NO. 17-20360

In the United States Court of Appeals For the Fifth Circuit

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON,

Plaintiffs – Appellants

v.

CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLIARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99,

Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF OF APPELLEE DARLENE PAYNE SMITH

Barry Abrams
Joshua A. Huber
BLANK ROME LLP
717 Texas Ave., Suite 1400
Houston, TX 77002
(713) 228-6601
(713) 228-6605 (Fax)

ATTORNEYS FOR APPELLEE, DARLENE PAYNE SMITH

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants**:**	Candace Louise Curtis Rik Wayne Munson 218 Landana St. American Canyon, CA 94503
Appellee-Defendant:	Darlene Payne Smith
Counsel for Appellee-Defendant, Darlene Payne Smith:	Barry Abrams Joshua Huber BLANK ROME LLP 717 Texas Ave., Suite 1400 Houston, Texas 77002
Defendant-Appellee:	Anita Kay Brunsting 203 Bloomingdale Circle Victoria, TX 77904
Defendant-Appellee:	Amy Ruth Brunsting 2582 Country Ledge Drive New Braunfels, TX 78132
Defendants-Appellees:	Candace L. Kunz-Freed Albert Vacek, Jr.
Counsel for Defendants-Appellees, Candace L. Kunz-Freed and Albert Vacek, Jr.:	Cory S. Reed Thompson Coe Cousins Irons One Riverway, Suite 1600 Houston, TX 77056
Defendant-Appellee:	Bernard Lyle Matthews, III Green and Matthews, LLP 14550 Torrey Chase Blvd., Suite 245 Houston, TX 77014
Defendant-Appellee:	Bobbie G. Bayless Bayless Stokes 2931 Ferndale Houston, TX 77098
Defendant-Appellee:	Jill Willard Young

Counsel for Defendant-Appellee, Jill Willard Young:	Rafe A. Schaefer Norton Rose Fulbright US, LLP 1301 McKinney St., Houston, TX 77010
Defendants-Appellees:	Stephen A. Mendel Bradley E. Featherston
Counsel for Defendants-Appellees, Stephen A. Mendel and Bradley E. Featherston:	Adraon DelJohn Green David Christopher Deiss Galloway Johnson Tompkins Burr & Smith 1301 McKinney St., Suite 1400 Houston, TX 77010
Defendant-Appellee:	Neal Spielman
Counsel for Defendant-Appellee, Neal Spielman:	Martin Samuel Schexnayder Winget, Spadafora & Schwartzberg, LLP Two Riverway, Suite 725 Houston, TX 77056
Defendants-Appellees:	Judge Christine Riddle Butts Judge Clarinda Comstock Tony Baiamonte
Counsel for Defendants-Appellees, Judge Christine Riddle Butts, Judge Clarinda Comstock, and Tony Baimonte:	Laura Beckman Hedge Harris County Attorney's Office 1019 Congress St., 15th Floor Houston, TX 77002
Defendant-Appellee:	Jason Ostrom 6363 Woodway, Suite 300 Houston, TX 77057
Defendant-Appellee:	Gregory Lester

Counsel for
Defendant-Appellee,
Gregory Lester:

Stacy L. Kelly
Terry Bryant, PLLC
8584 Katy Freeway, Suite 100
Houston, TX 77024

/s/ Barry Abrams
Attorney of Record for Appellee, Darlene Payne Smith

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. Rule 28.2.3, Darlene Payne Smith ("Smith") respectfully suggests that oral argument is unlikely to assist the Court. This appeal raises four principal issues:

(1) Whether the district court correctly concluded that attorney immunity bars all claims asserted against Smith, where the only factual allegations Plaintiffs-Appellants pled concern actions Smith undertook on behalf of her client in the discharge of her duties as a lawyer during Texas probate court litigation;

(2) Whether the district court correctly concluded that Plaintiffs-Appellants did not allege sufficient facts to plausibly state a claim for relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1691 *et seq*., 42 U.S.C. §1983, 42 U.S.C. §1985 or 18 U.S.C. §242;

(3) Whether the district court correctly concluded that Plaintiffs-Appellants' conspiracy-theory-laden Complaint was frivolous; and

(4) Whether the record confirms that Plaintiffs-Appellants' claims also fail for lack of ripeness and lack of Article III standing.

These issues can be resolved through a review of the appellate record. Smith therefore waives oral argument, unless the Court grants oral argument to Appellants, in which event Smith reserves her right to participate.

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ISSUES PRESENTED

1. Whether the district court correctly concluded that attorney immunity bars all claims asserted against Smith, where the only factual allegations Plaintiffs-Appellants pled concern actions Smith undertook on behalf of her client in the discharge of her duties as a lawyer during Texas probate court litigation;

2. Whether the district court correctly concluded that Plaintiffs-Appellants did not allege facts sufficient to plausibly support a claim for relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1691 *et seq*., 42 U.S.C. §1983, 42 U.S.C. §1985 or 18 U.S.C. §242;

3. Whether the district court correctly concluded that the Plaintiffs-Appellants' conspiracy-theory-laden Complaint was frivolous (and borderline malicious), and dismissed the suit on that basis; and

4. Whether the record supports dismissal for the additional reasons that Plaintiffs-Appellants' claims are not ripe and Plaintiff-Appellant Munson lacks Article III standing.

STATEMENT OF THE CASE

I. Nature of the Case, Factual Background, Course of Proceedings, and Disposition Below.

This is the most recent in a series of lawsuits[1] brought by Plaintiffs-Appellants Candace Louise Curtis ("Curtis") and Rik Wayne Munson ("Munson") (collectively, the "Appellants"), all of which emanate from a state court probate proceeding, *In re: Estate of Nelva E. Brunsting*, which is pending under Cause No. 412.249 in Probate Court No. 4, Harris County, Texas (the "Brunsting Probate Case"). Curtis is one of five sibling-beneficiaries in the Brunsting Probate Case and Munson is Curtis's domestic partner and paralegal. ROA.24, 72 (Complaint ("Compl.")) at ¶¶32, 213 & 215. Appellee-Defendant Darlene Payne Smith ("Smith") is a probate attorney who previously represented one of the other sibling-beneficiaries (*i.e.*, Carole Brunsting) in the Brunsting Probate Case. ROA.47-48 (Compl.) at ¶128. Smith withdrew as counsel in early 2016. ROA.2948.

Apparently dissatisfied with the rulings and administration of the Harris County Probate Court Number 4, Appellants vented their frustration by suing each

[1] In addition to the core probate proceeding, Curtis also earlier filed a similar action against her sister, and others, in the Southern District of Texas (Case No. 4:12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting, et al.*). That matter ultimately was remanded to Probate Court No. 4 upon agreement of the parties. Curtis' brother, Carl, has filed both a malpractice suit in Harris County District Court against his now-deceased parents' estate planning counsel (Cause No. 2013-05455; *Carl Henry Brunsting, et al. v. Candace L. Kunz-Freed, et al.*) and a separate lawsuit against Curtis and the other Brunsting siblings in Harris County Probate Court No. 4 (Cause No. 412.249-401; *Carl Henry Brunsting, et al. v. Anita Kay Brunsting, et al.*). *See* ROA.154-59.

Judge (*i.e.*, the Hon. Christine Riddle Butts and Hon. Clarinda Comstock) and lawyer (*i.e.,* Smith, Candace Kunz-Freed, Albert Vacek, Jr., Bernard Lyle Mathews, III, Neal Spielman, Bradley Featherston, Stephen A. Mendel, Jason Ostrom, Gregory Lester and Jill Willard Young) who has had any involvement with the Brunsting Probate Case, as well as certain Probate Court No. 4 administrative personnel (*i.e.*, substitute court reporter Tony Baiamonte). Appellants purported to assert claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1691 *et seq*. ("RICO") premised on 40 alleged "predicate acts" by some or all of this group of probate practitioners, Judges and court personnel, who Appellants colorfully described as the "Harris County Tomb Raiders" or "Probate Mafia."[2/]

Appellants also purported to assert "non-predicate act" claims for civil damages against Smith (collectively, the "Non-Predicate Act Claims") for: (1) "Conspiracy to violate 18 USC §§242 and 2, & 42 U.S.C. §§1983 and 1985;" (2) "Aiding and Abetting Breach of Fiduciary, Defalcation and Scienter;" (3) "Aiding and Abetting Misapplication of Fiduciary, Defalcation and Scienter;" and (4)

---

[2] Appellants contend that the "Harris County Tomb Raiders" or "Probate Mafia" is a "secret society" of probate practitioners, court personnel, probate judges, and other elected officials who supposedly are running a "criminal theft enterprise," or "organized criminal consortium," designed to "judicially kidnap and rob the elderly" and other heirs and beneficiaries of their "familial relations and inheritance expectations." *See* ROA.29, 33-34 (Compl.) at ¶¶57, 71, 76.

"Tortious Interference with Inheritance Expectancy." *See* ROA.58-59 (Compl.) at ¶¶159-166.

However, as the district court correctly recognized, Appellants' conclusory, conspiracy-theory-laden Complaint is not anchored to any cogently pleaded facts connecting Smith (or the other defendants-appellees) to any of the myriad federal or state statutory provisions referenced therein. Appellants' 59 page, 217 paragraph Complaint contains ***only one reference*** to any specific conduct by Smith – that she filed an objection to a motion for protective order on behalf of her client Carole Brunsting in the Brunsting Probate Case. *See* ROA.47-48 (Compl.) at ¶128. That is it.

The circumstances where an attorney can be held liable to a non-client for conduct incident to the execution of her professional duties to a client are extremely limited. Under Texas Law, attorneys retain complete immunity from suit for civil liability to non-clients for professional actions undertaken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (Tex. 2015); *Troice v. Proskauer Rose, L.L.P.,* 816 F.3d 341, 348 (5th Cir. 2016).

Appellants have not alleged or referenced a single fact on appeal that would fall outside the scope of the applicable attorney immunity doctrine. Notably—and consistent with Appellants' single reference in their Complaint below to any specific

conduct by Smith—on appeal Appellants have not referenced ***any*** specific conduct by Smith. Apart from listing Smith in the Certificate of Interested Persons, Appellants have not so much as mentioned Smith's ***name*** anywhere in their brief.

On November 10, 2016, Smith moved to dismiss Appellants' claims under both FED. R. CIV. P. 12(b)(1) and 12(b)(6) for the following reasons:

1. **Appellants' claims should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction because**:

   - Appellants' claims are speculative and contingent, and therefore not ripe for adjudication. *See Lopez v. City of Houston*, 617 F.3d 336, 341-42 (5th Cir. 2010);

   - Munson is not a beneficiary in the Brunsting Probate Case, has no direct stake in this action, and has not suffered an injury-in-fact sufficient to confer Article III standing. *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996); and

   - The attorney immunity doctrine bars Appellants' state law claims for civil damages since, under Texas law, attorneys are immune from suit by non-clients (*i.e.*, the Appellants) for actions taken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015);

2. **Appellants' claims should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted because**:

   - Appellants lack statutory standing to prosecute their civil RICO claims because they have not pled, and cannot establish, all of the necessary elements. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998);

   - Appellants failed to plead facts establishing any of the substantive elements of a RICO violation and instead only pled a formulaic and

conclusory recitation of statutory elements couched as factual allegations. *See Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007);

- Appellants failed to plead a viable claim under 42 U.S.C. §1983 ("Section 1983") since they did not identify any Constitutionally-protected rights that were violated, or plead any facts demonstrating that Defendant is a state actor. *See Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005);

- Appellants failed to plead a viable claim under 42 U.S.C. §1985 ("Section 1985") since they only conclusorily stated that Section 1985 had been violated and did not allege any facts which would plausibly suggest the existence of any of the five necessary elements of a Section 1985 claim. *See United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983); and

- 18 U.S.C. §242 ("Section 242") does not provide for a private right of action. *See Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989).

On May 16, 2017, the district court granted Smith's Motion to Dismiss (and the parallel motions to dismiss filed by each of the other defendants-appellees) and dismissed all claims against Smith with prejudice based on: (a) attorney immunity; (b) the failure to plead facts establishing a single claim for relief against Smith; and (c) the court's inherent power to dismiss frivolous complaints. ROA.3329-35 (Order).

As the district court stated, Appellants' Complaint,

> even when liberally construed, ***completely fails to plead anything close to a plausible claim for relief*** against any of the alleged Defendants. In fact, [Appellants'] allegations cannot be characterized as anything more than ***fanciful, fantastic, and delusional***. [Appellants'] allegations consist entirely of ***outlandish and conclusory factual assertions*** accompanied by a formulaic recitation of the elements of numerous

> causes of action unsupported by the alleged facts. Further, most of [Appellants'] alleged "claims" are either based on statutes that do not create a private cause of action, or simply do not exist under Texas or Federal law.

ROA.3332 (Order) (emphasis added).

The district court also observed that Appellants' allegations were frivolous "because [Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint," and, therefore, the court alternatively dismissed Appellants' claims pursuant to its inherent authority to dismiss frivolous complaints. ROA.3334 (Order). Charitably concluding that Appellants "[did] not understand the legal shortcomings of their Complaint," the district court declined to impose sanctions for their frivolous litigation conduct, as one defendant requested, but admonished Appellants that they should "now realize that all claims brought in this litigation—or any new claims relating to the subject matter of [Appellants'] Complaint—lack merit, and cannot be brought to this, or any other court, without a clear understanding that [Appellants] are bringing a frivolous claim." ROA.3335 (Order).

On May 26, 2017, Appellants timely filed their notice of appeal from the district court's dismissal order. ROA.3336 (Notice of Appeal).

STANDARDS OF REVIEW

Motion to Dismiss. This Court reviews *de novo* the granting of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Castro v. Collecto,*

Inc., 634 F.3d 779, 783 (5th Cir. 2011). Such a motion tests the formal sufficiency of the pleadings and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor, *id.*, but the court need "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007) (internal citations omitted).

To avoid dismissal a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). As framed by the Fifth Circuit, "a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws." *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. However, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line

between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly,* 550 U.S. at 570) (internal quotation marks omitted). "[D]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill,* 561 F.3d 377, 384 (5th Cir. 2009) (internal quotation marks and citation omitted).

This Court's review is not limited to the district court's stated reasons for its dismissal. Instead, "[it] may affirm the district court's dismissal under Rule 12(b)(6) for any ground supported by the record." *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006).

Waiver and Abandonment of Arguments. The failure of an appellant to challenge the district court's determination of an issue in its initial brief constitutes a waiver of the right to appellate review of that determination. *Health Care Serv. Corp. v. Methodist Hosps. of Dall*., 814 F.3d 242, 252 (5th Cir. 2016). In addition, "[q]uestions posed for appellate review but inadequately briefed are considered abandoned." *Smith v. Lonestar Const., Inc.*, 452 F. App'x 475, 476 (5th Cir. 2011) (quoting *Dardar v. Lafourche Realty Co., Inc.,* 985 F.2d 824, 831 (5th Cir. 1993)). Moreover, "[w]hile [courts] 'liberally construe briefs of *pro se* litigants and apply less stringent standards to parties proceeding *pro se* than to parties represented by counsel, *pro se* parties must still brief the issues and reasonably comply with the standards of Rule 28.'" *Id.* (quoting *Grant v. Cuellar,* 59 F.3d 523,

524 (5th Cir. 1995)). Thus, where a *pro se* appellant "fails . . . to set forth reasons why the district court's judgment was incorrect," the court may "conclude that any arguments attacking the district court's judgment have been abandoned on appeal." *See id.*

SUMMARY OF THE ARGUMENT

The district court correctly dismissed all claims against Smith for multiple independently dispositive reasons. This Court therefore should affirm.

First, Appellants' sparse allegations about Smith concern only routine advocacy that an attorney is permitted – and indeed obligated – to undertake when representing a client in litigation. Smith therefore remains absolutely immune from Appellants' claims. *See Cantey Hanger, LLP*, 467 S.W.3d at 483; *Troice,* 816 F.3d at 348. The district court correctly applied this immunity doctrine. Additionally, Appellants waived and abandoned any attack on that basis because they did not assert or brief the issue in this Court.

Second, Appellants' Complaint merely parroted various legal conclusions and was devoid of any factual allegations plausibly supporting a single claim for relief against Smith, including Appellants' standing to pursue a RICO claim, the substantive elements of a RICO claim, or any of the myriad non-predicate act claims outlined in the Complaint. *See Anderson*, 554 F.3d at 528 ("a complaint must do more than name laws that may have been violated by the defendant; it must also

allege facts regarding what conduct violated those laws."). The district court correctly dismissed all of Appellants' claims as insufficient because they did not satisfy the general pleadings standards of Rule 12(b)(6). Appellants did not contest or adequately brief this basis for the district court's decision, thereby waiving and abandoning any attack on the judgment below on that basis.

Third, Appellants' Complaint was delusional, factually and legally baseless and "borderline malicious." The district court therefore appropriately exercised its inherent power to dismiss Appellants' Complaint as frivolous. As is true with virtually all of the dispositive issues discussed below, Appellants did not challenge or adequately brief this alternative basis for the district court's dismissal and have waived and abandoned any challenge on that ground.

Fourth, although the district court did not specifically reference them as grounds for its decision, all of Appellants' claims were properly dismissed because they are not ripe and, with respect to Munson, he lacks Article III standing.

ARGUMENT

I. The District Court Correctly Concluded that All Claims Asserted Against Smith are Barred by Attorney Immunity.

A. Smith is Immune from Suit by Non-Clients for Actions Taken on Behalf of Her Client During Active Litigation.

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*, 467 S.W.3d at 481 (internal quotations omitted). "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.'" *Id*. (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)).

Attorney immunity is not merely a defense to liability. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). Rather, "attorney immunity is properly characterized as a true immunity from suit[.]" *Id*. This is true even where a plaintiff labels an attorney's conduct as "fraudulent." *See Byrd*, 467 S.W.3d at 483. The only exceptions to an attorney's immunity from suit are when the attorney has engaged in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve the provision of legal services . . . ." *See id.* at 482.

Appellants' Complaint below contained only ***a single reference*** to any specific conduct by Smith – that she filed an opposition to a motion for protective order on behalf of her client in the Brunsting Probate Case. *See* ROA.47-48 (Compl.) at ¶128. That is it. Put differently, Appellants alleged only that Smith was actively discharging her professional duties to her client in the context of ongoing litigation. Smith, then, remains immune from the non-client Appellants' claims.

The district court correctly observed that Appellants' allegations concerning Smith (and other counsel), "at best, assert wrongdoing based solely on actions taken during the representation of a client in litigation," and it properly dismissed

Appellants' claims as "clearly barred by attorney immunity." ROA.3333 (Order). The Court should affirm the district court's dismissal of all claims against Smith on this basis.

B. Appellants Failed to Address the District Court's Conclusion that All Claims Asserted Against Smith are Barred by Attorney Immunity.

Attorney immunity is dispositive of this appeal for an additional reason – Appellants waived and abandoned any challenge to the judgment on this basis. In their opening brief, Appellants did not address the attorney immunity doctrine and its applicability here.[3] *Health Care Serv. Corp.,* 814 F.3d at 252; *Lonestar Const., Inc.*, 452 F. App'x at 476. The judgment of the district court based on attorney immunity therefore should be affirmed for the additional reason that Appellants failed to assert or brief that issue.

II. The District Court Correctly Concluded that Appellants' Threadbare and Conclusory Complaint Did Not Allege Facts Plausibly Stating a Single Claim for Relief Against Smith.

As observed by the district court, "Plaintiffs' Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief." ROA.3342. A cursory review of Appellants' Complaint confirms that the district court was correct.

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[3] Appellants' Statement of the Issues mentions only the judicial immunity doctrine. Brief of Plaintiffs-Appellants ("Appellants' Brief") at 1, Issue No. 2.

A. The District Court Correctly Concluded that Appellants Lack Statutory Standing Under RICO.

The standing provision of civil RICO provides that "***any person injured*** in his business or property ***by reason of*** a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains." *See* 18 U.S.C. 1964(c) (emphasis added). To establish statutory standing, a RICO plaintiff must therefore demonstrate both (1) an injury (2) that was proximately caused by a RICO violation (*i.e.*, predicate act(s)). *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998); *Sedima, S.P. R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) ("[a] 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 violation.").

i. Appellants Lack a Direct, Concrete Injury-in-Fact.

To satisfy the requirements for RICO statutory standing, a plaintiff's injury must be "conclusive" and cannot be "speculative." *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409 (5th Cir. 2015). "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *See id*. (quoting *Pinnacle Brands*, 138 F.3d at 607).

Here, the face of the Complaint showed that Curtis did not allege any direct, concrete financial injury to her business or property. The Complaint identified only "***threats*** of injury," and repeatedly and consistently characterized Curtis' "injury" in terms of her "inheritance ***expectancy***." *See, e.g.*, ROA.59, 72 (Compl.) at ¶¶165-66,

213. Put differently, Curtis complained only that the "Probate Mafia's" alleged conduct interfered with, or threatened, her future anticipated ***expectancy interests*** in the Brunsting Probate Case. A clearer example of a speculative non-RICO injury is unimaginable. *See Sheshtawy v. Gray*, No. 17-20019, 2017 U.S. App. LEXIS 17790, at *4 (5th Cir. 2017) ("the alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing."); *Gil Ramirez Grp., L.L.C.,* 786 F.3d at 409 ("Injury to mere ***expectancy interests*** . . . is not sufficient to confer RICO standing.") (emphasis added); *Firestone v. Galbreath*, 976 F.2d 279, 282 (6th Cir. 1992) (estate beneficiaries lacked standing under RICO because the alleged direct harm was to the estate, which flowed only indirectly to the beneficiaries).

And Munson's purported "injury" was more attenuated, because he lacks even an expectancy interest in the Brunsting Probate Case. *See* ROA.1809 at ¶69. Munson's only connection to this matter is that he purportedly provided paralegal services to Curtis over the past several years, and is dissatisfied with the results of the cases on which he worked. *See* ROA.72 (Compl.) at ¶215. This is not a concrete injury in fact under any calculus.

Because Appellants failed to plead facts plausibly showing that they incurred an injury sufficient to meet the RICO standing requirements, the district court

properly dismissed all claims against Smith, and this Court should affirm its judgment. ROA.3342 (Order).

ii. Smith did not Proximately Cause Any of Appellants' "Injuries."

To adequately plead standing, Appellants must also establish that Smith's "predicate acts"—here, Smith's alleged violations of 18 U.S.C. §§ 1512 and 1519[4/] – "constitute both a factual and proximate cause of the plaintiff's alleged injury." *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992). This requires Appellants to show the "***directness*** of the relationship between the conduct and the harm." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (emphasis added) (internal citations omitted). Where, as is true here, the "link" between the alleged injury and predicate acts "is too remote, purely contingent, or indirect," the RICO claim should be dismissed. *Id.*

18 U.S.C. §§ 1512(c) provides that:

> (c) Whoever corruptly –
>
> (1) alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) Otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned for not more than 20 years, or both.

[4] Appellants have identified 45 separate "predicate acts" in the Com plaint but only 2 (Claims 20 and 21) appear to be directed at Smith.

18 U.S.C. §§ 1519 in turn states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Appellants' Complaint contained no factual allegations which could plausibly demonstrate that Smith had violated either federal statute. The only "fact" involving any conduct by Smith is that she opposed a motion for protective order in pending litigation. *See* ROA.47-48 (Compl.) at ¶128. But this is the type of routine advocacy that an attorney is permitted – and indeed obligated – to undertake when representing a client in litigation, and does not constitute a predicate act under RICO. *See*, *e.g.*, *St. Gernain v. Howard*, 556 F.3d 261, 262 (5th Cir. 2009) (attorney's alleged violation of Rules of Professional Conduct in prior litigation is insufficient to implicate RICO). Because Appellants pled no facts plausibly demonstrating that Smith engaged in any predicate act, they did not plead, and could not adequately plead, proximate causation. They lack statutory RICO standing for this additional reason.

