UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES G. PERDIGAO	*	CIVIL ACTION NO.: 08-3570
VERSUS	*	JUDGE: FALLON
ADAMS AND REESE, LLP, ET AL.	*	MAGISTRATE: CHASEZ

* *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Desperate people do desperate things, and Jamie Perdigao is an increasingly desperate man. Indicted by a federal grand jury, he faces a December trial on 59 felony counts that carry the prospect of decades in jail. According to the grand jury, Perdigao scammed the law firm and its clients for thirteen years by issuing phony invoices and stealing checks. The criminal charges even seek a money laundering forfeiture from Perdigao of $19.2 million that he sent to a Swiss bank account. Facing a long prison term in his immediate future, Perdigao recently launched a last-ditch, two-pronged attack of desperation: filing sensational, false allegations against both the prosecutors in his criminal case and the victims of his crimes. The attack on the prosecutors – a motion to disqualify the entire United States Attorney's office – was summarily rejected by the Court two weeks ago. The attack on the victims – this lawsuit against the law firm and lawyers who discovered and reported his crimes – should meet the same fate.

To make matters worse, after stealing millions from clients and his law firm, Perdigao's lawsuit now steals the right of confidentiality from his former clients. The Complaint discloses 72 pages of client information as it spins a fantasy – that although Adams and Reese demanded his resignation because of his crimes, he really departed because of retaliation for blowing the

whistle on clients and the firm. The Complaint is grotesquely unlawful because the Louisiana Rules of Professional Conduct for lawyers prohibit disclosure of any client information when lawyers try to enrich themselves by suing non-clients. If Perdigao's case is not dismissed with appropriate sanctions, lawyer-client confidentiality evaporates in Louisiana.

Perdigao's fantasy is both factually false and legally deficient. On a motion to dismiss, Adams and Reese is required to limit its arguments to the law. The firm therefore refrains at this time from disproving Perdigao's factual allegations, which would require disclosure of additional client information. Further abuse of client confidentiality will not be necessary because the law requires dismissal of the Complaint today.

First, Perdigao's attack on client confidentiality itself requires dismissal. Louisiana Rule of Professional Conduct 1.6 forbids the disclosure of all alleged client information in the Complaint. Because a lawyer cannot lawfully make the disclosures, the Complaint must be dismissed and should be stricken from the record of the Court.

Second, Perdigao's ludicrous invocation of the federal RICO statute, while perhaps useful to poison the jury pool for his criminal case, is legally baseless. Overreaching plaintiffs have misused civil RICO allegations for years, often claiming, as does Perdigao, to be whistle-blowers. The courts repeatedly have rejected such claims as a matter of law for lack of causation and pattern.

Third, Perdigao pleads under oath that he was involved in his fantasy. According to his story, he took no meaningful action about the many pretended wrongs, even though he pleads that he was a law firm ethics adviser. The legal doctrine of *in pari delicto* therefore requires dismissal.

PLAINTIFF'S ALLEGATIONS

As background for this Motion, defendants summarize Perdigao's allegations, including some of his admissions that require dismissal of the Complaint. Although defendants emphatically deny plaintiff's allegations of misconduct, those denials are not at issue in connection with this Motion to Dismiss.

Perdigao became a partner of Adams and Reese in January 1993. Compl. ¶ 11. He resigned from the firm in September 2004. Compl. ¶ 1(a).

Perdigao alleges that, during his tenure at the firm, Adams and Reese became a "racketeering enterprise" in violation the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. According to the Complaint, plaintiff knew about, or was involved in, most of the alleged misconduct. Compl. ¶¶ 14, 16, 18, 22, 24, 35, 72, 112, 118, 123. Perdigao specifically observes that he "kept his mouth shut about" certain allegedly criminal "activities and schemes," Compl. ¶ 14, and that even after a government investigation into these activities commenced he "took no action to report" the conduct at issue. Compl. ¶ 25. He claims that during his tenure as a partner, Adams and Reese earned substantial revenue from conduct that plaintiff now says was criminal. Compl. ¶¶ 25, 31, 57, 94. As a partner, Perdigao made his share of that money.

According to the Complaint, plaintiff eventually attempted to blow the whistle on his partners and clients. Compl. ¶¶ 36, 116, 128. He alleges that as a result of this whistle-blowing, the partners retaliated. They allegedly cut his compensation by an unspecified amount, Compl. ¶ 40, and eventually forced him to resign from the law firm. Compl. ¶¶ 116, 130, 131. After his resignation, a few additional retaliatory incidents allegedly occurred: circulation of letters and media statements criticizing his conduct, Compl. ¶¶ 132, 136-38; denial of the opportunity to

purchase COBRA interim health insurance, Compl. ¶¶ 142-44; and refusal to distribute the proceeds of his capital account. Compl. ¶ 144.

In discussing the supposed RICO violations, the Complaint repeatedly discloses real and imagined client information – privileged, confidential, and otherwise – relating to his and the firm's representation of clients. *E.g.*, Compl. ¶¶ 7-9, 10, 12-13, 15, 16, 17, 18-19, 20-25, 32, 33, 34, 35, 37, 38, 39, 42-44, 52, 53, 56, 57, 58-59, 67, 68, 69, 77, 78, 79, 80, 85-86, 92, 97-100; *see also infra* Part I-B.

