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.	)	

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

Tab 1: Exhibit 1 – LAWPLUS™ Service Agreement between Montgomery County, Texas and LAWPLUS, L.L.C. dated April 21, 1997

Tab 2: *Energy Inv. P'ship No. 1 v. Sproule Assocs., Inc.*, Civil Action No. 3:00-CV-1252, 2002 U.S. Dist. LEXIS 12367 (N.D. Tex. July 8, 2002)

Tab 3: *In re White Lung Ass'n*, No. 21, 1994 Del. LEXIS 95 (Del. Mar. 16, 1994)

Tab 4: *Pan American Maritime, Inc. v. Esco Marine*,2005 WL 1155149 (S.D. Tex. 2007)

Tab 5: *Perez v. Jim Hogg Co.*, Civil Action No. L-05-00019, 2006 U.S. Dist. LEXIS 51406 (S.D. Tex. July, 26 2006)

Tab 6: *Trevino v. Moore*, C.A. No. C-09-155, 2010 U.S. Dist. LEXIS 22433 (S.D. Tex. Mar. 10, 2010)

Tab 7: *Vernon v. Rollins-Threats*, Civil Action No. 3:04-CV-1482, 2005 U.S. Dist. LEXIS 41789 (N.D. Tex. Nov. 2, 2005)

Respectfully submitted,

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TAB 1

EXHIBIT 1

LAWPLUS™ SERVICE AGREEMENT

THIS LAWPLUS™ SERVICE AGREEMENT ("Agreement") is entered into as of the 21 day of April, 1997 between Montgomery County, Texas (the "County"), and LAWPLUS, L.L.C., a Texas limited liability company ("LAWPLUS™").

RECITAL

WHEREAS, the County desires for LAWPLUS™ to provide the County and its District Clerk (sometimes collectively referred to hereafter as the "County") with a system that will permit electronic filing, service, storage, search and retrieval of pleadings in certain designated cases.

AGREEMENT

NOW, THEREFORE, LAWPLUS™ and the County hereby agree as follows:

1. LAWPLUS™ Services

LAWPLUS™ agrees to supply the County with a system that will permit electronic filing, service, search, storage, and retrieval of pleadings or any other documents that may be filed in cases specifically designated by the County.

2. Subscription to LAWPLUS™ Services and License to Access and Use Data

During the term of this Agreement, subject to the terms and conditions hereof, LAWPLUS™ grants the County and its authorized personnel a non-exclusive, non-transferable, limited right to access LAWPLUS™ at such times as LAWPLUS™ is generally available, and to electronically deliver (or "upload") pleadings and other legal documents ("Documents") to LAWPLUS™ for delivery to any Subscribers to the LAWPLUS™ system. LAWPLUS™ also grants the County a non-exclusive, non-transferable, limited license to access, use, store, search, receive, and print any Documents that are made available to the County on LAWPLUS™. Except as otherwise provided herein, this license includes the right to download and store Documents on storage devices maintained under the control of the County, to create printouts of Documents and to distribute printouts to any persons requesting copies of same, with or without charge, as the County may elect.

3. Permitted Access to and Use of LAWPLUS™ Software

From time to time, LAWPLUS™ shall make available to the County certain software ("Software"). The County acknowledges that all such Software, including new or modified versions thereof and any user documentation therefor, is copyrighted information and constitutes a confidential trade secret of LAWPLUS™. Accordingly, the County agrees to

use commercially reasonable efforts to keep confidential all non-public materials and information provided to the County by LAWPLUS™ relating to the LAWPLUS™ Software. Under the terms of this Agreement, the County may only make the LAWPLUS™ Software available to (A) the County's District Clerk, employees and other authorized agents, (B) paralegals, secretaries, and legal assistants on staff or otherwise affiliated with the County, (C) third-party consultants and other independent contractors performing services for the County, and (D) any other governmental bodies lawfully requesting or requiring access to the LAWPLUS™ information and filing network. Unauthorized copying of the Software, including software that has been modified, merged or included with the Software, or of any of the written materials associated therewith is expressly forbidden. The County may not sublicense, assign or transfer any part of this license or the Software to anyone except as provided in this Agreement, and acknowledges that any such attempt to sublicense, assign or transfer any such rights, duties or obligations except as expressly provided for in this Agreement would be void.

