IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VALENTINA SHESHTAWY, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:16-cv-00733
	§	
CONSERVATIVE CLUB OF HOUSTON, INC., AKA "C CLUB PAC," ET AL.,	§	
	§	
	§	
Defendants.	§	

DEFENDANTS ROBERT MACINTYRE, JR., W. CAMERON MCCULLOCH, JILL WILLARD YOUNG, CHRISTOPHER BURT, AND MACINTYRE, MCCULLOCH, STANFIELD & YOUNG L.L.P.'S MOTION TO DISMISS AMENDED COMPLAINT

ROBERT S. HARRELL
ATTORNEY-IN-CHARGE
STATE BAR NO. 09041350
FEDERAL ID NO. 6690
ROBERT.HARRELL@NORTONROSEFULBRIGHT.COM
1301 MCKINNEY, SUITE 5100
HOUSTON, TX 77010-3095
TELEPHONE: (713) 651-5151
FACSIMILE: (713) 651-5246
OF COUNSEL:
BRIAN J. YOUNG
STATE BAR NO. 24089247
FEDERAL ID NO. 2726632
BRIAN.YOUNG@NORTONROSEFULBRIGHT.COM
NORTON ROSE FULBRIGHT US LLP
1301 MCKINNEY, SUITE 5100
HOUSTON, TX 77010-3095
TELEPHONE: (713) 651-5151
FACSIMILE: (713) 651-5246

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Pursuant to Federal Rules of Civil Procedure 8(a), 9(b), 12(b)(6), and 17(a), Defendants Robert MacIntyre, Jr., W. Cameron McCulloch, Christopher Burt, Jill Willard Young, and MacIntyre, McCulloch, Stanfield & Young, L.L.P. (the "MacIntyre Defendants") hereby submit this Motion to Dismiss and Brief in Support.

I. INTRODUCTION

Despite having had an opportunity to amend their Complaint to cure the numerous legal deficiencies identified by Defendants in the multiple Motions to Dismiss on file with the Court,[1] Plaintiffs still assert obviously deficient RICO, fraud, and breach of fiduciary duty claims against dozens of defendants, including two probate court judges, a court coordinator, appointed ad litem attorneys, opposing counsel, their own counsel, physicians, and their own family members.

In short, the 190-page original Complaint did not state a claim for numerous reasons, as the MacIntyre Defendants made clear in their Motion to Dismiss. The even longer but equally flawed 254-page Amended Complaint fares no better. The MacIntyre Defendants were opposing attorneys, court-appointed ad litem attorneys, and a guardian in the underlying probate proceedings. The conduct for which they have been sued is basic legal work they routinely perform on behalf of their clients, and the Amended Complaint still fails to explain how this routine conduct makes the MacIntyre Defendants liable for a criminal conspiracy, theft, mail and wire fraud, or any of the other criminal accusations in the Amended Complaint. The implausibility of the Amended Complaint is best illustrated by Plaintiffs' continued failure to properly plead even the basic elements of their RICO claims against the MacIntyre Defendants.

Plaintiffs betray the actual motive for this lawsuit: "Defendant Judge Loyd Wright and Defendant Associate Judge Ruth Ann Stiles always ruled against . . . the Plaintiffs." Dkt. No.

[1] Plaintiffs were made aware of their many pleading deficiencies through at least thirteen Rule 12(b)(6) motions to dismiss filed by or on behalf of almost thirty Defendants. Plaintiffs responded to those motions to dismiss by promising to "cure the deficiencies the Defendants attempted to identify in the Complaint." *See* Dkt. No. 92 at 11.

102, Pls.' Am. Compl. ¶ 359 (hereinafter, "Am. Compl."). Labeling their court a racketeering enterprise in a RICO action is not a proper substitute for appealing an unfavorable ruling, nor is it appropriate to use the federal courts to seek revenge against opposing and court-appointed counsel. Instead, as this lawsuit shows, a patently frivolous RICO suit is a blatant abuse of the United States courts system and its laws. *See Skidmore Energy, Inc. v. KPMG*, 455 F.3d 564, 568 (5th Cir. 2006) (affirming sanctions award for factually frivolous RICO filing). Because Plaintiffs cannot state a RICO, common law fraud, or breach of fiduciary duty claim against any of the MacIntyre Defendants, and have now failed to do so twice, the Court should dismiss the MacIntyre Defendants from this suit.

II. NATURE AND STAGE OF PROCEEDINGS

On March 18, 2016, Plaintiffs filed their Complaint alleging the MacIntyre Defendants violated the Racketeer Influenced and Corrupt Organization (RICO) Act and committed common law fraud and breach of fiduciary duty. On May 18, 2016, the MacIntyre Defendants filed a Motion to Dismiss each claim with prejudice. On June 8, 2016, Plaintiffs filed an Amended Complaint. Because of the new issues raised in the Amended Complaint, the MacIntyre Defendants now move under Rules 12(b)(6), 8(a), 9(b), and 17(a) to dismiss each of the claims in the Amended Complaint with prejudice, and in doing so, incorporate and restate the arguments set forth in their original Motion to Dismiss [Dkt. No. 108].

III. FACTUAL BACKGROUND

A. Defendant Cameron McCulloch and the Sheshtawy Matter

The "Sheshtawy Matter" took place in Harris County Probate Court No. 1 and involved the Estate of Adel Sheshtawy.[2] Valentina Sheshtawy and her daughter L.S. are the only

[2] Case No. 407499, *In the Estate of Adel Sheshtawy, Deceased*; Case No. 425238, *In re: Guardianship of the Estate of Lily Alexandra Sheshtawy, a Minor*.

"Sheshtawy Plaintiffs," and Valentina purports to bring this suit on L.S.'s behalf under Fed. R. Civ. P. 17(c).[3] Am. Compl. ¶ 9 n.23.

Because of a conflict of interest between Valentina and L.S., Judge Wright appointed McCulloch under Tex. Est. Code § 1054.007 to serve as L.S.'s attorney ad litem. Am. Compl. ¶¶ 58, 217, 265; Exs. A-B (orders appointing McCulloch as attorney ad litem).[4] Valentina Sheshtawy did not object to the appointment of an ad litem attorney and even moved for the court to again appoint an attorney ad litem for L.S. in the related guardianship proceeding. Ex. C (Valentina's Resp. to Movants' Mot. for Appointment of Attorney Ad Litem); Ex. D (Valentina's Mot. for Appointment of Attorney Ad Litem). McCulloch was appointed guardian of L.S.'s estate pursuant to a Tex. R. Civ. P. 11 settlement agreement executed by Valentina. Ex. E (Order Appointing Guardian of the Estate). Despite an allegation to the contrary in the Amended Complaint, McCulloch never served as L.S.'s guardian ad litem. *See* Am. Compl. ¶ 58.

As an attorney ad litem and guardian of L.S.'s estate, McCulloch received Judge Wright's approval before entering into settlement agreements on L.S.'s behalf or obtaining attorney's fees in connection with his representation of L.S. *See id.* ¶¶ 61, 248, 272, 277, 279. Attorneys ad litem and guardians are entitled to compensation under Texas law. Tex. Est. Code § 1054.007(b) ("attorney ad litem . . . is entitled to reasonable compensation for services provided in the amount set by the court"); *id.* § 1155.003 ("guardian of an estate is entitled to reasonable compensation on application to the court at the time the court approves an annual or final accounting filed by the guardian").

[3] Plaintiff Valentina Sheshtawy is also known as "Valentina Spassova," which she describes as her "maiden name." *See* Am. Compl. ¶ 190.

[4] The publicly-available February 28, 2013 Order appointing McCulloch as attorney ad litem includes the "Motion for Appointment of Attorney Ad Litem" filed by Defendants Sarah Pacheco and Kathleen Beduze on behalf of Defendants Nader Sheshtawy and Hanya Sustache. *See* Ex. A.

Judge Wright denied Plaintiff Valentina Sheshtawy's post hoc attempts to invalidate the Rule 11 agreements that resolved the Sheshtawy Matter, and she has appealed those rulings along with the other rulings she complains of in this suit. *Id.* ¶¶ 238, 267, 282.