ARGUMENT

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Complaint's purely factual allegations are assumed to be true, but, as the Supreme Court held last year in *Bell Atlantic Corp. v. Twombley*, 127 S. Ct. 1955 (2007), "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (brackets omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965. Even before *Twombley* was decided, the Fifth Circuit applied a similar standard to motions to dismiss RICO claims. *E.g.*, *In re Mastercard Int'l. Internet Gambling Litig.*, 313 F.3d 257, 261 (5th Cir. 2002) (affirming dismissal of civil RICO claims and holding that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss") (quoting *Nolen v. Nucentrix Broadband Networks, Inc.*, 293 F.3d 926, 928 (5th Cir. 2002)).

Where, as here, RICO claims are predicated on allegations of fraud, the plaintiff also must satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b). *E.g., Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997) ("Fed. R. Civ. P. 9(b) applies to . . . RICO

claims resting on allegations of fraud"); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (affirming dismissal of civil RICO claim when predicates acts of mail and wire fraud were not pleaded with the specificity required by Fed. R. Civ. P. 9(b)).

I. The Complaint Should Be Dismissed Because Plaintiff Repeatedly Violates Louisiana Rule of Professional Conduct 1.6.

Perdigao's unprecedented attack on client confidentiality has no place in any court. Louisiana Rule of Professional Conduct 1.6, which has been adopted by this Court,[1] codifies the bedrock confidentiality right. The Rule absolutely forbids Perdigao's Complaint, which therefore should be dismissed and stricken from the record of the Court.

A. Louisiana Imposes a Strict Standard of Confidentiality on Lawyers.

Louisiana's version of Rule 1.6 is one of the nation's strictest:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
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> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> > (1) to prevent reasonably certain death or substantial bodily harm;
> >
> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> >
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
> >
> > (4) to secure legal advice about the lawyer's compliance with these Rules;

[1] *See* Local Rule 83.2.4E.

> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply with other law or a court order.

La. Rules of Prof'l Conduct R. 1.6 (emphasis supplied).

As the Fifth Circuit recognized in a decision about the impact of this Rule on federal litigation rights, "except under specified limited circumstances, an attorney may not divulge her client's confidences." *Douglas v. DYNMcDermott Petrol. Operations Co.*, 144 F.3d 364, 369, *rehearing denied*, 163 F.3d 223 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). The prohibition is broad: "A 'confidence' in this context means exactly what the rule says – any 'information relating to representation of a client.'" 144 F.3d at 370 (emphasis supplied). The prohibition is not limited to privileged information. *Id.* Furthermore, as the Court pointed out, the Louisiana prohibition is broader than in several other states: Confidentiality in Louisiana "involves all 'information' gained in representation, as opposed to [only each] 'confidence' or 'secret.'" *Id.* (quoting *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979)).

In addition, the Fifth Circuit noted the relationship of Louisiana Rule 1.6 to the fundamental fiduciary duty of loyalty. "The duty of loyalty to the client, with which the duty of confidentiality is inherently intertwined, is one of the basic tenets of the legal profession. . . . These duties – confidentiality and loyalty – serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies." *Douglas*, 144 F.3d at 370 (citations omitted) "'[T]he integrity of the judicial system would be sullied if courts tolerated . . . [the unethical disclosure of

confidential information] by those who profess and owe undivided loyalty to their clients.'" *Id.* (quoting *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1027 (5th Cir. 1981)).

The limited nature of the so-called self defense exception in sub-paragraph 1.6(b)(5) is important. "Where it does apply, the exception to confidentiality set forth in part (b)(5) of the rule is still a limited one. If the exception does not apply, and if no other exceptions apply, an attorney who makes a disclosure of confidential information will violate the duty of confidentiality." 21 La. Civ. Law Treatise § 7.3.[2] The Rule does not create exceptions for all litigation involving lawyers. In defense of litigation, a lawyer may disclose information about representation of clients in three contexts – if the claim against the lawyer (1) is "in a controversy between the lawyer and the client," (2) is "based on conduct in which the client was involved," or (3) involves "allegations in any proceeding concerning the lawyer's representation of the client." But if a lawyer is making a claim, there is only one exception: "to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client." Rule 1.6 (emphasis supplied). One of the prices of Bar membership in Louisiana is that lawyers cannot "reveal information relating to the representation of a client" in order to sue non-clients. *Id.* The duties of loyalty and confidentiality to clients come first, ahead of the lawyers' personal interests in collecting money through litigation.

