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OPINIONS AND ORDERS

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

FILED
March 27,2023
Lyle W. Cayce
Clerk

No. 22-10314
Summary Calendar

GWENDOLYN D. GABRIEL; BARBARA J. GABRIEL; REGINA BROWN; BRITTNY WASHINGTON; KENNETH J. GABRIEL,
Plaintiffs-Appellants,

versus

MERRY OUTLAW; BRIDGETT ZOLTOWSKI; JUDGE TONYA PARKER; JOHN NATION; LORENZO BROWN; JOHN FRICK,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-60

Before WIENER, ELROD, AND ENGELHARDT, *Circuit Judges.*
PER CURIAM: *
Gwendolyn D. Gabriel, Barbara J. Gabriel, Regina Brown, Brittny Washington, and Kenneth J. Gabriel (collectively, "Plaintiffs") filed suit in the district court pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Merry Outlaw, Bridgett Zoltowski, Judge Tonya Parker, John Nation, Lorenzo Brown, and John Frick (collectively,

*This opinion is not designated for publication. *See* 5th Cir. R. 47.5

"Defendants"). The district court dismissed the claims of Regina Brown, Barbara Gabriel, Kenneth Gabriel, and Brittny Washington without prejudice for lack of subject matter jurisdiction. The court dismissed Gwendolyn Gabriel's claims seeking non-monetary relief for lack of subject matter jurisdiction and dismissed her claims seeking monetary relief for failure to state a claim. Plaintiffs timely appealed.

We review *de novo* the district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *Randall D. Wolcott, M.D., P.A. v. Sebelius,* 635 F. 3d 757, 762 (5th Cir. 2011). The district court adopted the recommendation of the magistrate judge ("MJ") to dismiss the claims of all Plaintiffs except Gwendolyn Gabriel for lack of standing. The MJ's implicit finding that Gwendolyn Gabriel had established Article III standing was correct, see Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58 (2014), so the district court should not have dismissed the case in part for lack of standing, see *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (stating that when at least one plaintiff has demonstrated standing, the court need not consider whether the other plaintiffs also have standing).

The district court also adopted the MJ's ruling that Plaintiffs' claims were barred by the *Rooker-Feldman* doctrine insofar as they sought an order that would void specific state court judgments and another order requiring the Defendants to remove notices of lis pendens that they had placed on identified properties. The Rooker-Feldman doctrine "is confined to...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." *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U. S. 280, 284 (2005). That doctrine does not apply to individuals who were not parties to the underlying state-court proceeding. *Lance v. Dennis*, 546 U.S. 459, 464 (2006). Because Gwendolyn Gabriel and Regina Brown are the only plaintiffs who were parties to the state court litigation at issue, here, the Rooker-Feldman doctrine bars only their claims-and the only to the extent that they seek "relief that directly attacks the validity of any existing state court judgment." *Weaver v. Texas Cap. Bank N.A.*, 660 F. 3d 900, 904 (5th Cir. 2011). We therefore affirm the district court's dismissal for lack of subject matter jurisdiction only as to the claims of Gwendolyn Gabriel and Regina Brown seeking reversal of the state court judgments. We also modify the district court's judgment to reflect that these claims are dismissed without prejudice.

Applying de novo review, *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Dir. 2018), we also affirm the dismissal of the remainder of the Plaintiffs' claims for their failures to state claims under Rule 12(b)(6), albeit for slightly different reasons than those expressed by the district court, see *Berry v. Brady*, 192 F. 3d 504, 507 (5th Cir. 1999) ("this Court may affirm on any basis supported by the record.").

"[A]ny RICO claim necessitates 1) a person who engages in 2) *a pattern of racketeering activity*, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Crowe v. Henry,* 43 F. 3d 198, 204 (5th Cir. 1995) (citation omitted). "A pattern of racketeering activity consists

of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009). A plaintiff must plead the elements of the criminal offenses that constitute the predicate acts, *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989), and must show that the alleged racketeering activity was both the "but for" and proximate cause of the injury to his business or property, *Holmes v. Sec. Inv. Prot. Corp,* 503 U.S. 258, 268 (1992).

The Plaintiffs' claim against Nation and Frick amount to complaints about their actions as attorneys in the underlying state court proceedings and cannot form the basis for civil RICO liability. *See Snow Ingredients, Inc. v. SnoWizard, Inc.*, 883 F. 3d 512, 525 (5th Cir. 2016/ The Plaintiffs' claims against Judge Parker arise out of acts performed in the exercise of her judicial function and are therefore barred by judicial immunity. *See Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir. 1994); *Ballard v. Wall*, 413 F. 3d 510, 515 (5th Cir. 2005).

With regard to Outlaw, Plaintiffs have not shown that her asserted predicate RICO acts "constitute or threaten long-term criminal activity," since all of her alleged wrongful acts were taken as part of her defense of the underlying state lawsuit, which has now ended. *In re Burzynski*, 989 F.2d 733, 742-43 (5th Cir. 1993). Further, Gwendolyn Gabriel has not plead facts sufficient to state a sexual harassment or retaliation claim against Outlaw under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Title VII"). See *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009).

With respect to Zoltowski, the Plaintiffs have

not demonstrated that her alleged attempt to bribe a witness in that state court via a settlement offer was a "but for" or proximate cause of any injury to their business or property. *See Holmes*, 503 U.S. at 268. Plaintiffs have also failed to state a RICO claim a RICO claim against Lorenzo Brown predicated on his alleged fraud because they have failed to plead the required elements of any type of fraud that is recognized as a RICO predicate act. See U.S.C. § 1961(1); *Elliot*, 867 F. 2d at 880. Neither has Gwendolyn Gabriel pleaded any facts that could form the basis of a sexual harassment or retaliation claim against Lorenzo Brown under Title VII. *See Iqbal*, 556 U.S. at 677-78.

Insofar as Plaintiffs challenge the district court's decision to issue a sanction warning, they have abandoned any such challenge by their failure to brief it on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1983).

