UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDICE LOUISE CURTIS, *ET AL.*	§	
	§	
VS.	§	
	§	**Civil Action No. 4:16-cv-01969**
CANDACE KUNZ-FREED, *ET AL*.	§	
	§	
	§	

DEFENDANTS JUDGE CHRISTINE RIDDLE BUTTS, JUDGE CLARINDA COMSTOCK & TONY BAIAMONTE'S MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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NATURE OF CASE, STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

Plaintiffs in this case are Candice Curtis, a disgruntled sibling in a probate case and Rik Munson, her alleged "domestic partner" and paralegal who claims to have assisted Curtis in her ongoing litigation against her siblings. Unhappy with the current state of the probate case, Plaintiffs have falsely alleged the Honorable Judges Christine Riddle Butts and Clarinda Comstock ("Honorable Judges") and substitute Court Reporter Tony Baiamonte (collectively, "Harris County Defendants") have engaged in a criminal and civil conspiracy with the opposing litigants and their attorneys, among others, to defraud and deprive them of the assets of Nelva Brunsting's estate and family trust.

The Harris County Defendants file this Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. #1] pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). This pleading fails to state a plausible and actionable claim against the Harris County Defendants and instead asserts numerous frivolous and wholly groundless claims which are unfounded, outrageous and sanctionable.

Plaintiffs allege the "multi-billion dollar Probate industry is an illicit wealth distribution empire run by morally bankrupt judges and attorneys". . . that is part of a "cancerous judicial black market plague" spread "throughout the state court systems" that have become "criminal racketeering enterprises."[1] Plaintiffs allege judges have become part of the "worst organized cartel of predatory criminals in the history of this nation."[2]

Turning their attention to the Harris County Defendants, Plaintiffs allege the "blatantly

[1] Complaint [Doc. 1], ¶¶ 170, 193.
[2] *Id.*, at 172.

corrupt probate court and its officers" engaged in a conspiracy to "loot assets" and "exploit the elders of our society" to unjustly enrich the attorneys and other "legal professionals" in Harris County Probate Court No. 4 ("Probate Court 4"). [3] The predicate acts alleged against the Honorable Judges include the referral of the case to mediation to an "extortionist thug mediator,"[4] and the removal of Curtis' motion for summary judgment from the Court's docket pending mediation.[5] These predicate acts are alleged under various federal statutes, including 18 U.S.C. §§ 242, 371, 1001, 1346, and 1951(b)(2), 42 U.S.C. §§ 1983, 1985, and TEX. PENAL CODE § 31.02, 31.03, 32.21.[6]

Plaintiffs additionally allege that Tony Baiamonte[7], a contract court reporter that was hired to stenographically record a *single hearing* in the underlying probate proceeding, "knowingly and willfully spoilate[d], destroy[ed] or otherwise conceal[ed]" some unidentified "material evidence" in violation of 18 U.S.C. §§ 1512(c), 1512(k) and 1519.[8] Mr. Baiamonte has destroyed nothing and the conclusory allegation is undeniably frivolous. Plaintiffs assert a total of at least 15 separate claims against the Harris County Defendants.

Harris County Defendants are entitled to dismissal as a matter of law, because the claims

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[3] *Id*. at ¶¶ 77, 78, 79, 215.

[4] Although Plaintiffs do not identify who this mediator is, Judge Mark Davidson was the mediator chosen to recently mediate this case. Based on the Motions to Dismiss filed by Candace Kunz-Freed [Doc. 20, ¶ 16] and Stephen A. Mendel and Bradley E. Featherston [Doc. 36, ¶¶ 2.5, 2.6], the mediation was cancelled and never took place.

[5] *Id*. at ¶¶ 131, 132.

[6] It does not appear Plaintiffs are asserting claims against the Harris County Defendants for any other alleged predicate acts in the Complaint, ¶ 59, since most of these claims, i.e. illegal wiretapping, misapplication of fiduciary, suborning perjury, identity theft, etc., are spelled out in separate counts against other defendants and not the Harris County Defendants. To the extent pled against the Harris County Defendants, they are denied and lack any factual basis.

[7] Mr. Baiamonte was improperly sued as "Toni Biamonte."

[8] Doc. # 1, ¶143.

against the Honorable Judges are barred by judicial, official and governmental immunity. Likewise, the claims against Tony Baiamonte are barred by governmental, qualified and official immunity.

Harris County Defendants are entitled to dismissal on these additional grounds: (1) the Complaint fails to state a claim sufficient to meet the requirements of Rules 8 and 9(b), (2) the Complaint fails to state a RICO claim or RICO conspiracy claim against the Harris County Defendants, (3) the Complaint fails to allege standing under RICO, (4) the Complaint fails to allege a conspiracy, (5) the Complaint is not plausible, (6) the Complaint fails to plausibly allege the existence of an "enterprise" or "association-in-fact," and (7) the Complaint is frivolous.

Neither Curtis nor Munson have standing to bring this lawsuit. Munson is not a party to the underlying probate proceeding and has no "private attorney general" standing. Further, his complaints that he could have pursued other work but instead spent four years providing paralegal services to Curtis and therefore lost out on other "property and business interests" is not a basis for standing.

Harris County Defendants seek to dismiss all of Plaintiffs' claims because there is no subject matter jurisdiction over the Defendants, and alternatively, for their failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(6), 8(a) and 9(b) of the Federal Rules of Civil Procedure.

