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,	§	
V.	§	CIVIL ACTION NO. 4:10cv1103
THE HONORABLE FREDERICK E. EDWARDS, BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC., d/b/a LexisNexis, Defendants.	§	

DEFENDANT'S, MONTGOMERY COUNTY, TEXAS, AMENDED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

TO THIS HONORABLE DISTRICT COURT:

Defendants, MONTGOMERY COUNTY, TEXAS and BARBARA GLADDEN ADAMICK, file this Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

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I. AMENDED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT

A. Nature and Stage of the Proceeding

1. Plaintiff is Karen McPeters. She has sued the Honorable Frederick E. Edwards, Judge of the 9th District Court of Montgomery County, Texas, Montgomery County, Texas, Barbara Gladden Adamick ("Adamick"), the Montgomery County District Clerk, and ReedElsevier, Inc., d/b/a LexisNexis ("LexisNexis"). Plaintiff filed her original complaint on April 6, 2010. On May 17, 2010, Defendants Montgomery County and Adamick filed their Motion to Dismiss for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6). LexisNexis filed a waiver of service on May 10, 2010. Judge Edwards was served on May 19, 2010.

2. On May 17, 2010, Plaintiff filed her 57-page Amended Complaint. As in her Original Complaint, Plaintiff's claims arise from Judge Edwards' order that she use e-file exclusively to file documents in a case she brought that was assigned to the 9th District Court. LexisNexis is the sole source provider for e-filing services in Montgomery County. She complains the fees charged by LexisNexis to use the e-file service are, in fact, filing fees that are not statutorily authorized. *Plaintiff's Amended Complaint,* ¶ 18, 64, 76 and 103. Plaintiff concedes in her petition, however, that LexisNexis is "personally and independently responsible for the amount billed to litigants for fees and charges for use of e-filing services." *Plaintiff's Amended Complaint,* ¶ 19. She further complains that Adamick refused to file documents tendered to her in person and through the mail, all in compliance with Judge Edwards' e-file order. *Plaintiff's Amended Complaint,* ¶ 35. McPeters asserts that Adamick voided the filing of a Rule 202 petition tendered to her through the mail, an assertion which is patently false. *Plaintiff's Amended Complaint,* ¶ 36-37.

3. All of the defendants are alleged to have violated: the RICO statute[1]; Plaintiff's federal constitutional rights to equal protection, procedural due process and substantive due process; and her Texas Constitution rights to equal rights, open courts and due course of law, and the separation of powers clause. Plaintiff has brought claims under the Texas Theft Liability Act and for common law fraud. Additionally, Plaintiff alleges Defendant Adamick violated her statutory duties and she is entitled to damages pursuant to Tex. Civ. Prac. & Rem. Code § 7.001. Finally, Plaintiff has requested class action status for the suit.

B. Issue to be Ruled upon by Court; Standard of Review

4. Defendants Montgomery County and Adamick seek dismissal of all claims brought against them pursuant to Fed. R. Civ. P. 12(b)(6). The issue is whether the Plaintiff has stated a claim upon which relief could be granted. A court should dismiss a plaintiff's claim for failure to state a claim upon which relief can be granted when the complaint demonstrates she cannot prove any set of facts which would entitle him to relief. *Rolf v. City of San Antonio*, 77 F.3d 823,827 (5th Cir. 1996). In considering a motion to dismiss, a district court should accept only well pleaded allegations as true, viewed in the light most favorable to the non-movant. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1996). "A statement of facts that merely creates a suspicion that the pleader might have a right of action is insufficient." Id. "The court is not required to conjure up unpled allegations or construe elaborately arcane scripts to save the complaint." Id. Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to avoid a motion to dismiss. *Fernandez-Montes v. Allied Pilot's Association*, 987 F.2d 278, 284 (5th Cir. 1993).

C. Summary of the Argument

[1] Plaintiff includes a separate cause of action for conspiracy, but this is also brought under RICO, Section 1962(d).

5. Plaintiff Karen McPeters has failed to state a claim upon which relief could be granted under RICO because she has failed to adequately allege an enterprise or racketeering activity. Further, Montgomery County cannot be held liable under RICO as civil RICO actions do not run against governmental entities.

6. McPeters has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983 against the County because Judge Edwards is not a county policymaker. As for her claims for injunctive relief, Plaintiff's claims fail because of Section 1983's prohibition against injunctive relief against judicial officers. As Adamick was merely acting in compliance with Judge Edwards' e-file order, she is also entitled to the same prohibition. Finally, Adamick is entitled to absolute immunity from McPeters' Section 1983 claims.

7. Plaintiff has failed to state a claim on which relief could be granted with respect to her claims under the Texas Constitution's protections for equal rights, open courts and due course of law, and the separation of powers clause. There is no private cause of action for monetary damages under The Texas Constitution. Further, there is a rational basis for the e-filing order and system and Plaintiff's claim for due course of law must fail because her complaints do not implicate a constitutionally recognized property or liberty interest. Additionally, she has failed to state a claim for a violation of the Open Courts Clause as she cannot show that the fees charged by LexisNexis placed an "unreasonable financial barrier" to her ability to litigate her claims. Finally, Plaintiff's claims under the Texas Constitution do not involve an action taken by Commissioners Court as to bind the County or an action taken by Adamick. The claims are based on Judge Edwards's order.

8. As for Plaintiff's claims under the Texas Theft Liability Act and for common law fraud, Montgomery County is entitled to dismissal as both claims are for intentional torts. Sovereign

immunity has not been waived for intentional torts. Adamick is entitled to dismissal on these claims pursuant to Tex. Civ. Prac. & Rem. Code § 101.106(e)(Vernon 2005)(election of remedies).

9. As for Plaintiff's claim under Tex. Civ. Prac. & Rem. Code § 7.001, she has failed to identify which Texas Rule of Civil Procedure or section of the Texas Civil Practice & Remedies Code Adamick failed to comply with. Assuming she is complaining about Adamick's failure to comply with Tex. R. Civ. P. 21, she has no claim and she suffered no injury. Finally, Adamick's claim regarding the filing of the Rule 202 petition is false.

