No. 19-5632

In the

Supreme Court of the United States

T.A., *ET AL.*,

Petitioners,

– against –

HOWARD B. LEFF, *ET AL.*,

Respondents.

ON OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

In this action to recover damages, the defendants-respondents MARGARET TROUTMAN and GAIL HOLMAN ("the broker defendants") submit this brief in opposition to the Petition For Writ of Certiorari filed by the Petitioners T.A., P.A., infants by their Mother the Natural Guardian and Custodial parent, REGAN LALLY, and REGAN LALLY, individually ("Petitioners" or "Lally") seeking this Court to vacate the Motion Order issued by the Second Circuit Court of Appeals on March 6, 2019, and remand this case for further consideration.

Petitioners maintain that the Second Circuit erred in denying the motion for removal and consolidation and in sua sponte dismissing the appeal. This filing is yet another in a long series of frivolous attempts by Lally to harass defendants, wasting not only the defendants' time and resources, but the Courts' as well. In the instant action, Lally alleges that all of the defendants conspired to and did engage in a series of purportedly fraudulent acts during an underlying divorce proceeding between Lally and her husband, Richard Aebly, for the inexplicable purpose of devaluing and depriving Lally of her interest in certain residential properties. Notably, the Complaint is riddled with speculative and conclusory accusations as purported "facts" which are tangential, at best, to the alleged fraud in this

action and are, in reality, meant solely to disparage the name and reputation of the defendants herein.

Lally brought four (4) causes action against the Broker Defendants: conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"); conspiracy to breach fiduciary duty; unjust enrichment; and bribery. Despite the hyperbolic nature of her pleadings, Lally attempts to morph her dissatisfaction with the outcome of the underlying divorce proceeding into an action for RICO. However, as recognized by the District Court, Lally's RICO claim under 18 U.S.C. § 1962(c) is facially deficient. Specifically, the alleged RICO "predicate acts" are insufficient to invoke RICO liability; Lally fails to allege predicate acts with the requisite particularity or scienter, and fails to plead a RICO enterprise. Additionally, Lally's common law claims of conspiracy to breach fiduciary duty, unjust enrichment, and bribery are similarly flawed and were properly dismissed as they fail to allege a cognizable cause of action.

Accordingly, the Petition for Certiorari to vacate the Motion Order of the Second Circuit and remand the case for further consideration must be denied, with costs.

STATEMENT OF THE CASE

A. Introduction And Background

The Complaint outlines a generic scheme purportedly undertaken to deprive Lally (and purportedly her children) of the value of three properties in connection with the litigation and resolution of an underlying divorce action, captioned Aebly v. Lally, pending in Supreme Court of the State of New York, Nassau County, Index No. 202114/2008 (the "Divorce Action"). See Complaint ¶¶70-287. The participants in that scheme are essentially every person or entity who was in any way involved in the Divorce Action, including the judge, various attorneys and law firms, the receiver, various real estate brokers, construction contractors, and the buyer of the marital residence. Petitioners label defendants Bloom, Leber, Howard Leff, Alexander Leff, and Flanagan as the "Phase One RICO Defendants" and defendants Goldstein, Howard Leff, Leber, Bloom, Flanagan, and Steinman as the "Phase Two RICO Defendants." All other defendants are alleged to be mere co-conspirators and are not part of the direct RICO conduct.

The Divorce Action was commenced by Richard Aebly against Regan Lally in approximately 2008. A judgment of divorce was granted in July of 2011 after trial. On October 13, 2011, Justice Palmieri issued an order of equitable distribution which appointed Bernice Leber, Esq. as receiver to liquidate the three residential properties owned by Aebly and Lally. These

properties included two rental properties, one located in Bayville (the "Bayville Property") and one located in Northport (the "Northport Property), as well as the marital residence located in Centre Island (the "Marital Residence"). Lally appealed Justice Palmieri's decision to appoint Leber as receiver, which was affirmed by the New York Appellate Division.In or about September 2012, repairs needed to be conducted to the Bayville and Northport Properties. In light of these needed repairs, Leff and Leber made a motion to the Appellate Division to have the stay lifted so that the properties could be sold, as the expense of the repairs no longer allowed for the Bayville and Northport Properties to cover the carrying costs. The Appellate Division granted the motion with respect to the Northport and Bayville Properties. Compl. ¶¶187-195.

Subsequently, on December 4, 2013, the Appellate Division rendered a decision with respect to the Marital Residence, providing Lally with the option to satisfy Aebly's portion of the mortgage within six months and requiring Aebly to transfer the deed to the Marital Residence to Lally. Compl. ¶134. Because Lally never satisfied Aebly's portion of the mortgage, the Marital Residence needed to be sold and an appraisal was conducted. Compl. ¶181.

Lally subsequently brought a motion in the Divorce Action to have Leber discharged as receiver based on her alleged collusion, willful

destruction, and conspiracy with Leff. Compl. ¶¶111-114. On January 23, 2014, Justice Steinman denied Lally's motion and instead granted Leber permission to use the rental funds for the Northport and Bayville Properties to make repairs to said properties. Compl. ¶137. Lally appealed this decision, which was affirmed by the Appellate Division.