McCulloch acted as an attorney and testified as a witness at a permanent injunction hearing against Valentina, which he was permitted to do under Tex. Disciplinary Rule of Prof'l Conduct 3.08(a)(4) as guardian of Lily's estate. Am. Compl. ¶¶ 289-90. As a result of the hearing, Judge Wright permanently enjoined Valentina from contacting third-party financial institutions, the Internal Revenue Service, and the Harris County Appraisal District to seek information relating to Adel Sheshtawy's private and confidential information. *Id.*

B. Defendant Jill Young and the Peterson Matter

The "Peterson Matter," which took place in Harris County Probate Court No. 1, was a guardianship proceeding over Ruby S. Peterson.[5] Judge Wright appointed Jill Young to be the guardian ad litem for Ruby S. Peterson under Tex. Est. Code § 1054.051. Am. Compl. ¶ 306; Ex. F. Ruby Peterson is now deceased. *See* Am. Compl. ¶ 67.

The allegations in the Amended Complaint were the subject of a temporary injunction hearing in Probate Court No. 1. *Id.* ¶ 365. As Ruby's guardian ad litem, Young opposed the Peterson Plaintiffs and their testifying expert. *Id.* ¶ 366. Judge Wright denied the Peterson Plaintiffs' motion for a temporary injunction. *Id.* ¶ 368. Young and other Defendants moved for sanctions and costs against the Peterson Plaintiffs, which was resolved through mediation and a resulting Rule 11 settlement agreement. *Id.* ¶ 375-76. Judge Wright entered judgment on the Rule 11 settlement. *Id.* ¶ 382.

[5] Case No. 427208, *In the Guardianship of Ruby Peterson, An Incapacitated Person.*

C. Defendants Robert MacIntyre and Christopher Burt and the Rizk Matter

The "Rizk Matter" is an ongoing dispute in Harris County Probate No. 1 concerning the Estate of Fred E. Rizk.[6] Defendants Robert MacIntyre, Jr. and Christopher Burt represent the executor of the Rizk Estate, Defendant J. Cary Gray. Am. Compl. ¶¶ 395(b)(i), 401, 422.

The "Rizk Plaintiffs" claim Judge Wright has consistently ruled against them. *Id.* ¶¶ 396-97. As part of the estate proceedings, the Rizk Plaintiffs initiated a declaratory action regarding the ownership of certain sewage rights, to which Robert MacIntyre Jr. filed a general denial. *Id.* ¶ 404. The Rizk Plaintiffs complain about Robert MacIntyre, Jr. moving to quash a deposition, opposing the Rizk Plaintiffs' motion for summary judgment, submitting affidavits not based on personal knowledge, and not addressing the statute of frauds and limitations with respect to the Rizk Estate's claim against Plaintiff Eddie Rizk. *Id.* ¶¶ 426, 449. Judge Wright has ruled against the Rizk Plaintiffs on each of these issues. *Id.* ¶ 451.

D. The Claims in the Amended Complaint

Plaintiffs assert RICO claims against the "Defendants," "Sheshtawy Defendants," "Rizk Defendants," and the "Peterson Defendants" under 18 U.S.C. § 1962(a), (b), and (d). Plaintiffs also assert common law fraud and breach of fiduciary duty claims against the Sheshtawy Defendants, Peterson Defendants, and Rizk Defendants. *See* Am. Compl. ¶¶ 572-601 (Counts I-V). The terms "Sheshtawy Defendants" and "Rizk Defendants" are not defined in the Amended Complaint. The "Peterson Defendants" are limited to Defendant Carol Ann Manley and Defendant David Troy Peterson.[7] *Id.* n.17.

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[6] Case No. 408941, *Estate of Fred E. Rizk, Deceased*.

[7] W. Cameron McCulloch, Robert MacIntyre, Jr., Christopher Burt, Jill Willard Young, and the Firm are described as being part of the "MacIntyre L.L.P. Defendants" and "Defendant MacIntyre L.L.P." Am. Compl. n.13. The allegations in the Amended Complaint relating to the Firm only relate to the conduct of its attorneys. Am. Compl. ¶ 71-72. Thus, this Motion to Dismiss and the grounds stated herein apply to all of the MacIntyre Defendants, including the Firm.

IV. STATEMENT OF THE ISSUES

1. **RICO Standing Under § 1964(c):** Whether Plaintiffs have pled facts showing they have sustained an injury proximately caused by the MacIntyre Defendants' alleged violations of RICO?
2. **Racketeering Under § 1961(1):** Whether Plaintiffs have pled facts showing the MacIntyre Defendants engaged in a "racketeering activity," which requires Plaintiffs to plead the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b)?
3. **RICO Claim Under § 1962(a):** Whether Plaintiffs have pled facts showing their injuries were proximately caused by the MacIntyre Defendants using income from a racketeering scheme to acquire an interest in or operate Probate Court No. 1?
4. **RICO Claim Under § 1962(b):** Whether Plaintiffs have pled facts showing their injuries were proximately caused by the MacIntyre Defendants gaining an interest or controlling Probate Court No. 1?
5. **Common Law Fraud:** Whether Plaintiffs have pled separate and individualized fraud allegations with the particularity required by Fed. R. Civ. P. 9(b)?
6. **Fiduciary Duty:** Whether Plaintiffs have pled separate and individualized facts showing a fiduciary relationship between Plaintiffs and the MacIntyre Defendants as required by Fed. R. Civ. P. 8(a) and *Iqbal*?
7. **Standing**: Whether the Peterson Plaintiffs and Valentina Sheshtawy have standing under Fed. R. Civ. P. 17 to assert claims against Defendants Young and McCulloch?
8. **Attorney Immunity:** Whether Plaintiffs have pled facts showing Robert MacIntyre, Jr., Christopher Burt, and Cameron McCulloch are entitled to immunity under Texas law as opposing counsel?

9. **Guardian Ad Litem Immunity**: Whether Plaintiffs have pled facts showing Jill Young is entitled to immunity under Texas law for her service as guardian ad litem?

V. LEGAL STANDARDS

A. Rule 8(a)

A court must dismiss a complaint for failure to state a claim when the factual allegations do not "raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is **plausible on its face**." *Del Castillo v. PMI Holdings North America Inc.*, No. 4:14-CV-3435, 2015 WL 3833447, at *5 (S.D. Tex. June 22, 2015) (Ellison, J.) (emphasis added) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere **conclusory statements**, do not suffice." *Iqbal*, 556 U.S. at 678 (emphasis added).

B. Rule 9(b)

Fraud claims must meet the heightened pleading requirements of Rule 9(b), which requires a plaintiff to plead allegations of fraud "with particularity." Fed. R. Civ. P. 9(b); *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) (per curiam) ("Rule 9(b) requires the 'who, what, when, where, and how' to be laid out.") (citation omitted); *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (to satisfy the particularity standard, a party must "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") (internal quotation marks and citations omitted).

By imposing a "higher, or more strict, standard than . . . basic notice pleading" on fraud claims, *Sushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993), Rule 9(b) ensures that a defendant "has sufficient information to formulate a defense; it protects defendants from harm to

their reputation and goodwill; it reduces the number of frivolous suits; and, it prevents plaintiffs from filing a claim and then attempting to uncover unknown wrongs through discovery." *United States ex. rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008).

C. Collective Pleading Under Rules 8(a) and 9(b)

Additionally, "[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." *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 one from another."). And the pleading requirements of Rule 9(b) likewise demand **specific** and **separate** allegations against each defendant. *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").

D. Capacity under Rule 17(a)

Rather than being an Article III jurisdictional objection, arguing that a party does not have the authority to bring a claim on behalf of an estate or a minor raises a prudential limitation that constitutes an objection to the real party in interest under Fed. R. Civ. P 17(a). *See Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999).

VI. SUMMARY OF THE ARGUMENT

All of Plaintiffs' RICO claims should be dismissed because Plaintiffs have not met their pleading burden to establish standing under RICO, and there are no well-pleaded and particular allegations that the MacIntyre Defendants committed a "racketeering activity" through the RICO

predicate acts of mail and wire fraud. Plaintiffs' separate RICO claims under § 1962(a), (b), and (d) also fail for other reasons. Plaintiffs cannot state a claim under § 1962(a) because they have not pled facts showing the MacIntyre Defendants received income from the alleged racketeering enterprise, Probate Court No. 1, that they in turn used to acquire an interest in or operate the court. Their claim under § 1962(b) likewise fails because they have not pled facts showing their injuries were caused by the MacIntyre Defendants acquiring an interest in or maintaining an interest in Probate Court No. 1. The conspiracy claim under § 1962(d) is deficient because Plaintiffs cannot state claims under § 1962(a)-(b).

The state-law claims against the MacIntyre Defendants should be dismissed for multiple reasons. First, the common law fraud claims against each MacIntyre Defendant should be dismissed because Plaintiffs have failed to plead their fraud claims with the requisite particularity, and their pleadings are collective and fail to identify separate wrongs for individual Defendants.

