STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Doyet A. Early III, Circuit Court Judge
Case No. 2008-CP-40-6656

Appellate Case No. 2014-002029

RECEIVED
SEP 04 2015
SC Court of Appeals

John R. Rakowsky, Respondent

v.

Law Offices of Adrian L. Falgione, LLC, James Spencer, Estate of Doris Holt, Nick Williams on behalf of RSC, Irene Santacroce, Rodney Keith Lail, Marguerite Stephens Ricky Stephens, Michael Hartness, Horry County, SC, Eugene Chewing, and Glenn W. Harrison,
Defendants,

Of whom James Spencer, Irene Santacroce, Rodney Keith Lail, and the Estate of Doris Holt are the Appellants.

RETURN IN OPPOSITION TO JOINT MOTION TO EXTEND TIME DUE TO NEWLY DISCOVERED EVIDENCE

Respondent John Rakowsky opposes the "Joint Motion to Extend Time Due to Newly Discovered Evidence" dated August 27, 2015 (served August 28, 2015). Rakowsky would show:

1. Appellants filed this appeal (jointly) on or about February 2, 2015. The appeal was consolidated with an earlier appeal filed in September, 2014[1].
2. By letter dated February 10, 2015, this Court notified appellants that the Notice of Appeal was defective for failing to pay the filing fee and failure to

---

[1] The September appeal was subsequently dismissed. (Order dated April 23, 2015).

include a copy of the order being appealed. Those omissions were apparently remedied on May 4, 2015, when copies of Judge Early's orders dated June 23, 2014[2] and December 18, 2014 were filed with this Court. *See also* order filed June 29, 2015, indicating a copy of the order on appeal had been received.

3. On the same date this Court issued the June 29, 2015 order, a letter was transmitted to Appellants advising the initial brief and designations were due within thirty (30) days of the letter, *i.e.*, no later than July 29, 2015.

4. In the never-ending appeals before the Fourth Circuit Court of Appeals (Case No. 14-1678[3]) from the underlying and related District Court litigation (Case No. 4:02-cv-01859RBH), on July 21, 2015 Appellants' counsel Sribnick filed an "Emergency Motion for Expansion of Scheduling Order Based on National Security Interests and the Discovery of New Evidence." **Docket No. 104 Exhibit A**.

5. According to Fourth Circuit online docketing information, the motion was granted by the Fourth Circuit on July 22, 2015 (Docket No. 107). However, the order also required the Appellant's opening brief in that court to be filed no later than August 27, 2015. .

6. On July 28, 2015 in this Court, Appellants requested an extension of time for filing of their initial brief, and Rakowsky did not object. The motion did not mention the emergency basis which was included in the motion made six (6)

---

[2] Judge Early's order dated June 23, 2014 was the subject of the September, 2014 appeal that was dismissed by order of this Court dated June 29, 2015.

[3] As indicated by the Docket Report from the Fourth Circuit Court of Appeals in Case No. 14-1678, there have been five (5) previous appeals in the same case, those being Case No. 05-18124 (dismissed 5-24-2006), Case No. 07-1612 (dismissed 12-3-2007), Case No. 08-1955 (dismissed 1-22-2010), Case No. 08-1966 (dismissed 1-22-2010) and 08-1967 (dismissed 1-22-2010).

days earlier to the Fourth Circuit. It also did not mention the "newly discovered evidence" of which the Fourth Circuit had been alerted on July 21, 2015.

7. The motion for an extension of time for filing the initial brief in this appeal was granted by this Court by order dated July 29, 2015.

8. In the Fourth Circuit appeal, Case No. 14-1678, Appellants' counsel Michael Sribnick[4] filed a Motion (on behalf of appellants Doris Holt, Rodney Keith Lail and Irene Santacroce, the same appellants he represents here) on August 24, 2015, seeking to remand the appeal to the United States District Court. The motion, docketed as Item No. 110, contains 398 pages and includes a detailed analysis, with exhibits, of the "newly discovered evidence" now relied upon here as a basis for yet another extension of time in this Court.

9. Sribnick mentions this Fourth Circuit filing in the instant motion for extension of time, stating that he "was forced to incorporate the newly discovered evidence into a related Fourth Circuit filing to meet a scheduling deadline." The "scheduling deadline" was the brief on the merits in the Fourth Circuit, which was due August 27, 2015. **Exhibit B**. Sribnick filed the Emergency Motion in the Fourth Circuit to avoid the obligation of filing a brief on the merits in that court.

10. Sribnick now claims in this Court a need for another extension based on "newly discovered evidence that has a direct bearing on the matter before this court." However, this "newly discovered evidence" was already submitted

---

[4] Appellant Spencer is also *pro se* in Appeal No. 14-1678 pending in the Fourth Circuit Court of Appeals.

and discussed in detail in the Fourth Circuit filing (Docket No. 110) on August 24, 2015. It is no longer new. It was not new when appellants requested their first extension of time from this Court on July 28, 2015.

11. Instead, appellants seek yet another extension of time from this Court in order to avoid addressing this appeal on the merits. In addition to the (old) "newly discovered evidence", Sribnick states he had another attorney who was going to assist him, but who apparently basked out. In an appeal where the appellants have had more than sixty (60) days to file their initial brief, the inability of Sribnick to lure another attorney into to assist him certainly does not constitute an emergency.

12. The deadline for the filing of Appellants' initial brief in this Court has already passed. Rakowsky respectfully requests that this Court deny the instant motion and dismiss the appeal, not only because of the frivolous basis for the request, but also because of the demonstrated unwillingness of appellants to address the merits, both here and in the Fourth Circuit.

13. All of this litigation arises from the settlement of a civil action which was placed on the record before United States District Court Judge Bryan Harwell on May 9, 2007. **Exhibit C**. Appellants changed their minds after the settlement and tried to set it aside. *Id.* They have used their buyer's remorse to attack numerous individuals and entities since that time (**Exhibit D**) and the instant appeal is simply the current iteration.

For the reasons set forth above, Rakowsky respectfully requests that the motion for another extension of time be denied.

Desa Ballard
Bar # 00498
Ballard & Watson, Attorneys at Law
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone: 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com

ATTORNEY FOR RESPONDENT

September 1, 2015

RECORD NO. 14-1678

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Doris Holt, et al.,

Plaintiffs-Appellants

v.

Horry County, South Carolina, et al.,

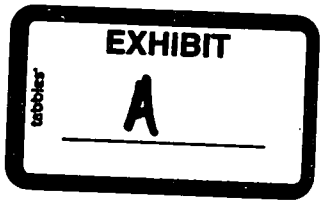
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

EMERGENCY MOTION FOR EXPANSION OF SCHEDULING ORDER BASED ON NATIONAL SECURITY INTERESTS AND THE DISCOVERY OF NEW EVIDENCE

NOW COME Irene Santacroce, Rodney Lail, and Estate of Doris Holt, hereinafter Appellants, by and through the undersigned, under Rule 27, to request an extension of time of thirty (30) days and a possible stay in these proceeding to file the Initial Brief and Designation of Matter with this Honorable Court. The undersigned had a male grandchild born on July 21, 2015



and will be in Columbus Ohio from July 26, 2015 through July 28, 2015 to participate in a Jewish religious ceremony.

Furthermore, through discovery of new critical evidence, primary documentation showing the head of the South Carolina Law Enforcement ("SLED") Mark Keel acting in concert with FBI agents and officers of the court to undermine the proceedings by destroying evidence in conjunction with forging documents presented to the Court. This has a direct bearing on this case in that it changes the entire evidentiary meaning of the preparation I had been doing and an expansion of time is critically needed so I can file an additional 60(d) motion in the District Court, within the next ten days, that will call for a vacate and retrial based on the newly discovered evidence concealed by SLED and the FBI for eleven years.

Therefore, to conserve this courts resources an expansion is necessitated to follow course as any District Court action would impact the proceedings. If the District Court denies a new trial the motion will be appealed and then can be reviewed with the matters currently before the court. The undersigned will keep this Honorable Court appraised as to the pending filing needed to address the court record that also impacts National Security Interests and outrageous actions of fraud on the court based on the newly discovered evidence obtained on **July 17, 2015**. At this time the undersigned needs at least a thirty (30) day extension up to and including August 27, 2015, for the due date the Opening Brief and Designation as it impacts the current evidence dramatically which necessitates a major rewrite as it impacts the truth. As soon as the undersigned submits the 60(d) I will file a copy with this Honorable Court as it relates to matters of ***National Security***.