On August 20, 2014, Justice Steinman issued an Order requiring the sale of the Marital Residence. Compl. ¶183. Leber then hired Margaret Trautmann to list the Marital Residence for sale, which was originally listed at a price of $1,250,000. Trautmann held open houses every other week for almost a year. Compl. ¶227. In 2015, due to condition of the Marital Residence, Leber made a motion for contempt against Lally cross-moved for compensation for alleged repairs made to the Marital Residence. Justice Steinman issued an Order requiring the Marital Residence be sold at public auction on December 11, 2015 if it could not be sold to a private buyer prior to that time. Leber re-listed the Marital Residence with Trautmann and it was ultimately sold to Best Real Estate Development, LLC for $749,500 in 2015. On December 21, 2016, Justice Steinman issued an Order approving the receiver's final accounting in the Divorce Action. As a result of that Order, the marital estate funds (after distributions) were directed to be paid to Aebly, with Lally receiving nothing based on the outcome of trial in the Divorce Action.

On October 5, 2015, Lally filed a summons and complaint in the Supreme Court of the State of New York, County of Nassau, Index No. 1413/2015, against defendants Leber, Arent Fox LLP, Goldstein, and Ezratty, Ezratty & Levine, LLP (the "Nassau Action"). The complaint alleged causes of action for defamation per se, libel per se, abuse of process, and conspiracy to commit defamation per se, all arising out of the defendants purported false statements made during the Divorce Action. In response to the Nassau Action, the Ezratty firm moved to dismiss the Complaint. Based on the issues raised in the Nassau Action, in November 2015 Justice Steinman issued an Order transferring the Nassau Action to him. On November 23, 2105, Lally filed a notice of voluntary discontinuance in the Nassau Action. On March 14, 2016, Justice Steinman issued an Order granting the Ezratty firm's motion to dismiss.

On April 4, 2016, Lally commenced a nearly identical action in the Supreme Court of the State of New York, County of Suffolk, Index No. 3889/2016 against defendants Goldstein, Leber, Arent Fox LLP, and Howard Leff, Esq. (the "Suffolk Action"). On August 22, 2016 an Order to Show Cause was filed in the Divorce Action seeking to transfer the Suffolk Action to Justice Steinman, to be consolidated with the Divorce Action, and seeking to enjoin Lally from filing any further motions or actions without Justice Steinman's approval. On August 23, 2016 Lally voluntarily discontinued the

Suffolk Action. On September 27, 2016 Justice Steinman issued a Decision and Order on the Order to Show Cause, denying the request to transfer the Suffolk Action as moot and enjoining Lally from filing any action or proceeding against Leber, Arent Fox, LLP, and Goldstein arising out of any conduct or proceedings in the Divorce Action except by permission from the Court.

Undeterred, in December 2016, Lally commenced yet another action in the Supreme Court of the State of New York, Suffolk County, Index No. 8358/2016 (the "Second Suffolk Action") against defendants Goldstein, Leber, Arent Fox LLP, Leff, and Steinman. This complaint contains nearly identical causes of action to both the Nassau Action and Suffolk Action, all arising out of purported fraudulent statements made during the course of the Divorce Action. Lally eventually voluntarily discontinued this action as well.

In the present action, Lally contends, in conclusory fashion, that the Phase One and Phase Two RICO Defendants made various misrepresentations, committed perjury, and engaged in fraudulent acts during the course of post-trial activities in the Divorce Action. Essentially, she alleges that the defendants made misrepresentations to various courts regarding, *inter alia*, Lally and the properties. These actions were supposedly engaged in for the purpose of harming Lally, devaluing the properties, and

ultimately depriving her and her children of occupancy of the Marital Residence.

With respect to the Broker Defendants, Petitioners' allegations center around their work in connection with the listing and sale of the Marital Residence. Compl. ¶¶225-233, 239-245, 249-254. In connection with Trautmann, the Complaint alleges: (1) Leber and Goldstein directed Trautmann to sign an affidavit written by Goldstein; (2) Leber and Goldstein directed Trautmann to go beyond the Marital Residence's backyard fence to photograph property which contained debris; (3) Leber and Goldstein directed Trautmann to falsely assert the Marital Residence contained black mold, damaged walls, and fungus; (4) Leber and Goldstein directed Trautmann to provide fraudulent comparable sales for the Marital Residence; (5) Leber directed Trautmann to conduct fraudulent open houses; (6) Trautmann ignored cash offers on the Marital Residence; (7) Trautmann increased the surrounding area eyesores; and (8) Leber contracted with Trautmann in October 2015 for the Martial Residence at a listing price of $749,500. Compl. ¶¶225, 228, 231, 232, 239, 242-245, 249.

The only allegations involving Holman are that she (1) fraudulently stated that nobody showed up for a June 28, 2015 Open House so that Leber could reduce the listing price from $1,250,000 to $999,999; and (2) she conducted fraudulent open houses at the direction of Leber. Compl. ¶226,

228. Trautmann is alleged to have received a $15,000 commission for the sale of the Marital Residence. Compl. ¶254.

The Broker Defendants are not alleged to have been part of the purported RICO enterprise (to the extent one is alleged), nor are they alleged to have any agreement to further the RICO enterprise's existence or purported purpose. In fact, nothing is even alleged reflecting that the Broker Defendants knew of the RICO enterprise's existence, much less had any intent to participate or further such enterprise. The allegations amount to nothing more than the Broker Defendants listing, marketing, and showing the Marital Residence in compliance with their client – Leber's – directives.

