E.D.N.Y. – C. Islip
17-cv-4291
Bianco, J.
Locke, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of March, two thousand nineteen.

Present:

Dennis Jacobs,
Gerard E. Lynch,
Circuit Judges,
Janet C. Hall,*
District Judge.

T.A., et al.,

Plaintiffs-Appellants,

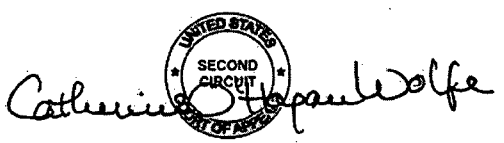
v. 18-3124

Howard B. Leff, Esq., et al.,

Defendants-Appellees.

Appellant, pro se, moves for leave to proceed in forma pauperis, appointment of counsel, "removal of [the] appeal to another circuit," and "consolidation [with] docket # 18-3141." Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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* Judge Janet C. Hall, of the United States District Court for the District of Connecticut, sitting by designation.

E.D.N.Y.-C. Islip
17-cv-5253
Bianco, J.
Locke, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of April, two thousand nineteen.

Present:

Denny Chin,
Raymond J. Lohier, Jr.,
Susan L. Carney,
Circuit Judges.

Temmi Kramer, et al.,

Plaintiffs-Appellants,

v. 18-3141

Edmund Dane, et al.,

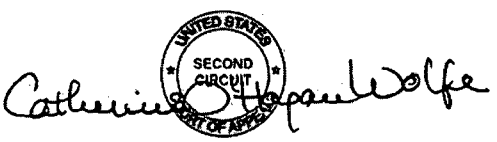
Defendants-Appellees,

Leagle, Inc., John Doe A,

Defendants.

Appellant, pro se, moves for leave to proceed in forma pauperis, the assignment of pro bono counsel, "consolidation with *T.A. v. Leff, et al.*" and to "remove [the appeal] from [this Court] to another Circuit." Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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T.A. and P.A., infants by their Mother the Natural Guardian and Custodial parent, REGAN LALLY, and REGAN LALLY, individually,

Plaintiff,

- against -

JUDGMENT
CV 17-4291 (JFB) (SIL)

HOWARD B. LEFF, ESQ., BERNICE K. LEBER, ESQ., MARK BLOOM, ESQ., ALEXANDER LEFF, ESQ., JUNE FLANAGAN, GERALD GOLDSTEIN, ESQ., LEONARD D. STEINMAN, MELANIE, CYGANOWSKI, ESQ., MARGARET TRAUTMAN INA ROMANO, GAIL HOLMAN, JANET PUSHEE, BRYAN PUSHEE, SILVER FOX CONSTRUCTION LTD., CHRIS KINNEAR, GREY HAWK CONSTRUCTION SERVICES, BEST REAL ESTATE DEVELOPMENT, LLC., ALLEN G. REITER, ESQ., ARENT FOX, LLP., ROBERT J. BERGSON, ESQ., John Doe #1, John Doe #2,

Defendants.

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An Order of Honorable Joseph F. Bianco, United States District Judge, having been filed on September 18, 2018, adopting in its entirety the July 19, 2018 Report and Recommendation of United States Magistrate Judge Steven I. Locke; granting defendants' motion to dismiss; dismissing plaintiff's federal claims with prejudice; declining to exercise supplemental jurisdiction over any remaining state law claims and dismissing those claims without prejudice; and directing the Clerk of Court to enter judgment accordingly and close the case, it is

ORDERED AND ADJUDGED that plaintiff Regan Lally take nothing of defendants Howard B. Leff, Esq., Bernice K. Leber, Esq., Mark Bloom, Esq., Alexander Leff, Esq., June Flanagan, Gerald Goldstein, Esq., Leonard D. Steinman, Melanie Cyganowski, Esq., Margaret

Trautmann, Ina Romano, Gail Holman, Janet Pushee, Bryan Pushee, Silver Fox Construction Ltd., Chris Kinnear, Grey Hawk Construction Services, Best Real Estate Development, LLC., Allen G. Reiter, Esq., Arent Fox, LLP., and Robert J. Bergson. Esq.; that defendants' motions to dismiss are granted; that plaintiff's federal claims are dismissed with prejudice; that the Court declines to exercise supplemental jurisdiction over any remaining state law claims and that those claims are dismissed without prejudice; and that this case is closed.

Dated: Central Islip, New York
September 19, 2018

DOUGLAS C. PALMER
CLERK OF THE COURT

BY: /S/ JAMES J. TORITTO
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TEMMI KRAMER (individually), TEMMI KRAMER as custodial parent and natural guardian of J. KRAMER, ZACHARY KRAMER, KEVIN KRMAMER, R.K. – as an illegally restrained Minor requesting Representation,

Plaintiff,

- against -

JUDGMENT
CV 17-5253 (JFB) (SIL)

EDUMND DANE LINDA MEJIAS, LEONARD STEINMAN, LAWRENCE MARKS, GOVERNOR ANDREW CUOMO, (all individually), THE STATE OF NEW YORK, BRIAN DAVIS, ESQ., NANCY SHERMAN, ESQ., JOHN ZENIR, ESQ., LEAGLE, INC. (LEAGLE.COM), LORI SCHLESINGER, and JOHN DOE "A",

Defendants.

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An Order of Honorable Joseph F. Bianco, United States District Judge, having been filed on September 19, 2018, adopting in its entirety the July 26, 2018 Report and Recommendation of United States Magistrate Judge Steven I. Locke; granting defendants' motion to dismiss; dismissing plaintiff's federal claims without prejudice; declining to exercise supplemental jurisdiction over any remaining state law claims and dismissing those claims without prejudice; directing the Clerk of Court to enter judgment accordingly and close the case; and, denying *in forma pauperis* status for the purpose of any appeal, it is

ORDERED AND ADJUDGED that plaintiff Temmi Kramer take nothing of defendants Edmund Dane, Linda Mejias, Leonard Steinman, Lawrence Marks, Governor Andrew Cuomo, the State of New York, Brian Davis, Nancy Sherman, John Zenir, Leagle, Inc., (Leagle.com), and Lori Schlesinger; that defendants' motions to dismiss are granted; that plaintiff's federal

claims are dismissed without prejudice; that the Court declines to exercise supplemental jurisdiction over any remaining state law claims and that those claims are dismissed without prejudice; that this case is closed; and that *in forma pauperis* status for the purpose of any appeal is denied.

Dated: Central Islip, New York
September 20, 2018

DOUGLAS C. PALMER
CLERK OF THE COURT

BY: /S/ JAMES J. TORITTO
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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REGAN LALLY, ET AL.,

Plaintiffs,

-against-

HOWARD B. LEFF, ESQ., ET AL.,

Defendants.

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ORDER
17-CV-4291 (JFB) (SIL)

JOSEPH F. BIANCO, District Judge:

Pro se plaintiff Regan Lally[1] brings this action on behalf of herself and her minor children for alleged violations of (1) 42 U.S.C. § 1981; (2) 42 U.S.C. § 1983; (3) 42 U.S.C. § 1985; (4) 42 U.S.C. § 1986; (5) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; (6) 28 U.S.C. § 455; and (7) various New York state laws. Plaintiff's claims stem from a state court divorce proceeding between herself and her ex-husband.[2] In July 2011, the state court entered a Judgment of Divorce. (Compl. ¶ 2.) Thereafter, in October 2011, the state court issued an Order of Equitable Distribution, which appointed a receiver to sell three residential properties.[3] (*Id.* ¶ 3.) The properties were each eventually sold throughout 2015 (*see, e.g., id.* ¶¶ 192, 259-60; ECF No. 85-3), and, on December 21, 2016, the state court approved the receiver's final accounting, (ECF No. 85-3). Defendants are twenty individuals and entities that were

[1] Plaintiff is an attorney admitted to practice in the State of New York, but she is not admitted to practice in the Eastern District of New York.

[2] Plaintiff has also filed state court actions relating to her divorce proceeding and involving the defendants named here. On May 2, 2018, Justice Martha L. Luft of the Suffolk County Supreme Court dismissed plaintiff's most recent state court complaint. (ECF No. 102.) Justice Luft additionally granted the defendants' motion for civil contempt and awarded sanctions against plaintiff. (*Id.* at 3.) Although plaintiff filed a notice of appeal, she subsequently withdrew the action. (*See* ECF No. 138-1.)

[3] According to the Complaint, the state court appointed a receiver to sell the properties after plaintiff and her ex-husband could not agree on a distribution. (Compl. ¶ 4.)

involved in the state court proceedings, including divorce counsel to plaintiff's ex-husband; the court-appointed receiver and her counsel, as well as the law firm at which the receiver is a partner; and the state court justice who, among other things, ordered the sales of the properties and approved the receiver's final accounting of the proceeds. Plaintiff also names realtors and brokers who were involved in selling the properties, and a company who purchased one of the properties. She additionally names her former mother-in-law. The gravamen of plaintiff's Complaint is that the defendants conspired to "corrupt the New York State court proceedings" and unlawfully devalue the properties in order to deprive her of the properties and proceeds from the sales. (*E.g.*, *id.* ¶¶ 1, 13, 28, 260.)

Several defendants filed motions to dismiss the Complaint on various grounds.[4] (ECF Nos. 37, 51-52, 56, 61, 65-66, 69, 74.) On April 27, 2018, the Court referred the motions to Magistrate Judge Steven I. Locke for a report and recommendation. (ECF No. 101.)

Presently before the Court is a Report and Recommendation ("R&R") from Magistrate Judge Locke advising the Court to dismiss the complaint in its entirety without leave to amend. (ECF No. 115.) In short, the R&R concludes that the Court lacks subject matter jurisdiction over plaintiff's claims and, in any event, plaintiff has failed to allege a federal claim for relief and the Court should decline to retain supplemental jurisdiction over the state law claims. For the reasons explained below, after a *de novo* review, the Court adopts the thorough and well-reasoned R&R in its entirety.

[4] As of the date of the R&R, defendants Best Real Estate, Grey Hawk Construction Services, Bryan Pushee, and Janet Pushee had failed to answer, move or otherwise respond to the complaint, and a motion for default judgment against them was pending. (ECF No. 113.) On August 16, 2018, Bryan and Janet Pushee submitted a response to plaintiff's objections to the R&R, requesting that the R&R be adopted in its entirety and the motion for default judgment be denied. (ECF No. 130.) In light of the Court's adoption of the R&R, and dismissal of the Complaint for lack of subject matter jurisdiction, the motion for default judgment against these defendants is denied as moot.

I. Standard of Review

A district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the Magistrate Judge. *E.g.*, *Kleinberg v. Radian Grp., Inc.*, 240 F. Supp. 2d 260, 262 (S.D.N.Y. 2002); *DeLuca v. Lord*, 858 F. Supp. 1330, 1345 (S.D.N.Y. 1994). As to those portions of a report to which no "specific written objections" are made, the Court may accept the findings contained therein, as long as the factual and legal bases supporting the findings are not clearly erroneous. *See* Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997). When "a party submits a timely objection to a report and recommendation, the district judge will review the parts of the report and recommendation to which the party objected under a *de novo* standard of review." *Dafeng Hengwei Textile Co. v. Aceco Indus. & Commercial Corp.*, 54 F. Supp. 3d 287, 291 (E.D.N.Y. 2014) (citing 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.")); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.").

II. Analysis

Having reviewed the full record and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the thorough and well-reasoned R&R in its entirety.[5]

As an initial matter, the R&R recommends dismissal of any claims that plaintiff brings on

[5] The parties filed submissions after the Court referred the pending motions to dismiss, and before Magistrate Judge Locke issued the R&R. (ECF Nos. 102-114.) After the R&R was issued, plaintiff filed objections (ECF No. 124) and various defendants filed responses to those objections. (ECF Nos. 127, 129-30, 132-34, 138.) Plaintiff then filed a response to defendants' submissions. (ECF No. 140.) The Court has thoroughly considered the parties' submissions.

behalf of her minor children because a *pro se* litigant may not represent others. (R&R 13-14.) The Court agrees that plaintiff, who is not admitted to the Eastern District of New York, may not represent her minor children in this action, and thus dismisses any claims brought on their behalf.

A. Jurisdiction

The R&R recommends dismissal of the Complaint because the Court lacks subject matter jurisdiction under both the *Rooker-Feldman* doctrine and the domestic relations exception to federal jurisdiction. (R&R 14-18.) It further concludes that the Court lacks personal jurisdiction over defendant Melanie Cyganowski, and that the claims against her should also be dismissed on that ground. Plaintiff, relying on arguments she asserted in opposition to the motions to dismiss, objects to these conclusions. As discussed below, the Court adopts the R&R's conclusions that the Court lacks subject matter jurisdiction under the above-mentioned doctrines, and dismisses the complaint on those grounds. The Court further concludes that personal jurisdiction is lacking over defendant Cyganowski, and dismisses the claims against her on that ground as well.

1. The *Rooker-Feldman* Doctrine

As correctly explained by Magistrate Judge Locke (R&R 14-16), the *Rooker-Feldman* doctrine precludes lower federal courts from exercising jurisdiction over claims that seek to collaterally attack a state court judgment. *See, e.g.*, *Lipko v. Christie*, 94 F. App'x 12, 14 (2d Cir. 2004) (citing *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, 415-16 (1923); and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983)). "In addition to claims that were actually litigated in state court, the *Rooker-Feldman* doctrine bars lower federal courts from exercising jurisdiction over claims that are 'inextricably intertwined' with state court determinations." *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002) (quoting *Feldman*, 460 U.S. at 482-83 n.16).

Plaintiff argues that her claims "do not complain of the injuries of a State Court Judgment" but instead demonstrate a conspiracy to "strip[] over $2.5 million in real estate from a custodial

parent and children." (*See* Pl. Objs. 6-7.) Plaintiff raised this argument in opposition to the motions to dismiss, and it was thoroughly considered and rejected by Magistrate Judge Locke. After a *de novo* review, this Court also concludes that plaintiff's argument is meritless. As explained at length in the R&R, plaintiff's claims allege that defendants corrupted state court proceedings to deprive her of the properties and proceeds from the sales. In other words, her claims seek to collaterally attack the state court's decisions to, *inter alia*, appoint a receiver, order and approve the sale of the properties, and approve the receiver's final accounting of the proceeds. Thus, the claims are barred by *Rooker-Feldman*. *See, e.g.*, *Hathaway v. Hathaway*, No. 07-CV-0113 JS ETB, 2007 WL 1075073, at *2 (E.D.N.Y. Apr. 5, 2007) (dismissing claims under *Rooker-Feldman* where they arose from a "state-court judgment awarding Plaintiff less than he contend[ed] he should have received upon his divorce from Defendant").

Plaintiff also argues that the *Rooker-Feldman* doctrine does not apply because $50,000 of proceeds from the sales of the properties remains in escrow. (Pl. Objs. 7-8.) However, the parties do not dispute that the properties have been sold or that the state court has approved the receiver's final accounting. Indeed, the Complaint alleges that defendants' conspiracy ended by May 2017. (*E.g.*, Compl. ¶¶ 62, 273.) The fact that $50,000 remains in escrow is insufficient to preclude application of the *Rooker-Feldman* doctrine. *C.f.*, *Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 427 (2d Cir. 2014) ("Although the state proceedings continued after entry of the foreclosure judgment, with Vossbrinck filing an appeal and a motion to reopen the judgment, Vossbrinck does not argue that the *relevant state judgment* was not 'rendered before the district court proceedings commenced' for *Rooker–Feldman* purposes." (emphasis added)); *Galtieri v. New York City Police Pension Fund*, No. 12 CIV. 1159 PGG, 2014 WL 4593927, at *11 (S.D.N.Y. Sept. 15, 2014) (applying *Rooker-Feldman* where the claims "implicate[d] four prior state court

judgments and decisions concerning Plaintiff's right to control disbursements from his pension" where distributions were ongoing).

