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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93104-6

Court of Appeals No. 73190-4-1

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

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Supreme Court No. 93104-6

CHARLES V. MCCLAIN, III, *Pro se*

Appellant/Petitioner

vs.

1st SECURITY BANK
OF WASHINGTON

Respondent

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# APPELANT'S INFORMAL REQUEST FOR DISCRETIONAL REVIEW

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## I. IDENITY OF PETITIONER

COMES NOW, Charles V. McClain, III, *Pro se*, with his request for the Court to accept review of the Court of Appeals (COA) decision terminating review designated in Part II. of this petition. Petitioner respectfully requests oral arguments.

## II. COURT OF APPEALS DECISION

Petitioner seeks review of the decision filed by Division I of the COA on March 7, 2016, affirming the Superior Court's order granting summary judgment in favor of Respondent and the awarding of attorney's fees. A copy of the decision is included in the Appendix. (App. 1) Petitioner's request for reconsideration was denied April 15, 2016, which lead to this request for review.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the COA decision raises questions of law under the U.S. and Washington Constitutions because the decision denied Petitioner his procedural and substantive due process rights and equal protection of the laws.

2. Whether the COA decision raises issue of public interest because the seizure of funds in Petitioner's account violates due process and the disclosure of Petitioner's private financial information violated public policy and raises questions about the integrity of the COA.

3. Whether the COA decision that Petitioner's claims have no basis in fact or law was an abuse of discretion and was actually in contradiction to both Washington State law and case decisions in addition to the COA complete disregard of U.S. Supreme Court decisions not only pertaining to the facts in this action, but also as to the COA obligation as well as the Superior Courts obligation to treat *Pro se* litigants pleadings liberally.

4. Whether the COA decision in granting attorney's fees was an abuse of discretion and whether Respondent gained in any way from the deposit of funds into Petitioner's account.

## IV. STATEMENT OF THE CASE

Between December 10th and 15th, 2009, Petitioners friend Harrison Hanover (Hanover) received deposits totaling approximately 4.6 million dollars to his account with Respondent. The account was governed by contract. On December 11, 2009, Hanover added Petitioner to his account as a joint account holder in order to allow Petitioner's access to half of the funds. Hanover gave half of all the funds he collected to Petitioner for saving his life and being his driver among other things. Hanover and Petitioner wired $475,000.00 to Petitioner's Sister-in-Law in Manila Philippines for business purposes. Petitioner and Hanover were charged $25.00, for this additional service. Petitioner accepted the funds from

Hanover for valuable consideration, in good faith and with no knowledge of any wrongdoing. Thus, making Petitioner a "Holder in Due Course".

Hanover then boarded a flight to San Juan, Costa Rico for business purposes. The business plans were made over several months so the quick action was not an attempt at any nefarious actions. Petitioner would like to state for the Court that both Petitioner and Hanover were cleared of any wrongdoing by the FBI, Secret Service and a Grand Jury.

On Monday December 14, 2009, Petitioner went to the Respondent Bank at 9:00am and attempted to withdraw several Cashier's Checks, one of which was a Charity donation of $100,000.00, none of the checks were for cash nor were they made out to Petitioner. Petitioner made no attempt to close the account and abscond with the funds. Respondent bank denied Petitioner access to his account clearly in violation of Petitioner's contract with Respondent.

The Respondent called the FBI and disclosed Petitioner's private financial information in violation of the Washington Consumers Protection Act (CPA) and Petitioner's contract (Privacy Disclosure). Respondent was contacted by the Secret Service and again disclosed private financial information including the wire that was sent out of the Country. This was done with no warrant, subpoena or Court Order. This

was also done in violation of the CPA and privacy disclosure portion of Petitioner's contract with Respondent.

Respondent withdrew all funds from Petitioner's account and closed the account on December 31, 2009. The Petitionert's bank statement supplied in discovery and sworn to be true and correct showed a total of over 9.3 million dollars in deposits for December of 2009. While Respondent wants the Courts to believe that the statement does not actually show that any additional deposits/credits were made the problem is that if that were the case the total deposits would be only the original 4.6 million dollars.

Respondent retrieved the wire that had been sent December 11, 2009, in January of 2010. Respondent waited and received a Letter of Indemnification from Cox Communications about February 15, 2010, and then returned those funds to Cox Communication, bypassing the originating bank altogether which did not request the funds to be returned nor did it send a Letter of Indemnification for those funds. Petitioner at this point would like to state that Respondent stated in discovery that had it not received Letters of Indemnification from Wachovia Bank (Now Wells Fargo), J.P. Morgan Chase Bank and Cox Communications agreeing to pay any and all legal fees as a result of Respondent's actions Respondent would not have taken the funds from Petitioner's account.

This amounts to a *de facto* admission that Respondent had liability for their actions regarding the Petitioner and his account with Respondent.

Petitioner for over a year attempted to settle this issue with Respondent to no avail this action is the result. Petitioner did attempt to amend his complaint on May 20, 2011, to add Breach of Contract and CPA violations but the motion was unjustly denied and there was no appeal possible. Petitioner has attached the Transcript of the hearing as App. A-2.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The COA decision raises questions of law under both the Washington State Constitution (WSC) and the U.S. Constitution. (USC) The WSC states in Article I. Sec. 7 states: No person shall be disturbed in his private affairs, or his home invaded, without authority of law. This includes financial affairs as stated in: *State v. Miles*, 160 Wn.2d 236, 252, 156 P.3d 864 (2007)

The WSC Article I. Sec. 3 parallels the USC 5th and 14th Amendment Sec. 1, in protecting individuals from being deprived of life, liberty, or property, without due process of law and equal access to the Courts. The COA decision is contrary to established Washington Law. The COA decision is effectively endorsing and violating Petitioner's rights to financial privacy, due process and equal access to the Courts.

**Washington State law and the U.S. Supreme Court grants Petitioner a property right in his deposit account**. The Ninth Circuit, in *United States v. Komisaruk*, 874 F.2d 686, 693 (1989) stated; ("[T]he word' property' implies ownership, or the 'exclusive right to possess, enjoy, and dispose of a thing.'"(citing Webster's Third New Int'l Dictionary 1818 (1986))); (same).

The U. S. Supreme Court has also supported this conclusion. In *U.S. v. National Bank of Commerce*, 472 U.S. 713 (1985); citing *IRS v. Gaster*, 42 F. 3d 787, 791 (3d Cir. 1994) **unrestricted right to withdrawal from joint demand deposit account is a property right** and (holding that IRS cannot levy against a joint bank account where the delinquent taxpayer lacks the right to make a unilateral withdrawal of the funds). (Emphasis Added) **Funds/Credits in a Bank Account Are Subject to a Claim of Conversion** "A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Reliance Insurance Co. v. U.S. Bank, WA., NA.,* 143 F.3d 502, 506 (9th Cir. 1998) citing *Public Utility District v. Washington Public Power Supply System,* 104 Wn.2d 353, 705 P.2d 1195, 1211 (1985). Reliance further states: "Even where money can be the subject of conversion, the cause of action does not lie"unless it was wrongfully received by the party charged with

conversion, **or unless such party was under obligation to return the specific money to the party claiming it.**" *Public Utility District*, 705 P.2d at 1211. Which Respondent was.

The United States Supreme Court in *Leather Manufacturers' Nat. Bank v. Merchants' Nat. Bank*, 128 U.S. 26, 9 S. Ct. 3, 32 L. Ed. 342 (1888) also said:

> "**The specific money deposited [in a bank] does not remain the money of the depositor, but becomes the property of the bank,** to be invested and used as it pleases; its obligation to the depositor is only to pay out an equal amount upon his demand or order; and proof of refusal or neglect to pay such demand or order is necessary to sustain an action by the depositor against the bank. **The bank cannot discharge its liability to account with the depositor to the extent of a deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check.**" (Emphasis Added)

See also, *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S. Ct. 1386, 1389, 118 L.Ed.2d 39 (1992) ("A person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance."). While this case is over 120 years old it is still good law and cited as recently as January 24, 2012. Respondent was in fact a debtor to Petitioner. Petitioner must have recourse when his property is illegally withheld, taken by another, or withheld in violation of a contract whether

it is called conversion, theft, misappropriation or another term especially when Respondent was violating statutes.

One of the statutes violated by Respondent was RCW 30.22.210 Authority to withhold payment — Vulnerable adults.

(1) Nothing contained in this chapter shall be deemed to require any financial institution to make any payment from an account to a depositor, or any trust or P.O.D. account beneficiary, or any other person claiming an interest in any funds deposited in the account, if the financial institution has actual knowledge of the existence of a dispute between the depositors, beneficiaries, or other persons concerning their respective rights of ownerships to the funds contained in, or proposed to be withdrawn, or previously withdrawn from the account, or in the event the financial institution is otherwise uncertain as to who is entitled to the funds pursuant to the contract of deposit. In any such case, the financial institution may, without liability, notify, in writing, all depositors, beneficiaries, or other persons claiming an interest in the account of either its uncertainty as to who is entitled to the distributions or the existence of any dispute, and may also, without liability, refuse to disburse any funds contained in the account to any depositor, and/or trust or P.O.D. account beneficiary thereof, and/or other persons claiming an interest therein, until such time as either:

(a) All such depositors and/or beneficiaries have consented, in writing, to the requested payment; or

(b) The payment is authorized or directed by a court of proper jurisdiction.

(2) If a financial institution reasonably believes that financial exploitation of a vulnerable adult, as defined in RCW 74.34.020, may have occurred, may have been attempted, or is being attempted, the financial institution may refuse a transaction as permitted under RCW 74.34.215.
[2010 c 133 § 1; 1981 c 192 § 21.]

At the time Petitioner attempted to withdraw funds on December 14, 2009, Respondent had no actual knowledge of any issues with the deposits. Respondent failed to notify Petitioner in writing, as required by statute, nor did Respondent wait until the provisions of RCW 30.22.210.1(a) or 1(b) was complied with. Respondent's failure to follow statute cemented it's liability to Petitioner.

The actions of Respondent allowed Wachovia Bank (Now Wells Fargo ), J.P. Morgan Chase and Cox Communications to avoid filing an action in a Washington Court to authorize payment by Respondent to the parties stated herein from the Petitioner's account. Additionally, Wachovia Bank (Now Wells Fargo), J.P. Morgan Chase and Cox Communications did not have to prove the alleged fraud actually took place and that Respondent was either part of the fraud or knew the money was tainted. The COA was in error to affirm the Superior Court Decision granting summary judgment as material facts were in dispute.

2. The COA decision raises issue of public interest and consumer protection because the seizure of funds in Petitioner's account violates Petitioner's contract with Respondent, due process and the disclosure of Petitioner's private financial information also violated Petitioner's contract, public policy, CPA and raises questions about the integrity of the COA.

Washington State has determined that an act is unfair under the CPA if it offends public policy as established "'by statutes [or] the common law" in Magney *v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) (holding that an act is unfair under the CPA if it offends public policy as established "'by statutes [or] the common law,'" or is "'unethical, oppressive, or unscrupulous,'" among other things (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972))). The disclosure of Petitioner's private financial information by Respondent was certainly done in violation of statute, contract and is of the public interest.

3. The COA decision that Petitioner's claims have no basis in fact or law was an abuse of discretion and was actually in contradiction to both Washington State law and case decisions in addition to the COA complete disregard of U.S. Supreme Court decisions not only pertaining to the facts in this action, but also as to the COA obligation as well as the Superior Courts obligation to treat *Pro se* litigants pleadings liberally.

The standard of review by the COA is a *de novo* review meaning the COA looks at the case from the same position as the Superior Court. The review is limited to the issues in the moving party's motion. Petitioner's pleadings and facts alleged must be taken as true, as the

nonmoving party. The COA did not adhere to these standards in their decision.

Respondent itself has stated under oath that no document, contract ACH or NACHA policy required it to return the ACH deposits to the Original Depository Financial Institution (Hereinafter ODFI) therefore there was no authority to do so. The COA decision states that Respondent had authority under the contract and ACH Rules because the Respondent claimed it had such authority. The COA states the deposits were fraudulent, this is incorrect Respondent alleged fraud but it was never proven in a Court of Law. Respondent is continually misleading the Courts and committing perjury. Respondent stated in discovery that; ***"Respondent is unaware of any document, contract, ACH or NACHA policy that required it to return the ACH deposits to the ODFI's."*** As the Court is well aware discovery requests require a party to answer under oath. Respondent also stated under oath in discovery; ***"Respondent did not make a decision as to the ownership of funds."*** and ***"In addition, Respondent made no determination regarding plaintiff's property interest or lack thereof in the fraudulent deposits."*** This was stated under oath in discovery to avoid the application and portion of *Kalk v Security Pacific Bank*, 126 Wn. 2d. 346 (1995) not overturned in describing RCW 30.22.140 which states; **As long as a financial institution relies on the**

**form of an account, as opposed to the actual ownership of the funds within the account, it is protected from liability.**

Petitioner had the right under contract to withdraw any and all funds in the account at Respondent Bank. Petitioner's contract clearly states that:

> WITHDRAWALS- Unless clearly indicated otherwise on the account records, **any of you, acting alone, who signs in the space designated for signatures on the signature card may withdraw or transfer all or any part of the account balance at any time.** (Emphasis Added)

In Washington State "any" means "all." The word "any" means "every" and "all." *State v. Westling*, 145 Wn.2d 607, 612, 40 P. 3d 669 (2002) (*citing State v. Smith*, 117 Wn. 2d 263, 271, 814 P.2d 652 (1991)). Respondent had no legal, contractual or other right by ACH Rule or Policy to deny Plaintiff access, freeze Plaintiff's account on December 14, 2009, or to return the funds.

Thus, Respondent willfully interfered without lawful justification and deprived Petitioner the possession of his funds. Because of Respondent's perjury the COA was incorrect when it made the statements; *"First, McClain has failed to show a genuine issue of material fact regarding whether he had a legitimate property interest in those funds. Second, 1st Security Bank had a lawful justification to seize and return the funds in dispute under its contract with McClain and the incorporated ACH rules. Finally, money in a bank account does not constitute "chattel"*

*for purposes of conversion under these circumstances."* This is true **as long as a financial institution relies on the form of an account, as opposed to the actual ownership of the funds within the account, it is protected from liability.** Petitioner had the right as owner of the account to withdraw all funds/credits. The funds/credits in the account are not the funds Respondent took control of by accepting the payment order. Respondent continually tells the Court the funds were returned to the true owners thus violating *Kalk* and Washington State law. As to dispute of material facts please see attached federal Court decision (App. A-3, pg. 2, lns. 17-21, pg. 3, lns. 1, 2) stating that there were material facts in dispute which would preclude the granting of summary judgment.