10. Plaintiff is not entitled to punitive damages. Her application for class action status should be denied.

D. Factual Allegations

1. Montgomery County E-Filing

11. In 1997, the Texas Supreme Court approved Local Rules for Montgomery County concerning e-filing. Miscellaneous Order No. 97-9155.[2] *Defendants' Exhibit 1*. The order remains in place today. The Local Rules provide:

[2] Defendants ask that the Court take judicial notice of the records attached to the 12(b)(6) motion. A court may take judicial notice of "a document filed in another court ... to establish the fact of such litigation and related filings," but "cannot take notice of the factual findings of another court." *Taylor v. Charter Medical Corporation*, 162 F.3d 827, 829 (5th Cir.1998). The Defendants ask the Court to take judicial notice of Miscellaneous Order 97-9155, attached as Exhibit 1; the e-file order in *McPeters I*, attached as Exhibit 2; the Travis County E-file Order, attached as Exhibit 3; the Harris County 127th Judicial District Court E-File Order, attached as Exhibit 4; the Harris County 315th Judicial District Court E-File Order, attached as Exhibit 5; the Travis County Local Rules, attached as Exhibit 6 (a copy of the Rules from Westlaw is also provided as the pdf printout from the State Judicial Commission on Information Technology website did not contain all of the pdf pages); the Harris County Local Rules, attached as Exhibit 7; the transfer order in *McPeters I*, attached as Exhibit 8; the Montgomery County District Clerk Notes in *McPeters I*, attached as Exhibit 9; and the court records in *McPeters II*, attached as Exhibit 10.

> A District Court in Montgomery County, or a County Court at Law having concurrent jurisdiction may, from time to time, by written order, select and designate those cases which shall be assigned to the electronic filing system, as created and contemplated by the April 21, 1997, Service Agreement between LawPlus™ and Montgomery County, Texas, or any successor system, all collectively hereinafter referred to as EFILE.

Defendants' Exhibit 1. The Local Rules actually recognize LexisNexis (LawPlus' successor) as the provider of e-filing services in Montgomery County.[3]

12. In 2003, Defendant Judge Edwards signed an order regarding the assignment of certain cases filed in his court to e-filing ("e-file order"). This order is currently used to govern all cases assigned to e-filing in his court.[4] *Plaintiff's Amended Complaint, Exhibit A* (*order filed in McPeters I); Defendants' Exhibit 2 (order filed in McPeters II.)*

13. The e-file order states that, as of January 1, 2000, all civil cases filed in the 9th District Court will be electronically filed and governed by the Local Rules Regarding Electronic Filing.[5] The Order specifically excepts certain types of cases from the e-file designation: actions brought

[3] Despite the apparent language in the contract (*Plaintiff's Amended Complaint, Exhibit B*) and Plaintiff's allegations, Montgomery County has not received any payments from LexisNexis pursuant to the contract.

[4] When ruling on a motion to dismiss pursuant to Rule 12(c), the court may look to both the pleadings and "documents attached to the complaint because these documents thereby become part of the pleadings." *See Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 313 (5th Cir.2002) (citations omitted).

[5] Plaintiff alleges that "no other Texas county mandates filing fees for motions and other civil filing fees, except for Montgomery County and Jefferson County. Both counties use LexisNexis." *Plaintiff's Amended Complaint, ¶ 103.* Plaintiff's theory is that, by mandating e-filing, the 9th District Court has essentially added a filing fee, namely the fees paid to LexisNexis for e-filing services. *Plaintiff's Amended Complaint, ¶ 103.* However, in October of 2008, Travis County ordered that certain types of civil cases, including employment discrimination/harassment cases (like Plaintiff's original case), be designated as e-file cases. *Defendants' Exhibit 3* . Two Harris County District Courts, the 127th and 215th District Courts, also have mandatory e-filing orders. *Defendants' Exhibit 4 and 5.* Both counties use TexasOnline, but TexasOnline also charges fees for filing. *Defendants Exhibit 6 and 7 (Travis and Harris County local rules).* Interestingly, Harris County does not have "optional" language in its local rules like Travis County has in its Local Rules. *See Travis County Local Rule 1.3.*

by the State of Texas, Child Protective Services, adoption actions and new divorce and annulment cases filed after January 1, 2001, that are resolved within 90 days.

14. The order provides that pleadings or party-generated documents must be e-filed if the case is designated as e-file. However, it does provide that certain documents may be conventionally filed: if the party has leave of Court to conventionally file; the document is an Original Petition or Return of Service, or the document is an exhibit, appendix or "image" document exceeding 50 pages in length).[6]

15. Parties to e-file cases have two options to e-file: the can become a subscriber to the CourtLink (now LexisNexis) e-file system or they may bring their filings on a 3 ½" diskette to the public terminal located in the District Clerk's Office and upload the pleadings at no charge. *Plaintiff's Amended Complaint Exhibit A; Defendants' Exhibit 2.* The public terminal option is also described in the Local Rules. *Defendants' Exhibit 1.*

16. The Order specifically notifies the parties to an e-file designated case that the District Clerk "shall not accept pleadings in paper form, and shall not use imaging technology to convert documents from paper to electronic form for the parties. Any documents submitted in paper form will be rejected by the District Clerk without further notice to submitting counsel. Documents so rejected will be regarded as "unfiled," even if the clerk, in error, file-stamps the incorrectly filed documents." *Plaintiff's Amended Complaint Exhibit A; Defendants' Exhibit 2.*

2. *McPeters I*

17. Plaintiff filed a civil lawsuit in Travis County, Texas, styled *Karen McPeters v. Montgomery County, Texas*. The case was transferred to Montgomery County and assigned to

[6] For exhibits, appendices or images exceeding 50 pages, the Order provides that those documents may be conventionally filed with the District Clerk's Office, but the filing party must e-file a notice that there are conventional "paper" exhibits on file at the District Clerk's Office. *Plaintiff's Amended Complaint, Exhibit A; Defendants' Exhibit 2.*

the 9th Judicial District Court, where Defendant Judge Edwards presides. *Defendants Exhibit 8.* Judge Edwards designated the *McPeters I* case as an e-file case. *Defendants' Exhibit 2*.

18. Plaintiff alleges she was not provided with a copy of the e-file order in *McPeters I*, nor did the clerk e-file it. *Plaintiff's Amended Complaint*, ¶¶ 53. However, she did participate in e-filing in the case, as she admits in ¶¶ 41 and 45, in which she states she has been billed and required to pay fees and charges to LexisNexis. Further, the Court notes show that on January 27, 2009, McPeters' counsel, Robert L. Mays, Jr., received a "courtesy phone call" regarding the assignment of the case to e-filing. *Defendants' Exhibit 9.* The court notes show that a copy of the e-file order was sent to him on that day. *Id.* Mr. Mays knew, as of January 27, 2009, that *McPeters I* was subject to e-filing. In her Amended Complaint, ¶ 44, Plaintiff states "[t]he Montgomery County District Clerk, or one of her deputies, stated that Judge Edwards mandated LexisNexis e-filing." However, McPeters did not ask for leave of court in McPeters to conventionally file documents in the case.[7]

19. Plaintiff asserts that the District Clerk rejected two filings in *McPeters I* due to Judge Edwards' e-file order: her notice of appeal, which she attempted to file in person at the District Clerk's Office. *Plaintiff's Amended Complaint*, ¶¶ *119-120*. She instead filed them both through LexisNexis and suffered no legal prejudice. Plaintiff does not state whether or not she attempted to use the public access terminal at the District Clerk's Office.