The district court correctly recognized that, to allege standing under RICO, Appellants "must show that the [RICO] violation was a but-for and proximate cause of the injury," *see* ROA.3332 (Order) (citing *Bridge v. Phoenix Bond & Indemn.*

Co., 553 U.S. 639, 654 (2008), and that Appellants must plead facts establishing a plausible claim that *each* of the Defendants engaged in a "'racketeering activity' sufficient to trigger the RICO statute." *Id.* That conclusion was correct, and this Court should affirm the district court's dismissal on this ground as well.

iii. Appellants Failed to Address the District Court's Conclusion that They Lack RICO Standing to Sue Smith.

Appellants have also waived and abandoned the issue of whether they have standing to sue Smith under RICO. Although Appellants devote a lengthy section of their brief to addressing their purported standing under RICO, Appellants never specifically address how ***Smith*** might have proximately caused them any injury in fact. Outside of a reference in the Certificate of Interested Parties, Appellants never even ***name*** Smith in their brief. It follows, therefore, that Appellants did not specifically address why they have standing under RICO to sue Smith.

Because Appellants have not addressed the threshold question of whether they have RICO standing to sue Smith, they have not adequately briefed the issue. Even allowing for Appellants' status as *pro se* litigants and construing their brief liberally, this Court should find that Appellants have waived and abandoned on appeal any challenge to the issue of whether Appellants have standing to sue Smith under RICO, and this Court should affirm the judgment of the district court on that basis.

B. The District Court Correctly Concluded that Appellants Did Not Plead Facts Plausibly Demonstrating the Substantive Elements of Their Civil RICO Claim.

Even if Appellants had statutory standing to sue under RICO, which they do not—and even if Appellants had not waived and abandoned the issue with respect to Smith, which they have done—their claims were still properly dismissed because Appellants did not plead facts plausibly supporting the substantive elements of their RICO claim.

Based only upon Smith's filing of an opposition to a motion for protective order in pending litigation, Appellants alleged violations of RICO sections 1962(c) and (d). These subsections state:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. §§ 1962(c), (d).

To plead a violation of 20 U.S.C. §§ 1962(c) or (d), Appellants were required to demonstrate: (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima*, 473 U.S. at 496; *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Appellants did not do so.

i. Appellants Did Not Allege the Existence of an "Enterprise."

To state a claim under RICO, a plaintiff must first allege the existence of an "enterprise," which RICO defines 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." *See* 18 U.S.C. § 1961(4). As the definition suggests, an enterprise can be either a legal entity or an association-in-fact. *See St. Paul Mercury Ins. Co.*, 224 F.3d at 445. Appellants' Complaint did not plausibly allege the existence of either.

a. "Probate Court No. 4" is Not a Legal Entity.

Appellants first alleged that "Probate Court No. 4" is a legal entity enterprise within the meaning of 18 U.S.C. § 1961(4). *See* ROA.25 (Compl.) at ¶36. But, as is true with the entire Complaint, Appellants did not plead facts supporting this conclusory assertion. And it is well-established that a government department (*i.e.*, a county probate court) is not a legal entity that can sue or be sued separate and apart from the government entity itself. *See* TEX. LOC. GOV'T CODE § 71.001 ("A county is a corporate and political body."); *Darby v. City of Pasadena,* 939 F.2d 311, 313 (5th Cir. 1991); *Crull v. City of New Braunfels, Texas*, 267 F. App'x. 338, 341-42 (5th Cir. 2008). Because Appellants' assertion of a legal entity enterprise has no basis in law or fact, dismissal was appropriate.

b. Appellants Did Not Allege an Association-in-Fact Enterprise.

Appellants apparently were attempting to argue that the various judges, lawyers and court personnel whom they sued (*i.e.*, the "Harris County Tomb Raiders" or "Probate Mafia") operate as an "association-in-fact" enterprise. *See* ROA.28-29 (Compl.) at ¶¶54-58. But this conspiracy-theory allegation is pure conjecture, and Appellants did not allege any facts which would plausibly demonstrate the existence of the "secret society" about which they complain. *See id*. at ¶58 (referencing "regular participants in this secret society.").

When the alleged enterprise is an association-in-fact enterprise, a plaintiff must show evidence of: (1) an existence separate and apart from the pattern of racketeering; (2) ongoing organization; and (3) members that function as a continuing unit as shown by a hierarchical or consensual, decision-making structure. *See Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988); *Boyle v. United States*, 556 U.S. 938, 943-45 (2009).

But Appellants did not allege any ***facts*** which, if true, would satisfy these three requirements. Appellants did not allege that the "Probate Mafia" maintains any existence separate and apart from what Appellants have alleged to be a pattern of racketeering. They likewise did not allege that the "Probate Mafia" is an ongoing organization or that the various alleged members operate or function as a continuing unit. Simply put, Appellants again merely parroted legal conclusions but did not

support their conclusory allegations with any concretely pleaded facts. *Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). For this reason, the district court correctly concluded that Appellants did not plausibly plead the existence of an association-in-fact enterprise.

ii. Appellants Did Not Allege a "Pattern" of Racketeering Activity.

"A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain*, 556 F.3d at 263; *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989). To adequately allege a "pattern," Appellants 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." *See H.J. Inc.*, 492 U.S. at 239.

Appellants' Complaint conclusorily states in several instances that the defendants-appellees had purportedly engaged in a "pattern of racketeering," but again does not recite any facts demonstrating the existence of such a pattern. The Complaint does not contain any facts demonstrating how the various alleged predicate acts are germane or connected, or that they constitute or threaten long-term criminal activity. *See, e.g.*, *Allstate Ins. Co. v. Donovan*, No. H-12-0432, 2012 U.S. Dist. LEXIS 92401, at *13 (S.D. Tex. 2012). To the contrary, Appellants' Complaint consisted of nothing more than a scatter-shot reference to myriad

"predicate act" statutes identified in RICO, followed by repetitive and conclusory assertions that one or more of the defendants-appellees had purportedly violated these statutes "for the purpose of executing or attempting to execute a scheme and artifice to default and deprive . . . ." *See, e.g.*, ROA.43-44, 45 (Compl.) at ¶¶121-123, 125. Because Appellants did not allege any facts which would plausibly demonstrate a single predicate act, let alone the required "pattern" of such acts, dismissal was appropriate.

iii. Appellants Did Not Plausibly Allege a Conspiracy Under §1692(d).

A claim under § 1962(d) is necessarily predicated upon a properly pleaded claim under subsections (a), (b), or (c). Because the district court correctly found that Appellants did not adequately plead violations of those other subsections, its dismissal of the §1962(d) conspiracy claim should likewise be affirmed. *Nolen v. Nucentrix Broadband Neflvorks,* 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims). As is true with respect to all of Appellants' allegations, their conspiracy allegations were conclusory and lacked supporting factual details. *See Lovick v. Ritemoney Ltd,* 378 F.3d 433, 437 (5th Cir. 2004) (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss). Appellants' bald insistence that Smith (or any of

the defendants-appellees) conspired to participate in a criminal enterprise does not make it so, and is insufficient to support a RICO claim.

The district court therefore correctly dismissed Appellants' purported RICO claims against Smith, and this Court should affirm that judgment.

C. Appellants Likewise Failed to Plead Facts Supporting Any of Their Non-Predicate Act Claims Alleging Purported Violations of Sections 1983, 1985 and 242.

In addition to their RICO claim, Appellants also purported to assert several "non-predicate act" claims[5] against Smith for civil damages. The first such claim (Claim 44) alleges violations of Sections 1983, 1985 and 242. *See* ROA.58 (Compl.) at ¶159. Each of these claims is without merit, is unsupported by any well-pled factual allegations and was properly dismissed.

i. Appellants' 42 U.S.C. §1983 ("Section 1983") Claim is Factually and Legally Baseless and Was Properly Dismissed.

Section 1983 "provides a federal cause of action for the deprivation, under the color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw,* 512 U.S. 107,

[5] This section addresses only those causes of action listed under the "Non-Predicate Act Civil Claims for Damages" in Appellants' Complaint. While none of those claims specifically mention Smith, out of an abundance of caution, she responded below to each such claim that globally referenced the "Defendants." To the extent that Appellants also sought individual liability against Smith based on their predicate act claims under 18 U.S.C. §§ 1512 and 1519 (*see* Claims 20 and 21), neither criminal statute creates a private right of action and those claims were properly dismissed for that reason as well. *See Gipson v. Callahan*, 18 F. Supp. 2d 662, 668 (W.D. Tex. 1997) (no private right of action under § 1512); *Peavey v. Holder*, 657 F. Supp. 2d 180, 191 (D.D.C. 2009) (no private right of action under § 1519).

132 (1994). To state a claim under Section 1983, a plaintiff must allege facts that show that she has been deprived of a right secured by the Constitution and laws of the United States and that the deprivation occurred under color of state law. *See Flagg Bros, Inc. v. Brooks,* 436 U.S. 149, 155 (1978); *Cornish v. Carr. Servs. Corp.,* 402 F.3d 545, 549 (5th Cir. 2005).

a. Appellants Did Not Identify Any Specific Constitutionally-Protected Rights.

Appellants' Section 1983 claim failed, in the first instance, because they did not identify in the Complaint any specific Constitutionally-protected rights that supposedly had been violated. *See Graham v. Connor,* 490, U.S. 386, 394 (1989). True to form, Appellants instead vaguely and generally stated only that they had been deprived of "rights, privileges, and immunities secured and protected by the Constitution . . ." and left it to the Court and Smith to speculate about what specific rights they claimed had been infringed. *See* ROA.58 (Compl.) at ¶159. For this reason alone, Appellants' Section 1983 claim was properly dismissed under Rule 12(b)(6).

b. Appellants Did Not Allege State Action.

The requirement that an actionable deprivation occur under color of state law is known as the "state action" requirement – and Appellants did not meet it here. *See Bass v. Parkwood Hosp.,* 180 F.3d 234, 241 (5th Cir. 1999). Smith is a private individual, and Appellants did not allege otherwise. A private party such as Smith

will be considered a state actor for Section 1983 purposes only in very rare circumstances. *See Gordon v. Neugebauer,* 57 F.Supp.3d 766, 773 (N.D. Tex. 2014).

A plaintiff can in some situations show that a private actor became a "state actor" if its conduct implemented an official government policy. *See Rundus v. City of Dallas, Tex.,* 634 F.3d 309, 312 (5th Cir. 2011). Here, however, Appellants did not identify any official government policy that they claim caused an alleged deprivation of their civil rights. Therefore, this first narrow application of the state action requirement is inapplicable.

Alternatively, a plaintiff can show that the private entity's actions are fairly attributable to the government. *Id*. This is known as the "attribution test." The Supreme Court has articulated a two-part inquiry for determining whether a private party's actions are fairly attributable to the government: (1) "the deprivation [of plaintiff's constitutional rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982); *see also Bass,* 180 F.3d at 241.

Appellants did not allege any facts sufficient to satisfy any of the tests the Supreme Court has utilized to determine whether the conduct of a private actor can be fairly attributable to a state actor under the attribution test: (1) the nexus or joint-

action test, (2) the public function test, or (3) the state coercion or encouragement test. *See Richard v. Hoechst Celanese Chern. Grp., Inc.,* 355 F.3d 345, 352 (5th Cir. 2003); *Lewis v. Law-Yone,* 813 F.Supp. 1247, 1254 (N.D. Tex. 1993) (describing the three tests as applicable to the resolution of the second prong of the attribution test articulated by the Supreme Court in *Lugar*).

Because Appellants did not plead any facts plausibly supporting the necessary state action element under Section 1983, that claim was properly dismissed.

ii. Appellants Failed to State a Claim Under 42 U.S.C. §1985 ("Section 1985").

To state a Section 1985 claim, a plaintiff must plead: (1) a conspiracy involving two or more persons; (2) to deprive, directly or indirectly, a person or class of persons of equal protection of the laws; (3) that one or more of the conspirators committed an act in furtherance of that conspiracy; (4) which causes injury to another in his person or property or a deprivation of any right or privilege he has as a citizen of the United States; and (5) that the conspirators' action is motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983); *Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir. 1989). Appellants' §1985 claim failed for several reasons.

Appellants did not allege any facts to support any of these elements. Appellants did not identify any specific "right or privilege" of which they had been

deprived. *See* ROA.58 (Compl.) at ¶159 (generally and vaguely alleging the deprivation of "rights, privileges, and immunities secured and protected by the Constitution and laws of the United States."). Appellants likewise did not plead with particularity a conspiracy or any overt acts. *Compare Taylor v. Fed. Home Loan Bank Bd.*, 661 F. Supp. 1341, 1346 (N.D. Tex. 1986) (plaintiff must plead existence of conspiracy and overt acts with particularity), *with* ROA.48 (Compl.) at ¶129 ("Defendants . . . did willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice . . . ."). Finally, the Complaint was devoid of any factual allegations demonstrating that Appellants are members of a protected class, or that any of the alleged "conspiracy" and "overt acts" were motivated by class-based discriminatory animus.

Appellants therefore once again conclusorily alleged a violation of the law, without stating any factual basis for the alleged violation. *See Anderson*, 554 F.3d at 528 ("a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws."). For these reasons, the district court correctly concluded that Appellants did not allege facts plausibly demonstrating a right to recover under Section 1985.

iii. 18 U.S.C. §242 ("Section 242") Does Not Provide for a Private Right of Action.

Section 242 is the criminal analogue to Section 1983 and does not provide a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989). Appellants' claim that Smith supposedly conspired to violate Section 242 was properly dismissed for this reason alone.

iv. Appellants Did Not Address and Have Waived and Abandoned Their Non-Predicate Act Claims.

Finally, as is true with most of the dispositive issues below, Appellants did not brief, reference or discuss their non-predicate act claims under Sections 1983, 1985 and 242. The Court therefore should deem those claims to have been waived and abandoned on appeal and their dismissal should be affirmed without further inquiry.

III. The District Court Correctly Concluded that Appellants' Suit was Frivolous (and Borderline Malicious).

A federal district court has the inherent authority to dismiss a frivolous or malicious lawsuit. *See Campbell v. Brender*, 3:10-CV-325-B, 2010 U.S. Dist. LEXIS 114, at *11 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the requiring filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional").

An alternative ground for the district court's dismissal of Appellants' suit is because it was frivolous: "[Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less facts giving rise to a plausible claim for relief." ROA.3334 (Order) (adding that "[a]s [Appellants]' allegations are undeniably legally insufficient to create a plausible claim, they are clearly frivolous (and borderline malicious)"). Even a cursory reading of Appellants' Complaint confirms the validity of the district court's observation.

Appellants have not addressed this independent ground for dismissal on appeal. This Court therefore should find that Appellants have waived and abandoned the issue and it should affirm the district court's exercise of its inherent power to dismiss Appellants' objectively frivolous complaint.

IV. The Record Also Demonstrates that Dismissal was Appropriate for Lack of Subject Matter Jurisdiction.

Smith argued below that Appellants' claims should be dismissed for lack of subject matter jurisdiction due to lack or ripeness and, with respect to Munson, his lack of Article III standing. Although the district court did not expressly rely upon these grounds when it dismissed Appellants' Complaint, both are amply established by the record and they provide additional reasons why this Court should affirm the decision below.

A. Appellants' Purported Injuries are Speculative, Contingent and Not Ripe.

"Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical," *Monk v. Huston,* 340 F.3d 279, 282 (5th Cir. 2003), or where "further factual development is required." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 833 F.2d 583, 587 (5th Cir. 1987). That is, "if the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 342 (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580–81 (1985)).

Here, Appellants' alleged injuries are contingent upon what they view as the presumptive outcome of pending litigation – the Brunsting Probate Case. *See* ROA.72 (Compl.) at ¶213 (stating that Curtis is being deprived of her "beneficial interests" in the Brunsting Family Trusts), ¶215 (alleging that Munson's efforts to "obtain justice" in the Brunsting Probate Case have been frustrated). But the future outcome of the Brunsting Probate Case is unknown and speculative and, because Appellants' purported injuries are "contingent [on] future events that may not occur as [Appellants] anticipate[]," their claims are not ripe and should be dismissed. *See Lopez*, 617 F.3d at 342; *Sheshtawy*, 2017 U.S. App. LEXIS 17790, at *4.

Thus, for this additional reason, the Court should affirm the district court's dismissal of all claims asserted against Smith.

B. Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing.

Standing is also a component of subject matter jurisdiction. *See Carr v. Alta Verde Indus.,* 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must demonstrate: (1) an injury in fact; (2) causation; and (3) redressability. *Okpalobi v. Foster,* 244 F.3d 405, 425 (5th Cir. 2001). The requirement of an "injury in fact" is intended to limit access to the courts only to those who "have a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996).

The fantastical theory underlying the Complaint is that Smith (and the rest of the "Probate Mafia") purportedly engaged in conduct which frustrated the direction and outcome of the Brunsting Probate Case. *See, generally,* ROA.16-74 (Compl.). But even if that were true, which it is not, Munson is not a beneficiary in the Brunsting Probate Case and he admittedly lacks any tangible interest in the outcome of those proceedings. *See* ROA.1809 at ¶69 ("One thing [the parties] appear to agree on is that Munson is not a party to any of the prior lawsuits, nor is he a beneficiary of the Brunsting Family of Trusts.").

Munson's only connection to any of the conclusory events in the Complaint is that he purportedly provided "paralegal" services to Curtis in connection with

other pending litigation. Munson's disappointment or frustration with the status, or results, of litigation in which he provided paralegal services is not a concrete injury in fact, and he lacks Article III standing. This is yet another reason to affirm the district court's judgment.

CONCLUSION

For all of the foregoing reasons, Appellee Darlene Payne Smith respectfully requests that the Court affirm the district court judgment in her favor, in all respects, as well as grant her such other and further relief to which she may be justly and equitably entitled.

Respectfully submitted,

By: /s/ Barry Abrams
Barry Abrams
Attorney-in-Charge
State Bar No. 00822700
SD Tex. Bar No. 2138
Joshua A. Huber
State Bar No. 24065457
SD Tex. Bar No. 1001404
BLANK ROME LLP
717 Texas Avenue, Suite 1400
Houston, Texas 77002
(713) 228-6601
(713) 228-6605 (fax)
babrams@blankrome.com
jhuber@blankrome.com

ATTORNEYS FOR APPELLEE DARLENE PAYNE SMITH

CERTIFICATE OF SERVICE

On September 27, 2017, I filed the Proposed Sufficient Brief for Appellee Darlene Payne Smith electronically through the Fifth Circuit's CM/ECF system. I will deliver seven paper copies to Federal Express for next day delivery to the Fifth Circuit Clerk for filing when requested by the Clerk.

On September 26, 2017, I served the Proposed Sufficient Brief for Appellee Darlene Payne Smith, pursuant to FED. R. APP. P. 25 on the following *pro se* parties, and pursuant to Fifth Circuit Rule 25.2.5, on the following counsel of record, all of whom are Filing Users of the Court's electronic filing system and all of whom have filed Appearance of Counsel forms with the Court in this case number:

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED:

Anita Kay Brunsting
203 Bloomingdale Circle
Victoria, TX 77904

Amy Ruth Brunsting
2582 Country Ledge Drive
New Braunfels, TX 78132

VIA FIFTH CIRCUIT CM/ECF E-FILE DELIVERY:

Candace Louise Curtis
Rik Wayne Munson
218 Landana St.
American Canyon, CA 94503

Andrew Johnson
Thompson Coe Cousins Irons
One Riverway, Suite 1600
Houston, TX 77056

Bernard L. Matthews, III
Green and Matthews, LLP
14550 Torrey Chase Blvd., Ste. 245
Houston, TX 77014

Bobbie G. Bayless
Bayless Stokes
2931 Ferndale
Houston, TX 77098

Robert Harrell
Rafe A. Schaefer
Norton Rose Fulbright US, LLP
1301 McKinney St., Suite 5100
Houston, TX 77010

Laura Beckman Hedge
Keith Adams Toler
Harris County Attorney's Office
1019 Congress St., 15th Floor
Houston, TX 77002

Jason Ostrom
Stacy L. Kelly
Ostrom Morris PLLC
6363 Woodway, Suite 300
Houston, TX 77057

Adraon D. Greene
Kelsi M. Wade
Galloway Johnson Tompkins Burr & Smith
1301 McKinney St., Suite 1400
Houston, TX 77010

Martin Samuel Schexnayder
Winget, Spadafora & Schwartzberg, LLP
Two Riverway, Suite 725
Houston, TX 77056

/s/ Barry Abrams
Barry Abrams

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/s/ Barry Abrams
Barry Abrams

ATTORNEY FOR APPELLEE DARLENE PAYNE SMITH

Dated: September 26, 2017.

United States Court of Appeals

FIFTH CIRCUIT
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LYLE W. CAYCE
CLERK

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

September 27, 2017

Mr. Barry Abrams
Blank Rome, L.L.P.
717 Texas Avenue
Suite 1400
Houston, TX 77002

No. 17-20360 Candace Curtis, et al v. Candace Kunz-Freed, et al
USDC No. 4:16-CV-1969

Dear Mr. Abrams,

The following pertains to your brief electronically filed on 9/26/17.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below). Appellee Candace Kunz-Freed's name is misspelled.

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

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LYLE W. CAYCE, Clerk

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc:
Mr. Bobbie G. Bayless
Ms. Amy Brunsting
Ms. Anita Brunsting
Ms. Candace Louise Curtis
Mr. Adraon DelJohn Greene
Mr. Robert Stanford Harrell
Mrs. Laura Beckman Hedge
Mr. Joshua A. Huber
Mr. Andrew Johnson
Ms. Stacy Lynn Kelly
Mr. Bernard Lilse Mathews III
Mr. Rik Wayne Munson
Mr. Jason Bradley Ostrom
Mr. Cory S. Reed
Mr. Rafe A. Schaefer
Mr. Martin Samuel Schexnayder
Mr. Keith Adams Toler
Ms. Kelsi M. Wade

Case No. 17-20360

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON,

Plaintiffs - Appellants

v.

CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLIARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99,

Defendants - Appellees

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

September 28, 2017

Mr. Barry Abrams
Blank Rome, L.L.P.
717 Texas Avenue
Suite 1400
Houston, TX 77002

No. 17-20360 Candace Curtis, et al v. Candace Kunz-Freed, et al
USDC No. 4:16-CV-1969

Dear Mr. Abrams,

We have reviewed your electronically filed appellee's brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

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Christina Gardner

By: _____
Christina A. Gardner, Deputy Clerk
504-310-7684

cc: Mr. Bobbie G. Bayless
Ms. Amy Brunsting
Ms. Anita Brunsting
Ms. Candace Louise Curtis
Mr. Adraon DelJohn Greene
Mr. Robert Stanford Harrell
Mrs. Laura Beckman Hedge
Mr. Joshua A. Huber

Mr. Andrew Johnson
Ms. Stacy Lynn Kelly
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Mr. Rik Wayne Munson
Mr. Jason Bradley Ostrom
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Mr. Rafe A. Schaefer
Mr. Martin Samuel Schexnayder
Mr. Keith Adams Toler
Ms. Kelsi M. Wade

NO. 17-20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS and RIK WAYNE MUNSON,

Plaintiffs-Appellants

v.

CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLIARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; and DOES 1-99,

Defendants-Appellees

On appeal from the United States District Court
for the Southern District of Texas, Houston Division
(No. 4:16-CV-1969)

APPELLEE BRIEF FOR BOBBIE G. BAYLESS

BAYLESS & STOKES
Bobbie G. Bayless
State Bar No. 01940600
2931 Ferndale
Houston, Texas 77098
Telephone: 713/522-2224
Telecopier: 713/522-2218

Attorneys for Appellee,
Bobbie G. Bayless

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:	Candace Louise Curtis Rik Wayne Munson *Pro Se*
Defendants-Appellees:	Candace Kunz-Freed Albert Vacek, Jr. Bernard Lyle Matthews, III Neal Spielman Bradley Featherston Stephen A. Mendel Darlene Payne Smith Jason Ostrom Gregory Lester Jill Williard Young Christine Riddle Butts Clarinda Comstock Toni Biamonte Bobbie Bayless Anita Brunsting, *Pro Se* Amy Brunsting, *Pro Se*
Attorneys for Defendants-Appellees, Candace Kunz-Freed and Albert Vacek, Jr.:	Zandra E. Foley Corey S. Reed Andrew L. Johnson Thompson, Coe, Cousins & Irons LLP One Riverway Houston, Texas 77056

Attorneys for Defendant-Appellee, Bernard Lyle Mathews, III:	Bernard Lyle Mathews, III Green and Mathews LLP 14550 Torrey Chase Blvd., Suite 245 Houston, Texas 77014
Attorneys for Defendant-Appellee, Neal Spielman	Martin Samuel Schexnayder Winget, Spadafora & Schwartzberg LLP Two Riverway, Suite 725 Houston, Texas 77056
Attorneys for Defendants-Appellees, Bradley Featherston and Stephen A. Mendel:	Adraon D. Greene Kelsi M. Wade Galloway Johnson Tompkins Burr & Smith 1301 McKinney Street, Suite 1400 Houston, Texas 77010
Attorneys for Defendant-Appellee, Darlene Payne Smith:	Barry Abrams Joshua A. Huber Blank Rome LLP 717 Texas Avenue, Suite 1400 Houston, Texas 77002
Attorneys for Defendants-Appellees, Jason Ostrom and Gregory Lester:	Stacy L. Kelly ostrommorris, pllc 6363 Woodway, Suite 300 Houston, Texas 77006
Attorneys for Defendant-Appellee, Jill Williard Young:	Robert Harrell Rafe Schaefer Norton Rose Fulbright US LLP 1301 McKinney Street, Suite 5100 Houston, Texas 77010
Attorneys for Defendants-Appellees, Christine Riddle Butts, Clarinda Comstock, and Toni Biamonte:	Keith Toler Laura Beckman Hedge Harris County Attorney's Office 1019 Congress, 15th Floor Houston, Texas 77002

Attorneys for Defendant-Appellee, Bobbie Bayless:

Bobbie G. Bayless
Bayless & Stokes
2931 Ferndale
Houston, Texas 77098

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

Bobbie G. Bayless
State Bar No. 01940600
2931 Ferndale
Houston, Texas 77098
Telephone: 713.522.2224
Telecopier: 713.522.2218
bayless@baylessstokes.com

Attorney for Appellee, Bobbie G. Bayless

STATEMENT CONCERNING ORAL ARGUMENT

The legal issues in this case are sufficiently well established that Appellee does not believe oral argument would be of assistance in the Court's review of this case.

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TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Appellee, Bobbie G. Bayless ("Bayless" or "Appellee") submits her response brief in this appeal of Judge Alfred H. Bennett's order dismissing Appellants' RICO action. Bayless asks this Court to affirm the district court's order.

STATEMENT OF THE ISSUE

1. Whether a party can end a state court proceeding by suing everyone involved in the proceeding in federal court, alleging the court and the attorneys representing the other parties are a RICO enterprise.

STATEMENT OF THE CASE

Plaintiffs, who are proceeding *pro se*, filed a RICO complaint against numerous parties, attorneys, and court officials involved in a state probate court action (ROA.16-79). The order being reviewed by this court granted dismissal because Plaintiffs' complaint failed to state a plausible claim for relief against any of the Defendants, including Bayless (ROA. 3329-3335).

Plaintiffs' statement of the case has very little, if anything, to d1o with this case. Instead it is filled with extraneous and irrelevant matters which have no bearing on this appeal. It appears to be Plaintiffs' attempt to compile random allegations by third parties the world over who describe alleged perceived injustices. The support for many of the statements Plaintiffs make comes from the internet. Indeed, Plaintiffs

spend approximately five pages talking about alleged case studies or commentaries found by Plaintiffs on the internet or some source other than the record in this case. Plaintiffs apparently believe this makes their claims plausible, but it falls well short of doing that. Even if these sources could somehow be verified, they have no bearing on the issues before this Court, and they do not provide a basis for Plaintiffs' claims. Nevertheless, Plaintiffs treat them as actual authorities, as is shown by their inclusion in Plaintiffs' table of authorities.

Plaintiffs' discussion sheds no light on the issues in this case. By way of example, Plaintiffs appear to rely on "Corruption in Nigeria: Historical Perspectives" in trying to define corruption. Appellants' Brief at p. 4. Plaintiffs also describe a 2002 survey by Roy Williams having nothing to do with this case which somehow concluded that 70% of generational asset transfers fail and that 97% of the failures were attributable to the family itself. Appellants' Brief at p. 5. Plaintiffs go on to state that Williams' writing was silent on questions of how or to whom control was lost and that Williams had no data to offer. Appellants' Brief at p. 5-6. But perhaps the most amazing part is that Plaintiffs end their reference to that completely irrelevant information by giving Williams' email address and phone number. Appellants' Brief, p. 6, footnote 17.

The facts actually relevant to the claims Plaintiffs assert against Bayless are as follows. Bayless represents Carl Henry Brunsting in a case pending in Harris County Probate Court Number 4 in Cause No. 412.249-401, styled *Carl Henry Brunsting, et al. v. Anita Kay Brunsting, et al.* (the "Probate Proceeding") (ROA. 2259-2278). The Probate Proceeding involves disputes concerning a trust created by the now deceased parents of the five Brunsting siblings, Bayless' client being one of those five Brunsting siblings and Plaintiff Curtis being another (ROA. 866). Neither Bayless nor her client has any relationship with the other Plaintiff, Rik Munson, and, Munson has no relationship to the Probate Proceeding.

In an attempt to end the probate court's involvement in the dispute, Plaintiffs filed their second *pro se* complaint[1] in federal district court (ROA. 16-79). Plaintiffs' new complaint was filed days before a mediation was occur in the Probate Proceeding.[2] This time even the judge, associate judge, and a visiting court reporter of Harris County Probate Court Number 4 were named as defendants, as were the attorneys involved in the probate proceeding (ROA. 16-79).

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[1] A prior action Plaintiff Curtis filed *pro se* in a different federal district court with the "assistance" of Plaintiff Munson was long ago transferred to the same Harris County probate court (ROA. 1148-49) and eventually consolidated with the Probate Proceeding (ROA. 2667-2675). That first federal court case only involved Curtis and two of her sisters, Anita Brunsting and Amy Brunsting (ROA. 2227-2233).

[2] *See* paragraphs 113-115 of the Complaint (ROA. 41) which specifically complain about mediation being required in the probate proceeding.

SUMMARY OF THE ARGUMENT

The district court correctly dismissed the entire case because Appellants did not plead anything close to a plausible claim for relief against any of the Defendants, including Bayless (ROA. 3329-3335). Plaintiffs have not provided one single fact to support their apparent position that Bayless is a person who is engaged in a pattern of racketeering activity connected to the acquisition, establishment, conduct, or control of an enterprise, and that Bayless participated in the operation or management of that enterprise.

The fact that Bayless practices law and, in the course of her practice, has represented and taken actions on behalf of another party involved in litigation in Harris County Probate Court Number 4 does not come close to supporting Plaintiffs' claims. Regardless of whether Plaintiffs agree with the actions Bayless has taken in the course of her representation of her client they have no right to complain about those actions. Attorneys are immune from liability to other parties for actions taken on behalf of their own client, something which the order of dismissal also stated as a grounds for dismissal and which Plaintiffs do not address in their Brief, just as they do not bother to try and distinguish the other authorities cited by the district court as the basis for the order dismissing the case.

ARGUMENT AND AUTHORITIES

Plaintiffs filed a complaint purporting to assert causes of action against Bayless and numerous other Defendants for what Plaintiffs describe as: (1) violations of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §1962(c); (2) conspiracy to violate 18 U.S.C. §1962(c); (3) conspiracy to violate due process rights; (4) conspiracy to deny equal protection of law; (5) conspiracy to deprive plaintiffs of an impartial forum; (6) breach of the public trust; (7) aiding and abetting public and private fiduciary breaches; (8) aiding and abetting fiduciary misapplications; and (9) claims allowed by 42 U.S.C. §1988(a), 18 U.S.C. §1964(c) and Rule 10b-5 Securities Exchange act of 1934 (17 C.F.R. §240.10b-5), including the right of private claims implied therefrom (ROA. 16-79).

The allegations relating to Bayless are minimal and do not even allege wrongdoing. The information identifying Bayless as a defendant is contained in paragraphs 21, 49, and 50 of the Complaint (ROA. 21 and 27).[3] Paragraph 55 of the Complaint alleges that Bayless is an attorney who has practiced law in the Harris County Probate courts (ROA. 28). Paragraph 56 alleges, without any facts to support it, that Bayless and the other named parties have engaged in a criminal enterprise

[3] Paragraph 21 names Bayless as a Defendant (ROA. 21). Paragraph 49 alleges the law firm of Bayless & Stokes to be an enterprise and a "legal entity associated with Harris County Probate Court...." (ROA. 27). Paragraph 50 alleges Bayless is employed by or associated with Bayless & Stokes (ROA. 27).

somehow being conducted through Harris County Probate Court Number 4 (ROA. 28-29). Paragraph 59 makes a similar allegation, again without one shred of factual support (ROA. 29-30). Bayless' name only otherwise appears at paragraph 124 of the Complaint, where an undefined conspiracy to alter the course of justice is alleged (ROA. 45), and paragraph 131 of the Complaint (ROA. 48-49) which contains the only alleged factual basis for Plaintiffs' claim against Bayless. That so-called claim is one, however, which fails on its face.

Even absent attorney immunity, Plaintiffs have no claim against Bayless because there has been no wrongdoing. But Bayless has no civil liability to non-clients for actions taken in representing her own client in litigation even if they could be viewed as wrongful. *Contey Hanger, LLP v. Byrd*, 467 SW 3d 477, 481 (Tex. 2015). This Court has already been asked to address this issue and has held that such immunity is true immunity from suit, not just a defense to liability. *Troice v. Proskauer Rose, LLP*, 816 F.3d 341 (5th Cir. 2016).

Plaintiffs' entire claim, as articulated in paragraph 131 of the Complaint, is based on Bayless' postponement of a hearing on the Motion for Partial Summary Judgment Bayless filed in the probate proceeding on behalf of her client, Carl Henry Brunsting (ROA. 48-49). Bayless certainly did postpone the hearing on her client's Motion for Partial Summary Judgment. Bayless' postponement of the hearing on her

own motion is not something that has any relationship to the Plaintiffs, and Plaintiffs have no right to dictate if, when, or on what motion Bayless schedules hearings in the representation of her client. There was nothing wrongful in what Bayless did, and Plaintiffs have no right to complain about Bayless' actions. Thus, there is no support for any kind of cause of action by these Plaintiffs against Bayless under any circumstances.

Nor, as the district court's order points out, have Plaintiffs alleged any causal relationship between any defined injury and any of Bayless' actions (ROA. 3329-3335). In a remarkably similar but unpublished case decided by this court on September 14, 2017, a dismissal and a sanctions order were affirmed in a similar RICO action filed against participants in a proceeding in Harris County Probate Court 1. In that case, the alleged damages were also financial losses to inheritance interests at issue in the probate proceedings. In *Sheshtawy, et al. v. Gray, et al.*, Case No. 17-20019 (5th Cir. Sept. 14, 2017) (unpublished), this Court held that alleged injury to one's share of an estate or trust is "merely an expectancy interest that is too speculative and indirect to satisfy RICO standing. (citations omitted)." *Id.* at pp. 3-4. And Plaintiff Munson does not even have that speculative and indirect alleged injury, because he is not a potential Brunsting heir.

After Bayless filed her Motion to Dismiss, Plaintiffs filed what they called Plaintiffs' Addendum of Memorandum in Support of RICO Complaint (ROA. 202-1775). The filing is comprised of two motions relating to the first federal court action Curtis filed in which Bayless never even appeared. Giving Plaintiffs every possible benefit of the doubt, Plaintiffs' "Addendum" also described actions Bayless took in the Probate Proceeding, all of which were in the representation of her client, Carl Brunsting (ROA. 210-211, 213, 215-217, 219).

And finally, in their Brief, Plaintiffs mention Bayless in similar contexts, none of which provide any more support for Plaintiffs' alleged claims against Bayless. Plaintiffs first mention Bayless on pages 12-14 of their Brief when they complain about the way in which Bayless described the style of the Probate Proceeding in her filings. At page 21 of their Brief, Plaintiffs discuss the fact that Bayless filed the Probate Proceeding. And finally, at page 25 of their Brief, Plaintiffs bring up Bayless when talking about motions having been filed requesting fees. Again, there is nothing there to support Plaintiffs' alleged claims against Bayless.

Plaintiffs' lack of understanding of the legal principles and procedures involved in the Probate Proceeding and Texas law in general have been an issue in all of their filings, including in the Brief filed in this Court, but addressing those

errors is unnecessary in the resolution of this case because there is nothing presented by Plaintiffs which, even if true, would subject Bayless to liability.

Thus, Plaintiffs' attempts to allege facts to support a claim against Bayless fall woefully short. Pursuant to Fed. R. Civ. P. 12(b)(6), Bayless asked the district court to dismiss Plaintiffs' action against her because it failed to state a claim upon which relief can be granted, and the district court correctly granted that request. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995).

CONCLUSION

Plaintiffs have stated no claim against Bayless but even if Plaintiffs had alleged some wrongful act, all actions Bayless took about which Plaintiffs complain were taken on behalf of her client, Carl Henry Brunsting. Bayless is, therefore, immune from suit by Plaintiffs for such actions. Judge Bennett's order dismissing Plaintiffs' claims should be affirmed in all respects.

WHEREFORE, PREMISES CONSIDERED, Bayless prays that the district court's order of dismissal be affirmed, and that Bayless have such other and further relief, both general and special, legal and equitable, to which she may show herself justly entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

Bobbie G. Bayless
State Bar No. 01940600
2931 Ferndale
Houston, Texas 77098
Telephone: 713.522.2224
Telecopier: 713.522.2218
bayless@baylessstokes.com

Attorneys for Appellee,
Bobbie G. Bayless

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following in compliance with Fed. R. App. P. 25, via U.S. Appellate CM/ECF on this 26th day of September, 2017:

Zandra E. Foley
Corey S. Reed
Andrew L. Johnson
Thompson, Coe, Cousins & Irons LLP
One Riverway
Houston, Texas 77056

Bernard Lyle Mathews, III
Green and Mathews LLP
14550 Torrey Chase Blvd., Suite 245
Houston, Texas 77014

Martin Samuel Schexnayder
Winget, Spadafora & Schwartzberg LLP
Two Riverway, Suite 725
Houston, Texas 77056

Adraon D. Greene
Kelsi M. Wade
Galloway Johnson Tompkins
Burr & Smith
1301 McKinney Street, Suite 1400
Houston, Texas 77010

Barry Abrams
Joshua A. Huber
Blank Rome LLP
717 Texas Avenue, Suite 1400
Houston, Texas 77002

Stacy L. Kelly
ostrommorris, pllc
6363 Woodway, Suite 300
Houston, Texas 77006

Robert Harrell
Rafe Schaefer
Norton Rose Fulbright US LLP
1301 McKinney Street, Suite 5100
Houston, Texas 77010

Keith Toler
Laura Beckman Hedge
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

Anita Brunsting
203 Bloomingdale Circle
Victoria, Texas 77904

Amy Brunsting
2582 Country Ledge Drive
New Braunfels, Texas 78132

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 2,058 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in Times New Roman 14 font for text and 12.5 font for footnotes.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH Cir. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

NO. 17-20360

In the United States Court of Appeals
For the Fifth Circuit

Candace Louise Curtis; Rik Wayne Munson,
Plaintiffs–Appellants,

v.

Candace Kunz-Freed; Albert Vacek, Jr.; Bernard Lyle Matthews, III; Neal Spielman; Bradley Featherston; Stephen A. Mendel; Darlene Payne Smith; Jason Ostrom; Gregory Lester; Jill Willard Young; Christine Riddle Butts; Clarinda Comstock; Toni Biamonte; Bobbie Bayless; Anita Brunsting; Amy Brunsting; Does 1-99,
Defendants–Appellees

Appeal from the United States District Court
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Judge Alfred H. Bennett, Presiding

BRIEF OF APPELLEE JILL WILLARD YOUNG

Robert S. Harrell
Texas Bar No. 09041350
Robert.Harrell@nortonrosefulbright.com
Rafe A. Schaefer
Texas Bar No. 24077700
Rafe.Schaefer@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
Fulbright Tower
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Attorneys for Appellee Jill Willard Young

NO. 17-20360

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1. Plaintiffs–Appellants are Candace Louise Curtis and Rik Wayne Munson, who represent themselves pro se.

2. Defendants–Appellees are Candace Kunz-Freed; Albert Vacek, Jr.; Bernard Lyle Matthews, III; Neal Spielman; Bradley

Featherston; Stephen A. Mendel; Darlene Payne Smith; Jason Ostrom; Gregory Lester; Jill Willard Young; Christine Riddle Butts; Clarinda Comstock; Toni Biamonte; Bobbie Bayless; Anita Brunsting; Amy Brunsting; and Does 1-99.

3. Attorneys for Defendants–Appellees Candace Kunz-Freed and Albert Vacek, Jr. are Andrew Johnson and Cory S. Reed of Thompson, Coe, Cousins & Irons L.L.P.

4. Defendant-Appellee Bernard Lyle Matthews, III represents himself.

5. Attorney for Defendant–Appellee Neal Spielman is Martin Samuel Schexnayder, Esq. of Winget, Spadafora & Schwartzberg, L.L.P.

6. Attorneys for Defendants–Appellees Bradley Featherston and Stephen A. Mendel are Adraon DelJohn Greene and Kelsi M. Wade of Galloway, Johnson, Tompkins, Burr & Smith.

7. Attorneys for Defendant–Appellee Darlene Payne Smith are Barry Abrams and Joshua A. Huber of Blank Rome, L.L.P.

8. Defendant–Appellee Jason Ostrom represents himself.

9. Attorney for Defendant–Appellee Gregory Lester is Stacy Lynn Kelly of Ostrom Morris, P.L.L.C.

10. Attorneys for Defendant–Appellee Jill Willard Young are Robert S. Harrell and Rafe A. Schaefer of Norton Rose Fulbright US LLP.

11. Attorneys for Defendants–Appellees Christine Riddle Butts, Clarinda Comstock, and Toni Biamonte are Keith Adams Toler and Laura Beckman Hedge of the County Attorney's Office for Harris County, Texas.

12. Defendant-Appellee Bobbie Bayless represents herself.

13. Defendant-Appellee Anita Brunsting represents herself pro se.

14. Defendant-Appellee Amy Brunsting represents herself pro se.

s/ Robert S. Harrell
Robert S. Harrell

Attorney-In-Charge for Appellee Jill Willard Young

STATEMENT REGARDING ORAL ARGUMENT

Appellee Jill Willard Young agrees with the statement in Appellants' Opening Brief ("Appellants Brief") that oral argument is not necessary here, because the district court decided this matter on the pleadings. But if this Court decides to have argument, Appellee Young would like to participate.

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STATEMENT OF JURISDICTION

The District Court properly determined that Plaintiffs–Appellants ("Appellants") failed to state a claim for violation of the Racketeering Influenced and Corrupt Organizations ("RICO") act against Ms. Young, that Appellants' claims against Ms. Young are barred by the attorney immunity doctrine, and that Appellants' claims were properly dismissed using the District Court's inherent power because they were frivolous and delusional. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the District Court's May 16, 2017 Order (the "Order") dismissing Appellants' Complaint was a final judgment.

ISSUES PRESENTED FOR REVIEW

1) Whether the District Court correctly determined that Appellants' RICO claim against Young was barred by the attorney immunity doctrine;
2) Whether the District Court correctly dismissed Appellants' Complaint as frivolous and delusional using its inherent power;
3) Whether the District Court correctly determined that Appellants failed to plead a valid RICO claim; and
4) Whether the District Court correctly determined that Appellants lacked standing to sue for a RICO claim.

STATEMENT OF THE CASE

I. Procedural History

In the District Court, Appellants sued more than fifteen parties—the judges, attorneys, and parties from a probate proceeding in Harris County Probate Court No. 1—alleging that Appellees–Defendants ("Appellees"), collectively, violated RICO and committed common law fraud and breach of fiduciary duty. Appellant Curtis herself was a party to the underlying probate proceeding, but Appellant Munson was not.

In the District Court, on September 15, 2016, Appellee Young filed a motion to dismiss with prejudice each claim in Appellants' Complaint. Appellants responded on October 3, 2016, and Appellee Young filed her reply on October 11, 2016. Separately and after Appellee Young had already moved to dismiss the Complaint but before Appellants had filed their response to that motion, Appellants filed a document that styled as "Plaintiffs' Addendum of Memorandum in Support of RICO Complaint" (the "Addendum"). *See* ROA.202–1762. All told, the Addendum contained more than thirty "exhibits" and totaled more than 1,500 pages. *See id.* The Addendum was not an amended complaint—it alleged no causes of action against any Appellee. Appellants never moved the District Court

to consider the Addendum in its determination of any motion. Nor did Appellants ever amend their Complaint to include any assertion included in the Addendum.[1]

The District Court held a hearing on the Appellees' pending motions to dismiss on December 15, 2016, and on May 16, 2017, the District Court entered the Order dismissing the Appellants' suit with prejudice.

II. The Allegations in Appellants' Complaint

As the District Court succinctly stated, Appellants' Complaint "assert[s] almost fifty 'claims' against more than fifteen defendants," but those "claims" consist of "fantastical allegations that some or all of the defendants are members in a secret society and 'cabal' known as the 'Harris County Tomb Raiders,' or 'The Probate Mafia.'" ROA.3330. Appellants' Complaint "rest[s] upon the assertion that this purported shadow organization engages in 'Poser Advocacy,' supposedly an 'exploitation opportunity' to 'hijack' 'familial wealth.'" *Id.*

Against, Appellee Young, Appellants alleged "causes of action" for:

- "18 U.S.C. § 1962(d) the Enterprise" (ROA.25–29, ¶¶ 35–58);

[1] Appellants' Brief asserts that their Complaint consists of twelve separate filings in the District Court, including the Addendum and several of Appellants' responses to motions to dismiss. *See* Appellants' Brief, at n.2 ("The complaint consists of Docket entries 1, 26, 33, 34, 45, 57, 62, 65, 69, 85, 87, and 89."). But the Addendum and responses to motions are not "pleadings" under the Federal Rules of Civil Procedure, which states, "Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer." *See* Fed. R. Civ. P. 7(a). Appellants also contend that Appellants' Motions to Dismiss somehow plead facts should be credited to Appellants in satisfaction of their pleading requirement. *See* Appellants' Brief, at 3. But Appellants' Motions to Dismiss are not pleadings, either. Fed. R. Civ. P. 7(a).

- "The Racketeering Conspiracy 18 U.S.C. § 1962(c)" (ROA.29–42, ¶¶ 59–120);
- Three claims for "Honest Services 18 U.S.C. § 1346 and 2" (ROA.42–44, ¶¶ 121, 122, 123);
- "Wire Fraud 18 U.S.C. § 1343 and 2" (ROA.44, ¶ 123);
- "Fraud 18 U.S.C. § 1001 and 2" (ROA.44, ¶ 123);
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. § 1951(b)(2) and 2" (ROA.44, ¶ 123); and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.A.C. § 371" (ROA.44, ¶ 123); "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting" (ROA.49, ¶ 132); and "Conspiracy to Violate 18 USC §§242 and 2, & 42 U.S.C. §§983 and 1985) (ROA.58, ¶ 159).

Aside from boilerplate recitations of the elements of causes of action, Appellants' Complaint did not assert any specific factual allegations of improper conduct against Appellee Young.

III. The Underlying Probate Proceeding

Appellants express indignation at the Order's statement that "Plaintiffs' Complaint appears to relate to a probate matter in Harris County Probate court No. 4, which the Plaintiffs generically call 'Curtis v. Brunsting" (Appellants' Brief, at 12 (citing ROA.3330)), contending that their case actually relates to a previously-filed District Court case decided in 2012. But the District Court properly attempted to divine what Appellants Complaint related to. Indeed, a review of the Complaint makes clear that the allegations related to a probate matter in Harris

County Probate Court, which the Appellants called "Curtis v. Brunsting," although no cause number was ever mentioned and no court was ever identified. *See, e.g.*, ROA.41, ¶ 110.