B. The District Court Order

By Order dated September 18, 2018, and after a de novo review, the District Court (Bianco, J.) adopted the "thorough and well-reasoned" Report and Recommendation of Magistrate Judge Locke in its entirety. See T.A. v. Leff, 17-cv-04291, Doc #141. Specifically, the District Court dismissed the action against all defendants due to the lack of subject matter jurisdiction under both the Rooker-Feldman doctrine and the domestic relations exception to federal jurisdiction. Alternatively, the District Court found that the complaint failed to state any viable federal claim, and determined that retaining jurisdiction of certain state-law claims was unwarranted. The District Court further concluded that because all of the claims were

jurisdictionally and substantively defective, they could not be cured by "better pleading" and denied leave to amend the complaint.

C. The Second Circuit Order

Petitioners filed a notice of appeal and thereafter filed a motion in the Second Circuit for leave to proceed in forma pauperis, appointment of counsel, removal of the appeal to another circuit, and consolidation with docket # 18-3141. By Motion Order issued March 6, 2019, the Second Circuit denied Petitioners' motion in its entirety and sua sponte dismissed the appeal because it "lacks and arguable basis either in law or in fact".

The instant Petition for Certiorari ensued.

ARGUMENT

THE SECOND CIRCUIT PROPERLY DENIED PETITIONERS' MOTION AND SUA SPONTE DISMISSED THE APPEAL

A. The Frivolous Complaint Was Properly Dismissed

1. The Claims Are Barred By The Rooker-Feldman Doctrine

A review of the Complaint reveals that Petitioners' claims herein seek nothing more than to challenge the decision of the state matrimonial court in disposing and distributing various assets of the marital estate. Such a challenge to a New York court's judgment is inappropriate in a federal action and barred by the Rooker-Feldman doctrine.

The Rooker–Feldman stands for the proposition that "lower federal courts possess no power whatever to sit in direct review of state court decisions." Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970); accord Hoblock v. Albany County Bd. of Elections., 422 F.3d 77, 84 (2d Cir. 2005). The Rooker-Feldman doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 85. Thus, the Second Circuit delineated four requirements for the application of Rooker–Feldman: (1) "the federal-court Petitioner must have lost in state court"; (2)

"the Petitioner must complain of injuries caused by a state court judgment"; (3) "the Petitioner must invite district court review and rejection of that judgment"; and (4) "the state-court judgment must have been rendered before the district court proceedings commenced." Id. at 85; see Swiatkowski v. Citibank, 745 F. Supp. 2d 150, 163 (E.D.N.Y. 2010), aff'd, 446 Fed. Appx. 360 (2d Cir. 2011).

Here, read as a whole, the Complaint purports to allege that the defendants have engaged in a pattern of submitting allegedly fraudulent and perjurious documents in connection with the Divorce Action, which was pending in New York Supreme Court. As a result of these allegedly fraudulent statements, Petitioners contend that they have been deprived of their property, specifically the Northport Property, Bayville Property, and Marital Residence. In essence, Petitioners attempt to undo the judgments rendered by the New York State Court, particularly the judgments (1) appointing Bernice Leber as receiver; (2) ordering sale of the martial residence; and (3) approving sale of the marital residence. Petitioners are seeking to undo the state court judgment based upon what they contend was a pattern of allegedly fraudulent activity.

Moreover, the alleged damages in the Complaint all occurred as a result of the judgment – i.e. as a result of the defendants purported conduct, the marital residence was de-valued, depriving Petitioners of the full benefit

of the property upon its sale. Thus, Petitioners' allegations involve allegedly fraudulent documents or acts that were associated with the state court Divorce Action. Petitioners further appear to allege that the fraudulent nature of the documents and defendants' fraudulent behavior undermines the outcome of the state court proceeding that resulted in the sale of the Marital Residence.

Construed this way, the state court judgment was the cause of Petitioners' purported injuries here and a federal Court would necessarily have to review the judgments in the Divorce Action to decide Petitioners' claims. Although Petitioners have labeled the relief in the Complaint as seeking monetary damages, it is abundantly clear that the whole purpose of this action is to reverse the judgments rendered in the Divorce Action. "The fact that [a] [plaintiff] alleges that the state court judgment was procured by fraud does not remove his claims from the ambit of Rooker–Feldman." Huszar v. Zeleny, 269 F. Supp. 2d 98, 103 (E.D.N.Y. 2003). Indeed, even if the order by the state court was wrongfully procured, as the Petitioners allege, the order remains in full force and effect until it is reversed or modified by an appropriate state court. Id. Specifically, "a litigant may not rely on the deception of her opponents to demonstrate that she was not afforded a reasonable opportunity to raise her claims." Swiatkowski, 745 F. Supp. 2d at 166. There is no "blanket fraud exception to Rooker–Feldman." Id. "Instead,

[Petitioner] must demonstrate 'some factor independent of the actions of the opposing party that precluded [her] from raising [her] federal claims.'" Id. As such, this Court lacks subject matter jurisdiction over the Petitioners' claims.

Given these factual allegations, which are inextricably intertwined with the state court judgment and would require overturning the state court judgment, this action is barred by the Rooker–Feldman doctrine. Lally, on behalf of herself and her children, had ample opportunity to raise these claims before the state court, in her answer, numerous motions, or trial. Moreover, to the extent that Lally claims that they were aggrieved by the state court's ruling in the Divorce Action, the proper venue to challenge that decision was by appeal in state court—not to bring a separate action in federal court. See Esposito v. New York, 2008 U.S. Dist. LEXIS 61268, *20 (S.D.N.Y. Aug. 8, 2008), aff'd, 355 Fed. Appx. 511 (2d Cir. 2009).