ARGUMENT & AUTHORITIES

1. The Court lacks subject matter jurisdiction.

FED. R. CIV. P. 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction; absent jurisdiction conferred

by statute or the Constitution, they lack the power to adjudicate claims.[9] Subject matter jurisdiction cannot be established by waiver or consent.[10] If subject matter jurisdiction is lacking, the court must dismiss the suit.[11]

When a plaintiff lacks standing, the court lacks subject matter jurisdiction.[12] "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III."[13] The constitutional requirements to establish standing are (1) injury in fact that is concrete, particularized, and actual or imminent, not hypothetical; (2) a fairly traceable causal link between the plaintiff's injury and the defendant's challenged actions; and the likelihood of redressability by the requested relief.[14] The Eleventh Amendment and sovereign immunity also restrict federal court jurisdiction.[15] "The Eleventh Amendment bars an individual from suing a state in federal court unless the state consents or Congress has clearly and validly abrogated the state's sovereign immunity."[16] A suit against a state agency or department is considered to be a suit against the state under the Eleventh Amendment.[17] In addition, the Eleventh Amendment bars suit against a state official when "'the state is the real substantial party in interest.'"[18]

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[9] *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).
[10] *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 459, 151 L.Ed.2d 377 (2001).
[11] *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir.1998).
[12] *Cadle Co. v. Neubauer*, 562 F.3d 369, 371 (5th Cir.2009).
[13] *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
[14] *Lujan*, 504 U.S. at 560–61; *Little v. KPMG LLP*, 575 F.3d 533, 520 (5th Cir.2009).
[15] *Vogt v. Board of Commissioners of the Orleans Levee Dist.*, 294 F.2d 684, 688 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002).
[16] *Fairley v. Louisiana State*, 254 Fed. Appx. 275, 276–77 (5th Cir. Sept.11, 2007), *citing* U.S. Const. Amend. XI, and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).
[17] *Id.*
[18] *Id., citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[19]

The Court lacks jurisdiction because the Plaintiffs have no standing to assert RICO claims and because the Defendants are entitled to immunity from suit.

a. Plaintiffs fail to allege standing under RICO[20]

Plaintiffs must plead and prove that they have legal standing to sue for an alleged RICO violation. 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"[21] To have standing under the RICO Act, a plaintiff must allege a tangible financial loss.[22] Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing.[23] Thus, speculative damages are not compensable under RICO.[24]

Additionally, a plaintiff may sue under § 1964(c) (civil RICO) only if the alleged RICO violations ("predicate acts") were the proximate cause of the plaintiff's injury.[25] In *Holmes v.*

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[19] *Randall D. Wolcott, MD, PA v. Sebelius*, —— F.3d ——, No. 10–10290, 635 F.3d 757, 2011 WL 870724, *4 (5th Cir. Mar.15, 2011), *citing Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001). Fed.R.Civ.P. 12(h)(3).

[20] To state a civil RICO claim under § 1962, 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) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985).

[21] *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5th Cir.1995) (quoting 18 U.S.C. § 1964(c)).

[22] *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998).

[23] *Id.*

[24] *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995).

[25] *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U. S. 258, 268 (1992)

Securities Investor Protection Corp., the Supreme Court held that the proximate-cause requirement necessitates the "demand for *some direct relation between the injury asserted and the injurious conduct alleged*."[26]

Thus, a RICO plaintiff must satisfy two elements to establish standing to bring a RICO claim: (1) a direct, concrete financial injury to Plaintiff's business or property; and (2) proximate causation (i.e., that the alleged injury was proximately caused by the alleged RICO predicate act(s)). The Plaintiffs herein have neither alleged nor proven that they have suffered any *direct*, personal, concrete financial injury to their business or property. Rather, Plaintiff Curtis has alleged *only indirect injury* -i.e., alleged loss to the *assets of the Brunsting family trust and estate in the underlying probate proceeding.* "[T]he 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."[27] (Emphasis added). Even Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[28]

Plaintiff Munson is even further removed as he *admittedly* has no interest in the Brunsting family trust and estate and was not a party to any prior lawsuits involving the subject trust and estate.[29] His only connection to the prior lawsuits was the "paralegal services" he provided to Curtis.

i. No proximate cause.

Plaintiffs have littered their Complaint with unsubstantiated allegations that Harris County

[26] *Id.*, at 268 [Emphasis added]; *See also*, *Anza v. Ideal Steel Supply Corp*., 547 US 451, 457 (2006).
[27] *Sedima*, 473 U.S. at 496 (emphasis added).
[28] Doc. 1, ¶¶ 163, 165, 213.
[29] See Doc. 33, ¶ 69.

Defendants have committed *unspecified* acts of honest services fraud, fraud, theft, mail fraud,[30]wire fraud,[31] obstruction of justice[32], spoliation of evidence[33] and interference with commerce or extortion[34]. It appears the complaints concerning mail fraud and wire fraud is limited to the other defendants – such as the exchange of discovery responses – which does not involve the Harris County Defendants.[35]

To satisfy the stringent pleading requirements of Rule 9(b) regarding claims sounding in fraud, "the plaintiff must specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent."[36] Plaintiffs must set out ***"the who, what, when, where, and how***" of the fraud.[37]

Plaintiffs' Complaint, despite its corpulence (59 pages and 217 paragraphs), wholly fails to plead "the who, what, when, where, and how" of the alleged fraud as required by Rule 9(b). This particularity requirement also applies to the pleading of mail fraud or wire fraud as predicate acts in a RICO claim.[38]

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[30] See 18 U. S. C. § 1341.
[31] See 18 U. S. C. § 1343.
[32] See 18 U. S. C. § 1503.
[33] See 18 U. S. C. § 1512.
[34] See 18 U. S. C. § 1951.
[35] See Doc. 1, ¶¶ 127, 135 – 141.
[36] *See Sullivan*, 600 F.3d at 551
[37] *See Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003)(emphasis added); *See also, Dawson v. Bank of America, NA*, No. 14-20560, Summary Calendar (5th Cir. Mar. 13, 2015). *See also Carroll v. Fort James Corp*., 470 F.3d 1171, 1174 (5th Cir. 2005) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005) (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).
[38]*See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F. 2d 1134, 1138-9 (5th Cir. 1992), citing *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 430 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *See, also, Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

Having failed to plead any facts in support of the conclusory allegations of racketeering activity based upon fraud, Plaintiffs have failed to plead and prove proximate causation as a required element of RICO standing.[39]

Likewise, Plaintiffs' "factual allegations" of proximate cause are scant to non-existent. The Complaint contains their proximate cause allegations, which are nothing but conclusory recitations, wholly devoid of the heightened level of factual pleading for fraud cases mandated by Rule 9(b) and federal law.