CONCLUSION

For all of the foregoing reasons, it is prayed that this Honorable Court allow at least a thirty (30) day extension and a consideration of a stay upon submission of the pending 60(d) motion in the District Court a copy of which will be provided to this Honorable Court.

Respectfully submitted,

s/Dr. Michael G. Sribnick, Esq.
Michael G. Sribnick, M.D., J.D., LLC
3 Kenilworth Avenue
Charleston, S.C. 29403
Phone: (843) 789-3504
Fax: (843) 720-8907
Email: michael.g.sribnickmdjdllc@gmail.com

I have complied with Local Rule 27(a) by notifying opposing counsel of this motion and he was opposed.

CERTIFICATE OF SERVICE

Opposing counsel has been served a copy of this motion via electronic means.

By,

s/Dr. Michael G. Sribnick, Esq.
Michael G. Sribnick, M.D., J.D., LLC
3 Kenilworth Avenue
Charleston, S.C. 29403
Phone: (843) 789-3504
Fax: (843) 720-8907
Email: michael.g.sribnickmdjdllc@gmail.com

FILED: July 22, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1678
(4:02-cv-01859-RBH)

ESTATE OF DORIS HOLT; RODNEY KEITH LAIL; IRENE SANTACROCE

Plaintiffs - Appellants

and

JAMES SPENCER; SOUTHERN HOLDINGS, INCORPORATED; RICKY STEPHENS; MARGUERITE STEPHENS

Plaintiffs

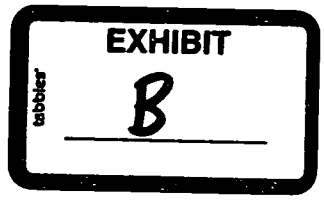
v.

HORRY COUNTY, SOUTH CAROLINA; HORRY COUNTY POLICE DEPARTMENT; JAMES ALBERT ALLEN, JR.; SIDNEY RICK THOMPSON; JEFFREY S. CALDWELL; CHARLES MCCLENDON; JAY BRANTLY; ANDY CHRISTENSEN; DAVID SMITH; MICHAEL STEVEN HARTNESS; HAROLD STEVEN HARTNESS; ANCIL B. GARVIN, III

Defendants - Appellees

O R D E R

Upon consideration of the motion to extend filing time, the court grants the motion. Any further requests for extension of time shall be disfavored. The



briefing schedule is extended as follows:

FRAP 30(c) page-proof opening brief & service of appendix designations due: 08/27/2015

FRAP 30(c) page-proof response brief & service of additional designations due: 09/28/2015

Appendix due: 10/13/2015

Opening brief, response brief, and any reply brief in final form due: 10/26/2015

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

(ATTACHMENT 2)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SOUTHERN HOLDINGS, INC., et al., Plaintiffs, v. HORRY COUNTY, et al., Defendants.	Civil Action No.: 4:02-cv-1859-RBH **ORDER ON MOTIONS PURSUANT TO F.R.A.P. 4(a)(4)**

Pending before the court are: 1) Letter/motion [Docket Entry # 483] by Dan Green, C.E.O. of Southern Holdings, Inc.; 2) Letter/motion [Docket Entry # 484] by Irene Santacroce; 3) Letter/motion [Docket Entry # 485] by Marguerite Stephens; 4) Letter/motion [Docket Entry # 486] by Ricky Stephens; and 5) Letter/motion [Docket Entry # 487] by Rodney Lail. All of these letters/motions request relief from the Order dismissing this case with prejudice pursuant to a settlement agreement that was stated on the record. *See* [Docket Entry # 475]; Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. The above letters/motions were not filed by Plaintiffs' counsel, but were filed *pro se* by the Plaintiffs listed above.[1]

On June 7, 2007, the court issued an Order requesting that any parties wishing to file responses to the Plaintiffs' *pro se* letters/motions must do so no later than June 14, 2007. Order [Docket Entry # 488]. On June 14, 2007, the court received responses from all Defendants and the Plaintiffs' attorneys.

As noted below, a Notice of Appeal has been filed in this case. However, pursuant to Federal Rule of Appellate Procedure 4(a)(4), this court has jurisdiction to rule on the pending

[1] It should be noted that Plaintiffs' attorneys, Rakowsky and Falgione, have not been relieved as attorneys for the Plaintiffs, nor have any motions to withdraw as attorney been filed.

EXHIBIT C

letters/motions. Under Local Rule of Civil Procedure 7.08, hearings on motions are not required. Therefore, the court, in its discretion, elects to rule on the pending matters without a hearing.

Procedural and Factual Background

The procedural background of this case is extensive; however, the procedural and factual background relevant to the current matters is fairly limited. The trial of this case was set to begin on May 9, 2007. On May 8, 2007, a larger than normal jury panel was brought in due to the anticipated length of the case, which was expected to last at least three weeks. On May 9, 2007, the jurors who had been selected reported to the courthouse for the beginning of trial.

On May 9, 2007, with the jury waiting to be brought out and just before the trial was to begin, the lawyers advised the court of a settlement, the terms of which were then stated on the record in the presence of all of the Plaintiffs who filed the *pro se* letters/motions.[2] Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. Accordingly, on the record, with the consent of counsel, and in the presence of the parties, the court Ordered that the case be dismissed with prejudice per the settlement agreement. [Docket Entry # 475]; Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482]. None of the parties objected to the settlement agreement or to the dismissal of the case with prejudice. Transcript of Trial Proceedings, at 2-6 [Docket Entry # 482].

Beginning on June 1, 2007, chambers began receiving emails from individual plaintiffs

[2] According to the Clerk's office, the total cost to the federal government to bring in jurors for the panel and first day of trial was Eleven thousand, nine hundred eighty-four dollars ($11,984.67) and sixty-seven cents.

with various attachments ranging from affidavits, court transcripts, court docket entries, and letters from Attorney Rakowsky to third persons.[3] These emails requested that this court, among other things, vacate the settlement and reinstate the case.

Some of the emails sent to chambers referenced relief under Rule 59(e) of the Federal Rules of Civil Procedure.[4] One email did not reference a specific procedural rule.[5] All of the letters appeared to seek relief on the basis that: 1) Both Plaintiffs' counsel and Defendants' counsel engaged in fraud in order to coerce the Plaintiffs into a settlement; 2) Plaintiffs' counsel misrepresented to Plaintiffs either certain evidentiary rulings the court had made or was going to make; 3) Plaintiffs' counsel allegedly gave the Plaintiffs bad legal advice concerning the likelihood of exposure to a Judgment in light of a previous Offer of Judgment; 4) Plaintiffs did not agree to the settlement offer at any time; and 5) the Offer of Judgment was somehow "bogus." Specifically, Dan Green, Ricky Stephens, Marguerite Stephens, Rodney Lail, and Irene Santacroce asked the court to: 1) vacate the settlement; 2) reinstate the case to active status; 3) order an independent Federal investigation into the corruption that has been

---

[3] With regard to Attorney Rakowsky's letters to third parties, while the court does not agree with many of the statements by Attorney Rakowsky concerning statements attributed to the court, this court did express concern about the matter of Plaintiffs' untimely production of evidence as argued by the Defendants in open court on May 8, 2007. The court reserved ruling until the next day at which time the court was advised the parties had reached a settlement.

[4] Rodney Lail, who sent an email on June 3, 2007, Irene Santacroce, who sent an email on June 4, 2007, Ricky Stephens, who sent an email on June 6, 2007, and Marguerite Stephens, who sent an email on June 6, 2007, all asked the court to vacate the settlement under Rule 59(e) based on alleged fraud and coercion committed against the Plaintiffs by Plaintiffs' attorneys in conjunction with Defendants' counsel.