B. Perdigao Repeatedly and Intentionally Breaches Rule 1.6.

The present Complaint massively violates Rule 1.6. Plaintiff discusses the legal and business affairs of twenty-seven clients. In the face of a rule that prohibits disclosure of any information about client representation, plaintiff discusses the following client interests and

[2] The Treatise also notes the significance of *Douglas*: "In *Douglas v. DynMcDermott Petroleum Operations Co.*, for example, a Louisiana lawyer was found to have violated the duty when the disclosure of confidential information was made for a purpose other than for those permitted by the rule." 21 La. Civ. Law Treatise § 7.3.

subject matters of information, as he attempts to make money through a lawsuit against non-client Adams and Reese. Again, taking plaintiff's allegations as true, each of the disclosures reveals, as Rule 1.6 puts it, "information relating to the representation of a client":[3]

- Collateralization of client debt
- Client tax planning
- Client contracts
- A client's own alleged conflict of interests
- Client efforts to obtain contracts
- Client business interests
- Client strategy to obtain contracts
- Client business arrangements
- Personnel matters of a client
- An "internal corporate dispute" of a client
- Alleged "regulatory violations" of clients
- Alleged "improprieties" of a client
- Client lobbying of government entities
- Documentation of clients' private transactions
- Alleged client violation of consumer protection laws
- Client business strategies
- Searching for technicalities to advance client interests
- Client strategies for pursuit of a legal matter
- Regulatory issues and problems of clients
- Capitalization of a client
- Credit rating of a client
- Defense of criminal investigations involving clients
- Client estate planning
- Income tax investigation against a client
- Criminal plea negotiations by a client
- Client wealth
- Client business transactions
- Client cooperation in a criminal case
- Client personal investments
- Financing of client personal investments
- The financial condition of clients

[3] The Complaint also violates Rule 1.8's prohibition on use of client information and Rule 1.9's prohibition of disclosure or use of former client information. To avoid additional or repeated disclosure of client information, Adams and Reese will not refer to specific clients or present its arguments in a manner that, because of the unethical allegations in the Complaint, would disclose client identification or information. We suggest that plaintiff should do the same with future filings.

- Client financial planning
- Interests of clients that might conflict

The intentional nature of plaintiff's breach of his duty of confidentiality to clients also bears scrutiny. He took no steps to preserve any degree of confidentiality regarding the Complaint. For example, although litigation pleadings are often filed under seal, plaintiff did not move to file the Complaint under seal. If he had proceeded with any good faith regarding client interests, he would have at least allowed the Court to consider whether public disclosure of client information was appropriate. Nor did Perdigao write the Complaint without using the names of clients. "John Doe" complaints commonly provide a degree of confidentiality in publicly filed pleadings, but plaintiff disregarded this technique. Although such steps to preserve client confidentiality would not satisfy the strict requirements of Louisiana's Rule 1.6, plaintiff's failure to use any of them, or any other procedure to limit disclosure of client information, establishes the extreme nature of his violation of the Rule.[4]

The context of plaintiff's filing, of course, explains why he intentionally violated the Rule. The Court can take judicial notice of the fact that plaintiff faces trial in December in a criminal case alleging financial crimes worth tens of millions of dollars. The looming incarceration would be many years. Plaintiff's civil Complaint implements one obvious strategy for such a desperate criminal defendant – figure out a way to poison the jury pool with publicity

[4] Although not to be considered for the Motion to Dismiss, the attached Perdigao testimony from the criminal trial of Governor Edwards (Exhibit A) may interest the Court with regard to whether sanctions are in order for the Complaint's massive violation of Rule 1.6. In addition, when a desperate lawyer like Perdigao has nothing to lose from unethical disclosure of client information, the last bulwark to protect client rights is often that lawyer's lawyer. We ask the Court to consider this fact as it addresses the breathtaking breaches of Rule 1.6 in the present Complaint and defendant's request for relief in the Conclusion below.

notwithstanding the prohibition of Professional Conduct Rule 3.6.[5] Plaintiff's ploy worked in one respect: substantial publicity occurred. Many media reports and postings have appeared as a result of the Complaint. At the same time, however, these reports highlight the outrageous violation of Rule 1.6 because the reports repeatedly reference a number of clients.

Even worse than the initial publicity, the Complaint, if it survives, will set in motion continuing and more expansive disclosure of client information. There will be twenty-seven or more mini-trials, at least one for each client. Client information will be disclosed in discovery and proved at trial. For every wrongful allegation made about a client, defendants will be forced to use additional client information to repair the reputation of the client and to fairly defend themselves.

Beyond Perdigao's PR ploy, his second equally obvious illicit strategy is the attack on Adams and Reese lawyers who reported his crimes and will testify against him in December. What better way to create a phony credibility attack than to sue witnesses for "racketeering"?

C. Perdigao's Rule 1.6 Violations Require Dismissal.

In analogous circumstances, courts have dismissed with prejudice lawyer-filed complaints that violate confidentiality requirements. For example, the Supreme Court of Illinois affirmed judgment against an in-house lawyer-plaintiff in a retaliatory discharge complaint against his former client-employer. *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991). The court reasoned:

> As stated in *Herbster*, "the attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets,

[5] Louisiana Rule of Professional Conduct 3.6(a), which also has been adopted by this Court, states: "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

> disclosures, and information that otherwise would not be divulged to intimate friends." We believe that if in-house counsel are granted the right to sue their employers for retaliatory discharge, employers might be less willing to be forthright and candid with their in-house counsel. . . .
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> . . . .
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> If extending the tort of retaliatory discharge might have a chilling effect on the communications between the employer/client and the in-house counsel, we believe that it is more wise to refrain from doing so.