The breach of fiduciary duty claims against each MacIntyre Defendant should be dismissed for lumping Defendants together. The breach of fiduciary duty claims against MacIntyre, Jr., Young, and Burt should also be dismissed because the Amended Complaint shows they did not have a fiduciary relationship with any of the Plaintiffs. For the same reason, Valentina Sheshtawy's claim against Cameron McCulloch should be dismissed, because she did not have a fiduciary relationship with McCulloch. McCulloch only had a fiduciary relationship with L.S.

Also, Defendants McCulloch, MacIntyre, and Burt are protected by attorney immunity, requiring dismissal of all claims against them based on their conduct as counsel. Young is protected by statutory guardian ad litem immunity for all claims asserted against her. Finally, all

of the state-law claims against Young and McCulloch should also be dismissed because the Peterson Plaintiffs and Valentina Sheshtawy do not have capacity to sue under Rule 17.

VII. ARGUMENT AND AUTHORITIES

A. The RICO claims against the MacIntyre Defendants should be dismissed.

Plaintiffs' RICO claims in Counts I-III, alleging violations of § 1962(b), (a), and (d), should be dismissed under Fed. R. Civ. P. 12(b)(6) for three independent reasons:

(1) Plaintiffs have not shown they have statutory standing to bring a civil RICO action under 18 U.S.C. § 1964(c);

(2) Plaintiffs have failed to plead a "racketeering activity," namely by not pleading the RICO predicate acts of mail and wire fraud with the particularity required by Fed. R. Civ. P. 9(b);

(3) Plaintiffs have failed to plead facts supporting at least one essential element of each claim under § 1962(a), § 1962 (b), and § 1962(d).

1. Plaintiffs have not shown they have standing under § 1964(c) to assert civil RICO claims against the MacIntyre Defendants.

All of Plaintiffs' RICO claims should be dismissed under Fed. R. Civ. P. 12(b)(6) because they have not met the threshold showing of statutory standing under § 1964(c).

A RICO plaintiff must show that he has statutory standing to sue under § 1964(c), which limits civil claimants to "[a]ny person injured in his business or property by reason of a violation of [RICO]." 18 U.S.C. § 1964(c); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). Courts construe § 1964(c) as requiring plaintiffs to "show that the [RICO] violation was a but-for and proximate cause of the injury." *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (citing *Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639, 654 (2008)). The focus of the proximate cause analysis is "directness," i.e., asking whether "the injury or damage was either a direct result or a reasonably probable consequence of the act." *Plambeck*, 802 F.3d at 676; *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 459, 460 (2006) ("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 plaintiff's injuries."); *Holmes v. Securities Investor Protection Corp.*, 559 U.S. 1, 9-10 (1992) ("[P]roximate cause" requires "some direct relation between the injury asserted and the injurious conduct alleged.").

Plaintiffs do not plead facts showing they suffered a financial loss that directly resulted from RICO violations by the MacIntyre Defendants. *See Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 408 (5th Cir. 2015). Plaintiffs complain of losses in the form of attorney's fees, costs, and losses to their alleged shares of the estates of Adel Sheshtawy, Ruby Peterson, and Fred Rizk. *See* Am. Compl. at 242-44. But Plaintiffs cannot use alleged injuries to the respective estates as a basis for RICO standing. *See Firestone v. Galbreath*, 976 F.2d 279, 281 (6th Cir. 1992).

In *Firestone*, the beneficiaries of the Firestone family estate and trust asserted RICO claims against the executor and trustee. *Id.* at 282. The court affirmed the district court's dismissal of the RICO claims for lack of standing, noting that the estate, not the beneficiaries, suffered the direct harm. *Id.* at 285 (citing *Holmes*, 559 U.S. at 9-10). The alleged harm inflicted by the executor and trustee flowed only indirectly to the beneficiaries through the harms inflicted directly on the decedent and her estate. *Id.* (reasoning that the beneficiaries were similar to shareholders who sue for acts aimed at a corporation—"the shareholder's injury is only indirect because the decrease in the value of the corporation precipitates the drop in the value of the stock") (citing *Gaff v. FDIC*, 814 F.2d 311 (6th Cir. 1987); *Warren v. Manufacturer's Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985)). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

Like the aggrieved beneficiaries in *Firestone*, Plaintiffs here have only alleged indirect harm through the alleged injuries inflicted on the Sheshtawy, Peterson, and Rizk estates. The rationale underlying the direct relationship requirement is plainly applicable, because the estates "can be expected to vindicate the laws by pursuing their own claims." *See Holmes*, 503 U.S. at 269-70 (holding broker dealers could be relied upon to bring suit against alleged securities fraud co-conspirators); *Anza*, 547 U.S. at 460 ("If the allegations are true [that defendants are defrauding the State of New York], the State can be expected to pursue appropriate remedies."). In short, by alleging that Defendants caused harm to the estates, which in turn caused harm to Plaintiffs, Plaintiffs improperly ask the Court to go "well beyond the first step." *See Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 10 (2010) ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.").

Plaintiffs have also not met their pleading burden to show their attorney's fees and costs were proximately caused by the MacIntyre Defendants' alleged RICO violations. *See* Am. Compl. ¶ 283. Instead, the allegations in the Amended Complaint show Plaintiffs' attorney's fees were caused by their own initiation of legal proceedings to recover what they believed were their rightful shares of the underlying estates. *See, e.g.*, *McCoy-McMahon v. Godlove*, No. 08-CV-05989, 2011 WL 4820185, at *16 (E.D. Pa. Sept. 30, 2011) ("[P]laintiff was not hauled into court but rather incurred legal expenses at her own initiation in response to the individual defendants alleged racketeering activities. Hence, plaintiff's legal expenses are not proximately caused by the defendants' conduct."); *Halpin v. David*, No. 4:06CV457-RH/WCS, 2009 WL 2960936, at *3 (N.D. Fla. Sept. 10, 2009) (holding alleged damages for "attorney's fees and travel expenses incurred in connection with rigged parole hearing" did not satisfy proximate

cause requirement because the "hearing was going to place" anyway); *Miller Hydro Grp. v. Popovitch*, 851 F. Supp. 7, 13-14 (D. Me. 1994) (holding there was no factual basis to determine whether a connection existed between litigation costs and alleged RICO violation); *Religious Tech. Ctr. v. Gerbode*, No. CV 93-2226 AWT, 1994 WL 228607, at *2 (C.D. Cal. May 2, 1994) (holding attorney's fees alleged as damages did not meet proximate cause requirement).

Additionally, a party does not plead RICO proximate cause when the directness inquiry requires a complex assessment to determine what part of the alleged injury resulted from non-culpable conduct and what part resulted from a RICO violation. *See Anza*, 547 U.S. at 459-60 (holding lost sales could have resulted from factors other than fraud, and speculative proceedings would be necessary to parse out damages actually resulting from RICO violations); *Varela v. Gonzales*, 773 F.3d 704, 711 (5th Cir. 2014) (affirming 12(b)(6) dismissal of RICO claims against employer for hiring undocumented workers that allegedly caused depressed wages because allegations in the complaint and factual assertions in attached expert report failed to sufficiently allege proximate cause).

Here, the attorney's fees and costs incurred by Plaintiffs resulted from factors other than the Defendants' alleged fraud, as Plaintiffs' own allegations detail significant, time-consuming litigation in Probate Court No. 1 over substantial estates. *See* Am. Compl. at 242-44 (Sheshtawy Plaintiffs' damages include one-third of estate, or $30 million; Peterson Plaintiffs' damages include $4 million in inheritance and trust losses; and Rizk Plaintiffs' damages include $5 million in inheritance and $2.5 million in trust losses). To assess RICO damages, this Court would be required to parse Plaintiffs' attorney's fees and costs to determine which were legitimately incurred in the ordinary course of probate litigation, and which were incurred because of the MacIntyre Defendants' alleged violations of RICO. This speculative task

highlights a "discontinuity between the RICO violation and the asserted injury" and "implicates fundamental concerns expressed in *Holmes*" that gave rise to the "directness" test. *See Anza*, 547 U.S. at 459. Because Plaintiffs have not pled plausible allegations showing their injuries were directly caused by a violation of RICO, they have failed to satisfy the proximate causation requirement necessary to establish RICO standing. *See Varela*, 773 F.3d at 710. All of Plaintiffs' RICO claims should be dismissed under Fed. R. Civ. P. 12(b)(6).

2. Section 1961(1): Plaintiffs have not pled facts showing the MacIntyre Defendants engaged in a "racketeering activity."