3. *McPeters II*

[7] McPeters' excuse was that she had never seen the e-filing order until it was filed as an exhibit to Defendants' first 12(b)(6). *Plaintiff's Amended Complaint*, ¶¶ *54, 187-190*. However, as the Court notes and her counsel's actions show (including the filing of the Rule 202 petition to investigate this pending federal complaint), McPeters and her counsel were well aware of the designation of the case to e-filing throughout the pendency of *McPeters I.* Plaintiff further asserts that she was fearful that her case would be dismissed for not using LexisNexis and paying LexisNexis's charges. *Plaintiff's Amended Complaint, ¶ 133.* Her fear was based on speculation.

20. On November 24, 2009, Plaintiff filed a "Petition to Investigate Potential Claims Pursuant to Tex. R. Civ. P. 202," *Karen McPeters v. Barbara Adamick*, Cause No. 09-11-11474-CV. *Plaintiff's Amended Complaint, Exhibit B.* ("*McPeters II*.") The petition was mailed to the Montgomery County District Clerk by McPeters' counsel, Robert L. Mays, Jr., and was filed by the District Clerk on November 24, 2009, upon receipt. *Defendants' Exhibit 10.*

21. The petition was assigned to the 9th Judicial District Court and was designated as an e-file case. *Defendants' Exhibit 10.* Plaintiff alleges that while Defendant Adamick prepared and provided a copy of the e-file order to her, Adamick failed to e-file the order itself. *Plaintiff's Amended Complaint, ¶ 89.*

21. On January 6, 2010, Plaintiff received a copy of the Rule 202 petition with a blue "VOID" stamp over the file stamp. *Plaintiff's Amended Complaint, ¶¶ 91.* However, the petition had been filed on November 24, 2009, when it was received by the District Clerk's Office. *Defendants' Exhibit 10.* While the Defendants are unable to identify the circumstances regarding the "VOID" stamp and the return of that document to Plaintiff's counsel, the certified record from the court demonstrates that the R. 202 petition was filed on November 24, 2009, when it was received in the mail from Plaintiff's counsel. *Defendants' Exhibit 10.* Thus, she did not suffer any injury in this "incident." The petition was eventually denied by Judge Bob Wortham, sitting as the 9th District presiding judge. *Defendants' Exhibit 10.*

22. Plaintiff's other specific complaint regarding *McPeters II* is that the District Clerk failed to file a vacation letter sent by counsel through the mail. *Plaintiff's Amended Complaint, ¶¶ 123.* She cannot show legal prejudice or injury due to this incident.

23. As in *McPeters I,* Plaintiff failed to request leave of court to conventionally file any documents. She also does not state whether she attempted to use the public access terminal at the District Clerk's Office.

E. Argument

1. RICO

24. Plaintiff's first federal cause of action is brought under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced Corrupt Organizations ("RICO"). Civil enforcement actions brought under RICO are brought pursuant to 18 U.S.C. § 1964. [8] Plaintiff alleges the Defendants have engaged in actions with a common purpose ("the Plan") of "mandating Karen McPeters, and similarly situated litigants, and their attorneys, participate in e-filing in Montgomery County, Texas. E-filing causes additional costs to litigants." *Plaintiff's Amended Complaint, ¶ 102.* Plaintiff further alleges the "Plan" results in litigants being forced to pay "illegal filing fees, service charges and taxes, not authorized by statute, and exceeding the amounts required by statute." *Plaintiff's Amended Complaint, ¶ 103.* She asserts the predicate acts for RICO liability are violations of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud) resulting from LexisNexis's billing to her through the U.S. mail and the internet. *Plaintiff's Amended Complaint, ¶ ¶ 134 and 135.* Additionally, she claims predicate acts under 18 U.S.C. § 1951, the Hobbs Act, with the threat being a statement made by Judge Edwards in 2001 at a court technology conference in which he stated that "[t]he judge has to be the one to herd, cajole or

[8] The Fifth Circuit has expressed doubt that injunctive relief is available to private plaintiffs in civil RICO actions. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977, n.42 (5th Cir. 2000), citing *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir.1988). However, th Fifth Circuit has not decided whether equitable relief is available for private civil RICO plaintiffs under 18 U.S.C. § 1964(a)-(c). *Cunningham v. Offshore Specialty Fabrications, Inc*., 543 F.Supp.2d 614, 640 (E.D.Tex.,2008).

even threaten the ensemble of participants into the 21st century." *Plaintiff's Amended Complaint*, ¶ *108.* In her Amended Complaint, Plaintiff also states that this threat also included "dismissal, contempt and incarceration as the next step for non-compliant, recalcitrant litigants or their counsel." *Plaintiff's Amended Complaint*, ¶¶ *48.* However, the 2003 e-file order makes no mention of dismissal, contempt or incarceration. *Plaintiff's Amended Complaint, Exhibit A; Defendants' Exhibit 1.* .

a. Montgomery County cannot be liable under RICO

25. With respect to Plaintiff's RICO claims as brought against Montgomery County, civil RICO actions under 18 U.S.C. § 1964 do not run against governmental entities. *See Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 404-405 (9th Cir. 1991)(hospital asserting RICO claims against public hospital and hospital district could not impose liability on "body politic", i.e., taxpayers); *Genty v. Resolution Trust Corp*., 937 F.2d 899, 914 (3rd Cir. 1991)(holding municipalities not liable for civil RICO claims brought under § 1964(c) because treble damages are mandatory); *Dammon v. Folse*, 846 F.Supp. 36, 38-39 (E.D.La. 1994)(municpalities unable to form requisite criminal intent and taxpayers, who are supposed to be protected by RICO, should not be punished when RICO is violated by agents over whom they have little or no control). Thus, her RICO claim as brought against the County should be dismissed.

b. Elements of RICO Claim

26. In order to state a claim under Section 1962, a plaintiff must allege: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989)(citation omitted). Adamick is entitled to dismissal of the RICO claims as brought against her because the Plaintiff has failed to meet these elements.

(1) Plaintiff fails to allege "Enterprise"

27. Plaintiff has failed to sufficiently allege the existence of an "enterprise." "An enterprise is a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528 (1981). An enterprise could be a legal entity or "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). For an "association in fact" enterprise, the Plaintiff must demonstrate "an ongoing organization, formal or informal, and … evidence that the various associates function as a continuing unit." *Atkinson v. Anardko Bank & Trust Co*., 808 F.2d 438, 439-40 (1987)(*quoting Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528).