In light of the foregoing, we MODIFY the district court's judgment to reflect dismissal of Gwendolyn Gabriel's and Regina Brown's claims without prejudice to the extent they sought reversal of the state court judgments, and we AFFIRM that judgment as thus MODIFIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN D. GABRIEL,	§	
BARBARA J. GABRIEL,	§	
REGINA BROWN,	§	
BRITTNY WASHINGTON,	§	
AND KENNETH J. GABRIEL,	§	
PLAINTIFFS,	§	
V.	§	CASE NO. 3:20-CV-§60-K-BK
MERRY OUTLAW,	§	
JOHN FRICK,	§	
LORENZO BROWN,	§	
BRIDGETT ZOLTOWSKI,	§	
ESTATE OF	§	
BRUCE TURNER,	§	
TONYA PARKER,	§	
JOHN NATION,	§	
ESTATE OF BENJAMIN	§	
STEPHENS,	§	
AND LATRENA BOOKER,	§	
DEFENDANTS.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED, ADJUDGED,** and **DECREED** that Defendant's motions to dismiss, Doc. 24, Doc. 27, Doc. 30, and Doc. 40, are GRANTED and this case is **DISMISSED WITHOUT PREJUDICE** as to Plaintiffs Barbara Gabriel, Regina Brown, Kenneth

Gabriel, and Brittny Washington, and **DISMISSED WITH PREJUDICE** as to Plaintiff Gwendolyn Gabriel.

IT IS FURTHER ORDERED that they Clerk shall transmit a true copy of this Judgment and the order accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge, to counsel for the parties.

SO ORDERED.

Signed March 2nd, 2022.

/s/Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN D. GABRIEL,	§	
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BRUCE TURNER,	§	
TONYA PARKER,	§	
JOHN NATION,	§	
ESTATE OF BENJAMIN	§	
STEPHENS,	§	
AND LATRENA BOOKER,	§	
DEFENDANTS.	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renee Harris Toliver made findings, conclusions and a recommendation in this case. Objections were filed by the plaintiffs. (*See* ECF Docs. 53, 54, 55, 56, and 57.) The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and

reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Plaintiffs' Objections are **OVERRULED**. Defendants' motions, Doc. 24, Doc. 27, Doc. 30, and Doc. 40, are **GRANTED**.

SO ORDERED.

Signed March 2nd, 2022.

/s/Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN D. GABRIEL,	§	
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TONYA PARKER,	§	
JOHN NATION,	§	
ESTATE OF BENJAMIN	§	
STEPHENS,	§	
AND LATRENA BOOKER,	§	
DEFENDANTS.	§	

FINDINGS, CONCLUSIONS,
AND RECOMMENDATION OF THE UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this case was referred to the United States magistrate judge for pretrial management. In this civil RICO action, the Court now considers the remaining Defendants' motions to dismiss[25], Doc. 24;

[25] Five defendants have already been dismissed from this suit.

Doc. 27; Doc. 30; Doc. 40. For the reasons that follow, Defendant's motions to dismiss should be **GRANTED** and all claims against Defendants should be**DISMISSED.**

I. BACKGROUND

Plaintiffs filed this *pro se* action[26] against various individuals involved in a state lawsuit that resulted in a substantial financial loss for Plaintiffs (the "State Suit"). Defendants include the opposing party, Merry Outlaw ("Outlaw"), and multiple counsel on both sides, including Lorenzo Brown ("Brown"), Bridgett Zoltowski ("Zoltowski"), and John Frick ("Frick"). Doc. 17 at 1, 3-4. Plaintiffs claim Defendants violated federal civil RICO law by covering up Outlaw's alleged perjury and fraud in the State Suit so that Defendants could obtain a money judgment against Plaintiffs. Doc. 17 at 3.

In response to Plaintiffs' operative *Complaint*, Doc. 17, remaining Defendants Frick, Brown, Zoltowski, and Outlaw filed motions to dismiss arguing, inter alia, that Plaintiffs' complaint should be dismissed under Rule 12(b)(1) because certain Plaintiffs lack standing, Doc. 24 at 6-7, Doc. 27 at 7-9, Doc. 30 at 6-7, and because the *Rooker-Feldman* doctrine[27] otherwise bars this suit, Doc. 24 at 2-6, Doc. 27 at 3-7, Doc. 30 at 2-6, Doc. 40 at 2-6.

II. RULE 12(b)(1) ANALYSIS

Where, as here, a Rule (b)(1) motion is filed in

Doc. 37; Doc. 43; Doc. 49.

[26] As defendants point out in their motions to dismiss, Gwendolyn Gabriel "has been licensed as an attorney by the State of Texas (State Bar No. 07563710) since May 10, 1991." Doc. 24 at 2: Doc. 27 at 2: Doc. 30 at 2.

[27] Rooker v. Fidelity Tr. Co., 263 U.S. 413, 415 (1923).

conjunction with other Rule 12 motions, the court considers the Rule 12(b)(1) motion first. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A Rule 12(b)(1) motion asserts that a court should dismiss a complaint for lack of subject matter jurisdiction. FED. R.CIV.P.12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998) (quotation omitted). The Court lacks subject matter jurisdiction when plaintiffs lack standing, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986), or when the *Rooker-Feldman* doctrine bars their claims, Rooker, 263 U.S. at 416, as are Defendants' contentions here. The Court concurs with Defendants' assessment.

1. Defendants Lack Standing

Article III of the Constitution requires that litigants have standing to sue in federal court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the standing requirement, plaintiffs generally need to demonstrate "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Standing's three constitutional requirements are: (1) injury in fact: (2) causation: and (3) redressability. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The injury-in-fact requirement must implicate "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. , 560 (1992) (internal quotations and citations omitted). Injuries in fact must be "suffered by the plaintiff, not someone else." *Stringer v. Whitley*, 942 F. 3d 715, 720-721 (5th Dir. 2019) citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)).

Here, Defendants argue Plaintiffs Barbara Gabriel, Regina Brown, Kenneth Gabriel, and Brittny Washington "lack standing to seek an award of monetary damages to [Gwendolyn] Gabriel." Doc. 24 at 6-7; Doc. 27 at 7-9; Doc. 30 at 6-7; Doc 40 at 6-7. Plaintiffs counter that they "were all directly injured by the unlawful conduct of the Defendant[s'] predicate acts even though they had nothing to do with and were not even a party to the state case." Doc. 34 at 3; Doc. 35 at 1 (incorporating Plaintiffs' response in Doc. 34); Doc. 41 at 2-3; Doc. 45 at 2-3.