4. Enhancements

LAWPLUS™ shall use reasonable efforts to timely provide the County with any enhancements, upgrades, environmental upgrades, fixes, modifications, improvements, additions to, new versions or releases of or derivative works of the LAWPLUS™ Software (collectively, the "Enhancements") to the LAWPLUS™ Software as soon as practicable after such Enhancements become available at no cost to the County. An environmental upgrade is any upgrade or program that operates on a different hardware platform or operations system or environment than the existing or any future version of the LAWPLUS™ Software.

5. Equipment and Training

From time to time, LAWPLUS™ will make available to the County and its District Clerk certain equipment ("Equipment") for use in connection with the LAWPLUS™ electronic filing system. In addition, LAWPLUS™ will provide a reasonable amount of training to the County, its District Clerk, and other County personnel at no cost to the County.

All Equipment furnished by LAWPLUS™ shall remain the sole and exclusive property of LAWPLUS™, and the County shall not take any action which may, directly or indirectly, impair the value of the Equipment or LAWPLUS'™ right, title and interest therein. The County agrees that all such Equipment shall promptly be returned to LAWPLUS™ upon termination of this Agreement, for whatever reason.

6. Term and Termination

This Agreement shall become effective on the date first set forth hereinabove and shall continue in force until terminated by either party, with or without cause, by giving at least 30 days prior written notice of termination to the other party.

7. Rights in Documents

Both LAWPLUS™ and the County shall have the right to distribute copies of any Documents publicly-filed with the County's District Clerk to members of the general public. Except for the license granted herein, all right, title and interest in non-public Documents, in all languages, formats and media throughout the world, including all copyrights therein, are and shall continue to be the exclusive property of LAWPLUS™ and other contributors of such Documents. In the event of termination of this agreement, LAWPLUS™ shall provide the Court with an electronic copy of all publicly filed documents filed through the LAWPLUS™ system with the Court. Such electronic copies shall be in an industry-standard format acceptable to the County.

8. Charges

LAWPLUS™ shall provide its services to the County and its District Clerk free of charge. LAWPLUS™ shall, however, charge Subscribers and third parties for its services.

9. Filing Fees and Other County Fees

LAWPLUS™ shall not be responsible for payment of any filing or other fees owed to the County or its District Clerk. Payment of any such fees shall be the sole responsibility of the Subscriber who forwards the Document to LAWPLUS™ for transmission and filing with the Clerk of the County.

10. The County's Responsibility for Certain Matters

The County shall be solely responsible for all access to and use of LAWPLUS™, Documents and Software by the County and its personnel (including, without limitation, the Clerk) or by means of the County's equipment or use of the County's LAWPLUS™ password(s), whether or not the County has knowledge of or authorizes such access or use.

11. Equipment Hardware Warranty

LAWPLUS™ warrants that it will use reasonable efforts to maintain any Equipment supplied to the County or its District Clerk by LAWPLUS™ in connection with this Agreement in good operating condition. The County shall be billed only for damage to and repair, replacement, or maintenance of Equipment that apparently results from misuse, abuse, theft or similar willful or negligent cause, normal wear and tear excepted.

12. Express Software Warranty

LAWPLUS™ warrants that its Software will be free from defects in design, materials, and workmanship, under normal use, and that LAWPLUS™ will either repair or replace free of charge any LAWPLUS™ Software that fails to comply with this express warranty.