Dismissal for failure to plead allegations of fraud, including RICO predicate acts of alleged mail fraud and wire fraud with particularity as required by Rule 9(b), is treated the same as Rule 12(b)(6) dismissal for failure to state a claim.[40] The Fifth Circuit interprets Rule 9(b) to require "specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statement were made, and an explanation of why they were fraudulent."[41]

Further, it is clear from the Complaint that Plaintiffs have not alleged any unlawful act against the County Defendants. Plaintiffs have listed 6 federal crimes that appear in 18 U.S.C. § 1961(1)'s definition of racketeering activity. However, to successfully plead a RICO claim under § 1962(c), Plaintiffs must do more than simply list the predicate act crimes necessary to establish a pattern of racketeering activity. Plaintiffs must also plead facts that, if true, would establish that each predicate act was in fact committed by the County Defendants.[42]

Plaintiff's Complaint fails to meet this standard. For the identified predicate acts, Plaintiffs

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[39] *Id.; See also, Holmes* at 268.
[40] *See Lovelace v Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).
[41] *See Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).
[42] *Elliott*, 867 F.2d at 880.

simply identify the statute, provide a general description of the conduct it prohibits (although for most the conduct is not even described), and then assert the County Defendants violated the statute. This is not sufficient to establish (1) a predicate act was committed, or (2) any damages were proximately caused by the alleged act.

In addition, Plaintiffs cite to various other purported predicate acts as a basis for RICO, but this fails too because only predicate acts of *racketeering activity* provide a basis for recovery under RICO section 1964(c).[43] The following generalized claims are not predicate acts that support a claim for racketeering activity: theft under the Texas Penal Code (Claim 12), conspiracy for "state law theft" and "aiding and abetting" (Claim 23), spoliation (Claim 38), conspiracy to violate constitutional rights (Claim 44), "aiding and abetting breach of fiduciary, defalcation and scienter" (Claim 45), "aiding and abetting misapplication of fiduciary, defalcation and scienter" (Claim 46) and "tortious interference with inheritance expectancy" (Claim 47). Further, Plaintiff's conclusory statements concerning these claims cannot support a claim against the Harris County Defendants.

ii. No direct injury.

Plaintiffs also lack RICO standing because they have failed to plead the "direct injury" ("directness") requirement.[44]

A justiciable interest is required as an element of standing under Texas law.[45] As noted by the Supreme Court, "There is no need to broaden the universe of actionable harms to permit RICO

[43] *Brandenburg v. Seidel*, 859 F.2d at 1179, 1188 (4th Cir. 1988).
[44] *See Holmes*, at 268.
[45] See also TEX. CIV. P. & REM CODE ANN. §§ 134.001-.005 (West 2011 & Supp. 2013) (Theft Liability Act); TEX. CIV. P. & REM CODE ANN. § 31.03(a) (West Supp. 2013) (claim under the Theft Liability Act requires ownership interest in the property unlawfully appropriated).

suits *by parties who have been injured only indirectly*."[46]

The Plaintiffs have failed to adequately allege *direct (i.e., personal)* concrete financial loss, as required to establish standing to sue for civil RICO or civil RICO conspiracy.[47] Rather, they have made myriad conclusory, unsubstantiated claims. Curtis acknowledges there are only "threats of injury to property rights" of which she only has an "expectancy interest."[48] Munson has *no* such interest at all.

Because Plaintiffs have wholly failed to plead standing to bring their RICO claims (i.e., the existence of a *direct* injury to their personal business or property, which was proximately caused by a predicate act, this motion should be granted and their RICO claims dismissed with prejudice.

b. The Honorable Judges are entitled to judicial immunity.

Plaintiffs attempt to argue around judicial immunity by asserting the Honorable Judges were engaged in "non-judicial acts."[49] Despite the exceptionally lengthy Complaint, the sum and substance of *all* allegations against the Honorable Judges is the Plaintiffs' belief that the actions taken by them during the course of the pending cases were improper and/or wrong. Indeed, the acts complained of are removing a motion for summary judgment from the hearing docket and ordering the parties to mediation.

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[46] *See Anza v. Ideal Steel Supply Corp.*, 547 US 451, 460 (2006) (emphasis added).
[47] "[T]o demonstrate injury for RICO purposes, plaintiffs must show proof of concrete financial loss." *Chaset v. Fleer/Skybox Intern, LP*, 300 F.3d 1083, 1086-87 (9th Cir. 2002); *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 728-29 (8th Cir.2004) (same); see also *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n. 16 (5th Cir.2003) (A plaintiff lacks RICO standing "unless he can show concrete financial loss").
[48] Doc. 1, ¶¶ 163, 165, 213.
[49] Doc. 1, ¶¶ 18, 19.

It is unquestionably clear that these actions were judicial acts that were made within Probate Court 4's jurisdiction and for which the Honorable Judges are entitled to immunity. The Complaint is completely void of any facts alleging actions taken in a nonjudicial role.

The Honorable Judges are entitled to absolute judicial immunity from suit for acts undertaken in their judicial capacity even if they are done maliciously or corruptly (which Defendants emphatically deny).[50] The two exceptions to this doctrine, i.e., actions by the judge in a non-judicial role and actions, while judicial actions, taken in complete absence of jurisdiction, do not apply here as Plaintiffs have not alleged facts that would invoke either.[51] Further, as Texas judges, the Honorable Judges are entitled to Eleventh Amendment protection and governmental immunity for claims against them in their official capacity.[52] Absolute judicial immunity does not bar prospective relief against a judge, but Plaintiffs have not sought such relief against the Honorable Judges.[53]

In a similar case, Houston's First Court of Appeals affirmed the trial court's finding that two probate judges were entitled to judicial immunity. In *James v. Underwood*, two siblings were involved in a legal dispute over who had the right to manage their mother's assets.[54] Their controversy spawned multiple lawsuits filed in various district and probate courts, resulting in no less than 11 appellate decisions.[55] James sued two judges (Judge Olen Underwood and Judge

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[50] *Price v. Porter*, 351 Fed. Appx. 925, 927 (5th Cir.2009), *citing Mireles v. Waco*, 502 U.S. at 10, and *Stump v. Sparkman*, 435 U.S. at 355–57.
[51] *Id.*
[52] *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985).
[53] *Bauer v. State of Texas*, 341 F.3d 352, 357 (5th Cir.2003).
[54] *James v. Underwood*, 438 S.W.3d 704, 706-07 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
[55] *Id*. at 707.

