

No.

IN THE
Supreme Court of the United States

VALENTINA SHESHTAWY ET AL., PETITIONERS

v.

J. CARY GRAY ET AL.

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Does natural guardian custodial parent, possessed of all parental rights lose statutory and constitutional standing to sue in federal Court as next friend for minor child because Harris County Texas Probate Court 1 (“Probate Court”) has appointed a guardian *ad litem* over minor ward’s guardianship estate in an estate distribution proceeding:
2. What constitutes standing under RICO for jurisdiction under Federal Rule Civil Procedure (“Fed.R.Civ.P.”) 12(b)(1) and what constitutes sufficient pleading for RICO claims to withstand dismissal for failure to state a cause of action under Federal Rule of Fed.R.Civ.P. 12(b)(6);
3. Whether partial waiver of judicial immunity under Texas Estates Code §1201.003 (former Probate Code § 671(d))(***James v. Underwood***, 438 S.W.3d 704, 714 (Tex. App. Dist. 12014, no pet.).)is applicable to RICO
4. Whether attorney litigant, guardian *ad litem* and attorney *ad litem* immunity under Texas law is applicable to RICO:
5. Whether there were sufficient legal and factual bases for the trial Court to impose sanctions adverse to Petitioners due to a Fed.R.Civ.P. 59 motion for new hearing after the trial Court had denied sanctions during the Rule 12 proceedings; Did the trial Court Disregard Petitioners” and their counsel’s due process rights; and,
6. Whether a trial Court may award and the Fifth Circuit may affirm *pro se* attorney attorney’s fees, as sanctions,

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contrary to Fifth Circuit and Supreme Court precedent.

PARTIES TO THE PROCEEDING

Valentina SHESHTAWY; L. S.; Don Peterson; Mackey
Peterson; Lonny Peterson; Edward G. Rizk; Maxwell
Rizk, Petitioners

v.

J. Cary GRAY; Lloyd Wright; Ruth Ann Stiles; Robert
MacIntyre, Jr.; W. Cameron McCulloch; Christopher
Burt; Jill Willard Young; MacIntyre, McCulloch,
Stanfield & Young, L.L.P.; Joseph Royce; Scott Funk;
Gray, Reed & McGraw, P.C.; Sarah Pacheco; Kathleen
Beduze; Crain, Caton & James, P.C.; Michael Fuqua;
Fuqua & Associates, P.C.; Kimberly Hightower;
Silverado Senior Living, Incorporated; Carol Ann
Manley; David Troy Peterson; Russ Jones; Underwood,
Jones, Scherrer, P.L.L.C.; Josh K. Davis; Lewis
Brisbois Bisgaard & Smith, L.L.P.; Christopher Merkl;
Farouk Sheshtawy; Hanya Sustache; Nader
Sheshtawy; McDonald Scott Worley; McDonald
Worley, P.C.; Harris County, Texas, Respondents

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OPINIONS BELOW

Unpublished 14 September 2017 Memorandum of Fifth Circuit in *Sheshtawy v. Gray* 17-20019 (1a)¹ affirmed (697 Fed. Appx. 380) trial court in *Sheshtawy v. Conservative Club* 4:16-cv-00733, Texas Southern District 7 October 2016 unpublished dismissal Order (2016 U.S. Dist. LEXIS 140144) (38a). Individuals lacked standing to pursue RICO claims because they failed to allege a direct, concrete, and particularized injury proximately caused by officials' conduct, *inter alia*.

No lexis citations available for 4:16-cv-00733² Docket 335 FRCivPro 59 14 October 2016 unpublished denial Order (36a) nor Docket 337 Sanctions Order (9a)(facts supported inference that individuals were acting in bad faith justifying sanctions, *inter alia*) nor 16 November 2016 Fifth Circuit unpublished FRAP 40 Motion denial Order (53a).

JURISDICTION

Lower Courts had jurisdiction under 28 U.S.C. §§ 1331 and 1291.

Petitioners file this petition for writ of certiorari within ninety (90) days of 16 November 2017, when Fifth Circuit denied petitioners' timely filed FRAP 40 petition (53a). 28 U.S.C. § 2101(c). Supreme Court Rule 13.3

Petitioners herein invoke jurisdiction under 28 U.S.C. § 1254(1).

¹ The Trial Court Record in Fifth Circuit Court of Appeals is also herein referenced as "ROA".

² United States District Court for the Southern District of Texas.

RELEVANT PROVISIONS INVOLVED

United States Constitution Amendments V and XIV:

United States Constitution

Amendment V:

“No person ... be deprived of life, liberty, or property, without due process of law...”

Amendment XIV:

“Section 1: ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Estates Code §1201.003, which is former Probate Code § 671(d).

“...This provision provides a limited waiver of judicial immunity, allowing recovery for losses directly tied to the judge's duties under the subchapter. Those duties include the use of reasonable diligence to determine whether an appointed guardian is performing the required duties...”³

³ *Underwood, infra.*

Texas Civil Practice & Remedies Code § 41.001(11)(B).

Gross negligence includes “conscious indifference”.

STATEMENT

This case concerns the alleged Probate Judges’ public corruption (Honorable Loyd Wright, Probate 1 Judge and Associate Judge Ruth Ann Stiles) and their Court Coordinator (Ms. Kimberly Hightower), as well as, select favored attorneys, retained and also appointed as *ad litem*s.

Three sets of Plaintiffs, all petitioners in this Court are Sheshtawy, Peterson and Rizk Petitioners.

A Texas legislative statutory partial waiver of judicial immunity exists.⁴ Statutory Texas Probate Judges may be sued for “gross negligence,” which definitively includes “conscious indifference.”

Petitioners allege corruption where seemingly consciously indifferent Probate Judges rule consistently, aided and abetted by Court coordinator, through favored lawyer cabal for lawyers’ clients or as appointed guardian or attorney *ad litem*s, whereby favored lawyer cabal is enabled to sack orphans’, widows’, incapacitateds’ and foolhardys’ estates at will. Petitioners contend that as a Court of Equity, Probate Court has affirmative statutory and common law duties to protect orphans, widows, the incapacitated and foolhardy.⁵

⁴ *Id.*

⁵ Blackstone Commentaries on the Laws of England.

Petitioners as Plaintiffs initiated this RICO case, including state law claims: conspiracy, fraud and fiduciary duty breaches.

The District Court dismissed without sanctioning Petitioners and then, following FRCivP 59 Motion denial, sanctioned Petitioners, all of which Fifth Circuit Affirmed.

Minor L.S.,⁶ Valentina and Adel Sheshtawy's biological child, orphaned at Adel's untimely intestate death, thus became Probate Court's ward and her share of Adel's estate became ensnared, purloined and greatly reduced in that Probate Court's probate proceedings, as well as, Valentina being thus widowed, where her widow's share of Adel's estate also became ensnared, purloined and greatly diminished in probate proceedings, due to Probate Court becoming and continuing as a corrupt organization. L.S.'s guardianship estate remains under Probate Court administration.

Don Peterson, Mack Peterson and Lonnie Peterson,⁷ sibling biological brothers, all Decedent Ruby S. Peterson's sons, who became supposedly incapacitated and Probate Court's ward until her untimely grizzly death, whose property and estate in Probate Court's proceedings became purloined by Petitioners' sibling brother and sister, as Peterson family trust II's trustees and later estate's executors, due to Probate Court becoming and continuing as a corrupt organization.