2. The Claims Are Barred By Res Judicata/Collateral Estoppel

In addition to being barred by the Rooker-Feldman doctrine, Petitioners' claims are barred by *res judicata* and collateral estoppel, precluding Petitioners from maintaining their conspiracy claims against the Broker Defendants herein.

"Under New York law, collateral estoppel bars relitigation of an issue when (1) the identical issue necessarily was decided in the prior action and is

decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action." Denton v. Hyman (In re Hyman), 502 F.3d 61, 65 (2d Cir. 2007) (citations omitted); Leather v. Ten Eyck, 180 F.3d 420, 424 (2d Cir. 1999). Collateral estoppel does not include a requirement that the parties against whom Petitioner litigated in the prior proceeding be the same parties they litigate against in the current proceeding. See United States v. Mendoza, 464 U.S. 154, 158 (1984).

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," not just those that were actually litigated. Flaherty v. Lang, 199 F.3d 607, 612 (2d Cir. 1999) (quoting Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998)). New York courts apply a transactional analysis of *res judicata*, "barring a later claim arising out of the same factual grouping as an earlier litigated claim even if the later claim is based on different legal theories or seeks dissimilar or additional relief." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). The doctrine applies if "(1) there is a previous adjudication on the merits; (2) the previous action involved [the party against whom *res judicata* is invoked] or its privy; and (3) the claims involved were or could have been raised in the previous action." Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150, 155 (2d Cir. 2005) (citing

Monahan v. New York City Dep't of Corr., 214 F.3d 275, 284-85 (2d Cir.), cert. denied, 531 U.S. 1035 (2000)); Waldman v. Village of Kiryas Joel, 39 F. Supp. 2d 370, 377 (S.D.N.Y. 1999). Once a claim is brought to final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981).

Here, Petitioners are barred from bringing their claim because they either were explicitly raised and decided in prior state court actions or should have been raised or decided in those actions. A careful reading of Petitioners' Complaint reveals that the intent is to overturn the decisions entered in the Divorce Action and recoup that amount from defendants herein. Indeed, Petitioners allege the purported fraudulent scheme by defendants as a means to challenge the determination by both the New York trial court and appellate court. The allegations in the Complaint herein blame the defendants' alleged fraud, deceit, and conspiracy for the reduced price and ultimate sale of the various properties. At its essence, Petitioners' contention is that the properties should not have been sold to third parties, let alone at the prices sold for, based on the purported fraudulent conduct of defendants. However, these issues were decided in the Divorce Action and cannot be re-litigated here. Indeed, Lally repeatedly raised the alleged fraud and conspiracy by the defendants during litigation of the Divorce Action as a

means of challenging these decisions, which were repeatedly dismissed by the trial and appellate courts.

Critically, if Petitioners were allowed to proceed with the claims herein and ultimately received the damages that they seek, the judgment and decisions in the Divorce Action would be rendered meaningless. Permitting Petitioners' claims to go forward (against any of the defendants herein) would constitute a re-examination of the rights and remedies that co-defendants secured in that action and are thus barred.

Moreover, the doctrine of *res judicata* works to bar Petitioners' claims against co-defendants Leber, Arent Fox, LLP, Leff, and Goldstein as these claims could have and should have been raised in either Nassau Action and/or the Suffolk Action. Since Lally failed to do so and these actions were adjudicated on the merits, Lally is now precluded from raising new claims against co-defendants under the doctrine of *res judicata*. As set forth above, Lally commenced three lawsuits against co-defendants alleging various common law torts against them all arising out of their conduct in the Divorce Action. Both the Nassau Action and Suffolk Action were voluntarily dismissed by Lally, rendering the second dismissal adjudication on the merits. See CPLR 3217(c) ("a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by

any method an action based on or including the same cause of action in a court of any state or the United States").

As a result of this dismissal on the merits, Petitioners' claims herein are barred, to the extent asserted against Leber, Arent Fox, LLP, Goldstein and Leff, by *res judicata* because they arise out of the same facts at issue in the Nassau Action and the Suffolk Action, namely, the purported fraud committed by Leber and the other defendants in procuring judgment against Lally in the Divorce Action. Indeed, in both the Nassau and Suffolk Action Complaints, Lally alleged, *inter alia*, that the defendants committed conspiracies, defamation, libel, and other improprieties in the course of their participation in the Divorce Action, including making misrepresentations regarding the condition and value of the Northport Property, Bayville Property, and Marital Residence.

A comparison of the factual allegations in the instant Complaint and the complaint filed in the Suffolk Action shows a complete identity between the factual allegations which form the basis for the claims in both actions. See Waldman, 39 F.Supp.2d at 377. The instant action is merely another attempt by Lally to get a court to declare that Leber (and various other parties) engaged in misconduct in litigating the Divorce Action. Lally has simply re-cast these allegations as RICO violations in a poorly veiled attempt to avoid the implications of *res judicata*. Irrespective of how they have

packaged her claims, Petitioners had a full and fair opportunity to litigate these issues and are barred from re-litigating them here against Leber, Arent Fox, LLP, Leff, and Goldstein.

Since Lally is barred by the doctrines of *res judicata* from asserting any new claims herein against the RICO defendants, any conspiracy claims against the Broker Defendants, as co-conspirators must be dismissed, as the conspiracy claims cannot stand on their own. See Goldstein v. Siegel, 19 A.D.2d 489, 492-493 (1st Dep't 1963).