[5] On June 1, 2007, Dan Green, C.E.O. of Southern Holdings, Inc., emailed a letter requesting that the court vacate the settlement based on the same factual allegations as the Plaintiffs noted in Footnote #4; however, Dan Green's email did not reference a specific procedural rule. Dan Green, who is not an attorney licensed to practice in this jurisdiction, purports to represent Southern Holdings, Inc.; however, Local Rule of Civil Procedure 83.I.07(3) states that a corporation cannot proceed without counsel and that such counsel must be admitted to practice in this District. Local Civil Rule 83.I.07(3) DSC.

associated with this case; and 4) stay the case until an independent review can be conducted, the Plaintiffs can assess the damage done to their case, and obtain qualified counsel to represent the Plaintiffs.[6]

On June 7, 2007, the court instructed that all of the emails be filed with the Clerk of Court. *See* [Docket Entry ## 483-487]. On the same day, the court Ordered that any party wishing to file a response to the letters/motions must do so no later than June 14, 2007. By June 14, 2007, all parties, including Plaintiffs' counsel Rakowsky and Falgione, responded to the allegations contained in Plaintiffs' *pro se* letters/motions. Additionally, the Hartness Defendants filed a motion for sanctions and other relief against the Plaintiffs. No replies have been filed.

As if the matter were not complicated enough, on June 21, 2007, a Notice of Appeal was filed by Ron Serota, Esq. on behalf of all Plaintiffs. On June 22, 2007, Attorney Serota also filed a motion to vacate the judgment on behalf of Doris Holt, an individual Plaintiff that had not previously filed a *pro se* letter/motion.

It should be noted that Attorney Serota, who is not admitted to the South Carolina Bar and was previously admitted in this case *pro hac vice*, was later removed and relieved as counsel for the Plaintiffs on May 3, 2007, pursuant to motions filed by both the Plaintiffs and Serota himself. Serota has *not* been readmitted *pro hac vice* and has not obtained sponsorship from any local counsel admitted to practice in this District. Serota has violated various Local Civil Rules of this District by: 1) filing documents without first being admitted *pro hac vice*;

[6] The Docket Report in this case indicates that the Plaintiffs have had several attorneys terminated or withdrawn from the case.

2) failing to obtain sponsorship by local counsel; and 3) failing to have his Notice of Appeal and motion signed by local counsel. As mentioned earlier, Attorneys Rakowsky and Falgione have not been relieved as counsel for any of the Plaintiffs. Additionally, it appears Serota filed these documents using Attorney Rakowsky's CM/ECF login and password without Rakowsky's permission. Nevertheless, the Notice of Appeal filed by Serota will be transmitted to the Fourth Circuit Court of Appeals where the propriety of the Notice of Appeal will ultimately be determined.[7] Because of Serota's failure to comply with the Local Civil Rules regarding local counsel, Holt's motion [Docket Entry # 500] to set aside the judgment based on Rule 60(b) is not properly before this court.[8]

Discussion

Plaintiffs' *pro se* letters/motions are untimely under Federal Rule of Civil Procedure 59(e)

To the extent Plaintiffs seek relief from this court's May 9, 2007, Order dismissing this case with prejudice, their motions are untimely. Rule 59(e) clearly states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Even if this court considers the date Plaintiffs emailed their letters to chambers as the filing date, their motions are still untimely. The 10 day deadline contained in Rule 59(e) is mandatory and cannot be extended pursuant to Rule 6(b). Fed. R. Civ. P. 6(b). Therefore, Plaintiffs' letters/motions founded on Rule 59(e) are denied as untimely.

Plaintiffs' *pro se* letters/motions under Federal Rule of Civil Procedure 60(b)(3)

---

[7] At first glance, Plaintiffs' Notice of Appeal appears to be untimely; however, that matter would be more properly decided by the Fourth Circuit Court of Appeals.

[8] The court also notes that Doris Holt's affidavit that was submitted with Attorney Serota's Rule 60(b) motion does not appear to be properly signed or notarized.

To the extent that Plaintiffs allege fraud as a basis for relief, the court liberally construes their letters/motions as motions under Rule 60(b)(3), which provides for relief from judgment or order based on fraud, misrepresentation, or other misconduct of an adverse party. Fed. R. Civ. P. 60(b)(3). The basis of Plaintiffs' allegations against the adverse parties is that they concocted a "bogus" Offer of Judgment and that, in conjunction with various alleged misrepresentations by the attorneys for the Plaintiffs, they coerced the Plaintiffs to settle the case.

Plaintiffs' *pro se* letters/motions fail under Rule 60(b)(3) because they have failed to show by clear and convincing evidence that the adverse parties, the Defendants or Defendants' counsel, were guilty of any fraud. *See Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994). This conclusion is evident from the court's review of the submissions of the parties relevant to the Plaintiffs' letters/motions.

To prevail on a Rule 60(b)(3) motion, the moving party must establish: 1) a meritorious defense; 2) misconduct by clear and convincing evidence; and 3) the misconduct prevented the moving party from fully presenting its case. *Schultz*, 24 F.3d at 630 (citing *Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir. 1981)).

Two Offers of Judgment are at issue. The Hartness Defendants' Offer of Judgment, signed by E. Glenn Elliot, Esq., is dated July 12, 2005. As evidenced by the facsimile transmission reports attached with the Hartness Defendants' response, the Hartness Offer of Judgment was successfully faxed to Plaintiffs' Attorneys Rakowsky, Serota, Cooper, and Hardee on July 12, 2005.

The second Offer of Judgment concerns the Horry County Defendants. The Horry

County Offer of Judgment contains a certificate of service indicating that the Offer of Judgment was mailed to Plaintiffs' Attorney Goldberg on July 21, 2004. Horry County also attached a facsimile transmission report that showed that the Horry County Offer of Judgment was successfully faxed to Plaintiffs' Attorney Goldberg on July 21, 2004. In fact, on July 24, 2004, the Horry County Defendants received an Objection from Plaintiffs' Attorney Goldberg and their local counsel at the time, James Cooper, to the Offer of Judgment. So the contention that the Defendants' attorneys "crafted" a fraudulent Offer of Judgment just days before trial, without proper service, in an attempt to coerce the Plaintiffs into a settlement agreement is totally without merit. The Plaintiffs assert no evidence whatsoever, much less clear and convincing evidence, of any fraud or misrepresentation by any of the adverse parties or lawyers in this case. Additionally, the Plaintiffs have not shown that the supposedly "bogus" Offers of Judgment prevented them from moving forward with their case. As noted above, a jury had already been selected and the settlement agreement was announced the morning trial was set to begin. Therefore, their requests for relief based on Rule 60(b)(3), fraud by an "adverse party," is denied. To the extent the Plaintiffs allege fraud committed by their own counsel, that is not a basis for relief under Rule 60(b)(3) as Plaintiffs' own counsel are not "adverse parties."

Other Grounds for Relief under Rule 60(b)

The court has reviewed the various submissions by the parties, and to the extent the Plaintiffs' letters/motions raise issues that could be construed as seeking relief under other subsections of Rule 60(b), the court has reviewed the applicable law regarding relief under subsections of Rule 60(b) that are arguably applicable to these circumstances and concludes

that the Plaintiffs are not entitled to any such relief. In other words, the Plaintiffs have not made a sufficient showing of entitlement such relief.

Further, with regard to any claim by the Plaintiffs of either improper inducement, bad advice, or inadequate representation or preparation against Plaintiffs' own attorneys, such is not a valid basis for repudiating a settlement. *Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988). In the event there was any breach of the standard of care owed by Plaintiffs' attorneys to the Plaintiffs as a result of alleged coercion, improper inducement, fraud, or inadequate representation, Plaintiffs have an available remedy for damages against their own attorneys. *See Petty*, 849 F.2d at 133.

Vacate or Set Aside Settlement Agreement

It is well settled that merely having second thoughts about entering into a settlement agreement is insufficient to set aside the settlement agreement. *Young v. Federal Deposit Ins. Corp.*, 103 F.3d 1180, 1195 (4th Cir. 1997). The court notes that all of the Plaintiffs who filed these letters/motions, *pro se* requests for relief, were present in the courtroom when the settlement agreement was announced on the record. Although the undersigned did not poll each plaintiff individually, nor each Defendant individually, he is not required to do so. This case did not involve a minor settlement or a wrongful death settlement, which would require court approval and may require the court to query a plaintiff regarding whether they believe the settlement is fair and in their best interests. Regardless, none of the Plaintiffs brought any of the matters they allege in their letters/motions to the court's attention until three weeks

later.[9] The court regrets that the Plaintiffs may have had a change of heart, but a change of heart is not a sufficient basis to set aside a settlement agreement. *See Petty*, 849 F.2d at 133.

