No. 03-10172-I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SANDRA JACKSON, *et al.*

Plaintiffs - Appellants,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A/ BELLSOUTH, *et al.*,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF DEFENDANTS-APPELLEES BELLSOUTH TELECOMMUNICATIONS, INC., KEITH KOCHLER, AND FRANCIS B. SEMMES

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned Counsel of Record certifies that the following list of interested persons and corporate entities complies with Circuit Rule 26.1-1:

Linden Adams, Plaintiff-Appellant

Virginia Adams, Plaintiff-Appellant

Sheila Andrews, Plaintiff-Appellant

Estate of Darlene Baker, Plaintiff-Appellant

Kyra Baptiste, Plaintiff-Appellant

Raphael Baptiste, Plaintiff-Appellant

Becker & Poliakoff, P.A., Attorneys for Linden Adams, Virginia Adams, Estate of Darlene Baker, Kyra Baptiste, Raphael Baptiste, Doris Benjamin, Linda Boatwright, Garriet Carter, Canta Chestnut, Kenneth Covin, Tracy Davis, Eileen Davidson, Jessie Dyett, Alice Fields, Windell Foote, Carl Forbes, John Fuller, Jacqueline Fuller-Rhaheed, John Johnson, Lynda Johnson, James Latham, Shedrick Little, Laura Lucas, Donald McGuckian, Cynthia Mincey, Sharwyn Rhyant Noble, Theresa Patterson, James Rachel, Linda Radford, James Robinson, James Scott, Derrick Smart, Arfonzo Smith, Bernette Snead, Douglas Stanton, Lorenzo Stewart, Shirley Washington,

Joseph Williams, Ivory Young, and Jacqueline Young

BellSouth Accounts Receivable Management, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Billing, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Business Systems, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Corporation, Parent Corporation of BellSouth Telecommunications, Inc.

BellSouth Credit and Collections Management, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Entertainment, LLC, Affiliate of BellSouth Telecommunications, Inc.

BellSouth Products, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Public Communications, Inc., Affiliate of BellSouth Telecommunications, Inc.

BellSouth Warranty Services of Florida, LLC, Affiliate of BellSouth Telecommunications, Inc.

BellSouth Telecommunications, Inc., Defendant-Appellee

Doris Benjamin, Plaintiff-Appellant

Linda Boatwright, Plaintiff-Appellant

Kevin Boothe, Plaintiff-Appellant

Danielle K. Brewer, Attorney for Linden Adams, Virginia Adams, Estate of Darlene Baker, Kyra Baptiste, Raphael Baptiste, Doris Benjamin, Linda Boatwright, Garriet

Carter, Canta Chestnut, Kenneth Covin, Tracy Davis, Eileen Davidson, Jessie Dyett, Alice Fields, Windell Foote, Carl Forbes, John Fuller, Jacqueline Fuller-Rhaheed, John Johnson, Lynda Johnson, James Latham, Shedrick Little, Laura Lucas, Donald McGuckian, Cynthia Mincey, Sharwyn Rhyant Noble, Theresa Patterson, James Rachel, Linda Radford, James Robinson, James Scott, Derrick Smart, Arfonzo Smith, Bernette Snead, Douglas Stanton, Lorenzo Stewart, Shirley Washington, Joseph Williams, Ivory Young, and Jacqueline Young

Willa Brown, Plaintiff-Appellant

Garriet Carter, Plaintiff-Appellant

Canta Chestnut, Plaintiff-Appellant

Laurie Stilwell Cohen, Attorney for Linden Adams, Virginia Adams, Estate of Darlene Baker, Kyra Baptiste, Raphael Baptiste, Doris Benjamin, Linda Boatwright, Garriet Carter, Canta Chestnut, Kenneth Covin, Tracy Davis, Eileen Davidson, Jessie Dyett, Alice Fields, Windell Foote, Carl Forbes, John Fuller, Jacqueline Fuller-Rhaheed, John Johnson, Lynda Johnson, James Latham, Shedrick Little, Laura Lucas, Donald McGuckian, Cynthia Mincey, Sharwyn Rhyant Noble, Theresa Patterson, James Rachel, Linda Radford, James Robinson, James Scott, Derrick Smart, Arfonzo Smith, Bernette Snead, Douglas Stanton, Lorenzo Stewart, Shirley Washington, Joseph Williams, Ivory Young, and Jacqueline Young Kenneth Covin, Plaintiff

Deborah Sampieri Corbishley, Attorney for Ruden, McClosky, Smith, Schuster & Russell, P.A. and Barry Mandelkorn

Tracy Davis, Plaintiff-Appellant

Eileen Davidson, Plaintiff-Appellant

Jessie Dyett, Plaintiff-Appellant

Teresa A. Facyson, Plaintiff-Appellant

Alice Fields, Plaintiff-Appellant

Justin C. Fineberg, Attorney for BellSouth Telecommunications, Inc. Keith Kochler, and Francis Semmes

Windell Foote, Plaintiff-Appellant

Carl Forbes, Plaintiff-Appellant

John Fuller, Plaintiff-Appellant

Jacqueline Fuller-Rhaheed, Plaintiff-Appellant

Martin B. Goldberg, Attorney for BellSouth Telecommunications, Inc. Keith Kochler, and Francis Semmes

Maurice Graham, Attorney for Willie Stovall

Hatch & Doty, P.A., Attorneys for Sheila Andrews, Kevin Boothe, Willa Brown, Teresa Facyson, Sandra Jackson, Sarah Jones, Edith Kelson, Melvin Kendrick, Zadie Wimberly, Lydia Youngs, and Victoria Young

Ira C. Hatch, Attorney for Sheila Andrews, Kevin Boothe, Willa Brown, Teresa Facyson, Sandra Jackson, Sarah Jones, Edith Kelson, Melvin Kendrick, Zadie Wimberly, Lydia Youngs, and Victoria Young

Sandra Jackson, Plaintiff-Appellant

John Johnson, Plaintiff-Appellant

Lynda Johnson, Plaintiff-Appellant

Sarah Jones, Plaintiff-Appellant

Edith Kelson, Plaintiff-Appellant

Melvin Kendrick, Plaintiff-Appellant

Keith Kochler, Defendant-Appellee

Lash & Goldberg, Attorneys for BellSouth Telecommunications, Inc. Keith Kochler, and Francis Semmes

James Latham, Plaintiff-Appellant

Lenox Park Holdings, L.L.C., Affiliate of BellSouth Telecommunications, Inc.

Shedrick Little, Plaintiff-Appellant

Laura Lucas, Plaintiff-Appellant

Barry Mandelkorn, Defendant

Hon. Kenneth A. Marra, United States District Judge

Donald McGuckian, Plaintiff-Appellant

Hon. Donald J. Middlebrooks, United States District Judge

Cynthia Mincey, Plaintiff-Appellant

Sharwyn Rhyant Noble, Plaintiff-Appellant

Theresa Patterson, Plaintiff-Appellant

Pamela Perry, Attorney for Ruden, McClosky, Smith, Schuster & Russell, P.A. and Barry Mandelkorn

James Rachel, Plaintiff-Appellant

Linda Radford, Plaintiff-Appellant

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James Robinson, Plaintiff-Appellant

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Rachel, Linda Radford, James Robinson, James Scott, Derrick Smart, Arfonzo Smith, Bernette Snead, Douglas Stanton, Lorenzo Stewart, Shirley Washington, Joseph Williams, Ivory Young, and Jacqueline Young

Ruden, McClosky, Smith, Schuster & Russell, P.A., Defendant

James Scott, Plaintiff-Appellant

Francis Semmes, Defendant-Appellee

Derrick Smart, Plaintiff-Appellant

Arfonzo Smith, Plaintiff-Appellant

Bernette Snead, Plaintiff-Appellant

Brian F. Spector, Attorney for Ruden, McClosky, Smith, Schuster & Russell, P.A. and Barry Mandelkorn

Douglas Stanton, Plaintiff-Appellant

Lorenzo Stewart, Plaintiff-Appellant

Willie Stovall, Plaintiff-Appellant

Prudence Taylor, Plaintiff-Appellant

Shirley Washington, Plaintiff-Appellant

Joseph Williams, Plaintiff-Appellant

Zadie Wimberly, Plaintiff-Appellant

Ivory Young, Plaintiff-Appellant

Victoria Young, Plaintiff-Appellant

Jacqueline Young, Plaintiff-Appellant

Lydia Youngs, Plaintiff-Appellant

Kathryn S. Zecca, Attorney for BellSouth Telecommunications, Inc. Keith Kochler, and Francis Semmes

_____
Kathryn S. Zecca

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees BellSouth Telecommunications, Inc., Keith Kochler, and Francis Semmes (the "BellSouth Defendants") believe that the briefs adequately address the legal issues presented on appeal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which gives this Court jurisdiction to review final judgments.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly conclude that plaintiffs had failed to allege a pattern of racketeering under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*., and Florida's parallel statute, Fla. Stat. § 772.103(2)-(4), where the alleged predicate acts spanned a period of only five months, plaintiffs did not allege that any illegal activity would continue into the future, and plaintiffs conceded that the alleged illegal activity was *not* part of BellSouth's regular way of doing business?

2. Are plaintiffs' federal and state racketeering claims barred because plaintiffs did not sufficiently allege the existence of an enterprise or that BellSouth Telecommunications, Inc., Keith Kochler, and Francis Semmes (collectively, the "BellSouth Defendants") committed any predicate act of racketeering?

3. Did the district court correctly conclude that plaintiffs' state law claims are barred by Florida's litigation privilege?

4. Did plaintiffs fail to state a claim for tortious interference with advantageous contractual and business relationships because there is no allegation

that defendants' conduct caused damage to plaintiffs' business or occupation?

5. Are plaintiffs' claims barred by the releases they signed as part of a 1997 settlement with BellSouth and by the final judgment entered in that case?

6. Did the district court correctly conclude that plaintiffs failed to plead a claim for race discrimination under 42 U.S.C. § 1981?

