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APPENDIX A — DENIAL OF PETITION FOR REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 4TH, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20135

DANIEL MONTES, JR.,

Plaintiff—Appellant,

Versus

BERTHA A. TIBBS,

Defendant— Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-1352

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before WILLETT, DUNCAN, and RAMIREZ, Circuit Judges.

PER CURIAM: The petition for panel rehearing is **DENIED.** Because no member of the panel or judge

in regular active service requested that the court be polled on rehearing en banc (FED. R. App. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is **DENIED.**

APPENDIX B — JUDGMENT AFFIRMED AS MODIFIED OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 16TH, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20135

DANIEL MONTES, JR.,

Plaintiff—Appellant,

Versus

BERTHA A. TIBBS,

Defendant— Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-1352

Before WILLETT, DUNCAN, and RAMIREZ, Circuit Judges.

PER CURIAM: In this breach-of-contract dispute, the appellant appeals the dismissal of his complaint for lack of subject-matter jurisdiction and his designation as a vexatious litigant. We **AFFIRM** the judgment as **MODIFIED**. I. Daniel Montes, Jr., a citizen of Mexico, seeks damages for an alleged

breach of an oral contract between his mother and several other family members, all of whom are citizens of Texas, to share the costs of support for Montes's grandmother. Montes alleges that the other family members stopped contributing to his grandmother's support, which allegedly required Montes's mother to pay the costs herself. This in turn reduced the money he stood to inherit. Montes asked his mother to assign the interest in her claim for breach of the agreement to him, and he filed this pro se lawsuit against his aunt, Bertha Tibbs, on April 7, 2023. On June 2, 2023, Tibbs moved to dismiss the complaint for lack of subject-matter jurisdiction and designate Montes as a vexatious litigant. The district court found that although the parties appeared diverse on the face of the complaint under 28 U.S.C. § 1332(a), Montes's citizenship was procured improperly under 28 U.S.C. § 1359, so diversity jurisdiction was absent. It also found that Montes was a vexatious litigant and barred him "from filing further pleadings or actions in the Southern District of Texas without the prior written permission of the Chief Judge of the United States District Court for the Southern District of Texas or his or her designee." The district court entered final judgment on March 14, 2024, dismissing Montes's claims with prejudice. Montes timely appealed. II A Although the district court found diversity jurisdiction lacking, we have jurisdiction to evaluate the district court's determination, see Williams v. Homeland Ins. Co. of

N.Y., 18 F.4th 806, 811 (5th Cir. 2021), which we review de novo, IFG Port Holdings, L.L.C. v. Lake Charles Harbor & Terminal 1 The district court noted that Montes had previously been labeled as a "vexatious litigant" in prior litigation with many of the same family members who were parties to the agreement to provide support for his grandmother. Dist., 82 F.4th 402, 408 (5th Cir. 2023). "The party seeking the federal forum, here [Montes], has the burden of establishing diversity jurisdiction." SGK Props., L.L.C. ». U.S. Bank Nat'l Ass'n, 881 F.3d 933, 939 (5th Cir. 2018). We conduct this analysis bearing in mind that "document[s] filed prose[are] 'to be liberally construed.'" Erickson v. Pardus,551U.S. 89,94 (2007) (per curiam) (quoting Estelle v. Gamble, 429 U.S. 97,106 (1976)). B The complaint asserts that Montes and Tibbs are citizens of Mexico and Texas, respectively. "Under 28 U.S.C. § 1332(a), diversity jurisdiction exists when there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000."2 Bynane v. Bank of N.Y. Mellon for CWMBS, Inc. Asset-Backed Certificates Series 2006-24, 866 F.3d 351, 355 (5th Cir. 2017). Diversity of the parties exists where "the matter in controversy" is between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2). Here, however, the district court determined that Montes improperly procured his citizenship to invoke diversity jurisdiction via the assignment of his mother's claim. See id. § 1359. Under § 1359, district courts have no jurisdiction over "civil action[s] in which any party, by assignment or otherwise, has been improperly or

collusively made or joined to invoke" jurisdiction. "Section 1359 is designed to prevent the litigation of claims in federal court by suitors who by sham, pretense, or other fiction acquire a spurious status that would allow them to invoke the limited jurisdiction of the federal courts." Nolan ». Boeing Co., 919 F.2d 1058, 1067 (5th Cir. 1990); see id.(describing the statute's purpose as "prevent[ing] the manipulation of jurisdictional facts where none existed before"). "In effect, Section 1359 closes the federal courthouse doors to controversies that properly should be litigated in state Tribunals." 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PRACTICE § 3637 (3d ed.). As the party invoking jurisdiction, Montes must demonstrate that he did not act improperly to procure diversity jurisdiction. In making its determination, the district court considered six factors: (1) whether there was nominal or no consideration involved in the assignment; (2) whether the assignee had any previous connection to the assigned claim; (3) whether there was a legitimate business reason for the assignment; (4) whether the timing of the assignment suggests it was merely an effort to secure federal diversity jurisdiction; (5) whether the assignor exercises any control over the conduct of the litigation; and (6) whether the assignor retains any interest in the
action such as receiving a portion of the assignee's recovery. Hytken Fam. Ltd. v. Schaefer, 431 F. Supp.

