

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

**LINDSEY LEE, ET AL.**

**CIVIL ACTION NO.**

**VERSUS**

**21-442-SDD-EWD**

**D.R. HORTON, INC., ET AL.**

**NOTICE**

Please take notice that the attached Magistrate Judge's Report and Recommendation has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 14 days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within 14 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Signed in Baton Rouge, Louisiana, on January 23, 2025.



**ERIN WILDER-DOOMES  
UNITED STATES MAGISTRATE JUDGE**

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

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**VERSUS**

**21-442-SDD-EWD**

**D.R. HORTON, INC., ET AL.**

**MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

Before the Court is the Plaintiffs’ Motion for Leave to File Amended and Restated Complaint (“Motion”),<sup>1</sup> filed by Lindsey Lee, Wayne Ballard Jr., Jennifer Ballard, Ronald Roberts, III, Kathryn Roberts, Zachary Russell, Lacey Russell, Luis Hinoestroza, Tim Addison, II, Stacy Addison, Jonathan McMorris, and Gilbert Bankston, III (collectively, “Plaintiffs”), which is opposed by Third Party Defendant Production Builder Services, Inc. d/b/a Carter & Clark (“Carter”).<sup>2</sup> Because Plaintiffs’ claim under the Racketeer Influenced Corrupt Organizations Act (“RICO”)<sup>3</sup> in their proposed Fourth Amended Complaint (“FAC”) is futile, it is recommended<sup>4</sup> that the Motion be denied. Additionally, because this Court’s original subject matter jurisdiction is based solely on the defective RICO claim, it is recommended that the Court decline to exercise supplemental jurisdiction over the remaining state law claims; this matter be dismissed without

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<sup>1</sup> R. Doc. 174 and *see* R. Doc. 191 (Plaintiffs’ Reply to Defendants’ Opposition to Plaintiffs’ Motion for Leave to File Amended and Restated Complaint).

<sup>2</sup> R. Doc. 185.

<sup>3</sup> 18 U.S.C. § 1961 *et seq.*

<sup>4</sup> A magistrate judge may decide motions for leave to amend. *See, e.g., Mornes v. Valdez*, 414 F.Supp.3d 888, 890 (N.D. Tex. 2019) (noting that, “...the Court of Appeals for the Fifth Circuit has addressed this issue, holding that a motion for leave to amend is not dispositive and, therefore, a magistrate [judge] may rule on it. *See PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1420-21 (5th Cir. 1996) ...”) (other citations omitted). However, because dismissal of the case is recommended, the Motion is addressed by report and recommendation.

prejudice;<sup>5</sup> and prescription be suspended for thirty days from the date of the dismissal to give Plaintiffs the opportunity to file suit in a state court of competent jurisdiction.

## I. BACKGROUND

The procedural history preceding the Motion is lengthy; therefore, only the pertinent history is presented here. Plaintiffs, twelve homeowners, originally filed suit in this Court against residential homebuilder Defendant D.R. Horton, Inc.-Gulf Coast, and its owner/operator, D.R. Horton, Inc. (together, “D.R. Horton”); Plaintiffs’ homeowners association, Acadian Trace HOA, Inc. (the “HOA”); three of the HOA’s directors, George Kurz, David Stanton, Jake D. Lambert (together, the “Directors”); the Livingston Parish Council (“LPC”);<sup>6</sup> and nineteen other individuals (since dismissed), who own the properties adjacent to the Plaintiffs’ properties.<sup>7</sup> Plaintiffs asserted, and continue to assert, that D.R. Horton bought undeveloped lots in their neighborhood, Acadian Trace Subdivision in Livingston Parish (the “Parish”), which allegedly resulted in a number of wrongs to Plaintiffs, including the termination of the existing HOA restrictive covenants that previously protected Plaintiffs, without their consent; the filing of amended restrictions by D.R. Horton that provided for less restrictive covenants; D.R. Horton’s appointment of its own employees (Kurz, Stanton, and Lambert) as the HOA’s directors, which resulted in a conflict of interest between the HOA and Plaintiffs; and D.R. Horton’s construction of new homes in the subdivision, which are in violation of Parish ordinances, servitudes, and RICO.

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<sup>5</sup> As noted below, the basis for diversity jurisdiction has not been established on the record before the Court at this time; however, Plaintiffs can attempt to allege the facts to support such jurisdiction in objections to this Report.

<sup>6</sup> Plaintiffs named LPC as a defendant, but also sometimes appear to make claims against “Livingston Parish.” *See, e.g.*, R. Doc. 174-2, p. 12, ¶ 26(d) (asserting a distinct cause of action as a “claim against Livingston Parish due to its poor oversights and failure to clear out existing drainage ditches and canals”); *see also*, pp. 132-34, ¶¶ 425-442.

<sup>7</sup> R. Doc. 1, pp. 12-17 and *see* R. Doc. 105 (Order granting Plaintiffs’ Motion for dismissal of the neighboring homeowners).

The original Complaint (and the FAC) allege that federal question subject matter jurisdiction exists solely based on Plaintiffs' RICO claim against D.R. Horton, the HOA, and the Directors (collectively, "the D.R. Horton Defendants"), and that supplemental jurisdiction exists over the remaining "state court claims," including breach of fiduciary duties and violations of Louisiana's Unfair Trade Practices Act, among others.<sup>8</sup>

Plaintiffs filed their First Amended Complaint in response to a Motion to Dismiss, filed by LPC, seeking dismissal of the state law claims against it on immunity grounds.<sup>9</sup> The filing of the First Amended Complaint resulted in the dismissal of LPC's Motion to Dismiss without prejudice.<sup>10</sup> The D.R. Horton Defendants then filed their first Motion to Dismiss, seeking dismissal of the RICO claims for failure to state a claim and lack of subject matter jurisdiction, and also filed a Third Party Demand against D.R. Horton's subcontractors: Quality Engineering & Surveying, LLC; Grass Master Maintenance and Landscaping, LLC; and Settoon Earthwork, LLC ("Settoon") (collectively, the "Subcontractors"), and the Subcontractors' respective insurance companies.<sup>11</sup> After several extensions of time,<sup>12</sup> Plaintiffs responded to the D.R. Horton Defendants' Motion to Dismiss with their 142-page Third Amended Complaint.<sup>13</sup> The Third Amended Complaint had over a thousand pages of exhibits attached; added the Subcontractors as

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<sup>8</sup> R. Doc. 1, p. 10, ¶¶ 9, 11; R. Doc. 174-2, p. 2, ¶¶ 1, 3. Plaintiffs' other Complaints alleged the same basis for jurisdiction but included additional defendants. *See* R. Doc. 30, p. 10, ¶¶ 9, 11; R. Doc. 86, pp. 2-3, ¶¶ 1, 3.