All of Plaintiffs' RICO claims should be dismissed under Fed. R. Civ. P. 9(b) and 12(b)(6) because the allegations do not show the MacIntyre Defendants engaged in the "racketeering activities" of mail and wire fraud.

All RICO claims require that a defendant commit a "pattern of racketeering activity." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). A "[r]acketeering activity consists of two or more predicate criminal acts" listed in 18 U.S.C. § 1961(1). *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (citation omitted); *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 559 (5th Cir. 2015). The predicate acts can be certain state or federal crimes. *See* 18 U.S.C. § 1961(1). But theft, common law fraud, and other garden-variety torts are not racketeering activities. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (holding plaintiffs pled facts showing nothing more than "violations of the rules of professional responsibility," not "the requisite predicate *criminal* acts under RICO"); *Toms v. Pizzo*, 4 F. Supp. 2d 178, 183 (W.D.N.Y.), *aff'd*, 172 F.3d 38 (2d Cir. 1998) ("[S]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 445 (1st Cir. 1990) ("[A]cts of common law fraud that do not implicate the mails (or the wires) do not constitute 'racketeering

activity'"); *Stangel v. A-1 Freeman N. Am., Inc.*, No. CIV.A. 3:01-CV-2198M, 2001 WL 1669387, at *1 (N.D. Tex. Dec. 27, 2001) ("breach of a settlement agreement, interference with a contract, conversion of property, and intentional infliction of emotional distress" are not racketeering activities).

Of the many offenses and claims Plaintiffs assert are RICO predicate acts, only mail and wire fraud are racketeering activities under § 1961(1).[8] And even though they generally allege these two offenses, Plaintiffs have not identified even one specific fraudulent communication.

"The mail fraud statute applies to anyone who knowingly causes to be delivered by mail anything for the purpose of executing any scheme or artifice to defraud," and "wire fraud involves the use of, or causing the use of, wire communications in furtherance of a scheme to defraud." *Plambeck*, 802 F.3d at 675 (citing *United States v. Whitfield*, 590 F.3d 325, 355 (5th Cir. 2009); *United States v. Stalnaker*, 571 F.3d 428, 436 (5th Cir. 2009)). Mail and wire fraud must be pled with particularity. *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (holding "alleged wrongs [were] not plead[] with sufficient particularity to constitute the RICO predicate act of wire fraud or mail fraud"); *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) ("Fed. R. Civ.P. 9(b) applies to . . . RICO claims resting on allegations of fraud."). Thus, to adequately plead mail or wire fraud, Plaintiffs must allege "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." *Tel-Phonic*, 975 F.2d at 1139 (emphasis added) (citing Fed. R. Civ. P. 9(b)). RICO claims should be dismissed if they

[8] Plaintiffs serially assert that the MacIntyre Defendants committed "fiduciary fraud" under Tex. Penal Code § 32.45, commercial bribery under Tex. Penal Code § 32.43, theft under Tex. Penal Code § 31.03, and tampering with a governmental document under Tex. Penal Code § 37.10. *See, e.g.*, Am. Compl. ¶¶ 53, 57, 63, 66, 166. However, Plaintiffs have not even attempted to plead facts showing any of the conduct by the MacIntyre Defendants satisfies the elements of these serious offenses, or that they are RICO predicate acts under 18 U.S.C. § 1961(1). Plaintiffs also incoherently assert that they have "pled generally . . . obstruction of justice on the part of the Defendants, which enhances the RICO claims." Am. Compl. ¶ 26. Again, Plaintiffs do not plead any facts to support this criminal accusation.

rest on mail and wire fraud claims that are not pled with particularity. *See id.*; *Elliott v. Foufas*, 867 F.2d 877, 882 (5th Cir. 1989); *St. Germain*, 556 F.3d at 263.

Plaintiffs have not come close to satisfying this requirement. They have not identified the content of a single false representation by any of the MacIntyre Defendants, much less pled the time, place, identity, or object of the fraud. Rather, Plaintiffs repeat the words that each of the MacIntyre Defendants "committed mail and wire fraud" through various court filings or, even more preposterously, by being "telecopied" on court filings. *See, e.g.*, Am. Compl. ¶¶ 162 ("Defendant lawyers herein all committed mail and wire fraud through their various filings . . . ."); *id.* ¶ 355 ("Defendant Judge Loyd Wright filed this Order electronically and telecopied it to Defendant Ms. Young [and other Defendants], which constitutes acts of wire fraud."). But they do not state which pleadings, or what content in those pleadings, were fraudulent. An attorney does not commit mail or wire fraud by filing papers with the Court or engaging in routine attorney conduct.[9] Merely labeling that conduct as "mail and wire fraud" will not do. *See Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do.");

Plaintiffs filed their Amended Complaint to correct the many deficiencies identified by Defendants in the their Motions to Dismiss. The principal difference between the original Complaint and Amended Complaint is the 60-page list of documents (which are attached as

[9] Federal courts have repeatedly rejected Plaintiffs' theory that routine litigation conduct can be the basis for RICO or mail or wire fraud claims. *See, e.g.*, *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) ("RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it."); *Gunn v. Palmieri*, No. 87 CV 1418, 1989 WL 119519, at *1 (E.D.N.Y. Sept. 29, 1989), *aff'd*, 904 F.2d 33 (2d Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991); *Spiegel v. Continental Illinois Nat. Bank*, 609 F. Supp. 1083 (N.D. Ill. 1985) ("Congress could not have intended that the mail fraud statute sweep up correspondence between attorneys, dealing at arm's length on behalf of their parties."); *Morin v. Trupin*, 711 F. Supp. 97, 106 (S.D.N.Y. 1989); *Paul S. Mullin & Assocs., Inc. v. Bassett*, 632 F. Supp. 532, 540 (D. Del. 1986) ("The Court finds absurd plaintiffs' apparent suggestion that a lawyer's act in posting a letter which states a client's legal position in a dispute can constitute mail fraud."); *Eastern Savings Bank, FSB v. Papageorge*, 31 F. Supp. 3d 1, 13 (D.D.C. 2014) ("Plaintiff's litany of woes delineated in the complaint cannot, as a matter of law, form the basis of a RICO complaint, since they are all directly or indirectly related to on-going, non-frivolous litigation . . . .").

hundreds of pages to the Amended Complaint). *See* Am. Compl. ¶¶ 454-571. But Plaintiffs do nothing more than provide a cursory description of the documents and again baldly state that routine e-filings, emails, faxes, and other correspondence are RICO predicate acts, mail fraud, and wire fraud. *See id.* Indeed, these documents show only what is undisputed—the MacIntyre Defendants performed legal work in the Lawsuits, nothing more than the "daily grist of the mill" of practicing attorneys. *See Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) (holding the routine work of attorneys cannot create aiding and abetting liability under the federal securities laws). Like the rest of the Amended Complaint, these conclusory assertions of fraud and "evidence" fall woefully short of the particularity requirement of Fed. R. Civ. P. 9(b).[10]

Additionally, Plaintiffs' refrain that the collective "Defendants" committed mail and wire fraud is legally insufficient because it fails to state any individualized fraud allegations against any of the individual MacIntyre Defendants. *See Del Castillo*, 2015 WL 3833447, at *6 ("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."); *Dimas*, 2010 WL 1875803, at *8 (dismissing RICO claims, in part, because the complaint failed to specify the role each Defendant played in the alleged scheme).

Because Plaintiffs have failed to plead facts showing the MacIntyre Defendants engaged in a "racketeering activity," namely the RICO predicate acts of mail and wire fraud, their RICO claims should be dismissed. *See Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.) (dismissing RICO claims against probate judges, attorneys, and clerks for failure to state a racketeering activity).

[10] Plaintiffs cannot satisfy their burden with hundreds of pages of routine correspondence and court filings in an attempt to have the Court to do their work for them. *See Finley v. Washington Mut. Bank, F.A.*, No. 4:07CV225, 2008 WL 2278922, at *3 (E.D. Tex. May 29, 2008) ("The Court's time and resources are limited, and the Court will not do Plaintiff's work for him.").

3. Plaintiffs have not pled facts to support each element of their separate claims under § 1962(a), (b), and (d).

Each of Plaintiffs' RICO claims asserted in Counts I-III should be dismissed for a third independent reason—Plaintiffs have not pled facts to support each element of their separate claims. The separate RICO claims under § 1962(a), (b), and (d) are summarized as follows:

> (a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;
>
> (b) a person cannot acquire or maintain an interest in an enterprise through a pattern of racketeering activity;
>
> (d) a person cannot conspire to violate subsections (a), (b), or (c).