STATEMENT OF THE CASE

This case arises from a prior lawsuit entitled *Adams et al.* v. *BellSouth Telecommunications, Inc.* (the "*Adams* Case"), which involved claims of race discrimination in employment; most of the plaintiffs in the present case were also plaintiffs in *Adams*. Regrettably, the *Adams* Case was marred by what Judge Middlebrooks later termed "terrorist" acts "tantamount to extortion" committed by plaintiffs' counsel. Plaintiffs' counsel threatened BellSouth with harassing publicity, vexatious discovery, waves of follow-on lawsuits, and pressure from political and media organizations – all tactics designed to secure a prompt and unwarranted settlement. Counsel's efforts paid off: Faced with the prospect of relentless litigation, BellSouth agreed to settle with the *Adams* plaintiffs.

To ensure that these unscrupulous lawyers would not make good on their threats of renewed litigation, BellSouth – after securing legal advice from Florida counsel and satisfying itself that Florida ethics rules permitted it – acquiesced in a

rather novel proposal first broached by plaintiffs' counsel. For an additional payment into the settlement pot, plaintiffs' counsel agreed to become consultants to BellSouth, thus removing themselves as potential adversaries during the period covered by the consulting agreement. Although BellSouth and its attorneys believed then – and believe now – that then-existing Florida law permitted such practice limitations, Judge Middlebrooks held otherwise and sanctioned both plaintiffs' counsel and BellSouth's in-house counsel. Judge Middlebrooks also ruled that the *Adams* plaintiffs could reopen their discrimination claims against BellSouth – provided, however, that they first disgorge the settlement proceeds they had received.

Without disgorging any of the proceeds, the plaintiffs – now armed with new lawyers – commenced the present action. In it, they sued not only their *former* attorneys (for a range of causes of action, including malpractice), but also the BellSouth Defendants, asserting a loose amalgam of claims arising from the way in which the *Adams* Case was settled. Plaintiffs' fundamental grievance was that their former lawyers had kept for themselves too much of the settlement proceeds; but plaintiffs were not content to file a simple malpractice action. Instead, they sought to embroil BellSouth in the case as well.

Plaintiffs took five tries to come up with a legal basis for doing so, and they failed every time. Time and again, plaintiffs filed new versions of the complaint, only

to be met by a motion to dismiss, prompting yet another amendment. This appeal, in fact, is from orders dismissing the BellSouth Defendants from the Third and Fourth Amended Complaints. See R1:3:1-21; R2:5:1-15.[1] The district court's decisions are plainly correct and should be affirmed.[2]

I. STATEMENT OF THE FACTS

A. The *Adams* Case and the Underlying Settlement

This litigation arose out of the settlement of a case brought in 1996 in the federal district court for the Southern District of Florida entitled *Adams, et al.* v. *BellSouth Telecommunications, Inc. d/b/a Southern Bell*, Case No. 96-2473-MIDDLEBROOKS (the "*Adams* Case"). The *Adams* Case was a group employment discrimination action – but not a class action – brought by approximately 56 employees of BellSouth and applicants for employment with BellSouth. See R1:1:6.

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[1] All references to the Record Excerpts are designated "R" and refer to the B&P Plaintiffs' Record Excerpts. References are in the format of RX:Y:Z, where X represents the volume number of the B&P Record Excerpts, Y the tab number, and Z the page number. References to the BellSouth Defendants' Supplemental Record Excerpts are designated "SR" and are in the same format.

[2] After all of the claims against the BellSouth Defendants were dismissed, the case proceeded against plaintiffs' former attorneys. Most of the plaintiffs settled with their former attorneys (see R1:1:54 (Docket Entries 320, 321)), and the trial court ultimately entered summary judgment against those plaintiffs who did not settle. A final judgment was therefore entered on December 5, 2002 (R2:6:1), which included a final judgment in favor of the BellSouth Defendants. *Id*. at 2.

The *Adams* plaintiffs were originally represented by the Ganz law firm, where the matter was principally staffed by Norman Ganz, an attorney, and Brian Neiman, a paralegal. The Ganz firm solicited clients by placing advertisements in Florida newspapers for participants in a discrimination lawsuit against BellSouth. R1:2:7.

Shortly after the complaint was filed in *Adams*, the law firm of Ruden, McClosky, Smith, Schuster & Russell, P.A., through attorney Barry Mandelkorn, appeared as co-counsel of record for plaintiffs. See R:1:3-8. Defendants-Appellees Keith Kochler and Francis B. Semmes, both in-house counsel for BellSouth, in conjunction with the Florida firm of Heinrich Gordon Hargrove Weihe & James, P.A., represented BellSouth in the *Adams* Case. R2:9:4-5; SR1:2:7.

In addition to the *Adams* plaintiffs, Ganz solicited numerous other individuals who purported to have discrimination claims against BellSouth. Twenty-two of these plaintiffs were included in a second complaint, entitled *Andrews et al.* v. *BellSouth Telecommunications, Inc.* Plaintiffs' counsel never filed the *Andrews* complaint (R2:4:7). Instead, as part of a campaign that Judge Middlebrooks later described as "terrorist" and "tantamount to extortion" (R2:8:7), plaintiffs' counsel threatened "to increase defense costs through the continuous addition of 'unnamed,' 'unfiled' plaintiffs as well as threats to join the local NAACP chapter as a party with undefined claims." *Id*. at 7 n.7.

Within months of the *Adams* case being filed – and in "respon[se] to [these] litigation tactics" (R2:8:7) – the BellSouth Defendants began discussing the possibility of settling all of Ganz's clients' claims. In the course of these negotiations, Ganz suggested that, in return for a settlement, his firm would agree not to represent any current or former employee of BellSouth against the company for a period of one year. *Id*. at 2. Before agreeing to this concept, BellSouth secured advice from Florida counsel, who researched the issue and advised BellSouth that it could indeed include a practice restriction as part of the settlement. *Id*. at 8.[3]

The parties thereafter agreed to settle the case for $1.6 million. As part of the settlement, BellSouth agreed to retain plaintiffs' counsel as consultants, thereby foreclosing them, during the life of the consulting agreement, from representing future clients against BellSouth. *Id*. at 3.

B. The Inquiry Into The Settlement

One plaintiff – Bettye Merricks – refused to settle for the amount proposed by plaintiffs' counsel, and instead complained about the settlement to the district court. Judge Middlebrooks thereafter referred the matter to a special master, who

[3] At the time, practice restrictions were permissible under the ethics rules in Georgia, where BellSouth's legal department is located and where Mr. Kochler and Mr. Semmes practiced. R2:9:12. Moreover, BellSouth was advised and believed in good faith that under *Lee* v. *Florida Dep't of Ins. and Treasurer*, 586 So.2d 1185 (Fla. Dist. App. 1991), the same was true in Florida.

recommended that sanctions be imposed for a violation of ethics rules. R2:9:1-16; R2:10:1-6.[4]

Rejecting BellSouth's contention that the practice limitation was valid under *Lee* v. *Florida Dep't of Ins. and Treasurer*, 586 So.2d 1185 (Dist. Ct. App. 1991), Judge Middlebrooks accepted the Special Master's recommendation, but sharply reduced the proposed sanction. The court recognized that "[t]he motive for [the BellSouth attorneys'] conduct is obvious from the record. Responding to litigation tactics this Court previously has described as 'terrorist' and 'tantamount to extortion,' BellSouth's attorneys sought 'finality' for their client by preventing the filing of similar future suits by Plaintiffs' counsel." R2:8:7. The court concluded, however, that BellSouth had not taken "adequate steps to check the validity of local counsel's opinion" on the propriety of a practice restriction. Judge Middlebrooks therefore ordered Messrs. Kochler and Semmes to complete five hours of ethics courses before

[4] In response to the ethics inquiry, Ruden McClosky and Barry Mandelkorn agreed to a settlement. The settlement provided that Mandelkorn would participate in continuing education and perform *pro bono* legal services, and Ruden McClosky would disgorge the entire amount ($120,000) allocated to it under the consulting agreement and would make an additional $130,000 available to its former clients, on the condition that any person taking his or her share of the latter sum released Ruden McClosky and Mandelkorn from further litigation. R2:10:1-6. The Court also ordered that Ganz be suspended from practice for three years, that he pay a sanction of $300,000 (R2:9:8; R2:8:26-27), and referred paralegal Neiman to the U.S. Attorney's Office. R2:8:25.

appearing again in the Southern District of Florida (*id*. at 27).[5]

Having determined that the practice limitation was impermissible, Judge Middlebrooks permitted the *Adams* plaintiffs to "opt out" of the prior settlement (R2:8:26) and reinstate their claims. The court added, however, that such opt-out plaintiffs must "first disgorge all benefits either already received or due to be received under the terms of the settlement." *Ibid*. Judge Middlebrooks also counseled the plaintiffs to consult with new counsel before opting out of the settlement. The court explained that the plaintiffs "have no guarantee of a favorable outcome at trial, and the case facts revealed thus far cast doubt on whether many of Plaintiffs' individual claims have much legal merit, if any." *Ibid*.[6]

II. THE PROCEEDINGS BELOW

Without disgorging their settlement proceeds as Judge Middlebrooks had required, plaintiffs filed the present action against their former attorneys, BellSouth, and BellSouth's attorneys. There then ensued a seemingly endless parade of amended

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[5] BellSouth and its counsel elected not to appeal the court's ruling.

[6] Judge Middlebrooks' cautionary note to plaintiffs was consistent with the special master's findings: "[T]his Court did not discover anything among the materials or evidence considered herein that would lead this Court to believe, much less conclude, that the gross amount of the settlement was anything other than that to which reasonable parties would agree in order to amicably resolve the litigation (other than the fact that Plaintiffs perhaps, should have received a greater portion of the settlement proceeds)." R2:9:16-17.

complaints, as plaintiffs tried, time and again, to devise a legally sufficient means of keeping BellSouth and its attorneys in the case.

Indeed, even before any of the defendants responded to plaintiffs' initial pleading, plaintiffs served their first amended complaint. The BellSouth Defendants and other defendants filed a motion to dismiss the amended complaint (R1:1:26-27 (Docket Entries 34, 36)); instead of responding to these motions (even after seeking extra time to do so), plaintiffs sought leave to file a second amended complaint. *Id*. at 27 (DE 42). The trial court granted the motion (*id*. at 28 (DE 52)). The BellSouth Defendants and other defendants moved to dismiss the second amended complaint (*id*. at 29-30 (DE 68, 78)); plaintiffs then asked the Court for leave to file a third amended complaint (*id*. at 32 (DE 94)).