The parties do not contest that the amount-in-controversy requirement is met.

2d 696, 699-700 (S.D. Tex. 2006).3Montes first contends that consideration was paid for the assignment. But the evidence he points to is the assignment itself, which only states that "other good and valuable consideration" was exchanged. This evidence does not permit an evaluation of whether the consideration was paid and, if so, whether it was nominal. Montes contends that the consideration was a Montes contends that these factors constitute an incorrect legal standard. Other circuits consider additional (albeit functionally identical) factors. See, e.g., Branson Label, Inc. v. City of Branson, 793 F.3d 910, 916-17 (8th Cir. 2015) (eight factors); Nat'l Fitness Holdings, Inc. v. Grand View Corp. Ctr., LLC, 749 F.3d 1202, 1205-06 (10th Cir. 2014) (seven factors). Nevertheless, these factors are only a "helpful guide" in the §1359 analysis—they are a non-exhaustive list of considerations for answering the ultimate question of "whether an assignment of a legal claim functioned as part of a scheme to manufacture diversity jurisdiction." See Branson Label, 793 F.3d at 916. We therefore need not determine at this time the "precise list of circumstances" to be considered. See id. $5,000 lump sum, but statements in a brief are not evidence. See D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 457 (5th Cir. 2010) ("[A]rguments by counsel are not evidence."). This factor weighs against jurisdiction.Montes states that he was previously connected to the claim because (i) the agreement provided financial support for Montes's grandmother; (i) Montes's "aunts and uncle" allegedly breached the

agreement; and (iii) Montes's inheritance was reduced due to the alleged breach. This contention hinges on Montes's ability to recover for loss of inheritance, which Texas law does not recognize outside of wrongful-death actions. See Yowell v. Piper Aircraft Corp., 703 SW.2d 630, 633 (Tex. 1986). Furthermore, Montes alleges nothing in the complaint nor offers any evidence to show that he was an intended third-party beneficiary under the agreement. Because the record does not demonstrate a previous connection between Montes and the assigned claim, this factor weighs against jurisdiction. Montes claims that his "purchase[]" of the assignment— "in hopes of a return on an investment" —is a legitimate business reason. That reason may be legitimate in other contexts, but it does not demonstrate why this factor should favor him. Montes explains only that he seeks to recover money he believes Ae is due, but he actually brings his mother's claim via assignment. Hoping to recover money in a lawsuit is not a legitimate business reason justifying the assignment of a claim for § 1359 purposes. This factor weighs against jurisdiction. Montes argues that the timing of the assignment is not cause for concern because he moved to Mexico three years before the assignment was executed, and he filed the action in district court within four months of the execution. The timing of Montes's move to Mexico is not relevant, as this factor concerns the timing of the assignment in
relation to when the case was filed. The record demonstrates that when Montes learned that the inheritance he expected had been depleted, he "immediately asked" his mother "to assign him the

entire debt owed her [sic], and he then immediately filed this federal civil action." As Montes's sworn words demonstrate, the assignment was executed so he could bring this lawsuit. This factor therefore weighs against jurisdiction.According to Montes, his mother "has no control nor influence over the conduct of the litigation and "is only a material eyewitness to the facts regarding the terms of the Assignment." At best, this factor is neutral given the absence of evidence supporting his contention. Montes contends that his mother "has no interest nor shall receive any recovery if [he] happens to prevail and recover any damages." As with the previous factor, this contention makes this factor neutral at best considering the absence of supporting evidence. Four factors ultimately weigh against jurisdiction, and two factors—viewed in the light most favorable to Montes —are neutral. Considering them together, Montes has not met his burden to show that the assignment was not executed to create diversity jurisdiction. Accordingly, the district court correctly determined diversity jurisdiction is lacking, and the action must be dismissed. But because the district court's dismissal order was based on a lack of subject-matter jurisdiction, we modify the judgment to dismiss without prejudice. See Abdullah v. Paxton, 65 F.4th 204, 208 n.3 (5th Cir. 2023) (per curiam) ("[D]ismissals based on jurisdictional issues must, by their very nature, be without prejudice."). II A The district court's order preventing Montes from filing further pleadings or actions is an injunction. See Baum v. Blue Moon Ventures, LLC, 513 F.3d 181, 187 (5th Cir. 2008). We review the grant of an injunction

for "abuse of discretion, and underlying questions of law de novo." Newby ». Enron Corp., 302 F.3d 295, 301 (5th Cir. 2002).* B District courts have jurisdiction to issue "pre-filing injunction[s] to deter vexatious, abusive, and harassing litigation." Baum, 513 F.3d at 187; see Harrelson v. United States, 613 F.2d 114,116 (5th Cir. 1980) (per curiam) ("A litigious plaintiff pressing a frivolous claim, though rarely succeeding on the merits, can be extremely costly to the defendant and can waste an inordinate amount of court time."). "Such injunctions must be tailored to protect the courts and innocent parties while also protecting the right of the enjoined party to file non-frivolous lawsuits." Nix ». Major League Baseball, 62 F.4th 920, 937 (5th Cir. 2023). "When considering whether to enjoin future filings, the court must consider the circumstances of the case," which involves four factors: (1) the party's history of litigation; (2) the party's basis for filing the lawsuit in question; (3) the burden on the courts and others involved resulting * Although the district court determined it did not have subject-matter jurisdiction over this action before designating Montes as a vexatious litigant, it was jurisdictionally proper for the district court to consider the issues in this sequence. See Qureshi v. United States, 600 F.3d 523, 525 (5th Cir. 2010) ("That the court loses jurisdiction over the litigation does not, however, deprive the district court of its inherent supervisory powers. After the termination of an action, a court may nevertheless 'consider collateral issues.'" (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990))). from the party's filings; and (4) the