<sup>9</sup> R. Doc. 12 (Motion to Dismiss filed by LPC); R. Doc. 30.

<sup>10</sup> R. Doc. 29. *See also*, Local Civil Rule 12.

<sup>11</sup> R. Doc. 34 (Motion to Dismiss and Motion to Strike) and R. Doc. 35, pp. 14-15 (Answer and Third-Party Demand). The insurance companies are Burlington Insurance Co.; Houston Specialty Ins. Co.; La. Construction & Industry; Certain Underwriters at Lloyd's, London Subscribing to Policy Number AA1122000; United Fire & Casualty Co.; United Fire Group, Inc.; and Regional Insurance Services Company, LLC. La. Construction & Industry, Houston Specialty Co. Inc. and Regional Insurance Services Company, LLC have since been dismissed. R. Docs. 106, 122, 126. The Motion for Summary judgment, filed by Certain Underwriters at Lloyd's, London, was granted and therefore Plaintiff's claims against it have also been dismissed. R. Doc. 147.

<sup>12</sup> R. Docs. 51, 54, 68, 70, 77, 78, 82, 83.

<sup>13</sup> R. Docs. 86-92 (Third Amended Complaint with exhibits).

defendants on the main demand;<sup>14</sup> and added Carter as a defendant.<sup>15</sup> The Third Amended Complaint resulted in the denial of D.R. Horton Defendants' first Motion to Dismiss without prejudice.<sup>16</sup>

The D.R. Horton Defendants then filed a second Motion to Dismiss, seeking dismissal of the RICO claims for failure to state a claim. Carter also filed a Motion to Dismiss, seeking dismissal of all claims.<sup>17</sup> Plaintiffs failed to timely respond by the original response deadlines, or by extended deadlines granted to Plaintiffs over Defendants' objections.<sup>18</sup> The Motions to Dismiss were ultimately granted, dismissing Plaintiffs' RICO claims against the D.R. Horton Defendants, and all claims against Carter, with prejudice, as unopposed in light of Plaintiffs' repeated failure to timely oppose the motions, failure to show excusable neglect, failure to act with diligence, and because the motions had merit.<sup>19</sup> After unsuccessfully seeking reconsideration, Plaintiffs appealed that Ruling to the United States Court of Appeals for the Fifth Circuit, who affirmed the Ruling, but vacated the dismissal with prejudice and remanded for entry of dismissal of the claims without prejudice.<sup>20</sup>

Currently before the Court is Plaintiffs' 145-page FAC, with 725 pages of exhibits attached. This is Plaintiffs' fourth attempt to allege their claims, and the Motion is opposed only

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<sup>14</sup> Grass Master Maintenance and Landscaping, LLC has been dismissed as a Third-Party Defendant. R. Doc. 142.

<sup>15</sup> R. Doc. 86 with supporting exhibits at R. Docs. 87-92. Plaintiffs were granted leave to file a Second Amended Complaint but filed a "Third Amended Complaint" instead. R. Docs. 81, 86. Plaintiffs also filed an Opposition to the Motion to Dismiss, arguing that it was mooted by the filing of the Third Amended Complaint. R. Doc. 93. D.R. Horton was granted leave to file a First Amended and Supplemental Third Party Demand, naming Carter as a Third Party Defendant. R. Doc. 195.

<sup>16</sup> R. Doc. 106.

<sup>17</sup> R. Docs. 108 (also asserting a Motion to Strike), 120.

<sup>18</sup> R. Docs. 145, 146. *See also*, R. Doc. 154, pp. 2-3 (procedural history describing Plaintiffs' failure to timely oppose the Motions and the extensions granted to Plaintiffs, as well as Plaintiffs' untimely attempt to "revive" the Order that granted Plaintiffs an extension until September 19, 2022, and Plaintiffs' unilateral filing of an Opposition to the D.R. Horton Motion. R. Docs. 148, 151; and R. Doc. 131 (minutes of the July 29, 2022 conference).

<sup>19</sup> R. Doc. 154, pp. 6-7.

<sup>20</sup> R. Docs. 160, 165, 166, 171.

by Carter.<sup>21</sup> Before turning to the merits of the Motion, this Report addresses Plaintiffs’ “threshold” argument—raised for the first time in reply—that the Motion is technically unopposed because Carter’s opposition should not be considered since “[Carter] is not currently a party to this litigation and has failed to file a motion to intervene in order to have standing to file its opposition.”<sup>22</sup> According to Plaintiffs, Carter is a “non-party” because Carter’s Motion to Dismiss was granted, dismissing all claims against Carter.<sup>23</sup>

It is hyper technical to argue that Carter is a “non-party.” D.R. Horton timely sought leave to add Carter as Third Party Defendant the following business day after Plaintiff filed the Motion.<sup>24</sup> While Carter filed its notice of intent to oppose the current Motion and its opposition memorandum before D.R. Horton’s Motion for Leave to add Carter as a party was granted, no party objected to the addition of Carter as a third party defendant, and Carter has since been added to the case in that capacity.<sup>25</sup> Furthermore, Plaintiffs previously named Carter as a defendant, the Fifth Circuit instructed that dismissal of those claims is without prejudice, and Plaintiffs seek leave to file the

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<sup>21</sup> R. Doc. 185 (Carter’s opposition memorandum). The Motion did not indicate if Plaintiffs sought consent as required by Local Civil Rule 7(e). Accordingly, Plaintiffs were ordered to supplement the Motion with a certificate stating the position of Defendants. R. Doc. 176. Plaintiffs sought leave to supplement the Motion with a Certificate that stated that Plaintiffs emailed all attorneys listed as “attorneys to be noticed” regarding their positions, including respective counsel for the D.R. Horton Defendants and LPC, but Plaintiffs did not receive any responses. R. Doc. 179, p. 2. Four days later, Carter filed its Notice of Intent to File an Opposition to Plaintiffs’ Motion, *etc.*, contending that Plaintiffs did not contact Carter to seek consent. R. Doc. 182, p. 1, n. 3. In Reply, Plaintiffs argue that they were not required to contact Carter for consent for the Motion because Carter is not a party. R. Doc. 191, p. 2. However, for the reasons explained in this Report, Carter’s opposition is properly considered.

<sup>22</sup> R. Doc. 191, p. 1.

<sup>23</sup> *Id.* at p. 2, and *see* R. Doc. 154.

<sup>24</sup> R. Doc. 175. D.R. Horton’s initial Motion for Leave to File First Amended and Supplemental Third-Party Demand was terminated due to procedural deficiencies. R. Docs. 190, 192. D.R. Horton then re-filed their Motion for Leave. R. Doc. 193.