Accordingly, for the reasons explained in the R&R and above, the Court adopts Magistrate Judge Locke's recommendation that the Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine, and dismisses the Complaint on that ground.[6]

2. The Domestic Relations Exception

Magistrate Judge Locke alternatively concluded that the Court lacks subject matter jurisdiction under the domestic relations exception to federal jurisdiction. (R&R 16-18.) Plaintiff argues that the domestic relations exception does not apply because this lawsuit challenges a "post-judgment receivership," not "domestic issues of [d]ivorce, alimony or child custody." (Pl. Objs. 1-5.) Contrary to plaintiff's assertions, and as thoroughly explained by Magistrate Judge Locke, the domestic relations exception is not strictly limited to actions involving the issuance of divorce, alimony, or child custody orders. It also applies to "cases 'on the verge' of being matrimonial in nature," *id.* (quoting *Amer. Airlines v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) (per curiam)), which includes "actions directed at challenging the results of domestic relations proceedings," *Martinez*

[6] Justice Steinman moved to dismiss the complaint for lack of subject matter jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), which established an abstention doctrine ("*Younger* abstention") that applies to ongoing state court proceedings, rather than under the *Rooker-Feldman* doctrine. (ECF No. 65-1 at 19.) Although the basis for this argument is unclear, it appears to be based on the fact that one of plaintiff's state court actions, *Lally v. Goldstein*, No. 8358/2016 (Suffolk Cty. Sup. Ct. Aug. 26, 2016), was pending when she filed this lawsuit. However, this action does not seek to challenge any decisions or judgments rendered in *Lally v. Goldstein*. Instead, as discussed above, this action seeks to collaterally attack decisions and judgments rendered in plaintiff's divorce proceeding. To the extent that Justice Steinman asserts that *Younger* abstention applies because appeals were pending when plaintiff commenced this action (which is not clear from the parties' submissions), the Court disagrees. *See, e.g., Deraffele v. City of New Rochelle*, No. 15-CV-282 (KMK), 2016 WL 1274590, at *18 (S.D.N.Y. Mar. 30, 2016), *appeal dismissed*, (July 7, 2016) ("[D]istrict courts within the Second Circuit have not confined application of the *Rooker-Feldman* doctrine to situations where federal plaintiffs have exhausted their state-court appeals."); *Davis v. Baldwin*, No. 12-CV-6422 ER, 2013 WL 6877560, at *5 (S.D.N.Y. Dec. 31, 2013), *aff'd*, 594 F. App'x 49 (2d Cir. 2015) ("Regardless of the status of any state court appeals, plaintiff is still seeking federal review of a state-court judgment, and that is what *Rooker–Feldman* prohibits."). Thus, although *Younger* abstention would warrant dismissal of any effort by plaintiff to bring claims that involved or called into question an ongoing divorce proceeding, *see, e.g., Finnan v. Ryan*, 357 F. App'x 331, 333 (2d Cir. 2009), that doctrine has no application here because plaintiff is attempting to undo decisions and judgments already rendered in her divorce proceeding. Under these circumstances, as noted above, the *Rooker-Feldman* doctrine warrants dismissal of the complaint for lack of subject matter jurisdiction.

v. Queens Cty. Dist. Att'y, 596 F. App'x 10, 12 (2d Cir. 2015).

Here, plaintiff seeks to challenge the results of her divorce proceeding—specifically, the state court's decision to order the sale of the properties by a receiver after she and her ex-husband could not agree on an equitable distribution, and her resulting loss of the properties and share in the proceeds. Accordingly, Magistrate Judge Locke correctly concluded that the Court lacks subject matter jurisdiction under the domestic relations exception, and the Court also dismisses the Complaint on that ground.

3. Personal Jurisdiction

The R&R recommends, in the alternative, dismissal of the claims against Melanie Cyganowski for lack of personal jurisdiction. (R&R 20-23.) Specifically, Magistrate Judge Locke concluded that service was not properly effected on Cyganowski under Section 308 of the New York Civil Practice Law and Rules ("C.P.L.R."). (R&R 20-21.) Plaintiff's objections argue, in substance, that Magistrate Judge Locke improperly applied the C.P.L.R. (*See* Pl. Objs. 19-20.) The Court disagrees, and concurs with Magistrate Judge Locke's analysis. Plaintiff also notes that an attorney for Cyganowski entered an appearance on October 23, 2017. (*Id.* at 20.) To the extent plaintiff argues that that appearance, which expressly noted that it was for the limited purpose of challenging personal jurisdiction, waived service, that argument is meritless. *See, e.g.*, *Zherka v. Ryan*, 52 F. Supp. 3d 571, 577 (S.D.N.Y. 2014) ("Merely making a general appearance before the court will not constitute a waiver of the defense so long as the party makes a timely challenge to the court's jurisdiction."). Accordingly, the Court dismisses the claims against Cyganowski for lack of personal jurisdiction.

B. Judicial and Quasi-Judicial Immunity

Magistrate Judge Locke further recommends, in the alternative, that the claims against Justice Steinman and the court-appointed receiver, Bernice K. Leber, be dismissed as barred by the doctrines of absolute judicial immunity and quasi-judicial immunity, respectively. (R&R 18-20.) Plaintiff objects, arguing that these immunities do not apply here because Justice Steinman and Leber "acted with criminal intent that would 'shock the conscience', outside of any judicial mandate, and without jurisdiction." (Pl. Objs. 9.) These conclusory assertions were raised in plaintiff's opposition to the motions to dismiss, and were correctly rejected by Magistrate Judge Locke. (R&R 20.) With respect to Justice Steinman, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability *only when he has acted in the clear absence of all jurisdiction.*" *Gross v. Rell*, 585 F.3d 72, 84 (2d Cir. 2009) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978)). As the R&R correctly concludes, Justice Steinman had jurisdiction over the post-judgment divorce proceedings.[7] He is thus entitled to judicial immunity. Leber also would lose her quasi-judicial immunity only if she acted "in the clear absence of all jurisdiction." *Finn v. Anderson*, 592 F. App'x 16, 19 (2d. Cir. 2014) (quoting *Stump*, 435 U.S. at 356-57). Because the allegations against Leber all relate to actions she took within her mandate as a court-appointed receiver, she is also entitled to immunity. Because plaintiff has not alleged any facts, as opposed to conclusory assertions, establishing that either Justice Steinman or Leber acted in the clear absence of all jurisdiction, the Court dismisses the claims against those defendants.

[7] Justice Steinman was assigned to the state court proceedings after a different state court justice entered the order of equitable distribution. (ECF No. 65-1 at 9.)

C. Failure to State a Claim

Magistrate Judge Locke concluded that, even if the Court had subject matter jurisdiction, the Complaint should nevertheless be dismissed for failure to state a claim. Specifically, the R&R advises that the claims are barred by the doctrine of collateral estoppel, and that, in any event, plaintiff has failed to state a plausible federal claim for relief and the Court should decline to exercise supplemental jurisdiction over the state law claims. Although plaintiff objects to these conclusions, the Court, after a *de novo* review, adopts the R&R's recommendations.

1. Collateral Estoppel

Plaintiff objects to Magistrate Judge Locke's conclusion (R&R 23-25) that her claims are barred by the doctrine of collateral estoppel. She argues that collateral estoppel does not apply because the "issues surrounding the RICO enterprise–intentionally devaluing property by racketeering and profiting illegally by $2.5 million dollars–and the Unconstitutional, corrupt state process under which they operated was NOT litigated in State Court." (Pl. Objs. 9.) However, contrary to plaintiff's conclusory assertions, and as thoroughly explained in the R&R, plaintiff has raised the issues in this action in numerous state court actions and appeals. (R&R 3-6, 24.) Accordingly, the Court adopts Magistrate Judge Locke's recommendation that plaintiff's claims are barred by the doctrine of collateral estoppel.

2. Insufficient Pleading

As noted above, the R&R concludes that the Complaint fails to state a federal claim for relief, and that the Court should decline to exercise supplemental jurisdiction over the remaining state law claims. (R&R 25-30.)

Plaintiff objects to the R&R's conclusion that the Complaint does not allege a violation of her procedural or substantive due process rights, as required to state her claim under 42 U.S.C.

§ 1983. (Pl. Objs. 12-13.) She asserts that "it was clearly a violation of Plaintiffs' Constitutional rights, recognizable by a 5th grade student, to forbid the purchase of the children's home at the 50% reduced rate received by Defendant BEST REAL ESTATE DEVELOPMENT LLC and disallow the Plaintiffs the opportunity to purchase and/or lease the home until the year 2021." (*Id.* at 13.) The Court agrees with Magistrate Judge Locke that such allegations do not rise to the level of a due process violation.

Plaintiff also objects to the R&R's conclusion that the Complaint fails to allege a plausible RICO claim. She argues that Magistrate Judge Locke "misapplie[d] the law" with respect to RICO's interstate commerce requirement and points to paragraphs in the Complaint that she asserts satisfy the requirement. (Pl. Objs. 14-15.) Although "[t]he law in this Circuit does not require RICO plaintiffs to show more than a minimal effect on interstate commerce," *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001), "[e]ven a minimal showing . . . requires some factual allegations of a nexus with interstate commerce," *Aliev v. Borukhov*, No. 15-CV-6113 (ERK) (JO), 2016 WL 3746562, at *12 (E.D.N.Y. July 8, 2016). Here, the Court agrees with Magistrate Judge Locke that the Complaint fails to allege facts establishing a nexus to interstate commerce. The allegations on which plaintiff relies in her objections contain only vague and conclusory assertions regarding mails, wires, and interstate commerce, and are thus insufficient to meet even the low pleading threshold. *See, e.g.*, *Aliev*, 2016 WL 3746562, at *12. In any event, the Complaint fails to satisfy numerous other RICO pleading requirements. For instance, it fails to plead the existence of a RICO enterprise, *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 175 (2d Cir. 2004), and fails to allege the fraudulent scheme with the requisite particularity, *e.g.*, *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 420-21 (E.D.N.Y. 2017); *McGee v. State Farm Mut. Auto. Ins. Co.*, No. 08-CV-392 FB CLP, 2009 WL 2132439, at *5 (E.D.N.Y. July 10, 2009).

Thus, the Court adopts Magistrate Judge Locke's recommendation that, even if subject matter jurisdiction existed, the federal claims should be dismissed for failure to state a claim.

D. Supplemental Jurisdiction

Plaintiff also objects to Magistrate Judge Locke's recommendation that the Court should decline to exercise supplemental jurisdiction over the state law claims. (R&R 30-31.) Having determined that plaintiff's federal claims do not survive defendants' motions to dismiss, the Court concludes that retaining jurisdiction over any state law claims is unwarranted. *See* 28 U.S.C. § 1367(c)(3). "In the interest of comity, the Second Circuit instructs that 'absent exceptional circumstances,' where federal claims can be disposed of pursuant to Rule 12(b)(6) or summary judgment grounds, courts should 'abstain from exercising pendent jurisdiction.'" *Birch v. Pioneer Credit Recovery, Inc.*, No. 06-CV-6497T, 2007 WL 1703914, at *5 (W.D.N.Y. June 8, 2007) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986)). Therefore, in the instant case, the Court, in its discretion, "'decline[s] to exercise supplemental jurisdiction'" over plaintiff's state law claims because "it 'has dismissed all claims over which it has original jurisdiction.'" *Kolari v. N.Y-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting 28 U.S.C. § 1367(c)(3)); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) ("We have already found that the district court lacks subject matter jurisdiction over appellants' federal claims. It would thus be clearly inappropriate for the district court to retain jurisdiction over the state law claims when there is no basis for supplemental jurisdiction.").

E. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that a party shall be given leave to amend "when justice so requires." Fed. R. Civ. P. 15(a). "Leave to amend should be freely granted, but the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). The Second Circuit has held that "a *pro se* litigant in particular 'should be afforded every reasonable opportunity to demonstrate that he has a valid claim.'" *Dluhos v. Floating & Abandoned Vessel, Known as New York*, 162 F.3d 63, 69 (2d Cir. 1998) (*quoting Satchell v. Dilworth*, 745 F.2d 781, 785 (2d Cir. 1984)). Nevertheless, even in the case of a *pro se* plaintiff, "[i]t is axiomatic that leave to amend need not be granted if to do so would be futile." *Cruz v. Garden of Eden Wholesale, Inc.*, 12 CIV. 5188 BMC MDG, 2012 WL 5386046, at *2 (E.D.N.Y. Oct. 26, 2012). As to futility, "leave to amend will be denied as futile only if the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim, *i.e.*, if it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief." *Milanese v. Rust–Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991)).

Here, the defects in the Complaint are jurisdictional and substantive and cannot be cured through better pleading. Accordingly, the Court denies plaintiff leave to amend and dismisses her claims without prejudice. *See Vandor, Inc. v. Militello*, 301 F.3d 37, 38-39 (2d Cir. 2002) (per curiam) ("[A]bsent jurisdiction 'federal courts do not have the power to dismiss *with prejudice*.'" (quoting *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 122 (2d Cir. 1999))).

III. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that, after a *de novo* review, the Court adopts the R&R in its entirety. Accordingly, defendants' motions to dismiss are granted, and plaintiff's federal claims are dismissed without prejudice. The Court declines to exercise supplemental jurisdiction over any remaining state law claims and dismisses those claims without prejudice. The Clerk of Court shall enter judgment accordingly and close the case.

IT IS FURTHER ORDERED that the represented moving defendants shall serve a copy of this Order on plaintiff and on *pro se* defendant, June Flanagan, and file proof of service with the Court.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that, should plaintiff seek leave to appeal *in forma pauperis*, any appeal from this Order would not be taken in good faith, and *in forma pauperis* status is therefore denied for the purpose of any appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED

Joseph Bianco

Joseph F. Bianco
United States District Judge

Dated: September 18, 2018
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

TEMMI KRAMER, ET AL.,

Plaintiffs,

-against-

EDMUND DANE, ET AL.,

Defendants.

----------X

ORDER
17-CV-5253 (JFB) (SIL)

JOSEPH F. BIANCO, District Judge:

Pro se plaintiffs Temmi Kramer and her son Zachary Kramer[1] bring this action for violations of (1) the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983; (2) 42 U.S.C. § 1985; (3) 42 U.S.C. § 1986; (4) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and (5) various New York state laws. Plaintiffs' claims arise from a state court divorce proceeding between plaintiff Temmi Kramer and her now ex-husband, David Kramer. In particular, the claims involve a July 2015 Order that awarded custody of Temmi and David Kramer's daughter, R.K., to David Kramer; an October 2015 Order that appointed a receiver to sell marital property; and a June 2017 Order that enjoined Temmi Kramer from interacting with R.K. and suspended child support payments for one of Temmi and David Kramer's sons, J.K.

Most defendants are individuals who were involved in the divorce proceeding, including David Kramer's divorce counsel, the court-appointed receiver, state court justices, a state court law clerk, and a court-appointed guardian. Plaintiffs also name Governor Andrew Cuomo and the State of New York as defendants. In sum and substance, plaintiffs allege that these individuals

[1] The Amended Complaint is verified by both Temmi Kramer and Zachary Kramer, who is over eighteen. Temmi Kramer also purports to assert the claims on behalf of her other children, Kevin Kramer, J.K., and R.K.

participated in a conspiracy to unconstitutionally "strip[] Plaintiffs of their property and Child support" and to "illegally restrain . . . Temmi Kramer from her daughter." (Am. Compl. ¶ 3; *see also, e.g., id.* ¶¶ 4, 6, 24, 53.)

Several defendants have moved to dismiss the Amended Complaint.[2] (ECF Nos. 39, 49-51.) On April 25, 2018, the Court referred the motions to dismiss to Magistrate Judge Locke for a report and recommendation. (ECF No. 65.)

Presently before the Court is a Report and Recommendation ("R&R") from Magistrate Judge Locke advising the Court to dismiss the complaint in its entirety without leave to amend. (ECF No. 91.) More specifically, the R&R recommends that the Amended Complaint should be dismissed for lack of subject matter jurisdiction. The R&R alternatively recommends that the federal claims should be dismissed for failure to state a claim and that the Court should decline to exercise supplemental jurisdiction over the state law claims. For the reasons explained below, after a *de novo* review, the Court adopts the thorough and well-reasoned R&R in its entirety.