adequacy of alternative sanctions. Carroll . Abide (In re Carroll), 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). Montes discusses these factors in his briefing, but he does not support his arguments with citations to legal authority or the record on appeal. "Although we liberally construe pro se briefs, such litigants must still brief the issues and reasonably comply with the standards of Rule 28 in order to preserve them." Clark v. Waters, 407 F. App'x 794,796 (5th Cir. 2011) (per curiam); see Arredondo v. Univ. of Tex. Med. Branch at Galveston, 950 F.3d 294, 298 (5th Cir. 2020) ("[Parties filing appeals in this court, including those filing pro se, must adhere to the requirements of the Federal Rules of Appellate Procedure."). In his brief, Montes needed to support his "contentions and the reasons for them" with "citations to the authorities and parts of the record," FED. R. ApP. P. 28(a)(8)(A), but he did not. Failure to do so constitutes forfeiture, and we do not address the issue. See Guillot ex rel. T.A.G. ». Russell, 59 F.4th 743, 751 (5th Cir. 2023). V For these reasons, we **MODIFY** the judgment so the dismissal for lack of subject-matter jurisdiction is without prejudice and **AFFIRM** the judgment as modified.

APPENDIX C — DENIAL OF RECONSIDERATION, MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED APRIL 18TH, 2024

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

USDC No. 4:23-CV-1352

DANIEL MONTES, JR.,

Plaintiff,

Versus

BERTHA A. TIBBS,

Defendant.

MEMORANDUM AND ORDER

Daniel Montes has moved for reconsideration of this court's March 12, 2024, Memorandum and Opinion. (Docket Entry Nos. 30-31, 34). Based on the motion, the response, and the applicable law, the court **denies** the motion for reconsideration. The defendant has also moved for sanctions. (Docket Entry No. 38). Sanctions are denied at this time, but Montes is warned that profane and uncivil exchanges with the defendants and frivolous arguments to the

court will result in sanctions. The reasons for these rulings are set out below. I The Rule 59(e) Standard The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. Washington ex rel. JW. v. Katy Indep. Sch. Dist., 403 F. Supp. 3d 610, 616 (S.D. Tex. 2019) (citing Sz. Paul Mercury Ins. Co. v. Fair Grounds Corp., 123 F.3d 336, 339 (5th Cir. 1997)). A motion asking the court to reconsider a prior ruling is evaluated as a motion to alter or amend a judgment under Rule 59 if it is filed within 28 days of the entry of judgment. Demahy v. Schwar-Pharma, Inc., 702 F.3d 177, 182 n.2 (5th Cir. 2012). Because Montes filed his motion within the 28-day window, his motion is evaluated under Rule 59(e). "A Rule 59(e) motion calls into question the correctness of a judgment." Templet v. HydroChem Inc., 367 F.3d 473, 478-79 (5th Cir. 2004) (internal quotation omitted). A Rule 59(e) motion "'must clearly establish either a manifest error of law or fact or must present newly discovered evidence" and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued." Rosenzweigv. Azurix Corp., 332 F.3d 854, 863 (5th Cir. 2003) (quoting Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990)). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." Templet, 367 F.3d at 479. A party seeking reconsideration must satisfy "at least one of" the following criteria: "(1) the motion is necessary to correct a manifest error of fact or law; (2) the movant presents newly discovered or previously unavailable evidence; (3) the motion is necessary . . . to prevent

manifest injustice; and (4) the motion is justified by an intervening change in the controlling law." Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc., 305 F. Supp. 3d 711, 717 (E.D. La. 2018). 1L Analysis A. Improper Assignment Montes argues that the court failed to properly consider the factors related to assignment, leading to an incorrect dismissal of the case. (Docket Entry No. 35). But Montes misunderstands the case law on assignment, and his "errors" are not errors on the part of the court. Title 28 U.S.C. § 1359 provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." In determining whether diversity jurisdiction has been created in an improper or collusive manner, courts consider the following factors: "(1) whether there was nominal or no consideration involved in the assignment; (2) whether the assignee had any previous connection to the assigned claim; (3) whether there was a legitimate business reason for the assignment; (4) whether the timing of the assignment suggests it was merely an effort to secure federal diversity jurisdiction; (5) whether the assignor exercises any control over the conduct of the litigation; and (6) whether the assignor retains any interest in the action such as receiving a portion of the assignee's recovery." Hytken Fam. Ltd. v. Schaefer, 431 F. Supp. 2d 696, 699-700 (S.D. Tex. 2006) (citing Long & Foster Real Estate, Inc. v. NRT Mid—Atlantic, Inc., 357 F.Supp.2d 911, 922-23 (E.D.Va.2005) (collecting cases); Wright & Miller, 14