Respondent was in fact, Petitioner's debtor on December 14, 2009 at 9:00am and can only discharge their liability by paying Petitioner the amount of funds/credits shown on deposit and available for withdrawal at that time. While the Respondent can have indemnification from others for fees and damages they cannot assign their liability to Petitioner to another as stated in *Leather Manufacturers' Nat. Bank*

Hanover's contact information was all over the internet which is public domain therefore, Petitioner was under no obligation to provide information to Respondent. Hanover's Declaration was stricken and Petitioner provided the Court with a new Declaration (DKT. # 111) of

which was not stricken, nor was it considered by the Superior Court or the COA. This Declaration was not considered by the Court even when Petitioner brought it to the Court's (Judge's) attention. (*See* Transcript attached as App. A-4, pgs. 4, lns. 21-25, 5, lns. 1-14) This procedural error is more than enough itself to warrant an appeal and the voiding of the summary judgment by the COA. The Superior Court determined that prior history of Petitioner and Hanover was irrelevant. (App. A-4, pgs. 7, lns. 10-11) However the COA made the history a major part of its decision and the notes contained in the COA decision.

The Court has to realize the money deposited is not the same money or credits that are in dispute as stated above in *Leather Manufacturers' Nat. Bank.* Also, the total of deposits on Petitioner's bank statement clearly shows $9,323,583.08. Had the funds/credits from Petitioner's bank account not actually been withdrawn, as Respondent claims (CP 217), the total deposited would be approximately $4.6 million. The fact is the credits were withdrawn and then redeposited accounting for the over nine million in total deposits is vital to Petitioner's UCC argument. The COA disregarded all of Petitioner's UCC claims as being unavailing and mute. In fact the UCC is a vital argument of Petitioner's claims as it applies to those claims title to funds in a wire transfer passes to the *beneficiary bank* upon acceptance of a payment order. *See United*

*States v. BCCI Holdings (Luxembourg), S.A.*, 980 F. Supp. 21, 27 (D.D.C. 1997) ("Because an accepted transfer cannot be revoked without the consent of the beneficiary, and the beneficiary bank incurs an obligation to the beneficiary upon acceptance of the funds, the ownership interest in those funds must pass from the originator upon completion of the funds transfer.") Petitioner clearly had a property right to the funds/credits in the account. The new approach of the Third Restatement is located in comment c to section 6. It states: **§ 6 Payment of Money Not Due: Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.** The parties (Payer's the ODFI's) that claim the money was erroneous deposited into Petitioner's (Recipient's) account with the Respondent have a claim against Petitioner for those funds that Respondent took clear title by acceptance of the payment orders. That clear title passed to Petitioner upon the acceptance of half the funds from Hanover. Thus, making Petitioner a third party recipient that accepted the funds for valuable consideration, in good faith and with no knowledge of wrongdoing (which is the standard set by the U.S. Supreme Court and common law) making Petitioner a " Holder in Due Course". Petitioner's claims are based in fact and law regardless of the misstated, misleading and perjuries contained within the Respondent's pleadings to the Courts. **It is a rule of law that title to currency passes**

**with delivery to the person who receives it in good faith and for valuable consideration.** *Rankin v. Chase National Bank*, 188 U.S. 557, 23 S. Ct. 372, 47 L. Ed. 594[6] (1903); *Knapp v. First Nat. Bank & Trust Co.*, 154 F.2d 395, 398-399 (10th Cir.1946). See also, *Holly v. Domestic & Foreign Missionary Society*, 180 U.S. 284, 21 S. Ct. 395, 45 L. Ed. 531 (1901); *State National Bank of Boston v. United States*, 114 U.S. 401, 5 S. Ct. 888, 29 L. Ed. 149 (1885); *In re Brainard Hotel Co.*, 75 F.2d 481 (2d Cir. 1935); Restatement, Restitution, § 173, comment n.(Emphasis Added)

Additionally, One who receives money in good conscience and has practiced no deceit or unfairness in receiving it, is under no legal obligation to return it to one from whom it's been obtained by deceit on the part of another. *Transamerica Insurance Company v. Long*, 318 F. Supp. 156, (W.D. Pa. 1970) Petitioner meets the standards of the above mentioned cases.

Breach of Fiduciary Duty Respondent provided an "extra service" by wiring money to Armi Que, Petitioner's agent in the Philippines and charging $25.00. That charge was never returned and the steps Respondent went to retrieve the funds from Armi Que's account in the Philippines amounts to wire fraud, bank fraud and money laundering. That is a breach of a quasi-fiduciary duty.

Regulation J provides for irrevocable settlement once the money is

in the account of a beneficiary. Respondent stated in pleadings and a Declaration in the Superior Court that; *"As co-owner of the Account, Hanover was authorized to make withdrawals. Huffington Dec., Exhibit O.* ***Upon removal of the funds, all right title and interest thereto were vested in Hanover*** *not McClain."* (Emphasis Added) This statement applies equally to Petitioner. Hanover in his sworn Declaration in Support of Plaintiff's Reply to Respondent's Response to Plaintiff's Motion for Partial Summary Judgment, (DKT # 111) which was not stricken by Respondent stated that; *"Half of the money belonged to Charles V. McClain, III."* Using Respondent's own logic half of the $475.000.00 Respondent recovered/seized through money laundering, wire and bank fraud belonged to Petitioner. By what legal authority did Respondent recover the $475,000.00 from the account of a foreign national in a foreign country when Respondent stated that the funds were Hanover's? That is what all rights, title and interest means.

Due Process Showing a civil conspiracy exists between Respondent, its employees, agents, attorneys, the FBI or Secret Service (Due Process Violation/Acting under Color of Law) in retrieving the funds from the Philippines is a question of fact, not law, and it is one a jury should decide. A civil conspiracy requires clear, cogent, and convincing proof that "(1) two or more people combined to accomplish an unlawful

purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy." *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996) (citing *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967)). A suspicion or "commonality of interests is insufficient to prove a conspiracy." *Wilson*, 84 Wn. App. at 351 (citing *Corbit*, 70 Wn.2d at 529). Petitioner presented more than enough evidence to show civil conspiracy.

The Superior Court and the COA have ignored the U. S. Supreme Courts direction regarding *Pro se* litigants. Petitioner is entitled to the following: Due Process provides that the "rights of *sui juris* litigants are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if a court can reasonably read pleadings to state valid claims on which a litigant could prevail, it should do so despite the failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements." *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972); *Hoag v. MacDougall*, 454 U.S. 364, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982).

The Superior Court should and did recognize this is an action on contract, but refused to afford Petitioner his day in Court even after the

Respondent agreed. (App. A-3, pgs. 12, lns. 12-25, pg. 13, lns. 1-19, pg. 14, lns. 1-7) Petitioner made legitimate objections at A-3, pg. 4, lns. 12-20, pg. 8, lns. 19-21, pg. 9, lns. 14-20, pg. 15, lns. 14-19 The Respondent and their Counsel through their misconduct, unethical, dishonest deceitful and illegal actions have misrepresented, the facts, the issues, the law and have contradicted their own sworn statements that were provided in discovery to Petitioner and the Courts. In the interest of justice the Respondent cannot be allowed to perjure itself to avoid a trial by jury to decide the facts. This action is prejudicial to Petitioner.

If Respondent had the authority itself to carry out the actions they took in violating Petitioner's contract, committing money laundering (By participating in a financial transaction, the wiring of funds it believed to be the product of an illegal transaction), wire and bank fraud in the acquisition of funds under control of another bank, in another country and then committing perjury to mislead the honorable Courts all to avoid a trial by jury and the possibility of having to pay restitution it would not have had to lie, mislead and misrepresent the facts to this Court. Had the Respondent not been given Letters of Indemnification from other parties we would not be here today.

Attorney's fees Respondent failed to advise the Court that it has not suffered any loss as a result of the attorney's fees regarding this appeal

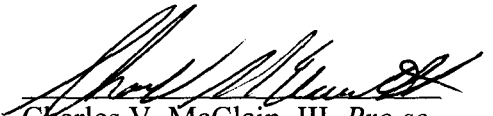
or the cost involved in Superior Court. Wachovia Bank, (Now Wells Fargo Bank) J.P. Morgan Chase Bank along with Cox Communications gave Respondent Letters of Indemnification and covered all cost involved in this instant action. The Superior Court did not determine this action was frivolous. To award fees to Respondent would be unjust enrichment.

## VI. CONCLUSION

Petitioner has shown within this brief that the COA abused its discretion in both the decision and the awarding of attorney's fees. Petitioner's account paid interest which allowed Respondent to use the Fractional Reserve Banking System. This is where the deposits create money for the Respondent to loan to others. Petitioner is a totally disabled former U.S. Marine with limited disability income. The awarding of over $54,000.00 in attorney's fees will put Petitioner in bankruptcy.

In the interest of Justice Petitioner respectfully request the Court grant review of the COA decision and at the least remand back to Superior Court for trial. If not, Petitioner will be left with after six years with no remedy at law for the breach of contract by Respondent. This Petition conforms to RAP 13.4 *et seq.*

Respectfully Submitted this 13th day of May, 2016.



Charles V. McClain, III, *Pro se*

## VII. APPENDIX

1-4

# APPENDIX 1

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON
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| CHARLES V. MCCLAIN III,<br><br>Appellant,<br><br>v.<br><br>1ST SECURITY BANK OF WASHINGTON, a Washington Corporation,<br><br>Respondent. | ) | NO. 73190-4-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: March 7, 2016 |

LAU, J. — Charles McClain appeals the trial court's summary judgment dismissal of his claims for conversion, breach of fiduciary duty, and violation of due process against 1st Security Bank. McClain contends 1st Security Bank wrongfully seized funds in his bank account and transferred those funds to Cox Communications and Comcast—national cable companies—after those companies erroneously transferred the funds to McClain. Because McClain's claims have no basis in fact or in law, we affirm.

## FACTS

This appeal involves funds deposited in a joint bank account belonging to Harrison Hanover and Charles McClain. Hanover opened a bank account at 1st Security Bank of Washington in early 2009 and added McClain to the account in December 2009. From December 10 through 15, several fraudulent deposits were credited to the account. The deposits were made to the account through the Automated Clearinghouse System (ACH). The ACH system shows the sender of each fund transfer. The deposits were sent by Cox Communications and Comcast, two national cable companies. The deposits totaled just over $4.6 million.

Cox Communications and Comcast sent the money to Hanover and McClain's account due to a fraudulent e-mail scheme. Representatives from Cox Communications and Comcast stated they received e-mails from someone identifying himself as "Robert Willox." Clerk's Papers (CP) at 590-99. Willox claimed to be the Vice President of Finance for Arris Solutions, Inc., a vender providing goods and services to both Cox Communications and Comcast. Willox instructed both Cox Communications and Comcast that payments of future invoices should be routed to an account in 1st Security Bank. Unknown to representatives of Cox Communications and Comcast at the time, the account at 1st Security Bank belonged to Hanover and McClain—not Arris Solutions, Inc. Comcast and Cox Communications both quickly discovered that Arris Solutions had not received payment and that the routing instructions they received in the "Robert Willox" e-mails were fraudulent. On December 14, 1st Security Bank determined some of the deposits were not legitimate, and it froze the funds in McClain's account while it investigated other deposits. On December 15,

1st Security Bank honored requests from Cox Communications and Comcast to return the misdirected funds.

On December 2, 2010, McClain sued 1st Security Bank, alleging conversion, breach of fiduciary duty, and a violation of his due process rights under the Fifth Amendment of the U.S. Constitution.[1] The trial court dismissed McClain's claims on summary judgment. McClain appeals.

## ANALYSIS[2]

### Standard of Review

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); Michak, 148 Wn.2d at 794-95.

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[1] Hanover, McClain's business partner, quickly absconded to Miami and then to Costa Rica. In 2013, he died in a Nicaraguan prison while serving a 24-year sentence for possession of child pornography and rape of a child. See Ramon Villareal and Lucia Vargas, Extranjero muere en Penal, La Prensa, April 20, 2013 (available at http://www.laprensa.com.ni/2013/04/20/departamentales/143266-extranjero-muere-en-penal).

[2] We note at the outset that McClain's brief contains many confusing, nonsensical arguments containing dubious legal reasoning and citations to inapplicable law. We will not consider McClain's arguments to the extent that they misconstrue entirely irrelevant legal authority or lack reasoned analysis. See Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."); "We will not consider an inadequately briefed argument." Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

Conversion

McClain's argues 1st Security Bank committed conversion when it seized the funds in his account and returned those funds to Cox Communications and Comcast. We disagree.

"A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." Public Util. Dist. No. 1 of Lewis County v. Washington Public Power Supply Sys., 104 Wn.2d 353, 378, 705 P.2d 1195 (1985). First, McClain has failed to show a genuine issue of material fact regarding whether he had a legitimate property interest in those funds. Second, 1st Security Bank had a lawful justification to seize and return the funds in dispute under its contract with McClain and the incorporated ACH rules. Finally, money in a bank account does not constitute "chattel" for purposes of conversion under these circumstances.

McClain failed to produce any evidence demonstrating he was legally entitled to the funds in the account. The ACH deposits unambiguously demonstrate the funds came from Cox Communications and Comcast, and McClain produced no evidence showing he was entitled to payment from either Cox Communications or Comcast. McClain's arguments to the contrary are groundless. First, McClain claimed the funds were the proceeds of a contract Hanover brokered involving the sale of diesel fuel overseas. McClain claimed the details of the contract were confidential and that only Hanover knew those details. McClain claimed he spoke to Hanover on a regular basis but refused to give counsel any contact information for Hanover. McClain did eventually provide a declaration in support of the diesel fuel story, but it was stricken by the trial

court as inadmissible and is therefore not part of our record. Regardless, nothing in that declaration demonstrates that the funds at issue originated from anywhere other than Cox Communications and Comcast. The trial court therefore had overwhelming and undisputed evidence that the funds came directly from Cox Communications and Comcast.