I. Standard of Review

A district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the Magistrate Judge. *E.g., Kleinberg v. Radian Grp., Inc.*, 240 F. Supp. 2d 260, 262 (S.D.N.Y. 2002); *DeLuca v. Lord*, 858 F. Supp. 1330, 1345 (S.D.N.Y. 1994). As to those portions of a report to which no "specific written objections" are made, the Court may accept the findings contained therein, as long as the factual and legal bases supporting the findings are not

[2] Plaintiffs also name Leagle, Inc., which owns Leagle.com, a website that publishes judicial opinions. Plaintiff asserts state law claims against Leagle, Inc. for publishing the state court's July 2015 custody decision. On May 17, 2018, the Clerk of the Court entered a certificate of default against Leagle, Inc., finding that it had failed to appear or otherwise defend this action. (ECF No. 81.) On June 1, 2018, plaintiffs moved for default judgment against Leagle, Inc. (ECF No. 88.) On July 13, 2018, the Chief Operating Officer of Leagle, Inc. submitted a letter to the Court stating that the Court lacked personal jurisdiction over Leagle, Inc. it had not been properly served. (ECF No. 89.) In light of the Court's adoption of the R&R, and dismissal of the Amended Complaint for lack of subject matter jurisdiction, the motion for default judgment against Leagle, Inc. is denied as moot.

clearly erroneous. *See* Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997). When "a party submits a timely objection to a report and recommendation, the district judge will review the parts of the report and recommendation to which the party objected under a *de novo* standard of review." *Dafeng Hengwei Textile Co. v. Aceco Indus. & Commercial Corp.*, 54 F. Supp. 3d 287, 291 (E.D.N.Y. 2014) (citing 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.")); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.").

II. Analysis

Having reviewed the full record and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the thorough and well-reasoned R&R in its entirety.

As an initial matter, the R&R recommends dismissal of any claims that plaintiff Temmi Kramer asserts on behalf of her children because a *pro se* litigant may not represent others. (R&R 19.) The Court agrees that plaintiff Temmi Kramer may not represent her children in this action, and dismisses any claims brought on their behalf.

A. Subject Matter Jurisdiction

Magistrate Judge Locke concluded that the Amended Complaint should be dismissed for lack of subject matter jurisdiction under both the *Rooker-Feldman* doctrine and the domestic relations exception to federal jurisdiction. (R&R 11-14.) In their objections, plaintiffs argue that neither doctrine applies to bar the instant claims. For the reasons discussed below, the Court

disagrees with plaintiffs, and dismisses the Amended Complaint for lack of subject matter jurisdiction.

1. The *Rooker-Feldman* Doctrine

Plaintiffs argue that the *Rooker-Feldman* doctrine, which precludes lower federal courts from exercising jurisdiction over claims that seek to collaterally attack state court judgments, does not apply to bar the instant claims. (Pls. Objs. 11-12.) They assert that they did not lose in state court, and that "[n]o judgement has been rendered in State Court and, without authority or jurisdiction, Plaintiffs are still being stripped of their due process rights and Constitutional rights to date without due process." (*Id.*) These objections lack merit.

Plaintiffs repeatedly allege that various state court decisions and judgments deprived them of custody of R.K., child support payments, and marital property. (*E.g.*, Am. Compl. ¶¶ 3, 4, 7, 16, 26-27, 53.) Plaintiffs are accordingly "state court losers" for purposes of the *Rooker-Feldman* doctrine. *See, e.g.*, *Davis v. Baldwin*, No. 12-CV-6422 ER, 2013 WL 6877560, at *3 (S.D.N.Y. Dec. 31, 2013) ("Plaintiff 'lost' in state court when the Family Court issued the Order of Removal placing Aaliyah in the custody of ACS and the Orders of Protection precluding Plaintiff from interfering with the care and custody of his children."), *aff'd*, 594 F. App'x 49 (2d Cir. 2015); *Cogswell v. Rodriguez*, 304 F. Supp. 2d 350, 355 (E.D.N.Y. 2004) (claims that state court determinations regarding child support denied plaintiff due process and equal protection were barred by *Rooker-Feldman*).

Those same allegations, and other allegations in the Amended Complaint, contradict plaintiffs' assertion that no judgment has been rendered. Specifically, in addition to the allegations above, plaintiffs allege that the divorce proceeding was "closed by STEINMAN in April 2017"[3]

[3] In their objections, plaintiffs state that a Judgment of Divorce was entered on June 2, 2016. (Pl. Objs. 5.)

(*id.* ¶ 59); that Justice Steinman "reopened" the matter to issue the June 16, 2017 order (*id.* ¶¶ 4(e), 75); and that the New York State Supreme Court Appellate Division, Second Department denied leave to appeal that order (*id.* ¶ 2). Thus, plaintiffs' assertions that no judgment has been rendered are meritless.

To the extent plaintiffs argue that no *valid* state court judgment has been rendered because defendants allegedly acted without jurisdiction and in violation of plaintiffs' constitutional rights (*see* Pls. Objs. 2), that argument is unavailing. *See, e.g.*, *Remy v. NYS Dep't of Taxation & Fin.*, No. 09 CV 4444, 2010 WL 3926919, at *3 (E.D.N.Y. Sept. 29, 2010) (rejecting argument that *Rooker-Feldman* did not apply because plaintiff alleged state court judgment was rendered unconstitutionally and without jurisdiction), *aff'd*, 507 F. App'x 16 (2d Cir. 2013).

Finally, the fact that plaintiffs assert that their constitutional rights were violated during the state court proceedings does not except their claims from the *Rooker-Feldman* doctrine. *E.g.*, *Edem v. Spitzer*, No. 05-CV-3504 (RJD), 2005 WL 1971024, at *1 (E.D.N.Y. Aug. 15, 2005), *aff'd*, 204 F. App'x 95 (2d Cir. 2006). Accordingly, the Court adopts Magistrate Judge Locke's recommendation that the Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine, and dismisses the Amended Complaint on that ground.

2. The Domestic Relations Exception

Magistrate Judge Locke alternatively determined that the Court lacks subject matter jurisdiction under the domestic relations exception to federal jurisdiction. (R&R 14-15.) Plaintiffs argue that "[t]he divorce proceedings terminated and the lawsuit is not about custody, alimony, or divorce proceedings" but is instead about the deprivation of plaintiffs' constitutional rights. (Pls. Objs. 4.) However, plaintiffs cannot avoid the domestic relations exception by recasting a domestic dispute as a tort, civil RICO claim, or constitutional violation. *See, e.g.*, *Sobel v.*

Prudenti, 25 F. Supp. 3d 340, 354 (E.D.N.Y. 2014) (collecting cases). Here, as thoroughly explained in the R&R, plaintiffs' Amended Complaint is, in effect, directed at challenging the results of Temmi Kramer's divorce proceedings. Accordingly, the Court adopts Magistrate Judge Locke's recommendation that the Court lacks subject matter jurisdiction under the domestic relations exception, and alternatively dismisses the Amended Complaint on that ground.[4]

B. Immunity

Magistrate Judge Locke further concluded that, even if the Court had subject matter jurisdiction over the Amended Complaint, several defendants are entitled to immunity. Specifically, the R&R recommends that the claims against the State of New York are barred by the Eleventh Amendment, and that the claims against Justice Dane, Justice Steinman, Justice Marks, Linda Mejias (Justice Dane's law clerk at all relevant times), John Zenir (the court-appointed guardian), Brian Davis (the court-appointed receiver), and Lori Schlesinger (a court-appointed real-estate broker) are barred by the doctrines of judicial and quasi-judicial immunity. (R&R 15-19.)

With respect to the Eleventh Amendment, plaintiffs argue only that the R&R "incorrectly recommends dismissal upon the Eleventh Amendment." (Pls. Objs. 11.) After a *de novo* review, the Court agrees with Magistrate Judge Locke's determination that the Eleventh Amendment bars the claims against the State of New York.

As to judicial and quasi-judicial immunity, plaintiffs argue that those doctrines do not apply because the relevant defendants "act[ed] entirely without jurisdiction." (Pls. Objs. 3.) However, the Amended Complaint fails to allege any facts supporting this conclusory assertion. *See, e.g.*,

[4] As noted above, plaintiffs bring state law claims against Leagle, Inc. for publishing the state court's July 2015 custody decision. Although those claims are likely not barred by the *Rooker-Feldman* doctrine or the domestic relations exception, the Court declines to exercise supplemental jurisdiction over the state law claims and accordingly dismisses them without prejudice.

Jackson v. Cty. of Nassau, No. 15-CV-7218(SJF)(AKT), 2016 WL 1452394, at *6 (E.D.N.Y. Apr. 13, 2016) (collecting cases where conclusory assertions that judge acted without jurisdiction were insufficient to defeat immunity). Indeed, to the contrary, the factual allegations in the Amended Complaint make clear that these defendants were acting within the scope of their jurisdiction at all relevant times.

Finally, plaintiffs argue that Schlesinger is not entitled to quasi-judicial immunity because she is a real estate agent. (Pls. Objs. 4.) A private actor is protected by quasi-judicial immunity if her "acts are integrally related to an ongoing judicial proceeding." *El-Shabazz v. Henry*, No. 12 CIV. 5044 BMC, 2012 WL 5347824, at *5 (E.D.N.Y. Oct. 29, 2012) (quoting *Mitchell v. Fishbein*, 377 F.3d 157, 172 (2d Cir. 2004)). In other words, quasi-judicial immunity attaches to individuals who are acting "as an arm of the court." *Dowlah v. Dowlah*, No. 09-CV-2020 SLT/LB, 2010 WL 889292, at *6 (E.D.N.Y. Mar. 10, 2010) (quoting *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir. 1998)). Although plaintiffs are correct that Schlesinger is a real estate broker, they ignore that she is a defendant in this case solely because she was appointed by Justice Steinman to assist with the sale of marital property pursuant to a court order issued in Temmi Kramer's divorce proceeding. (*See, e.g.*, Am. Compl. ¶¶ 4(j), 25.) Thus, the Court agrees with Magistrate Judge Locke that Schlesinger is entitled to quasi-judicial immunity.

C. Failure to State a Claim

As noted above, Magistrate Judge Locke further concluded that, even if the Court had subject matter jurisdiction, the federal causes of action should nevertheless be dismissed for failure to state a claim. (R&R 19-25.) After a *de novo* review, the Court agrees that the Amended Complaint fails to state a federal claim for relief.

Plaintiffs objects to the R&R's recommendation that the civil RICO claim should be dismissed because the Amended Complaint fails to allege that defendants' engaged in racketeering acts. (R&R 24-25.) In particular, plaintiffs point to a chart attached to the Amended Complaint, which, they contend, adequately alleges defendants' racketeering activity. (Pls. Objs. 10.) However, the "racketeering acts" described in the chart are devoid of any factual information. Instead, they allege only that defendants "participated in scheme to defraud," "conspired through wire & mail," and "obstruct[ed] justice." (*See generally* ECF No. 23-1 at 83-95.) In other words, the racketeering acts that plaintiffs allege amount to nothing more than legal conclusions, which are insufficient to state a plausible RICO claim.

Plaintiff asserts other scattershot objections to Magistrate Judge Locke's determination that the Amended Complaint fails to state a federal claim for relief. The Court has reviewed plaintiffs' arguments *de novo*, and finds them to be without merit. Accordingly, the Court adopts Magistrate Judge Locke's recommendation that the Amended Complaint fails to state a federal claim for relief, and dismisses those claims.

D. Supplemental Jurisdiction

Plaintiffs also object to Magistrate Judge Locke's recommendation that the Court should decline to exercise supplemental jurisdiction over the state law claims. (R&R 25-26.) Having determined that plaintiffs' federal claims do not survive defendants' motions to dismiss, the Court concludes that retaining jurisdiction over any state law claims is unwarranted. *See* 28 U.S.C. § 1367(c)(3). "In the interest of comity, the Second Circuit instructs that 'absent exceptional circumstances,' where federal claims can be disposed of pursuant to Rule 12(b)(6) or summary judgment grounds, courts should 'abstain from exercising pendent jurisdiction.'" *Birch v. Pioneer Credit Recovery, Inc.*, No. 06-CV-6497T, 2007 WL 1703914, at *5 (W.D.N.Y. June 8, 2007)

(quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986)). Therefore, in the instant case, the Court, in its discretion, "'decline[s] to exercise supplemental jurisdiction'" over plaintiffs' state law claims because "it 'has dismissed all claims over which it has original jurisdiction.'" *Kolari v. N.Y-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting 28 U.S.C. § 1367(c)(3)); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) ("We have already found that the district court lacks subject matter jurisdiction over appellants' federal claims. It would thus be clearly inappropriate for the district court to retain jurisdiction over the state law claims when there is no basis for supplemental jurisdiction.").

E. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that a party shall be given leave to amend "when justice so requires." Fed. R. Civ. P. 15(a). "Leave to amend should be freely granted, but the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). The Second Circuit has held that "a *pro se* litigant in particular 'should be afforded every reasonable opportunity to demonstrate that he has a valid claim.'" *Dluhos v. Floating & Abandoned Vessel, Known as New York*, 162 F.3d 63, 69 (2d Cir. 1998) (*quoting Satchell v. Dilworth*, 745 F.2d 781, 785 (2d Cir. 1984)). Nevertheless, even in the case of a *pro se* plaintiff, "[i]t is axiomatic that leave to amend need not be granted if to do so would be futile." *Cruz v. Garden of Eden Wholesale, Inc.*, 12 CIV. 5188 BMC MDG, 2012 WL 5386046, at *2 (E.D.N.Y. Oct. 26, 2012). As to futility, "leave to amend will be denied as futile only if the proposed new claim cannot withstand a 12(b)(6) motion to dismiss for failure to state a claim, *i.e.*, if it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief." *Milanese v. Rust–Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (citing *Ricciuti v. N.Y.C.*

Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)).

Here, the defects in the Amended Complaint are jurisdictional and substantive and cannot be cured through better pleading. Accordingly, the Court denies plaintiffs leave to amend and dismisses the claims without prejudice. *See Vandor, Inc. v. Militello*, 301 F.3d 37, 38-39 (2d Cir. 2002) (per curiam) ("[A]bsent jurisdiction 'federal courts do not have the power to dismiss *with prejudice*.'" (quoting *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 122 (2d Cir. 1999))).

III. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that, after a *de novo* review, the Court adopts the R&R in its entirety. Accordingly, defendants' motions to dismiss are granted, and plaintiffs' federal claims are dismissed without prejudice. The Court declines to exercise supplemental jurisdiction over any remaining state law claims and dismisses those claims without prejudice. The Clerk of Court shall enter judgment accordingly and close the case.

IT IS FURTHER ORDERED that the moving defendants shall serve a copy of this Order on plaintiffs, and file proof of service with the Court.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that, should plaintiff seek leave to appeal *in forma pauperis*, any appeal from this Order would not be taken in good faith, and *in forma pauperis* status is therefore denied for the purpose of any appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Joseph Bianco

Joseph F. Bianco
United States District Judge

Dated: September 19, 2018
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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T.A. and P.A., infants by their Mother the Natural Guardian and Custodial parent, REGAN LALLY, and REGAN LALLY, individually,

Plaintiff,

-against-

HOWARD B. LEFF, ESQ., BERNICE K. LEBER, ESQ., MARK BLOOM, ESQ., ALEXANDER LEFF, ESQ., JUNE FLANAGAN, GERALD GOLDSTEIN, ESQ., LEONARD D. STEINMAN, MELANIE, CYGANOWSKI, ESQ., MARGARET TRAUTMANN, INA ROMANO, GAIL HOLMAN, JANET PUSHEE, BRYAN PUSHEE, SILVER FOX CONSTRUCTION LTD., CHRIS KINNEAR, GREY HAWK CONSTRUCTION SERVICES, BEST REAL ESTATE DEVELOPMENT, LLC., ALLEN G. REITER, ESQ., ARENT FOX, LLP., ROBERT J. BERGSON, ESQ., John Doe #1, John Doe #2,

Defendants.

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REPORT AND RECOMMENDATION
17-CV-4291 (JFB)(SIL)

STEVEN I. LOCKE, United States Magistrate Judge:

Presently before the Court, on referral from the Honorable Joseph F. Bianco for Report and Recommendation in this civil rights action, are several motions to dismiss. *See* motion to dismiss ("Flanagan Motion"), Docket Entry ("DE") [37]; motion to dismiss ("Second Flanagan Motion"), DE [51]; motion to dismiss ("Leff Motion"), DE [52]; motion to dismiss ("Holman Motion"), DE [56]; motion to dismiss ("Cyganowski Motion"), DE [51]; motion to dismiss ("Justice Steinman Motion"), DE [65]; motion to dismiss ("Arent Fox Motion"), DE [66]; motion to

dismiss ("Bergson Motion"), DE [69]; motion to dismiss ("Third Flanagan Motion"), DE [74]; and motion to dismiss ("Romano Motion"), DE [98]. *Pro se* Plaintiff Regan Lally ("Lally" or "Plaintiff"), on behalf of herself and her infant children T.A. and P.A., commenced this civil rights action seeking relief for purported fraudulent conduct committed during her underlying state court proceedings. *See* Complaint ("Compl."), DE [1].