By this point, plaintiffs had begun to wear out their welcome. Judge Middlebrooks noted that "[t]hus far, this Court has been patient with Plaintiffs' continued amendment of their pleadings. However, at some point, interests of economy and equity require an end to Plaintiffs' continued amendments of their pleadings so that this case may be prosecuted in a fair and expeditious manner." SR1:1:1. Thus, the court granted plaintiffs leave to amend but noted that "*[a]ny* claim asserted in any of the prior three complaints, that has been reasserted in the third amended complaint and attacked by pre- or post-answer motion to dismiss, will

be subject to dismissal with prejudice." *Ibid*. (emphasis in original).

Having now had *four* chances to draft a legally sufficient complaint – and two previews of arguments the defendants would make to obtain dismissal of their claims – plaintiffs filed the Third Amended Complaint. Plaintiffs alleged that by including the practice restriction and consulting agreement in the *Adams* settlement, and supposedly concealing these provisions from the plaintiffs, BellSouth committed race discrimination under 42 U.S.C. § 1981, violated the federal and Florida state RICO statutes, 18 U.S.C. § 1961 *et seq*. and Fla. Stat. § 772.103(2)-(4), and committed the common law torts of conspiracy to defraud and tortious interference with advantageous contractual and business relationships. The BellSouth Defendants again filed a motion to dismiss.

Judge Middlebrooks granted the motion, dismissing the complaint against the BellSouth Defendants in its entirety (R1:3:1-21) although permitting most of the claims against plaintiffs' attorneys to go forward (*ibid*.). With regard to the Section 1981 claim, the court held that plaintiffs' "conclusory allegations" failed to allege discriminatory intent: "[B]lanket assertions of racially discriminatory motivation, painted with a broad brush but unsupported by hard facts set forth in the complaint, are insufficient to make out a claim under Section 1981." *Id*. at 8. The court next held that plaintiffs had failed to state a claim under the federal and state RICO

statutes because they had not pleaded a "pattern of racketeering" within the meaning of the statute. *Id*. at 10-11, *citing H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-43 (1989). The court also concluded that plaintiffs' conspiracy to defraud and tortious interference claims were barred by Florida's litigation privilege, which provides "an immunity from suit" (*id*. at 18) for claims based on "any act occurring during the course of a judicial proceeding." *Ibid*., *citing Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A.* v. *United States Fire Ins. Co.*, 639 So.2d 606, 608 (Fla. 1994). Finally, the court held that, with regard to the plaintiffs who had settled their claims with BellSouth, the releases in the settlement agreement barred their claims against BellSouth. *Id*. at 19-20.

Notwithstanding the court's earlier admonition that this dismissal would be with prejudice, Judge Middlebrooks was persuaded to give plaintiffs a fifth try at pleading a Section 1981 claim against BellSouth. *Id*. at 20. So try plaintiffs did – filing the Fourth Amended Complaint. To meet the racial motive element, plaintiffs listed a series of innocuous litigation steps taken by the BellSouth Defendants – such as the decision of in-house counsel to become personally involved in the *Adams* Case – and then alleged, in conclusory fashion, that each such action was taken because of the plaintiffs' race. See R2:4:16-17. Plaintiffs did add one factually specific charge (Paragraph 70) purportedly addressed to "disparate treatment"; significantly, that is

the *only* paragraph relating to discriminatory intent that plaintiffs have chosen to omit from their otherwise verbatim quotation of the Fourth Amended Complaint's allegations of discriminatory intent (see B&P Br. 51-54).[7] But far from alleging that the BellSouth Defendants had treated similarly situated non-minority employees in a more favorable way, it alleged that in previous cases involving *African American* plaintiffs, BellSouth did *not* insist on a practice limitation:

> BELLSOUTH and its counsel, SEMMES and KOCHLER, had litigated at least two other race-based discrimination claims in which the plaintiffs were African Americans and were represented by Ganz. One of those cases, *Darlene Peterson v. BellSouth Telecommunications, Inc.*, Case No. 96-0103-CIV-DAVIS (S.D. Fla.) was settled by BELLSOUTH and SEMMES in the amount of $106,250.00 and, *did not include a practice restriction agreement or consulting agreement* as part of the settlement.

R2:4:19 (emphasis added).

The BellSouth Defendants moved to dismiss the Fourth Amended Complaint, and Judge Middlebrooks agreed that – on this, their *fifth* try – plaintiffs had yet again failed to state a claim under Section 1981. None of the allegations, Judge Middlebrooks explained, raise even a slight inference of race discrimination. R2:5:9-12. Indeed, the court observed, Paragraph 70 – quoted above –"is the death knell to

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[7] We will refer to the brief filed on behalf of the plaintiffs-appellants represented by Becker & Poliakoff as "B&P Br." and to the brief filed on behalf of the plaintiffs-appellants represented by Hatch & Doty as "H&D Br.".

plaintiffs' claims, as if they have fallen on their own sword" (*id*. at 12) because it "actually cuts directly *against* [plaintiffs'] claim." *Ibid*. (emphasis added). Judge Middlebrooks also concluded that the releases signed by all but four of the plaintiffs barred any lawsuit against the BellSouth Defendants by the settling plaintiffs.

III. STANDARD OF REVIEW

The B&P Plaintiffs have appealed the orders dismissing both the Third and Fourth Amended Complaints. The H&D Plaintiffs address only the order dismissing the Fourth Amended Complaint. The standard of review of an order granting a motion to dismiss is *de novo*. *Hill* v. *White*, 321 F.3d 1334, 1335 (11th Cir. 2002)

SUMMARY OF ARGUMENT

Plaintiffs have no business suing the BellSouth Defendants. Their allegations boil down to one basic issue – that they did not receive enough money in the settlement of the *Adams* Case. If plaintiffs believe that the settlement was not large enough, or that their attorneys took too large a share of the settlement, they may well have a valid malpractice cause of action against their attorneys. But they are not entitled to embroil the BellSouth Defendants in this intramural dispute. Still less should they be permitted to do so on the strength of tissue-thin allegations to which they have casually affixed the labels "RICO" and "race discrimination." Even at the pleading stage, the law expects more of plaintiffs' lawyers and their clients.

First, this is not a RICO case, for several reasons. Plaintiffs failed to allege a "pattern of racketeering" in that the identified predicate acts – mail and wire fraud – are not alleged to have posed a threat of continued criminal activity. See *H.J. Inc.*, 492 U.S. at 239. Indeed, the purported predicate acts are alleged to have lasted only five months – and this brief duration falls far short of the "substantial period of time" required to establish closed-ended continuity. Moreover, because plaintiffs did not allege that the predicate acts will continue into the future, and because plaintiffs *conceded* that the *Adams* settlement is not the BellSouth Defendants' regular way of doing business, plaintiffs failed to allege open-ended continuity.

Although a failure to plead continuity (and hence, a pattern of racketeering) is sufficient to defeat plaintiffs' federal and state RICO claims, these claims fail for two additional reasons. First, plaintiffs did not allege the existence of an "enterprise" – the BellSouth Defendants did not "associate" with plaintiffs' counsel for "the purpose of conducting illegal activity." *United States* v. *Hewes*, 729 F.2d 1302, 1311 (11th Cir. 1984). To the contrary, the BellSouth Defendants "associated" with plaintiffs' counsel only because plaintiffs hired those attorneys to sue BellSouth. Second, plaintiffs did not adequately plead that the BellSouth Defendants committed the identified predicate acts – mail and wire fraud. Nowhere in the Third Amended Complaint is there a single allegation that the BellSouth Defendants intended to

deceive plaintiffs. And, finally, because plaintiffs did not allege that the BellSouth Defendants agreed to violate a substantive provision of the RICO statute, their conspiracy claim failed.

Second, all of plaintiffs' state law claims are barred by Florida's litigation privilege. Under Florida law, absolute immunity is afforded "to any act occurring during the course of a judicial proceeding" so long as the act "has some relation to the proceeding." *Levin, Middlebrooks, et al.*, 639 So.2d at 608. The conduct underlying the Third Amended Complaint, which involves the settlement of a lawsuit, is unquestionably related to a judicial proceeding. Moreover, plaintiffs' claim for tortious interference with business and contractual relations fails for the independent reason that plaintiffs have not alleged an injury to their business or profession.

Third, the claims of each of the plaintiffs who settled the *Adams* Case are barred by the settlement agreements they signed. Each of those agreements included a release of all claims against BellSouth for conduct occurring as of the date of the settlement agreement, which necessarily includes the *negotiation* of that settlement. Because plaintiffs elected not to rescind those settlements – an option expressly granted to them – their claims here are barred. Moreover, many of plaintiffs' claims are barred by the final judgment in *Adams* dismissing their claims.

Fourth, plaintiffs have failed to state a claim for race discrimination under 42

U.S.C. § 1981. The complaint, bulky as it is, does not contain a single allegation that gives rise to an inference, even a weak inference, of discrimination. Plaintiffs have therefore failed to give the BellSouth Defendants "notice * * * of the grounds upon which [their claim] rests." *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506, 514 (2002).

ARGUMENT

A motion to dismiss should be granted when"the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal is warranted "when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5A CHARLES ALAN WRIGHT & ARTHUR B. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1995). Although, for purposes of a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff (see *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984)), a court may disregard allegations that contain no more than opinions or legal conclusions. See *South Florida Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 409 n.10 (11th Cir. 1996). Under these noncontroversial principles – and having given plaintiffs repeated chances to get it right – the trial court properly dismissed plaintiffs' claims against the BellSouth Defendants.

I. THE THIRD AMENDED COMPLAINT FAILED TO STATE A CLAIM UNDER THE FEDERAL OR STATE RICO STATUTES

In the Third Amended Complaint, plaintiffs alleged claims under the federal and state RICO statutes.[8] But the Third Amended Complaint fails to satisfy the requirements for pleading a RICO claim. In particular, it does not sufficiently allege a pattern of racketeering activity, the existence of a RICO enterprise, or the requisite predicate offenses. This is simply not a RICO case, and Judge Middlebrooks was correct in dismissing plaintiffs' state and federal RICO claims with prejudice.