28. In Paragraphs 102-103 of her Amended Complaint, Plaintiff identifies the enterprise as the actions taken by the Defendants "with a common purpose" of requiring McPeters and other similarly situated litigants to pay filing fees, service charges, and taxes that are not authorized by statute and exceed the amounts required by statute.[9] She identifies the actions taken as the "Plan." *Plaintiff's Amended Complaint, ¶ 102.* This is clearly insufficient to allege an enterprise. "The enterprise is not a pattern of racketeering activity, but must exist separate and apart from the pattern of racketeering activity in which it engages." *Whelan v. Winchester Production Company*, 319 F.2d 225, 229 (5th Cir. 2003)(citing *Atkinson*, 808 F.2d at 441). Plaintiff has failed to allege the existence of an enterprise "separate and apart" from the alleged racketeering activity.

(2) Plaintiff fails to allege Racketeering Activity

[9] Defendants note that, on the one hand, Plaintiff argues the fees are wholly unauthorized by law, but on the other hand, argues that the fees "exceed the amounts required by statute." *Plaintiff's Amended Complaint, ¶ 103.* If a fee is required by statute, then it is authorized by law. Plaintiff cannot have it both ways. Either the fee is unauthorized or it authorized and she is just being charged too much for the service underlying the fee.

29. "Racketeering activity includes the commission of specified state-law crimes, conduct indictable under various provisions within Title 18 of the United States Code, including mail and wire fraud, and certain other offenses." *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp*., 101 F.3d 900, 903-04 (2d Cir.1996). Section 1961(1) enumerates the various state and federal criminal offenses that qualify as predicate acts to a RICO claim. Only those crimes can serve as predicate offenses for the purpose of a RICO claim. 18 U.S.C. §§ 1961(1), 1962; *See Pan American Maritime, Inc. v. Esco Marine***,** 2005 WL 1155149, *4-5 (S.D.Tex. 2007)(citations omitted). Further, in order to establish a "pattern of racketeering activity, the Plaintiff a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." *' See In re Mastercard Int'l, Inc*., 313 F.3d 257, 261 (5th Cir.2002) (*quoting St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir.2000)) (other citations omitted).

30. In her Amended Complaint, Plaintiff alleges as predicate acts violations of 18 U.S.C. § 1341; 18 U.S.C. § 1343; 18 U.S.C. § 1951; and 18 U.S.C. § 1349. She also alleges conspiracy in violation of Section 1962(d), which is the conspiracy provision of RICO. *Plaintiff's Amended Complaint, ¶¶ 234-250.* Section 1349, which provides that "anyone that attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which is the object of the attempt or conspiracy" is not included in the list as a separate predicate offense in Section 1961(1).

31. Sections 1341 and 1343 of Title 18, United States Code, involve mail and wire fraud and are listed in Section 1961(1) as predicate acts. Plaintiff asserts that LexisNexis delivered bills for e-filing activities through the U.S. mail and through the internet. *Plaintiff's Amended Complaint, ¶ 42, 43.* Defendant Adamick is not alleged to have sent her any bills. For RICO mail fraud,

the Plaintiff must establish the following: 1) a scheme to defraud by means of false or fraudulent misrepresentation, 2) interstate or intrastate use of the mails to execute the scheme, 3) use of the mails by the defendant connected with the scheme, and 4) actual injury to the Plaintiff.[10] *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 428 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S.Ct. 244 (1990). When mail or wire fraud is to alleged as a RICO predicate, the Fifth Circuit requires a showing of reliance. *In Re Mastercard Int'l Inc*., 313 F.3d at 263. RICO claims based on fraud must be pled with particularity. *Elliot*, 867 F.2d at 880.

32. Plaintiff has failed to allege the Defendants attempted to make a false or fraudulent misrepresentation. *In Re Mastercard International, Inc*., 313 F.3d at 263. She has failed to explain how the bills "advanced the alleged scheme of the defendants to defraud her." *Elliot*, 867 F.2d at 882. Nor does Plaintiff state how the communications violated federal law. *Id.*

33. Finally, Plaintiff cannot show reliance. The alleged fraudulent communications violate the mail fraud statute when they "serve[ ] to 'lull' the plaintiff into a false sense of security, postpone inquiries or complaints, or to lessen the suspect appearance of the fraudulent transaction." *Cadle Co. v. Shultz*, 779 F.Supp. 392, 400 (N.D. Tex. 1991). Plaintiff admits that LexisNexis was independently responsible for fees for using e-filing services. *Plaintiff's Amended Complaint*, ¶ *19.* There was no sense of "false security." Instead, she basically asserts that she was "lulled" by the Court's order and the District Clerk's compliance with it. *Plaintiff's Amended Complaint*, ¶ *118.* However, as shown in the District Clerk Court notes, *Defendant's Exhibit 9* and in *Plaintiff's Amended Complaint*, ¶ *44*, she knew that the case was designated as

[10] *United States v. Bruno*, 809 F.2d 1097, 1104 (5th Cir.1987) ("Because the requisite elements of "scheme to defraud" under the wire fraud statute, 18 U.S.C. section 1343 and the mail fraud statute are identical, cases construing the mail fraud statute apply to the wire fraud statute as well.")"

an e-file case and her counsel did not think Judge Edwards had the authority to make such a mandatory designation. Thus, there was no "lulling." Plaintiff – and her counsel – always thought there was a problem with the e-file designation and order and cannot show that they were "misled."

34. As the last predicate act, Plaintiff alleges Defendants violated 18 U.S.C. 1951, the Hobbs Act. *Plaintiff's Amended Complaint, ¶ 136*. She alleges that Defendants "obstructed, delayed or affected commerce by requiring and obtaining payment from Karen McPeters in furtherance of their Plan under the color of official right." *Id.* The Hobbs Act prohibits the use of robbery, extortion, physical violence or threats of physical violence to obstruct interstate commerce. 18 U.S.C. § 1951(a). Plaintiff's allegations do not include robbery, physical violence or threats of violence. "'Extortion' means obtaining property from another, with his consent, induced by actual or threatened force, violence, or fear." *Elliot*, 867 F.2d at 882. None of the alleged acts by Defendants fall into this category. Plaintiff was required to e-file, nothing more. Her reliance on the 2001 statement made by Judge Edwards (Plaintiff's Amended Complaint, ¶ 108) is disingenuous, at best since it is innocuous, vague and was made six years before she filed her lawsuit. No one threatened physical harm and certainly, if Plaintiff was in fear her cause would somehow be dismissed because of her objection to e-filing (which she never took any action on with the 9th District Court), she had a remedy: she could appeal to the state appellate court.