Plaintiffs Barbara Gabriel, Regina Brown, Kenneth Gabriel, and Brittny Washington fail to specifically allege any injury they themselves suffered as a result of Defendants' purported actions and claim only injuries allegedly suffered solely by Gwendolyn Gabriel ("Gwendolyn"). As relief, Plaintiffs pray that the Court:

> Award Plaintiff Gwendolyn Gabriel a judgment in the amount of $4.8M in treble damages for Defendants' violation of the RICO Act by committing the predicate acts of perjury, fraud, bribery, mail fraud, obstruction of justice, witness tampering and jury tampering to prevent justice from being served, then giving plaintiff Gabriel's family property where Brittny Washington and her 3 children lived,

> placing Lis Pendens on Gabriel's family properties, including Gabriel's homestead (with a collective value of $1.5 million) in 2017 to present. Command the State Commission on Judicial Conduct and the State Bar of Texas to Void the Judgments awarding the Defendant/Perjurer more than $400,000+...and return the Plaintiffs' family's house, ...and reverse all judgments. Order the Defendants to remove all 3 Lis Pendens they placed, in their collection of an unlawful debt. Award a judgment in the amount of $5M for covering up the sexual harassment and retaliation against Plaintiff Gabriel, an individual with mental health disabilities, from the defendants Merry Outlaw and Lorenzo Brown.

Doc 17 at 20 (cleaned up). Also, Plaintiffs Barbara Gabriel, Kenneth Gabriel, and Brittny Washington did not appear in the State Suit in any capacity.[28] And while Regina Brown was a party to the State Suit, she nevertheless lacks standing for also failing to allege any injury she suffered.

"[A] RICO plaintiff only has standing, if and can only recover to the extent that, he has been injured in this business or property by reason of the conduct constituting the violation." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258,279 (1992) (quotation

[28] Only two Plaintiffs in this case were plaintiffs in the State Suit-Regina Brown and Gwendolyn Gabriel. Doc. 17-1 at 1.

omitted). RICO standing is limited "to those who have suffered injury in fact"- "those whom the defendant[s] [have] truly injured in some meaningful sense." *Id.* Here, Plaintiffs Barbara Gabriel, Regina Brown, Kenneth Gabriel, Brittny Washington claim no injuries to their personal businesses or property, and every injury for which those Plaintiffs seek redress was alleged to be suffered by Gwendolyn Gabriel alone.

For the foregoing reasons, all claims of Plaintiffs Regina Brown, Barbara Gabriel, Kenneth Gabriel, and Brittny Washington should be dismissed without prejudice for lack of standing.

2. Rooker-Feldman bars Plaintiffs' Claims for Declaratory Relief

In any event, the Rooker-Feldman doctrine bars the claims for non-monetary relief of any Plaintiff with standing. It provides that "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). "[F]ederal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts." *Weekly v. Morrow*, 204 F. 3d 613, 615 (5th Cir. 2000) (quotation omitted). Errors in state cases should be reviewed through the appellate process. *See Rooker*, 263 U.S. at 415. The Rooker-Feldman bar is not limited to actions in federal court that explicitly seek review of state court decisions, but also extends to those in which "the federal claims are inextricably intertwined with

a challenged state court judgment." *Weaver v. Tex. Cap. Bank N.A.*, 660 F. 3d 900, 904 (5th Cir. 2011) (citation omitted).

In the case *sub judice*, Defendants argue that the Court lacks subject-matter jurisdiction to hear Plaintiffs' claims (including those of Gwendolyn) under the *Rooker-Feldman* doctrine.[29] Doc. 24 at 1; Doc 27 at 1-2; Doc. 30 at 1; Doc. 40 at 2. Plaintiffs counter that, whereas the State Suit asserted a claim for fraud, here, they allege RICO violations and, as such, do not seek repudiation of the state court's judgment. Doc. 34 at 3; Doc. 35 at 1 (incorporating response in Doc. 34) Doc. 41 at 1-2; Doc. 45 at 2.

The record belies Plaintiffs' assertion, however, as the claims here directly stem from Defendants' purported actions during the State Suit. Thus, to the extent Plaintiffs ask the Court to: (1) "[c]ommand the State Commission on Judicial Conduct and the State Bar of Texas to Void the Judgments awarding" monetary damages in the state court proceedings; (2) return the Plaintiffs' family house"; (3) "reverse all judgments"; and (4) "remove all 3 Lis Pendens" Defendants placed, such claims are clearly barred by *Rooker-Feldman* and the Court lacks subject-matter jurisdiction to review them. Doc. 17 at 20; *Hale v. Harney*, 786 F. 2d 688, 690-91 (5th Cir. 1986). Although framed as a RICO action, such claims necessarily constitute a collateral

[29] As the Court noted supra, the other Plaintiffs' claims for monetary reef fail for lack of standing. However, assuming those Plaintiffs could demonstrate standing, the 12(b)(1) and 12(b)(6) analysis of Gwendolyn's claims would also result in their claims being barred.

attack on the validity of the State Suit. Stated differently, Plaintiffs can only prevail on the RICO claim alleged here if this Court reverses the state court's findings, which *Rooker-Feldman* prohibits.

Insofar as Plaintiffs request monetary damages based on Defendants' alleged RICO violations, however, their claim is not automatically barred by *Rooker-Feldman*. *Brown v. Anderson*, No. 3:16-CV-0620-D-BK, 2016 WL 6903730, at *2 (N.D. Tex. Oct. 5, 2016) Toliver, J.), adopted by 2016 WL 6893723 (N. D. Tex. Nov. 21, 2016) (citing Truong, 717 F.3d at 383; *Illinois Cent. R. Co. v. Guy*, 682 F.3d 381, 391 (5th Cir. 2012)). That notwithstanding, under the Court's Rule 12(b)(6) analysis (*infra*), the claims for monetary damages likewise fail.

III. RULE 12(b)(6) ANALYSIS

A complaint must be dismissed under Rule 12(b)(6) when it fails to plead enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqball,* 556 U.S. 662, 663 (2009) (citation omitted). When considering a motion to dismiss, the court accepts as true all well-pleaded facts and views those facts in a light most favorable to the plaintiff. *Campbell v. City of San Antonio*, 43 F. 3d 973, 975 (5th Cir. 1995). However, the Court is not required to accept legal conclusions. *Iqbal,* 556 U.S. at 664. Thus, conclusionary allegations cannot be accepted as true; rather, the complaint should be pled with a certain

level of factual specificity. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

RICO creates a civil cause of action for any individual "injured in his business or property by reason of a violation of section 1962." *Beck v. Prupis*, 529 U.S. 494, 495 (2000) (quoting 18 U.S.C § 1964(C)). To state a claim for a RICO violation under section 1962, a plaintiff must establish that the defendant "(1)...engage[d] in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *St. Paul Mercury Ins. Co. V. Williamson*, 224 F.3d425, 439 (5th Cir. 2000) (quotation omitted) (emphasis omitted). "Racketeering activity" is defined as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extorsion, dealing in obscene matter, or dealing in a controlled substance or listed chemical..., which is chargeable under State law and punishable by imprisonment for more than one year...." 18 U.S.C. § 1961(1)(A). "A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity." *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009). "The predicate criminal acts can be violations of either state or federal law." *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 524 (5th Cir. 2016)

Plaintiffs allege Defendants engaged in numerous "predicate acts" in violation of RICO, including, *inter alia*, perjury, fraud, fraud on the court, bribery of a witness, witness tampering, mail fraud, and obstruction of justice. Doc. 17 at 5 -11.