A. Plaintiffs Failed To Allege A Pattern Of Racketeering Activity

To meet the "pattern" requirement under RICO, a complaint must allege (i) that the defendants committed two or more of the predicate crimes enumerated in the statute (18 U.S.C. §§ 1961(1), 1961(5), 1962(a)-(c)), and (ii) "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 at 239 (1989) (emphasis in original). "It is this fact of *continuity plus relationship* which combines to produce a pattern." *Ibid.* (internal quotation marks omitted) (emphasis in original). As the trial court correctly held (R1:3:15), the Third Amended Complaint failed to allege that the predicate acts "amount to or pose a threat of continued criminal activity." *Ibid.*

In *H.J. Inc.*, the Supreme Court explained that "continuity" may refer either to

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[8] The Florida racketeering statute "is informed by case law interpreting the federal RICO statute * * * on which Chapter 772 is patterned." *Jones* v. *Childers*, 18 F.3d 899, 910 (11th Cir. 1994).

"a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." 492 U.S. at 241. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id*. at 242. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement * * * ." *Ibid*. Open-ended continuity may be established by showing that the "predicates themselves involve a distinct threat of long-term racketeering activity" or that the "predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Ibid*.

Moreover, "RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Efron* v. *Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001). Thus, courts have "caution[ed] against finding continuity too easily in the context of a single dishonest undertaking involving mail or wire fraud" (*ibid*.) because:

> "Virtually every garden variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions [under RICO] dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time."

Id. at 20-21, *quoting United States Textiles, Inc.* v. *Anheuser-Busch Cos*., 911 F.2d 1261, 1268 (7th Cir. 1990). See also *Menasco, Inc.* v. *Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989) ("The pattern requirement * * * ensures that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value.").

Seeking to plead a pattern of racketeering, plaintiffs point to a series of mailings between April and September 1997, which were part of the effort to negotiate the settlement. R1:2:17. Even assuming that each of the cited mailings was part of a scheme to defraud – an assumption that is not supported by the innocuous correspondence attached to the Third Amended Complaint (see R1:2:39-46, 145-48) – the alleged acts do not constitute a pattern of racketeering.

1. The alleged period of wrongful activity – lasting only five months – is too short to establish continuity over a "closed period." In *Aldridge* v. *Lily Tulip, Inc. Salary Retirement Plan Benefits Cmte.*, 953 F.2d 587, 593 (11th Cir. 1992), this Court rejected an allegation of closed-ended continuity, holding that six months is "too short a period of time * * * to qualify as a pattern of racketeering activity." Indeed, as a general rule, a closed-end scheme that runs its course within one year does not constitute a pattern of racketeering. See *Religious Technology Ctr.* v. *Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) ("We have found no case in which a court [of appeals] has held the [continuity] requirement to be satisfied by a pattern of activity

lasting less than a year."); *Cofacredit, S.A.* v. *Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (Second Circuit "has never held a period of less than two years to constitute a 'substantial period of time'"); *Vemco, Inc.* v. *Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (single scheme over seventeen months insufficient to form RICO pattern); *Wisdom* v. *First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 407 (8th Cir. 1999) (ten-month period "too short" to satisfy closed-ended continuity requirement).[9]

Indeed, when – as here – the RICO allegations concern only a single scheme involving a discrete goal, courts have held that even significantly *longer* periods do not establish a closed-end pattern of racketeering. See, *e.g.*, *Efron*, 223 F.3d at 18 (allegations of "only one scheme with a singular objective and a closed group of targeted victims" supports conclusion that there was no closed-end continuity); *Al-Abood* v. *El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (scheme to defraud spanning several years but having "narrow focus" and "commonplace predicate acts" did not

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[9] To beef up the alleged period of racketeering, plaintiffs list as a predicate act the January 1998 mailing of tax documents relating to the earlier settlement payments. R1:2:17. However, BellSouth's routine action to comply with the federal tax laws did not "further" the alleged scheme to defraud. See *Primary Care Investors, Seven, Inc.* v. *PHP Healthcare Corp.*, 986 F.2d 1208, 1215 (8th Cir. 1993) ("ministerial act" of tendering payment for securities plaintiffs had already sold pursuant to fraudulent scheme was not part of alleged pattern of racketeering); *Rodriguez* v. *Banco Cent.*, 777 F. Supp. 1043, 1063 (D.P.R. 1991) (acceptance of payment on a note is not a separate predicate act). In any event, even the ten-month period from April 1997 to January 1998 is insufficient to meet the closed-ended continuity requirement.

satisfy pattern requirement); *Edmondson & Gallagher* v. *Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995) (three-year period over which the predicate acts occurred was insufficient to establish a pattern of racketeering where the complaint alleged a single scheme with a discrete goal).

Without acknowledging this overwhelming weight of authority, plaintiffs contend that neither *H.J., Inc.* nor *Aldridge* creates a "bright-line and inflexible rule" requiring compliance with an "arbitrary time period." B&P Br. 27. But even a cursory reading of *H.J., Inc.* demonstrates that the Supreme Court *did* require that some minimum time period be met: "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement." 492 U.S. at 242. And this Court in *Aldridge* expressly stated that six months is too short a period to satisfy the closed-ended continuity requirement. 953 F.2d at 593.

2. Nor do the allegations demonstrate continuity over an open-ended period. Plaintiffs do not allege any facts indicating that the predicate acts "involve a distinct threat of long-term racketeering activity" or that they are part of BellSouth's "regular way of doing business." See *H.J. Inc.*, 492 U.S. at 242. To the contrary, plaintiffs acknowledge that defendants "have never before conspired and colluded to engage in the activities" set forth in the complaint (R1:2:14), and they allege nowhere in the complaint that the predicate acts – mail and wire fraud – will continue into the future. See, *e.g.*, *Aldridge*, 953 F.2d at 594 (no open-ended pattern of racketeering where the

defendants' acts after the initial fraud "did not threaten future harm or a repetition of their illegal acts"). Plaintiffs contend that the alleged illegalities *might* have continued into the future had the district court not initiated an inquiry into the *Adams* settlement. B&P Br. 29-30. But first, plaintiffs do not allege this in their complaint, and cannot amend their pleadings through arguments in their briefs on appeal. See *Whitaker* v. *T.J. Snow*, 151 F.3d 661, 665 (7th Cir. 1998). In any event, as plaintiffs effectively concede, because the alleged illegality was terminated by the district court's inquiry, there is *no* risk that the conduct will continue into the future. The trial court therefore properly concluded that the Third Amended Complaint does not plead a pattern of racketeering.

B. Plaintiffs Failed Sufficiently To Allege the Existence of An Enterprise[10]

To make out a RICO claim, plaintiffs also must establish the existence of an enterprise. "[A] RICO enterprise exists where a group of persons associates, formally or informally, with the purpose of conducting illegal activity." *United States* v. *Hewes*, 729 F.2d 1302, 1311 (11th Cir. 1984); see also *United States* v. *Turkette*, 452 U.S. 576, 583 (1981) (an enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct"). "[T]he definitive factor in

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[10] Judge Middlebrooks did not address this argument in his order dismissing the Third Amended Complaint, and plaintiffs do not address it on appeal. Nonetheless, a party may defend a judgment in its favor on any argument raised below, even if the trial court did not have occasion to address the point. See *In re Pan American World Airways, Inc. Maternity Leave Practices & Flight Attendant Weight Program Litigation*, 905 F.2d 1457, 1462 (11th Cir. 1990).

determining the existence of a RICO enterprise is the existence of an association of individual entities * * * that furnishes a vehicle for the commission of two or more predicate crimes * * *." *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.), *cert. denied*, 121 S. Ct. 573 (2000) (citing *United States* v. *Elliot*, 571 F.2d 880, 898 (5th Cir. 1978)). A RICO enterprise may be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. The Third Amended Complaint does not allege a sufficient association among the parties for the purposes of a RICO enterprise, nor does it adequately allege that the so-called enterprise "function[ed] as a continuing unit."

Plaintiffs allege that "BELLSOUTH, along with its attorneys SEMMES and KOCHLER, associated together with [Norman] Ganz, RUDEN and MANDELKORN, and functioned as a continuing unit for the common purpose" of settling *Adams* for less than its value and depriving plaintiffs of their fair share of settlement proceeds. R1:2:15. But this conclusory allegation is facially absurd. The BellSouth Defendants did not "associate" with plaintiffs' former lawyers "for the common purpose" of depriving plaintiffs of settlement proceeds; they "associated" with plaintiffs' counsel because the plaintiffs elected *to sue* BellSouth and *to hire* these particular lawyers to press their claim. In the course of this "association," the prospect of settlement arose; but the suggestion that this group of strange bedfellows associated "for the common purpose" of engineering a low-value settlement is not

only conclusory, it is preposterous. Indeed, if plaintiffs' allegations were sufficient to plead a RICO enterprise, then any group of lawyers negotiating a settlement would be subject to claims that they had formed a RICO enterprise.

C. The Third Amended Complaint Did Not Sufficiently Allege That The BellSouth Defendants Committed Any Predicate Acts Of Racketeering

Plaintiffs' RICO claims also fail because they did not sufficiently allege the requisite predicate acts of racketeering. Where, as here, a plaintiff relies on mail fraud as the predicate, he must show, among other things, that the defendant participated in a deliberate scheme to defraud. See 18 U.S.C. § 1341; *Pelletier* v. *Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991).

But plaintiffs make no such allegation. Although they claim that they received less settlement money than they deserved, they did not allege an act of *fraud by the BellSouth Defendants* – as opposed to fraud by their own lawyers – in furtherance of that goal. "Under the mail and wire fraud statutes, a plaintiff only can show a scheme to defraud if he proves that some type of deceptive conduct occurred." *Pelletier*, 921 F.2d at 1500. To satisfy the pleading requirements, plaintiffs must allege facts giving rise to a strong inference *both* that they were deceived *and* that BellSouth was complicit in deceiving them.

The complaint does not allege that BellSouth made any affirmative

misrepresentations to plaintiffs.[11] Nor does it allege facts suggesting that BellSouth knew and intended that plaintiffs' counsel mislead their clients about the terms of the global settlement or the existence of the consulting arrangement. Accordingly, there is no basis for inferring that BellSouth participated in a scheme to defraud plaintiffs about the settlement.