Abraham, 48 F.3d at 354-55. Plaintiffs must plead the unique elements of each RICO subsection. They have not done so.

a. **Count II, Section 1962(a): Plaintiffs have not pled that the MacIntyre Defendants used racketeering income to acquire an interest in or operate Probate Court No. 1.**

Plaintiffs' claim under § 1962(a) should be dismissed because they have not pled an injury from the MacIntyre Defendants' use of racketeering income to acquire an interest in or operate Probate Court No. 1.

Section 1962(a) prohibits a person from investing racketeering income in an enterprise. *Abraham*, 480 F.3d at 354. Thus, a plaintiff must prove the defendant derived income from a pattern of racketeering activity and used that income to acquire an interest in or operate an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000) (emphasis added); *In re Burzynski*, 989 F.2d 733, 744 (5th Cir. 1993). In other words, to state a civil claim under § 1962(a), Plaintiffs must prove they were "injured as a result of the use or investment of racketeering proceeds." *BAC Home Loans Servicing, LP v. Texas Realty*

Holdings, LLC, 901 F. Supp. 2d 884, 919 (S.D. Tex. 2012). The "injury must be separate from any injury as a result of the racketeering activity." *Williamson*, 224 F.3d at 443.

First, Plaintiffs have not pled facts showing the MacIntyre Defendants received income from a racketeering activity. Instead, the only income identified is attorney's fees payable to attorneys ad litem, guardians ad litem, and guardians under the Texas Estates Code. *See* Tex. Est. Code. §§ 1155.003, 1054.055, 1054.07(b).

Nor do Plaintiffs state how any alleged racketeering income received by the MacIntyre Defendants was used to acquire an interest in or operate the allegedly illegal enterprise, Probate Court No. 1. *See* Am. Compl. ¶ 159 ("All of Defendants' target herein as an enterprise, which . . . was and is Probate Court 1 for Harris County Texas . . . ."). Their conclusory statement that "Defendants used or invested, directly or indirectly, part or all of such income, or the proceeds of such income, in the establishment or operation of the association in fact to further the association's scheme to defraud Plaintiffs of all valuable assets and property" is woefully inadequate. *Id.* ¶ 583. It does not identify any particular Defendant, which income was invested, what "association in fact" was used, or what specific scheme was furthered. *See Abraham*, 480 F.3d at 357 ("Conclusory allegations are insufficient to state a claim under § 1962(a).").[11] Their failure to plead specific facts showing the MacIntyre Defendants invested racketeering income in Probate Court No. 1 shows, at most, Plaintiffs' alleged injuries "stem not from the use of or investment of racketeering income, but from the Defendants' alleged predicate acts . . . ." *See Abraham*, 480 F.3d at 357; Am. Compl. ¶ 283 ("The acts of Sheshtawy Defendants directly and

[11] Attorney's fees approved by Judge Wright cannot suffice to show the MacIntyre Defendants were able to acquire an interest in or operate Probate Court No. 1, as those fees were paid as compensation under the Texas Estates Code and therefore not derived from racketeering activity. *See Williamson*, 224 F.3d at 442 (affirming dismissal of § 1962(a) claim, in part, because "investment was derived income attributed to acts that were not alleged to have been predicate acts forming a pattern of racketeering activity"). Without racketeering income, there is nothing to invest in the enterprise and no resulting injury. *See id.*

proximately caused the damages to Plaintiff. . . . These acts are also RICO predicate acts."); *see also id.* ¶¶ 74, 382, 384. Pleading an injury caused by an alleged RICO predicate act does not state a claim under § 1962(a). *See Abraham*, 480 F.3d at 356-57.

Without specific facts showing the MacIntyre Defendants used any part of any allegedly ill-gotten income or attorney's fees to acquire an interest in or operate any alleged enterprise, and that Plaintiffs were injured as a result of that investment, Count II should be dismissed.

b. **Count I, Section 1962(b): Plaintiffs have not pled their injuries were proximately caused by the MacIntyre Defendants gaining an interest in or controlling Probate Court No. 1.**

Plaintiffs' claim under § 1962(b) should be dismissed because Plaintiffs have not pled that their alleged injuries—attorney's fees, court costs, and losses to estates and trusts—were proximately caused by the MacIntyre Defendants gaining an interest in or controlling Probate Court No. 1 through mail and wire fraud.

To state a claim under 18 U.S.C. § 1962(b), "Plaintiffs must show that their injuries were 'proximately caused by a RICO violator gaining an interest in, or control of, the enterprise through a pattern of racketeering activity." *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995). Plaintiffs must do more than aver in conclusory terms that the MacIntyre Defendants "have, through a pattern of racketeering activity, maintained . . . an interest in or control of an enterprise." *Abraham*, 480 F.3d at 357. Plaintiffs must instead plead specific facts showing a "causal relationship between their injuries and the Defendants' acquisition or maintenance of an interest in the enterprise." *Id.* (citing *Crowe*, 43 F.3d at 205 ("[T]here must be a nexus between the claimed RICO violations and the injury suffered")).

Plaintiffs do not plead a causal relationship between the injuries they allege—diminution in the value of their alleged shares in the relevant estates, attorney's fees, and costs—and the MacIntyre Defendants acquiring or maintaining an interest in Probate Court No. 1. Rather,

Plaintiffs simply state the MacIntyre Defendants "did in fact conspire to defraud the Rizk Plaintiffs . . . the Peterson Plaintiffs and the Sheshtawy Plaintiffs through fiduciary, mail and wire fraud, which they accomplished resulting directly and proximately in injuries to those Plaintiffs' property and businesses." *See* Am. Compl. ¶ 74. Thus, it is the alleged RICO predicate acts of mail and wire fraud, not the maintenance of an interest in or control of Probate Court No. 1, that allegedly caused the injuries the Plaintiffs allege.

In an attempt to properly plead a claim under § 1962(b), Plaintiffs allege the collective Defendants "acquired or maintained, directly or indirectly, interest in or control over Defendant CPAC and through that Defendant Harris County Probate Court 1." Am. Compl. ¶ 573. But this allegation is the very type of conclusory allegation the Fifth Circuit has stated should be dismissed, because it is unsupported by any specific facts in the Amended Complaint showing a causal relationship between the injuries alleged and the MacIntyre Defendants' alleged acquiring or maintaining an interest in Probate Court No. 1. *See Abraham*, 480 F.3d at 357 ("Their complaint describes no facts that would show a causal relationship between their injuries and the Defendants' acquisition or maintenance of an interest in the enterprise.").

Because Plaintiffs do not plead specific facts showing their harm was caused by the MacIntyre Defendants acquiring or maintaining an interest in Probate Court No. 1, the alleged enterprise, they have failed to state a RICO claim under § 1962(b). Count I against the MacIntyre Defendants should be dismissed.

c. **Count III, Section 1962(d): Plaintiffs cannot maintain a RICO conspiracy claim without pleading a claim under § 1962(a) or (b).**

Plaintiffs' conspiracy claim under § 1962(d) should also be dismissed under Rule 12(b)(6) because Plaintiffs have failed to state a claim under 18 U.S.C. § 1962(a) or (b). *See* 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions

of subsection (a), (b), or (c) of this section."); *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 203 (5th Cir. 2015) (affirming dismissal of RICO conspiracy claim because of failure to properly plead claims under § 1962(a), (b), or (c)).

B. Plaintiffs have not pled common law fraud claims against the individual MacIntyre Defendants with particularity.

Plaintiffs' common law fraud claims against the MacIntyre Defendants in Count V are legally insufficient because they are not asserted against any of the individual MacIntyre Defendants, they improperly lump Defendants together, and they have not been pled with particularity under Fed. R. Civ. P. 9(b).

The terms "Sheshtawy Defendants" and "Rizk Defendants" are undefined in the Amended Complaint, and the "Peterson Defendants" are limited to Defendants Carol Ann Manley and David Peterson. *See* Am. Compl. ¶¶ 595-601 (alleging fraud against the "Sheshtawy Defendants," "Rizk Defendants," and "Peterson Defendants"); *id.* n.17. Accordingly, no common law fraud claims are asserted against any of the individual MacIntyre Defendants.

But even if the MacIntyre Defendants were among the foregoing groups, Plaintiffs have also "improperly lumped together all defendants, while providing no factual basis to distinguish their conduct." *See Del Castillo*, 2015 WL 3833447, at *6. Rule 9(b) requires specific, particular, and separate allegations against each Defendant. *See Dimas*, 2010 WL 1875803, at *8. And, like their mail and wire fraud claims, Plaintiffs have not pled their common law fraud claims with particularity. *See Potter*, 607 F.3d at 1032 (requiring "who, what, where, when, and how"). Instead, Plaintiffs list hundreds of pages of documents comprising routine attorney correspondence, court filings, and routine litigation conduct, but they do not identify any fraudulent representations in those documents. *See Wallace v. Tesoro Corp.*, 796 F.3d 468, 480 (5th Cir. 2015) ("**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." (emphasis added)).