McClain next argues he was entitled to the funds regardless of their origin simply because they ended up in his bank account. This is not the law. See, e.g., Powderly v. Schweiker, 704 F.2d 1092, 1097 (9th Cir. 1983) ("Appellant's attempt to claim a property interest by reason of her own bank account is groundless. In reality, she is attempting to claim a property interest in the funds erroneously sent to her deceased husband, but cannot escape the fact that she has no entitlement to these funds."). McClain cites no legal authority supporting his assertion that the presence of the funds in his account is sufficient on its own to confer a valid property interest for purposes of a conversion claim. He only presents nonsensical arguments containing little legal analysis and relies on cherry-picked dicta from unrelated cases. For example, McClain cites United States v. Redcorn, 528 F.3d 727 (10th Cir. 2008) to support his argument that one has a property interest in the funds contained in a bank account even if those funds are stolen. In Redcorn, a criminal case involving an embezzlement scheme, the court noted that "[o]nce the defendants deposited the funds into their personal bank accounts, they had accomplished their crime and the funds were available for their personal use." Redcorn, 528 F.3d at 739. But the court's language does not mean that the defendants in that case suddenly had a legally valid property interest in the stolen funds once they were deposited in their personal bank accounts. Rather, the court

simply stated that once the funds were in the defendants' bank accounts, the fraud was complete; future transfers were not "essential" parts of the scheme, and the defendants could not be charged based on those future transfers. Redcorn, 528 F.3d at 739. But nothing in Redcorn or any other authority McClain cites suggests that an individual gains legal entitlement to stolen funds simply by virtue of the fact that those funds show up in his or her bank account. McClain has failed to show that he had a legitimate property interest in the allegedly converted funds.

Despite McClain's lack of any property interest, we note that 1st Security Bank had the legal justification under its contract with McClain to seize and return the funds. The account agreement, which McClain signed when he joined the account, unambiguously states that "if any of the deposited funds or fund transfers are suspected to be in violation of state or federal law they may not be available for immediate withdrawal." CP at 525. Further, the agreement states that fund transfers are governed by the ACH rules. Those rules, incorporated into the agreement, expressly allow 1st Security Bank to return erroneous fund transfers at the request of the party originating the deposit. Therefore, 1st Security Bank had a legal justification to return the funds to Cox Communications and Comcast, and McClain's conversion claim fails. See Public Util. Dist., 104 Wn.2d at 378 (Defendant must have acted without legal justification to be liable for conversion).

McClain's reliance on the Uniform Commercial Code (UCC) is unavailing. The UCC expressly provides that "the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." RCW 62A.4A-501(a). It also provides that "a funds-transfer system rule governing rights and obligations between the

participating banks using the system may be effective even if the rule conflicts with this Article and indirectly affects another party to the funds transfer who does not consent to the rule." RCW 62A.4A-501(b). Therefore, McClain has failed to show that the account agreement requiring that fund transfers be governed by the ACH rules is inconsistent with any Washington law.

Funds in a bank account typically cannot be "chattel" for purposes of conversion except under certain circumstances. Indeed, "bank accounts generally cannot be the subject of conversion, because they are not specific money, but only an acknowledgement by the bank of a debt to its depositor." Reliance Ins. Co. v. U.S. Bank of Washington, N.A., 143 F.3d 502, 506 (9th Cir. 1998). "[T]here can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it." Public Util. Dist. No.1, 104 Wn.2d at 378. Neither of these circumstances are present here. Though arguably wrongfully received, as discussed above, McClain has failed to show any legal entitlement to the funds. For the same reason, 1st Security Bank was under no obligation to give those funds to McClain.

Breach of Fiduciary Duty

McClain seems to have abandoned his claim for breach of fiduciary duty. Regardless, the trial court properly dismissed this claim because 1st Security Bank owed McClain no fiduciary duty. "As a general rule, the relationship between a bank and a depositor or customer does not ordinarily impose a fiduciary duty of disclosure upon the bank. They deal at arm's length." Tokarz v. Frontier Federal Savings & Loan Ass'n, 33 Wn. App. 456, 458-59, 656 P.2d 1089 (1982). There may be limited

circumstances where a bank owes a depositor a quasi-fiduciary duty, such as where the bank provides an "extra service" or there is a unique relationship of trust and confidence between the bank and the customer. Annechino v. Worthy, 162 Wn. App. 138, 143-44, 252 P.3d 415 (2011). No special circumstances exist here.

Due Process

McClain argues that 1st Security Bank violated his constitutional right to due process when it seized the funds in his account and returned them to Cox Communications and Comcast. He seems to have abandoned this claim on appeal. Regardless, the trial court properly dismissed this claim.

The U.S. Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V; U.S. Const. amend. XIV. Generally, the Fifth and Fourteenth Amendments only protect persons against infringement by governments, not private entities. See Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978). In order to prevail, McClain must show some "direct and substantial" government involvement. Nat'l Bd. of YMCA v. United States, 395 U.S. 85, 93, 89 S. Ct. 1511, 23 L. Ed. 2d 117 (1969). McClain has failed to show any facts demonstrating any government involvement in 1st Security Bank's allegedly unlawful conduct. McClain only alleges that 1st Security Bank's conduct was "not possible without conspiracy and government support." Br. of Appellant at 4. This is insufficient to sustain his due process claim.

Appellate Attorney Fees

1st Security Bank requests an award of attorney fees under CR 11, claiming McClain's appeal is frivolous. We agree and grant attorney fees to 1st Security Bank.

CR 11 provides:

> The signature of a party . . . constitutes a certificate by the party . . . that the party . . . has read the pleading, motion, or legal memorandum, and that to the best of the party's . . . knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> (1) it is well grounded in fact;
> (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

CR 11(a). If a party violates this rule by pursuing frivolous litigation, the court may impose an appropriate sanction, including reasonable attorney fees. See Eller v. East Sprague Motors & R.V.'s, Inc., 159 Wn. App. 180, 191, 244 P.3d 447 (2010). An action is frivolous if it "cannot be supported by any rational argument on the law or facts." Clarke v. Equinox Holdings, Ltd., 56 Wn. App. 125, 132, 783 P.2d 82 (1989). CR 11 does not require the court to find that the action was brought in bad faith or for purposes of delay or harassment; "[i]t is enough that the action is not supported by any rational argument and is advanced without reasonable cause." Eller, 159 Wn. App. at 192. 1st Security Bank's CR 11 counterclaim provided notice to McClain of its intent to seek sanctions based on his frivolous claims.

We conclude that McClain's appeal is frivolous under this standard. McClain's lengthy brief lacks any reasonable legal argument. His claims are grounded neither in fact nor the law. He selectively quotes dicta from entirely unrelated legal authority that, upon close examination, does not support any of the assertions he makes. He essentially abandoned on appeal his due process and breach of fiduciary duty claims. Because we find that McClain's appeal has no basis in fact or in law, we grant

1st Security Bank's request for reasonable attorney fees and costs under RAP 18.9 and subject to compliance with the requirements of RAP 18.1.

## CONCLUSION

For the foregoing reasons, we affirm and award 1st Security Bank reasonable attorney fees and costs for having to respond to McClain's frivolous appeal.

Ian, J.

WE CONCUR:

Spearman, C.J.

Cox, J.

# APPENDIX 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

| | | |
|---|---|---|
| CHARLES V. McCLAIN, III, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 10-2-10798-1 |
| 1st SECURITY BANK OF | ) | |
| WASHINGTON, | ) | |
| Defendant. | ) | |

TRANSCRIPT OF THE PROCEEDINGS

COMMISSIONER'S CALENDAR

MOTION HEARING

May 20, 2011

Snohomish County Superior Court

3000 Rockefeller Avenue

Everett, Washington

DATE REPORTED VIA FTR CD: MAY 31, 2011

MARY A. WHITNEY, CCR - WCRL #2728



EXA

APPEARANCES

FOR THE PLAINTIFF: CHARLES V. McCLAIN, III
Pro Se

FOR THE DEFENDANT: JEAN E. HUFFINGTON, ESQ.
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-oOo-

SEATTLE, WASHINGTON; FRIDAY, MAY 20, 2011

TRANSCRIPT OF THE PROCEEDINGS

MOTION HEARING

11:48 A.M.

-o0o-

THE COURT: -- ... his claims were that the communications were with the FBI?

MS. HUFFINGTON: Your Honor, there are two separate things. As I understand the claim, his complaint for breach of an unspecified right of privacy relates to communications between the defendant and law enforcement agencies. That isn't the same as the wire fraud and mail fraud claims, where he says that's premised upon the defendant's response to the agency requests.

THE COURT: The wire fraud and mail fraud --

MS. HUFFINGTON: Yes.

THE COURT: -- are based on the responses.

MS. HUFFINGTON: Exactly, your Honor.

THE COURT: And that's what you're saying is privileged --

MS. HUFFINGTON: It's absolutely privileged under the cases, your Honor.

THE COURT: Okay. Anything else?

MS. HUFFINGTON: Yes, your Honor. Thank you.

So I think what I've addressed is that there are no predicate acts here which can stand, so there is no civil RICO case that is appropriate.

The other thing I want to talk about is just the general vagueness and indefiniteness and lack of specificity to the entire amended portion of the proposed amended complaint.

MR. McCLAIN: Your Honor, if the entire thing is that vague and abstract, she could have filed CR 12(b)- -- or CR 12(b)(6) on the original complaint, and she failed to do so.

THE COURT: Okay. Mr. McClain, I want you to let her finish.

And I'll need to have you be brief, because I want Mr. McClain --

MS. HUFFINGTON: Thank you.

THE COURT: -- to have the opportunity to respond.

MS. HUFFINGTON: All right. I will go quickly and skip through things.

The problem with not having factual allegations is, defendant has a CR 11 obligation in its response to make a good-faith investigation of the

facts and law that are alleged.

It's impossible when all that appears in this document is an allegation that a law was violated, an allegation that there was something false, not knowing anything about what's false, what right to privacy, what law was violated.

These five new claims are replete with that kind of vagueness and lack of specificity, and for that reason, it's a futile amendment. They would fail to survive a 12(b)(6) motion, and that means we shouldn't let the amendment --.

I think the briefing probably addresses the issues of naming defense counsel for acts undertaken --

MR. McCLAIN: Objection, your Honor. She has no standing to argue anything about adding plaintiffs.

MS. HUFFINGTON: Your Honor, I'm arguing on behalf of my client, defendant 1st Security Bank, and I'm going to finish my argument if I can.

There is good case law that says that you cannot name attorneys as individual defendants for acts that they take in the course of their representation, and every single allegation against defense counsel refers to acts done on behalf of the

defendant. So there's no basis in the law for permitting any of these claims to include defense counsel.

Finally, we've included a great deal of information -- and I'm not going to repeat it here -- regarding the litigation history of the plaintiff --

MR. McCLAIN: Objection; irrelevant.

MS. HUFFINGTON: -- and I bring that up now, regretfully, for the reason of saying if your Honor is on the fence --

THE COURT: You know, Counsel, I've seen your material on this, so I'm not going to go back to prior litigation.

MS. HUFFINGTON: I don't want to address any specifics of it. I was simply going to say, if there's any aspect of this argument on which you're on the fence, on which your Honor has some reason to consider granting the relief that's been requested, we would suggest that that long history of filing frivolous claims should be a compelling reason to deny. Thank you.

THE COURT: All right.

MR. McCLAIN: I have to object to that, too, just for the record.

THE COURT: Well, generally, Mr. McClain,

we don't rule on objections in the course of argument. If something is egregious and highly prejudicial, I might hear an objection, but at this point I think we just need to proceed with the argument.

MR. McCLAIN: Okay. That's fine.

THE COURT: So what I want you to do is to address, going through the additional claims -- and you're going to need to do this quickly, because we're going to run out of time --

MR. McCLAIN: Okay.

THE COURT: -- I want you to tell me about the elements of each of the causes of action that you are asking the Court to allow be added to the complaint.

MR. McCLAIN: Okay. Well, first of all, under the pleading deficiencies, Haines v. Kerner in the Supreme Court is very clear on that issue. As long as the court can make a reasonable determination of what the plaintiff is trying to get across, it stands.

I don't believe the -- as far as the filing in the complaint, defense counsel was late in her answer --

THE COURT: I'm not asking about that. I'm asking to address your count IV --

MR. McCLAIN: Okay.

THE COURT: -- as for violation of the Privacy Act. You're asking that that be added to the complaint, correct?

MR. McCLAIN: Okay. The violation of the Privacy Act --

THE COURT: What are the elements of the cause of action for violation of privacy?

MR. McCLAIN: Under the CPA, as I stated previously --

THE COURT: Well, I'm not talking about the Consumer Protection Act.

MR. McCLAIN: Oh, okay.

THE COURT: You're stating that -- you're purporting to state a cause of action under count IV --

MR. McCLAIN: Right.

THE COURT: -- for violation of privacy, so I want you to tell me what the elements of that cause of action are, in your understanding, what it is that you would have to prove to establish that cause of action.

I mean, you say in 4.18 that the defendant "violated federal and state privacy laws," but you don't say what the laws are, so are you talking about

an independent right of privacy, or are you saying that they violated particular laws and that is your caution of action?

MR. McCLAIN: Uh --

THE COURT: I just want to understand what you're trying to --

MR. McCLAIN: The -- well, what I read is that if they give out information on an account holder, it's a violation of the Privacy Act.

THE COURT: Okay. And what are the remedies under the Privacy Act?

MR. McCLAIN: You can bring a civil complaint.

THE COURT: Well, do you have a citation to that statute?

MR. McCLAIN: Not with me, your Honor, no.

THE COURT: All right. Go ahead.

MR. McCLAIN: Other than just the -- you know, under the Consumer Protection Act, it also covers the privacy issue, so they're kind of intertwined.

THE COURT: Why does the Consumer Protection Act cover the privacy issue?

MR. McCLAIN: Because it's a matter of

public interest, and that's all that's necessary under RC- --

THE COURT: Is it in the course of trade or commerce?

MR. McCLAIN: Yes, ma'am.

THE COURT: Okay.

MR. McCLAIN: I'm at the bank. I trade and do commerce there. I don't see how it could not be.

As far as the wire fraud and bank fraud and the privilege, she's asserting that privilege knocks out all the prerequisite underlying felonies for the civil RICO.

First of all, privilege was waived under the Freedom of Information Act. When they gave me the material, they waived any privilege to that material, because they didn't send me anything saying it was privileged.

THE COURT: Well, I don't think the privilege is based on the attorney-client relationship that's subject to waiver. I think she's saying that as a general matter, there's a privilege that attaches to the reporting of certain conduct.

MR. McCLAIN: Well, even if that attaches, if you're doing something illegal, there's no way they

can have privilege from that. You can't commit illegal acts and have privilege. I mean, it's insane to even -- even argue that.

THE COURT: Well, let's look at count V for a minute. You say there was mail fraud and wire fraud for "knowingly submitting false statements to a government agency." So are you saying that there is a private cause of action for mail fraud and wire fraud?

MR. McCLAIN: I'm saying, under the prerequisites for civil RICO, you have to have -- under the state law, you have to have a minimum of two predicate felony acts.

THE COURT: Okay.

MR. McCLAIN: Under federal law, you have to have a minimum of three predicate felony acts.

THE COURT: And are those felonies established in the course of the civil litigation, or are they established in a criminal court and then become the basis for the civil RICO action?

