

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

KAREN McPETERS, individually, and on §
 behalf of those individuals, persons and entities §
 who are similarly situated §
 Plaintiff §

vs.

§ CIVIL ACTION NO. 4:10-CV-01103

§
 § JURY

THE HONORABLE FREDERICK E. §
EDWARDS; BARBARA GLADDEN §
ADAMICK, DISTRICT CLERK; §
MONTGOMERY COUNTY, TEXAS, and §
REED ELSEVIER, INC. d/b/a LexisNexis §
 Defendants §

**PLAINTIFF’S POST-HEARING MEMORANDUM ON THE ISSUE OF
 DE MINIMIS VIOLATIONS OF CONSTITUTIONAL RIGHTS**

TO THE HONORABLE KEITH ELLISON, UNITED STATES DISTRICT JUDGE:

Karen McPeters files her Post-Hearing Memorandum for the Court’s consideration:

1. The determination of whether a violation is too small to require the attention of a federal court is not subject to a bright line test. Some Supreme Court justices say there is no such thing as a “slight” violation of a fundamental Constitutional right. “There are no *de minimis* violations of the Constitution--no constitutional harms so slight that the courts are obliged to ignore them.” *ELK Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37, 124 S. Ct. 2301 (2004) (O’Connor, J. concurring).
2. Others have said that financial standards may not be compared with constitutional mandates.

Taxpayers can be vigilant private attorneys general. Their stake in the outcome of litigation may be *de minimis* by financial standards, yet very great when measured by a particular constitutional mandate. My Brother HARLAN's opinion reflects the British, not the American, tradition of constitutionalism. We have a written Constitution, and it is full of "thou shalt nots" directed at Congress and the President, as well as at the courts. And the role of the federal courts is not only to serve as referee between the States and the center, but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.

Flast v. Cohen, 392 U.S. 83, 109-110, 88 S.Ct. 1942 (1968)(Douglas, J. concurring)

3. The Fifth Circuit also acknowledges the existence of *de minimis* claims and has referenced the standard of deterrence as an analytical tool. "Some acts, though maybe motivated by retaliatory intent, are so *de minimis* that they would not deter the ordinary person from further exercise of his rights. Such acts do not rise to the level of constitutional violations and cannot form the basis of a §1983 claim." *Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006).

4. The Sixth Circuit has applied the same test, but has confirmed that a fact issue, and not a pure question of law, is presented in the *de minimis* context. "Whether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a **question of fact**. *See id.* at 398-99; *Davidson v. Chestnut*, 193 F.3d 144, 150 (2d Cir. 1999) (noting that question of whether one-day denial of inmate's exercise opportunities was *de minimis* was "factual in nature")." *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002), emphasis added.

We emphasize that while certain threats or deprivations are so *de minimis* that they do not rise to the level of being constitutional violations, this threshold is intended to weed out *only inconsequential actions*, **and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment.**

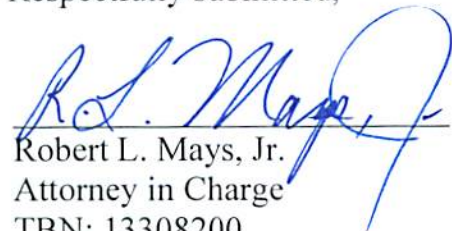
Ibid., emphasis added.

5. The Court has not yet been furnished with evidence of whether the charges in question are minor or egregious in size on a case by case basis. Discovery will solve that deficiency, and the average total of charges in e-file cases will confer standing to sue. By analogy, the poll tax was financially insignificant but constitutionally unacceptable.

6. In this case, the Court has thus far seen that the unregulated charges by LexisNexis significantly outweigh the fees authorized by the Legislature and that the decision as to which litigants will have to pay those charges is made randomly at the time a suit is filed. The Plaintiff will prove that the charges are unconscionable in amount and, according to multiple definitions of the term, are a deterrent to the exercise of a fundamental Constitutional right.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that her case be permitted to proceed.

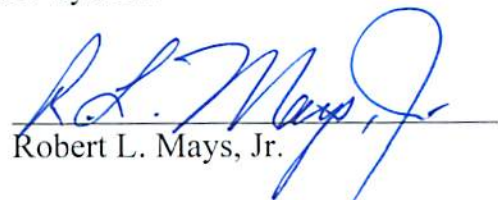
Respectfully submitted,



Robert L. Mays, Jr.
Attorney in Charge
TBN: 13308200
So. Dist. ID: 11606
8626 Tesoro Drive, Suite 820
San Antonio, Texas 78217
Phone: 210-657-7772
FAX: 210-657-7780

CERTIFICATE OF SERVICE

I certify that on April 7, 2011, after filing this Post-Hearing Memorandum, each counsel for Defendants will be served via the court's ECF system.



Robert L. Mays, Jr.