Id. at 109-10 (citations omitted) (quoting *Herbster v. N. Am. Co.*, 501 N.E.2d 343, 346 (Ill. App. Ct. 1986)). *Accord Wise v. Consol. Edison Co.* 723 N.Y.S.2d 462, 463 (N.Y. App. Div. 2001).

Two appellate decisions in California are also instructive. *Solin v. O'Melveny & Myers, LLP,* 107 Cal. Rptr. 2d 456 (Cal. Ct. App. 2001) and *McDermott, Will & Emery v. Superior Court,* 99 Cal. Rptr. 2d 622 (Cal. Ct. App. 2000), affirmed and ordered, respectively, final judgments against plaintiffs because the litigation would have required disclosure of privileged information of clients not involved in the lawsuits. The California legislature has enacted lawyer confidentiality statutes, which do not include exceptions for prosecution or defense of claims against non-clients.[6] In the context of these statutes, lawyer-client confidentiality precluded litigation of claims by a lawyer in *Solin* and by corporate derivative plaintiffs in *McDermott.*

In New York, a trial court dismissed a case filed by an associate against a law firm because of the disclosure of confidential client information. *Charney v. Sullivan & Cromwell LLP,* No. 100625, 2007 WL 1240422 (N.Y. Sup. Ct. Apr. 30, 2007). Aaron Charney sued Sullivan & Cromwell for employment discrimination. Because his complaint included client

[6] Cal. Bus. & Prof. Code § 6068(e)(1) (West 2008).

information that might have violated Disciplinary Rule 4-101, New York's client confidentiality provision, the trial court granted the firm's motion to dismiss.[7]

The reasoning of these cases and of the Fifth Circuit's decision in *Douglas* supports dismissal with prejudice of the present Complaint.[8] Plaintiff intentionally constructed the Complaint to create publicity by disclosure of client information. Because the Complaint addresses a supposed controversy with plaintiff's former law firm and not with any client, its multiple disclosures of client information are not permitted by Rule 1.6. None of the narrow exceptions in the Rule allows the disclosure. Regarding exception (b)(1), the Complaint will not prevent "reasonably certain death or substantial bodily harm" of any person. Regarding exceptions (b)(2) and (b)(3), the Complaint will not prevent, mitigate, or rectify any client-caused "substantial injury to the financial interests or property of another." Instead, the Complaint merely seeks money from defendants, all alleged victims in the criminal indictment. Regarding exception (b)(4), the Complaint seeks no legal advice about plaintiff's compliance with the Rules. To the contrary, the Complaint repeatedly violates the Rules. Regarding

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[7] Although the New York court allowed Charney to replead, Perdigao should not receive a second chance for at least two reasons. First, in contrast to New York's disciplinary rule, which is limited to privileged information and a limited category of client "secrets," Louisiana's Rule 1.6 covers all information related to client representation. *See Douglas*, 144 F.3d at 370. The New York court gave Charney a second chance because some client information ethically could be used to support the discrimination claim. Here, by contrast, no client information is available to Perdigao; repleading would serve no purpose other than to continue to poison the criminal case jury venire. Second, Perdigao's extensive disclosure of client information, including privileged information, vastly exceeds the more limited disclosures by Charney. *Compare Charney*, 2007 WL 1240422, *with* Perdigao Complaint ¶¶ 7-9, 10, 12-13, 15, 16, 17, 18-19, 20-25, 32, 33, 34, 35, 37, 38, 39, 42-44, 52, 53, 56, 57, 58-59, 67, 68, 69, 77, 78, 79, 80, 85-86, 92, 97-100.

[8] In addition to Rule 12(b)(6), the Court has procedural authority, pursuant to the inherent powers doctrine, to dismiss the Complaint for bad-faith violations of its rules. *E.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1407 (5th Cir. 1993).

exception (b)(5), the Complaint constitutes a claim, rather than a defense, and the claim is not "in a controversy between the lawyer and the client." Regarding exception (b)(6), no law or court order has compelled plaintiff's disclosures.

D. Lawyer Claims Proceed Only When Permitted by Ethics Rules.

The absence of any applicable disclosure exception under the Louisiana Rules distinguishes the present Complaint from cases in other jurisdictions in which lawyers have been permitted to file suits that disclosed client information. Apart from litigation about attorneys fees, most of the cases involved controversies between in-house lawyers and their client-employers. *E.g.*, *Willy v. Admin. Review Bd.*, 423 F.3d 483, 500-01 (5th Cir. 2005); *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 181 (3d Cir. 1997); *Doe v. A Corp.*, 709 F.2d 1043, 1050 (5th Cir. 1983); *Gen. Dynamics Corp. v. Super. Ct.*, 876 P.2d 487, 490 (Cal. 1994). These decisions do not support the present Complaint because in most jurisdictions including Louisiana, lawyers are permitted by the applicable professional responsibility rules to disclose confidential information to litigate against their clients. *E.g.*, La. Rules of Prof'l Conduct R. 1.6(b)(5) (2008); Pa. Rules of Prof'l Conduct R 1.6(b)(4) (2006); Model Rules of Prof'l Conduct R. 1.6(5) (2002). As *Charney* illustrates, claims by lawyers against their law firms are different.

