

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

OPTEUM FINANCIAL SERVICES,
LLC, f/k/a HOME STAR MORTGAGE
SERVICES, LLC, and PETER NORDEN,

Plaintiffs/
Counterdefendant,

vs.

CASE NO. 8:03-CV-355-T-17TBM

TODD KOLBE, et al.,

Defendants/
Counterclaimant,

TODD KOLBE,

Third Party Plaintiff,

vs.

PETER NORDEN,

Third Party Defendant.

ORDER

This cause is before the Court on:

- Dkt. 149 Motion for Summary Judgment or Dismissal of Counterclaim and Third Party Complaint (Home Star)and Motion to Strike Twelfth Affirmative Defense of Todd Kolbe, Amy Samelson and Kirk McVey
- Dkt. 154 Opposition (Todd Kolbe)
- Dkt. 155 Opposition (Kirk McVey)

The Court regrets the long delay in the disposition of these motions, which was due to the demands of the Court's criminal docket. The Court further notes that Home Star Mortgage Services, LLC is now known as Opteum Financial Services, LLC and any reference to Home Star Mortgage Services, LLC means Opteum Financial Services, LLC>

The Counterclaim (Dkt. 86, p. 34) of Todd Kolbe includes Count I, alleging a claim under 18 U.S.C. 1962(c), and seeking treble damages against Home Star Mortgage Services, LLC, along with attorney's fees and costs, and Count II, for fraud, seeking entry of judgment against Home Star Mortgage Services, LLC, for damages and costs.

The Third Party Complaint (Dkt. 86, p. 43) of Todd Kolbe includes Count I, alleging an action for contribution against Peter Norden, and seeking judgment for Todd Kolbe's proportionate share of liability to Home Star Mortgage Services, LLC, Count II, alleging an action for damages against Peter Norden based on the alleged agreement with Peter Norden that Todd Kolbe was to serve as manager of the Florida operations of Sovereign Mortgage, with a draw of \$120,000 against Todd Kolbe's entitlement to 450% of the profits. Third Party Plaintiff Todd Kolbe seeks entry of judgment of \$710,000 (profits due to Kolbe) and \$136,297 (for Home Star's nonpayment of agreed amount to Sovereign Mortgage for assets). The Third Party Complaint also includes Count II, for fraud, based on the alleged representations and promises made by Third Party Defendant Peter Norden which Peter Norden allegedly never intended to keep.

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I. Motion to Strike Twelfth Affirmative Defense of Kolbe, Samelson, Kirk McVey

Plaintiff/Counterclaim Defendant Home Star Mortgage Services, LLC moves to strike the Twelfth Affirmative Defense of Defendant/Counterclaim Plaintiff Todd Kolbe, Defendant Amy Samelson, and Defendant Kirk McVey, pursuant to Fed.R.Civ.P. 12(f). Defendants' Twelfth Affirmative Defense includes the same allegations as the Counterclaim and Third Party Complaint of Todd Kolbe.

Defendants oppose the Plaintiff's Motion.

II. Dkt. 149 Motion for Summary Judgment or Dismissal of Counterclaim and Third Party Complaint

Counterclaim Defendant Home Star and Third Party Defendant Peter Norden seek dismissal of the Counterclaim and Third Party Complaint, or entry of summary judgment.

A. Standard of Review

Summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

"The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial.”

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The appropriate substantive law will guide the determination of which facts are material and which facts are...irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” See Anderson, 477 U.S. at 248. But, “[i]f the evidence is merely colorable...or is not significantly probative...summary judgment may be granted.” Id. at 249-50.

B. Judicial Notice

The Court takes judicial notice of the related criminal cases, Case No. 8:04-CR-486-T-23MAP and Case No. 8:05-CR-342-T-24TGW, and the related civil case, Case No. 8:05-CV-1133-T-27TGW.

