

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

**PLAINTIFFS’ RESPONSE TO DEFENDANT DARLENE PAYNE-SMITH’S FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS**

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I. Introduction

1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.
2. On November 10, 2016, Defendant Darlene Payne-Smith filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt 84).

II. Defendants Issues

- A. Plaintiffs' Claims Should be Dismissed for Lack of Subject Matter Jurisdiction
 1. Standard of Review
 2. Plaintiffs' Purported Injuries are Speculative, Contingent and Not Ripe
 3. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing
 4. Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.
- B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim upon Which Relief May be Granted
 1. Standard of Review
 2. Plaintiffs Lack Statutory Standing under RICO
 - a. Plaintiffs Lack a Direct, Concrete Injury-in-Fact
 - b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."
 3. Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.
 - a. Plaintiffs Have Not Alleged the Existence of an "Enterprise,"
 - (i) "Probate Court No. 4" is Not a Legal Entity
 - (ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise
 - b. Plaintiffs Have Not Alleged a "Pattern" of Racketeering Activity.
 - c. Plaintiffs Have Not Plausibly Alleged a Conspiracy Under § 1692(d)
 4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.
 - a. Plaintiffs' Section 1983 Claim Should be Dismissed.
 - (i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights

(ii) Plaintiffs Have Not Alleged State Action

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

III. STANDARDS OF REVIEW

3. Plaintiffs incorporate and adopt by reference the Standards of Review in Section II of their Reply (Dkt 33) to the Motions to Dismiss filed by Defendants Albert Vacek Jr. and Candace Kunz-Freed. (Dkt 19 & 20)

IV. PLAINTIFFS' ARGUMENT

Summary of Plaintiffs' Argument

4. An "Estate" is an abstraction of the mind that only exists in contemplation of rights in property. An "Estate" is not a legal entity and not a proper party to litigation. An estate can only act through its legal representative.

5. Fifteen Motions to Dismiss have been filed in this case and all fifteen motions claim "Probate Matter" or "Probate Case", yet there is not a single mention of the Wills of Elmer or Nelva Brunsting.

6. On January 12, 2005, the "Brunsting Family Trust" (Dkt 33-2) was restated. The Wills, signed at the same time, devise, bequeath and transfer all right, title and interest to property of any kind to the "Brunsting Trust". (Dkt 41-3 and 41-4)

7. Article III states in part:

"I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisalment and list of claims as required by law."

8. This list of acts was completed March 27, 2013 (Dkt 41-7) and “Probate” of the “Estates” was dropped from Calendar (Dkt 41-5 and 41-6) four days before Defendant Bobbie Bayless filed her “Probate Matter”. (Dkt 33-6)

9. Carl’s second application for letters testamentary was filed October 17, 2014, (Dkt 41-8) fourteen months after the Drop Order (Dkt 41-5 and 41-6), and five months after the remand of the “Trust Matter” from the federal Court.

The Assertion of Contrary Facts

10. In the second unnumbered paragraph on page 1 under “Introduction” Defendant makes the following fact claims:

“This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the “Brunsting Probate Case”).”

11. Defendant goes on to add an entire paragraph in footnote 1 adopting the adverse statement of facts contained in Vacek and Freed’s Rule 12(b)(1) Motion to Dismiss. (Dkt 20)

12. However, Vacek and Freed’s Rule 12(b)(1) Motion to Dismiss adopts the statement of facts in their Rule 12(b)(6) Motion to Dismiss (Dkt 19), but those claims of fact are adverse to those contained in the complaint and may not be considered under 12(b)(6).

13. In order to overcome the presumptions in favor of the Plaintiffs’ claim of facts under 12(b)(1), a Defendant must support their claim of conflicting facts with matters outside the pleadings such as testimony and affidavits.

14. Defendant’s claims of contrary facts are not cognizable under Rule 12(b)(1), as there are no affidavits or exhibits attached to Docket entries 19, 20 or 84, and there are no references to the record of any proceedings. Defendant’s claims of contrary facts are not cognizable under

Rule 12(b)(1) or 12(b)(6). Moreover, the asserted facts are patently false and cannot be defended against the public record.

