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 REED ELSEVIER, INC.'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendant LexisNexis,[1] a division of Reed Elsevier Inc., ("LexisNexis") respectfully submits this Motion to Dismiss and Brief in Support.

[1] Improperly pled as Reed Elsevier, Inc., d/b/a LexisNexis by Plaintiff.

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MOTION TO DISMISS AND BRIEF IN SUPPORT

I. Nature and Stage of the Proceeding

Plaintiff is a Montgomery County civil litigant who complains about the e-filing system that Montgomery County began implementing in 1997, which requires litigants in designated e-filing cases to pay for filing pleadings with the County's District Courts and the County Courts at Law having concurrent jurisdiction with the District Courts.[2] (See Miscellaneous Order No. 97-9155, attached as Exhibit 1 to Defendant's, Montgomery County, Texas, Motion to Dismiss for Failure to State a Claim and Brief in Support, filed with this Court, hereinafter "Montgomery County's Brief"). Plaintiff sues Montgomery County, Texas itself, along with the Honorable Frederick E. Edwards, District Judge, 9th District Court, Montgomery County, Texas ("Judge Edwards"); Barbara Gladden Adamick, District Court Clerk of Montgomery County, Texas ("Adamick") (collectively with Montgomery County and Judge Edwards, the "Government Defendants"); and Reed Elsevier, Inc. ("LexisNexis"), the company that currently administers the e-filing system (collectively with Judge Edwards, Adamick and Montgomery County, the "Defendants").

Plaintiff contends Defendants have refused paper filings and charged litigants and/or their counsel fees in excess of those authorized by Texas statute, allegedly in violation of rights secured by the United States Constitution. (Compl. at ¶¶ 170-194). Plaintiff also claims the e-filing requirements violate the Texas Constitution, Texas statutes, and RICO. (Compl. at ¶¶ 102-147, 148-169, 195-209, 234-250). In addition to these claims, Plaintiff brings claims of fraud and violation of the Texas Theft Liability Act. (Compl. at ¶¶ 210-233). Plaintiff seeks the return of all out-of-pocket filing fees, service charges and taxes as well as statutory damages, injunctive relief, punitive damages and attorneys' fees. (Compl. at ¶¶ 253-285).

[2] E-filing fees are not new in Texas or elsewhere, nor are they without a recognized function. As the Supreme Court of Delaware noted over fourteen years ago: "The use of computers to access information is a commonplace feature of modern law office operation. If the court system is to be able to respond to the demands of complex litigation, parties and their counsel who seek the intervention of the judicial system may be required to incur the reasonable expenses of participation in the modern information systems." *In re White Lung Ass'n*, No. 21, 1994, 1994 Del. LEXIS 95, at *6 (Del. Mar. 16, 1994).

II. Issues to be Ruled Upon by the Court; Standard of Review

LexisNexis seeks dismissal of all claims brought against it pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The issues before this Court are whether the Court has subject matter jurisdiction over Plaintiff's claims and whether Plaintiff has stated a claim upon which relief can be granted.

A. Subject Matter Jurisdiction

A federal court should dismiss a plaintiff's claim for lack of subject matter jurisdiction when Plaintiff has failed to establish diversity of citizenship or federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. Plaintiff seeks jurisdiction under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (jurisdiction over § 1983 claims). Pursuant to 28 U.S.C. § 1331, the district courts have original jurisdiction of any civil action arising under the United States Constitution, laws, or treaties. Pursuant to 28 U.S.C. § 1343(3), district courts have original jurisdiction over any "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." When a plaintiff's federal claims fail to meet the minimum complaint requirements to survive a motion to dismiss, plaintiff's state law claims should be dismissed for lack of subject matter jurisdiction. *See Energy Inv. P'ship No. 1 v. Sproule Assocs., Inc*., Civil Action No. 3:00-CV-1252, 2002 U.S. Dist. LEXIS 12367, at *2 (N.D. Tex. July 8, 2002).

B. Failure to State a Claim

When ruling on a motion to dismiss for failure to state a claim, a two-step analysis is required. First, a court must consider only the factual allegations of the complaint — neither its legal conclusions nor its bare recitation of the elements of a claim — in determining whether the plaintiff has made a plain statement of the grounds of her entitlement to relief. Fed R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). *See also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (following *Iqbal* and *Twombly* in affirming dismissal of claims under Texas law when factual allegations failed to support legal allegations in the complaint.). Second, if the plaintiff has alleged sufficient facts to bear out the elements of the claim, the court must then consider whether the adequately pleaded facts state a "plausible," rather than a merely "possible," claim. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 555. When determining whether a Plaintiff has stated a claim upon which relief can be granted, a court need not accept as true unpled or conclusory allegations. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

III. Summary of the Argument

As a preliminary matter, this Court lacks subject matter jurisdiction over Plaintiff's § 1983 claims, which fail to allege any constitutional violation(s) committed by LexisNexis. However, even if this Court had subject matter jurisdiction, dismissal would still be required as LexisNexis – like the Government Defendants – is immune from suit.[3] As the allegations of the First Amended Complaint (the "Complaint") make clear, LexisNexis and its predecessor(s) have merely been (1) dutifully complying with a series of facially-valid Orders entered by members of the Texas judiciary establishing the e-filing system and ordering its use, (2) adhering to e-filing rules that were approved by the Texas Supreme Court, and (3) performing the function of a clerk in accordance with the terms of a public contract that was entered into with Montgomery County.[4] In addition, even if LexisNexis were not immune from suit, Plaintiff's claims for

[3] On May 4, 2010, Montgomery County, Texas and Adamick moved to dismiss the Complaint raising many of the same immunity and other defenses upon which LexisNexis also relies. LexisNexis hereby adopts and incorporates by reference the arguments and defenses raised within their motion to dismiss to the extent they also apply to Plaintiff's claims against LexisNexis.