Patrick Sebesta) who had presided over aspects of her on-going legal dispute with her sibling and an intervenor.[56] The judges filed a motion to dismiss on the basis of judicial and sovereign immunity and the motion was granted.[57] The First Court of Appeals concluded the dismissal based on judicial immunity was proper and therefore did not reach the issue of sovereign immunity.[58] The Court noted that immunity from suit "deprives a trial court of subject-matter jurisdiction."[59] "The Supreme Court has stated repeatedly that 'it is a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."[60]

In a suit alleging RICO violations, the Fifth Circuit determined that three state court judges and a court secretary were entitled to absolute judicial immunity and quasi-judicial immunity, respectively.[61] The plaintiffs sued twenty individual and corporate defendants, alleging a law firm engaged in a criminal conspiracy with the other defendants to infiltrate and to control the state and federal court systems in Texas.[62] As predicate acts to the RICO violation, the plaintiffs alleged illegal campaign contributions, bribery, mail and wire fraud, and obstruction of justice.[63] The Fifth Circuit rejected as frivolous the plaintiffs' argument that there is no absolute judicial

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[56] *Id*.
[57] *Id*. at 709.
[58] *Id*.
[59] *Id*., citing *Reata Constr. Corp v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).
[60] *Id*., citing *Bradley v. Fisher*, 80 U.S. 335, 347, 13 Wall. 335, 20 L.Ed. 646 (1871), *Mireles v. Waco*, 502 U.S. at 10, *Stump v. Sparkman*, 435 U.S. at 355.
[61] *Kirkendall v. Grambling & Mounce, Inc*., 4 F.3d 989, 1993 WL 360732, *2 (5th Cir. 1993).
[62] *Id*., *1.
[63] *Id*.

immunity and quasi-judicial immunity in RICO actions.[64]

Judicial immunity provides immunity from suit, not just from the ultimate assessment of damages.[65] "Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction."[66] To determine whether an act is "judicial", the courts look at the following four factors: (1) the act complained of is one normally performed by a judge, (2) the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) the controversy centered around a case pending before the judge, and (4) the act arose out of an exchange with the judge in the judge's official capacity.[67] These factors are construed broadly in favor of immunity.[68] And, not all factors must be met for immunity to exist – in some circumstances, immunity may exist even if only one factor is met.[69] The factors are not required to be given equal weight; rather they are weighted according to the facts of the particular case.[70]

In considering whether the act complained of is normally performed by a judge, we ask whether the action is a "function normally performed by a judge, and to the expectations of the parties, i.e. whether they dealt with the judge in his judicial capacity."[71] The relevant inquiry is

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[64] *Id*., at *3.
[65] *James at 709* (citations omitted).
[66] *Id*., quoting *Alpert v. Gerstner*, 232 S.W.3d 117, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)(quoting *City of Houston v. W. Capital Fin. Servs. Corp*., 961 S.W.2d 687, 689 (Tex. App.—Houston [1st dist.] 1998, pet. dism'd w.o.j.)).
[67] *Id*., at 710, citing *Bradt v. West*, 892 S.W.2d 56 67 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993).
[68] *Id*., citing *Bradt*, at 67.
[69] *Id*. (citation omitted).
[70] *Id*., citing *Bradt* at 67.
[71] *Id*., citing *Mireles*, 502 U.S. at 11; *Twilligear v. Carrell*, 148 S.W.3d 502, 504 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

the "nature" and "function" of the act, not the "act" itself.[72] This distinction is necessary, otherwise any act characterized as improper would be deemed nonjudicial because "an improper or erroneous act cannot be said to be normally performed by a judge."[73]

In *Twilligear*, the Fourteenth Court of Appeals concluded that a judge accused of "negligence and gross negligence in failing to adequately oversee expenditures from a guardianship account" was exercising judicial action.[74] In the instant case, the Plaintiffs accuse the Honorable Judges of "obstruction of justice" by "removing Summary Judgment Motions from Calendar and creating stasis", and conspiring to "redirect civil litigation away from the public record to a staged mediation" for the purpose of "adding delay and increasing expense" and "holding the money cow trust hostage for attorney fee ransoms."[75] The actions Plaintiffs complain of are the rulings and Orders issued by the Honorable Judges.[76] The act of holding hearings and issuing rulings and Orders are all functions normally performed by a judge. This satisfies the first element of whether the actions were "judicial acts." The complained of actions occurred in court or in the course of handling their docket; therefore the second factor also supports a finding that the Honorable Judges' actions were judicial in nature.[77]

The third factor is whether the controversy centered around a case pending before the judge. The entirety of the allegations raised center around the underlying probate proceeding

[72] *Id*., citing *Mireles*, 502 U.S. at 13, *Stump*, 435 U.S. at 362.
[73] *Id*., citing *Mireles*, 502 U.S. at 12.
[74] *Id*., citing *Twilligear*, 148 S.W.3d at 505.
[75] Doc. 1, ¶¶ 121, 131.
[76] *Id*.
[77] *James*, at 711, citing *Bradt*, 892 S.W.2d at 67. *See also* the Complaint.

before the Honorable Judges. Accordingly, this factor supports the conclusion that the Honorable Judges' actions were judicial.[78]

The final factor is whether the act arose out of an exchange with the judge in the judge's official capacity.[79] Plaintiff Curtis, both pro se and through her former counsel, Jason Ostrom (who is also a named defendant in this lawsuit), appeared before the Honorable Judges and interacted with them in the judges' judicial capacities and not in any alternative capacities. The Honorable Judges acted in a judicial capacity in doing so, whether their rulings or decisions were correct or not (Defendants *emphatically* contend they were correct). Accordingly, this last factor supports the conclusion that the Honorable Judges' actions were judicial.