<sup>25</sup> R. Doc. 194. *See also*, R. Docs. 190, 194 (the Court’s Orders, noting no opposition to Carter’s addition as a third party defendant).

FAC that reasserts claims against Carter.<sup>26</sup> Under these facts, Carter is a party with an interest to oppose the Motion, and its opposition memorandum is properly considered.

## II. LAW AND ANALYSIS

### A. Applicable Legal Standards for Amendments and Fed. R. Civ. P. 12(b)(6) Dismissals

#### 1. Motions for Leave to Amend Under Fed. R. Civ. P. 15(a)

Timely filed motions for leave to amend are considered under Fed. R. Civ. P. 15(a), which provides that leave to amend pleadings “shall be freely given when justice so requires.” However, “leave to amend is by no means automatic” and the “decision lies within the sound discretion of the district court.”<sup>27</sup> A court should consider the following five factors to determine whether to grant a party leave to amend a complaint under Rule 15: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of the amendment.<sup>28</sup> An amendment is “futile” if it would fail to survive a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. “If the proposed amendment is legally insufficient on its face the Court should deny leave to amend without consideration of the other factors.”<sup>29</sup>

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<sup>26</sup> R. Doc. 86, pp. 5-6, ¶13(10); R. Doc. 154, p. 8 (Ruling and Order dismissing Plaintiffs’ claims against Carter with prejudice); R. Doc. 166 (Notice of Appeal); R. Doc. 171 (5th Cir. Mandate ordering dismissal of claims without prejudice); R. Doc. 174-2, p. 5, ¶ 13(10).

<sup>27</sup> *Parish v. Frazier*, 195 F.3d 761, 763 (5th Cir. 1999) (citations omitted).

<sup>28</sup> *Smith v. EMC Corp*, 393 F.3d 590, 595 (5th Cir. 2004), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). Absent any of these factors, the leave sought should be freely given. *Smith*, 393 F.3d at 595.

<sup>29</sup> *Durgin v. Crescent Towing & Salvage, Inc.*, No. 00-1602, 2002 WL 1022510, at \*2 (E.D. La. May 17, 2002), citing *Truehart v. Blandon*, 684 F.Supp. 1368, 1371 n. 2 (E.D. La. 1988), rev’d on other grounds, 884 F.2d 223 (5th Cir. 1989) and *Ridgle v. Lowe’s Home Centers, Inc.*, No. 04-1650, 2005 WL 8158192, at \*2 (N.D. Tex. Mar. 17, 2005) (accord). See also *Billiot v. Roche*, No. 20-61, 2021 WL 7906831, at \*3 (M.D. La. Dec. 29, 2021), report and recommendation adopted, No. 20-61, 2022 WL 988368 (M.D. La. Mar. 31, 2022) (denying leave to amend on claims *sua sponte* dismissed pursuant to § 28 U.S.C. 1915A and holding; “...leave to amend is not required when an amendment would be futile, *i.e.*, “an amended complaint would still ‘fail to survive a Rule 12(b)(6) motion.’”).

## 2. Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6)

In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*,<sup>30</sup> the United States Supreme Court addressed the standard of pleading that a plaintiff must meet to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>31</sup> “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>32</sup> “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>33</sup> It follows that, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’”<sup>34</sup> “Where a Complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”<sup>35</sup> On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court “must accept as true all of the factual allegations contained in the Complaint.”<sup>36</sup> While factual assertions are presumed to be true, “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” alone are not enough to withstand a Fed. R. Civ. P.12(b)(6) motion.<sup>37</sup>

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<sup>30</sup> *Twombly*, 550 U.S. 544 (2007) and *Iqbal*, 556 U.S. 662 (2009).

<sup>31</sup> *Twombly*, 550 U.S. at 555.

<sup>32</sup> *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 570.

<sup>33</sup> *Iqbal*, 556 U.S. at 678.

<sup>34</sup> *Id.* at 679.

<sup>35</sup> *Id.* at 678 (internal quotation marks omitted).

<sup>36</sup> *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

<sup>37</sup> *Iqbal*, 556 U.S. at 678.

“Ordinarily, causation is a fact issue resolved by the finder of fact rather than in a Rule 12(b)(6) motion to dismiss. However, proximate cause is a legal issue, not a fact issue, in cases involving civil RICO claims because RICO is a statutory tort remedy reflecting unique ‘ideas of what justice demands, or of what is administratively possible and convenient.’ As a result, it falls within the competence of this Court to decide whether legal causation exists at the Rule 12(b)(6) stage in a civil RICO case.”<sup>38</sup>

Guided by the foregoing, the issue before the Court is as follows: If Plaintiffs’ RICO claims can survive a Fed. R. Civ. P. 12(b)(6) analysis (as considered under the Fed. R. Civ. P. 15 futility factor) and no other Fed. R. Civ. P. 15(a) factor precludes amendment, then the Motion can be granted. If, however, Plaintiffs’ RICO claims cannot withstand a Fed. R. Civ. P. 12(b)(6) challenge, then the Motion should be denied. Because there will no longer be a federal claim, “the district court ha[s] discretion to decline to exercise supplemental jurisdiction over [the plaintiff’s] state law claim[s].”<sup>39</sup> “The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial.”<sup>40</sup> When a district court exercises its discretion and dismisses state law claims, the dismissal must also be without prejudice so that the plaintiff may refile in the appropriate state court.<sup>41</sup>

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<sup>38</sup> *Lewis v. Louisiana State Univ.*, No. 21-198, 2022 WL 2187098, at \*4 (M.D. La. June 16, 2022), reconsideration denied, motion to certify appeal granted, No. 21-198, 2022 WL 14487953 (M.D. La. Sept. 29, 2022), aff’d sub nom., *Lewis v. Danos*, 83 F.4th 948 (5th Cir. 2023), citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (other citations omitted).

<sup>39</sup> *Gordon v. Univ. of Texas Med. Branch*, 700 Fed.Appx. 350, 352 (5th Cir. 2017), citing 28 U.S.C. § 1367(c)(3) (“The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if— . . . (3) the district court has dismissed all claims over which it has original jurisdiction.”) and *Rhyne v. Henderson Cty.*, 973 F.2d 386, 395 (5th Cir. 1992).

<sup>40</sup> *Brookshire Bros. Holding v. Dayco Prod., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009); see also *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) (“Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.” (citing *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989))).

<sup>41</sup> *Gordon*, 700 Fed.Appx. at 352, citing *Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999).