[4] In her Complaint, Plaintiff cites and attaches a contract between Montgomery County and LexisNexis File&Serve. (Compl. at ¶ 17, Exhibit B). The parties to this contract never exchanged signed copies, and therefore, this contract was never executed. While this fact does not affect the validity of LexisNexis' arguments in this Motion to Dismiss (even if the contract

restitution of the "out-of-pocket filing fees, service charges and taxes" are still barred by the voluntary payment doctrine. Furthermore, Plaintiff fails to state a violation of Separation of Powers claim, RICO claim, fraud claim or theft claim under the Texas Theft Liability Act. For these and other reasons discussed below, the Complaint should be dismissed with prejudice for lack of subject matter jurisdiction and failure to state a claim.

IV. Factual Allegations of the Complaint

On September 16, 1997, the Texas Supreme Court approved the Local Rule for e-filing and service of pleadings in the district courts and county courts at law of Montgomery County, Texas. (S*ee* Exhibit 1, attached to Montgomery County's Brief). On February 10, 2003, Judge Edwards signed an order assigning certain cases to e-filing (the 2003 Order, together with the Miscellaneous Order No. 97-9155, the "e-filing Orders") (*See* Exhibit 3, attached to Montgomery County's Brief). Pursuant to the 2003 Order, as of January 1, 2000, all civil cases filed in the 9th District Court of Montgomery County are to be filed as described and governed by the Local Rules regarding electronic filing. The following exceptions to e-filing apply under the 2003 Order: (1) if the party has leave of Court to file conventionally; (2) if the document is the original petition or a return of service; (3) if the document is an exhibit, appendix or image document exceeding 50 pages in length; (4) if the actions are brought by the State of Texas or Child Protective Services or if the actions are adoption actions; (5) if the documents are original petitions for divorce or annulment that are resolved within 90 days; and (6) if the documents are inventories and appraisal documents in family law cases.[5] Parties have the option to e-file

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were as Plaintiff pleads, there still is no claim) and while LexisNexis does not intend for this information to convert this motion to one for summary judgment, LexisNexis attaches, as Exhibit 1, the correct contract between LexisNexis and Montgomery County which does not contain a revenue sharing provision as clarification and for whatever assistance this information may be to this Court. (See Exhibit 1, attached to Appendix as Tab 1).

[5] Plaintiff does not allege that LexisNexis played any part in deciding which classes of cases would be subject to e-filing. As explained, *infra*, the members of the Texas judiciary who made those decisions are immune from suit. LexisNexis, acting as an agent of the court, shares their judicial immunity in administering the e-filing system. *See Barr v. Matteo*, 360 U.S. 564, 569 (1959) ("This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in exercise of their judicial functions, . . . and that a like immunity extends to other officers of government whose duties are related to the judicial process."). *See also Jarvis*

documents (1) through access to the LexisNexis e-file system, or (2) in person by using the free Public Access Terminal located in the District Clerk's Office. The 2003 Order states that:

> The District Clerk shall not accept any 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*.

V. Legal Argument

A. The Court Lacks Subject Matter Jurisdiction

1. Plaintiff fails to state a §1983 claim against LexisNexis to support subject matter jurisdiction under 28 U.S.C. §1331 and/or §1343.

Section 1983 does not create any substantive rights. *Davenport v. Rodriguez*, 147 F. Supp. 2d 630, 635 (S.D. Tex. 2001). "Before Plaintiff can successfully assert § 1983 as a valid cause of action…Plaintiff must first identify one or more specific constitutionally protected rights that have been infringed." *Id*. Here, Plaintiff purports to allege causes of action for violations of the Due Process and due course of law clauses, Equal Protection clause, the First Amendment guarantee of access-to-courts, and civil conspiracy under § 1983. Plaintiff has failed to allege any valid constitutional claims against LexisNexis; therefore, she cannot rely upon 28 U.S.C. § 1331 (federal question jurisdiction) or § 1343 (jurisdiction over § 1983 claims) to confer subject matter jurisdiction.[6]

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v. Roberts, 489 F. Supp. 924, 929 (W.D. Tex. 1980) (motion to dismiss § 1983 claim granted where bank and its attorney merely complied with court orders and "actions complained of were essentially those taken by the Court through its orders"); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969) (prothonotary of Superior Court of Pennsylvania not liable for § 1983 claim for refusing to accept certain papers for filing, where action of prothonotary was pursuant to Superior Court order); *Board of Educ. v. Board of Educ.*, 413 F. Supp. 342 (W.D. Okla. 1975) (where acts were taken only pursuant to order of state Supreme Court, officials could not be held liable in § 1983 action for alleged violations of constitutional rights), *aff'd*, 532 F.2d 730 (10th Cir. 1976).

[6] Because this Court does not have subject matter jurisdiction over Plaintiff's § 1983 claims against LexisNexis, the Court should refuse to exercise supplemental jurisdiction over Plaintiff's state law claims. *See Energy*, 2002 U.S. Dist. LEXIS 12367, at *2.

a. Equal Protection

Plaintiff alleges equal protection violations under the Texas and U.S. Constitutions. (Compl. at 112, 134, 135, 138, 139, 178, 180, 183, 195, 196, 200, 201, 256). Because the equal protection provision of the Texas constitution is nearly identical to that of the U.S. Constitution, and Plaintiff fails to distinguish any factual or legal allegations between the two statutes, the claims will be addressed together. *See Lively v. Missouri K & T. Ry. Co.*, 102 Tex. 545, 558-59 (1909). Plaintiff alleges that Defendants discriminate against litigants by requiring them to e-file, while not requiring others to e-file. (Compl. at ¶ 196). Plaintiff has completely misinterpreted the nature of the protection the Equal Protection Clause provides.[7]

As stated by the Supreme Court: "[M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000). To qualify as similarly situated, the comparison group must be "prima facie identical in all relevant respects," or "directly comparable in all material respects." *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005). That is plainly not the case here.