35. In Paragraph 2 of her Amended Complaint, Plaintiff alleges Defendants have received income from a "pattern of racketeering activity or through collection of an unlawful debt…." To the extent she is claiming that Defendants' actions constituted the "collection of an unlawful debt," Plaintiff has failed to state a claim. An "unlawful debt" is defined in 18 U.S.C. 1961(6) as one:

> (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and
> (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

36. Plaintiff has alleged no gambling activity by Defendants, so they must show that the "unlawful debt" was (1) incurred in connection with the business of lending money and (2) at a usurious rate which was at least twice the enforceable rate. 18 U.S.C. § 1961(6).

37. The Defendants are alleged to have charged Plaintiff "filing fees" that she did not want to pay because she thinks they are illegal. While that may, on the surface, sound like an "unlawful debt," it is not an "unlawful debt" under RICO. There is no allegation that the Defendants lent Plaintiff money or that the lending rate was usurious.

38. Plaintiff has failed to state a claim for RICO violations. Montgomery County cannot be held liable under RICO. Plaintiff has failed to adequately allege the existence of an "enterprise" and any sufficient predicate acts to support a RICO claim. She has failed to meet the heightened pleading requirements for RICO claims based on predicate acts of fraud. Plaintiff also cannot show Defendants' conduct constituted the collection of an "unlawful debt" under RICO. This claim should be dismissed.

2. Section 1983 Civil Rights Claims

39. In her second cause of action, Plaintiff has brought claims under 42 U.S.C. § 1983 for violations of her equal protection, substantive due process and procedural due process rights. *Plaintiff's Amended Complaint*, ¶¶ 170-194. These claims stem from Judge Edwards' e-filing order and Defendant Adamick's actions in complying with that order. *Plaintiff's Amended Complaint*, ¶¶ 170-194.

40. In order to state a claim under Section 1983, Plaintiffs must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Leffall v. Dallas Independent School District*, 28 F.3d 521, 525 (5th Cir. 1994).

a. Adamick is Immune from both Monetary and Injunctive Relief

41. Court clerks "have absolute immunity from actions arising from acts they are specifically required to do under court order or at a judge's discretion." *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001)(quoting *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981)). This is true even if the employee acts "in bad faith or with malice." *See Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). Plaintiff's allegations against Adamick are all based on actions taken by Adamick while following on Edwards' e-file order.[11] Thus, Adamick is entitled to absolute immunity from Plaintiff's Section 1983 claim.

42. To the extent that Plaintiff requests injunctive relief against Adamick based on her Section 1983 claim, such relief is not available. Section 1983 provides in pertinent part:

> [I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphasis added). Plaintiff does not allege that Judge Edwards' order, or Adamick's reliance on it, were in violation of a declaratory decree or that declaratory relief is otherwise unavailable. As Adamick was acting in compliance with Judge Edwards order – and

[11] Actually, the actions taken by Adamick (not accepting documents tendered to her in writing or through the mail) are in specific compliance with the e-file designation order.

he is entitled to immunity from a Section 1983 injunction – Adamick should likewise be immune from injunctive relief.

43. Plaintiff argues that Adamick is not entitled to absolute immunity in relying on Judge Edwards's order since Judge Edwards is himself not entitled to judicial immunity. Her argument is based on her theory that Judge Edwards's actions were not judicial, but instead administrative. The Fifth Circuit has a four-part test for determining if a judge's actions were judicial in nature: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. *Davis v. Tarrant County*, 565 F.3d 214, 222 (5th Cir. 2009).

44. The decision as to which cases are designated as e-file can only be made by a judge. The Local Rules provide that a district court or county court at law "may, from time to time, by written order, select or designate those cases which shall be designated to the electronic filing system…" *Defendants' Exhibit 1*. Only a judge can make that decision, not the County and not the District Clerk. The order relates to a case (or set of cases) that fall into the judge's court. The act of entering the order is one only a judge can perform, only he has the power to enter orders in a case in his courtroom. The controversy clearly centers around cases pending before the judge, and, specifically here, *McPeters I* and *McPeters II*. Finally, Judge Edwards's order arose out of a visit to the judge in his official capacity: it was entered in *McPeters I* after it was transferred to Montgomery County and in *McPeters II* when it was filed. In other words, Judge Edwards's authority to enter the order was invoked by the Plaintiff's filing of the lawsuits.

45. In *Davis*, the Fifth Circuit considered whether state district court judges were entitled to absolute judicial immunity when they denied an attorney's application for placement on the court appointed attorney list used by the district courts. *Davis*, 565 F.3d at 216-217. The Fifth Circuit held that the district judges were entitled to absolute immunity, even though the act complained of "… did not concern the appointment of counsel in a specific suit …, but rather the selection of applicants for inclusion on a rotating list of applicants eligible for court appointments pursuant to a countywide policy." *Davis*, 565 F.3d at 223. However, the act of selecting attorneys for inclusion on the rotating list was "inextricably linked to" and could not be separated from the act of appointing an attorney in a particular case. *Id.* at 226. The same could be said here: Judge Edwards's decision to designate certain types of cases and litigants for e-filing cannot be separated from the act of managing a particular case.

46. Thus, Judge Edwards's action in entering the order was a judicial act, not an administrative one and it is covered by judicial immunity. As such, Adamick is also entitled to absolute immunity as the clerk as she acted as directed by Judge Edwards's order.

47. McPeters has sued Adamick in her official and individual capacity. A suit brought against a defendant in his official capacity is a suit against the county. *Bennett v. Pippin*, 74 F.3d 578, 584 (5th Cir.), *cert. denied*, 519 U.S. 817, 117 S.Ct. 68 (1996)("[a] suit against the Sheriff in his official capacity is a suit against the County"); *see Smith v. Davis*, 999 S.W.2d 409, 416 (Tex. App. – Dallas 1999) (citation omitted)("[i]n suing the employee in his official capacity, a plaintiff seeks, in effect, to impose liability on the governmental unit the employee represents rather than on the employee himself"). Thus, suing the County and Adamick in her official capacity is redundant.

b. Montgomery County – Judge Edwards is not a policymaker

48. In order to recover against Montgomery County for these claims, McPeters must identify the governmental policy or custom which resulted in the alleged deprivations of her constitutional rights, connect the policy or custom to the government itself, and show that the alleged policy or custom was the "cause in fact" or the "moving force" behind the violation of her constitutional rights. *Spiller v. City of Texas City Police Department*, 130 F.3d 162, 167 (5th Cir. 1997).

49. County liability can also be predicated on an official "custom" or "practice" which is most commonly defined as a "persistent, widespread practice of municipal officials or employees," which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom which fairly represents municipal policy. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). "Actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir.), *cert. denied*, 122 S.Ct. 53 (2001), citing *Webster*, 735 F.2d at 842.