The next inquiry is whether the judges acted in a "complete absence of all jurisdiction."[80] "Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes."[81] The First Court of Appeals determined probate judges have jurisdiction to preside over probate cases, which is what Judge Sebesta had been doing at the point when his actions became "actionable" in the plaintiff's view.[82] Importantly, immunity is not lost based on an allegation that the action taken had procedural errors, even "grave" ones. *Id*., citing *Bradt*, at 68 (holding that judge had jurisdiction, for judicial immunity purposes, to sign order even if that order would be determined void because motion to recuse judge was pending). *See also In re J. B.H*., No. 14-05-00745-CV, 2006 WL 2254130, *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, pet.

[78] *Id*. at 711.
[79] *Id*.
[80] *Id*., citing *Mireles*, 502 U.S. at 12; *Bradt*, 892 S.W.2d at 68.
[81] *Id*., at 712, quoting *Malina*, 994 F.2d at 1125.
[82] *Id*.

denied)(mem.op.) (affirming dismissal of claims against judge who had judicial immunity regarding order in guardianship proceeding).

The Honorable Judges had the necessary jurisdiction to take the actions they did. Because the actions complained of by Plaintiffs are judicial in nature and because they were made within the Honorable Judges' jurisdiction, they are entitled to absolute judicial immunity on all claims brought against them.

c. Tony Baiamonte is entitled to official immunity.

To the extent Plaintiffs are asserting claims against Tony Baiamonte in his official capacity (which it appears is the case since he is only referred to in his capacity as the "Official Court Reporter"), such a claim is construed as a claim against Harris County. *See Hafer v. Melo,* 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."); *see also Bennett v. Pippin,* 74 F.3d 578, 584 (5th Cir.1996) ("When a plaintiff sues a county or municipal official in her official capacity, the county or municipality is liable for the resulting judgment and, accordingly, may control the litigation on behalf of the officer in her official capacity. A suit against the Sheriff in his official capacity is a suit against the County."). Harris County (and therefore Tony Baiamonte) cannot be liable under RICO for two independent reasons: (1) it is incapable of forming the *mens rea* required for the underlying criminal act, and (2) because RICO is punitive in nature, municipal entities enjoy common law immunity from the punitive damages.[83]

d. Harris County Defendants are entitled to qualified immunity.

[83] *Gil Ramirez Group, L.L.C. v. Houston Independent School Dist*., 786 F.3d 400, 412 (5th Cir. 2015).

The doctrine of qualified immunity shields public officials acting within the scope of their authority from civil liability.[84] "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation."[85] Plaintiffs have not presented any facts to support a constitutional violation.

In *Bagby v. King*, a litigant filed suit against two federal judges, a federal district clerk, and an appeals court clerk claiming he had been denied access to various federal district and appellate courts in California.[86] The Magistrate Judge issued a Show Cause Order explaining that the plaintiff's claims failed to overcome the doctrines of absolute judicial immunity and qualified immunity and directed plaintiff to amend his complaint to cure these defects.[87] Instead, the plaintiff filed a host of new lawsuits against a number of federal judicial officers and court staff, complaining cryptically about their handling and disposition of prior lawsuits plaintiff had filed or attempted to file.[88] The court determined the plaintiff's claims extended no further than complaints about the dispositions of previous lawsuits.[89] The court held the plaintiff's purported claims were barred by either judicial immunity, qualified immunity, or failed to state a non-frivolous claim.[90]

In the instant case, the Plaintiffs have likewise complained about actions taken by the Honorable Judges in their handling of the probate matter and appear to complain about actions taken by Tony Baiamonte acting as the Official Court Reporter. Plaintiffs contend Mr. Baiamonte

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[84] *Bilbrew v. Corona*, No. H-04-2075, 2005 WL 1515409 *2 (S.D. Tex., June 27, 2005) (J. Hittner), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[85] *Id*., quoting *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).
[86] *Bagby v. King*, No. SA-14-CA0682-XR, 2014 WL 4692479 *1 (W.D. Tex. Sept. 18, 2014).
[87] *Id*. at *2.
[88] *Id*.
[89] *Id*.
[90] *Id*.

"knowingly and willfully" spoliated, destroyed or otherwise concealed some unidentified "material evidence of a racketeering conspiracy."[91] These cryptic, conclusory complaints of all Harris County Defendants are not sufficient to identify a violation of any constitutional rights. Defendants are therefore entitled to qualified immunity and the case against them must be dismissed.

2. Plaintiffs have failed to state a claim against the Harris County Defendants.

Rule 12(b)(6) mandates dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A complaint that fails to satisfy the pleading requirements of Rule 8(a) or Rule 9(b) is subject to dismissal under Rule 12(b)(6).[92] To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[93]

A complaint must also "provide the plaintiff's grounds for entitlement to relief including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[94] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[95] "Nor does a complaint suffice if it tenders 'naked assertion[s],' devoid of 'further factual enhancement.'"[96]

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[91] Complaint, ¶ 143.
[92] *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (Rule 8(a)); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) (Rule 9(b)).
[93] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).
[94] *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555-566).
[95] *Iqbal*, 556 U.S. at 678.
[96] *Id.* (quoting, 550 U.S. at 557).

Plaintiff alleges a RICO claim under § 1962(c) and (d). To state a claim under any subsection, "a plaintiff must plead specific facts ... which establish the existence of an enterprise."[97] Plaintiffs have not pled facts that show or create a reasonable inference of a pattern of racketeering activity or the existence of any enterprise.

a. Plaintiffs fail to allege conspiracy.

