e.g., APPENDIX A Court Opinion

COURT OF APPEALS FIFTH CIRCUIT

e.g.,APPENDIX A Court Opinion

20-10224

Mr. Allen Glenn Thomas
Apartment C
2004 High Hill Boulevard
Dallas, TX 75203

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 29, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-10224 Allen Thomas v. Tekle Abebe, et al
USDC No. 3:19-CV-1049

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that appellant pay to appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By:_____
Charles B. Whitney, Deputy Clerk

Enclosure(s)

Ms. Cassie J. Dallas
Mr. Craig L. Dowis
Mr. Shelby Hall
Mr. Selim Hassan Taherzadeh
Mr. Allen Glenn Thomas

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 29, 2020
Lyle W. Cayce
Clerk

No. 20-10224
Summary Calendar

ALLEN GLENN THOMAS,

Plaintiff—Appellant,

versus

TEKLE GIRMA ABEBE; WOLDER MARIAM ASTER; DALLAS AREA HABITAT FOR HUMANITY, INCORPORATED AND DALLAS NEIGHBORHOOD ALLIANCE FOR HABITAT; WILLIAM D. HALL, *Trustee*; NEAL TOMLINS, *Trustee for* F & M BANK TRUST COMPANY; TARRANCE L. HAWKINS; CYNTHIA BRYANT,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-1049

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

Pro se plaintiff-appellant Allen Glenn Thomas appeals the dismissal

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

with prejudice of his claims pursuant to FED. R. CIV. P. 12(b)(6). Thomas contends that the district court erred in dismissing his claims, denying him a discovery hearing, and denying him an opportunity to amend his complaint. For the reasons stated herein, we AFFIRM.

I.

Thomas alleges that, while he was in prison, defendant-appellees Tarrance L. Hawkins (his son) and Cynthia Bryant stole the deed to a residential property owned by his mother. According to Thomas, Hawkins subsequently gave or sold the property to Bryant, who sold it to the defendant-appellees Dallas Neighborhood Alliance for Habitat and the Dallas Area Habitat for Humanity, Inc. (hereinafter "the defendant charities"). The defendant charities eventually sold the property to defendants Girma Abebe Tekle and Aster Kifle Woldmariam. Liberally construed, Thomas's complaint asserts claims of fraud, conspiracy to commit fraud, violations of the 5th and 14th Amendments of the U.S. Constitution, and Article I §§ 17, 19 of the Texas Constitution.[1] In response to motions to dismiss filed by the defendant charities and defendants Tekle and Woldmariam, Thomas also alleged that the defendants had violated federal criminal statute 18 U.S.C. § 1001.

The district court, accepting the recommendations of the magistrate judge, granted the motions to dismiss filed by the defendant charities and Tekle and Woldmariam and *sua sponte* dismissed the claims against the remaining, unserved defendants—Hawkins, Bryant, William D. Hall, and Neal Tomlins. The court reasoned that Thomas failed to state claims of fraud

[1] For the first time on appeal, Thomas expressly raises a claim under § 12.002 of the Texas Civil Practice and Remedies Code. However, we "will not consider new claims . . . presented for the first time on appeal." *Franklin v. Blair*, 806 F. App'x 261, 263 (5th Cir. 2020) (internal citations omitted).

or conspiracy to commit fraud, and could not bring his constitutional claims against private citizens without any allegations of state involvement. The court also held that Thomas had no private cause of action under 18 U.S.C. § 1001. The court dismissed the claims with prejudice—denying Thomas an opportunity to amend his pleadings.

II.

"We review a district court's grant of a motion to dismiss *de novo*." *Boyd v. Driver*, 579 F.3d 513, 515 (5th Cir. 2009). In so doing, we accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

We review the "denial of leave to amend a complaint under Federal Rule of Civil Procedure 15 for abuse of discretion." *Mayeaux v. La. Health Serv. and Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004). A district court is "entrusted with the discretion to grant or deny a motion to amend" and may consider "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , and futility of the amendment." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (quoting *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005)). In addition, "it is not reversible error 'in any case where the pleadings, when viewed under the individual circumstances of the case, demonstrate that the plaintiff has pleaded his *best case*.'" *Brown v. DFS Servs., L.L.C.*, 434 F. App'x 347, 352 (5th Cir. 2011) (quoting *Jacquez v.*

Procunier, 801 F.2d 789, 791 (5th Cir. 1986) (emphasis in original)).

III.

The district court reasoned that Thomas failed to plead his fraud claim with the particularity required by FED. R. CIV. P. 9(b). We agree. "At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (quoting *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992)). Thomas's complaint, even liberally construed, fails to satisfy this requirement. Because Thomas's claim of conspiracy to commit fraud is predicated on his fraud claim, it likewise fails. *See Tummel v. Milane*, 787 F. App'x 226, 227 (5th Cir. 2019) (explaining that, under Texas law, "when plaintiffs fail to state a claim for any underlying tort, their claims for civil conspiracy likewise fail").[2]

The district court further found that Thomas's constitutional claims brought pursuant to § 1983 failed because the defendants are private citizens, and Thomas did not allege any involvement by state actors. Section 1983 provides a remedy for constitutional violations that occur "'under color of' state law." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). Accordingly, absent any allegation that the defendants were "jointly engaged with state officials in the

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[2] Thomas contends that the district court failed to accept all pleaded facts as true and relied on evidence outside of the pleading to rule on the motions. However, Thomas cites no evidence of such errors and we find none in the district court's opinion. Relatedly, Thomas contends that the district court erred in denying him an "evidentiary/[d]iscovery hearing." We review the denial of an evidentiary hearing for abuse of discretion. *See In re Eckstein Marine Service L.L.C.*, 672 F.3d 310, 319 (5th Cir. 2012). Given that the district court merely evaluated the sufficiency of Thomas's pleadings pursuant to Rules 12(b)(6) and 9(b), we find no abuse of discretion in denying Thomas an evidentiary hearing.

challenged action," Thomas fails to state a claim under § 1983. *Id.* at 27–28. Thomas's claims under Sections 17 and 19 of the Texas Bill of Rights fail for the same reason. *See Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89–91 (Tex. 1997) (holding that claims under Article I of the Texas Constitution require state action).

The district court also considered claims under 18 U.S.C. § 1001 raised by Thomas in response to defendants' motions, and correctly held that he did not have a private cause of action under that federal criminal statute. *See Ali v. Shabazz*, 8 F.3d 22, 22 (5th Cir. 1993) ("In order for a private right of action to exist under a criminal statute, there must be 'a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'") (quoting *Cort v. Ash*, 422 U.S. 66, 79 (1975)); *see also AirTrans, Inc. v. Mead*, 389 F.3d 594, 597 n.1 (6th Cir. 2004) (finding "no right to bring a private action under" 18 U.S.C. § 1001).

Thomas challenges the district court's decision to dismiss *sua sponte* the foregoing claims against those defendants that had not been properly served—Hawkins, Bryant, Hall, and Tomlins. He contends that he sent summons via certified mail to those four defendants and indicates that he received a return receipt from Hawkins. Thomas thus argues that the defendants had been properly served and that the district court should have entered judgment by default against those defendants. However, a review of the record reveals that Thomas never filed proof of service as to any of these defendants. *See* FED. R. CIV. P. 4(l)(1) ("Unless service is waived, proof of service must be made to the court" in the form of the "server's affidavit."). "No person need defend an action nor suffer judgment against him unless he has been served with process and properly brought before the court." *Broadcast Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 282 (5th Cir. 1987). Accordingly, contrary to Thomas's contention, the district court could not have entered judgment against these defendants. *See, e.g.*, *Smith v.*

Okla. ex rel. Tulsa Cty. Dist. Att'y Office, 798 F. App'x 319, 321 (10th Cir. 2020) (explaining that, because the plaintiff had not "file[d] a proof of service, . . . the court clerk had no basis to enter a default against the defendants"). In any case, Thomas failed to raise this issue below in his objections to the magistrate judge's recommendations and thus waived the argument. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.").

Finally, Thomas appeals the district court's denial of an opportunity to amend his pleadings. In dismissing Thomas's claims with prejudice, the district court reasoned that Thomas had "alleged his best case" and no further opportunity to amend was warranted. The court emphasized that, in responding to defendants' motions, Thomas had failed to "specify or clarify the alleged fraud by the moving defendants or against the unserved defendants" and that repleading his constitutional and criminal claims would be futile. Generally, "a *pro se* litigant should be offered an opportunity to amend his complaint before it is dismissed." *Brewster v. Dretke*, 587 F.3d 764, 767–68 (5th Cir. 2009) (citing *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). However, "[g]ranting leave to amend is not required, . . . if the plaintiff has already pleaded his 'best case.'" *Id.* at 768. We thus find no abuse of discretion in the district court's decision. *See Mayeaux*, 376 F.3d at 425.

IV.

For the foregoing reasons, we AFFIRM the dismissal of Thomas's claims with prejudice.

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Trial Court UNITED STATES DISTRIC COUR FOR THE NORTHERN DISTRIC OF TEXAS DAL S

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Allen Glenn Thomas
2004 High Hill Blvd Apt C
Dallas, Tx 75203-3824

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

ALLEN GLENN THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GIRMA ABEBE TEKLE, *et al.*,	)	
	)	
Defendants.	)	Civil Action No. 3:19-CV-1049-C-BH

ORDER

Before the Court are the Findings, Conclusions, and Recommendation of the United States Magistrate Judge therein advising the Court that Defendants' Motions to Dismiss should be granted and that Plaintiff's Complaint should be dismissed with prejudice as to all Defendants.[1]

The Court conducts a *de novo* review of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which a timely objection is made. 28 U.S.C. § 636(b)(1)(C). Portions of the report or proposed findings or recommendations that are not the subject of a timely objection will be accepted by the Court unless they are clearly erroneous or contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

After due consideration and having conducted a *de novo* review, the Court finds that Plaintiff's objections should be **OVERRULED.**[2] The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is

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[1] Plaintiff filed objections to the Magistrate Judge's Report and Recommendation on February 7, 2020.

[2] To the extent Plaintiff requests that an evidentiary hearing be held, the Court is of the opinion that the same should be **DENIED.**

therefore **ORDERED** that the Findings, Conclusions, and Recommendation are hereby **ADOPTED** as the findings and conclusions of the Court. For the reasons stated therein, Defendants' Motions to Dismiss are hereby **GRANTED** and Plaintiff's Complaint is **DISMISSED** with prejudice.[3]

SO ORDERED this 12th day of February, 2020.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

[3] Defendants' Alternative Motions for a More Definite Statement are **DENIED AS MOOT**.

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

ALLEN GLENN THOMAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GIRMA ABEBE TEKLE, *et al.*,	)	
	)	
Defendants.	)	Civil Action No. 3:19-CV-1049-C-BH

FINAL JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims against Girma Abebe Tekle, Aster Kifle Woldmariam, Dallas Area Habitat for Humanity, Inc. and Dallas Neighborhood Alliance for Habitat are **DISMISSED** with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims against the remaining Defendants are *sua sponte* **DISMISSED** with prejudice for failure to state a claim upon which relief may be granted. Costs shall be taxed against Plaintiff.

SIGNED this 12th day of February, 2020.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

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

ALLEN GLENN THOMAS,	§	
Plaintiff,	§	
vs.	§	**Civil Action No. 3:19-CV-1049-C-BH**
	§	
TEKLE GIRMA ABEBE, et. al,	§	
	§	
Defendants.	§	**Referred to U.S. Magistrate Judge**[1]

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Before the Court are *Defendants Dallas Area Habitat for Humanity, Inc. and Dallas Neighborhood Alliance for Habitat Motion to Dismiss Plaintiff's Complaint or Alternatively, Motion for a More Definite Statement*, filed May 30, 2019 (doc. 8), and *Defendants Girma Abebe Tekle and Aster Kifle Woldmariam's Rule 12(b)(6) Motion to Dismiss, or Alternatively, Rule 12(e) Motion for a More Definite Statement*, filed June 28, 2019 (doc. 12). Based on the relevant filings and applicable law, the motions to dismiss should be **GRANTED**, any remaining and new claims should be dismissed *sua sponte*, and the plaintiff's complaint should be **DISMISSED with prejudice** for failure to state a claim as to all defendants. The alternative motions for a more definite statement are **DENIED as moot**.

I. BACKGROUND

This case arises out of the transfer and sale of the residential property located at 1911 McBroom St., Dallas Texas 75212 (Property), which was originally owned by the mother of Allen Glenn Thomas (Plaintiff). (doc. 3 at 1.) Plaintiff alleges that while he was in prison and his mother was in a nursing home, his son, Tarrance L. Hawkins (Son), and Cynthia Bryant (Bryant) stole the

[1] By *Special Order 3-251*, this *pro se* case has been referred for full case management, including the determination of non-dispositive motions and issuance of findings of fact and recommendations on dispositive motions.

doc. 12 at 4-6.)