3. Petitioners' Rico Claims Are Defective As A Matter of Law

a. Elements of RICO and RICO Conspiracy

To allege a claim of RICO conspiracy, a plaintiff must establish that the "[d]efendants agreed to form and associate themselves with a RICO enterprise and that they agreed to commit two predicate acts in furtherance of a pattern of racketeering activity in connection with the enterprise … if the agreed-upon predicate acts had been carried out, they would have constituted a pattern of racketeering activity." Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 244-45 (2d Cir. 1999). Thus, the failure to state a claim for a substantive RICO violation is fatal to a RICO conspiracy claim under § 1962(d). See First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 182 (2d Cir. 2004) (dismissing RICO conspiracy clam where plaintiff failed to adequately allege a substantive RICO violation).

To maintain a cause of action under RICO, a plaintiff must allege the existence of seven constituent elements: (1) that Defendants (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. 18 U.S.C. § 1962(a)-(c) (1976); see also S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp., 84 F.3d 629, 633 (2d Cir. 1996). "Under RICO, a pattern of racketeering activity consists of at least two acts of racketeering activity (often referred to as the "predicate acts") within a ten year period." Lugosch v. Congel, 443 F. Supp. 2d 254, 264 (N.D.N.Y. 2006) (citing 18 U.S.C. §1961(1), (5). Additionally, to invoke RICO's civil remedies of treble damages, attorneys' fees and costs. A plaintiff must show injury to its business or property by reason of a violation of section 1962. Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

b. Petitioners Cannot Establish A RICO Violation

Petitioners' RICO claims against the Broker Defendants are based solely on their participation in the RICO scheme as co-conspirators (as they are not alleged to be direct participants in the RICO enterprise).[1] As set forth

[1] Even if the Complaint can be read to allege the Broker Defendants are direct participants in the RICO enterprise, the claim fails to state a cause of action for the reasons set forth below. Moreover, the claims against the Broker Defendants

above, in order to maintain a RICO conspiracy claim in the first instance, Petitioners must sufficiently allege an underlying RICO violation. As will be discussed below, Petitioners have not done so here.

i. Petitioners Fail To Allege A RICO Enterprise

RICO defines enterprise as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). An association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981). "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle v. United States, 556 U.S. 938, 946 (2009). A conclusory naming of a string of persons or entities does not adequately allege an enterprise under RICO. See Cedar Swamp Holdings Inc. v. Zaman, 487 F. Supp. 2d 444 (S.D.N.Y. 2007). Moreover, the alleged "enterprise" through which a pattern of racketeering activity is conducted must be distinct from those persons or entities that stand accused

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amount to nothing more than the provision of services that benefit the alleged enterprise, insufficient to sustain a claim. See United States Fire Ins. Co. v. United Limousine Serv., Inc., 303 F. Supp. 2d 432, 451-52 (S.D.N.Y. 2004) (a person may not be held liable merely for taking directions and performing "tasks that are 'necessary and helpful' to the enterprise," or for providing "goods and services that ultimately benefit the enterprise").

of conducting that racketeering activity. See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994); Turkette, 452 U.S. at 583 (holding that an enterprise cannot merely be the pattern of racketeering activity and must be separate and apart from the activity in which it engages). Accordingly, "in assessing whether an alleged enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is appropriate to consider whether the enterprise would still exist were the predicate acts removed from the equation." Wood v. Inc. Vill. of Patchogue, 311 F. Supp. 2d 344, 357 (E.D.N.Y. 2004) (internal quotations and citation omitted).

Petitioners' Complaint fails to allege an enterprise sufficient to maintain a RICO claim. As an initial matter, the Complaint does not specify how the members constituting the alleged "association in fact" enterprise joined together as a group with any factual allegations regarding continuity of structure and/or personnel. Petitioners' mere conclusory allegations that disparate parties were associated in fact by virtue of their involvement in various stages of the Divorce Action is wholly inadequate, absent allegations as to how the members were associated together. See First Nationwide Bank v. Gelt Funding Corp, 820 F. Supp 89 (S.D.N.Y. 1993), aff'd, 27 F.3d 763 (2d Cir. 1994), cert. denied, 513 U.S. 1079 (1995). In fact, the alleged enterprise is not supported by common sense and is thus not plausible under the law.

For example, there are no facts pled which would explain why the various parties would join in association together for a common purpose. A "series of discontinuous independent frauds is no more an 'enterprise' than it is a single conspiracy." See id. at 98, citing Kotteakos v. United States, 328 U.S. 750 (1946).

Moreover, the Complaint fails to detail any common course of fraudulent or illegal conduct by the enterprise, let alone any such conduct that is separate and distinct from the alleged predicate racketeering acts themselves, rendering it defective as a matter of law. See Id. at 98. Petitioners have not advanced any factual allegations that the purported enterprise was an "ongoing organization, formal or informal," or any "evidence that the various associates" of the alleged enterprise functioned "as a continuing unit." Turkette, 452 U.S. at 583. In fact, Petitioners' Complaint establishes just the opposite – the only alleged purposes of the purported enterprise is to engage in the supposed predicate acts set forth in the Complaint. There is no alleged ongoing organization or any purported fraudulent or illegal conduct the organization is purportedly engaged in. This is insufficient to sustain a claim for RICO violations.

For instance, in Hoatson v. N.Y. Archdiocese, 2007 U.S. Dist. LEXIS 9406 (S.D.N.Y. Feb 8, 2007), aff'd, 280 Fed. Appx. 88 (2d Cir. 2008), Petitioner alleged RICO violations against defendants who allegedly fired

him for exposing sexual abuse by clergymen. In dismissing the plaintiff's RICO violations, the Court held that the plaintiff did not allege any facts that defendants were "an entity separate and apart" from their alleged illegal activities.