Thus, any common law fraud claims against the MacIntyre Defendants should be dismissed under Rule 12(b)(6). *See Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 550-51 (5th Cir. 2010) (dismissing state-law fraud claims for failing to identify the speaker, state when and where the statements were made, or explain why the statements were fraudulent).

C. Plaintiffs' breach of fiduciary duty claims should be dismissed because they are collectively pled and show the MacIntyre Defendants did not have a fiduciary duty to the Rizk Plaintiffs, Peterson Plaintiffs, or Valentina Sheshtawy.

The fiduciary duty claims in Count IV should be dismissed under Fed. R. Civ. P. 12(b)(6) for three reasons—(1) Plaintiffs have not asserted claims against any of the MacIntyre Defendants; (2) the allegations impermissibly lump Defendants together; and (3) the MacIntyre Defendants did not have fiduciary relationships with any of the Rizk Plaintiffs, Peterson Plaintiffs, or Plaintiff Valentina Sheshtawy.

Plaintiffs allege the "Sheshtawy Defendants," "Rizk Defendants," and "Peterson Defendants" breached their fiduciary duties. *See* Am. Compl. ¶¶ 588-94. As already stated, none of the MacIntyre Defendants are identified as being members of these Defendant groups. Accordingly, Plaintiffs have not asserted breach of fiduciary duty claims against any of the MacIntyre Defendants, and those claims should be dismissed.

But even if the MacIntyre Defendants were each part of the "Sheshtawy Defendants," the "Peterson Defendants," and the "Rizk Defendants," these allegations are deficient under Rule 8(a) for lumping Defendants together and failing to distinguish their individual conduct. *See Del Castillo*, 2015 WL 3833447, at *6.

In addition, to state a claim for breach of fiduciary duty, Plaintiffs must plead facts showing "a fiduciary relationship between the plaintiff and defendant." *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 581 (5th Cir. 2015) (quoting *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.)). From the face of the Amended Complaint, it is clear that none of the Plaintiffs had fiduciary relationships with Robert MacIntyre, Jr. or Christopher Burt, who only represented J. Cary Gray, a Defendant in this suit. Am. Compl. ¶¶ 54, 63.

It is equally clear from the Amended Complaint that Jill Young could only have had a fiduciary relationship with Ruby S. Peterson, who is now deceased. Am. Compl. ¶ 297; *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ denied). As discussed below, the Peterson Plaintiffs do not have standing to sue on Ruby's behalf, because that authority is vested with the guardian of her estate. *See In re Guardianship of Archer*, 203 S.W.3d 16, 22 (Tex. App.—San Antonio 2006, pet. denied).

Plaintiffs allege McCulloch represented L.S. as attorney ad litem and guardian of her estate. Am. Compl. ¶¶ 58, 266. Because McCulloch did not represent Valentina Sheshtawy, he did not have a formal fiduciary relationship with her. *Id.* ¶ 6 (describing McCulloch as "opposing counsel").

The only fiduciary relationship in this entire case involving any of the MacIntyre Defendants and any of the Plaintiffs is the fiduciary relationship between McCulloch and L.S., as attorney ad litem and guardian of L.S.'s estate.[12] But for the reasons stated below, Valentina

[12] Texas law does imply fiduciary duties in "certain informal relationships based on a relationship of trust and confidence," *Bancroft Life & Cas. ICC, Ltd. v. GRBR Ventures, L.P.*, 12 F. Supp. 3d 980, 994 (S.D. Tex. 2014), but "the relationship of trust and confidence must exist prior to, and apart from, the agreement that is the basis of the suit." *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Here, Plaintiffs do not allege they had a relationship of trust and confidence that existed prior to the events giving rise to this suit.

Sheshtawy does not have capacity to sue on L.S.'s behalf, and all of L.S.'s claims should be dismissed.

Because Plaintiffs have not actually asserted breach of fiduciary claims against the individual MacIntyre Defendants, have improperly lumped Defendants together, and have not pled the existence of a fiduciary relationship, Count IV should be dismissed. *See Texas Opportunity Fund L.P. v. Hammerman & Gainer Int'l, Inc.*, 107 F. Supp. 3d 620, 637 (N.D. Tex. 2015) (dismissing breach of fiduciary duty claims under Rule 12(b)(6) for failure to plead plausible formal or informal fiduciary relationship).

D. Plaintiff Valentina Sheshtawy and the Peterson Plaintiffs do not have standing to pursue claims against Defendants McCulloch and Young.

All claims purportedly asserted by Valentina Sheshtawy on behalf of L.S., and all claims asserted by the Peterson Plaintiffs, should be dismissed because they do not have standing or capacity under Rule 17 to bring those claims.

1. Plaintiff Valentina Sheshtawy does not have standing or capacity to sue McCulloch or the Firm on behalf of her daughter L.S.

Plaintiffs Valentina Sheshtawy and L.S. are asserting claims exclusively against McCulloch and the Firm. Am. Compl. ¶ 7. Valentina purports to sue on L.S.'s behalf as "next friend" but also states that she is representing L.S. under Fed. R. Civ. P. 17(c)(1)(A), which allows a "general guardian" to sue on behalf of a minor. *See* Am. Compl. ¶ 9 n.23. Valentina cannot assert claims on behalf of L.S.

Under Federal Rule of Civil Procedure 17(b)(3), Valentina's capacity to sue on behalf of L.S. is determined by Texas law. *See Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 163-64 (5th Cir. 2016) (holding resort to state law is necessary despite language in Rule 17(c) authorizing a "general guardian" to sue on behalf of a minor). Only the guardian of the minor's estate has capacity to sue on the minor's behalf. *See id.* at 164 (citing Tex. Est. Code §

1151.104(a)(1) ("The guardian of the estate of a ward appointed in this state may commence a suit for . . . the recovery of personal property, debts, or damages . . . ."). Texas courts construe this provision as giving the guardian of the estate the **exclusive right** to sue on behalf of the ward. *See id.* (citing *In re Guardianship of Archer*, 203 S.W.3d at 21 ("Generally speaking, only the guardian of the ward's estate may bring a lawsuit on behalf of a ward.")).

Although Tex. R. Civ. P. 173.2(a) requires a court to appoint a guardian ad litem if the "guardian appears to the court to have an interest adverse to the party," Valentina has not requested the Court to appoint a guardian ad litem in this case. Instead, Valentina has unilaterally decided to pursue the case as "next friend" of L.S. But this too is improper. Under Texas law, "[a] guardian ad litem is necessary when a parent has an interest adverse to a minor child because the parent cannot be presumed to act in the child's best interests in the lawsuit." *In re KC Greenhouse Patio Apartments*, LP, 445 S.W.3d 168, 175-76 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Indeed, "the conflict need not actually exist; the **potential for conflict is sufficient** to justify the appointment of a guardian ad litem." *Id.* at 176 (emphasis added) (citing *Owens v. Perez*, 158 S.W.3d 96, 111 (Tex. App.—Corpus Christi 2005, no pet.)); *see also id.* ("Courts most commonly apply the rule to adverse interests relating to the division of settlement proceeds.").

McCulloch was appointed as attorney ad litem for L.S. in two related proceedings because a "material conflict" existed between Valentina and L.S. Exs. A-B. Valentina was the movant in one of the proceedings and simply consented to the appointment in the other proceeding (the Sheshtawy Matter). Exs. C-D. The conflict that triggered the appointments still exists. The allegations in the Complaint that (1) Valentina was the spouse of Adel Sheshtawy, (2) she was entitled to one-third of his estate, and (3) the Rule 11 settlement agreement she

executed was invalid, all show that Valentina's interests remain adverse to L.S., who received substantial assets under the Rule 11 settlement agreement Valentina seeks to nullify through this lawsuit. *See* Am. Compl. ¶¶ 190, 230, 267, p. 242. Indeed, Valentina's allegations in the Amended Complaint are mirror images of arguments and issues she has already raised in Probate Court No. 1, where McCulloch served as attorney ad litem for L.S because of a "material conflict." *See* Ex. A.