MR. McCLAIN: It's not specific on that. I mean, as long as you can prove that the felonies were committed, which I can --.

The other issue is the fact that defense counsel herself disclosed the existence of the SAR to

me in an email, so standing here and telling the Court that I'm asserting that when she knows it to be damn well true is -- is abusing -- abusing the court system.

THE COURT: I'm sorry, I didn't follow what you were just saying about --

MR. McCLAIN: Defense counsel disclosed the existence of a SAR to me in an email.

THE COURT: Okay.

MR. McCLAIN: Okay? That was a federal offense. Every day that goes by that she doesn't report that to the Office of the Comptroller of Currency or FNSN (phonetic) is an additional felony count.

THE COURT: So the felony count is the fairly for counsel to report that they've disclosed something to you?

MR. McCLAIN: Exactly, and her client, both.

THE COURT: Okay. And how are you damaged by that?

MR. McCLAIN: I'm damaged by the totality of their actions, your Honor. The totality of their actions together is -- is what's taken all the money out of my bank account.

THE COURT: Okay.

MR. McCLAIN: And then they try and cover it up by sending lies through the mail and then claiming privilege when they violate the law. I don't think privilege should attach when somebody is violating the law.

Additionally, she waived privilege when she authorized DFI, through an email, to give me the paperwork.

THE COURT: Okay. I think I understand your argument on that.

Let's move to count VI, "Wire Fraud, Bank Fraud." "Defendant committed wire fraud and bank fraud when they repeatedly sent wires to their agent claiming fraud on sender's account."

MR. McCLAIN: Correct.

THE COURT: So, again, you're saying here that you have a private cause of action for the establishment of fraud --

MR. McCLAIN: For the establishment of them --

THE COURT: -- in the form of wire fraud?

MR. McCLAIN: -- them claiming that it was fraud from my account, which it wasn't, and it couldn't have been, and then getting the money back

and not returning it to me.

THE COURT: But again, is this -- are you making these allegations because you think that's necessary in support of your RICO claim?

MR. McCLAIN: It's a prerequisite, your Honor.

THE COURT: Right. But there's no -- you're not saying there is an independent cause of action for -- civil cause of action for wire fraud and bank fraud, you're just saying: I have to do this because it's a predicate act.

MR. McCLAIN: I haven't --

THE COURT: And again, I'm trying to track you.

MR. McCLAIN: I'm sure I can find a case somewhere, but right now I can't cite anything right off the top of my head.

THE COURT: Okay.

MR. McCLAIN: But I believe there's -- if there's not, there should be, because you can't allow people just to violate the law and then hide behind, you know: You can't do anything to us.

THE COURT: All right. How about count VII?

MR. McCLAIN: Okay.

THE COURT: Do you want to tell me about the elements of the Consumer Protection Act?

MR. McCLAIN: (Reviewing documentation.)

Okay. Under RCW 1986, et seq., I have to prove defendant's act or practice is unfair or deceptive. Okay? It was unfair that they gave my account information to somebody without legal authority to do so. It's also a violation of the Privacy Act in -- both state and federal.

THE COURT: Why is it unfair for them to provide account information to law enforcement agencies?

MR. McCLAIN: Because they didn't have a right to do it.

THE COURT: What would give them the right to do it?

MR. McCLAIN: A subpoena.

THE COURT: Okay.

MR. McCLAIN: It occurred in conduct of trade or commerce, because they're a business and I have my account there. It impacts the public interest because -- the reason they have the privacy laws is because of public interest.

As a matter of fact, that's why we have pretty much all of the laws, is because of public

interest, and it caused the injury to my property or business because they took all of my money.

You know, I tried for over a year to get them to answer questions, and it was the last resort to come to court. You know, they ignored me, and I had to bring this action, and now we're here.

THE COURT: Okay. Is there anything else you want me to know?

MR. McCLAIN: Other than they're not going to be injured because they have indemnification letters, so they can't be claiming any damages.

THE COURT: What do you mean, they have "indemnification letters"?

MR. McCLAIN: I mean the reason my money was taken from me is because other parties gave them indemnification letters, so if they got sued, they wouldn't suffer any damages, because the other parties breached warranties of presentment and authorization.

THE COURT: Okay. All right.

Well, I've looked through this, and first I agree with the bank's position that it's not appropriate to add the attorneys as parties defendant to this case.

I think there is a litigation privilege.

There's a privilege in reporting and in operating as attorneys that protects them from suit in the course of their conduct as attorneys, so I'm going to deny the motion with respect to adding the attorneys as parties defendant.

I don't find that there is a sufficient basis for adding causes of action for a violation of privacy. I don't think that there is -- if there are privacy statutes that you cite and bring to the court and show that there is a civil remedy provided, maybe there is an appropriate amendment, but I don't see substantiation for that here.

And I agree with counsel that once an answer has been filed in a case, then the Court has to evaluate proposed amendments based on good cause and whether it promotes justice to permit the amendment, all things considered.

So I do think that it has to pass the test of whether or not the claim has a reasonable basis in law and fact, and with respect to the way that you have this couched, the violation of privacy, I don't find constitutes a cause of action as this is written.

With respect to the mail fraud and wire fraud, I don't think you have a private cause of

action for mail fraud and wire fraud. I think if those are felonies and there's a conviction for a felony, that's fine, but I don't think you have an independent cause of action for those allegations of misconduct, so I feel the same way about count V and count VI.

Count VII --. What was the basis of the deposits into the account? Why were they deposited in your account?

MR. McCLAIN: The knowledge that I had, your Honor, is they were deposited into a friend of mine's account for payment on a contract, a private contract.

MS. HUFFINGTON: May I address that?

THE COURT: Yes.

MS. HUFFINGTON: Okay.

Two companies, Comcast and Cox Communications, had millions of dollars that they were directing to their vendor, Eris Solutions.

During the week that these deposits were made, an unknown person pretending to be from Eris Solutions emailed Cox and Comcast to give them new bank routing information.

The bank routing information went to the checking account of the plaintiff and Harrison

Hanover. That's how they ended up there.

Neither the owners of the funds, Cox and Comcast, nor the intended recipient, Eris Solutions, would ever agree that they were intending to pay Harrison Hanover or Charles McClain.

MR. McCLAIN: I object to that, your Honor.

THE COURT: Okay. I saw that in your response.

MR. McCLAIN: But she has no firsthand knowledge and cannot swear to it.

THE COURT: Well, you tell me, if you can, why those funds were transferred into your account. What would you offer to the Court?

MR. McCLAIN: Well, it wasn't my account when it -- you know, when it originally got transferred, I wasn't a member -- I wasn't on the account.

THE COURT: Well, but you're telling me -- I think you're telling me you were damaged because the funds were taken out of your account.

MR. McCLAIN: After the funds became my property, that's true.

THE COURT: Okay. And what was the basis for them becoming your property?

MR. McCLAIN: The law.
THE COURT: Well, what was the actual basis for them becoming your property?
MR. McCLAIN: Uh --
THE COURT: What did you do in order to earn the dollars that were deposited into your account?
MR. McCLAIN: Actually, the money was deposited to Harrison Hanover and he gave me money.
THE COURT: So it was a gift?
MR. McCLAIN: Yeah -- well, not really a gift, but it was -- basically, I covered expenses for a business for about six years, and I -- I'm his driver, because he couldn't drive because of his eyes.
THE COURT: So was it a repayment of a loan?
MR. McCLAIN: Well, we didn't really consider it a repayment, but it basically was a repayment of that, plus the fact I saved his life and he felt like he was going to give me 50 percent of his earnings.
THE COURT: So that would be a gift --
MR. McCLAIN: So, you know --
THE COURT: -- some combination of business and gift.

MR. McCLAIN: It was for valuable consideration. It was given in good faith, I accepted it in good faith. I had no knowledge there was any problem.

THE COURT: Well, I'm not asking, really, about whether there was a problem with the original source of the funds. I'm trying to figure out the context in which you received or you claim that the funds belong to you.

MR. McCLAIN: I received it in combination of, I guess, business and repayment, yes.

THE COURT: Okay. All right.

So I don't find that there was a Consumer Protection -- I don't find a prima facie showing of a violation of the Consumer Protection Act. It doesn't sound to me like you were acting in the capacity of a consumer with respect to the information that was reported.

And this isn't a summary judgment proceeding. All I'm saying is, is it's a motion to amend, and I have to find whether there is a good cause to allow an amendment.

I don't see that the report to law-enforcement agencies without the subpoena is an unfair or deceptive act or practice under the Consumer

Protection Act, so I don't think you're stating sufficient showing of a valid cause of action, so I'm going to deny an amendment to count VII.

The RICO conspiracy, again, seems to be based on a failure to report the disclosure of a suspicious activity report, and I don't know that there is an affirmative duty to report a disclosure.

MR. McCLAIN: Yes, there is.

THE COURT: I think what you're telling me is that the disclosure is a violation.

MR. McCLAIN: What I'm telling you is that under the -- under the statute -- okay? -- [if] any bank, bank officer, director, employee, or agent of the bank discloses a SAR, it's a federal offense and they must disclose it.

If they do not disclose it, every day that they do not disclose it from the time they disclosed it is a separate count. They can be hit with civil penalties and criminal penalties for that.

THE COURT: All right. What are the cause -- what are elements of the cause of action under civil RICO?

MR. McCLAIN: Three predicate felonies -- two predicate felonies.

THE COURT: And what makes something

a predicate felony?

MR. McCLAIN: Somebody violating the law and committing a felony.

THE COURT: So any felony is a sufficient basis?

MR. McCLAIN: It doesn't stipulate. You know, mail fraud is a common one that's used.

THE COURT: Uh-huh.

MR. McCLAIN: Wire fraud is a common one that's used. And we -- and I have more than enough predicate -- you know, predicate felonies to meet the standard for the civil RICO claim.

THE COURT: Ms. Huffington, any response to the argument that you've committed a felony -- you and/or the bank have committed -- well, the bank has committed a felony by failing to report a disclosure of SARs apparently to the plaintiff?

MS. HUFFINGTON: I have to tread carefully, because -- I have to tread carefully, because there are restrictions on discussing whether or not a SAR was filed, so --

THE COURT: Okay.

MS. HUFFINGTON: -- but I can tell you that we're confident that the bank and I have not committed a felony.

We've satisfied ourselves -- and it would be wrong of me to say how, but I'm an officer of the Court and I'm standing before you telling you that.

THE COURT: Well, I'm not satisfied that there is good cause for the amendment of complaint, so I'm going to deny the motion, and Mr. McClain ... additional efforts you can make, but at this point in time I'm not satisfied that the amendment is justified under the rules, so I'm going to deny the motion to amend.

MR. McCLAIN: So you're going to let her commit a felony, stand here and lie to you, and not allow me a civil RICO complaint?

THE COURT: Well, Mr. McClain, I have things that I have to follow in the Court, and I'm here on the civil motions calendar of the Commissioner of the Court, and I only have so much ability, and I've applied it to the best of my ability, and so at this point in time I'm denying the motion.

MR. McCLAIN: You know, the primary reason to allow an amended complaint is not utility. The primary reason is notice.

THE COURT: That's one of many reasons for denying a motion to amend a complaint.

MR. McCLAIN: Well --

THE COURT: -- so --

MR. McCLAIN: Okay. I just wanted to preserve all my objections ...

MS. HUFFINGTON: I have an order, an original order, in precisely the form -- other than one typo that was corrected -- that was submitted. I don't know if your Honor has already looked at that --

THE COURT: Hand it up and I'll take a look at it.

MR. McCLAIN: Does your Honor have any objection to me amending the original complaint and keeping it basically the same, except for typographical and maybe language errors --

THE COURT: No, I'm --

MR. McCLAIN: -- not adding any additional complaints?

THE COURT: I'm not going to rule with respect to amendments to correct typographical errors, so you don't -- I don't consider that that motion is before me today.

If you want to bring up a motion to amend typographical errors within the original, body of the original complaint, I would ask that you note that as a separate motion ...

And I would also ask and tell you that it's most helpful if you can specifically identify the language that is new in your proposed complaint, and maybe hand a proposal ... that has highlighted sections, because, as you can imagine, this calendar is very difficult if you have to go back and compare the two at the time it's allowed --

MR. McCLAIN: Right, your Honor.

THE COURT: -- to try to figure out what your request is.

MR. McCLAIN: Okay. I'll anything to make it easier for the Court. That's not a problem.

THE COURT: That's my suggestion.

MR. McCLAIN: Okay.

THE COURT: Thank you.

(Reviewing documentation.)

THE CLERK: ...

MR. McCLAIN: Uh-huh.

THE COURT: Actually, we should have showed this -- excuse me, shown this to Mr. McClain.

MS. HUFFINGTON: I handed --

MR. McCLAIN: (Indicating.)

MS. HUFFINGTON: I handed him a copy --

THE COURT: All right.

MS. HUFFINGTON: -- when I handed you up

one.

THE COURT: Thank you.

I've changed the order by deleting the reference to "adequately ... facts relevant to the action," because I don't think that's pertinent or fair to the motion to deny, so if you would provide another copy to Mr. McClain, I'd appreciate that.

MS. HUFFINGTON: All right.

THE COURT: And with that, there being nothing further, Court will be in recess.

MS. HUFFINGTON: Thank you, your Honor.

THE BAILIFF: All rise.

(Hearing recessed - 12:13 p.m.)

-o0o-

CERTIFICATE

STATE OF WASHINGTON )
) ss.
COUNTY OF KING )

I, the undersigned Washington Certified Court Reporter, hereby certify that the foregoing excerpted transcript of the hearing proceedings was taken stenographically by me on May 31, 2011, and thereafter transcribed under my direction;

That any witness, before examination, was first duly pursuant to RCW 5.28.010 to testify truthfully; that the transcript of the hearing proceedings is a full, true, and correct transcript to the best of my ability; and that I am neither attorney for, nor relative or employee of any of the parties to the action, or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of June, 2011.

/s/ Mary A. Whitney
---
Mary A. Whitney, CCR

MARY A. WHITNEY, CCR - WCRL #2728

# APPENDIX 3

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| CHARLES V MCCLAIN, III, et al.,<br><br>Plaintiffs,<br><br>v.<br>1ST SECURITY BANK OF WASHINGTON, et al.,<br><br>Defendants. | CASE NO. C15-1945 JCC<br><br>ORDER DISMISSING CASE |

This matter comes before the Court on Defendants' Motion to Dismiss (Dkt. No. 14). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

## I. BACKGROUND

Plaintiff Charles V. McClain III filed this *pro se* action on December 16, 2015, against 1st Security Bank of Washington ("FSBW"), several of its employees, and its legal counsel. (Dkt. No. 4.) McClain characterizes this suit as a breach of contract case that arose after FSBW refused McClain access to the funds in his bank account.