> [Plaintiff] does not allege any facts that the defendants functioned "as a continuing unit," or were "an entity separate and apart" from their alleged illegal activities. Rather, it appears that this group of Defendants has been grouped together for the sole reason that they all allegedly had a hand in [Plaintiff's] termination. The "enterprise," however, must exist and function separately from the alleged illegal acts, and [Plaintiff] has failed to assert that.

Id. at *10

In similar fashion, Petitioners here failed to allege that the defendants functioned as a continuing unit that was separate and apart from the conduct alleged in the Complaint.

ii. Petitioner Fail To Allege A Predicate Acts Of Mail Or Wire Fraud

A complaint alleging mail or wire fraud must show (1) the existence of a scheme to defraud; (2) the defendant's knowing and intentional participation in the scheme; and (3) the use of the mails in furtherance of the scheme. See Cofacredit, S.A., 187 F.3d at 243. Further, the particularity requirements of pleading Fed. R. Civ. P. 9(b) are applicable to RICO claims based on mail fraud under 18 U.S.C. § 1341 or wire fraud under 18 U.S.C. §

1343. Powers v. British Vita, P.L.C., 57 F.3d 176, 184 (2d Cir. 1995). In order to comply with Rule 9(b) a "complaint must: (1) specify the statements that the [Petitioner] contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006). Further, where, as here, the complaint charges multiple defendants with fraud, it "should inform each defendant of the nature of his alleged participation in the fraud." DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987). Conclusory allegations of scienter must be supported by facts giving rise to a strong inference of fraudulent intent. Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995).

In the present case, the Complaint fails to make even a superficial attempt to articulate mail and wire fraud against the defendants herein, no less with the particularity required by Fed. R. Civ. P. 9(b), as there are no facts explaining the defendants' knowing participation in the scheme to "devalue" the properties or any facts establishing the defendants' fraudulent intent. Rather, Petitioners repeatedly make conclusory claims that defendants made various purportedly "fraudulent" or "false" statements in correspondence and submissions to the court in the Divorce Action. The Complaint does not identify the manner in which each statement was false or fraudulent with the particularity required for sustaining such a claim. There

are similarly no facts alleged establishing a strong inference of the defendants' fraudulent intent as required. See D'Orange v. Feely, 877 F. Supp. 152, 159 (S.D.N.Y. 1995), aff'd, 1996 U.S. App. LEXIS 20495 (2d Cir. 1996).

Such generic conclusory pleading of mail and/or wire fraud is completely inadequate under Fed. R. Civ. P. 9(b). See Kashelkar v. Rubin & Rothman, 97 F. Supp. 2d 383 (S.D.N.Y. 2000), aff'd, 242 F.3d 365 (2d Cir. 2001) (noting wire fraud predicate act of RICO claim inadequate under Rule 9(b) where plaintiff gave no particulars about the alleged statements or any facts which give rise to an inference of fraudulent intent). Petitioners' reckless allegations of a "scheme to defraud" simply do not constitute a RICO predicate offense. Accordingly, Petitioners have failed to allege the necessary predicate acts of mail and/or wire fraud warranting dismissal of their RICO claims.

iii. Petitioners Fail To Allege A Predicate Act Of Bribery

To the extent Petitioners' Complaint can be characterized as predicating the RICO claim on acts of bribery, Petitioners fail to meet the stringent requirements of Rule 9(b), and consequently fail to establish the predicate acts necessary to invoke RICO liability. See 18 U.S.C. § 1961(1)(A). Here, Petitioners' Complaint generically states the "phase two RICO

Defendants" bribed various other co-defendants. However, such allegation lacks any facts establishing which defendant issued such bribes, the nature of such bribes, and when such bribes purportedly occurred. Moreover, Petitioners have failed to allege the requisite agreement necessary to establish such bribery occurred.

As such, the allegations of bribery cannot sustain Petitioners' RICO cause of action. See Roberto's Fruit Mkt., Inc. v. Schaffer, 13 F. Supp. 2d 390, 399 (E.D.N.Y. 1998) (holding there was no predicate act of bribery alleged because "there is no indication of who paid the bribes, how the bribes were furnished, when and where the bribes were paid, and the approximate value of the bribes").

iv. The Enterprise's Activities Do Not Affect Interstate Commerce

Section 1962(c) makes unlawful racketeering activity of enterprises who are "engaged in or the activities of which affect interstate or foreign commerce." 18 U.S.C. § 1962(a)-(c). The alleged "enterprise" described in Petitioners' complaint did not engage in "interstate" or "foreign commerce" nor do the allegations of the Complaint describe how any purported racketeering activities affected interstate or foreign commerce. Instead, the purported enterprise described in the Complaint was comprised of individuals who reside and have places of business within the State of New

York, mainly in Nassau County and New York County, who are employed companies who are located in Nassau County and/or New York County in the State of New York. These allegations are insufficient to support Petitioners' claim, further warranting dismissal. See, e.g., Huszar, 269 F. Supp. 2d at 105 (dismissing RICO claim where complaint failed to allege any effect on interstate commerce resulting from a sale of real property in connection with marital proceedings).