**B. Legal Standards for RICO Claims Under 18 U.S.C. §§ 1962(c) and (d) and Prudential Standing**

1. 18 U.S.C. §§ 1962(c) and (d)

Plaintiffs' civil RICO claim asserts that D.R. Horton, the HOA, the Directors, and the Subcontractors engaged in an enterprise that, among other acts, intentionally elevated the subdivision's undeveloped lots by two feet without government approval, which has caused, and continues to cause, Plaintiffs' properties to flood.<sup>42</sup> The RICO claims are asserted under 18 U.S.C. §§ 1962(c) and (d), which provide as follows:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.<sup>43</sup>

As succinctly summarized in *Lewis*, “[t]o state a RICO claim based on a violation of § 1962(c), a plaintiff is required to allege a ‘RICO person’ engaged in the ‘(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.’ To state a RICO claim based on a violation of § 1962(d), a plaintiff must allege ‘(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendants knew of and agreed to the overall objective of the RICO offense.’ Moreover, the ‘failure to plead the requisite elements of ... a § 1962(c) violation implicitly means that [the plaintiff] cannot plead a conspiracy to violate [that] section.’”<sup>44</sup>

<sup>42</sup> R. Doc. 174-2, pp. 22-34, ¶¶ 62-100.

<sup>43</sup> R. Doc. 174-2, pp. 122-23, ¶ 381.

<sup>44</sup> *Lewis*, 2022 WL 2187098, at \*4, citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985), *N. Cypress Med. Ctr. Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 203 (5th Cir. 2015), and *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 930 (5th Cir. 2002).

“‘Racketeering activity’ ... encompasses those federal crimes listed in 18 U.S.C. § 1961(1)(B), including mail fraud, wire fraud....”<sup>45</sup>

## 2. Prudential Standing

“An individual has a civil RICO claim under 18 U.S.C. § 1964(c), and a right to recover treble damages and an attorney’s fee, ‘[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962], and the racketeering activities injure the plaintiff in his business or property.’ The injury must be ‘by reason of,’ or caused by, a violation of § 1962. Thus, § 1964(c) imposes two requirements on the plaintiff’s right to recover, namely, damage to business or property and causation.”<sup>46</sup>

As explained in *Lewis*, “courts in the past have referred ‘to the independent § 1964(c) requirements of damages and causation as “standing.”” The use of the phrase ‘standing’ to refer to statutory requirements has been referred to as ‘prudential standing,’ rather than constitutional standing. The Supreme Court in *Lexmark International, Inc. v. Static Control Components* explained that a better way of phrasing the inquiry is to ask whether the plaintiff has a cause of action under the statute, which is plainly not a jurisdictional inquiry. Rather than examining jurisdiction, the Supreme Court explained, the inquiry should be whether the plaintiff has stated a cause of action by alleging damage to business or property and causation. The *Lexmark* court ‘construed federal causes of action in a variety of contexts,’ including in the civil RICO context, ‘to incorporate a requirement of proximate causation.’ Under a proximate cause analysis, courts ask ‘whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.’ Proximate cause, in this context, ‘is employed ... as a limiting principle intended to

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<sup>45</sup> *Lewis*, 2022 WL 2187098, at \*5, citing 18 U.S.C. § 1961(1).

<sup>46</sup> *Lewis*, 2022 WL 2187098, at \*5, citing *Sedima, S.P.R.L.*, 473 U.S. at 495 and 18 U.S.C. § 1964(c) (providing a right of action to “[a]ny person injured ... by reason of” the conduct constituting the RICO violation).

stymie a flood of litigation, reserving recovery for those who have been directly affected by a defendant’s wrongdoing.”<sup>47</sup>

“‘RICO standing’ ... is not a jurisdictional matter, and, instead, is ‘properly characterize[d] as the usual pleading stage inquiry: whether the plaintiff has plausibly pled a cause of action under RICO.’<sup>48</sup> To plead the elements of a civil RICO claim under § 1964(c), a plaintiff must plead a § 1962 violation and injury to business or property proximately caused by a RICO violation.<sup>49</sup> The plaintiff bears the burden of establishing proximate cause and damages.<sup>50</sup> ‘Any recoverable damages occurring by reason of a violation of ... [Section 1962] must flow from the commission of the predicate acts.’<sup>51</sup> With respect to the causation requirement, ‘a RICO predicate offense must not only [be] a but for cause of [plaintiff’s] injury, but it must be the proximate cause as well.’ To survive a Rule 12(b)(6) motion, a civil RICO plaintiff must sufficiently plead an injury resulting directly from the alleged RICO violation.”<sup>52</sup>

In *Molina-Aranda v. Black Magic Enterprises, L.L.C.*, the Fifth Circuit made clear that proximate cause for purposes of RICO does not turn on the question of “foreseeability;” instead, a plaintiff must demonstrate the alleged RICO violation “led directly” to her injuries, and thus the proximate cause requirement is met when “the alleged violation ‘led directly’ to the injuries.”<sup>53</sup>

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<sup>47</sup> *Lewis*, 2022 WL 2187098, at \*5, citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 132-33 (2014) (other citations omitted).

<sup>48</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 887 (10th Cir. 2017) and *HCB Fin. Corp. v. McPherson*, 8 F.4th 335, 339 (5th Cir. 2021) (explaining that “a motion to dismiss for lack of statutory standing is analyzed under Rule 12(b)(6), not Rule 12(b)(1)”).

<sup>49</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Cullom v. Hibernia National Bank*, 857 [sic, 859] F.2d 1211, 1214-15 (5th Cir. 1988).

<sup>50</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Arroyo v. Opron, Inc.*, 736 Fed. Appx. 427, 429 (5th Cir. 2018) and *Jackson v. NAACP*, 546 Fed. Appx. 438, 442 (5th Cir. 2013).

<sup>51</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Cullom*, 859 F.2d at 1215 (quoting *Sedima S.P.R.L.*, 473 U.S. at 497).

<sup>52</sup> *Lewis*, 2022 WL 2187098, at \*6 (citations omitted).

<sup>53</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Molina-Aranda Black Magic Enterprises, L.L.C.*, 983 F.3d 779, 784-85 (5th Cir. 2020) (other citations omitted). See also *Holmes*, 503 U.S. at 267-68 (interpreting § 1964(c) by reference to

“The proximate cause requirement ‘forces the plaintiff to demonstrate a direct relation between the injury suffered and the alleged injurious conduct. Thus, the concept of direct injury refers to the relationship between the [plaintiff’s] injury and the defendants’ actions.’”<sup>54</sup>