A. Rule 12(b)(6)

Rule 12(b)(6) allows motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Under the 12(b)(6) standard, a court cannot look beyond the face of the pleadings. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *see also Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). It is well-established that "*pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers." *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981). Nonetheless, regardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, pleadings must show specific, well-pleaded facts, not mere conclusory allegations to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker*, 75 F.3d at 196.

"[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). Nevertheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555; *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasizing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The alleged facts must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

"[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Williams v. WMX Techs.*, 112 F.3d 175, 177 (5th Cir. 1997). "Put simply, Rule 9(b) requires 'the who, what, when, where, and how' to be laid out" with respect to a fraud claim. *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (quoting *Williams*, 112 F.3d at 179).

Here, Plaintiff generally alleges that Defendants fraudulently attempted to gain control of his "heirship" Property, but he fails to allege what material misrepresentation was made, who made it, when it was made, or how he relied upon it to his detriment. The extent of Defendants' alleged involvement in the fraud is Charities' purchase of the Property, which it then sold it to Residents. Plaintiff's conclusory allegations do not meet the heightened pleading requirements of Rule 9(b), so the motions to dismiss his fraud claim for failure to state a claim for relief should be granted.[4]

III. REMAINING CLAIMS

Plaintiff's complaint may be liberally construed as also asserting a claim that the defendants conspired to commit fraud. (doc. 3 at 1.) He also claims based on federal law, the Fifth and Fourteenth Amendments of the Constitution, 42 U.S.C. § 1983, and Article I §§ 17, 19 of the Texas Constitution. (doc. 3 at 4.) The defendants have not moved to dismiss these claims.

A court may *sua sponte* dismiss a plaintiff's claims on its own motion under Rule 12(b)(6) for failure to state a claim as long as the plaintiff has notice of the Court's intention and an opportunity respond. *See Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006) (citing *Shawnee Int'l., N.V. v. Hondo Drilling Co.*, 742 F.2d 234, 236 (5th Cir. 1984)). "The fourteen-day

[4] Because Defendants' initial arguments concerning the fraud claim are dispositive, the Court does not reach their limitations argument. (*See* docs. 9 at 4; 12 at 5-6.)

of the conspiracy. His conspiracy claim is predicated on his fraud claim, so it likewise fails. *See Mathis v. DCR Mortg. III Sub, I, LLC*, 952 F.Supp.2d 828, 836 (W.D. Tex. 2013) (finding plaintiff's civil conspiracy claim was predicated primarily on his fraud claims, and it failed alongside those claims). Plaintiff's claim for conspiracy to commit fraud should be dismissed *sua sponte*.

B. Constitutional Claims

Plaintiff's allegations that the fraudulent transfers violate his rights under the Fifth and Fourteenth Amendments of the Constitution cannot support a cause of action. The Fifth Amendment's due process clause only applies to the actions of the federal government, and the Fourteenth Amendment's due process clause applies to municipalities. *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996). Constitutional due process protections do not extend to private conduct. *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734 (N.D. Tex. 1997) (citing *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190–91 (11th Cir.1995)). Plaintiff fails to allege what process was owed to him, how his rights were violated, or that any state actors were involved in the series of transfers. Because Defendants are private citizens, any claims under the Fifth and Fourteenth Amendments should be *sua sponte* dismissed.[5]

Plaintiff similarly fails to state a § 1983 claim against Defendants because they are private citizens. "Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United

[5] Plaintiff's claim under Article I § 19 of the Texas Constitution fails for the same reasons. Section 19 has traditionally been viewed as co-extensive with the United States Constitution's due process of law. *McPeters v. LexisNexis*, 910 F. Supp. 2d 981, 991 (S.D. Tex. 2012), *on reconsideration*, 11 F. Supp. 3d 789 (S.D. Tex. 2014) (citing *Armstrong v. Randle*, 881 S.W.2d 53, 56 (Tex.App.1994)). It has not been held to provide any greater protection than that afforded by the United States Constitution's Due Process Clause. *Cravin v. State*, 95 S.W.3d 506, 510 n. 3 (Tex.App.—Houston [1st Dist.] 2002, pet. ref'd).