In their rambling and disjointed Complaint, Plaintiffs allege the following regarding an alleged RICO conspiracy:

> The Harris County Defendants and the other Defendants "did at various times unlawfully, willfully and knowingly combine, conspire and agree with each other to violate 18 U.S.C. Sections 1962(c), by participating, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity involving multiple predicate acts within the meaning of 18 U.S.C. § 1961(1) in violation of 18 U.S.C. § 1962(c) and (d)" (Complaint, ¶59)
>
> * * *
>
> "It was part of the racketeering conspiracy that <u>through the use of estate plan instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the heirs of estates that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 66)
>
> * * *
>
> "It was part of the racketeering conspiracy that <u>through the use of trust instruments</u> Defendants, acting in concert both individually and severally, would and did intercept assets intended for the beneficiaries of trusts that pass through Harris County Probate Court, an enterprise, which engaged in, and the activities of which affected interstate and foreign commerce." (Complaint, ¶ 67)

Beyond this ***conclusory*** language, the Complaint contains no further factual enhancement regarding the alleged conspiracy. "[A] conclusory allegation of agreement at some unidentified

[97] *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989); *accord State Farm Mut. Auto. Ins. Co. v. Giventer*, 212 F.Supp.2d 639, 649–50 (N.D.Tex.2002).

point does not supply facts adequate to show illegality."[98] Because Plaintiffs allege no pattern of activity or the acquisition, establishment, conduct, or control of any enterprise as required under RICO, Plaintiffs have failed to state a RICO claim upon which relief may be granted.

Furthermore, civil conspiracy is a *derivative* tort; therefore, liability for a civil conspiracy depends on participation in an underlying tort.[99] Because the core of a RICO civil conspiracy is ***an agreement to commit predicate acts***, a RICO civil conspiracy complaint, at the very least, must allege *specifically* such an agreement.[100] Plaintiffs have wholly failed to allege a *specific agreement* among Defendants to commit the RICO predicate acts alleged. **There are no allegations that Judge Butts, Judge Comstock or Tony Baiamonte was a party to or principal in any such agreement.**

The Plaintiffs have pled **no facts** which would support even the existence of any conspiracy. As such, Plaintiffs have failed to establish that there is any plausibility to their conclusory allegations of conspiracy.[101]

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[98] *See Spectrum Stores Inc. v. Citgo Petroleum Corp*.,632 F.3d 938, 948 (5th. Cir., 2011), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

[99] *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402(5th. Cir., 2013), citing *Allstate Ins. Co. v. Receivable Fin. Co., L.L.C.*, 501 F.3d 398, 414 (5th Cir. 2007) (citations omitted). In order to adequately plead a claim for civil conspiracy, a plaintiff must adequately plead the underlying tort. *Id.*, citing *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 649 (5th Cir. 2007) ("If a plaintiff fails to state a separate claim on which the court may grant relief, then the claim for civil conspiracy necessarily fails.")

[100] *See Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1140-1 (5th Cir. 1992)(Where complaints fail to plead specifically any agreement to commit predicate acts of racketeering, the RICO conspiracy claim was also properly dismissed.) , citing *Hecht v. Commerce Clearing House, Inc*., 897 F.2d 21, 25 (2d Cir.1990)[Emphasis added]; *see also Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir.1991) (civil RICO conspiracy claim must plead agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 47 (1st Cir.1991) (civil RICO conspiracy claim must charge that defendants knowingly entered into an agreement to commit two or more predicate crimes).

[101] *Twombly*, 127 S. Ct. at 1971-2.

As the Supreme Court held in *Twombly*[102], "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[103]

b. Plaintiffs fail to plausibly allege the existence of an "enterprise" or "association-in-fact."

In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise and association-in-fact. The Plaintiffs' Complaint does not make it plausible that either a legal enterprise or an association-in-fact existed.

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."[104] The Fifth Circuit 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."[105]

Without any legal authority cited, Plaintiffs contend Probate Court Four is an "enterprise" within the meaning of 18 U.S.C. § 1961(4) because it was "involved in various aspects of interstate and foreign commerce" by its adjudication of lawsuits involving persons or properties outside of Texas.[106] This is a conclusory recitation and purely legal conclusion, unsupported by facts. The Fifth Circuit has held that "a recitation of the elements masquerading as facts" . . . does not make

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[102] *Id.* at 1974.
[103] Plaintiffs assert § 1983 as part and parcel of their "predicate acts." It is unclear whether Plaintiffs are asserting a conspiracy to violate § 1983. However, a § 1983 claim is not actionable without an actual violation of § 1983 and Plaintiff has not alleged facts sufficient to support a claim that there was a constitutional violation under § 1983. *See Pfannsteil v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir.1990).
[104] 18 U.S.C. § 1961(4); *see also Elliott,* 867 F.2d at 881.
[105] *Elliott,* 867 F .2d at 881.
[106] Complaint, ¶ 36-38.

it any more or less probable that the listed parties have an existence separate and apart from the pattern of racketeering, are an ongoing organization, and function as a continuing unit as shown by a hierarchical or consensual decision making structure."[107]

Probate Court Four is not a legal entity. There is an abundance of case law holding that various county or city officials and departments are not separate units of government and capable of being sued. "A county is a corporate and political body." TEX. LOC. GOV'T CODE § 71.001. With respect to counties, the county as a whole constitutes the governmental unit. The commissioner's court is the governing body.[108] Plaintiff's contention that Probate Court is an "enterprise" for purposes of RICO has no basis in law or fact.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[109]

To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4), a plaintiff must show "'evidence of an ongoing organization, formal or informal, and ... evidence that the various associates function as a continuing unit.'"[110] The Supreme Court in *Turkette* stated that the "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[111] The Fifth Circuit has enumerated the requirements

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[107] *See Brunig v. Clark*, 560 F.3d 292, 297 (5th. Cir. 2009)(Rule 12(b)(6) dismissal of Plaintiff's RICO claims affirmed for failure to plead the plausible existence of an enterprise or association in fact).

[108] *Tarrant County v. Ashmore*, 624 S.W.2d 740 (Tex.App.—Fort Worth 1981), *rev'd on other grounds*, 635 S.W.2d 417 (Tex.1982), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 606 (1982).

[109] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[110] *Atkinson v. Anadarko Bank & Trust Co.*,808 F.2d 438, 440-41 (5th Cir. 1987) (quoting *US. v. Turkette*, 452 U.S. 576, 583 (1981)).

[111] 452 U.S. at 583.