Judge Middlebrooks saw this issue differently, finding a sufficient allegation that the BellSouth Defendants conspired with plaintiffs' attorneys to deprive plaintiffs of their fair share of the settlement proceeds. R1:3:11-12. But neither the allegations cited by Judge Middlebrooks in support of this conclusion (see R1:2:16) nor any other part of the complaint alleges that the BellSouth Defendants *knew and intended* that plaintiffs' counsel would deceive their clients. Without an allegation that the BellSouth Defendants knew and intended that plaintiffs would be deceived by their counsel (see *Pelletier*, 921 F.2d at 1500), plaintiffs have not pled mail or wire fraud.

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[11] As opposing counsel, BellSouth had no duty to make any disclosures to plaintiffs regarding the terms of the settlement or the advisability of their accepting it. In fact, such direct communications with a represented party would have violated the ethics rules. Thus, *BellSouth's* failure to disclose information about the settlement could not conceivably violate the federal mail and wire fraud statutes. See *Ayres* v. *General Motors Corp.*, 234 F.3d 514, 521 (11th Cir. 2000) (nondisclosure can violate federal fraud statutes only where a special relationship of trust requires disclosure of material facts).

D. Plaintiffs Failed to Allege A Conspiracy Claim Under RICO And The Florida Racketeering Statute

Plaintiffs contend that, even if they failed to plead a *substantive* RICO claim, their RICO conspiracy claims should not have been dismissed. B&P Br. 31-33. To state a claim for a racketeering conspiracy, plaintiffs must allege that the parties agreed "to commit an act that is itself illegal." *United States* v. *Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999). Plaintiffs, however, do not allege an agreement to commit the alleged predicate acts – mail and wire fraud. At most, they allege an agreement to settle the case for less than plaintiffs' claims were worth (R1:2:16-17), but settling a lawsuit for the wrong amount is not a predicate act under RICO. Thus, although plaintiffs may be correct that a party can be liable for conspiracy even where it has not committed the underlying RICO claims (see B&P Br. 31), the plaintiffs must at least *allege* an agreement to violate a substantive provision of the statute. See *Colonial Penn Ins. Co.* v. *Value Rent-A-Car, Inc.*, 814 F. Supp. 1084, 1096 (S.D. Fla. 1992). Plaintiffs did not do so in the Third Amended Complaint, and the trial court therefore properly dismissed their conspiracy claims.

II. ALL OF PLAINTIFFS' STATE-LAW CLAIMS FAIL AS A MATTER OF LAW

A. All of Plaintiffs' State Law Claims Are Barred By The Florida Litigation Privilege

As Judge Middlebrooks held (R1:3:18-19), all of plaintiffs' state-law claims are barred by the absolute immunity from liability for damages afforded by Florida law to acts related to litigation.[12] Under Florida law, absolute immunity must be afforded "to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior * * *, so long as the act *has some relation* to the proceeding." *Levin, Middlebrooks, et al.*, 639 So.2d at 608 (emphasis added). As the Florida Supreme Court explained in *Levin*:

> Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Ibid.; see also, *e.g.*, *American Nat'l Title & Escrow of Fla. Inc.* v. *Guarantee Title & Trust Co.*, 748 So. 2d 1054 (Fla. Dist. Ct. App. 1999) (defendants immune from tort

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[12] Having already dismissed plaintiffs' state RICO claims on other grounds (R1:2:10-15), the trial court applied Florida's litigation privilege only to plaintiffs' conspiracy to defraud and tortious interference claims. The litigation privilege, however, applies to *all* of plaintiffs' state law claims, including the state law racketeering claims.

claim based on allegations that they misused a court order to coerce the payment of money); *Ponzoli & Wassenberg, P.A.* v. *Zuckerman*, 545 So. 2d 309 (Fla. Dist. Ct. App. 1989) (per curiam) (law firm immune from claim that it committed extortion against opposing party in litigation). The litigation privilege applies to state-law claims adjudicated in federal court. See *Florida Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 135 F. Supp.2d 1271 (S.D. Fla. 2001) (dismissing state-law claims as barred by the privilege).

Plaintiffs' state-law claims against BellSouth clearly fall within the litigation privilege. BellSouth's misconduct allegedly consists of (1) unfairly extracting a bargain settlement from plaintiffs; and (2) negotiating settlement terms that allowed plaintiffs' counsel to keep too large a share of the settlement proceeds. Although plaintiffs protest that the conduct at issue here is not related to the defense of the *Adams* Case (B&P Br. 37-38), there is no real dispute that these acts "occurr[ed] during the course of a judicial proceeding * * * [and] ha[d] some relation to the proceeding." 639 So. 2d at 608.[13] As Judge Middlebrooks stated in rejecting the same argument plaintiffs advance here, "the occurrences from which plaintiffs' claims arise have *everything* to do with the settlement of a lawsuit, which is a crucial element in concluding the vast majority of civil litigation today." R1:3:18 (emphasis in

[13] It might be said, in fact, that the district court's exercise of sanctioning authority over the ethical infractions at issue in this case rested on the fundamental understanding that the settlement process is part and parcel to "a judicial proceeding," albeit the final stage of that proceeding.

original). Indeed, although (to our knowledge) no Florida court has decided whether the litigation privilege applies to settlement-related actions,[14] other jurisdictions recognizing privileges applicable to judicial proceedings uniformly have applied those privileges to settlement of ongoing litigation. See, *e.g.*, *AroChem Int'l Inc.* v. *Buirkle*, 968 F.2d 266, 273 (2nd Cir. 1992) (applying California law) (statements made to encourage settlement of litigation absolutely privileged); *Petty* v. *General Accident Fire & Life Assurance Corp.*, 365 F.2d 419 (3d Cir. 1966) (applying New Jersey law) (statements made by non-party insurer at settlement conference absolutely immune from defamation claim). As the courts applying the privilege have recognized, "the negotiation of a settlement is a part of a judicial proceeding"; in fact, "the termination of litigation through settlement is a judicially favored way of disposing of litigation." *Petty*, 365 F.2d at 421. Plaintiffs provide no reason to suppose that Florida courts would exclude from the broad litigation privilege the negotiation of a settlement agreement that terminated ongoing litigation.

Plaintiffs contend, however, that the litigation privilege does not apply because the alleged misconduct was neither "required nor permitted by law." B&P Br. 35.

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[14] In *Pledger* v. *Burnup & Sims, Inc.*, 432 So.2d 1323, 1326-28 (Fla. Dist. Ct. App. 1983), the court held that *pre-litigation* settlement discussions were subject only to a qualified privilege. That holding is consistent with the general principle of Florida law that pre-litigation activity that is not a "necessary preliminary act to judicial proceedings" does not fall within the absolute privilege (see *e.g.*, *Silver* v. *Levinson*, 648 So. 2d 240, 244 (Fla. Dist. Ct. App. 1994)), and does not bear on whether actions in conjunction with settlement of ongoing litigation are absolutely privileged.

But that cannot possibly be a loophole in the Florida litigation privilege. If it were, then privilege would be available only when it serves no purpose whatsoever.[15] Next, citing *American National Title & Escrow of Florida, Inc.* v. *Guarantee Title & Trust Co.*, 810 So.2d 996 (Fla. Dist. Ct. App. 2002), plaintiffs claim that the litigation privilege is an affirmative defense that cannot be asserted on a motion to dismiss. *Id.* at 38-39. Plaintiffs' reliance on *American National*, however, is misplaced. For one thing, the question whether a particular issue may be resolved on a motion to dismiss filed in federal district court is one of *federal* law. See *Esfeld* v. *Costa Crociere, S.P.A.*, 289 F.3d 1300, 1306-15 (11th Cir. 2002) (application of the doctrine of *forum non conveniens* is a procedural matter that requires the application of federal law); *Cohen* v. *Office Depot, Inc.*, 184 F.3d 1292, 1296-99 (11th Cir. 1999) (Florida statute requiring leave of court to include punitive damages demand conflicted with federal procedural rule and therefore did not apply in a federal diversity case), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000). In any event, even under Florida procedural law, any affirmative defense – including the litigation privilege – may be resolved on a motion to dismiss when "'the complaint affirmatively and clearly shows the conclusive applicability' of the defense to bar the action." *Reisman*

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[15] Plaintiffs' argument brings to mind the character of Major Major in the novel *Catch-22*: The only time you can see Major Major in his office is when he's out. If he's in, you can't see him. JOSEPH HELLER, CATCH-22 102 (Simon and Schuster, Inc. 1984) (1955).

v. *General Motors Corp.*, 845 F.2d 289, 291 (11th Cir. 1988) (quoting *Evans* v. *Parker*, 440 So.2d 640, 641 (Fla. Dist. Ct. App. 1983); Fla. R. Civ. P. 1.110(d)). Here, the complaint "affirmatively and clearly" demonstrates that the challenged conduct relates to the *Adams* litigation.

Finding that BellSouth's conduct is immune from state law liability does not, of course, leave plaintiffs without recourse. As the Florida Supreme Court observed in *Levin*, "just as [r]emedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state, other tortious conduct occurring during litigation is equally susceptible to that same discipline." 639 So. 2d at 608 (internal citation and quotation marks omitted). Indeed, the trial court has *already* used its inherent power to investigate and remedy the very conduct upon which plaintiffs' state-law theories are premised; it even permitted plaintiffs to rescind the settlement if they first disgorged the proceeds. See R2:8:1-27. Plaintiffs did not elect to take that course – but that does not entitle them to file a new lawsuit arising from conduct protected by the litigation privilege.

B. The Third Amended Complaint Did Not State A Claim For Tortious Interference

There is an additional reason to affirm the dismissal of plaintiffs' claim for tortious interference with advantageous contractual and business relationships: The theory is legally inapplicable. "The type of injury alleged in an action for tortious interference with business relationship is *damage to one's business or occupation.*"

Garrison v. *Herbert J. Thomas Mem. Hosp. Ass'n*, 438 S.E. 2d 6, 14 (W. Va. 1993) (emphasis added). A tortious interference action "protects the right to pursue one's business, calling, or occupation, free from undue influence or molestation." *Lamorte Burns & Co.* v. *Walters*, No. A-26 Sept. Term 2000, 2001 WL 502464, at *10 (N.J. May 14, 2001).[16] Plaintiffs do not allege that they are in the "business, calling or occupation" of bringing lawsuits against their employer; nor do they allege that BellSouth interfered with their right to pursue their chosen occupations, whatever they may be. Accordingly, they fail to state a tortious interference claim.