FED. PRAC. & PROC. § 3639 (3d ed. 1998)). Alleged Error 1. Montes argues that because the assignment document claims the presence of "other good and valuable consideration," the court erred in finding that there was no evidence of consideration. (Docket Entry No. 35 at 8). When there is no evidence of the actual consideration, or only a reference to "other good and valuable consideration," the circumstances alleged show that consideration "is either nominal or nonexistent," weighing in favor of finding an improper assignment. Hytken Fam. Ltd. 431 F. Supp 2d. at 700. Alleged Error 2. Montes argues that his unjust enrichment claim was confused with his assignment claim. He does not explain how this occurred or what the confusion is. The court examined whether Montes could allege facts that would prove a claim for loss of inheritance as part of analyzing his right to recover. Under Texas law, the facts Montes alleges do not allow him to recover on a claim for a potential reduction of a possible future inheritance from an individual who is very much alive. See Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 290 (5th Cir. 1987). Applying this law to the assignment factors, Montes does not have a previous connection to the claim, or a legitimate reason to bring the claim, and, for the same reasons, his unjust enrichment claim fails. Both these claims are defeated by the same principle of law. Alleged Error 3. Montes claims that the court should not have found the timing of assignment suspect and that the court failed to credit his claim that his mother is getting nothing from this litigation. First, Montes himself has stated that he requested the

assignment to file suit. (Docket Entry No. 21-1 at 85). This is the type of timing that factor four of the assignment test seeks to capture. As to his claim that his mother is getting nothing from the litigation, it is true that his assignment was complete. However, "even when there is a complete assignment, collusion may be found. That is most likely to be where there is an excellent opportunity for manipulation, as in transfers between [related businesses]." Atz 'ys Tr. v. Videotape Computer Prod., Inc., 93 F.3d 593 (9th Cir. 1996). Here, the court found the factor to be neutral because the parties are so closely related—mother and son. Given that close connection, the court cannot conclusively determine that Montes's mother would not benefit if Montes won. Alleged Error 4. Montes claims that "[t]he Court further makes unfounded allegations against me that I asked my mother for the Assignment so I can file suit in some kind of devious plan or improper assignment." (Docket Entry No. 35 at 12). The court is not sure what Montes is referring to. In its prior opinion, the court noted that in Montes's own words, he asked his mother to assign him the alleged debt so he could file suit. (Docket Entry No. 21-1 at 1§37, 85). While it is true, as Montes observes, that an assignment can be made for any reason, not every assignment can sustain diversity jurisdiction. These are two different legal tests. The issue is not whether an assignment of a claim as a debt to permit suit is good or bad. The issue is whether the assignment can sustain diversity jurisdiction. Alleged Error 5. Montes again states that because the assignment is valid under Texas state law, it must be sufficient to sustain

diversity jurisdiction. Section 1359 restricts what type of assignments can sustain diversity jurisdiction. Not all assignments valid under a state law are sufficient for federal diversity. Alleged Error 6. Montes claims that the court declared him a vexatious litigant "mid case." (Docket Entry No. 35 at 13). Prior courts involved in unrelated litigation deemed Montes a vexatious litigant. In the present case, the court dismissed the case with prejudice and then declared Montes a vexatious litigant. Alleged Error 7. Montes claims that "[t]he Court abused its discretion by relying on clearly erroneous factual findings." (Id. at 14). Because he does not explain what those findings are—beyond those already discussed—this is a conclusory statement that does not support consideration. Alleged Error 8. Montes argues that the court misapplied § 1359 to the facts. Montes does not explain how. Montes has emailed the court repeatedly despite being instructed not to do so. He attaches one email to his motion that references footnote 9 in Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 828-29 (1969). The footnote explained that Kramer did not apply to cases in which "the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter," because "then the transfer is not 'improperly or collusively made," regardless of the transferor's motive." The law on this element of assignment law has evolved beyond the dicta in the Kramer footnote in 1969. Today, courts use the six-factor test discussed above, and whether the assignee retains an interest in the action is but one factor. See, e.g., Hytken Fam. Ltd. v. Schaefer, 431 F. Supp. 2d 696

(finding an improper and collusive assignment even when the plaintiff received "all of [assignee's] rights, claims, title, interest and choses in action"); Funderburk Enterprises, LLC v. Cavern Disposal, Inc., No. 09-CV-327, 2009 WL 3101064 (W.D. Tex. Sept. 22, 2009), report and recommendation adopted, Docket No. 33 (W.D. Tex. Oct. 30, 2009). Even if this was not the case, the situation here can be distinguished from the situation discussed in footnote 9 in Kramer because, as the court has previously discussed, it is not clear that Montes's mother retains no interest in the subject matter. In fact, Montes has offered her as a key witness to prove the existence of the oral contract, and so she would remain involved in the litigation. Alleged Error 9. Montes again argues that the court erroneously dismissed his unjust enrichment claim, independent of the error alleged in the assignment claim. There are several problems with his argument. First, when Montes first brought this case, he asserted only a breach of contract claim. (Docket Entry No. 1). He moved to amend his complaint and then sent repeated additional amended complaints, without seeking leave. The court nonetheless considered his latest proposed amended complaint, filed on February 18, 2024, in its prior Memorandum and Opinion. However, the statute of limitations for an unjust enrichment claim is two years. Elledge v. Friberg-Cooper Water Supply Corp., 240 S.W.3d 869, 869 (Tex. 2007). Even accepting Montes's arguments about tolling, the statute began running on January 10, 2022. (Docket Entry No. 1). Montes's claim for unjust enrichment is