As a result of this alleged misconduct, Plaintiff seeks money damages for violations of: (1) 42 U.S.C. § 1981; (2) her procedural and substantive due process rights pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution under 42 U.S.C. § 1983;[1] (3) 42 U.S.C. § 1985; (4) 42 U.S.C. § 1986; (5) the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*; (6) 28 U.S.C. § 455; and (5) various state laws. *See id.* Judge Bianco referred the pending motions to dismiss to this Court for a Report and Recommendation as to whether they should be granted. *See* DE [65]. For the reasons set forth herein, the Court respectfully recommends that the motions be granted in their entirety and that the Complaint be dismissed without prejudice.

Initially, the Court recommends dismissal for lack of subject matter jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines. The Court similarly recommends dismissal of the claims asserted against

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[1] While Plaintiff invokes both the Fifth and Fourteenth Amendments, the Court construes the allegations as invoking only the latter as the Complaint fails to allege any federal wrongdoing. *See Sibiski v. Cuomo*, No. 08-cv-3376, 2010 WL 3984706, at *8 (E.D.N.Y. Sept. 15, 2010) (construing purported Fifth Amendment violation under the Fourteenth Amendment without any allegations of federal wrongdoing).

Defendants Justice Leonard D. Steinman ("Justice Steinman") and Bernice Leber, Esq. ("Leber") based on the judicial and quasi-judicial immunity doctrines, respectively. The Court also recommends dismissal of the claims against Defendant Melanie Cyganowski, Esq. ("Cyganowski") for lack of personal jurisdiction because of Plaintiff's failure to effectuate proper service of process.

Alternatively, the Court recommends dismissal of Plaintiff's 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and RICO causes of action on their merits for failure to state a claim. Finally, the Court recommends that supplemental jurisdiction over Plaintiff's remaining state law causes of action be declined and that Plaintiff be denied leave to amend her Complaint.

I. BACKGROUND

The following facts, set forth in the Complaint and the attached exhibits, are presumed true for purposes of Defendants' motions.[2]

This action stems from a purported fraudulent scheme perpetrated against Plaintiff Regan Lally, an attorney admitted in New York State, arising out of her state court divorce proceedings (the "Divorce Action"). *See generally* Compl.; *see also Aebly v. Lally*, No. 202114-2008 (Nassau Sup. Ct. Dec. 21, 2016). Initially, Plaintiff divorced her ex-husband Richard Aebly ("Aebly") and Defendant Leber was appointed as receiver to liquidate three residential properties owned by the former couple. *See* Compl. ¶ 2. These properties included two rental locations, one in

[2] While the Court provides facts relevant only to the pending motions to dismiss, a more thorough recitation of the underlying state court proceedings are available at *Aebly v Lally*, 112 A.D.3d 561, 977 N.Y.S.2d 50 (2d. Dep't 2013).

Bayville (the "Bayville Property") and another in Northport (the "Northport Property"), as well as a marital residence in Centre Island (the "Marital Residence") (collectively, the "Marital Property"). *See id.* ¶¶ 2, 6. The Divorce Action resulted in several years of litigation and various appeals. *See, e.g., Aebly v Lally*, 140 A.D.3d 678, 30 N.Y.S.3d 890 (2d Dep't 2016); *Matter of Lally v Aebly*, 128 A.D.3d 699, 6 N.Y.S.3d 495 (2d Dep't 2015); *Aebly v Lally*, 112 A.D.3d 561, 975 N.Y.S.2d 891 (2d Dep't 2013).

Over the course of the Divorce Action, Lally alleges that Defendants collectively engaged in a two-phase racketeering enterprise designed to enrich themselves by devaluing the Marital Property. *See id.* ¶¶ 17-69. To that end, Defendants are various attorneys, judges, real estate brokers and construction contractors that were involved in Plaintiff's underlying state court proceedings. *See id.* As for the first phase, Leber, a partner at Defendant Arent Fox LLP ("Arent Fox"), purportedly conspired with Defendants: (1) Howard Leff, Esq. ("H. Leff") and Alexander Leff, Esq. ("A. Leff") who both represented Aebly during the Divorce Action; (2) June Flanagan ("Flanagan") who is Aebly's mother; and (3) Mark Bloom, Esq. ("Bloom"), another partner at Arent Fox. *See id.* ¶¶ 8, 21. As for the second phase, Howard Leff, Leber, Flanagan and Bloom continued the scheme while conspiring with Justice Steinman and court-appointed counsel Gerald Goldstein, Esq. ("Goldstein"). *See id.*

The Complaint alleges that, among other things, Defendants made several misrepresentations about mold and fabricated certificate of occupancy violations to

depreciate the Marital Property and undertook unnecessary repairs. *See id.* ¶¶ 9, 225. To that end, Plaintiff alleges that Defendant Cyganowski made certain false statements during two court appearances. *See id.* ¶ 126. Further, Leber hired Defendants Chris Kinnear and Grey Hawk Construction Services to allegedly destroy an "entire floor" of the Bayville Property while Defendant Silver Fox Construction, LTD was then retained to repair the damage. *See id.* ¶¶ 64, 316, 319. Defendants Margaret Trautmann, Gail Holman, Ina Romano, Janet Pushee ("J. Pushee") and Bryan Pushee ("B. Pushee") allegedly made various false representations while listing the Marital Property for sale. *See id.* ¶¶ 197, 205-07, 226, 229. As a result, Plaintiff claims that Defendant Best Real Estate Development ("Best Real Estate") purchased the Marital Residence at an artificially discounted rate. *See id.* ¶ 245.

Based on the above, Lally began and voluntarily discontinued a tort action in the Nassau County Supreme Court against Leber, Arent Fox and Goldstein alleging defamation, libel, abuse of process and conspiracy for their purported actions during her divorce proceedings (the "Nassau Action"). *See Lally v. Leber*, No. 2015-1413 (Nassau Sup. Ct. Oct. 5, 2015); *see also* Summons and Complaint, DE [57-3]; Notice of Withdrawal & Discontinuance without Prejudice, DE [57-4]. Defendant Robert J. Bergson, Esq. ("Bergson") represented Goldstein in the Nassau Action and purportedly made several false statement during the course of the proceedings. *See* Compl. ¶ 282.

Lally then started and once again voluntarily discontinued a nearly identical

action in the Suffolk County Supreme Court against Goldstein, Leber, Arent Fox and H. Leff (the "Suffolk Action"). *See Lally v. Goldstein*, No. 2016-3889 (Suffolk Sup. Ct. April 4, 2016); *see also* Summons and Complaint, DE [57-7]; Notice of Withdrawal & Discontinuance without Prejudice, DE [57-8]. Defendant Allen G. Reiter, Esq. ("Reiter"), a partner at Arent Fox, allegedly supported the conspiracy by filing allegedly false documents in the Suffolk Action. *See* Compl. ¶¶ 66, 281.

Lally then sued in Suffolk County Supreme Court (the "Second Suffolk Action") against defendants Goldstein, Leber, Arent Fox, Leff and Steinman. *See Lally v. Goldstein*, No. 8358-2016 (Suffolk Sup. Ct. Jan. 18, 2017); *see also* Summons and Complaint, DE [57-10]. This complaint seeks relief for purported unlawful conduct in the Divorce Action consistent with the allegations made in both the Nassau Action and Suffolk Action.

While the Second Suffolk Action was pending, Plaintiff commenced the instant action. *See* Compl. While Lally is an attorney admitted to practice in the State of New York, she is not admitted to practice law in the Eastern District of New York and proceeds *pro se* here. *See* Application for the Court to Request Counsel, DE [20], ¶ 8. As set forth above, the Complaint seeks money damages for violations of: (1) 42 U.S.C. § 1981; (2) the Fifth and Fourteenth Amendments of the U.S. Constitution under 42 U.S.C. § 1983; (3) 42 U.S.C. § 1985; (4) 42 U.S.C. § 1986; (5) RICO; (6) 28 U.S.C. § 455; and (7) various state laws. *See id. See generally* Am. Compl.

On August 16, 2017, Judge Bianco extended Lally's time to effectuate service

of process against all Defendants until October 18, 2017. *See* DE [8]. On October 16, 2017, this deadline was extended to November 29, 2017 for Defendants Reiter, Bloom, Goldstein, Bergson, H. Leff, A. Leff and Leber. *See* DE [22]. On November 2, 2017, Silver Fox Construction interposed its Answer. *See* DE [38].

In lieu of an answer, Flanagan, also proceeding *pro se*, moved to dismiss for lack of subject matter and failure to state a claim. *See* DE [37, 51]. A. Leff's and H. Leff's motion to dismiss the claims made on behalf of T.A. and P.A. because of Lally's inability to represent others as a *pro se* litigant soon followed. *See* DE [52]. Holman and Trautmann, as well as Cyganowski, then moved for relief on subject matter jurisdiction and failure to state a claim grounds. *See* DE [56, 61]. Justice Steinman moved shortly after for dismissal for similar reasons. *See* DE [65]. Arent Fox, Bloom, Leber and Reiter, as well as Bergson and Goldstein, sought dismissal of Lally's claims made on behalf of her infant children. *See* DE [66, 69]. Flanagan, for a third time, then moved to dismiss on unspecified grounds. *See* DE [74]. Finally, Romano moved to dismiss the claims made on behalf of T.A. and P.A. because of Lally's *pro se* status. *See* DE [98]. On April 27, 2018, Judge Bianco referred all the pending motions to dismiss this Court for Report and Recommendation.[3] *See* DE [101]. On May 3, 2018, the Supreme Court, Suffolk County, dismissed the Second Suffolk Action. *See* Decision and Order dated May 2, 2018, DE [102].

[3] Best Real Estate, Grey Hawk Construction Services, Bryan Pushee, and Janet Pushee have failed to answer, move or otherwise respond to the Complaint and Plaintiff's motion for a default judgment is currently pending. *See* Certificate of Default, DE [110]; *see also* motion for default judgment, DE [113].

II. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(1)

"It is axiomatic that federal courts are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction." *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000). To that end, "[d]etermining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir.2008). In deciding a motion to dismiss for lack of subject matter jurisdiction, "a court must accept as true all material factual allegations in the complaint and refrain from drawing inferences in favor of the party contesting jurisdiction." *U.S. ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 449 (S.D.N.Y. 2001).

Lower federal courts lack subject matter jurisdiction over direct appeals of state court judgments under the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923) (holding that only the Supreme Court can entertain a direct appeal from a state court judgment); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, n.3, 103 S.Ct. 1303, 1308 (1983) (finding that federal courts lack jurisdiction over claims which are "inextricably intertwined" with prior state court determinations). Federal courts also lack subject matter jurisdiction over claims against judges relating to the exercise of their judicial functions on immunity grounds. *Mireless v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286,

288 (1991). The domestic relations exception to subject matter jurisdiction also divests the federal courts of the power to issue "divorce, alimony, and child custody decrees." *Marshall v. Marshall*, 547 U.S. 293, 308, 126 S. Ct. 1735, 1746 (2006).

B. Fed. R. Civ. P. 12(b)(2)

"A plaintiff bears the burden of demonstrating personal jurisdiction over the person or entity against whom it seeks to bring suit." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010) (citation omitted). Federal Rule of Civil Procedure 12(b)(2) "permits a defendant to challenge a court's personal jurisdiction over it prior to the filing of an answer or the commencement of discovery." *A.W.L.I. Group, Inc. v. Amber Freight Shipping Lines*, 828 F.Supp.2d 557, 562 (E.D.N.Y .2011). In considering a motion to dismiss for lack of personal jurisdiction, a court may rely on materials beyond the pleadings. *Phillips v. Reed Group, Ltd.*, 955 F.Supp.2d 201, 225 (S.D.N.Y .2013) (when considering a 12(b)(2) motion, "the Court may also rely on submitted affidavits and other supporting materials submitted in relation to the motion"). "When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). Where a court opts to determine the jurisdictional issue without an evidentiary hearing or discovery, a plaintiff need "make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). When, however, a court permits the parties to engage in

jurisdictional discovery, the party seeking to establish jurisdiction bears "the burden of proving by a preponderance of the evidence that personal jurisdiction exists." *Landoil Resources Corp. v. Alexander & Alexander Servs.*, Inc., 918 F.2d 1039, 1043 (2d Cir. 1991). Under either scenario, the "pleadings and affidavits are construed in the light most favorable to the plaintiff, and all doubts are resolved in its favor." *Mazloum v. International Commerce Corp.*, 829 F.Supp.2d 223, 227 (S.D.N.Y. 2011).

C. Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). But a pleading "that offers only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966).

In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *See LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 475 (2d Cir. 2009). Where the complaint is filed by a *pro se* litigant, the Court must also be careful to "interpret the complaint liberally to raise the strongest claims that

the allegations suggest." *Rosen v. N. Shore Tower Apartments, Inc.*, 11-CV-00752, 2011 WL 2550733, at *2 (E.D.N.Y. June 27, 2011) (citing *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000)). Even so, "threadbare recitals of the elements of a cause of action" that are supported by "conclusory" statements and mere speculation are inadequate and subject to dismissal. *See Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation and citation omitted).

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court may consider:

> (1) the factual allegations in the complaint, which are accepted as true; (2) documents attached to the complaint as an exhibit or incorporated . . . by reference; (3) matters of which judicial notice may be taken; and (4) documents upon whose terms and effect the complaint relies heavily, *i.e.*, documents that are "integral" to the complaint.

Calcutti v. SBU, Inc., 273 F. Supp. 2d 488, 498 (S.D.N.Y. 2003) (internal citation omitted); *see also Miotto v. Yonkers Pub. Sch.*, 534 F. Supp. 2d 422, 425 (S.D.N.Y. 2008) ("[I]n assessing the legal sufficiency of a claim, the court may consider only the facts alleged in the complaint, and any document attached as an exhibit to the complaint or incorporated in it by reference."). The Court may also "take judicial notice of documents in the public record." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F.Supp.3d 426, 433 (E.D.N.Y. 2015) (quoting *Volpe v. Nassau County*, 915 F.Supp.2d 284, 291 (E.D.N.Y. 2013)).

Rule 12(g)(2) states that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under [Rule 12] must not make another motion under [Rule 12]

raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). Under Fed. R. Civ. P. 12(h)(2), a party may raise a 12(b)(6) failure to state a claim defense that it omitted from an earlier motion: (1) in any pleading allowed or ordered under Rule 7(a); (2) by a motion under Rule 12(c); or (3) at trial. To that end, the Court concludes that Flanagan's Second and Third Motions are properly considered under Rule 12(c). In any event, as both 12(b)(6) and 12(c) apply the same standard, this is a distinction without difference. *See Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 521 (2d Cir. 2006) ("The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim.").

III. DISCUSSION

Applying the standards outlined above, and for the reasons below, the Court respectfully recommends that Defendants' respective motions to dismiss be granted in their entirety. The Court initially recommends dismissal for a lack of subject matter jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines. Similarly, the Court recommends dismissal of the claims against Defendants Justice Steinman and Leber for lack of subject matter jurisdiction based on the judicial and quasi-judicial immunity doctrines, respectively. The Court also recommends dismissal of the claims against Cyganowski for lack of personal jurisdiction because of Plaintiff's failure to effectuate proper service of process.

In addition, the Court recommends dismissal of Plaintiff's Section 1981, 1983, 1985 and 1986, RICO and 28 U.S.C. § 455 causes of action on their merits for failure

to state a claim. But because the Court lacks subject matter jurisdiction, the Court does not address the viability of each cause of action element by element. Instead, the Court first considers subject matter jurisdiction and subsequently addresses each statute as appropriate. Finally, the Court recommends that supplemental jurisdiction over Plaintiff's remaining state law causes of action be declined and that Plaintiff not be granted leave to amend.