Edward G. Rizk, biological father of adult Max Rizk,⁸ are late Fred Rizk heirs under will being

⁶ Together with Valentina Sheshtawy "Sheshtawy Petitioners".

⁷ "Peterson Petitioners".

⁸ "Rizk Petitioners".

probated in Probate Court and beneficiaries under *inter vivos* and testamentary trusts, all of which property executor is continuing to diminish, due to Probate Court becoming and continuing as a corrupt organization.

REASONS FOR GRANTING THE PETITION

Trial Court Memorandum Order⁹ sobriqueted Petitioners' case as "pure zanyism".¹⁰

Petitioners respectfully assert that attempting through federal RICO to right repeated illegal public corruption injustice imposed unlawfully through Texas Probate Judges' judicial offices where, there is a legislative partial judicial immunity waiver allowing suit,¹¹ which corruption attorneys, Court officers as counsel for their illicitly profiting clients or as appointed *ad litem*s abetted actively, should not and cannot be merely summarily dismissed as "zany", without complete litigated discovery and inquiry.

Memorandum Order¹² mistypifies procedural history and what Amended Complaint¹³ factually portrays.¹⁴

Memorandum Order describes Kelly Cowan, M.D. as principle actor against Peterson Petitioners,¹⁵ while overlooking Petitioners' Dismissal Notice¹⁶ and

⁹ ROA.7884-7894 and Ax. 25.

¹⁰ ROA.7893.

¹¹ Ax 21 ROA.7359-7397,7361, citing Texas Estates Code §1201.003, former Probate Code § 671(d). *Underwood, infra*.

¹² ROA.7885 ¶ 11.

¹³ ROA.2601-3368.

¹⁴ ROA.7895.

¹⁵ ROA.7885.

¹⁶ ROA.3780-3781.

Court's 22 June 2016 dismissal Order, as to Dr. Cowan, 14 days following Amended Complaint's filing.

Also Memorandum Order pagination references¹⁷ does not jive accurately with Amended Complaint's,⁴⁴ causing Petitioners' Amended Complaint's mischaracterization. Amended

Complaint text is non-supportive of Judge's conclusions.¹⁸ After dismissal latter reference to Dr. Cowan's participation¹⁹ is troublesome and reflective of Judge's total misunderstanding of Amended Complaint's actually pled facts.²⁰

Question 1: Does natural guardian custodial parent, possessed of all parental rights lose statutory and constitutional standing to sue in federal Court as next friend for minor child, because Probate Court has appointed a guardian *ad litem* over minor ward's guardianship estate in an estate distribution proceeding:

Appellant Valentina Sheshtawy being minor Petitioner L.S.'s parent is proper Next Friend, to sue on behalf of L.S. in this case under Texas Rules of Civil Procedure.²¹

Also Texas Family Code⁵⁰ § 151.001 states: "(a) A parent of a child has the following rights and duties: ... (7) the right to represent the child in legal action ..."

A parent may properly sue on child's behalf, although a Court appointed guardian *ad litem*.

¹⁷ Ax. 19-27

¹⁸ ROA.3064-3065 as opposed to ROA.7884-7894.

¹⁹ ROA.7896 1st ¶ under V. A.

²⁰ ROA.3001-3368. 02.

²¹ Tex.R.Civ.P. 44 and 17.

Valentina Sheshtawy as next friend had standing and capacity to sue under RICO for her minor daughter L.S., who suffered direct injury to her property²² because she remained at law and in equity L.S.'s guardian.²³

United States Constitution Fifth and Fourteenth Amendments Due Process Clauses protect fundamental right of parents to make decisions concerning their children's care, custody, and control.²⁴ So long as a parent adequately cares for their children (i.e., is fit), there will normally be no reason for the State to inject itself into private realm of the family to further question parent's ability to make best decisions concerning children's rearing. Texas law states that a minor child's natural parents are the *natural guardians of the person*.²⁵

If a parent dies, the surviving parent is automatically guardian. Because of automatic recognition of parents as children's guardians, **no Court appointment is necessary to validate guardianship status.**²⁶

This automatic provision does not relate to money or property to which minor children may become entitled. If a child inherits property from parent or grandparent, the law presumes that minor is

²² “*In re KC Greenhouse Patio Apts., LP*, 445 S.W.3d 168, 173 (Tex. App. Dist. 1 -- Houston 2012, no pet.); *In re Bridgestone Ams. Tire Operations, L.L.C., RELATOR*, 387 S.W.3d 840 (Tex. App. Dist. 9-- Beaumont 2012). ROA.2608, .2615-.2619, .2623 ¶ 29, .2634-.2640,.2641, .2643- .2648, .2644,.2669-.2671,.2673.

²³ ROA.7957-7961.

²⁴ *Troxel v. Granville*, 530 U.S. 57, 66, 68-69 120 S. Ct. 2054, 2060 (2000).

²⁵ *Id.*

²⁶ *Id.*

not capable of handling property for themselves. Likewise, **law does not provide automatic provision for parent to serve as guardian of *estate* to manage property.** In this instance, a Court would appoint a guardian of the estate to manage minor's money or property.²⁷

The problem is especially complex when a **parent** wants to initiate civil litigation on child's behalf. Minors cannot sue on their own behalf and may sue or be sued only through representative, typically **parent** acting either as general guardian, **next friend**, or guardian *ad litem*.²⁸

Valentina Sheshtawy has never judicially lost any parental rights, including right to sue as L.S.'s next friend. Despite Probate Court's appointment of Respondents Mr. McCulloch and MacIntyre law firm, as guardians *ad litem* solely over L.S.'s guardianship Estate,²⁹ Valentina Sheshtawy's standing to sue still legally remains intact.⁵⁹

The Texas Supreme Court states: "... The term '*ad litem*' means '**for the suit**'. "³⁰ "... [R]epresentation of an *ad litem* is limited to matters related to the suit for which he or she is appointed... an *ad litem* during litigation... when a conflict of interests arises..."³¹ (Our Emphasis.)

²⁷ <http://www.fordbergner.com/legal-practice-areas/texas-guardianship/index>.

²⁸ Nancy J. Moore, ARTICLE: *Ethical Issues In Third-Party Payment: Beyond The Insurance Defense Paradigm*, 16 Rev. Litig. 586, 611.

²⁹ ROA.50-241 and .3001-3368.

³⁰ BLACK'S LAW DICTIONARY 27 (6th ed. 1990).

³¹ *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980).

Questions 2: What constitutes standing under RICO for jurisdiction under Federal Rule Civil Procedure³²12(b)(1) and what constitutes sufficient pleading for RICO claims to withstand dismissal for failure to state a cause of action under Federal Rule of Fed.R.Civ.P. 12(b)(6):

A District Court may inquire into its subject matter jurisdiction basis at any stage of proceedings.³³ A Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction must include Court's own inquiry into its own jurisdiction.³⁴

Petitioners have alleged sufficiently direct injury to their property per RICO statute.³⁵ Dismissal is inappropriate unless it appears beyond doubt that Petitioners can prove no set of facts which would entitle them to relief.³⁶ As long as complaint purports to set out federal claim, as Amended Complaint does and claim is not insubstantial and frivolous, trial Court has subject matter jurisdiction.³⁷

³² "Fed.R.Civ.P."