In sum, with no exception permitting plaintiff's disclosure of "information relating to the representation[s]" of multiple clients, the admonition of the Fifth Circuit in *Douglas* requires dismissal of the Complaint with prejudice: "'[T]he integrity of the judicial system would be sullied if courts tolerated . . . [the unethical disclosure of confidential information] by those who profess and owe undivided loyalty to their clients.'" *Id.* (quoting *Duncan v. Merrill Lynch*, 646 F.2d 1020, 1027 (5th Cir. 1981)). Because Perdigao's Complaint constitutes both a frontal

assault on Rule 1.6 and a back-door evasion of Rule 3.6, it deserves no tolerance. It should be dismissed now, with prejudice.[9]

II. The Complaint Should Be Dismissed for Failure to State a Claim under the RICO Act.

A. Plaintiff Fails to Plead Loss Causation.

Perdigao is not the first self-proclaimed whistle-blower to bring a RICO action. Courts in the Fifth Circuit have seen many cases in which supposed whistle-blowers, just like Perdigao, allege loss of jobs, income, and other employment benefits. The suits fail because, according to Fifth Circuit authority, such injuries are not, as a matter of law, caused by racketeering activity. Firing someone or cutting pay – right or wrong – just is not racketeering, and Congress did not include such employment disputes in its racketeering statutes.

Although this is a civil case, the Complaint fails to mention 18 U.S.C. § 1964, the RICO civil remedies provision that establishes a private right of action.[10] This failure is understandable because section 1964 states a causation requirement that Perdigao cannot meet. Congress reserved private RICO actions for persons "injured in [their] business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c) (emphasis supplied). Consequently, a private plaintiff may bring a civil RICO claim only if he has suffered an injury to business or property that was "directly caused by a RICO violation." *Alden v. Allied Adult & Child Clinic,*

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[9] To repair Perdigao's breach of client confidentiality, defendants also request that the Complaint be stricken from the record of the Court. Fed. R. Civ. P. 12(f).

[10] Section 1964 is the only possible basis on which a private plaintiff can bring a RICO claim for violations of 18 U.S.C. § 1962. *E.g., Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1214 (5th Cir. 1988) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985)). In some courts, the failure to plead § 1964 can by itself support dismissal of civil RICO claims. *E.g., Garringer v. Daniels*, 41 F.3d 1510 (7th Cir. 1994) (unpublished table decision), *available at* 1994 WL 642409 at *2 (affirming dismissal of civil RICO claim when plaintiff "failed to properly plead his RICO claim under 18 U.S.C. § 1964(c)").

LLC, 171 F. Supp. 2d 647, 650 (E.D. La. 2001) (citing *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258 (1992)). "The causal nexus between the alleged predicate acts and the defendant's injury must be direct: it is not sufficient that the injury alleged is simply the result of an unlawful act connected to the operation of the alleged RICO enterprise, or in furtherance of its goals." *Marriott Bros. v. Gage*, 911 F.2d 1105, 1108 (5th Cir. 1990) (emphasis supplied). This principle applies not only to substantive RICO claims for violations of § 1962(a), (b), or (c), but also to claims for RICO conspiracy pursuant to § 1962(d). *Beck v. Prupis*, 529 U.S. 494, 500 (2000). The injury to business or property that is required for any civil RICO claim must consist of a "concrete financial loss." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003).

Applying these principles, the Fifth Circuit has held that because the decision to fire an employee is not itself a RICO predicate act, "[w]histle blowers do not have standing to sue under RICO for the injury caused by the loss of their job." *E.g., Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1212 (5th Cir. 1988); *see also Alden v. Allied Adult & Child Clinic, L.L.C.*, 171 F. Supp. 2d 647 (E.D. La. 2001) (dismissing on this basis RICO § 1962(c) and (d) claims brought by a whistle-blower). In *Cullom*, the plaintiff alleged that he refused to participate in a RICO scheme – and reported the scheme to the company's Board of Directors and in-house legal counsel – but was advised "not to make waves" and ultimately was forced to resign in a manner that constituted constructive discharge. *Cullom*, 859 F.2d at 1213-14. The Fifth Circuit affirmed the dismissal of plaintiff's civil RICO claim, reasoning that his injuries were not caused by the racketeering activity that he alleged, but "resulted from [the company's] decision to fire him after he refused to participate in the alleged scheme." *Id.* at 1216. Other circuits have consistently reached the same conclusion. *E.g., Reddy v. Litton Indust., Inc.*, 912 F.2d 291, 296

(9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991) (plaintiff fired for reporting bribery scheme lacked RICO standing because "his injury was caused by his alleged wrongful termination" and "was not the result of the alleged predicate acts of racketeering"); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (refusal to participate in mail fraud did not bestow RICO standing because plaintiffs' injuries were not the direct result of the mail fraud); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993) (accord); *Nodine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987) (accord). Other kinds of retaliation against whistle-blowers likewise do not bestow RICO standing. *E.g.*, *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 947 (8th Cir. 1999) (whistle-blowers may not base a civil RICO claim on "allegations of wrongful discharge, denial of promotion, loss of compensation or benefits, harassment or intimidation").