4. Petitioners Fail To State A Claim for RICO Conspiracy

Where, as here, Petitioners have not adequately alleged a substantive violation of RICO under § 1962(c), a claim of conspiracy to violate RICO under § 1962(d) may not be maintained. See Discon Inc. v. NYNEX Corp., 93 F.3d 1055, 1062-63 (2d Cir. 1996), cert. denied, 522 U.S. 809 (1997) (noting RICO conspiracy claim cannot stand where substantive RICO violation has not been established). Thus, the RICO conspiracy claims must be dismissed as against the Broker Defendants.

Moreover, Petitioners have failed to allege the basic elements of a RICO conspiracy claim. As set forth above, in order to maintain a claim for RICO conspiracy Petitioners must establish that "(i) the defendants agreed to form and associate themselves with a RICO enterprise; (ii) the defendants agreed to commit two predicate acts in furtherance of a pattern of racketeering

activity in connection with the enterprise; and (iii) if the agreed-upon predicate acts had been carried out, they would have constituted a pattern of racketeering activity." Elsevier, Inc. v. Grossman, 2013 U.S. Dist. LEXIS 171701, *34 (S.D.N.Y. Dec. 5, 2013). Petitioners have utterly failed to meet their pleading burden herein as against the Broker Defendants.

Here, there are no facts pled establishing that the Broker Defendants agreed to perform two or more predicate acts of mail or wire fraud in connection with scheme alleged. Other than Petitioners' conclusory allegation that the Broker Defendants "conspired" to commit various RICO violations, the Petitioners have alleged no facts to show specifically that the Broker Defendants had any "meeting of the minds" in the alleged violations or that they even knew of the purported RICO enterprise. Rather, this assertion is pled as a bare conclusion. Such conclusory, threadbare pleading is patently insufficient to sustain the conspiracy count. See FD Prop. Holding, Inc. v. U.S. Traffic Corp., 206 F. Supp. 2d 362, 374 (E.D.N.Y. 2002) (finding a general allegation that "[e]ach of these defendants agreed to commit each of the two or more predicate acts" insufficient to state a claim for RICO conspiracy under § 1962(d)).

Further, Petitioners have not sufficiently asserted that the Broker Defendants knew of or had an economic incentive to engage in the enterprise's scheme, further warranting dismissal of the Petitioners' claims

against them. See Flexborrow LLC v. TD Auto Fin. LLC, 255 F. Supp. 3d 406, 425 (E.D.N.Y. 2017). The allegations instead reveal that the Broker Defendants merely performed work on behalf of Leber in listing, marketing, and selling the Marital Residence. It defies logic that the Broker Defendants (who receive a percentage of the sale price as commission) would conspire to decrease the value and price of the Marital Residence, as such does not benefit them in any manner.

Even if the Complaint can be read to allege the Broker Defendants had knowledge of the purported RICO scheme, "mere knowledge of the scheme . . . coupled with personal benefit, is not enough to impose liability for a RICO conspiracy" and would not salvage Petitioners' claims herein. Congregacion de la Mision Provincia de Venezuela v. Curi, 978 F. Supp. 435, 451 (E.D.N.Y. 1997).

Consequently, Petitioners' RICO conspiracy claims are defective on their face and must be dismissed to the extent asserted against the Broker Defendants.

5. Petitioners' Conspiracy To Breach Fiduciary Duty Claim Fails To State A Cause Of Action Against The Broker Defendants

It is well settled under New York law that there is no substantive tort of conspiracy and that in order to state a claim for conspiracy there must be allegations of an independent actionable tort. See Guthartz v. City of New

York, 84 A.D.2d 707, 707-708 (1st Dep't 1981). A plaintiff asserting vicarious liability by virtue of a conspiracy must allege facts showing: "(1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." Kottler v. Deutsche Bank AG, 607 F. Supp. 2d 447, 463 (S.D.N.Y. 2009). Under New York law, malice and intent both to participate in the alleged conspiracy and to injure the plaintiff are essential elements in conspiracy actions. Wegman v. Dairylea Coop., Inc., 50 A.D.2d 108, 114 (4th Dep't 1975), appeal dismissed, 38 N.Y.2d 918 (1976).

Here, not only have Petitioners failed to allege the underlying tort (i.e. breach of fiduciary duty by co-defendant Leber), but Petitioners have failed to allege the necessary agreement and intent on behalf of the Broker Defendants in furtherance of the tort. Indeed, the Complaint fails to set forth any facts establishing that the Broker Defendants and Leber came to an agreement or that the Broker Defendants took any overt acts in furtherance of that agreement. Instead, Petitioners merely allege that the Broker Defendants, at the direction of Leber, took actions which purportedly de-valued the Marital Residence. Nor have Petitioners alleged the requisite malice and intent required to plead a conspiracy claim, merely alleging the Broker Defendants followed the directions of Leber. Such allegations,

without more, cannot sustain a claim for conspiracy. See Kottler, 607 F. Supp. 2d at 463; Wegman, 50 A.D.2d at 114.

6. Petitioners' Unjust Enrichment Claim Was Properly Dismissed

The Petitioners assert a boilerplate claim for unjust enrichment against all defendants as well. In this count it is asserted that co-defendant Steinman "financially unjustly enriched all other Defendants in their conduct. . ." Aside from being nonsensical, this claim utterly fails to allege a claim for unjust enrichment.

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" Goel v. Ramachandran, 111 A.D.3d 783, 791 (2d Dep't 2013) (citations omitted). "[A] Petitioner's allegation that the [defendant] received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment." Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp., 14 A.D.3d 678, 680 (2d Dep't 2005). Further, [a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011).