C. Counterclaim

1. Count I - 18 U.S.C. Sec. 1962(c); 18 U.S.C. Sec. 1962(a)

Counterclaim Defendant Home Star argues that Counterclaim Plaintiff Kolbe does not allege the existence of an enterprise and conduct which constitutes a pattern of racketeering activity.

2. Fraud

Counterclaim Defendant Home Star argues that Counterclaim Plaintiff Kolbe does not allege fraud with particularity in that no allegations of "who, where, when, how and why" are included.

3. Invocation of Fifth Amendment Privilege

Counterclaim Defendant Home Star argues that it is appropriate to draw an adverse inference from Counterclaim Plaintiff Kolbe's repeated invocation of the Fifth Amendment concerning the discrete matters as to which he was questioned during his February 20, 2004 deposition, and in the interrogatories propounded to him.

4. Rule 37, Fed.R.Civ.P.

Counterclaim Defendant Home Star argues that Home Star was unable to obtain any discovery whatsoever from Counterclaim Plaintiff Kolbe about the facts and circumstances surrounding mortgage loan transactions and conversations with Peter Norden that are critical to Todd Kolbe's Counterclaims of RICO violations and fraud. Counterclaim Defendant Home Star argues that Home Star's need for the requested information outweighs Todd Kolbe's right to have his claims heard. Counterclaim Defendant Home Star argues that where other remedies would be an ineffective means of preventing unfairness to a defendant, dismissal of the action is appropriate.

C. Third Party Complaint

Third Party Defendant Peter Norden moves for summary judgment or dismissal of the Third Party Complaint on the same bases stated above as to the Counterclaim against Home Star Mortgage Services, LLC.

D. Discussion

The allegations of the Counterclaim and Third Party Complaint are premised on an alleged agreement between Counterclaim/Third Party Plaintiff Todd A. Kolbe and Counterclaim Defendant Home Star Mortgage Services LLC/Third Party Defendant Peter Norden that Todd A. Kolbe would start and operate Sovereign Mortgage Corporation as a "front" for Peter Norden to allow Peter Norden to avoid the provisions of a non-competition agreement signed when Peter Norden left Chase Mortgage. In other words, Counterclaim/Third Party Plaintiff alleges that Counterclaim Defendant Home Star and Third Party Defendant Peter Norden were parties to the conspiracy alleged in the Complaint brought by Home Star. Pursuant to the alleged agreement, Peter Norden would acquire Sovereign Mortgage upon the expiration of the non-competition agreement. Counterclaim Plaintiff/Third Party Plaintiff Todd A. Kolbe alleges that Home Star/Peter Norden knew that, based on the amount of the purchase price for Sovereign Mortgage, more money would have to be "made available" for Sovereign Mortgage to satisfy its debts incurred for start-up costs, and that money could come from a series of real estate purchases and loan transactions for properties that had "upside potential." Upon the sale of the improved properties, Sovereign's debts would be satisfied. The series of real estate

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transactions allegedly contemplated by Todd A. Kolbe and Home Star/Peter Norden was the same series of real estate transactions for which Counterclaim/Third Party Plaintiff Todd A. Kolbe was indicted for conspiracy to commit bank fraud and conspiracy to commit mail and wire fraud (Case No. 8:04-CR-486-T-23MAP, Superseding Information, Dkt. 27). The charge of conspiracy to commit bank fraud involves other transactions with AmSouth Bank that are not related to the allegations of this case; the charge of conspiracy to commit mail fraud and wire fraud is related to this case.

Counterclaim/Third Party Plaintiff Todd A. Kolbe entered into a plea agreement, and was sentenced to a term of incarceration, a term of supervised release, forfeiture and the payment of restitution, joint and severally with the co-conspirators, to the victim of the crime, Home Star Mortgage Services, LLC.

1. Count I - RICO Violation

The Court notes that the defendants in Case No. 8:04-CR-486-T-23MAP and Case No. 8:05-CR-342-T-24TGW were sentenced to pay a joint and several award of restitution to Home Star Mortgage LLC. All fraudulent acts alleged in both cases are within the scope of the same conspiracy.