barred. Additionally, Montes cannot state an independent claim for unjust enrichment. "Texas courts . . . hold that unjust enrichment is an element of restitution and not an independent cause of action." Gedalia v. Whole Foods Mkt. Servs., Inc., 53 F. Supp. 3d 943,961 (S.D. Tex. 2014); Lilani v. Noorali, No. H-09-2617, 2011 WL 13667, at *11 (S.D. Tex. Jan. 3, 2011) ("The majority of Texas appellate courts hold that unjust enrichment is not an independent cause of action."). Assuming, for the sake of argument, that Montes could bring an independent claim for unjust enrichment, he cannot sustain such a claim with a hypothetical claim for loss of future inheritance. His mother is still alive. Any number of events could occur that would affect whether Montes recovers the inheritance he expects. His mother could change her mind. She could encounter a need to spend the money during her life rather than make it available as part of her estate when she dies. Whether, and how much, and when Montes will inherit money from his mother is too speculative to allow his claim to be sustained. Montes has not pointed to new law or facts that would alter the court's judgment that there is no diversity jurisdiction over his claims. The motion to reconsider is denied. B. Other Bases for Dismissal In its Memorandum and Opinion, the court noted that it need not reach the issue of the amount in controversy because there was a separate basis for dismissal. In the interest of completeness, the court points out that even if Montes could establish diversity on the basis of the assignment—and he cannot—he has not alleged a sufficient amount in controversy to sustain federal jurisdiction. "[When there are multiple,

severally liable defendants, the potential liability of the multiple defendants may not be aggregated." Cronin v. State Farm Lloyds, No. CIV.A.H-08-1983, 2008 WL 4649653, at *4 (S.D. Tex. Oct. 10, 2008); see Wright & Miller, 14 FED. PRAC. & PrROC. § 3704, at 38-41 (3d ed. 1998) ("[T]he cases are quite clear and virtually unanimous that separate and distinct claims by different plaintiffs still cannot be aggregated for purposes of measuring the amount in controversy. The same rule applies when suit is brought by a single plaintiff against multiple defendants."). At the time Montes brought the suit—solely against Tibbs—he sought $82,000. (Docket Entry No. 1). Montes later admitted over email, in his damages calculations sent to the proposed defendants, that his damages against Tibbs were only $39,840. (Docket Entry No. 26-1). Other documents Montes relies on state that each proposed defendant owes his mother "$40K." (Docket Entry No. 6-2). Montes claims that aggregation is allowed because the proposed defendants "jointly and maliciously caused" the damages. (Docket Entry No. 27). But by Montes's own admission, each defendant allegedly breached a separate personal obligation to pay for Montes's grandmother's care—the defendants were not jointly liable under the alleged oral contract. See Bierscheid v. Hamman, No. 16-3251, 2022 WL 2256306, at *8 (S.D. Tex. June 23, 2022) ("Under Texas contract law, joint and several liability usually arises when two or more promisors in the same contract promise the same performance to the same promisee."); Int'l Marine, LLC v. Delta Towing LLC, No. 10-CV-0044,2013 WL 5890551, at *4 (E.D. La. Nov. 1,

2013) (""joint and several' liability pertains to promises of the same, not separate, performances."). Here, Montes alleges that the defendants each agreed to pay a separate amount for Montes's grandmother's care and agreed to take care of the grandmother on separate days. The defendants clearly did not agree to jointly make the same performance. Montes's damages calculation reflects this. Montes has made no showing that the defendants should be jointly liable, and there is no basis in the record to make such a finding. Given that Montes cannot aggregate his claims, Montes's claim for 18% interest could not create over $75,000 in liability for each defendant, and Montes has not supported this demanded interest. The court notes that even if the assignment was proper, the amount in controversy, by Montes's own admission, would not be sufficient to support federal jurisdiction. C. Sanctions Montes has proceeded in this case pro se, but even pro se plaintiffs may be sanctioned. See Mendoza v. Lynaugh, 989 F.2d 191, 195-96 (5th Cir. 1993) (collecting cases). Montes has repeatedly emailed the court, often multiple times a day, demanding updates on his case and casting aspersions on the court and its staff, despite being repeatedly asked to stop.In her response to the motion to reconsider, Tibbs brings to the court's attention numerous incidents of harassing and abusive conduct on the part of Montes. (Docket Entry No. 38). This includes statements calling the proposed defendants "whore b****es," (Id. at 9), n-word "d***sucker Mexicans," and "limp d*** mexican born wet back clients." (id. at 11). This conduct is plainly improper harassing and abusive

behavior. "[O]ne acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986). Montes is given warning here. If he continues to harass the court or the defendants in this case, he will face sanctions. III. Conclusion Montes's motion presents insufficient grounds for the "extraordinary remedy" of reconsideration. He instead attempts to relitigate issues that the court decided in ruling on the motion for summary judgment. Templet, 367 F.3d at 478-79 (A Rule 59(e) motion "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."). Montes's motion for reconsideration, (Docket Entry No. 35), is **denied**. SIGNED on April 18, 2024, at Houston, Texas. Lee H. Rosenthal United States District Judge.