To be sure, Florida courts have recognized a cause of action for tortious interference with attorney-client relationships; but in each of those cases, the claims were brought by a *law firm* (not a client), suing in its capacity as a *business enterprise.* The plaintiff law firm's theory of recovery was either (i) that another law firm had stolen a client from the plaintiff firm (see *Brown* v. *Larkin & Shea, P.A.*, 522 So. 2d 500 (Fla. Dist. Ct. App. 1988); *Thomas* v. *Ratiner*, 462 So. 2d 1157 (Fla. Dist. Ct. App. 1984); *Agudo, Pineiro & Kates, P.A.* v. *Harbert Constr. Co.*, 476 So. 2d 1311 (Fla. Dist. Ct. App. 1984)); or (ii) that a liability insurer had induced the client

[16] The elements of a claim of tortious interference with a business relationship are (1) the existence of a business relationship; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the plaintiff as a result of the breach of the relationship. *Gossard* v. *Adia Servs., Inc.*, 723 So. 2d 182, 184 (Fla. 1998).

to settle or drop a pending lawsuit, thereby depriving the plaintiff law firm of legal fees (see *Farish* v. *Bankers Multiple Line Ins. Co.*, 425 So. 2d 12 (Fla. Dist. Ct. App. 1982); *State Farm Mut. Auto. Ins. Co.* v. *Ganz*, 119 So. 2d 319 (Fla. Dist. Ct. App. 1960)). In substance, these claims are no different from tortious interference claims brought by any other type of business venture.

But as far as we are aware, there is *no* reported case in Florida *or in any other jurisdiction* sustaining a claim of tortious interference with an attorney-client relationship that was brought by the *client* against a third party. See 90 A.L.R. 4th 621 (1991 and Sept. 2000 Supp.), LIABILITY IN TORT FOR INTERFERENCE WITH ATTORNEY-CLIENT RELATIONSHIP (discussing more than 100 cases from 34 states; none sustaining a tortious interference claim brought by the client). This case should not be the first one.

III. THE CLAIMS OF THE PLAINTIFFS WHO SETTLED WITH BELLSOUTH ARE BARRED BECAUSE THEY HAVE ELECTED NOT TO RESCIND THE SETTLEMENT

A. Plaintiffs' Claims Are Barred By The Releases

As an alternative basis for dismissing plaintiffs' state law claims in the Third Amended Complaint (R1:3:19-20) and the Section 1981 claim in Fourth Amended Complaint (R2:5:13-14), Judge Middlebrooks held that the claims of those plaintiffs' who settled with BellSouth are barred by the releases they signed as part of the

settlement. This holding is correct.

Each of the plaintiffs who settled his or her claims against BellSouth signed a Settlement Agreement and Full and Final Release of Claims (the "Release") waiving "all claims against BELLSOUTH." R2:4:10. By suing for damages, rather than seeking rescission of the settlement agreement, plaintiffs affirmed the contract and are bound by all of its terms, including the terms of the Release. See *Mazzoni Farms, Inc*. v. *E.I. DuPont De Nemours & Co.*, 761 So.2d 306, 313 (Fla. 2000); see also *Fineberg* v. *Kline*, 542 So.2d 1002, 1004 (Fla. Dist. Ct. App. 1988) ("Based on equitable principles, once a party accepts the proceeds and benefits of a contract, that party is estopped from renouncing the burdens the contract places upon him.").

Under Florida law, "a general release will ordinarily be regarded as embracing all claims which have matured at the time of its execution." *Mergens* v. *Dreyfoos*, No. 95-8793-CIV, 1997 WL 611576, at *4 (S.D. Fla. July 18, 1997), *aff'd*, 166 F.3d 1114 (11th Cir. 1999). "[T]he language used in the release is the best evidence of the parties' intent." *Hurt* v. *Leatherby Ins. Co.*, 380 So.2d 432, 433 (Fla. 1980). "When that language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning." *Ibid*.

In the Release at issue here, plaintiffs clearly and unambiguously waived

> *all claims against BellSouth*, whether or not actually asserted and whether *known or unknown*, as a result of *actions or omissions occurring through the date of this Release,* including all claims under

> Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq*., the Florida Civil Rights Act of 1992, F.S.A. §§ 760.10, *et. seq*., the Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq*., and *any other federal, state or local law*.

R2:7:2 (emphasis added). Plaintiffs specifically "agree[d] * * * not [to] institute a lawsuit or any other legal action against BellSouth relating to or arising out of any claim encompassed by [the] Release." *Ibid.* And, by defining "BellSouth" to include its attorneys (*ibid.*), the Release encompassed potential claims against defendants Kochler and Semmes.

The express language of the Release evidences that the parties' intent was to settle "all claims against BellSouth, whether known or unknown, * * * as a result of actions or omissions occurring through the date of the Release." *Ibid.* Although plaintiffs now argue (without any meaningful explanation for this proposition) that the language of the release does not encompass their claims here (B&P Br. 42-43), there can be no real dispute that plaintiffs' claims against the BellSouth Defendants arose from their conduct "during the settlement" of the *Adams* case. R2:4:5. As the acts and omissions underlying plaintiffs' claims thus necessarily occurred *before* the settlements were consummated, the claim is barred by the Release. See, *e.g.*, *Mergens*, 1997 WL 611576, at *6-7.

Plaintiffs contend that the release cannot preclude their claims because they

were fraudulently induced into executing it. B&P Br. 43-44. But "[i]t is axiomatic that fraudulent inducement renders a contract voidable, not void." *Mazzoni Farms,* 761 So.2d at 313. "A prerequisite to rescission is placing the other party in status quo" (*ibid.*), which means that plaintiffs must tender the benefits of the allegedly voidable contract (here, the monies received under the Settlement Agreement) to BellSouth in order to rescind the contract and its release provision.

Plaintiffs insist, however, that the releases were not "central to the plaintiff[s'] claims" (*Brooks* v. *Blue Cross Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (per curiam)), and therefore could not permissibly be considered on a motion to dismiss. *Ibid.* But that is not so. The releases were referred to throughout the Third and Fourth Amended Complaints. See R1:2:5, 8-10; R2:4:5-8, 10-13. Indeed, both complaints are entirely predicated on conduct occurring during the settlement of the *Adams* Case, which was consummated when the plaintiffs signed settlement agreements *that included a release.* As for their suggestion (B&P Br. 41-42) that the releases were undated and unsigned, plaintiffs concede that the release agreement relied on by the trial court is the *exact* document they attached to their Second Amended Complaint (B&P Br. 41; SR1:2:96-103), which plaintiffs described in that pleading as "executed by Plaintiffs." SR1:2:14. Although plaintiffs refrained from attaching this exhibit to their Third Amended Complaint – doubtless because the

BellSouth Defendants moved to dismiss the *Second* Amended Complaint based on the Release – they cannot, having previously placed the document before the court, avoid the legal consequences of the Release.

Nor are plaintiffs correct in claiming (B&P Br. 44-45) that they are not bound by Judge Middlebrooks' Order requiring them to disgorge their settlement monies in order to bring a lawsuit. That Order arose from the *Adams* Case itself, to which all of the plaintiffs were parties. The district court afforded the plaintiffs an opportunity to be heard (2:9:18) – indeed, the court's proceedings were initiated at the behest of one of the *Adams* plaintiffs. *Id*. at 1. Plaintiffs offer no reason, and we can think of none, why they are not bound by an order duly entered by a federal judge presiding over a case they brought.

Plaintiffs are also wrong when they argue (B&P Br. 45) that they need not return the settlement proceeds *before* commencing a lawsuit. The Florida Supreme Court has stated that placing the other party in the *status quo* is a "*pre*requisite to rescission," and that 'the necessary *pre*condition for rescission is to tender the benefits received under the contract." *Mazzoni Farms*, 761 So.2d at 313 (emphasis added). As Judge Middlebrooks correctly observed, "[t]o conclude otherwise would allow a party to retain the benefits received, sue for rescission, and if unsuccessful, the party would be out nothing." R2:5:14. Apart from their own say-so (B&P Br. 46-

47), moreover, plaintiffs have made no showing that it would be impossible to restore BellSouth to the status quo. Again quoting Judge Middlebrooks, that "would only involve the return of certain monies, the quintessential fungible good." *Ibid.* Thus, having made the choice to keep the proceeds of their settlement with BellSouth, plaintiffs may not return to court in search of more damages.

B. Plaintiffs May Not Seek Damages for Claims That Have Been Dismissed

Even if the Releases did not bar plaintiffs' claim, plaintiffs would be precluded from seeking from BellSouth amounts they contend they would have recovered had they litigated, or settled under different circumstances, their employment discrimination claims. Under the Omnibus Order, plaintiffs could have rescinded the allegedly unfair settlement, and either settled those claims again or litigated them to judgment. Having decided against rescission and having foregone the opportunity actually to litigate their claims, however, plaintiffs should not be permitted, under any liability theory, to obtain additional damages based on a *hypothetical* assessment of what they *would* have received had their claims been fairly handled.

First, many of the plaintiffs are parties to a final judgment dismissing their claims in *Adams*.[17] Under federal law, Federal Rule of Civil Procedure 60(b)(3) is the

[17] Although plaintiffs do not expressly allege that a final judgment was entered in *Adams*, that is fairly inferred from the allegations in the complaint that the *Adams*

exclusive vehicle for raising claims that a federal judgment has been obtained by "fraud * * *, misrepresentation, or other misconduct of an adverse party." See *Geo. P. Reintjes Co.* v. *Riley Stoker Corp.*, 71 F.3d 44, 46 (1st Cir. 1995) (Rule 60(b) "prescribes the exclusive methods by which federal judgments may be attacked"); *Villarreal* v. *Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (per curiam) (same); *Porter* v. *Chicago Sch. Reform Bd. of Trs*., 187 F.R.D. 563, 565 (N.D. Ill. 1999) (Rule 60(b) provides exclusive remedy for action to rescind on the ground of fraud a settlement embodied in a federal judgment).

