UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY JEROME HARRIS, *Plaintiff*,	§ § §	
v.	§	CIVIL ACTION NO. 4:25-CV-03413
BIO-MEDICAL APPLICATION OF TEXAS, INC., D/B/A FRESENIUS KIDNEY CARE PEARLAND *Defendant*.	§ § § § §	

MEMORANDUM AND RECOMMENDATION

Before the Court is Defendant's Motion to Dismiss.[1] ECF 20. Defendant seeks dismissal of Plaintiff's claims with prejudice for failure to state a claim. For the reasons discussed below, the Court RECOMMENDS that Defendant's Motion be GRANTED.

I. Factual and Procedural Background.

This case arises out of a dispute related to Plaintiff's hemodialysis treatment. In August 2022, Plaintiff was diagnosed with end-stage renal failure. ECF 16 ¶¶ 7-10. Plaintiff began dialysis treatment at Defendant's clinic in September 2022. *Id.* ¶ 12. Plaintiff alleges that Defendant's employees, without Plaintiff's knowledge, applied for an American Kidney Fund ("AKF") "debit card," which was later given

[1] The District Judge referred this case to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. ECF 9.

to him. *Id.* ¶ 14. Plaintiff alleges that Defendant's employees then falsely accused him of stealing the AKF funds. *Id.* ¶¶ 15-18. Plaintiff alleges he complained about this accusation, which triggered a series of harassing and retaliatory acts: denying him a social worker, instructing staff not to speak to him, aggressively cannulating[2] him, cutting the hours of his preferred employees, assigning him staff "known for repeated failed sticks," publicly berating him, touching him without consent, refusing to let him elevate his legs and plug in his laptop, putting him on a behavior plan, and threatening to terminate treatment. *Id.* ¶¶ 19-37. Plaintiff also alleges that he required vascular surgery as a result of Defendant's employees' improper cannulations. *Id.* ¶¶ 21-22, 33.

Plaintiff filed his original complaint in July 2025. ECF 1. In response, Defendant filed its first Motion to Dismiss. ECF 8. Plaintiff then filed his First Amended Complaint (ECF 10), and Defendant filed its second Motion to Dismiss. ECF 11. The Court granted Plaintiff leave to amend his complaint a second time in light of his pro se status. ECF 14 at 2. Plaintiff subsequently filed his Second Amended Complaint, which is his operative pleading. ECF 16. Defendant filed its third Motion to Dismiss. ECF 20. The Motion is fully briefed and ripe for adjudication. ECF 23; ECF 25.

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[2] Cannulating is the act of inserting "a small tube . . . into a body cavity or into a duct or vessel." *Cannula*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cannula (last visited May 5, 2026).

II. Legal Standards.

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 701 (5th Cir. 2017) (citing *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). However, the court does not apply the same presumption to conclusory statements or legal conclusions. *Iqbal*, 556 U.S. at 678-79.

III. Analysis.

Plaintiff brings the following claims: disability discrimination under the Americans With Disabilities Act ("ADA") and Rehabilitation Act ("RA"); racial discrimination pursuant to 42 U.S.C. § 1981; sex discrimination and sexual harassment under the Affordable Care Act ("ACA"); retaliation under the ADA, ACA, and § 1981; civil RICO claims pursuant to 18 U.S.C. § 1962; and Texas common law claims for negligence, intentional infliction of emotional distress ("IIED"), and fraud and forgery.

A. Plaintiff's disability discrimination claims fail as a matter of law.

1. Rehabilitation Act claim.

The RA prohibits an otherwise qualified individual from being excluded from participation in, denied the benefit of, or subjected to discrimination solely on the basis of disability by any program or activity receiving federal financial assistance. 29 U.S.C. § 794. To state a claim under the RA, a plaintiff must allege facts showing "(1) he has a qualifying disability; (2) he is being excluded from participation in, denied the benefits of, or otherwise discriminated against by a covered entity; and (3) such discrimination is by reason of his disability." *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370, 378 (5th Cir. 2021). Unlike other anti-discrimination statutes that support mixed motive theories of causation (e.g., Title VII or the ADA), the causation element of a discrimination claim under the RA requires disability be the sole basis for discrimination. *Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 353 (5th Cir. 1997). *See also Kurth v. Gonzales*, 472 F. Supp. 2d 874, 879 (E.D. Tex. 2007) (contrasting the RA's causation element with those of other statutes).