Conclusion

For the reasons stated above, the relief requested in the: 1) Letter/motion [Docket Entry # 483] by Dan Green, C.E.O. of Southern Holdings, Inc.; 2) Letter/motion [Docket Entry # 484] by Irene Santacroce; 3) Letter/motion [Docket Entry # 485] by Marguerite Stephens; 4) Letter/motion [Docket Entry # 486] by Ricky Stephens; and 5) Letter/motion [Docket Entry # 487] by Rodney Lail is **DENIED**.

Because Attorney Serota failed to comply with this District's Local Rules of Civil Procedure regarding the use of local counsel, Holt's [Docket Entry # 500] motion to set aside or vacate the judgment is not even properly before the court.

Finally, because this case is on appeal to the Fourth Circuit, the court feels that it would not be appropriate to rule on the additional relief requested by the Hartness Defendants.

IT IS SO ORDERED.

Florence, SC
July 3, 2007

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

[9] The court cannot disregard the fact that substantial juror costs and court time had been allocated for this case and to simply allow the matter to be reopened when a settlement agreement has been placed on the record in open court with a jury standing by would open the court to easy manipulation of its time and resources.

RODNEY LAIL, et al., Plaintiffs,

v.

UNITED STATES GOVERNMENT, et al. Defendants.

Civil Action No. 10-0210 (PLF)

United States District Court, District of Columbia

March 24, 2011

OPINION

PAUL L. FRIEDMAN United States District Judge

Pending before the Court are nine motions to dismiss the plaintiffs' second amended complaint. Those motions were filed, respectively, by the following defendants or groups of defendants: (1) Kathy Beers, Jennifer Brewton, David Caldwell, Larry Gainey, Princess Hodges, Horry County, Mark Keel, John Morgan, Palmetto Health Care, Mike Prodon, the South Carolina Department of Social Services, the State of South Carolina, the State of South Carolina Law Enforcement Division, Susan Stroman, Suzanne Tillman, and John Weaver ("the South Carolina defendants"); (2) Brenda Hughes and Unihealth Post Acute Care of Columbia ("the Unihealth defendants"); (3) Shawn Markham and Susan Stewart; (4) Andrew Lindemann; (5) Jay Saleeby; (6) E. Glenn Elliott; (7) Robert E. Lee; (8) the Academy Group, Inc.; and (9) N. John Benson, David Caldwell, Phil Celestini, the Federal Bureau of Investigation, Paul Gardner, David M. Hardy, Kerry Haynes, Noel Herold, Thomas Isabella, Jr., Michael Kirkpatrick, Thomas Marsha, Monte Dell McKee, Matthew Perry, George Skaluba, Chris Swecker, and the United States ("the federal defendants").

Also pending before the Court are (1) the *pro se* plaintiffs' motion for leave to proceed *in forma pauperis*, for an order authorizing the United States Marshals Service to effect service on plaintiffs' behalf, and for appointment of counsel, (2) plaintiffs' "motion for firewall protection, " and (3) plaintiffs' motion for leave to file a third amended complaint. Because at least one of the plaintiffs appears to have substantial financial resources, the Court will deny the motion to proceed *in forma pauperis* . Furthermore, because the Court lacks personal jurisdiction over many defendants, and the second amended complaint fails to state a claim as to the other defendants, the pending motions to dismiss will be granted. The Court will deny as futile plaintiffs' motion for leave to file a third amended complaint, and will deny as moot plaintiffs' remaining motion for relief.[1]

I. BACKGROUND

A. South Carolina Litigation

Most of the claims in the plaintiffs' second amended complaint grow out of or are related to certain proceedings before the United States District Court for the District of South Carolina that took place between 2002 and 2008. In 2002, seven of the individuals currently proceeding as plaintiffs in this action - James Spencer, Rodney Lail, Irene Santacroce, Ricky Stephens, Marguerite Stephens, Doris Holt, and Nicholas Williamson - along with an entity called Southern Holdings, Inc., filed a civil complaint in the South Carolina district court. *See Southern Holdings v. Horry County*, Civil Action No. 02-1859, Complaint at 1 (D.S.C. May 29, 2002) ("SC Compl."). Each named individual plaintiff resided in South or North Carolina and was in some way connected with James Spencer and/or Southern Holdings, of which Mr. Spencer was allegedly the CEO and president. *Id.* ¶ 33. Irene Santacroce was the corporate secretary of Southern Holdings, *id.* ¶ 4; Ricky and Marguerite Stephens held equity in the corporation, *id.* ¶ 5; Nicholas Williamson sat on the corporation's board, *id.* ¶ 7; Doris Holt was Mr. Spencer's mother, *id.* ¶ 6; and Rodney Lail was a friend or acquaintance of Mr. Spencer. *See id.* ¶ 89.

The South Carolina complaint named twenty defendants, including the state of South Carolina; Horry County, South Carolina; the Horry County Police Department; and several police officers employed by Horry County or Myrtle Beach, South Carolina. S.C. Compl. at 1. The plaintiffs alleged that they had been the targets of a variety of tortious actions arising out of an attempt by two shareholders and former corporate officers of Southern Holdings, Ancil B. Garvin, III, and David Smith, to wrest control of the company from Mr. Spencer. *Id.* ¶¶ 33-37. More specifically, Mr. Garvin and Mr. Smith allegedly "made telephone calls and sent e-mails and correspondence to Southern Holdings' shareholders, business partners and customers" in which they falsely "accus[ed]" three plaintiffs - Mr. Spencer, Mr. Williamson, and Ms. Santacroce - "of various crimes and immoral acts." *Id.* ¶ 40. Furthermore, in June of 2000, Mr. Garvin and Mr. Smith allegedly "orchestrated the entry of an invalid and illegitimate listing for Spencer's arrest in the NCIC [National Crime Information Center], a national database of outstanding felony warrants used by law enforcement agencies." S.C. Compl. ¶ 43. Because of the listing of Mr. Spencer as subject to arrest, an assistant district attorney in North Carolina - also named as a defendant in the suit - arranged for "the extradition of Spencer from South Carolina" to North Carolina. *Id.* ¶ 44. An arrest warrant was issued for Mr. Spencer in South Carolina by James Albert Allen, Jr., a police officer in Horry County and also a named defendant in the South Carolina case. *Id.* ¶

47. Mr. Allen "maliciously and intentionally issued" the warrant "knowing that [the North Carolina warrant upon which it was based] was invalid." *Id.* ¶ 50.

On June 7, 2000, while searching for Mr. Spencer in order to effect his arrest, various police officers allegedly visited and searched the homes of three plaintiffs without search warrants and without probable cause. *See* 2d Am. Compl. ¶¶ 51-65. The same evening, the plaintiffs claimed, the car of plaintiff Ricky Stephens was pulled over by a defendant police officer, who "maliciously and intentionally pulled over Stephens' vehicle for the sole purpose of scaring, intimidating and humiliating Stephens." *Id.* ¶¶ 66-74. Two named defendants "and other unidentified individuals" were said to have "repeatedly threatened, harassed and stalked" some plaintiffs, "engag[ing] in numerous and continuous acts designed and intended to intimidate and scare them." *Id.* ¶ 75.

Although a court invalidated the South Carolina arrest warrant for James Spencer in July 2000, on August 5, 2000, Horry County police officers pulled over the car occupied by Mr. Spencer and co-plaintiff Rodney Lail and arrested Mr. Spencer. S.C. Compl. ¶¶ 89-93. Mr. Spencer was handcuffed and "put in the back of [a police] car without air conditioning in extremely hot temperatures with the windows rolled up." *Id.* ¶ 99. The arresting officers allegedly learned by contacting their dispatcher that there was no longer an outstanding warrant for Mr. Spencer's arrest, but they nevertheless left Mr. Spencer handcuffed in the police car while they searched his vehicle. *Id.* ¶ 109. After the search, Mr. Spencer was charged "with unlawful possession of a firearm and giving false information to a law enforcement officer." *Id.* ¶ 116. He spent three days in jail before posting bond. *Id.* ¶ 118. The charges against Mr. Spencer were eventually dismissed. *Id.* ¶ 124. According to the South Carolina complaint, there had never been probable cause for the arrest of Mr. Spencer, for the search of his car, or for the filing of charges against him. *Id.* ¶¶ 109, 117.