50. Plaintiff cannot maintain a claim against the County because Judge Edwards is not a county policymaker. State district judges are agents of the State of Texas. *See Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996)(holding Texas judges entitled to Eleventh Amendment immunity for claims made against them in their official capacity). Local judges acting in their judicial capacities do not act as local governmental policy-makers. *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995)) (holding that neither a state district judge nor a County District Attorney acts as a local policy-maker when performing their respective official duties); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992) (holding that a municipal judge's actions in repeatedly

committing the plaintiff to jail without first appointing counsel for the plaintiff did not constitute actions establishing city policy); *Bigford v. Taylor*, 834 F.2d 1213, 1221-22 (5th Cir. 1988) (holding that a county magistrate's ruling in a case pending before him did not constitute setting county policy); *Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir.), *cert. denied*, 474 U.S. 1007, 106 S.Ct. 529, 88 L.Ed.2d 461 (1985) (holding that municipal judge did not act as a county policy-maker in refusing to accept a criminal defendant's offer of credit card charges in lieu of cash bail).

51. Montgomery County's only involvement in the case is based on the contract with LexisNexis. Plaintiff attempts to hold Montgomery County liable for her alleged constitutional injuries by asserting the County inflicted the injuries by entering into the contract. But, Plaintiff's complaints for civil rights violations are based on Judge Edwards' exempting certain litigants and types of cases, from e-filing, and from Judge Edwards's designation of her case as an e-file case. The only action taken by the County was entering into the LexisNexis contract, and the contract itself did not mandate any of the decisions about which Plaintiff complains. Plaintiff has not alleged – and cannot show – that the County took any actions in discriminating against certain litigants or that Adamick established Montgomery County policy by following Judge Edwards' e-file order. It was Judge Edwards, not Montgomery County, who exempted certain litigants and types of cases from the e-filing requirements and ordered the Clerk to reject the pleadings.

3. Texas Constitution Violations

52. Plaintiff alleges Defendants' actions violated her rights under the Texas Constitution to equal rights, open courts and due course of law. Tex. Const. Art. I, §§ 3, 13, 19. *Plaintiff's Amended Complaint ¶¶ 195-209.* The Texas Supreme Court in *City of Beaumont v. Bouillion*,

896 S.W.2d 143, 147 (Tex.1995), held that no private cause of action for money damages exists for alleged violations of Texas Constitutional rights. Thus, Plaintiff is barred from seeking money damages under the Texas Constitution. However, Plaintiff also seeks injunctive relief.

a. Equal Rights – Rational Basis for E-filing System

53. Plaintiffs must establish two elements for an equal protection claim: 1) similarly situated individuals were treated differently, and 2) the disparate treatment she experienced was "deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification." *Allred's Produce v. United States Dept. of Agriculture*, 178 F.3d 743, 748 (5th Cir. 1999). Plaintiff asserts the disparate treatment she suffered was due to her status as a non-State of Texas, non-CPS, non-adoption case litigant. As this case does not involve a classification that does not target a suspect class or burden a fundamental right, the exception of certain class of cases from e-filing must be upheld unless it fails to bear a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 115-116 (1996)(holding that rational basis is the correct equal protection scrutiny level for filing fees).

54. Plaintiff's equal protection claim fails because there is a rational basis for the Court's e-file order and system. For rational basis review, the reviewing court need only find that a legitimate goal "conceivably" or "reasonably" could have been the purpose and policy of the relevant decisionmaker. *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326 (1992). The actual motivation behind the restriction is irrelevant. *Id.*

55. The e-filing system reduces paper filing, offers immediate access to the docket to both court personnel and litigants, and substantially reduces the service burden for parties. Parties are afforded more time to file pleadings, as the filing time is extended. As acknowledged by

Plaintiff, other Texas courts use the TexasOnline e-filing system and the same advantages are considered. Additionally, civil cases usually last longer than the types of cases excepted in the e-file order and generate more motions and paperwork. Child Protective Services cases are excepted because of privacy concerns. There is a rational basis for the e-file order and system and any classifications contained therein. This claim should be dismissed.

b. Open Courts – No claim under Open Courts

56. Plaintiff also seeks injunctive relief and while she does not specify which cause of action entitles her to relief, she is not entitled to any such relief under the Texas Open Courts provision of the Texas Constitution found in Article I, Section 13. She essentially alleges that the fees charged by LexisNexis (the payment of which is effectively mandated by Judge Edwards's e-file order) impedes a citizen's access to courts by imposing an "unreasonable financial barrier."[12] *See Plaintiff's Amended Complaint, ¶ 204.*

57. The Plaintiff has not shown that an "unreasonable financial barrier" was imposed on her. She has e-filed documents and never requested relief from the Court based on financial reasons. The availability of a free public access terminal for e-filing also cuts against the argument that the fees were an "unreasonable financial barrier." The e-filing system is essentially an electronic courier. Instead of paying postal fees or courier fees, the litigant pays e-filing fees. This is not

[12] Plaintiff criticizes Defendants' briefing on this issue in their first Motion to Dismiss. See Plaintiff's Amended Complaint, ¶ 204. However, it is not entirely clear that there exists a claim under the "unreasonable financial barrier" aspect listed in the opinion cited by Plaintiff, *Cronen v. Davis*, 2007 WL 765453 (Tex. App. – Corpus Christi 2007, pet. denied). The Texas Supreme Court has held that the Open Courts Clause only applies to statutory restrictions upon a legitimate common law cause of action. *Federal Sign v. Texas Southern Univ*., 951 S.W.2d 401, 410 (Tex. 1997), superseded by statute on other grounds, *citing Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995). Thus, while there appears to be a protection against "unreasonable fees," it is not entirely clear that the Texas courts continues to recognize a cause of action based upon it.

an "unreasonable financial barrier." Plaintiff was able to litigate her cases (and continues to do so). She has suffered no constitutional injury.[13]

c. Due Course of Law – No Claim

58. The Texas Due Course of Law Clause, Article I, Section 3, has been held to provide the same protections as the Due Process Clause of the United States Constitution. Thus, in assessing due process claims under the Texas Constitution, federal case law is considered. *University of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (citing *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 252-53 (1887)). Citizens are to be afforded procedural due process, meaning notice and opportunity to be heard, when constitutionally recognized property or liberty interests are infringed upon by the state. *Freeman v City of Dallas*, 186 F.3d 601, 606 (5th Cir. 1999), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-315, 70 S.Ct. 652 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976). In this case, Plaintiff has not shown that she has been deprived of a constitutionally protected liberty or property interest because her case was designated as an e-file case. She has failed to specify what procedural due process she was not afforded. Further, Defendants point out that the e-file

[13] Plaintiff argues that the public access terminal in the District Clerk's office, which is available for e-filing free of charge, unconstitutionally restricts access to courts because it would limit the amount of time a litigant could use it and it requires knowledge of computers which would discriminate against the elderly and the uneducated. *Plaintiff's Amended Complaint at ¶¶ 77-78.* Plaintiff, who was represented by counsel and did not even allege attempting to use the public access terminal, has no standing to make this claim. Standing, at its "irreducible constitutional minimum," requires a plaintiff "to demonstrate: they have suffered an 'injury in fact'; the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely ... be redressed by a favorable decision.' " *Public Citizen, Inc. v. Bomer,* 274 F.3d 212, 217 (5th Cir.2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)). "[A]n injury in fact [is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S.Ct. at 2136. Plaintiff has suffered no such injury.

order specifically allows parties to ask for leave of court to conventionally file documents. Plaintiff has not alleged that she exhausted this remedy.