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."[112]

"[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."[113] However, "if the individuals associate together to commit several criminal acts, their relationship gains an ongoing nature, coming within the purview of RICO."[114]

Here, the purported enterprise fails to meet RICO's "continuity" requirement on all three levels. First, nothing in the Complaint even remotely suggests that the alleged enterprise is an ongoing organization that maintains operations that are separate and apart from the alleged predicate acts. Second, there are no facts in the Complaint suggesting that the enterprise is an ongoing organization, or that the various enterprise members function as a continuing unit. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The Absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

Having failed to plausibly allege the existence of an enterprise or association-in-fact, the Plaintiffs' Complaint must be dismissed for failing to state a claim upon which relief may be granted.

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[112] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 433 (5th Cir.1990).
[113] *Montesano et al. v. Seafirst Commercial Corp. et al.*, 818 F.2d 423, 426-27 (5th Cir. 1987).
[114] *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 749 (5th Cir. 1989) (quoting *Montesano*, 818 F.2d at 427).

c. Plaintiffs have failed to plead a pattern of racketeering activity.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[115] To properly allege a "pattern" of predicate acts, 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."[116]

When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[117] Such continuity may refer "either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition."[118]

Here, Plaintiffs allege several times throughout their Complaint that the Harris County Defendants engaged in a "pattern of racketeering." However, their conclusory allegations fail to set forth the necessary *pattern* of predicate acts and the supporting facts to establish that they amount to or threaten continuous racketeering activity.

d. Plaintiffs' Complaint is not plausible.

The Supreme Court held, "[a] pleading that offers "labels and conclusions" or "a formulaic

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[115] *See In re Burzynski,* 989 F.2d 989 733, 741-42 (5th Cir. 1993) (citing *Delta Truck,* 855 F.2d at 242-43).
[116] *HJ, Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989).
[117] *In re Burzynski,* 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).
[118] *Id.*, quoting *HJ., Inc.*, 492 U.S. at 241.

recitation of the elements of a cause of action will not do." [119] Nor does a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement."[120]

Further, under Rule 8(a), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To survive dismissal, Rule 8(a) requires that a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face,"[121] and must plead those facts with enough specificity "to raise a right to relief above the speculative level."[122]

"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."[123] The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully."[124] "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.'"[125]

As is the case with their allegations of conspiracy and RICO predicate acts, the Plaintiffs have "***labeled***" myriad alleged offenses including: (1) honest services mail fraud (18 U.S.C. § 1346); (2) fraud (18 U.S.C. § 1001); (3) theft (Texas Penal Code § 31.02); (4) theft (Texas Penal Code §31.03); (5) Hobbs Act extortion (18 U.S.C. § 1951(b)(2); (6) conspiracy (18 U.S.C. § 371); (7) conspiracy to obstruct justice (18 U.S.C. §§ 1512(c), 1512(k), 1519, and 1951(b)(2) and 18

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[119] *Id.* at 1965.
[120] *Id*. at 1966.
[121] *Twombly*, 550 U.S. at 570
[122] *Id*. at 555.
[123] *Iqbal*, 556 U.S. at 678.
[124] *Id.*
[125] *Id*.

U.S.C. § 242); (8) theft and extortion (Texas Penal Code § 32.21); (9) access to the Courts (42 U.S.C. § 1983); (10) substantive due process (42 U.S.C. § 1985); (11) equal protection; (12) property rights (Texas Penal Code §§ 31.02 and 31.03); (13) spoliation (18 U.S.C. § 1512(c)); (14) aiding and abetting breach of fiduciary, defalcation & scienter; (15) aiding and abetting misapplication of fiduciary, defalcation & scienter; and (16) tortious interference with inheritance expectancy -- yet Plaintiffs have failed to plead the essential elements of a cause of action for most, if not all, of the above alleged causes of action or offenses, much less pled any non-conclusory factual support. Rather, the Plaintiffs' rambling and disjointed Complaint is littered with bald, conclusory assertions, masquerading as facts.

The Plaintiffs' Complaint, standing alone, fails to meet either the Rule 12(b)(6) "plausibility" standard or the broadly similar standards announced by the Second[126] and Ninth Circuits.[127] Plaintiffs' few factual allegations are inextricably bound up with legal conclusions (e.g., Tony Baiamonte "did unlawfully, knowingly and willfully spoliated, destroy or otherwise conceal material evidence of a racketeering conspiracy in violation of 18 U.S.C. §§ 1512(c) conspiracy 1512(k) and 1419, aiding and abetting the racketeering conspiracy. . .";[128] the Harris County Defendants "did unlawfully, willfully and knowingly conspire to alter the course of justice, under color of official right, for the purpose of executing or attempting to execute a scheme and artifice to defraud and deprive, in furtherance of a pattern of racketeering activity affecting

[126] *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 64 (2d Cir. 1971) (first alteration in original), rev'd on other grounds sub nom. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).
[127] The Ninth Circuit has held that factual allegations are not well-pleaded when they "parrot the language" of the statute creating liability. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).
[128] Complaint, ¶143.

interstate and foreign commerce in violation of 18 U.S.C. § 1346"[129]; on July 22, 2015, Judge Comstock "aided and abetted by persons known and unknown to Plaintiffs…did unlawfully, willfully and knowingly combine, conspire and agree with each other to obstruct and conceal evidence and engage in predicate acts including but not limited to 18 U.S.C. § 1512(c) conspiracy 1512(k), 1519 and 18 U.S.C. §§ 1951(b)(2) and 2, Extortion and Texas Penal Codes §§ 31.02, 31.03 and 32.21 (theft/extortion) by removing Summary Judgment Motions from Calendar and creating stasis,[130] as part of a conspiracy to deprive Plaintiff Curtis of an impartial forum."). These are but a few of countless examples.

Plaintiffs have not alleged any factual support that actions taken by the Harris County Defendants are predicate acts under 18 USC § 1961(b).

