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

CANDACE LOUISE CURTIS AND RIK WAYNE MUNSON,	§	
	§	
Plaintiffs,	§	
	§	Civil Action No. 4:16-cv-01969
vs.	§	
	§	
CANDACE KUNZ-FREED, ET AL.,	§	
	§	
Defendants.	§	

DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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DEFENDANT DARLENE PAYNE SMITH'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), Defendant Darlene Payne Smith (the "Defendant" or "Smith") files her Motion to Dismiss the Verified Complaint for Damages (the "Complaint") of Plaintiffs Candace Louise Curtis ("Curtis") and Rik Wayne Munson ("Munson") (collectively, the "Plaintiffs") for Lack of Subject Matter Jurisdiction and Failure to State a Claim, and would respectfully show the Court the following:

I.
INTRODUCTION

This is the most recent in a series of lawsuits[1/] involving the Brunsting siblings, 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

[1] In addition to the core probate proceeding, Curtis has previously 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.*), which was ultimately remanded to the 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.*). For a more detailed account of the Brunsting siblings' litigation history, Defendant incorporates by reference the factual recitations contained in pages 2-7 of defendants Candace Kunz-Freed and Albert Vacek, Jr.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction [ECF No. 20].

Probate Case"). Curtis is one of five sibling-beneficiaries in the Brunsting Probate Case and Munson is Curtis's domestic partner and paralegal. Defendant Smith is a probate attorney who previously represented one of the other sibling-beneficiaries (*i.e.*, Carole Brunsting) in the Brunsting Probate Case. *See* Complaint ("Compl.") at ¶¶32, 213 & 215. Defendant withdrew as counsel in early 2016.

Apparently dissatisfied with the rulings and administration of Harris County Probate Court Number 4, Plaintiffs have taken out their frustration by suing each Judge (*i.e.*, the Hon. Christine Riddle Butts and Hon. Clarinda Comstock) and lawyer (*i.e.,* Defendant 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 contact with the Brunsting Probate Case, as well as certain Probate Court No. 4 administrative personnel (*i.e.*, substitute court reporter Tony Baiamonte). Plaintiffs purport 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 Plaintiffs caustically describe as the "Harris County Tomb Raiders" or "Probate Mafia."[2/]

Plaintiffs also purport to assert "non-predicate act" claims for civil damages against Defendant 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) "Tortious Interference with Inheritance Expectancy." *See* Compl. at ¶¶159-166.

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[2] Plaintiffs allege 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 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 id*. at ¶¶57, 71, 76.

Plaintiffs' conclusory, conspiracy-theory-laden Complaint is not anchored to any cogently pleaded facts connecting Defendant Smith (or any of the defendants) to any of the myriad federal or state statutory provisions referenced therein. In fact, Plaintiffs' 59 page, 217 paragraph Complaint contains ***only one reference*** to any specific conduct by Defendant Smith – that she filed an objection to a motion for protective order on behalf of Carole Brunsting in the Brunsting Probate Case. *See* Compl. at ¶128. That is it.

The circumstances where an attorney can be liable to a non-client for litigation conduct incident to the execution of her professional duties to a client are extremely limited,[3/] and Plaintiffs have failed to allege any such facts here.

Plaintiffs' Complaint is inherently implausible, and should be dismissed for the following procedural, jurisdictional and substantive reasons:

1. **The Court Should Dismiss Plaintiffs' Claims Pursuant to FED. R. CIV. P. 12(b)(1) for Lack of Subject Matter Jurisdiction** – The Court lacks subject matter jurisdiction over Plaintiffs' claims for the following reasons:

   - Plaintiffs' Claims are Not Ripe – Ripeness is a component of subject matter jurisdiction. *See Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). Where, as is true here, a plaintiff's claimed injury is contingent upon the occurrence of uncertain future events that may not occur as anticipated (*i.e.*, an unfavorable outcome in a pending probate proceeding), "the claim is not ripe for adjudication." *Id.* at 342.

   - Munson Lacks Article III Standing – Standing is a component of subject matter jurisdiction. *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061 (5th Cir. 1991). To establish Article III standing, a plaintiff must establish an "injury-in-fact," which entails "a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.,* 73 F.3d 546, 555-56 (5th Cir. 1996). 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.

   - Attorney Immunity Bars Plaintiffs' State Law Claims for Civil Damages – Immunity from suit is jurisdictional. *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787,

[3] Under Texas Law, attorneys retain complete immunity from suit for civil liability to non-clients for actions taken 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).