59. Due Process also encompasses "substantive" due process, whereby citizens are protected from state action that arbitrarily or capriciously deprives them of an interest in life, liberty or property. *Morton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). However, the Supreme Court has held that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). As Plaintiff's claims are already covered under the Equal Protection Clause and the procedural due process component of due process, she has no separate substantive due process claims.

d. Separation of Powers – No Claim

60. In her Amended Complaint, McPeters adds another alleged violation of the Texas Constitution: Article II, Section 1, the Separation of Powers Clause. *Plaintiff's Amended Complaint, ¶¶ 148-160.* She alleges that Judge Edwards's e-file order effectively imposed another filing fee on her, thereby violating the Separation of Powers Clause because setting filing fees is the job of the Texas Legislature. *Plaintiff's Amended Complaint, ¶¶ 153.*

61. As with her other claims, she seeks to hold the County and Adamick liable for Judge Edwards's actions. However, the only officials who can bind the County are the member of its Commissioners Court and they can only bind the County when they act as a body. *Hays County v. Hays County Water Planning Partnership*, 106 S.W.3d 349, 360-361 (Tex. App. – Austin, 2003, no pet.). The only actions taken by Commissioners Court for the County was entering into an agreement with LexisNexis for provision of e-filing services. The decision as to which cases

were designated as e-file cases, who had to e-file and what would be done if Judge Edwards's order was not complied with, was made solely by Judge Edwards. The decision on the amount of service fees charged by LexisNexis is made by LexisNexis. The Montgomery County Commissioners' Court did not make any such orders or decisions. Thus, Plaintiff's reliance on the existence of the County's contract with LexisNexis to make the County liable for Judge Edwards's actions is misplaced. Similarly, Adamick did not act to set out the parameters for e-filing. Those are contained in Judge Edwards's order, not an order from her. She merely complied with his order. All of Plaintiff's claims against the County and Adamick based on the Texas Constitution should be dismissed.

4. Texas Theft Liability Act and Fraud – No Waiver of Sovereign Immunity

62. In her Amended Complaint, Plaintiff adds two more state law claims, one under the Texas Theft Liability Act, Texas Civil Practice and Remedies Code Chapter 134, and another for common law fraud. *Plaintiff's Amended Complaint,* ¶¶ *210-233.*

63. The Texas Theft Liability Act imposed civil liability on a defendant who committed theft from the plaintiff. *Air Routing Int'l v. Brittania Airways, Ltd*., 150 S.W.3d 682, 699 (Tex. App. – Houston [14th Dist.] 2005, no pet.). Plaintiff's claim against Montgomery County brought under this Act is barred by sovereign immunity. *Presiado v. Sheffield*, 230 S.W.3d 272, 275 (Tex. App. – Beaumont, 2007, no pet.); *Minix v. Gonzales*, 162 S.W.3d 635, 638 (Tex.App. – Houston [14th Dist.] 2005, no pet.)(claims against officers in their official capacity brought under Act barred by sovereign immunity). "It is fundamental that a suit against a state official is merely ''another way of pleading an action against the entity of which [the official] is an agent.''" *Texas A & M University System v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007), *citing Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (quoting *Monell*

v. Dep't of Social Servs. of City of New York, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978))); *see also Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581 (Tex.2001). "Theft is undoubtedly an intentional act." *Minix*, 162 S.W.3d at 638.

64. Fraud is also an intentional tort. *Sanders v. City of Grapevine*, 218 S.W.3d 772, 779 (Tex. App. – Fort Worth, 2007, pet. denied), *citing General Electric Co. v. City of Abilene*, 795 S.W.3d 311, 313 (Tex. App. – Eastland 1990, no writ).

65. Sovereign immunity is not waived for intentional acts. *Minix*, 162 S.W.3d at 638; TEX. CIV. PRAC. & REM. CODE § 101.057 (Vernon 2005). Thus, Plaintiff's claims under the Texas Theft Liability Act and for common law fraud as brought against the County should be dismissed.

66. Plaintiff also brings these intentional tort claims against Adamick. Texas Civil Practice and Remedies Code Section 101.106(e) provides: "If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(e) (Vernon 2005.)

67. In *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 658 (Tex. 2008), the Texas Supreme Court considered whether a defendant employee was entitled to dismissal from a suit where the employee was sued for intentional torts. The lower Court of Appeals held that Section 101.106(e) did not apply because none of the plaintiffs' claims were "brought under this chapter" because they did not fit within the Act's waiver, i.e., there was no waiver for intentional torts. *Id.* at 658. The Texas Supreme Court reversed, holding that Section 101.106(e) did apply, stating:

> [W]e have never interpreted 'under this chapter' to only encompass tort claims for which the Tort Claims Act waives immunity…. Because the Tort Claims Act is

> the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under this chapter' for purposes of section 101.106.

Id. at 658-659.

68. Since "all tort theories" are "under this chapter" for purposes of section 101.106, subsection (e) applies to Plaintiffs' claims and Adamick should be dismissed from this lawsuit. *See Casteel v. Singleton*, 267 S.W.3d 547, 554 (Tex. App. – Houston [14th Dist.] 2008, no pet.)(holding that officers sued for malicious prosecution, civil conspiracy and intentional infliction of emotional distress entitled to dismissal under section 101.106(e) because city employer also sued); *see also Bustos v. Martini Club, Inc*., 599 F.3d 458, 464 (5th Cir. 2010)(holding that Section 101.106(e) election of remedies provision applies to state law intentional tort claims against a governmental unit and its employees).

5. Statutory Duties – No Claim

69. In her fourth cause of action, Plaintiff complains that Defendant Adamick failed to perform her "statutory duties" and seeks the statutory penalties provided by Texas Civil Practice & Remedies Code § 7.001. *Plaintiff's Amended Complaint at 48.*

70. Section 7.001 is entitled "Liability for Refusal or Neglect in Performance of Official Duties," and provides as follows:

> (a) A clerk, sheriff, or other officer who neglects or refuses to perform a duty required under the Texas Rules of Civil Procedure or under a provision of this code derived from those rules is liable for actual damages only in a suit brought by a person injured by the officer's neglect or refusal.
>
> (b) The officer may be punished for contempt of court for neglect or refusal in the performance of those duties. The court shall set the fine at not less than $10 or more than $100, with costs. The officer must be given 10 days' notice of the motion.
>
> (c) This section does not create a cause of action for an action that can otherwise

> be brought under Chapter 34. A party may seek actual damages under this section or Chapter 34, or the party may seek contempt sanctions, but the party may not seek both damages and contempt.
>
> (d) An action or motion brought under this section must comply with and is subject to the provisions in Sections 34.068, 34.069, 34.070, and 34.074, except that a motion brought under Subsection (b) need not comply with Section 34.068(b).