And the District Court's parsing of the Complaint makes sense, because the only matter in which Appellee Young was ever involved with Appellant Curtis was *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4) (the "*Brunsting* matter"). ROA.183 In the *Brunsting* matter, Appellee Young was attorney for Greg Lester, who had been appointed by Probate Court No. 4 as temporary administrator,[2] to assist Mr. Lester in preparing a written report to the Court. *Id.*; ROA.199–201. Appellant Munson was not party to that matter. ROA.183.

Appellee Young never had a fiduciary relationship with either Appellant, and she did not represent any other party in the *Brunsting* matter. *Id.* Nor was Appellee Young a party or attorney in the previously-dismissed federal court case that Appellants' Brief references. Appellants' Complaint make no allegation to the contrary. Nor does Appellants' Brief.

[2] *See* ROA.199–201 (Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code § 452.051, *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4 Jul. 24, 2015)).

SUMMARY OF ARGUMENT

Appellants' arguments fail for myriad reasons, and the District Court's dismissal of the case should be affirmed on multiple independent grounds.

First, the District Court determined that Appellants' claims against Appellee Young were barred by the attorney immunity doctrine. ROA.3333. But Appellants' arguments need not be reached, because they have waived any error regarding this determination They fail to cite to any legal authority or any portion of the record to argue that the District Court erred.

Second, Appellants do not address the District Court's dismissal of the case via its inherent power to dismiss frivolous suits, waiving any error for that independent basis for dismissal. But even on the merits, the District Court appropriately dismissed Appellants' complaint as "frivolous (and borderline malicious) . . . via the Court's inherent ability to dismiss frivolous complaints." ROA.3334.

Third, the District Court correctly determine the Appellants did not adequately plead a plausible RICO claim that could satisfy Rule 12(b)(6). ROA.3332.

Finally, the District Court correctly held that Appellants lacked standing to bring a RICO claim because they failed to "plead facts showing a recognizable injury to their business or property caused by the alleged RICO violations." *Id.*

For each reason, the District Court's Order should be affirmed.

ARGUMENT AND AUTHORITIES

In denying Appellee Young's Motion for Sanctions against Appellants while granting the Appellees' various motions to dismiss the Complaint, the District Court noted that it would "give Plaintiffs, as pro se litigants, the benefit of the doubt" that they had not "underst[oo]d the legal shortcomings of their Complaint." ROA.3335. But the District Court "caution[ed Appellants] from additional meritless filings," making clear that the Appellants should "now realize that all claims brought in this litigation . . . lack merit, and cannot be brought to this, or any other court, without a clear understanding that Plaintiffs are bringing a frivolous claim." *Id.* Now, despite the District Court's clear and stern instructions, Appellants have brought this appeal, asserting the same allegations the District Court appropriately dismissed as "fanciful, fantastical, and delusional." ROA.3332.

I. Appellants' Attorney Immunity Argument Should Not Be Reached, But if It Is, It Lacks Merit.

The District Court correctly held that, under Texas law, "attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation." ROA.3333 (quoting *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015)). Based on that law, the District Court determined that Appellants' allegations against Appellee Young were barred

because they, "at best, assert wrongdoing based solely on actions taken during the representation of a client in litigation." *Id.*

Appellants have failed to preserve any error relating to the District Court's dismissal of Appellants' claims under the attorney immunity doctrine. But even if they had preserved error, the District Court's ruling should be affirmed on the merits.

A. Waiver

Despite this independent basis for dismissal of Appellants' claims against Appellee Young, Appellants mention attorney immunity only in a single sentence, stating, "These RICO claims are not dealing with attorney or judicial error, and are not attempting to correct mistake, inadvertence or excusable neglect." Appellants' Brief, at 29. Appellants do not contend that the District Court erred in its determination that attorney immunity barred their claims. And the assertion that their allegations are not based on claims of attorney "error" or "mistake, inadvertence, or excusable" neglect makes no difference. Even if supported by record citations or well-pleaded facts, Appellants could not maintain a cause of action against Appellee Young, because "[e]ven 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.'" *Byrd*, 467 S.W.3d at 481 (Tex.

2015) (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)).

Appellants cite no legal authority and make no record citations relating to attorney immunity. *See* Appellants' Brief, at 28–29. Thus, Appellants have failed to preserve error relating to Appellee Young's attorney immunity. FED. R. APP. P. 28(a)(8)(A); *United States v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010) ("[A]mong other requirements to properly raise an argument, a party must ordinarily identify the relevant legal standards and any relevant Fifth Circuit cases.") (internal quotations omitted).

B. The District Court Correctly Determined Appellee Young is Entitled to Attorney Immunity.

Even if reached, the District Court correctly determined that Appellants' claims against Appellee Young are barred by the attorney immunity doctrine.

In Texas, "attorney immunity is properly characterized as a true immunity from suit," and not merely "a defense to liability." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346–48 (5th Cir. 2016). This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Id.* at 346. And a plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'"[3] *Id.* at 483; *see also*

[3] The only exceptions to an attorney's "true immunity from suit" are if an attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduct "does not involve

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) (citing *Byrd*, 467 S.W.3d at 482, and 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").

Here, Appellants' Complaint contains no allegations that Appellee Young engaged in any conduct that was "entirely foreign to the duties of an attorney." *Id.* at 482. Nor did Appellants allege Appellee Young was engaging in conduct that did not involve the provision of legal services. *Id.* Indeed, Appellants' Complaint did not allege ***any*** conduct of Appellee Young they claimed was wrongful. *Id.*

In this Court, the only conduct of Appellee Young that is mentioned in Appellants' Brief (other than complaining about substantive arguments raised at the District Court in Appellee Young's defense of this case) is the unremarkable fact that Appellee Young was able to schedule a single hearing in the probate court. Appellants' Brief, at 27 ("It only took nine days for Jill Willard Young to get a hearing . . . ."). Certainly, scheduling a hearing is one of "the kinds of actions that are part of the discharge of an attorney's duties in representing a party . . . ." *Highland Capital Mgmt., LP*, No. 05-15-00055-CV, 2016 WL 164528, at *6.

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the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482 (quoting *Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882)).

Thus, Appellee Young is protected by Texas's doctrine of attorney immunity Her dismissal from this suit should be affirmed.

II. Appellants Fail to Challenge the District Court's Dismissal of the Case Via Its Inherent Power.

The District Court determined that Appellants' Complaint should be dismissed as "frivolous because [Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less any facts giving rise to a plausible claim for relief." ROA.3334. The District Court then exercised its own "inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte." *Id.*

Appellants have failed to preserve any error relating to the District Court's dismissal of Appellants' claims using its inherent authority. But even if they had preserved error, the District Court's ruling should be affirmed on the merits.

A. Waiver

Nowhere do Appellants contend the District Court erred in dismissing the case via its inherent power. Indeed, nowhere in Appellants' Brief are the words "inherent" or "sua sponte" even mentioned. By failing to assign error to the specific determinations made by the District Court, Appellants have waived any error by the District Court. *See* FED. R. APP. P. 28 (a)(8)(A); *Scroggins*, 599 F.3d at 447.

B. The District Court Correctly Dismissed the Complaint With Its Inherent Authority.

As the District Court recognized, it had the "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint . . . ." *See Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the required filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)).

Here, Appellants concocted conspiracy theories allege shadow organizations engaging in "poser advocacy" through the "probate mafia." ROA.38, ¶ 95. Other courts in this Circuit have held that almost identical allegations made by pro se litigants were frivolous. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a

pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). Thus, the District Court's Order should be affirmed.

III. The District Court Properly Dismissed Appellants' Complaint Under Rule 12(b)(6).

The District Court held that the "Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332. The Court specifically noted that Appellants' allegations could not "be characterized as anything more than fanciful, fantastic, and delusional." *Id.* Instead, the allegations "consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts." *Id.*

Appellants' Brief confirms the accuracy of the District Court's Order. Rather than identify the ruling made by the District Court and show why or how the Complaint pleaded any plausible claim for relief, Appellants instead spin a thirty-page yarn as bizarre, conclusory, and ill-founded as their original Complaint. Indeed, in just the first few pages of their brief, Appellants do all of the following:

- write the confounding sentence "Due to the tendency for concepts to elicit varying interpretations, Plaintiffs view matters of conceptual clarification as apposite and not peripheral" (Appellants' Brief, at 4);

- assert that the definition of "'corruption'" under the U.S. constitution is based on a Nigerian legal article (*id.*; *id.* at n.8); and
- argue, based on alleged 2006 "testimony" of a person named "Van Bookshire" that because Bookshire had trouble finding an attorney who would take his case in Harris County Probate Court, probate attorneys in Harris County must be members of a "circle of friends . . . called the tomb raiders club" (*id.* at 6 (citing a URL that leads to a "file not found" error on the Texas Senate's streaming video web player)).

Appellants acknowledge they were required to "plead sufficient factual matter" to provide "the grounds' of [their] entitle[ment] to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." Appellants' Brief, 7 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted)). Nevertheless, throughout the entirety of Appellants' Brief, they fail to point to a single well-pleaded fact that could support any element of any cause of action pleaded in their Complaint.

As Ms. Young asserted below (ROA.190–92), Appellants' Complaint relies on implausible and conclusory allegations, unsupported by any sufficient factual assertions to state a valid claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, Appellants were required to plead enough facts "to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Appellants' claim is "facially plausible" only if they pled facts that allowed the court to "draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Id.* Further, the District Court was not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678–79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Appellants' Complaint consists of conclusory conspiracy theories about lawyers and judges forming a criminal enterprise in a Texas state probate court, which appropriately led the District Court to state that Appellants' Complaint, "even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332 (determining the allegations "cannot be characterized as anything more than fanciful, fantastic, and delusional").[4]

[4] In addition to the RICO claim, which is the only claim Appellants appear to complain of in this appeal, the District Court properly determined that most of Appellants alleged 'claims' are "either based on statutes that do not create a private cause of action, or simply do not exist under Texas or Federal law." ROA.3332. As examples, against Appellee Young, Appellants also allege three causes of action for "honest services" fraud under 18 U.S.C. § 1346, along with causes of action for wire fraud, fraud under 18 USC § 1001, and violation of the Hobbs Act. *See* ROA.43–44, at ¶¶ 121–123. But those are criminal causes of action that cannot be pursued by a private plaintiff. *See, e.g.*, *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.); *Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (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"); *Thompson,* No. CV-H-15-598, 2016 WL 164114,

The Southern District of Texas has repeatedly rejected identical claims. *See Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.); *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, 2016 WL 5871463 (S.D. Tex. Oct. 7, 2016). In *Freeman*, two pro se plaintiffs alleged that a "probate court enterprise comprised of judges and lawyers" had "'virtually looted' his mother's homestead." *Id.* at *2 (internal footnotes omitted). But even if that were true, the court held that "these allegations fail to state a 'racketeering activity' because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred." *Id.*

In *Sheshtawy*, the plaintiffs alleged parties and attorneys practicing before Harris County Probate Court No. 1 were members of a RICO conspiracy, along with two judges, based on the allegation that the judges always ruled against the Plaintiffs. 2016 WL 5871463, at *1–2. The district court dismissed that matter pursuant to Rule 12(b)(6), because plaintiffs' allegations were "pure zanyism." *Id.* at *4. That dismissal was recently affirmed by this Court. *See Sheshtawy v. Gray*, No. 17-20019, 2017 WL 4082754, at *1 (5th Cir. Sept. 14, 2017) (per curiam)

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at *3 ("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); *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"),

("[W]e affirm the district court's determination that Plaintiffs lack RICO standing . . . ."); *id.* at *2 n.4 ("The district court also dismissed Plaintiffs' RICO claims for failure to state a claim under Rule 12(b)(6). Although we need not address it, we would affirm on this basis as well.").

Here, the District Court's correctly determined that Appellants failed to plead a plausible claim for relief against Appellee Young, requiring dismissal. The Order should be affirmed.

IV. The District Court Appropriately Determined Appellants Lack Standing to Sue for RICO.

The District Court's Order correctly determined that Appellants "fail[ed] to plead any facts establishing they have standing under § 1964(c) to assert civil RICO claims against any of the [Appellees] because [Appellants] fail to plead facts showing a recognizable injury to their business or property caused by the alleged RICO violations." ROA.3332. Appellants' Brief confirms the District Court was correct. *See Gil Ramirez Group, L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 408 (5th Cir. 2015).

The RICO statute states, "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). And a RICO plaintiff must show he has standing to sue. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir. 1998). To plead standing under RICO, a plaintiff "must 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)); *Holmes v. Securities Investor Protection Corp.*, 559 U.S. 1, 9-10 (1992) ("[P]roximate cause is thus required," which means there must be "some direct relation between the injury asserted and the injurious conduct alleged.").

The focus of proximate cause analysis is "directness"—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.").

The *Firestone* case is instructive. *See Firestone v. Galbreath,* 976 F.2d 279 (6th Cir. 1992). There, 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, if any actually existed. *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 upon 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"). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

A party also fails to show it has standing to bring a RICO claim 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).

Like the aggrieved beneficiaries in *Firestone*, Appellants here could, at most, suffer only indirect harm. The direct relationship requirement is plainly applicable here, 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 sue alleged securities fraud co-conspirators). Appellants allege only that Appellee Young caused them damage by injuring the

"Brunsting family of Trusts." Appellants' Brief, at 16. And by only alleging that Appellee Young caused harm to the trust through conduct in the probate proceeding, which in turn caused harm to Appellants, Appellants improperly ask the Court to go "beyond the first step" of the direct relationship requirement. *See Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. at 10 ("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.").

Any damages, attorneys' fees, or costs incurred by Appellants resulted from factors other than Appellee Young's alleged RICO violations, as Appellants' Brief itself details the significant, time-consuming litigation in Probate Court No. 4. *See Sheshtawy,* 2016 WL 5871463, at *5 ("[T]he use of mail and wire services by attorneys and judges is a legal and acceptable means to communicate legal business. The fact that the plaintiffs dispute the outcome of various motions does not mean that routine communications are acts of conspiracy or fraud. Routine litigation conduct, even conflicts, cannot become a basis for a RICO suit . . . .").

Thus, dismissal of Appellants' RICO claims for lack of standing to sue was appropriate, and the District Court's Order should be affirmed.

PRAYER

Appellee Jill Willard Young requests that the District Court's Order be affirmed. She requests all other relief to which she may be justly entitled.

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

s/ Robert S. Harrell

Robert S. Harrell
State Bar No. 09041350
Rafe A. Schaefer
State Bar No. 24077700
Fulbright Tower
1301 McKinney, Suite 5100
Houston, TX 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Attorneys for Appellee Jill Willard Young

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that an electronic copy of the Brief of Appellee was served by CM-ECF and electronic mail on all counsel of record in compliance with FED. R. APP. P. 25 and Fifth Circuit Rule 25.2.5. Undersigned counsel further certifies that an electronic (PDF) copy of Brief of Appellee was electronically filed with the Clerk of the Fifth Circuit in compliance with Fifth Circuit Rule 25.2 on September 26, 2017.

/s/ Robert S. Harrell
Robert S. Harrell

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,788 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

/s/ Robert S. Harrell
Robert S. Harrell

Attorney of Record for Appellee Jill Willard Young

Date: September 26, 2017

No. 17-20360

In the United States Court of Appeals
for the Fifth Circuit

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON,

Plaintiffs - Appellants

v.

CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99,

Defendants - Appellees

On Appeal from the
United States District Court,
Southern District of Texas-Houston Division
Case No. 4:16-cv-1969

APPELLEES CANDACE KUNZ-FREED AND ALBERT VACEK, JR.'S BRIEF

Andrew L. Johnson
Texas Bar No. 24060025
Thompson, Coe, Cousins & Irons, LLP
One Riverway, Suite 1400
Houston, Texas 77056
Telephone: (713) 403-8210
Facsimile: (713) 403-8299
ajohnson@thompsonscoe.com

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PRO SE APPELLANTS:	Candace Louise Curtis Rik Wayne Muson 218 Landana Street American Canyon, CA 94503
APPELLEES:	Candace Kunz-Freed Albert Vacek, Jr.
COUNSEL FOR APPELLEES:	Andrew L. Johnson Zandra E. Foley Cory S. Reed Thompson, Coe, Cousins & Irons, LLP One Riverway, Suite 1400 Houston, Texas 77056
PRO SE APPELLEE:	Bernard Lyle Matthews, III Green and Mathews LLP 14550 Torrey Chase Blvd, Suite 245 Houston, TX 77014
APPELLEE:	Neal Spielman
COUNSEL FOR APPELLEES:	Martin Schexnayder Winget, Spadafora & Schwartzberg LLP Two Riverway, Suite 725 Houston, TX 77056

APPELLEES:	Bradley Featherston Stephen A. Mendel
COUNSEL FOR APPELLEES:	Adraon Greene Kelsi Wade David Christopher Deiss Galloway Johnson Tompkins Burr & Smith 1301 McKinney St, Ste 1400 Houston, TX 77010
APPELLEE:	Darlene Payne Smith
COUNSEL FOR APPELLEES:	Barry Abrams Joshua A. Huber Blank Rome LLP 717 Texas Avenue, Suite 1400 Houston, TX 77002
PRO SE APPELLEE:	Jason B. Ostrom Ostrom Morris PLLC 6363 Woodway, Ste 300 Houston, TX 77057
APPELLEE:	Gregory Lester
COUNSEL FOR APPELLEES:	Stacy L. Kelly Terry Bryant PLLC 8584 Katy Freeway, Ste 100 Houston, TX 77024
APPELLEE:	Jill Willard Young
COUNSEL FOR APPELLEES:	Rafe A. Schaefer Robert S. Harrell Norton Rose Fulbright LLP 1301 McKinney, Suite 5100 Houston, TX 77010

APPELLEES:	Christine Riddle Butts Clarinda Comstock Toni Biamonte
COUNSEL FOR APPELLEES:	Keith Adams Toler Laura Beckman Hedge Harris County Attorney's Office 1019 Congress St., 15th Floor Houston, TX 77002
PRO SE APPELLEE:	Bobbie G. Bayless Bayless Stokes 2931 Ferndale Houston, TX 77098
PRO SE APPELLEE:	Anita Brunsting 203 Bloomingdale Circle Victoria, TX 77904
PRO SE APPELLEE:	Amy Brunsting 2582 Country Ledge Drive New Braunfels, TX 78132

/s/ Andrew L. Johnson
Andrew L. Johnson
Attorney of Record for Appellees
Candace Kunz-Freed & Albert Vacek, Jr.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Candace Kunz-Freed and Albert Vacek, Jr. believe oral argument is unnecessary and will not assist the Court in considering and ruling on Appellants' issues. Appellants clearly failed to satisfy the pleading requirements of the Federal Rules of Civil Procedure, and there are no novel or convoluted issues for the Court to consider. However, to the extent the Court orders oral argument, Appellees reserve the right to present argument.

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STATEMENT OF THE ISSUES

Issue 1: The District Court's judgment should be affirmed because Appellants failed to challenge on appeal all independent bases on which the judgment is based.

Issue 2: The District Court's judgment should be affirmed because Appellants failed to state a RICO claim upon which relief can be granted. Specifically, Appellants lumped all Defendants together in their Complaint without alleging sufficient facts specific regarding Kunz-Freed or Vacek, they failed to allege facts showing they have standing to bring a RICO claim, and they failed to sufficiently allege facts regarding racketeering activity.

Issue 3: The District Court's judgment should be affirmed on the additional grounds raised by Kunz-Freed and Vacek in their Motions to Dismiss but not reached by the District Court.

STATEMENT OF THE CASE

On July 5, 2016, California residents Appellants Candace Louise Curtis and Rik Wayne Munson filed a 59-page Complaint in the Southern District of Texas against a diverse group of family members, attorneys, judges, and court staff (collectively, "Defendants"), all allegedly involved in a conspiracy to commit violations of the Racketeer Influenced Corrupt Organization Act ("RICO"). ROA.16.[1] Curtis, along with her siblings, are presently involved in a dispute regarding their parents' estates in Probate Court No. 4 of Harris County, Texas. Curtis contends the Defendants are conspiring to deplete estate funds that otherwise may eventually go to a family trust of which she is one of the beneficiaries. ROA.72. Despite lacking any connection to the probate case or family trust, Munson joins as a plaintiff because he is Curtis' domestic partner and seeks compensation for the time he has spent assisting with her court filings. ROA.72.

Appellants allege Defendants are part of a secret society known as the "Harris County Tomb Raiders," "Probate Cabal," and "Probate Mafia" which engages in racketeering activity aimed at absconding with estate assets. ROA.29, .37, .40.

[1] Appellants argue that their Complaint is also comprised of an "Addendum of Memorandum"—a two-page filing with over 1,500 pages of exhibits—and their responses to the Defendants' respective motions to dismiss. *See* Appellants' Brief at 2 n.2. Appellants cite no authority permitting amendment of their Complaint by such means. Accordingly, none of these filings are considered part of their Complaint. Moreover, it is well-settled that courts do not look beyond the face of the pleadings to determine whether relief should be granted under Rule 12(b)(6). *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). Regardless, even if these filings are considered, Appellants do not allege any facts that rectify the deficiencies in their claims.

Appellants admit they have no proof that such activities are actually occurring, but speculate Defendants must be doing something wrong: "The specific quid pro quo method of profit sharing is unknown to Plaintiffs but appears to include political aspiration, judicial favors, campaign contributions, bribes and kickbacks, cronyism and 'Good Ole Boy' networking." ROA.35. Appellants accuse some of the lawyer Defendants of engaging in "Poser Advocacy," which apparently means performing unnecessary legal work to increase their fees. ROA.38. According to Appellants, "Genovese, Luciano, Bonanno, Gambino, Lucchese, Capone, Cohen, Nitty, and the Krays would be drooling with envy and admiration, as they could never have built such an invasive and successful criminal empire in the private sector." ROA.61.

Although Appellants' Complaint is 59 pages with 217 paragraphs, they fail to allege facts stating a plausible claim against Kunz-Freed or Vacek. Appellants simply restate the elements of RICO and cite various federal and state statutes, asserting that groups of Defendants conspired to violate such laws. ROA.29–34. Most of the predicate acts Appellants allege omit reference to Kunz-Freed, and none mention Vacek. ROA.42–.56. The few predicate-act paragraphs that do mention Kunz-Freed contain no supporting factual allegations. ROA.42, .50, .54.[2]

[2] Appellants also asserted a confusing group of "Non-Predicate Act Civil Claims for Damages," which included claims for securities fraud, violations of 18 U.S.C. § 242, 42 U.S.C. §§ 1983 and 1985, aiding and abetting breach of fiduciary duty, defalcation, and "scienter," and tortious interference with inheritance expectancy. ROA.56–.59. Appellants do not address the dismissal of these claims on appeal, so it is unnecessary to further discuss them.

Kunz-Freed and Vacek filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), arguing Appellants failed to allege sufficient facts on any of the elements of their RICO claim. ROA.133. The other Defendants likewise filed their own 12(b)(6) motions to dismiss.

Kunz-Freed and Vacek also filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing Appellants lack standing because they failed to allege any financial loss caused by a RICO violation and because Appellants have no attorney-client relationship with Kunz-Freed and Vacek. ROA.153.

Appellants filed a response to Kunz-Freed and Vacek's Motions to Dismiss. ROA.1793. Appellants attached hundreds of pages of exhibits to their response, but did not explain why the allegations in their Complaint satisfy the federal pleading requirements.

On December 15, 2016, the District Court held oral argument on all Defendants' motions to dismiss. ROA.3378. On May 16, 2017, the District Court issued its order granting all motions to dismiss, concluding, "Plaintiffs' Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3329, .3332. The District Court ruled that Appellants' RICO claim fails because they did not sufficiently allege that they have standing based on a recognizable injury to their

business or property caused by a RICO violation, and they failed to sufficiently allege Defendants engaged in racketeering activity. ROA.3332. The Court also determined Plaintiffs' allegations are frivolous and exercised its inherent authority to dismiss a frivolous complaint. ROA.3334. Appellants now bring this appeal.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed all of Appellants' claims. Appellants fail to challenge on appeal the District Court's dismissal based on its inherent power. For this reason alone, the judgment should be affirmed.

