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

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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

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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,

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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