2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). Under Texas law, attorneys are immune from suit by non-clients (*i.e.*, the Plaintiffs) for actions taken in connection with representing a client in litigation. *Cantey Hanger, LLP*, 467 S.W.3d at 481. Because Smith is alleged only to have filed an opposition to a motion on behalf of her client in pending state court litigation, she remains immune from Plaintiffs' state law claims for civil damages (*i.e.*, Claims 45, 46 and 47).

2. **Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted, and Their Claims Should be Dismissed** – Each of Plaintiffs' claims is implausible and should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for the following reasons:

- Plaintiffs Lack RICO Statutory Standing – Plaintiffs lack statutory standing to prosecute their civil RICO claims because they have not pled, and cannot establish, (1) a direct, concrete financial injury to the their business or property, and (2) proximate causation (*i.e.*, that the alleged injury was proximately caused by the alleged RICO predicate act(s)). *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

- Plaintiffs Have Failed to Plead Facts Establishing Any of the Substantive Elements of a RICO Violation – Despite its length, Plaintiffs' Complaint consists of nothing more than a formulaic and conclusory recitation of statutory elements couched as factual allegations. *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007). Plaintiffs offer no factual support for any of their conclusions, and have failed to plausibly allege any actual (1) conduct or participation (2) of an enterprise (3) through a pattern (4) of racketeering activity. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5th Cir. 2000). Plaintiffs' RICO claims therefore should be dismissed. *See Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008) ("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.").

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1983 ("Section 1983") – Plaintiffs' Section 1983 claim must be dismissed because they fail to identify any Constitutionally-protected rights which have been 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).

- Plaintiffs Have Failed to Plead a Viable Claim Under 42 U.S.C. §1985 ("Section 1985") – Plaintiffs' Complaint does nothing more than reference Section 1985 and conclusorily state that it has been violated. Because Plaintiffs have not alleged any facts which would plausibly suggest (1) that they are members of a protected class, (2) that they have been deprived of any Constitutionally-protected rights, (3) that a conspiracy existed, (4) that Defendant engaged in any overt acts in furtherance of the conspiracy, or (5) the existence of any class-based discriminatory animus, their claim should be dismissed. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983).

- 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 for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989).

II.
ARGUMENT AND AUTHORITIES

A. Plaintiffs’ Claims Should be Dismissed for Lack of Subject Matter Jurisdiction.

1. Standard of Review.

FED. R. CIV. P. 12(b)(1) governs challenges to a court’s subject-matter jurisdiction. “Under Rule 12(b)(1), a claim is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim.” *In re FEMA Trailer Formaldehyde Prods. Liab. Litg.*, 668 F.3d 281, 286 (5th Cir. 2012). Plaintiffs’ claims are not justiciable because (1) they are not ripe and, even if they were, (2) Munson lacks Article III standing and (3) Defendant is immune from each of Plaintiff’s state law Non-Predicate Act Claims for civil damages.

2. Plaintiffs’ 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, Plaintiffs' alleged injuries are contingent upon what they view as the presumptive outcome of pending litigation – the Brunsting Probate Case. *See* Compl. at ¶¶213 (stating that Curtis is being deprived of her "beneficial interests" in the Brunsting Family Trusts), ¶213 (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, because Plaintiffs' purported injuries are "contingent [on] future events that may not occur as [Plaintiffs] anticipate[]," their claims are not ripe and should be dismissed. *See Lopez*, 617 F.3d at 342.

3. <u>Munson Has No Direct Stake in the Outcome of this Case and Lacks Article III Standing.</u>

Standing is 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 general theory underlying the Complaint is that Defendant (and the rest of the "Probate Mafia") have engaged in conduct which has frustrated the direction and outcome of the Brunsting Probate Case. *See generally* Complaint. But Munson is not a beneficiary in the Brunsting Probate Case and admittedly lacks any tangible interest in the outcome of those proceedings. *See* ECF No. 33 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.

4. <u>Plaintiffs' State Law Non-Predicate Act Claims are Barred by Attorney Immunity.</u>

"Immunity from suit is jurisdictional and, therefore, is properly decided pursuant to a Rule 12(b)(1)." *Higgins v. Montgomery Cnty. Hosp. Dist.*, No. H-10-3787, 2011 U.S. Dist. LEXIS 81402, at *5 (S.D. Tex. Jul. 26, 2011). 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 W.W.3d at 483. The only exceptions to an attorney's immunity from suit are if 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.