As set forth below, however, the complaint fails to state a legally sufficient RICO claim against any Defendant.

1. RICO Claims Against Outlaw

Plaintiffs allege Outlaw committed the predicate act of obstruction of justice and fraud, which was motivated by Outlaw's desire to cover up her sexual harassment and retaliation against Gwendolyn and "win hundreds of thousands in money and property" from her. Doc. 17 at 11. According to Plaintiffs' , Outlaw's *Amended Original Answer, Special Exceptions, and Counterclaim* filed in the State Suit were the culpable offenses. Doc. 17 at 5. Outlaw argues Plaintiffs' allegations are simply legal conclusions that the Court need not accept as true. Doc. 40 at 10. Outlaw counters that her actions during litigation of the State Suit "do not constitute predicate acts under RICO." Doc. 40 at 9.

Even assuming *arguendo* that the allegations in the pleadings filed in the State Suit could be considered the statements – let alone the perjured statements – of Outlaw, perjury is not among the listed predicate acts in section 1961. 18 U.S.C. § 1961(1). A few courts outside of this circuit have found that perjury may qualify as a predicate act under RICO because obstruction of justice in violation of 18 U.S.C. § 1503—arguably encompassing acts of perjury and fraud—is a listed offense. *Thomas v. Daneshgari*, 997 F. Supp. 2d 754, 761 (E.D. Mich. 2014) (citing as examples *C & W Constr. Co. v. Bhd. Of Carpenters & Joiners of Am.*, 687 F. Supp. 1453, 1467 (D. Haw. 1988), and *United States v. Mayer*, 775 F.2d 1387, 1391 (9th Cir. 1985)). Notably, however, those cases are limited to perjury

that occurred in federal proceedings, as section 1503 only applies to federal judicial proceedings. *Id;* 18 U.S.C. § 1503.

Although this issue has not yet been addressed by the Court of Appeals for the Fifth Circuit, numerous other circuits have found state perjury and fraud cannot constitute racketeering activity. *Giuliano v. Fulton*, 399 F. 3d 381, 388 (1st Cir. 2005) ("[G]eneric allegations of common law fraud that do not implicate the mails or wires...do not constitute racketeering activity under RICO."); *Pearce v. Romeo*, 299 F. App'x 653, 658 (9th Cir. 2008) (Perjury is not "within the type of state law crimes that constitute predicate acts under RICO."). The Seventh Circuit, citing the Second Circuit, expounded on this finding:

> Rather than develop a new category of prohibited acts, RICO borrowed other provisions of the federal criminal to define "racketeering activities." 18 U.S.C. § 1961(1). The statute cross-references various acts of witness tampering and obstruction of justice, but it does not include the criminal sanction for perjury, found at 18 U.S.C. § 1962. As the Second Circuit explained, "Congress did not wish to permit instances of federal or state court perjury as such to constitute a pattern of RICO racketeering activities, [demonstrating] an understandable reluctance to use federal criminal law as a back-stop for all state court litigation."

United States v. Eisen, 974 F. 2d 246, 254 (2d Cir. 1992).
Day v. Johns Hopkins Health Sys. Corp., 907 F.3d 766, 776-77 (7th Cir. 2018).

Although not binding, the reasoning of the Second and Seventh Circuit appellate courts is nevertheless instructive, and it is adopted here. The Court thus finds that the alleged perjury that took place in State Suit proceedings cannot reasonably constitute a predicate act for RICO purposes. Id. (citing *O'Malley v. N.Y.C. Transit. Auth.*, 896 F.2d 704, 708 (2d Cir. 1990)).

1. RICO Claims Against Zoltowski and Frick

Zoltowski and Frick represented Outlaw in various capacities in the State Suit. Doc. 17 at 3, 9. Plaintiffs allege Zoltowski's settlement offer to Plaintiff Regina Brown in the State Suit was really a veiled attempt at witness bribery and constituted mail fraud and obstruction of justice. Doc.17 at 6, 11-12. Plaintiffs allege Frick committed fraud and attempted to unlawfully collect a debt in the State Suit when he signed an abstract of judgment and filed three notices of lis pendens. Doc 17 at 1 – 14; Doc. 24 at 8-9. Frick and Zoltowski both aver these were protected litigation acts by an attorney. Doc. 24 at 8-9; Doc. 30 at 8-9.

Attorneys have qualified immunity from civil liability with respect to the claims of non-clients for actions taken in connection with representing a client. *Troice v. Proskauer Rose, LLP*, 816 F. 3d 341, 349 (5th Cir. 2016) citing *Cantey Hanger LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015)). An attorney

cannot be held liable to an opponent for conduct that requires "the office, professional training, skill, and authority of an attorney." *Taco Bell Corp. v. Craken*, 939 F. Supp. 528, 532 (N.D. Tex. 1996) (Fitzwater, J.) (citing *Martin v. Trevino*, 578 S. W.2d 763, 771 (Tex. App.-Corpus Christi-Edinburg 1978, writ ref'd n.r.e.)). Because Plaintiffs merely complain of Zoltowski and Frick's conduct in the representation of their client, Outlaw, they are entitled to qualified immunity.

2. RICO Claims Against Brown

Defendant Lorenzo Brown was Plaintiff Regina Brown's retained attorney in the State Suit (apparently the two are unrelated). Doc. 17 at 3. Plaintiffs allege Lorenzo Brown violated RICO in the State Suit by belatedly enjoining Gwendolyn for purposes of partitioning the Property against her will, which Plaintiffs contend was "accomplished to almost win $10,000" through the attempted bribery of her State Suit co-plaintiff. Doc. 17 at 11. They aver that Gwendolyn refused to sign a representation agreement with Lorenzo Brown, however, Doc. 17 at 3. Brown argues in his motion to dismiss that, *inter alia*, the actions Plaintiffs complain of were not criminal but were taken in the course of litigation, and therefore do not amount to predicate actions supporting a RICO claim. Doc. 27 at 11-12. Plaintiffs disagree that Brown's status as an attorney absolves him of liability under RICO. Doc. 45 at 4.