But what begins as a contract dispute quickly takes a turn for the unusual when one examines the declaration of Harrison Rains Hanover: a man of multiple aliases who Defendants allege died in a Nicaraguan prison in 2013. (Dkt. No. 6 at 1; Dkt. No. 19 at 12.) Hanover's

declaration (Dkt. No. 5) recounts his brokering of a multi-million dollar diesel contract for London bankers (¶ 7), his kidnapping in Costa Rica (¶ 8), and his plans to extract gold from the jungles of Central America by way of a Toyota FJ Cruiser with modified suspension (¶¶ 14, 19).

Despite these outlandish claims, McClain and Hanover assert at every turn that they have done nothing fraudulent. As well they should, for "[f]raud vitiates everything it enters into." *J.A. Fay & Egan Co. v. Louis Cohn & Bros.*, 130 So. 290, 292 (Miss. 1930).

**A. FSBW Bank Account**

The parties agree that the following sequence of events occurred in December 2009. On December 11, Hanover added McClain as a joint account holder to his FSBW account. (Dkt. No. 4 at 6.) Between December 10 and 15, several million dollars were deposited in this account. (*Id.* at 6–8.) On December 11, $475,000 was wired from the FSBW account to a bank account in the Phillipines. (*Id.* at 6.) On December 14, McClain attempted to withdraw funds from the account, but FSBW denied him access. (*Id.* at 8.) FSBW also seized the funds that were wired to the Phillipines and denied McClain access to these as well. (*Id.* at 10.)

Here, the parties disagree. Defendants allege that the deposits originated from Comcast and Cox Communications and were obtained through an email fraud scheme. (Dkt. No. 14 at 2.) The Washington Court of Appeals found this to be the case. (Dkt. No. 19-1 at 3.) McClain maintains that the funds in the account were obtained legally and were gifted to him after he saved Hanover's life.[1] (Dkt. No. 16 at 1, 5; Dkt. No. 4 at 2–5.) Defendants allege that FSBW

[1] In his declaration, Hanover describes occasions where McClain saved his life. One such occasion is best described in Hanover's own words: "That, in 2005, I suffered from Toxic Shock Syndrome, That, McClain obtained an exotic antibiotic for me from his doctor, That, this antibiotic saved my life, That, the antibiotic works in the same way the AIDS cocktail works, i.e., it stops the bacteria from reproducing." (Dkt. No. 5 at ¶ 8.) Other life-saving occasions

ultimately returned all of the allegedly fraudulent deposits to the original depositors. (Dkt. No. 14 at 5.)

**B. Litigation of Claims**

McClain has filed multiple actions in relation to these factual allegations. First, McClain filed in Snohomish County Superior Court on December 10, 2010 ("*McClain I*"). (Dkt. No. 14-1.) His complaint was nearly identical to the one in this case, only it contained fewer causes of action and fewer parties. (*Id.*) At one point, McClain moved to amend his complaint to add claims and defendants; the court denied the motion on the basis that amendment would be futile. (Dkt. Nos. 14-2 and 14-3.) On January 27, 2012, the court dismissed all of McClain's claims on summary judgment. (Dkt. No. 14-4.) McClain appealed the dismissal ("*McClain II*"). (Dkt. No. 19-1.) The court of appeals recently affirmed, finding that "McClain's claims have no basis in fact or in law." (Dkt. No. 19-1 at 2.)

On December 19, 2013, McClain filed a complaint in the Western District of Washington, naming almost all of the same defendants as in the present case and asserting what appear to be the same exact claims ("*McClain III*"). *McClain v. 1st Security Bank of Washington*, Case No. C13-2277-RSM, Dkt. No. 5 (W.D. Wash. 2009). The matter was dismissed without prejudice for failure to serve. *Id.*, Dkt. No. 48. at 7.

Defendants now argue that McClain's current case should be dismissed because his claims are barred by res judicata, judicial action privilege, and statutes of limitations.

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include driving Hanover to the hospital when he was having a heart attack and rescuing Hanover from kidnappers and torturers in Costa Rica. (*Id.*)

## II. DISCUSSION

The Court will divide its analysis into two parts. In Part A, it will analyze McClain's claims against FSBW and its employees. In Part B, it will analyze his claims against FSBW's attorneys Jean Huffington and William McKay, and their law firm McKay, Huffington & Tyler, PLLC.[2]

### A. FSBW and its Employees

The doctrine of res judicata forecloses repetitive litigation of the same claim. "A final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). "Three elements constitute a successful res judicata defense. Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011) (internal quotation marks omitted). "The fact that res judicata depends on an 'identity of claims' does not mean that an imaginative attorney may avoid preclusion by attaching a different legal label to an issue that has, or could have, been litigated." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) ("*Tahoe*").

Because all three elements of the res judicata defense are present, McClain's claims are barred as to FSBW and its employees.

#### 1. Identity of Claims

"Identity of claims exists when two suits arise from the same transactional nucleus of facts." *Tahoe*, 322 F.3d at 1078 (internal quotation marks omitted). In *McClain I*, McClain's

[2] It appears that the law firm is now known as McKay Huffington, PLLC. MCKAY HUFFINGTON, PLLC (last visited April 19, 2016), http://www.mckayhuffingtontyler.com/.

claims arose from the 2009 seizure of his FSBW account and wire transfer. (Dkt. No. 14-1.) The Court has examined McClain's complaint in detail, and finds that these are the very same facts underlying this action. (Dkt. No. 4 at 5–23.) McClain argues that some of his current claims were not litigated in *McClain I*, and that res judicata should not bar him from litigating these claims now. (Dkt. No. 16 at 14.)

McClain's argument rests on a misstatement of law. "Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims *could have been brought* in an earlier action." *Tahoe*, 322 F.3d at 1078 (emphasis added). Once again, *all* of McClain's claims against FSBW and its employees are based on the same set of facts at issue in *McClain I*. (Dkt. No. 14-1.) He could have—and should have—brought his claims then.

The Court therefore finds that "identity of claims" exists between the present suit and *McClain I*.

**2. Final Judgment on the Merits**

"The second res judicata element is satisfied by a summary judgment dismissal which is considered a decision on the merits for res judicata purposes." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005). In *McClain I*, the superior court dismissed McClain's case on summary judgment and the court of appeals affirmed. (Dkt. No. 19-1 at 2.) This was a final judgment on the merits.

**3. Privity**

In *McClain I*, there was only one plaintiff—McClain—and one Defendant—FSBW. (Dkt. No. 14-1 at 7.) This time around, McClain has added his wife as a plaintiff, and a number of FSBW's employees, their attorneys in the previous suit, and these individuals' marital

communities as defendants.[3] (Dkt. No. 4 at 4–5.) But even though these parties are new, they do not defeat privity, because "[i]t is the identity of interest that controls in determining privity, not the nominal identity of the parties." *Virginia Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1247 (9th Cir. 1998) (internal quotation marks omitted). Moreover, "federal courts will bind a non-party whose interests were represented adequately by a party in the original suit." *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (internal quotation marks omitted).

McClain and his wife share a "sufficient commonality of interest" such that it is irrelevant that she was not a party in *McClain I. Tahoe*, 322 F.3d at 1081. McClain does not argue that his wife had any interest in this matter separate from his own—namely, the retrieval of the money seized from his account. Consequently, on the specific facts of this case, her interests are identical to his and were adequately represented in *McClain I.* The Court also notes that "a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy." *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008). That seems to be exactly what McClain is attempting to do here.

FSBW's employees are similarly in privity with FSBW, because "an employer-employee relationship will satisfy the privity requirement for matters within the scope of employment, irrespective of whether the employer or employee is sued first." *Knox v. Potter*, No. C–03–3638 MMC, 2004 WL 1091148, at *13 (N.D. Cal. May 4, 2004) *aff'd*, 131 F. App'x 567 (9th Cir. 2005). All of McClain's claims against FSBW's employees concern matters within the scope of their employment. They are thus in privity with FSBW.

McClain is also suing Defendants' marital communities. But he does not indicate any

[3] The Court will address McClain's claims against Huffington, McKay, and their firm in Part B below.

way—again, under the specific facts of this case—in which the marital communities' interests diverge from those of FSBW's employees. Adding them does not destroy privity.

The Court therefore holds that res judicata bars all of McClain's claims against FSBW, its employees, and their marital communities.[4]

**B. Attorney Defendants**

McClain also alleges that Jean Huffington, William McKay, and the law of firm of McKay, Huffington & Tyler, PLLC are liable for the following: breach of contract; civil conspiracy; violations of the Right to Financial Privacy Act, Electronic Communications Privacy Act, Consumer Protection Act, and the Washington Constitution; and violation of the civil RICO statute.

These claims are barred by res judicata, judicial action privilege, and statutes of limitations.

**1. Res Judicata**

All of McClain's claims against McKay, Huffington, and their firm are barred by res judicata, with the exception of his civil RICO claim that they "committed perjury in court proceedings." (Dkt. No. 4 at 28.) Once again, the three elements of the res judicata defense—identity of claims, final judgment on the merits, and privity—have been satisfied.

First, the facts underlying McClain's current claims are identical to those in *McClain I*. (Dkt. No. 4 at 25, 26–27.) McClain's sole basis for his claims against Huffington, McKay, and

[4] It appears that McClain's claims against FSBW and its employees are time-barred as well; indeed, Judge Martinez found that this was most likely the case during McClain's 2013 suit. *McClain III*, Dkt. No. 48 at 6 ("The majority of Plaintiff's claims appear to be subject to a three-year statute of limitations, which, assuming no equitable tolling, expired in December 2012, prior to the initiation of this lawsuit."). Because res judicata also bars his claims, the Court need not reach the statute of limitations issue.

their firm—again, excluding his allegation that they lied in court during *McClain I*—is his assertion that they improperly released his financial information, and committed perjury and mail fraud in doing so. (*Id.*) Not only could McClain have made these claims in his previous lawsuit, he actually attempted to do so. In *McClain I*, McClain moved to amend his complaint, asserting that Huffington and her firm "committed mail fraud when the two letters from her office were sent to the FDIC and the Washington Department of Financial Institutions containing perjurious, misleading, misrepresented and misstated facts." (Dkt. No. 14-2 at 20–21, 25–26.) It is therefore apparent that McClain's current claims against Huffington, McKay, and their firm arise from the same "transactional nucleus of facts" as that of *McClain I*.[5]

Second, as explained above, the previous judgment was final and on the merits because *McClain I* was decided on summary judgment. (Dkt. No. 19-1 at 2.)

Third, Huffington, McKay, and their firm are in privity with FSBW. As McClain explicitly and repeatedly alleges throughout his complaint, these defendants were the "agents" of FSBW. (Dkt. No. 4 at 25, 26, 27.) They are thus in privity with FSBW. *See Spector v. El Ranco, Inc.*, 263 F.2d 143, 145 (9th Cir. 1959) ("Where, as here, the relations between two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, is to be accepted as conclusive against the plaintiff's right of action against the other.").

Res judicata therefore applies to all of McClain's claims against Huffington, McKay, and their firm, with the exception of his civil RICO in-court perjury claim.

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[5] It is irrelevant that the superior court denied McClain's motion to amend. What matters is that McClain could have brought these claims in *McClain I* because the facts at issue now were also at issue then. *Tahoe*, 322 F.3d at 1078.

**2. Judicial Action Privilege**

The Court also finds that all McClain's state law claims against Huffington, McKay, and their firm are barred by the doctrine of "judicial action privilege." *Jeckle v. Crotty*, 120 Wash. App. 374, 386 (2004). This doctrine bars a plaintiff from suing attorneys and law firms for actions undertaken while "representing their clients." *Id.*

All of McClain's state law claims against Huffington, McKay, and their firm are based on actions they took on behalf of FSBW. (Dkt. No. 4 at 25, 26–27.) They are therefore immune from liability for these actions.

**3. Statutes of Limitations**

Although all of McClain's claims against Huffington, McKay, and their firm are almost certainly barred by statutes of limitations, *McClain III*, Dkt. No. 48 at 6, the Court need only discuss McClain's civil RICO claim here.

McClain alleges that the attorney defendants are liable under the civil RICO statute, 18 U.S.C. § 1964, for "commit[ing] perjury in Court proceedings" and for mail fraud. (Dkt. No. 4 at 28.) As explained above, McClain's allegation of mail fraud is subject to res judicata, as it arises from the same set of facts at issue in *McClain I*.[6] (Dkt. No. 14-2 at 19–20.) His in-court perjury allegation is all new, however, and relates not to the facts underlying *McClain I*, but to the litigation of the case itself. Although the Court doubts that this allegation is even actionable, it need not reach that question, because it is time-barred.

The civil RICO statute has a four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). McClain filed his complaint on

[6] In fact, McClain attempted to amend his complaint in *McClain I* to add this very claim. (Dkt. No. 14-2 at 25–26.)

December 16, 2015, (Dkt. No. 4), so only acts occurring after that date in 2011 may be used as a basis for his civil RICO claim. *Agency Holding Corp.*, 483 U.S. at 156. The sole basis for McClain's perjury allegation is a statement made in court on May 20, 2011. (Dkt. No. 14-7 at 7, 29.) This is inarguably outside of the limitations period.

McClain's civil RICO claim is therefore time-barred.

## III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion (Dkt. No. 4) and DISMISSES Plaintiffs' claims with prejudice. McClain is strongly advised that he will not prevail in relitigating the events of December 2009. He has already brought these claims twice before. It is time they were laid to rest.

DATED this 21st day of April 2016.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

# APPENDIX 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

---

CHARLES V. MCCLAIN III,

Plaintiff,

V.

1st SECURITY BANK OF WASHINGTON, a Washington corporation,

Defendant.

Cause No. 10-2-10798-1

COA No. 73190-4-I

COPY

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VERBATIM REPORT OF PROCEEDINGS

Motions Hearing

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THE HONORABLE Bruce I. Weiss
Department No. 5
Snohomish County Courthouse
January 27, 2012

A P P E A R A N C E S

For the Plaintiff: CHARLES V. MCCLAIN III
Pro Se

For the Defendant: JEAN HUFFINGTON and
WILLIAM MCKAY
Attorneys at Law

REPORTED BY: WILLIAM MEEK, CSR NO. 2696 1/27/15 McClain

* * * * *

THE COURT: What I'm going to do is I'm going to give each side a half an hour to argue all the motions, so you can decide how much time you want to spend on each motion.

Since both sides have several motions, I'm not sure who wants to go first. It doesn't make much of a difference to me.

MR. MCKAY: Your Honor, good morning. Bill McKay on behalf of defendant 1st Security Bank of Washington. I'm also here with my partner, Jean Huffington.