V. The History and Nature of the Claims as Documented In the Public Record

15. A properly supported history of the “*Series of lawsuits involving the Brunsting siblings*” begins with:

1. Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 filed TXSD February 27, 2012. The docket sheet for that case is attached as Exhibit 1.¹ The CA 4:12-cv-592 matter was dismissed sua sponte under the “Probate Exception to Federal Diversity Jurisdiction” March 8, 2012. (Exhibit 1 entry 13)

2. On March 9, 2012, Defendant Bobbie Bayless filed a Petition to take depositions before Suit in the Harris County District Court. (Exhibit 2)

3. On January 9, 2013, The Fifth Circuit Court of Appeals in Case Number 12-20164, issued a unanimous Opinion with Reverse and Remand, published Curtis v Brunsting et al, 704 F.3d 406. (Dkt 34-4) The Circuit Court held: 1) Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100, CA 4:12-cv-592 is a lawsuit relating only to the administration of inter vivos trusts, 2) assets in an inter vivos trust are not property belonging to an estate, 3) the Brunsting Trusts were not in the custody of a state court, 4) was not subject to probate administration and, 5) did not come within the purview of the probate exception to federal diversity jurisdiction. (Dkt 34-4)

4. On January 29, 2013, Defendant Bobbie Bayless filed malpractice and breach of fiduciary claims against Vacek and Freed in the Harris County District Court in the name

¹ Plaintiff Munson’s name appears at entries 9 and 38.

of “Carl Henry Brunsting Independent Executor of the Estates of Elmer and Nelva Brunsting. (Dkt 33-9)

5. On April 9, 2013, the Honorable Kenneth Hoyt issued an injunction in Candace Louise Curtis vs. Anita and Amy Brunsting, CA 4:12-cv-592, (Dkt 26-2) and on the same date, April 9, 2013:

6. Defendant Bobbie Bayless filed lawsuits against Anita, Amy and Carole Brunsting, and Candace Curtis, in Harris County Probate Court Number 4. This is the phenomenon Defendants refer to as “The Probate Matter”. The “Probate Matter” docket sheets are attached as Exhibits 3, 4, 5 and 6.

7. Upon being named a Defendant in Bayless “Probate Matter” Carole retained Darlene Payne-Smith and on May 6, 2013 Payne-Smith filed a Counter suit against Carl Brunsting for interfering with Carole’s “Inheritance expectancy”.²

16. Carole Ann Brunsting has never had fiduciary duties in regard to the Brunsting Trusts.

17. Carole Brunsting held Nelva Brunsting’s Medical Power of Attorney and her duties were to Nelva’s personal and medical care. That role and the subsequent conduct of the Defendant “legal professionals” would be consistent with the unsuspecting sibling medical POA role in the classic hustle fully explained in “How to Steal your Family Inheritance”. (Exhibit 7)

18. Plaintiff Candace Curtis has been obstructed from the performance of her fiduciary duties, and the pursuit of claims belonging to the Trusts, by Trustees de son tort, Anita and Amy Brunsting and these other Defendants in concert efforts.

VI. STANDING

19. Defendant Darlene Payne-Smith argues that the matter before the Court is:

² Harris County Probate Document No. PBT-2013-146160

“the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting”

The Brunsting Wills

20. Every one of these Defendants argued that the RICO action before the Court stems from a “Probate Matter” pending in Harris County Probate Court No. 4, and yet not a single one of those Motions (Dkt 19, 20, 23, 25, 30, 35, 36, 39, 40, 53, 78, 81, 83 or 84) mentions the Wills of Elmer or Nelva Brunsting. (Dkt 41-3 and 41-4)

21. Not a single one of the Motions identifies an heir to any estate and not a single one of the Motions identifies any assets belonging to an “Estate”.

22. The Will of Nelva Brunsting says in Articles II and III:

II.

“I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; ...”

“All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration.”

III.

...”I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisal and list of claims as required by law.”

23. Under Section H. “Protection of Beneficiaries”:

“No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.”

