

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

CANDACE LOUISE CURTIS AND RIK  
WAYNE MUNSON,

*Plaintiffs,*

vs.

CANDACE KUNZ-FREED, ET AL.,

*Defendants.*

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Civil Action No. 4:16-cv-01969

**DEFENDANT DARLENE PAYNE SMITH’S REPLY TO PLAINTIFFS’ RESPONSE TO  
DEFENDANT’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 Reply to Plaintiffs Candace Louise Curtis (“Curtis”) and Rik Wayne Munson’s (“Munson”) (collectively, the “Plaintiffs”) Response to Defendant’s Motion to Dismiss the Verified Complaint for Damages for Lack of Subject Matter Jurisdiction and Failure to State a Claim (the “Motion”), and would respectfully show the Court the following:

**I.  
INTRODUCTION**

On December 1, 2016, Plaintiffs filed their Response to Defendant’s Motion to Dismiss. *See generally*, ECF No. 38 (the “Response”). Consistent with the Complaint under review, Plaintiffs’ Response fails to provide a cogent response to *any* of independently dispositive bases for dismissal outlined in Defendant’s Motion. The Response instead consists of nothing more than a timeline of the Brunsting siblings’ various lawsuits, followed by a series of legal conclusions couched as fact.

For the following reasons, and those more fully-stated in Defendant’s Motion, Plaintiffs’ claims should be dismissed with prejudice.

**II.**  
**OBJECTION TO PURPORTED AMENDMENT OF COMPLAINT**

Initially, Defendant objects to Plaintiffs' attempt to use the Response as a vehicle to "amend" their Complaint. Specifically, in Paragraphs 52 through 54 of the Response, Plaintiffs purport to "adopt and incorporate by reference" into the Complaint *the entire record in this case*. See Response at ¶¶52-54. FED. R. CIV. P. 10 permits, in some circumstances, the incorporation by reference of certain information. However, "an incorporation by reference is always accompanied by the requirement that it be done with a degree of specificity and clarity which would enable a responding party to easily determine the nature and extent of the incorporation." See, e.g., *Morrison v. Office of the United States Tr. (In re Morrison)*, 375 B.R. 179, 193 (Bankr. W.D. Pa. 2007). Where, as here, use of the incorporation by reference tool fails in this regard, the Court maintains authority to take appropriate action to regulate its use. See *id.*

Plaintiffs' amorphous incorporation of the "entire record before the Court," which encompasses many thousands of pages, without specifying which portions allegedly cure the numerous pleading defects highlighted by Defendants' Motion, does not comport with the purpose and function of Rule 10 and should be stricken.

**III.**  
**JURISDICTIONAL BASES FOR DISMISSAL**

**A. Plaintiffs' Claims are Not Ripe.**

In her Motion, Defendant argued that Plaintiffs' claims must be dismissed because they 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). That is, because Plaintiffs' alleged injuries are 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 Court lacks jurisdiction to hear those claims. *Id.* at

342. Plaintiffs have responded with only a conclusory statement that the claims are “over-ripe for remedy.” *see* Response at ¶55. Because Plaintiffs have failed to offer any argument or support demonstrating *how* their claims – all of which are premised on an unfavorable future outcome in the pending Brunsting Probate Case – are ripe for adjudication, dismissal is appropriate.

**B. Munson Lacks Article III Standing.**

In the Response, Plaintiffs appear to argue that Munson elected to quit his job in order to focus full time on legal research and writing in connection with Curtis’ multiple pending lawsuits. *See* Response at ¶¶44-46. Setting aside whether Munson is engaging in the unauthorized practice of law, his decision to do so is not a concrete “injury in fact” for standing purposes because it does not alter the fact that he is not a beneficiary of any of the Brunsting Trusts and has no direct stake in the outcome of this lawsuit. Plaintiffs have offered no authority to the contrary. Munson therefore lacks standing and all of his claims should be dismissed.

**C. Attorney Immunity Bars Plaintiffs’ Claims.**

The Response, much like the Complaint, contains only two references to any alleged conduct by Defendant Smith<sup>1/</sup> – and both Defendant-specific references pertain to core litigation conduct incident to Defendant’s execution of her professional duties to her client (Carole Ann Brunsting) in the Brunsting Probate Case. *See* Response at ¶¶7, 33 (alleging that Defendant, on behalf of her client, filed a counterclaim against Carl Brunsting); ¶¶36-37 (alleging that Defendant, on behalf of her client, filed an objection to Plaintiff Curtis’ request to distribute Brunsting Trust funds to pay her attorney’s fees for separate litigation against her siblings).<sup>2/</sup> As outlined in

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<sup>1</sup> As noted in the Motion, Defendant Smith had very limited involvement in one of the Brunsting series of lawsuits. She represented Plaintiff Curtis’ sister – Carole Brunsting – in the Brunsting Probate Case until she withdraw as counsel in early 2016. Defendant Smith was not involved in the remaining Brunsting lawsuits in any respect.

<sup>2</sup> The filing at issue is attached to Plaintiffs’ Response. *See* ECF No. 89-8.

Defendant's Motion, 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. 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). Because that is all that has been alleged here, Defendant remains immune from Plaintiffs' claims.

**IV.**  
**SUBSTANTIVE BASES FOR DISMISSAL**

Defendant additionally moved for dismissal under Rule 12(b)(6) and the Response likewise does not address any of the substantive arguments raised that motion. Instead, the Response purports to "incorporate by reference" the entire record in this suit, provides a bullet-point list of the elements of Plaintiffs' RICO claim and then conclusively states that "Plaintiffs have sufficiently pled" each of those elements. *See* Response at ¶¶55-56. It is well established that the Court "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). Because the Complaint (and the Response) consist of nothing more than fantastical and conclusory assertions couched as facts, the Complaint should be dismissed.

**V.**  
**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,

By:   /s/ Barry Abrams

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 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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