Liberally construing the Second Amended Complaint, Plaintiff asserts alleges that he is disabled due to end-stage renal failure. ECF 16 ¶¶ 7-11. Plaintiff claims Defendant owns and operates a place of public accommodation (the dialysis clinic) which receives Medicare funds. *Id.* ¶¶ 12-13, 38-43. Plaintiff further alleges he was refused care and denied equal enjoyment of Defendant's services due to the hostile environment and refusal of care. *Id.* ¶¶ 20-37, 38-43.

Even assuming that Plaintiff has alleged a disability, Defendant is a covered entity, and Defendant's alleged conduct constitutes discrimination, Plaintiff's claim fails because he has failed to provide facts supporting a causal connection between the alleged discrimination and his disability. The Second Amended Complaint is devoid of any facts connecting the alleged discrimination and his renal failure, let alone facts showing it is the *sole basis* for Defendant's purported unlawful conduct. *See T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417–18 (5th Cir. 2021) (affirming dismissal of plaintiff's RA claim because "none of the factual allegations contained in the complaint permit the inference that [plaintiff] was ever discriminated against because of his disability."). It stretches credulity that Defendant, whose business is providing dialysis treatment, would refuse Plaintiff equal access to its services solely because of his renal failure. Plaintiff has alleged no facts to support such a claim either. Therefore, he fails to state a claim under the RA.

2. Americans with Disabilities Act claim.

Title III of the ADA similarly prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). To state a Title III ADA claim, a plaintiff must plead: "(1) that he has a disability; (2) that the place the defendant owns, leases, or operates is a place of public accommodation; and (3) that he was denied full and equal enjoyment because of his disability." *George v. Hobby Lobby Stores, Inc.*, 769 F. Supp. 3d 537, 545 (E.D. La. 2025). Hospitals and other offices of healthcare providers are places of public accommodation under the Act. 42 U.S.C. § 12181(7)(F).

Plaintiff's ADA claim fails for the same reason his RA claim fails: his allegations do not show Defendant's conduct was based even in part on Plaintiff's alleged disability. The allegations in the Second Amended Complaint fail to give rise to an inference that his disability was a motivating factor for Defendant's allegedly discriminatory conduct. Therefore, he fails to state an ADA public accommodations claim.

B. Plaintiff's § 1981 race discrimination claim fail as a matter of law.

Section 1981(a) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ...

42 U.S.C. § 1981(a). In order to succeed on a claim of discrimination under § 1981, a plaintiff must show: "(1) the plaintiff is a member of a racial minority; (2) an intent

to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute." *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994). Discriminatory intent is often demonstrated through circumstantial evidence, such as similarly situated comparators of a different race. *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386–87 (5th Cir. 2017).

Plaintiff alleges that he is black and Defendant intentionally discriminated against him on the basis of race in the making and performance of the contractual relationship for dialysis services. ECF 16 ¶¶ 44-46. Specifically, Plaintiff alleges Plaintiff subjected him to public humiliation and false accusations and denied him competent and equal care. *Id.* ¶ 46. Plaintiff also claims that Defendant treated similarly situated non-black patients more favorably. *Id.*

Plaintiff's threadbare allegations of discriminatory intent are insufficient to state a claim under § 1981. Although Plaintiff claims similarly situated non-black patients were treated more favorably, the vague allegations lack the specificity required for an inference of discriminatory intent. *See Body by Cook*, 869 F.3d at 387 (finding inadequate plaintiffs' generalized allegations against some defendants of disparate treatment compared to non-minority-owned shops because they failed to identify specific instances when plaintiffs were refused contracts but similarly situated non-minority comparators were given them). Without the required specificity, Plaintiff fails to fulfill this element.