As a preliminary matter, the Court recommends dismissal of claims on behalf of T.A. and P.A. because Lally, as a *pro se* litigant, cannot represent any third-party interests. A lay person cannot represent another individual—not even her own child. *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("[A] non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child."); *see Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998) ("[B]ecause *pro se* means to appear for one's self, a lay person may not represent a corporation or a partnership or appear on behalf of his or her own child."). When it is apparent to the court that a *pro se* plaintiff is suing on behalf of a minor, the Court has a duty to protect the child by enforcing this prohibition against unauthorized representation. *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998). T.A. and P.A., named Plaintiffs in this action, appear to be minors. *See* Compl. ¶ 23. Because Plaintiff, although an attorney, is not admitted in the Eastern District of New York, she cannot sue on behalf of her infant children. On this basis alone, the

Court therefore recommends dismissal without prejudice of all claims filed on behalf of T.A. and P.A.[4]

A. Subject Matter Jurisdiction

Initially, the Court recommends that the Complaint be dismissed for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine and the domestic relations exception. Similarly, the Court recommends dismissal of the claims against Defendants Steinman and Leber for lack of subject matter jurisdiction based on the judicial and quasi-judicial immunity doctrines, respectively. The Court addresses each basis for dismissal in turn.

i. The Rooker-Feldman Doctrine

At the outset, the Court recommends dismissal for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine "recognizes that 'federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments.'" *Alston v. Sebelius*, No. 13-cv-4537, 2014 U.S. Dist. LEXIS 123613, at *23-*24 (E.D.N.Y. July 31, 2014) *Report and Recommendation adopted by* 2014 U.S. Dist. LEXIS 122970 (E.D.N.Y. Sept. 2, 2014) (quoting *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005)). " Underlying the *Rooker-Feldman* doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court

[4] The Court notes that this omission might be remedied by Lally's admission to the Eastern District of New York. Her admission, however, would not save her otherwise deficient claims.

may review state-court decisions." *Green v. Mattingly*, 585 F.3d 97, 101 (2d Cir. 2009) (quoting *Hoblock*, 422 F.3d at 85) (internal citations omitted).

The Second Circuit has identified four requirements that must be satisfied before the doctrine applies:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must 'complain [] of injuries caused by [a] state-court judgment[.]' Third, the plaintiff must 'invite district court review and rejection of [that] judgment [].' Fourth, the state-court judgment must have been 'rendered before the district court proceedings commenced'—*i.e.*, *Rooker-Feldman* has no application to federal-court suits proceeding in parallel with ongoing state-court litigation.

Hoblock, 422 F.3d at 85 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282, 125 S. Ct. 1517, 1521-22 (2005)). This doctrine also prohibits a district court review of claims that are "inextricably intertwined" with a state court's judgment. *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002). A claim is inextricably intertwined with the state court judgment if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 25, 107 S. Ct. 1519, 1533 (1987).

In addition, a plaintiff cannot circumvent *Rooker-Feldman* by recasting her claim as a federal civil rights violation. *See Davidson v. Garry*, 956 F. Supp. 265, 268–69 (E.D.N.Y. 1996). "The fact that [a] plaintiff alleges that the state court judgment was procured by fraud does not remove her claims from the ambit of *Rooker-Feldman*." *Huszar v. Zeleny*, 269 F. Supp. 2d 98, 103 (E.D.N.Y. 2003) (internal citation omitted). "Indeed, even if the order by the state court was

wrongfully procured[,] the order remains in full force and effect until it is reversed or modified by an appropriate state court." *Id.*

The Court concludes that all four factors of the *Rooker-Feldman* doctrine are present here. Lally's divorce proceedings were fully and fairly litigated and she lost. Plaintiff's allegations, construed liberally in their favor, essentially challenge the validity of the Divorce Action. In broad terms, Plaintiff alleges that an overarching racketeering enterprise tainted the state court proceeding and those involved conspired to, among other things, unlawfully devalue her marital property. *See, e.g.*, Compl. ¶¶ 17-69. Plaintiff's claims thus presuppose and hinge on the allegation of unlawful conduct in the Divorce Action. In essence, Plaintiff requests review of the merits of that judgment including a determination on the propriety of: (i) appointing Leber as receiver; and (ii) the sale of the Marital Property. It is also undisputed that the Divorce Action concluded, and the judgment was rendered before this federal action. As a result, the *Rooker-Feldman* doctrine precludes Plaintiff's claims and thus this Court lacks subject matter jurisdiction over them. The Court therefore recommends that Lally's claims be dismissed on this basis.

ii. The Domestic Relations Exception

Next, the Court lacks subject matter jurisdiction over Plaintiff's claims based on the domestic relations exception. As set forth above, "it is a fundamental precept that federal courts are courts of limited jurisdiction." *Durant, Nichols, Houston, Hodgson & Cortese-Costa P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009). To that end, the Supreme Court has recognized a domestic relations exception to subject matter jurisdiction that divests the federal courts of the power to issue "divorce, alimony,

and child custody decrees." *Marshall*, 547 U.S. at 308, 126 S. Ct. at 1746 (internal quotation marks and citation omitted); *Rabinowitz v. New York*, 329 F. Supp. 2d 373, 376 (E.D.N.Y. 2004) (dismissing *pro se* complaint seeking to challenge state court child custody order because federal court review was barred by the domestic relations exception). This exception is based on a "policy consideration that the states have traditionally adjudicated marital and child custody disputes and therefore have developed competence and expertise in adjudicating such matters, which the federal courts lack." *Thomas v. New York City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993).

While this exception is narrow, "a plaintiff cannot obtain federal jurisdiction merely by rewriting a domestic dispute as a tort claim for monetary damages." *Schottel v. Kutyba*, No. 06-cv-1577, 2009 WL 230106, at *1 (2d Cir. Feb. 2, 2009). To that end, federal courts will dismiss civil rights actions aimed at changing the results of domestic proceedings, including orders of child custody. *See Mitchell-Angel v. Cronin*, 101 F.3d 108 (2d Cir. 1996). Federal courts may abstain from exercising jurisdiction over issues "on the verge of being matrimonial in nature" if full and fair adjudication is available in state courts. *Id.* (internal citations omitted).

Although Plaintiff styles her claims as raising constitutional and statutory issues, the allegations stem directly from the Divorce Action and are thus outside this Court's jurisdiction. In large measure, consideration of Plaintiff's alleged damages, namely the loss of marital property, requires the Court to improperly "re-examine and re-interpret all the evidence brought before the state court" in the underlying divorce proceedings. *McArthur v. Bell*, 788 F. Supp. 706, 709 (E.D.N.Y. 1992).

Simply, even if the Court were only asked to decide damages it could not do so without analyzing the propriety of liquidating the marital property. *See Neustein v. Orbach*, 732 F. Supp. 333, 339 (E.D.N.Y. 1990) (barring claims under the domestic relations exception when it requires a reexamination of the evidence in the underlying state court action). Thus, this action is barred by the domestic relations exception and the Court recommends dismissal on this alternate basis.

iii. Judicial and Quasi-Judicial Immunity

The Court also recommends that Plaintiff's claims against Justice Steinman and Leber be dismissed as they are barred by the doctrines of absolute judicial and quasi-judicial immunity.[5] Judges are immune from liability for damages for acts committed within the scope of their jurisdiction. *See Mireles*, 502 U.S. at 11-12, 112 S. Ct. at 288 (finding that judges have absolute immunity from suits for damages arising out of judicial acts performed in their judicial capacities); *see also Stump v. Sparkman*, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106 (1978); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990). This absolute immunity is necessary to permit judges to act independently and without fear of consequences to themselves. *Stump*, 435 U.S. at 355, 98 S. Ct. at 1104. To that end, "judicial immunity is not overcome by allegations of bad faith or malice." *Mireles v. Waco*, 502 U.S. at 11, 112 S. Ct. at 288.

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[5] The Complaint explicitly seeks relief against Justice Steinman in his individual capacity. *See, e.g.*, Compl. ¶ 366. Even so, to the extent that Justice Steinman is sued in his official capacity, Plaintiff's claims are similarly precluded by the Eleventh Amendment. *See, e.g., Caldwell v. Pesce*, 83 F. Supp. 3d 472, 482 (E.D.N.Y. 2015), *aff'd*, 639 F. App'x 38 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 307 (2016), *reh'g denied*, 137 S. Ct. 587 (2016) (dismissing claims against current state court judges based on Eleventh Amendment grounds).

Yet immunity for money damages will be denied where a judge: (i) acts in the clear absence of all jurisdiction and (ii) knew or must have known that he was acting in such a manner. *Tucker v. Outwater*, 118 F.3d 930, 936 (2d Cir. 1997). The first element is an objective" inquiry: "that no reasonable judge would have thought jurisdiction proper." *Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2d Cir. 1988). The second element is a subjective inquiry about whether "the judge whose actions are questioned actually knew or must have known" of the jurisdictional defect. *Id.*

Quasi-judicial immunity also affords a private actor protection if his role is functionally comparable to that of a judge or if his actions are integrally related to an ongoing judicial proceeding. *Mitchell v. Fishbein*, 377 F.3d 157, 172–73 (2d Cir. 2004) (internal citations and quotation marks omitted). This quasi-judicial immunity applies to federal claims in federal court. *See Gross v. Rell*, 585 F.3d 72, 81 (2d Cir. 2009). In the category of private actor's conduct integrally related to ongoing judicial proceedings, absolute immunity may attach to non-judicial officers and employees where the individual serves as an "arm of the court," *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir.1998) (quoting *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987)), or where the individual conducts "activities that are inexorably connected with the execution of [court] procedures and are analogous to judicial action," *id.* (internal citations omitted). To that end, court-appointed receivers are entitled to quasi-judicial immunity for actions related to their representation of a child in family court. *See Yapi v. Kondratyeva*, 340 Fed. App'x. 683, 685 (2d Cir. 2009) (citations omitted); *Lewittes v. Lobis*, No. 04-cv-0155, 2004 WL 1854082, *11 (S.D.N.Y. Aug. 19, 2004).

Accordingly, court-appointed receivers complying with a judicial mandate are immune from suit. *MacKay v. Crews*, No. 09-cv-2218, 2009 WL 5062119, at *12 (E.D.N.Y. Dec. 16, 2009).

Applying the standards above, Plaintiff's claims against Justice Steinman and Leber are barred by judicial and quasi-judicial immunity. Here, subject matter jurisdiction over the Divorce Action is vested with the state courts and Plaintiff has failed to allege plausibly that the rulings made during the matrimonial dispute were outside that court's jurisdiction. The Complaint similarly fails to set forth plausibly any allegations that Leber as an appointed receiver, acted outside her judicial mandate. As a result, the claims against the above Defendants are barred under the judicial and quasi-judicial immunity doctrines and the Court recommends dismissal of the claims against Justice Steinman and Leber on these subject matter jurisdiction grounds.

B. Personal Jurisdiction

Next, the Court concludes that it lacks personal jurisdiction under Fed. R. Civ. P. 12(b)(2) over Cyganowski due to inadequate service of process. "Valid service of process is an essential element of personal jurisdiction." *Daval Steel Prod. v. M.V. Juraj Dalmatinac*, 718 F.Supp. 159, 161 (S.D.N.Y. 1989). Federal Rule of Civil Procedure 4(e) governs how individuals within a judicial district of the United States may be served. *See* Fed. R. Civ. P. 4(e). According to Rule 4(e), service may be completed by:

> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e).

As the first subsection of Rule 4(e) incorporates state law, the Court looks to applicable statute, section 308 of the New York Civil Practice Law and Rules ("C.P.L.R."). *See* N.Y. C.P.L.R. 308. Under C.P.L.R. 308, service upon an individual may be effectuated by:

> 1. [] delivering the summons within the state to the person to be served; or
>
> 2. [] delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or . . . at his or her actual place of business . . .; [or]
>
> 3. [] delivering the summons within the state to the agent for service of the person to be served . . . ; [or]
>
> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person

> at his or her last known residence or . . . at his or her actual place of business . . .; [or]
>
> 5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

N.Y. C.P.L.R. 308; *see Allen v. Nassau Cty. Exec. Office*, No. CV 09-1520, 2011 WL 1061019, at *5 (E.D.N.Y. Feb. 15, 2011), *Report and Recommendation adopted sub nom. Allen v. Suozzi*, 2011 WL 1059147 (E.D.N.Y. Mar. 21, 2011) (reciting same standard). The statute also provides that "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing." C.P.L.R. § 308(2). As a result, federal and New York state courts have held that substituted service in New York is only "complete" upon the expiration of ten days after proof of service is filed. *See Creative Kids Far E. Inc. v. Griffin*, No. 15-cv-06027, 2016 WL 8710479, at *2 (S.D.N.Y. Jan. 22, 2016). The method of service attempted by Plaintiff on Cyganowski most resembles that permitted under C.P.L.R. 308(2).

The court concludes that Lally has not complied with CPLR 308(2). Cyganowski argues that Plaintiff failed to complete service on or before Judge Bianco's October 18, 2017 deadline. Consistent with the above, Plaintiff's proof of service was not filed until October 25, 2017. *See* DE [35]. Thus, under C.P.L.R. 308(2) the substitute service was not "complete" until November 4, 2017–more than two weeks after the deadline for accomplishing service set by Judge Bianco had expired. As a result, Lally failed to timely effectuate service against Cyganowski and this

Court lacks personal jurisdiction over her. Accordingly, on this alternate basis the Court recommends that the claims against Cyganowski be dismissed.

C. Failure to State a Claim

Turning to the merits, the Court also concludes that the Complaint's various causes of action fail to state a claim under Fed. R. Civ. P. 12(b)(6). Initially, the Court considers whether Plaintiff's claims are barred by the doctrine of collateral estoppel and then considers whether each cause of action fails on its merits.

i. Collateral Estoppel

Plaintiff's claims are barred by the doctrine of collateral estoppel. The doctrine of collateral estoppel prevents a party from re-litigating an issue of fact or law decided in an earlier suit. *See Wilder v. Thomas*, 854 F.2d 605, 616 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053, 109 S.Ct. 1314 (1989). Federal courts are required by 28 U.S.C. § 1738 to give effect to collateral estoppel rules of the state that rendered a prior judgment where the same issues are later raised in a federal proceeding. *Id.* (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896 (1984)). Under New York law, there are two requirements for collateral estoppel: (1) an identity of issues necessarily decided in the previous action that are decisive in the present action; and (2) a full and fair opportunity to contest the decision now said to be controlling. *See Schwartz v. Pub. Adm'r of Bronx*, 24 N.Y.2d 65, 73, 298 N.Y.S.2d 955, 961 (1969). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, (1979). "What

matters for collateral estoppel purposes is that the issues are identical, not the claims themselves." *Cerny v. Rayburn*, 972 F.Supp.2d 308, 317 (E.D.N.Y. 2013) (internal citations omitted). In determining whether a party had a full and fair opportunity to litigate the issue, New York courts direct an exploration of "the various elements which make up the realities of litigation." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 734 (2d Cir. 2001) (quoting *Schwartz*, 24 N.Y.2d at 72, 298 N.Y.S.2d at 961).

There can be no real dispute here that the issues that comprise the basis for Plaintiff's current litigation are identical to those previously raised in her state court proceedings. Plaintiff's previous actions, specifically the Divorce and Second Suffolk Actions, assert claims premised on whether Defendants unlawfully devalued the Marital Property. This is precisely the underlying issue Plaintiff seeks to litigate here. Thus, the Court would be unable to grant Plaintiff relief on any of her asserted causes of action, which emanate from her prior proceedings, without making findings directly contrary to those made in her previous state court actions. *See LaFleur v. Whitman*, 300 F.3d 256, 273 (2d Cir. 2002) (concluding that issues raised by petitioner in federal action were identical to issues raised in the state court action because the court could not grant the requested relief "without directly contradicting the state court on issues it has previously decided.") Accordingly, the court concludes that Defendants have established an identity of issues for purposes of collateral estoppel.

Plaintiff also had a full and fair opportunity to contest the previous decisions. In both the Divorce and Second Suffolk Actions, Lally engaged in significant motion

and appellate practice resulting in years of litigation. Accordingly, Plaintiff has received a full and fair opportunity to contest the previous decisions. As a result, Lally is barred from re-litigating issues stemming from the Divorce Action and the Court recommends that her claims be dismissed in their entirety pursuant to the doctrine of collateral estoppel.

ii. 42 U.S.C. § 1981

Plaintiff's Section 1981 claim also fails as a matter of law. 42 U.S.C. § 1981 prohibits discrimination in the enjoyment of benefits, privileges, terms, and conditions of a contractual relationship. *See* 42 U.S.C. § 1981(a); *Patterson v. Cnty. of Oneida*, N.Y., 375 F.3d 206, 224 (2d Cir. 2004). To establish a violation of Section 1981, a plaintiff must show that (1) she is a member of a racial minority; (2) the defendant intended to discriminate based on race; and (3) the discrimination concerned one or more of the activities enumerated in Section 1981. *Dasrath v. Stony Brook Univ. Med. Ctr.*, 12 CV 1484, 2014 WL 1779475, at *5 (E.D.N.Y. Feb. 27, 2014). Liability may not be imposed under Section 1981 absent proof of purposeful discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 3149 (1982).

