Case No. 10-51125

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROY E. ERWIN; RUTH ILENE ERWIN ROBERTS; TED BOOHER; ELIZABETH ANN MCKINNEY, as attorney-in-fact for MARY M. LUNSFORD; TODD REYNOLDS; CLIFTON MUZYKA; CAROL FITZPATRICK; PHILLIP KRUMNOW, JR., as representative of the Estate of Phillip Krumnow, Sr., Krumnow Family Trust, and Phil Krumnow, Inc. Employee Pension Trust; RAYMOND F. MARTINE; TIMOTHY R. STONE; LUCINDA R. WARNSTAFF; BRIAN MOORE; MADELINE MOORE; CINDY NICHOLS, individually and as next friend of J.H.; CASSANDRA BUTLER; ALAN EPPERS; CHERYL MAXWELL; WAYNE MAXWELL; JIMMY CZAJKOWSKI; ESTELLA SCOTT; NANCY ERICKSON; and JANNA GOSSEN,

Plaintiffs - Appellants,

vs.

BRYAN F. RUSS, JR.; JAMES H. MCCULLOUGH; NESTOR LEAMON; PALMOS, RUSS, MCCULLOUGH & RUSS, L.L.P.; L K & P, L.L.C; OAKS & DIAMONDS, L.L.C.; VELNON, L.L.C.; DEMINIMUS MANAGEMENT, L.L.C.; FLARE ROYALTIES GENERAL PARTNER; FLARE ROYALTIES, L.P.; LEOR ENERGY, L.P.; ENCANA OIL & GAS (USA), INC.; HEARNE BUSINESS PARK, L.L.C.; RODRICK JACKSON; SHIRLEY BIELAMOWICZ; BLUE WATER SYSTEMS, L.P.; KAREN BOX; STEPHEN BOYKIN; MARC CATALINA; JOE DAVIS; FIRST STAR BANK OF BREMOND; GUARANTY TITLE OF ROBERTSON COUNTY, INC.; DONA E. HARRIS; MACRU, LLC; BETTIE MENDENHALL; DICK MILSTEAD; MARK MILSTEAD; TIM MOORE; TRACEY MOORE; CATHERINE MOTLEY; MICHAEL MUZYKA; JERRY WAYNE NICHOLS; BRYAN F. RUSS, III; KENNETH SWICK; MICHAEL WERLINGER; HEATHER WHEELER; NORA CORA WITHEM; GERALD YEZAK; AMY ZACHMEYER; JERRY BAXTER; MOLLY HEDRICK; and HOLLIE ELLIOTT,

Defendants – Appellees,

Appeal from the United States District Court for the Western District of Texas
Honorable Walter S. Smith, United States District Judge
Case No. W:09-CA-127 *consolidated with* Case No. W:10-CA-005

BRIEF OF PLAINTIFFS / APPELLANTS

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STATEMENT OF THE CASE

The Plaintiffs / Appellants are individuals with business, property, or personal connections to Robertson County, Texas. The Defendants are individuals and companies affiliated in one way or another with Defendants Bryan F. Russ, Jr. and James H. McCullough, attorneys and law partners in Hearne, Texas. The Plaintiffs sued the various Defendants for fraud, breaches of fiduciary duty, racketeering, civil rights violation, civil conspiracy, statutory theft, and conversion. FAC at ¶¶197-217. The district court issued what purported to be a final judgment on October 15, 2010, dismissing all claims on the pleadings, and the Plaintiffs filed a timely notice of appeal. Tab 16, ROA 2882. Three Defendants made requests for attorney fees or sanctions. Docket No. 157, ROA 2641 and Docket No. 186, ROA 2935. After noticing the appeal, the parties realized that the trial court had not fully disposed of all claims and parties, so they moved the trial court to dismiss the remaining claims and certify the case for appeal. Docket No. 200. The trial court dismissed the remaining claims on February 14, 2011, Docket No. 202, and certified the case on February 17, 2011, Docket No. 203, and the Plaintiffs filed an amended notice of appeal. On March 11, 2010, the trial court sanctioned the Plaintiffs and awarded $25,000 in purported attorney fees to various Defendants. *See* Sanctions Order, Tab 18. The Plaintiffs appeal the dismissal of their claims as well as the award of sanctions.

STATEMENT OF FACTS

In a 47-page complaint, the Plaintiffs alleged that Defendant Bryan F. Russ and James McCullough, two law partners in Hearne, Texas, and Judge Robert M. Stem, the state district judge in Robertson County, Texas, ran a white-collar criminal enterprise that affected just about anything that could pass through a small-town law office. *See* FAC.[1] The FAC generally alleges that Defendants Russ and McCullough used their law firm and various shell companies to carry out fraudulent business and real estate transactions. Defendant Palmos, Russ, McCullough & Russ, LLP ("The Firm"), L K & P, LLC, Oaks & Diamonds, LLC, Velnon, LLC, Deminimus Management, LLC, Flare Royalties, LLC, Flare Royalties, LP, and MACRU, LLC are business entities owned or controlled by Russ and McCullough. FAC at ¶¶29-35 and 72. They, together with Defendants Trey Russ, *id*. at ¶26, and Molly Hedrick, *id*. at 41, are referred to collectively as the Russ and McCullough Defendants. The Russ and McCullough Defendants periodically joined forces with other Defendants to steal surface and mineral estates, steal livestock, and corruptly influence almost any kind of court proceeding before Judge Stem. FAC at ¶¶78, 80, and 191-192.

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1 Since this case was decided on the pleadings, the Plaintiffs will incorporate the FAC by reference rather than restate it all here.

ARGUMENT AND AUTHORITIES

Standard of Review

Motions to dismiss and motions for judgment on the pleadings are reviewed *de novo*. *See Association of American Physicians & Surgeons, Inc. v. Texas Association of American Physicians & Surgeons, Inc. v. Texas Medical Bd.*, 627 F.3d 547 (5th Cir. 2010). A grant of summary judgment is reviewed *de novo*, *Bolton v. City of Dallas*, 472 F.3d 261, 263 (5th Cir.2006), while sanctions generally are reviewed for an abuse of discretion. *Fleming & Associates v. Newby & Tittle*, 529 F.3d 631, 641 (5th Cir. 2008). Here, however, the Plaintiffs contend that the trial court erred as a matter of law by failing to comply with the express requirements of the relevant rules and statutes concerning sanctions.

Summary of Argument

The pleading issues in this case are similar to those found in *Chavers v. Morrow*, Case No. 10-20792, which is currently pending before this Court. As a starting point, the Plaintiffs would urge the Court to read the 47-page First Amended Complaint in its entirety, then ponder the district court's conclusion that the Plaintiffs failed to state a single claim against *any* of the defendants on *any* of the numerous causes of action. As set forth below, most of the Defendants answered the complaint without filing a motion to dismiss or a motion for a Rule 7(a) reply. Nonetheless, the trial court refused to allow amendments, then dismissed the case in its entirety. The trial court later admitted, at least implicitly, that some of the claims could have been saved by amendment. Nonetheless, the district judge sanctioned the Plaintiffs and their attorney and assessed attorney fees against them, awarding sanctions and fees to parties that had not even requested them. As a result, the district court should be reversed and the case should be reassigned to a new judge for trial.

Argument

All Plaintiffs (FAC at ¶¶3-24) appeal all claims against all Defendants (*id*. at ¶¶25-75), unless otherwise stated below. Steve Stokely and Todd Reynolds do not appeal, but the undersigned appeals with respect to sanctions attributable to claims brought on behalf of Todd Reynolds. Ted Booher appeals only with respect

to sanctions. The Plaintiffs do not appeal claims against Zeig Enterprises, James Zeig, Delaware Development Company, Larry Aikens, Metropolitan Water Company, W. Scott Carlson, Eleanor Funk, John Paschall, or Gene Wilganowski. Given the complexity of the complaint, and the word limits for this brief, the Plaintiffs must ask the Court to apply the cases and arguments for each cause of action to all parties asserting or defending that cause of action. The Plaintiffs frequently will cite their trial briefs (or incorporate them by reference) for a more detailed discussion.

(1) The trial court improperly applied federal pleading standards.

In holding that the Plaintiffs failed to state a claim, the trial court relied heavily on *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The undersigned cannot pretend to understand exactly what current federal pleading standards are post-*Iqbal* and post-*Twombly*, but he does take some consolation in the fact that much brighter minds have shared the same struggle:

> The Supreme Court's decisions in *Twombly* and *Iqbal* seem to suggest a shift from notice back toward fact pleading. *See e.g.*, Wright & Miller § 1216; West Group, Federal Practice & Procedure Supplemental Service § 1357 (referencing the Notice Pleading Restoration Act of 2009, S. 1504, introduced in the Senate to reinstate pre-*Twombly* standards for the motion to dismiss); and Jay S. Goodman, *Two, New, U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?*, 58 Feb R.I. B.J. 5 (2010). This reversal of over fifty years of Federal Rules of Civil Procedure interpretation will likely bring vast consequences in fairness to plaintiffs while doing little to increase fair notice to defendants. *See* Wright & Miller

> § 1216 ("the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved") (quoting Robert Millar, *Civil Procedure of the Trial Court in Historical Perspective* 190-93 (1952)). Although Plaintiff's Amended Complaint cannot survive the Motion to Dismiss after *Iqbal*, the Court must note that it is uncomfortable with this pleading standard as now applied, especially in the context of Section 1983 and municipal liability.