Plaintiff also fails to plead facts demonstrating Defendant's actions interfered with Plaintiff's right to contract. *See Arvie v. Vidrine*, No. CV 6:21-1387, 2021 WL 4762679, at *5 (W.D. La. Sept. 22, 2021) (explaining that conclusory allegations that the right to make or enforce contracts has been violated is insufficient to state a claim), *report and recommendation adopted,* No. CV 21-1387, 2021 WL 4762364 (W.D. La. Oct. 12, 2021). Plaintiff's allegations do not tend to show Defendant's actions interfered with Plaintiff's "making, performance, modification, and termination of contracts" or his enjoyment of a previous contractual relationship. 42 U.S.C. § 1981(b). *See also Pinto de Saldana v. Solis*, No. CV B-09-168, 2010 WL 11646779, at *3 (S.D. Tex. Jan. 29, 2010) (dismissing plaintiffs § 1981 claims because they pleaded no facts showing defendants discriminated against them in formation or enforcement of contracts, of their contract rights, failed to uphold their contract obligations, or interfered with an attempt to contract with others). Therefore, Plaintiff fails to state a § 1981 claim.

C. Plaintiff's sex discrimination and sexual harassment claims fail as a matter of law.

The ACA prohibits discrimination and denial of benefits on the basis of race, color, national origin, sex, age, or disability "under any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116. The

ACA's sex discrimination prohibition incorporates Title IX's "on the basis of sex" standard (20 U.S.C. § 1681), and the Court applies frameworks used to analyze Title IX claims to ACA sex discrimination claims. *See Francois*, 8 F.4th at 377-78 (explaining the relationship between the ACA's discrimination provision and its incorporated statutes). To plead a claim for sex discrimination generally under the ACA, a plaintiff must allege: "(1) the defendant is a healthcare program that receives federal financial assistance; (2) the plaintiff was excluded from participation in, denied the benefits of, or subjected to discrimination in the provision of healthcare services; and (3) the latter occurred on the basis of sex." *Joganik v. E. Texas Med. Ctr.*, No. 6:19-CV-517-JCB-KNM, 2021 WL 6694455, at *11 (E.D. Tex. Dec. 14, 2021), *report and recommendation adopted,* No. 6:19-CV-00517, 2022 WL 243886 (E.D. Tex. Jan. 25, 2022). To state a claim for sexual harassment against a covered entity for its employee's conduct under Title IX as incorporated by the ACA, a plaintiff must allege: "1) an 'appropriate person,' i.e., an official or employee of the funding recipient with authority to take corrective action to end the discrimination; 2) had actual notice; 3) of harassment 'on the basis of sex'; and 4) responded with deliberate indifference." *Herndon v. Coll. of Mainland*, No. CIV.A.G-06-0286, 2009 WL 367500, at *14 (S.D. Tex. Feb. 13, 2009) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). *See also Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *21–22 (D. Minn. Mar.

16, 2015) (noting the *Gebser* standard would apply if harassing physician was employee of defendant hospital).

Plaintiff alleges Defendant is a healthcare provider receiving federal funds and that while receiving treatment he "was subjected to repeated, unwelcome, sex-based conduct by nurse Erica Cobb, including invasive physical contact and sexually charged remarks." ECF 16 ¶¶ 49-51. Plaintiff further alleges that the conduct was so severe or pervasive that it created a hostile environment and interfered with his access to medical services. *Id.* ¶ 52. Plaintiff also claims he complained to Defendant multiple times about the harassment but that Cobb was permitted to continue treating Plaintiff. *Id.* ¶ 43.

Plaintiff's allegations of sexual harassment are conclusory. He fails to provide specific details or examples that could support an inference that he was harassed on the basis of sex. Similarly, the allegations contain no details regarding to whom Plaintiff complained, and therefore he fails to plead that an appropriate individual had actual notice of the harassment. Further, Plaintiff's allegation of deliberate indifference based on Cobb's continuing to treat him fails to allege a response by Defendant that was "clearly unreasonable in light of the known circumstances." *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167–68 (5th Cir. 2011) (explaining the high bar of deliberate indifference in Title IX cases) (internal quotation marks and citation omitted). Even after

Defendant's Motion put Plaintiff on notice of these pleading deficiencies (ECF 20 at 16-17), Plaintiff merely maintained that Cobb "engaged in repeated, unwelcome, sex-based conduct and invasive touching during treatment." ECF 23 at 5.