The sentence of Counterclaim Plaintiff Todd A. Kolbe is a final judgment. During the criminal proceedings, Third Party Plaintiff Todd A. Kolbe contested the scope of conspiracy and the amount of restitution due to the victim of the conspiracy, Home Star Mortgage Services, LLC. The Mandatory Victims Restitution

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Act, 18 U.S.C. Sec. 3663A requires that the Court determine the amount of the loss due to victim of crimes involving fraud, and enter a restitution order requiring the perpetrators to pay the amount of the loss. 18 U.S.C. Sec. 3664 sets out the procedure to issue and enforce orders of restitution.

18 U.S.C. Sec. 3664 provides:

(1) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with state law, brought by the victim.

18 U.S.C. Sec. 3664(1).

In the Counterclaim, Counterclaim Plaintiff Todd A. Kolbe is seeking to pursue RICO, fraud and indemnity claims against the victim of the conspiracy for which he has been convicted and sentenced, based on the facts admitted his plea agreement. Counterclaim Plaintiff Todd A. Kolbe presented evidence of the alleged involvement of Counterclaim Defendant Home Star, through the conduct of Home Star's then CEO, Peter Norden, to the Court during sentencing, during which the Court was required to determine the scope of the conspiracy to commit mail fraud and wire fraud, and the amount of loss to the victim of the conspiracy, Home Star Mortgage Services, LLC. (Case No. 8:04-CR-486-T-23MAP, Dkts. 88, 91, 108).

Counterclaim Plaintiff has alleged that Sovereign Mortgage was created in January, 2000 with the knowledge and approval of

Home Star, who allegedly controlled Sovereign Mortgage until Peter Norden, upon the expiration of his non-competition agreement with Chase Mortgage, could acquire Sovereign Mortgage. Counterclaim Plaintiff alleges that during that time he acted as agent and stand-in for Peter Norden and Home Star. Counterclaim Plaintiff has further alleged that the start-up costs were to be paid for with the proceeds of the fraudulent "land-flipping" scheme. Counterclaim Plaintiff Kolbe alleges that Counterclaim Defendant Home Star took over the business of Sovereign Mortgage on April 1, 2001.

In entering a plea of guilty as stated above, Counterclaim Plaintiff Todd A. Kolbe admits that Home Star did not know of the false documents submitted in connection with the Sovereign loans and the Lakewood loans. Sales of Sovereign loans to Home Star took place in December, 2000 and March, 2001. The final judgment of restitution bars Counterclaim/Third Party Plaintiff from any claim that there was an agreement between Counterclaim Defendant Home Star and Third Party Defendant Peter Norden that Home Star would provide money for the start-up costs of Sovereign Mortgage. Counterclaim Plaintiff Todd A. Kolbe has admitted that he, along with his co-conspirators, deceived Home Star in obtaining the funds.

In Count I of the Counterclaim, Counterclaim Plaintiff Kolbe alleges that Counterclaim Defendant Home Star engaged in mail fraud and wire fraud in its communications by e-mail, fax and telephone, and funds transfers between January 2000 and April 2001. Counterclaim Plaintiff has not alleged specific transactions that form the alleged pattern or racketeering activity. Even if the general allegations of a pattern of

racketeering activity were sufficient, the allegations of the Counterclaim fail to establish a RICO claim as a matter of law. Once Home Star acquired Sovereign Mortgage in April, 2001, there was no threat of on-going activity which would support a finding of open-ended continuity. Based on the sales of Sovereign loan to Home Star in December, 2000 and March, 2001, the Court finds that the allegations of Count I are insufficient to establish closed-end continuity, as there was no long term racketeering activity.