24. The Fifth Circuit Court of Appeals did read the Wills and did determine that the only heir to the Estates of Elmer and Nelva Brunsting is “The Trust”.

25. Plaintiffs find no indication that any of the Brunsting siblings have challenged either Will, and it would necessarily follow that neither Carl Brunsting, nor any Brunsting sibling, has individual standing in any administration of the “Estate of Nelva Brunsting”, a.k.a. the “Brunsting Probate Matter”. Let us look at that opening paragraph again.

“This is the most recent in a series of lawsuits involving the Brunsting siblings, all of which emanate from a state court probate proceeding, In re: Estate of Nelva E. Brunsting, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the “Brunsting Probate Case”).”

26. An “Estate”, is not a legal entity but an abstraction that only exists in contemplation of rights in property, in whatever form. A Decedent’s estate is the sum of the person’s assets – legal rights, interests and entitlements to property of any kind’ at the time of their death.

27. As noted by the Fifth Circuit and as can be seen in reading the Wills, the assets in the Brunsting Trusts are not assets belonging to either Founders Estate, and all of the Brunstings’ interest in property, whether real or personal, had been appointed and transferred to the Trust at the time of the Restatement in 2005.

28. As the assets in the Brunsting Trusts are not property belonging to an estate, those Trusts are not subject to probate administration.

Gaming the Judicial Process

29. Defendant Bayless filed her suit in Harris County Probate No. 4, in the name of Carl Henry Brunsting “Individually and as Executor of the Estates of Elmer and Nelva Brunsting” raising only trust related claims, knowing the Brunsting Trusts were in the custody of a federal Court and that a federal Court had issued an injunction involving the Brunsting trusts that same day.

30. Having begun depositions before suit more than a year earlier and having read the Wills, Bayless knew or should have known that Carl Brunsting had no individual standing in the administration of any estate.

31. Bayless would also know that the trust, not being an asset belonging to any estate, would not be subject to probate and, as the Wills bequeath and direct all rights in property to “the Trust” to be disposed of under the terms of the trust, it would follow Bayless knew the estate had no right of claims relating to Trust assets. In any event, she had a duty to know.

VII. ENTER THE VEXATIOUS MULTIPLIER - DARLENE PAYNE-SMITH

32. Bayless’ suit, brought in the name of Carl Brunsting individually, and in the name of the “Estate of Nelva Brunsting”, involving exclusively trust related claims, names all four of the other Brunsting siblings defendants, including federal Plaintiff Curtis.

33. Carole retained Defendant Darlene Payne-Smith and rather than point out the obvious, that the “Estate” owned no property, had no property interests in the Brunsting Trusts, and that Carl, not being an heir, had no individual standing to bring any “Probate Matter”, none-the-less filed a counter-suit against Carl Brunsting for tortious interference with “inheritance expectancy”, which is an interest none of the Brunsting siblings have in the probate of any “estate”.

34. The Brunsting trusts are the only real party in interest to all matters involving trust property, and all of the Defendants’ Motion to Dismiss have confessed to what they are charged with, attempting to loot an inter vivos trust under the pretext of administering a probate estate. In the process they have multiplied the litigation and the injuries exponentially.

Motions for Distributions in “Estate of Nelva Brunsting”

35. After Defendant Jason Ostrom arranged a remand of the federal case of Curtis v Brunsting 4:12-cv-592 to Harris County Probate, he immediately filed an unauthorized “Second Amended Complaint” (Dkt 34-9) in “Estate of Nelva Brunsting” and followed with application for a distribution of \$45,000 to pay his fees (Dkt 62-1), also in “Estate of Nelva Brunsting”. That ridiculous excuse for litigation spawned a flurry of vexatious objections from all the other “Probate Matter’ poser advocates.

36. Rather than point out the obvious, that there are no assets in the “Estate”, all of the Defendant attorneys joined in with objections pointing to the trust this and the trust that, generating hundreds of pages, never once mentioning the wills, standing or identifying an heir. (Exhibits 8-10).