Hutchison v. Metropolitan Government of Nashville and Davidson County, 685 F.Supp.2d 747, 751-752 (M.D.Tenn. 2010); *see also Jewell Coke Co., L.P. v. ArcelorMittal USA, Inc.*, 2010 WL 4628756, n. 2 (N.D. Ohio) ("The Supreme Court's *Iqbal* and *Twombly* interpretation of Rule 12(b)(6) has been correctly criticized as 'contrary to many of the values underlying the Federal Rules' and 'that the [Supreme] Court's preoccupation with defense costs is misplaced and its belittlement of case management as a way of cabining those costs is unpersuasive.'"), quoting Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: a Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 2 (2010). At least one district court has declined to follow *Iqbal* on the grounds that the relevant language was merely dicta, *see Butt v. United Broth. of Carpenters & Joiners of America*, 2010 WL 2080034 (E.D.Pa. 2010).

The Plaintiffs will not go so far as to say that the *Iqbal* pleading standards are dicta, but it does appear that the court below misconstrued *Twombly* and *Iqbal* as a license to disregard the plain language of Fed. R. Civ. Pro. 8. The confusion seems to arise from the following statement: "Determining whether a complaint

states a plausible claim for relief will… be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

> Plausibility… is a relative measure. Allegations become "conclusory" where they recite only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts. *See Maldonado* [*v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009)]. This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible. *See Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir.2008) (juxtaposing Rule 8(a)'s fair notice and plausibility requirements, as interpreted in *Twombly*).

Chao v. Ballista, 630 F.Supp.2d 170, 178 (D.Mass. 2009). The Supreme Court could not have intended a subjective, "gut feeling" standard that hinges on each individual jurist's belief in human nature (good or ill) or his or her affinity for or aversion to conspiracy theories:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557, 127 S.Ct. 1955.

Iqbal, 129 S.Ct. at 1949. Rule 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era," but "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." 129 S.Ct. at 1950. It would serve no purpose to recite a 47-page complaint here, but suffice it to say that the complaint comes a lot closer to fact pleading than notice pleading, and it certainly contains a lot more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."

Some district courts apparently have interpreted *Iqbal* and *Twombly* as a license to clear their dockets via swift and sweeping dismissals. This Court recently had to caution district courts against reading those cases too broadly:

> The Supreme Court's decisions in *Iqbal* and *Twombly*… did not alter the long-standing requirement that when evaluating a motion to dismiss under Rule 12(b)(6), a court must "'accept[ ] all well-pleaded facts as true and view[ ] those facts in the light most favorable to the plaintiff.'" *True v. Robles*, 571 F.3d 412, 417 (5th Cir.2009) (quoting *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir.2007)). *Iqbal* and *Twombly's* emphasis on the plausibility of a complaint's allegations does not give district courts license to look behind those allegations and independently assess the likelihood that the plaintiff will be able to prove them at trial.

Harold H. Huggins Realty, Inc. v. FNC, Inc., --- F.3d ----, 2011 WL 651892, *7, n.44 (February 24, 2011). As explained herein, the district court ignored pleadings, drew inferences against the pleadings, and even contradicted the pleadings. In fact, the district court even contradicted itself. The district court sanctioned Plaintiffs Roberts, Martine, Stone, Warnstaff and McKinney

(collectively "Erwin Heir Majority") because they supposedly sued the Russ and McCullough Defendants after settling with them. March 11, 2011 Order, 5, Tab 18 ("Especially egregious are the claims of the Erwin Heir Majority Plaintiffs, who had reached a settlement with a number of the Defendants…"). But the complaint explicitly – and repeatedly – stated that the Erwin Plaintiffs were not bringing claims against the Defendants with whom they had settled. FAC at ¶197, 200, 203, 208, 211, 213, and 215. In its October 15, 2010 opinion ("Main Opinion"), the trial court recognized that fact. Tab 16, ROA 2920. But six months later, the trial court reversed itself and sanctioned the Plaintiffs for their "especially egregious" claims, Tab 18, even though the Defendants never alleged that they had been sued in violation of the settlement agreement, much less did they seek sanctions on those grounds.[2]

It is particularly telling that so many Defendants filed answers without moving to dismiss or requesting a more definite statement. *See* Docket No. 2 (Various Russ and McCullough Defendants); Docket No. 7 (Defendant Leamon); and Docket No. 46 (Defendant Bielamowicz). After being served, Defendant Mark Milstead began settlement negotiations, and that fact was made known to the trial court when the parties sought an extension of time to respond to a motion to dismiss. *See* Agreed Motion for Extension of Time, Docket No. 62, ROA 1010.

2 The Russ and McCullough Defendants counterclaimed that the Erwin plaintiffs violated a confidentially provision of a settlement agreement, but they did not allege that the Plaintiffs had sued them in violation of the settlement agreement.

Given the indisputable public record, *see* FAC at ¶¶183-189 and citations to the record therein, the court could have reasonably inferred that someone knew he had been caught red-handed. Settlement negotiations ended, however, when the trial court casually threw out all the claims against Defendant Mark Milstead. *See* Docket No. 95, ROA 1289. In a case such as this, where some of the defendants acknowledged (at least implicitly) that the pleadings had merit, a trial court should not be so gung ho about dismissing the entire lawsuit.

(2) The trial court abused its discretion by refusing to permit amendments.

According to FRCP 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." The U.S. Supreme Court and the Fifth Circuit have construed the rule broadly:

> [Rule 15] evinces a bias in favor of granting leave to amend. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. *See, e. g., Foman v. Davis*, 371 U.S. 178, 182 (1962); *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Sherman v. Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972). Thus, unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial. *See Lone Star Motor Import v. Citroen Cars*, 288 F.2d 69, 75 (5th Cir. 1961). The types of reasons that might justify denial of permission to amend a pleading include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party.

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597-598 (5th Cir. 1981); *see also U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 386 (5th

Cir. 2003). As predicted by the *Dussouy* court, this case has degenerated into "a technical exercise in the fine points of pleading." 660 F.2d at 598. There was no undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies or undue prejudice when the Plaintiffs requested the opportunity to amend.

Dissouy and related cases were provided to the trial court time and again, *see, e.g.*, Docket No. 140, ROA 2503, Docket No. 148, ROA 2573, Docket No. 170, ROA 2731, but nonetheless it categorically refused to permit *any* amendments at *any* time. The trial court faulted the Plaintiffs for its unwillingness to permit amendments:

> 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… The Court is satisfied that Plaintiffs have been given more than enough opportunity to present amendments.

See Main Order, Tab 16, ROA 2914. The trial court's statement is flatly contradicted by the record, so much so that it seems rather disingenuous. Case No. 6:09-cv-127 was first filed in Waco on May 18, 2009. The Plaintiffs decided to abandon that case and pursue the same claims elsewhere, so they never served the parties but instead filed the same complaint in Houston. FAC at 2, n. 1. Before the original complaint was served, the parties amended it to include new parties. *Compare* Docket No. 1 with FAC. Before the amended complaint could be served, however, some of the defendants preemptively answered and counter-

claimed in Waco, *see* Docket No. 2, ROA 60, apparently perceiving some advantage in Waco versus Houston. Other than the original amendment by right – which happened before any defendant was served – the Plaintiffs were *never* allowed to make amendments. In other words, the Plaintiffs were *never* afforded an opportunity to make amendments in response to the Defendants' motions for a more definite statement, motions to dismiss, etc.

And the requests for amendment were not "casual" or frivolous, as the trial court suggested. *See* Main Order, Tab 16, ROA 2914. Plaintiff Alan Eppers, for example, sought to add claims for statutory and common-law interference with child custody. Docket No. 170, ROA 2731 (incorporated herein by reference). Paragraphs 129-132 of the FAC set forth a textbook case of interference with child custody, yet the trial court did not even acknowledge the motion to amend. The Plaintiffs sought to add new information regarding Defendant Boykin's role in defrauding the Erickson heirs, *see* Docket No. 154 (this document and its attachments are incorporated herein by reference), ROA 2616, but the trial court did not allow it. Worse, the trial court implicitly admitted that claims could have been preserved by amendment:

> Perhaps, had the claim been pled properly, there might have been a viable RICO claim against Defendants Russ and McCullough arising out of their actions in snatching up properties at tax sales. But, adding in a variety of unrelated plaintiffs with unrelated claims, such as child custody disputes and false arrest charges, clearly shows that Plaintiffs' attorney multiplied

> the proceedings "unreasonably and vexatiously" to the extent that excess costs and attorneys' fees were incurred by the Defendants.

Sanctions Order, Tab 18, 5.[3] This seems to be the heart of the problem: The trial court was angry because it thought the complaint was too broad. The Plaintiffs offered to sever claims and pare it down, *see* Docket No. 159, ROA 2677, but by then the trial court had already made up its mind. Rather than sever claims or dismiss some of them without prejudice, the trial court just threw the entire case out. *See* Main Order, Tab 16. Then it sanctioned the Plaintiffs and Plaintiffs' Counsel $25,000 for daring to assert their First Amendment rights to petition for redress of grievances. *See* Sanctions Order, Tab 18.