D. All of Plaintiff's retaliation claims fail as a matter of law.

The ADA, § 1981, and the ACA (through the incorporated Title IX) all contain anti-retaliation provisions prohibiting retaliation for opposing or complaining about unlawful conduct with respect to each statute. 42 U.S.C. § 12203(a) (ADA's retaliation provision); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008) (holding § 1981 encompasses retaliation claims); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (concluding that retaliation for complaining of sex discrimination constitutes a violation of Title IX). *See also Lucas v. VHC Health*, 128 F.4th 213, 224 (4th Cir. 2025) (holding that ACA's anti-discrimination provision prohibits retaliation as covered by the incorporated statutes). To make out a claim under the retaliation provisions of these statutes, a plaintiff must plead facts demonstrating: (1) he engaged in a protected activity, (2) he suffered an adverse action at the hands of the defendant, and (3) there is a causal link between the two. *See Bracken v. G6 Hosp. LLC*, No. 4:14-CV-644-ALM-CAN, 2016 WL 3946791, at *6 (E.D. Tex. June 3, 2016) (explaining elements of an ADA retaliation claim), *report and recommendation adopted sub nom. Bracken v. G6 Hosp. Corp.,* No. 4:14-CV-644, 2016 WL 3917701 (E.D. Tex. July 20, 2016);

Zastrow v. Houston Auto Imports Greenway Ltd., 789 F.3d 553, 564 (5th Cir. 2015) (explaining elements of a non-employment § 1981 retaliation claim); *Sanches*, 647 F.3d at 170 (explaining elements of a Title IX retaliation claim).

Plaintiff alleges he engaged in protected activity by "reporting harassment, discrimination, fraud, and falsification of records." ECF 16 ¶ 56. Plaintiff claims Defendant then retaliated against him by isolating him, delaying or denying treatment, assigning staff known to cause harm, and falsely accusing him of behavior issues. *Id.* ¶ 57.

Construed liberally, Plaintiff's Second Amended Complaint alleges he complained twice and his daughter submitted a written complaint (ECF 16 ¶¶ 18, 28, 35), but Plaintiff never specifies the contents of the complaints. Plaintiff's conclusory assertion that he complained of fraud and record falsification fails to demonstrate protected activity under the ADA, § 1981, or the ACA. The vague allegation that he complained of harassment and discrimination lacks the specificity required to support a claim under one of the statutes because the complaint must relate to disability, racial, or sex discrimination. Finally, none of the pleaded facts support an inference that a causal link exists between the alleged protected activity and alleged retaliatory acts.

E. Plaintiff's RICO claims fail as a matter of law.

The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). It also prohibits conspiracy to commit the same. 18 U.S.C. § 1962(d).

To state a § 1962(c) civil RICO claim, a plaintiff must allege: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Crosswell v. Martinez*, 120 F.4th 177, 185 (5th Cir. 2024) (cleaned up). To plead a § 1962(d) RICO conspiracy claim, a plaintiff must allege: "(1) that two or more people agreed to commit a substantive RICO offense and (2) that [defendant] knew of and agreed to the overall objective of the RICO offense." *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 239 (5th Cir. 2010) (cleaned up).

Plaintiff alleges Defendant is a person engaged in an enterprise within the meaning of the statute. ECF 16 ¶ 68. Plaintiff further alleges that Defendant conducts the enterprise's affairs through agents and employees who engaged in mail and wire fraud. *Id.* ¶ 69. Plaintiff claims the predicate acts include submitting a false

AKF application, forging Plaintiff's signature, mailing a fraudulent AFK debit card, and communicating via interstate wire to execute the scheme. *Id.* ¶ 70.

1. Plaintiff fails to plead a pattern of racketeering activity.

To plead a pattern of racketeering activity, Plaintiff must allege two or more criminal acts, referred to as "predicate acts," that are related and which amount to or pose a threat of continued criminal activity. *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). Continuity can either be open-ended, meaning a threat of repetition exists, or closed-ended, meaning a closed period of repeated conduct. *D&T Partners, L.L.C. v. Baymark Partners Mgmt., L.L.C.*, 98 F.4th 198, 205 (5th Cir.), *cert. denied,* 145 S. Ct. 264 (2024). A predicate act includes mail, wire, and other forms of fraud. 18 U.S.C. § 1961(1). RICO claims based on allegations of fraud are subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading burden. *See Arruda v. Curves Int'l, Inc.*, No. 6:20-CV-00092-ADA, 2020 WL 4289380, at *3 (W.D. Tex. July 27, 2020); FED. R. CIV. P. 9 (explaining that to allege fraud, "a party must state with particularity the circumstances constituting fraud or mistake").