Here, the principal injury alleged by plaintiff is that he was forced to resign from Adams and Reese in retaliation for his supposed attempts to blow the whistle on his partners and clients. Compl. ¶¶ 130, 131. Plaintiff also alleges that in connection with his resignation the proceeds of his capital account were not distributed to him, Compl. ¶¶ 143-44, and that prior to his resignation his compensation was reduced by an unspecified amount. Compl. ¶ 40. Plaintiff moreover asserts that after he resigned the firm denied him the opportunity to purchase interim COBRA health care coverage, Compl. ¶¶ 139-42, and damaged his reputation by circulating various letters and statements discussing his misconduct. Compl. ¶¶ 132-37. The Complaint does not allege any other injury that could even remotely constitute a concrete financial loss to plaintiff. Binding Fifth Circuit precedent establishes that plaintiff's supposed injuries do not suffice for a civil RICO claim, because, as pleaded, they resulted from alleged retaliation against plaintiff, not from RICO predicate acts.

Plaintiff tries to plead around the Fifth Circuit's decisions by implying that defendants' alleged retaliation encompasses various RICO predicate acts. He theorizes, for instance, that the retaliation that resulted in his resignation may have included a RICO predicate act of extortion. Compl. ¶ 119. But according to the Complaint, the threat that supposedly extorted plaintiff's resignation had already been carried out before he resigned. Compl. ¶¶ 130-31. Consequently, plaintiff cannot claim that the supposed extortionary threat caused his resignation. A similar argument was rejected in *Jones v. Enterprise Rent A Car Co. of Texas*, 187 F. Supp. 2d 670 (S.D. Tex. 2002), in which the district court held that the wrongfully discharged plaintiff lacked standing to sue under civil RICO notwithstanding her attempt to "plead her way around the *Cullom* and *Beck* line of cases by arguing that defendants' acts of extortion directly targeted and injured her." *Id.* at 676; *see also Corp. Healthcare Fin., Inc., v. BCI Holdings Co.*, 444 F. Supp. 2d 423, 432-33 (D. Md. 2006) (accord). Plaintiff also alleges that the letters and media statements that injured his reputation were acts of mail and wire fraud. But mail and wire fraud requires an attempt to deprive someone of money or property by fraud, 18 U.S.C. §§ 1341, 1343; *Cleveland v. United States*, 531 U.S. 12, 26 (2000), which plainly was not the purpose of these alleged communications. Most fundamentally, the contention that retaliation against a whistle-blower may have been allegedly connected, in some attenuated fashion, with alleged racketeering activity does not suffice to bestow a RICO cause of action on the whistle-blower. "RICO does not provide a remedy for every injury that may be traced to a predicate act." *O'Malley*, 887 F.2d at 1561. Since it is easy to allege a connection between purported retaliation and some RICO predicate act, the exception that plaintiff apparently is proposing would quickly swallow the rule. The Court should reject plaintiff's attempt to resurrect civil RICO as a cause of action for whistle-blowers.

The alleged injury to plaintiff's reputation, and the alleged denial of COBRA insurance coverage, also separately fail to support plaintiff's RICO claims because they do not involve concrete financial loss. "[E]very court that has addressed this issue has held that injuries proffered by plaintiffs in order to confer RICO standing must be concrete and actual, as opposed to speculative and amorphous . . . . [A] cause of action does not accrue under RICO until the amount of damages becomes clear and definite." *Evans v. City of Chicago*, 434 F.3d 916, 932 (7th Cir. 2006) (quotations omitted); s*ee also In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518. 523 (5th Cir. 1995) (affirming the dismissal of civil RICO claims where the "claimed damages would have required extensive speculation"). Of course, "reputation is not 'business or property' and thus an injury to one's reputation is not an injury for purposes of RICO." *Hamm v. Rhone-Poulenc Rorer Pharma, Inc.*, 187 F.3d 941, 947 (8th Cir. 1999). Plaintiff's speculation that the supposed injury to his reputation might have discouraged some potential clients from hiring him, Compl. ¶ 137, does not even remotely constitute the non-speculative "concrete financial loss," *Patterson*, 335 F.3d at 492 n.16, that is required to state a RICO claim. The denial of the opportunity to purchase COBRA interim insurance likewise is not a RICO injury. Plaintiff does not claim that after leaving the firm he was forced to pay for any uninsured medical expenses, or that he purchased other more expensive interim insurance. The Complaint makes it clear that plaintiff would have been personally responsible for the cost of interim COBRA coverage, Compl. ¶ 141; so as alleged the only concrete result of not being able to purchase COBRA insurance was a financial gain for plaintiff.

The Complaint should be dismissed for failure to plead financial loss caused by racketeering activity.

