

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS
RIK WAYNE MUNSON
Plaintiffs,

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

Vs.

C.A. No. 4:16-cv-01969

CANDACE KUNZ-FREED, ALBERT
VACEK, JR., BERNARD LYLE
MATHEWS III, NEAL SPIELMAN,
BRADLEY FEATHERSTON, STEPHEN
MENDEL, DARLENE PAYNE SMITH
JASON LESTER, GREGORY LESTER
JILL WILLARD YOUNG, CHRISTINE
RIDDLE BUTSS, CLARINDA
COMSTOCK, TONI BIAMONTE,
BOBBY BAYLESS, ANITA
BRUNSTING AND AMY BRUNSTING

DEFENDANT GREGORY LESTER’S
MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Gregory Lester (“Mr. Lester”) files this Rule 12 Motion to Dismiss and shows the following:

I.
INTRODUCTION

Plaintiffs’ pro se Complaint (*D.E. #1*) purports to assert almost fifty “claims” against more than fifteen defendants, who are lawyers, judges, and other legal professionals who practice in Harris County Probate Court Number 4. Plaintiffs in this case are Candace Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged “domestic partner” and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings.

The allegations related to Mr. Lester are minimal. The information identifying Mr. Lester as a defendant is contained in paragraphs 1, 16, 55, 56 and 59 of the Complaint. (*D.E.# 1*).

Paragraph 55 of the Complaint alleges that Mr. Lester is an attorney who has practiced in Harris County **Probate** Courts. Paragraph 56 alleges, without any facts to support it, that Mr. Lester and the other named defendants have engaged in a criminal enterprise somehow being conducted through Harris County **Probate** Court Number 4. Paragraph 59 makes a similar allegation, again without any factual support. The Complaint asserts no factual content sufficient to maintain any cause of action against Mr. Lester. (*D.E.#1*).

In response to Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6) filed by some Defendants, Plaintiffs filed their Addendum of Memorandum in Support of RICO Complaint. (*D.E. #26*). Rather than provide any specifics about how a frivolous 59-page complaint states a RICO claim against Mr. Lester, Plaintiffs have instead come forward with a 25-page Addendum that still does not state a claim. (*D.E.# 26*). Although the Addendum is replete with inaccuracies, it has not changed or added any additional factual allegations to support RICO claims. All the Addendum does is describe a handful of events and then conclude without explanation that the events constitute a RICO predicate act. Because the Addendum does nothing to cure the problems found in Plaintiffs' Original Complaint, the Court should grant this Motion and dismiss all claims against Mr. Lester.

II. **STANDARDS OF REVIEW FOR PLEADING CONSTRUCTION**

In a Rule 12(b)(6) motion, the Court accepts all factual allegations in the pleadings as true and examines whether the allegations state a claim sufficient to avoid dismissal.¹ This standard of construction presupposes well-pleaded facts; a court does not accept conclusory allegations,

¹ *Guilbeaux v. Grand Casinos, Inc.*, 114 F.3d 1181 (5th Cir. 1997); *Kansa Reins Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

unwarranted factual inferences, or legal conclusions as true.² It is appropriate to consider the exhibits attached to a complaint for purposes of a Rule 12(b)(6) motion.³ A Court should grant a Rule 12(b)(6) motion when it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.⁴ Similarly, when a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate.⁵

III.
STATEMENT OF FACTS DERIVED EXCLUSIVELY FROM PLAINTIFFS'
ORIGINAL COMPLAINT AND ADDENDUM

It is evident from the Original Complaint that Plaintiffs have underlying litigation in **Probate** Court Number Four with various attorneys and opposing parties. It is also evident from the Original Complaint that Plaintiffs are dissatisfied with the status of those proceedings. Beyond this, it has been extremely cumbersome to locate any specific allegations against Mr. Lester. In an effort to provide some clarity for the Court regarding the claims against Mr. Lester, Mr. Lester opens with a statement of facts.