³³ 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3522 (1975).

³⁴ *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); and, *McLain v. Real Estate Board of New Orleans, Inc.*, 583 F.2d 1315, 1318 n. 1 (5th Cir. 1978), Vacated and remanded on other grounds, 444 U.S. 232, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980).

³⁵ *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (CA3 2000).

³⁶ *Id.*; and, 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.12 (2d ed. 1984).

³⁷ ROA.2624, .2632, .2635 ¶ 59, .2638 ¶ 61, .2640 ¶ 74, .2645 ¶ 88, .2647 ¶ 96, .2650 ¶ 102, .2651 ¶ 107, .2652 ¶ 110, .2653 ¶ 113, .2654 ¶ 116, .2656 ¶ 119, .2657 ¶ 126, .2659 ¶ 132, .2661 ¶ 139, .2662 ¶ 144, .2624 ¶ 153, .2668 ¶ 170, .2669, .2838 ¶¶ 171-577, .2843-.2846.

Amended Complaint adequately sets out substantial, non-frivolous federal claims.⁷⁴

"...The standard for surviving a Rule 12(b)(1) motion is lower than that for a 12(b)(6) motion."⁷⁵

Rule 12(b)(6) motions require Court to draw all reasonable inferences in plaintiff's favor.⁷⁶ Because Rule 12(b)(1) has a more forgiving standard of review than that for Rule 12(b)(6), it follows that Court should also draw all reasonable inferences in the Plaintiff's favor, when considering Rule 12(b)(1).⁷⁷

Respondents have raised and reasserted issues of whether or not Petitioners have standing and capacity to sue any Respondent. There are two justiciability considerations usually in inquiry as to whether or not Court lacks subject matter jurisdiction: standing and ripeness. Commentators have noted discussions of standing and ripeness often blend together. For this reason it is practical to frame standing as inquiry into whether plaintiff has adequately stated injury and to frame ripeness as inquiry into whether plaintiff's adequately-stated injury has occurred.³⁸ Petitioners assert that they have demonstrated standing for their Amended Complaint and that it is ripe. Most Respondents did not raise ripeness in their dismissal Motions.

Sheshtawy Petitioners' Amended Complaint portion asserted federal claims that Sheshtawy Respondents with County Respondents damaged their vested property interests in Adel Sheshtawy's Estate, because of Respondents' actual conspiratorial thieving through fiduciary fraud, gross negligence (conscious indifference) and other state and federal torts.

³⁸ Wright & Miller, *supra*, §§ 3531, 3532. ROA 300.43.

Peterson Petitioners' portion of Amended Complaint asserted federal claims that Peterson Respondents with County Respondents damaged their property vested interests in Ruby S. Peterson's Estate and in Peterson Family Trust II, because of Respondents' actual conspiratorial thieving through fiduciary fraud, gross negligence (conscious indifference) and other adequately pled state and federal torts.³⁹

Rizk Petitioners' Amended Complaint portion asserted federal claims that Rizk Respondents with County Respondents damaged their vested property interests in Fred Rizk's Estate and Trusts, because of Respondents' actual conspiratorial thieving through fiduciary fraud, gross negligence (conscious indifference) and other adequately pled state and federal torts.

Defendants in Rule 12(b)(6) motion bear burden of showing no claim has been stated.⁴⁰

Dismissal on Rule 12(b)(1) jurisdictional grounds and for Rule 12(b)(6) failure to state a claim are analytically distinct, each bearing different burdens and implicating different legal principles. The latter, if sustained without leave to plead further, is disposition on the merits; the former involves right to be heard in court.⁴¹ Although burden of demonstrating existence of federal jurisdiction is on one seeking to invoke it, moving party seeking disfavored summary

³⁹ *Infra*. Foot Note 70.

⁴⁰ *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (CA3 1996); *McNutt v. General Motors Corp.*, 298 U.S. 178, 182-83, 56 S. Ct. 780, 782, 80 L. Ed. 1135 (1936).

⁴¹ *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

disposition on merits has burden.⁴² Court will not dismiss complaint for failure to state claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of claim, which would entitle relief.⁴³ Plaintiff has burden of persuasion to convince Court it has jurisdiction. Court may dismiss claim under Rule 12(b)(1) only if it "clearly appears to be immaterial and made solely for purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous."⁴⁴ Even when constitutional minimum has been met, judicially created prudential limitations may defeat a party's standing to maintain a suit.⁴⁵

Article III standing requires each Appellant to first demonstrate that each has suffered an injury-in-fact. Injury must be concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical.⁴⁶

Each Petitioner has demonstrated personal stake in outcome of this litigation. Each has lost vested beneficial property interests in individual shares of three estates and trusts involved, as a direct and

⁴² *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L. Ed. 2d 80 (1957).

⁴³ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974) (claim must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.")

⁴⁴ *Bell v. Hood*, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946).

⁴⁵ ROA 300.44-47. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

⁴⁶ *Id.*

proximate result of Respondents' criminal and tortious conduct violative of civil RICO.⁴⁷

County Respondents mistakenly, erroneously relied in Dismissal Motion upon *Firestone v. Galbreath*,⁴⁸ as have MacIntyre⁹⁷ and UJS Respondents, to which Petitioners have pointed out in their Responses in Opposition that that case has no applicability to this case and has no bearing on any issue in this case. Trial and Fifth Circuit Courts agreed to this.

Firestone is a Sixth Circuit case dealing with Ohio Probate law, which differs substantially from Texas Probate law.

As Justice Brandeis aptly stated, there is "no federal common law and federal Courts should follow and apply state law where case arose,"⁴⁹ which for this case is Texas Probate law, not Ohio's.⁵⁰

Under Texas law even remainderman may sue for property value diminution.⁵¹

Article III standing requires trial Court to ascertain whether each alleged injury-in-fact is causally connected and traceable to each Respondents'

⁴⁷ *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 329-30, 119 S. Ct. 765, 772-73, 142 L. Ed. 2d 797 (1999); *Secretary of State of Maryland v. Joseph Munson Co., Inc.*, 467 U.S. 947, 958-59, 104 S. Ct. 2839, 2848, 81 L. Ed. 2d 786 (1984) (question of whether challenged statute was substantially overbroad was question better left for merits, not resolved as part of standing inquiry).

⁴⁸ *Firestone v. Galbreath*, 976 F.2d 279, (6th Cir. 1992).
ROA 219.21-22. ROA.2112.

⁴⁹ *Erie v. Tompkins*, 304 U.S. 64 (US 1938) citing *Bucher v. Cheshire Railroad Co.*, 125 U.S. 555, 583-584..

⁵⁰ *Id.*; and ROA 300.48.

⁵¹ *Singer v. Singer*, 150 Tex. 115 (TEX. 1951).

conduct specifically related to each Petitioner group.⁵² Article III requires that, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief..."⁵³

This Court explained Article III standing elements are constant throughout litigation: injury in fact, injury's traceability to defendant's conduct, and potential for the injury to be redressed by requested relief.⁵⁴ *Lujan* emphasizes the standard establishing three elements is not constant, but becomes gradually stricter through successive litigation stages. This Court reaffirmed this formulation.⁵⁵

Each Petitioner herein only has Article III standing if "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁵⁶

On Amended Complaint's facts, it is not "merely speculative" that each Plaintiff will receive redress, if each prevails on the merits at trial.⁵⁷

Petitioners' Amended Complaint complied with Fed. R. Civ. P. 8 that pleadings contain a plain statement of their claims and that pleadings be direct and concise.⁵⁸

⁵² *Lujan, supra*, at 560-61 and n.1, 112 S. Ct. at 2136 and n.1.