It is also clear that Appellants have not pleaded a RICO claim upon which relief may be granted, in violation of Rules 12(b)(6) and 9(b). Appellants lumped all Defendants together without alleging any facts specific to Kunz-Freed or Vacek. Appellants further failed to allege any facts showing they have been directly injured by a RICO violation, meaning they lack standing to bring a RICO claim. And Appellants failed to sufficiently plead facts regarding racketeering activity. Hence, the District Court's 12(b)(6) dismissal should be affirmed.

Lastly, even if the Court does not affirm for the reasons stated in the District Court's dismissal order, the judgment should still be affirmed for the additional reasons Kunz-Freed and Vacek raised in their Motions to Dismiss. Specifically, Appellants failed to sufficiently allege that they relied on predicate acts of fraud,

failed to allege a RICO enterprise, and lack the requisite privity to sue Kunz-Freed and Vacek.

ARGUMENT

A. Statement of Standard of Review

The Court reviews the District Court's grant of a Rule 12(b)(6) motion under the *de novo* standard of review. *Little v. KPMG LLP*, 575 F.3d 533, 540–41 (5th Cir. 2009). "A dismissal for failure to plead fraud with particularity under Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6)." *United States ex. rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (1997).

Rule 12(b)(6) allows dismissal where the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 9(b) allows dismissal if a party fails to "state with particularity the circumstances constituting fraud or mistake." Fed R. Civ. P. 9(b). This requires, at a minimum, that a plaintiff plead the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 371 (5th Cir. 2017).

A complaint survives a Rule 12(b)(6) motion if its facts, accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility requires that the plaintiff plead factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged. *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 establish facial plausibility. *Id.* at 663.

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. *Twombly*, 550 U.S. at 545. "[A] statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient." *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 421 (5th Cir. 2006). Courts are not required to conjure up unpled allegations or construe elaborately arcane scripts to save a complaint, and conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Id.* And while a *pro se* complaint is to be construed liberally with all well-pleaded allegations taken as true, it nevertheless must still set forth facts giving rise to a claim upon which relief may be granted. *Ward v. Fisher*, 616 Fed. App'x 680, 683 (5th Cir. 2015).

B. Relevant RICO Law

RICO makes it unlawful to conduct or participate in an enterprise's affairs through a pattern of racketeering. *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 636 (5th Cir. 2016) (citing 18 U.S.C. § 1962(c)). To bring a RICO claim, a plaintiff must prove (1) a person employed by or associated with any enterprise

engaged in, or the activities of which affect, interstate or foreign commerce, (2) who conducts or participates, directly or indirectly, in the conduct of such enterprise's affairs (3) through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c). It is also a RICO violation for someone to conspire to violate Section 1962(c). 18 U.S.C. § 1962(d). Each of these elements is a term of art with its own inherent requirements of particularity. *Elliott v. Foufas,* 867 F.2d 877, 880 (5th Cir. 1989). Unlike other claims, a RICO claim must be pled with specific facts, not mere conclusions, which establish the elements of a claim under the statute. *Andrade v. Chojnacki,* 65 F. Supp. 2d 431, 450 (W.D. Tex. 1999); *see also Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989) (dismissing RICO claims, noting plaintiffs' claims "do not state a RICO claim against defendants with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is").

To prove RICO racketeering under 18 U.S.C. § 1962(c), a plaintiff must show (1) an enterprise and (2) a pattern of racketeering activity. *Tel–Phonic Servs., Inc. v. TBS Int'l, Inc.,* 975 F.2d 1134, 1139–40 (5th Cir. 1992). The "pattern" element requires at least two predicate acts of racketeering activity. *Id.* To establish that pattern, a plaintiff must show both a relationship between the predicate offenses and the threat of continuing activity. *Malvino v. Delluniversita*,

840 F.3d 223, 231 (5th Cir. 2016). These requirements keep civil RICO focused on the long-term criminal conduct Congress intended it to address, and prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law. *Id.*

Days ago, this Court considered whether almost identical probate-court-based RICO claims survived the Rule 12(b)(6) and 12(b)(1) challenges brought by a group of defendants comprised of lawyers, judges, ad litems, and court staff. *Sheshtawy v. Gray*, 17-20019, 2017 WL 4082754 (5th Cir. Sept. 14, 2017). The plaintiffs argued on appeal that the district court erred by concluding plaintiffs lacked standing because they did not suffer a cognizable injury under RICO and failed to plead their RICO claims with sufficient particularity. *Id.* at *1. In a succinct opinion, this Court held, "Plaintiffs lack standing to pursue their RICO claims because they have failed to allege a direct, concrete, and particularized injury proximately caused by Defendants' conduct." *Id.* "Plaintiffs' suggest that their injury comes in the form of financial losses to their property interests in their respective probate proceedings. However, the alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing." *Id.* at *2. This Court also determined the plaintiffs failed to state a claim for relief, noting that in their complaint, the plaintiffs "substantially rescript [ ] the language of the statute in

conclusory form," and on appeal, the plaintiffs "simply make conclusory assertions that their complaint is sufficient to survive a motion to dismiss and cite to their entire complaint as evidencing the sufficiency." *Id.* at 2 n.4 (citations omitted).

C. The District Court's Dismissal Was Proper and Should Be Affirmed

As in *Sheshtawy*, Appellants' fantastical allegations here do not come close to asserting a viable RICO claim. Appellants do not make any substantive arguments for why the District Court improperly applied the Rule 12(b)(6) and Rule 9(b) standards or why their claims were sufficiently pleaded. Instead, they cite to irrelevant internet sources and exhibits which cannot be considered in a Rule 12(b)(6) review, apparently to support their conspiracy theory that judicial misconduct is a universal problem. Appellants do not even cite to the Complaint in their brief. For several reasons, the District Court's judgment should be affirmed.

1. The District Court's dismissal should be affirmed because Appellants have failed to challenge all bases for the dismissal

As noted above, an independent basis on which the District Court dismissed Appellants' Complaint was its inherent power to dismiss frivolous lawsuits. ROA.3334. Appellants do not address this basis in their brief and have thus abandoned any argument challenging it. *See DSC Commc'ns Corp. v. Next Level Commc'ns,* 107 F.3d 322, 327 n.2 (5th Cir.1997) ("[I]t is clear that a party who

fails to raise an issue in its initial brief waives the right to review of that issue[.]"); *see also Longoria v. Dretke*, 507 F.3d 898, 901 (5th Cir. 2007) ("Although we liberally construe *pro se* briefs, such litigants must still brief contentions in order to preserve them."). For this reason alone, the District Court's judgment should be affirmed. *See Sookma v. Millard*, 151 Fed. App'x 299, 301 (5th Cir. 2005) (per curiam) ("Sookma [a *pro se* appellant] has failed to address the alternate bases for dismissal, including defective service of process, issues of absolute and qualified immunity, and failure to state a claim. By failing to brief these issues, Sookma has abandoned them; it is the same as if she had not appealed the judgment.").

2. The District Court properly determined Appellants failed to adequately plead a RICO claim

a. Dismissal as to Kunz-Freed and Vacek should be affirmed summarily because Appellants fail to make any argument regarding these Defendants

In their brief, Appellants do not mention any act Kunz-Freed or Vacek allegedly committed. In fact, Appellants never mention Kunz-Freed or Vacek except as their names appear in the styles of the various lawsuits. *See* Appellants' Brief at i, ii, viii, 6. Thus, Appellants do not satisfy the requirements of *Iqbal* and *Twombly* because they lump together all Defendants while providing no factual basis to distinguish their conduct. *See Marlin v. Moody Nat. Bank, N.A.*, 248 Fed. App'x 534, 540 (5th Cir. 2007) ("[U]nder RICO, the plaintiff must establish

that each defendant knew of, and agreed to assist, the racketeering enterprise." (emphasis added)); *Cadle Co. v. Schultz*, 779 F. Supp. 392, 397 (N.D. Tex. 1991) ("To avoid dismissal for failure to state a claim, a plaintiff must articulate ***how each defendant*** acquired or maintained an interest in an enterprise, or acquired control of an enterprise, by means of a racketeering activity." (emphasis added)); *see also 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."). For this reason, Appellants' issues should be overruled.

b. Dismissal should be affirmed because Appellants failed to plead sufficient facts to establish their standing to bring a RICO claim

Regarding the District Court's dismissal based on Appellants' failure to plead facts showing they have standing to bring a RICO claim, Appellants argue, "In addition to injuries to Plaintiff Curtis' Trust property interests, Plaintiffs have standing because the activity complained of violates 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d), causing pecuniary injury, by forcing the redirection of time and money away from the California concerns of Curtis and Munson to the defense of Curtis' property interests in Texas courts." Appellants' Brief at 19

Similar standing arguments failed in *Sheshtawy*, when this Court rejected the plaintiffs' arguments "that their injury comes in the form of financial losses to their

property interests in their respective probate proceedings" because "injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing." 2017 WL 4082754, at *2; *see also Brown v. Protective Life Ins. Co.*, 353 F.3d 405, 407 (5th Cir. 2003) (recognizing RICO plaintiff has standing only if he has been injured in his business or property by conduct constituting the RICO violation); *Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) (holding plaintiffs' RICO claims failed because they were based on injury to estate and inheritance expectancy, not based on direct harm to plaintiffs). "Our precedent requires a RICO plaintiff to show a 'conclusive financial loss' and not harm to 'mere expectancy' or 'intangible' interests." *Gil Ramirez Group, L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 408 (5th Cir. 2015).

Appellants generally cite cases regarding RICO damages, and pontificate on supply-and-demand economics, but do not explain why the allegations in their Complaint establish that they have standing to bring a RICO claim. Appellants' Brief at 16–19. Appellants also cite *Slorp v. Lerner, Sampson & Rothfuss*, arguing the case supports the proposition that attorney's fees can be viable RICO damages. 587 Fed. App'x 249 (6th Cir. 2014). But the *Slorp* court expressly determined that the plaintiffs' attorney's fees flowed from and were intertwined with a direct injury

to their property caused by a RICO predicate act. *Id.* at 262–63. There is no such allegation here.

Appellants do not point to any allegation, let alone allegations pled with the requisite particularity, that Kunz-Freed or Vacek caused them direct injury based on a RICO violation. Accordingly, Appellants' RICO claim was properly dismissed based on lack of standing.

c. Dismissal should be affirmed because Appellants failed to plead sufficient facts regarding the racketeering-pattern element of their claim

The District Court also determined Appellants failed to allege a pattern of racketeering activity. ROA.3332. To establish a racketeering pattern, a plaintiff must show both a relationship between the predicate offenses and the threat of continuing activity. *See Malvino*, 840 F.3d at 231 (5th Cir. 2016); *Tel–Phonic Servs.*, 975 F.2d at 1139–40.

In their brief, Appellants contend, "As the ultimate predicate act is honest services fraud, Plaintiffs' claims fully meet this criterion." Appellants' Brief at 15. Hence, Appellants assert their RICO claim is based on a predicate act of fraud—a claim which must meet Rule 9(b)'s heightened pleading requirement. *See Red Rock v. Jafco Ltd.*, 79 F.3d 1146 (5th Cir. 1996) ("The plaintiffs thus have failed to meet rule 9(b)'s particularity requirement, which applies to the pleading of fraud as a predicate act in a RICO claim. This failure to allege a predicate act at all is also

fatal to the claim of a racketeering conspiracy, because it prevents plaintiffs from successfully alleging an agreement to commit predicate acts." (citation omitted)); *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) ("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.'" (citation omitted)).

Regarding the racketeering-pattern element, Appellants point to extraneous evidence (not to allegations in their Complaint) that purportedly shows the "correlative" actions are proceeding slowly and should have been resolved by now. Appellants' Brief at 19–28. Appellants also fault Defendants for not presenting their own evidence to rebut Appellants' conspiracy theories. Appellants' Brief at 23–25. But, of course, it is improper to consider evidence in this Rule 12(b)(6) appeal. *See Back v. Univ. Texas Med. Branch-Corr. Managed Healthcare*, 689 Fed. App'x 302 (5th Cir. 2017) (per curiam) ("[Plaintiff] is incorrect in stating that the district court improperly granted a motion filed per Federal Rule of Civil Procedure 12(b)(6) in the absence of affidavits and evidence from the defendants."); *Copeland v. State Farm Ins. Co.*, 657 Fed. App'x 237, 241 (5th Cir. 2016) (per curiam) ("A Rule 12(b)(6) inquiry is restricted to 'the contents of the pleadings, including attachments thereto,' so Liberty Mutual and Wellington were not required to submit evidence.").

Appellants' argument is wholly devoid of any explanation regarding what allegations establish that Kunz-Freed or Vacek conspired to be part of continuing racketeering activity. *See Marlin*, 248 Fed. App'x at 540; *Cadle Co.*, 779 F. Supp. at 397; *Parkcentral Glob. Litig.*, 884 F. Supp. 2d at 471. Hence, Appellants argument is abandoned, and the District Court's judgment should be affirmed. *See Hawkins v. Hutchison*, 277 Fed. App'x 518, 519 (5th Cir. 2008) ("On appeal, Appellants do not make legal arguments but only conclusory assertions that their pleadings were sufficient to state RICO violations. Appellants have, therefore, abandoned this argument.").

3. Dismissal should be affirmed on other bases Kunz-Freed and Vacek raised in their Motions to Dismiss

Finally, Kunz-Freed and Vacek raised other grounds for dismissal in their Motions to Dismiss that the District Court did not need to consider but upon which the judgment should be affirmed if not for the reasons already stated. *See Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006) (noting Court may affirm a district court's dismissal on any grounds supported by the record).

In their Motion to Dismiss for failure to state a claim, Kunz-Freed and Vacek argued that Appellants failed to allege sufficient facts regarding their reliance on fraud and the existence of a RICO enterprise. ROA.137–.141. RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff. *See 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). Appellants asserted no allegations detailing how they purportedly relied upon Kunz-Freed's and Vacek's allegedly fraudulent conduct.

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." 18 U.S.C. § 1961(4); *see also Elliott*, 867 F.2d at 881. This Court 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." *Elliott*, 867 F.2d at 881. 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." *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir. 1990). "[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." *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426–27 (5th Cir. 1987). Appellants alleged no facts concerning an enterprise,

how it operated, how Kunz-Freed and Vacek were involved, how decisions were made, how the operations of the individuals were carried out, or how they went about accomplishing their purported goals.

In their Motion to Dismiss for lack of subject matter jurisdiction, Kunz-Freed and Vacek argued Appellants' claims against them actually sound in professional negligence, which Appellants lack standing to bring because the Estate—not Appellants—were Kunz-Freed and Vacek's client. ROA.162–165. An attorney owes a duty of care only to a person with whom the attorney has a professional attorney-client relationship. *See Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996). Because an attorney does not represent a trust beneficiary they do not owe a professional duty to them. *Id.* at 576; *see Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) ("It would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trust's attorney, is the real client."). Without this "privity barrier," clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability. *Barcelo*, 923 S.W.2d at 577.

In *Barcelo*, the court considered whether beneficiaries dissatisfied with the distribution of estate assets could sue an estate-planning attorney for legal malpractice after a client's death. *Id.* at 576. The intended beneficiaries of a trust, which was declared invalid after the client's death, sued the attorney who drafted

the trust agreement. *Id.* The court concluded that the non-client beneficiaries could not maintain a suit against the decedent's attorney because "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." *Id.* at 578.

Several policy considerations supported the *Barcelo* holding. First, the threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney's representation. *Id.* at 578. The court also noted that suits brought by beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties." *Id.*

Accordingly, because Appellants were not Kunz-Freed's and Vacek's clients, they do not have standing to assert their claims.

CONCLUSION

Appellants have failed to challenge all bases for the District Court's judgment and have clearly failed to comply with the pleading requirements under the Federal Rules of Civil Procedure. The Court should affirm the District Court's judgment and award Kunz-Freed and Vacek all other relief to which they are entitled, including appellate costs.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

By: */s/ Andrew L. Johnson*

Andrew L. Johnson
State Bar No. 24060025
ajohnson@thompsoncoe.com
One Riverway, Suite 1400
Houston, Texas 77056
Telephone: (713) 403-8295
Telecopy: (713) 403-8299

COUNSEL FOR APPELLEES CANDACE KUNZ-FREED AND ALBERT VACEK, JR.

CERTIFICATE OF SERVICE

I certify that on October 6, 2017, (1) an electronic copy in PDF text-searchable format was submitted by electronic case filing. I further certify that on October 6, 2017, a true and correct copy of the brief was served by electronic case filing or via certified mail on the counsel of record or pro se parties listed below.

Anita Kay Brunsting **Via CM/RRR**
203 Bloomingdale Circle
Victoria, TX 77904

Amy Ruth Brunsting **Via CM/RRR**
2582 Country Ledge Drive
New Braunfels, TX 78132

Candace Louise Curtis **Via Electronic Filing**
Rik Wayne Munson
218 Landana St.
American Canyon, CA 94503

Bernard L. Matthews, III **Via Electronic Filing**
Green and Matthews, LLP
14550 Torrey Chase Blvd., Ste. 245
Houston, TX 77014

Barry Abrams **Via Electronic Filing**
Joshia Huber
Blank Rome LLP
717 Texas Ave., Suite 1400
Houston, Texas 77002

Bobbie G. Bayless **Via Electronic Filing**
Bayless Stokes
2931 Ferndale
Houston, TX 77098

Laura Beckman Hedge **Via Electronic Filing**
Keith Adams Toler
Harris County Attorney's Office
1019 Congress St., 15th Floor
Houston, TX 77002

Jason Ostrom **Via Electronic Filing**
Stacy L. Kelly
Ostrom Morris PLLC
6363 Woodway, Suite 300
Houston, TX 77057

Adraon D. Greene **Via Electronic Filing**
Kelsi M. Wade
Galloway Johnson Tompkins Burr & Smith
1301 McKinney St., Suite 1400
Houston, TX 77010

Martin Samuel Schexnayder **Via Electronic Filing**
Winget, Spadafora & Schwartzberg, LLP
Two Riverway, Suite 725
Houston, TX 77056

/s/ *Andrew L. Johnson*
Andrew L. Johnson

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 28.1(e)(2)(A)(i) because it contains 5,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font for the text, 12-point font for footnotes, and Times New Roman type style throughout.

/s/ Andrew L. Johnson
Andrew L. Johnson

Dated: October 6, 2017

Case No. 17-20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON,
Plaintiffs – Appellants

v.

CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99,
Defendants – Appellees

On Appeal from the United States District Court,
Southern District Of Texas-Houston Division
Civil Action 4:16-cv-01969

BRIEF OF APPELLEES STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

Adraon D. Greene
TBN: 24014533
agreene@gallowaylawfirm.com
Kelsi M. Wade
TBN: 24088597
kwade@gallowaylawfirm.com
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
1301 McKinney St., Suite 1400
Houston, Texas 77010
Tel.: (713) 599-0700
Fax.: (713) 599-0777

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants	Candace Louise Curtis Rik Wayne Munson *Pro se*
Defendants-Appellees	Candace Kunz-Freed Albert Vacek, Jr. Bernard Lyle Matthews, III Neal Spielman Bradley E. Featherston Stephen A. Mendel Darlene Payne Smith Jason Ostrom Gregory Lester Jill Willard Young Christine Riddle Butts Clarinda Comstock Toni Biamonte Bobbie Bayless Anita Brunsting, *Pro Se* Amy Brunsting, *Pro Se* Does 1-99
Attorneys for Defendants-Appellees Candace Kunz-Freed and Albert Vacek, Jr.	Andrew Johnson Cory S. Reed Thompson, Coe, Cousins, & Irons, LLP
Attorney for Bernard Lyle Matthews, III	Bernard Lyle Matthews, III Green and Matthews, LLP

Attorney for Defendant-Appellee Neal Spielman	Martin Samuel Schexnayder Winget, Spadafora & Schwartzberg, LLP
Attorneys for Defendants-Appellees Stephen A. Mendel and Bradley E. Featherston	Adraon D. Greene Kelsi M. Wade Galloway, Johnson, Tompkins, Burr & Smith
Attorneys for Defendant-Appellee Darlene Payne Smith	Barry Abrams Joshua A. Huber Blank Rome, LLP
Attorney for Defendant-Appellee Jason Ostrom	Jason B. Ostrom Ostrom Morris, P.L.L.C.
Attorney for Defendant-Appellee Gregory Lester	Stacy Lynn Kelly Ostrom Morris, P.L.L.C.
Attorneys for Defendant-Appellee Jill Willard Young	Robert Stanford Harrell Rafe A. Schaefer Norton Rose Fulbright US, L.L.P.
Attorneys for Defendants-Appellees Christine Riddle Butts, Clarinda Comstock and Toni Biamonte	Keith Adams Toler Laura Beckman Hedge County Attorney's Office for the County of Harris
Attorney for Defendant-Appellee Bobbie Bayless	Bobbie G. Bayless Bayless & Stokes

s/ Adraon D. Greene
Adraon D. Greene

COUNSEL FOR DEFENDANTS-APPELLEES STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

STATEMENT REGARDING ORAL ARGUMENT

In accordance with 5th Circuit Rule 28.2.3, Defendants-Appellees Stephen A. Mendel and Bradley E. Featherston (hereinafter "Appellees Mendel and Featherston") submit that oral argument is unnecessary and would not be beneficial in this matter. Specifically, the facts and legal arguments are adequately presented in the briefs and the record, and would not be significantly aided by oral argument. However, if this Court determines that oral argument is necessary, Appellees Mendel and Featherston would like to participate.

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STATEMENT OF JURISDICTION

The District Court correctly determined that Plaintiffs-Appellants Candace Louise Curtis and Rik Wayne Munson's (hereinafter "Appellants") claims against Appellees Mendel and Featherston are barred by the attorney immunity doctrine. The District Court properly dismissed Appellants' frivolous Complaint pursuant to its inherent authority. The District Court also correctly concluded that Appellants lack standing to assert a claim under the Racketeering Influenced and Corrupt Organizations ("RICO") Act. Further, even if Appellants had standing to bring a RICO claim against Appellees Mendel and Featherston, the District Court correctly held that Appellants' failed to plead sufficient facts to state a claim. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the District Court's May 16, 2017 Order dismissing Appellants' Complaint on the foregoing grounds was a final judgment.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that the attorney immunity doctrine bars Appellants' RICO claims against Appellees Mendel and Featherston.

2. Whether the District Court's use of its inherent power to dismiss Appellants' frivolous Complaint was proper.

3. Whether the District Court correctly concluded that Appellants lacked

standing to assert a RICO claim against Appellees Mendel and Featherston.

4. Whether the District Court properly held that Appellants did not plead sufficient facts to state a claim under Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

On July 5, 2016, Appellants, who are pro se litigants, filed suit against Appellees Mendel and Featherston in the District Court. [ROA.16-79]. In addition to suing Appellees Mendel and Featherston, Appellants sued nine (9) other attorneys, two (2) probate judges, and a court reporter for alleged violations of the RICO Act that arose from an underlying probate proceeding in Harris County Probate Court No. 4. [ROA.16-79].

Appellees Mendel and Featherston represented an opposing party in the probate proceeding in which Appellant Curtis allegedly defended her property interests. [ROA.24]. Appellant Munson claims he was Appellant Curtis' domestic partner with overlapping business activities; however, he was not a party in the probate proceeding. [ROA.24].

On September 30, 2016, Appellees Mendel and Featherston filed a motion to dismiss Appellants' Complaint under Federal Rule of Civil Procedure 12(b)(6). [ROA.2303-2313]. On December 15, 2016, the District Court held a hearing on the motion to dismiss. The District Court entered an Order dismissing Appellants'

lawsuit with prejudice on May 16, 2017. [ROA.3329-3335].

II. STATEMENT OF THE FACTS

A. Appellants' Allegations

As the District Court stated in its May 16, 2017 Order, Appellants' Complaint "assert[s] almost fifty 'claims' against more than fifteen [appellees]" which consist of "fantastical allegations that some or all of the [Appellees] are members of a secret society…known as the 'Harris County Tomb Raiders,' or 'The Probate Mafia.'" [ROA.3330]. Appellants' "claims rest on the assertion that this purported shadow organization engages in 'poser advocacy' as an 'exploitation opportunity' to 'hijack' 'familial wealth'." [ROA.3330].