A. FACTS INVOLVING MR. LESTER.

On July 23, 2015, the Honorable Christine Butts, Judge of Harris County **Probate** Court Number Four (4), entered its **Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code 452.051.**⁶ That Order appointed Gregory Lester as Temporary Administrator with limited powers.⁷ The only powers conferred on Mr. Lester were the powers

² *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

³ *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004).

⁴ *Century Sur. Co. v. Blevins*, 799 F.3d 366, 371 (5th Cir. 2015).

⁵ *Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 619 (5th Cir. 1992).

⁶ Exhibit A.

⁷ *Id.*

to investigate all claims pending by all parties and file a report with the court regarding the merits of the claims.⁸ The Order was only effective for 180 days.⁹ Mr. Lester filed his Report of Temporary Administrator Pending Contest on January 14, 2016.¹⁰

Against Mr. Lester, Plaintiffs allege causes of action for:

- “18 U.S.C. §1962(d) the Enterprise;”¹¹
- “The Racketeering Conspiracy 18 U.S.C. §1962(c);”¹²
- Three claims for “Honest Services 18 U.S.C. §1346 and 2;”¹³
- “Wire Fraud 18 U.S.C. §1343 and 2;”¹⁴
- “Fraud 18 U.S.C. §1001 and 2;”¹⁵
- “Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. §1951(b)(2) and 2;”¹⁶ and
- Three conspiracy claims for “Conspiracy to Obstruct Justice 18 U.S.C. §371;”¹⁷ “Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting;”¹⁸ and “Conspiracy to Violate 18 U.S.C. §§ 242 and 2, & 42 U.S.C. §§983 and 1985.”¹⁹

But despite the many “claims”, Plaintiffs complain of only one specific action taken by Mr.

Lester. Plaintiffs allege that Mr. Lester filed a “fictitious report into the Harris County **Probate**

⁸ *Id.*

⁹ *Id.*

¹⁰ Exhibit B.

¹¹ *See* Complaint, at §IV, ¶¶ 35-58.

¹² *Id.* at ¶¶ 59-120.

¹³ *Id.* at ¶¶ 121, 122, and 123.

¹⁴ *Id.* at ¶ 123

¹⁵ *Id.* at ¶123

¹⁶ *Id.* at ¶123

¹⁷ *Id.* at ¶123

¹⁸ *Id.* at ¶132

¹⁹ *Id.* at ¶159

Court No.4.”²⁰ Plaintiffs have asserted no factual content sufficient to maintain any cause of action against Mr. Lester. The Complaint should be dismissed with prejudice.

IV.
THE COURT SHOULD DISMISS THE PLAINTIFFS’
CLAIMS AGAINST MR. LESTER.

A. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED THE NECESSARY PREDICATE ACTS.

Based on virtually no specific allegations of a criminal enterprise beyond dissatisfaction with the public proceedings in the underlying case, the Plaintiffs have asserted two RICO claims against Mr. Lester. Plaintiffs have brought their RICO action under 18 U.S.C. §1962(c) AND 18 U.S.C. §1962(d).

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or “predicate acts.”²¹ Plaintiffs fail to meet this standard.

With respect to Mr. Lester, Plaintiffs have listed four federal crimes that appear in 18 U.S.C § 1961(l)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simple list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead specific facts that, if true, would establish that each predicate act was in fact committed by Mr. Lester.²² Plaintiffs' Complaint fails to meet this standard. For most of the identified predicated acts, Plaintiffs simply identify the statute, provide a general description of the conduct it prohibits, and then asserts that Mr. Lester violated the statute. However, these allegations are baseless on their face and a far cry from the truth. Accordingly, Plaintiffs' claims must be dismissed.

²⁰ See Complaint, Paragraph 123.

²¹ *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991)

²² *Id.* at 880.

B. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(c).

