UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80755

TEXELLA ADAMS and
OLA MOORE

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a BELLSOUTH, FRANCIS B. SEMMES and KEITH KOCHLER,

Defendants.
_____/

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS BELLSOUTH TELECOMMUNICATIONS, INC., FRANCIS B. SEMMES, AND KEITH KOCHLER TO DISMISS THE SECOND AMENDED COMPLAINT

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Defendants BellSouth Telecommunications, Inc. ("BellSouth"), Francis B. Semmes, and Keith Kochler (the "BellSouth defendants") respectfully submit this memorandum in support of their motion to dismiss the Second Amended Complaint.

BACKGROUND

According to the Second Amended Complaint, plaintiffs are part of a group of individuals who settled employment discrimination claims against BellSouth in a global settlement of a suit captioned *Adams* v. *BellSouth* and a related unfiled case (together, the "*Adams* lawsuit"). 2d Am. Cplt.¶¶ 5, 20, 21, 43. Plaintiffs contend that in connection with the settlement, the BellSouth defendants and plaintiffs' own attorneys in the *Adams* lawsuit – who are not named as defendants in this action – entered into a scheme to defraud plaintiffs. Plaintiffs assert common law claims for conspiracy to defraud, tortious interference with advantageous contractual and business relationships, and conversion, as well as a federal claim for a violation of 42 U.S.C. § 1981.

What the Complaint does not reveal is that, at one point, Adams and Moore were part of a group of 58 plaintiffs – represented by the *exact same* attorneys who represent them here – who brought suit against the BellSouth defendants in federal district court (the "*Jackson* suit"), raising the *exact same* Section 1981, conspiracy to defraud, and tortious interference claims that are raised in this complaint,[1] based on factual allegations that are *nearly identical* to the ones contained in this complaint. See Second Amended Complaint, *Jackson* v. *Bellsouth Telecomms., Inc.*, Case No. 00-7558-CIV-MIDDLEBROOKS (attached hereto as Ex. A). Adams and Moore later withdrew from the *Jackson* suit prior to any decision on the merits,[2] and Judge Middlebrooks ultimately dismissed

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[1] In *Jackson*, the plaintiffs raised a conversion claim against their attorneys but not the BellSouth defendants.

[2] After the Second Amended Complaint was filed in *Jackson*, the law firm of Becker & Poliakoff, which represented the *Jackson* plaintiffs (as it does the plaintiffs in this case), withdrew

with prejudice all of the state-law claims asserted against the BellSouth defendants on the ground that they were barred by Florida's litigation privilege. See *Jackson* v. *BellSouth Telecomms., Inc.*, 181 F. Supp. 2d 1345, 1363-1364 (S.D. Fla. 2001). Judge Middlebrooks also found that the *Jackson* plaintiffs' failure to rescind the settlement agreement and disgorge the settlement proceeds precluded them from bringing suit against the BellSouth defendants collaterally attacking the terms of the settlement agreement. *Id*. at 1363-1365.

The Court also dismissed the federal law claims against the BellSouth defendants, although it gave the *Jackson* plaintiffs one more opportunity to replead their Section 1981 claim. See *Jackson*, 181 F. Supp. 2d at 1365. On plaintiffs' fifth attempt, the Court dismissed the Section 1981 claim with prejudice, concluding that plaintiffs had not adequately pled the federal claim and that plaintiffs' failure to rescind the settlement agreement barred the federal claim (as well as the state claims). Order on BellSouth Defendants' Motion to Dismiss, *Jackson* v. *BellSouth Telecomms., Inc.*, Case No. 00-7558-CIV-MIDDLEBROOKS (S.D. Fla. June 3, 2002) (attached hereto as Ex. D).

In a transparent attempt to avoid appearing before Judge Middlebrooks, plaintiffs originally filed the present case in Florida state court. Indeed, plaintiffs have admitted as much. See DE 7 at 3. After the BellSouth defendants removed the case to federal court based on diversity jurisdiction, however, the plaintiffs sought to amend their complaint to add a Section 1981 claim. Frankly conceding that "this Court could reach the same conclusion in this case as it did in *Jackson*" (*ibid.*), plaintiffs admitted that they sought to add the federal claim simply to preserve all issues for appeal.

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its appearance for Moore and Adams. *See* Notice of Withdrawal of Prior Notice of Appearance with Regards to Ola Moore Only and Notice of Withdrawal of Prior Notice of Appearance with Regards to Texella Adams Only (attached hereto as Exs. B and C, respectively). Subsequently, in response to the BellSouth defendants' motion to dismiss the Second Amended Complaint, plaintiffs tendered the Third Amended Complaint, in which Moore and Adams were not included as plaintiffs.

As in the *Jackson* suit, the Complaint here alleges that the BellSouth defendants colluded with plaintiffs' counsel to settle plaintiffs' claims for less than they were worth and to prevent plaintiffs and others from suing BellSouth in the future. 2d Am. Cplt. ¶ 13. Plaintiffs became involved in the underlying lawsuit after they responded to advertisements and word-of-mouth solicitations seeking participants in an employment discrimination suit against BellSouth. *Id.* ¶¶ 25-27. On or about August 30, 1996, plaintiffs' counsel filed the *Adams* case. *Id.* ¶ 20. In August 1997, plaintiffs' attorneys told them that a settlement had been reached with BellSouth, and asked them to release their claims in exchange for payments ranging from $500 to $79,000. *Id.* ¶¶ 38-39. Plaintiffs' counsel allegedly did not disclose the terms of the global settlement to the individual plaintiffs. *Id.* ¶¶ 41-42, 44. Each settling plaintiff agreed to keep the settlement confidential, and was advised by plaintiffs' counsel that breach of the agreement could result in his or her termination as an employee of BellSouth. *Id.* ¶¶ 42, 49.

As part of the settlement agreement, plaintiffs' attorneys supposedly agreed to a "practice restriction," promising not to represent any plaintiffs in any action against BellSouth for one year. *Id.* ¶ 47. Plaintiffs' counsel also entered into a four-year "consulting agreement" with BellSouth, allegedly for the purpose of creating a "conflict of interest for *Adams* Plaintiffs' former attorneys and to prevent future representation of any *Adams* Plaintiffs in legal actions against BELLSOUTH. . . ." *Id.* ¶ 54. In exchange for the consulting agreement, plaintiffs' counsel received $120,000 of the $1.6 million settlement proceeds. *Id.* ¶¶ 55-56. On November 3, 1997, allegations of misconduct in the settling of the *Adams* lawsuit were made to Judge Middlebrooks, who appointed a special master to investigate the matter. *Id.* ¶ 52. Judge Middlebrooks issued an opinion on the special master's Report and Recommendation in January, 2001. *Id.* ¶ 53.

ARGUMENT

A motion to dismiss "will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Canon* v. *Clark*, 883 F. Supp. 718, 720 (S.D. Fla. 1995). Dismissal is justified "'when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim.'" *Ibid.* (quoting 5A Charles Alan Wright & Arthur B. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357 (1995)). In assessing the sufficiency of a complaint, the Court may consider "the face of the complaint," *Brooks* v. *Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997), as well as orders and other matters of public record, *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535, n.1 (S.D. Fla. 1993).

This case should be dismissed for multiple, independently sufficient reasons. To begin with, *each* of plaintiffs' claims is time-barred, since this lawsuit was filed more than four years after the claims accrued. Moreover, as Judge Middlebrooks has already held, plaintiffs' failure to rescind their settlement agreement bars *all* of their present claims. In addition, as Judge Middlebrooks also has already held under identical facts, all of plaintiffs' common law claims are barred by the litigation privilege. As if those reasons were not enough, plaintiffs' tortious interference claim is barred for the additional reason that the tort simply does not cover cases like this one. And plaintiffs' conversion claim is legally defective since, as the Complaint itself concedes, the plaintiffs never took ownership of the portion of the settlement proceeds that was allegedly diverted to their attorneys; absent actual ownership, the alleged diversion (whatever else it may be) cannot constitute "conversion." Finally, as plaintiffs themselves conceded in seeking leave to file the Second Amended Complaint (DE 7 at 3), Judge Middlebrooks has already held that allegations essentially identical to those here do not sufficiently allege discriminatory intent for purposes of Section 1981.

I. ALL OF PLAINTIFFS' CLAIMS ARE TIME-BARRED

All of plaintiffs' claims are barred by the applicable statutes of limitations. Florida imposes a four-year statute of limitations on fraud and other intentional tort claims (like the common law claims alleged in this case). Fla. Stat. § 95.11(3)(j), (o). For claims brought pursuant to 42 U.S.C. § 1981, Florida's four-year statute of limitations also applies. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661-62 (1987) (state statute for personal injury claims should be borrowed for Section 1981 actions); *Baker* v. *Gulf & Western Indus., Inc.*, 850 F.2d 1480, 1482 (11th Cir. 1988) (applying Florida's four-year statute of limitations for personal injury actions to Section 1981 claim). Plaintiffs did not file suit, however, until more than four years after their claims accrued.

"Under Florida law, the statutes of limitations begin to run at the time the cause of action accrues." *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 85 F.3d 1514, 1518 (11th Cir. 1996) (citing Fla. Stat. Ann. § 95.031)). "A cause of action accrues when the last element constituting the cause of action occurs and the plaintiff knew or should have discovered the injury." *Id.*; *see also* Fla. Stat. Ann. § 95.031 (the limitations period on a fraud action starts running "from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. . .."). [3] Under this rule, the statute of limitations attaches when a plaintiff has been put on notice of the *possible* invasion of a legal right. *Korman* v. *Iglesias*, 825 F. Supp. 1010, 1014

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[3] It is in fact not clear whether the "discovery rule" applies to plaintiffs' tortious interference and conversion claims, since § 95.031 expressly applies the discovery rule only to fraud and product liability claims. Fla. Stat. Ann. § 95.031(2). Some courts have refused to apply the discovery rule to causes of action that are not expressly provided for in the statute (see *Yusef Mohamed Excavation, Inc.* v. *Ringhaver Equipment Co.*, 793 So.2d 1127 (Fla. Dist. Ct. App. 2001)), while others have applied the discovery rule even to those causes of action that are not provided for in the statute (see *Senfeld* v. *Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So.2d 1157, 1163 (Fla. Dist. Ct. App. 1984)). The issue is ultimately beside the point, however, because – with or without a discovery rule – plaintiffs' claims were untimely as a matter of law.

(S.D Fla. 1993). For that purpose, "it [is] not necessary that plaintiff know of all elements of his alleged cause of action. . .", *id*., the full extent of his injuries, *Doe v. Cutter Biological*, 813 F. Supp. 1547, 1555 (M.D. Fla. 1993), or even that the defendant's conduct contributed to the injuries, *Johnson* v. *Deluxe Tire Serv., Inc.*, 544 So.2d 1158, 1159-1160 (Fla. Dist. Ct. App. 1989). Moreover, "[d]iscovery of facts sufficient to trigger the limitations period is determined by an objective standard and means knowledge of facts which would have been discovered in the exercise of due diligence." *Korman*, 825 F. Supp. at 1014.

All of plaintiffs' causes of action accrued no later than November 3, 1997. As the Complaint itself concedes, that was the date on which Judge Middlebrooks "became aware of allegations of misconduct in the settling of the [*Adams* lawsuit] and appointed United States Magistrate Judge Stephen T. Brown as a Special Master to investigate the allegations of attorney misconduct." 2d Am. Cplt. ¶ 52. On that date, the alleged wrongdoing involving the settlement of the *Adams* lawsuit was made public.[4] Plaintiffs were thus put on notice regarding the possible invasion of their legal rights with respect to the *Adams* settlement, and the statute of limitations began to run.

Indeed, on May 4, 1998 – still more than four years before this lawsuit was filed— plaintiff Texella Adams, along with several other *Adams* plaintiffs, sent a letter to Judge Middlebrooks referencing Ms. Merricks' allegations and also complaining of injuries suffered as a result of attorney misconduct in the settling of the *Adams* suit. See *Adams*, Letter of May 4, 1998 to Judge Middlebrooks (attached to Order dated June 5, 1998) (attached hereto as Ex. F).

Even if Adams and Moore could somehow claim that they lacked actual knowledge that

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[4] *See* Order, *Adams* v. *BellSouth Telecommunications, Inc.*, Case No. 96-2473-CIV-MIDDLEBROOKS (S.D. Fla. Nov. 25, 1997) (attached hereto as Ex. E).

allegations of misconduct had been made, as plaintiffs in the *Adams* lawsuit they should have discovered them through the exercise of due diligence, and thus the limitations period was triggered. See *Korman*, 825 F. Supp. at 1014; see also *Armbister* v. *Roland Int'l. Corp.*, 667 F. Supp. 802, 812 (M.D. Fla. 1987) (statute of limitations on cause of action for fraud began to run when plaintiff should have known, with the exercise of any diligence, that the transactions were suspect). Similarly, the fact that in November 1997 plaintiffs may not have been fully aware of all of the elements of their causes of action, the extent of their alleged injuries, or even that the BellSouth defendants allegedly caused these injuries, is of no moment. BellSouth negotiated and was a party to the *Adams* settlement. Accordingly, plaintiffs' knowledge of the settlement issues that underlie their claims in this action and of the fact that their legal rights possibly had been invaded with respect to the settlement, was sufficient to start the statute of limitations running on plaintiffs' claims against the BellSouth defendants. See *Korman*, 825 F. Supp. at 1014-1016 (plaintiff's knowledge that royalties to which she was entitled were overdue was sufficient to trigger limitations period even if she did not know of defendant's fraudulent intent); *Kelley* v. *School Bd. of Seminole County*, 435 So.2d 804, 806-807 (Fla. 1983) (school boards' knowledge that there was something wrong with building roof was sufficient to put it on notice that it had a cause of action, even if board lacked knowledge of a specific defect); *Johnson* v. *Deluxe Tire Serv.*, 544 So.2d 1158, 1159-1160 (Fla. Dist. Ct. App. 1989) (cause of action accrued when plaintiff was put on notice of the invasion of her legal rights, not when she became aware of a right to sue a particular defendant); *Roberts* v. *Casey*, 413 So.2d 1226, 1229 (Fla. Dist. Ct. App. 1982) (same).

Although the statute of limitations on plaintiffs' claims began to run on November 3, 1997, they did not file their initial Complaint until July 9, 2002—more than four years after their causes

of action against the BellSouth defendants accrued. Plaintiffs' claims are therefore time-barred and should be dismissed with prejudice.

II. BECAUSE PLAINTIFFS HAVE NOT ELECTED TO RESCIND THE SETTLEMENT AGREEMENTS, THEIR CLAIMS ARE BARRED

In resolving the ethics issue raised by the *Adams* settlement, Judge Middlebrooks ruled that plaintiffs were entitled to set aside their settlements and litigate their claims, so long as they "first disgorge[d] all benefits either already received or due to be received under the terms of the settlement." See *Adams* v. *BellSouth Telecomms., Inc.*, C.A. No. 96-2473-CIV-MIDDLEBROOKS, Omnibus Order on Magistrate's Reports and Recommendations, at 26 (S.D. Fla. Jan. 29, 2001) (attached hereto as Ex. G). Here, as in *Jackson*, plaintiffs did not elect rescission; instead, they seek to retain proceeds of their settlements and sue the BellSouth defendants for additional damages – the additional money they supposedly would have recovered in *Adams* absent the alleged misconduct. See, *e.g.*, 2d Am. Cplt. ¶¶ 13, 64, 69a-b, 77, 86a-b. But as the Court ruled in *Jackson*, having elected to neither rescind the settlements nor disturb the final judgments that rest on them, plaintiffs may not seek additional damages from the BellSouth defendants. See *Jackson*, 181 F. Supp. 2d at 1364-1365; Ex. D at 13-14.

A. Plaintiffs' Claims Are Barred By The Release

In settling their employment discrimination claims against BellSouth, plaintiffs signed a Settlement Agreement and Full and Final Release of Claims (the "Release") waiving "all claims against BellSouth."[5] 2d Am. Cplt. ¶¶ 39, 43. By suing for damages, rather than seeking rescission

[5] The Release, attached hereto as Ex. H, is referred to throughout the Complaint (see, *e.g.*, ¶¶ 13, 39, 43), and therefore the terms of the Release are properly considered by the Court in this motion to dismiss. See *Jackson* v. *BellSouth Telecomms., Inc.*, 181 F. Supp. 2d 1345, 1365 n.17 (S.D. Fla. 2001) ("where the plaintiff refers to certain documents in the complaint and these documents are central to the plaintiff's claim, then the Court may consider the documents part of the

of the settlement agreement, plaintiffs have affirmed the contract and are bound by all of its terms, including the terms of the Release. See *Mazzoni Farms, Inc.* v. *E.I. DuPont de Nemours & Co.*, 761 So.2d 306, 313 (Fla. 2000); *Hauser* v. *Van Zile*, 269 So.2d 396, 398-399 (Fla. Dist. Ct. App. 1972); see also *Fineberg* v. *Kline*, 542 So.2d 1002, 1004 (Fla. Dist. Ct. App. 1988) ("Based on equitable principles, once a party accepts the proceeds and benefits of a contract, that party is estopped from renouncing the burdens the contract places upon him.").

Under Florida law, "a general release will ordinarily be regarded as embracing all claims which have matured at the time of its execution." *Mergens* v. *Dreyfoos*, 1997 WL 611576, at *4 (S.D. Fla. July 18, 1997), *aff'd*, 166 F.3d 1114 (11th Cir. 1999). "[T]he language used in the release is the best evidence of the parties' intent." *Hurt* v. *Leatherby Ins. Co.*, 380 So.2d 432, 433 (Fla. 1980). "When that language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning." *Ibid.*

In the Release at issue here, plaintiffs clearly and unambiguously waived:

> *all claims against BellSouth*, whether or not actually asserted and whether *known or unknown*, as a result of *actions or omissions occurring through the date of this Release,* including all claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq.*, the Florida Civil Rights Act of 1992, F.S.A. §§ 760.10, *et. seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq.*, and *any other federal, state or local law*.

Ex. H ¶ 1 (emphasis added). The term "BellSouth," as used in the release, expressly included BellSouth's attorneys. *Id.* at 1. Plaintiffs specifically "agree[d] . . . not [to] institute a lawsuit or any other legal action against BellSouth relating to or arising out of any claim encompassed by [the] Release." *Ibid.*

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pleadings for purposes of Rule 12(b)(6)")(quoting *Brooks* v. *Blue Cross Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (per curiam)).

The express language of the Release evidences the parties' intention to settle "all claims against BellSouth . . . as a result of actions or omissions occurring through the date of the Release." *Ibid.* Plaintiffs allege that their claims arise from defendants' conduct "[d]uring the settlement" of the *Adams* case. 2d Am. Cplt. ¶ 13. The "acts and omissions" underlying all of their claims all occurred before the settlement took place. *Id.* ¶¶ 13, 14, 17, 62, 69, 86. Accordingly, all of plaintiffs' claims are barred by the Release. See, *e.g.*, *Mergens*, 1997 WL 611576, at *6-7.

Whether plaintiffs were aware of these claims when they executed the Release is irrelevant. By signing the Release, plaintiffs gave up all causes of action against the BellSouth defendants, whether "*known or unknown.*" Ex. H ¶ 1 (emphasis added). See *Hardage Enters., Inc.*, v. *Fidesys Corp., N.V.*, 570 So. 2d 436, 436-438 (Fla. Dist. Ct. App. 1990) (general release barred negligence claim of which releasing party became aware only after release was executed); see also, *e.g.*, *Kobatake* v. *E.I. Dupont De Nemours & Co.*, 162 F.3d 619, 625 n.5 (11th Cir. 1998) (relying on Georgia law, stating that party's claims were barred by express language of settlement agreement releasing all unknown claims), cert. denied, 528 U.S. 921 (1999). In sum, plaintiffs' claims against the BellSouth defendants are barred by the unambiguous language of the Release and must be dismissed.

This is the case notwithstanding plaintiffs' apparent contention that they were fraudulently induced into signing the release. See 2d Am. Cplt. ¶ 40. As Judge Middlebrooks ruled in dismissing the *Jackson* plaintiffs' claims against the BellSouth defendants, "[e]ven assuming that the plaintiffs were fraudulently induced into signing the general releases, '[i]t is axiomatic that fraudulent inducement renders a contract voidable, not void.'" *Jackson*, 181 F. Supp. 2d at 1364 (quoting *Mazzoni Farms, Inc.*, 761 So.2d at 313); Ex. D at 13 (same). "'[A] prerequisite to rescission is

placing the other party in status quo,' meaning that plaintiffs would have to tender the benefits of the voidable contract (here the monies and attorneys' fees received under the Settlement Agreement) to the defendants in order to rescind said contract and its release provision." *Jackson*, 181 F. Supp. 2d at 1364; (quoting *Mazzoni Farms, Inc.*, 761 So.2d at 313); Ex. D at 13 (same). Thus, "in order to opt out of their prior settlement, . . . a plaintiff must first disgorge all benefits either already received or due to be received under the terms of the settlement." *Jackson*, 181 F. Supp. 2d at 1364; Ex. D at 13 (same).

Although plaintiffs were given the opportunity to opt out of the prior settlement and disgorge all benefits received, they have elected not to do so. Plaintiffs are certainly entitled to retain the benefits of the *Adams* settlement, but as Judge Middlebrooks stated in *Jackson*, "they cannot now retain the proceeds of the settlement and press a collateral attack on the agreement's terms" at the same time. 181 F. Supp. 2d at 1364; Ex. D at 13.

B. Plaintiffs May Not Seek Damages For Claims That Have Been Dismissed

Even if the Releases did not bar plaintiffs' claim, plaintiffs would be precluded from seeking from the BellSouth defendants amounts they contend they would have recovered had they litigated, or settled under different circumstances, their employment discrimination claims. Under the Court's Omnibus Order in the *Adams* lawsuit, plaintiffs could have rescinded the allegedly unfair settlement, and either settled those claims again or litigated them to judgment. See Ex. G at 26. Having decided against rescission and foregone the opportunity actually to litigate their claims, however, plaintiffs should not be permitted, under any liability theory, to obtain additional damages based on a *hypothetical* assessment of what they *would* have received had their claims been fairly handled.

First, both of the plaintiffs are parties to a final judgment dismissing their claims in *Adams*.[6] Fed. R. Civ. Pro. 60(b)(3) is the exclusive vehicle for raising claims that a federal judgment has been obtained by "fraud . . ., misrepresentation, or other misconduct of an adverse party." See *Geo. P. Reintjes Co.* v. *Riley Stoker Corp.*, 71 F.3d 44, 46 (1st Cir. 1995) (Rule 60(b) "prescribes the exclusive method by which federal judgments may be attacked"); *Porter* v. *Chicago Sch. Reform Bd. of Trs.*, 187 F.R.D. 563, 565 (N.D. Ill. 1999) (Rule 60(b) provides exclusive remedy for action to rescind on the ground of fraud a settlement embodied in a federal judgment). Accordingly, federal courts consistently have refused to recognize collateral actions seeking damages for amounts the plaintiffs claim they *should* have received in a prior federal action; such plaintiffs must challenge the judgment directly and then, if they succeed in escaping its otherwise preclusive effect, litigate the underlying claims. See, *e.g.*, *In re VMS Sec. Litig.*, 103 F.3d 1317, 1325 (7th Cir.1996) (affirming injunction against class members' state-court suit for fraudulently inducing participation in class action settlement agreement as an improper "attempt[] to evade the final judgments issued by the district court below" by "trying to recover damages they *might* have received had they not participated in the class action") (emphasis in original); *Reintges*, 71 F.3d at 45, 46 (refusing to recognize a claim for "fraud in procurement of the settlement agreement," because plaintiffs' "only route to relief from the settlement and underlying judgment is through application of [Rule 60(b)]"); *Villarreal* v. *Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (*per curiam*) (conversion action that was "essentially one to recover additional damages" for injuries claimed in prior federal

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[6] Although plaintiffs do not expressly allege that a final judgment was entered in *Adams*, that is fairly inferred from the plaintiffs' allegations that the *Adams* case was filed and settled. See 2d Am. Cplt. ¶¶ 20, 44. In fact, the docket in *Adams* reflects that the Court entered a final order dismissing the *Adams* case while retaining jurisdiction over the settlement.

action was "an action which attacks the order of dismissal entered by the district court. . . within the purview" of Rule 60(b)). Because plaintiffs have elected not to reopen the *Adams* judgment, they may not bring a suit seeking damages they *might* have received had they done so.

Second, both of these plaintiffs are governed by the court's order in *Adams*, which required them to rescind their settlements and tender back the consideration had they wished to litigate their employment discrimination claims. By seeking as damages here the difference between what they settled for and what they supposedly would have recovered absent the alleged misconduct, plaintiffs seek to avoid that order. In effect, they hope to try their employment discrimination claims *within this case* and to obtain additional damages without returning (or even risking) their prior recoveries. Because this end-run around the *Adams* order is improper, plaintiffs' claims should be dismissed.

III. PLAINTIFFS' COMMON LAW CLAIMS ARE BARRED BY THE LITIGATION PRIVILEGE

In the *Jackson* case, Judge Middlebrooks dismissed virtually identical common law claims on the basis of the absolute immunity from liability for damages afforded by Florida law to acts related to litigation. There is simply no way for plaintiffs to escape the same result in this case. The Florida Supreme Court has held that absolute immunity must be afforded "to any act occurring during the course of a judicial proceeding, regardless of whether the act involved. . . tortious behavior. . ., so long as the act *has some relation* to the proceeding." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A.* v. *United States Fire Ins. Co.*, 639 So.2d 606, 608 (Fla. 1994) (emphasis added). In *Levin*, where the Court ruled that the defendant was immune from plaintiffs' claim that it had tortiously interfered with a business relationship by contriving to disqualify plaintiffs' counsel, the Court stated:

> Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Ibid.; see also, *e.g.*, *American Nat'l Title & Escrow of Fla. Inc.* v. *Guarantee Title & Trust Co.*, 748 So.2d 1054 (Fla. Dist. Ct. App. 1999) (defendants were immune from tort claim based on allegations that they misused a court order to coerce the payment of money); *Ponzoli & Wassenberg, P.A.* v. *Zuckerman*, 545 So.2d 309 (Fla. Dist. Ct. App. 1989) (per curiam) (law firm immune from claim that it committed extortion against opposing party in litigation).

Applying those principles in *Jackson*, Judge Middlebrooks dismissed common law causes of action based on the settlement of the *Adams* case. Judge Middlebrooks explained that "settlement negotiations . . . and the communications between opposing counsel occurring during these negotiations[] are an integral part of the judicial process" and are "a crucial element in concluding the vast majority of litigation today."[7] 181 F. Supp. 2d at 1364. The Court further noted that "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action and is thus an *immunity from suit* rather than a mere defense to liability." *Id*. at 1363 (internal quotations omitted).

Not surprisingly – since the allegations in this case are cribbed nearly word for word from the *Jackson* case – plaintiffs' common law claims against the BellSouth defendants clearly fall within the litigation privilege. Here, as in *Jackson*, BellSouth's misconduct allegedly consists of (1)

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[7] Indeed, other jurisdictions recognizing privileges applicable to judicial proceedings uniformly have applied those privileges to settlement of ongoing litigation. See, *e.g.*, *AroChem Int'l Inc.* v. *Buirkle*, 968 F.2d 266, 273 (2d Cir. 1992); *Petty* v. *General Accident Fire & Life Assurance Corp.*, 365 F.2d 419 (3d Cir. 1966); *Saunders* v. *Weissburg & Aronson*, 87 Cal. Rptr. 2d 405, 408 (Cal. Ct. App. 1999); *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995) (absolute privilege "covers statements made during settlement negotiations").

unfairly extracting a bargain settlement from plaintiffs; and (2) negotiating settlement terms that allowed plaintiffs' counsel to keep too large a share of the settlement proceeds. Plaintiffs' Complaint is predicated on the "the injustices they suffered as a result of the fraudulent and collusive activities of the BELLSOUTH DEFENDANTS during the settlement of the *Adams* Case." 2d Am. Cplt. ¶ 13. Accordingly here, as in *Jackson*, "the occurrences from which plaintiffs' claims arise have *everything* to do with the settlement of a lawsuit . . . ." See *Jackson*, 181 F. Supp. 2d at 1363. Plaintiffs' claims are thus barred by the litigation privilege.

American Nat'l Title & Escrow of Florida, Inc. v. *Guarantee Title & Trust Co.*, 810 So.2d 996 (Fla. Dist. Ct. App. 2002) is not to the contrary. As one of the many alternative bases for its holding, that case states simply that, as a matter of *Florida* procedure, an affirmative defense such as the litigation privilege generally should not be resolved on a motion to dismiss. *Id*. at 998. But that has no bearing on *federal* procedure at all. In any event, even under Florida procedural law, any affirmative defense – including the litigation privilege – may be resolved on a motion to dismiss when "'the complaint affirmatively and clearly shows the conclusive applicability' of the defense to bar the action." *Reisman* v. *General Motors Corp.*, 845 F.2d 289, 291 (11th Cir. 1988) (quoting *Evans* v. *Parker*, 440 So.2d 640, 641 (Fla. Dist. Ct. App. 1983); Fla. R. Civ. P. 1.110(d)). Here, the complaint's allegations "affirmatively and clearly" demonstrate that the challenged actions related to the *Adams* litigation. The common law causes of action therefore must be dismissed.

Of course, a finding that BellSouth's conduct is immune from state tort liability does not leave plaintiffs without recourse for any settlement-related misconduct by BellSouth. As Judge Middlebrooks pointed out in *Jackson*, "just as remedies for perjury, slander and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state,

other tortious conduct occurring during litigation is equally susceptible to that same discipline." 181 F. Supp. 2d at 1364 n.16 (quoting *Levin*, 639 So.2d at 608). And in fact, as plaintiffs acknowledge (2d Am. Cplt. ¶ 19), the *Adams* court has *already* used its inherent power to investigate and remedy the very conduct upon which plaintiffs' state-law theories are premised, and it has ruled that plaintiffs were free to rescind the settlement. See Ex. G at 26. Plaintiffs did not elect to take that course—but that does not entitle them to file a new lawsuit arising from conduct protected by the litigation privilege. Accordingly, all of their state law claims should be dismissed with prejudice, exactly as was done with the identical allegations in the *Jackson* case.

IV. PLAINTIFFS FAIL TO STATE A TORTIOUS INTERFERENCE CLAIM

Plaintiffs' claim for tortious interference with advantageous contractual and business relationships should be dismissed for the independent reason that the theory has no application to the facts alleged in the complaint. "The type of injury alleged in an action for tortious interference with business relationship is *damage to one's business or occupation.*" *Garrison* v. *Herbert J. Thomas Mem. Hosp. Ass'n*, 438 S.E. 2d 6, 14 (W. Va. 1993) (emphasis added). A tortious interference action "protects the right to pursue one's business, calling, or occupation, free from undue influence or molestation." *Lamorte Burns & Co.* v. *Walters*, 2001 WL 502464, at *10 (N.J. May 14, 2001). "What is actionable is the luring away, by devious, improper and unrighteous means, of the customer of another." *Energex Lighting Indus., Inc.* v. *North Am. Philips Lighting Corp.*, 765 F. Supp. 93, 109 (S.D.N.Y. 1991) (citation and internal quotation omitted).[8] The

[8] The elements of a claim of tortious interference with a business relationship are (1) the existence of a business relationship; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff as a result of the breach of the relationship. *Gossard* v. *Adia Servs., Inc.*, 723 So. 2d 182, 184 (Fla. 1998).

plaintiffs here do not allege that they are in the "business, calling or occupation" of bringing lawsuits against their employer; nor do they allege that the BellSouth defendants have interfered with their rights to pursue their chosen occupations, whatever they may be. Accordingly, plaintiffs fail to state a tortious interference claim.

Plaintiffs will likely point out that Florida courts have recognized a cause of action for tortious interference with attorney-client relationships, and that the claim in this case therefore should at least survive the pleading stage. However, each of the Florida cases in which such claims have been allowed to proceed was brought by a *law firm* (not a client), suing in its capacity as a business enterprise. The plaintiff law firm's theory of recovery in these cases was either (i) that another law firm had stolen a client and the client's business from the plaintiff firm (see *Brown* v. *Larkin & Shea, P.A.*, 522 So. 2d 500 (Fla. Dist. Ct. App. 1988); *Thomas* v. *Ratiner*, 462 So. 2d 1157 (Fla. Dist. Ct. App. 1984); *Agudo, Pineiro & Kates, P.A.* v. *Harbert Constr. Co.*, 476 So. 2d 1311 (Fla. Dist. Ct. App. 1984)); or (ii) that a liability insurer had induced the client to settle or drop a pending lawsuit, thereby depriving the plaintiff law firm of legal fees (see *Farish* v. *Bankers Multiple Line Ins. Co.*, 425 So. 2d 12 (Fla. Dist. Ct. App. 1982); *State Farm Mut. Auto. Ins. Co.* v. *Ganz*, 119 So. 2d 319 (Fla. Dist. Ct. App. 1960)). In substance, these claims are no different from tortious interference claims brought by any other type of business venture. But as far as we are aware, there is *no* reported case in Florida *or in any other jurisdiction* sustaining a claim of tortious interference with an attorney-client relationship that was brought by the *client* against a third party. See 90 A.L.R. 4th 621 (1991 and Sept. 2000 Supp.), LIABILITY IN TORT FOR INTERFERENCE WITH ATTORNEY-CLIENT RELATIONSHIP (discussing more than 100 cases from 34 states; none sustaining a tortious interference claim brought by the client). This Court should decline the invitation to make

this case the first one.

V. PLAINTIFFS FAIL TO STATE A CONVERSION CLAIM

The conversion claim should be dismissed because plaintiffs cannot, as a matter of law, show an essential element of conversion: a property right in allegedly converted money.

Under Florida law, conversion is defined as the wrongful control of another person's property. *Seymour* v. *Adams*, 638 So.2d 1044, 1046-47 (Fla. Dist. Ct. App. 1994) ("The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner."); *Goodwin* v. *Alexatos*, 584 So.2d 1007, 1011 (Fla. Dist. Ct. App. 1991) ("Conversion is an act of dominion wrongfully asserted over, and inconsistent with another's possessory rights in personal property."). It follows, of course, that a plaintiff who cannot establish a property right in the allegedly converted property cannot state a claim for conversion. *Page* v. *Matthews*, 386 So.2d 815, 816 (Fla. Dist. Ct. App. 1980) ("In Florida, an action for conversion is regarded as a possessory action and the plaintiff must have a present or immediate right of possession of the property in question."); see also *In re Jones*, 219 B.R. 631, 635 (Bankr. M.D. Fla. 1998) (stating that in order to find conversion, the court must first find that plaintiff had an ownership interest in the allegedly converted property).

United American Bank of Central Florida, Inc. v. *Seligman*, 599 So.2d 1014 (Fla. Dist. Ct. App. 1992), illustrates this requirement in a closely related setting. In *United American Bank*, the plaintiff sued an escrow agent who delivered escrow funds to the wrong party. The plaintiff alleged that this wrongful distribution constituted conversion. *Id.* at 1016. The District Court of Appeal disagreed. Stating that the "essence of the tort cause of action of conversion is . . . interference with legal rights incident to ownership," the court held that a claim for conversion could not stand because

the escrow agent, not plaintiff, had lawful possession of the escrow funds. *Id.* at 1017; see also *Charter Air Center, Inc.* v. *Miller*, 348 So.2d 614, 616 (Fla. Dist. Ct. App. 1977) (buyer who voluntarily made down payment to seller could not allege or prove conversion); *In re Eli Witt Co.*, 2 B.R. 492, 495 (Bankr. M.D. Fla. 1980) (finding that a party cannot be found liable for conversion of goods to which it holds title).

These principles dispositively foreclose plaintiffs' conversion claim. Here, as in *United American Bank*, plaintiffs claim, in essence, that the defendants paid money to the wrong party (here, plaintiffs' lawyers, instead of plaintiffs themselves). As the Complaint puts it, the "BELLSOUTH DEFENDANTS wrongfully asserted dominion over the *Adams* Plaintiff's funds, including PLAINTIFFS' funds, by diverting vast amounts of money away from the *Adams* Plaintiffs." 2d Am. Cplt. ¶ 69. But at the time of this alleged "diversion," the BellSouth defendants – not the plaintiffs – were indisputably the lawful owner of the settlement monies. To be sure, BellSouth had executed a settlement agreement with the plaintiffs; but plaintiffs do not, and cannot, allege that the settlement agreement provided that they would receive a specific portion of the total $1.6 million settlement (leaving nothing for their lawyers). Thus, although the plaintiffs – like the plaintiff in *United American Bank* – may have wanted all of the monies to be sent to them directly, and not to their lawyers, they had no legal right to or property interest in this money unless and until they actually received the funds. Perhaps they can sue their former lawyers for having taken the lion's share of the settlement proceeds. But under *no* view of the case law do plaintiffs have a *conversion* action against *the BellSouth defendants*.

VI. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 42 U.S.C. § 1981

To state a claim under Section 1981, a plaintiff must allege facts establishing that (1) the

plaintiff is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Rutstein* v. *Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001)). The enumerated activity at issue here is the right "to make and enforce contracts." 2d Am. Cplt. ¶ 85. Section 1981 "can be violated only by purposeful discrimination." 181 F. Supp. 2d at 1354 (quoting *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 391 (1982)). A complaint must not only give a defendant "fair notice of what the plaintiff's claim is," (*Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 998 (2002)), but also "*the grounds on which it rests*." *Ibid.* (in Title VII case, stating that "complaint detailed the events leading to [plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with this termination") (citation omitted, emphasis added). Thus, a plaintiff must supply some facts (*i.e.*, "grounds") from which an inference of discriminatory intent may be drawn. See Ex. D at 6 (discussing application of *Swierkiewicz* to complaint in *Jackson*); see also *Iodice* v. *United States*, 289 F.3d 270, 281 (4th Cir. 2002) ("Dismissal of a complaint for failure to state facts supporting each of the elements of a claim is, of course, proper . . . [e]ven in these days of notice pleading, *see* [*Swierkiewicz*]. . . ."). In other words, "'[p]leadings must be something more than an ingenious academic exercise in the conceivable.'" *Marsh* v. *Butler County, Ala.*, 268 F.3d 1014, 1037 (11th Cir. 2001), *quoting United States* v. *Students Challenging Regulatory Ag. Proc.*, 412 U.S. 669 (1973).