Thus, Valentina does not have capacity to sue on L.S.'s behalf under Rule 17. The only persons who may sue are (1) McCulloch as guardian of L.S.'s estate, or (2) a new guardian ad litem under Rule 17(c) if the Court finds a conflict of interest exists between McCulloch and L.S. Although a guardian ad litem could ratify this suit on L.S.'s behalf under Rule 17(a)(3), ratification is permitted "only when the plaintiff brought the action in her own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult." *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 308 (5th Cir. 2001). Given the underlying probate proceeding in which McCulloch was twice appointed attorney ad litem with Valentina's consent and at her request, it was not understandable for Valentina to believe she could bring this suit on L.S.'s behalf. This suit was filed on March 18, 2016, the MacIntyre Defendants raised the "next friend" issue in their Motion to Dismiss on May 18, 2016, and Plaintiff Valentina Sheshtawy has still failed to request the appointment of a guardian ad litem for L.S. Thus, L.S.'s claims should be dismissed under Fed. R. Civ. P. 17 because Valentina cannot sue on L.S.'s behalf.

2. The Peterson Plaintiffs do not have standing to sue Young or the Firm.

The Peterson Plaintiffs do not have standing to assert claims against Jill Young and the Firm because they were not guardians, representatives of Ruby's estate, or trustees of the Peterson Family Trust II. Defendant Jill Young was appointed as guardian ad litem for Ruby S.

Peterson. Am. Compl. ¶ 306; Ex. F. She is being sued by Plaintiffs Mackey Peterson, Don Peterson, and Lonny Peterson, who are Ruby's children but were not Ruby's guardian or trustees of the Peterson Family Trust. Am. Compl. ¶¶ 10-13, 301-02. Her other children, David Peterson and Carol Ann Manley, held Ruby's medical power of attorney and are Defendants in this case. *Id.* ¶ 303.

The Amended Complaint alleges harms incurred to Ruby Peterson's person, estate, and a family trust. *See* Am. Compl. ¶ 298. But under Texas law, only the guardian of the ward's estate may bring a lawsuit on her behalf. Tex. Est. Code § 1151.104(a); *In re Guardianship of Archer*, 203 S.W.3d at 22-24 (holding relative did not have standing to sue for breach of fiduciary duty owed to ward). Thus, even if Ms. Peterson were still alive, the "Peterson Plaintiffs" would not have standing to assert claims on her behalf. Now that she is deceased, the personal representatives of her estate, Defendants Carol Ann Manley and David Peterson, are the only persons with legal capacity to sue on her behalf. *See Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971) ("It is settled in Texas that the personal representative of the estate of a decedent is ordinarily the only person entitled to sue for the recovery of property belonging to the estate."). Similarly, with respect to the Peterson Family Trust II, the trustees, not the beneficiaries, must bring suit. *See Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston 1985, writ ref'd n.r.e.).

Because none of the Peterson Plaintiffs were guardians of Ruby's estate, nor are they personal representatives of her estate or trustees of the "Peterson Family Trust II," they do not have standing to assert any claims for harm caused to Ruby Peterson's person, estate, or trust. The Peterson Plaintiffs' claims should be dismissed under Fed. R. Civ. P. 17.

E. The MacIntyre Defendants are entitled to immunity under Texas law.

All claims asserted by Plaintiff Valentina Sheshtawy individually against Cameron McCulloch as attorney ad litem, and all the claims asserted by the Rizk Plaintiffs against Robert MacIntyre, Jr. and Christopher Burt should be dismissed under the doctrine of attorney immunity, which protects attorneys from suits by non-clients and opposing counsel.[13] Likewise, the claims asserted by the Peterson Plaintiffs against Jill Young should be dismissed because she is protected by statutory guardian ad litem immunity. A claim may be dismissed under Rule 12(b)(6) "if a successful affirmative defense appears clearly on the face of the pleadings," and attorney and guardian ad litem immunity are affirmative defenses. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986); *Zeifman v. Nowlin*, 322 S.W.3d 804, 806 (Tex. App.—Austin 2010, no pet.); *Tanner v. Black*, 464 S.W.3d 23, 27 (Tex. App.—Houston [1st Dist.] 2015).

1. Defendants Cameron McCulloch, Robert MacIntyre, Jr., and Christopher Burt cannot be liable to Plaintiffs for conduct as opposing counsel.

The Sheshtawy Plaintiffs' claims against McCulloch for his conduct as an attorney ad litem should be dismissed. *See* Am. Compl. ¶ 217. Once appointed, the attorney ad litem "becomes the legal representative for the ward and an attorney-client relationship is established." *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex. App.—Fort Worth 1996, no writ). Thus, "an attorney ad litem performs similar services as any attorney such as giving advice, doing research, and conducting litigation . . . ." *Id.* (citations omitted). Plaintiff Valentina Sheshtawy was not

[13] The Texas attorney immunity doctrine bars all of the Rizk Plaintiffs and Plaintiff Valentina Sheshtawy's claims. In *Chappell v. Robbins*, the Ninth Circuit held that, "[i]n passing RICO, Congress did not evidence a "clear legislative intent to displace common-law immunities," such as legislative immunity. 73 F.3d 918, 923-25 (9th Cir. 1996); *see also Rogers v. McDorman*, 521 F.3d 381, 388 n.26 (5th Cir. 2008) ("[C]ourts have taken civil RICO's textual silence as an indication that Congress did not intend to displace background principles." (citing *Chappell*, 73 F.3d at 923-25)); *Hecker v. Plattsmier*, No. CIV.A. 08-4200, 2009 WL 4642014, at *4 (E.D. La. Nov. 25, 2009) (dismissing RICO claims, in part, because Louisiana statutory immunity and Louisiana Supreme Court Rules protected disciplinary staff from suit); *Zeifman v. Nowlin*, 322 S.W.3d 804, 813 (Tex. App.—Austin 2010, no pet.) (Patterson, J., concurring) ("Section 107.009 substantially codifies existing case law that holds that the doctrine of derived judicial immunity applies to lawyers appointed as guardians ad litem in the family law context because they conduct their duties as **extensions of the court**." (emphasis added)).

McCulloch's client in the Sheshtawy Matter, and she was represented by separate counsel. Am. Compl. ¶¶ 228, 253. The Rizk Plaintiffs' claims against Defendant Robert MacIntyre, Jr. and Christopher Burt for their conduct as opposing counsel in the Rizk Matter likewise fail. *See* Am. Compl. ¶ 401. MacIntyre and Burt represent J. Cary Gray, the executor of the Rizk Estate, in litigation against the Rizk Plaintiffs in Probate Court No. 1. *Id.* ¶¶ 63, 396-97, 401, 404.

Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). In March of this year, the Fifth Circuit recognized this Texas doctrine:

> In short, because the policies underlying attorney immunity support the conclusion that Texas courts seek to protect attorneys against even defending a lawsuit, and because Texas courts describe conduct covered by attorney immunity as not actionable (and attorneys engaging in that conduct as immune from suit), we conclude that the Texas Supreme Court would consider attorney immunity to be a true immunity from suit.

Troice v. Proskauer Rose, L.L.P., 816 F.3d 341, 348 (5th Cir. 2016). "Even conduct that is 'wrongful in the context of the underlying suit' is not actionable if it is 'part of the discharge of the lawyer's duties in representing his or her client.'" *Cantey Hanger*, 467 S.W.3d at 481-82 (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)); *see also Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. filed) (dismissing conspiracy and breach of fiduciary claims asserted by party against opposing attorneys because actions alleged were "kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation" (citing *Byrd*, 467 S.W.3d at 482)).

The only exceptions to this rule of immunity are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Id.* at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)). But a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 483 (quoting *Alpert*, 178 S.W.3d at 406); *see also Troice*, 816 F.3d at 350 ("[S]imply claiming that an attorney's conduct was fraudulent does not allow plaintiffs to circumvent attorney immunity") .

Here, Plaintiffs have done exactly what the Supreme Court of Texas said was insufficient in *Cantey Hanger*, as they do nothing more than label routine attorney conduct as fraudulent. *See Cantey Hanger*, 467 S.W.3d at 483. The allegations in the Amended Complaint show McCulloch, Robert MacIntyre, Jr., and Christopher Burt took routine actions in the course of representing their clients, L.S. and J. Cary Gray. *See id.* at 482.

Robert MacIntyre, Jr. and Christopher Burt are accused of filing a general denial in a declaratory action initiated by the Rizk Plaintiffs, entering an attorney appearance, moving to quash a deposition, not fully briefing certain issues in response to a motion for summary judgment, and opposing the Rizk Plaintiffs' motion for summary judgment. *See id.* ¶¶ 404, 421-23, 426, 449. These activities are routine and part of client representation. *See Troice*, 816 F.3d at 348 (attorney's conduct in sending a letter, participating in discovery, and communicating with SEC about client were "classic examples of an attorney's conduct in representing his client"). Thus, Robert MacIntyre, Jr. and Christopher Burt cannot be liable to the Rizk Plaintiffs.