As to the claims under § 1962(c), the Plaintiffs did not allege with the requisite factual specificity (or beyond merely conclusory statements) any predicate acts committed by Mr. Lester. Similarly, the Plaintiffs did not allege and the law would not sustain any assertion that Mr. Lester conducted, controlled, or participated in an enterprise under the standard set forth by the Supreme Court in *Reves*.²³

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

Most of Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."²⁴

Underpinning the heightened pleading requirement for fraud claims is the federal courts' determination that "defendants are not required to guess what statements were made in connection with a plaintiffs claim and how and why they are fraudulent."²⁵ Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."²⁶ When pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.²⁷

²³ 507 U.S. 170, 185, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

²⁴ *Walsh v. America's Tele- Network Corp.*, 195 F. Supp.2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

²⁵ *Allstate Insurance Company v. Benhamou*, No. 4:15-CV-00367, 2016 WL 3126423, at *17 (S.D. Tex. June 2, 2016).

²⁶ *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG LLP*, No. CIV.A.3:03CV2138-B, 2004 WL 3019097, at *3 (N.D. Tex. Dec. 28, 2004).

²⁷ *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.*, 975 F.2d at 1138.

Here, Plaintiffs have failed to allege the contents of any of the purported false representations made by Mr. Lester, or how they advanced the alleged scheme to defraud Plaintiffs, flaws that are fatal to their claims. Moreover, as stated above, Plaintiffs offer no real factual support for their obstruction of justice, mail and wire-fraud allegations, or truly any of their claims. Given these fatal defects, the Court should dismiss Plaintiffs' RICO action.

2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.²⁸ This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiffs' injuries and the underlying RICO violation.²⁹ But, despite this firmly established requirement, Plaintiffs in this case have asserted no allegations-indeed, not even a conclusory allegation-detailing how they purportedly relied upon Mr. Lester's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, most of which are fraud-based, should be dismissed.

C. PLAINTIFFS HAVE FAILED TO PLEAD A COGNIZABLE RICO ENTERPRISE

1. Plaintiffs Enterprise Allegations Are Too Vague and Conclusory

An enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."³⁰ The Fifth Circuit requires that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise."³¹ To

²⁸ *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts)

²⁹ See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 279 (1992); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003); *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling").

³⁰ 18 U.S.C. § 1961(4); see also *Elliott*, 867 F.2d at 881.

³¹ *Elliott*, 867 F.2d at 881.

establish an "association in fact" enterprise under 18 U.S.C. § 1961(4) a plaintiff must show "evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit."³²

The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."³³ The Fifth Circuit has enumerated the requirements of an enterprise as requiring that it "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure."³⁴

"[T]wo individuals who join together for the commission of one discrete criminal offense have not created an "association-in-fact" enterprise, even if they commit two predicate acts during the commission of this offense, because their relationship to one another has no continuity."³⁵ However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."³⁶

Plaintiffs have provided virtually no facts concerning the alleged enterprise, how it operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege the text book elements of an enterprise characterized with inflammatory exaggerations and baseless

³² *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).

³³ 452 U.S. at 583.

³⁴ *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).

³⁵ *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).

³⁶ *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

conclusions.

Plaintiffs fail to allege any specific facts that would demonstrate a conspiracy of any kind-when it began, who was actually a part of such conspiracy or any facts suggesting that any defendant had actual knowledge that any of the seemingly harmless acts were done in furtherance of some secret conspiracy. In the absence of these, or any other supporting facts, Plaintiffs' pleadings are simply insufficient.

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.³⁷ Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute; and (ii) a causal nexus between that activity and the harm alleged."³⁸ Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs alleged enterprise lacks continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.³⁹ Specifically, "[a]n association-in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."⁴⁰ These requirements limit the application of the RICO Act, and serve to prevent an overly-broad

³⁷ See *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

³⁸ *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

³⁹ See, e.g., *Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

⁴⁰ *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995).

application to general commercial conduct that was never really the intended focus of the Act.⁴¹

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

D. PLAINTIFFS HAVE FAILED TO ADEQUATELY PLEAD A PATTERN OF RACKETEERING ACTIVITY.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.⁴² To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other and that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."⁴³ When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."⁴⁴ Such continuity may refer "either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition."⁴⁵

⁴¹ *Delta Truck*, 855 F.2d at 242-43.