Plaintiff's fraud allegations lack specific false representations or any facts indicating Defendant *knowingly* made the false representations. *See United States v. Hoffman*, 901 F.3d 523, 545 (5th Cir. 2018), *as revised* (Aug. 28, 2018) (noting the elements of mail or wire fraud are: "(1) a scheme to defraud that employed false material representations, (2) the use of mail or interstate wires in furtherance of the scheme, and (3) the specific intent to defraud."); *United States v. Stalnaker*, 571 F.3d 428, 436 (5th Cir. 2009) (explaining that wire fraud requires proof the defendant *knew* the scheme involved *false* representations).

Further, the alleged pattern of racketeering activity lacks continuity because it involves a single, concluded scheme with a single victim and none of the facts demonstrates a threat of repetition. *See D&T Partners*, 98 F.4th at 206–08 (explaining courts consider the number of victims and schemes alongside length of time, and affirming dismissal because allegations of a single scheme with a single direct victim did not support an inference continuity, even if it occurred over several years).

2. Plaintiff failed to plead a distinct enterprise.

"An enterprise is a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003) (citing *United States v. Turkette,* 452 U.S. 576, 583 (1981)). For § 1962(c) claims, the enterprise must be distinct both from the racketeering activity (the predicate acts) *and* the RICO person (i.e., the defendant) who commits the predicate acts. *Id.*

Plaintiff fails to plead an enterprise that is distinct from Defendant and existed for reasons beyond simply committing the predicate acts. Plaintiff alleges the enterprise is an association of Defendant's employees (*see* ECF 23 at 6) who committed racketeering activity in the regular course of Defendant's business. These allegations demonstrate that the "RICO person," the Defendant, is not distinct from the alleged enterprise. *See Whelan*, 319 F.3d at 229 (explaining that pleading "employees of a corporation, in the course of their employment, associate to commit predicate acts does not establish an . . . enterprise distinct from the corporation"). To the extent Plaintiff alleges the enterprise involves Defendant's employees acting outside the scope of their employment, the enterprise lacks continuity because the pleaded facts do not demonstrate such an enterprise existed for reasons beyond a specific scheme to fraudulently apply for AKF funds in Plaintiff's name. *See Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989) (finding plaintiffs failed to plead an enterprise where they failed to allege facts showing it existed for a purpose other than committing the predicate acts); *In re Taxable Mun. Bond Sec. Litig.*, No. MDL 863, 1992 WL 125452, at *3-4 (E.D. La. May 20, 1992) (explaining the similarity between the continuing enterprise and continuing pattern of racketeering activity requirements).

Plaintiff has failed to state a civil RICO claim under § 1962(c) and by extension § 1962(d). *See Tran v. Gulf Coast Bank & Tr. Co.*, No. CV 24-1933, 2026 WL 878459, at *12 (E.D. La. Mar. 31, 2026) (noting that a § 1962(d) conspiracy claim cannot survive absent an underlying RICO claim)

F. The Court should decline to exercise jurisdiction over Plaintiff's state law claims.

Courts in the Fifth Circuit generally decline to exercise supplemental jurisdiction when federal claims have been dismissed. *See Terry v. Inocencio*, 633 F. App'x 281, 282 n.5 (collecting cases) (5th Cir. 2016). When the federal claims creating subject matter jurisdiction are dismissed, the Court must "examine whether alternative grounds for jurisdiction (such as diversity) exist, *if such alternative grounds have been raised by the plaintiff*." *Ronald Alexander Leblanc Tr. v. Ransom*, 276 F. Supp. 2d 647, 650 (S.D. Tex. 2003) (emphasis added) (citing *Bass v. Parkwood Hosp.,* 180 F.3d 234, 246 n.12 (5th Cir.1999)).