Read in its entirety, the complaint merely "parrot[s] the language" of the RICO statute,[131] and comprises a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[132] Indeed, given the lack of factual detail (as opposed to a litany of *vague and conclusory* legal conclusions masquerading as facts) in the Complaint, it is impossible to even speculate as to whether the facts "might [. . .] have been the case."[133]

To plead facial plausibility, a plaintiff must set forth **factual content** that permits the courts to draw the reasonable inference that the defendant is liable.[134] The "tenet that a court must accept

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[129] Complaint, ¶122.
[130] Complaint, ¶131.
[131] *See Wooten v. McDonald Transit Assocs., Inc.*, 775 F.3d 689, 696 (5th Cir.2015) citing *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007)
[132] *Iqbal*, 556 U.S. at 678.
[133] *Wooten* at p.696, citing *Trans World Airlines, Inc.*
[134] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. (Emphasis added).

as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[135] Although the Plaintiffs allege that the Harris County Defendants engaged in, or conspired to engage in, racketeering activity in the form of fraud and other acts aimed at depleting the assets of the trust in the underlying contested probate proceeding, their Complaint is ***devoid of facts*** to make it plausible and amounts to a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements."[136]

In addition to failing to plead the "***who, what where, when and how***" of mail fraud, wire fraud or state law fraud, or that *anyone* relied on such conduct, the Plaintiffs offer no "factual content allow[ing] [this] court to draw the reasonable inference" that Defendants have plausible liability such that Plaintiffs are entitled to relief for their claims.[137]

The Plaintiffs' legal conclusions are not entitled to the presumption of validity.[138] They have pled insufficient facts to establish a plausible entitlement to relief for the claims they are asserting. Because the Plaintiffs have failed to adequately plead that the alleged RICO predicate acts were a *direct and proximate cause* of injury to their personal "business or property," the Court should dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Because the Plaintiff's Complaint is not plausible, it should be dismissed.

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[135] *Id.*
[136] *Iqbal*, 556 U.S. at 678,129 S.Ct. 1937.
[137] *See Patrick v. Wal–Mart, Inc.—Store # 155*, 681 F.3d 614, 622 (5th. Cir., 2012) citing *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir.2011). (quotation marks and citation omitted). [Emphasis added]
[138] *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

e. Plaintiffs' claims are frivolous.

A complaint is frivolous if it lacks an arguable basis in law or fact.[139] "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist."[140]

The claims brought against the Harris County Defendants are frivolous and brought in violation of FED. R. CIV. P. 11. There is no conspiracy to deprive the Plaintiffs of the assets of the Brunsting estate, no racketeering scheme and no use of the mail, wire or internet to further any alleged scheme or conspiracy. Perhaps the only "conspiracy" is that of the Plaintiffs and other litigants that are bringing these frivolous lawsuits against Harris County Probate Courts for RICO violations.[141]

As is patently obvious from Plaintiffs' 62-page Complaint, they were dissatisfied with the rulings and administration of the Brunsting probate case in Probate Court Four. **This is not a basis for bringing a lawsuit.** This case should be dismissed *with prejudice*. See *Boyd v. Biggers*, 31 F.3d 279 (5th Cir. 1994) at 285 (dismissing *with prejudice* the claims against Judge Biggers because the plaintiff did not complain of any actions that were nonjudicial in nature); *Lister v. Perdue*, No. 3:14-CV-715-D-BN, 2014 WL 7927823, (N.D. Tex., Aug. 27, 2014) at *3 (dismissing

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[139] See *Denton v. Hernandez*, 504 U.S. 25, 31, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992); *Richardson v. Spurlock*, 260 F.3d 495, 498 (5th Cir.2001)(citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir.1997)).

[140] *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir.1998)(*quoting McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir.1997)).

[141] Plaintiff mentions the RICO suit filed against the judges in Probate Court One, claiming it is related by "continuity." (Case 4:16-cv-00733; pending before Judge Hoyt) [Doc. 33, ¶ 51]. This smear campaign against the Honorable Judges in Probate Court One and Probate Court Four appears to be nothing more than pure harassment by disgruntled litigants. Indeed, due to the frivolous filing in the Probate Court One case, dismissal and sanctions have been sought.

with prejudice the claims against Judge Lewis and her court staff because all actions complained of were nonjudicial in nature); *Bilbrew v. Wilkinson*, No. H-05-0130, 2005 WL 3019743 *9-10, (S.D. Tex., Nov. 10, 2005)(J. Gilmore) (dismissed *with prejudice* as frivolous and finding Judge Wilkinson entitled to absolute judicial immunity). This lawsuit is frivolous because it lacks an arguable basis in law or fact. It should be dismissed with prejudice.

CONCLUSION

The case should be dismissed with prejudice in its entirety because Plaintiffs have no actionable RICO claim against the Harris County Defendants. The Honorable Judges are entitled to judicial immunity, official immunity and governmental immunity. Likewise, Tony Baiamonte is entitled to official immunity and governmental immunity. Additionally, the Plaintiffs lack standing to bring the conspiracy/RICO claims asserted in this lawsuit – Plaintiffs have failed to allege facts sufficient to establish they suffered a tangible financial loss and that it was proximately caused by any "predicate acts" by the Harris County Defendants. Further, Plaintiffs have no state law claims against the Harris County Defendants and they should be dismissed under TEX. CIV. P. & REM. CODE § 101.106. Harris County Defendants are entitled to dismissal on the Plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(1).

The case should also be dismissed with prejudice in its entirety because Plaintiffs have failed to state a claim against the Harris County Defendants. Plaintiffs have failed to allege a conspiracy, failed to allege a RICO violation, failed to establish a pattern of racketeering activity, failed to establish an "enterprise" or "association-in-fact," their claims are not plausible on their face, and their claims are frivolous.

PRAYER

For the reasons set forth above, the Harris County Defendants request the Court grant its Motion to Dismiss the Plaintiffs' Verified Complaint for Damages [Doc. 1] with prejudice, sanction the Plaintiffs for filing a frivolous and groundless lawsuit, and award the Harris County Defendants such other and further relief, at law or in equity, to which they may show themselves to be justly entitled.

Dated: October 7, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure on this the 7th day of October, 2016, via ECF.

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