B. Plaintiff Fails to Plead a Pattern of Racketeering Activity.

The Complaint alleges that plaintiff was injured by a pattern of racketeering activity consisting of essentially one event – plaintiff's involuntary resignation from Adams and Reese – plus a few related but sporadic incidents of supposed retaliation that occurred at approximately the same time as plaintiff's resignation. As a matter of law, this does not constitute the pattern of criminal acts that is required for a civil RICO claim. Although the Complaint also alleges unrelated racketeering activity by Adams and Reese lawyers in their day-to-day practice of law, that alleged conduct is not independently sufficient for a RICO claim because it did not injure plaintiff. The Complaint should be dismissed because the two distinct kinds of racketeering activity that plaintiff alleges – retaliation for whistle-blowing and misconduct in the day-to-day practice of law – are not sufficiently related to constitute a single RICO pattern, and do not independently suffice for plaintiff's RICO claim.

To state any RICO claim, a plaintiff must allege a pattern of RICO predicate acts. A pattern cannot consist of "sporadic activity" but rather requires predicate acts that are related and also pose a threat of continuing criminal activity. *E.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). "Although proof of continuity and relationship may often overlap, the two inquiries analytically are distinct prongs of the pattern element requiring separate analysis." *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 524 (5th Cir. 1996) (citing *H.J. Inc.*, 492 U.S. at 239).

The two kinds of supposed racketeering activity alleged in the Complaint – misconduct in the day-to-day practice of law and retaliation – are not sufficiently related to form a single RICO pattern, as they do not share "the 'same or similar purposes, results, participants, victims, or methods of commission.'" *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (quoting *H.J., Inc.*, 492 U.S. at 240). Although the Complaint attempts

to obscure this point by lumping together distinct allegations and characterizing them as unitary "schemes," the two categories of supposed racketeering activity are not related in the required sense. *E.g. Heller*, 71 F.3d at 524-25 (commercial bribery of third party and mail and wire fraud directed at plaintiff not sufficiently related to form a pattern); *Vild v. Visconsi*, 956 F.2d 560, 566-69 (6th Cir. 1992) (pattern requirement not satisfied because predicate acts directed at others were not sufficiently related to predicate acts directed at plaintiff). The alleged malfeasance in the practice of law was supposedly directed against numerous third parties, was aimed principally at financial gain, was achieved through allegedly fraudulent means, and allegedly resulted in increased revenue for Adams and Reese. The alleged retaliation, by contrast, was directed only against plaintiff himself, did not aim primarily at financial gain, and resulted in plaintiff's separation from Adams and Reese. Because these distinct categories of conduct are not related, they cannot constitute a single RICO pattern.

Consequently, in order for plaintiff to state any RICO claim, either the allegations pertaining to retaliation, or the allegations pertaining to misconduct in the day-to-day practice of law, must independently be sufficient to support his claims. *E.g.*, *Vild*, 956 F.2d at 570 (citing *H.J., Inc.*, 492 U.S. at 241-43). Regarding retaliation, the brief alleged acts against plaintiff, as an initial matter, are not RICO predicate acts. They independently violate no federal law listed in § 1961. In addition, they do not satisfy the continuity prong of the pattern requirement. *E.g. Word of Faith*, 90 F.3d at 120-22; *Roger Whitmore's Auto Services, Inc. v. Lake County, Ill.*, 424 F.3d 659, 673-74 (7th Cir. 2005). As a result, the acts do not independently constitute a pattern.

The supposed misconduct by Adams and Reese in the day-to-day practice of law does not suffice for a RICO claim either because, even if these allegations satisfied the requirements of relatedness and continuity, none of this conduct injured plaintiff. This exact issue was

considered by the Fifth Circuit in *Heller*, 71 F.3d 518, which held that, even if alleged bribery independently constituted a pattern, it would not support plaintiff's RICO claim absent showing that the bribery itself – or predicate acts that were related to the alleged bribery and therefore were part of the same RICO pattern – caused plaintiff's injury. *Id.* at 525 n.15. The Complaint contains no such allegation. To the contrary, the Complaint makes it clear that the alleged misconduct in the day-to-day practice of law increased the firm's revenue, Compl. ¶¶ 25, 31, 57, 94, which would have benefited plaintiff who was a partner of the firm at the time.

In sum, the two kinds of racketeering activity alleged by plaintiff are not sufficiently related to constitute a single RICO pattern, and do not independently support plaintiff's RICO claims. The Complaint should be dismissed.

C. Plaintiff's RICO Conspiracy Claim (Count 2) Is Barred by the Intracorporate Conspiracy Doctrine.

Plaintiff seeks to recover pursuant to § 1962(d) for an alleged RICO conspiracy that supposedly was perpetrated by the individual defendants, Compl. ¶ 156, all of whom were partners and an employee in the same law firm. Compl. ¶ 1. This alleged conduct does not, as a matter of law, constitute a RICO conspiracy.

In *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) the United States Supreme Court held that the coordinated conduct of a corporation, its subsidiaries, divisions, officers, or employees cannot constitute a conspiracy. S*ee also Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997) (accord). The Eighth Circuit specifically held in *Fogie v. Thorn Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999) that this doctrine applies to RICO conspiracy. District Courts in the First, Second, and Third Circuits have reached the same conclusion. *E.g.*, *Rhodes v. Consumers' Buyline, Inc.*, 868 F. Supp. 368, 377 (D. Mass. 1993); *Sluka v. Estate of Herink*, No. 94-CV-4999, 1996 WL 612462, at *7 n.2 (E.D.N.Y. Aug. 13, 1996); *Helman v.*

Murry's Steaks, Inc., 742 F. Supp. 860, 883 (D. Del. 1990).[11] Consistent with these decisions, the Fifth Circuit has held that "[RICO] § 1962(d) is governed by traditional conspiracy law," *U.S. v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998), and observed that in the Fifth Circuit "a corporation or other company cannot conspire with itself, no matter how many of its agents participate in the complained of action." *Elliott v. Tilton*, 89 F.3d 260, 265 (5th Cir. 1996) (quotations omitted).