Tex. Civ. Prac. & Rem. Code § 7.001 (Vernon Supp. 2009).

71. Plaintiff does not specifically identify which Rule of Civil Procedure and/or provision of the Texas Civil Practice and Remedies Code Adamick allegedly violated. In Paragraph 37 of the Amended Complaint, she states that the District Clerk is "required by statute to accept and file documents tendered to her, Tex. Gov't Code § 51.303(a) and Texas Rules of Civil Procedure 21" (*Plaintiff's Amended Complaint* § 37.)

72. A plain reading of Section 7.001 demonstrates that Plaintiff cannot recover based on Adamick's failure to comply with Tex. Gov't Code § 51.303(a) because Section 7.001 only applies to violations of the Texas Rules of Civil Procedure and the Texas Civil Practice and Remedies Code, not a violation of the Texas Government Code.

73. As for Texas Rule of Civil Procedure 21, Plaintiff has not shown an injury. Contrary to Plaintiffs' assertions, Adamick is only accused of one act of not filing the documents as tendered and returning them to the Plaintiff, the Rule 202 petition. *Plaintiff's Amended Complaint* at ¶ 50. In fact, she is not even accused of not filing it, but merely returning a copy of it with "VOID" stamp over the file stamp. The records from that case make clear that Plaintiff has no claim of not having documents filed that were tendered to the Clerk. As for the remaining documents Adamick is alleged to not have filed, Plaintiff cannot show she was injured in pursuing her state court actions.

74. Plaintiff's reliance on Section 7.001 to state a cause of action is misplaced and this claim should be dismissed.

6. Class Action – No Certification Necessary

75. Plaintiff has included a request for the court to designate this case as a class action pursuant to Fed. R. Civ. P. 23. *Plaintiff's Amended Complaint*, ¶¶ *251-252.* As outlined above, the Plaintiff has failed to state a claim for which relief could be granted. Thus, she also fails to present a basis for class certification and certainly could not serve as class representative. Defendants respectfully request the Court deny Plaintiff's request for class status.

7. Punitive Damages – No recovery from County

76. The County is immune from punitive and/or exemplary damages under federal law. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) ("a municipality is immune from punitive damages under 42 U.S.C. § 1983"); *Davis v. West Community Hospital,* 755 F.2d 455, 459, 467 5th Cir. 1985)(reversing award of punitive damages against hospital system because it was a governmental entity under City of Newport rule); *Mosley v. Houston Community College System*, 951 F.Supp. 1279, 1290 (S.D. Tex. 1996)(punitive damages claim under Section 1983 barred as a matter of law because HCC, as a local governmental unit, was treated the same as a municipality under *Monell*).

77. The County also enjoys sovereign immunity under state law from punitive damages. Texas Civil Practice and Remedies Code §101.024 (Vernon 2005)("This chapter does not authorize exemplary damages."); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 682 n. 59 (Tex. 2008)(Texas Tort Claims Act does not waive governmental immunity from punitive damages and noting that Texas Legislature did waive immunity from punitive damages

in Whistleblower actions but then reversed itself in 1995 and that punitive damages are not available for employment discrimination, Tex. Labor Code §21.2585).

II. REQUEST FOR REPLY OR MORE DEFINITE STATEMENT

78. A motion for more definite statement is proper when the plaintiff did not plead its cause of action by particularized pleading, as required by the Fifth Circuit for Section 1983 cases in which individual is alleged to have violated the plaintiff's civil rights. *Schultea v. Wood*, 47 F.3d 1427, 1432-1434 (5th Cir. 1995)(*en banc*). The heightened pleading standard demands that a plaintiff's pleadings raise a genuine issue as to the alleged illegality by the defendant, identify the defendant's alleged unlawful conduct, and must rest on more than conclusions alone. *See Schultea*, 47 F.3d at 1433; *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.) *cert. denied*, 498 U.S. 908, 111 S.Ct. 279 (1990). To avoid dismissal, a plaintiff must plead all facts with particularity and demonstrate specifically how his federal rights have been violated by the defendant. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Accordingly, in order to avoid dismissal and in order to comply with the requirement of reply, plaintiffs must allege specific facts which show an objectively unreasonable violation of clearly established law. *See Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793 (1991); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2680 (1994). Furthermore, governmental officials are entitled to a stay of discovery until after the Court determines, assuming the truth of the factually specific allegations, that the official's conduct violated clearly established law. *See Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 1597 (1998).

79. "Personal involvement is the touchstone of § 1983 jurisprudence." *Fickes v. Jefferson County*, 900 F.Supp. 84, 88 (E.D. Texas 1995). Plaintiff must plead all facts demonstrating Defendant Adamick's *personal involvement* in her alleged injury. She had not yet done so and to

the extent that the Court does not deem Adamick is entitled to absolute immunity and only qualified immunity is at issue, Defendant Adamick requests a more definite statement from the Plaintiff to state, with particularity, detailed facts supporting the contention that Adamick is not entitled to qualified immunity. *See Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985). Mere conclusory allegations are not enough to overcome this burden. *See Schultea*, 47 F.3d at 1433.

80. The heightened pleading requirement also applies to RICO claims based on fraud, as Plaintiff apparently alleges. *See Elliot*, 857 F.2d at 880. To the extent that the Court does not dismiss the RICO claims at this stage of the proceedings, Defendants Montgomery County and Adamick request the Court order Plaintiff to satisfy the heightened pleading requirements for RICO claims based on fraud.

III. CONCLUSION

81. Plaintiff has wholly failed to state any claims against the County and Adamick – federal or state – upon which this Court can grant relief. Thus, the Court should grant the County's and Adamick's Rule 12(b)(6) Motion and dismiss all of Plaintiffs' claims against the Count and Adamick.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Montgomery County, Texas and Barbara Gladden Adamick, pray the claims made by Karen McPeters made against them be dismissed, with prejudice, and for such other and further relief, both general and special, at law or in equity, to which they may be entitled, and for which they will ever pray.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2010, a true and correct copy of the foregoing document and of this certificate will be automatically served on known Filing Users through Notice of Electronic Filing and was sent certified mail, return receipt requested, to the following parties of record:

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