The Court further notes that Counterclaim Plaintiff does not allege that Counterclaim Plaintiff's injuries flow from the predicate acts of mail fraud and wire fraud, but from the "business plan" to accuse Counterclaim Plaintiff of having carried out a series of "fraudulent" mortgage loan transactions, terminating Counterclaim Plaintiff, claiming that he breached his fiduciary duty to Counterclaim Defendant, of "bringing suit against Kolbe and others alleging they had engaged in a criminal conspiracy that involved "siphoning" off \$5,000,000 from Home Star and then of communicating the accusations to the general public, and within the mortgage industry in an attempt to destroy Kolbe." (Dkt. 22, Par. 129). Counterclaim Plaintiff alleges Counterclaim Defendant put this "business plan" in operation on March 8, 2002, when Counterclaim Defendant terminated Counterclaim Plaintiff Kolbe and then filed suit in New Jersey. Counterclaim Plaintiff alleges that by making the accusations of conspiracy without disclosing that Counterclaim Defendant Home Star and Third Party Defendant Norden were fully aware of the means and purposes of the mortgage loan transactions about which Counterclaim Defendant Home Star complains in the Complaint, Counterclaim Plaintiff Todd A. Kolbe has sustained substantial

damages to his business and his reputation.

Given the absence of any allegation that Counterclaim Plaintiff's injuries flow from the predicate acts of mail fraud and wire fraud, and the record evidence of Counterclaim Plaintiff's participation in the criminal conspiracy which was allegedly part of Home Star's business plan, and to which Counterclaim Plaintiff entered a guilty plea, the Court finds that Counterclaim Plaintiff Todd A. Kolbe lacks standing to sue for a RICO violation, O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989). If Counterclaim Plaintiff Todd A. Kolbe could be found to have standing, Counterclaim Plaintiff Kolbe cannot establish proximate cause for his damages. The award of restitution collaterally estops Counterclaim Plaintiff Kolbe from denying that Counterclaim Plaintiff Kolbe caused the losses to Home Star Mortgage Services, LLC. After consideration, the Court **grants** Counterclaim Defendant Home Star Mortgage Services, LLC's Motion for Summary Judgment as to Count I of the Counterclaim.

2. Count II - Fraud

Under Florida law, to establish a claim of fraud, a plaintiff must demonstrate:

1. that the defendant made a false statement or omission of material fact;
2. that by making the statement or omission, the defendant intended to induce the plaintiff to act;
3. that the plaintiff relied upon the statement;

4. that the plaintiff suffered damages.

See Brough v. Imperial Sterling Limited, 297 F.3d 1172 (11th Cir. 2002); First Interstate Dev. Corp. v. Ablanedo, 511 So.2d 536, 539 (Fla. 1987).

In Count II, Counterclaim Plaintiff Todd A. Kolbe alleges that:

128. In February 2002, an independent auditor questioned the transactions to which HOME STAR refers in its amended complaint. With that, NORDEN decided to distance himself from the business plan that he architected and assisted in implementing and decided to make KOLBE the "fall guy."

129. The plan involved accusing KOLBE and others of having completed a series of "fraudulent" mortgage loan transactions, of terminated KOLBE claiming that he breached his fiduciary duty to HOME STAR; of bringing suit against KOLBE and others alleging that they had engaged in a criminal conspiracy that involved "siphoning" off \$5,000,000 from HOME STAR and then of communicating the accusations to the general public and within the mortgage industry in an attempt to destroy KOLBE.

130. On March 8, 2002, with HOME STAR owing KOLBE \$710,000 in unpaid compensation for the year ending December 31, 2001, and owing Sovereign Mortgage Corporation \$136,297 for the assets of which it had taken custody and control, HOME STAR and NORDEN struck by implementing the plan that would make it appear KOLBE along was responsible for the business plan. HOME STAR terminated KOLBE and shortly thereafter filed suit against him in New Jersey. The suit was intended to make KOLBE the "fall guy" and complete the process

of NORDEN "distancing" himself from the plan that began with NORDEN operating secretly to violate his non-competition through KOLBE and ended with the destruction of KOLBE.

131. At all times material HOME STAR and NORDEN were parties to the "conspiracy" about which it complains and is therefore in no position to complain.