Appellants' alleged the following "causes of action" against Appellees Mendel and Featherston:

- "18 U.S.C. § 1962(d) the Enterprise" [ROA.25-29];
- "The Racketeering Conspiracy 18 U.S.C. § 1962(c)" [ROA.29-42];
- "Honest Services 18 U.S.C. § 1346 and 2" [ROA.42-44];
- "Wire Fraud 18 U.S.C. § 1343 and 2" [ROA.44];
- "Fraud 18 U.S.C. § 1000 and 2" [ROA.44];
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. § 1951(b)(2) and 2" [ROA.44];
- "Conspiracy to Obstruct Justice 18 U.S.A.C. § 371" [ROA.44];

- "Conspiracy Re: State Law Theft/Extortion – in Convert Aiding and Abetting" [ROA.49]; and
- "Conspiracy to Viplate 18 USC §§ 242 and 2, & 42 U.S.C. §§ 983 and 1985" [ROA.58].

However, the purported "causes of action" are not supported by any factual allegations. Instead, Appellants merely recite boilerplate elements of the numerous alleged "causes of action."

B. The Underlying Probate Proceedings

Appellants claim that all Appellees were part of a conspiracy in which several Houston area law firms and Harris County Probate Court No. 4 allegedly worked in concert to defraud heirs of their inheritances in order to enrich themselves. [ROA.29, 35, 41]. Appellants refer to this alleged entity as the "Harris County Tomb Raiders, a/k/a the Probate Mafia." [ROA.29]. Appellees Mendel and Featherston represented Co-Trustee Anita Brunsting in C.A. No. 412249-401, *Estate of Nelva Brunsting, Deceased*, in Harris County Probate Court No. 4. ("the *Brunsting* matter"). [ROA.2304].

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Appellants' Complaint on multiple grounds; all of which should be affirmed. As an initial matter, Appellants failed to address the District Court's correct dismissal pursuant to the attorney immunity

doctrine and the District Court's proper dismissal of a "frivolous" Complaint under its inherent authority. Therefore, Appellants have waived appellate review of both of these issues and the District Court's dismissal on these grounds should be affirmed.

To the extent the Court requires Appellees Mendel and Featherston to fully brief these issues despite Appellants' waiver, the District Court correctly determined that Appellants' claims are barred by the attorney immunity doctrine. As a consequence of Appellants' waiver of this issue, Appellants failed to preserve error and the District Court's dismissal based on the attorney immunity doctrine should be affirmed on that ground alone.

If the Court concludes that Appellants did not waive appellate review of the attorney immunity doctrine, their claims are nonetheless barred by the doctrine. The actions taken by Appellees Mendel and Featherston were performed pursuant to their representation of their client in a probate matter. Under Texas law, those actions are protected by the attorney immunity doctrine. Neither Appellants' Complaint nor their Brief contains any well-pleaded facts or legal authority to the contrary. Therefore, the District Court's dismissal based on the attorney immunity doctrine should be affirmed.

The District Court properly dismissed Appellants' frivolous claims pursuant to its inherent authority. Appellants also waived this issue when they failed to

address it on appeal. The District Court's Order should be affirmed on this ground alone. Even if the Court concludes that Appellants did not waive appellate review of this issue, the District Court correctly concluded Appellants' claims are "frivolous" and properly dismissed the claims.

This Court should also affirm the District Court's ruling that Appellants lack standing to assert RICO claims. Appellants failed to plead facts showing a recognizable injury to their business or property that was proximately caused by the alleged RICO violations. In this regard, Appellants' Brief suffers the same fatal flaw as their Complaint; it fails to allege any specific facts attributable to Appellees Mendel and Featherston. As such, Appellants fail to plead sufficient facts to establish standing to sue Appellees Mendel and Featherston for alleged RICO violations.

The District Court's ruling that Appellants failed to plead sufficient facts to state a cause of action against Appellees Mendel and Featherston under Federal Rule of Civil Procedure 12(b)(6) should be affirmed. Appellants' Complaint contains nothing but conclusory allegations that merely recite the elements of numerous causes of action; thereby failing to comply with Rule 12(b)(6).

For all of the foregoing reasons, the District Court should be affirmed.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW.

This Court reviews the granting of a motion to dismiss *de novo.* *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011). The court accepts all well-pleaded facts as true and views those facts in the light most favorable to the plaintiff. *Toy v. Holder*, 714 F.3d 881, 883 (5th Cir. 2013) (citing *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010)). The court need "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *See Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to state a claim for relief that is plausible on its face. *Toy*, 714 F.3d at 883. Plausibility requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must do more than name laws that may have been violated. *Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). A complaint must also allege facts regarding what conduct violated those laws. *Id.* A complaint stops short of the line between possibility and plausibility of entitlement to relief where it pleads facts that are merely consistent with a defendant's liability. *Iqbal*, 556 U.S. at 678.

II. APPELLANTS' CLAIMS ARE BARRED BY THE ATTORNEY IMMUNITY DOCTRINE.

The District Court correctly concluded that Appellants' claims are barred by the attorney immunity doctrine. [ROA.3333]. In Texas, "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)). Appellants' Brief does not dispute this as it fails to cite any legal authority to the contrary. In fact, the phrase "attorney immunity" is nowhere to be found in Appellants' Brief. Thus, Appellants have waived the issue of whether Appellees Mendel and Featherston's action are protected by the attorney immunity doctrine.

In this regard, Appellants failed to preserve error regarding Appellees Mendel and Featherston's entitlement to the attorney immunity doctrine. Consequently, Appellants waived any argument that the District Court erred in holding that the attorney immunity doctrine bars their claims. Even if the issue was not waived, the attorney immunity doctrine nonetheless bars Appellants' claims. Therefore, the District Court's ruling should be affirmed.

A. Appellants Waived The Issue Regarding The Applicability Of The Attorney Immunity Doctrine.

As an initial matter, Appellants' failure to challenge the applicability of the attorney immunity doctrine amounts to waiver of this issue. Appellants do not contend that the District Court erred in ruling that attorney immunity bars Appellants' claims against Appellees Mendel and Featherston. Appellants' Brief does not contain any legal authority regarding attorney immunity. *See* Appellants' Brief, at 28-29. In fact, Appellants' Brief does not even contain the phrase "attorney immunity." *Id.*

The failure of an appellant to challenge the district court's determination of an issue in its initial brief constitutes a waiver of the right to appellate review of that determination. *Health Care Serv. Corp.* v. *Methodist Hosps. of Dall.,* 814 F.3d 242, 252 (5th Cir. 2016). This Court looks to an appellant's initial brief to determine the adequately asserted bases for relief. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). Additionally, "[q]uestions posed for appellate review but inadequately briefed are considered abandoned." *Smith* v. *Lonestar Const., Inc.,* 452 F. App'x 475, 476 (5th Cir. 2011) (quoting *Dardar* v. *Lafourche Realty Co., Inc.,* 985 F.2d 824, 831 (5th Cir. 1993)).

Moreover, "[w]hile [courts] 'liberally construe briefs of *pro se* litigants and apply less stringent standards to parties proceeding *pro se* than to parties represented by counsel, *pro se* parties must still brief the issues and reasonably

comply with the standards of Rule 28.'" *Id.* (quoting *Grant* v. *Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995)). Thus, where a *pro se* appellant "fails . . . to set forth reasons why the district court's judgment was incorrect," the court may "conclude that any arguments attacking the district court's judgment have been abandoned on appeal." *See id.*

Appellants failed to address, challenge or even mention the attorney immunity doctrine on appeal. Likewise, Appellants failed to assert that the District Court erred in holding that attorney immunity bars their claims. As a result, Appellants failed to preserve error regarding Appellees Mendel and Featherston's entitlement to attorney immunity, which is a fatal flaw. *See* Appellants' Brief, at pp. 28-29. FED. R. APP. P. 28(a)(8)(A).

The only colorable reference to attorney immunity is Appellants' assertion that "[t]hese RICO claims are not dealing with attorney or judicial error, and are not attempting to correct mistake, inadvertence or excusable neglect." *See* Appellants' Brief, at p. 29.[1] However, this contention is irrelevant as it fails to address the applicability of the attorney immunity doctrine.

Because Appellants failed to raise this issue on appeal, they have abandoned it. *See Cinel*, 15 F.3d at 1345 ("An appellant abandons all issues not raised and argued in its initial brief on appeal."); *see also United States* v. *Scroggins*, 599

[1] However, Appellants specifically attempted to address the issue of "judicial immunity." *See* Appellants' Brief at pp. 28-29.

F.3d 433, 447 (5th Cir. 2010). As a result of Appellants' waiver, the District Court's ruling that Appellants' claims are barred by the attorney immunity doctrine should be affirmed.

B. Appellants' Claims Against Appellees Mendel And Featherston Are Barred By The Attorney Immunity Doctrine.

The District Court properly held that Appellees Mendel and Featherston, who are attorneys, are entitled to immunity from Appellants' claims. Therefore, even if this Court reaches the attorney immunity issue, the District Court correctly determined that Appellants' claims against Appellees Mendel and Featherston are barred by the attorney immunity doctrine and this Court should affirm that ruling.

As this Court noted, "attorney immunity is properly characterized as true immunity from suit," and not merely "a defense to liability." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-348 (5th Cir. 2016). It insulates the attorney from liability and prevents the attorney from being exposed to discovery and/or trial. *Id.* at 346. A plaintiff cannot evade attorney immunity by simply "labeling an attorney's conduct 'fraudulent.'" *Id.* at 348.

Appellants cannot maintain a cause of action against Appellees Mendel and Featherston because "[e]ven 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.'" *Byrd*, 467 S.W.3d at 481 (Tex. 2015) (quoting *Toles v. Toles*, 113 S.W.3d 899, 910-11 (Tex. App.—Dallas 2003, no pet.)). The

District Court properly acknowledged that Appellants' Complaint "at best, assert[s] wrongdoing based solely on actions taken during the representation of a client in litigation." [ROA.3333].

Appellants' Complaint does not contain any well-pleaded facts to suggest that Appellees Mendel and Featherston engaged in any conduct outside of their duties as attorneys. Therefore, Appellants' claims are barred by the attorney immunity doctrine and the District Court's ruling should be affirmed.

III. THE DISTRICT COURT'S DISMISSAL PURSUANT TO ITS INHERENT POWER IS PROPER.

Appellants' frivolous claim was properly dismissed by the District Court. The District Court correctly determined that Appellants' Complaint should be dismissed as "frivolous because [Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, must less any facts giving rise to a plausible claim for relief." [ROA.3334]. The District Court exercised its "inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte." [ROA.3334]. Appellants failed to address this issue on appeal; thereby failing to preserve error related to dismissal on this ground. As such, the District Court's dismissal of Appellants' claims pursuant to its inherent authority should be affirmed.

A. Appellants Failed To Address The District Court's Dismissal Pursuant To Its Inherent Power.

Appellants did not address the District Court's dismissal under its inherent power; thereby waiving any argument to the contrary. *Scroggins*, 599 F.3d at 447. As discussed *supra,* by failing to brief the issue on appeal, Appellants have waived and abandoned the issue. *See Cinel*, 15 F.3d at 1345. As a result, the District Court's dismissal of Appellants' "frivolous" Complaint pursuant to its inherent powers should be affirmed.

B. The District Court Properly Dismissed Appellants' Frivolous Complaint.

The District Court correctly used its inherent authority to dismiss Appellants' Complaint. A district court has the "inherent authority to dismiss a pro se litigant's frivolous or malicious complaint." *See Campbell v. Brender*, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte even when the plaintiff has paid the required filing fee."); *see also Neitzke v. Williams,* 490 U.S. 319, 325 & 328 (1989) (holding a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Brender*, 2010 WL

4363396, at *5 (citing *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992)).

The District Court noted that Appellants' "fanciful, fantastic, and delusional" allegations do not comport with the pleading standard. [ROA.3332]. Instead, Appellants' claims were properly characterized as "frivolous" because the "delusional scenario articulated in their Complaint" was unsupported by any facts. [ROA.3334].

Appellants do not rely on any legal authority to refute the foregoing. Rather, the frivolous nature of Appellants' Complaint is evident based on the outlandish and unsupported allegations of shadow organizations engaging in "poser advocacy" through the "probate mafia." [ROA.38, 95]. Therefore, the District Court's dismissal should be affirmed.

IV. APPELLANTS LACK STANDING TO SUE UNDER RICO.

Appellants lack standing to pursue civil RICO claims because they did not plead a recognizable injury. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 697 (5th Cir. 1998). In its Order, the District Court correctly concluded that Appellants "fail[ed] to plead any facts establishing they have standing under § 1964(c) to assert civil RICO claims against any of the [Appellees] because [Appellants] fail to plead facts showing a recognizable injury to their business or property caused by the alleged RICO violations." [ROA.3332]. Nothing in Appellants' Brief contradicts this conclusion. Therefore, the District Court's ruling should be

affirmed.

The RICO statute provides in pertinent part that "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). To establish standing, a RICO plaintiff "must 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)).

Proximate cause requires a showing of "directness of the relationship between the conduct and the harm" *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010). *See also Plambeck*, 802 F.3d at 676. The injury must be "conclusive" and cannot be "speculative." *Gil Ramirez Grp., L.L.C., v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 409 (5th Cir. 2015). "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *See Gil Ramirez Grp., L.L.C.*, 786 F.3d at 409 (quoting *Pinnacle Brands*, 138 F.3d at 607). A party cannot show that it has standing to assert a RICO claim 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 v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006).

An analogous and instructive case is *Sheshtawy v. Conservative Club of*

Houston, Inc., 4:16-CV-733, 2016 WL 5871463, at *5 (S.D. Tex. Oct. 7, 2016). In *Sheshtawy*, the plaintiffs alleged numerous attorneys practicing before Harris County Probate Court No. 1, two judges and other parties were members of a RICO conspiracy based on the allegation that the judges always ruled against the Plaintiffs. 2016 WL 5871463, at *1-2. The District Court dismissed the matter pursuant to Rule 12(b)(6), because plaintiffs' allegations were "pure zanyism." *Id.* at *4. This Court recently affirmed the dismissal. *See Sheshtawy* v. *Gray*, No. 17-20019, 2017 WL 4082754, at *1 (5th Cir. Sept. 14, 2017) (per curiam) ("[W]e affirm the district court's determination that Plaintiffs lack RICO standing.").

Specifically, this Court held "Plaintiffs lack standing to pursue their RICO claims because they have failed to allege a direct, concrete, and particularized injury proximately caused by Defendants' conduct." *Id.* "Plaintiffs suggest that their injury comes in the form of financial losses to their property interests in their respective probate proceedings. However, the alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing." *Id.* at *2.

Just as the plaintiffs in *Sheshtawy* lacked standing, Appellants lack standing because their purported injury is also too speculative and indirect to satisfy RICO standing. As an initial matter, Appellants fail to even mention that Appellees Mendel and/or Featherston proximately caused their injury, harm or damages as

neither's name is anywhere to be found in the body of Appellants' Brief. *See* Appellants' Brief, at pp. 10-29. Nonetheless, assuming arguendo, Appellant Curtis could only suffer indirect harm or harm to an expectancy interest as she contends she has been deprived of the enjoyment of her beneficial interests in a family trust.[2] [ROA.72]. *Sheshtawy*, 2017 WL 4082754, at *2. Accordingly, the District Court's dismissal based on lack of standing was appropriate, and should be affirmed.

V. APPELLANTS' COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO RULE 12 (b)(6).

Appellants failed to allege any facts that state a cause of action against Appellees Mendel and Featherston. As the District Court properly observed, Appellants' complaint, "even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." [ROA.3332]. The District Court noted that Appellants' allegations could "not be characterized as anything more than fanciful, fantastic, and delusional." [ROA.3332]. The allegations "consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts." [ROA.3332].

[2] It is undisputed that Appellant Munson is not a named beneficiary of the trust; therefore, he cannot even suffer indirect harm.

Appellants have offered nothing to refute the District Court's correct dismissal under Rule 12(b)(6). Rather, in striking similarity to their Complaint, Appellants' Brief does not cite to or rely on any facts upon which a cause of action can rest. Notably, Appellants' fail to mention Appellees Mendel and Featherston by name in the body of their Brief.

Appellants fail to point to a single well-pleaded fact that could support any element of any cause of action purportedly pleaded in their Complaint against Appellees Mendel and Featherston. Contrary to applicable case law, Appellants' Complaint improperly relies on implausible and conclusory allegations, unsupported by any sufficient factual assertions to state a valid claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Specifically, Appellants claim lawyers and judges conspired to form a purported criminal enterprise in a Texas state probate court. [ROA.29]. However, none of Appellants' conspiracy theories are supported by well-pleaded facts. Instead, Appellants rehash the elements of various causes of action without providing any factual support for their allegations. [ROA.25-72].

As noted *supra,* this Court recently affirmed the dismissal of an analogous claim in *Sheshtawy*, 2017 WL 4082754, at *1. In analyzing the RICO claims in *Sheshtawy*, the Court stated the following:

> To state a RICO claim, "a plaintiff must allege: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity." *Elliott*

> *v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989) (recognizing that each element of a RICO claim is a term of art which requires particularity). A review of Plaintiffs' amended complaint shows that, as in *Elliott*, Plaintiffs "substantially rescript [ ] the language of the statute in conclusory form," and fail to sufficiently plead any RICO causes of action. *See id.; see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On appeal, Plaintiffs simply make conclusory assertions that their complaint is sufficient to survive a motion to dismiss and cite to their entire complaint as evidencing the sufficiency.

Id. Thus, this Court has already provided guidance on these types of claims. Specifically, the Court in *Sheshtawy* noted, "[T]he district court also dismissed Plaintiffs' RICO claims for failure to state a claim under Rule 12(b)(6). Although we need not address it, we would affirm on this basis as well." *Id*. at *2 n.4.

Appellants' contentions are nearly identical to those alleged in *Sheshtawy*.[3] Therefore, the District Court's dismissal under Rule 12(b)(6) is proper and should be affirmed because Appellants' Complaint fails to allege any well-pleaded facts upon which a RICO claim can rest.

CONCLUSION

For the foregoing reasons, Appellees Mendel and Featherston respectfully request that the Court affirm the District Court's judgment in their favor, in all respects, as well as grant all such other and further relief to which Appellees

[3] Similarly, in *Freeman v. Texas*, the Southern District of Texas rejected claims by two pro se plaintiffs who alleged that a "probate court enterprise comprised of judges and lawyers" had "'virtually looted' his mother's homestead." *Freeman v. Texas*, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008). The District Court held that the plaintiffs' allegations "fail[ed] to state a 'racketeering activity' because Plaintiffs failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred." *Id.*

Mendel and Featherston may be justly and equitably entitled.

Respectfully submitted,

s/ Adraon D. Greene
Adraon D. Greene
TBN: 24014533
agreene@gallowaylawfirm.com
Kelsi M. Wade
TBN: 24088597
kwade@gallowaylawfirm.com
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
1301 McKinney St., Suite 1400
Houston, Texas 77010
Tel.: (713) 599-0700
Fax.: (713) 599-0777

COUNSEL FOR DEFENDANTS- APPELLEES, STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

CERTIFICATE OF SERVICE

I certify that on October 10, 2017, an electronic copy in PDF text searchable format was submitted by electronic case filing. I further certify that on October 10, 2017, a true and correct copy of the brief was served by electronic case filing or via certified mail on the counsel of record or pro se parties listed below.

Anita Kay Brunsting **Via CM/RRR**
203 Bloomingdale Circle
Victoria, TX 77904

Amy Ruth Brunsting **Via CM/RRR**
2582 Country Ledge Drive
New Braunfels, TX 78132

Candace Louise Curtis **Via Electronic Filing**
Rik Wayne Munson
218 Landana St.
American Canyon, CA 94503

Bernard L. Matthews, III **Via Electronic Filing**
Green and Matthews, LLP
14550 Torrey Chase Blvd., Ste. 245
Houston, TX 77014

Barry Abrams **Via Electronic Filing**
Joshia Huber
Blank Rome LLP
717 Texas Ave., Suite 1400
Houston, Texas 77002

Bobbie G. Bayless **Via Electronic Filing**
Bayless Stokes
2931 Ferndale
Houston, TX 77098

Laura Beckman Hedge **Via Electronic Filing**
Keith Adams Toler
Harris County Attorney's Office
1019 Congress St., 15th Floor
Houston, TX 77002

Jason Ostrom **Via Electronic Filing**
Stacy L. Kelly
Ostrom Morris PLLC
6363 Woodway, Suite 300
Houston, TX 77057

Andrew L. Johnson
Thompson, Coe, Cousins & Irons, LLP **Via Electronic Filing**
One Riverway, Suite 1400
Houston, Texas 77056

Martin Samuel Schexnayder **Via Electronic Filing**
Winget, Spadafora & Schwartzberg, LLP
Two Riverway, Suite 725
Houston, TX 77056

s/ Adraon D. Greene
Adraon D. Greene (TBN: 24014533)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,123 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word in Times New Roman 14 pt. font.

Respectfully submitted,

s/ Adraon D. Greene

Adraon D. Greene
TBN: 24014533
agreene@gallowaylawfirm.com
Kelsi M. Wade
TBN: 24088597
kwade@gallowaylawfirm.com
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
1301 McKinney St., Suite 1400
Houston, Texas 77010
Tel.: (713) 599-0700
Fax.: (713) 599-0777

COUNSEL FOR DEFENDANTS- APPELLEES, STEPHEN A. MENDEL AND BRADLEY E. FEATHERSTON

CASE NO. 17-20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS; Rik Wayne Munson
Plaintiffs- Appellants,

V.

CANDANCE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99,
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
Case No. 4:16-cv-01969

BRIEF OF APPELLEE JASON OSTROM

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
Stacy L. Kelly
(TBA #24010153)
stacy@ostrommorris.com
OSTROMMORRIS, PLLC
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Jason Ostrom

CASE NO. 17-20360

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Defendants-Appellees.

On Appeal from the United States District Court
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Candace Louise Curtis, Plaintiff, pro se
2. Rik Munson, Plaintiff, pro se
3. Candace Kunz-Freed, Defendant

4. Albert Vacek Jr., Defendant

5. Attorneys for Defendants–Appellees Candace Kunz-Freed and Albert Vacek, Jr. are Andrew Johnston and Cory S. Reed of Thompson, Coe, Cousins & Irons, LLP

6. Bernard Lyle Mathews, Defendant-Appellee, represents himself

7. Anita Brunsting, Defendant-Appellee, represents herself pro se

8. Amy Brunsting, Defendant-Appellee, represents herself pro se

9. Neal Spielman, Defendant-Appellee

10. Attorneys for Defendant-Appellee Neal Spielman is Martin Samuel Schexnayder, Winget, Spadafora & Schwartzberg, LLP

11. Bradley Featherston, Defendant-Appellee

12. Stephen A. Mendel, Defendant-Appellee

13. Attorneys for Defendant-Appellee Bradley Featherston and Stephen A. Mendel are Adraon DelJohn Greene and Kelsi M. Wade of Galloway, Johnson, Tompkins, Burr & Smith

14. Darlene Payne Smith, Defendant-Appellee

15. Attorneys for Defendant-Appellee Darlene Payne Smith are Barry Adams and Joshua A. Huber of Blank Rome, LLP

16. Jason Ostrom, Defendant-Appellee, represents himself

17. Gregory Lester, Defendant-Appellee

18. Attorney for Gregory Lester is Stacy L. Kelly of Ostrom Morris, PLLC

19. Jill Willard Young, Defendant-Appellee

20. Attorneys for Jill Willard Young are Robert S. Harrell and Rafe A. Schaefer of Norton Rose Fulbright US LLP

21. Bobbie Bayless, Defendant-Appellee, represents herself

22. Christine Riddle Butts, Defendant-Appellee

23. Clarinda Comstock, Defendant-Appellee

24. Toni Biamonte, Defendant-Appellee

25. Attorneys for Defendant Appellees Christine Riddle Butts, Clarinda Comstock and Toni Biamonte are Keith Adams Toler and Laura Beckman Hedge of the County Attorney's Office for Harris County, Texas

By: _____

JASON B. OSTROM
(TBN #24027710)
jason@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

ATTORNEY-IN -CHARGE FOR DEFENDANT-APPELLEE JASON OSTROM

STATEMENT REGARDING ORAL ARGUMENT

Appellee Jason Ostrom agrees with the statement in Appellants' Opening Brief that oral argument is not necessary here, because the district court decided this matter on the pleadings. But if this Court decides to have argument, Appellee Ostrom would like to participate.