**C. Plaintiffs Have Failed to Show That the RICO Predicate Acts Led Directly Their Injuries under § 1962(c)**

1. Plaintiffs’ Injuries

Early in the FAC, Plaintiffs allege: “D.R. Horton raised each of their lots two (2) feet and changed the front half of the lots to flow to the street. The water flow directed to the street forced water onto the street that then flowed onto the lower lots that were two feet lower,” which was done in violation of natural and legal drainage servitudes and/or Parish Ordinances and/or in violation of La. C.C. arts. 655-56 or art. 477.<sup>55</sup> As a result of the improper lot elevation, “[t]he unapproved, illegal, fraudulent, and impermissible actions of defendants D.R. Horton, Inc. – Gulf South and D.R. Horton, Inc. have caused sewage and other untreated water to intrude into plaintiffs’ homes, causing damage to the property along with health concerns for plaintiffs and their minor children.”<sup>56</sup> However, later in the FAC, Plaintiffs clarify that some or all of the Subcontractors actually performed the lot elevations, *e.g.*, “...Setton Earthworks, LLC performed the clearing and grading of [the lots]. It knowingly failed to follow the prescribed drainage plan required by Parish Ordinance by raising the plot above the one (1) foot elevation requirement set forth in the Livingston Municipal Ordinance Sec. 115-67. Settoon [sic] raised the plot for the

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analysis of the civil-action provision of the federal antitrust law upon which it is modeled, *i.e.*, § 4 of the Clayton Act, and holding that a plaintiff’s right to sue under § 4, and thus § 1964(c), requires a showing that the defendant’s violation not only was a “but for” cause of his injury, but was the proximate cause as well).

<sup>54</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992), certified question answered, 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993).

<sup>55</sup> R. Doc. 174-2, pp. 27-29, ¶¶ 81, 83, 85, 88.

<sup>56</sup> R. Doc. 174-2, p. 30, ¶ 91.

purpose of making the home flood-resistant in furtherance of the enterprise,”<sup>57</sup> and *e.g.*, with respect to Carter, “[Carter] knowingly provided a false Plot Plan for [the lots]... The fraudulent Plot Plan was rendered to allow D.R. Horton, Inc. – Gulf to fraudulently obtain a building permit in furtherance of the enterprise in violation of the approved drainage plan.”<sup>58</sup>

## 2. Defendants’ Predicate Acts and the Lack of Proximate Cause to Plaintiffs’ Injuries

The FAC contains four allegations of purported RICO predicate acts of wire and mail fraud that are alleged to have led to Plaintiffs’ injuries. As the first example, and for each of Plaintiffs’ properties, the FAC alleges (emphasis added):

129.

On 08/20/2019, Jennifer Carlin, as an authorized agent of D. R. Horton, Inc. – Gulf Coast, **used interstate commerce, specifically via email, and made payments via credit card to obtain a Building Permit for Lot 2**, addressed 28464 Longfellow Lane. The permit was obtained fraudulently because D.R. Horton, Inc. – Gulf Coast intended to raise the elevation of the plot above those specified in the construction plans. The permit was submitted in furtherance of a larger scheme **to defraud** Livingston Parish **and the named plaintiffs**. See Exhibit A, Pg. 11.<sup>59</sup>

The foregoing represents Plaintiffs’ primary allegation of RICO fraud, and is just one example of many similar allegations regarding D.R. Horton’s actions in obtaining building and occupancy permits for 59 lots, which span nearly 70 pages of the FAC.<sup>60</sup> The allegation pleads details regarding the date that a D.R. Horton agent used a credit card to obtain a building permit under false pretenses via email, and acknowledges that D.R. Horton’s mail/wire activity used to obtain the fraudulent permit was not directed at, nor in any way involved, Plaintiffs. Rather, D.R.

<sup>57</sup> R. Doc. 174-2, p. 42, ¶ 131. *See id.* through p. 111, ¶ 337 for similar allegations as to all the lots at issue.

<sup>58</sup> R. Doc. 174-2, p. 42, ¶ 132.

<sup>59</sup> R. Doc. 174-2, p. 41, ¶ 129.

<sup>60</sup> *See id.* at pp. 42-111 for similar allegations regarding permits obtained for fifty-eight other lots. Plaintiffs’ voluminous exhibits are largely comprised of the referenced permits and permit applications.

Horton's predicate acts of mail and wire fraud used to illegally obtain permits were directed at the source of the permit, LPC and/or the Parish. Similarly, while Plaintiffs argue in brief that Carter provided fraudulent plot maps to D.R. Horton so that D.R. Horton could obtain fraudulent permits, the plot maps were used to obtain permits via activity targeted at LPC/the Parish, not Plaintiffs.<sup>61</sup> Setting aside the fact that the predicate acts were not directly targeted at Plaintiffs, which is not the controlling question,<sup>62</sup> what is significant is that Plaintiffs' claimed injury of flooded properties cannot be said to flow directly from D.R. Horton's predicate acts of fraud directed to LPC/the Parish.

In *Anza v. Ideal Steel Supply Corp.*, plaintiff Ideal, a seller of steel products, alleged that its competitor National, and National's owners, the Anzas, "were engaged in an unlawful racketeering scheme aimed at "gain[ing] sales and market share at Ideal's expense." Ideal claimed that the defendants failed to charge state taxes on cash purchases, which gave them a competitive advantage by enabling them to charge less for their products, and then the defendants committed RICO violations by submitting fraudulent state tax returns to conceal their conduct.<sup>63</sup> However, the Supreme Court held that the harm to Ideal was not proximately caused by the defendants' alleged RICO violations:

Ideal's theory is that Joseph and Vincent Anza harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud. The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result.

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<sup>61</sup> R. Doc. 191, pp. 3-4.

<sup>62</sup> See, n. 68, *infra* (While a RICO plaintiff need not show direct reliance on the defendant's misrepresentations, (*see Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008)), RICO plaintiffs must still show a direct relationship between the fraud and their injury, as "[a] direct relationship between the fraud and the injury is still required." *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 802 F.Supp.2d 725, 730 (E.D. La. 2011).

<sup>63</sup> 547 U.S. 451, 453-54 (2006).

The proper referent of the proximate-cause analysis is an alleged practice of conducting National's business through a pattern of defrauding the State. To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).<sup>64</sup>

The Supreme Court thus found that, although the same defendants were alleged to have caused the harm and the RICO violation, they did not *proximately* cause Ideal's harm because the harm to Ideal (offering of lower prices) and the alleged RICO violation (submitting false tax returns) arose from different actions. Here, the cause of Plaintiffs' alleged harm is a set of actions directly committed by the Subcontractors (property lots improperly elevated by Settoon and graded by Carter) entirely distinct from the RICO violation alleged to have been committed by D.R. Horton and directed to a third party (fraudulent statements/documents by D.R. Horton to LPC to obtain permits).<sup>65</sup>

Furthermore, Plaintiffs' argument that "[b]ut for" the acquisition of the permits, the Plaintiffs' injury would not have occurred," is insufficient standing alone, because RICO claims require a showing of "but for" *and* proximate causation.<sup>66</sup> Merely alleging that obtaining fraudulent permits ultimately led to Plaintiffs' property flooding at some later point in time does

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<sup>64</sup> *Id.* at 457-58.