In an attempt to secure dismissal with prejudice *in toto*, Defendant argues the Court should exercise jurisdiction over the state law claims and address their merits because the Court purportedly has diversity jurisdiction. ECF 20 at 19-20. Defendant represents it is a Delaware corporation with a principal place of business in Massachusetts. *Id.* at 19. Defendant also suggests the Court look to the address and claimed damages in Plaintiff's original, inoperative Complaint to establish diversity jurisdiction. *Id.*

Defendant cannot avoid well-settled jurisdictional rules. In his Second Amended Complaint, Plaintiff asserted federal question jurisdiction as the basis for subject matter jurisdiction, as did his prior complaints. ECF 1 at 3 (original complaint); ECF 10 at 1 (First Amended Complaint); ECF 16 ¶¶ 1-2 (Second

Amended Complaint). Plaintiff is the master of his complaint and has exclusive right to assert jurisdiction in this case originally filed in federal court. *See Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 35 (2025) (explaining that as master of the complaint, plaintiff determines the claims and establishes, or not, subject matter jurisdiction). Plaintiff never asserted diversity jurisdiction, so the factual existence of diversity among the Parties does not give rise to the legal existence of diversity jurisdiction. *See Becker v. Tidewater, Inc.*, 405 F.3d 257, 259 (5th Cir. 2005) (holding defendant could not invoke diversity jurisdiction to circumvent rule prohibiting jury trials in admiralty suits, even though factual diversity existed, because plaintiff only asserted admiralty jurisdiction). Therefore, the Court should decline to exercise supplementary jurisdiction over Plaintiff's state law claims and dismiss them without prejudice. *Terry*, 633 F. App'x at 282 n.5.

G. Dismissal of Plaintiff's federal claims should be with prejudice and leave to amend should be denied.

Dismissal with prejudice is appropriate when a plaintiff has had an opportunity to state his best case and still cannot establish a cause of action. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (affirming dismissal with prejudice where plaintiffs had four chances to amend their complaint). *See also Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986) (establishing the best-case rule and noting that a plaintiff is more likely to have pleaded his best case when he is aware of pleading requirements).

Plaintiff has already amended his complaint twice. ECF 10; ECF 16. The Second Amended Complaint was filed after the Court specifically granted Plaintiff leave to amend due to his pro se status. ECF 14. Plaintiff has had opportunities to plead his best case, and therefore his claims should be dismissed with prejudice. *See, e.g.*, *Barcenas v. McCraw*, No. 1:22-CV-397-RP, 2024 WL 420157, at *9 (W.D. Tex. Feb. 5, 2024) (dismissing with prejudice where plaintiffs had amended their complaint three times); *Williams v. X Corp.*, No. 4:25-CV-1084-P, 2026 WL 885208, at *4 (N.D. Tex. Mar. 16, 2026) (dismissing with prejudice where Court gave plaintiff opportunity to amend prior to considering the motion to dismiss), *report and recommendation adopted sub nom. Williams v. X Corp*, No. 4:25-CV-01084-P, 2026 WL 885048 (N.D. Tex. Mar. 31, 2026).

Similarly, although leave to amend should be freely given (FED. R. CIV. P. 15(a)(2)), it can also be denied for an appropriate reason "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Defendant has filed two prior motions to dismiss which put Plaintiff on notice of his pleading deficiencies, several of which mirror those raised in the pending Motion. ECF 8; ECF 11; ECF 20. Despite two chances to amend, Plaintiff has failed to cure the deficiencies or heed the general requirement to plausibly allege his claims. Therefore, leave to amend should be denied. *See Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 567 (5th Cir. 2002) (affirming denial of leave to amend where plaintiff had amended twice already).

IV. Conclusion and Recommendation/Order.

For the reasons stated above, the Court RECOMMENDS that Defendant's Motion to Dismiss (ECF 20) be GRANTED and Plaintiff's federal claims be DISMISSED WITH PREJUDICE and his state law claimed be DISMISSED WITHOUT PREJUDICE due to lack of jurisdiction.

The Clerk of the Court shall send copies of the memorandum and recommendation to the respective parties, who will then have fourteen days to file written objections, pursuant to 28 U.S.C. § 636(b)(1)(C). Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), superseded by statute on other grounds.

Signed on May 19, 2026, at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge