IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BETTY BRIDGEWATER AND JERRY WILLIAMS, INDIVIDUALLY and on Behalf of A Class of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 3:09CV1758-B**
DOUBLE DIAMOND-DELAWARE, INC., DOUBLE DIAMOND, INC., R. MIKE WARD, FRED CURRAN, WHITE BLUFF CLUB CORP., WHITE BLUFF GOLF, INC., THE INN AT WHITE BLUFF, INC., WHITE BLUFF MARINA, INC., THE LIGHTHOUSE DINING CO., and THE WHITE BLUFF 19TH HOLE, INC.,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, FOR STAY, AND BRIEF IN SUPPORT

Respectfully submitted

WINSTEAD PC

By: /s/ Jay J. Madrid

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DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, FOR STAY, AND BRIEF IN SUPPORT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Double Diamond-Delaware, Inc. ("DD-Delaware"), Double Diamond, Inc. ("Double Diamond"), R. Mike Ward, Fred Curran, White Bluff Club Corp., White Bluff Golf, Inc., The Inn At White Bluff, Inc., White Bluff Marina, Inc., The Lighthouse Dining Co., and The White Bluff 19th Hole, Inc. (collectively, the foregoing White Bluff corporate entities are hereafter referred to as the "White Bluff Defendants" and all Defendants are hereafter referred to as the "Defendants"), file this their Motion to Dismiss, or Alternatively, for Stay, and Brief In Support Thereof (the "Motion") and in support respectfully show the Court as follows:

I.
BACKGROUND

The claims asserted in this flawed class action[1] are an outgrowth of and inextricably intertwined with claims raised, by way of counterclaim, in the case cited in Plaintiffs' Complaint-Class Action (the "Complaint"). As acknowledged in the Complaint, in Cause No. DC-07-12490, styled *Double Diamond, Inc. and White Bluff Property Owners Association, Inc. v. Daniel Saturn,* Judgment was entered pursuant to a jury verdict in the 68th Judicial District Court of Dallas County, Texas (the "State Court Action"). Plaintiffs concede the interrelationship between the present case and the State Court Action by improperly attempting to exploit the State Court Action to advance their own claims in the present action (Count 3).

In the State Court Action, plaintiffs Double Diamond, Inc. ("Double Diamond"), the developer of the White Bluff Resort, and the White Bluff Property Owners Association ("WBPOA") asserted claims against Daniel Saturn ("Saturn") for, among other things, a declaratory judgment (WBPOA) regarding the validity of White Bluff's food and beverage assessments assessed by the WBPOA (the "Hospitality Assessments") which are part of White Bluff's food and beverage credit program (the "Hospitality Program"). Saturn, who is a putative class member of the present action, asserted a counterclaim for declaratory judgment challenging the validity of the Hospitality Assessments and Hospitality Program based on, among other reasons, alleged violations of the Texas Non-Profit Corporations Act and the WBPOA's governing documents. In the State Court Action, Saturn's counsel (who is one of putative class counsel in the present case) raised many, if not all, of the same issues raised in the present action.

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[1] Among other defects, property owners allegedly represented by Plaintiffs fit into diverse categories in which individual issues predominate: owners of unimproved property at White Bluff Resort; owners of improved property who are not permanent residents; those who reside permanently at the resort and have homesteaded their property; owners of time share interests in condominiums at White Bluff; those who own a 1/50th "Membership Interest" in a lot; and corporate lot owners who hold their lots for resale.

Final Judgment was entered in the State Court Action on June 15, 2009. *See* Complaint, Ex. A. In post-trial and post-judgment motions, Double Diamond and the WBPOA challenged the jury verdict and several of the trial court's rulings, including the Court's finding that the Hospitality Program violates the WBPOA Bylaws and Article 1396-2.24 of the Texas Non-Profit Corporations Act. The State Court Action is on appeal in the Fifth Court of Appeals in Dallas. *See* App. 1-50 (Plaintiffs' Motion to Disregard Jury Question No. 5, Motion for New Trial, Notice of Appeal, Fifth Court of Appeals Docket Report, respectively).[2]

The Complaint in the present action should be dismissed on the following grounds. First, this case should be dismissed or stayed under the doctrine set forth in *Colo. River Water Conservation District v. United States,* 424 U.S. 800 (1976) (the "*Colorado River* Doctrine") or on other grounds. Second, assuming the Court is disinclined to abstain, the Complaint nonetheless should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiffs lack standing to assert their claims, or pursuant to Fed. R. Civ. P. 8(a)(2), 9(b) and/or 12(b)(6) because the Complaint fails to meet fundamental notice and pleading requirements.

II.
ARGUMENT AND AUTHORITIES

A. The Court Should Dismiss, Or Alternatively, Stay Plaintiffs' Claims Under The *Colorado River* Doctrine.

1. Applicable standards

It has long been the policy of federal courts to abstain from exercising jurisdiction based on "wise judicial administration, giving regard to conservation of judicial resources and

[2] Defendants respectfully request the Court to take judicial notice of these publicly-filed documents. FED. R. EVID. 201. Further, the Court should consider these State Court Action pleadings as related to the Final Judgment in the State Court Action, which is attached to the Complaint, and invoked by Plaintiffs' claim for offensive collateral estoppel in the Complaint. *See generally Collins v. Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *Skidmore Energy, Inc. v. KPMG*, Civil Action No. 3:03-CV-2138-B, 2004 U.S. Dist. LEXIS 28396 *12 n.2 (N.D. Tex. Dec. 28, 2004)

comprehensive disposition of litigation."[3] In *Colorado River* and its progeny, while recognizing that courts should abstain only in exceptional circumstances, the U.S. Supreme Court noted several factors to be considered when determining whether abstention in favor of other pending litigation is appropriate, including (1) the desirability of avoiding piecemeal litigation, (2) assumption by either court of jurisdiction over a *res*; (3) the order in which jurisdiction was obtained by the concurrent forums, and (4) the relative inconvenience of the forums, (5) whether the source of governing law was state or federal, and (6) whether the state court proceedings could adequately protect the federal plaintiff's rights. *See Colo. River*, 424 U.S. at 817; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-27 (1983). No one factor is determinative – a court must carefully consider both the obligation to exercise jurisdiction and the combination of factors counseling against the exercise of jurisdiction. *Colo. River*, 424 U.S. at 818-819 (citation omitted). The factors do not represent a hard and fast rule for determining whether abstention is appropriate, but instead are some of the factors relevant to the decision. *Moses H. Cone*, 460 U.S. at 15. Not all of the factors are important in every case. *New Orleans Public Serv., Inc. v. The Council Of The City Of New Orleans*, 911 F.2d 993, 1004-1005 (5th Cir. 1990). The factors must be applied "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone*, 460 U.S. at 21. If abstention is warranted, the Court may dismiss or stay the action. *Colo. River*, 424 U.S. at 818-819 (dismiss); *New Orleans Public Service, Inc.*, 911 F.2d at 1005 (stay).

The initial question in *Colorado River* abstention is whether there are parallel proceedings in state court. *See MidTexas Int'l Center, Inc. v. Myronowicz*, No. 3:05-CV-1957-R, 2006 U.S. Dist. LEXIS 5538 at *7 (N.D. Tex. August 9, 2006) (citing *Caminiti & Iatarola, Ltd.*

[3] *See Colo. River,* 24 U.S. 800, (1976) (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, (1952)).

v. Behnke Warehousing, Inc., 962 F.2d 698, 700 (7th Cir. 1992)). A suit is "parallel" when substantially the same parties are contemporaneously litigating substantially the same issues in another forum. *Id.* (citing *Caminiti*, 962 F.2d at 700). Two actions may involve different parties and still be parallel so long as there is a substantial similarity between the two actions. *Id.* (citing *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)).

Finally, even if abstention is not warranted under the *Colorado River* doctrine, a federal court has inherent power to stay proceedings "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Itel Corp. v. M/S. Victoria U (Ex Pishtaz Iran)*, 710 F.2d 199, 203 (5th Cir. 1983). The Fifth Circuit has specifically recognized that district courts have inherent power to stay a federal lawsuit in favor of a concurrent state court proceeding even when other standards for abstention are not strictly met. *Id.*; *PPG Indus., Inc. v. Cont'l Oil Co.*, 478 F.2d 674, 679-82 (5th Cir. 1973).

2. Abstention is warranted under *Colorado River*.

The present action and the State Court Action are parallel proceedings. The parties are substantially similar in that Double Diamond, who is the primary focus of the allegations in the present action, is a party to both actions, and the WBPOA, who is central to all of Plaintiffs' allegations in the present action, is a party to the State Court Action. Further, the issues in both actions are substantially similar. In fact, all of Plaintiffs' claims are inextricably dependent on issues and claims that have already been litigated in the State Court Action and which are now on appeal. *See Caminiti*, 962 F.2d at 700 (finding that the state court's potential to dispose of the issues raised in the federal action was sufficient to defeat a difference in the parties in both cases). Finally, Plaintiffs are asserting offensive collateral estoppel precisely based on the similarity of issues between the actions. Accordingly, the proceedings are parallel. *See*

Caminiti, 962 F.2d at 700; *Myronowicz*, 2006 U.S. Dist. LEXIS 55387 at *8. As demonstrated below, "exceptional circumstances" exist in this case warrant abstention.

a. Avoidance of piecemeal litigation.

Many, if not all, of the issues and evidence in the present case were already heard and determined in the State Court Action. It therefore would be wasteful to relitigate those issues and evidence. *See New Orleans Public Serv., Inc.*, 911 F.2d at 1005 ("[T]he fact that the state trial court has rendered judgment nonetheless weighs in favor of a stay. There is little to be gained from rehashing the same evidence in another forum."); *Allen v. La. State Board of Dentistry*, 835 F.2d 100, 105 (5th Cir. 1988). Also, this is not situation of duplicative litigation (e.g., one plaintiff, one defendant, one issue), but instead a case where there is a real danger of inconsistent rulings with respect to a property – the legitimacy of the collection and use of the Hospitality Assessments already collected and to be collected by the WBPOA. *See Am. Fam. Life Assurance Co. v. Anderson*, No. 00-60027, 2000 WL 1056303, at *2 (5th Cir. July 27, 2000) (unpublished opinion). All of Plaintiffs' claims are inextricably dependent on issues and claims that have already been litigated in the State Court Action and which are now on appeal. *See* Complaint, ¶¶ 35-52, 75(i)-(iv), 83-85, Ex. A. According to the Complaint, the alleged RICO fraud *is* the "illegal assessments." *See* Complaint, at 10. There is no mail or wire fraud or conspiracy to commit mail or wire fraud if the "illegal assessments" are in fact perfectly legal (Counts 1-2). *See* Complaint, ¶¶ 47, 83-89. Similarly, all of Plaintiffs' other claims fail if the Hospitality Assessments are not "illegal assessments." *See* Complaint, ¶¶ 93-95, 98, 100, 102, 104. These same issues are on appeal with the Fifth Court of Appeals. Obviously, if the Fifth Court of Appeals were to determine these issues one way and this Court determined the issues a different way, the inconsistent rulings would render futile and wasteful both litigations.

Finally, Plaintiffs not only recognize the risk of piecemeal litigation but are trying to exploit it to their advantage. In Count 3 of the Complaint, Plaintiffs assert a claim of reimbursement/offensive collateral estoppel asking the Court to apply the rulings of the 68th District Court in the State Court Action, despite the Judgment's non-final status. This opportunism at the expense of the Court's resources is like the vexatious and reactive litigation that courts have determined are exceptional circumstances warranting abstention. *See*, *e.g.*, *Allen*, 835 F.2d at 105 (citing *Moses H. Cone*, 460 U.S. at 18 n 20). Accordingly, the avoidance of piecemeal litigation strongly favors abstention.

b. Jurisdiction over property.

To the extent that there is a *res* in this case, the 68th District Court has already asserted jurisdiction over the *res*. In the present case, Plaintiffs contend that the Hospitality Assessments are WBPOA property. *See*, *e.g.*, Complaint, ¶¶ 38, 48, 83, 89a, 95, 98, 100, 104. Non-payment of the Hospitality Assessments entitles the WBPOA to place liens on the properties of non-paying WBPOA members and to foreclose on the liens. *See* Complaint, Ex. A. Further, by virtue of the Capital Improvements Agreement, Double Diamond has contractual interests in the Hospitality Assessments. *See* Complaint, ¶ 44. In its Final Judgment, the 68th District Court expressly purported to determine property rights to the Hospitality Assessments by enjoining Double Diamond and the WBPOA from foreclosing on the property of Saturn, a putative class member, for non-payment of Hospitality Assessments, by invalidating the Hospitality Program (as to Saturn only), and by purporting to invalidate the Capital Improvements Agreement (as to Saturn only). *See* Complaint, Ex. A. The 68th District Court clearly asserted jurisdiction over the Hospitality Assessments, the very same Assessments for which Plaintiffs in the present action are seeking a constructive trust and reimbursement. *See* Complaint, ¶¶ 91, 100. Also, the 68th District Court and the Fifth Court of Appeals asserted jurisdiction over the WBPOA, which

is the only party, if any, who has standing to assert claims for WBPOA property. This factor alone warrants abstention. *See Colo. River*, 424 U.S. at 818; *Princess Lida v. Thompson*, 305 U.S. 456 (1939); *Smith v. Humble Oil and Refining Co.*, 425 F.2d 1287, 1288 (5th Cir. 1970); *Wash. St. Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992).

c. The order in which jurisdiction was obtained.

The 68th District Court first obtained jurisdiction over Saturn (a putative class member) and the WBPOA and Double Diamond. The State Court Action was filed on October 19, 2007. In the State Court Action, there were numerous amended pleadings and extensive discovery and briefing on the issues now raised in the present action. A Dallas jury heard testimony from nearly one dozen witnesses and hundreds of exhibits at trial. The 68th District Court rendered a Final Judgment and heard and ruled on extensive post-judgment motion practice. The Fifth Court of Appeals obtained jurisdiction over these parties on September 9, 2009 when Double Diamond and the WBPOA filed their Notice of Appeal. In short, substantial litigation has already taken place on evidentiary matters that are central to all or virtually all of Plaintiffs' claims. In contrast, the present action has not proceeded past initial pleadings. Accordingly, this factor strongly favors abstention. *See Colo. River*, 424 U.S. at 820; *Allen*, 835 F.2d at 104; *Melo v. Gardere Wynne Sewell LLP*, No. 3-04-CV-2238-BD, 2005 U.S. Dist. LEXIS 7040 at*9 (N.D. Tex. April 21, 2005) ("[T]he substantial difference in the progress of the state and federal actions weighs heavily in favor of abstention.") (citing *Bates v. Van Buren Township*, 122 Fed. Appx. 803, 807-808 (6th Cir. 2004).

d. The relative convenience of the forums.

Both the State Court Action and the present action were both brought in Dallas, Texas. The present action, however, imposes greater inconvenience on the parties and witnesses because of the significant overlap of issues. Witnesses will be inconvenienced by having to be

redeposed, and generally significant discovery in the State Court will have to be repeated, which will be wasteful in time and resources for the parties and witnesses. Accordingly, this factor favors abstention is neutral.

e. Whether and to what extent federal law governs the claims.

Federal law will apply to Plaintiffs' RICO claim. But the RICO claim will itself turn on determination of a number of predicate issues based on Texas law, including whether the food and beverage credit program violates Article 1396.-2.24 of the Texas Non-Profit Corporations Act and whether the Hospitality Assessments violated the WBPOA Bylaws (state contract law). *See* Complaint, ¶¶ 30, 36, 51, 60-61. In addition, Plaintiffs' claim of misapplication of fiduciary property (Count 5) will certainly be governed by Texas law, which is allegedly based on violation of Section 32.45 of the Texas Penal Code. *See* Complaint, ¶¶ 97-98. Plaintiffs' other claims will likely be determined by Texas law because they all depend in whole or in part on property, rights and obligations of directors and members of the WBPOA, a Texas Non-Profit Corporation. In any event, all of Plaintiffs' claims will turn on resolution of issues pending in the appeal of the State Court Action. Accordingly, this factor favors abstention.

f. Adequacy of state proceedings.

Because the issues in the appeal of the State Court Action are central to all or virtually all of Plaintiffs' claims regarding the Hospitality Assessments, the State Court Action is adequate to protect the rights of all of Plaintiffs. *See Myronowicz*, 2006 U.S. Dist. LEXIS 55387 at *11 n.4 (substantial likelihood that the state litigation would dispose of all claims presented in federal case presupposes that state proceeding is adequate) (citing *Caminiti*, 962 F.2d at 700). Accordingly, this factor favors abstention or is neutral.

3. Abstention is warranted on other grounds.

Even if abstention under the *Colorado River* doctrine were found unavailing, the Court should abstain from exercising jurisdiction because Plaintiffs' claims improperly invite the Court to intrude upon the province of the Texas courts and Texas Legislature. Though Plaintiffs have not asserted a claim for declaratory judgment in the present action, as part of their RICO claim, Plaintiffs are effectively asking the Court to declare as a matter of Texas law that Defendants violated Article 1396-2.24 of the Texas Non-Profit Corporations Act and the governing documents of the WBPOA. If this Court makes a determination of these issues, the Court would in effect be rendering a declaratory judgment over issues first asserted in the cross-declaratory judgments in the State Court Action (and which claims are now on appeal). Under clear U.S. Supreme Court and Fifth Circuit precedent, this Court should abstain from providing declaratory relief on issues that are the subject of a declaratory judgment in state court. *See Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 945, 950 (5th Cir. 1994). On the other hand, if the Court were to apply the determinations from the Final Judgment in the State Court Action on the basis of collateral estoppel, as requested by Plaintiffs' reimbursement/offensive collateral estoppel claim, the Court would be essentially overruling or rewriting the Final Judgment itself, which expressly limits the Judgment to the parties to the State Court Action, as well as the Texas Declaratory Judgment Act, which limits the reach of declaratory judgments under the Act to the parties to the suit. *See Geneva Brooks, et al. v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004); TEX. CIV. PRAC. & REM. CODE § 37.006. Under these circumstances, the Court should abstain from exercising jurisdiction over Plaintiffs' claims.

B. Alternatively, The Court Should Dismiss Plaintiffs' Claims Under Rules 8(a)(2), 9(b) and/or 12(b)(6) For Failure State Claims.

1. Applicable Standards

a. Standards for dismissal under Rules 8(a)(2) and 12(b)(6).

Plaintiffs' Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* FED. R. CIV. P. 8(a)(2). As the U.S. Supreme Court explained in *Bell Atlantic Corp. v. Twombly*,[4] and reaffirmed in *Ashcroft v. Iqbal*,[5] the pleading standard established in Rule 8 does not require "detailed factual allegations," but it does demand more than an unadorned accusation devoid of factual support. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949. While the Court must accept all of Plaintiffs' allegations as true, it is not bound to accept as true "a legal conclusion couched as a factual allegation." *Iqbal*, 129 S.Ct. at 1949-50; *Twombly*, 550 U.S. at 555. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not do. *Twombly*, 550 U.S. at 555; *Hildebrandt v. Indianapolis Life Ins. Co.*, No. 3:08-CV-1815-B, 2009 U.S. Dist. LEXIS 81160 at *8 (N.D. Tex. Sept. 8, 2009) (Boyle, J.). To survive a motion to dismiss, Plaintiffs' Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S.Ct. at 1949. A claim has facial plausibility when the Court can draw a reasonable inference from the pleadings that Defendants are liable for the misconduct alleged. *Twombly*, 550 U.S.at 556. Where the facts do not permit the Court to infer more than the mere possibility of misconduct, the Complaint has stopped short of showing that Plaintiffs are plausibly entitled to relief. *Iqbal*, 129 S. Ct. at 1950; *Hildebrandt*, 2009 U.S. Dist. LEXIS 81160 at *12-13; FED. R. CIV. P. 8(a)(2).

[4] 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).
[5] 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

A review of just some of the conclusory allegations in the Complaint makes it clear that the pleading requirements set forth in *Twombly* and *Iqbal* have not been satisfied:

- ". . . Double Diamond commingles the *funds* of the not-for-profit WBPOA with the *accounts* of Double Diamond." (Complaint, ¶ 33).
- "Since its inception in 1990, the WBPOA has never established a reserve account for future expenditures because virtually every dollar that goes into the association is sucked out in some or fashion by Double Diamond." (Complaint, ¶ 34).
- "Based on the conduct alleged herein, the WBPOA is not organized and operated to provide for the acquisition, construction, management, maintenance and care of association property, but rather is organized and operated for the purpose of increasing the profitability of Double Diamond and filling the pockets of Defendant Ward.") (Complaint, ¶ 38).
- "Many of the representations set forth in the excerpted above [the January 2004 letter] are false." (Complaint, ¶ 41).
- "Not only does Double Diamond collect all of the revenue from the golf course operations but it inapplicably passes off all or most of the golf course expenses to the WBPOA. Double Diamond fraudulently represents to the members that the WBPOA is only paying for golf courses 'maintenance' expenses, but the alleged 'expenses' far exceed the typical costs of maintaining similar golf courses." (Complaint, ¶ 54).
- "Additionally, these funds constitute a transfer of POA net earnings which are inuring to the benefit of Double Diamond's related third parties but do not constitute reasonable compensation for services provided, in violation of federal and state tax laws and governing documents of the WBPOA." (Complaint, ¶ 61).
- "Yet another example of the illegal use of the assessments made by the WBPOA is an annual 'allocation' that is transferred from the WBPOA to Double Diamond." (Complaint, ¶ 63).

As can easily be seen from the foregoing examples, Plaintiffs' conclusory and formulaic recitations of illegal and improper conduct are woefully lacking in substantive facts. Plaintiffs' Complaint fails to meet the *Twombly* and *Iqbal* test of plausibility, and fails by a wide margin.

Rule 12(b)(6) requires dismissal of Plaintiffs' Complaint if Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Tuchman v. DSC Comm. Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

While the Court must accept as true all well-pleaded allegations and any reasonable inferences to be drawn from them, the Court must not accept as true "conclusory allegations or unwarranted deductions of fact." *Id.* Plaintiffs must plead specific factual allegations and not mere legal conclusions. *Id.* Dismissal under Rule 12(b)(6) is appropriate if "the complaint lacks an allegation regarding a required element necessary to obtain relief." *See Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

b. Heightened pleading requirements of Rule 9(b).

Counts 1, 2, 7, and 8 (wire and mail fraud and related claims) must satisfy the heightened pleading requirements of Rule 9(b). *See* FED. R. CIV. P. 9(b); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138-39 (5th Cir. 1992); *Heden v. Hill*, 937 F. Supp. 1230, 1243 (S.D. Tex. 1996) ("[A]llegations of mail fraud and wire fraud must be made with the particularity required by Fed. R. Civ. P. 9(b)."). Rule 9(b) requires Plaintiffs to plead the circumstances of their RICO fraud claims and related claims with particularity and specifically allege the time, place, and contents of the false representations, the identities of the persons making the representations, as well as what the persons obtained by the misrepresentations (why the statements were fraudulent). *See Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177-178 (5th Cir. 1997); *Tuchman* 14 F.3d at 1068; *Skidmore Energy, Inc.*, 2004 U.S. Dist. LEXIS 28396 at *7-8. The heightened pleading requirements are applied "with force, without apology." *See Williams*, 112 F.3d at 178. Conclusory allegations of fraud are insufficient to comply with Rule 9(b). *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549 (8th Cir. 1997). Failure to satisfy Rule 9(b)'s pleading requirements warrants dismissal for failing to state a claim. *See Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993).

2. Plaintiffs' RICO claims must be dismissed for failure to state a claim.

To state a claim under RICO, Plaintiffs must plead and prove (1) a person who engages in (2) a pattern of racketeering activity (3) [which is] connected to the acquisition, establishment, conduct, or control of an enterprise." *See Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995); *Murphy v. Grisaffi*, 2005 WL598015, *2 (N.D. Tex. Mar. 14, 2005); 18 U.S.C. § 1961(5).

a. Plaintiffs have not properly identified a RICO "person."

Plaintiffs allege that all Defendants are RICO "persons" who "conducted the affairs of the Enterprise." *See* Complaint, § 80. Plaintiffs fail to allege that each Defendant is one "that either poses or has posed a continuous threat of engaging in acts of racketeering." *See Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988). Attributing RICO conduct generally to all Defendants is legally insufficient to allege a RICO "person." *See FMC Int'l A.G. v. ABB Lummus Global, Inc.*, 2006 WL 213948 at *4 (S.D. Tex. Jan. 25, 2006) (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)). Plaintiffs fail to specifically attribute at least two predicate acts to each RICO "person." *See generally* Complaint; *Conkling v. Turner*, 18 F.3d 1285, 1293 (5th Cir. 1994) (noting that the "bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts). In fact, there are no specific allegations of any specific fraudulent conduct or misrepresentation by, or with the specific assistance of, Double Diamond-Delaware or the White Bluff Defendants. Plaintiffs have not plead with particularity facts showing that each Defendant "conducted the Enterprise." Finally, Plaintiffs have not alleged "persons" separate and distinct from the alleged "enterprise." All Defendants cannot be "persons" and also the, or part of the, alleged RICO "enterprise." *See Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 154-55 (5th Cir. 1997). *See* Complaint, ¶¶ 80-81.

b. Plaintiffs have not properly pled a "pattern of racketeering activity."

To state a claim for RICO, Plaintiffs must show that Defendants engaged in a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5). Plaintiffs must demonstrate (1) predicate acts – the requisite racketeering activity, and (2) a pattern of such acts. *See In re Burzynksi*, 989 F.2d 733, 742 (5th Cir. 1993); *Rogers v. Mitchell*, No. 3:03-CV-0355-D, 2003 U.S. Dist. LEXIS 15120 at *8 (Aug. 19, 2003). A "pattern of activity" requires Plaintiffs to plead that (1) predicate acts are related to each other and (2) that they either constitute or threaten long-term criminal activity. *See In re Burzynksi*, 989 F.2d at 742; *Mitchell*, 2003 U.S. Dist. LEXIS 15120 at *8. The "predicate acts" alleged by Plaintiffs are mail and wire fraud. The elements of RICO mail/wire fraud include (1) a scheme to defraud by means of false or fraudulent misrepresentations, (2) interstate or intrastate use of the mails/wires to execute the scheme, (2) use of the mails/wires by the defendant connected with the scheme, and (4) actual injury to the Plaintiff. *See In re Burzynksi*, 989 F.2d at 742; *Mitchell*, 2003 U.S. Dist. LEXIS 15120 at *8.

Plaintiffs' conclusory allegations do not sufficiently plead a pattern of mail or wire fraud. First, Plaintiffs fail to sufficiently plead a scheme to defraud by false representations. Plaintiffs' alleged "fraudulent scheme" is nothing more than an implausible, disjointed collection of allegations of statutory violations and alleged misrepresentations attributed generally to Defendants and directed generally at Plaintiffs and the putative class. Plaintiffs allege that the WBPOA's collection and reporting of the Hospitality Assessments violate Section 528 of the Internal Revenue Code and Article 1396-2.24 of the Texas Non-Profit Corporations Act. At best, these allegations suggest that the WBPOA must elect to report the Hospitality Assessments as taxable income, and that the WBPOA may need to reorganize as a for-profit corporation, but these are not RICO claims. If anything, this "fraud," as well as the alleged "fraud" regarding how the Assessments are accounted for in the WBPOA financials, are directed at the

governmental authorities, not at Plaintiffs. Plaintiffs fail to plead with particularity any facts specifically showing that the WBPOA's non-profit corporate status and tax-exempt status are designed to specifically defraud and injure Plaintiffs. Further, the allegations connecting these statutory violations to the alleged fraud regarding the need and use for the Hospitality Assessments are completely absent or conclusory and implausible. Plaintiffs allege that "these funds [Hospitality Assessments] constitute a transfer of POA net earnings which are inuring to the benefit of Double Diamond's related third parties but do not constitute reasonable compensation for services provided" (Complaint, ¶ 61), but Plaintiffs fail to plead specific allegations showing how the alleged compensation is "unreasonable" and how each Defendant is financially benefitting from the alleged fraud. Standing alone, the conclusory allegation that the Assessments are not "reasonable compensation" for services rendered in violation of Section 528 of the Internal Revenue Code and Article 1396-2.24 of the Texas Non-Profit Corporations Act does not plausibly support inferences that any Defendant, Defendant Ward included, is earning substantial financial rewards from the Assessments, much less that the compensation paid is designed to defraud and cause actual injury to Plaintiffs.

The few examples of "fraudulent misrepresentations" provided in the Complaint do not support any scheme to defraud and certainly are not "related" to the alleged statutory violations sufficient to show a pattern of mail or wire fraud. For example, in support of its allegation that the WBPOA fraudulently misrepresented the need for and use of the Hospitality Assessments in its January 2004 letter to the WBPOA members, Plaintiffs simply allege "many of the representations set forth [therein] were false." *See* Complaint, ¶ 41. Plaintiffs also allege that Double Diamond "fraudulently represents to the [WBPOA] members that the WBPOA is only paying for golf course "maintenance" expenses. There is no allegation showing the crucial fact

that the WBPOA misrepresented what are "maintenance expenses" – without this allegation, the alleged misrepresentation is nothing more than a difference of opinion about what Double Diamond considers to be a maintenance expense and what Plaintiffs consider what should be "maintenance" expenses. *See* Complaint, ¶¶ 54-59. Again, there is nothing connecting this alleged "maintenance expense" misrepresentation to the alleged statutory violations or the alleged fraud regarding the Hospitality Assessments. In short, Plaintiffs have failed to plead with particularity the requirements to show a pattern of mail or wire fraud.

Finally, Plaintiffs' allegations against Defendants Double Diamond-Delaware and the White Bluff Defendants are particularly deficient. The Complaint clearly portrays these Defendants as merely passive recipients of the alleged Hospitality Assessments. *See* Complaint, ¶ 42; *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 449 (2d Cir. 2008) ("[S]imply alleging that certain entities provided services which are helpful to the enterprise does not sufficiently allege a claim under RICO against those entities."). There is no specific allegation of what each of these Defendants specifically knew or did with respect to any of the alleged fraudulent conduct. Plaintiffs' conclusory group allegations of fraud fail to satisfy Rule 9(b)'s heightened pleading requirement as well as the pleading requirements under *Twombley* and *Iqbal*. *Marriott Bros. v. Gage*, 704 F. Supp. 731, 740 (N.D. Tex. 1988); *See Iqbal*, 129 S.Ct. at 1949-50; *Twombly*, 550 U.S. at 555.

Accordingly, because Plaintiffs fail to sufficiently plead with particularity a "pattern" of mail or wire fraud with respect to any Defendant, the Court should dismiss Plaintiffs' RICO claims as to all Defendants for failing to comply with Rules 8(a)(2); 9(b) and/or 12(b).

c. Plaintiffs have not properly pled an "enterprise."

To state a claim for RICO, Plaintiffs must plead specific facts and not mere conclusory allegations establishing the existence of an "enterprise." *See Elliott v. Foufas*, 867 F.2d 877, 881

(5th Cir. 1989). The "enterprise" must be distinct from the defendant "RICO" persons as well as from the predicate acts. *Id.* Where the alleged "enterprise" consists of a corporate defendant's affiliates and agents, the "enterprise" is not sufficiently distinct from the corporate defendant. *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997). Where, as here, Plaintiffs allege an association-in-fact "enterprise," Plaintiffs must allege sufficient facts showing that the group possesses (1) continuity of structure and personnel; (2) a common or shared purpose, and (3) an ascertainable structure distinct from that inherent in the pattern of racketeering. *See Delta Truck v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988).

As a matter of law, Plaintiffs have failed to adequately plead an "enterprise" that is distinct from the alleged RICO "persons." Plaintiffs allege that the RICO "enterprise" consists of (1) the WBPOA Board of Directors; (2) Defendants Ward and Curran, (3) and Double Diamond "and its web of related entities." *See* Complaint, ¶ 81. However, according to Plaintiffs, Defendants Ward and/or Double Diamond directly or indirectly control the WBPOA Board of Directors , Double Diamond, and all the named corporate Double Diamond entities. *See* Complaint, ¶¶ 22-34, 38, *et al.* Accordingly, there is no "enterprise" distinct from the RICO persons. *See Foufas*, 867 F.2d at 881; *Fitzgerald*, 116 F.3d at 228; *Skidmore Energy, Inc.*, 2004 U.S. Dist. LEXIS 28396 at *29. Similarly, there are no allegations showing that the alleged "enterprise" is distinct from the alleged racketeering activities. In fact, Plaintiffs allege that the WBPOA exists to collect the illegal assessments to pay to the White Bluff Defendants which exist solely to help Double Diamond and Defendant Ward control and profit from the amenities at White Bluff. See Complaint, ¶ 38. Plaintiffs fail to plead with particularity that the alleged "enterprise" is an ongoing organization with continuing membership (e.g., the WBPOA Board of Directors). Further, the alleged shared goal of making money for Double Diamond is legally

insufficient to allege a continued membership. *See Manax v. McNamara*, 842 F.2d 808, 811-812 (5th Cir. 1988); *Skidmore Energy, Inc.*, 2004 U.S. Dist. LEXIS 28396, at *30. Accordingly, Plaintiffs' conclusory allegations fail to plead an "enterprise" under 18 U.S.C. § 1961(4).

3. Plaintiffs' common law claims must be dismissed for failure to state claims.

a. Reimbursement/offensive collateral estoppel

In Count 3, Plaintiffs assert a claim for reimbursement/offensive collateral estoppel against Double Diamond, Double Diamond-Delaware, and the White Bluff Defendants. To the extent that such a cause of action exists, Plaintiffs have failed to allege sufficient facts demonstrating a right to reimbursement of all Hospitality Assessments allegedly "collected or received by any of the Double Diamond Defendants from 2004 through the present." *See* Complaint, ¶ 91. Also, Plaintiffs have failed to plead facts showing that no special circumstances exist that would render preclusion inappropriate or unfair. *See In re Parkway Sales,* No. 07-40713-BTR, 2009 WL 2105984 at * 9 (E.D. Tex. July 10, 2009). In addition, since the Final Judgment was a declaratory judgment based on Texas law is not binding on non-parties, and no claim for reimbursement was litigated, offensive collateral estoppel is unavailing. *See Geneva Brooks, et al. v. Northglen Ass'n*, 141 S.W.3d 158 (Tex. 2004); TEX. CIV. PRAC. & REM. CODE § 37.006. Accordingly, the Court must dismiss this claim for failure to state a claim.

b. Breach of fiduciary duty and misapplication of fiduciary property.

In Counts 4 and 5, Plaintiffs assert that Defendants Ward and Curran breached fiduciary duties owed to the WBPOA and misapplied "fiduciary property" of WBPOA. *See* Complaint, ¶¶ 94, 98. Plaintiffs have no standing to assert claims for duties owed to the WBPOA nor is there a private right of action under §32.45 Texas Penal Code. *See* discussion *infra*. Plaintiffs fail to allege that Defendants Ward and Curran did not reasonably believe that they were acting in the best interest of the WBPOA, as is required under Art. 1396-2.28(d) of the Texas Non-Profit

Corporations Act. Accordingly, because Plaintiffs fail to state a claim for breach of fiduciary duty against Defendants Ward and Curran, the Court must dismiss this claim.

As to Count 5, as a matter of law, Plaintiffs cannot state a claim for misapplication of fiduciary property under Section 32.45 of the Texas Penal Code because there is no private right of action to enforce the Texas Penal Code. *See Cooper v. Sony Music Entm't Inc.*, No. Civ. A. 01-0941, 2002 WL 391693 at *5 (S.D. Tex. Feb. 22, 2002) ("...the Texas Penal Code does not provide a private right of action.") (citing *Gipson v. Calahan*, 18 F. Supp. 2d 662, 668 (W.D. Tex. 1997)). Accordingly, the Court must dismiss this claim for failure to state a claim.

c. Conspiracy/aiding and abetting.

In Count 8, Plaintiffs allege that all Defendants generally conspired with each other to perform the conduct alleged elsewhere in the Complaint. *See* Complaint, ¶ 104. These conclusory recitations fail to meet the pleading requirements of Rule 8(a)(2) under *Twombly* and *Iqbal*. In addition, Plaintiffs fail to allege crucial elements of common law conspiracy, including (1) object of the alleged conspiracy, (2) a meeting of the minds among all Defendants on the course of action, (3) an unlawful overt act by one of the conspirators in furtherance of the conspiracy, and (4) that Plaintiffs individually were injured as a proximate result of the conspiracy. *See Massey v. Armco Steel Co.,* 652 S.W.2d 932, 934 (Tex. 1983). In any event, the alleged conspiracy is barred as a matter of law. Under Texas law, conspiracy is not an independent cause of action. *See Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979). Also, the corporate Defendants (e.g., Double Diamond) cannot conspire with their agents (the individual Defendants). *See Elliot v. Tilton*, 89 F.3d 260 (5th Cir. 1996). Double Diamond cannot conspire with co-Defendants who are alleged to be involved in the management, direction, and control of Double Diamond and are acting for the benefit of Double Diamond. *See id.*, Complaint, ¶ 104 (conspiracy was for the benefit of Double Diamond). Moreover, the

alleged wholly owned subsidiaries of Double Diamond (the White Bluff Defendants) and the wholly owned subsidiary of Double Diamond-Delaware (Double Diamond) (Complaint, ¶¶ 4, 5, 8-13) cannot conspire with each other. *See Atl. Richfield Co. v. Misty Prods.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Finally, there is no cause of action for aiding/abetting under Texas law. *O'Kane v. Coleman*, No. 14-06-00657-CV, 2008 WL 2579832 at *5 (Tex. App. – Houston [14th Dist.] 2008, no pet.). Accordingly, Plaintiffs cannot state a claim for conspiracy or aiding/abetting, and therefore the Court must dismiss these claims for failure to state a claim.

C. In The Further Alternative, The Court Should Dismiss Plaintiffs' Claims Under Rule 12(B)(1) For Lack Of Subject Matter Jurisdiction Because Plaintiffs Lack Standing To Assert Their Claims.

1. Applicable Standards

Plaintiffs individually must have standing to assert their claims. *See* FED. R. CIV. P. 12(b)(1); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001). If Plaintiffs do not have standing, then the Court must dismiss the Complaint even if putative class members would have standing. *See Gabrielson v. BancTexas Group, Inc.*, 675 F. Supp. 367, 371 n.3 (N.D. Tex. 1987).

Article III of the U.S. Constitution requires that Plaintiffs allege (1) an injury in fact, or harm suffered by the Plaintiff that is concrete or actual and not conjectural or hypothetical, (2) causation, or a traceable connection between the injury and the alleged conduct, and (3) redressibility, or a likelihood that the requested relief will redress the alleged injury. *See McClure v. Ashcroft*, 335 F.3d 404, 409 (5th Cir. 2003); U.S. CONST., art. III. In addition to the Article III requirements, Plaintiffs must also satisfy RICO's specific standing requirements. Under RICO, only those persons who have been injured "by reason of" the commission of RICO predicate acts have standing to bring suit. *See* 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex*

Co., 473 U.S. 479, 496 (1985). In a RICO class action, each of the named Plaintiffs must allege and show that they personally have been injured. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Brown v. Protective Life Ins. Co.*, 353 F.3d 405, 407 (5th Cir. 2003). "An injury 'by reason of' a RICO violation can only exist if the predicate act constitutes both a factual (but for) causation of the alleged injury and the (proximate) causation of the alleged injury." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998); *Pan Am. Maritime, Inc. v. Esco Marine, Inc.*, 2005 WL 1155149 at*8 (S.D. Tex. May 10, 2005). Further, although reliance is not expressly required by the RICO statute, to show injury caused by fraudulent misrepresentations, a RICO plaintiff will necessarily have to plead and prove reliance. *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2144 (2008) ("In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation.").

2. Plaintiffs lack standing to assert their RICO claims.

Plaintiffs' general, conclusory, and unspecific allegations of injuries from Defendants' alleged mail and wire fraud do not satisfy Article III or RICO's standing requirements. Plaintiffs generally allege that Defendants' (as a group) mail and wire fraud caused injury to "Plaintiffs and the Class" or to members of the WBPOA. *See, e.g.*, Complaint, ¶¶ 52-64 (members of the WBPOA); ¶¶ 65-89 ("Plaintiffs and the Class"). Plaintiffs generally allege that "Plaintiffs and the Class" are out of pocket "millions of dollars" in payments made to the WBPOA, but a mere allegation of monetary loss does not show a direct injury proximately caused by Defendants' conduct. *See, e.g., Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992). Plaintiffs do not allege any concrete or particularized injury to Plaintiffs individually. *See Casey*, 518 U.S. at 357; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Brown*, 353 F.3d at 407. Plaintiffs do not allege if and how Plaintiffs individually were proximately injured by

Defendants' alleged mail and wire fraud. *See Price*, 138 F.3d at 607.[6] Accordingly, Plaintiffs have failed to adequately plead causation and injury in order to show standing to assert their RICO claims.

In addition, Plaintiffs lack standing to assert their RICO claims because they lack standing to assert the underlying statutory violations which are necessary to show that the assessments are "illegal." Plaintiffs' RICO claims fail unless Plaintiffs can show that the Hospitality Assessments are "illegal" under (1) 26 U.S.C. § 528 (Complaint, ¶¶ 37-38, 42, 49, 53, 60-61), (2) Article 1396-2.24 of the Texas Non-Profit Corporations Act, and (3) the WBPOA's governing documents. *See* Complaint, ¶¶ 30, 36, 51, 60-61. These allegations require a determination of whether the WBPOA has violated 26 U.S.C. § 528, Article 1396-2.24 of the Texas Non-Profit Corporations Act, and the WBPOA governing documents. Plaintiffs have no standing to seek a determination of whether violations of 26 U.S.C. § 528[7] and Article 1396-2.24 of the Texas Non-Profit Corporations Act[8] have occurred. Because Plaintiffs have no standing to

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[6] For example, Plaintiffs failed to plead with particularity facts showing, among other things, that (1) Plaintiffs individually received the allegedly fraudulent misrepresentations (e.g. January 2004 letter, false WBPOA financial statements, etc.); (2) in response to specific misrepresentations, Plaintiffs paid the Hospitality Assessments; (3) but for the specific conduct, misrepresentations or concealment of specific Defendant(s), Plaintiffs individually would not have paid the "illegal assessments" had they known the truth of the Defendants' allegedly fraudulent conduct; (4) Plaintiffs individually were injured by reason of payment of the "illegal assessments" and specifically how and to what extent, if at all; and (5) Plaintiffs were individually injured, and that the relief requested by Plaintiffs will likely redress Plaintiffs' alleged individual injuries, if any.

[7] There is scant case law interpreting 26 U.S.C. § 528; however, where as here, the statute does not expressly provide a private right of action or remedy, the Court may not infer a private right of action or remedy. *See* 26 U.S.C. § 528; *Alexander v. Sandoval,* 532 U.S. 275, 286, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001); *Love v. Delta Air Lines*, 310 F.3d 1347, 1352 (11th Cir. 2002). Also, under an analogous provision , 26 U.S.C. § 501 [of which Section 528 is a part], federal courts have found no private right of action to enforce the tax-exempt status of charitable organizations. *See, e.g., Amato v. UPMC*, 371 F. Supp. 2d 752, 756 (W.D. Pa. 2004); *Burton v. William Beaumont Hosp.*, 347 F. Supp. 2d 486 (E.D. Mich. 2004). Only the Internal Revenue Service has standing to pursue violations of these provisions of the Internal Revenue Code. *See Amato*, 371 F. Supp. 2d at 756; 26 U.S.C. § 7428. In any event, the plain language of 26 U.S.C. § 528 and the complete absence of any private right of action strongly suggest that the WBPOA, who is not a party to this action, would have to be a party to any action to determine the WBPOA's tax-exempt status under 26 U.S.C. § 528.

[8] Plaintiffs' claims that the WBPOA Board (and Defendants Ward and Curran specifically) has violated the WBPOA governing documents (e.g., the Bylaws) and Article 1396-2.24 of the Texas Non-Profit Corporations Act are disguised *ultra vires* claims that must be brought, if at all, according to the mechanism provided in Article 1396-2.03 of the Texas Non-Profit Corporations Act. *See* TEX. REV. CIV. STAT. ANN., art. 1396-2.03. Article 1396-2.03 does

assert violations of 26 U.S.C. § 528, Article 1396-2.24 of the Texas Non-Profit Corporations Act, and the WBPOA Bylaws, and because these claims, as alleged by Plaintiffs, are essential to Plaintiffs' RICO claims, Plaintiffs have no standing to assert their RICO claims.

Accordingly, because Plaintiffs fail to comply with the specific standing requirements of Article III and 18 U.S.C. § 1964(c), Plaintiffs do not have standing to assert their RICO claims, and therefore the Court must dismiss Plaintiffs' RICO claims for lack of subject matter jurisdiction. *See Sedima, S.P.R.L.*, 473 U.S. at 496; FED. R. CIV. P. 12(b)(1).

3. The Court should decline to exercise jurisdiction over Plaintiffs' state law claims.

Defendants have moved to dismiss Plaintiffs' only apparent federal claim which is the only alleged basis for subject matter jurisdiction. To the extent that Plaintiffs' remaining claims are governed by Texas statutory or common law, under clear Fifth Circuit precedent, the Court should decline to exercise supplemental jurisdiction over supplemental state law claims when all federal claims have been dismissed or otherwise eliminated. *See Parker & Parley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992); *Murphy*, 2005 WL598015 at *7 (dismissing plaintiff's state law claims where the only federal claim, a RICO violation, was also dismissed); 28 U.S.C. § 1367(c)(3).

III.
PRAYER

WHEREFORE, PREMISES CONSIDERED, for all the foregoing reasons, Defendants Double Diamond-Delaware, Inc., Double Diamond, Inc., R. Mike Ward, Fred Curran, White

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not permit a claim for damages (only injunctive relief) and the WBPOA must be a party to such an action. *See id.* Also, under Texas common law, a property owner cannot personally recover damages done solely to the owners' association even though the owner may be injured by that wrong; the owner's remedy is to bring a derivative suit on behalf of the owners' association. *See Mitchell v. LaFlamme*, 60 S.W.3d 123, 128 (Tex. App.— Houston [14th Dist.] 2000, no pet.) (citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990).

Bluff Club Corp., White Bluff Golf, Inc., The Inn At White Bluff, Inc., White Bluff Marina, Inc., The Lighthouse Dining Co., and The White Bluff 19th Hole, Inc. respectfully request that the Court (1) dismiss or stay the present action pending resolution of the State Court Action; alternatively, (2) dismiss all of Plaintiffs' claims for failure to state claims under Rules 8(a)(2), 9(b) and/or 12(b)(6); or in the further alternative, (3) dismiss all of Plaintiffs' claims for lack of subject matter jurisdiction under Rule 12(b)(1) for lack of standing to assert the claims; and award Defendants such other and further relief to which they may be justly entitled.

Respectfully submitted

WINSTEAD PC

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CERTIFICATE OF SERVICE

The undersigned certifies that on this the 16th day of October, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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