

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 4:10-CV-01103

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

JURY

**PLAINTFF KAREN McPETERS’ RESPONSE TO DEFENDANT’S,
MONTGOMERY COUNTY, TEXAS, AMENDED MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT**

1. Plaintiff Karen McPeters has amended her complaint (second amended complaint) to address additional information provided by Defendant Montgomery County, and to further respond to its Rule 12(b)(6) motion to dismiss.
2. Karen McPeters offers further limited comments and authority concerning the motion to dismiss.
3. In paragraph 12 of Montgomery County’s Amended Motion to Dismiss, footnote 4, Montgomery County suggests looking at the attached documents in considering the 12(b)(6) motion. Montgomery County is

correct; it is permissible. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996).

4. Generally, if the court decides to consider the evidence, the motion must be converted into a motion for summary judgment. See Fed. R. Civ. P. 12(d), *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002), *Marques v. Federal Reserve Bank*, 286 F.3d 1014, 1017 (7th Cir. 2002).
5. If the court converts the motion, the parties must be given notice to prevent unfair surprise and to allow for a reasonable opportunity to present additional material. See *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67 (2nd Cir. 2008); *In re Rockefeller Center Properties, Inc. Securities Litigation*, 183 F.3d 280, 288 (3rd Cir. 1999); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 n.2 (10th Cir. 1996).
6. In paragraph 13, footnote 5, Montgomery County discusses mandatory E-filing in other counties. The problem is more severe than originally assumed. The Travis County Orders, Docket 13-3, 13-4, appear to be unconstitutional for the same reasons that Judge Edwards' 2003 order is unconstitutional. Harris County does not appear to violate the law. See Document 13-7, page 5, Rule 3.3, and Rule 4.6 on page 8.
7. In brief, if E-filing is optional, there is no constitutional violation. If the Texas legislature delegates authority over E-filing to the judiciary, and that

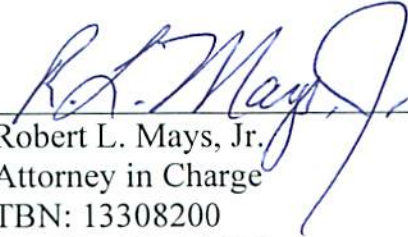
bill is signed into law, then, under the “rational basis” test, the delegation would probably pass constitutional muster.

8. But, no matter how many counties or courts **do it**, without legislative delegation, each action increasing filing fees by making E-filing mandatory is a violation of the open courts provision of the Texas constitution and a violation of the separation of powers doctrine.
9. One cannot allow private entities, whether LexisNexis or Texas On-Line, to determine “mandatory costs” for a litigant to participate in our judicial system.
10. One should keep in mind that half of all litigants are unwilling participants, except in this case where the number of unwilling litigants is four.
11. In paragraph 14, footnote 6, Montgomery County discusses E-filing a notice that “there are conventional paper exhibits on file with the District Clerk’s office.” There is no similar notice for Judge Edwards’ 2003 Order. It is not in evidence in McPeters I or McPeters II.
12. In paragraph 19, Montgomery County alleges that Karen McPeters suffered “no legal prejudice.” Montgomery County is correct only in the sense that McPeters’ documents were filed. Time of filing was adversely affected and Montgomery County forced Karen McPeters to pay illegal costs to LexisNexis.
13. Every denial of Karen McPeters’ right to open courts in Texas is a legal injury and she suffered legal prejudice.

14. Karen McPeters respectfully requests that Montgomery County's Amended Motion to Dismiss be denied.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Karen McPeters requests that Montgomery County's Rule 12(b)(6) motion be denied.

Respectfully submitted,



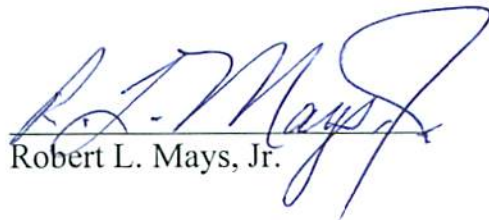
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CERTIFICATE OF SERVICE

I certify that on June 6, 2010, I transmitted a true and correct copy of this Motion and proposed Order via email to:

Sara M. Forlano
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sara.forlano@mctx.org



Robert L. Mays, Jr.