Such an abuse mandates reversal. "[A] plaintiff's failure to meet the specific pleading requirements should not automatically or inflexibility [*sic*] result in dismissal of the complaint with prejudice to re-filing." *Hart v. Bayer Corporation*, 199 F.3d 239, 248 n. 6 (5th Cir. 2000). "Although a court may dismiss the claim, it should not do so without granting leave to amend, unless the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so." *Id*. Thus far, the Plaintiffs have been afforded zero opportunities.

(3) <u>The trial court should not have dismissed the claims of the Erwin heirs</u>.

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3 This statement alone demonstrates just how little attention the trial court paid to the pleadings. Of all the thefts of land and minerals described in the FAC, only one even mentions a tax sale. FAC at ¶141-143. And the tort therein was not premised on the tax sale, but the fraudulent advice given by Defendant McCullough. *Id*.

The FAC provides great detail about how Defendants Encana, Leor, Harris, and Leamon, as well as various Russ and McCullough Defendants, stole mineral interests that belonged to the Erwin heirs. FAC at ¶¶144 – 160.

A. Fraud

Somehow, the trial court concluded that no fraud was involved. *See, e.g.*, July 19 Order Dismissing Encana and Leor, Tab 9, ROA 1182. The trial court's conclusion was contrary to Texas law:

> "In determining issues of fraud courts allow a wide latitude" remaining cognizant that "[f]raud is deductible from artifice and concealment as well as from affirmative conduct of a character to deceive." *Campbell*, 526 S.W.2d at 169. "A party in interest may become liable by mere silent acquiescence for the fraudulent misrepresentations of a third party." *Beazley*, 238 S.W. at 952. "The partaking of the benefits of a fraudulent transaction makes the participants principals and liable as such." *Five Star Transfer & Terminal Warehouse Corp.*, 339 S.W.2d at 387. "Each party to a fraudulent transaction is responsible for the acts of the others done in furtherance of the fraudulent scheme," and "all who participate are liable for the fraud...." *Crisp*, 586 S.W.2d at 615.

Corpus Christi Area Teachers Credit Union v. Hernandez, 814 S.W.2d 195, 202 (Tex.App. – Corpus Christi 1991), cited with approval in *Matis v. Golden*, 228 S.W.3d 301, 310 (Tex.App.-Waco 2007). It is hard to imagine how "artifice and concealment" could not be found in ¶¶146-151 and 159. Even if one were to conclude that the only misrepresentations were made to the state court, *i.e.*, a fraud on that court, the fact remains that the Defendants were the beneficiaries of that fraud and the Erwin heirs were the victims. *See Matis*, 228 S.W.3d at 310, citing

Corpus Christi Area Teachers, 814 S.W.2d at 202 ("[A]ll who participate are liable for the fraud, ... irrespective of proof that they shared in the profits, for the gravamen of the action is injury to plaintiff and not benefit to defendant."). Moreover, Defendant Harris perpetrated a fraud on the Erwin heirs because, as their attorney ad litem, he had a duty to disclose the scam, but instead he participated in it. *See* FAC at ¶¶149 and 151; *see also* ¶¶78 and 136-137 (showing Defendant Harris's ongoing role in the fraudulent scheme).

Paragraph 154 of the FAC plainly describes the role of Defendants Encana and Leor in the fraudulent scheme, yet the trial court concluded they were not liable because "Plaintiffs have not specifically identified what actions of [Encana and Leor] were fraudulent and certainly have not met the heightened pleading requirements necessary for a fraud allegation." As noted above, however, the Plaintiffs need only describe how the Defendants were aware of the fraudulent scheme and benefited from it, not that they made false representations themselves. The trial court faulted the Plaintiffs because they supposedly did not explain the nature and the source of the warning to Encana and Leor in ¶154 of the FAC. *See* Tab 9, ROA 1179. The Plaintiffs think it should be self-evident in that paragraph that Mr. Lunsford gave the warning, but they certainly could have amended the complaint to make that clearer, and they could certainly add more detail about the contents of Mr. Lunsford's warning to the Defendants. But the trial court went a

step further – once again construing facts in a light most favorable to the Defendants – by holding that Leor must not have done anything wrong because it dispatched a landman in response to Mr. Lunsford's warnings. ROA 1179. That's quite a reach. If Leor and Encana want to argue that they were acting in good faith by sending the landman, they can try that argument with the jury. A more plausible explanation is that the landman discovered exactly what Burlington Resources had discovered, *see* ¶154, *i.e.*, that the mineral estate belonged to the Erwin heirs. But whereas Burlington Resources kept its hands clean, Leor and Encana apparently thought they were safe because their co-conspirators, *i.e.*, Defendants Russ and McCullough, owned the local judge who had sanctioned the scam. If that wasn't clear enough, the Plaintiffs could have easily amended their complaint – that is, if the trial court had not systematically refused to allow amendments.

B. Breach of Fiduciary Duties

Defendants Encana and Leor, as well as all the other Defendants identified in ¶¶144-160, are further liable for the fiduciary breaches of Defendants Harris, Bryan F. Russ, Jr., The Firm, and even Judge Robert Stem. The trial court correctly cited the elements of a fiduciary breach, and it further noted that a third party can be held liable for a breach of fiduciary duty when he "knowingly participates in the breach," Tab 9, ROA 2908, quoting *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex.App. – Dallas 2010, no pet.), yet it dismissed the

claims. It should be self-evident that Defendant Bryan F. Russ, Jr., had a fiduciary relationship with Plaintiff Roberts (and, by privity, her fellow Erwin heirs) because he served as her attorney with respect to the property at issue. *See* FAC at ¶144. Even though he is no longer liable to Plaintiff Roberts because of a settlement, he is still liable to Plaintiff Erwin (who did not settle with Mr. Russ), and his non-settling co-defendants are still liable to all the Erwin heirs for his breach. Defendant Harris's fiduciary breach is equally self-evident, because he was the attorney ad litem for the Erwin Heirs, yet he aided and abetted the swindle.

Judge Stem also had a fiduciary duty to the Plaintiffs as a public official and an officer of the court. "[A] public officer occupies a fiduciary relationship to the political entity on whose behalf he or she serves, and stands in a fiduciary relationship to the citizens that he or she has been elected to serve." 63C Am. Jur. 2d Public Officers and Employees § 241, citing *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181 (Ill. 1980) and *Felkner v. Chariho Regional School Committee*, 968 A.2d 865 (R.I. 2009). Under Texas law, a public official may be held liable for breach of fiduciary duty where the official wrongfully performs public duties in bad faith. *Souder v. Cannon*, 235 S.W.3d 841, 852-858 (Tex.App.-Fort Worth 2007). While judicial immunity protects Judge Stem from liability for his fiduciary breaches, it does not protect his co-conspirators. *See Dennis v.*

Sparks, 449 U.S. 24 (1980) (Private parties liable under 42 U.S.C. §1983 for corruptly conspiring with a state district judge against defendants).

If Judge Stem is helping his cronies steal mineral interests from the Erwin heirs, his cronies are liable for his fiduciary breach.

C. Racketeering

The trial court faulted the Plaintiffs because: "(1) they have not identified a RICO enterprise; and (2) they have not identified specific actions which constitute a pattern of racketeering activity." October 15, 2011 Order, ROA 2917. "It is impossible to tell whether the 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." *Id*. The enterprise is an association-in-fact led by Defendants Bryan F. Russ, Jr. and McCullough, as well as Judge Stem. *See* FAC at ¶78. A fair reading of the FAC shows that Defendants Trey Russ, Leamon, The Firm, L K & P, Oaks & Diamonds, Velnon, Deminimus, Flare Royalties, Hearne Business Park, Hedrick, Boykin, Harris, Guaranty Title, MACRU, and Baxter are all part of the enterprise. If permitted to amend, the Plaintiffs could have made that clearer.

The trial court further faulted the Plaintiffs because "they have not identified specific actions which constitute a pattern of racketeering activity." *Id*. at 2917. The trial court itself acknowledged that the Plaintiffs alleged mail fraud,

but it faulted the Plaintiffs because "they fail to specifically identify which items were mailed, by whom, and for what purpose." *Id*. That certainly is not true with respect to Paragraph 172 of the FAC. And the Plaintiffs repeatedly offered to amend the complaint to add more detail about the mailings, *see, e.g.*, Docket No. 148, ROA 2571 and Docket No. 149, ROA 2584, all of which was readily obtainable from the certificates of service on file at the Robertson County Courthouse. However, as noted above, the trial court refused to permit any amendments. Nonetheless, the Plaintiffs pointed the trial court to the obvious: the Defendants' "ongoing real estate fraud and litigation fraud inevitably involved the use of the United States mail, *e.g.*, sending notice to opposing counsel." Docket No. 149, ROA 2584. And the FAC itself noted that Defendant Encana used the U.S. Mail to send out stolen royalty proceeds. *See* FAC at ¶154.

The elements of mail fraud are different from, and less stringent than, those of common-law fraud:

> The mailings themselves need not be essential to the defendant's scheme; rather, the mailings must have been made to execute the scheme. *See Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *see also[United States v.] Silvano*, 812 F.2d [754,] 760 ("A mailing need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions."). There is no requirement that the defendant herself was responsible for the mailing that establishes the jurisdictional hook. *See United States v. Morrow*, 39 F.3d 1228, 1237 (1st Cir.1994).