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JURISDICTIONAL STATEMENT

The District Court properly determined that Plaintiffs-Appellants ("Appellants") failed to state a claim for violation of the Racketeering Influenced and Corrupt Organizations ("RICO") act against Jason Ostrom, and that Appellants' claims were properly dismissed using the District Court's inherent power because they were frivolous and delusional. This Court has jurisdiction pursuant to 28 U.S.C. §1291, because the District Court's May 16, 2017 Order (the ("Order") dismissing Appellants' Complaint was a final judgment.

ISSUES PRESENTED

1. Whether the District Court correctly dismissed Appellants' Complaint as frivolous and delusional using its inherent power;
2. Whether the District Court correctly determined that Appellants failed to plead a valid RICO claim; and
3. Whether the District Court correctly determined that Appellants lacked standing to sue for a RICO claim.

STATEMENT OF THE CASE AND FACTS

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. Ostrom. In an effort to provide some clarity for the Court regarding the claims against Mr. Ostrom, Mr. Ostrom opens with a statement of facts derived exclusively from the Original Complaint and Addendum.

A. Facts Involving Appellee Ostrom

Following the hearing on October 2, 2013, Plaintiff Curtis hired Mr. Ostrom on November 27, 2013. ROA.212 at ¶32. Mr. Ostrom then assisted in remanding the case back to Harris County Probate Number 4. ROA.212 at ¶33. Plaintiffs state in their Addendum that the matter was remanded to Harris County Probate Court Number 4 pursuant to a stipulation that in turn for the remand, Defendants agreed the federal injunction issued by this Court would remain in full force and effect. ROA.207 at ¶3. Plaintiffs then argue that once they were back in state court, Defendants immediately ignored the injunction. ROA.207 at ¶4. However, Plaintiffs contradict their own statement by acknowledging that Probate Court Number 4 entered an Order modifying the federal injunction. ROA.213 at ¶42. Obviously the federal injunction was not being ignored.

Plaintiffs complain of two actions taken by Mr. Ostrom. First, that Mr. Ostrom filed an application for distribution without Plaintiff Curtis's consent. ROA.214 at ¶50. Attached to Appellee Ostrom's Motion to Dismiss is a letter from

Mr. Ostrom to Plaintiff Curtis wherein he discusses the fact that she was aware of the application for distribution and indeed agreed to another application for distribution being filed. ROA.2884.

Secondly, Plaintiffs complain that Mr. Ostrom filed an amended complaint in the probate court raising questions as to the competency of a very lucid Nelva Brunsting. ROA.215 at ¶55. It is the Plaintiff's Second Amended Petition that Plaintiffs are referring to. ROA.2885-2892. Nowhere within the Second Amended Petition does Mr. Ostrom raise the issue of Nelva's capacity. *Id.* Mr. Ostrom was then discharged as Plaintiff Curtis's attorney on or about March 28, 2015.

B. PROCEDURAL HISTORY

In the District Court, Appellants sued more than fifteen parties – the judges, attorneys, and parties from a probate proceeding in Harris County Probate Court No. 4 – alleging that Appellees-Defendants ("Appellees"), collectively, violated RICO and committed common law fraud and breach of fiduciary duty. Appellant Curtis herself was a party to the underlying probate proceeding, but Appellant Munson was not.

Appellants filed a document styled as "Plaintiffs' Addendum of Memorandum in Support of RICO Complaint" (the "Addendum"). *See* ROA.202-1762. All told, the Addendum contained more than thirty "exhibits" and totaled more than 1,500 pages. *See id.* The Addendum was not an amended complaint – it alleged no causes of

action against any Appellee. Appellants never moved the District Court to consider the Addendum in its determination of any motion. Nor did Appellants ever amend their Complaint to include any assertion included in the Addendum.

In the District Court, on October 31, 2016, Appellee Ostrom filed a motion to dismiss with prejudice each claim in Appellants' Complaint. Appellants responded on November 18, 2016. The District Court held a hearing on the Appellees' pending motions to dismiss on December 15, 2016, and on May 16, 2017, the District Court entered the Order dismissing the Appellants' suit with prejudice.

SUMMARY OF ARGUMENT

Appellants' arguments fail for myriad of reasons, and the District Court's dismissal of the case should be affirmed on multiple independent grounds.

First, Appellants do not address the District Court's dismissal of the case via its inherent power to dismiss frivolous suits, waiving any error for that independent basis for dismissal. But even on the merits, the District Court appropriately dismissed Appellants' complaint as "frivolous (and borderline malicious)…via the Court's inherent ability to dismiss frivolous complaints." ROA.3334.

Second, the District Court correctly determined the Appellants did not adequately plead a plausible RICO claim that could satisfy Rule 12(b)(6). ROA.3332.

Finally, the District Court correctly held that Appellants lacked standing to

bring a RICO claim because they failed to "plead facts showing a recognizable injury to their business or property caused by the alleged RICO violation." *Id.*

For each reason, the District Court's Order should be affirmed.

ARGUMENT AND AUTHORITIES

In granting the Appellees' various motions to dismiss the Complaint, the District Court noted that it would "give plaintiffs, as pro se litigants, the benefit of the doubt" that they had not "underst[oo]d the legal shortcomings of their Complaint." ROA.3335. But the District Court "caution[ed Appellants] from additional meritless filings," making clear that the Appellants should "now realize that all claims brought in this litigation…lack merit, and cannot be brought to this, or any other court, without a clear understanding that Plaintiffs are bringing a frivolous claim." *Id.* Now, despite the District Court's clear and stern instructions, Appellants have brought this appeal, asserting the same allegations the District Court appropriately dismissed as "fanciful, fantastical and delusional." ROA.3332.

I. The Appellants Fail To Challenge the District Court's Dismissal of the Case Via Its Inherent Power

The District Court determined that Appellants' Complaint should be dismissed as "frivolous because [Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less any facts giving rise to a plausible claim for relief." ROA.3334. The District Court then

exercised its own "inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte." *Id.*

Appellants have failed to preserve any error relating to the District Court's dismissal of Appellants' claims using its inherent authority. But even if they had preserved error, the District Court's ruling should be affirmed on the merits.

A. Waiver

Nowhere do Appellants contend the District Court erred in dismissing the case via its inherent power. Indeed, nowhere in Appellants' Brief are the words "inherent" or "sua sponte" even mentioned. By failing to assign error to the specific determinations made by the District Court, Appellants have waived any error by the District Court. *See* FED. R. APP. P. 28 (a)(8)(A); *United States* v. *Scroggins,* 599 F.3d 433, 447 (5th Cir. 2010).

B. The District Court Correctly Dismissed the Complaint With Its Inherent Authority.

As the District Court recognized, it had the "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint.. .." *See Campbell* v. *Brender,* 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the required filing fee."); *see also Neitzke* v. *Williams,* 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or

"delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell* v. *Brender,* 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton* v. *Hernandez,* 504 U.S. 25, 32-33 (1992)).

Here, Appellants concocted conspiracy theories allege shadow organizations engaging in "poser advocacy" through the "probate mafia." ROA.38 at ¶95. Other courts in this Circuit have held that almost identical allegations made by pro se litigants were frivolous. *See Whitehead v. White & Case, LLP,* 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted,* 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). Thus, the District Court's Order should be affirmed.

II. The District Court Correctly Dismissed Appellants' Complaint Under Rule 12(b)(6)

The District Court held that the "Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332. The Court specifically noted that Appellants' allegations could not "be characterized as anything more than fanciful, fantastic, and

delusional." *Id.* Instead, the allegations "consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts." *Id.*

Appellants acknowledge they were required to "plead sufficient factual matter" to provide "the grounds' of [their] entitlement] to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." Appellants' Brief, 7 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal quotations omitted)). Nevertheless, throughout the entirety of Appellants' Brief, they fail to point to a single well-pleaded fact that could support any element of any cause of action pleaded in their Complaint.

Appellants' Complaint relies on implausible and conclusory allegations, unsupported by any sufficient factual assertions to state a valid claim for relief. *Ashcroft v. Iqbal* 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, Appellants were required to plead enough facts "'to state a claim to relief that is plausible on its face." *Iqbal* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Appellants' claim is "facially plausible" only if they pled facts that allowed the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Further, the District Court was not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678-79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff

armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Appellants' Complaint consists of conclusory conspiracy theories about lawyers and judges forming a criminal enterprise in a Texas state probate court, which appropriately led the District Court to state that Appellants' Complaint, "even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332 (determining the allegations "cannot be characterized as anything more than fanciful, fantastic, and delusional").

The Southern District of Texas has repeatedly rejected identical claims. *See Freeman v. Texas,* No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.); *Sheshtawy v. Conservative Club of Houston, Inc.,* No. 4:16-cv-00733, 2016 WL 5871463 (S.D. Tex. Oct. 7, 2016). In *Freeman,* two pro se plaintiffs alleged that a "probate court enterprise comprised of judges and lawyers" had "'virtually looted' his mother's homestead." *Id.* at *2 (internal footnotes omitted). But even if that were true, the court held that "these allegations fail to state a 'racketeering activity' because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred." *Id.*

In *Sheshtawy,* the plaintiffs alleged parties and attorneys practicing before Harris

County Probate Court No. 1 were members of a RICO conspiracy, along with two judges, based on the allegation that the judges always ruled against the Plaintiffs. 2016 WL 5871463, at *l-2. The district court dismissed that matter pursuant to Rule 12(b)(6), because plaintiffs' allegations were "pure zanyism." *Id.* at *4. That dismissal was recently affirmed by this Court. *See Sheshtawy v. Gray,* No. 17-20019, 2017 WL 4082754, at *1 (5th Cir. Sept. 14, 2017) (per curiam)("[W]e affirm the district court's determination that Plaintiffs lack RICO standing . . ."); *id.* at *2 n.4 ("The district court also dismissed Plaintiffs' RICO claims for failure to state a claim under Rule 12(b)(6). Although we need not address it, we would affirm on this basis as well.").

Here, the District Court's correctly determined that Appellants failed to plead a plausible claim for relief against Appellee Ostrom, requiring dismissal. The Order should be affirmed.

III. The District Court Appropriately Determined That Appellants Lacked Standing to Sue for a RICO Claim

The District Court's Order correctly determined that Appellants "fail[ed] to plead any facts establishing they have standing under § 1964(c) to assert civil RICO claims against any of the [Appellees] because [Appellants] fail to plead facts showing a recognizable injury to their business or property caused by the alleged RICO violations." ROA.3332. Appellants' Brief confirms the District Court was correct. *See Gil Ramirez Group, LLC. v. Houston Indep. Sch. Dist.,* 786 F.3d 400,408 (5th Cir.

2015).

The RICO statute states, "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). And a RICO plaintiff must show he has standing to sue. *Price* v. *Pinnacle Brands, Inc.,* 138 F.3d 602, 606 (5th Cir. 1998). To plead standing under RICO, a plaintiff "must 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)); *Holmes* v. *Securities Investor Protection Corp.,* 559 U.S. 1, 9-10 (1992) ("[P]roximate cause is thus required," which means there must be "some direct relation between the injury asserted and the injurious conduct alleged.").

The focus of proximate cause analysis is "directness"—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 plaintiffs injuries.").

The *Firestone* case is instructive. *See Firestone* v. *Galbreath,* 976 F.2d 279 (6th Cir. 1992). There, 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, if any actually existed. *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 upon 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"). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

A party also fails to show it has standing to bring a RICO claim 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,* 113 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).

Like the aggrieved beneficiaries in *Firestone,* Appellants here could, at most, suffer only indirect harm. The direct relationship requirement is plainly applicable

here, 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 sue alleged securities fraud co-conspirators). Appellants allege only that Appellee Ostrom caused them damage by injuring the "Brunsting family of Trusts." Appellants' Brief, at 16. And by only alleging that Appellee Ostrom caused harm to the trust through conduct in the probate proceeding, which in turn caused harm to Appellants, Appellants improperly ask the Court to go "beyond the first step" of the direct relationship requirement. *See Hemi Group, LLC* v. *City of New York, N.Y.,* 559 U.S. 1, 10 ("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.").

Any damages, attorneys' fees, or costs incurred by Appellants resulted from factors other than Appellee Ostrom's alleged RICO violations, as Appellants' Brief itself details the significant, time-consuming litigation in Probate Court No. 4. *See Sheshtawy,* 2016 WL 5871463, at *5 ("[T]he use of mail and wire services by attorneys and judges is a legal and acceptable means to communicate legal business. The fact that the plaintiffs dispute the outcome of various motions does not mean that routine communications are acts of conspiracy or fraud. Routine litigation conduct, even conflicts, cannot become a basis for a RICO suit …").

Thus, dismissal of Appellants' RICO claims for lack of standing to sue was appropriate, and the District Court's Order should be affirmed.

PRAYER

Appellee Jason B. Ostrom requests that the District Court's Order be affirmed. He requests all other relief to which he may be justly entitled.

Respectfully submitted,

ostrommorris, PLLC

BY: _____

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
STACY L. KELLY
(TBA #24010153)
stacy@ostrmmorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

ATTORNEYS FOR APPELLEE JASON B. OSTROM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all counsel of record in accordance with the Federal Rules of Civil Procedure on the 10th day of October, 2017.

/s/ Stacy L. Kelly
Stacy L. Kelly

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 3,002 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in proportionally spaced typeface using Word in Times New Roman 14 font for text and 12.5 font for footnotes.

3. THE UDNERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH Cir. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAISNT THE PERSON SIGNING THE BRIEF.

/s/ Stacy L. Kelly
STACY L. KELLY

CASE NO. 17-20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS; Rik Wayne Munson
Plaintiffs- Appellants,

V.

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Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
Case No. 4:16-cv-01969

BRIEF OF APPELLEE GREGORY LESTER

Stacy L. Kelly
(TBA #24010153)
stacy@ostrommorris.com
JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
OSTROMMORRIS, PLLC
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Gregory Lester

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Candace Louise Curtis, Plaintiff, pro se
2. Rik Munson, Plaintiff, pro se
3. Candace Kunz-Freed, Defendant

4. Albert Vacek Jr., Defendant

5. Attorneys for Defendants–Appellees Candace Kunz-Freed and Albert Vacek, Jr. are Andrew Johnston and Cory S. Reed of Thompson, Coe, Cousins & Irons, LLP

6. Bernard Lyle Mathews, Defendant-Appellee, represents himself

7. Anita Brunsting, Defendant-Appellee, represents herself pro se

8. Amy Brunsting, Defendant-Appellee, represents herself pro se

9. Neal Spielman, Defendant-Appellee

10. Attorneys for Defendant-Appellee Neal Spielman is Martin Samuel Schexnayder, Winget, Spadafora & Schwartzberg, LLP

11. Bradley Featherston, Defendant-Appellee

12. Stephen A. Mendel, Defendant-Appellee

13. Attorneys for Defendant-Appellee Bradley Featherston and Stephen A. Mendel are Adraon DelJohn Greene and Kelsi M. Wade of Galloway, Johnson, Tompkins, Burr & Smith

14. Darlene Payne Smith, Defendant-Appellee

15. Attorneys for Defendant-Appellee Darlene Payne Smith are Barry Adams and Joshua A. Huber of Blank Rome, LLP

16. Jason Ostrom, Defendant-Appellee, represents himself

17. Gregory Lester, Defendant-Appellee

18. Attorney for Gregory Lester is Stacy L. Kelly of Ostrom Morris, PLLC

19. Jill Willard Young, Defendant-Appellee

20. Attorneys for Jill Willard Young are Robert S. Harrell and Rafe A. Schaefer of Norton Rose Fulbright US LLP

21. Bobbie Bayless, Defendant-Appellee, represents herself

22. Christine Riddle Butts, Defendant-Appellee

23. Clarinda Comstock, Defendant-Appellee

24. Toni Biamonte, Defendant-Appellee

25. Attorneys for Defendant Appellees Christine Riddle Butts, Clarinda Comstock and Toni Biamonte are Keith Adams Toler and Laura Beckman Hedge of the County Attorney's Office for Harris County, Texas

By: _____

STACY L. KELLY
(TBA #24010153)
stacy@ostrommorris.com
JASON B. OSTROM
(TBN #24027710)
jason@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
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STATEMENT OF THE CASE AND FACTS

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 derived exclusively from the Original Complaint and Addendum.

A. Facts Involving Appellee 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. ROA.2926-2928. That Order appointed Gregory Lester as Temporary Administrator with limited powers. *Id.* The only powers conferred on Mr. Lester were the powers to investigate all claims pending by all parties and file a report with the court regarding the merits of the claims. *Id.* The Order was only effective for 180 days. *Id.* Mr. Lester filed his Report of Temporary Administrator Pending Contest on January 14, 2016. ROA.2929-2938.

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

- "18 U.S.C. §1962(d) the Enterprise;" ROA.25-29 at ¶¶35-58.
- "The Racketeering Conspiracy 18 U.S.C. §1962(c);" *Id.* at ¶¶ 59-120.
- Three claims for "Honest Services 18 U.S.C. §1346 and 2;" *Id.* at ¶¶121-123.

- "Wire Fraud 18 U.S.C. §1343 and 2;" *Id.* at ¶123.
- "Fraud 18 U.S.C. §1001 and 2;" *Id.*
- "Theft/Hobbs Act Extortion Texas Penal Codes § 31.02 & 3.03 and 18 U.S.C. §1951(b)(2) and 2;" *Id.* and
- Three conspiracy claims for "Conspiracy to Obstruct Justice 18 U.S.C. §371;" *Id.* "Conspiracy Re: State Law Theft/Extortion – in Concert Aiding and Abetting;" *Id.* at ¶132. and "Conspiracy to Violate 18 U.S.C. §§ 242 and 2, & 42 U.S.C. §§983 and 1985." *Id.* at ¶58.

But despite the many "claims", Appellants complain of only one specific action taken by Mr. Lester. Appellants allege that Mr. Lester filed a "fictitious report into the Harris County Probate Court No.4." ROA.44 at ¶123. Appellants have asserted no factual content sufficient to maintain any cause of action against Mr. Lester.

A. PROCEDURAL HISTORY

In the District Court, Appellants sued more than fifteen parties – the judges, attorneys, and parties from a probate proceeding in Harris County Probate Court No. 4 – alleging that Appellees-Defendants ("Appellees"), collectively, violated RICO and committed common law fraud and breach of fiduciary duty. Appellant Curtis herself was a party to the underlying probate proceeding, but Appellant Munson was not.

Appellants filed a document styled as "Plaintiffs' Addendum of Memorandum

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Appellants' arguments fail for myriad of reasons, and the District Court's dismissal of the case should be affirmed on multiple independent grounds.

First, Appellants do not address the District Court's dismissal of the case via its inherent power to dismiss frivolous suits, waiving any error for that independent basis for dismissal. But even on the merits, the District Court appropriately dismissed Appellants' complaint as "frivolous (and borderline malicious)…via the Court's inherent ability to dismiss frivolous complaints." ROA.3334.

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adequately plead a plausible RICO claim that could satisfy Rule 12(b)(6). ROA.3332.

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For each reason, the District Court's Order should be affirmed.

ARGUMENT AND AUTHORITIES

In granting the Appellees' various motions to dismiss the Complaint, the District Court noted that it would "give plaintiffs, as pro se litigants, the benefit of the doubt" that they had not "underst[oo]d the legal shortcomings of their Complaint." ROA.3335. But the District Court "caution[ed Appellants] from additional meritless filings," making clear that the Appellants should "now realize that all claims brought in this litigation…lack merit, and cannot be brought to this, or any other court, without a clear understanding that Plaintiffs are bringing a frivolous claim." *Id.* Now, despite the District Court's clear and stern instructions, Appellants have brought this appeal, asserting the same allegations the District Court appropriately dismissed as "fanciful, fantastical and delusional." ROA.3332.

I. The Appellants Fail To Challenge the District Court's Dismissal of the Case Via Its Inherent Power

The District Court determined that Appellants' Complaint should be dismissed

as "frivolous because [Appellants] have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less any facts giving rise to a plausible claim for relief." ROA.3334. The District Court then exercised its own "inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte." *Id.*

Appellants have failed to preserve any error relating to the District Court's dismissal of Appellants' claims using its inherent authority. But even if they had preserved error, the District Court's ruling should be affirmed on the merits.

A. Waiver

Nowhere do Appellants contend the District Court erred in dismissing the case via its inherent power. Indeed, nowhere in Appellants' Brief are the words "inherent" or "sua sponte" even mentioned. By failing to assign error to the specific determinations made by the District Court, Appellants have waived any error by the District Court. *See* FED. R. APP. P. 28 (a)(8)(A); *United States* v. *Scroggins,* 599 F.3d 433, 447 (5th Cir. 2010).

B. The District Court Correctly Dismissed the Complaint With Its Inherent Authority.

As the District Court recognized, it had the "inherent authority to dismiss a *pro se* litigant's frivolous or malicious complaint.. .." *See Campbell* v. *Brender,* 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua*

sponte even when the plaintiff has paid the required filing fee."); *see also Neitzke* v. *Williams,* 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). To determine "whether a plaintiff's complaint is frivolous, district courts must determine whether the facts alleged are 'clearly baseless,' meaning that the allegations are 'fanciful,' 'fantastic,' or 'delusional.'" *Campbell* v. *Brender,* 3:10-CV-325-B, 2010 WL 4363396, at *5 (N.D. Tex. Oct. 25, 2010) (citing *Denton* v. *Hernandez,* 504 U.S. 25, 32-33 (1992)).

Here, Appellants concocted conspiracy theories allege shadow organizations engaging in "poser advocacy" through the "probate mafia." ROA.38 at ¶95. Other courts in this Circuit have held that almost identical allegations made by pro se litigants were frivolous. *See Whitehead v. White & Case, LLP,* 12-CV-0399, 2012 WL 1795151, at *2 (W.D. La. Apr. 19, 2012), *report and recommendation adopted,* 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a pro se plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms, as "frivolous and vexatious" and sanctioning the pro se plaintiff). Thus, the District Court's Order should be affirmed.

II. The District Court Correctly Dismissed Appellants' Complaint Under Rule 12(b)(6)

The District Court held that the "Complaint, even when liberally construed,

completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332. The Court specifically noted that Appellants' allegations could not "be characterized as anything more than fanciful, fantastic, and delusional." *Id.* Instead, the allegations "consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts." *Id.*

Appellants acknowledge they were required to "plead sufficient factual matter" to provide "the grounds' of [their] entitlement] to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." Appellants' Brief, 7 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal quotations omitted)). Nevertheless, throughout the entirety of Appellants' Brief, they fail to point to a single well-pleaded fact that could support any element of any cause of action pleaded in their Complaint.

Appellants' Complaint relies on implausible and conclusory allegations, unsupported by any sufficient factual assertions to state a valid claim for relief. *Ashcroft v. Iqbal* 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, Appellants were required to plead enough facts "'to state a claim to relief that is plausible on its face." *Iqbal* 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007)). Appellants' claim is "facially plausible" only if they pled facts that allowed the court to "draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id.* Further, the District Court was not bound to accept as true legal conclusions couched as factual allegations. *Id.* at 678-79 (holding that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). And "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679.

Here, Appellants' Complaint consists of conclusory conspiracy theories about lawyers and judges forming a criminal enterprise in a Texas state probate court, which appropriately led the District Court to state that Appellants' Complaint, "even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3332 (determining the allegations "cannot be characterized as anything more than fanciful, fantastic, and delusional").