Your Honor, since we have a motion for summary judgment as to all issues, we suggest that we go first to properly summarize and encapsulate all the issues before the Court.

THE COURT: Okay. Mr. McClain, your position?

MR. MCCLAIN: I have no objection, Your Honor.

THE COURT: All right.

MR. MCKAY: Good morning, Your Honor.

For the Court's convenience, what I'd like to do is address our motion for summary judgment first. I know that there are issues of striking that might affect that argument, but for the sake of encapsulizing all the issues before the Court, I'd like to address that. Then my partner will address some of the other issues.

Your Honor, plaintiff's claims in that matter arise out of funds in the amount in excess of $4 million that were

erroneously deposited into his account from our client's bank, 1st Security Bank of Washington, as a result of an internet fraud scam. Plaintiff has alleged that when 1st Security discovered the erroneous deposits and returned the money to their rightful owners that it committed the tort of conversion, it breached its fiduciary duty, and violated his Fifth Amendment right to due process.

We're here today on cross-motions for summary judgment. 1st Security has moved for summary judgment as to all of the plaintiff's claims, and Mr. McClain has cross-motioned solely on his issue of conversion. He, therefore, acknowledges to this Court that there are no material facts in dispute, at least to that issue of conversion.

I'd like to take a brief moment to summarize the issues in order to properly characterize the claims before the Court.

Your Honor, Mr. McClain is an experienced pro se litigant. We've provided the Court with numerous public documents showing a long history of filing lawsuits by the plaintiff, several against banks, and in nearly every case his claims were dismissed with sanctions imposed for filing frivolous claims. He's been enjoined in previous lawsuits from filing frivolous lawsuits. Indeed, he's been enjoined in this case for filing frivolous lawsuits and claims. He has been accused in previous lawsuits of

check kiting and even forgery, in forging a Snohomish County Superior Court judge's signature in a case pending in this jurisdiction. He has been ordered to cease the unlicensed practice of law by the Supreme Court of the State of Washington.

In this case, he relies on declarations from a Harrison Hanover, his friend, a convicted felon and admitted scam artist and fraudster.

From this public information the Court can make some pretty serious inferences, as we have in presenting our motions to the Court today.

MR. MCCLAIN: Excuse me, Your Honor. Do I have the right to object to any of this?

THE COURT: Sure.

MR. MCCLAIN: Okay.

THE COURT: Your objection?

MR. MCCLAIN: First of all, I don't think prior litigation history is relevant for this issue. And as far as witnesses, the defendant themselves have identified Harrison Hanover as a key witness.

THE COURT: Here's the problem with Mr. Hanover, okay? I don't have an affidavit and I don't have a declaration that satisfies the requirements for it to be admitted as evidence in this proceeding.

MR. MCCLAIN: Actually, Your Honor, you do.

THE COURT: Well, I'm not going to argue with you, sir. Actually, my position is I don't. It's not been notarized, and although it's signed by somebody, there's no indication where they signed that particular document. Pursuant to the statute, there needs to be a location indicated, based upon my review of the document, and I can't determine where that document was located.

There are additional other issues in relation to that gentleman that give rise to significant concerns, but it would be my position that one of the motions was the motion to strike that statement because it doesn't comply with the appropriate rules related to declarations, and I would grant that motion. I will not consider it for purposes of the hearing today.

MR. MCKAY: Thank you, Your Honor.

Moving on, we were talking about some serious inferences that we have taken from the plaintiff's motions, and we think that the Court is fair in reaching those same inferences.

THE COURT: Let me ask you a question. What difference does it make? Does it matter if any of that's true or not true, because your position is that the money, for whatever reason, intentionally, inadvertently, went to the wrong account. Under the terms of the agreement the bank had the right to take it back and place it in the correct

location. That Mr. McClain cannot show, one, legally, that there's any legal claim for the conversion claim, and then, two, even if it did exist in relation to the bank account, as part of the elements he has to establish that he has a lawful right to the money.

MR. MCKAY: Absolutely.

THE COURT: The only potential way that that could have been established was through the statement that I've just indicated is not being admitted for purposes of the hearing because it doesn't comply with the requirements for a declaration. So is it really relevant, the past history, to either your issues? Because it seems to me that it's not. It doesn't matter to me whether he's engaged in these behaviors or not, because even if he didn't do anything inappropriately, from the standpoint of the money that was deposited in this account, your argument is, the way I understand it, legally, he has no right to the money anyway, so what difference does it make?

MR. MCKAY: I agree. Just so long as it's clear that Mr. McClain is not a person who happened upon these funds, and that as an innocent bystander he has some sort of a claim, we submit he does not.

THE COURT: Even if that's true, how does he have the ability to argue he's entitled to the money? What

difference does it make?

MR. MCKAY: He doesn't have --

THE COURT: Even if the bank inadvertently and mistakenly put the money in his account, your argument, as I understood it, would be it doesn't matter, he doesn't have any legal right to the money, so he can't be successful in his claims. Is that not your issue?

MR. MCKAY: That is absolutely our claim, yes, Your Honor.

THE COURT: So I don't think it's relevant, his past history.

MR. MCKAY: Then I will certainly move on.

Your Honor, we have a series of undisputed facts that are sufficient for the Court to rule on the issue of conversion. I'd like to summarize. If the Court already feels like it has those facts before it, I'm happy to move right on to the issue of the law.

THE COURT: It's up to you. I'll give you the time.

MR. MCKAY: Let me summarize. There's a lot of facts in this case. We've killed a grove of trees in all the motions and the arguments made. A lot of those facts are very interesting and sexy, a lot of those facts, as the Court has already indicated, are immaterial to the issues before the Court.

There are a key set of fundamental undisputed facts

that, and that is all that the Court needs to rule upon the issue before it, and let me just summarize those really quickly.

It's undisputed that Mr. McClain was added as an account owner to this account on December 11, 2009. That it was a joint checking account with right of survivorship. That it was a joint account with Mr. McClain's friend, Harrison Hanover. And that the account is governed by the terms of the account agreement. None of those are disputed.

It is undisputed that immediately upon being added to the account, huge deposits began appearing into that account. Over a few days, over $4 million were deposited into the account.

It is undisputed that 1st Security's procedures identified the unusual transactions, froze the account pursuant to ACH procedures and to the terms of the account agreement, determined that the --

MR. MCCLAIN: I actually object to that, Your Honor. It wasn't pursuant to the terms and the agreements of the contract.

THE COURT: Okay. Well, that's their argument, so I'll overrule the objection.

MR. MCKAY: 1st Security determined that the transactions were deposited in error and as a result of

fraud, and, ultimately, returned the money to their rightful owners. It is undisputed that Cox and Comcast were the victims of the fraud. All of the disputed funds in Mr. McClain's account were deposited directly by Cox and Comcast, not by anyone else. Cox and Comcast did not intend the money to go to plaintiff or to Harrison Hanover, nor did they owe any obligation or money to the plaintiff or Harrison Hanover, and that none of the money was deposited by the plaintiff, Mr. McClain.

Now, Mr. McClain acknowledges in his pleadings that there are no material facts in dispute as to the claim of conversion. We submit that there are no material facts in dispute as to any of the claims before the Court today.

MR. MCCLAIN: Objection, Your Honor. My claim of conversion covers only the money that's missing from the deposit account. It doesn't cover anything other than the $4.6 million difference between what was deposited and what it says on the bank statement. It doesn't cover the entire set of conversions or what they're claiming are conversions.

MR. MCKAY: And, Your Honor, perhaps you could help everyone, that when Mr. McClain steps up and has an opportunity to address the Court, you might inquire as to what his claims are and what the basis of his claims are, because they seem to be forever moving.

So, moving on, two of the claims, Your Honor, that we've moved for summary judgment, the claim of breach of fiduciary duty and violation of due process has been essentially abandoned by Mr. McClain. He has the duty on summary judgment to come forward with specific facts that are material to the issues in dispute. He's failed to do so as to both of those claims. He's not submitted any evidence of governmental action, a necessary element to a violation of due process, other than just idle speculation. He's failed on that claim.

On the fiduciary duty claim, we provided the Court with indisputable legal authority that a fiduciary duty does not arise in the course of a simple bank account like this, and Mr. McClain does not dispute that authority. Both claims must be dismissed. The plaintiff has failed on his duty in summary judgment.

The final remaining claim is conversion, Your Honor. There are essentially four elements to conversion; wilful interference with the chattel, without lawful authority, whereby the person entitled thereto is deprived of possession of it. We submit that the plaintiff has failed to prove any of those elements, although our burden on summary judgment is to establish that he can't prove one of them.

First, he can't prove that he's entitled to the funds.

I think the Court already addressed that issue. Mr. McClain claims that who deposited the funds or how they got put into his account is irrelevant. Simply because they are put in his account, according to him, means that he owns them.

He's difficult to pin down on the issue, but it appears, after reading all of his briefs and reading all the cases that he cites, that his sole support for this claim is RCW 30.22.090. The cases that he cites for the proposition that he has an ownership interest in deposited funds just simply don't support him. We have read all of them, we provided the Court with our review of those cases. They simply don't support him.

He also ignores the fact that RCW 30.22.090 is strictly limited by RCW 30.22.100, which limits this dispute to disputes between depositors in a joint account or their creditors, and that that statute is relevant only to disputes between those types of persons, depositors or their creditors. And further the statute expressly states that it has no bearing on the bank under the terms of the contract. No matter how you slice it, RCW 30.22.090 just doesn't support any lawful entitlement to the funds in that account.

The other reason that the Court should dismiss the claim for conversion is that the funds in the account are

not chattel. We've provided the Court with the case law dealing with claims of conversion to both money and to claims in a bank account. The case law is clear, that funds in a bank account are such that do not warrant a claim for conversion. We've provided the Court with case law in support of that, including Lyons v. U.S. Bank, at page 8 of our brief. Mr. McClain acknowledges that relationship, that when funds are deposited they become the property of the bank. Therefore, his claim of conversion based upon his own argument fails.

The final reason that this Court should dismiss --

THE COURT: Let me ask you a question in relation to that.

MR. MCKAY: Yes.

THE COURT: Let's assume that there was no dispute, no argument in relation to any of the facts, and that Mr. McClain can show that he had the right to the funds and the bank denied him access to the funds. Your argument is he wouldn't have a claim for conversion against the bank. Would he have a different legal theory under which if the bank wrongfully withheld the funds from him to have legal entitlement?

MR. MCKAY: Possibly, possibly yes.

THE COURT: So what legal theories would those potentially be, because I can't imagine that if a bank

acted inappropriately that a person would be left without any sort of remedy.

MR. MCKAY: Oh, no, there's a remedy. None of those remedies are before the Court.

THE COURT: I understand that. I'm just asking theoretically.

MR. MCKAY: I think that if the contract didn't allow the bank to do what it did there would be a claim of breach of contract, but, in this case, the contract --

THE COURT: So it's limited just to a breach of contract claim, there's no tort theories under which --

MR. MCKAY: Absolutely, correct, Your Honor. And that's what the case law says. It says, hey, wait a minute, you don't get these tort remedies, you had a contract. It's the economic loss rule in another coat.

THE COURT: So what about Mr. McClain's argument that the terms of the agreement specifically indicate that once the money is deposited into the account he has full access to it.

MR. MCKAY: And we provided the Court with case law that says, yes, if you have full access doesn't mean you own it. The Allied Sheet Metal case, the Tang case that we cited in our brief said certainly somebody can contractually allow another person to remove funds. That doesn't mean they own it. In order to prevail on

conversion you have to show that you are entitled to the funds, that you own those funds. He doesn't, he can't, and, therefore, his claim of conversion fails.

Your Honor, we also submit that the account did allow for the bank to do what it did. It operated lawfully pursuant to the contract, and, therefore, on that prong Mr. McClain's claim for conversion fails.

And remember, all we have to do is prove that he can't prove one of the those issues. We've proved that he can't prove any of them. We're asking the Court to grant our motion to dismiss on the issue of conversion and on the issues that he abandoned, the fiduciary duty and violation of due process.

I think my partner has some other issues to address.

THE COURT: Okay.

MS. HUFFINGTON: Your Honor, Jean Huffington here. I'm not sure how far to go with the arguments on our motion to strike because there were a number of things that we asked to have stricken from the record, one being the Hanover declaration. I understand from Your Honor's comments that you are inclined to grant that, and I don't want to spend any time --

THE COURT: I'm not inclined, I'm granting the motion to strike. I don't believe that it complies with the rules in relation to declarations. I'm not going to

consider it for purposes of the argument today.

If you want to argue your other motions to strike, they were based on the collateral source rule, you can do so, if you want.

MS. HUFFINGTON: Thank you, Your Honor.

We would seek to exclude any evidence that was submitted by the plaintiff of the existence of letters of indemnity. I identified two places in his declarations where he has submitted those. He also has argued about the existence of those letters of indemnity. To the extent that those arguments are part of the record, they should not be, and they should be stricken, but I'm more concerned with the actual evidence that he submitted in --

MR. MCCLAIN: Can I object, Your Honor? She's asking to strike evidence that she has submitted herself in support of her motion in the declaration of May-Ling Sowell, Exhibit A, it makes no sense for her to ask to strike evidence that she herself has submitted in the declaration.

THE COURT: Okay. Well, first of all, I didn't grant the motion to strike in relation to the portions that were referenced by the defendants. The information is inadmissible consistent with the collateral source rule. Even though the case law that I reviewed really was dealing with injury, personal injury type of torts, the

rule itself and the theory behind it is not just for that specific purpose. The purpose behind it is is if somebody's acted inappropriately, which the allegations are here, that they shouldn't be entitled to benefit by that because some other source might be available for collection of other funds. So the collateral source rule does apply here. I'll strike those positions.

To the extent that there may be materials contained in the defendant's materials which are not stricken subject to a motion to strike, they can be argued by either side for purposes of arguing their positions on the legal argument.

So you can continue.

MS. HUFFINGTON: Thank you, Your Honor.

I also have a number of arguments to make. I have a motion for protective order, and I'm not certain whether or not to argue that, because I would hate to spend time arguing that depending on whether this case is going forward with -- following your ruling on a motion for summary judgment. So I am going to set that aside, and if we have time following Mr. McClain's arguments, I'll address it.

I also have responses to make to his motions, and I don't think it's appropriate to respond prior to the time that he's been allowed to argue these motions, and so I

will reserve the time to do that.

THE COURT: All right.

MS. HUFFINGTON: Which is on his motion for removal of counsel, his motion for dismissal of the counterclaim for malicious prosecution. The other argument that we have is a motion for contempt, which my partner is going to address.