The alleged plan between Counterclaim Plaintiff Kolbe and Counterclaim Defendant Home Star involves inducing Todd A Kolbe to undertake the start-up of Sovereign Mortgage Corporation, the alleged control and operation of Sovereign, the agreement to acquire Sovereign Mortgage at a price sufficient to pay start-up and operational cost obligations, the approval of loan activity to pay the start-up and operational costs, and the agreement to employ Todd A. Kolbe as a manager when Home Star acquired Sovereign Mortgage. The Court assumes that Counterclaim Plaintiff includes the above allegations (Paragraphs 129-131) to establish that Home Star never intended to keep the alleged promises, but instead intended to destroy Counterclaim Plaintiff Todd A. Kolbe.

Counterclaim Plaintiff Kolbe has acknowledged that the fraudulent loan activity was carried out with his co-conspirators without the knowledge and approval of Home Star. The final judgments in the criminal cases award restitution to Counterclaim Defendant Home Star. Implicit in the final judgments is the Court's finding that Home Star's financial losses were directly and proximately caused by Todd A. Kolbe and his co-conspirators. Counterclaim Plaintiff Kolbe is estopped from asserting that Counterclaim Defendant Home Star is a co-conspirator. A co-

conspirator can never be awarded restitution.

To the extent that Counterclaim Plaintiff Kolbe alleges the existence of Home Star's agreement and approval of the fraudulent loan activity in order to fund the start-up and operational costs of Sovereign Mortgage, the allegations have no basis in fact, since Counterclaim Plaintiff Todd A. Kolbe and other co-conspirators have admitted the fraudulent loan activity within the scope of the conspiracy was carried out without the knowledge and approval of Home Start Mortgage Services, LLC. Without such funding, the existence of any alleged agreement as to the start-up and acquisition of Sovereign Mortgage becomes so factually implausible that no reasonable jury could conclude there was an agreement. Counterclaim Plaintiff Kolbe alleged that Home Star and Norden knew Counterclaim Plaintiff Kolbe did not have the means to pay the start-up and operational costs, and that such costs could not be directly paid by Home Star/Norden. Since the co-conspirators carried out the fraudulent loan activity without the knowledge and approval of Home Star, the only logical conclusion is that the "business plan" to operate Sovereign Mortgage was undertaken only by the co-conspirators, and not pursuant to any agreement between Counterclaim Plaintiff Kolbe and Counterclaim Defendant Home Star. It is beyond common sense and reason for Counterclaim Plaintiff Kolbe to allege that accusations of conspiracy to commit mail fraud and wire fraud were fabricated by Home Star and Peter Norden as part of a business plan to discredit Counterclaim Plaintiff Todd A. Kolbe, given that Counterclaim Plaintiff Kolbe entered a plea of guilty to the charges. Counterclaim Plaintiff Todd A. Kolbe was the architect of his own destruction, and any allegation that the termination of Counterclaim Plaintiff's employment with

Counterclaim Defendant Home Star was part of a business plan carried out by Counterclaim Defendant Home Star and Third Party Defendant Peter Norden is without a basis in fact.

After consideration, the Court finds that Counterclaim Plaintiff Kolbe cannot prevail on his fraud claim. Counterclaim Plaintiff Kolbe is estopped from asserting that he did not cause the losses sustained by Home Star. The undisputed record evidence establishes that Counterclaim Plaintiff's factual allegations as to promises made by Counterclaim Defendant Home Star have no basis in fact.

3. Third Party Complaint

Third Party Plaintiff Todd A. Kolbe has asserted an action for contribution in Count I, and an action for damages for fraud in Count II against Third Party Defendant, Peter Norden.