⁵³ *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984).

⁵⁴ *Lujan, infra*, at 560-61.

⁵⁵ *Lewis v. Casey*, 518 U.S. 343, 358, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

⁵⁶ *In Re Deepwater Horizon-Appeals of the Economic and Property Damage Class Action Settlement* 103836, 739 F.3d 790, 799 (CA5 2014).

⁵⁷ ROA. 7330-7333. ¹⁰⁸ Fed. R. Civ. P. 8.

⁵⁸ *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

Amended Complaint sufficiently describes alleged fraudulent conduct as basis of RICO claim with sufficient particularity and specificity under Fed. R. Civ. P. 9(b).

Amended Complaint complies with *Elliott v. Foufas* requirements.⁵⁹

Petitioners satisfied Fed. R. Civ. P. 8 and 9 dictates because fraud also encompasses misrepresentation by material fact omission. “...In cases concerning fraudulent misrepresentation” and factual omission, Rule 9(b) typically requires claimant to plead factual type omitted, place in which the omissions should have appeared, and manner whereby omitted facts made representations misleading.⁶⁰

Amended Complaint contains adequately pled material facts for fraud by commission and omission.

To establish fraud claim, plaintiff must prove defendant made material misrepresentation, which defendant knew was false or made recklessly without any knowledge of its truth, with intent that plaintiff act upon it and actually rely on the misrepresentation and suffer injury.⁶¹

Fraud by omission is a subcategory of fraud because omission or non-disclosure may be as

⁵⁹ *Elliott v. Foufas*, 867 F.2d 877, 880 (CA5 1989) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (CA 5 2006), quoting *United States ex. rel. Riley v. St. Luke's Hosp.*, 355 F.3d 370, 381 (CA 5 2004).

⁶⁰ *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (CA 5 2006), quoting *United States ex. rel. Riley v. St. Luke's Hosp.*, 355 F.3d 370, 381 (CA 5 2004).

⁶¹ *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001); *Manon v. Solis*, 142 S.W.3d 380, 387 (Tex. App. Dist. 14 — Houston 2004, pet. denied).

misleading as positive misrepresentation when a party has a duty to disclose. Failure to disclose does not constitute fraud unless there is duty to disclose the information.⁶²

Duty to disclose may arise not only when there is a confidential or fiduciary relationship,⁶³ but also in the three following situations:

1. when one voluntarily discloses information, there is duty to disclose whole truth;
2. when one makes representation, there is duty to disclose new information when there is awareness that new information makes earlier representation misleading or untrue; and
3. when one makes partial disclosure and conveys false impression, there is a duty to speak.

To establish civil conspiracy, one must prove:

- 1.combination of two or more persons;
- 2.an object to be accomplished (either an unlawful purpose or a lawful purpose by unlawful means);

⁶² *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667 (Tex. 1998); *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App. Dist. 14—Houston 1997, pet. denied).

⁶³ *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212-13 (Tex. App. Dist. 14 —Houston 2001, pet. Denied; *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 869 (Tex. App. Dist. 1—Houston 1999), aff'd on other grounds, 73 S.W.3d 193 (Tex. 2002) (citing *Stephanz v. Laird*, 846 S.W.2d 895, 903 (Tex. App. Dist. 1 —Houston 1993, writ denied)).

3.meeting of the minds on object or course of action;

4.one or more unlawful, overt acts; and damages as proximate result.⁶⁴

Civil conspiracies are considered derivative torts because defendant's liability depends upon participation in some underlying tort for which plaintiff seeks to hold the defendant liable.

This Court defined RICO conspiracy in *Beck v. Prupis* stating that such mirrors common law conspiracy as herein above stated.⁶⁵

Petitioners' Amended Complaint contains adequate allegations for common law and RICO conspiracies.⁶⁶ 18 U.S.C. § 1962(d) makes it unlawful to conspire to violate 18 U.S.C.A. § 1962 subsections (a), (b), or (c).

Crux of § 1962(d) violation is agreement to violate substantive portions of § 1962.⁶⁷

Before 1997, there was a split of authority as to whether each defendant in § 1962(d) claim had to agree personally to commit at least two predicate acts.⁶⁸ The majority view was that to violate § 1962(d), defendant needed only to agree to join a conspiracy that had predicate acts commission as its goal. In 1997 this Court finally settled issue in

⁶⁴ *Morris, infra*, 675.

⁶⁵ *Beck v. Prupis*, 529 U.S. 494 at 500 (2000).

⁶⁶ ROA.2601-3000.

⁶⁷ *Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n*, 298 F.3d 768, 774 (CA9 2002) ("It is the mere agreement to violate RICO that § 1962(d) forbids . . ."); *United States v. Sessa*, 125 F.3d 68, 71 (CA2 1997).

⁶⁸ *Id.*

Salinas v. United States.⁶⁹ “[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense.”⁷⁰

The Third Circuit applied *Salinas* to hold that § 1962(d) extends beyond those who have conspired themselves to operate or manage a corrupt enterprise.⁷¹ It also held that conspiracy liability is not limited only to those who are liable for a substantive violation under § 1962 upon successful completion of the scheme.⁷² The court emphasized that “one who opts into or participates in a conspiracy is liable for the acts of his [or her] co-conspirators which violate §1962(c), even if the defendant did not personally agree to do, or to conspire with respect to, any particular element.”⁷³ Under this standard, defendants can be held liable for conspiracy if they knowingly agree to facilitate scheme that includes operation or management of a RICO enterprise.⁷⁴ The Second Circuit, also looking to *Salinas*, concluded that proof that enterprise was

⁶⁹ *Salinas v. United States*, 522 U.S. 52, at 63-64 (1997) (quoting Justice Holmes: “[P]lainly a person may conspire for the commission of a crime by a third person”).

⁸⁰ *Id.* at 65.

⁷¹ *Smith v Berg.*, 247 F.3d 532, 534 (CA3 2001).

⁷² *Id.*

⁷³ *Id.* at 537, *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 257 F. App’x 49 (CA9 2007).

⁷⁴ *Smith, supra*, at 538. But see *Shams v. Fisher*, 107 F. Supp. 2d 266, 277 (S.D.N.Y. 2000) (wife’s voluntary presence answering phones and typing documents for the family-owned business was insufficient to show that she agreed to further the objectives of the enterprise).

actually established is not necessary for conspiracy.⁷⁵

This court in *Brouwer* clarified that the level of personal participation required by first agreement is to “knowingly facilitate the activities of the operators or managers to whom subsection (c) applies ... It is an agreement, not to operate or manage the enterprise, but to facilitate the activities of those who do.”⁷⁶

Petitioners have pled adequately a RICO conspiracy and enhanced their Amended Complaint allegations of mail and wire fraud.

Mail fraud and wire fraud⁷⁷ are included as racketeering activities and are alleged as predicate acts in “high percentage” of civil RICO claims.⁷⁸

Mail fraud involves (1) a scheme based on intent to defraud; and (2) the use of mails to further that scheme.⁷⁹ Scheme to defraud encompasses “acts of artifice or deceit which are intended to deprive an owner of his property or money.”⁸⁰

Mail or wire fraud elements have been identified:

1. a plan or scheme to defraud;
2. intent to defraud;

⁷⁵ *United States v. Applins*, 637 F.3d 59, 75 (CA 2 2011).

⁷⁶ *Brouwer v. Raffensperger, Hughes & Co.Reves v. Ernst & Young*, 507 U.S. 170 (1993).

⁷⁷ U.S.C.A. § 1341 and U.S.C.A. § 1343.

⁷⁸ *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (noting that fraud is alleged as a predicate act in a “high percentage” of civil RICO claims).

⁷⁹ *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998). *judgment aff'd*, 20 F.3d 771 (CA 7 1994).

⁸⁰ *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, No. 92-CV-2808, 1993 WL 8340 (N.D. Ill. Jan. 8, 1993).

3. reasonable foreseeability that mail or wires will be used; and
4. actual use of mail or wires to further *scheme*.⁸¹

Mailings or wirings sent or delivered through use of “any private or commercial interstate carrier” may violate mail fraud statute.⁸² Petitioners here have met their respective burdens of pleading a plausible Amended Complaint regarding racketeering against all Respondents, as well as, satisfying the dictates of *Twombly* and *Iqbal*.⁸³

Some Respondents misstate that their efilng or use of internet or emailing is only in “*intrastate*” as opposed to “*interstate commerce*”, without citation to any specific statute or precedential holding for such.⁸⁴

The Sixth Circuit stated:⁸⁵

⁸¹ *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402 (CA 8 1999). *In re Sumitomo Copper Litig.*, *supra*, at 455 (noting that elements of mail fraud are more broadly defined than elements of common law fraud).

⁸² 18 U.S.C.A. § 1341. *Florida Software Sys., Inc. v. Columbia/HCA Healthcare Corp*, 46 F. Supp. 2d 1276, 1281 (M.D. Fla. 1999).

⁸³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

⁸⁴ ROA 300.59. 18 U.S.C.A. § 1341; *Florida Software Sys., Inc. v. Columbia/HCA Healthcare Corp*, 46 F. Supp. 2d 1276, 1281 (M.D. Fla. 1999).

⁸⁵ *United States v. Napier*, 787 F.3d 333 (CA6 2015); *Doe v. Smith*, 429 F.3d 706, 709-10 (7th Cir. 2005) (holding interstate commerce nexus met and reversing grant of motion to dismiss for failure to state a claim under the Wiretap Act where counsel stated at oral argument that defendant had emailed video).

“...The Internet, which the Supreme Court has described as ‘an international network of interconnected computers,’ and which facilitates the constant flow of e-mail, enables interstate commerce of many types to occur.”⁸⁶ When e-mails or files attached to them cross state lines, they travel in interstate commerce.⁸⁷ ... The most instructive discussions of whether e-mails necessarily travel in interstate commerce arise in the criminal context.⁸⁸ ... The ‘relevant inquiry’ for interstate commerce purposes for a sufficiency of the evidence challenge by a criminal defendant was ‘whether there is enough circumstantial evidence that these electronic communications were transmitted through interstate wires. Given the omnipresent nature of the Internet, this is not a difficult burden for the government to satisfy.’⁸⁹ Napier approvingly cited case law from other circuits to the effect that **no showing was necessary that transmissions had crossed state lines.**⁹⁰ (collecting cases from the First, Second, Third, Fourth, and *Fifth Circuits*).¹⁵⁵ However, it stopped short of adopting an unequivocal rule to that effect because of

⁸⁶ *Reno v. ACLU*, 521 U.S. 844, 849, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (describing history of Internet and types of communication through its portals).

⁸⁷ *United States v. Chambers*, 441 F.3d 438, 449 (6th Cir. 2006); *United States v. Lay*, 612 F.3d 440, 447 (6th Cir. 2010) (affirming wire fraud conviction where emails were sent between states).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

circumstantial evidence that the images had traveled between different time zones.

United States v. Mellies also discussed this body of law with approval, but declined to hold that email or Internet transmissions always move in interstate commerce because the parties had not addressed the issue in their briefs. In light of this guidance, we hold that a civil plaintiff need not allege that an email crossed state lines to survive a motion to dismiss. *Napier* specifically stated that the government—which, by the time of trial, would necessarily have concluded its investigation—need not prove the location of an email recipient to establish an interstate nexus, and we believe it would be unfair to impose a more stringent burden on a plaintiff in a civil case who has not yet had the benefit of discovery. To survive a motion to dismiss, a plaintiff must allege ‘factual content that allows the court to draw the reasonable inference’ that the supposed false advertisements were introduced *into interstate commerce*. Stating that an email was sent is enough. In so holding, we join the Seventh Circuit that the very act of sending an email creates the interstate commerce nexus necessary for federal jurisdiction.” (Our Emphasis.)

This Court should thereby reverse the trial Court in this case

Question 3: Whether partial waiver of judicial immunity under Texas Estates Code §1201.003 (former Probate Code § 671(d)) is applicable to RICO;

In Anglo legal world's entirety, which stretches globally, north and south, east and west, from Greenwich, England Prime Meridian around and back again to Greenwich Prime Meridian, upon which, as for its founding British Empire the sun never sets, there is no other waiver of all-encompassing and absolutely controlling judicial immunity⁹¹ save that found in Texas Estates Code § 1201.003, former Probate Code § 671(d), which states that

"[a] judge is liable on the judge's bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect (conscious indifference) of the judge⁹² to use reasonable diligence in the performance of the judge's duty under this subchapter." (Our Emphasis.)

James v. Underwood⁹³ states:

"Texas Estates Code § 1201.003, which is former section 671(d) of the Probate Code states:

⁹² Texas Civil Practice and Remedies Code § 41.001 (11) defines 'gross negligence' as conscious indifference.

⁹³ ***Underwood, infra***, 714.

‘[a] judge is liable on the judge's bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect (conscious indifference) of the judge to use reasonable diligence in the performance of the judge's duty under this subchapter.’ This provision provides a limited waiver of judicial immunity, allowing recovery for losses directly tied to the judge's duties under the subchapter...” (Our Emphasis).

Amended Complaint’s allegations⁹⁴ aver County Respondents are liable to Sheshtawy and Peterson Petitioners⁹⁵ for Probate Judges’ conscious indifference (gross negligence).⁹⁶

Gross negligence is defined as a measure for punitive damages.⁹⁷ The statutory prohibition against suing a municipal corporation in Texas and the assigned venue for suits against a municipal corporation in the same statute are also waived.⁹⁸

This Court stated:⁹⁹

⁹⁴ ROA.5903.

⁹⁵ ROA.2619-.2621, .2710 ¶ 279, .2763 ¶ 396.

⁹⁶ Texas Government Code § 25.00231: Texas Civil Practice and Remedies Code §§ 41.001(11), 41.003 and 162.

⁹⁷ Texas Government Code § 25.00231. Texas Civil Practice and Remedies Code §§ 41.001 (11) and 41.003.

⁹⁸ Texas Civil Practice and Remedies Code Chapter 5. ROA.7283-7344.

⁹⁹ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).

“...While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment -- an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance **immunity by consenting to suit...**”¹⁰⁰
Second, a State may waive its sovereign immunity...”¹⁰¹. (Our Emphasis.)

Cited Estates Code section does not limit what actions may be brought against a Probate Judge nor where a lawsuit might be initiated. RICO actions should be available to federal claimants in United States District Court where Probate Judge in personal and official capacity acts with conscious indifference in regard to a guardianship estate or the Court’s ward in and through a conspiracy and/or association-in-fact with others in racketeering activity.

Sheshtawy and Peterson Petitioners adequately pled plausible case, for which they could obtain favorable outcome and trial Court could grant relief under civil RICO.

This Court should reverse this case as to County Respondents under both Fed. R. Civ. P.12(b)(1) or Rule 12(b)(6).

¹⁰⁰ ***Fitzpatrick v. Bitzer***, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976).

¹⁰¹ ***Clark v. Barnard***, 108 U.S. 436, 447-448, 27 L. Ed. 780, 2 S. Ct. 878 (1883).

Question 4: Immunities

County Respondents state that derivative or quasi-judicial immunity shields Respondent Ms. Hightower.

The First Court stated:¹⁰² “...Quasi-judicial immunity is an affirmative defense. Therefore, the **official must plead and prove all of its elements...**”¹⁰³ (Our Emphasis)

County Respondents asserting quasi or qualified immunity had burden of proof through the production of evidence for such an affirmative defense. Once Respondents properly have raised it under Rule 8 and have adduced evidence in evidentiary proceedings, Petitioners will have opportunity to adduce their own contravening evidence.

This Court should reverse trial Court in sustaining County Respondents’ Motion to dismiss on quasi-immunity affirmative defense’s applicability.

Lawyer Respondents also stated that the attorney Respondents¹⁰⁴ enjoy immunity.¹⁰⁵ Texas

¹⁰² *Alcorn v. Vaksman*, 877 S.W.2d 390, 405 (Tex. App. Dist. 1 -- Houston 1994); and, *Perry, supra*, 110.

¹⁰³ *Austin v. Hale*, 711 S.W.2d 64, 66 (Tex. App.—Dist. 10 Waco 1986, no writ).

¹⁰⁴ Respondents Mr. MacIntyre, Mr. McCulloch, Mr. Burt, Ms. Young, MacIntyre, McCulloch, Stanfield & Young, L.L.P., Mr. Royce, Mr. Funk, Gray Reed & McGraw, P.C., Ms. Pacheco, Ms. Beduze, Crain, Caton & James, P.C., Mr. Fuqua, Fuqua & Associates, P.C., Mr. Jones, Underwood, Jones & Scherrer,

Supreme Court observed a lawyer's protection from liability arising from his client's representation is not limitless.¹⁰⁶

An attorney, who knowingly commits fraudulent act outside the scope of client's legal representation could be sued.¹⁰⁷ If a lawyer participates independently in fraud, he accts "foreign to an attorney's duties." A lawyer cannot shield his own willful and premeditated fraud from liability simply because he is his client's agent.¹⁰⁸

Likover states:

“...An attorney has no general duty to the opposing party, but he is liable for injuries to third parties when his conduct is fraudulent or malicious. He is not liable for breach of a duty to the third party, but he is liable for fraud.¹⁰⁹ A lawyer is authorized **to practice his profession, to advise his clients, and to interpose any or supposed defense, without making himself**

P.L.L.C., Mr. Davis, Lewis, Brisbois, Bisgaard & Smith, L.L.P., Mr. Worley and McDonald Worley, P.C.

¹⁰⁵ ROA,2021-2027, both as counsel and as *ad litem*s.

¹⁰⁶ **McCamish, Martin, Brown & Loeffler, P v. F. E. Appling Interests**, 991 S.W.2d 787, 793-94 (Tex. 1999); **Toles v. Toles**, 113 S.W.3d 899, 912-13 (Tex. App. Dist. 5 -- Dallas 2003, no pet.); **Alpert v. Crain, Caton & James, P.C.**, et al., 178 S.W.3d 398 (Tex. App. Dist. 1 –Houston 2005).

¹⁰⁷ **Likover v. Sunflower Terrace II, Ltd.**, 696 S.W.2d 468, 472 (Tex. App. Dist. 1 -- Houston 1985, no writ).

¹⁰⁸ *Id.* (quoting **Poole v. Houston & T.C. Ry. Co.**, 58 Tex. 134, 137 (1882)).

¹⁰⁹ **Wilbourn v. Mostek Corp.**, 537 F. Supp. 302 (D. Colo. 1982).

liable for damages.¹¹⁰ However, an attorney is liable if he knowingly commits a fraudulent act that injures a third person, or if he knowingly enters into a conspiracy to defraud a third person.¹¹¹...[T]he Texas Supreme Court held that where a lawyer acting for his client participates in fraudulent activities, his action in ‘foreign to the duties of an attorney.’¹¹² ... Court held that a lawyer could not shield himself from liability on the ground that he was an agent, because no one is justified on that ground in knowingly committing a willful and premeditated fraud for another.¹¹³ The jury found that Sanford Likover engaged in a civil conspiracy with Ron Ritter, Monique Ritter, and Erwin Ritter to defraud Sunflower Terrace, and that the conspiracy was a proximate cause of injury to Sunflower Terrace, Ltd. Likover contends that there is no evidence or, in the alternative, insufficient evidence to support this finding... In *Great National Life Insurance Co. v. Chapa*,¹¹⁴186 the court said: ‘A civil action for a conspiracy will lie if the acts of the conspirators are not only malicious but without legal justification or excuse and are performed with the intent

¹¹⁰ *Morris v. Bailey*, 398 S.W.2d 946 (Tex.Civ.App.Dist.3 -- Austin 1966, writ ref'd n.r.e.); *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. Civ. App. 1910, writ ref'd).

¹¹¹ *Hennigan v. Harris County*, 593 S.W.2d 380 (Tex. Civ. App. Dist. 10 -- Waco 1979, no writ).

¹¹² *Poole v. Houston & T.C. Ry*, 58 Tex. 134, 137 (1882).

¹¹³ *Id.*

¹¹⁴ *Great National Life Insurance Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964).

of injuring another or if the natural and necessary consequence of the acts is the oppression of an individual.”(Our Emphasis.)

Likover’s facts were that *Defendant Likover, the attorney in conspiracy with his clients defrauded the Plaintiff in and through these judicial proceedings.*

Petitioners’ Amended Complaint similarly adequately refutes affirmative attorney immunity defenses, which also require evidentiary proceedings.

Petitioners have pled like scenarios under civil RICO, for common law conspiracy, as well as, for common law, wire and mail fraud in this case. This Court should reverse trial Court as to attorney Respondents.¹¹⁵

Texas Estates Code § 1054.056 provides Guardians *ad litem* limited immunity:”

“... involving the creation, modification, or termination of a guardianship is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian *ad litem*. (b) This section does not apply to a recommendation or opinion that is: (1) wilfully wrongful; (2) given: (A) *with conscious indifference to or reckless disregard for the safety of another;* (B) *with malice;* or (C) *in bad faith;* or (3) *grossly negligent.*” (Our Emphasis)

¹¹⁵ROA.7283-7344.

This section only applies to the UJR Respondents and not to Mr. McCulloch.