37. On page 1 and 2 of an objection to a second application for distribution filed by Defendant Ostrom in “Estate of Nelva Brunsting”, Defendant Payne-Smith had these alleged fact assertions to offer: (Exhibit 8) (emphasis added)

“1. Plaintiff, acting pro se, first filed her suit against her siblings, Anita Brunsting and Amy Brunsting, regarding the Trust in United States District Court for the Southern District of Texas.

Plaintiff’s Petition was filed in federal court in bad faith, without just cause, and frivolously as Plaintiff knew there was already litigation pending in this Court on the same and/or similar Trust issues and involving the same parties and did so without representation to the detriment of everyone else involved in this case. Plaintiff’s frivolous filing in federal court caused the other parties in this case to incur substantial unnecessary expenses defending against the suit, attending needless hearings in federal court on issues already before this Court, and responding to Plaintiff’s relentless and unsuccessful attempts to represent herself. Plaintiff wasted so much time and money attempting to represent herself in federal court that she was ordered by federal Judge Kenneth M. Hoyt to obtain legal counsel.”

“2. On April 19,2013, Judge Hoyt enjoined the Trustees from disbursing any funds from any Trust accounts without the Court’s permission. Plaintiff’s suit was

then transferred to this Court on June 4, 2014, pursuant to an Order of Remand entered by Judge Hoyt, and Plaintiff amended her Petition to include Carol Brunsting as a defendant. The injunction stands to this day.”

VIII. RICO - INJURY IN FACT, PROXIMATE CAUSE AND STANDING

February 2012 to August 2014 in the Federal Court

38. Plaintiffs are informed and believe that an estimated \$20,000 in fees were paid to attorneys by Brunsting interests, in connection with the federal case of Curtis v Brunsting 4:12-cv-592, between February 2012 and the August 2014 mediation.³

February 2012 to August 2014 in State Courts

39. Plaintiffs are informed and believe that a very rough estimate of state court claims related fees incurred during this period, based on figures thrown out at the mediation in August 2014, \$225,000 to Bayless from Carl’s pocket,⁴ \$37,000 to Mills Shirley paid from the trust – 1/5 of which was Curtis’ property and, at a minimum, \$30,000 more from each sibling during this same period of time, most likely on credit terms.

August 2014 to December 2016:

40. The estimated totals for state court actions between February 2012 and August 2014, as shown above, is approximately \$412,000. That is approximately \$13,733 per month for that thirty month period.

41. If we use that value as the basis and multiply by the 28 months between August 2014 and December 2016, our total for that period equals approximately \$384,533.

³ These numbers do not reflect the federal appeal.

⁴ Carl Brunstings’ Deposition testimony (Exhibit 11 Carl deposition page 78 line14)

42. Thus, the total estimated attorney fees for the “Probate Matter”, which includes the Harris County District Court case, is \$796,533. While grossly underestimated, this figure is more than absurd considering that nothing substantive was accomplished in any state court.

Injuries to Plaintiffs Curtis and Munson, are both Personal and Pecuniary

43. When Plaintiff Curtis was forced to file a pro se lawsuit in the Southern District of Texas to defend her rights in property from her sisters Anita and Amy Brunsting, She had to pay the filing and service of process fees. Neither Munson nor Curtis had ever filed a lawsuit in any court, but they did the best they could under the circumstances.

44. After the “breach of fiduciary” action was dismissed, Plaintiffs were forced to file a Fifth Circuit Appeal. Neither Munson nor Curtis had ever filed a federal appeal, did not know the process or the rules and neither knew anything about the probate exception. Plaintiffs thus agreed that one had to work to bring home the bacon and one would have to study, inform, write, and teach or in other words, “pull the plow”.

45. Curtis agreed that she had the more dependable income and would perform the bread winner function and that Munson had the better understanding of legal concepts and was thus the better suited to the legal research and writing function.

46. Munson was working at the time as both a performing artist and as a Systems Engineer, providing network support for the same Company where Plaintiff Curtis is employed as an accountant. Munson was eventually forced to resign from the network management obligations to focus on protecting Plaintiff Curtis’ property interests.