The South Carolina complaint alleged that the defendants were liable for civil conspiracy, false arrest and imprisonment, malicious prosecution, abuse of process, assault and battery, wrongful discharge, conversion, intentional infliction of emotional distress, tortious interference with contract, libel, slander, infringement upon the plaintiffs' civil rights in violation of 42 U.S.C. § 1983, and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* S.C. Compl. ¶¶ 127-222. Once the South Carolina proceedings had reached the discovery stage, the plaintiffs indicated that they had retained an expert who would opine that three police videotapes depicting the August 6, 2000 arrest of Mr. Spencer had been "altered or edited." *Southern Holdings v. Horry County*, Civil Action No. 02-1859, Horry County's Supplemental Motion to Exclude Plaintiffs' Videotape Expert at 2 (D.S.C. July 14, 2005). In response, the defendants informed the plaintiffs that an FBI expert, Noel Herold, would testify that the tapes had *not* been altered. *See Southern Holdings v. Horry County*, Civil Action No. 02-1859, Horry County's Supplemental Motion to Exclude Plaintiffs' Videotape Expert at 2 (D.S.C. July 14, 2005).

The plaintiffs protested the proffer of Mr. Herold as an expert on numerous grounds, arguing that (1) the FBI had refused to produce "documentation . . . concerning the FBI protocols, procedures, standards and manuals pertaining to the examination of videotapes"; (2) the FBI had not provided unredacted versions of Mr. Herold's "working papers"; (3) "the FBI refused to identify and in fact concealed the name of at least one other party involved in the examination of the three police videotapes"; (4) the CV provided for Mr. Herold did not contain sufficient detail regarding prior legal testimony; and (5) the defendants had "failed to provide legitimate and standard third party documentation showing a chain of custody" for the videotapes "to allow the Plaintiffs to review the processes' integrity." *Southern Holdings v. Horry County*, Civil Action No. 02-1859, Plaintiffs' Motion to Strike Noel Herold As an Expert Witness, at 2-3 (D.S.C. Mar. 26, 2007). Before the court ruled on that motion, the case progressed to trial, and a jury was selected on May 8, 2007. The jury had not yet been sworn, however, when plaintiffs' counsel informed the court that the parties had settled the case, and the complaint was dismissed with prejudice. *See Southern Holdings v. Horry County*, Civil Action No. 02-1859, Minute Entry (D.S.C. May 9, 2007); *id.*, Order at 1 (D.S.C. Aug. 13, 2008) (summarizing the steps leading to the dismissal of plaintiffs' complaint).

After the dismissal of their complaint, the plaintiffs, at that point proceeding *pro se*, made numerous attempts to persuade the court to reopen the case. *See Southern Holdings v. Horry County*, Civil Action No. 02-1859, Order at 2-3 (D.S.C. Aug. 13, 2008) (summarizing the plaintiffs' attempts to "rescind the settlement agreement and vacate the May 9, 2007 Order dismissing the case with prejudice"). Among other things, the plaintiffs argued that their complaint should be reinstated because of "alleged fraud and concealment of evidence by the Defendants and their lawyers." *Id.* at 3. The plaintiffs claimed that after the settlement of their case, they had discovered new evidence so important as to justify rescission of their settlement agreement. *See id.* This evidence included (1) a published article by Mr. Herold; (2) a copy of Mr. Herold's resume that had been submitted in an unrelated civil case; (3) FBI procedural manuals; and (4) plaintiffs' interviews of three FBI employees, which supposedly "refuted key issues concerning FBI evidentiary and examination procedures, " "confirmed that Herold's laboratory worksheet used during his analysis of the [police] videotape was missing key information, " and "establishe[d] Herold's perjury during his deposition." *Id.* at 3-4.

The district court rejected the plaintiffs' arguments that they were entitled to rescission of the settlement agreement, finding that all of the evidence identified by the plaintiffs was "merely impeaching or cumulative evidence or evidence that could have been discovered through the exercise of due diligence" in a more timely manner. *Southern Holdings v. Horry County*, Civil Action No. 02-1859, Order at 4-5 (D.S.C. Aug. 13, 2008). The court also noted that it was "unable to say what effect the 'newly discovered evidence' would have had if the case were tried because the case settled." *Id.* at 5. Because the plaintiffs had failed to make the showing necessary for the reopening of their case, and because their arguments had been untimely, the court denied their motion to vacate the order dismissing the complaint. *See id.* at 9. On appeal, the district court's decision was affirmed by the Fourth Circuit. *See Lail v. Horry County*, 363 Fed.Appx. 223, 226 (4th Cir. Jan 22, 2010).

B. Allegations of the Second Amended Complaint

In addition to the seven plaintiffs who participated in the South Carolina litigation, the second amended complaint currently before this Court names as plaintiffs Bruce Benson, Dan Green, and Virginia Williamson. *See* 2d Am. Compl. ¶¶ 1, 2, 10. Roughly thirty paragraphs of the complaint, which contains 329 paragraphs and spans 131 pages, recount largely the same allegations that were made in the South Carolina litigation: the alleged effort to take control of Southern Holdings, the alleged harassment of various plaintiffs connected to Southern Holdings, the allegedly unlawful arrest of Mr. Spencer on August 6, 2000. *See id.* ¶¶ 57-89. Numerous additional paragraphs allege that various law enforcement agencies and employees at the state and federal levels conspired to hide evidence of the civil rights violations at issue in the South Carolina lawsuit. *See id.* ¶¶ 90-144. Specifically, according to the second amended complaint, defendant John Weaver, in his capacity as counsel for Horry County, South Carolina, "wrongly hid public documents that evidence the civil rights violations, " and defendant John Morgan, chief of the Horry County Police, "assisted and/or directed the hiding and/or destruction of incriminating evidence." *Id.* ¶¶ 90-91.

The plaintiffs further allege that the FBI assisted Horry County officials in covering up evidence of the claimed civil rights violations because the FBI wanted to avoid "public awareness of the ease of civilian access to commit criminal acts using the FBI-NCIC system." 2d Am. Compl. ¶ 92. This claim is presumably a reference to plaintiffs' allegation that either two former corporate officers of Southern Holdings, *see* S.C. Compl. ¶ 43, or an assistant district attorney in North Carolina, *see* 2d Am. Compl. ¶ 70, engineered the inclusion of James Spencer's name and a warrant for his arrest in the National Criminal Information Center database. The FBI would want to conceal such "civilian" tampering with the database, the plaintiffs say, because "[t]he FBI is actively looking to expand its databases on United States Citizens and seeking large amounts of funding from Congress for such expansion. Publicity of misuse of such databases would be counterproductive to the FBI's agenda for expansion." *Id.* ¶ 92.

Not only the FBI, but also the South Carolina Law Enforcement Division ("SLED") is alleged to have participated in a cover-up of the civil rights violations alleged by the plaintiffs. *See* 2d Am. Compl. ¶ 93. SLED's "motivation" for assisting in such a cover- up was allegedly "financial . . . in that the South Carolina Insurance Reserve Fund was the South Carolina state agency that would have been financially responsible for the damages associated with civil rights violations." *Id.* In furtherance of this claimed cover-up, the plaintiffs say, the FBI refused to investigate the matter when plaintiff Nicholas Williamson reported to defendant Phil Celestini, a special agent with the FBI, "the criminal misuse of the FBI-NCIC to facilitate the civil rights violations . . . and the extortion of Plaintiff James Spencer and the civil rights violations under color of law suffered by [Nicholas] Williamson and [co-plaintiff] Virginia Williamson." *Id.* ¶ 94. The FBI continued not to investigate plaintiffs' claims even after various plaintiffs complained about the alleged civil rights violations to the FBI on multiple occasions. *See id.* ¶¶ 99, 103-06, 135-36, 138. Furthermore, plaintiffs allege, one FBI special agent shared evidence given to him by the plaintiffs, including police videotapes of Mr. Spencer's August 2000 arrest, with SLED. *Id.* ¶ 106.