Plaintiff has failed alleged facts that establish the three elements necessary to state a Section 1981 claim, namely that she was discriminated against because of her race with respect to the terms of a contractual relationship. The Complaint provides no basis to suggest the existence of any contract, let alone a cognizable claim that any Defendant intentionally discriminated against her based on her race as required to state a claim under Section 1981. *See Mian v. Donaldson, Lufkin & Jenrette Secs.*

Corp., 7 F.3d 1085, 1087 (2d Cir.1993); *see also Yusuf v. Vassar Coll.*, 35 F.3d 709, 713 (2d Cir.1994). Accordingly, the Court recommends that Lally's Section 1981 claim also be dismissed on its merits.

iii. 42 U.S.C. § 1983

Plaintiff's Section 1983 claims similarly fail as a matter of law. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983. Although section 1983 itself does not create substantive rights, it does provide "a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). To prevail on a claim arising under 42 U.S.C. § 1983, a plaintiff must establish: "(1) the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws; (2) by a person acting under the color of state[-]law." *Hawkins v. Nassau Cty. Corr. Facility*, 781 F. Supp. 2d 107, 111 (E.D.N.Y. 2011) (citing 42 U.S.C. § 1983).

1. Substantive Due Process

Plaintiff's substantive due process cause of action is untenable. Substantive due process "is the right to be free of arbitrary government action that infringes a protected right." *O'Connor v. Pierson*, 426 F.3d 187, 200 n.6 (2d Cir. 2005). To prevail on a substantive due process claim, a plaintiff must establish that the defendant infringed on a protected liberty or property interest in an arbitrary or irrational

manner that shocks the conscience. *See Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005). To state a claim for a violation of substantive due process, a plaintiff must demonstrate that the state action was "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir.1999). It is not enough that the government act be "incorrect or ill-advised"; it must be "conscience-shocking." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). "Only the most egregious official conduct can be said to be arbitrary in the constitutional sense and therefore unconstitutional." *Tenenbaum*, 193 F.3d at 600 (internal quotation marks omitted).

Even construing the Complaint's allegations in a light most favorable to Plaintiff, they fail to set forth a substantive due process violation. A divorce proceeding liquidating marital property can hardly be said to shock the conscience. At best, the Amended Complaint sets forth "incorrect" or "ill-advised" government decision-making, which insufficient to sustain a viable substantive due process violation. As a result, the Court recommends dismissal of Plaintiff's due process cause of action.

2. Procedural Due Process

The Court also concludes that the Amended Complaint fails to set forth a viable procedural due process claim. To establish a procedural due process violation, a plaintiff must prove that she was deprived of "an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988) (quoting *Boddie v.*

Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786 (1971)) (internal alterations omitted). But Plaintiff does not allege that she was denied the opportunity to be heard. Instead, the Complaint details various hearings and appearances in the Divorce Action as well as a lengthy appellate history over the course of those proceedings. "[T]he availability of such recourse [within the state judicial system], as a matter of law, precludes finding that the defendants' conduct violated plaintiff[s'] rights to procedural due process under the [F]ourteenth [A]mendment." *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F.Supp.2d 455, 465 (E.D.N.Y. 2002). Accordingly, the Court recommends dismissal of Plaintiff's procedural due process cause of action on its merits.

iv. 42 U.S.C. § 1985

Plaintiff's conspiracy cause of action under 42 U.S.C. § 1985 is also without merit. To state a claim for conspiracy under Section 1985(3), a plaintiff must allege:

> (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen.

Turkmen v. Hasty, 789 F.3d 218, 262 (2d Cir. 2015). To prevail on a claim under 42 U.S.C. § 1985(3), "the conspiracy must also be motivated by 'some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (quoting *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1088 (2d Cir. 1993)). Plaintiff fails to allege that Defendants acted with any racial, class-based, or otherwise

discriminatory animus. Accordingly, the Court recommends that Plaintiff's Section 1985 cause of action be dismissed for failure to state a claim.

v. 42 U.S.C. § 1986

As Plaintiff has failed to plead a viable Section 1985 cause of action, her Section 1986 claim necessarily fails. 42 U.S.C. § 1986 imposes liability on an individual who has knowledge of discrimination prohibited under 42 U.S.C. § 1985. *Graham v. Henderson*, 89 F.3d 75, 82 (2d Cir. 1996). Accordingly, Section 1986 claim depends on a viable Section 1985 cause of action. *See Mian*, 7 F.3d at 1088 (finding that Section 1986 claims depend on a valid section 1985 claim). As a result, having concluded that Plaintiff fails to state a claim under Section 1985, the Court also recommends dismissal of Plaintiff's Section 1986 cause of action.

vi. RICO

The Court also concludes that the Complaint fails to set forth a plausible RICO cause of action. To bring a RICO claim, a plaintiff must allege (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. *See Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir.1983). "Racketeering activity" is defined as comprising specific enumerated crimes, including mail fraud as alleged in the Complaint. 18 U.S.C. § 1961(1). But Lally fails to set forth any facts that plausibly allege that Defendants were engaged in a "racketeering activity" or how they participated in an "enterprise." *See First Nationwide Bank v. Gelt Funding, Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993), *aff'd*,

27 F.3d 763 (2d Cir. 1994) ("[A] series of discontinuous independent frauds is no more an "enterprise" than it is a single conspiracy."). The Complaint is similarly silent as to how Defendants' activities in the underlying Divorce Action affected interstate or foreign commerce. Instead, the purported enterprise described in the Complaint included individuals who appear to reside and have places of business solely within the State of New York. Accordingly, the Court recommends that Plaintiff's RICO claim also be dismissed on its merits.

vii. 28 U.S.C. § 455

Finally, Lally's claims based on 28 U.S.C. § 455 cannot proceed. Section 455 governs solely the disqualification and conduct of judges within the federal courts. *See Conway v. Garvey*, No. 03-cv-7958, 2003 WL 22510384, at *3 (S.D.N.Y. Nov. 5, 2003), *aff'd*, 117 F. App'x 792 (2d Cir. 2004). Thus, because Lally's claims are based on the alleged misconduct of actors operating in New York State courts, her 28 U.S.C. § 455 cause of action fails as a matter of law.

D. Supplemental Jurisdiction Over State-Law Claims

Having recommended that each of Plaintiff's federal claims be dismissed, the Court also recommends that the Court decline to exercise supplemental jurisdiction over any remaining state law causes of action. *See Quiroz v. U.S. Bank Nat'l Ass'n*, No. 10-CV-2485, 2011 WL 2471733, at *8 (E.D.N.Y. May 16, 2011) (recommending that the district court decline to exercise supplemental jurisdiction) (Report and Recommendation), *adopted by*, 2011 WL 3471497 (E.D.N.Y. Aug. 5, 2011). Supplemental jurisdiction over Plaintiff's state-law claims is governed by 28 U.S.C. § 1367, which provides that, "in any civil action of which the district courts

have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . " 28 U.S.C. § 1367(a).

When a district court dismisses for lack of subject matter jurisdiction, the district court may not exercise its discretion to retain supplemental jurisdiction over related state-law claims. *See Cohen v. Postal Holdings, LLC*, 873 F.3d 394, 399 (2d Cir. 2017). Here, as the Court recommends dismissal of Plaintiff's claims for a lack of subject matter jurisdiction, the Court similarly lacks discretion to exercise supplemental jurisdiction over Plaintiff's state-law claims. *See Cohen, LLC*, 873 F.3d at 399. Accordingly, the Court recommends that supplemental jurisdiction over Plaintiff's state-law causes of action be declined.

E. Leave to File an Amended Complaint

While leave to amend a complaint should be freely given "when justice so requires," Fed. R. Civ. P. 15(a)(2), it is "within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Yet the court must be mindful of the unique context of a *pro se* complaint and "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Aquino v. Prudential Life & Cas. Ins. Co.*, 419 F. Supp. 2d 259, 278 (E.D.N.Y. 2005); *see also Thompson v. Carter*, 284 F.3d 411, 419 (2d Cir. 2002) ("The liberal pleading standards applicable to *pro se* civil rights complaints in this circuit

require that the district court give [plaintiff] an opportunity to flesh out his somewhat skeletal complaints before dismissing them"). That said, "a district court may deny leave to amend when, as here, amendment would be futile because the problem with the claim 'is substantive ... [and] better pleading will not cure it.'" *Reynolds v. City of Mount Vernon*, 14-CV-1481, 2015 WL 1514894, at *5 (S.D.N.Y. Apr. 1, 2015) (quoting *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir. 2000)).

Despite the leniency afforded Plaintiff considering her *pro se* status, the Court finds that the deficiencies in her pleadings are substantive and any amendments would be futile. While Plaintiff requested permission to file an amended complaint, the current submissions here have "given [no] indication that [s]he is in possession of facts that would cure the problems identified in this opinion." *Clark v. Kitt*, 12-CV-8061, 2014 WL 4054284, at *15 (S.D.N.Y. Aug. 15, 2014). Accordingly, as the facts present in the pleadings "give[] no indication that a valid claim may be stated," the Court respectfully recommends that Plaintiff be denied leave to amend. *See Flaherty v. All Hampton Limousine, Inc.*, 02-CV-4801, 2008 WL 2788171, at *8 (E.D.N.Y. July 16, 2008).

IV. CONCLUSION

For the reasons set forth above, the Court respectfully recommends that the motions be granted in their entirety and that the Complaint be dismissed without prejudice.[6] Initially, the Court recommends dismissal for lack of subject matter

[6] Second Circuit precedent instructs that when a court dismisses for lack of subject-matter jurisdiction, that dismissal must be without prejudice. *See Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with

jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines.[7] The Court similarly recommends dismissal of the claims asserted against Justice Steinman and Leber based on the judicial and quasi-judicial immunity doctrines, respectively. The Court also recommends dismissal of the claims against Cyganowski for lack of personal jurisdiction for Plaintiff's failure to effectuate proper service of process. Moreover, the Court recommends dismissal of Plaintiff's 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and RICO causes of action on their merits for failure to state a claim. Finally, the Court recommends that supplemental jurisdiction over Plaintiff's remaining state law causes of action be declined and that Plaintiff be denied leave to amend her Complaint.

V. OBJECTIONS

A copy of this Report and Recommendation is being served on Defendants by electronic filing on the date below. Defendants are directed to serve a copy of this Report and Recommendation on Plaintiff and promptly file proof of service by ECF. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of receipt of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a); *Ferrer v. Woliver*, 05-3696, 2008 WL

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prejudice."). Accordingly, the Court recommends dismissal of Plaintiff's claims for lack of subject matter jurisdiction without prejudice.

[7] Because the Court lacks subject matter jurisdiction over Plaintiff's claims, it is also recommended *sua sponte* that Plaintiff's pending default judgment motion, DE [113], be denied.

4951035, at *2 (2d Cir. Nov. 20, 2008); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
July 17, 2018

/s/ Steven I. Locke
STEVEN I. LOCKE
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TEMMI KRAMER, (individually), TEMMI KRAMER as custodial parent and natural guardian of J. KRAMER, ZACHARY KRAMER, KEVIN KRAMER, R.K. – as an illegally restrained Minor requesting Representation

Plaintiff,

-against-

EDMUND DANE, LINDA MEJIAS, LEONARD STEINMAN, LAWRENCE MARKS, GOVERNOR ANDREW CUOMO, (all individually), THE STATE OF NEW YORK, BRIAN DAVIS, ESQ., NANCY SHERMAN, ESQ., JOHN ZENIR, ESQ. LEAGLE, INC. (LEAGLE.COM), LORI SCHLESINGER, and JOHN DOE "A",

Defendants.

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REPORT AND RECOMMENDATION
17-CV-5253 (JFB)(SIL)

STEVEN I. LOCKE, United States Magistrate Judge:

Presently before the Court, on referral from the Honorable Joseph F. Bianco for Report and Recommendation in this civil rights action, are several motions to dismiss. *See* motion to dismiss ("State Motion"), Docket Entry ("DE") [16]; motion to dismiss ("Davis Motion"), DE [39]; motion to dismiss ("Second State Motion"), DE [49]; motion to dismiss ("Zenir Motion"), DE [50]; motion to dismiss ("Sherman Motion"), DE [51]. *Pro se* Plaintiff Temmi Kramer, on behalf of her children Kevin Kramer and infants J.K. and R.K., as well as *pro se* Plaintiff Zachary Kramer (collectively "Plaintiffs") commenced this civil rights action seeking relief from

purported unlawful conduct in an underlying state court proceeding.[1] *See* Amended Complaint ("Am. Compl."), DE [21]. Plaintiffs seeks money damages for violations of: (1) the First, Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution under 42 U.S.C. § 1983; (2) 42 U.S.C. § 1985; (3) 42 U.S.C. § 1986; (4) the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*; and (5) various state laws. *See id.* Judge Bianco referred the above-mentioned motions to this Court for a Report and Recommendation as to whether they should be granted. *See* DE [65]. For the reasons set forth herein, the Court respectfully recommends that the motions be granted in their entirety and that the Amended Complaint be dismissed without prejudice.

Initially, the Court recommends dismissal for lack of subject matter jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines. The Court also recommends dismissal of the claims against certain individual Defendants for lack of subject matter jurisdiction based on the judicial and quasi-judicial immunity doctrines. Similarly, the causes of action against New York State should be dismissed because they are barred by the Eleventh Amendment. The Court alternatively recommends dismissal of the majority of Plaintiffs' 42 U.S.C. §§ 1983, 1985 and 1986 and RICO causes of action on their merits for failure to state a claim. Finally, the Court recommends that supplemental jurisdiction over

[1] While the caption indicates that Temmi Kramer seeks to represent the interests of her children, the Court notes that the Amended Complaint is verified by both Temmi Kramer and Zachary Kramer. As a result, the Court construes the Amended Complaint as Temmi and Zachary Kramer bringing claims in their respective individual capacities in addition to Temmi Kramer's attempt to represent the interests of her children, Kevin Kramer and infants J.K. and R.K.

Plaintiffs' remaining state law causes of action be declined.

I. BACKGROUND

The following facts, set forth in the Complaint and the attached exhibits, are presumed true for purposes of Defendants' motions.

This action stems from Plaintiff Temmi Kramer's New York state court divorce proceedings presided over at various times by Defendants Justice Edmund M. Dane ("Justice Dane") and Justice Leonard D. Steinman ("Justice Steinman"). *See generally* Am. Compl. Plaintiffs allege a wide-ranging conspiracy centered on a purported mail fraud and racketeering enterprise within the New York State court system designed to strip litigants of marital property and child support. *See id.* Defendant John Zenir ("Zenir") was appointed as law guardian for Plaintiffs' children and Defendant Nancy Sherman ("Sherman") acted as Temmi Kramer's ex-husband's attorney during the underlying state court action. *See id.* ¶¶ 4, 6, 16-17. Defendants Brian J. Davis ("Davis") and Lori Schlesinger ("Schlesinger") were appointed as temporary receivers tasked with liquidating the marital property. *See id.* ¶¶ 4, 26-27. Plaintiffs also allege that Defendants Chief Administrative Judge Lawrence Marks ("Judge Marks") and Governor Andrew Cuomo ("Governor Cuomo") were aware of the purported racketeering scheme. *See id.* ¶ 4.

Over the course of her divorce proceedings Temmi Kramer: (1) lost custody of the couple's youngest child, R.K., to her ex-husband; (2) was denied child support; and (3) received a temporary restraining order enjoining her from: (a) interacting with R.K.; and (b) publicizing the divorce proceedings. *See id.* ¶¶ 2, 4. Kramer

alleges that the temporary restraining order's bar on publicity was a retaliatory measure motivated by Kramer's previous efforts in speaking out against Defendants' purportedly unlawful RICO scheme. *See id.* ¶ 49. After the proceedings, Defendant Leagle.com ("Leagle") published the custody decision on the internet. *See id.* ¶ 4. Temmi Kramer then sought to stay enforcement of the temporary restraining order, but her request was denied by the Appellate Division, Second Department. *See id.* ¶ 49; *see also* Decision & Order on Motion, Appellate Division, Second Department, DE [51-6].