MR. MCKAY: Thank you, Your Honor. Briefly, Your Honor, we've asked the Court to find Mr. McClain in contempt for bringing his motion for removal of counsel.

Your Honor, 1st Security sought a preliminary injunction in this case, in June of this year, that was following Mr. McClain's blatant attempts to both harass 1st Security and defense counsel by attempting to file a second lawsuit against them in this very court. The plaintiff's actions followed his attempt to amend his complaint to add additional charges against 1st Security and to include charges against defense counsel in this case, including those exact claims upon which he bases his motion to remove counsel pending before this Court, and that's that counsel committed felonies by disclosing the Suspicious Activity Report, or SAR.

Now, the Court denied the plaintiff's motion to amend to bring these charges against 1st Security and defense counsel. It told him at the time that he cannot sue

defense counsel based upon their actions in representing 1st Security in this case, and that their statements in the course of litigation are privileged and, therefore, they're immune from suit. Despite the Court's ruling, three days later, Mr. McClain attempted to sue 1st Security defense counsel in a separate proceeding in this court alleging the very same facts.

Based upon that, Your Honor, we brought a motion for TRO and a preliminary injunction to seek the cessation of Mr. McClain's harassment of both 1st Security and defense counsel in this case. The court granted the motion, and enjoined Mr. McClain from, and we laid it out in our response brief, filing any duplicative claims, meaning the claims raised in this matter and the threatened lawsuit against defendant 1st Security Bank of Washington in any court, and then, number three, filing any future claims against 1st Security Bank of Washington's defense counsel, including without limitation Jean E. Huffington, McKay Huffington & Tyler, PLLC, arising solely out of conduct undertaken in their representation of their client in this action. Nevertheless, Mr. McClain filed this motion to remove counsel in November based upon the exact conduct that was before the court in both the motion to amend and the preliminary injunction.

Despite being advised by counsel in December -- or,

excuse me, in November, at the original time he filed his motion, that his motion was in violation of the preliminary injunction, he continues to press the motion.

He claims that the motion is not enjoined by the terms of the preliminary injunction because it precludes conduct, not misconduct, and he says that he's trying to right the misconduct of counsel as opposed to the conduct of counsel. Other than a childish attempt at semantics, it's pretty clear that his claims violate the spirit and direct letter of the preliminary injunction.

And we can go back and go over the terms again, but remember, that his claims were before the court at the time they granted this motion. This is the same thing that he filed back in June, the same thing he filed back in May.

He also claims that the -- I can't remember what -- oh, yeah, that it was a claim and not a lawsuit. It's clear in the form of the document, Your Honor, that the court enjoined both claims and lawsuits.

Mr. McClain's motion is clearly an intent to get around the terms of the preliminary injunction. His intent is to harass counsel. All the Court need to do is simply look at his brief and response where he alleges that, clearly, a threat that he intends to go ahead and have Harrison Hanover sue counsel and to sue 1st Security based upon

these same allegations. His intent in this manner is to harass. The preliminary injunction's intent was to injoin him from harassing, and we're asking the Court to find him in contempt and to sanction him for the minimum amount of the attorney's fees for defending the violative motion as well as to have to bring this motion for contempt.

THE COURT: Okay. Your time is up. Mr. McClain?

MR. MCCLAIN: Morning, Your Honor.

THE COURT: Good morning.

MR. MCCLAIN: Okay. To start with, plaintiff adopts, incorporates by reference herein and states the facts contained within his pleadings, declarations and exhibits contained in Snohomish County Superior Court under Cause No. 10-2-10798-1.

Plaintiff is entitled to the following due process: Provides that the rights of suis juris litigants are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers. If a court can reasonably read the pleadings to state a valid claim on which a litigant can prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, or syntax and sentence structure, or litigants unfamiliar with pleading requirements. And that's from Haines v. Kerner, 404 U.S. 519, 1972, and Boag v. MacDougall, 454 U.S. 364, 1982.

Plaintiff has not prosecuted this lawsuit in furtherance of an internet fraud claim. Plaintiff is simply enforcing property rights given to him under the law. Even if plaintiff was the mastermind in whatever crime was committed, the money defendant took from his deposit account was done legally. The courts agree with plaintiff as stated in United States v. Redcorn, 528 F.3d 727, 10th Circuit, 2008.

Nonetheless, at some point a fraudulent scheme must be complete, and the perpetrator's subsequent enjoyment of its fruits, buying groceries, going to the movies, redecorating the bathroom is not an essential part of the scheme. United States v. Taylor, 789 F.2nd, 618-620, 8th Circuit 1986; United States v. Altman, 48 F.3d 96, 2d Circuit, 1995.

The defendant's claim once they had deposited the embezzled funds in their personal bank accounts in Oklahoma, the scheme was complete. The subsequent transfer to Florida, they say, was simply a means of using their ill-gotten gains. Reluctantly, we are forced to agree. Once defendants deposited the funds into their personal bank accounts they had accomplished their crime, and the fruits were available for their personal use. That they chose to transfer part of the stolen money to their broker in Florida for the purposes of an investment

is purely incidental to the fraud. They could just as easily have decided to blow it on a luxury trip to the Ozarks. Without a closer connection to the mechanism of their fraud, what they did with the stolen money afterward cannot itself relate to an essential part of the scheme. Mann, 884 F.2d at 536, quoting Puckett, 692 F.2d 669.

Additionally, the court stated the funds were labeled from the moment they were deposited and held in a Bank of America accounts, and they could be spent, transferred or otherwise drawn on at their pleasure. We see nothing to bear out the contention that moving the stolen funds would have been slower, without the intermediate stopovers. We think the scheme to defraud ended at the earlier step, before the interstate wires were used. It was at that point the persons intended to receive the money had received it irrevocably, and the scheme had reached fruition. Kann, 323 U.S. at 94.

Although appellants may have wished to draw on investment return on the proceeds of their fraud, investing stolen money is no more a part of the scheme to defraud than spending it. According to the law it makes no difference if plaintiff was a party to the scheme or not. The money, once deposited, is demanded from the deposit account, was given to him by Harrison Hanover. It was given in good faith for valuable consideration and

without knowledge of any wrongdoing. That's the standard set by federal law and federal law dictates stolen funds.

My next declaration was unopposed by defendants. They never opposed the declaration that stated I received the funds in good faith and valuable consideration with no knowledge of any wrongdoing.

As far as their claim against the credits in the bank account, Barnhill v. Johnson, 503 U.S. 393, 1992, states a person with an account at a bank enjoys a claim against the bank for funds equal to the account balance.

United States Supreme Court in Leather Manufacturers' National Bank v. Merchants' National Bank, 128 U.S. 26, 1888. Although it's a 120-year-old case, it's still good law. It says that the bank cannot discharge its liability to account with the depositor to the extent of a deposit except by payment to him or to the holder of a written order from him, usually in the form of a check.

While the defendant may give their money to anyone they desire, they cannot do the same with a liability owed under the law to plaintiffs. In order to discharge their liability they must pay plaintiff amount on deposit shown by a deposit bank statement. The right of parties to stolen currency are governed by federal law rather than local law. Clearfield Trust Company v. United States, 318 U.S. 363, and National Metropolitan Bank v. United States,

323 U.S. 454.

Defendant talks about the ACH agreement and the contract. Plaintiff has pointed that out in his briefs that he didn't authorize the credits to be given to his account, therefore, he was not a receiver under the terms of the ACH contract. Since plaintiff wasn't a receiver, the ACH rules do not apply.

If you look at -- I believe in the declaration of Jean Huffington, Exhibit 0 -- or Exhibit O, shows the -- page 2, is the terms of the account agreement. If you go down on the left-hand side to where it says withdrawals, it says unless clearly indicated otherwise on the account records, any of you acting alone who signs in the space designated for signatures on the signature card may withdraw or transfer all or any part of the account balance at any time. Any time under statute construction in Washington state means all times.

When plaintiff went into the bank on December 14th at 9:00 a.m., and attempted to make a withdrawal, defendant was restricted from doing so. May-Ling Sowell instructed the manager at the branch where the account was held to tell plaintiff that the funds were not available. That was a lie. They withheld the funds until at least 11:56, according to the declaration of Mr. Lippert. That conflicts with the declaration of May-Ling Sowell before

the court.

If you look at statute RCW 30.22.210, authority to withhold payments, it plainly says that unless defendant had actual knowledge, that they can't withhold a payment from a depositor just on a whim. Actual knowledge is defined in the statutes as written notice to the manager of the branch at the bank where the account's held. I don't believe they can produce that even today.

In reference to the conversion claims and the statute that they referenced about ownership of the funds, the one thing that they don't actually or didn't actually explain to the Court was the definition of depositor when it comes to using the statutes. RCW 30.22.040 defines depositor as depositor when utilized in determining the rights of individuals to funds in an account means an individual who owns the funds. When utilized in determining the rights of a financial institution to make or withhold payment and/or to take any other action with regard to the funds held under a contract of deposit, depositor means the individual or individuals who have the current right to payment of the funds held under the contract of deposit without regard to the actual rights of ownership thereof by these individuals. When they withheld the payment from me, December 14th, when I tried to make withdrawals, they had no legal authority to do that. They had no

contractual authority to do that.

They cite in their paperwork a section called limitations of accounts. If you actually -- it's kind of hard to read on their copy because it's so small, but if you actually look down to the third bold print in their exhibit, still Exhibit 0 -- or 0, I mean, says limitations on services. The following limitations for withdrawal amount and frequency of transfer may apply when using the services listed above. Then, in their brief, they quote a section from below that in the money market and savings account section which applies to the money market and savings accounts, and it says that we reserve the right to refuse any transaction which withdrawal upon insufficient funds exceed a credit limit, lower an account below a required balance, or otherwise require us to increase other required reserves in the account. We reserve the right to limit the dollar amount and the frequency of any transaction from your account for security reasons. That applies to the money market and savings accounts. Limitations on services that they reference in their brief applies to everything above that, which is electronic check conversion, electronic returned checks, and ACH clearinghouse deposits and withdrawals, but it talks about pre-authorized deposits and withdrawals.

It's clear from the evidence that their account

agreement did not allow them to freeze the account without any prior knowledge, nor did the law of the state of Washington. They did not have the right to withhold the money from me. When they withheld the money they opened themselves up by statute to consequential damages, because we were unable to make an investment due to the fact that they withheld the funds.

In plaintiff's motion for partial summary judgment -- or in defendant's response to plaintiff's motion to partial summary judgment, at 13, lines 4 and 5, defendant makes the statement that upon removal of the funds, all right, title and interest thereto were vested in Harrison Hanover, not the plaintiff. That means that once the funds were removed from the account, ownership of the funds were vested in the person withdrawing the funds. This is the defendant's own statement in their own brief. How they can say now they didn't have -- you know, whether or not a person had actual ownership of the funds when it comes to the conversion, once Harrison transferred half ownership to me, I had legal ownership of the funds. Under the definition of depositor had I been allowed to withdraw the funds I would have had ownership of the funds. The bank withheld the legal right for me to have the funds.

Under the conversion theory, money in the bank account

can be subject to conversion if they withheld it illegally and did not give it to me when -- or were required to give it to me, and they didn't. Because they were under an obligation to return the money to the party claiming it, they were under an obligation to give it to me when I tried to make a deposit -- or tried to make a withdrawal, and they didn't let me. They were under an obligation by statute to produce the funds on demand from plaintiff's deposit account. As I read before, the terms of the agreement said that I may withdraw and transfer any or all or part of the account balance at any time. Obviously, they wouldn't let me do that, so they violated the terms of their own agreement.

(Pause.) In relationship to the bank receiving title, the bank received clear title when they accepted the payment orders and they had no knowledge of any wrongdoing. Regents Bank case states that, and is cited in the brief.

The credits in the bank account were an obligation of the bank's liability to the account holders and had nothing to do with the money that was deposited that they assumed ownership of. Ohio Casualty Insurance Company v. Smith, et al., 297 F.2d 265, 7th Circuit. U.S. Court Of Appeals in the 7th Circuit noted that Porter v. Roseman, 74 N.E., 1105, 1905, stands against the weight of

authority in the United States against a recognized public policy that money must be permitted to flow freely in our economy, at 266. The 7th Circuit further noted the general rule is that one who receives money in good faith for valuable consideration prevails over the victim. Such is still the general rule. Toupin v. Laverdiere, 729 A.2d 1286, 1999.

One who receives money in good conscious and has practiced no deceit or unfairness in receiving it is under no legal obligation to return it to one from whom it's been obtained by deceit on the part of another. Transamerica Insurance Company v. Long, 318 F.Supp. 156, 1970.

After stolen money has been negotiated, the victim owner cannot recover a like amount from a third party recipient unless it can be proven that the recipient had prior knowledge that the money was stolen. It is absolutely necessary for commerce that the one who receives money is not put under inquiry as to the source. It is generally impractical to discovery the source of money, and for this reason, one who receives money in good faith for valuable consideration prevails over the victim. James Talcott, Incorporated v. Roy D. Warren Commercial Incorporated, 171 S.E.2d 907,1969.

Plaintiff received the funds in dispute from Harrison

Hanover in good faith without consideration with no knowledge of wrongdoing. That's stated in my declaration in my answer to defendant's motion for summary judgment at Exhibit 11. Defendant never disputed those facts, never filed a declaration in opposition to those facts. Therefore, the Court must take those facts as true. Thus, under applicable federal law, the plaintiff is entitled to the credit, slash, funds in his demand deposit account, and the consequential damages caused as a result of defendant's illegal action.

Defendant's claim that plaintiff was involved in a conspiracy. Plaintiff claims that the bank and the government were involved in a conspiracy. The existence or non-existence of a conspiracy is an essential fact, issue that a jury, not a judge, not the trial judge, should decide. And that's from Justice Black in his concurrence in Adickes v. S.H. Kress and Company, 398 U.S. 144, 1970. In this case, petitioner may have to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in their affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of a trial before a live jury with live

witnesses and all the possibilities of considering the human factors should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of evenhanded justice. Poller v. Columbia Broadcasting, 368 U.S. 464, 1962.

This alone justifies the denial of defendant's motion. When defendant accepted the ACH payment orders defendant was obligated to pay plaintiff upon demand. The money transferred became property of the defendant, and the credits shown as a liability is where defendant became plaintiff's debtor. The failure of the defendant to honor the account agreement and state law is a basis of this lawsuit. The defendant was liable to plaintiff for the amount shown in credits on plaintiff's account statement and the consequential damages authorized by statute.

In reference to plaintiff's motion for partial summary judgment, that motion was made only on the missing $4.6 million from deposits, shown in deposits on plaintiff's account statement. That was not accounted for by defendant. It was not on every single claim that plaintiff had made under the conversion or theft.