Plaintiff Valentina Sheshtawy accuses McCulloch of entering into Rule 11 settlement agreements, failing to inform Valentina of her inheritance rights, requesting attorney's fees, moving for sanctions, and generally not fulfilling what the Sheshtawy Plaintiffs allege were his

duties as attorney ad litem. *See* Am. Compl. ¶¶ 6, 218, 236, 248, 251, 252, 255, 256, 258, 266, 271, 272, 277, 280, 284, 288. The allegations that relate to L.S., the only person to whom McCulloch owed a duty as attorney ad litem, show McCulloch undertaking the "kinds of actions that are part of the discharge of an attorney's duties in representing a party in hard-fought litigation." *See Highland Capital Mgmt., LP*, 2016 WL 164528, at *6.

Valentina Sheshtawy and the Rizk Plaintiffs, who were opposing parties, have done nothing more than label routine attorney conduct as "fraudulent." Thus, all claims asserted by the Rizk Plaintiffs against Robert MacIntyre, Jr., Christopher Burt, and the Firm should be dismissed. Plaintiff Valentina Sheshtawy's claims against McCulloch for his conduct as attorney ad litem in the Sheshtawy Matter should also be dismissed. *See Troice*, 816 F.3d at 350. (reversing district court order denying defendants' motions to dismiss and rendering judgment of dismissal with prejudice under attorney immunity doctrine).

2. Young is entitled to immunity as a guardian ad litem.

Even if the Peterson Plaintiffs had standing to enforce a duty Young owed only to Ruby Peterson, all of the claims asserted by the Peterson Plaintiffs against Defendant Jill Young should be dismissed because she is entitled to immunity as a guardian ad litem.[14] Young was appointed as a guardian ad litem for Ruby Peterson in the Peterson Matter. Am. Compl. ¶ 306. She was appointed under the Texas Estates Code, which provides guardians ad litem with qualified immunity:

> A guardian ad litem appointed under this subchapter or Section 1102.001 or 1202.054 to represent the interests of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem.

[14] Plaintiffs allege McCulloch was guardian ad litem for L.S., but this is incorrect. Am. Compl. ¶¶ 6, 58. Even if McCulloch were guardian ad litem, the claims against him would also be subject to dismissal under Fed. R. Civ. P. 12(b)(6) and Tex. Est. Code § 1054.056(a).

Tex. Est. Code § 1054.056(a). The only three exceptions to this broad immunity are for "a recommendation made, or an opinion given: (1) with conscious indifference or reckless disregard to the safety of another; (2) in bad faith or with malice;[15] or (3) that is grossly negligent or willfully wrongful." *Id.* § 1054.056(b).

The immunity statute applies because the allegations in the Amended Complaint relate to Young's recommendations and opinions as guardian ad litem for Ruby S. Peterson. *See* Am. Compl. ¶¶ 67-68, 306; Tex. Est. Code § 1054.054 ("A guardian ad litem is an officer of the court" and required to "protect the incapacitated person whose interests the guardian has been appointed to represent in a manner that will enable to the court to determine the action that will be in that person's best interests").

Here, the Peterson Plaintiffs do not invoke any of the exceptions to guardian ad litem immunity. The Peterson Plaintiffs describe how they "complained" to Judge Wright and Associate Judge Stiles about Young and other Defendants' "wrongful exercise of dominion and control over then living Decedent Ruby S. Peterson, misuse of funds, negligence/gross negligence, and purloining of then living Decedent Ruby S. Peterson's IRA, investment account funds, and the Peterson Family Trust." *See* Am. Compl. ¶ 330. But these allegations do not single out Young's allegedly wrongful conduct for the purposes of determining whether an exception to guardian ad litem immunity applies. *See Del Castillo*, 2015 WL 3833447, at *6 (holding allegations that lump defendants together are insufficient under Rule 12(b)(6)).

The allegations are also conclusory and do not include facts supporting a finding of gross negligence, bad faith, or malice. *See Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 621 (5th Cir. 1992) (holding conclusory allegations of "bad faith" are insufficient to overcome

[15] The Peterson Plaintiffs have not even generally alleged that Young acted with "malice." *See* Fed. R. Civ. P. 9(b) ("Malice . . . may be alleged generally.").

qualified immunity defense); *Jones v. Nueces Cty., Tex.*, No. CIV.A. C-12-145, 2012 WL 4867556, at *7 (S.D. Tex. Oct. 12, 2012), *aff'd*, 589 F. App'x 682 (5th Cir. 2014) (affirming Rule 12(b)(6) dismissal of "deliberate indifference" and "malice" claims); *see also Bowles v. Mars, Inc.*, No. 4:14-CV-2258, 2015 WL 3629717, at *5 (S.D. Tex. June 10, 2015) (Hoyt, J.) (dismissing gross negligence claim, in part, for failure to meet "elevated showing" and allege facts establishing intent and recklessness). The other allegations that mention Ms. Young improperly lump her together with other Defendants, are conclusory, and/or merely describe what the Peterson Plaintiffs asserted in Probate Court No. 1. *See* Am. Compl. ¶¶ 299-300, 306, 329-31, 355, 357-58, 361, 366, 368, 375-76, 380-83. None contain facts showing the applicability of any of the three exceptions to guardian ad litem immunity.

Other courts in this district have dismissed claims based on the affirmative defense of ad litem immunity under a nearly-identical immunity statute in the Texas Family Code. *See Hall v. Dixon*, No. H-09-2611, 2010 WL3909515, at *42-43 (S.D. Tex. Sept. 30, 2010) (Rosenthal, J.) (dismissing breach of fiduciary duty and other state-law claims because plaintiff failed to plead a legal basis for applying one of the three identical exceptions in Tex. Fam. Code § 107.009); *In re: Brown Medical Center, Inc.*, No. 16-0084, 2016 WL 807768, at *6 (S.D. Tex. Mar. 2, 2016) (holding record on motion to dismiss established defendant was entitled to immunity because there were no "factual allegations" that defendant acted with conscious indifference or reckless disregard of the safety of another, acted in bad faith, or acted with malice).

Thus, in addition to the other reasons provided, this Court should dismiss the Peterson Plaintiffs' claims against Young because the affirmative defense of guardian ad litem immunity appears on the face of the Amended Complaint.

F. Plaintiffs should not be granted leave to amend their Complaint a second time.

Plaintiffs have already amended their Complaint once, and their RICO, breach of fiduciary duty, and common law fraud claims remain deficient as a matter of law for numerous reasons. Giving Plaintiffs an opportunity to replead would be futile. *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 254 (5th Cir. 2003) (affirming denial of leave to amend after dismissing 110-page complaint that was "poorly drafted," "repetitive," and "rich in legal deficiencies"); *see also Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) (declining to remand for repleading where plaintiff filed "extensive response to defendants' motion to dismiss" arguing complaint was adequate and amended complaint would remedy any inadequacies)*; United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't*, 911 F. Supp. 2d 1118, 1141 (E.D. Wash. 2012), *aff'd sub nom.*, 770 F.3d 834 (9th Cir. 2014) (denying leave to amend original RICO complaint where plaintiff "painstakingly detailed all of the facts alleged to be relevant to Plaintiffs' claims in a sprawling 246 page Complaint" and court could not "conceive of any new facts that could possibly cure the pleading").

VIII. CONCLUSION

The MacIntyre Defendants respectfully request that the Court dismiss all claims against them with prejudice. Alternatively, should the Court dismiss the RICO claims and deny this Motion with respect to any state-law claim against any MacIntyre Defendant, the MacIntyre Defendants respectfully request that the Court exercise its discretion and dismiss the state-law claims under 28 U.S.C. § 1367(c)(3).

Dated: June 22, 2016

Respectfully submitted,

/s/ Robert S. Harrell

Robert S. Harrell
Attorney-in-charge
State Bar No. 09041350
Federal ID No. 6690
robert.harrell@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

OF COUNSEL:
Brian J. Young
State Bar No. 24089247
Federal ID No. 2726632
brian.young@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

ATTORNEYS FOR DEFENDANTS ROBERT MACINTYRE, JR., W. CAMERON MCCULLOCH, CHRISTOPHER BURT, JILL WILLARD YOUNG, AND MACINTYRE, MCCULLOCH, STANFIELD & YOUNG, L.L.P.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Motion to Dismiss and Brief in Support has been served on June 22, 2016 through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Robert S. Harrell
Robert S. Harrell