The Amended Complaint alleges that Judge Wright appointed Mr. McCulloch (L.S.'s attorney *ad litem*, later guardian *ad litem*, and L.S.'s guardianship estate's guardian *ad litem*), Ms. Young and Respondents MacIntyre (Ruby S. Peterson's attorney *ad litem*) and UJR (Ruby S. Peterson's guardian *ad litem*), who all acted with conscious indifference, "gross negligence" in their *ad litem* capacities.

Petitioners adequately pled *ad litem* Respondent were not sued for participation as such **"... in a guardianship proceeding involving the creation, modification, or termination of a guardianship,"** (Our Emphasis) but rather for their agreement to enter into common law and RICO conspiracies, their entry into those conspiracies and their engagement with others in patterns of participation in associations-in-fact and in doing such in concerted, continuous racketeering activities.¹¹⁶

Any immunity again constituted affirmative defense requiring evidentiary proceedings,¹¹⁷ as the Fifth Court stated:

"...The guardian *ad litem* is not an agent of the court and has no delegated authority to act in the name of the court. A distinguishing feature of judicial officers granted absolute immunity, such as court clerks, law clerks, bailiff's, constables issuing writs, and court-appointed receivers

¹¹⁶ ROA.2601-3368.

¹¹⁷ *Byrd v. Woodruff*, 891 S.W.2d 689, 1994 Tex. App. LEXIS 3098 (Tex. App. Dist. 5-- Dallas 1994).

and trustees, is their accountability to the appointing court. Such officers act at the discretion of the court. The guardian *ad litem*, on the other hand, acts independently of the district court. Absent removing the guardian *ad litem*, the court has no discretion to control the *ad litem*'s actions. Because the guardian *ad litem* is not acting as an agent of the court, the policy rationale for extending absolute immunity to the guardian *ad litem* is not present.

Although the possibility of claims based on breach of a guardian *ad litem*'s duties may discourage potential *ad litem*s from participating in the guardian *ad litem* program, a minor's right to sue ... must be considered in light of countervailing concerns, including the utility of the friendly suit guardian *ad litem* program. Texas law holds, that the, guardian *ad litem* displaces the next friend as the personal representative of the minor's interests.¹¹⁸ As a fiduciary, the *ad litem* is empowered to make decisions for, and act on behalf of, the minor.¹⁹⁰ If we cloak the guardian *ad litem* with judicial immunity, the minor has no recourse for an inadequate representation of her interests. The system's attempt to maintain the finality of judgments and protect the minor from the next friend's adverse interests would deny the minor any protection against acts of incompetence or bad faith committed by her guardian *ad litem*. Consequently, we

¹¹⁸ Only in actual lawsuits where so appointed.

conclude that policy requires this Court to hold the guardian *ad litem* accountable to the minor... (Our Emphasis)

Guardians *ad litem*, absent explicit statutory provision, of which there is little and attorneys' *ad litem*, absent explicit statutory provision, of which there is none have no immunity in this RICO case.

Such guardian *ad litem* quasi-immunity is an affirmative defense requiring evidentiary proceedings

This Court should reverse the trial Court regarding any guardian *ad litem*'s or attorney *ad litem*'s Rule 12(b)(1) or 12(b)(6) Motion to Dismiss.¹¹⁹

Questions 5 and 6 : Sanctions

Respondents MacIntyre,¹²⁰ CCJ,¹²¹ UJS¹²² and Gray Reed¹²³ have their own renewed Motion for Sanctions embedded within their Responses in Opposition to Petitioners' post Judgment Motions.

Petitioners filed Responses in Opposition to all Respondents' sanctions Motions, which Petitioners incorporate herein for all purposes.¹²⁴

Respondents did not attach proper attorney's fees affidavits and no time sheets under Federal Rule

¹¹⁹ ***Newman v. King***, 433 S.W.2d 420 at 421 Tex. 1968); ***Dawson v. Garcia***, 666 S.W.2d 256, 265 (Tex. App. Dist. 5 – Dallas 1984); and, ***Pleasant Hills Children's Home of The Assemblies of God, Inc. v. Nida***, 596 S.W.2d 947, 951 (Tex. App. Dist. 2 – Fort Worth 1980).

¹²⁰ ROA.8100-.8104.

¹²¹ ROA.8013-.8019.

¹²² ROA.8020-.8033.

¹²⁴ ROA.7953-.7999.

6(c), Fifth Circuit Rule 47.8, or Southern District Local Rule 7.

This Court has emphasized that claims for fees and costs must not be “excessive,” and must, in all respects, be “fairly and honestly made,” as well as, for fees actually incurred.¹²⁵ Even casual purview of the CCJ Respondents’ counsel’s billing statements reveals that their actual hourly rate is nowhere stated or supplied or to be found. Nor was it in the 11 August 2016 email, which merely states that Mr. Jefferson had given Ms. Pacheco a “professional courtesy” discount for \$150USD per hour of his still unknown actual hourly rate and “slight” deduction for Mr. Suazo’s hourly rate, also absent any rate disclosure.

Under Fed. R. Civ. P. 11, attorney’s fees sanctions must be only compensatory, as attorney’s fees attributable to those directly and proximately “incurred” in actually addressing sanctionable conduct.¹²⁶ The same holds true for 28 U.S.C. § 1927 attorney’s fees.

¹²⁵ *Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1982); *Trustees v. Greenough*, 105 U.S. 527, 537, 26 L. Ed. 1157 (1881); **ARTICLE: THE ETHICS OF ZEALOUS ADVOCACY: CIVILITY, CANDOR AND PARLOR TRICKS**, 34 Tex. Tech L. Rev. 3 (2002).

¹²⁶ Fed. R. Civ. P. 11 which states:

“...A sanction imposed under this rule **must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated**. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, **an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses *directly* resulting from the violation...**” (Our Emphasis.)

The Second Circuit citing Fifth Circuit Rule 22.2 (Now Rule 47.8) stated:¹²⁷

“[W]e think it appropriate to convert our previously expressed preference for contemporaneous time records,¹²⁸ into a mandatory requirement, as other Circuits have done. Hereafter, any attorney -- whether a private practitioner or an employee of a nonprofit law office -- who applies for court-ordered compensation in this Circuit for work done after the date of this opinion must document the application with contemporaneous time records. These records should specify, for each attorney, the date, the hours expended, and the nature of the work done.”

(Our Emphasis)

Petitioners and their counsel formally objected to statements as supplied, reasonableness of fees requested, statement accuracy and statement provision

¹²⁷ *New York Association of Retarded Children, Inc., et al, v. Hugh L. Carey, Individually and as Governor of the State of New York*, 711 F.2d 1136, 1147, 1983 U.S. App. LEXIS 26713 (CA2 1983).