Plaintiffs further allege that during the South Carolina litigation, "[t]he FBI intentionally falsified 'certified' NCIC reports, " removing "the incriminating inquiries that evidenced civil rights crimes . . . by the local law enforcement officers." 2d Am. Compl. ¶ 117. "These fabricated FBI 'certified' reports were submitted by FBI personnel in Washington to United States Senator Lindsey Graham, thus committing fraud on an unwitting United States Senator." *Id.* ¶ 118. According to the plaintiffs, the FBI also "joined in a conspiracy . . . to cover-up the illegal editing of the police videotapes" during the South Carolina litigation. *Id.* ¶ 121. The FBI allegedly effected the cover-up in question by "fabricat[ing]" the CV of Noel Herold and the "SLED Chain of Custody concerning the suspect police videotapes." *Id.* ¶ 124.

After making the allegations concerning the South Carolina litigation that are described above, the focus of the second amended complaint shifts abruptly. According to the plaintiffs, in the first half of 2009, Mr. Spencer and his elderly mother, plaintiff Doris Holt, began filing administrative claims against the defendants under the Federal Tort Claims Act and its counterpart in South Carolina statutory law. *See* 2d Am. Compl. ¶ 145. According to the second amended complaint, employees of the state of South Carolina reacted to the filing of those claims by arranging for Ms. Holt to be removed from her home and placed in protective custody. *See id.* ¶

152. More specifically, plaintiffs claim that defendant Susan Stroman, an employee of the South Carolina Department of Social Services ("DSS"), filed a complaint in family court in which she made "contrived and baseless claims" that Mr. Spencer had abused his mother and threatened Ms. Stroman with guns. *Id.* ¶¶ 154-158. Based on that complaint, the family court issued an order removing Ms. Holt from Mr. Spencer's custody and placing her in the care of the state of South Carolina on July 29, 2009. *Id.* ¶ 158. When Mr. Spencer subsequently spoke to Ms. Stroman, she told him that she had "photographic evidence showing where [he] had beat[en] his mother in the face." *Id.* ¶ 164. These photos, however, according to plaintiffs, were "fabricate[d]" by Ms. Stroman and an employee of defendant Palmetto Senior Care, the eldercare facility where Ms. Holt spent her days. *Id.* ¶ 161. Ms. Stroman and the Palmetto employee, defendant Jennifer Brewton, placed "makeup on 92-year-old Doris Holt" to create the look of "facial injuries" and "then took photographs." *Id.*

A South Carolina family court held several hearings regarding Ms. Holt's case in the summer and fall of 2009. *See* 2d Am. Compl. ¶¶ 170, 186, 189. Although "it was put on the Court record" at a hearing held on September 5, 2009, that Mr. Spencer "had not physically abused his mother, " the family court still refused to release Ms. Holt from protective custody and has not reinstated Mr. Spencer's authority to exercise power of attorney on his mother's behalf. *Id.* ¶¶ 187-90. Ms. Holt allegedly remains "at UniHealth acute care facility[,] where she was placed by DSS, " and where, according to the second amended complaint, she "was denied her care benefits under her comprehensive policy with Palmetto Senior Care . . . and suffered cruel and unwarranted treatment." *Id.* ¶ 194.

Based on the allegations summarized above, the plaintiffs contend that they are entitled to relief under the Federal Tort Claims Act ("FTCA"), *Bivens v. Six Unknown NamedAgents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. § 1983, the Racketeer Influenced and Corrupt Organizations Act, the South Carolina Tort Claims Act, and South Carolina common law. *See* 2d Am. Compl. ¶¶ 218-305. They claim damages as follows: James Spencer, $80 million, *id.* ¶¶ 312-13; Rodney Lail, $12 million, *id.* ¶ 316; Irene Santacroce, $15 million, *id.* ¶ 322; Ricky Stephens, $7 million, *id.* ¶ 323; Marguerite Stephens, $2 million, *id.* ¶ 324; Doris Holt, $35 million, *id.* ¶ 325; Nicholas Williamson, $25 million, *id.* ¶ 326; Virginia Williamson, $10 million, *id.* ¶ 327; Bruce Benson, $20 million, *id.* ¶ 328; and Dan Green, $25 million. *Id.* ¶ 329.

C. Miscellaneous Matters

On February 22, 2011, Mr. Spencer, who apparently has filed all documents submitted on behalf of the plaintiffs in this matter, filed a document entitled "Emergency Motion for Court Orders to Perform Autopsy and Preserve Records." *See* Docket No. 86. In that motion he represented that his mother, plaintiff Doris Holt, had passed away on February 19, 2011, "while in the custody of Defendant South Carolina Department of Social Services." *Id.* at 1. He asserted that her death "was due to dehydration and starvation while being held captive against her will at the facility of Defendant UniHealth in Orangeburg, South Carolina, " *id.*, and requested that the Court order, among other things, that a "complete autopsy" be "performed at the Medical University of South Carolina in Charleston, South Carolina due to the suspicious nature of the death." *Id.* at 5. Because this Court was not convinced that it had jurisdiction to enter such an order, it denied Mr. Spencer's motion on February 24, 2011.

On March 22, 2011, the plaintiffs moved for leave to file a third amended complaint. Although the plaintiffs have failed to enumerate in their motion the specific differences between the proposed third amended complaint, which is 121 pages long, and the operative second amended complaint, which is 131 pages long, they state that the differences consist of the "delet[ion of] the Rackeeteer Influenced and Corruption [*sic*] Organizations Act . . . cause of action against the Defendants and [the] adjust[ment of] the complaint to reflect the death of Plaintiff Doris Holt." Mot. for 3d Am. Compl. at 7.

II. MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

The Court will "freely give leave [to amend a complaint] when justice so requires, " Fed.R.Civ.P. 15(a)(2), and "[i]t is common ground that Rule 15 embodies a generally favorable -policy toward amendments." *Howard v. Gutierrez*, 237 F.R.D. 310, 312 (D.D.C. 2006) (quoting *Davis v. Liberty Mutual Insurace Co.*, 871 F.2d 1134, 1136-37 (D.C. Cir. 1989)). Where amendment would be futile, however, the Court may in its discretion deny such a motion. *See Vreven v. AARP*, 604 F.Supp.2d 9, 13 (D.D.C. 2009) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The third amended complaint that the plaintiffs propose to file differs only slightly from the operative second amended complaint and remedies none of the deficiencies identified by the Court in the remainder of this Opinion. As a result, the Court will deny as futile the plaintiffs' motion for leave to amend their complaint a third time.

III. FEDERAL DEFENDANTS' MOTION TO DISMISS

The various defendants who are employees or agencies of the United States government - the United States, the FBI, and the numerous FBI officials and special agents who are alleged to have manufactured or altered evidence related to the South Carolina litigation or to have refused to investigate plaintiffs' civil rights claims - have moved to dismiss the claims against them pursuant

to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *See* Fed. MTD at 5-6. Because the Court concludes that plaintiffs have failed to state a claim for relief against any of the federal defendants, the motion to dismiss all claims against those defendants will be granted.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief, ' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Erickson v. Pardus*, 551 U.S. 89 (2007). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).

On a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. at 94; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555. The complaint "is construed liberally in the [plaintiff's] favor, and [the Court should] grant [the plaintiff] the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *See Kowal v. MCI Communications Corp.*, 16 F.3d at 1276; *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

The Court generally may not rely on facts "outside" the complaint in deciding a motion for dismissal pursuant to Rule 12(b)(6), but it may consider, among other things, "matters of public record." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004). To provide context for the *pro se* plaintiffs' claims, the Court has reviewed the record of the South Carolina litigation, to the extent that it is publicly available.

B. Damages and Constitutional Claims

Plaintiffs assert that the various federal defendants are liable for (1) violations of the Federal Tort Claims Act ("FTCA"), 2d Am. Compl. ¶ 220; (2) constitutional violations, pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), 2d Am. Compl. ¶ 250; (3) 42 U.S.C. §§ 1983, 1981, & 1985, *id.* ¶¶ 257-258; (4) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *id.* ¶ 262; (5) intentional infliction of emotional distress, *id.* ¶¶ 277-280; and (6) civil conspiracy. *Id.* ¶ 283. The complaint fails to state a claim for relief against the federal defendants on any of those grounds.