Plaintiff alleges a § 1962(d) civil RICO conspiracy based on the coordinated conduct of the Adams and Reese partners and employee who are named as defendants in his Complaint. This claim should be dismissed because, under the intracorporate conspiracy doctrine, such conduct cannot constitute a conspiracy.

III. The Complaint Should Be Dismissed Based on the Doctrine of *In Pari Delicto*.

Finally, Perdigao's Complaint establishes an affirmative defense as a matter of law. The Complaint seeks damages based on conduct that allegedly occurred at Adams and Reese while Perdigao was a partner of the firm. He pleads direct involvement in conduct that he now claims was criminal. Because he was substantially responsible for much of the misconduct that he alleges in the Complaint, Perdigao's claims are barred by the doctrine of *in pari delicto*.[12]

The doctrine provides that civil claims are not cognizable when "as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress." *Rogers v. McDorman*, 521 F.3d 381, 389 n.34 (5th Cir. 2008) (quoting

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[11] The Seventh, Ninth and Eleventh circuits have reached the opposite conclusion. *See Kirwin v. Price Commc'ns. Corp.*, 391 F.3d 1323, 1326 (11th Cir. 2004).

[12] Although *in pari delicto*, like prescription or limitations, is an affirmative defense, when the Complaint judicially admits plaintiffs' involvement, dismissal is in order. *E.g. Nisselson v. Lernout*, 469 F.3d 143, 154 (1st Cir. 2006) (defense of *in pari delicto* may properly be decided on a 12(b)(6) motion when "the factual scenario, as pleaded, is clear enough to permit peremptory resolution of the dispositive issue").

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11 (1985)). A principal rationale for the doctrine is that "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006) (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985)). The Fifth Circuit has specifically held that *in pari delicto* is a defense to civil RICO. *Rogers*, 521 F.3d at 387. Where, as here, a plaintiff's allegations demonstrate his involvement in the misconduct for which he is suing, the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *E.g.*, *Nisselson*, 469 F.3d at 149 (affirming dismissal of civil RICO claim based on *in pari delicto*); *Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230, 238 (7th Cir. 2003) (affirming dismissal based on *in pari delicto*); *Baena v. KPMG LLP*, 453 F.3d 1, 8 (1st Cir. 2006) (same); *Terlecky v. Hurd (In re Dublin Sec.)*, 133 F.3d 377, 380 (6th Cir. 1997) (same).

The Complaint admits that Perdigao was directly involved in alleged conduct about which he now complains. He was a partner at Adams and Reese when the alleged conduct at issue occurred. Compl. ¶¶ 1(a), 11. Importantly, he says he was the ethics officer who was supposed to control the conduct. Compl. ¶ 11. As such, he was an active participant in what he now calls a criminal enterprise. Compl. ¶ 154. Plaintiff did not prevent or report his firm's supposed misconduct, and he remained at the firm for many years, Compl. ¶¶ 1(a), 11, even though he was either involved in, or contemporaneously aware of, most of the conduct that he now claims was criminal. *E.g.*, Compl. ¶¶ 14, 16, 18, 22, 24, 35, 72, 112, 118, 123.[13] The Complaint specifically alleges that plaintiff "kept his mouth shut about" allegedly criminal "activities and schemes," Compl. ¶ 14, and indicates that even after a government investigation into these activities commenced he "took no action to report" the conduct at issue. Compl. ¶ 25.

[13] The failure by a lawyer to report professional misconduct by another lawyer is itself a violation of the Rules of Professional Conduct. La. R. Prof. Cond. 8.3(a).

His admitted, if fanciful, silence allegedly lasted more than six years. Compl. ¶¶ 12, 1(a). Moreover, as a partner, plaintiff benefited financially from activities that, according to the Complaint, substantially increased the firm's revenue. Compl. ¶¶ 25, 31, 57, 94. Although plaintiff makes self-serving allegations to the effect that he occasionally objected to certain conduct, Compl. ¶¶ 36, 72, this cannot obscure his pleaded complicity in his story. The Complaint should be dismissed on this basis alone.

CONCLUSION

On the above multiple, independent grounds, defendants respectfully request that the Complaint be dismissed, and in addition that:

- The Complaint be stricken pursuant to Rule 12(f) in order to stop Perdigao's abuse of client information; and
- The Court consider whether discipline pursuant to Local Rule 83.2.10E and/or referral to counsel for the Louisiana Disciplinary Board are in order because of the flagrant violations of Rule 1.6.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon Plaintiff's counsel by electronic mail, court's electronic system, and/or placing same in the United States Mail, postage prepaid and properly addressed this 17th day of June, 2008.

/s/ Stephen H. Kupperman