⁴² See *In re Burzynski* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck*, 855 F.2d at 242-43).

⁴³ *HJ., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

⁴⁴ *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).

⁴⁵ *Id.* (quoting *HJ., Inc.*, 492 U.S. at 241).

Here, Plaintiffs alleges several times throughout their Complaint that Mr. Lester engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary pattern of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

E. THE PLAINTIFFS HAVE NOT STATED A RICO CLAIM UNDER SECTION 1962(d).

To prove a RICO conspiracy, the Plaintiffs must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.⁴⁶ A RICO conspiracy thus has RICO-specific requirements—an agreement by at least two conspirators to engage in a pattern of racketeering.⁴⁷ Mere association with the enterprise is not actionable; agreement is essential.⁴⁸ Further, if a plaintiff fails to properly plead a RICO claim under §§ 1962(a), (b), or (c), it correspondingly fails to properly plead a conspiracy claim under § 1962(d).⁴⁹

The Court should dismiss the § 1962(d) claim because the Plaintiffs failed to state a claim under §§ 1962(a-c). As a result, the conspiracy claims fail under controlling Fifth Circuit authority.⁵⁰ The Court should additionally dismiss the claim because the Plaintiffs have not alleged any specific facts detailing an agreement to commit a RICO offense, what the agreement was, how it was reached, and when it was entered.⁵¹ These types of missing details are necessary to state a claim under § 1962(d). As explained in *Twombly*, allegations that a defendant acted in ways consistent with a conspiratorial agreement, but also equally well explained by legitimate

⁴⁶ *TruGreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 625 n.11 (N.D. Tex. 2007) (Fitzwater, J.) (quoting *United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005)).

⁴⁷ *Id.*

⁴⁸ *Baumer*, 8 F.3d at 1344.

⁴⁹ *N. Cypress Med. Ctr. Operating Co.*, 781 F.3d at 203.

⁵⁰ *Id.*

⁵¹ *Lewis v. Sprock*, 612 F.Supp. 1316, 1325 (N.D. Cal. 1985); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365 (D. Hawaii 1995).

economic incentives, do not suffice to show illegality.⁵² So too, unsupported conclusory allegations are not entitled to be assumed true, and dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because the conduct could be compatible with or explained by, lawful, unchoreographed free-market behavior."⁵³ Because the Plaintiffs have failed to state a claim upon which relief may be granted, the Court should grant this Motion to Dismiss.

1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of a statutory violation. 18 U.S.C. § 1964(c). The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the violation was the "but for" cause and "proximate" cause of the injury.⁵⁴ That is, a plaintiff must allege facts which show that, "but for" defendant's conduct, the plaintiff would not have suffered the injuries claimed.⁵⁵ A plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct.⁵⁶ More plainly stated, a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation."⁵⁷

Thus, to avoid a Rule 12(b)(6) dismissal, Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."⁵⁸ These allegations must

⁵² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

⁵³ *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

⁵⁴ *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 559 (E.D. Tex. 2004)(citing *Holmes*, 503 U.S. at 279).

⁵⁵ *Ocean Energy II. V. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989).

⁵⁶ *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277,289 (5th Cir. 2007).

⁵⁷ *Sedima*, 473 U.S. at 496.