APPENDIX D — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED MARCH 14TH, 2024

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

USDC No. 4:23-CV-1352

DANIEL MONTES, JR.,

Plaintiff,

Versus

BERTHA A. TIBBS,

Defendant.

ORDER AND FINAL JUDGMENT

For the reasons set out in this court's Memorandum and Order entered on March 14, 2024, Daniel Montes is barred from filing any lawsuit in the Southern District of Texas without the prior written permission of the Chief Judge of the United States District Court for the Southern District of Texas or his or her designee. Montes may not proceed pro se in the Southern District of Texas. The pending civil action brought by Montes is dismissed with

prejudice. This is a **final judgment**. SIGNED on March 14, 2024, at Houston, Texas. Lee H. Rosenthal United States District Judge

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED MARCH 14TH, 2024

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

USDC No. 4:23-CV-1352

DANIEL MONTES, JR.,

Plaintiff,

Versus

BERTHA A. TIBBS,

Defendant.

MEMORANDUM AND ORDER

Daniel Montes Jr. sued Bertha A. Tibbs, his aunt, for breach of an alleged oral contract to which he was not a party. (Docket Entry No. 1). He seeks to amend his complaint to add as defendants seven other family member parties to the alleged contract: Ben L. Tibbs, Jose M. Hernandez, Norma E. Hernandez, Elvira H. Ximenes, Robert A. Ximenes, and Raul D. Ortiz. (Docket Entry No. 21-1). The alleged oral contract was made between Montes's mother, Elizabeth Hudson, and the seven family members, to

share in providing financial and physical support for Montes's Grandmother. Montes alleges that the family members breached the contract when they stopped contributing to the cost of support for the care of Montes's grandmother, instead requiring Hudson—Montes's mother—to pay the costs herself. Montes alleges that as a result, the money that he might inherit in the future from his mother has been reduced. In preparation for filing this lawsuit, Montes asked Hudson to assign her interest in her claim for breach of the oral contract to him. Montes then brought suit against the seven family members who allegedly failed to perform under the oral contract they allegedly entered into with Montes's mother, alleging breach of contract, civil conspiracy, and unjust enrichment. (Docket Entry No. 21-1). Montes has filed a number of proposed amended complaints, although the court has not given him permission to do so. Because Montes is pro se, the court considers the latest one, the February 18, 2024, complaint, (see Docket Entry Nos. 21-1, 30), in its analysis. Tibbs moves to dismiss on the basis that no diversity jurisdiction exists because the assignment of the contract to Montes was improperly done to allow him to sue in federal court, and because the amount in controversy for each of the defendant family members is less than $75,000. (Docket Entry No. 6). Based on the motion, pleadings, and law, the court grants Tibbs's motion to dismiss, with prejudice, because further amendment would be futile. The court also notes that Montes comes to this court previously labeled as a "vexatious litigant" in prior litigation with many of the same family

members named here. The relaxed standard for interpreting the pleadings of pro se litigants does not allow for repeated meritless litigation. Montes may not file further litigation in the Southern District of Texas without seeking advance permission from the Chief Judge of this district or that judge's designee. The reasons for these rulings are set out below. I The Legal Standard for Diversity Jurisdiction Federal courts are courts of limited jurisdiction. Howery v. Alstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001). Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject-matter jurisdiction. "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) (quoting Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996)). Title 28 U.S.C. § 1332 states as follows: The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled. "Courts

may dismiss for lack of subject matter jurisdiction on any one of three bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Clark v. Tarrant County, 798 F.2d 736, 741 (5th Cir. 1986) (citing Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)). The party who invokes the jurisdiction of the federal courts bears the burden of showing that jurisdiction is proper. Hartford Ins. Groupv. Lou-Con Inc., 293 F.3d 908, 910 (5th Cir. 2002). 1L Analysis Elizabeth Hudson, Montes's mother, is a citizen of Texas. Tibbs and the family members Montes proposes adding to the lawsuit are also Texas citizens. There is no diversity between the parties to the original contract. Diversity of citizenship exists between Montes and Tibbs because Montes is domiciled in, and a citizen of, Mexico. (Docket Entry No. 6 at 2). Tibbs argues that because Montes was not a party to the alleged oral agreement among the siblings, including Hudson, Hudson's assignment of the contract to Montes was an improper attempt to obtain diversity jurisdiction, necessitating dismissal. (id. at 3). 28 U.S.C. § 1359 provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." This statute is intended to "prevent the litigation of claims in federal court by suitors who by sham, pretense, or other fiction would acquire spurious status that would allow them to invoke the limited jurisdiction of

federal courts." Nolan v. Boeing Co., 919 F.2d 1058, 1067 (5th Cir. 1990); see Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 828-29 (1969) (warning that improper assignment could allow "a vast quantity of ordinary contract and tort litigation [to] be channeled into the federal courts at the will of one of the parties[.]"). Application of § 1359 has "generally been restricted to circumstances involving assignment of interests from non-diverse to diverse parties to collusively create diversity jurisdiction." Delgado v. Shell Oil Co., 231 F.3d 165, 178 (5th Cir. 2000). In determining whether diversity jurisdiction has been created in an improper or collusive manner, courts consider the following factors: "(1) whether there was nominal or no consideration involved in the assignment; (2) whether the assignee had any previous connection to the assigned claim; (3) whether there was a legitimate business reason for the assignment; (4) whether the timing of the assignment suggests was merely an effort to secure federal diversity jurisdiction; (5) whether the assignor exercises any control over the conduct of the litigation; and (6) whether the assignor retains any interest in the action such as receiving a portion of the assignee's recovery." Hytken Fam. Ltd. v. Schaefer, 431 F. Supp. 2d 696, 699-700 (S.D. Tex. 2006) (citing Long & Foster Real Estate, Inc. v. NRT Mid-Atlantic, Inc., 357 F.Supp.2d 911, 922-23 E.D.Va.2005) (collecting cases); Wright & Miller, 14 FED. PRAC. & PROC. § 3639 (3d ed. 1998)). Montes's complaint explains the assignment as follows: 'When Daniel Montes, Jr. found out that his Mother Elizabeth H. Hudson used his inheritance

money of at least $178,440 USD to make up for the defendants' intentional joint breach and shortfall, that he DID FLIP OUT on his aunts and uncle, and he immediately asked for his Mother Elizabeth H. Hudson to assign him the entire debt owed her, and he then immediately filed this federal civil action against all eight Defendants . . . (Docket Entry No. 21-1 at 37). Neither the complaint nor the assignment document show any consideration for the assignment, weighing in favor of finding an improper assignment. Montes argues that he had a legitimate reason to be assigned Hudson's breach of contract claim. He alleges, and argues, that when his aunts and uncles refused to contribute to their mother's care, and Hudson had to take on all the expenses of caring for his grandmother, Hudson had to spend money that Montes might have inherited. Under Texas law, loss of inheritance is considered a valid basis only for a claim in a wrongful death suit in which the "plaintiff shows that the decedent (1) would have enhanced his estate by some amount by saving some of his earnings or by prosperous management of his investments, and (2) would, in all reasonable probability, have left that amount upon his natural death to the plaintiff." Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278, 290 (5th Cir. 1987). Montes has not cited, and the court has not found, a basis for a damages recovery for the reduction in the size of a possible future inheritance, when the individual giving the inheritance is still alive and making financial decisions on how to spend her money. There is also no complaint allegation or any other indication that Montes was intended as a

third-party beneficiary of the alleged agreement. See Janvey v. Alguire, 847 F.3d 231, 243 (5th Cir. 2017) ("a third party is bound only if the intent to make someone a third-party beneficiary is clearly written or evidenced in the contract." (internal quotations omitted)). Because Texas law regards the kind of claim Montes makes as speculative, this claim weighs in favor of finding an improper assignment. The next factor, the timing of the assignment, weighs heavily in favor of finding an improper assignment. Montes's complaint makes clear that he received the assignment in order to file suit, because his mother "didn't have the emotional energy to collect what her siblings And their spouses owed her." (Docket Entry No. 21-1 at § 85). Montes states that as soon as he received the assignment, he filed this federal action. (/d. At 37). Finally, while it is unclear what role Hudson is currently playing in the case or whether she will receive a benefit should Montes win, Montes has stated that she is "willing to be deposed, and or testify" and "is a material eyewitness." (Id. at § 25). Viewing these factors in the light most favorable to Montes, and given the lack of concrete information about Hudson's involvement in the case, the final two factors can be considered neutral. The factors relevant to determining improper assignment of the oral contract to Montes are neutral or weigh in favor of finding improper assignment. Montes asked Hudson for the assignment so he could file suit. The parties to the alleged oral contract are Montes's mother, aunts, and uncles; Montes has no present interest in the contract. Montes cannot support federal diversity jurisdiction on the basis of the

assignment of his mother's claim for breach of contract. Adding other parties to the contract as defendants would not change this deficiency. Because the improper assignment means that this court lacks diversity jurisdiction, the issue of the amount in controversy or other grounds raised for dismissal need not be reached. III. Vexatious Litigant "The district court has the power under 28 U.S.C. § 1651(a) to enjoin litigants who are abusing the court system by harassing their opponents." McMullen v. Cain, 17-CV-103,2017 WL 4510594, at *2 (W.D. Tex. Feb. 23, 2017) (quoting Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980)), report and recommendation adopted, 17-CV-103,2017 WL 4506814 (W.D. Tex. June 22, 2017). "A district court has jurisdiction to impose a pre-filing injunction to deter vexatious, abusive, and harassing litigation." Baum v. Blue Moon Ventures, LLC, 513 F.3d 181, 187 (5th Cir. 2008). "The court's power to enter such orders flows not only from various statutes and rules relating to sanctions, but the inherent power of the court to protect its jurisdiction and judgments and to control its docket." Farguson v. MBank Houston, N.A4, 808 F.2d 359, 360 (5th Cir. 1986). Such an injunction would bar a litigant from filing further actions without first obtaining leave from the court. See Day v. Allstate Ins. Co., 788 F.2d 1110, 1115 (5th Cir. 1986). A pre-filing injunction "must be tailored to protect the courts and innocent parties, while preserving the legitimate rights of litigants." Id. Tibbs asks the court to recognize that Montes is a vexatious litigant. (Docket Entry No. 6). Montes has been found to be a vexatious litigant in Tarrant County, Dallas