47. There are three conditions in the American system of jurisprudence where an opposing party can be awarded attorney fees under 28 U.S.C. §1927. First, a party who preserves or recovers a fund for the benefit of others (common fund) may recover attorneys' fees from the

fund or from the other parties who benefit from the fund.⁵ Second, a party may recover attorneys' fees from an opposing party when the opposing party or the opposing party's attorney has disobeyed a court order,⁶ and third, a party may recover attorneys' fees from an opposing party when the opposing party acts in bad faith.⁷ All three of these criteria are met in this case.

48. If not for the conduct complained of against Vacek & Freed there would have been no litigation and if not for the participatory conduct of the rest of these defendants the legitimate Trust litigation would have long since been resolved.

49. The Honorable Kenneth Hoyt observed at the injunction hearing April 9, 2013, (Dkt 26-7, page 35 and 36) all that was needed to resolve the trust dispute was to distribute the assets to the beneficiaries, despite Defendants argument that the state court lawsuits were an obstacle to that end.

50. Given that Defendants, Anita and Amy Brunsting have clearly failed to honor the obligations of the office of trustee, are accused of malfeasance in the conduct of trust business, have conflicts of interest, and have refused or otherwise failed to pursue claims belonging to the Trusts, Plaintiff Curtis has assumed her proper station as successor trustee, in law and in fact.

51. Plaintiffs Curtis and Munson, through their active defense of the Brunsting Trust interests and the pursuit of claims belonging to the Brunsting Trusts have assumed the vacant office and are entitled to recover fees and costs.

IX. AMENDMENT AND ADOPTION BY REFERENCE

52. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1),

⁵ Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-97 (1970). The Supreme Court in Mills defined the term "common fund" as a fund for the benefit of an entire class, such as an estate.

⁶ Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923); see Alyeska, 421 U.S. at 258 (noting that award of attorneys' fees may be part of sanction imposed on party or party's attorney for disobeying court order).

⁷ Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257-59 (1975)

the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Responses to Defendants' Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85, 86, 87 and this response, as if fully expressed therein.

53. Plaintiffs further adopt and incorporate by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.

X. CONCLUSION

54. As of the filing of this response, the Complaint consists of the entire record before the Court and those Public Records this Honorable Court has been respectfully requested to take judicial notice of under Federal Rule of Evidence §201.

55. The Complaint contains satisfactory allegations with sufficient evidentiary support for the court to conclude 1) predicate acts have been articulated that establish a pattern of racketeering activity, 2) the Probate Court is both the enterprise and a victim of the racketeering conspiracy, 3) Legitimizing the theft of Brunsting Trust assets was the object of the racketeering conspiracy, 4) Defendants each participated in furthering the success of the racketeering conspiracy 5) Plaintiffs were injured in their business and property interests directly and proximately caused by the racketeering conspiracy 6) the racketeering activity is ongoing and continuous and the Brunstings are only one of many families victimized by the racketeering activities, 7) without the intervention of this Court the conduct complained of will continue unabated and other members of society will suffer injury directly and proximately caused by the same persons, the same racketeering conduct and 8) Plaintiffs claims are over-ripe for remedy.

56. Plaintiffs have sufficiently pled that:

- (1) defendants:
- (2) through commission of two of the enumerated predicate acts,
- (3) which constitute a “pattern” of
- (4) “racketeering activity,”
- (5) directly or indirectly participates in the conduct of
- (6) an “enterprise,”
- (7) the activities of which affect interstate or foreign commerce, and that
- (8) Plaintiffs have been injured in their business and property interests by reason of such conduct.

57. It has already been shown that participants need not have personally committed any predicate acts and that aiding and abetting by providing substantial assistance to the perpetrators in furtherance of a racketeering conspiracy is sufficient.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Darlene Payne-Smith filed November 10, 2016, and hold to answer.

Respectfully submitted, December 1, 2016

/s/ Candace L. Curtis
Candace L. Curtis

/s/ Rik W. Munson
Rik W. Munson

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 1st day of December, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson
Rik W. Munson