Accordingly, federal courts consistently have refused to recognize collateral actions seeking damages for amounts the plaintiffs claim they *should* have received in a prior federal action; such plaintiffs must challenge the judgment directly and then, if they succeed in escaping its otherwise preclusive effect, litigate the underlying claims. See, *e.g.*, *In re VMS Sec. Litig.*, 103 F.3d 1317, 1325 (7th Cir.1996) (affirming injunction against class members' state-court suit for fraudulently inducing participation in class action settlement agreement as an improper "attempt[] to evade the final judgments issued by the district court below" by "trying to recover damages they *might* have received had they not participated in

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case was filed and settled on behalf of plaintiffs. See R1:2:3-5, 9-10; R2:4:3-5, 10-11. In fact, the docket in *Adams* reflects that the district court entered a final order dismissing the *Adams* case while retaining jurisdiction over the settlement.

the class action") (emphasis in original); *Geo. P. Reintjes*, 71 F.3d at 45-46 (refusing to recognize a claim for "fraud in procurement of the settlement agreement," and holding that plaintiffs' "only route to relief from the settlement and underlying judgment is through application of [Rule 60(b)]"); *Villareal*, 529 F.2d at 1221 (state law conversion action that was "essentially one to recover additional damages" for injuries claimed in prior federal action was "an action which attacks the order of dismissal entered by the district court in the prior suit between these parties" and was properly treated "as being within the purview" of Rule 60(b)). Because plaintiffs have elected not to reopen the *Adams* judgment, they may not bring a claim seeking damages they *might* have received had they done so.

Second, all of the settling plaintiffs are governed by the Court's order in *Adams*, which required them to rescind their settlements and tender back the consideration had they wished to litigate their employment discrimination claims. By seeking as damages in this suit the difference between what they settled for and what they supposedly would have recovered absent the alleged misconduct, plaintiffs are seeking to avoid that order. In effect, they hope to try their employment discrimination claims *within this case*, and to obtain additional damages without returning – or even risking – their prior recoveries. Because this end-run around the Omnibus Order is improper, plaintiffs' claims were properly dismissed.

IV. THE FOURTH AMENDED COMPLAINT FAILED TO STATE A CLAIM UNDER SECTION 1981

To state a claim under Section 1981, a plaintiff must allege facts establishing (1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute. *Rutstein* v. *Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1354 (2001). The enumerated activity at issue here is the right "to make and enforce contracts." 42 U.S.C. § 1981; R1:4:16. Section 1981 "can be violated only by purposeful discrimination." *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). A complaint must not only give a defendant "fair notice of what the plaintiff's claim is," (*Swierkiewicz*, 534 U.S. at 512), but also "*the grounds on which it rests*." *Ibid.* (citation omitted, emphasis added). Thus, a plaintiff must supply some facts (*i.e.*, "grounds") from which an inference of discriminatory intent may be drawn. See *Iodice* v. *United States*, 289 F.3d 270, 281 (4th Cir. 2002) ("Dismissal of a complaint for failure to state facts supporting each of the elements of a claim is, of course, proper * * * [e]ven in these days of notice pleading"). And in making the requisite allegations of discriminatory intent, "'[p]leadings must be something more than an ingenious academic exercise in the conceivable.'" *Marsh* v. *Butler County,*

Ala., 268 F.3d 1014, 1037 (11th Cir. 2001), *quoting United States* v. *Students Challenging Regulatory Ag. Proc.*, 412 U.S. 669 (1973).

Plaintiffs contend that their allegations of racial motivation were sufficient, relying on the Supreme Court's decision in *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506 (2002). B&P Br. 49-50. The plaintiff in *Swierkiewicz*, a 53-year-old native of Hungary, alleged that he was the victim of both ethnic and age discrimination under Title VII. The Second Circuit affirmed the dismissal of the complaint, applying a precedent unique to the Second and Sixth Circuits according to which a Title VII plaintiff must allege a prima facie case of discrimination under the framework set out in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The Supreme Court reversed. "The prima facie case under *McDonnell Douglas*," the Court explained, "is an evidentiary standard, not a pleading requirement (534 U.S. at 510); the case does not "apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." *Id*. at 511 (emphasis in the original). Thus, the Court stated, the Second Circuit's "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)," under which a complaint need only "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id*. at 512 (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

Applying these principles, the Supreme Court held that the plaintiff had

sufficiently pleaded ethnic and age discrimination. In language that starkly distinguishes the present case, the Court noted (534 U.S. at 514):

> His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.

In particular, the complaint identified a specific superior in the company, identified him as French, identified a comparator employee as French as well, specified the comparator's age, and alleged that the superior had demoted the plaintiff, and promoted the comparator, in order to "energize" the department. From "[t]hese allegations," the Supreme Court explained, the defendant certainly had "fair notice" of the "grounds" upon which plaintiff's claim rested.

This Court's decision in *Wagner* v. *Daewoo Heavy Indus. Amer. Corp.*, 289 F.3d 1268 (11th Cir. 2002), confirms that the "fair notice" standard in *Swierkiewicz* is not the toothless requirement that plaintiffs suppose.[18] According to the complaint,

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[18] In *Wagner*, a panel of this Court affirmed the trial court's dismissal of a complaint, but held that the trial court should have permitted the plaintiff to amend his complaint (notwithstanding plaintiff's failure to request leave to amend). 289 F.3d at 1275. This opinion was vacated (see 298 F.3d 1228 (11th Cir. 2002) (*per curiam*)), and the Court reconsidered *en banc* the question whether a district court is required to grant a plaintiff leave to amend his complaint *sua sponte*. See 314 F.3d 541, 542 (11th Cir. 2002). In its *en banc* decision, this Court, before turning to the amendment issue, expressly "agree[d]" with the panel's determination that the complaint failed to state a claim (*ibid.*). Accordingly, the panel's opinion regarding the sufficiency of the complaint remains persuasive authority.

plaintiff, an employee of the defendant corporation, was prepared to testify against the defendants with regard to allegations of unlawful trading with Cuba. To deter him from doing so, the defendants allegedly terminated plaintiff's's employment and accused him of soliciting bribes, all in violation of the conspiracy provisions of 42 U.S.C. § 1985. This Court held that the complaint was insufficient. As the Court put it,"unsupported conclusions of law or of mixed law and fact are not sufficient to withstand a dismissal under Rule 12(b)(6)." *Id*. at 1271.

Under that standard, this Court continued, plaintiff was required to plead all of "[t]he elements of a claim under Section 1985(2)," including that the defendant's conduct was designed "to deter a witness by force, intimidation or threat from attending or testifying before a United States court[.]" *Id*. at 1271. Parsing the complaint, this Court found no facts from which an inference could be drawn that defendants' conduct was actually intended to deter the plaintiff from testifying. Expressly relying on *Swierkiewicz*, the Court held that "[s]ome details of the events leading to Plaintiff's termination, *which support an inference of deterrence*, need to be alleged." *Id*. at 1272 (emphasis added). Significantly, the plaintiff in *Wagner* – adopting the same technique deployed by the plaintiffs in this case – added to his complaint a boilerplate allegation that all of the identified conduct was done to "deter him from testifying before a federal grand jury." *Id*. at 1273. But in language equally

suited to the complaint in the present case, this Court held that "applying the ordinary rules of pleading, this wholly conclusory allegation is insufficient to meet even the liberal standard of notice pleading." *Ibid.*

As *Wagner* makes clear, in order to satisfy the requirement that a complaint give the defendant "notice of the grounds upon which [plaintiff's claims] rest" (*Swierkiewicz*, 534 U.S. at 514), a plaintiff must allege facts – or "grounds" – that give rise to a legally sufficient claim. In a Section 1981 case, a plaintiff cannot survive a motion to dismiss merely by alleging a series of utterly neutral acts and then tacking on a conclusory allegation that everything was done for racial reasons. "While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief." *Bass* v. *E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (emphasis in original).

Although Judge Middlebrooks showed extraordinary patience – permitting plaintiffs to amend again and again – even the Fourth Amended Complaint failed the test. True, their allegations are lengthy: the relevant portions of the Fourth Amended Complaint (except for one crucial paragraph – Paragraph 70 – that plaintiffs strategically omit) take up three full pages of their brief. See B&P Br. 51-54. But *none* of the allegations raises even the remotest inference of race discrimination.

1. First, plaintiffs allege that the BellSouth defendants, "aware of BELLSOUTH's history of discriminatory practices toward African American[s]," "seized the opportunity" to include the practice restriction and consulting agreement suggested by Ruden McClosky "to preclude future [race discrimination] claims against BELLSOUTH." R2:4:19.[19] According to plaintiffs, "[t]his decision by [BellSouth] was intentional and was motivated * * * by the race of the PLAINTIFFS who, because of their status as African Americans, were able to bring the lawsuit in the first place." *Ibid*. That allegation – as best we can discern – seems to make two points: first, that the plaintiffs were able to bring the *Adams* case only because they are African American; and second, that the *Adams* case was settled with an eye toward discouraging future race discrimination lawsuits by future African American plaintiffs. As such, the allegation suffers from two fatal defects.

First, the mere fact that the *settled claims* alleged race discrimination – and that plaintiffs could bring such claims because they are African-American – does not

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[19] Plaintiffs take pains to allege (R2:4:18-19) that "neither SEMMES nor KOCHLER, on behalf of BELLSOUTH, proposed the Practice Restriction Agreement or the Consulting Agreement"; rather, these supposedly discriminatory provisions "were proposed by former counsel for the PLAINTIFFS." See also *id*. at 6 ("[T]he Practice Restriction Agreement and the Consulting Agreement were initially suggested by counsel for the PLAINTIFFS * * *."). It is hard to see how the fact that *others*, not BellSouth, first proposed the practice limitation could possibly give rise to an inference of racial motivation on *BellSouth's* part.

demonstrate that BellSouth's actions *in connection with the settlement* constituted race-based discrimination. Plaintiffs do not offer a single fact to suggest that the BellSouth defendants' conduct would have been different if, for example, the same plaintiffs' lawyers had represented white employees suing BellSouth for breach of an implied contract to provide job benefits. In that circumstance, no one would argue that the conduct in settling the case showed intentional race discrimination; and there is no more basis for inferring discriminatory intent here. See *Lake Lucerne Civic Ass'n, Inc.* v. *Dolphin Stadium Corp.*, 801 F. Supp. 684 (S.D. Fla. 1992) (dismissing for failure to allege purposeful discrimination § 1981 claim alleging defendants coerced and intimidated African-American plaintiffs into dropping litigation challenging construction of stadium in predominantly black neighborhood).