As discussed *supra*, Brown is protected by qualified immunity for acts taken as attorney in the

scope of litigation. Even actions that violate lawyers' rules of professional conduct but are not crimes in and of themselves cannot be the requisite predicate acts to establish a RICO pattern. *St. Germain*, 556 F.3d at 263. The specific acts Plaintiffs attribute to Brown and contend amounted to fraud, perjury, and bribery are merely those of legal counsel related to and done during the course of litigation and, as such, cannot support a RICO claim.

Further, Brown's alleged sexual harassment of Gwendolyn is insufficient to state a claim under RICO—she demonstrates no pattern of racketeering activity as related to the alleged misconduct, which, as Brown points out, occurred, in 2012 at the least.[30] Doc. 27 at 12; *see Fowler v. Burns Intern. Sec. Servs. Inc.,* 763 F. Supp. 862 (N.D. Miss. 1991) (finding extortion claim rooted in sexual harassment did not qualify as racketeering activity" as defined in 18 U.S.C. § 1961(1)(A) absent a threat of future criminal conduct, so plaintiff could not establish a pattern of racketeering activity).

For the foregoing reasons, Plaintiffs' – and

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[30] RICO actions are subject to a four-year-statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,* 483 U.S. 143, 156 (1987). The Fifth Circuit follows the "injury discovery" rule, "under which the limitations period runs from the date when a plaintiff knew or should have known of his injury." *Boulmay v. Rampart* 920 Inc., 124 F. App'x 889, 901 (5th Cir. 2005) (quoting *Rotella v. Wood*, 528 U.S. 549, 553-54 (2000))"In *Rotella,* the Supreme Court rejected a limitations period that begins to run only when the plaintiff discovers both an injury and a pattern of RICO activity." Id. (citing *Rotella*, 528 U.S. at 552-54). Here, the alleged harassment occurred no later than in 2012. Doc. 27 at 12. Plaintiffs did not bring this RICO action until January 2020, more than seven years later. Doc. 3 at 1.

specifically Gwendolyn's—claims all fail.

3. Leave to Amend

Although a court may dismiss a claim that fails to meet the pleading requirements, "it should not do so without granting leave to amend, unless the defect is simply incurable or the plaintiff has failed to plead with particularity after repeated opportunities to do so." *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000). Here, the defects in Plaintiffs' complaint are, as outlined above, simply incurable. Granding leave to amend would be futile and the Court is under no obligation to do so.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss, Doc. 24, Doc. 27, Doc. 30, and Doc. 40, should be **GRANTED**. Plaintiffs Barbara Gabriel, Regina Brown, Kenneth Gabriel, and Brittny Washington's claims should be **DISMISSED WITHOUT PREJUDICE** for lack of standing, and Plaintiff Gwendoly Gabriel's claims (and alternatively those of the other Plaintiffs should be **DISMISSED WITH PREJUDICE** in accordance with the Rooker-Feldman doctrine and for failure to state a claim upon which relief can be granted.

SO RECOMMENDED on February 14, 2022.

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(B). An objection must identify the finding or recommendation to which objection is made, state the basis for the objection, and indicate where in the magistrate judge's report and recommendation the disputed determination is found. An objection that merely incorporates by refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual finding and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Services Automobile Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996), modified by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN GABRIEL, ET.AL. PLAINTIFFS,	§
V.	§
	§CASE NO. 3:20-CV-60-K-BK
TONYA PARKER, ET. AL. DEFENDANTS.	§

ORDER ACCEPTING THE FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renee Harris Toliver made findings, conclusions and a recommendation on Defendant Honorable Judge Tonya Parker's Motion to Dismiss. Objections were filed, and the Court has made a de novo review of those portions of the proposed findings, conclusions, and recommendation to which objections were made. The objections are overruled, and the Court accepts the Findings, Conclusions and Recommendation of the United States Magistrate Judge. Defendant the Honorable Judge Tonya Parker's Motion to Dismiss is **GRANTED**. Plaintiffs' claims against Defendant Tonya Parker are **DISMISSED WITH PREJUDICE**, and Defendant Tonya Parker is **DISMISSED** from this case.

SO ORDERED.

Signed November 18, 2021.

/s/Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN GABRIEL, ET.AL. PLAINTIFFS,	§
V.	§
	§CASE NO. 3:20-CV-60-K-BK
TONYA PARKER, ET. AL. DEFENDANTS.	§

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this case was referred to the United States magistrate judge for pretrial management. Doc. 1. The Court now considers *Defendant the Honorable Judge Tonya Parker's Motion to Dismiss.* Doc. 31. As detailed here, the motion should be **GRANTED** and all of Plaintiffs' claims against Judge Parker should be **DISMISSED WITH PREJUDICE.**

I. BACKGROUND

Plaintiffs filed this pro se suit against various individuals who were involved in a state lawsuit that resulted in a substantial financial loss for Plaintiffs (the "State Suit")[31]. Defendants include Merry Outlaw (opposing party), multiple counsel on both

[31] Of Plaintiffs in the instant suit, only two were named-plaintiffs in the State Suit—Regina Brown and Gwendolyn Gabriel. Doc. 17-1 at 1.

sides, and the presiding judge, Judge Tonya Parker ("Judge Parker"). Doc. 17 at 1. Plaintiffs claim Judge Parker violated 18 U.S.C. § 1962(a)-(d) ("RICO") during the State Suit by "furthering the intent of a bribe," obstructing justice, and corruptly influencing" Plaintiffs' attorney. Doc 17 at 3.

In response to Plaintiffs' *Amended Complaint*, Doc. 17, Judge Parker filed the instate motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rule of Civil Procedure based on judicial immunity, Eleventh Amendment immunity, and the *Rooker-Feldman* doctrine, Doc. 31.

II. APPICABLE LAW

A Rule 12(b)(1) motion asserts that a court should dismiss a complaint for lack of subject matter jurisdiction. FED. R.CIV.P.12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quotation omitted). The Court considers a motion to dismiss based on immunity under Rule 12(b)(6), however, rather than Rule 12(b)(1) because "arguments for immunity are attacks on the existence of a federal cause of action." *Morrison v. Walker*, 704 Fed. App'x 369, 372 n.5 (5th Cir. 2017) (citing see *Daniel v. Ferguson*, 839 F. 2d 1124m 1127 (5th Cir. 1988) ("when a defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper procedure for the district court is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case.")).