And in reference to the -- okay. In Kalk v. Security Pacific Bank, 73 Wn. App, 1995, pursuant to the act, a financial institution may engage in transactions to or for any one or more of the depositor's name on the account without regard to the actual ownership of the funds by or between the depositors, RCW 30.22.140. And I believe that's one of the statutes that defendant cited.

As long as the financial institution relies on the form of the account, as opposed to the actual ownership of the funds within the account, it is protected from liability. Here, defendant has admitted in open court that they relied on the ownership of the funds and not on the type of account, so they're not protected from liability.

Kalk goes on to hold it is clear from legislative history, however, that the protection extended financial institutions was not intended to threaten actual ownership rights to the deposited funds. See State Senate Bill 3154. While financial institutions may pledge funds without regard to actual ownership, the act also provides the protection accorded to financial institutions shall have no bearing on the actual rights of ownership to deposited funds by a depositor and/or between depositors, and as we know, depositors is defined when it comes to financial institution withholding funds, it's a person who has a right to make a withdrawal.

Defendant stated under oath that the ownership of the funds was not determined, but, yet, they keep saying that they determined ownership of the funds. They're judicially estopped from doing that.

Plaintiff's right is to demand the deposited account and is granted by law and contract. No claim was made for the missing $4.6 million from plaintiff's account. Plaintiff's bank statement shows deposits of $9.3 million were made in December of 2009. Defendant admits returning 4.6 odd million, and that the plaintiffs withdrew about 47,000, and that 475,000 was wired to the Philippines, which raises another interesting question. Once that money was withdrawn and wired to the Philippines, what possible legal authority after defendants have stated in their own answer to their -- to my motion for partial summary judgment, that Harrison Hanover obtained all right, title and interest to the funds, could they have possibly gone overseas and had that money wired back? They sent a wire to Citibank, which was their intermediary bank in New York, claiming fraud on the account, fraud on the sender's account, and that was basically a lie. So they used a lie to get another bank to gain control of assets under control of another bank, which is by definition bank fraud.

I believe I've met the burden of proving conversion

happened.

In reference to the motion to remove counsel, it's pretty straightforward, and I can't understand why defendants continually claim they didn't do anything wrong. If you -- (Pause.)

Well, let's address the motion for contempt first.

THE COURT: You have four minutes left.

MR. MCCLAIN: Okay. Plaintiff's not making an allegation that defense counsel discloses the SAR and by doing so violated federal law. Plaintiff is stating a fact. The e-mail of April 6, 2011, attached to the declaration of plaintiff in support of his motion for removal of counsel as Exhibit 2, clearly discloses existence of SAR and that the SAR is created and filed. Defendant's counsel has never denied the authenticity of the e-mail. As such, the e-mail must be taken as true by the Court.

Defendant offered no evidence and made no argument against the facts plaintiff pled to this Court. Therefore, the Court must take the facts as true.

The motion for removal of counsel must be liberally construed in plaintiff's favor, and generally, this Court must take as true the facts as alleged. Rosen v. Walters, 719 F.2d 1422, 9th Circuit, 1983.

The plaintiff's declaration is unopposed. Thus,

plaintiff's assertions must be taken as true. Lawrence v. Cambridge, 422 Mass. 406, 1996.

What is most troubling here is not whether defendant, defendant's counsel, prosecutors are fined at some later date, but the fact defendant's counsel, as an officer of the court, has resorted to such unethical conduct in representation of their client. It also questions the character of defendant's counsel, the honesty and integrity of her pleadings before this court.

When the judge asked her pointblank if she disclosed a SAR, when I filed my motion to amend the complaint, she stated on the record in open court that it was her belief that her and her client hadn't violated the law, and as an officer of the court that was her statement. It's contained as Exhibit 1 attached to the declaration of plaintiff in support of his motion for removal of counsel. It was a yes or no question.

Plaintiff's motion -- how can plaintiff's motion be in contempt when defendant's counsel can come before the court with unclean hands? Mas v. Coca-Cola, 163 F.2d 505, 1947, citing Loughran v. Loughran, 292 U.S. 216, 1934.

It is well-settled, of course, that this court will not close its door in the face of a suitor if the misconduct of which he's been guilty is not related to the equity which he seeks to enforce. Loughran v. Loughran, 292 U.S.

216, 1934.

Here, the relationship of the illegality to the relief sought is indirect and remote. The wrong done is a thing of the past and is collateral, by the long line of cases following Connolly v. Union Sewer Pipe Company, 184 U.S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on. A person does not become an outlaw and lose all right by doing an illegal act. National Bank & Loan Company v. Petrie, 189 U.S. 423.

Courts grant relief against present wrongs and to enforce an existing right. All of the property involved was acquired by some past illegal act. Brooks v. Martin, 2 Wallace, 70. Planters' Bank v. Union Bank, 16 Wallace, 483.

To deny plaintiff access to this court because he has no money when it was defendants illegal actions that left plaintiff with no money not only violates the First Amendment right to access to the courts, but is absurd on its face. Plaintiff did not threaten anything in relationship to filing another suit. He just reminded defendant that Harrison Hanover was not a party to this action and that he could also take legal action against this defendant.

THE COURT: Thirty seconds.

MR. MCCLAIN: Okay. The evidence does not lie, and shows conclusively that the existence in the filing of the SAR was disclosed by defendant and their counsel. The defendant's counsel was told by defendant and then defendant's counsel disclosed the existence of the filing of the SAR in writing plaintiff, which violates the banks' secrecy act. This is a felony.

Every day that passes prior to self-reporting mandated by statute is an additional count. The fact that defendant's counsel is stating in pleadings this is a false issue is an act of bad faith and misrepresentation to the Court. Therefore, defendant and defendant's counsel have repeatedly come before this Court with unclean hands, as they do now.

This motion is properly before the Court and was not prohibited by the preliminary injunction. Plaintiff did not re-note the motion due to being told by Jessica Rosenberg that she would place it on the correct calendar for January 6th. Later, that was changed to January 27th, and she sent out a letter informing both parties that all pending motions would be heard on today's date. Defendant's counsel's unclean hands are directly related to her misrepresentation or to her representation of defendant.

THE COURT: Okay. Your time is up.

I'm going to give my ruling on some of the issues now, and when I'm done, we'll decide where we're going to go from there.

First of all, in relation to the motion to strike the declaration of Jean Huffington, that motion is denied.

On the motion for removal of the defendant's counsel for the alleged misconduct, that motion's denied. Even if the allegations from Mr. McClain were correct, I don't believe that there is legally a basis to have counsel removed from this case from representing their client. They are not witnesses in this proceeding. I would indicate for the record that I do not have any evidence before me that establishes the alleged misconduct such that the motion would be granted. Even if there were a legal basis for it, but I don't believe there is a legal basis, so that motion's denied.

I've already indicated my rulings in relation to the defense motions to strike.

If relation to the defendant's motion for summary judgment, their motion for summary judgment was to dismiss all claims with prejudice.

The first claim that I'll address is the alleged claim of a breach of fiduciary duty on behalf of the plaintiff. The motion for summary judgment in relation to that claim is granted. This was purely a contractual relationship

between Mr. McClain and the bank. They did not have any more significant relationship than that of an account holder and a bank, and under the law there is no fiduciary duty that's established, unless there are extra services provided. No such extra services were provided or contemplated, so, therefore, there is no evidence, there is no breach of fiduciary duty under the law. The motion to dismiss that claim is granted.

In relation to the motion to dismiss the Fifth Amendment claim, Mr. McClain seems to indicate that once he makes a pure speculative statement in his own declaration that that's sufficient to overcome a motion for summary judgment. In fact, there has to be more than pure speculation. There has to be at least some evidence that it could be concluded if the facts as alleged were accurate that the claim would survive. In this case, there is absolutely no evidence of any conspiracy, as he alleges.

There additionally is no governmental action that's been involved in this. This was an action that was done independently by a bank. The government was not involved. As such, the motion for summary judgment in relation to the Fifth Amendment claims is also granted.

The last motion is the motion to dismiss the conversion claim. First of all, the law is well-established that

funds that are on deposit in a bank are not sufficient chattel for purposes of a conversion claim. There may be other remedies available. Conversion is not one of them. The complaint in this case was under the legal theory of conversion.

Furthermore, under the terms of the agreement, which is Exhibit O, it specifically references that the agreement of the parties is subject to the automated clearinghouse rules. Automated clearinghouse rules have the five-day cut-off in relation to when it's reported. The contract then authorizes the bank to, in essence, get back money that was inappropriately deposited into the wrong account. That is what the bank has done in this particular instance. As such, the bank acted lawfully under the terms of the agreement because the money was deposited into an account that it was not intended to be deposited into, and that would be even if it were done inadvertently as opposed to intentionally as alleged here.

The last element of the claim is that Mr. McClain has to come forward with some showing that he's entitled to the funds, and on the basis of the evidence that he supplied here, which is only his declaration, there is no reference for how this money was obtained for purposes of being placed in the account.

There was some information contained in the statement

that was made by Mr. Hanover, but that was not appropriate evidence and has been deemed inadmissible, so there is no showing that Mr. McClain was entitled legally to possession of any of these funds.

Although only one of those elements needs to be -- although if just one of those elements is missing, it's such to satisfy and have the claim for conversion dismissed. In this case, all those elements exist. Therefore, the motion for summary judgment on that claim is also granted.

In relation to the motion for contempt, part of the argument is that Mr. McClain has violated the spirit if not the terms of the agreement. That's probably accurate, but the way that the injunction was worded it did use the term claims, which could have been taken into context from the standpoint of actual claims for compensation, claims for a complaint to the allegation as opposed to here, the basis for the request is for removal of counsel. I'm not going to find that he violated the terms of the order. There's a slight distinction. It is, I guess, minimal, but it's enough such that here I'm going to decline to find Mr. McClain in contempt. Although I agree, he probably did violate the spirit of the order, I don't know that he violated the actual terms of the order.

So I'm not sure if there's any other motions that

either side feels need to be ruled on at this time, so first, I'll hear from Mr. McClain -- oh, excuse me, the motion to dismiss the counterclaim.

The motion to dismiss the counterclaim is denied at this point. It seems to me that there are sufficient facts, if they were established, that the malicious prosecution claim could be successful, and at this point, I'll deny the motion to dismiss.

So, Mr. McClain, any other issues we need to address today?

While you're thinking, I'll ask the defense attorneys. Any other issues that need to be addressed today?

MS. HUFFINGTON: Yes, Your Honor. We submitted an order on summary judgment and we submitted one when the papers were filed. We submitted a second one yesterday including delivering one to the plaintiff and one to Your Honor's mail room, and we've included some language that we think is important in view of the preliminary injunction issue that was just addressed on our motion for contempt, and that is that we would like to ensure that there is at least a 30-day period in which we have the opportunity to come and brief a motion for permanent injunction. Our anticipation being from the various items of correspondence and what's been written in the briefing by the plaintiff that as soon as this case is dismissed he

may take advantage of some perceived opportunity to proceed without the preliminary injunction any longer being in force, at least arguably.

THE COURT: But at this point your counterclaim is still in existence so the entire case is not being dismissed. The terms of the preliminary injunction, from my perspective, remain in full force and effect. Legally that may not be accurate, but I think it is because the case still exists, and the order was entered into the specific case, not in relation to the specific claims. So if you want to have an order entered that specifically indicates, so it's clear to Mr. McClain, that that temporary injunction or restraining order continues to remain in effect because the case is still active, then I'm willing to sign that order.

MS. HUFFINGTON: Your Honor, thank you, and I will simply amend the order that we submitted to reflect that conclusion on your part. I think that was the only thing that we had that was outstanding, other than --

MR. MCKAY: Well, we need to address the protective order then, because the case is still outstanding, there's technically discovery --

THE COURT: Well, except the only discovery that is available is the discovery on your claims, not on Mr. -- Mr. McClain's claims have all now been dismissed. I'm

dismissing it with prejudice, so that's clear, which means that any outstanding discovery that he's presented to you in relation to his claims do not need to be addressed because he doesn't have any further claims. If you have any outstanding discovery that he owes to you, then he would be responsible for providing it to you, but you don't have to respond to his discovery requests.

MS. HUFFINGTON: Would Your Honor be willing to have us insert a line to that effect?

THE COURT: A separate order, yes, because that's the status of the case at this point. That would be fine. You can include that in the order.

MS. HUFFINGTON: I think that does it for us. Thank you.

THE COURT: All right. Mr. McClain, any other issues that need to be addressed? Obviously, I'm sure you know you have the right to appeal. You would have to consult the rules in relation to the appropriate time frame in relation to an appeal of the issues here.

MR. MCCLAIN: Fine. Thank you, Your Honor.

THE COURT: All right. That will conclude the matter for today. Thank you.

(The proceedings were concluded.)

* * * * *

# C E R T I F I C A T E

STATE OF WASHINGTON )
: ss.
COUNTY OF SNOHOMISH )

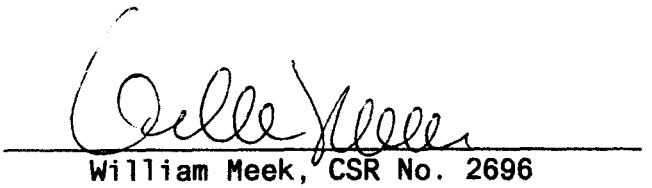
I, WILLIAM MEEK, Official Court Reporter of the Superior Court of the State of Washington, hereby certify:

That I attended the hearing of the above-entitled matter and reported in shorthand the proceedings had thereat;

That I thereafter, from the shorthand record made by me at said hearing, prepared a computer-assisted transcript of said testimony and proceedings;

That the foregoing pages constitute said transcript, and that said transcript contains a full, true, complete and correct transcript of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of April, 2015.



William Meek, CSR No. 2696
***OFFICIAL COURT REPORTER***

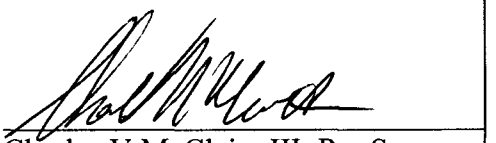
## CERTIFICATE OF SERVICE

I certify that on this 13th, day of May 2016, I caused the **APPELANT'S INFORMAL REQUEST FOR DISCRETIONAL REVIEW** to be delivered by Priority Mail to:

TEMPLE OF JUSTICE
P.O. Box 40929
Olympia, WA 98504-0929
Attn: Clerk of the Court

And a copy by Priority Mail to:

McKay Huffington & Tyler, PLLC.
701 5th Avenue Ste. 4400
Seattle, WA 98104
Attn: Jean Huffington
William McKay



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