Plaintiff, as a holder of claims ordered to e-filing, is not similar in all relevant respects to litigants with divorce, annulment, family law and child protective services claims not subject to the 2003 Order. *See Lindquist*, 656 F. Supp. 2d at 688 (similarly situated requirement must be applied ***"with rigor"***). Moreover, even if Plaintiff had successfully alleged the "similarly situated" requirement, her claim would still fail. Plaintiff's Complaint does not, on its face, meet

[7] In assessing the constitutionality of a law under the Equal Protection Clause, the Court must first determine whether the classification targets a suspect class. A classification which does not target a suspect class passes constitutional muster if it survives the rational basis test. *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Usually, this level of scrutiny is not a particularly burdensome standard for the government to meet. *Romer v. Evans*, 517 U.S. 620, 632 (1996). Nothing about the e-filing system discriminates on the basis of a ***suspect class***, such as race or gender. Moreover, the e-filing requirements are ***rationally related*** to several legitimate governmental purposes, *e.g.*, improving access to documents, maximizing court resources and increasing court efficiencies.

the second prong of her "class of one" claim -- the requirement that there be no rational basis for the difference in treatment. Even the allegations as pled by Plaintiff establish a rational basis for Defendants' actions.[8] *Id.* Thus, Plaintiff fails to state an equal protection claim.

b. Due Process

Plaintiff's procedural due process claim against LexisNexis fails as a matter of law.[9] The Texas Due Course of Law Clause is virtually identical to the Due Process Clause of the United States Constitution. *University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Thus, Texas courts consult federal case law when deciding due process issues. *Than*, 901 S.W.2d at 929 (citing *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252-53 (1887)). The Texas Constitution's due process clause does not provide a basis for a private action for damages. *See, e.g., Patel v. City of Everman*, 179 S.W.3d 1, 13 (Tex. App. 2004).

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[8] Benefits of the e-filing systems include, but are not limited to, a litigant's ability to access and/or transmit electronic documents ***twenty-four (24) hours a day, seven (7) days per week***, with service being made upon all parties ***electronically within seconds*** and an unlimited amount of ***free views*** offered to litigants once a paper is filed.

[9] Plaintiff does not specifically allege a substantive due process claim, which is premised upon the violation of a "fundamental right." *See* Compl. ¶ 148; *Karr v. Schmidt*, 460 F.2d 609, 615 (5th Cir. 1972). Because of the stringent standard associated with a substantive due process violation, "only fundamental rights and liberties which are 'deeply rooted in this nation's history and tradition'…qualify for the protection afforded by substantive due process." *Perez v. Jim Hogg Co.*, Civil Action No. L-05-00019, 2006 U.S. Dist. LEXIS 51406, at *12 (S.D. Tex. July 26, 2006). Examples of those rights include the right to marry, to direct the education and upbringing of one's children, to marital privacy, and the right to bodily integrity (abortion, contraception, etc.). *Id.* If a plaintiff fails to allege the violation of a fundamental right, the plaintiff fails to state a substantive due process claim. *Id.*

Here, Plaintiff has failed to allege the violation of any recognized fundamental right in her Complaint. The only alleged "right" Plaintiff identifies is an alleged property interest in fees paid to LexisNexis for e-filing. Such a property interest, if one even exists, does not amount to a fundamental right under settled federal law. Furthermore, as discussed above, the e-filing Orders are rationally related to the legitimate government interest of maximizing court resources and increasing court efficiencies. The purpose of the filing fee is also obvious. LexisNexis incurs operating costs in administering the e-filing system, and the fee produces some small revenue to assist in offsetting those expenses. *See Ortwein v. Schwab*, 410 U.S. 656, 661 (1973). Accordingly, Plaintiff has failed to state a substantive due process claim. *See Perez*, 2006 U.S. Dist. LEXIS 51406, *at 12.* Furthermore, 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.

Even if the courts did provide for a private right of action, with any due process challenge, a plaintiff must show: (1) a constitutionally protected property interest, (2) what process was owed before that interest could be deprived, and (3) the inadequacy of process provided. *Johnson v. Houston Indep. Sch. Dist*., 930 F. Supp. 276, 286 (S.D. Tex. 1996). Protected property interests stem from statutes, regulations, ordinances and contracts. *Id*.; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Here, Plaintiff has failed to identify any property interest created by an independent source such as a statute, regulation, ordinance or state law.[10] Moreover, e-filing is not mandatory. Alternative means are available for those who cannot afford, or prefer not to pay the fees for e-filing services. The e-filing Orders specifically state that plaintiffs have the option of using the Public Access Terminal in lieu of paying the e-filing fees. (*See* Exhibit 3, attached to Montgomery County's Brief). In addition, pursuant to the 2003 Order, plaintiffs have the option to ask for leave of court to conventionally file documents. *Id*. Courts have routinely upheld fee requirements against due process claims when alternatives for the indigent are available. *See e.g., Green v. Mortham*, 155 F. 3d 1332, 1337 (11th Cir. 1998); *Harris v. Iorio*, 922 F.Supp. 588, 591 (M.D. Fla. 1996). In short, the e-filing requirements do not violate the Due Process Clause, and Plaintiff's claim should be dismissed.

c. Access-To-Courts

The Texas Constitution's open courts provision "applies only to statutory restrictions of a cognizable . . . cause of action." *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995). Plaintiff does not allege the existence of a statutory restriction on any particular cause of action. And even assuming, for the sake of argument, that the rules requiring her to e-file documents with the court is a "statutory restriction," Plaintiff has not pled that the rules have restricted her from moving forward with her claims, just that she wants to do so without paying fees.

[10] Plaintiff has no property interest in fees voluntarily paid to LexisNexis. *See Key West Harbour Dev. Corp. v. City of Key West*, 987 F.2d 723 (11th Cir. 1993) (state law defines parameters of plaintiff's property interest for purposes of § 1983).