IV. NEW CLAIMS

Plaintiff's response to Defendants' motions to dismiss asserts that Defendants "committed crimes" in violation of criminal statute 18 U.S.C. § 1001. (docs. 11 at 2; 14 at 2.) Because this claim was raised for the first time in his response, it is not part of the pleadings to be considered for purposes of the motion to dismiss. *See Hearn v. Deutsche Bank Nat. Trust Co.*, 3:13-CV-2417-B, 2014 WL 4055473 at *4 n.3 (N.D. Tex. Aug. 15, 2014); *Middleton v. Life Ins. Co. of North America*, H-09-CV-3270, 2010 WL 582552 at *5 (S.D. Tex. Feb. 12, 2010) (claim raised for first time in response to motion to dismiss was not properly before the Court) (citing *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990)). He has not been granted leave to amend his complaint to add these allegations, and he has not shown that the defendants consented to an amendment. *See* Fed. R. Civ. P. 15(a)(2). Nevertheless, because the *pro se* response may be liberally construed as a request for leave to amend his complaint, this claim is also addressed in an abundance of caution. *See Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217, 218 (5th Cir. 1992) (deciding that a response to a motion to dismiss, in which plaintiff first alleged that she had been willfully discriminated against, should be treated as a motion to amend her pleadings).

Plaintiff contends that he has stated a claim to relief because Defendants "committed crimes" in violation of federal criminal statute 18. U.S.C. § 1001 (making false statements to an agency of the United States). "[P]rivate citizens do not have the right to bring a private action under a federal criminal statute," however. *Sappore v. Arlington Career Inst.*, No. 3:09-CV-1671-N, 2010 WL 446076, at *2 (N.D. Tex. Feb. 8, 2010) (citing *Pierre v. Guidry*, 75 F. App'x 300, 301 (5th Cir. 2003) (per curiam)). Plaintiff cannot enforce a criminal statute in a civil action. *See Florance v. Buchmeyer*, 500 F. Supp. 2d at 626 (N.D. Tex. 2007); *see, e.g., Algoe v. Tex.*, Nos. 3:15-CV-1162-D,

VI. OPPORTUNITY TO AMEND

Notwithstanding a *pro se* party's failure to plead sufficient facts, the Fifth Circuit is inclined to give *pro se* plaintiffs several opportunities to state a claim upon which relief can be granted. *See Scott v. Byrnes*, No. 3:07-CV-1975-D, 2008 WL 398314, at *1 (N.D. Tex. Feb. 13, 2008); *Sims v. Tester*, No. 3:00-CV-0863-D, 2001 WL 627600, at *2 (N.D. Tex. Feb. 13, 2001). Courts therefore typically allow *pro se* plaintiffs to amend their complaints when the action is to be dismissed by court order. *See Robinette v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:96-CV-2923-D, 2004 WL 789870, at *2 (N.D. Tex. Apr. 12, 2004); *Sims*, 2001 WL 627600, at *2. A *pro se* plaintiff may also obtain leave to amend his complaint in response to a recommended dismissal. *See Swanson v. Aegis Commc'ns Grp., Inc.*, No. 3:09-CV-0041-D, 2010 WL 26459, at * 1 (N.D. Tex. Jan. 5, 2010). Nevertheless, courts may appropriately dismiss an action with prejudice without giving an opportunity to amend when the plaintiff fails to respond to a motion to dismiss after being specifically invited to do so by the court and the plaintiff has had ample opportunity to amend the complaint. *Rodriguez v. United States*, 66 F.3d 95, 97 (5th Cir. 1995). Dismissal with prejudice is also appropriate if a court finds that the plaintiff has alleged his or her best case. *Jones v. Greninger*, 188 F.3d 322, 327 (5th Cir. 1999).

Here, all of Plaintiff's claims are based on alleged transfers of the Property deed more than ten years ago. His response does not specify or clarify the alleged fraud by the moving defendants or against the unserved defendants; he merely reasserts constitutional provisions and adds a criminal statute as a basis for his suit. It does not appear that he could successfully state a claim for relief even if provided an opportunity to amend because none of the defendants are state actors, and he cannot assert claims under criminal statutes. It appears that he has alleged his best case, and no