<sup>65</sup> See also, *Abbott v. Medgar Evers Houses Associates, L.P.*, 201 F.3d 430 (2nd Cir. 1999) (tenants of a federally subsidized low-income housing project alleged that the defendant owners and managers of the project committed RICO violations when they engaged in mail and wire fraud via false certifications of the conditions at the project in monthly filings with the U.S. Department of Housing and Urban development in order to obtain federal subsidies. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the RICO claims because the plaintiffs could not establish that their injuries, *i.e.*, diminished property values due to the defendants' violations of housing codes, were proximately caused by the defendants' alleged RICO violation, *i.e.*, misrepresentations to HUD (who was also named as a nominal co-defendant, akin to LPC, here).

<sup>66</sup> R. Doc. 191, p. 4. See also a similar allegation in the FAC: "*But for* improper lot elevations as pled herein as Acadian Trace subdivision, Plaintiffs would not be involved in this litigation. Plaintiffs aver that they have alleged sufficient predicate acts to establish a RICO violation that is pled herein." R. Doc. 174-2, p. 27, ¶ 79. However, the applicable legal standard also requires a showing that the predicate acts are a proximate cause of the injury. *Lewis*, 2022 WL 2187098, at \*6, citing *Jackson*, 546 Fed.Appx. at 442 (internal quotations omitted) ("a RICO predicate offense must not only [be] a 'but for' cause of [plaintiff's] injury, but [it must be] the proximate cause as well").

not sufficiently plead “a direct relation between the injury suffered and the alleged injurious conduct” under RICO. The Court would have to speculate on several facts to find that obtaining the fraudulent permits was a proximate cause of the flooding.

*In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010* (“*In re Oil Spill*”) is instructive. In that case, property owners brought RICO claims against oil drilling operators, alleging that the defendants defrauded government regulators in connection with the safety of their drilling operations and their response to the 2010 oil spill at the Macondo Well in the Gulf of Mexico via acts of mail and wire fraud. The court dismissed these RICO claims, holding that the plaintiffs failed to show that the defendants’ actions in defrauding the government proximately caused the plaintiffs’ injuries, *i.e.*, damage to property and lost business earnings due to the oil spill. The court agreed that, in order for the plaintiffs’ theory of causation to prevail, they would have to rely on a “domino effect” stemming from the fraud, *e.g.*, that if the government had known the truth about BP’s safety practices and ability to respond to the spill, it would have concluded that they were insufficient; that if the government concluded they were insufficient, the defendants would have been required to adopt different practices; and that if the government required the defendants to adopt different practices, the practices would have prevented the blowout or lessened the impact of the spill.<sup>67</sup>

Here, for Plaintiffs’ theory to prevail, similar assumptions would have to be made, *i.e.*, that if LPC would have known the truth about D.R. Horton’s building practices and/or permit representations, LPC would have concluded they were insufficient to meet municipal building requirements; that if LPC had concluded D.R. Horton’s building practices were insufficient, LPC would have required D.R. Horton to adopt compliant practices; and that if LPC had required D.R.

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<sup>67</sup> 802 F.Supp.2d 725, 727, 729-30 (E.D. La. 2011). The court also noted that the direct victim of the defendants’ fraud was the government, not the plaintiffs, as is the case here. *Id.* at 731.

Horton to adopt compliant practices, those practices would have prevented Plaintiffs' properties from flooding.<sup>68</sup> These assumptions render causation for Plaintiffs' injuries too remote from the alleged RICO violations.<sup>69</sup>

Turning to the other RICO allegations in the FAC,

367.

D.R. Horton, Inc. - Gulf Coast, D.R. Horton, Inc., George Kurz, Jake Lambert, David Stanton and Acadian Trace HOA, Inc. devised a scheme- in furtherance of their collusive relationship- **to defraud by the use of mail, telephone, and internet traveling in interstate or foreign commerce**, writings, and/or signals including the D.R. Horton website, the D.R. Horton, Inc. - Gulf Coast Website, the Acadian Trace HOA, Inc. Facebook Page, **statements to Plaintiffs via paper mail and email**, communications between .R. Horton (sic), D.R. Horton, Inc. - Gulf Coast, and Acadian Trace HOA, Inc.<sup>70</sup>

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<sup>68</sup> As noted in *In re Oil Spill*, the United States Supreme Court has previously held a RICO plaintiff does not need to prove that he directly relied on a defendant's misrepresentation to establish the proximate cause requirement, 802 F.Supp.2d at 730, citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008) and *see id.* at 657–58 (“[F]irst-party reliance [is not] necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*.”). However, the Supreme Court also noted in *Bridge* that, “[b]y the same token, the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)'s proximate-cause requirement but it is not in and of itself dispositive. A contrary holding would ignore *Holmes*' instruction that proximate cause is generally not amenable to bright-line rules.” 553 U.S. at 659. In any case, RICO plaintiffs must still show a direct relationship between the fraud and their injury, as “[a] direct relationship between the fraud and the injury is still required. Plaintiffs' failure to allege a direct relationship between BP's alleged defrauding of government regulators and their economic injuries is the fatal flaw in their RICO claims-not failure to allege first-party reliance.” *In re Oil Spill*, 802 F.Supp.2d at 730. So too here, Plaintiffs' failure to allege a direct relationship between the defendants' alleged defrauding of LPC and Plaintiffs' economic injuries is the fatal flaw in their RICO claims. *See also, Hemi Group, LLC v. City of New York, NY*, 559 U.S. 1, 12 (2010) (rejecting the dissent's argument that, if the harm is foreseeable and/or intended, that should be sufficient to satisfy proximate cause for a RICO claim, finding that “the focus is on the directness of the relationship between the conduct and the harm.”).

<sup>69</sup> As to other possible causes of their damages, Plaintiffs allege, for example, “On or about January 16, 2019, The Resource Foundation, Inc. (original owner of the lots in Acadian Trace subdivision), the State of Louisiana, acting by and through the Division of Administration, Office of Community Development, and LISC Louisiana Loan Fund, L.L.C., executed a Termination of Declaration of Building Restrictions and Predial Servitudes (the “Termination”), effectively removing all of the restrictive covenants that had served to protect Plaintiffs and other homeowners in Acadian Trace Subdivision from substandard construction, inharmonious design, and other design and/or construction issues which lead to diminution of their property values. R. Doc. 174-2, pp. 15-16, ¶ 38. *See also*, p. 19, ¶ 45, in relevant part, “With the recordation of these two documents (one, the Termination), Defendant D.R. Horton, Inc. – Gulf Coast essentially unilaterally did away with the restrictive covenants that had been in place for nearly a decade, to the detriment of Plaintiffs.”

<sup>70</sup> R. Doc. 172-4, p. 119, ¶ 367.