Certain flaws inherent in plaintiffs' second amended complaint are fatal to multiple theories of the federal defendants' liability. First, the Court notes that while the complaint alleges a wide array of facts concerning events allegedly occurring over roughly a ten-year period, the alleged actions that may be plausibly attributed to any of the federal defendants are relatively few. Because the plaintiffs' factual allegations fail to permit any reasonable inference that any federal defendant was connected either to the civil rights violations alleged in the South Carolina litigation or the placement of Doris Holt in state custody, those occurrences may not serve as the basis for any claims against the federal defendants. *Cf.* 2d Am. Compl. ¶ 260 (suggesting that FBI employees "cause[d] the constitutionally impermissible, retaliatory removal of Plaintiff Doris Holt from her home).

Second, the plaintiffs have failed to state a plausible claim that they were injured by the actions of the federal defendants that are alleged in the second amended complaint. In general terms, the actions alleged in the complaint to which a federal defendant may possibly be linked are those claiming that (1) the FBI refused to investigate the plaintiffs' civil rights complaints, *see* 2d Am. Compl. ¶¶ 99, 103-06, 135-36, 138; (2) one or more FBI employees tried to conceal the fact that police videotapes to be used as evidence during the South Carolina litigation had been altered, *id.* ¶ 121; (3) one or more FBI employees falsified documents related to the NCIC and/or the background of Noel Herold, *id.* ¶¶ 117, 124; and (4) FBI employees refused to provide various agency manuals on internal procedure to the plaintiffs. *Id.* ¶ 235. The plaintiffs do not make any specific factual allegations concerning injuries allegedly attributable to those acts. Where the plaintiffs do allege specific injuries, those injuries bear no plausible connection to the alleged actions of the *federal* defendants. *See, e.g., id.* ¶ 316 ("As a result of Defendants['] negligent and/or malicious conduct, Plaintiff Rodney Lail has a claim for back pay, lost wages, and benefits dating back to his termination from the Myrtle Beach Police Department on November 1, 2000."); *id.* ¶ 315 ("As a result of Defendants['] negligent and/or malicious conduct, Plaintiff Spencer has chronic PTSD and serious depression and lives in fear for his life."). Plaintiffs' other allegations of injury are purely conclusory, in some cases merely parroting statutory language. *See, e.g., id.* ¶ 242 (federal defendants "caused personal injury to one or more Plaintiffs"); *id.* ¶ 262 ("Defendants are two or more persons or entities that have conspired and formed one or more interacting entrprises, through a pattern of racketeering activity - causing injury to business or property of Plaintiffs"

(echoing the language of 18 U.S.C. § 1964, which provides a private right of action for persons "injured in [their] business or property" by certain activities)).

The manner in which the alleged actions of the federal defendants might have injured any of the plaintiffs is in no way evident from the second amended complaint. Plaintiffs identify no injury that would have been averted if the FBI had investigated their civil rights claims. They do not claim that the outcome of the South Carolina litigation would have been different if not for the alleged actions of the federal defendants. In the absence of any allegation of any form of injury that might logically flow from the conduct complained of, purely conclusory allegations of damages fail to rise to the level of plausibility. *See Ashcroft v. Iqbal*, 129 S.Ct. at 1949 ("[t]hreadbare recitals of [one of] the elements of a cause of action" are not sufficient to withstand a motion to dismiss). Consequently, plaintiffs have failed to state a claim for relief based on any theory of liability that is viable only if damages are properly pled; their claims against the federal defendants based on the FTCA, RICO, and the South Carolina torts of civil conspiracy and intentional infliction of emotional distress therefore must be dismissed. *See* 28 U.S.C. § 1346(b) (waiving the sovereign immunity of the United States as to claims for damages based on "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); 18 U.S.C. § 1964 (providing a cause of action under RICO for persons "injured in [their] business or property" by specified activities); *Argoe v. Three Rivers Behavioral Center*, 697 S.E.2d 551, 555 (S.C. 2010) (to prevail on a claim for intentional infliction of emotional distress, plaintiffs must show that they experienced "emotional distress [that] was 'severe' such that 'no reasonable man could be expected to endure it'"); *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 874 (S.C. Ct. App. 2009) (tort of civil conspiracy includes as an element a requirement of "special damage").

Plaintiffs have also failed to state any claim predicated upon an alleged violation of their constitutional rights by any of the federal defendants. The second amended complaint alleges that the federal defendants "deprive[d] Plaintiffs of the Constitutional rights of due process, and rights to equal protection of the law, in acts of obstruction of justice and commission of fraud upon the court, and deprived the Plaintiffs of the right to a jury trial under the 7th Amendment and other applicable Amendments of the United States Constitution including the 1st, 5th, and 14th Amendments." 2d Am. Compl. ¶ 253. None of the actions alleged in the complaint and attributable to the federal defendants constituted a violation of any of the constitutional amendments identified by the plaintiffs. For the same reason that the complaint fails to allege any injury caused to the plaintiffs by the federal defendants, it also fails to allege a deprivation of life, liberty, or property - an essential element of a due process claim. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Furthermore, the plaintiffs were in no way deprived of a jury trial, in violation of the Seventh Amendment or otherwise; the record of the South Carolina litigation shows that the plaintiffs, who were represented by counsel, voluntarily waived that right by entering into a settlement agreement. Finally, there is no apparent factual foundation in the complaint for plaintiffs' claims that the federal defendants violated either their First Amendment rights or the Equal Protection Clause. As a result, plaintiffs' claims against the federal defendants under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. §§ 1981, 1983, and 1985 will be dismissed, leaving no remaining valid claims against the federal defendants.[2] Because the liability of non-federal defendant the Academy Group is predicated upon its employment of Noel Herold, a federal defendant, *see* 2d Am. Compl. ¶¶ 286-87, all claims against the Academy Group will also be dismissed.

IV. REMAINING DEFENDANTS' MOTIONS TO DISMISS

All remaining defendants - Kathy Beers, Jennifer Brewton, David Caldwell, Larry Gainey, Princess Hodges, Horry County, Mark Keel, John Morgan, Palmetto Health Care, Mike Prodon, the South Carolina Department of Social Services, the State of South Carolina, the State of South Carolina Law Enforcement Division, Susan Stroman, Suzanne Tillman, John Weaver, Brenda Hughes, Unihealth Post Acute Care of Columbia, Shawn Markham, Susan Stewart, Andrew Lindemann, Jay Saleeby, E. Glenn Elliott, and Robert E. Lee (for ease of reference, "the nonresident defendants") - contend that they are not subject to personal jurisdiction in the District of Columbia and therefore that the plaintiffs' claims against them should be dismissed under Rule 12(b)(2) of the Federal Rules of Civil Procedure. It is the plaintiffs' burden to make a *prima facie* showing that this Court has personal jurisdiction over a defendant. *See First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378-79 (D.C. Cir. 1988); *Davis v. Grant Park Nursing Home LP*, 639 F.Supp.2d 60, 65 (D.D.C. 2009). "Plaintiff[s] must allege specific facts on which personal jurisdiction can be based; [they] cannot rely on conclusory allegations." *Moore v. Motz*, 437 F.Supp.2d 88, 91 (D.D.C. 2006) (citations omitted).

The plaintiffs' only effort to connect most of the nonresident defendants in any way to the District of Columbia is their claim that those defendants were part of a vast conspiracy encompassing the federal defendants, and that the federal defendants took actions in the District of Columbia. *See* S.C. Opp. at 9; Markham/Stewart Opp. at 2-8; Elliott Opp. at 3-5; Saleeby Opp. at 4-5; Lee Opp. at 3-5; Lindemann Opp. at 6; Unihealth Opp. at 9-11. As the Court already has explained, however, the plaintiffs have stated no valid claims, for civil conspiracy or otherwise, against the federal defendants, and their

alleged actions therefore cannot serve as the basis for the exercise of personal jurisdiction over the nonresident defendants, none of whom are claimed to have taken *any* specific action in or directed toward the District of Columbia.