Here, Plaintiffs' Complaint contains only one reference to any specific conduct by Defendant Smith – that she filed an opposition to a motion for protective order on behalf of her client in the Brunsting Probate Case. *See* Compl. at ¶128. Put differently, Plaintiffs allege only that Defendant was actively discharging her duties to her client in the context of active litigation. Defendant therefore remains immune from the non-client Plaintiffs' claims for civil liability with respect to any claims arising under Texas law. For this reason, the Court lacks subject matter

jurisdiction over Plaintiffs' Non-Predicate Act Claims 45, 46 and 47, and those claims should be dismissed.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim Upon Which Relief May be Granted.

1. Standard of Review.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) 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 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. "Where 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).

2. Plaintiffs 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 establish 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.").

a. Plaintiffs 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 shows that Curtis has not alleged any direct, concrete financial injury to her business or property. Indeed, the Complaint identifies only "***threats*** of injury," and repeatedly and consistently characterizes Curtis' supposed "injury" in terms of her "inheritance ***expectancy***." *See, e.g.*, Compl. at ¶¶165-66, 213. Put differently, Curtis complains only that the "Probate Mafia's" alleged conduct has 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 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" is even more attenuated, because he lacks any expectancy interest in the Brunsting Probate Case. *See* ECF No. 33 at ¶69. Munson's only claimed connection to this matter is that he purportedly provided paralegal services to Ms. Curtis over the past several years, and is dissatisfied with the results of the cases on which he worked. *See* Compl. at ¶215. This is not a concrete injury in fact under any calculus.

Because Plaintiffs have failed to plead facts plausibly showing that they incurred an injury sufficient to meet the RICO standing requirements, the Court can and should dismiss all claims against Defendant Smith.

b. Defendant Smith did not Proximately Cause Any of Plaintiffs' "Injuries."

To adequately plead standing, Plaintiffs must also establish that Defendant'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 Plaintiffs 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 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:

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4 Plaintiffs have identified 45 separate "predicate acts" in the Complaint but only 2 (Claims 20 and 21) appear to be directed at Defendant.

> (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.

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.

Here, Plaintiffs' Complaint contains no factual allegations which could plausibly demonstrate that Smith has 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* Compl. at ¶128. But this is the type of routine advocacy that an attorney is permitted – and indeed obligated – to engage in when representing a client in litigation, and cannot rise to the level of 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 Plaintiffs have pleaded no facts plausibly demonstrating that Smith engaged in any predicate act, they have not, and cannot, adequately plead proximate causation and lack statutory RICO standing for this additional reason.

3. <u>Plaintiffs Have Failed to Plead the Substantive Elements of a Civil RICO Claim.</u>

Even if Plaintiffs had statutory standing to sue under RICO, which they clearly do not, their claims must still be dismissed because they have pleaded no facts plausibly supporting the substantive elements of their claim. Based only on Defendant Smith's filing of an opposition to a

motion for protective order in pending state court probate litigation, Plaintiffs have 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), Plaintiffs must 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). Plaintiffs have not done so here.

a. Plaintiffs Have Not Alleged 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 association-in-fact. *See St. Paul Mercury Ins. Co.*, 224 F.3d at 445. Plaintiffs' Complaint does not plausibly allege the existence of either.

(i) "Probate Court No. 4" is Not a Legal Entity.

Plaintiffs first allege that "Probate Court No. 4" is a legal entity enterprise within the meaning of 18 U.S.C. § 1961(4). *See* Compl. at ¶36. But, as is true with the entire Complaint, Plaintiffs fail to plead facts supporting this conclusory assertion. And it is well-established that a county government department (*i.e.*, a county probate court) is not a legal entity that can sue or be sued separate and apart from the county itself. *See* TEX. LOC. GOV'T CODE § 71.001 ("A county

is a corporate and political body."); *see 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 Plaintiffs' assertion of a legal entity enterprise has no basis in law or fact, dismissal is appropriate.

(ii) Plaintiffs Have Not Alleged an Association-in-Fact Enterprise.

What Plaintiffs appear to be claiming is that the various individual judges, lawyers and court personnel whom they have sued (*i.e.*, the "Harris County Tomb Raiders" or "Probate Mafia") operate as an "association-in-fact" enterprise. *See* Compl. at ¶¶54-58. But this conspiracy-theory allegation is pure conjecture, and Plaintiffs again allege no facts which plausibly demonstrate the existence of the ominous "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, the 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).