378.

Plaintiffs aver that RICO defendants **sent emails to plaintiffs containing fraudulent materials** which were designed to induce Plaintiffs into submitting to the RICO Defendants Scheme.<sup>71</sup>

While these two allegations assert that Defendants sent emails/mail containing fraudulent materials directly to Plaintiffs, the FAC lacks any details regarding the emails/mail that were sent to Plaintiffs, including the “who, what, why” of the correspondence and how they were fraudulent, which fails to survive a Fed. R. Civ. P. 12(b)(6) inquiry. These allegations also fail to show a direct injury because they do not allege how the emails/mails Plaintiffs received were directly connected to the flooding of Plaintiffs’ property.

Lastly, Plaintiffs allege:

382.

D.R. Horton, Inc. - Gulf Coast, D.R. Horton, Inc., George Kurz, Jake Lambert, David Stanton, Acadian Trace HOA, Inc., Quality Engineering & Surveying, LLC., Settoon Earthwork, LLC., Production Builder Services, Inc., (DBA Carter & Clark), and Grass Master Maintenance and Landscaping, LLC., knew their predicate acts of **wire fraud and mail fraud** were a part of a pattern of racketeering activity and agreed to the commission of those acts to further their purpose of **defrauding Plaintiffs and led directly to Plaintiffs’ alleged injury of flooded homes and lots.**<sup>72</sup>

While Plaintiffs’ baldly assert that Defendants’ collective predicate acts of wire and mail fraud “defraud[ed] Plaintiffs’ and “led directly” to Plaintiffs’ flooded property, the FAC generally alleges that the wire and mail fraud was committed directly by D.R. Horton and its agents; however, even if the other Defendants were alleged to have acted similarly, the FAC does not plead how this fraud directly caused Plaintiffs’ properties to flood.<sup>73</sup>

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<sup>71</sup> R. Doc. 172-4, p. 122, ¶ 378.

<sup>72</sup> R. Doc. 174-2, p. 123, ¶ 382 and *see* ¶ 383.

<sup>73</sup> The only other reference to events occurring through mail and email is “[t]hrough mail and email, Acadian Trace HOA, Inc. has threatened Plaintiffs with liens on their homes,” R. Doc. 172-4, p. 22, ¶ 60. However, this claim has

Carter is correct that Plaintiffs' failure to allege a direct link between the wire and mail fraud allegations and their flooded property renders Plaintiffs without prudential standing to raise their RICO claim under § 1962(c).<sup>74</sup> Because Plaintiffs cannot show a violation of § 1962(c), their § 1962(d) conspiracy claim to violate § 1962(c) necessarily fails.<sup>75</sup>

To survive a Rule 12(b)(6) motion, a civil RICO plaintiff must sufficiently plead an injury resulting directly from the alleged RICO violation.<sup>76</sup> Here, because Plaintiffs have failed to allege a direct relationship between the predicate acts and their injuries, they lack prudential standing to raise their RICO claim.<sup>77</sup> As such, the proposed FAC is futile as to that claim.<sup>78</sup> Consideration of the other Fed. R. Civ. P. 15 factors is not warranted,<sup>79</sup> and the Motion should be denied.<sup>80</sup>

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no connection at all to flooding on Plaintiffs' properties, or the obtaining of building permits through fraudulent means, and is unrelated to the RICO claim. The FAC also contains several other generalized wire and mail fraud allegations that lack specificity, and importantly, fail to allege a direct connection between the predicate acts and Plaintiffs' flooded properties. *See, e.g.*, R. Doc. 174-2, p. 34, ¶ 100 ("D.R. Horton, Inc. - Gulf Coast, D.R. Horton, Inc., George Kurz, Jake Lambert, David Stanton and Acadian Trace HOA, Inc. conduct and participate in the conduct of the affairs of the Enterprise through a pattern of racketeering activity that has consisted of numerous and repeated violations of the federal mail and wire fraud statutes, which prohibit the use of any interstate or foreign mail or wire facility for the purpose of executing a scheme to defraud in violation of 18 U.S.C. § 1341 and 1343);" *id.* at p. 113, ¶ 342 (same at ¶ 346) ("To obtain these permits, D.R. Horton, submitted knowingly false guarantees and applications in furtherance of its scheme to build the Acadian trace subdivision without abiding by the laws of Louisiana and causing damage to Plaintiff's homes"); and *id.* at p. 119, ¶ 368 ("D.R. Horton, Inc. - Gulf Coast, D.R. Horton, Inc., George Kurz, Jake Lambert, David Stanton, Acadian Trace HOA, Inc., Quality Engineering & Surveying, LLC., Settoon Earthwork, LLC., Production Builder Services, Inc., (DBA Carter & Clark), and Grass Master Maintenance and Landscaping, LLC., utilize and have utilized the interstate and international mail and wires for the purpose of obtaining money or property by means of the omissions, false pretenses, and misrepresentations described therein.") *See* other general allegations at ¶¶ 369-371.

<sup>74</sup> R. Doc. 185, pp. 8-12.

<sup>75</sup> *Lewis*, 2022 WL 2187098, at \*4; *N. Cypress Med. Ctr. Operating Co.*, 781 F.3d at 203; and *Nolen*, 293 F.3d at 930.

<sup>76</sup> *Lewis*, 2022 WL 2187098, at \*6, citing *6315 Magazine, LLC v. Flot Nola, LLC*, No. 20-1472, 2020 WL 4922361, at \*10 (E.D. La. Aug. 21, 2020) (citing *Sedima* 473 U.S. at 496).

<sup>77</sup> Because Plaintiffs lack prudential standing, Carter's other RICO arguments, and Plaintiffs' responses, are not considered, *e.g.*, whether Plaintiffs have adequately alleged the required elements of a RICO claim.

<sup>78</sup> Although only Carter filed an opposition to the Motion, because Plaintiffs lack prudential standing as to their RICO claim, that claim should not proceed as to any defendant.

<sup>79</sup> That said, it must be noted that Plaintiffs have been given multiple chances to state their RICO claims, which Plaintiffs acknowledge. Plaintiffs' inability to cure pleading deficiencies is a Fed. R. Civ. P. 15(a) factor to be considered and weighs against further leave to amend. R. Doc. 191, pp. 10-11.