⁵⁸ *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006), 1996 (2006); *Old Time Enterprises*, 862 F.2d at 1219.

include specific facts; conclusory and generalized allegations are insufficient.⁵⁹ "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiffs' injuries."⁶⁰ The United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp.* In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."⁶¹ If the case were allowed to go forward, the court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages.⁶²

Clearly, the allegations in the Complaint are insufficient to properly plead a violation of the RICO Act because they are vague, conclusory and generalized. Nevertheless, just like in *Anza*, Plaintiffs have alleged a similar disjunctive causation pattern with respect to their claims against Mr. Lester. There is not a direct relation between the injury asserted and the injurious conduct alleged as anticipated by *Anza*. At a minimum, the necessary causal link is missing. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

F. PLAINTIFFS' CLAIMS FOR "HOBBS ACT," "WIRE FRAUD," "FRAUD UNDER 18 U.S.C. 51001," AND "HONEST SERVICES" FAIL BECAUSE THOSE STATUTES DO NOT CREATE PRIVATE CAUSES OF ACTION.

⁵⁹ *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278,284 (5th Cir. 1993).

⁶⁰ *Anza*, 547 U.S. at 452.

⁶¹ *Id.*

⁶² *Id.*

The Plaintiffs purport to assert claims against Mr. Lester for violation of the Hobbs Act, Wire Fraud, "Fraud under 18 U.S.C. 1001," and "Honest Services," but those acts do not create private causes of action. Thus, those claims should all be dismissed.

1. The Hobbs Act does not create a private cause of action.

The Hobbs Act does not create a private cause of action. *Moore v. Garner*, No. Civ.A. 6:04-CV-79, 2005 WL 1022088, at *4 (E.D. Tex. 2005) ("Nor does the Hobbs Act create a private cause of action") (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408 (8th Cir. 1999)). This is settled law. *See, e.g., Campbel v. Austin Air Systems, Ltd.*, 423 F. Supp. 2d 61, 72 (W.D.N.Y. September 29, 2005) ("[F]ederal courts have consistently found that the Hobbs Act does not support a private cause of action."); *Barge v. Apple Computer*, No. 95 CIV. 9715 (KMW), 1997 WL 394935, at *1 (S.D.N.Y. July 15, 1997), *affd*, 164 F.3d 617 (2nd Cir. 1998) ("[C]ourts that have considered this question have consistently found that the Hobbs Act does not support a private cause of action."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("There is no implied private cause of action under the Hobbs Act.").

Thus, Plaintiffs' Hobbs Act claim against Mr. Lester fails.

2. The Wire Fraud statute does not create a private cause of action.

The wire fraud statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) (citing *Napper v. Anderson, Hensley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) for its holding that there is "no private cause of action under the mail-and wire fraud statutes, 18 U.S.C. 1341 and 1343"); *see also Morse v. Stanley*, ICV230, 2012 WL 1014996, at *2 (E.D. Tex. Mar. 23, 2012) ("18 U.S.C. 1343 is a criminal statute pertaining to wire fraud and does

not provide Plaintiff with a private cause of action."); *Benitez v. Rumage*, CIV.A. c-11-208, 2011 WL 3236199, at *1 (S.D. Tex. July 27, 2011) (the wire fraud statute "do[es] not provide a private cause of action").

Thus, Plaintiffs' Wire Fraud act claim against Mr. Lester fails.

3. The claim for "Fraud under 18 U.S.C. 91001" is not a private cause of action.

Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails, as well, because that statute does not create a private cause of action. *See Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (Rosenthal, J.) ("The Thompsons assert causes of action under 18 U.S.C. 1001, 1010, 1014, 1341, 1343, and 1344. These federal criminal statutes do not provide a private cause of action.") (emphasis added). Again, this is settled law. *See Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987) ("Finding no congressional intent to create a private right of action under 1001 (b), Blaze has failed to state a claim upon which relief could be granted, and the district court's grant of summary judgment was proper."); *Grant v. CPC Logistics Inc.*, 3:12-CV-200-L BK, 2012 WL 601149, at *1 (N.D. Tex. Feb. 1, 2012), report and recommendation adopted, 3:12-CV-200-L, 2012 WL 601128 (N.D. Tex. Feb. 23, 2012) ("Federal courts have repeatedly held that violations of criminal statutes, such as 18 U.S.C. 1001, 1505 and 1621, do not give rise to a private right of action.") (emphasis added); *Parker v. Blake*, CIV. A. 08-184, 2008 WL 4092070, at *3 (W.D. La. Aug. 29, 2008) ("Section 1001 provides criminal penalties for persons convicted of fraud or false statements during the course of certain dealings with the federal government As above, this criminal statute, were it applicable to allegations made by plaintiff still would not create a private civil cause of action or entitlement to monetary relief thereunder."); *Doyon v. U.S.*, No. A-07-CA977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (holding that there is "no private cause of action under 18 U.S.C. 1001 ").