In Count I of the Third Party Complaint, Third Party Plaintiff incorporates the allegations of paragraphs 100 through 122 of the Second Amended Complaint, referring to the Lakewood loans. Third Party Plaintiff Todd A. Kolbe alleges that at all material times, Home Star and Peter Norden were parties to the "conspiracy" about which it complains, and is therefore in no position to complain. (Dkt. 86, p. 40, par. 199). Third Party Plaintiff Kolbe is collaterally estopped from asserting common liability, a necessary element of an action for contribution. After entering a plea of guilty to the conspiracy to commit mail fraud and wire fraud, the Court's sentence included a joint and several award of restitution to Home Star, the victim of the fraudulent scheme. Third Part Plaintiff Todd A. Kolbe had the

opportunity to contest the scope of the conspiracy and the amount of the loss to the victim, and in fact did contest those issues. Third Party Plaintiff Todd A. Kolbe and the other co-conspirators who are liable for restitution directly and proximately caused the losses of the victim, Home Star Mortgage Services, LLC.

In Count II of the Third Party Complaint, Third Party Plaintiff Todd A. Kolbe asserts the same allegations of fraud against Third Party Defendant Peter Norden which were alleged in the Counterclaim as to Counterclaim Defendant Home Star Mortgage Services, LLC.

For the same reasons stated above as to Counterclaim Defendant Home Star Mortgage Services, LLC, the Court **grants** the Motion for Summary Judgment of Third Party Defendant Peter Norden as to Count I and Count II of the Third Party Complaint. The Court **denies** the Motion to Strike as moot.

The Clerk of Court shall enter a final judgment in favor of Counterclaim Defendant Home Star Mortgage Services, LLC (now known as Opteum Financial Services, LLC) on the Counterclaim, and shall enter a final judgment in favor of Third Party Defendant Peter Norden on the Third Party Complaint.

4. Adverse Inferences

The Court has also considered whether the entry of summary judgment on the Counterclaim and Third Party Complaint is appropriate based on substantial independent evidence in the record and adverse inferences drawn from Counterclaim/Third Party Plaintiff Todd A. Kolbe's assertion of the Fifth Amendment. The

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Court includes the following chronology relative to Counterclaim/Third Party Plaintiff's argument as his assertion of the Fifth Amendment privilege during discovery in this case.

This case was commenced in 2002 in New Jersey. It was transferred to Orlando, Florida, and then to Tampa, Florida, as of February 27, 2003. A case management order was entered on October 3, 2003 (Dkt. 71) setting a discovery cutoff of January 30, 2004. The Second Amended Complaint was filed on October 14, 2003. Counterclaim Plaintiff Todd A. Kolbe moved to stay this case on October 29, 2003 (Dkt. 81). The Motion to Stay was denied on January 13, 2004 (Dkt. 120). The Counterclaim and Third Party Complaint were first asserted in March, 2003 (Dkt. 22), and then reasserted in November, 2003 (Dkt. 86).

The Court extended the discovery cutoff to November 12, 2004, and then to February 11, 2005. (Dkts. 119, 148). The Court extended the discovery cutoff to April 11, 2005, pursuant to a Joint Motion. (Dkt. 160). The docket shows the resolution of various discovery disputes between July, 2003 and November, 2005, when the Reply to Counterclaim Plaintiff's Response to the Motion for Summary Judgment was filed.

On September 23, 2005, Defendants Abercrombie and Kerber moved to stay this case until completion of related criminal proceedings (Dkt. 218). The Motion for Stay was granted to 3/1/2006 (Dkt. 222). At the time the Court entered the Order granting the stay, the Court acknowledged that sentencings were scheduled for February, 2006, and indicated that the Court would evaluate the posture of this case and the related criminal cases at that time.

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Case No. 8:04-CR-486-T-23 MAP, USA v. Todd A. Kolbe, Kirk McVey and Amy Samelson was commenced on October 14, 2004. Defendants entered plea agreements, which contain a factual basis. Defendant Kolbe's sentencing hearing was commenced on June 23, 2006, at which time the Court heard argument as to the application of the sentencing guidelines and as to the amount of restitution/loss amount (Dkt. 88). Defendants were sentenced on August 14, 2006, and judgments were entered on August 17, 2006. Defendants' sentences include joint and several liability for restitution due to Home Star Mortgage Services, LLC.