With respect to the State of South Carolina, Palmetto Senior Care, and Unihealth, the plaintiffs suggest that personal jurisdiction is proper in the District of Columbia because those defendants receive funding from and are regulated by the federal government. *See* S.C. Opp. at 12; Unihealth Opp. at 9-11. This argument fails because, under the "government contacts" doctrine, "'a defendant's relationships with federal agencies do not enter the calculus of minimum contacts with the District of Columbia for jurisdictional purposes.'" *Ficken v. Rice*, 594 F.Supp.2d 71, 75 (D.D.C. 2009) (quoting *Chrysler Corp. v. General Motors Corp.*, 589 F.Supp. 1182, 1196 (D.D.C. 1984)); *see Bechtel & Cole v. Graceland Broadcasting, Inc.*, 18 F.3d 953 (table), 1994 WL 85047, at *1-2 (D.C. Cir. 1994) ("The government contacts doctrine bars courts in the District of Columbia from exercising personal jurisdiction based solely on the defendant's contacts with a federal instrumentality."); *Jung v. Ass'n of Am. Med. Colleges*, 300 F.Supp.2d 119, 139 (D.D.C. 2004) ("'The District of Columbia's unique character as the home of the federal government requires this exception in order to maintain unobstructed access to the instrumentalities of the federal government.'" (citation omitted)). The plaintiffs therefore have failed to establish that any nonresident defendant is subject to the exercise of personal jurisdiction by this Court. As a result, all claims against those defendants must be dismissed.

V. REMAINING MATTERS

For the reasons outlined above, all claims against the defendants specifically named in the plaintiffs' second amended complaint will be dismissed, leaving as defendants in this case only "[u]nknown John Does." 2d Am. Compl. ¶ 51. The record does not reflect that any individual initially identified as a John Doe has been served with process. On June 21, 2010, the Court ordered the plaintiffs to effect service on all defendants by July 2, 2010, or to show cause in writing why claims against defendants who had not been served should not be dismissed. The plaintiffs responded by filing a motion to proceed *in forma pauperis* so that they could request that the United States Marshals Service effect service on their behalf. *See* IFP Mot. at 3-4. Then, in July 2010, the plaintiffs filed numerous affidavits attesting that service had been made on the named defendants. They made no attempt to describe any efforts to identify the individuals named as "John Does" or to propose a plan for identifying them. Consequently, the Court finds that the plaintiffs have not shown good cause for their failure to serve the John Doe defendants, and those defendants will be dismissed pursuant Rule 4(m) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 4(m).

As for the plaintiffs' motion for leave to proceed *in forma pauperis*, the Court finds that the plaintiffs have failed to demonstrate that they qualify for such relief. According to plaintiffs' own affidavits, one plaintiff, Nicholas Williamson, is a tenured professor at the University of North Carolina at Greensboro who earns a salary of $116, 602 per year and owns two houses. *See* Williamson Affid. (attached to IFP Mot. as unnumbered exhibit). The Court is unconvinced that, as a group, the plaintiffs are unable to pay filing fees, and notes further that the plaintiffs did in fact pay the required fee upon filing the complaint in this case. Because the plaintiffs do not qualify to proceed *in forma pauperis*, and because their claims are dismissed, their requests for use of the Marshals Service to serve process and for appointment of *pro bono* counsel will also be denied.

VI. CONCLUSION

For the foregoing reasons, all pending motions to dismiss the plaintiffs' second amended complaint will be granted, and the complaint will be dismissed. The plaintiffs' motion to proceed *in forma pauperis* and for related relief will be denied, as will their motion for leave to file a third amended complaint. Plaintiffs' motion for "firewall protection" will be denied as moot. An Order consistent with this Opinion shall issue this same day.

SO ORDERED.

Notes:

[1] The following documents were among those considered by the Court in resolving the pending motions: plaintiffs' second amended complaint ("2d Am. Compl."); plaintiffs' motion for leave to file a third amended complaint ("Mot. for 3d Am. Compl."); the South Carolina defendants' motion to dismiss ("SC MTD"); the plaintiffs' opposition to that motion ("SC Opp."); the reply in support of that motion ("SC Reply"); the Unihealth defendants' motion to dismiss ("Unihealth MTD"); plaintiffs' opposition to that motion ("Unihealth Opp."); the reply in support of that motion ("Unihealth Reply"); Shawn Markham and Susan Stewart's motion to dismiss ("Markham/Stewart MTD"); plaintiffs' opposition to that motion ("Markham/Stewart Opp."); the reply in support of that motion ("Markham/Stewart Reply"); Andrew Lindeman's motion to dismiss and related filings ("Lindeman MTD" and "Lindeman Opp."); Jay Saleeby's motion to dismiss and related filings ("Saleeby MTD" and "Saleeby Opp."); Robert E. Lee's motion to dismiss and related filings ("Lee MTD" and "Lee Opp."); the Academy Group's motion to dismiss and related filings ("Acad. MTD, " "Acad. Opp., " and "Acad. Reply"); E. Glenn Elliott's motion to dismiss and related filings ("Elliott MTD" and "Elliott Opp."); the federal defendants' motion to dismiss and related filings ("Fed. MTD" and "Fed. Opp."); the plaintiffs' motion to proceed

in forma pauperis and for other relief ("IFP Mot."); and the plaintiffs' "motion for firewall protection" ("Firewall Mot.").

[2] Of course, claims against federal employees may rarely, if ever, be brought under 42 U.S.C. § 1983, *see Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1104 (D.C. Cir. 2005), and may not be brought against federal employees acting in their official capacity under Section 1981 or 1985. *See Roum v. Bush*, 461 F.Supp.2d 40, 46 (D.D.C. 2006). Indeed, all of plaintiffs' legal theories are flawed in numerous fundamental ways. In the interest of brevity, the Court has chosen to highlight only so many of those flaws as are sufficient to warrant dismissal of plaintiffs' claims.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Doyet A. Early III, Circuit Court Judge
Case No. 2008-CP-40-6656
Appellate Case No. 2014-002029

John R. Rakowsky,

Respondent

v.

Law Offices of Adrian L. Falgione, LLC, James Spencer, Estate of Doris Holt, Nick Williamson On behalf of RSC, Irene Santacroce, Rodney Keith Lail, Marguerite Stephens, Ricky Stephens, Michael Hartness, Horry County, SC, Eugene Chewning and Glenn W. Harrison,

Defendants.

Of whom:

Irene Santacroce, Rodney Keith Lail and Estate Of Doris Holt are,

Appellants.

CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on September 1, 2015, I served a copy of the **Return in Opposition to Joint Motion to Extend Time Due to Newly Discovered Evidence** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

Andrew F. Lindemann
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, South Carolina 29202-8568

Benjamin C. Bruner
Bruner Powell Wall & Mullins, LLC
Post Office Box 61110
Columbia, South Carolina 29260

Michael Sribnick
3 Kenilworth Avenue
Charleston, South Carolina 29403

James Spencer
7001 Saint Andrews Road
P.O. Box 183
Columbia, South Carolina 29212

Marguerite Stephens
2455 Moores Mill Road
Aynor, South Carolina 29511

Ricky Stephens
2455 Moores Mill Road
Aynor, South Carolina 29511

Nicholas Williamson
8005 White Ash Court
Oak Ridge, North Carolina 27310

Beth Cogan, Paralegal

September 1, 2015
West Columbia, South Carolina

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

September 1, 2015

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *John Rakowsky vs. Adrian Falgione, et al.*
Appellate Case No.: 2014-002029

Dear Ms. Kitchings:

Enclosed for filing with your office, please find the original and seven (7) copies of the Return in Opposition to Joint Motion to Extend Time due to Newly Discovered Evidence in the above-referenced matter. Please have your office file the original and return the stamped filed copy via our self-addressed, stamped envelope that is provided.

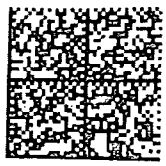
By copy of this letter, I am serving the same upon the *pro se* Defendant and all the parties of record. If you have any questions please do not hesitate to call. With warm personal regards, I am,

Sincerely yours,

Beth Cogan

Beth Cogan, Paralegal
beth@desaballard.com

cc: (all via U.S. mail)
The Honorable Doyet A. Early, III
Andrew Lindemann, Esquire
Benjamin Bruner, Esquire
Michael Sribnick, Esquire
James Spencer
Marguerite Stephens
Ricky Stephens
Nicholas Williamson
John Rakowsky, Esquire (via Email)



UNITED STATES POSTAGE
PITNEY BOWES
02 1P $ 005.90⁰
0001838218 SEP 01 2015
MAILED FROM ZIP CODE 29170

RECEIVED
SEP 04 2015
SC Court of Appeals

Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211