U.S. v. Sawyer, 239 F.3d 31, 39-40 (1st Cir. 2001). Certainly it was "reasonably foreseeable" that the Defendants would be using the mail to send documents to court officials and opposing counsel. The U.S. Supreme Court recently re-emphasized that the elements of mail fraud are less stringent than common-law fraud:

> Mail fraud… occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." [18 USC] § 1341. The gravamen of the offense is the scheme to defraud, and any "mailing that is incident to an essential part of the scheme satisfies the mailing element," *Schmuck v. United States*, 489 U.S. 705, 712, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (citation and internal quotation marks omitted), even if the mailing itself "contain[s] no false information," *id.*, at 715, 109 S.Ct. 1443.

Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008). The Supreme Court held that the plaintiffs need not have relied on anything contained in the mailings that underlie the mail fraud. *Id*. *Bridge* could be analogized to the present case insofar as the plaintiffs were actually third parties injured by a fraud perpetrated on the county, just like the Defendants herein were perpetrating a fraud on the state court. Accordingly, when the Defendants mailed court documents and royalty checks pursuant to their scheme, they engaged in mail fraud.

The trial court overlooked other predicate offenses for racketeering, *e.g.*, bribery, retaliation against a witness, and obstruction of justice. 18 U.S.C. §1961(1). And the Plaintiffs didn't just make allegations. The Plaintiffs presented

uncontested evidence that Judge Stem and the Russ and McCullough Defendants coerced Plaintiff Eppers to testify in Judge Stem's chambers, then used the coerced testimony to try to frame the undersigned for barratry.[4] *See* Docket No. 13, ROA 331 (and attachments) and Docket No. 16, ROA 369 (motion for criminal referral).

Finally, the trial court overlooked the breadth of conspiracy liability:

> A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all the participants therein." *Hoffman-LaRoche, Inc. [v. Greenberg]*, 447 F.2d [872] at 875 [(7th Cir.1971)]. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." Id… Frequently, a conspiracy must be proven with circumstantial evidence because "[r]arely ... will there be direct evidence of an express agreement among all the conspirators to conspire." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260 (7th Cir.1984).

Snell v. Tunnell, 920 F.2d 673, 702 (10th Cir. 1990)(dealing with 42 U.S.C. §1983 conspiracy liability). Liability for a racketeering conspiracy, however, is even broader:

> [I]t is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs… [T]o prove

4 Plaintiffs' Counsel is glad to report that he was unanimously no-billed in 2010 by the grand jury of Judge Stem's court.

> a RICO conspiracy no actual acts of racketeering need occur; there need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy.

U.S. v. Marmolejo, 89 F.3d 1185, 1196 (5th Cir. 1996)(citations omitted).

D. Civil Conspiracy

As noted above, a conspiracy under federal law usually must be proved with circumstantial evidence. The same is true under Texas law. *See* 12 Tex. Jur. 3d Civil Conspiracy § 13, and cases cited therein. Once established, conspiracy liability is quite broad. "Upon entering a conspiracy, one becomes party to all acts previously or subsequently done by any of the conspirators pursuant to the conspiracy." *Id*. at §2, citing *State v. Standard Oil Co.*, 130 Tex. 313, 107 S.W.2d 550 (1937); *Mims v. Bohn*, 536 S.W.2d 568 (Tex. Civ. App. Dallas 1976); *Bourland v. State*, 528 S.W.2d 350 (Tex. Civ. App. Austin 1975), *writ refused n.r.e.*, (Feb. 4, 1976). The FAC plainly states numerous overt acts by various Defendants within the limitations periods of the various causes of action. Thus, for example, when Defendants Encana and Leor decided to "get in bed" with The Firm, *see* ¶¶146 and 154, they became liable to all the Plaintiffs, *e.g.*, Plaintiff Erickson and Plaintiff Gossen, for all the prior and subsequent acts of the The Firm and the other co-conspirators.

E. Theft and Conversion

The trial court correctly concluded that theft and conversion claims do not apply to real property. Main Order, Tab 16, ROA 2909-2910. However, it overlooked the fact that certain of the stolen property, *i.e.*, royalty payments, *see* FAC at ¶¶154 and 159, is personal property under Texas law. "Royalties become personal property once the mineral estate is severed from the real estate at the well head." *Amoco Production Co. v. Wood*, 113 S.W.3d 462, 466 (Tex.App.-Texarkana 2003), citing *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812, 817 (Tex.1974) and *Rogers v. Ricane Enters., Inc.*, 930 S.W.2d 157, 165 (Tex.App.-Amarillo 1996, no writ).

F. 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). "Generally, an accounting is appropriate when there was a close fiduciary relationship between the parties." *Sauceda v. Kerlin*, 164 S.W.3d 892, 927 (Tex.App.—Corpus Christi 2005, rev'd on other grounds), citing *Richardson v. First National Life Ins. Co.*, 419 S.W.2d 836, 838 (Tex. 1967). To the extent the Defendants breached their fiduciary duties, *e.g.*, doling out royalty proceeds to their co-conspirators, they should have been required to provide an accounting.

(4) The trial court should not have dismissed the claims of Alan Eppers.

Paragraphs 129-132 of the FAC set forth a textbook case of statutory and common-law interference with child custody. *See* Tex. Family Code § 42.002 and *In re J.G.W.*, 54 S.W.3d 826 (Tex.App.-Texarkana 2001)(common law). The Plaintiffs sought permission to amend the complaint to add these claims, *see* Docket No. 170, ROA 2730, and the trial court erred by arbitrarily refusing to permit amendments.

Even so, Plaintiff Eppers properly stated claims against the Defendants for fiduciary breaches and civil rights violations. Judge Stem improperly rules in favor of clients of The Firm, regardless of the merits. *See* FAC at ¶¶80 and 123 (Defendant Bryan F. Russ, Jr. boasted that he had Judge Stem "in his back pocket"); *see also* FAC at ¶¶103, 117, 137, 159 and 172 (Defendant Russ secretly served as Judge Stem's personal attorney). "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). When Judge Stem acted with prejudice against Plaintiff Eppers, he violated the Due Process rights of Plaintiff Eppers, and The Firm and Defendant Russ are liable for inducing Judge Stem to act improperly. Judge Stem had a serious conflict of interest because The Firm was secretly representing him. *See* FAC at ¶172. Insofar as The Firm has refused to produce documents or answer questions about its relationship with Judge Stem, a

jury could reasonably infer other *quid pro quo* arrangements. Why else would a judge go to all the lengths set forth in the FAC to favor clients of a particular firm? Under the holding of *Dennis v. Sparks*, 449 U.S. 24 (1980), the Defendants would be liable for Judge Stem's tainted rulings. Likewise, for the reasons set forth above, the Defendants would be liable for conspiring with Judge Stem to breach his fiduciary duties.

Defendant Elliott's liability is a more complex question. The trial court chose to follow *Bradt v. West*, 892 S.W.2d 56, 76 (Tex.App. – Houston [1st Dist.] 1994) rather than *Southwestern Bell Telephone Co. v. Wilson*, 78 S.W.2d 755, 759 (Tex.App. – Corpus Christi 1988), which held that "generally the acts and omissions within the scope of [an attorney's] employment are regarded as the clients' acts." ROA 2913.[5] The trial court noted an unpublished opinion from this Court which employed the *Bradt* rule. ROA 2913, citing *Guthrie v. Buckley*, 79 Fed.Appx. 637, 639 (5th Cir. 2003). Even so, the trial court noted that the limited immunity of *Bradt* "does not extend to conduct 'foreign to the duties of an attorney,'" ROA 2913, citing *Falcon Headwear, Inc. v. Jackson*, 2006 WL 626381, *2 (S.D. Tex. March 10, 2006). "Fraudulent conduct is of this type." *Id*. If Defendant Russ was bribing or otherwise improperly influencing Judge Stem, such conduct certainly would be "foreign to the duties of an attorney," thus

5 To the extent the conflicting opinions are relevant to this Court's decision, the Plaintiffs would urge the Court to certify a question to the Texas Supreme Court regarding which opinion is correct.

Defendant Elliot should be liable for the acts of her attorneys. Moreover, it is common knowledge that The Firm has improper influence over Judge Stem, *see* FAC at ¶¶80, 103, 123, 117, 137, 159 and 172, and indeed the services of The Firm are sought out precisely because of its improper influence over Judge Stem. *See* FAC at ¶80. If permitted, the Plaintiffs would have amended the complaint to expressly state that Defendant Elliott, and all the other Defendants who retained The Firm, did so with the knowledge of its improper influence over Judge Stem, and with the intent that it exercise that improper influence. If a client knowingly retains a crooked lawyer because he has a judge "in his back pocket," FAC at ¶22, reason alone dictates that the client should be held responsible for the resulting damage.

(5) The trial court should not have dismissed the claims of Cassandra Butler.

The FAC plainly describes Equal Protection violations and unlawful retaliation against Plaintiff Butler for the exercise of her First Amendment rights. *See* FAC at ¶¶123-128. As set forth in the Plaintiff's April 5, 2010 opposition to a motion to dismiss, Docket 69, ROA 163 (incorporated herein by reference), Defendants Werlinger and Catalina are not protected by legislative immunity, because their acts of retaliation were not legislative acts. Moreover, Defendant Bryan F. Russ, Jr. cannot possibly claim legislative immunity, and it is not clear whether or why the trial court thought he was immune. Even if the Court

concluded that Defendants Werlinger and Catalina were legislatively immune in their *individual* capacities, Defendant Russ would still be liable for conspiring with them. And Plaintiff Butler did not restrict her claims to individual capacity claims.