To state an access-to-courts claim, a claimant must show "actual injury resulting from [the] alleged denial of access to the courts." *Trevino v. Moore*, C.A. No. C-09-155, 2010 U.S. Dist. LEXIS 22433, at *11 (S.D. Tex. Mar. 10, 2010).[11] Plaintiff does not allege LexisNexis prevented her from filing suit, or that an action she filed was dismissed by LexisNexis due to her failure to pay the required e-filing fees. Critically, Plaintiff has not pled ***any*** actual injury allegedly caused by LexisNexis.[12] Accordingly, Plaintiff's access-to-courts claim fails to state a claim and provides no basis for subject matter jurisdiction.

d. § 1983 Conspiracy

Plaintiff alleges in conclusory fashion that LexisNexis acted jointly with the Government Defendants to implement the e-filing system, depriving Plaintiff of constitutionally-protected rights. A conspiracy claim cannot independently support a cause of action under § 1983. Plaintiff must assert Defendants deprived her of "rights, privileges, or immunities secured by the Constitution or laws of the United States." *Thompson v. Aland*, 639 F. Supp. 724, 727 (N.D. Tex. 1986). Moreover, merely characterizing Defendants' conduct as "conspiratorial or unlawful does not set out allegations upon which [§ 1983] relief can be granted." *Gipson v. Rosenberg*, 797 F.2d 224, 225-26 (5th Cir. 1986). That is, a plaintiff must demonstrate "that the defendants agreed to commit an illegal act." *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982). Plaintiff must plead specific facts to show Defendants conspired to violate her rights. *Thompson* at 729.

Plaintiff fails to meet the pleading requirements for stating a conspiracy claim under § 1983 because she did not, and cannot, allege that LexisNexis made an agreement with ***anyone***

[11] The Supreme Court has stated that a plaintiff might show, "for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement … that he had suffered arguable actionably harm that he wished to bring before the courts, but…was unable even to file a complaint." *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

[12] Even if Plaintiff had suffered any actual injury, her First Amendment claim would still fail, as merely requiring payment of reasonable fees is not enough to amount to a denial of access to courts. *Rivera v. Allin*, 144 F.3d 719, 723 (11th Cir. 1998) (*abrogated on other grounds, Jones v. Bock*, 549 U.S. 199 (2007)). For the reasons stated above, the e-filing requirements and resulting fees meet the applicable test of being rationally related to legitimate public purposes. *See Ortwein v. Schwab*, 410 U.S. 656, 660-61, n.5 (1973); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136-37 (6th Cir. 1991).

to violate Plaintiff's federal rights. At best, Plaintiff alleges that LexisNexis entered into a public contract to operate the e-filing system and charge fees authorized by the facially-valid Orders. Plaintiff makes a woefully unsupported assumption that evidence of an agreement to provide e-filing services is evidence of an agreement to violate Plaintiff's constitutional rights. Plaintiff has failed to plead a conspiracy claim under § 1983, or any other legal theory. As such, Plaintiff's claims are insufficient to give rise to subject matter jurisdiction.[13]

B. Plaintiff Cannot Establish an Affirmative Link Between LexisNexis and Any Constitutional Violation.

To be held liable under § 1983, a defendant must be someone who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2006). Plaintiff alleges the e-filing system endorsed by all four commissioners and the county judge of Montgomery County constitutes various violations of the United States Equal Protection Clause, First Amendment Petition Clause and/or Due Process Clause. (Compl. at ¶ 170-209).

The Orders establishing the e-filing system were entered – ***not*** by LexisNexis - but by members of the Texas judiciary. Critically, Plaintiff does ***not*** allege that LexisNexis made *or otherwise played any part in* the decisions (a) to implement e-filing in Montgomery County's district courts; (b) to implement e-filing in only select (and not all) cases; (c) to not accept paper filings in those selected cases; (d) to implement other e-filing rules applicable to those cases; or (e) to allow litigants and/or their counsel to be charged additional fees for using the Montgomery

[13] *See Sales v. Murray*, 862 F. Supp. 1511 (W.D. Va. 1994) (dismissal appropriate if complaint makes only conclusory allegations of conspiracy under § 1983 and fails to allege facts suggesting agreement among defendants); *Theis v. Smith*, 676 F. Supp. 874 (N.D. Ill. 1988) (in order to plead a § 1983 conspiracy between private persons and state officials, plaintiffs must allege an agreement to deprive them of their constitutional rights; boilerplate allegations of such an agreement are insufficient); *Copus v. City of Edgerton*, 959 F. Supp. 1047 (W.D. Wis. 1997) (plaintiff must allege in complaint some evidence of concerted plan or agreement between private party and government officials, and mere allegations of conspiracy are not sufficient to withstand motion to dismiss); *see also Russell v. Town of Mamaroneck*, 440 F. Supp. 607, 611 (S.D.N.Y. 1977) ("it has been uniformly held that private defendants cannot act under color of state law on the basis of conspiracy or joint activity with the state or its agents if the governmental entities or officials with whom they are alleged to act in concert are themselves immune from liability under [§ 1983]).").

County e-filing system. Rather, Plaintiff contends that LexisNexis merely entered into a contract to administer the e-filing system. (Compl. at ¶ 17-19).

In short, to the extent that any violation of Plaintiff's constitutional rights occurred (which LexisNexis denies), the order implementing the e-filing system was the proximate cause of the injury, and LexisNexis cannot be held liable for any corresponding civil rights violation under § 1983. *See Novak v. Cobb County-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1575 (N.D. Ga. 1994), *aff'd*, 74 F.3d 1173 (11th Cir. 1996) ("[Plaintiff's] enemy here was the order. [Plaintiff's] enemy was the judge. To the extent any violation of [Plaintiff's] rights … could have occurred, the order issued by Judge Hines is the 'proximate cause of the injury.'") (internal citation omitted).[14]

C. LexisNexis Is Immune From Suit

The United States Supreme Court instructs courts to examine ***the function*** of individual defendants – the nature of the individual responsibilities – not their status, in resolving immunity defenses. *Forrester v. White*, 484 U.S. 219, 228-29 (1988). Based upon its governmental function as an electronic clerk for Montgomery County, LexisNexis is entitled to immunity for Plaintiff's claims.

1. Absolute Immunity

Numerous courts have recognized that public or private officials are entitled to absolute (or derived) immunity from claims where they (like LexisNexis here) perform services for the

[14] *See Jarvis v. Roberts*, 489 F. Supp. 924, 929 (W.D. Tex. 1980) (motion to dismiss § 1983 claim granted where bank and its attorney merely complied with court orders and "actions complained of were essentially those taken by the Court through its orders."); *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969) (prothonotary of Superior Court of Pennsylvania not liable for § 1983 claim for refusing to accept for filing certain papers, where action of prothonotary was pursuant to Superior Court order); *Board of Educ. v. Board of Educ.*, 413 F. Supp. 342 (W.D. Okla. 1975) (Though individuals who administered school district boundary changes were state officials, where their acts were ministerial in nature and were accomplished only pursuant to order of state Supreme Court, officials could not be held liable in § 1983 action for alleged violations of constitutional rights), *aff'd*, 532 F.2d 730 (10th Cir. 1976); *see also Auvao v. City of Taylorsville*, 506 F. Supp. 2d 903 (D. Utah 2007) (dismissing § 1983 claims where plaintiffs alleged no facts showing any affirmative link between defendants' conduct and any constitutional violation suffered by plaintiffs); *Eden v. Voss*, 105 F. App'x. 234, 241 (10th Cir. 2004) ("Without a constitutional violation, [Defendant] cannot be liable under § 1983 regardless of whether [Defendant], a private company, may assert a qualified immunity defense.").

court. *Vernon v. Rollins-Threats*, Civil Action No. 3:04-CV-1482, 2005 U.S. Dist. LEXIS 41789, at *11 (N.D. Tex. Nov. 2, 2005).[15] Here, LexisNexis has been acting in furtherance of official duties and relying on facially- valid e-filing orders. Although LexisNexis is a private party acting pursuant to official duties and court orders, LexisNexis is nonetheless entitled to immunity. LexisNexis receives public filings and manages those filings as a neutral actor. Accordingly, LexisNexis is entitled to absolute immunity under the quasi-judicial immunity doctrine. *See Vernon*, 2005 U.S. Dist. LEXIS 41789, at *16-17 (When a defendant performs a

[15] *See Mays v. Sudderth*, 97 F.3d 107 (5th Cir. 1996) (sheriff had absolute immunity from § 1983 claims since conduct in arresting and detaining arrestee complied with court order compelling him to do so); *Mullinax v. McElhenney*, 672 F. Supp. 1449, 1452 (N.D. Ga. 1987) (defendants absolutely immune from suit for conspiring to do acts which were "intimately associated" with the judicial process); *Inkel v. Connecticut Dep't of Children & Families*, 421 F. Supp. 2d 513 (D. Conn. 2006) (chief administrator of Connecticut courts entitled to absolute judicial immunity from liability in § 1983 suit); *Valdez v. City & County of Denver*, 878 F.2d 1285 (10th Cir. 1989) (deputies who arrested spectator pursuant to judge's order entitled to absolute immunity); *Argentieri v. Clerk of Court for Judge Kmiotek*, 420 F. Supp. 2d 162 (W.D.N.Y. 2006) (assuming clerks of court deliberately violated litigant's constitutional rights, litigant's § 1983 claims were barred by absolute immunity); *Akins v. Deptford Twp.*, 813 F. Supp. 1098 (D.N.J. 1993) (clerk had absolute judicial immunity against civil rights suit), *aff'd mem.*, 995 F.2d 215 (3d Cir. 1993); *Clay v. Yates*, 809 F. Supp. 417 (E.D. Va. 1992) (clerk entitled to derivative absolute judicial immunity for conduct taken in response to judicial order in performing or refusing to perform ministerial acts of filing pleadings or responding to requests for information), *aff'd mem.*, 36 F.3d 1091 (4th Cir. 1994); *Pokrandt v. Shields*, 773 F. Supp. 758 (E.D. Pa. 1991) (clerk of court, who was compelled by state law to require plaintiff to pay fee before accepting any motions in connection with pending criminal action, was absolutely immune from civil suit for damages under § 1983); *Rodriguez v. Weprin*, 116 F.3d 62 (2d Cir. 1997) (§ 1983 claims against court clerks related to judicial functions; clerks entitled to absolute judicial immunity); *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977) (state court judge and his clerk enjoyed absolute immunity from § 1983 suit); *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970) (clerks of court entitled to immunity from suit the same as judges); *DeFerro v. Coco*, 719 F. Supp. 379 (E.D. Pa. 1989) (clerk entitled to absolute immunity for actions taken pursuant to judge's directive and instructions); *Glucksman v. Birns*, 398 F. Supp. 1343 (S.D.N.Y. 1975) (judicial immunity protects not only judges but other officers of court from damages claims under § 1983 for acts committed in their official capacity); *Pritt v. Johnson*, 264 F. Supp. 167 (M.D. Pa. 1967) (clerk of court immune under judicial immunity doctrine from liability in civil rights action for acts performed in his official capacity); *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980) (clerk of court may receive immunity in his own right for performance of discretionary act or he may be covered by immunity of the judge because he is performing ministerial function at discretion of judge); *Ginsburg v. Stern*, 125 F. Supp. 596 (W.D. Pa. 1954) (even if alleged failure to file petition was patently violative of complainant's civil rights, Supreme Court prothonotary allegedly acting pursuant to court order and direction in allegedly failing to file, could not be held civilly liable), *aff'd*, 225 F.2d 245 (3d Cir. 1955).

function "integral to the judicial process" and "pursuant to a court order," defendant is entitled to "absolute derived judicial immunity.").

D. Plaintiff's Restitution Claims are Barred by the Voluntary Payment Doctrine

Even if LexisNexis were not immune from suit, Plaintiff's claims are still subject to dismissal pursuant to Fed.R.Civ.P. 12(b)(6) based upon the voluntary payment doctrine. The party seeking to recover payment bears the burden of showing that the doctrine does not apply. *See American Cas. & Life Ins. Co. v. Boyd*, 394 S.W.2d 685, 690 (Tex. Civ. App. 1965).

A couple of conditions must be met before recovery of a payment is barred by the doctrine. First, the payment must have been made with awareness of "all the facts upon which liability to make the payment depends." *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 769 (Tex. 2005). Mistake of law is no defense under the voluntary payment doctrine. *Id*. at 773. Second, the payment must not have been induced by fraud, deception, duress, or compulsion on the part of the person to whom the money is paid. *Id*. at 768. The voluntary payment doctrine has also applied to payments to the government, even under circumstances when the payment was not lawfully owed. *County of Galveston v. Gorham*, 49 Tex. 279, 302, 308 (1878) (holding it was "not unconscionable" for the county to retain funds paid to it when the payment was made voluntarily).

When Plaintiff made her payments for using the e-filing system, Plaintiff knew all material facts. At best, Plaintiff made the payments through an unexcused ignorance of the law, which is no defense as previously stated. *See BMG*, 178 S.W.3d at 773. Plaintiff maintains that Defendants billed her for excessive and illegal amounts which the Defendants could not impose under the Texas statutes. The voluntary payment doctrine, however, is ***not*** avoided by reason of the fact that the charges were imposed in contravention of a statute. *County of Galveston*, 49 Tex. at 302, 308. A party is not entitled to the recovery of restitutionary damages for unjust enrichment where there has been a voluntary payment of the money received. *BMG*, 178 S.W.3d at 768. Each of the members of the proposed Plaintiff class chose to voluntarily pay the fee ***after*** registering for e-filing and ***after*** the fee was assessed. (*See* Compl. at ¶ 41, 45). In

addition, Plaintiff has failed to adequately allege fraud, deception, duress or compulsion in her Complaint, and she has not alleged any facts from which any of these statutory claims could be based. *See BMG*, 178 S.W.3d at 768 (citations omitted). *See infra* Section V.F and Section V.G.

E. Plaintiff Fails to State a Claim for Violation of the Separation of Powers Doctrine.

Although clarity is lacking in the Complaint, it appears Plaintiff alleges two ways in which the Separation of Powers doctrine is violated under the Texas Constitution. First, Plaintiff alleges unlawful interference by the judicial branch with the legislative branch. Plaintiff alleges the e-filing Orders constitute a mandate, requiring e-filing and resulting filing fees of certain litigants. (Compl. at ¶¶ 149-153). Plaintiff alleges this mandate amounts to law-making, a power exclusively reserved to the legislative branch. (Compl. at ¶¶ 149-152).[16]

Plaintiff's argument fails for several reasons, however. First, the e-filing Orders were not a legislative act or mandate. The e-filing Orders established filing procedures for Montgomery County litigants to enable the Court to efficiently perform its judicial functions. Courts are entitled to establish orders which facilitate judicial functions. Court filings are dealt with administratively by each court, and individual courts are in the best position to determine the most efficient, least costly means for carrying out their administrative duties. The e-filing Orders did not become law, and Plaintiff and other litigants retained access to the Public Access Terminal and could even request leave from the Court to submit paper filings.

Second, Judge Edwards did not unlawfully delegate e-filing authority to LexisNexis. Plaintiff alleges the authority to set filing fees was delegated to LexisNexis when Montgomery County entered into the agreement with LexisNexis to service e-filings. (Compl. at ¶¶ 142, 143). If a delegation of authority took place at all, it was reasonable and lawful. *Texas v. Rhine*, 297

[16] Plaintiff also alleges a Separation of Powers violation based on the fact that delegation of filing fee services is not an enumerated power of the judiciary. (Compl. at ¶¶ 149-152). However, there are powers which courts may exercise though not expressly authorized or described by constitution or statute. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-99 (Tex. 1979) ("The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.").

S.W.3d 301, 306-7 (Tex. Crim. App. 2009). A Court can appoint traditional judicial functions to others. *Morrison v. Olson*, 487 U.S. 654, 677 (1988). ("We do not think that judicial exercise of the power to appoint, per se, is in any way inconsistent with the functional matter with the courts' exercise of their Article III powers. We note that courts have long participated in the appointment of court officials…" and "a court should have the authority to appoint its own clerk."). In *Rhine*, the court found there was no violation of separation of powers because the authority delegated by the Texas Legislature involved standards (1) capable of reasonable application, (2) which provided guidance, and (3) limited discretion of the entity to which the authority was delegated. *Id*. Standards can be of a general nature as long as the standards are capable of reasonable application. *Id*. at 312 (citing *Ex parte Granviel*, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978)). The authority delegated to LexisNexis was capable of reasonable application. LexisNexis is in the e-filing business and is in a position to accurately and efficiently perform e-filing functions. The agreement between LexisNexis and Montgomery County provides LexisNexis with guidance regarding its specific and limited responsibilities, going into specific detail regarding LexisNexis's monitoring, servicing and facilitating duties. (*See* Exhibit 1, Sections 4, 7, and 10, attached to Appendix as Tab 1). The Agreement sets forth the parties rights and responsibilities regarding e-filing and document rights. *Id*. Thus, Plaintiff fails to state a claim for violation of the Separation of Powers doctrine.

F. Plaintiff Fails to Plead Fraud with Particularity under Rule 9(b).

Rule 9(b) of the Federal Rules of Civil Procedure requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In the Fifth Circuit, such "circumstances" include "the particulars of time, place, and contents of the false representations . . . as well as the identity of the person making the misrepresentation and what that person obtained thereby, otherwise referred to as the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel Willard v. Humana Health Plan of Texas*, 336 F.3d 375, 384 (5th Cir. 2003). Rule 9(b) allows that malice, intent, knowledge, and other conditions of the mind of a person may be averred generally. Under *Tuchman v. DSC*

Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994), adequately pleading conditions of the mind such as scienter requires the plaintiff to "set forth specific facts that support an inference of fraud," and "[f]acts that show a defendant's motive to commit the fraud may sometimes provide a factual background for and inference of fraudulent intent."

Plaintiff alleges general and conclusory allegations regarding LexisNexis's purported fraudulent acts, without stating the particulars of time, place, and contents of the false representation. Furthermore, she fails to set forth specific facts that support an inference of fraud and sets forth no motive of LexisNexis to commit fraud other than LexisNexis's desire to recover fees. (Compl. at ¶ 233) ("LexisNexis benefitted from the scheme by ensuring that it would be paid on every filing by every qualifying litigant in Montgomery County.") Plaintiff alleges LexisNexis made fraudulent representations by including Judge Edwards' 2003 Order in its contract with Montgomery County. (Compl. ¶ 223). Plaintiff, however, fails to explain how a contractual reference to Judge Edwards' representations is a representation made by LexisNexis *to* Plaintiff in order to fraudulently induce Plaintiff to pay e-filing fees. Plaintiff fails to explain any facts showing representations made by LexisNexis were fraudulent and that LexisNexis knew they were fraudulent, particularly because the representations were not alleged to be made by LexisNexis, but merely incorporated by LexisNexis into a contractual agreement. Thus, she has failed to plead fraud with particularity under Rule 9(b) and her claim for fraud should be dismissed.

G. Plaintiff Fails to State a Claim Under RICO

Plaintiff alleges that LexisNexis and the Government Defendants engaged in actions with a common purpose of requiring "McPeters, and similarly situated litigants, to pay filing fees, service charges and taxes that are not authorized by statute, and that exceed the amounts required by statute." (Compl. at ¶¶ 103, 131, 138). Claims under RICO, 18 U.S.C. § 1962, require a plaintiff plead and prove that a defendant (1) has engaged in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir., cert. denied, 129 S. Ct. 2835 (2009)).

A "pattern of racketeering activity" consists of two or more criminal acts that are related and amount to or pose a threat of continued criminal activity. *Id*.; *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). 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). The enterprise may be a legal entity, or a union or group of individuals associated in fact though not necessarily as a legal entity. *Id*. Allegations of an association-in-fact enterprise must show that the various associates "function as a continuous unit." *Id*.; *see also Rivera v. AT&T Corp.*, 141 F. Supp. 2d 719, 726 (S.D. Tex. 2001) (J. Ellison). Importantly, 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." *Id*.; *see also Rivera* at 726. A plaintiff must plead "not only that the enterprise is distinct from the series of predicate acts constituting racketeering activity, but also that the RICO 'person' who commits the predicate acts is distinct from the enterprise." *Id*.

1. Plaintiff's Allegation of "Racketeering Activity"

Plaintiff fails to allege properly "racketeering activity." Plaintiff alleges predicate act violations of 18 U.S.C. § 1349, 18 U.S.C. § 1341, 18 U.S.C. § 1343, and 18 U.S.C. § 1951. First, 18 U.S.C. § 1961(1), which lists the statutory violations that may constitute "racketeering activity," does not list 18 U.S.C. § 1349 as a predicate act. Only those crimes listed under 18 U.S.C. § 1961(1) and prohibited in state statutes can serve as predicate offenses under RICO. *See Pan American Maritime, Inc. v. Esco Marine*, No. C.A. B-04-188, 2005 WL 1155149, at *4-5 (S.D. Tex. May 10, 2005) (citations omitted). Second, while 1961(1) does list 18 U.S.C. § 1341, 1343, and 1951 as possible predicate acts, Plaintiff has failed to allege facts supporting such claims. Plaintiff's allegations fail in the following ways: (1) Plaintiff has not alleged that LexisNexis made misrepresentations necessary to find liability under 1341 and 1343, (2) nor has she alleged how the bills advanced the scheme of the defendants so as to support a finding of liability under 1341 and 1343; (3) nor has she shown adequate reliance under 1341 and 1343;

and (4) she has failed to allege injury. In addition, Plaintiff has failed to allege robbery, physical violence or threats of violence under section 1951.

a. Mail and Wire Fraud

RICO claims based on fraud must be pled with particularity. *Elliot v. Foufas,* 867 F.2d 877, 880 (5th Cir. 1989). Allegations of RICO predicate acts of mail and wire fraud must include "factual evidence of the content, time, place, and speaker of each alleged mailing or wire transmission" and plaintiffs must "demonstrate how each purported mailing or wire transmission furthered the alleged fraudulent scheme." *Living Music Records, Inc. v. Moss Music Group, Inc.*, 827 F. Supp. 974, 982 (S.D.N.Y. 1993). To satisfy the requirements of a RICO claim where the predicate acts alleged are mail fraud, the alleged fraudulent mailings must be linked to particular defendants and may not be attributed vaguely to "defendants." *Tribune Co. v. Purcigliotti,* 869 F. Supp. 1076, 1088 (S.D.N.Y. 1994), aff'd, 66 F.3d 12 (2d Cir. 1995). In addition, a 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 defendant connected with the scheme, and 4) actual injury to the Plaintiff. *Landry v. Air Line Pilots Ass'n Int'l,* 901 F.2d 404, 428 (5th Cir. 1990). *See, 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."). When mail or wire fraud is alleged as a RICO predicate, the Fifth Circuit also requires a showing of reliance. *In re Mastercard Int'l Inc. Internet Gambling Litigation v. Mastercard International, Inc.*, 313 F.3d 257, 263 (5th Cir. 2002).

Plaintiff states general and conclusory allegations regarding Defendants' purported acts of mail and wire fraud, without naming the specific actors involved or the time/place of such acts. Plaintiff simply lumps LexisNexis in with other defendants. (Compl. at ¶ 134, "Defendants injured Karen McPeters by using the U.S. Mail to bill her."; Compl. at ¶ 135 "Defendants injured Karen McPeters by using the Internet to send bills to her via email."). This is insufficient:

"allegations that generally allege fraud as against multiple defendants, without informing each defendant as to the specific fraudulent acts he or she is alleged to have committed, do not satisfy Rule 9(b)." *Poling v. K. Hovnanian Enters.*, 99 F. Supp. 2d 502, 508 (D.N.J. 2005). Plaintiff's allegations against LexisNexis are either vague to the point of meaninglessness or mere legal conclusions. Plaintiff has not alleged that LexisNexis made misrepresentations necessary to find liability under 1341 and 1343, *In re Mastercard Int'l, Inc.*, 313 F.3d at 263, nor has she alleged how the bills advanced the scheme of the Defendants to find liability under 1341 and 1343. *Elliott*, 867 F.2d at 882.

Furthermore, 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. Schultz*, 779 F. Supp. 392, 400 (N.D. Tex. 1991). Here, Plaintiff did not postpone inquiries or complaints. Plaintiff inquired about the filing fees, received a letter from the Clerk about the e-filing procedure or option to use the Public Access Terminal, and filed an action against the Clerk in the form of a Rule 202 Petition. (Compl. at ¶ 35, 121). Defendants did nothing to lessen the suspect appearance of the fraudulent transaction. Instead, Defendants insisted on the fees and justified the fees at every turn. Defendants did not try to hide what Defendants believe is the lawful justification for the filing fees and the e-filing procedure.

Finally, Plaintiff has not alleged injury. LexisNexis simply was following facially valid e-filing Orders when it collected fees from Plaintiff. The e-filing system did not keep Plaintiff from filing her documents or cause her to miss a deadline due to the e-filing requirements. Furthermore, she could have taken advantage of cost free options such as using the Public Access Terminal or asking for leave to file conventionally.

b. Violation of the Hobbs Act

In addition, Plaintiff fails to state a claim for violation 18 U.S.C. 1951, the Hobbs Act. (Compl., ¶ 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." (Compl., ¶ 136). 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) (2006). 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." *Elliott*, 867 F.2d at 882. None of the alleged acts by Defendants fall into this category. Plaintiff alleges that Judge Edwards stated his willingness to use force to mandate attorney participation in an article he wrote for a Technology Conference. Yet, this article, which Plaintiff fails to allege she read, is not sufficient to demonstrate threat of force. (Compl, ¶ 108). Plaintiff was required to e-file, nothing more. No one threatened physical harm.[17]

2. Plaintiff's Allegation of "Enterprise"

Plaintiff's RICO claim also fails because she does not properly allege the existence of an "enterprise." Plaintiff alleges that the "enterprise" (which Plaintiff calls the "Plan") is the Defendants' alleged plan requiring that Plaintiff, "and similarly situated litigants, and their attorneys, participate in E-filing in Montgomery County, Texas." (Compl. at ¶ 102). Plaintiff's

[17] Plaintiff also brings a claim under the Texas Theft Liability Act, alleging that Defendants are liable for theft and extortion for depriving McPeters of her money. (Compl. at ¶¶ 210-213). As noted above, none of the alleged acts by Defendants include extortion, deception or coercion. LexisNexis operated under an agreement with Montgomery County pursuant to a facially-valid order which authorized LexisNexis to provide e-filing services in exchange for a fee. LexisNexis did not deceive Plaintiff. Plaintiff fails to allege any direct communication between LexisNexis and Plaintiff, much less evidence of "words or conduct" by LexisNexis creating a "false impression of law or fact" to Plaintiff. Plaintiff has not alleged how LexisNexis coerced Plaintiff by threat. The only "threat" referenced by Plaintiff is an article written by Judge Edwards regarding the use of modern technology in court procedures. (Compl. at ¶ 108). Judge Edwards' "threat" in stating a judge must "threaten the ensemble of participants into the 21st century" is taken out of context and hardly threatening. *Id*. In addition, Plaintiff cannot show LexisNexis's intent to deprive Plaintiff of property, as required under the Texas Theft Liability Act. Plaintiff contracted with LexisNexis to provide e-filing services in exchange for a fee. Upon consideration of the promise of those services, the fees were tendered to LexisNexis and were no longer Plaintiff's property. Plaintiff cannot show that, if e-filing procedures violate Texas law, that LexisNexis had any knowledge of the illegality sufficient to make LexisNexis competent to mislead Plaintiff.

allegation conflates the RICO elements of "enterprise" and "pattern of racketeering activity."[18] Plaintiff's conflation of these two elements is impermissible under Fifth Circuit precedent. Under Fifth Circuit precedent, a plaintiff must allege an "enterprise" that is "separate and apart" from the "pattern of racketeering activity." *See Whelan*, 319 F.3d at 229; *AT&T Corp.*, 141 F. Supp. 2d at 726. Furthermore, this conclusory allegation is the extent of Plaintiff's support for showing an "enterprise" under RICO. The remaining allegations either (1) support the resulting injury of the alleged "Plan" or enterprise (*See* Compl. at ¶¶ 103, 107, 112, 131, 133-139), or (2) allege individual actions which barely allege individual motives, much less a "Plan" or enterprise under RICO. (*See* Compl. at ¶ 105-108). For this reason, Plaintiff's RICO allegation fails as a matter of law.

VI. Conclusion

For all of the foregoing reasons, LexisNexis respectfully requests that the Court grant its Motion to Dismiss the First Amended Complaint with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted,

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[18] Plaintiff does not allege elements of an enterprise separate and apart from the predicate acts of racketeering activity. Any association between the Defendants was and has been for the purpose of facilitating e-filing, not an ongoing enterprise, as required under RICO.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I electronically filed the foregoing **Defendant Reed Elsevier, Inc.'s Motion to Dismiss and Brief in Support** with the Clerk of Court using the CM/ECF system, which automatically sends an e-mail notification of such filing to the following attorneys of record:

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