Applying these principles, Judge Middlebrooks concluded that the Fourth Amended Complaint in *Jackson* (attached hereto as Ex. I) did not adequately allege discriminatory intent. See Ex. D. In particular, he held that "[t]he facts alleged to not relate to the race of the plaintiffs, and the

allegations relating to race are not factually supported." Ex. D at 14 (citing *Cummings* v. *Plam Beach County*, 642 F. Supp. 248, 249 (S.D. Fla. 1986)); see also Ex. D at 10 (addressing allegation identical to that made in ¶ 86(F) of 2d Am. Cplt.); *id*. at 10-11 (addressing allegation identical to that made in ¶ 87(A) of 2d Am. Cplt.); *id*. at 10 n.5 (addressing allegations identical to those made in ¶¶87(C) and 87(D) of 2d Am. Cplt.).

The allegations of discriminatory intent contained in the present Complaint are taken, practically word for word, from the allegations contained in the Fourth Amended Complaint in *Jackson* – except for certain glaring omissions. In this complaint, plaintiffs and their counsel have conveniently omitted almost all of the allegations that were addressed at any length in Judge Middlebrooks' opinion dismissing the Fourth Amended Complaint. Thus, plaintiffs' allegation that the BellSouth defendants failed to disclose the terms of the settlement agreement, which was rejected as insufficient by Judge Middlebrooks (Ex. D at 10), is missing from the Second Amended Complaint. So too are the allegations that BellSouth managed the *Adams* litigation from its headquarters in Atlanta (Ex. I ¶ 67(b)) and that BellSouth required that documents be returned at the end of the litigation (*ibid*.), both of which were rejected as insufficient by Judge Middlebrooks (Ex. D at 11-12). And, the most notable omission from the Second Amended Complaint is the lack of any reference to *Darlene Peterson* v. *BellSouth Telecommunications, Inc.*, which, according to the Fourth Amended Complaint in *Jackson*, was a race discrimination case that BellSouth settled *without* insisting on a practice restriction agreement or a consulting agreement. Ex. I ¶ 70. In Judge Middlebrooks's words, this allegation "is the death knell to plaintiffs' claims, as if they have fallen on their own sword." It comes as no surprise, then, that this allegation is completely missing from the complaint in this lawsuit.

But plaintiffs cannot transform a legally deficient complaint into a sufficient one simply by deleting certain especially defective allegations. To the contrary, if the *Jackson* Complaint failed to adequately allege discriminatory intent, then the current complaint – which contains only a subset of the insufficient allegations made in *Jackson – a fortiori* also must be insufficient.

Nor can plaintiffs avoid the same result as *Jackson* merely by rewording certain allegations from the *Jackson* complaint in what is paragraph 89 of the Second Amended Complaint. In *Jackson*, plaintiffs alleged that BellSouth had settled other discrimination lawsuits in the past, but had never before conditioned settlement on the type of restrictions imposed in the Adams settlement with African American plaintiffs. Ex. I ¶ 69. Now, plaintiffs allege that "BellSouth has settled other similarly situated discrimination lawsuits with Caucasian plaintiffs, but has never before conditioned settlement on the type of restrictions imposed in the *Adams Case* settlement with PLAINTIFFS, who are African American." 2d Am. Cplt. ¶ 89. But the conclusory addition of the words "similarly situated" and "Caucasian" simply cannot make this complaint legally sufficient. Plaintiffs provide no description of these lawsuits and no basis for the assertion of these allegations. Moreover, from the allegations in the Fourth Amended Complaint, we know that paragraph 89 is misleading. For one thing, the *Jackson* Complaint makes clear that at least one of the settling *Adams* plaintiffs, Donald McGuckian, was Caucasian (Ex. I ¶¶ 6, 46); the settlement of his claims – as was the settlement of the African American plaintiffs' claims – was conditioned on the execution of a practice restriction agreement and a consulting agreement. Additionally, as discussed above, the Fourth Amended Complaint in *Jackson* makes clear that in a different discrimination case involving African American plaintiffs, the settlement was *not* conditioned on the imposition of the restrictions attendant to the *Adams* settlement. *Id*. ¶ 70. The combination of allegations that a Caucasian

plaintiff was treated identically to the plaintiffs here, and that different African American plaintiffs were treated more favorably than the African American *Adams* plaintiffs clearly undermines any inference of discriminatory motive. Accordingly, just as Judge Middlebrooks concluded with regard to the complaint in *Jackson* – and just as plaintiffs themselves have conceded in their motion for leave to amend (DE 7 at 3) – the complaint here fails to sufficiently allege a discriminatory motive on the part of the BellSouth defendants. The cause of action for violation of Section 1981, therefore, should be dismissed.

CONCLUSION

For the foregoing reasons, the Second Amended Complaint should be dismissed against all of the defendants with prejudice.

October 11, 2002

Respectfully submitted,

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