Based on the above, Plaintiffs commenced the instant action by Complaint filed on April 6, 2016 and amended on December 14, 2017. *See* Complaint, DE [1]; *see also* Am. Compl. As set forth above, the Amended Complaint, which is verified by Temmi Kramer and Zachary Kramer, seeks money damages for violations of:

(1) the First and Fourteenth Amendments of the U.S. Constitution for an abridgment of Temmi Kramer's free speech, equal protection and procedural and substantive due process rights under 42 U.S.C. § 1983 against all Defendants except Leagle;
(2) 42 U.S.C. § 1985 for conspiracy as to: (a) Justice Steinman; (b) Justice Dane; (c) Justice Steinman's then-law clerk Defendant Judge Linda Mejias ("Judge Mejias"); (d) Judge Marks; (e) Governor Cuomo; (f) Zenir; (g) Davis; (h) Sherman; and (i) Defendant State of New York ("New York State");
(3) 42 U.S.C. § 1986 against all Defendants;
(4) RICO against: (a) Justice Steinman; (b) Justice Dane; (c) Judge Mejias; (d) Judge Marks; (e) Governor Cuomo; (f) Zenir; and (g) Sherman; and
(5) Various state laws.

See generally Am. Compl.

The Amended Complaint also seeks relief against New York State based on a municipal liability theory for its purported adoption of "a policy, pattern and practice

[. . .] of permitting illegal and unconstitutional *sua sponta* [*sic*] [. . .] [r]ecieversh ip appointments against vulnerable custodial mothers . . . . " *See* Am. Compl. ¶¶ 102-105. In the Amended Complaint's current form, the Court is unable to discern Plaintiffs' claims or identify the basis for relief purportedly arising of the Fourth or Fifth Amendments to the U.S. Constitution.

In lieu of an answer, Justice Dane, Judge Mejias and New York State first moved to dismiss under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) and 12(b)(6) for lack of subject matter and for failure to state a claim. *See* DE [16]. Davis's and Schlesinger's motion to dismiss seeking relief on similar grounds soon followed. *See* DE [39]. Justice Dane, Judge Mejias and New York State, now joined by Governor Cuomo, Judge Marks and Justice Steinman, moved once again seeking to dismiss Temmi Kramer's claims made on behalf of her infant children due to her inability to represent them as a *pro se* litigant. *See* DE [49]. Zenir and Sherman, respectively, moved shortly after for dismissal for lack of subject matter and failure to state a claim. *See* DE [50], [51]. Leagle has failed to answer, move or otherwise respond to the Amended Complaint and is currently in default. *See* Certificate of Default, DE [81]. Judge Bianco referred all of the motions to this Court for Report and Recommendation. *See* DE [65].

II. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(1)

"It is axiomatic that federal courts are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction." *Lyndonville Sav.*

Bank & Tr. Co. v. Lussier, 211 F.3d 697, 700 (2d Cir. 2000). To that end, "[d]etermining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir.2008). In deciding a motion to dismiss for lack of subject matter jurisdiction, "a court must accept as true all material factual allegations in the complaint and refrain from drawing inferences in favor of the party contesting jurisdiction." *U.S. ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 449 (S.D.N.Y. 2001).

Lower federal courts lack subject matter jurisdiction over direct appeals of state court judgments under the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923) (holding that only the Supreme Court can entertain a direct appeal from a state court judgment); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, n.3, 103 S.Ct. 1303, 1308 (1983) (finding that federal courts lack jurisdiction over claims which are "inextricably intertwined" with prior state court determinations). Federal courts also lack subject matter jurisdiction over claims against judges relating to the exercise of their judicial functions on immunity grounds. *Mireless v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286, 288 (1991). In addition, the Supreme Court has articulated a domestic relations exception to subject matter jurisdiction that divests the federal courts of the power to issue "divorce, alimony, and child custody decrees." *Marshall v. Marshall*, 547 U.S. 293, 308, 126 S. Ct. 1735, 1746 (2006).

The Eleventh Amendment provides for state immunity: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI. Further, a non-consenting state is immune from suits brought by its own citizens in federal court. *Clissuras v. City Univ. of New York*, 359 F.3d 79, 81 (2d Cir. 2004) (internal citations omitted). This immunity extends not only to the state itself, but also to entities considered "arms of the state," *id.* (quoting *McGinty v. New York*, 251 F.3d 84, 95 (2d Cir. 2001)), and "applies regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984).

B. Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss under Federal Civil Rule 12(b)(6), a complaint must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). But a pleading "that offers only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid

of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966).

In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *See LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 475 (2d Cir. 2009). Where the complaint is filed by a *pro se* litigant, the Court must also be careful to "interpret the complaint liberally to raise the strongest claims that the allegations suggest." *Rosen v. N. Shore Tower Apartments, Inc.*, 11-CV-00752, 2011 WL 2550733, at *2 (E.D.N.Y. June 27, 2011) (citing *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000)). Even so, "threadbare recitals of the elements of a cause of action" that are supported by "conclusory" statements and mere speculation are inadequate and subject to dismissal. *See Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation and citation omitted).

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court may consider:

> (1) the factual allegations in the complaint, which are accepted as true; (2) documents attached to the complaint as an exhibit or incorporated . . . by reference; (3) matters of which judicial notice may be taken; and (4) documents upon whose terms and effect the complaint relies heavily, *i.e.*, documents that are "integral" to the complaint.

Calcutti v. SBU, Inc., 273 F. Supp. 2d 488, 498 (S.D.N.Y. 2003) (internal citation omitted); *see also Miotto v. Yonkers Pub. Sch.*, 534 F. Supp. 2d 422, 425 (S.D.N.Y. 2008) ("[I]n assessing the legal sufficiency of a claim, the court may consider only the

facts alleged in the complaint, and any document attached as an exhibit to the complaint or incorporated in it by reference."). The Court may also "take judicial notice of documents in the public record." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F.Supp.3d 426, 433 (E.D.N.Y. 2015) (quoting *Volpe v. Nassau County*, 915 F.Supp.2d 284, 291 (E.D.N.Y. 2013)).

Rule 12(g)(2) states that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under [Rule 12] must not make another motion under [Rule 12] raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). Under Fed. R. Civ. P. 12(h)(2), a party may raise a 12(b)(6) failure to state a claim defense that it omitted from an earlier motion: (1) in any pleading allowed or ordered under Rule 7(a); (2) by a motion under Rule 12(c); or (3) at trial. To that end, the Court concludes that the Second State Motion's arguments for dismissal based on a failure to state a claim are properly considered under Rule 12(c). In any event, as both 12(b)(6) and 12(c) apply the same standard, this is a distinction without difference. *See Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 521 (2d Cir. 2006) ("The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim.").

III. DISCUSSION

Applying the standards outlined above, and for the reasons below, the Court respectfully recommends that Defendants' respective motions to dismiss the Amended Complaint be granted in their entirety. The Court initially recommends

dismissal for a lack of subject matter jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines. The Court also recommends dismissal of the claims against Defendants Justice Dane, Justice Steinman, Judge Mejias, Judge Marks, Zenir, Davis and Schlesinger for lack of subject matter jurisdiction based on the judicial and quasi-judicial immunity doctrines. Similarly, the causes of action against New York State should be dismissed because they are barred by the Eleventh Amendment.

The Court also recommends dismissal of the majority of Plaintiffs' 42 U.S.C. §§ 1983, 1985 and 1986 and RICO causes of action on their merits for failure to state a claim. But because the Court lacks subject matter jurisdiction, as set forth above, the Court does not address the viability of each cause of action. Instead, the Court first considers subject matter jurisdiction and subsequently addresses each claim as appropriate. Finally, the Court recommends that supplemental jurisdiction over Plaintiffs' remaining state law causes of action be declined.

As a preliminary matter, the Court recommends dismissal of claims made on behalf of Temmi Kramer's children because both Temmi Kramer and Zachary Kramer are *pro se* litigants and cannot represent any third-party interests. A lay person cannot represent another individual—not even his or her own child. *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("[A] non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child."); *see Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998) ("[B]ecause *pro se* means to appear for one's self, a lay person may not represent a corporation or

a partnership or appear on behalf of his or her own child."). When it is apparent to the court that a *pro se* plaintiff is suing on behalf of a minor, the Court has a duty to protect the child by enforcing this prohibition against unauthorized representation. *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998). Here, R.K. and J.K., named Plaintiffs in this action, appear to be minors. *See* Am. Compl. ¶ 23. Because Plaintiffs are not represented by counsel and neither Temmi Kramer nor Zachary Kramer are attorneys themselves, they cannot sue on behalf of Kevin Kramer or J.K. and R.K. Therefore, on this basis, the Court recommends dismissal without prejudice of all claims filed on behalf of Kevin Kramer, J.K. and R.K.

A. Subject Matter Jurisdiction

The Court recommends that the entire Amended Complaint be dismissed in its entirety for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine and the domestic relations exception. The Court also recommends dismissal of the claims against the State of New York on sovereign immunity grounds. Further, the Court concludes that judicial and quasi-judicial immunity bars the claims against Justices Dane and Steinman, as well as Judge Marks, Davis and Schlesinger and recommends dismissal as to them on this alternate basis.

i. The Rooker-Feldman Doctrine

At the outset, the Court recommends dismissal for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine "recognizes that 'federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments.'" *Alston v. Sebelius*, No. 13-cv-4537, 2014 U.S. Dist. LEXIS 123613, at *23-*24 (E.D.N.Y. July 31, 2014) *Report and*

Recommendation adopted by 2014 U.S. Dist. LEXIS 122970 (E.D.N.Y. Sept. 2, 2014) (quoting *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 84 (2d Cir. 2005)). "Underlying the *Rooker-Feldman* doctrine is the principle, expressed by Congress in 28 U.S.C. § 1257, that within the federal judicial system, only the Supreme Court may review state-court decisions." *Green v. Mattingly*, 585 F.3d 97, 101 (2d Cir. 2009) (quoting *Hoblock*, 422 F.3d at 85) (internal citations omitted).

The Second Circuit has identified four requirements that must be met before the doctrine applies:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must 'complain [] of injuries caused by [a] state-court judgment[.]' Third, the plaintiff must 'invite district court review and rejection of [that] judgment [].' Fourth, the state-court judgment must have been 'rendered before the district court proceedings commenced'—*i.e.*, *Rooker-Feldman* has no application to federal-court suits proceeding in parallel with ongoing state-court litigation.

Hoblock, 422 F.3d at 85 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282, 125 S. Ct. 1517, 1521-22 (2005)). This doctrine also prohibits a district court review of state court judgments to claims that are "inextricably intertwined" with a state court's determinations. *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002). A claim is inextricably intertwined with the state court judgment if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 25, 107 S. Ct. 1519, 1533 (1987).

In addition, a plaintiff cannot circumvent *Rooker-Feldman* by recasting her claims as federal civil rights violations. *See Davidson v. Garry*, 956 F. Supp. 265, 268–69 (E.D.N.Y. 1996). "The fact that [a] plaintiff alleges that the state court judgment was procured by fraud does not remove h[er] claims from the ambit of *Rooker-Feldman*." *Huszar v. Zeleny*, 269 F. Supp. 2d 98, 103 (E.D.N.Y. 2003) (internal citation omitted). "Indeed, even if the order by the state court was wrongfully procured[,] the order remains in full force and effect until it is reversed or modified by an appropriate state court." *Id.*

The Court concludes that all four factors of the *Rooker-Feldman* doctrine are present here. Temmi Kramer's divorce proceedings were fully and fairly litigated in state court and she lost. Plaintiffs' allegations, construed liberally in their favor, essentially challenge the validity of her divorce and post-divorce proceedings. In broad terms, Plaintiffs allege that an overarching racketeering enterprise tainted the state court action, and those involved conspired to, among other things, unlawfully seize her marital property and deny her custody of her children. *See, e.g.*, Am. Compl. ¶¶ 26-17. Plaintiffs' claims thus hinge on the allegation of unlawful conduct in her underlying state court action, and they invite this Court to review the merits of that judgment. Finally, it is undisputed that the divorce proceedings concluded, and the judgment was rendered before this federal action was commenced. As a result, Plaintiffs' claims are precluded by the *Rooker-Feldman* doctrine and this Court lacks subject matter jurisdiction over them. The Court therefore recommends that Plaintiffs' claims be dismissed on this basis.

ii. The Domestic Relations Exception

Next, Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims based on the domestic relations exception. The Supreme Court has recognized a domestic relations exception to subject matter jurisdiction that divests the federal courts of the power to issue "divorce, alimony, and child custody decrees." *Marshall*, 547 U.S. at 308, 126 S. Ct. at 1746 (internal quotation marks and citation omitted); *Rabinowitz v. New York*, 329 F. Supp. 2d 373, 376 (E.D.N.Y. 2004) (dismissing *pro se* complaint seeking to challenge state court child custody order because federal court review was barred by the domestic relations exception). This exception is based on a "policy consideration that the states have traditionally adjudicated marital and child custody disputes and therefore have developed competence and expertise in adjudicating such matters, which the federal courts lack." *Thomas v. New York City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993).

While this exception is narrow, "a plaintiff cannot obtain federal jurisdiction merely by rewriting a domestic dispute as a tort claim for monetary damages." *Schottel v. Kutyba*, No. 06-cv-1577, 2009 WL 230106, at *1 (2d Cir. Feb. 2, 2009). As a result, federal courts will dismiss civil rights actions aimed at changing the results of domestic proceedings, including orders of child custody. *See Mitchell-Angel v. Cronin*, 101 F.3d 108 (2d Cir. 1996). Further, federal courts may abstain from exercising jurisdiction over issues "on the verge of being matrimonial in nature" if full and fair adjudication is available in state courts. *Id.* (internal citations omitted).

Applying these standards, Plaintiffs' claims should again be dismissed. Although Plaintiffs style their claims as raising constitutional and statutory issues,

the allegations stem directly from the underlying state domestic relations matter and are thus outside this Court's jurisdiction. In large measure, Plaintiffs seek relief for the loss of marital property and custody over R.K., which would require the Court to improperly "re-examine and re-interpret all the evidence brought before the state court" in the underlying divorce proceedings. *McArthur v. Bell*, 788 F. Supp. 706, 709 (E.D.N.Y. 1992). Simply, any review of Plaintiffs' claims would require analysis of: (1) the basis for R.K.'s custody determination; (2) the propriety of liquidating the marital property; or (3) calculations of owed child support. *See Neustein v. Orbach*, 732 F. Supp. 333, 339 (E.D.N.Y. 1990) (barring claims under the domestic relations exception when it requires a reexamination of the evidence in the underlying state court action). Accordingly, this action is barred by the domestic relations exception and the Court recommends dismissal on this alternate basis.

iii. Eleventh Amendment Immunity

The Court also concludes that Plaintiffs' claims against New York State are barred by the Eleventh Amendment. As set forth above, the Eleventh Amendment bars suits in federal court by private parties against a state absent consent to suit or an express statutory waiver of the state's otherwise presumed sovereign immunity. *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 362, 121 S. Ct. 955, 962 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."). Thus, a claim that is barred by a state's sovereign immunity is properly dismissed under the Eleventh Amendment for a lack of subject matter jurisdiction. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1121 (1996)

("For over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against non-consenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"); *see also Bryant v. Steele*, 25 F. Supp. 3d 233, 241 (E.D.N.Y. 2014) (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 252, 131 S. Ct. 1632, 1637 (2011) (noting that "the Eleventh Amendment ... confirm[s] the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant")).[2]

Neither RICO nor 42 U.S.C. §§ 1983, 1985 or 1986 operate as a waiver of New York's Eleventh Amendment immunity and New York has not consented to such suits in federal court. *Murawski v. New York State Bd. of Elections*, 285 F. Supp. 3d 691, 694 (S.D.N.Y. 2018); *see also Molina v. State of N.Y.*, 956 F. Supp. 257, 260 (E.D.N.Y. 1995). Accordingly, the Court recommends that Plaintiffs' claims against New York State also be dismissed for lack of subject matter jurisdiction on Eleventh Amendment grounds.