Again, Plaintiffs' have alleged ***no facts*** which, if true, would satisfy any of these three requirements. Plaintiffs do not allege that the "Probate Mafia" maintains any existence separate and apart from what Plaintiffs have alleged to be a pattern of racketeering. They likewise do 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, Plaintiffs have again parroted legal conclusions but failed to support them with any concretely pleaded facts. *Anderson v. United States HUD*, 554 F.3d 525, 528 (5th Cir. 2008). For this reason, Plaintiffs have not plausibly pled the existence of an association-in-fact enterprise.

b. Plaintiffs Have Not Alleged 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," Plaintiffs must plead both that the acts are related to each other, and that those acts either constitute or threaten long-term criminal activity – thereby reflecting "continuity." *See H.J. Inc.*, 492 U.S. at 239.

Here, Plaintiffs' Complaint conclusorily states in several instances that the Defendants have engaged in a "pattern of racketeering," but fails to set forth any facts demonstrating such a pattern. The Complaint includes no facts demonstrating how the various alleged predicate acts are germane, 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). Plaintiffs' Complaint consists of nothing more than scatter-shot references to myriad "predicate act" statutes identified in RICO, followed by repetitive and conclusory assertions that one or more of the Defendants have purportedly violated these statutes "for the purpose of executing or attempting to execute a scheme and artifice to default and deprive . . . ." *See, e.g.*, Compl. at ¶¶121-123, 125. Because Plaintiffs have alleged no facts which would plausibly demonstrate a single predicate act, let alone the required "pattern" of such acts, dismissal is appropriate.

c. Plaintiffs Have Not Plausibly Alleged 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 Plaintiffs have failed to adequately plead violations of those other subsections, the § 1962(d) conspiracy allegation fails to state a claim. *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). Additionally, Plaintiffs'

conspiracy allegations are conclusory and lack 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). Plaintiffs' bald insistence that Defendant Smith (or any of the defendants) conspired to participate in a criminal enterprise does not make it so, and is insufficient to support a RICO claim.

4. Plaintiffs' Non-Predicate Act Claims Alleging Violations of Sections 1983, 1985 and 242 Should All be Dismissed.

In addition to their RICO claim, Plaintiffs have also asserted four "non-predicate act" claims[5/] against Defendant for civil damages. The first such claim (Claim 44) alleges violations of Sections 1983, 1985 and 242. *See* Compl. at ¶159. Each of these claims is without merit, and is addressed in turn below.

a. Plaintiffs' Section 1983 Claim Should be 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, 132 (1994). To state a claim under Section 1983, a plaintiff must allege facts that show that he 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).

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5 This section addresses only those causes of action listed under the "Non-Predicate Act Civil Claims for Damages." While none of these claims specifically mention Smith, in an abundance of caution, she responds to each such claim that globally references the "Defendants." To the extent Plaintiffs also seek 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 also should be dismissed. *See Gipson v. Callahan*, MO-97-CA-160, 1997 U.S. Dist. LEXIS 23139, at *17 (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).

(i) Plaintiffs Do Not Identify Any Particular Constitutionally-Protected Rights.

Plaintiffs' Section 1983 claim should be dismissed in the first instance because they have not even identified in the Complaint any particular Constitutionally-protected rights that have allegedly been violated. *See Graham v. Connor,* 490, U.S. 386, 394 (1989). True to form, Plaintiffs have instead vaguely and generally stated only that they have been deprived of unspecified "rights, privileges, and immunities secured and protected by the Constitution . . ." and leave it to the Court and the Defendant to speculate as to which one(s). *See* Compl. at ¶159. For this reason alone, Plaintiffs Section 1983 claims should be dismissed.

(ii) Plaintiffs Have Not Alleged State Action.

The requirement that a deprivation occur under color of state law is also known as the "state action" requirement – and Plaintiffs cannot meet it here. *See Bass v. Parlnvood Hasp.,* 180 F.3d 234, 241 (5th Cir. 1999). Smith is a private individual, and Plaintiffs have not alleged otherwise. A private party such as Smith will be considered a state actor for Section 1983 purposes only in rare circumstances. *See Gordon v. Neugebauer,* 57 F.Supp.3d 766, 773 (N.D. Tex. 2014). First, the plaintiff can show that the private actor was implementing an official government policy. *See Rundus v. City of Dallas, Tex.,* 634 F.3d 309, 312 (5th Cir. 2011). Plaintiffs have not identified any official government policy that caused an alleged deprivation of their civil rights, and the first narrow exception is therefore inapplicable here.

Alternatively, a plaintiff can show that a private entity's actions are fairly attributable to the government. *Id*. This is also 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 plaintiffs 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.