<sup>80</sup> Plaintiffs' informal alternative request for relief, *i.e.*, to be given leave to file another amended complaint that dismisses all claims against Carter, to render the Motion unopposed, should be denied. R. Doc. 191, p. 12. Amendment to dismiss the claims as to Carter does not change the substance of the RICO claims. To the extent Plaintiffs argue

#### **D. The Court Should Decline to Exercise Supplemental Jurisdiction Over State Law Claims and Should Dismiss This Case**

Plaintiffs' asserted basis for this Court's subject matter jurisdiction is 28 U.S.C. § 1331 based on the assertion of the RICO claim.<sup>81</sup> Because the RICO claim does not withstand a 12(b)(6) analysis, the Court would no longer have original subject matter jurisdiction under § 1331, leaving only supplemental jurisdiction over the state law claims.<sup>82</sup> "Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a state-law claim if: ... the district court has dismissed all claims over which it has original jurisdiction..." and "[d]istrict courts have "wide discretion" in deciding whether to decline supplemental jurisdiction under section 1367(c)."<sup>83</sup>

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that the Fifth Circuit's mandate "clearly indicates" that Plaintiffs should be able to replead their RICO claims and to rule otherwise would render that order irrelevant, Plaintiffs have now attempted to re-plead the claim, which lacks merit. The reasonable explanation for why the Fifth Circuit instructed that dismissal of the claims is without prejudice is not because the RICO claims were determined to have merit, but because the prior dismissal was primarily based on Plaintiffs' unexplained failure to timely oppose the motions to dismiss. The result of the mandate was to afford Plaintiffs an additional opportunity to seek leave to amend, which they have been given.

<sup>81</sup> See R. Doc. 174-2, p. 2, ¶ 1 ("Venue is proper pursuant to 28 U.S.C. § 1331 because this action arises under the law of the United States, and 18 U.S.C. § 1964 (c) because plaintiffs assert claims under the Racketeering Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et. seq.* ").

<sup>82</sup> In their Reply brief, Plaintiffs attempt to allege that diversity jurisdiction exists based on the Louisiana citizenship of Plaintiffs and that of D.R. Horton Inc., alleged to be "a foreign corporation domiciled in the State of Delaware." R. Doc. 191, pp. 11-12 and *see* R. Doc. 174-2, pp. 1-2, introductory paragraph (adequately alleging the Louisiana citizenship of all Plaintiffs). However, Plaintiffs' citizenship allegation as to corporation D.R. Horton, Inc. is insufficient because D.R. Horton Inc.'s principal place of business is not stated. Additionally, LPC, alleged to be a governmental subdivision, is clearly non-diverse from Plaintiffs (to the extent it has capacity to be sued); Acadian Trace is also alleged to be non-diverse; several other defendants may also be non-diverse; and the amount in controversy is unclear, as all that is alleged are boilerplate categories of damages, *e.g.*, loss of use, emotional distress, and mental anguish, and vague allegations of flooding and property damage, with no supporting information. *See, e.g.*, R. Doc. 174-2, ¶¶ 13(3), 13(4), 438, 442, 455-56, 460, and p. 139, "DAMAGES." Plaintiffs have had multiple chances to amend their Complaint in this proceeding and have previously failed to timely respond to deadlines without good cause. That said, Plaintiffs can attempt to assert diversity jurisdiction by adequately asserting the citizenship of all parties and the requisite amount in controversy in a timely-filed objection to this Report, if Plaintiffs contend that diversity subject jurisdiction exists. Plaintiffs shall review the Court's Notice of Jurisdictional Requirements, on the Court's website at

<https://www.lamd.uscourts.gov/sites/default/files/pdf/EWD%20notice%20for%20juris.%20pleading%201332%2C%203.28.24%20revisions.pdf>

regarding the allegations necessary to allege citizenship for individuals, corporations, limited liability companies, *etc.* for purposes of alleging diversity subject matter jurisdiction.

<sup>83</sup> *Hicks v. Austin Indep. Sch. Dist.*, 564 Fed. Appx. 747, 748 (5th Cir. 2014).

If leave to amend is denied because Plaintiffs have not stated a RICO claim—the only basis for federal jurisdiction—it is recommended that the Court decline to exercise supplemental jurisdiction over state law claims and dismiss this case without prejudice.<sup>84</sup> To avoid any potential prejudice to Plaintiffs, it is further recommended that prescription be suspended for thirty days pursuant to 28 U.S.C. § 1367(d)<sup>85</sup> so that Plaintiffs can re-file suit in state court if they so choose.<sup>86</sup>

### III. RECOMMENDATIONS

**IT IS RECOMMENDED** the Motion for Leave to File Amended and Restated Complaint,<sup>87</sup> filed by Plaintiffs Lindsey Lee, Wayne Ballard Jr., Jennifer Ballard, Ronald Roberts, III, Kathryn Roberts, Zachary Russell, Lacey Russell, Luis Hinostrroza, Tim Addison, II, Stacy Addison, Jonathan McMorris, and Gilbert Bankston, III be **DENIED** because Plaintiffs lack prudential standing to bring their purported Racketeer Influenced Corrupt Organizations Act claim, which is futile.

**IT IS FURTHER RECOMMENDED** that, if Plaintiffs are denied leave to amend their RICO claim and no other basis for federal subject matter jurisdiction is established, such that only state law claims remain, the Court decline to exercise supplemental jurisdiction and dismiss this

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<sup>84</sup> See *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (affirming dismissal of pendent state law claims where RICO claim was dismissed).

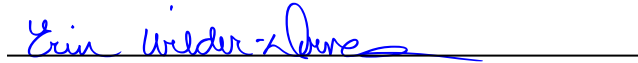
<sup>85</sup> 28 U.S.C.A. § 1367 (d) provides: “The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

<sup>86</sup> See *Medgar Evers Houses Tenants Ass’n v. Medgar Evers Houses Associates, L.P.*, 25 F.Supp.2d 116, 124 (E.D.N.Y. 1998) (affirmed by *Abbot, supra*), in which the trial court also declined to exercise supplemental jurisdiction, stating, “The plaintiff’s allegations, which I accept as true, cry out for relief. There may well be an avenue for such relief in state court...however, the civil RICO cause of action is not a proper vehicle for these allegations.” A thirty day suspension of prescription will permit Plaintiffs to seek relief in state court. While Plaintiff says, “the secondary purpose of this litigation is to prevent D.R. Horton and its affiliated defendants from continuing to engage in unlawful behavior within the State of Louisiana” such that “as a matter of justice and for the benefit of the public” they should be granted leave to amend to cure defects, these stated objectives can be accomplished in state court. Plaintiffs have also brought claims under the Louisiana Unfair Trade Practices Act. See, R. Doc. 174-1, ¶ 7; R. Doc. 174-2, pp. 135-136, ¶¶ 443-447.

<sup>87</sup> R. Doc. 174.

case without prejudice, suspending prescription for thirty days pursuant to 28 U.S.C. § 1367(d) so that Plaintiffs can re-file suit in state court, should they choose to do so.

Signed in Baton Rouge, Louisiana, January 23, 2025.



**ERIN WILDER-DOOMES**  
**UNITED STATES MAGISTRATE JUDGE**