Thus, Plaintiffs' claim for "Fraud 18 U.S.C. 1001" fails.

4. The claim for "Honest Services" is not a private cause of action.

Plaintiffs allege three claims for "honest services," based on 18 U.S.C. 1346.⁶³ But 18 U.S.C. §1346 does not create a private cause of action either. *See Eberhardt v. Braud*, 16-CV-3153, 2016 WL 3620709, at *3 (C.D. 111. June 29, 2016) ("Plaintiff attempts to bring a private right of action under 18 U.S.C. 1346 and 18 U.S.C. §1951, but those criminal statutes do not contain an express or implied private right of action."); *Alford v. S. Gen. Ins.*, 7:12-CV-00273-BR, 2013 WL 1010584, at *2 (E.D.N.C. Mar. 14, 2013) (holding that a "claim for honest services fraud under 18 U.S.C. 1346" must be dismissed "pursuant to Rule 12(b)(6) because a private right of action for a violation of that law does not exist"); *Hooten v. Greggo & Ferrara Co.*, CIV. 10-776-RGA, 2012 WL 4718648, at *6 (D. Del. Oct. 3, 2012) ("18 U.S.C. 1341 and 1346 . . . are found in the federal criminal code. Neither §1341 or 1346 allow for a private cause of action.").

Thus, Plaintiffs' three claims against Mr. Lester for "Honest Services" fail.

5. Plaintiffs rely on impermissible collective pleading.

"A complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct."⁶⁴ And the pleading requirements of Rule 9(b) likewise demand specific and separate allegations against each defendant.⁶⁵

⁶³ See Complaint at ¶¶121-123.

⁶⁴ *In re Parkcentral Glob. Litig.*, 884 F. Supp. 2d 464, 471 (N.D. Tex. 2012) ("It is impermissible to make general allegations that lump all defendants together; rather, the complaint must segregate the alleged wrongdoing of No. 1 from another.").

⁶⁵ See *Dimas v. Vanderbilt Mortg & Fin., Inc.*, No. C-10-68, 2010 WL 1875803, at *8 (S.D. Tex. May 6, 2010) ("[W]hile the Complaint makes several general allegations of fraud, it often fails to specify the role each Defendant played in the alleged scheme."); *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (affirming dismissal of fraud claim for not stating with particularity "what representations each defendant made").

Here, Plaintiffs offer no individualized allegations about any wrongful conduct they allege against Mr. Lester. Instead, Plaintiffs' vague and fanciful pleadings are lobbed at all Defendants, with no discernible specific or separate allegations for Mr. Lester. This is insufficient to state a claim.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Lester respectfully prays that this Court GRANT this Motion to Dismiss, dismiss all of the Plaintiffs' claims against Mr. Lester with prejudice, and award Mr. Lester all such other relief to which he may be justly entitled.

Respectfully submitted,

ostrommorris, PLLC

BY: 

R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com


JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com

STACY L. KELLY
(TBA #24010153)
stacy@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

ATTORNEYS FOR GREGORY A. LESTER

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of the foregoing instrument was served on all known counsel of record through the Court's CM/ECF system, which constitutes service on all parties in accordance with the Federal Rules of Civil Procedure.


STACY L. KELLY