The Southern District of Texas has repeatedly rejected identical claims. *See Freeman v. Texas,* No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.); *Sheshtawy v. Conservative Club of Houston, Inc.,* No. 4:16-cv-00733, 2016 WL 5871463 (S.D. Tex. Oct. 7, 2016). In *Freeman,* two pro se plaintiffs alleged that a "probate court enterprise comprised of judges and lawyers" had "'virtually looted' his mother's homestead." *Id.* at *2 (internal footnotes omitted). But even if that were true, the court held that "these allegations fail to state a 'racketeering activity' because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any

violation of one of the numerous criminal statutes constituting racketeering activity has occurred." *Id.*

In *Sheshtawy,* the plaintiffs alleged parties and attorneys practicing before Harris County Probate Court No. 1 were members of a RICO conspiracy, along with two judges, based on the allegation that the judges always ruled against the Plaintiffs. 2016 WL 5871463, at *l-2. The district court dismissed that matter pursuant to Rule 12(b)(6), because plaintiffs' allegations were "pure zanyism." *Id.* at *4. That dismissal was recently affirmed by this Court. *See Sheshtawy v. Gray,* No. 17-20019, 2017 WL 4082754, at *1 (5th Cir. Sept. 14, 2017) (per curiam)("[W]e affirm the district court's determination that Plaintiffs lack RICO standing . . ."); *id.* at *2 n.4 ("The district court also dismissed Plaintiffs' RICO claims for failure to state a claim under Rule 12(b)(6). Although we need not address it, we would affirm on this basis as well.").

Here, the District Court's correctly determined that Appellants failed to plead a plausible claim for relief against Appellee Lester, requiring dismissal. The Order should be affirmed.

III. The District Court Appropriately Determined That Appellants Lacked Standing to Sue for a RICO Claim

The District Court's Order correctly determined that Appellants "fail[ed] to plead any facts establishing they have standing under § 1964(c) to assert civil RICO claims against any of the [Appellees] because [Appellants] fail to plead facts showing a recognizable injury to their business or property caused by the alleged RICO

violations." ROA.3332. Appellants' Brief confirms the District Court was correct. *See Gil Ramirez Group, LLC. v. Houston Indep. Sch. Dist.,* 786 F.3d 400,408 (5th Cir. 2015).

The RICO statute states, "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). And a RICO plaintiff must show he has standing to sue. *Price* v. *Pinnacle Brands, Inc.,* 138 F.3d 602, 606 (5th Cir. 1998). To plead standing under RICO, a plaintiff "must 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)); *Holmes* v. *Securities Investor Protection Corp.,* 559 U.S. 1, 9-10 (1992) ("[P]roximate cause is thus required," which means there must be "some direct relation between the injury asserted and the injurious conduct alleged.").

The focus of proximate cause analysis is "directness"—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 plaintiffs injuries.").

The *Firestone* case is instructive. *See Firestone* v. *Galbreath,* 976 F.2d 279 (6th Cir. 1992). There, 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, if any actually existed. *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 upon 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"). Thus, the *Firestone* beneficiaries lacked direct injury, and therefore standing, to pursue their individual RICO claims. *Id.*

A party also fails to show it has standing to bring a RICO claim 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,* 113 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).

Like the aggrieved beneficiaries in *Firestone,* Appellants here could, at most, suffer only indirect harm. The direct relationship requirement is plainly applicable here, 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 sue alleged securities fraud co-conspirators). Appellants allege only that Appellee Lester caused them damage by injuring the "Brunsting family of Trusts." Appellants' Brief, at 16. And by only alleging that Appellee Lester caused harm to the trust through conduct in the probate proceeding, which in turn caused harm to Appellants, Appellants improperly ask the Court to go "beyond the first step" of the direct relationship requirement. *See Hemi Group, LLC* v. *City of New York, N.Y.,* 559 U.S. 1, 10 ("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.").

Any damages, attorneys' fees, or costs incurred by Appellants resulted from factors other than Appellee Lester's alleged RICO violations, as Appellants' Brief itself details the significant, time-consuming litigation in Probate Court No. 4. *See Sheshtawy,* 2016 WL 5871463, at *5 ("[T]he use of mail and wire services by attorneys and judges is a legal and acceptable means to communicate legal business. The fact that the plaintiffs dispute the outcome of various motions does not mean that routine communications are acts of conspiracy or fraud. Routine litigation conduct, even conflicts, cannot become a basis for a RICO suit …").

Thus, dismissal of Appellants' RICO claims for lack of standing to sue was appropriate, and the District Court's Order should be affirmed.

PRAYER

Appellee Gregory Lester requests that the District Court's Order be affirmed. He requests all other relief to which he may be justly entitled.

Respectfully submitted,

ostrommorris, PLLC

BY: _____

STACY L. KELLY
(TBA #24010153)
stacy@ostrmmorris.com
JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

ATTORNEYS FOR APPELLEE GREGORY LESTER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all counsel of record in accordance with the Federal Rules of Civil Procedure on the 10th day of October, 2017.

/s/ Stacy L. Kelly
Stacy L. Kelly

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 2,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   This brief has been prepared in proportionally spaced typeface using Word in Times New Roman 14 font for text and 12.5 font for footnotes.

3. THE UDNERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH Cir. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAISNT THE PERSON SIGNING THE BRIEF.

/s/ Stacy L. Kelly
STACY L. KELLY

Case No. 17-20360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS and RIK WAYNE MUNSON
Plaintiffs – Appellants,

v.

CANDACE KUNZ-FREED, ALBERT VACEK, JR., BERNARD LYLE MATTHEWS, III, NEAL SPIELMAN, BRADLEY FEATHERSTON, STEPHEN A. MENDEL, DARLENE PAYNE SMITH, JASON OSTROM, GREGORY LESTER, JILL WILLIARD YOUNG, CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, BOBBIE BAYLESS, ANITA BRUNSTING, AMY BRUNSTING.
Defendant – Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
HONORABLE ALFRED H. BENNETT
CIVIL ACTION NO: 4:16-CV-01969

BRIEF OF APPELLEE NEAL SPIELMAN

WINGET, SPADAFORA & SCHWARTZBERG
Martin S. Schexnayder
State Bar No.: 17745610
Eron F. Reid
State Bar No.: 24100320
2 Riverway, Ste. 725
Houston, Texas 77056
(713) 343-9200 (Telephone)
(713) 343-9201 (Facsimile)
schexnayder.m@wssllp.com
reid.e@wssllp.com
ATTORNEYS FOR APPELLEE
NEAL SPIELMAN

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
HONORABLE ALFRED H. BENNETT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellants are Candace Louise Curtis and Rik Wayne Munson, *pro se.*

2. Defendants-Appellees Candace Kunz-Freed and Albert Vasek, Jr.; represented by Andrew Johnson and Cory S. Reed of Thompson, Coe, Cousins & Irons LLP.

3. Defendant-Appellee Bernard Lyle Matthews, III.

4. Defendant-Appellee Neal Spielman; represented by Martin S. Schexnayder and Eron F. Reid of Winget, Spadafora & Schwartzberg, LLP.

5. Defendants-Appellees Bradley Featherston and Stephen A. Mendel; represented by Adraon D. Greene and Kelsi M. Wade of Galloway, Johnson, Tompkins, Burr & Smith.

6. Defendant-Appellee Darlene Payne Smith; represented by Barry Abrams and Joshua A. Huber of Blank Rome, LLP.

7. Defendant-Appellee Jason Ostrom.

8. Defendant-Appellee Jill Willard Young; represented by Robert S. Harrell and Rafe A. Schaefer of Norton Rose Fulbright US LLP.

9. Defendant-Appellees Christine Riddle Butts, Clarinda Comstock, and Toni Biamonte; represented by Keith A. Toler and Laura Beckman Hedge of the County Attorney's Office for Harris County, Texas.

10. Defendant-Appellee Bobbie Bayless;

11. Defendant-Appellee Anita Brunsting; *pro se*.

12. Defendant-Appellee Amy Brunsting; *pro se.*

/s/ Martin S. Schexnayder
Martin S. Schexnayder

ATTORNEY FOR APPELLEE
NEAL SPIELMAN

STATEMENT REGARDING ORAL ARGUMENT

Appellee Neal Spielman believes that the issues are sufficiently briefed that oral argument is unlikely to assist the Court. However, should the Court grant oral arguments to Appellants, Spielman reserves his right to participate.

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STATEMENT OF JURISDICTION

The District Court properly determined that Plaintiffs-Appellants ("Plaintiffs") failed to show they had standing to assert civil RICO claims under 18 U.S.C. § 1964(c) or that they had plead any other plausible claims under Texas or Federal law. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because the District Court's Order (the "Order") dismissing Plaintiffs' claims was a final judgment.

ISSUES PRESENTED FOR REVIEW

1) Whether the District Court correctly determined that Plaintiffs failed to show that they had standing to bring their RICO claims;

2) Whether the District Court correctly determined that the doctrine of attorney immunity barred Plaintiff's claims;

3) Whether the District Court correctly dismissed the Plaintiffs' Complaint based on its inherent authority to dismiss frivolous claims.

STATEMENT OF THE CASE

I. Procedural History.

Appellants Candace Louise Curtis and Rik Wayne Munson filed a Complaint in the Southern District of Texas against more than fifteen parties—including the judges, attorneys, and even the court staff related to a probate proceeding in Harris County Probate Court No. 4. Plaintiff Curtis was a party to

the probate proceeding, but Plaintiff Munson was not. Plaintiff Munson, despite no connection to the probate proceeding, has joined as a plaintiff because he is Curtis' domestic partner and seeks compensation for the time spent assisting her with court filings. ROA.72.

In the Complaint, Plaintiffs alleged that the Appellees-Defendants (collectively, "Defendants") conspired to commit violations of the Racketeer Influenced Corrupt Organization Act ("RICO") and numerous other Texas and Federal causes of action. ROA.16. Plaintiffs alleged that all of the Defendants were part of a conspiracy in which the attorneys and Harris County Probate Court No. 4 worked in concert to defraud heirs of their inheritance to enrich themselves. Plaintiffs have named this alleged entity as the "Harris County Tomb Raiders, or the Probate Mafia." ROA.29, .37, .40.

Plaintiffs' Complaint wholly failed to allege facts stating a plausible claim against Defendant Spielman. The Complaint simply restates the elements of RICO and other federal and state causes of action without supporting factual allegations. ROA.29-34. In support of the Complaint, the Plaintiffs filed what they refer to as "Plaintiffs' Addendum of Memorandum in Support of RICO Complaint." (the "Addendum"). ROA.202-1762. The Addendum, which consisted of more than thirty "exhibits" totaling more than 1,500 pages, was not an amended Complaint as contemplated by the Federal Rules nor was the Complaint amended to include any

asserted in the Addendum.[1] Defendant Spielman filed two motions to dismiss based the Plaintiff's failure to state a claim and lack of standing on October 3, 2016.

The District Court heard oral arguments on Spielman's, and the other Defendants' motions. ROA.3378. On May 16, 2017, the District Court entered an order granting all motions to dismiss, stating that, "Plaintiffs' Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants." ROA.3329, .3332. Despite the District Court's admonishment for filing a frivolous complaint, Plaintiffs now bring this appeal. ROA.3334.

II. The Complaint.

Appellants' Complaint "assert[s] almost fifty 'claims' against more than fifteen defendants—including eleven lawyers, two judges, and one court reporter." As the District Court stated however, "the purported 'claims' consist of fantastical allegations that some or all of the Defendants are members of a secret society and 'cabal' known as the 'Harris County Tomb Raiders,' or 'The Probate Mafia.'"

[1] Plaintiffs assert that their Complaint consists of the Addendum as well as several of Plaintiffs' responses to motions to dismiss. *See* Appellants' Brief at 2, n.2. The Addendum and responses to motions, however, are not "pleadings" under the Federal Rules. *See* Fed. R. Civ. P. 7(a). Plaintiffs' further cite no authority which would suggest that pleading can be amended in such a manner. Accordingly, none of these filings should be considered part of the Complaint. Moreover, it is well-settled that courts do not look beyond the face on the pleadings to determine whether relief should be granted under Rule 12(b)(6). *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

ROA.3330. According to Plaintiffs, Defendant Spielman was a member of this secret society, who engaged in "poser advocacy" as an "exploitation opportunity to "hijack" "familial wealth." *Id.*

Specifically, the Plaintiffs have alleged against Spielman (1) violations of the Racketeer Influence Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) and conspiracy to violate the same; (2) conspiracy to commit Honest Services Fraud, 18 U.S.C. § 1346; (3) conspiracy to commit Mail Fraud, 18 U.S.C. § 1341; (4) conspiracy to commit Wire Fraud, 18 U.S.C. § 1343; (5) Hobbes Act Extortion 15 U.S.C. §1951(b)(2); (6) conspiracy to obstruct justice, 18 U.S.C. §371; (7) and state law theft, Texas Penal Codes 31.02 & 31.03. Despite the litany of allegations, Plaintiffs have failed to plead any specific factual allegations which would support their causes of action.

III. The Probate Proceeding.

The Plaintiffs have set their target on Spielman for his involvement in the probate matter *In re: Estate of Nelva E. Brunsting*, No. 412.249 (Harris County Probate Court No. 4)(the "*Brunsting* matter"). ROA.183. Spielman's role was to serve as attorney for Amy Brunsting, a potential beneficiary to the estate at issue, in the *Brunsting* matter. Plaintiffs appear to have asserted only one claim specifically against Spielman: that Spielman "obstructed justice" by assenting to the postponement of a hearing on summary judgment motions filed by several of

the co-Defendants. This, Plaintiffs allege, deprived Curtis access to the courts and other due process rights. ROA.49, ¶ 131. Again, Munson was not a party to the *Brunsting* matter. ROA.183. The conduct for which Spielman was sued is the typical and customary legal work routinely performed by an attorney on behalf of their client.

SUMMARY OF ARGUMENT

The District Court's dismissal of the case should be affirmed on multiple independent grounds. At the District Court, the Plaintiffs failed to show they had standing to bring a RICO claim and did not plead at the least the minimal allegations required to bring a RICO lawsuit. The District Court properly determined Plaintiffs lacked standing to bring a RICO claim because Plaintiffs failed to show that they suffered any cognizant, direct injury as a result of the allegations against Spielman or any other Defendant. Plaintiffs allege only that Spielman caused them harm by harming the estate of Nelva Brunsting, which is not a direct injury that can be remedied under RICO.

Additionally, the District Court also properly applied the doctrine of attorney immunity to Plaintiffs' claims. Attorneys retain complete immunity from civil liability to non-clients for professional actions undertaken in connection with representing a client in litigation. The Plaintiffs have not alleged a single specific

action which would fall outside the scope of the attorney immunity doctrine. Therefore, their claims are barred by law.

Finally, The District Court also properly determined that Plaintiffs' allegations were frivolous and the Plaintiffs failed to plead anything close to a plausible claim for relief. The District Court specifically noted that Plaintiffs' Complaint is completely devoid of any well-pleaded facts, and went so far as to admonish the Plaintiffs for their frivolous pleadings, urging them that subsequent filings could be followed by sanctions.

ARGUMENT AND AUTHORITIES

I. Standard of Review.

On appeal, the Court reviews the District Court's granting of a Rule 12(b)(6) motion under a *de novo* standard of review. *Little v. KPMG LLP*, 575 F.3d 533, 540-41 (5th Cir. 2009). "A dismissal for failure to plead fraud with particularity under Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6)." *United States ex. rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (1997).

Rule 12(b)(6) allows dismissal where the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 9(b) allows dismissal if a party fails "to state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This requires, at a minimum, that a plaintiff

plead the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Colquitt v. Abbott Labs*, 858 F.3d 365, 371 (5th Cir. 2017).

In order to defeat a Rule 12(b)(6) motion, Plaintiffs must plead enough facts to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is "facially plausible" if the facts plead allow the court to draw reasonable inferences about the alleged liability of the defendants. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not establish facial plausibility. *Id.* at 663. While a *pro se* complaint is to be construed liberally with all well-pleaded allegations taken as true, it nevertheless must still set forth facts giving rise to a claim upon which relief may be granted. *Ward v. Fisher*, 616 Fed. App'x 680, 683 (5th Cir. 2015).

II. The District Court Correctly Determined that Plaintiffs' ComplaintFailed to Plead Facts Establishing Standing under RICO.

The RICO statute states that "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue." 18 U.S.C. § 1964(c). The burden lies on the RICO plaintiff to establish standing to sue. *Price v. Pinnacle Brands, Inc.,* 138 F.3d 602, 606 (5th Cir. 1998). To establish standing, a RICO plaintiff must demonstrate (1) an injury (2) that was proximately caused by the violation. *Id. Sedima, S.P. R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) ("[a]

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 violation."). Furthermore, a RICO claim must be pled with specific facts, not merely conclusory statements, which establish the predicate acts of a claim under the statute. *Id. See Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989) (dismissing RICO claims for failure to plead with particularity).

The Southern District of Texas has consistently dismissed claims like the Plaintiffs, where *pro se* plaintiffs have made allegations likening probate courts to racketeering enterprises. *See Freeman v. Texas*, No. H-08-2050, 2008 WL 4155346, at *2 (S.D. Tex. Sept. 2, 2008) (Rosenthal, J.); *Sheshtawy v. Conservative Club of Houston, Inc.*, No. 4:16-cv-00733, 2016 WL 5871463 (S.D. Tex. Oct. 7, 2016). *Freeman* involved two *pro se* plaintiffs alleging that a "probate court enterprise comprised of judges and lawyers" had "'virtually looted' his mother's homestead." *Id.* at *2 (internal footnotes omitted). The court held that, even if the allegations were taken as true, "these allegations fail to state a 'racketeering activity' because Plaintiff has failed to allege sufficient facts to raise a colorable claim that any violation of one of the numerous criminal statutes constituting racketeering activity has occurred." *Id.*

In *Sheshtawy,* the plaintiffs alleged, similar to the instant case, that the parties, attorneys, and judges in the Harris County probate courts were members of

a RICO conspiracy. 2016 WL 5871463, at *1-2. The district court dismissed that matter, referring to the plaintiffs' allegations as "pure zanyism." *Id.* at *4. The dismissal was affirmed by this Court. *See Sheshtawy v. Gray*, No. 17-20019, 2017 WL 4082754, at *1 (5th Cir. Sept. 14, 2017) (per curiam). In its decision, this Court held that "[p]laintiffs lack standing to pursue their RICO claims because they have failed to allege a direct, concrete, and particularized injury proximately caused by Defendants' conduct." *Id.* This Court continued that, "[p]laintiffs suggest that their injury comes in the form of financial losses to their property interests in their respective probate proceedings. However, the alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing." *Id.* at *2.

In the present case, Plaintiffs' injuries are all hypothetical and their allegations fanciful. Plaintiff Curtis did not plead with any particularity how Spielman's conduct caused her injury to a valid property interest. Plaintiff Munson cannot show any property interest in the probate proceedings at all. In their brief, they have failed to provide any argument that the pleading standards were misapplied by the District Court or why their claims were sufficiently pled. For these reasons, the District Court's judgment should be affirmed.

III. The District Court Correctly Determined that the Attorney Immunity Doctrine Barred Plaintiff's Claims.

The District Court properly determined that Plaintiffs' claims were barred pursuant to the "Attorney Immunity Doctrine." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) ("[A]ttorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation."). More so, in Texas, "attorney immunity is properly characterized as a true immunity from suit." *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346-48 (5th Cir. 2016). This is true even where a plaintiff labels an attorney's conduct as "fraudulent." *See Byrd,* 467 S.W.3d at 483. This immunity "not only insulates the [attorney] from liability, but also prevents the [attorney] from being exposed to discovery and/or trial." *Proskauer Rose, L.L.P.*, 816 F.d 341 at 346. The only exceptions to attorney immunity is if the attorney engages in conduct that is "entirely foreign to the duties of an attorney," or if the conduction "does not involve the provision of legal services and would thus fall outside the scope of client representation." *Byrd*, 467 S.W.3d at 482.

There are only two mentions of specific conduct attributable to Spielman articulated by the Plaintiffs in their Complaint. First, the filing of an opposition to a motion for protective orders in the *Brunsting* matter. *See* ROA.47-48, at ¶128. Second, Spielman served responses to discovery in the *Brunsting* matter. *See*

ROA.51-52, at ¶138-139. These acts unequivocally fall within the scope of an attorney's professional duties to a client in litigation. In the fifty-eight pages of Plaintiffs' Complaint, these are the only two specific acts by Spielman that are identified. The District Court was correct in its conclusion that the allegations against Spielman, "at best, assert wrongdoing based solely on actions taken during the representation of a client in litigation." For this reason, the District Court's judgment should be affirmed.

IV. The District Court Correctly Determined that the Plaintiffs' Complaint was Frivolous.

The District Court properly dismissed the Plaintiffs' action based on its inherent authority to dismiss lawsuits that are frivolous or malicious. *See Campell v. Brender*, 3:10-CV-325-B, 2010 WL 4363396, at *4 (N.D. Tex. Oct. 25, 2010) ("District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte* even when the plaintiff has paid the required filing fee."); *see also Neitzke v. Williams*, 490 U.S. 319, 325 & 328 (1989) (holding that a complaint is "frivolous" and should be dismissed when the factual allegations are "fanciful," "fantastic," or "delusional"). As stated in the District Court's Order dismissing this case: "Plaintiffs' allegations are frivolous because Plaintiffs have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less facts giving rise to a plausible

claim for relief." ROA.3334. The District Court also stated, "Plaintiffs' allegations consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts." ROA.3332. (adding that "most of Plaintiffs alleged 'claims' are either based on statutes that do not create a private cause of action, or simply do not exist under Texas or Federal law."[2]

Based on these conclusions, the District Court dismissed the Plaintiffs' Complaint based on its inherent ability to dismiss frivolous complaints. The Plaintiffs' Complaint alleged the existence of a secret society engaging in "poser advocacy" in order to hijack familial wealth. ROA.38, ¶ 95. District Courts in the Fifth Circuit have routinely dismissed similar allegations made by *pro se* litigants as frivolous. *See Whitehead v. White & Case, LLP*, 12-CV-0399, 2012 WL

[2] In addition to the RICO claims, the Plaintiffs alleged several other causes of action against Spielman which the District Court properly determined either did not exist or did not create a private cause of action. For example, Plaintiffs alleged three causes of action for "honest services" fraud under 18 U.S.C. § 1346, along with causes of action for illegal wiretapping, wire fraud, fraud under 18 U.S.C. § 1001, and violations of the Hobbs Act. *See* ROA.43-46, ¶¶121, 122,124, 128. These are criminal causes of action that cannot be initiated by private plaintiffs. *See, e.g.*, *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.); *Thompson v. Wells Fargo Bank, N.A.*, CV H-15-598, 2016 WL 164114, at *3 (S.D. Tex. Jan. 14, 2016) (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 statues, 18 U.S.C. §§ 1341 and 1343"); *Thompson*, No. CV-H-15-598, 2016 WL 164114, at *3 ("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."); *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").

1795151, at *2 (W.D. La. Apr. 19, 2012) *report and recommendation adopted*, 12-CV-0399, 2012 WL 1795148 (W.D. La. May 16, 2012) (dismissing a *pro se* plaintiff's conspiracy claims against judges, magistrate judges, attorneys and law firms as "frivolous and vexatious" and imposing sanctions on the *pro se* plaintiff). For these reasons, the District Court's judgment should be affirmed.

CONCLUSION

Plaintiffs' Complaint failed to plead any plausible claim for relief against any of the Defendants. On appeal, the Plaintiffs have failed to properly challenge the basis for the District Court's judgment dismissing the case. For these foregoing reasons, Appellee-Defendant Neal Spielman respectfully requests that this Court affirm the District Court's judgement and award Spielman all other relief to which he may be justly entitled.

Respectfully submitted,

WINGET, SPADAFORA & SCHWARTZBERG

Martin S. Schexnayder
Federal Bar No. 15146
Eron F. Reid
Federal Bar No. 2973081
2 Riverway, Ste. 725
Houston, Texas 77056
(713) 343-9200 (Telephone)
(713) 343-9201 (Facsimile)
schexnayder.m@wssllp.com
reid.e@wssllp.com

ATTORNEYS FOR APPELLEE FOR NEAL SPIELMAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all parties and counsel of record through the Court's CM/ECF system or via certified mail on this date: October 10, 2017.

/s/ Martin S. Schexnayder
Martin S. Schexnayder

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3447 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedures 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font for the text, 12-point font for footnotes, and Times New Roman type style throughout.

/s/ Martin S. Schexnayder
Martin S. Schexnayder