A lawsuit against Defendants Werlinger and Catalina in their official capacities as councilmen is equivalent to a lawsuit against the City of Hearne. *See, e.g., Brooks v. George County, Miss.*, 84 F.3d 157, 165 (5th Cir. 1996). The Plaintiffs did not address this distinction below because the Defendants did not raise the issue, but they could have amended the complaint to explain the distinction if they had been permitted to make amendments. The Plaintiffs are not aware of any form of immunity – qualified, legislative, etc. – that could protect the City of Hearne from the official and unlawful acts of its city council. Accordingly, the City of Hearne, via Defendants Werlinger and Catalina, remains liable to Plaintiff Butler.

(6) The trial court should not have dismissed the claims of the Erickson heirs.

The Plaintiffs described in considerable detail how the Defendants stole title to 30 acres in Robertson County. *See* FAC at ¶¶183-189. The wrongdoing occurred within the four-year limitations period for racketeering, fraud and breach of fiduciary duty claims.[6] *Id*. at ¶188. In fact, the claims were not discovered until

6 Defendant Harris clearly breached his fiduciary duties to his clients, and Judge Stem clearly breached his duties as a public official.

August of 2007. *Id*. at ¶189. Faced with this, Defendant Mark Milstead entered settlement negotiations, and that was made known to the trial court when the parties sought more time to work out the settlement terms. *See* Docket No. 62, ROA 1010 and Docket No. 71, ROA 71.

Meanwhile, Defendant Dick Milstead defaulted. Docket No. 111 (clerk's entry of default), ROA 111. After the default was entered, Dick Milstead's attorney purported to file a motion to dismiss, Docket No. 134, ROA 2442, and an answer, Docket No. 135, 2460. The Plaintiffs objected, noting that the answer and the motion were untimely, and they were foreclosed by the default. Docket No. 142, ROA 2521 (incorporated fully herein by reference). The Plaintiffs further objected because Defendant Milstead cited no legal authority in his motion, and he made numerous factual averments without any evidentiary support. *Id*. The Plaintiffs moved the trial court to strike the untimely motion for the foregoing reasons, *id*., and the trial court erred in failing to do so.

After the default was entered, Dick Milstead had one option: he could move to set aside the default. *See* Fed. R. Civ. Pro. 55(c). He did not do that. Nonetheless, in an abundance of caution, the Plaintiffs explained why Dick Milstead's arguments regarding dismissal were in error. Docket No. 142, ROA 2521. In response, the trial court did not even pretend to set aside the default, much less address the arguments or the law. Instead, the trial court simply wrote

that "Defendant Milstead filed an answer in this case," and it purported to deny Plaintiffs' Request for Entry of Default and Motion for Default Judgment, even though the default had already been entered. Docket 161, Tab 15, ROA 2687. Then, of course, the trial court just arbitrarily dismissed all claims against all Defendants.

The Plaintiffs' claims against Defendants Mark Milstead, Dick Milstead, Leamon, Harris, McCullough, and The Firm were properly alleged, and the trial court erred in dismissing them.

(7) The Court should not have dismissed the claims of Clifton Muzyka and Carol Fitzpatrick.

The Plaintiffs set forth detailed allegations about the way in which various Defendants deprived Plaintiffs Muzyka and Fitzpatrick of their property and their Constitutional rights. See FAC at ¶¶190-196. And, once again, the trial court disregarded the pleadings and casually threw out all the claims.

A. Civil rights violations

Plaintiff Muzyka alleged a rather straightforward case of selective prosecution and selective enforcement:

> A violation of equal protection by selective enforcement [arises]… if a person, compared with others similarly situated, is selectively treated, if such selective treatment is based on impermissible considerations such as race, religion, or intent to inhibit or punish the exercise of constitutional rights, or if such selective treatment is based on a malicious or bad faith intent to injure a person.

16B Am. Jur. 2d Constitutional Law §941, 1 (citations omitted); *see also Bryan v. City of Madison*, 213 F.3d 267, 276-277 (5th Cir. 2000). With respect to the charge of animal cruelty against Plaintiff Muzyka, the Plaintiffs plainly alleged that they "are aware of other instances in which the sheriff's department refused to take action when livestock were in far worse condition." FAC at ¶191. The Plaintiffs further alleged that discovery *will* reveal that "Defendants Yezak and Davis undertook this scheme, in conjunction with Defendants Russ, McCullough, Swick, Paschall and First Star Bank, in order to put financial pressure on Plaintiff Muzyka," *id*., and such pleadings are permitted by Fed. R. Civ. Pro. 11(b)(3). The Defendants violated Plaintiff Muzyka's equal protection rights, therefore they are liable to him under 42 U.S.C. §1983. Similarly, the Defendants violated Plaintiff Muzyka's Eighth Amendment right to reasonable bail (see FAC ¶¶191 and 194) and his due process rights. *See, e.g.*, FAC ¶193 (describing Defendant Davis's withholding of exculpatory evidence). The entire conspiracy against Plaintiff Muyzika centered around Defendants Yezak, Davis, and Box and other defendants acting "under color of law," as required by 42 U.S.C. §1983, to deprive Plaintiff Muzyka of liberty and property. FAC at ¶¶190-196. While some of these events occurred outside the two-year limitations period, unlawful acts related to the conspiracy (*see, e.g.*, FAC at ¶¶ 193-194) continued within the limitations period.

B. Racketeering

Plaintiff Muzyka alleged extortion, a predicate racketeering act, *see* 18 U.S.C. 1961(1), though not by name. In Texas, extortion falls under the general theft statute, *see Roberts v. State*, 278 S.W.3d 778 (Tex.App.-San Antonio 2008), and the Plaintiffs alleged theft. FAC at ¶ 210. The relevant pleadings plainly accuse the Defendants of various unlawful acts designed to coerce Plaintiff Muzyka into relinquishing his property, *see* FAC at 190-196, and that is textbook extortion. *See Roberts*, 278 S.W.3d 778. The Plaintiffs tried to amend their complaint to add more detail about the use of U.S. Mail to defraud Plaintiffs Muzyka and Fitzpatrick, Docket No. 27, ROA 474, but the trial court would not permit amendments.

C. Breach of Fiduciary Duty

As noted previously, a public official may be held liable for breach of fiduciary duty where the official wrongfully performs public duties in bad faith. *Souder v. Cannon*, 235 S.W.3d 841, 852-858 (Tex.App.-Fort Worth 2007). Defendant Yezak is the elected Sheriff of Robertson County and Defendants Davis and Box are his deputies. *See* FAC at ¶¶53-55. They breached their fiduciary duties to uphold the law and protect the public when they decided to steal and otherwise violate the legal rights of the Plaintiffs. In the case of Plaintiff Muzyka, in particular, the state entrusted them with his property, and they betrayed that

trust by converting it to their own use. *See* FAC at ¶192. Likewise, Judge Stem, John Paschall and Defendant Leamon were officers of the court, and they breached their duties to Plaintiffs Muzyka and Fitzpatrick by colluding with other parties to deprive him of his liberty and property. *See* FAC at ¶195. Paragraphs 190-196 of the FAC don't give much detail about Judge Stem's role (although the Plaintiffs would have added it if permitted), but elsewhere the FAC explains Judge Stem's role in the swindling schemes of Defendants Russ and McCullough. *See, e.g.*, FAC at ¶¶78, 80, 135-138, 148-151, 159, 164-166, 172-174, and 188.

D. Fraud

Defendants Davis and Box committed fraud when they purported to take livestock as court officers, when in fact they were taking the livestock for their own use.

E. Theft and Conversion

Defendants Davis and Box wrongfully took livestock, *i.e.*, personal property, therefore they and their fellow Defendants are liable for theft and fraud.

F. Limitations

The misconduct described in Paragraphs 190-196 clearly took place within the four-year limitations period for fraud, racketeering, and breach of fiduciary duty. Admittedly, it is not clear whether all events took place within the two-year limitations period for theft, conversion, and civil rights violations[7], *see, e.g.*, FAC

7 The Plaintiffs do not appeal the dismissal of the abuse of process claim.

at ¶192, but the Plaintiffs should have been afforded an opportunity to amend their complaint.

G. The trial court should have denied the motion for summary judgment and stricken the affidavits of Defendants Muzyka and Motley.

The Plaintiffs moved the trial court to strike the affidavits of Defendants Muzyka and Motley because they were self serving. Docket No. 155, ROA 2633 (fully incorporated herein by reference).

> Self-serving declarations – that is, statements made by a defendant in his or her own favor – are not admissible in evidence as proof of the facts asserted. One reason for this rule is the danger in permitting a party to manufacture favorable evidence. Another reason for denying a defendant the right to introduce in evidence his or her exculpatory declaration is that if the defendant were permitted to do so the defendant would be presenting his or her testimony to the jury without taking the witness stand and running the risk of impeachment on cross-examination.