A plaintiff fails to state a claim for relief

under Rule(b)(6) when the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). A plaintiff's complaint should "contain either direct allegations on every material point necessary to sustain a recovery or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quotation omitted).

III. ANALYSIS

Judge Parker moves to dismiss Plaintiffs' amended complaint arguing, inter alia, that Plaintiffs are challenging actions she took in her capacity as a judicial officer; thus, judicial immunity bars such claims. Doc. 32 at 4-6. Plaintiffs respond, in relevant part, that Judge Parker's actions were illegal "acts to obstruct justice." Doc. 33 at 3. Specifically, Plaintiffs assert Judge Parker committed fraudulent extrajudicial acts during the state suit, including (1) blocking the testimony of the plaintiffs' witness; (2) dismissing that witness without explanation; and (3) corruptly influencing the plaintiffs' attorney to withdraw their objections to the jury charge. Doc. 33 at 2. Upon review, the finds Judge Parker's argument is well-founded and entirely disposes of Plaintiffs' claims against her. As such, the Court need not reach her Eleventh Amendment and *Rooker-Feldman* arguments.

A. Judicial Immunity

Judges enjoy absolute immunity for actions taken in the performance of their judicial duties, *Nixon v. Fitzgerald*, 457 U.S. 731, 745-46 (1982), and are immune from suit for

damages resulting from any judicial act, *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Allegations of bad faith or malice do not defeat judicial immunity. Id. At 11. A plaintiff can only overcome the bar of judicial immunity in two limited circumstances. Id. At 11-12. The first is when the judicial action was "taken in the complete absence of all jurisdiction." Id. At 12 (citations omitted).

The second exception to the judicial immunity bar is when the complained-of action is not "judicial" in nature. Id. At 11. In making this determination, the Court analyzes four factors:

> (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in [her] official capacity. These factors are broadly construed in favor of immunity.

Davis v. Tarrant Cnty, 565 F.3d 214, 222-23 (5th Cir. 2009) (citations omitted). All four factors need not be met for judicial immunity to apply. *Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005 (citation omitted).

Here, all of Plaintiffs' allegations against Judge Parker are premised on her actions as presiding judge in the State Suit. See, e.g., Doc 17 at 3 (blocking of a witness's testimony at trial and dismissing that witness); Doc. 17 at 8, 14(conducting in camera conversations with counsel).

Further, Plaintiffs admit in their response to the instant motion that blocking the witness's testimony and dismissing him were judicial actions protected by judicial immunity, despite Plaintiff's' belief that they were done with the intent to carry out the alleged bribe. Doc. 33 at 3-4. In fact, all of Judge Parker's contested actions – deciding who may properly testify, presiding over the same parties' subsequent litigation, and speaking with counsel in camera – are normal judicial functions. See *Carter v. Carter*, No 3:13-CV-2939-D, 2014 WL 803638, at *2 (N.D. Texas Feb. 20, 2014 (Stickney, J.) (finding that issuing orders, communicating with counsel, and holding hearings are all normal judicial functions). Even if deemed true, Plaintiffs' scurrilous allegations that Judge Parker performed judicial acts pursuant to a bribe or conspiracy fail – as do their baseless allegations that Judge Parker discriminated against Plaintiff Gwendolyn Gabriel because of her sexual orientation and disabilities – because the judge's motivation is of no moment. See *Ballard*, 413 F.3d at 515 (("[I}t is the Judge's actions alone, not intent, that [the Court] must consider" in applying judicial immunity.); see also Doc. 33 at 6. Finally, Judge Parker's judicial acts as presiding judge over the State Suit were not taken in the complete absence of all jurisdiction. See *Aubrey v. D Mag. Partner*, L.P., No. 3:19-CV-0056-B, 2019 WL 2549458m at *3 (concluding Texas state court judges have "original jurisdiction over all civil matters when the amount in controversy is over $500) (citing TEX. CONST. art. V, § 8; TEX. GOV'T CODE § 24.007)). Accordingly, Plaintiffs' claims against Judge Parker should be **DISMISSED** based on judicial immunity.

B. Leave to Amend

Originally, pro se plaintiffs should be granted leave to amend their complaint prior to dismissal. However, leave to amend it not required when plaintiffs have "already pleaded [their] 'best case.'" *Brewster v. Dretke*, 587 F.3d 764, 767-68 (5th Cir. 2009) (quotation omitted). Plaintiffs have previously amended their complaint, and , as discussed herein, Plaintiffs' claims against Judge Parker are fatally infirm. Thus, granting them leave to amend would be futile and cause needless delay.

IV. CONCLUSION

For the foregoing reasons, Defendant the Honorable Judge Tonya Parker's Motion to Dismiss, Doc. 31, should be **GRANTED**. Plaintiffs' case against Judge Parker should be **DISMISSED WITH PREJUDICE**, and she should be terminated as a Defendant in this case.

SO RECOMMENDED

on November 5, 2021.

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy.

See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(B). An objection must identify the finding or recommendation to which objection is made, state the basis for the objection, and indicate where in the magistrate judge's report and recommendation the disputed determination is found. An objection that merely incorporates by refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual finding and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Services Automobile Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996), modified by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN GABRIEL, ET.AL. PLAINTIFFS,	§
V.	§CASE NO. 3:20-CV-§60-K-BK
Merry Outlaw, ET. AL, DEFENDANTS.	§

AMENDED ORDER ACCEPTING THE FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renee Harris Toliver made findings, conclusions and a recommendation on Defendant John Nation's Motion to Dismiss for Failure to State a Claim. No objections were filed. The Court reviewed the proposed findings, conclusions and recommendation for plain error. Finding none, the Court **ACCEPTS** the Findings, Conclusions and Recommendation of the United States Magistrate Judge. Defendant John Nation's Motion to Dismiss for Failure to State a Claim is **GRANTED**. Plaintiff's claims against Nation are **DISMISSED WITH PREJUDICE.**

SO ORDERED.

Signed June 30, 2021.

/s/Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN GABRIEL, ET.AL. PLAINTIFFS,	§
V.	§CASE NO. 3:20-CV-§0060-K-BK
Merry Outlaw, ET. AL, DEFENDANTS.	§

ORDER ACCEPTING THE FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

United States Magistrate Judge Renee Harris Toliver made findings, conclusions and a recommendation on Defendant John Nation's Motion to Dismiss for Failure to State a Claim. No objections were filed. The Court reviewed the proposed findings, conclusions and recommendation for plain error. Finding none, the Court **ACCEPTS** the Findings, Conclusions and Recommendation of the United States Magistrate Judge. Defendant John Nation's Motion to Dismiss for Failure to State a Claim is **GRANTED**. Plaintiff's claims against Nation are **DISMISSED WITHOUT PREJUDICE** to Plaintiffs' filing an amended complaint. If, within 14 days of this order, Plaintiffs fail to amend their complaint to cure the deficiencies noted herein, at the re-urging of Nation, those claims will be **DISMISSED WITH PREJUDICE.**

SO ORDERED.