County, and the Western District of Texas. See Elvira H. Ximenes, et al. v. In re: Ricardo Perez Hernandez, No. 15-cv-855, Docket No. 11 (W.D. Tex. Oct. 16, 2015). The suits resulting in finding Montes a vexatious litigant apparently involved the same defendants that Montes sues here. The court finds that Montes is a vexatious litigant and bars him from filing further pleadings or actions in the Southern District of Texas without the prior written permission of the Chief Judge of the United States District Court for the Southern District of Texas or his or her designee. Finally, Tibbs asks the court to fine and incarcerate Montes for contempt. (Docket Entry Nos. 6 at 7, 10 at 2). This step is unwarranted, and the request is denied. IV. Conclusion Montes's claims are dismissed. Montes is declared a vexatious litigant in the United States District Court for the Southern District of Texas. Final judgment and an order prohibiting Montes from filing suit without requisite permission is separately entered. SIGNED on March 14, 2024, at Houston, Texas. Lee H. Rosenthal United States District Judge.

APPENDIX F — DECLARATION OF DANIEL MONTES, JR

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Daniel Montes, Jr.,
Petitioner,

v.

Bertha A. Tibbs,
Respondent.

On Petition for a Writ of Certiorari tp
the United States Court of Appeals
for the Fifth Circuit

DECLARATION OF DANIEL MONTES, JR.

I, Daniel Montes, Jr., pursuant to 28 U.S.C §1746, declare as follows: 1. I am the Plaintiff pro se in this action. I offer this Declaration in support of my petition for writ of certiorari. I have personal knowledge of the facts set forth in this Declaration and could and would testify competently to those facts if called as a witness. 2. I am a citizen of a foreign sovereign state and permanently reside abroad. 4. I paid my mother Elizabeth H. Hudson $5k USD for the absolute assignment she gave me to recover losses from a breach of family support agreement by my

aunts and uncles in hopes for a return on my investment. 5. I did not with my mother collude to create citizenship nor diversity jurisdiction improperly. 6. I feel that my due process rights have been violated by the trial court and the Fifth Circuit Court of Appeals, because I have the facts and law in my favor as to my timely claims. 7. The trial court used inadmissible settlement emails against me in declaring that the amount of controversy was not met. The trial court in error ordered that I was not permitted to aggregate my claims when the exception clearly permits me. The trial court arbitrarily ordered that my claims were not timely, when they are clearly timely. The trial court refused to grant my first motion to amend which would have corrected any perceived deficiencies. The defendants entered no evidence permitting the conversion of their motion to dismiss to summary judgment and failed their initial burden. The trial court did not give me proper notice of its intent to convert the motion to dismiss to summary judgment. The trial court did not permit me any discovery nor enter any evidence in response to the converted summary judgment. I was taken by complete surprise when the trial court granted summary judgment and dismissed with prejudice for lack of jurisdiction. Summary judgment was inappropriate. The trial court ignored Supreme Court precedent in Caribbean v. Kramer (1969) n. 9, where an absolute assignment is not improper regardless of motive. I proper plead Caribbean before the trial court and the Fifth Circuit and both completely ignored it, where in other circuits my case would be permitted to proceed. The trial court threatened me

with sanctions by chilling my First Amendment rights of free speech. The trial court is hostile against pro se litigants including myself which led to a prejudicial harmful dismissal of my lawful claims. 8. The trial court and the Fifth Circuit used in dicta non binding law against me, my absolute assignment, and my timely state law claims, because no uniform test standard exists for 28 U.S.C. 1359. The use of non binding law against me, my assignment and my claims violated my due process rights. 9. The trial court invalidated the state law claim for unjust enrichment without legal basis. 10. I ask this Supreme Court to intervene in my case, to bring the trial court and Fifth Circuit back into compliance with this court's precedent, because they both are way off the farm. Both the trial court and Fifth Circuit prejudicially ruled against me, because I'm proceeding pro se, and they know my plead facts are sound, and that the law is in my favor. 11. I ask this Supreme Court to take the time to resolve the recurring conflict of the lack of a uniform test standard for 28 U.S.C. 1359. I suggest the court adopt the eight test factor developed by the Eighth Circuit as being one being legally sound and takes into account the totality of the circumstances. 12. What the trial court and Fifth Circuit did to me is not justice. It's actually extrajudicial, because nothing in their opinions and denials are based on fact nor law. Both the trial court and the Fifth Circuit are rogue. 13. Only this Supreme Court can reign in their problem children, the Fifth Circuit and it's trial court. I declare under the penalty of perjury that the

foregoing is true and correct. Daniel Montes, Jr.
Dated: September 5th, 2024 /s/ Daniel Montes, Jr.