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[2] The Court is mindful that "whether the claim of sovereign immunity [under the Eleventh Amendment] constitutes a true issue of subject matter jurisdiction or is more appropriately viewed as an affirmative defense" has not been definitively answered by the Supreme Court or the Second Circuit. *Carver v. Nassau Cty. Interim Fin. Auth.*, 730 F.3d 150, 156 (2d Cir. 2013) (citing *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 391, 118 S. Ct. 2047, 2053 (1998) (leaving open whether "Eleventh Amendment immunity is a matter of subject-matter jurisdiction"); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237-39 (2d Cir. 2006) (holding that the burden of proof for sovereign immunity rests on the party asserting it as is true of affirmative defenses generally)). But the Supreme Court discussed the Eleventh Amendment as a jurisdictional bar and has confirmed that a state's sovereign immunity conferred by it can be raised for the first time on appeal. *See Woods*, 466 F.3d at 237-38 (collecting cases). Both holdings accord with the issue being essentially jurisdictional. *See id.* As the exact characterization of Eleventh Amendment immunity does not substantively impact this Court's Report and Recommendation that the Amended Complaint be dismissed, the Court assumes it to be jurisdictional and does not analyze the issue further.

iv. Judicial and Quasi-Judicial Immunity

The Court further recommends that Plaintiffs' claims against Justice Dane, Justice Steinman, Judge Marks, Davis and Schlesinger be dismissed as they are barred by the doctrines of absolute judicial and quasi-judicial immunity. Judges are immune from liability for damages for acts committed within the scope of their jurisdiction. *See Mireles*, 502 U.S. at 11-12, 112 S. Ct. at 288 (finding that judges have absolute immunity from suits for damages arising out of judicial acts performed in their judicial capacities); *see also Stump v. Sparkman*, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106 (1978); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990). Law clerks similarly enjoy absolute immunity. *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988) ("As law clerks are simply extensions of the judges at whose pleasure they serve[,] . . . for purposes of absolute judicial immunity, judges and their law clerks are considered as one.").

A judge will not be deprived of this immunity even when the action was taken in error, done maliciously or exceeded his authority. *See Stump*, 435 U.S. at 356-58, 98 S. Ct. at 1104. This absolute immunity is necessary to permit judges to act independently and without fear of consequences to themselves. *Stump*, 435 U.S. at 355, 98 S. Ct. at 1104. To that end, "judicial immunity is not overcome by allegations of bad faith or malice." *Mireles v. Waco*, 502 U.S. at 11, 112 S. Ct. at 288.

Yet immunity from money damages will be denied where a judge: (i) acts in the clear absence of all jurisdiction and (ii) knew or must have known that he was acting in such a manner. *Tucker v. Outwater*, 118 F.3d 930, 936 (2d Cir. 1997). The first element is an objective inquiry: "that no reasonable judge would have thought

jurisdiction proper." *Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2d Cir. 1988). The second element is a subjective inquiry about whether "the judge whose actions are questioned actually knew or must have known" of the jurisdictional defect. *Id.*

A private actor may also be afforded the immunity ordinarily accorded judges if his role is functionally comparable to that of a judge or if his actions are integrally related to an ongoing judicial proceeding. *Mitchell v. Fishbein*, 377 F.3d 157, 172–73 (2d Cir. 2004) (internal citations and quotation marks omitted). This quasi-judicial immunity applies to federal claims in federal court. *See Gross v. Rell*, 585 F.3d 72, 81 (2d Cir. 2009). In the category of private actor's acts integrally related to ongoing judicial proceedings, absolute immunity may attach to non-judicial officers and employees where the individual serves as an "arm of the court," *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir.1998) (quoting *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987)), or where the individual conducts "activities that are inexorably connected with the execution of [court] procedures and are analogous to judicial action," *id.* (internal citations omitted). To that end, law guardians and court-appointed receivers are entitled to quasi-judicial immunity for actions related to their representation of a child in family court. *See Yapi v. Kondratyeva*, 340 Fed. App'x. 683, 685 (2d Cir. 2009) (citations omitted); *Lewittes v. Lobis*, No. 04-cv-0155, 2004 WL 1854082, *11 (S.D.N.Y. Aug. 19, 2004). Accordingly, court-appointed receivers or law guardians acting in accordance with a judicial mandate are immune from suit. *MacKay v. Crews*, No. 09-cv-2218, 2009 WL 5062119, at *12 (E.D.N.Y. Dec. 16, 2009).

Applying the standards above, Plaintiffs' claims against Justice Dane, Judge Mejias, Justice Steinman, Davis and Schlesinger are precluded. Here, the state courts at issue are vested with subject matter jurisdiction over Plaintiffs' divorce proceedings and Plaintiffs have failed to plausibly allege that the rulings made during the matrimonial dispute were outside their jurisdiction. The Amended Complaint similarly fails to plausibly set forth any allegations that Davis and Schlesinger, as appointed temporary receivers, acted outside their judicial mandate. As a result, the claims against these Defendants are barred under the judicial and quasi-judicial immunity doctrines and the Court recommends dismissal of Plaintiffs' claims against them on jurisdictional grounds.

B. Failure to State a Claim

Turning to the merits, the Court also concludes that various causes of action set forth in the Amended Complaint fail to state a claim under Fed. R. Civ. P. 12(b)(6). The Court addresses these in turn.

i. 42 U.S.C. § 1983

The majority of Plaintiffs' Section 1983 claims fail as a matter of law. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983. Although section 1983 itself does not create substantive rights, it does provide "a procedure for redress for the deprivation of rights established

elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). To prevail on a claim arising under 42 U.S.C. § 1983, a plaintiff must establish: "(1) the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws; (2) by a person acting under the color of state[-]law." *Hawkins v. Nassau Cty. Corr. Facility*, 781 F. Supp. 2d 107, 111 (E.D.N.Y. 2011) (citing 42 U.S.C. § 1983).

1. Color of State Law

Beginning the merits analysis with Zenir and Sherman, the Court concludes that the Amended Complaint fails to plausibly allege they acted under the color of state law as required to set forth a viable 42 U.S.C. § 1983. Section 1983 liability may be imposed only upon wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179,191, 109 S.Ct. 454, 461(1988) (internal quotations and citation omitted).

Here, Plaintiffs essentially allege that Sherman and Zenir, solely through their positions, as a private attorney licensed in New York and as a court-appointed law guardian, respectively, were acting under the color of state law. Yet it has been repeatedly held that law guardians, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983. *See Arena v. Dep't of Soc. Servs. of Nassau Cty.*, 216 F. Supp. 2d 146, 155 (E.D.N.Y. 2002) (citing *Storck v. Suffolk Cty. Dep't of Soc. Servs.*, 62 F. Supp. 2d 927, 941 (E.D.N.Y. 1999)). And private attorneys are not state actors simply by their state-issued licenses to practice law. *See Polk County v. Dodson*, 454 U.S. 312, 319, 102 S.Ct. 445, 450 (1981). As a

result, without more, the Amended Complaint fails to allege that Zenir and Sherman acted under the color of state law sufficient to establish claims against them pursuant to Section 1983. Accordingly, the Court recommends dismissal of Plaintiffs' 42 U.S.C. § 1983 causes of action against Zenir and Sherman on this basis.

2. Equal Protection

Plaintiffs' equal protection cause of action also fails as a matter of law. A plaintiff asserting a class-based equal protection claim under Section 1983 must allege that the discriminatory actions were intentional and based on her membership in a protected class. *See Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000). Alternatively, a plaintiff may pursue an equal protection claim under a "class of one" theory. *See Vassallo v. Lando*, 591 F. Supp. 2d 172, 183 (E.D.N.Y. 2008). A class-of-one equal protection claim arises when an individual is "intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222 (2d Cir. 2012) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 (2000)). Here, Plaintiffs fail to identify or allege the existence of any similarly situated comparator, whether distinguished by membership in a protected class or otherwise. Accordingly, the Court recommends dismissal of Plaintiffs' equal protection claim for failure to state a cause of action.

3. Substantive Due Process

Plaintiffs' substantive due process cause of action is likewise untenable. Substantive due process "is the right to be free of arbitrary government action that infringes a protected right." *O'Connor v. Pierson*, 426 F.3d 187, 200 n.6 (2d Cir. 2005).

To prevail on a substantive due process claim, a plaintiff must establish that the defendant infringed on a protected liberty or property interest in an arbitrary or irrational manner that shocks the conscience. *See Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005). To establish a violation of substantive due process for the right to custody, a plaintiff must demonstrate that the state action was "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir.1999). It is not enough that the government act be "incorrect or ill-advised"; it must be "conscience-shocking." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). "Only the most egregious official conduct can be said to be arbitrary in the constitutional sense and therefore unconstitutional." *Tenenbaum*, 193 F.3d at 600 (internal quotation marks omitted).

Even construing the Amended Complaint's allegations in a light most favorable to Plaintiffs, they fail to set forth a substantive due process violation. A divorce proceeding granting custody to one parent over the other, modifying child support and liquidating marital property can hardly be said to shock the conscience. At best, the Amended Complaint alleges "incorrect" or "ill-advised" government decision-making, which is insufficient to sustain a viable substantive due process violation. As a result, Court recommends dismissal of Plaintiffs' substantive due process cause of action.

4. Procedural Due Process

The Court also concludes that the Amended Complaint fails to set forth a viable procedural due process claim. To establish a procedural due process violation, a

plaintiff must prove that she was deprived of "an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988) (internal quotation omitted). Plaintiff, however, does not allege that she was denied the opportunity to be heard. Instead, she concedes that she was afforded a state court hearing and even chose to appeal the adverse decision rendered in that proceeding. "[T]he availability of such recourse [within the state judicial system], as a matter of law, precludes finding that the defendants' conduct violated" Plaintiffs' rights to procedural due process under the Fourteenth Amendment. *T.S. Haulers, Inc. v. Town of Riverhead*, 190 F.Supp.2d 455, 465 (E.D.N.Y. 2002). Accordingly, the Court recommends dismissal of Plaintiffs' procedural due process cause of action on its merits.

ii. 42 U.S.C. § 1985

Plaintiffs' conspiracy cause of action under 42 U.S.C. § 1985 is also without merit. To state a claim for conspiracy under Section 1985(3), a plaintiff must allege:

> (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen.

Turkmen v. Hasty, 789 F.3d 218, 262 (2d Cir. 2015). To prevail on a claim under 42 U.S.C. § 1985(3), "the conspiracy must also be motivated by 'some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (quoting *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1088 (2d Cir. 1993)). Plaintiffs, however, fail to allege that Defendants acted with any racial, class-based,

or otherwise discriminatory animus. Accordingly, the Court recommends that Plaintiffs' Section 1985 cause of action be dismissed for failure to state a cause of action.

iii. 42 U.S.C. § 1986

As Plaintiffs fail to plead a viable Section 1985 cause of action, their Section 1986 claim is similarly invalid. 42 U.S.C. § 1986 imposes liability on an individual who has knowledge of discrimination prohibited under 42 U.S.C. § 1985. *Graham v. Henderson*, 89 F.3d 75, 82 (2d Cir. 1996). Accordingly, Section 1986 claim depends on a tenable Section 1985 claim. *See Mian*, 7 F.3d at 1088 (finding that Section 1986 claims depend on a valid section 1985 claim). As a result, having concluded that Plaintiffs fail to state a claim under Section 1985, the Court also recommends dismissal of Plaintiffs' Section 1986 cause of action.

iv. RICO

Finally, the Court concludes that Plaintiffs' RICO cause of action fails as a matter of law. To bring a RICO claim, a plaintiff must allege (1) that the defendants (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly to conduct or participate in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. *See Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir.1983). "Racketeering activity" is defined as comprising specific enumerated crimes, including mail fraud as alleged in the Amended Complaint. 18 U.S.C. § 1961(1). Here, Plaintiffs summarily allege that Defendants were engaged in mail fraud so as to constitute "racketeering activity," but fail to set forth any facts or details as to how Defendants carried out such fraudulent

activity. Nor does the Amended Complaint explain how Defendants participated in an "enterprise" and there are no allegations how the underlying marital proceedings affected interstate or foreign commerce. Such naked assertions devoid of factual enhancement are insufficient as a matter of law and the Court accordingly recommends that Plaintiffs' RICO claim be dismissed on its merits.

C. Supplemental Jurisdiction Over State-Law Claims

Having recommended that each of Plaintiffs' federal claims be dismissed, the Court also recommends that the Court decline to exercise supplemental jurisdiction over any remaining state law causes of action. *See Quiroz v. U.S. Bank Nat'l Ass'n*, No. 10-CV-2485, 2011 WL 2471733, at *8 (E.D.N.Y. May 16, 2011) (recommending that the district court decline to exercise supplemental jurisdiction) (Report and Recommendation), *adopted by*, 2011 WL 3471497 (E.D.N.Y. Aug. 5, 2011). Supplemental jurisdiction over Plaintiffs' state-law claims is governed by 28 U.S.C. § 1367, which provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . " 28 U.S.C. § 1367(a).

Where a district court dismisses for lack of subject matter jurisdiction, the district court may not exercise its discretion to retain supplemental jurisdiction over related state-law claims, which is the case here. *See Cohen v. Postal Holdings, LLC*,

873 F.3d 394, 399 (2d Cir. 2017). Accordingly, the Court recommends that supplemental jurisdiction over Plaintiffs' state-law causes of action be declined.

D. Leave to File an Amended Complaint

While leave to amend a complaint should be freely given "when justice so requires," Fed. R. Civ. P. 15(a)(2), it is "within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Yet the court must be mindful of the unique context of a *pro se* complaint and "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Aquino v. Prudential Life & Cas. Ins. Co.*, 419 F. Supp. 2d 259, 278 (E.D.N.Y. 2005); *see also Thompson v. Carter*, 284 F.3d 411, 419 (2d Cir. 2002) ("The liberal pleading standards applicable to *pro se* civil rights complaints in this circuit require that the district court give [plaintiff] an opportunity to flesh out his somewhat skeletal complaints before dismissing them"). That said, "a district court may deny leave to amend when, as here, amendment would be futile because the problem with the claim 'is substantive ... [and] better pleading will not cure it.'" *Reynolds v. City of Mount Vernon*, 14-CV-1481, 2015 WL 1514894, at *5 (S.D.N.Y. Apr. 1, 2015) (quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)).

Despite the leniency afforded Plaintiffs considering their *pro se* status, the Court finds that the deficiencies in their pleadings are substantive and, because of the untenable nature of their claims, any further amendments would be futile. Additionally, in their opposition Plaintiffs have not requested permission to file a

second amended complaint, nor have they "given any indication that [they are] in possession of facts that would cure the problems identified in this opinion." *Clark v. Kitt*, 12-CV-8061, 2014 WL 4054284, at *15 (S.D.N.Y. Aug. 15, 2014). Accordingly, as the facts present in the pleadings "give[] no indication that a valid claim may be stated," the Court respectfully recommends that Plaintiffs be denied leave to amend. *See Flaherty v. All Hampton Limousine, Inc.*, 02-CV-4801, 2008 WL 2788171, at *8 (E.D.N.Y. July 16, 2008).

IV. CONCLUSION

For the reasons set forth above, the Court respectfully recommends that the motions to dismiss be granted in their entirety and that the Amended Complaint be dismissed without prejudice.[3] The Court recommends dismissal for lack of subject matter jurisdiction under the *Rooker-Feldman* and domestic relations exception doctrines. The Court also recommends dismissal of the claims against Defendants Justice Dane, Justice Steinman, Judge Mejias, Marks, Zenir, Davis and Schlesinger for lack of subject matter jurisdiction based on the judicial and quasi-judicial immunity doctrines. Similarly, the causes of action against New York State should be dismissed because they are barred by the Eleventh Amendment.

The Court also recommends dismissal of the majority of Plaintiffs' 42 U.S.C. §§ 1983, 1985 and 1986 and RICO causes of action on their merits for failure to

[3] Second Circuit precedent instructs that when a court dismisses for lack of subject-matter jurisdiction, that dismissal must be without prejudice. *See Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice.").

state a claim. Finally, the Court recommends that supplemental jurisdiction over Plaintiffs' remaining state law causes of action be declined and that leave to amend be denied.

V. OBJECTIONS

A copy of this Report and Recommendation is being served on Defendants by electronic filing on the date below. Defendants are directed to serve a copy of this Report and Recommendation on Plaintiffs and promptly file proof of service by ECF. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of receipt of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a); *Ferrer v. Woliver*, 05-3696, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
July 26, 2018

/s/ Steven I. Locke
STEVEN I. LOCKE
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.