Second, even assuming, *arguendo*, that BellSouth settled the *Adams* case in an effort to forestall *future* race discrimination claims, plaintiffs would have no standing to assert any deprivation. To establish Article III standing, plaintiffs must allege (among other things) that *they* have suffered an actual injury in fact, that is "concrete and particularized," and not "conjectural or hypothetical." *White's Place, Inc.* v. *Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000) (quoting *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Services, Inc.* 528 U.S. 167 (2000)). Plaintiffs cannot bring a claim to redress an injury that may befall *some unknown plaintiff* at some date in the future.

2. Next, plaintiffs list a series of steps taken by BellSouth in the litigation of the underlying *Adams* case that, they contend, are "evidence[]" of BellSouth's discriminatory intent. According to plaintiffs, these supposedly unusual steps were taken because "the racial aspects of the *Adams* Case were so important and so potentially damaging to BELLSOUTH." R2:4:17. But even if the Court takes as true the allegation that BellSouth regarded the claims brought in the *Adams* Case as "potentially damaging," that does not raise an inference that BellSouth discriminated on the basis of race in *settling* the case.

In any event, each of these allegations regarding BellSouth's tactics in the *Adams* case is either demonstrably false on the face of the public record, or else irrelevant to the question whether BellSouth was motivated by racial animus. For example, plaintiffs allege (R2:4:17) that BellSouth "controlled, managed and handled the litigation of the *Adams* Case from BellSouth's legal department in Atlanta, Georgia, rather than following their customary practice of sending out litigation for handling by local counsel." But that is contradicted by allegations made *by plaintiffs* themselves in their Second Amended Complaint. In that pleading, plaintiffs alleged (correctly) that the law firm Heinrich Gordon Hargrove Weihe & James, P.A., represented BellSouth in the *Adams* case. See SR1:2:7.

Also preposterous on its face is plaintiffs' allegation that defendants Semmes

and Kochler "even sought and obtained permission to appear *pro hac vice* in the Adams Case to maintain control of the case and the secrecy of the settlement terms, conditions and settlement amounts." There is nothing unusual about in-house attorneys at companies like BellSouth appearing in pending litigation; indeed, as the public dockets reveal, defendants Semmes and Kochler have done so on behalf of BellSouth in cases all over the country. See, *e.g.*, *McClusky* v. *BellSouth Medical Assistance Plan*, 23 F. Supp.2d 1312, 1313 (D. Utah 1998) (listing Keith Kochler as counsel for BellSouth in case involving BellSouth's provision of medical benefits under ERISA); *BellSouth Telecommunications, Inc.* v. *City of Mobile*, 171 F. Supp.2d 1261, 1262 (S.D. Ala. 2001) (listing Francis Semmes as counsel for BellSouth in a challenge to the constitutionality of a municipal construction ordinance); *Hilliard* v. *BellSouth Medical Assistance Plan*, 918 F. Supp. 1016, 1018-1019 (S.D. Miss. 1995) (listing Keith Kochler as counsel for BellSouth in defense of a claim brought under the Americans with Disabilities Act). The suggestion that, by entering their appearances in the *Adams* case Mr. Semmes and Mr. Kochler exhibited race discrimination, is errant nonsense.

Equally insubstantial is plaintiffs' contention (R2:4:17) that BellSouth demonstrated racial animus by requesting that plaintiffs' lawyers in the *Adams* case return to BellSouth "all documents provided [by BellSouth] except those responsive

to requests for production * * * in order to limit the exposure of its racially discriminatory practices." Even if those documents might have "expos[ed]" BellSouth's allegedly "discriminatory" employment practices (as plaintiffs allege), that has *nothing* to do with the separate question whether BellSouth intentionally discriminated against these plaintiffs in connection with the settlement of the *Adams* case. What is more, as plaintiffs acknowledge, the settlement allowed plaintiffs to retain all documents "responsive to requests for production"; surely those would have constituted the vast majority of the documents produced, and the ones most relevant to the *Adams* plaintiffs' race discrimination claims. It is hard to see why a party motivated by racial animus would permit its adversary to retain the documents *most likely* to be probative of the underlying claims.

Finally – and demonstrating that plaintiffs would have said *anything* to avoid dismissal of their claim – plaintiffs made the incredible assertion that BellSouth "continue[s] to this day" to show evidence of intentional race discrimination against plaintiffs by "imped[ing] PLAINTIFFS' discovery efforts in this case." R2:4:18. But, as Judge Middlebrooks found, "the record in *this* case indicates that the BellSouth defendants have turned over thousands of pages of documents in connection with the plaintiffs' claims." R2:5:11 (emphasis in original).

3. Finally, plaintiffs allege that BellSouth's conduct toward the plaintiffs

"differs markedly from their treatment of caucasian plaintiffs in other cases litigated and settled by BELLSOUTH and its attorneys in the past." R2:4:18. That allegation falls woefully short of what is required to state a Section 1981 claim on a disparate treatment theory.

In a disparate treatment case, a plaintiff cannot merely allege that the defendant accorded different treatment to nonminorities "in other cases." Only where minority and nonminority individuals "are similarly situated *in all relevant respects*" except for race does the defendants' preferential treatment of one over the other raise an inference that race was the motivating factor behind the disparate treatment. *Jones* v. *Bessemer Carraway Medical Center*, 137 F.3d 1306, 1311 (11th Cir. 1998) (emphasis added) (affirming judgment for defendant as a matter of law where nonminority employees cited by plaintiff were not similarly situated), *opinion superseded in part*, 151 F.3d 1321 (11th Cir. 1998). By the same token, "[i]f plaintiff fails to identify similarly situated, nonminority employees who were treated more favorably, her case must fail." *Ibid*. See also *E&T Realty* v. *Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987) ("Different treatment of dissimilarly situated persons does not violate" the civil rights laws); cf. *Faulk* v. *City of Orlando*, 731 F.2d 787 (11th Cir. 1984) (plaintiff stated a disparate treatment claim by identifying specific

similarly situated employees who received more favorable treatment).[20]

Here, plaintiffs do not identify any nonminority employee of BellSouth, "similarly situated in all relevant respects," who was treated more favorably than they were. All they say is that, in "other cases" involving "caucasian plaintiffs," BellSouth behaved differently than it did in the *Adams* case. R2:4:18. Indeed, plaintiffs do not even *allege* that the "other cases" they advert to involved individuals who were "similarly situated" to plaintiffs here. Plaintiffs' nonspecific allegation of disparate treatment is not nearly enough to state a claim under Section 1981.

Even worse for plaintiffs, every time they *do* make a specific allegation it affirmatively *undercuts* their claim of race discrimination. Most problematic for plaintiffs, as Judge Middlebrooks recognized, is the allegation in Paragraph 70 (*id.* at 19) that BellSouth had settled a case against an African-American plaintiff and did *not* require a practice restriction or consulting agreement. That allegation "is the death knell to plaintiffs' claims, as if they have fallen on their own sword" (R2:5:12); and this undoubtedly explains why Paragraph 70 is the only portion of the complaint

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[20] Plaintiffs quote this Court's statement in *Faulk* that "a plaintiff need not prove his whole case in his complaint." B&P Br. 50 (*quoting* 731 F.2d at 791); see also H&D Br. 12 (citing *Faulk*). But, as Judge Middlebrooks recognized (R2:5:12), *Faulk* is dramatically different than this case. In *Faulk*, the plaintiff alleged specific instances in which "similarly situated blacks had not been similarly treated." 731 F.2d at 790. Here, plaintiffs do not identify a single such instance.

that plaintiffs do not reproduce in their brief. Moreover, one of the plaintiffs here – Donald McGuckian – is Caucasian, yet he was as much affected as every other plaintiff by the allegedly unlawful practice restriction. R2:4:3, 10-12. And, as if that were not enough, plaintiffs *themselves* provide a rationale for BellSouth's conduct in settling the *Adams* Case that has nothing to do with plaintiffs' race – the Fourth Amended Complaint alleges that the Ganz legal team "engaged in 'guerrilla tactics' * * * to force BellSouth to make a settlement offer." *Id*. at 26. Thus, the only factually specific allegation addressing BellSouth's motive for settling the *Adams* case is one that defeats, rather than supports, plaintiffs' claim of race discrimination.

Plaintiffs do not really dispute any of this. They instead argue that having alleged facts that they *claim* show race discrimination, their complaint should have survived a motion to dismiss (B&P Br. 57-58; H&D Br. 12-13) – even if those facts do not support an inference of discrimination and, in some instances, negate any such inference. But liberal as they are, the pleading standards do not permit such an absurd result. Judge Middlebrooks gave plaintiffs (who are not *pro se*) every opportunity – and then some – to cobble together a sufficient Section 1981 claim. Plaintiffs failed to do so, and with good reason: It is simply false, even sanctionably so, to allege that the BellSouth Defendants settled the *Adams* Case as they did for race-based reasons. The district court properly dismissed the Section 1981 claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the Third and Fourth Amended Complaints against the BellSouth Defendants should be affirmed.

Respectfully submitted.

_____

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June 9, 2003

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief uses a proportionally spaced font and contains 13,069 words.

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Kathryn S. Zecca

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SANDRA JACKSON, *ET AL.*	)	
	)	
Plaintiffs-Appellants	)	
v.	)	**Case No. 03-11072-I**
	)	
BELLSOUTH TELECOMMUNICATIONS, INC., *ET AL.*	)	
	)	
	)	
Defendants-Appellees	)	

CERTIFICATE OF SERVICE

I, Kathryn S. Zecca, an attorney admitted to the bar of this Court, hereby certify that on June 9, 2003 two copies of this brief were served by first-class United States mail, postage-prepaid, on each of the following counsel of record:

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Pursuant to 11th Cir. Rule 31-5(c), I further certify that this brief was uploaded via the internet to the Eleventh Circuit's website at www.ca11.uscourts.gov on June 9, 2003 at 3:00 p.m.

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