29A Am. Jur. 2d Evidence § 809 (internal citations omitted); see also 31A C.J.S. Evidence §400. The Plaintiffs did not object to the authentication of documents, but the remaining portions of the self-serving affidavits should have been disregarded. ROA 2634. Plaintiff Muzyka alleged that he was coerced into signing a settlement agreement because of ongoing persecution from Defendant Myzuka's and Defendant Motley's government co-defendants. *See* FAC at ¶196. As noted before the trial court, ROA at 2634, the Defendants cannot possibly offer as evidence their assumptions regarding Plaintiff Muzyka's state of mind when he executed the settlement agreement in question. Moreover, Defendants Muzyka and

Motley did not even attempt to deny that their government co-defendants actively persecuted Plaintiff Muzyka.

The trial court wrote that "Plaintiff Fitzpatrick's claims have no independent factual standing other than the existence of her marriage to Clifton Muzyka." Main Order, Tab 16, ROA 2916. This is condescending, and it plainly contradicts the complaint. *See* FAC at ¶195.

(8) The trial court should not have dismissed the claims of Brian and Madeline Moore.

The Plaintiffs incorporate by reference their responses to the motions to dismiss of Amy Zachmeyer, Docket No. 37, ROA 502 and the Moores, Docket No. 60, ROA 998. Some of the civil rights violations alleged by the Plaintiffs occurred outside the two-year statute of limitations period, *see* FAC at ¶113, but the violations continued up to the time of the filing of the lawsuit. *Id*. at ¶117. Moreover, various government Defendants and officials breached their fiduciary duties when colluding with The Firm or Defendants Timothy Moore and Tracey Moore. *Id*. at ¶¶114-116. These allegations could have been clearer and more specific but, of course, the trial court refused to allow amendments.

(9) The trial court should not have dismissed the claims of Cindy Nichols and J.H.

The Plaintiffs incorporate by reference their response to the motion to

dismiss of Defendant Jerry Nichols, Docket 98, ROA 1301. The Plaintiffs should have added more detail about how Defendant Bryan F. Russ, Jr. colluded with Judge Stem and John Paschall to drive Cindy Nichols and J.H. out of their home, but, of course, the trial court refused to permit amendments at any time for any reason. The collusion between Judge Stem and the other Defendants, including Defendants Russ and Nichols, continued within the two-year limitations period, *see* FAC at ¶122, but this should have been made clearer. Regardless, all claims related to Judge Stem's and John Paschall's breaches of their fiduciary duties as public officials would fall within the four-yet limitations period for fiduciary breaches. Moreover, the limitations periods for J.H.'s claims are tolled until she turns 18. Tex. Civ. Prac. & Rem. Code §16.001.

(10) <u>The trial court should not have dismissed the claims of Estella Scott</u>.

In dismissing the claims of Estella Scott, the trial court did more than construe the pleadings in favor of the Defendants – it flatly contradicted the pleadings. Main Order, Tab 16, ROA 2928. "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." *Id*. The Plaintiffs are not sure where the trial court came up with its seven-year figure, because neither the Plaintiffs nor the Defendants suggested it. According to the FAC, the family stopped paying taxes in 1997 (*i.e.*, following the

meeting with Defendant McCullough), and the property was sold at a tax sale in 2007. FAC at ¶141. Nothing in the FAC suggests there was any delay between the time Defendant McCullough gave the advice and the time the family stopped paying taxes, so the trial court's argument does not even make sense. If the trial court was concerned about the delay between the time the family stopped paying taxes and the time the property was sold, the Plaintiffs could have explained that it can take years for a property to be sold for delinquent taxes. The Plaintiffs could have further explained that Plaintiff Scott did not learn about the scam until an attorney ad litem contacted her following the sale in 2007. *See* FAC at ¶147.

The trial court further wrote that because "interest in gas exploration did not occur in Robertson County until some time in 2003 or 2004… Defendant McCullough would have needed to be psychic to have anticipated the demand for the Scott property over ten years earlier." Main Order, Tab 16, ROA 2928. Nothing in the FAC states that Defendant McCullough stole the property just to get the mineral estate. Defendant McCullough has been stealing surface *and* mineral estates for many years, *see, e.g.*, FAC at ¶78. In fact, Defendant McCullough clearly stole at least one other mineral estate before the boom in oil and gas exploration. *See* FAC at ¶¶133-139. The Plaintiffs could have cited a number of other cases where Defendants McCullough and Russ stole surface and mineral estates back in the 1990s, but it seems the trial court was rather anxious to

dismiss this entire case.

And Plaintiff Scott's claims are not barred by limitations. "[B]ecause of the fiduciary relationship between attorney and client, an attorney's misconduct is considered inherently undiscoverable." *Lewis v. Nolan*, 105 S.W.3d 185, 187 (Tex.App.-Houston [14th Dist.] 2003). This is true for fiduciary breaches in general. *See Treuil v. Treuil*, 311 S.W.3d 114, 124 (Tex.App.-Beaumont 2010) ("A fiduciary's conduct can be inherently undiscoverable when the 'person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so.'").

(11) The trial court should not have dismissed the claims of Ted Booher.

Various defendants conspired to interfere with a contract between Plaintiff Ted Booher and Zeig Enterprises. *See* FAC at ¶¶161-165. The purpose of the conspiracy was not only to interfere with the contract but ultimately to acquire the property which was the subject of the contract. *Id*. The interference led to the premature scheduling of the closing despite an agreement to between Booher and Zeig Enterprises to close following remediation of the contaminated property. *Id*.

As the Plaintiffs explained to the trial court, Defendants McCullough, Russ, Baxter, and The Firm extorted and coerced Plaintiff Booher through their improper relationship with Judge Stem. FAC at ¶166. Even though Plaintiff

Booher has settled his claims and only appeals the sanctions order, the other Plaintiffs may proceed against Defendant Baxter and Hearne Business Park because they were part of the racketeering enterprise.

(12) The trial court should not have dismissed the claims of Todd Reynolds.

Defendant Bryan F. Russ, Jr. sabotaged the case of Plaintiff Todd Reynolds, who was then a client of Defendant Russ and The Firm. FAC at ¶¶167. This is a rather straightforward breach of fiduciary duty. When they filed their case, the Plaintiffs believed that Defendant Blue Water was the successor in interest to Defendant MWC. FAC at ¶51. When Blue Water showed that they were not, in fact, the successor to MWC, the Plaintiffs did not oppose Blue Water's motion for summary judgment. *See* Docket No. 68, ROA 1056. If nothing else, Plaintiff Reynolds had a legitimate claim to recover his attorney fees from Defendants Russ and The Firm. The complaint did not state exactly when in 2005 Mr. Reynolds discovered the fiduciary breach, *see* FAC at ¶169, but the Plaintiffs should have been allowed to clarify when it was discovered, *i.e.*, whether it occurred within the four-year limitations period.

(13) The trial court should not have dismissed the claims of Plaintiff Krumnow.

The claims of Plaintiff Krumnow were first asserted on June 17, 2005 when Case No. 6:09-cv-127 was pending in the Southern District of Texas.[8] That's four

8 The district court clerk did not include documents from the Southern District of Texas in the appellate record, but the Plaintiffs have asked the district court to correct the record to include these documents. *See* Motion to Correct Record on Appeal, Tab 2.

years to the day from the time that Defendants Boykin and Harris conspired to sell the property at a below-market price, FAC at ¶172, *i.e.*, within the limitations period for fraud, racketeering, and breach of fiduciary duty claims. As noted in Paragraph 173 of the FAC, an appeals court held that Judge Stem abused his authority when he appointed two cronies, *i.e.*, Defendants Boykin and Harris, to control the sale of the property. All the while, Defendant Bryan F. Russ, Jr. was representing Judge Stem in a real estate dispute, a blatant conflict of interest that both men concealed from the public. FAC at ¶172. The Plaintiffs believe it is abundantly clear that Defendants Bryan F. Russ, Jr., Hedrick, Boykin, and Harris were engaged in fraud, racketeering, and fiduciary breaches. FAC at ¶¶171-178. If permitted, the Plaintiffs would have amended their complaint to make it clearer that Defendants Krumnow, Mendenhall, and Withem hired The Firm precisely because of its control over Judge Stem. Nonetheless, they should be liable because the limited immunity of the *Bradt* rule "does not extend to conduct 'foreign to the duties of an attorney,'" *Falcon Headwear, Inc. v. Jackson*, 2006 WL 626381, *2 (S.D. Tex. March 10, 2006), such as trying to fraudulently sell land to cronies at a below-market price. FAC at ¶¶172.

The trial court might have been concerned about interfering in state court proceedings, though it did not raise the issue. If the trial court believed some issues overlapped (and the Plaintiffs maintain that they do not), then it could have

stayed those portions that might have interfered. But the Plaintiffs do not understand how the trial court could read Paragraphs 171-174 and conclude that Plaintiff Krumnow failed to state a claim. The Plaintiffs would further direct the Court to their response to Stephen Boykin's motion to dismiss, Docket No. 153, ROA 2608 (incorporated herein by reference).

(14) The trial court should not have dismissed the claims of Jimmy Czajkowski and Cheryl and Wayne Maxwell.