Case No. 8:05-CR-342-T-24TGW, USA v. Kelly Abercrombie, Todd Kerber, Mary Bolan, Taya Parodo was commenced on August 11, 2005. Defendants Abercrombie, Bolan and Parodo entered plea agreements. Upon acceptance of the Abercrombie plea agreement, pretrial diversion was offered to Defendant Todd Kerber, and the indictment was dismissed without prejudice as to Defendant Todd Kerber. Defendant Kelly Abercrombie's sentencing was commenced on October 13, 2006 (Dkt. 113), and continued on December 18, 2006. Defendant Bolan was sentenced on November 29, 2006. Defendant Parodo was sentenced on December 20, 2006.

At the sentencing hearing of Defendant Abercrombie, the assigned District Judge heard argument as to the scope of the conspiracy, and ruled that there was one conspiracy including the Sovereign loans and the Lakewood loans. Defendants' sentences include joint and several liability for restitution due to Home Star Mortgage Services, LLC with Defendants Todd A. Kolbe, Kirk McVey and Amy Samelson.

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On April 27, 2006, the Court conducted a hearing on all pending dispositive motions (Dkt. 233).

Counterclaim Defendant Home Star argues that, in light of Counterclaim Plaintiff Todd A. Kolbe's blanket assertion of Fifth Amendment rights during discovery, Counterclaim Defendant Home Star was deprived of the opportunity to develop its defenses as to the Counterclaim. Counterclaim Plaintiff Todd A. Kolbe did not appear for his scheduled deposition in October, 2003. During his deposition on February 20, 2004, Counterclaim Plaintiff was specifically questioned as to the truth of the allegations of the Counterclaim and Third Party Complaint, but Counterclaim Plaintiff Todd A. Kolbe invoked his Fifth Amendment rights. (Dkt. 149-4).

The Court notes that the deposition of February 20, 2004 was Counterclaim Defendant's only opportunity to depose Counterclaim Plaintiff Todd A. Kolbe. Counterclaim Plaintiff Todd A. Kolbe filed his Counterclaim and Third Party Complaint on March 6, 2003 (Dkt. 22), and reasserted the Counterclaim and Third Party Complaint on November 4, 2003 (Dkt. 86). The criminal case was commenced on October 14, 2004 and terminated on August 17, 2006. Counterclaim Plaintiff Kolbe's Motion for Protective Order (Dkt. 79) shows that in October, 2003, Counterclaim Plaintiff was aware of a criminal investigation.

The Court notes that Counterclaim Plaintiff Todd A. Kolbe has admitted under oath that the Answer filed in Case No. 8:03-CV-355-T-17TBM is riddled with lies. (Case No. 8:05-CR-342-T-24TGW, Dkt. 113). The Counterclaim and Third Party Complaint are included in the same document. Counterclaim Plaintiff Kolbe has

admitted that fraudulent loan transactions within the scope of the conspiracy were carried out without the knowledge and approval of Counterclaim Defendant Home Star Mortgage. Counterclaim Plaintiff has filed depositions and affidavits intended to establish the existence of an agreement between Counterclaim Plaintiff and Counterclaim Defendant Home Star Mortgage, that Counterclaim Plaintiff Kolbe started up and operated Sovereign Mortgage as a front for Home Star and Peter Norden, with the understanding that Home Star and Norden would step in and acquire Sovereign Mortgage. However, Counterclaim Plaintiff Kolbe's admission that fraudulent loan transactions were carried out solely by co-conspirators charged for the criminal conspiracy, that is, not intended to pay for the start-up costs of Sovereign Mortgage Corporation by agreement with Home Star, and Counterclaim Plaintiff's allegations that Home Star and Norden knew of Counterclaim Plaintiff's inability to pay for start-up costs, Counterclaim Plaintiff's allegation that Peter Norden could not pay for the start-up costs directly, render the existence of any such agreement so implausible that no reasonable jury could find that the agreement alleged by Counterclaim Plaintiff existed.