Signed March 17, 2021.

/s/Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GWENDOLYN GABRIEL, ET.AL. PLAINTIFFS,	§
V.	§CASE NO. 3:20-CV-§60-E-BK
Merry Outlaw, ET. AL, DEFENDANTS.	§

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to *Special Order 3* and 28 U.S.C. § 636(b), this case was referred to the United States magistrate judge for pretrial management. Doc. 1. The Court now considers Defendant *John Nation's Motion to Dismiss for Failure to State a Claim*, Doc. 8. Upon review, the motion should be **GRANTED.**

I. BACKGROUND

Plaintiffs filed this pro se suit against various individuals who were involved in a state lawsuit that resulted in a substantial financial loss for Plaintiffs, including the opposing party, multiple counsel on both sides, and the presiding judge. Doc. 3 at 2-3. Plaintiffs allege Defendants engaged in a RICO enterprise and conspiracy that included the commission of, *inter alia*, perjury, obstruction of justice, bribery, mail fraud, witness tampering, and jury tampering, all of which occurred during the

state lawsuit and contributed to Plaintiffs' loss. Coc. 3 at 3, 17. Plaintiffs also claim the intentional infliction of emotional distress (IIED) based on the same acts. Doc 3 at 15.

Defendant John Nation, Plaintiffs' appellate attorney in the state lawsuit, Doc. 3 at 11, filed the instant motion to dismiss, Doc. 8[32]. Plaintiffs have filed a response in opposition. Doc. 12.

II. APPICABLE LAW

A plaintiff fails to state a claim for relief under Rule 12(b)(6) when the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell At. Corp. v. Twombly,* 550 U.S. 544 (2007). In making this determination, the court accepts "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches, Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) internal quotation marks and citations omitted). However, the court cannot "accept as true conclusory allegations or unwarranted deductions of facts." *Collins v. Morgan Stanley Dean Witter*, 224 F. 3d 496, 498 (5th Cir. 2000) (internal citation and quotation marks omitted). To survive a motion to dismiss, a plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 550 U.S. at 55 (internal citations and footnote omitted).

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[32] As of the filing of this Recommendation, no other Defendants have been served with process.

III. ANALYSIS

A. RICO Claim

Plaintiffs claim Defendants are part of a RICO enterprise organized against them for the sole purpose of throwing the state lawsuit to the opposing party. Doc. 3 at 3. Plaintiffs allege Defendants committed a variety of crimes in service of that enterprise. Doc. 3 at 3, 17. Nation allegedly committed his RICO acts during his preparation for and oral argument in front of the state court of appeals. Doc. 3 at 17, 20. Specifically, Plaintiffs allege Nation committed obstruction of justice, perjury, and conspiracy by lying to the court during oral argument, not designating proper documents for the court's record, and colluding with the opposing party. See Doc. 3 at 11-12, 17, 20. Nation responds that Plaintiffs have failed to plausibly allege the essential elements of a RICO claim. Doc. 8 at 7. Nation argues, inter alia, that the alleged acts were not crimes, but actions taken during the course of litigation, which do not amount to predicate actions supporting a RICO claim. Doc. 8 at 8. Further, Nation argues Plaintiffs did not properly allege a RICO conspiracy because they did show an agreement between Nation and another party to commit a criminal act. Doc. 8 at 10-11.

A RICO claim has three elements: "1) a person engages in, 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." *St. Germain v. Howard*, 556 F. 3d 261, 263 (5th Cir. 2009) (citation omitted). A pattern of racketeering activity consists of two or more predicate criminal acts, federal or state, "that are 1) related and 2) amount to or pose a threat of

continued criminal acts, federal or state, "that are 1) related and 2) amount to or pose a threat of continued criminal activity." *Id.* A RICO conspiracy claim requires one additional element – there must be an agreement between the conspirators to specifically commit the alleged predicate acts. *Snow Ingredients, Inc. v. Sno Wizard, Inc.*, 833 F.3d 512, 526 (5th Cir. 2016).

Civil RICO liability does not exist unless the pleadings allege actual criminal activity. *Id.* Actions that violate lawyers' rules of professional conduct but are not crimes themselves cannot be the requisite predicate acts to establish a RICO pattern. *St. Germain*, 556 F. 3d at 263. Construing counsel's litigation acts, even bad-faith acts or acts that violate professional rules, as federal crimes for RICO purposes "would undermine the policies of access and finality that animate our legal system." *Snow*, 833 F.3d at 525 (citation omitted). Simply put, poor lawyering does not expose counsel to civil RICO liability. See id.

Moreover, Plaintiffs' complaint does not plausibly allege the necessary elements of a RICO claim on many fronts, including that it is absent of any factual allegations demonstrating a pattern of racketeering behavior. Plaintiffs allege in conclusory fashion that Nation committed various criminal acts such as perjury, obstruction of justice, and conspiracy – but the mere invocation of such crimes is insufficient to state a claim. Plaintiffs must plead plausible facts that show Nation committed such predicate offenses, and they have wholly failed to do so. Even construing Plaintiffs' pro se pleadings liberally, the specific acts they attribute to Nation are merely those of legal counsel

related to and done during the course of litigation. Thus, they cannot support a RICO claim. See *Johnson v. Pfeiffer*, 821 F. 2d 1120, 1122 (5th Cir. 1987) (*pro se* complaints must be held to a less rigorous standard than pleadings prepared by lawyers). See *Snow*, 833 F.3d at525 (non-criminal acts taken by counsel during a lawsuit can never be the proper predicate for RICO).

B. IIED Claim:

Plaintiffs also claim Nation, through the same ostensibly illegal acts alleged in their RICO claim, intentionally inflicted emotional distress on them. Doc. 3 at 15. Nation argues the claim should be dismissed because Plaintiffs have not plausibly alleged facts to establish the essential elements of this tort. Doc. 8 at 15.