The Supreme Court utilizes three different tests for determining whether the conduct of a private actor can be fairly attributable to a state actor under the second prong of the attribution test: (1) the nexus or joint-action test, (2) the public function test, and (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*).

Under the "nexus test," a private party may be considered a state actor "where the government has 'so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise,'" and the actions of the private party can be treated as that of the state itself. *Bass,* 180 F.3d at 242; *see also Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982). Plaintiffs have pled no facts which would suggest that any state governmental entity has "insinuated itself into a position of interdependence" with Defendant Smith. Indeed, Plaintiffs fail to plead any facts which would show that Smith ever interacted or communicated with the any state governmental entity regarding the filing of an opposition to a motion for protective order on behalf of her client. Plaintiffs therefore have failed to plead facts that would satisfy the nexus test for state action under Section 1983.

Under the "public function test," a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *Bass,* 180 F.3d at 241-42. Here, Plaintiffs' Complaint is devoid of any facts showing that the representation

of beneficiaries in probate litigation is a function that traditionally is the exclusive province of the state, and Plaintiffs therefore have failed to plead facts that would satisfy the public function test for state action under Section 1983.

Under the "state coercion test," "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass,* 180 F.3d at 242. State coercion or compulsion can be found where the plaintiff establishes that the private defendants were engaged in a conspiracy with state officials. *See Tebo v. Tebo,* 550 F.3d 492, 496 (5th Cir. 2008).

To establish such a conspiracy, the plaintiff must show that the private and public actors entered into an agreement to commit an illegal act. *Id.* At the motion to dismiss stage, the plaintiff must "allege specific facts to show an agreement." *See id.* (quoting *Priester v. Lowndes Cnty.,* 354 F.3d 414, 421 (5th Cir. 2004)). Here, Plaintiffs have not included any facts in their Complaint which would suggest that Defendant Smith entered into any agreement with, or was acting at the behest of, any government official when she prepared an opposition to a motion for protective order on behalf of her client. There are simply no facts pleaded which would, if true, show the existence of such an agreement. Plaintiffs thus have failed to plead facts showing that Defendant Smith was coerced or encouraged by any governmental entity sufficient to satisfy the state coercion test. *Priester,* 354 F.3d at 420 (conspiracy alleges that are "merely conclusory, without reference to specific facts," will not survive a motion to dismiss).

Because Plaintiffs have failed to establish the necessary state action, their Section 1983 claim should be dismissed.

b. Plaintiffs' Section 1985 Claim Should be Dismissed.

To state a §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) 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). Plaintiffs' §1985 claim fails for several reasons.

Plaintiffs have not alleged any facts to support any of these elements. Plaintiffs identify no specific "right of privilege" that has been deprived. *See* 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."). Plaintiffs likewise fail to 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* Compl. at ¶129 ("Defendants . . . did willfully and knowingly conspire together to participate, and did participate, in a scheme or artifice . . . ."). Finally, the Complaint is devoid of any factual allegations demonstrating that Plaintiffs are members of a protected class, or that any of the alleged "conspiracy" and "overt acts" were modified by class-based discriminatory animus. Simply put, Plaintiffs have once again conclusively alleged a violation of the law, without stating the 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, Plaintiffs' Section 1985 claim should be dismissed.

c. Section 242 Does Not Provide for a Private Right of Action.

Section 242 is the criminal analogue to Section 1983 and does not provide for a private right of action. *Johnson v. Kegans*, 870 F.2d 992, 1005 n.4 (5th Cir. 1989). Plaintiffs' claim that Defendant has conspired to violate Section 242 therefore should be dismissed without further inquiry.

5. Plaintiffs' Remaining Non-Predicate Act Claims (Claims 45, 46 and 47) are all Barred by Attorney Immunity.

Plaintiffs' remaining Non-Predicate Act Claims, which allege "aiding and abetting breach of fiduciary duty," "aiding and abetting misapplication of fiduciary" and "tortious interference with inheritance expectancy," all arise under Texas law and, for the reasons more fully stated in Section II(A)(4) of this Motion, are barred by attorney immunity. *See* Compl. at ¶¶160-66.

III.
CONCLUSION

Accordingly, Defendant respectfully requests that the Court grant her Motion to Dismiss and dismiss Plaintiffs' claims with prejudice, and for such other and further relief, at law or in equity, to which Defendant may show herself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a true and correct copy of the foregoing and/or attached instrument was served on all counsel of record pursuant to the Federal Rules of Civil Procedure through the Southern District of Texas CM/ECF E-File System and as indicated below:

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