The Plaintiffs incorporate by reference their response to the motion to dismiss of Defendant Oaks & Diamonds. Docket No. 150, ROA 2589. The FAC clearly explains how Defendants Bielamowicz, Leamon, McCullough and Oaks & Diamonds defrauded Plaintiff Czajkowski and the Maxwells, as well as the McIntosh estate. FAC at ¶¶175-182. The Plaintiffs further alleged that "further discovery will likely reveal that Defendant Boykin, acting through Guaranty Title, personally participated in the fraudulent scheme." FAC at ¶¶178 and 182. Defendant Boykin faulted the Plaintiffs' pleading that "[f]urther discovery will likely reveal…" his role in attempting to profit from the estate, ROA 2619, but Fed. R. Civ. Pro. 11(b)(3) specifically permits this form of pleading. Defendant McCullough was actually serving as an attorney for the McIntosh estate when he tried to defraud it and the Plaintiffs, and that fact could have been added if the trial court had permitted amendments.

(15) The court should have dismissed the counterclaims with prejudice.

After the Plaintiffs stated their intention to pursue this case in Houston, the Russ and McCullough Defendants preemptively answered an unserved complaint and filed counterclaims in an apparent attempt to keep this litigation in the Waco. See Docket No. 2, ROA 60. The Plaintiffs moved for dismissal and summary judgment, but the trial court denied the motion. *See* Docket No. 35, Tab 5, ROA 544. Ultimately, the claims were dismissed without prejudice, with the consent of the Defendants, so this case could be certified for appeal. Docket No. 203.

The Plaintiffs were entitled to summary judgment and/or dismissal *with* prejudice. The Russ and McCullough Defendants alleged that a confidentiality agreement had been breached, but it should be self evident that one cannot breach confidentiality when discussing something that is not confidential. *See* Motion to Dismiss Counterclaims, Docket No. 5, ROA 87 (incorporated herein by reference). The FAC relies on – and plainly identifies and references – documents that are publicly available in the Robertson County Courthouse in Franklin, Texas. *Id*. Specifically, the Original Complaint identifies and references documents from the state-court case that precipitated the settlement agreement, as well as real estate records in the county clerk's office. *Id*. The Defendants admit as much. *See* Counterclaim, Docket No. 2, ¶¶146 and 148-154. Moreover, the allegedly confidential facts at issue were published in *The Bryan-College Station Eagle* on

May 16, 2007. *See* "Suit stakes claim to royalty rights," http://209.189.226.235/stories/051607/local_20070516013.php; *see also* Counterclaim, ¶158 (admitting the date and existence of the newspaper story). In other words, the facts contained within the FAC were published by a newspaper more than two years before the FAC was filed. Thus nothing in the Original Complaint was confidential, and the Defendants cannot claim any damages because their crimes had been publicly exposed as far back as 2007.

According to the Defendants' interpretation of the settlement agreement, the Plaintiffs should not be able to obtain discovery or even present their case in open court, because "the facts giving rise to the [state-court] lawsuit are confidential and not to be divulged or revealed to anyone not a party to the Settlement Agreement..." Counterclaim, ¶236. The flaw in the Defendants' logic is particularly evident when applied to Plaintiff Erwin, who was not a party to the settlement agreement. Under the Defendants' interpretation, Plaintiff Erwin should not be able to cite the public record in support of his claims, because a settlement agreement supposedly prohibits some of his co-plaintiffs from citing the public record in support of their claims.

State and federal courts have consistently refused such interpretations of confidentiality agreements, going so far as to void agreements that interfered with non-parties' ability to present their claims. *See Hoffman v. Sbarro, Inc.*, 1997 WL

736703 (S.D.N.Y 1997)(to the extent that non-disclosure agreement signed by Sbarro employees "might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void") and *Nestor v. Posner-Gerstenhaber*, 857 So.2d 953 (Fla. Dist. App. 2003) ("Contractual confidentiality agreements… cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case). In *Scott v. Nelson*, Dr. Duke Scott tried to prevent a party with whom he had previously settled from being deposed in another case. 697 S.2d 1300 (Fla. Dist. App. 1997). Dr. Scott cited, as the Defendants do here, a confidentiality provision in the settlement agreement. The Florida court rejected his argument, noting that it was improper to allow defendants "to buy the silence of witnesses with a settlement agreement when the facts of one controversy may be relevant to another." *Id*. at 1301, citing *Kalinauskas v. Wong*, 151 F.R.D. 363, 365-366 (D.Nev. 1993). "While settlement is an important objective, an overzealous quest for alternative dispute resolution can distort the proper role of the court… [S]ettlement agreements which suppress evidence violate the greater public policy." *Wong*, 151 F.R.D. at 367; *see also Wilk v. American Medical Assoc.*, 635 F.2d 1295 (7th Cir. 1980). If settlement agreements cannot prohibit discovery in related litigation, then certainly they cannot prevent litigants from setting forth facts in their pleadings.

Furthermore, Texas courts have long recognized the principle that statements made in the course of judicial proceedings cannot form the basis of a claim for defamation. *See James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982) ("Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made"), citing *Reagan v. Guardian Life Insurance Co.*, 166 S.W.2d 909 (Tex. 1942). Though the Defendants' couch their counterclaim as one for breach of contract, as a practical matter they seek damages for purported defamation. Regardless, the policy that underlies the absolute privilege for judicial pleadings should be applied here. Such a pleadings privilege need not be absolute, as in the case of defamation claims, because a court pleading should not, for example, allow a disgruntled ex-employee to disclose trade secrets in violation of a confidentiality agreement. Nonetheless, plaintiffs who plead facts in support of facially valid claims should not be subject to baseless counterclaims.

The Plaintiffs encourage the Court to compare the February 23, 2010 order, Tab 5, ROA 544, with any of the other orders of dismissal. The trial court clearly had two different pleading standards: one for the Plaintiffs, and another for the Defendants. This further suggests judicial bias.

(16) <u>The trial court had no legal basis for awarding sanctions or attorney fees</u>.

The Sanctions Order variously cites 28 U.S.C. §1927, 42 U.S.C. §1988, and

Fed. R. Civ. Pro. 11 as authority of its award of $25,000 in sanctions / attorney fees, but it is not clear what is awarded to whom on what basis. Regardless, the entire Sanctions Order fails as a matter of law.

Defendants Boykin and Guaranty Title were the only Defendants who requested Rule 11 sanctions. (The Plaintiffs incorporate by reference their response in opposition to the motion for sanctions filed by Defendants Boykin and Guaranty Title. *See* Docket No. 164, ROA 2699.) Any motion for sanctions under Rule 11 must be made *separately* from any other motion or request to the court. Fed.R.Civ.Proc. 11(c)(2); *see also Johnson v. Waddell & Reed, Inc*., 74 F.3d 147, 150-151 (7th Cir. 1996)(sanctions cannot be imposed based on opposing party's request in a brief in support of motion to dismiss). Yet the Court broadly cited Rule 11 in its order awarding sanctions to 21 Defendants. *See* Sanctions Order, Tab 18 at 7 ("Having considered the Johnson factors and the requirements of Rule 11, the Court determines that the Plaintiffs and their attorney should reimburse the Defendants in the total amount of $25,000"). Relying upon Rule 11 to award damages to the 19 Defendants who did not specifically request them, nor comply with the statutory requirements, was plain error. Even if the Court was acting *sua sponte* to award sanctions pursuant Rule 11 to the other 19 Defendants, that too would be plain error. The Court cannot award Rule 11 sanctions *sua sponte* without giving notice beforehand and issuing an order to show cause. Rule 11

provides for a statutory "safe harbor" provision. Although a court is not restrained by the "safe harbor" in invoking Rule 11 sanctions *sua sponte*, the court must first issue an order to show cause; and there are restrictions on the court's sua sponte sanctions authority, including no monetary sanctions to the opposing party. *See Barber v. Miller*, 146 F.3d 707, 71 (9th Cir.1998) and *Laurino v. Tate*, 220 F.3d 1213, 1218 (10th Cir. 2000). Indeed, a court may only impose Rule 11 sanctions *sua sponte* after (1) entering an order describing the specific conduct that allegedly violates Rule 11; and (2) directing the offending party to show cause why it has not violated the rule. *See* Fed.R.Civ.Proc. 11(c)(3); *see also Johnson v. Waddell & Reed, Inc*., 74 F.3d 147, 151 (7th Cir. 1996)(not sufficient to give attorney after-the-fact opportunity to convince court to set aside sanctions it already determined.). Here no such order issued beforehand, nor an order to show cause thereafter. Further, although no Rule 11 sanctions were sought against *any* party, the Court awarded sanctions against 24 of the plaintiffs. If the Court was acting *sua sponte*, it was legal error to award Rule 11 sanctions to the defendants (*i.e.*, parties). *See Barber, supra*, 146 F.3d 707, 71; *Laurino, supra*, 220 F.3d at 1218.

Moreover, only Defendant Blue Water Systems, LP[9] and Defendants Stephen Boykin and Guaranty Title of Robertson County submitted any evidence regarding fees. As a result, the Rule 11 sanctions cannot be deemed to

9 The Plaintiffs incorporate by reference their responses to Defendant Blue Water's motion for sanctions. Docket No. 164, ROA 2699.

compensate the other eighteen defendants who offered no evidence of their fees. Instead, the awarded sanctions must be viewed as punitive, and the Court failed to comply with the appropriate constitutional safeguards for imposing *per se* contempt fines (*i.e*., right to counsel, jury, etc.). *See e.g. Mackler Productions, Inc. v. Choen*, 146 F.3d 126, 129 (2nd Cir. 1998)("[A]lthough the imposition of a sanction for litigation misconduct is not technically a conviction of a crime, the $10,000 sanctions imposed in this case required the protections of criminal procedure.").

28 U.S.C. § 1927 does not save the Sanctions Order either. The statute only allows sanctions against attorneys of record – not parties. *See* 28 U.S.C. §1927. This restriction applies even if the client is jointly and severally responsible for the improper conduct. *See Procter & Gamble Co. v. Amway Corp*., 280 F.3d 519, 525 (5th Cir. 2002). In its Sanctions Order, the trial court cites pleading defects, and it even cites pleadings from other cases. Because §1927 authorizes "sanctions only for multiplication of proceedings," it cannot be applied to claims made in the original complaint. "The filing of a complaint may be sanctioned pursuant to Rule 11 or a court's inherent power, but it may not be sanctioned pursuant to § 1927." *In re Keegan Management Co. Secur. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). Likewise, §1927 is not applicable to proceedings in other courts. *See Matter of Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) and *Cresswell v. Sullivan & Cromwell*,

922 F.2d 60, 69-70. (2nd Cir. 1990). Finally, due process limitations require that a sanctioned attorney receive notice both of the conduct alleged to be sanctionable "and the standard by which that conduct will be assessed." *Id*. For instance, notice of a request for sanctions under Rule 11 does not constitute notice that sanctions may be sought under § 1927. *See, e.g., Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2nd Cir. 1997). In the Fifth Circuit, §1927 sanctions must be supported by specific findings of wrongful intent. *See Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991)(record must show with "convincing clarity" fees cause by attorney's multiplication of proceedings). The Order failed to meet this requirement.

Finally, the trial court lacked authority to award fees under 42 U.S.C. §1988. The Supreme Court recently held that §1988 "serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights." *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662, 1676 (2010). "The purpose for awarding attorney's fees under 42 U.S.C. § 1988 is to provide an incentive for competent and skilled attorneys to take on unpopular cases and indigent clients thereby acting as a 'private attorney general.'" *Lucas v. Guyton*, 901 F.Supp. 1047, 1055 (D.S.C. 1995), citing *Farrar v. Hobby*, 113 S.Ct. 566, 578 (1992) (O'Connor, J. concurring). It certainly was not intended as a truncheon for trial judges to use on plaintiffs whenever their pleadings are too broad. "While

plaintiffs prevailing under 42 U.S.C. § 1988 are entitled to attorneys' fees unless special circumstances would render an award unjust, prevailing defendants are entitled to attorney fees *only* when a plaintiff's underlying claim is frivolous, unreasonable, or groundless." *U.S. v. State of Miss.*, 921 F.2d 604, 609 (5th Cir. 1991). The Third Circuit has held that §1988 does not authorize a court to assess attorney fees against opposing counsel, *see Brown v. Borough of Chambersburg*, 903 F.2d 274, 277 (1990), and the Plaintiffs are not aware of any other circuit that has addressed the issue.

The most glaring error, however, is the trial court's award of attorney fees to parties who did not even seek attorney fees. An award of attorney fees under 42 U.S.C. § 1988 must comply with Fed. R. Civ. Pro. 54(d)(2). *Slader v. Pearle Vision Inc.*, 199 F.R.D. 125, 126 (S.D.N.Y. 2001). None of the Defendants – not one – sought attorney fees pursuant to Fed. R. Civ. Pro. 54(d)(2). The fact that the trial court would award unrequested relief *sua sponte* and in direct contravention of Rule 54(d)(2) is all the more evidence that the trial court is deeply biased against the Plaintiffs and Plaintiffs' Counsel.

(18) <u>This case should be reassigned on remand</u>.

> This circuit employs two tests to determine whether to exercise its extraordinary power to reassign a case to another judge on remand. *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir.2002). The first test requires consideration of three factors: (1) whether the original judge would

> reasonably be expected to have substantial difficulty putting aside previously expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id*. at 700-01. The second test permits reassignment "when the facts 'might reasonably cause an objective observer to question [the judge's] impartiality.' " *Id*. at 701 (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C.Cir.1995)).

Benchmark Electronics, Inc. v. J.M. Huber Corp., 343 F.3d 719, 731 (5th Cir. 2003). Under either test, this case should be assigned to a new judge. As this brief demonstrates, the judge below tossed out every single claim and never allowed amendments, even though he later conceded that the racketeering claims could have been saved by amendment. Worse, the judge punished the Plaintiffs with sanctions for daring to assert their First Amendment right to petition for redress of grievances. The judge employed a double standard for the claims of the Plaintiffs versus the counter-claims of the Defendants, refusing to dismiss the counterclaims with prejudice even though they were plainly barred by law.

In their purported response to a motion to dismiss, counsel for the Russ and McCullough devoted two pages of "argument" – and scores of pages of "evidence" – to an *ad hominem* attack on Plaintiffs' Counsel. *See* Docket No. 8, ROA 126. The unauthenticated "evidence" (most of which would have been inadmissible even if it was authenticated) consisted of newspaper stories and Website posts about Plaintiffs' Counsel, as well as wholly unrelated pleadings

from other cases and a law journal article about gay rights. *Id*. Counsel for the Russ and McCullough Defendants wantonly violated the Texas Disciplinary Rules of Professional Conduct, which are incorporated in the Western District of Texas by Local Rule AT-7(a) (available at http://www.txwd.uscourts.gov/rules/online/at/at-7.pdf). According to Texas Disciplinary Rule 3.04(c)(2), a lawyer shall not "state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding…" *See also* Comment 4 to Rule 3.04. Rule 4.04(a) states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…" The Plaintiffs defy counsel for the Russ and McCullough Defendants to explain how their extended *ad hominem* attack was relevant to the proceedings below – or how it was intended to do anything other than generate prejudice and embarrassment. Opposing counsel will almost certainly try to ignore this issue, because there's really nothing they can say in response. What possible relevance do the undersigned's views on gay rights, for example, have to do with this case?

At the time, Plaintiffs' Counsel made light of the *ad hominem* attack, noting that the Russ and McCullough Defendants overlooked other salient background information, *e.g.*, Plaintiffs' Counsel had snored during church and he had set the pasture on fire. Docket No. 13, ROA 331 and Docket No. 15, ROA 361 (both

incorporated fully herein by reference). Plaintiffs' Counsel directed the trial judge's attention to Disciplinary Rule 4.04(a), ROA 332, and he mistakenly assumed the trial judge would take it from there. The reason for that assumption was simple: if Plaintiffs' Counsel had tried such a sleazy stunt in any other court, he would have been severely reprimanded at minimum, and more likely sanctioned or referred to the grievance committee.

In retrospect, it now appears that Russ and McCullough's hometown Waco lawyers knew exactly what they were doing. The trial judge didn't just ignore their misconduct – he appears to have been persuaded by it. In their personal attack, opposing counsel referred the trial court to *The United States of America, ex rel. Ty Clevenger v. Bryan F. Russ, Jr., et al.*, 6:08-cv-259. Docket No. 2, ROA 60. Plaintiffs' Counsel explained that the case was voluntarily dismissed for reasons wholly unrelated to the merits of the claims, namely, failure to comply with a prior notice requirement. ROA 334. None of that was relevant, but the trial court clearly was angered by it:

> Perhaps, had the claim been pled properly, there might have been a viable RICO claim against Defendants Russ and McCullough arising out of their actions in snatching up properties at tax sales. But, adding in a variety of unrelated plaintiffs with unrelated claims, such as child custody disputes and false arrest charges, clearly shows that Plaintiffs' attorney multiplied the proceedings "unreasonably and vaxatiously" to the extent that excess costs and attorneys' fees were incurred by the Defendants. This particularly true in light of the fact that Plaintiff's [*sic*] attorney initially raised at least one claim in a prior lawsuit, styled *The United States of America, ex rel. Ty Clevenger v. Bryan F. Russ, Jr., et al.*, W-08-CV-259, with himself as

> plaintiff. This was a qui tam action, in which the United States declined to intervene. Plaintiffs' attorney agreed to dismissal of that suit, but only after the Defendants had expended fees in filing motions to dismiss.

This one excerpt demonstrates just how woefully unfamiliar the trial court was with the pleadings. First, as noted above, the FAC was not about "snatching up property at tax sales." Second, there is not a false arrest claim anywhere in the FAC. Third, nobody in this lawsuit purported to bring claims related to the *qui tam* action. Paragraphs 133-139 of the FAC cite facts that are undisputed because they are matters of public record. And they were included because they showed racketeering acts within the past ten years, as required by 18 U.S.C. § 1961(5) to establish a pattern of racketeering activity. If the Plaintiffs had known the trial court was so fixated upon the *qui tam* action, the undersigned could have explained that the United States declined to intervene because it was uncertain whether the mineral estate had been stolen from the United States or from the heirs of R.M. Johnson. To be perfectly clear, there is no question that Defendants Russ and McCullough stole the mineral estate. The only question is who they stole it from.

Counsel for the Russ and McCullough Defendants tried diligently to prejudice the trial court against the Plaintiffs, and it appears they succeeded. If this case is remanded back to the same judge, they will continue to reap the benefits of their misconduct.

CONCLUSION

The FAC alleged valid claims against all the Defendants. The trial court employed a double-standard, arbitrarily dismissing all of the Plaintiffs' claims, but refusing to dismiss the Defendants' counterclaims. The trial court also sanctioned the Plaintiffs without any legal foundation. The trial court should be reversed and this case should be reassigned to another judge.

Respectfully submitted,

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