¹²⁸ *McCann v. Coughlin*, 698 F.2d 112, 131 (CA2 1983); *In re Hudson & Manhattan R.R. Co.*, 339 F.2d 114, 115 (CA2 1964). *208 National Ass'n of Concerned Vets v. Sec. of Defense*, 219 U.S. App. D.C. 94, 675 F.2d 1319, 1327 (CA D.C. 1982); 5th Cir. R. 22.2, reprinted in 693 F.2d No. 3, at lxxiii (Jan. 10, 1983); E. Larson, *supra*, at 281 (recommending that all litigating attorneys keep daily time records); and, A. Miller, *Attorneys' Fees in Class Actions* 344-45 (Fed. Jud. Cr. 1980) (recommending trial court require time sheets at pretrial conference).

timeliness, the latter because their provision was not in keeping with Circuit Rule 47.8 nor Fed.Rs.Civ.P. 5 and 6.¹²⁹ Rule 11 is not an attorneys' fees shifting Rule and was not written to compensate counsel, but rather, to deter conduct in pleadings and other writings. 28 U.S.C. § 1927, on the other hand, is a fee shifting statute, but it requires under cited precedent bad faith showing, which neither the CCJ and other Appellees nor their counsel is or were able to do. None can show that this case has been initiated for any improper purpose. If there is no bases for Rule 11 sanctions there is no grounds or bases for 28 U.S.C. § 1927 sanctions.

Rule 11 1993 amendments eliminated mandatory sanctions and returned to district courts discretion to decide whether or not to impose sanctions if violation has occurred. Rule 11 amendments introduced series of constraints on District Judges being asked to impose **sanctions**.

They are as follows: Every **sanction** “**must be limited** to what suffices **to deter** repetition of conduct or comparable conduct by others similarly situated.”¹³⁰ This limitation is consistent with caselaw requirement, developed under 1983 Rule, “Court is **to impose the least severe sanction adequate to serve the purpose for which sanction is being imposed**.”¹³¹ **Even on motion, if monetary penalty is awarded**, Court ordinarily Orders payment to be paid into Court and may only be paid to opposing party “if...warranted for effective deterrence.”¹³² Advisory Committee Note

¹²⁹ ROA.8547-8550.

¹³⁰ Advisory Committee Notes subdivision (c)(4).

¹³¹ *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (CA D.C. 1990); and, *Dodd Ins. Servs. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1159 (CA10 1991). 211 Advisory Committee Notes.

¹³² *Id.*

identifies some circumstances warranting award to opposing party: i.e., “under **unusual circumstances, particularly for (b)(violations [e.g., presenting papers for improper purposes]**, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by violation.”¹³³ This constraint, presumptive inappropriateness of awarding attorneys’ fees to opponent, was added in recognition of fact that “the **purpose of Rule 11 sanctions is to deter rather than to compensate.**”¹³⁴ (Our Emphasis) This Court’s decisions repeatedly stress this point in construing the 1983 version of Rule 11. Advisory Committee also sought to decrease incentive for parties to file Rule 11 motions because “... Too often, Rule 11 motions have been filed in an effort to circumvent the standards for statutory awards¹³⁵ of attorney’s fees to prevailing parties or to shortcut the procedures that would apply in traditional malicious prosecution actions...”

Sanctioning court is to impose least severe sanction adequate to serve Rule’s deterrent **purpose**. Rule 11(c)(4) states in fact that: “A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”¹³⁶

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Plante v. Fleet Nat’l Bank*, 978 F. Supp. 59, 67 (D.R.I. 1997) *Caldwell v. Cummings*, 33 P.3d 1138, 1143 (Wyo. 2001). (“**sanctions are not intended to be a fee-shifting device**”) (analyzing identical Wyoming Rule of Civil Procedure 11)...” (Our Emphasis)

¹³⁶ *Thomas v. Early Cnty., GA*, 2013 U.S. App. LEXIS 8626 (CA 11 2013) (“the sanction ‘**must be limited to what suffices to**

The Fifth Circuit stated:¹³⁷ “Whatever the ultimate sanction imposed, the district court should utilize the sanction that furthers the **purposes of Rule 11 and is the least severe sanction adequate to such purpose.**”¹³⁸ (Our Emphasis)

The Fifth Circuit stated:¹³⁹

“... We must determine whether the language ‘reasonable attorney fees and other litigation costs reasonably incurred’ extends only to fees actually paid or payable to an attorney or whether such includes a sum to compensate a *pro se* litigant for time and effort expended ...”¹⁴⁰

deter repetition of the conduct or comparable conduct by others similarly situated.’ ”); and, *Cabell v. Petty*, 810 F.2d 463, 466 (CA4 1987) (“In choosing a sanction, [t]he basic principle ... is that the least severe sanction adequate to serve the purpose should be imposed” ’) (quoting W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985). (Our Emphasis)

¹³⁷ *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 878 (CA5 Cir. 1988) (en banc).

¹³⁸ *Brown v. Federation of State Med. Bds.*, 830 F.2d 1429, 1437 (CA7 1987) (quoting *Cabell*, *supra*, and Judge Schwarzer); *Jackson v. Law Firm of O’Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (CA6 1989); *Hilton Hotels Corp.*, *supra*, at 46 (citing ABA Standard (L)(4) (Appendix A); *Dodd Ins. Serv. v. Royal Ins. Co.*, *supra*, at 1159 (CA 10 1991); *Miltier v. Downes*, 935 F.2d 660, 665 (CA 4 1991); *Williams v. Adams*, 660 F.3d 263, 265–266 (CA7 2011).

¹³⁹ *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (CA5 1988).

¹⁴⁰ *Crooker v. U.S. Dep’t of Justice*, 632 F.2d 916 (CA 1 1980) (FOIA, 5 U.S.C. § 552(a)(4)(E)); *White v. Arlen Realty & Development Corp.*, 614 F.2d 387 (CA 4 1980) (Truth in Lending Act, 15 U.S.C. § 1640(a)(3)); *Davis v. Parratt*, 608 F.2d 717 (CA 8

Courts have addressed whether attorney fees may be awarded to a party, who did not use an attorney's services, with varying responses. First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits declined to make such awards.

The Trial Court's sanctions Order nonetheless in this case awarded fees to Respondents UJS, Fuqua and Worley, who acted *pro se* and are not entitled to any monetary sanctions. Fifth Circuit interpretation is unless a party does actually incur attorneys' fees for Rule 11 and/or 28 U.S.C. § 1927 actual violation, such attorneys' fees applicant may not claim additional fees.¹⁴¹

Respondents and trial Court failed to articulate how Petitioners or their counsel acted in bad faith or for an improper purpose in filing a Rule 59 Motion. Respondents have not articulated how Petitioners and their counsel through their Rule 59 Motion are not asserting "**...the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law...**"¹⁴² dealing specifically with immunity issues as statute and precedent define cited throughout

1979) (Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988); *Hannon v. Security Nat. Bank*, 537 F.2d 327 (CA 9 1976) (Truth in Lending Act); *Burke v. United States Dept. of Justice*, 559 F.2d 1182 (CA 10 1977) (FOIA), *aff'd* 432 F. Supp. 251 (D.Kan.1976).

¹⁴¹ *Cofield v. City of Atlanta*, 648 F.2d 986 (CA 5 1981); *Kay v. Ehrler*, 499 U.S. 432 (U.S. 1991); and, *New York Gaslight Club v. Carey*, 447 U.S. 544 (1980).

¹⁴² F.R.Civ. P. 11.

Petitioners' Opposition Responses to Dismissal Motions and sanctions Motions, as well as, for civil RICO.

This Court should reverse the Rule 11 and 28 U.S.C. § 1927 trial Court Sanctions.

CONCLUSION

This Court should grant Petitioners' Petition, as well as, grant whatever other relief to which they might be entitled at law or in equity, or the nature of this cause might require, as this Court might deem meet, just and proper.

Respectfully submitted

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