To plausibly allege IIED under Texas law, a plaintiff must establish that (1) a person acted intentionally or recklessly, (2) the person's conduct was extreme or outrageous, (3) the conduct caused the plaintiff's emotional distress, and (4) the distress was severe. *Guthrie v. Tifco Ind.*, 941 F.2d 374, 379 (5th Cir. 1991). The bar for extreme or outrageous conduct is high. Tortious or otherwise wrongful conduct does not, by itself, satisfy this element. *Bradford v. Vento*, 48 S. W.3d 749, 758 (Tex. 2001). To be sufficient, the alleged conduct must be so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in civilized society. *Id.* Plaintiffs' allegations do not come close to meeting this high bar.

As with their RICO claim, Plaintiff

allegations against Nation solely relate to his conduct as counsel in the state lawsuit. See, e.g., Doc, 3 at 11-12, 14, 17, 20-21. The complaint is devoid of plausible facts establishing that Nation's conduct was sufficiently outrageous or extreme. No matter how dissatisfied Plaintiffs are with Nation's performance as their counsel in the state action, their mere allegations that Nation committed acts that caused Plaintiffs distress are insufficient to state a legally cognizable claim of IIED. Thus, Plaintiffs' claim for IIED against Nation should be dismissed.

C. Leave to Amend

Generally "a pro se litigant should be offered an opportunity to amend his complaint before it is dismissed." *Brewster v. Dretke*, 587 F. 3d 764, 767-68 (5th Cir. 2009). However, the Court is not required to frant leave to amend "if the plaintiff has already pleaded his best case.'" *Id.*

For the reasons outlined here, Plaintiffs' claims are fatally infirm. In sum, Plaintiffs' dissatisfaction with Nation's legal actions taken in the course of the previous state litigation can never support an IIED or RICO claim. Further, Plaintiffs' have not even suggested any other factually plausible bases to support such claims in either their complaint or response to the motion to dismiss. Under these circumstances, the Court can only conclude that Plaintiffs' have pled their best case against Nation and that granting leave to amend would be futile and cause needless delay.

IV. CONCLUSION

Defendant John Nation's Motion to Dismiss for

Failure to State a Claim, Doc. 8, should be **GRANTED**. Plaintiffs' claims against Nation should be **DISMISSED WITH PREJUDICE.**

SO RECOMMENDED on March 1, 2021.

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(B). An objection must identify the finding or recommendation to which objection is made, state the basis for the objection, and indicate where in the magistrate judge's report and recommendation the disputed determination is found. An objection that merely incorporates by refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual finding and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996), modified by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

ADA BROWN
214/753-2360 Chambers
U. S. DISTRICT JUDGE
214/753-2660 Facsimile

March 16, 2021

Karen Mitchell
Clerk of Court
United States District Court
Northern District of Texas
1100 Commerce Street
Dallas, TX 75242

Re: 3:20-cv-00060-E-BK; Gabriel v. Outlaw, et al.

Dear Ms. Mitchell:

I hereby recuse myself from the above styled and numbered case. Please see that it is assigned to another judge per the usual procedure.

Sincerely,

/s/Ada Brown
ADA BROWN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended. ***NOTE TO PUBLIC ACCESS USERS* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

If you need to know whether you must send the presiding judge a paper copy of a document that you have docketed in this case, click here: Judge's Copy Requirements. Click here to see Judge Specific Requirements. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge.

U.S. Court

Northern District of Texas

Notice of Electronic Filing

The following transaction was entered on 3/3/2022 at 12:29 PM CST and filed on 3/3/2022

Case Name: Gabriel et al v. Outlaw et al

Case Number : 3:20-cv-00060-K-BK

Filer:

WARNING: CASE CLOSED ON 03/02/2022

Document Number: 60(No document attached)

Docket Text:
Electronic Order: Pursuant to 28 U.S.C 636(b) and Special Order 3, this case was referred to the United States magistrate judge for pretrial management. Doc. 1. The Court now considers Defendant John Nations Motion for Sanctions. Doc. [21]. Upon careful review of the motion, Plaintiffs' response, Doc. [23], and other relevant pleadings and orders, the relief requested is DENIED. See McCampbell v. KPMG Peat Marwick, 982 F. Supp. 445, 448 (N.D. Tex. 1997) (J. Kaplan)(Pro se litigants should be sanctioned under Rule 11 "only after successive attempts to press a wholly frivolous claim."). Nevertheless, Plaintiffs are admonished that filing any further frivolous actions based on the same subject matter as this lawsuit may subject them to monetary or other sanctions.
(Ordered by Magistrate Judge Renee Harris Toliver on 3/3/2022) (Magistrate Judge Renee Harris Toliver)

When RICO violations collided with Petitioners' Constitutional Rights: the Judge Rewarded the Association $300K+, and if that wasn't enough, the Judge Rewarded Outlaw this Petitioners' house where Petitioner Brittny and her children lived.

When RICO violations collided with Petitioners' Constitutional Rights: Petitioners invested a lot of money and the 3 children invested a lot of sweat equity to make their house a home in 2016, then moved in before the Judge Rewarded it to Outlaw, after committing the predicate acts, in 2018.

(Handwritten letters (typed up) to the Judge when children had nowhere to live after the Judge Rewarded Outlaw their home; filed 3/2021.)

Dear Judge,

When I was served the eviction papers from the constable I was heartbroken. That was my home that I put blood, sweat and tears in. It was in the perfect location for me and my kids. It was in the middle of my parents and granny and the next street over from the kids school. When I was told to move it was a shocker to me and short notice. I didn't have nowhere to go. I had to ask this person and that person to stay with them until I found me and my kids a place to stay which was stressful for me.

-Brittny Washington
(mother)

Dear Judge,

When they told me we had to move I was sad because it was the perfect house for us and we was right down the street from both of my grannys and all we had to do was walk and that's it. But if I had the chance to move back in I would.

-Saniya

Dear Judge,

When my mama told me that we was moving out our house I was upset because it was just right for my family. I miss going to the game room and having family game night and having my friends come over for a sleep over and stuff. I also miss my room it was so big and it had so much light. I miss it so much.

-Zavarhi

Dear Judge,

When my mom told me we was moving out our home I was sad and didn't know what to do. So I keep asking my mom why cant we just stay here. She kept saying no. At that time I did not know why we had to move. I miss my own room and the game room.

-Emadrei

When RICO violations collided with Petitioners' Constitutional Rights: Outlaw, after committing predicate acts, gave Petitioner Brittny and her children 3 days to get out in 2018, and now she has made over $100,000 so far on this house, her 8th or 9th rental house + still has Lis Pendens on Petitioners' 3 other houses.