Defendants. In light of the foregoing, it is **ORDERED** that the Motions to Dismiss filed by Defendants Bryan F. Russ, Jr. (Doc. #130), James McCullough (Doc. #132), and Palmos, Russ, McCullough & Russ, LLP (Doc. #127) are **GRANTED**.

The intent of that Order was to dismiss all of the Plaintiffs' claims against all of the Defendants who have not previously been dismissed. To the extent there are any remaining Plaintiffs or Defendants, they are **DISMISSED**. It is further

ORDERED that the following motions are **DENIED**: (1) Russ and McCullough Defendants' Rule 37 Motion to Compel (Doc. #102); (2) Plaintiffs' Motion for Protective Order and Motion to Strike Russ and McCullough Defendants' Rule 37 Motion to Compel (Doc. # 123); (3) Defendant Leamon's Motion for a Protective Order (Docs. # 175 and 176); and (4) Defendant Bielamowicz's Third Motion for Protective Order (Doc. # 177.

The various motions for sanctions will be addressed in a separate Order.

SIGNED on this 15th day of October, 2010.



WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE