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

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| **CANDACE LOUISE CURTIS AND RICK WAYNE MUNSON,** | § | |
| | § | |
| **Plaintiffs,** | § | |
| | § | |
| **V.** | § | **CIVIL ACTION NO. 4:16-CV-01969** |
| | § | |
| **CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATHEWS III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBY BAYLESS, ANITA 'BRUNSTING, AND AMY BRUNSTING,** | § | |
| | § | |
| **Defendants.** | § | |

**DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Motion to Dismiss for Failure to State a Claim and would respectfully show the Court the following:

## I.
## BACKGROUND

1. For the purpose of this motion, V&F incorporates the detailed background contained in their Motion to Dismiss for Lack of Subject Matter Jurisdiction.

## II.
## BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW

2. Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiff's complaint lacks "direct allegations on every material point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED. R. CIV. P. 12(b)(6); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." *See, e.g.*, *Tuchman v. DSC Communications*, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint." *Id.* For the reasons set forth in more detail below, Plaintiffs' claims should be dismissed because Plaintiffs have failed to state a claim upon which relief may be granted.

## III.
## ARGUMENTS AND AUTHORITIES

### A. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A VIOLATION OF THE RICO ACT.

3. To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must allege the following:

> (1) that a "person" within the scope of the statute (2) has utilized a "pattern of racketeering activity" or the proceeds thereof (3) to infiltrate an interstate "enterprise" (4) by [violations of § 1962 subsections] (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts.

Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.02 (2006); *see also Delta Truck & Tractor, Inc. v. J.I.* Case Co., 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991).

4. Each of these elements is a "term of art which carries its own inherent requirements of particularity." *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Thus, "[u]nlike other claims, a RICO claim must be plead with specific facts, not mere conclusions, which establish the elements of a claim under the statute." *Andrade v. Chojnacki,* 65 F. Supp. 2d 431, 450 (W.D. Tex. 1999) (dismissing RICO claims for failure to include "specific facts" in complaints). Plaintiffs are not entitled to submit a conclusory, barebones complaint that fails to provide fair notice of the facts on which they rely. Likewise, including paragraph after paragraph of irrelevant allegations will not satisfy Plaintiffs pleading burden. The onus of asserting clear and understandable allegations falls squarely on Plaintiffs, who cannot avoid that obligation by filing a confusing complaint that requires the court or the defendant to strain in an attempt to comprehend the incomprehensible. *See, e.g., Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989) (dismissing RICO allegations and stating "[i]t is perhaps not impossible that a RICO claim may lie hidden or buried somewhere in [plaintiff's] complaints and the Standing Order case statement. [Plaintiff's] pleadings do not unequivocally negate such a possibility. However, they also do not state a RICO claim against defendants with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is.").

### 1. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

5. Plaintiffs have brought their RICO action under 18 U.S.C. § 1962(c) and (d). To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant

engaged in a prohibited pattern of racketeering activity or "predicate acts." *Cadle Co.,* 779 F. Supp. at 397 (citing *Elliott,* 867 F.2d at 882). The only "facts" cited by Plaintiffs regarding V&F's predicate acts are contained in paragraphs 133 and 145 – 151. The RICO Act defines "racketeering activity" by reference to various state and federal offenses, "each of which subsumes additional constituent elements that the plaintiff must plead." *Id.* at 398. As demonstrated below, Plaintiffs have failed to adequately plead these necessary predicate acts.

**a. PLAINTIFFS HAVE FAILED TO ALLEGE AN UNLAWFUL ACT AGAINST V&F.**

6. With respect to V&F, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by V&F. *Elliott*, 867 F.2d at 880. Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts, Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that V&F violated the statute. However, these allegations are baseless on its face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

**b. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD WITH PARTICULARITY THEIR FRAUD-BASED PREDICATE ACTS AS REQUIRED BY FEDERAL RULE 9(B).**

7. Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity." *Walsh v. America's Tele-Network Corp.,* 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.,* 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake,

the circumstances constituting fraud or mistake shall be stated with particularity."). Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiff's claim and how and why they are fraudulent." *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016). Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP*, No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004). When pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs. *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.,* 975 F.2d at 1138.

8. Here, Plaintiffs have failed to allege the contents of *any* of the purported false representations made by V&F, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

**c. PLAINTIFFS HAVE FAILED TO PLEAD RELIANCE IN CONNECTION WITH THEIR FRAUD RELATED CLAIMS.**

9. RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff. *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts); *Sherman v. Main Event, Inc.*, No. 3:02-CV-1314-G, 2003 U.S. Dist. LEXIS

1571, *16 (N.D. Tex. Feb. 3, 2003) (Fish, J.) (unpublished) (dismissing RICO claims for mail, wire, and bankruptcy fraud where plaintiff failed to allege reliance). This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003); *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling"). But, despite this firmly established requirement, Plaintiffs in this case have asserted *no* allegations—indeed, not even a conclusory allegation—detailing *how* they purportedly relied upon V&F's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

### 2. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE.

#### a. PLAINTIFFS ENTERPRISE ALLEGATIONS ARE TOO VAGUE AND CONCLUSORY.

10. An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881. The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise." *Elliott*, 867 F.2d at 881.

11. To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence

that the various associates function as a continuing unit.'" *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)). The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure." *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).

12. "[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity." *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987). However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO." *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

13. Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless conclusions.

14. Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind—when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these or *any* other supporting facts, Plaintiffs' pleadings are simply insufficient.

15. Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations. *See Fitzgerald v. Chrysler Corp.,* 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank,* 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly"). Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, *at a bare minimum*, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged." *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit"). Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

**b. PLAINTIFFS ALLEGED ENTERPRISE LACKS CONTINUITY.**

16. Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements. *See*, *e.g.*, *Delta Truck,* 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962."). Specifically, "[a]n association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a

continuing unit as shown by a hierarchical or consensual decision making structure." *Crowe v. Henry,* 43 F.3d 198, 205 (5th Cir. 1995). These requirements limit the application of the RICO Act, and serve to prevent an overly-broad application to general commercial conduct that was never really the intended focus of the Act. *Delta Truck,* 855 F.2d at 242-43.

17. Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

### 3. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

18. Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts. *See In re Burzynski*, 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43). To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other *and* that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity." *In re Burzynski*, 989 F.2d

at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity). Such continuity may refer "either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241).

19. Here, Plaintiffs alleges several times throughout their Complaint that V&F engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

#### 4. PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED A CONSPIRACY CLAIM UNDER § 1962(d).

20. A claim under § 1962(d) necessarily relies upon a properly pleaded claim brought under subsections (a), (b), or (c). Because Plaintiffs have failed to adequately plead violations of those other subsections, the § 1962(d) conspiracy allegation fails to state a claim. *Nolen v. Nucentrix Broadband Networks,* 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims). Plaintiffs' conspiracy allegations are conclusory and lack supporting factual details. *See Lovick v. Ritemoney Ltd*, 378 F.3d 433, 437 (5th Cir. 2004) (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss); *see also Crowe*, 43 F.3d at 206 (dismissing § 1962(d) claim because plaintiff's allegations were conclusory and failed to allege adequate supporting facts). Plaintiffs mere insistence that V&F conspired to participate in a criminal enterprise is insufficient to support a RICO claim. As a result, this claim too should be dismissed.

### C. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS' ALLEGATIONS DO NOT SATISFY RICO'S PROXIMATE CAUSE STANDARD.

21. To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of" a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury. *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004) (citing *Holmes*, 503 U.S. at 279). That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed. *Ocean Energy II v. Alexander & Alexander, Inc.,* 868 F.2d 740, 744 (5th Cir. 1989). A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct. N*avigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 289 (5th Cir. 2007). More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation." *Sedima,* 473 U.S. at 496.

22. Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged." *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219. These allegations must include specific facts; conclusory and generalized allegations are insufficient. *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries." *Anza*, 547 U.S. at 452.

23. The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp*. In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors." *Id.* If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages. *Id.*

24. Applying the above-referenced strict proximate-cause requirements in this case, it becomes clear that the required direct relationship between the injury asserted and the alleged injurious conduct is simply lacking. Plaintiffs' Complaint contains the following allegations regarding Plaintiffs' alleged injuries, which fail to meet the required pleading standards:

- Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expense and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering, activity herein delineated with a particularity.

- As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.

- Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v. Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.

- As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interest in an amount to be proven at trial.

25. Clearly, these allegations are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs has alleged a similar disjunctive causation pattern with respect to their claims against V&F. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

### D. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE A VIOLATION OF THE HOBBS ACT DOES NOT CREATE A PRIVATE CAUSE OF ACTION.

27. On its face, the Hobbs Act is a criminal statute which contains no reference to any private civil right of action. 18 U.S.C. § 1851. While the Fifth Circuit has not specifically spoken to this issue, other courts, have specifically held that the Hobbs Act creates no private right of action. *See, e.g.,*, *Trevino v. Pechero*, 592 F.Supp.2d 939, 946-47 (S.D. Tex. 2008); *Decker v. Dunbar*, No. 5:06-cv-210, 2008 WL 4500650, *43 (E.D. Tex Sept. 29, 2008). Because the Hobbs Act cannot support an independent civil action, Plaintiffs' Hobbs Act claim should be dismissed for failure to state a claim.

### E. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE V&F CANNOT BE CIVILLY LIABLE FOR AIDING AND ABETTING

28. There is no statutory provision holding persons civilly liable for aiding and abetting violations of the RICO statute, and thus this claim must be dismissed as it is not a viable cause of action against V&F. *See Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

### F. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A VIOLATION OF PLAINTIFFS' CIVIL RIGHTS.

#### 1. Plaintiffs HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER § 1983.

29. Section 1983 "provides a federal cause of action for the deprivation, under the color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). To state a claim under § 1983, a plaintiff must allege facts that show that he has been deprived of a right secured by the Constitution and laws of the United States and that the deprivation occurred under color of state law. *See Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). Plaintiffs cannot meet the essential element of this claim – identify a specific constitutionally protected right that has been infringed. *See Graham v. Connor*, 490, U.S. 386, 394 (1989). The requirement that the deprivation occur under color of state law is also known as the "state action" requirement. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999). A private party, like V&F, will be considered in a state action for § 1983 purposes only in rare circumstances. *See Gordon v. Neugebauer*, 57 F.Supp.3d 766, 773 (N.D. Tex. 2014). V&F requests the Court dismiss Plaintiffs' § 1983 claims because Plaintiffs' Complaint fail to allege facts that, if true, would amount to a violation of § 1983.

30. There are two ways that a private actor can be considered a state actor for purposes of imposing § 1983 liability. First, the plaintiff can show that the private actor was implementing an official government policy. *See Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 312 (5th Cir. 2011). Plaintiffs have included no facts in their Complaint which, if true, would show that any of the governmental units sued by Plaintiffs had an official policy that caused the alleged constitutional violations—much less that V&F implemented that policy.

31. The second method for proving state action under § 1983 is a showing that the private entity's actions are fairly attributable to the government. *See Rundus*, 634 F.3d at 312. This is also known as the "attribution test." The Supreme Court has articulated a two-part inquiry for determining whether a private party's actions are fairly attributable to the government: (1) "the deprivation [of plaintiff's constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Bass*, 180 F.3d at 241. Here, V&F are private citizens. Thus, V&F can only be liable under § 1983 if their conduct that forms the basis of this lawsuit is fairly attributable to the state of Texas or one of its political subdivisions.

32. The Supreme Court utilizes three different tests for determining whether the conduct of a private actor can be fairly attributable to a state actor under the second prong of the attribution test: (1) the nexus or joint-action test, (2) the public function test, and (3) the state coercion or encouragement test. *See Richard v. Hoechst Celanese Chem. Grp., Inc.*, 355 F.3d 345, 352 (5th Cir. 2003); *Lewis v. Law–Yone*, 813 F.Supp. 1247, 1254 (N.D. Tex. 1993) (describing the three tests as applicable to the resolution of the second prong of the attribution test articulated by the Supreme Court in *Lugar*).

**a. NEXUS/JOINT-ACTION TEST**

33. Under the nexus test, a private party will be considered a state actor "where the government has 'so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise,'" and the actions of the private party can be treated as that of the state itself. *Bass*, 180 F.3d at 242; *see also Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982). Plaintiffs have pled no facts which would suggest that any state governmental entity has "insinuated itself into a position of interdependence" with V&F. Indeed, Plaintiffs fail to plead any facts which would show that V&F ever interacted or communicated with the any state governmental entity regarding the estate planning documents. Plaintiffs have failed to plead facts that would satisfy the nexus test for state action under § 1983.

**b. PUBLIC FUNCTION TEST**

34. Under the public function test, a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *Bass*, 180 F.3d at 241–42. Here, Plaintiffs' Complaint is devoid of any facts showing that V&F was performing a function that was traditionally the exclusive province of the state when they drafted the estate planning documents.

**c. STATE COERCION OR ENCOURAGEMENT TEST**

35. Under the state coercion test, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass*, 180 F.3d at 242. State coercion or compulsion can be found where the plaintiff establishes that the private defendants were engaged in a conspiracy with state officials. *See Tebo v. Tebo*, 550 F.3d 492, 496 (5th Cir. 2008).

36. To establish such a conspiracy, the plaintiff must show that the private and public actors entered into an agreement to commit an illegal act. *Id.* At the motion to dismiss stage, the plaintiff must "allege specific facts to show an agreement." *See id.* (quoting *Priester v. Lowndes*

*Cnty.*, 354 F.3d 414, 421 (5th Cir. 2004)). Here, Plaintiffs have included no facts in their Complaint which would suggest that V&F entered into an agreement or was acting at the direction of any government official when they drafted the estate planning documents. There are simply no facts which would, if true, show the existence of an illegal agreement between V&F and a governmental entity. Plaintiffs have thus failed to plead facts showing that V&F was coerced or encouraged by any governmental entity with respect to drafting of the estate planning documents. *Priester*, 354 F.3d at 420 (conspiracy alleges that are "merely conclusory, without reference to specific facts," will not survive a motion to dismiss).

37. In sum, Plaintiffs' Complaint is devoid of the factual allegations necessary to plead state action under the nexus test, the public function test, or the state coercion or encouragement test. Plaintiffs have failed to establish the necessary state action required to hold a private actor liable under § 1983. Accordingly, Plaintiffs' § 1983 claims against V&F should be dismissed for failure to state a claim upon which relief can be granted.

**2. Plaintiffs HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER § 1985**

38. To state a § 1985 claim, a plaintiff must plead: (1) a conspiracy involving two or more persons, (2) to deprive, directly or indirectly, a person or class of persons of equal protection of the laws, (3) that one or more of the conspirators committed an act in furtherance of that conspiracy, (4) which causes injury to another in his person or property or a deprivation of any right or privilege he has as a citizen of the United States, and (5) the conspirators' action is motivated by "discriminatory animus." *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989).

39. Plaintiffs' § 1985 claim fails for several reasons. First, a viable § 1985 claim requires an underlying violation of constitutional rights or privileges secured elsewhere. *See Griffin v. Breckenridge*, 403 US. 88, 102-04 (1971).

40. Plaintiffs' § 1985 claim also fails because Plaintiffs failed to properly identify facts sufficient to support the elements of a § 1985 claim. Plaintiffs' Complaint, as to this cause of action, is very brief and does not contain any factual averments from which a neutral fact finder could conclude that a conspiracy existed, that it was race-based, that Plaintiffs are in a protected class, or that it involved obstruction of justice or denial of equal protection of the laws.

41. Finally, Plaintiffs' § 1985 claim fails because they have provided no evidence whatsoever of class-based animus. Nor do Plaintiffs allege that they are members of a protected class. As such, Plaintiffs' § 1985 claims against V&F should be dismissed for failure to state a claim upon which relief can be granted.

### F. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS IS NOT A RECOGNIZED CAUSE OF ACTION IN TEXAS

42. Neither the Texas Legislature nor the Texas Supreme Court have recognized a cause of action for tortious interference with inheritance rights. *See Anderson v. Archer*, 490 S.W.3d 175, 176 (Tex. App.—Austin 2016, pet. filed May 18, 2016); *Walker v. Kinsel*, No. 07-13-00130-CV, 2015 WL 2085220, *3 (Tex. App.—Amarillo Apr. 10, 2015, pet. filed Aug. 19, 2015). Because this is not a viable cause of action, Plaintiffs claim for tortious interference with inheritance rights should be dismissed for failure to state a claim.

## IV.
## PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that their Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs.

Respectfully Submitted,

By:/s/ *Cory S. Reed*

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**ATTORNEYS FOR DEFENDANTS CANDACE KUNTZ-FREED AND ALBERT VACEK, JR.**

**CERTIFICATE OF SERVICE**

I certify that on the 7th day of September, 2016, a true and correct copy of the foregoing was served was served via the Court's ECF system upon the following counsel of record:

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/s/ Cory S. Reed
**Cory S. Reed**