Petitioners' claim here fails as against the Broker Defendants in numerous respects. First, Petitioners have not alleged (and did not maintain) a sufficient connection with the Broker Defendants to maintain an unjust enrichment claim. Petitioners did not hire, retain, or contract with the Broker Defendants. Instead, the Broker Defendants were hired by co-defendant Leber (the Court appointed receiver for the marital residence), approved by the court in the Divorce Action, and maintained a contractual relationship solely with Leber. Thus, the relationship is much too attenuated to support a claim of unjust enrichment. See Mandarin Trading Ltd., 16 N.Y.3d at 182.

Moreover, there are no indicia of an "enrichment" that was unjust. The only alleged compensation received by the Broker Defendants is the negotiated fee for listing and selling the marital residence. There are no allegations that this fee was an enrichment (rather than payment for services provided) or that came at Petitioners' expense. In fact, Petitioners did not pay the Broker Defendants for their services, they were compensated as a result of the sale of the Marital Residence (the proceeds of which Petitioners were not entitled to). This is insufficient to sustain a claim of unjust enrichment. See Kaye v. Grossman, 1999 U.S. Dist. LEXIS 688 (S.D.N.Y. Jan. 25, 1999) (holding even an indirect benefit to defendant from Petitioners' payment does not establish the specific and direct benefit necessary to support an unjust enrichment claim).

While Petitioners are dissatisfied with the ultimate (court approved) sale price for marital residence (which was obtained after being on the market for over a year), the fact that the Broker Defendants received a broker fee for their services does not render this transaction one of equitable injustice requiring a remedy to balance a wrong. There is simply nothing alleged – other than conclusory allegations - establishing why the Broker Defendants were not entitled to retain the fee paid to them as a result of over a year of work.

7. Petitioners' Bribery Claim Was Subject To Dismissal

Petitioners' Complaint fails to specify in precisely what vein she is asserting bribery. However, it is presumed Petitioners are attempting to allege a civil cause of action for commercial bribery. In this vein, New York law provides that "a person is guilty of commercial bribing . . . when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs...." N.Y. Penal Law § 180.03; see Am. Fed'n of State v. Bristol-Myers Squibb Co., 948 F. Supp. 2d 338, 358 (S.D.N.Y. 2013).

Petitioners' bribery allegations against the Broker Defendants fall woefully short of the pleading standard and lack the factual support to constitute a sufficiently alleged predicate act. Petitioners rely solely on their

conclusory and subjective belief that, by merely hiring the Broker Defendants to sell the marital residence, the co-defendant Leber somehow bribed the Broker Defendants to engage in certain unspecified conduct. Other than Petitioners' hollow contention that the "phase two RICO Defendants" compensated the Broker Defendants "for following through with acts of racketeering," Petitioners' Complaint contains no allegations indicating that the Broker Defendants accepted a bribe. Without any factual allegations, particularly any indicating an agreement to engage in the act constituting bribery, Petitioners' allegations are insufficient to sustain a claim. See People v. Canepa, 295 A.D.2d 247, 248 (1st Dep't 2002) (New York's bribery statute requires an "agreement" or "understanding," that " 'in the mind of the bribe maker that the bribe receiver would effectuate the proscribed corruption of public process and was affected to do so by the *actus reus* of this particular crime.'").

8. The Claims On Behalf Of T.A. And P.A. Must Be Dismissed

It is well-settled that a parent may not represent his or her child *pro se*. Cheung v. Youth Orchestra Foundation, Inc., 906 F.2d 59, 61 (2d Cir. 1990). Here, Lally is attempting to represent both herself and her two minor children *pro se*. Lally is not appearing in this action as an attorney and is not acting in her capacity as an attorney in representing her two minor children.

As such, Lally is precluded from representing the children's interests in this action and their claims were properly dismissed. Id.

B. Petitioners' Motion For Removal And Consolidation Was Properly Denied

Finally, Petitioners' motion to remove this appeal to another Circuit was properly denied. The only basis for this relief was the vague assertion that certain defendants are very influential and powerful attorneys, that defendant Cyganowski is a court-appointed receiver in the Eastern and Southern Districts of New York, and that Judge Bianco, who issued the order dismissing Petitioners' complaint in this action has been nominated for a position on the Second Circuit.

The foregoing is insufficient to warrant removal to another Circuit. Petitioners did not show that the Second Circuit could not review their appeal in an unbiased manner. Petitioners, in effect, were seeking to disqualify every judge in the Circuit, but has failed to demonstrate that disqualification of any judge is warranted under 28 U.S.C. § 455.

Nor was there any basis to consolidate this appeal with Kramer v. Dane, Docket No. 18-3141. Although there are certain overlapping legal issues in these two appeals, these appeals involve completely different parties and arise out of separate transactions.

Finally, it should be noted that the District Court properly found that any appeal from its Order would not be in good faith, and thus denied Petitioner in forma pauperis status for the purpose of any appeal and this portion of the motion was properly dismissed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to vacate the Motion Order of the Second Circuit Court of Appeals which was issued March 6, 2019, and which denied Petitioners' motion and dismissed the Petitioners' appeal, should be affirmed in its entirety, with costs.

Dated: Uniondale, New York
September 16, 2019

Respectfully submitted,
RIVKIN RADLER LLP
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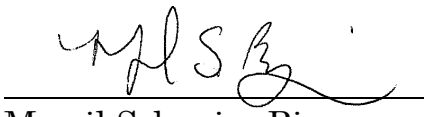
BROKER DEFENDANTS



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