The Court may draw adverse inferences from the assertion of Fifth Amendment rights in civil proceedings, as long as invocation of the privilege does not result in the automatic entry of an adverse judgment. Where there is substantial independent evidence in the record, that evidence when combined with adverse inferences may justify entry of summary judgment. It is not appropriate to draw an adverse inference when a criminal case related to the civil case in which the Fifth Amendment privilege is asserted is pending, and the Court is

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reluctant to burden the assertion of the Fifth Amendment privilege where a criminal indictment is imminent.

The allegations of Counterclaim Plaintiff Kolbe's counterclaim are based on alleged personal conversations and alleged representations and promises as to a secret agreement made by Counterclaim Defendant Home Star/Third Party Defendant Peter Norden to Counterclaim Plaintiff Kolbe. The Court recognizes that Counterclaim Plaintiff Kolbe is entitled to assert the Fifth Amendment privilege against self-incrimination. The Court extended discovery several times, and granted a stay to avoid any penalty associated with assertion of the Fifth Amendment privilege. While discovery was open and before the filing of dispositive motions, there was no opportunity for Counterclaim Defendant Home Star Mortgage Services, LLC and Third Party Defendant Peter Norden to develop their defenses as to the Counterclaim and Third Party Complaint. It would be unfair to allow Counterclaim Plaintiff Kolbe to proceed with this lawsuit while Counterclaim/Third Party Plaintiff invokes the Fifth Amendment both as a shield and as a sword. Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1086 (5th Cir. 1979). Since discovery has long since concluded, there is no less effective remedy than entry of an adverse judgment to prevent unfairness to the Counterclaim Defendant and Third Party Defendant.

After consideration, based on the substantial evidence in the record and the adverse inferences drawn from Counterclaim/Third Party Plaintiff's assertion of the Fifth Amendment rights, the Court **grants** the Motion for Summary Judgment of Counterclaim Defendant Home Star and Third Party Defendant Peter Norden.

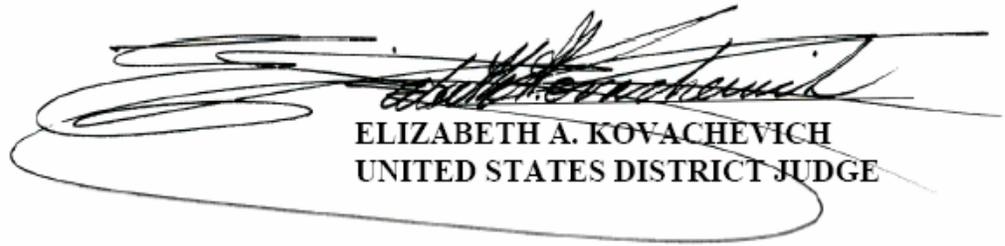
5. Rule 37

In order to impose sanctions under Rule 37, in general the Court must find that a party has violated a court order, and then must evaluate the range of sanctions, selecting the least severe sanction that is effective. Because the Court has granted Counterclaim Defendant Home Star's Motion for Summary Judgment on other grounds, it is not necessary for the Court to address Rule 37. Accordingly, it is

ORDERED that the Motion of Counterclaim Defendant Home Star Mortgage Services, LLC, n/k/a Opteum Financial Services, LLC, for Dismissal or Summary Judgment is **granted**; and the Motion of Third Party Defendant Peter Norden is **granted**. The Clerk of Court shall enter a final judgment on the Counterclaim in favor of Counterclaim Defendant Opteum Financial Services, LLC and against Counterclaim Plaintiff Todd A. Kolbe. The Clerk of Court shall enter a final judgment in favor of Third Party Defendant Peter Norden and against Third Party Plaintiff Todd A. Kolbe. The Motion to Strike is **denied** as moot.

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DONE and ORDERED in Chambers, in Tampa, Florida on this
22nd day of September, 2010.



ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies to:
All parties and counsel of record