13. DISCLAIMER OF ALL OTHER WARRANTIES AND LIMITATION OF LIABILITY

LAWPLUS™ SERVICES, DOCUMENTS, SOFTWARE, AND EQUIPMENT ARE PROVIDED "AS IS," WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN PARAGRAPHS 11 AND 12 OF THIS AGREEMENT). LAWPLUS™ EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF PERFORMANCE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. LAWPLUS™ MAKES NO WARRANTY CONCERNING THE ACCURACY OR COMPLETENESS OF THE INFORMATION IN RECORDS AVAILABLE ON THE SERVICE, NOR ANY WARRANTY THAT ANY PLEADINGS, MAIL OR OTHER DOCUMENTS ACTUALLY WILL BE RECEIVED AND READ BY THEIR INTENDED RECIPIENTS. LAWPLUS™ DOES NOT WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED OR ERROR FREE OR THAT THE SOFTWARE WILL BE ERROR FREE; NOR DOES LAWPLUS™ MAKE ANY WARRANTY AS TO THE RESULTS TO BE OBTAINED FROM USE OF THE SERVICE OR THE SOFTWARE OR EQUIPMENT. THE COUNTY'S EXCLUSIVE REMEDY, AND LAWPLUS™ MAXIMUM LIABILITY HEREUNDER, IF ANY, FOR ANY CLAIM(S) FOR DAMAGES AGAINST LAWPLUS™, WHETHER BASED IN CONTRACT OR TORT OR OTHERWISE, SHALL BE STRICTLY LIMITED TO CANCELLATION OF THIS AGREEMENT ON THIRTY (30) DAYS NOTICE. FURTHER, LAWPLUS™ SHALL HAVE NO LIABILITY WHATSOEVER TO ANY PARTY FOR ANY CLAIM(S) RELATING IN ANY WAY TO (i) THE COUNTY'S INABILITY OR FAILURE TO TIMELY ACCESS, TRANSMIT, FILE, SERVE, SEARCH, RECEIVE, OR RETRIEVE DOCUMENTS, OR (ii) FOR ANY CLAIMED LOST PROFITS OR OTHER CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, INDIRECT OR SPECIAL DAMAGES RELATING IN WHOLE OR IN PART TO THE COUNTY'S RIGHTS HEREUNDER, OR USE OF, OR INABILITY TO USE, THE LAWPLUS™ ELECTRONIC FILING SYSTEM OR DOCUMENTS, EVEN IF LAWPLUS™ HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

14. Time Limitation on Asserting Claims

No claim, regardless of form, which in any way arises out of or relates to the services provided or to be provided under this Agreement, or the use of, or inability to use LAWPLUS™ or Documents, Software, or Equipment connected therewith may be made, nor action based upon such claim brought, by any party hereto more than two (2) years after the basis for asserting the claim is discovered or should have been discovered by the party desiring to assert it.

15. Violation of Laws

LAWPLUS™ is not responsible for any misuse of information on the system. For example, but not by way of limitation, the use of database listings containing information on individuals in connection with transactions involving a consumer as defined in the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., is prohibited by law. In addition, accessing, altering, interfering with or disclosing electronic mail of others without their prior consent is also prohibited by law. (*See, e.g.*, 18 U.S.C. 2701, *et seq.*) A number of other laws and regulations also have an impact on the improper alteration, use and transmission of Documents and other data, and the County is advised to consider such laws and regulations in connection with the County's use of the service and Documents.

16. Risk of Loss

Except as specifically provided herein, as of the date of delivery of any Equipment and while the County or its District Clerk is in possession of the Equipment, the County assumes all risk of loss and liability, whether or not covered by insurance, for any damage to or loss of Equipment or for property damage or personal injury arising out of or related to the Equipment provided hereunder.

17. Copyright Infringement

LAWPLUS™ is not responsible for any claimed infringement of any copyright that may result from the distribution to anyone of any material transmitted by or through the County or its District Clerk to LAWPLUS™ . Furthermore, the County represents and warrants to LAWPLUS™ that no material transmitted or communicated to LAWPLUS™ or in any other manner placed on the LAWPLUS™ network by or through the County shall contain any copyrighted material that LAWPLUS™ is not authorized to distribute or publish.

18. Defamation, Libel, and Slander

LAWPLUS™ is not responsible for any defamation, libel or slander that may result from the distribution of any material provided by or through the County or its District Clerk. The County hereby represents and warrants to LAWPLUS™ that no nonprivileged defamatory, slanderous, or libelous material will be transmitted or communicated by or through the County to LAWPLUS™.

19. Misdelivery

With respect to delivery of Documents transmitted to LAWPLUS™, LAWPLUS™ is responsible only for the electronic or facsimile distribution of such Documents as instructed by the County, subject to availability of telephone and other electronic transmission lines and facilities and Equipment. LAWPLUS™ is not responsible for inadvertent misdelivery of Documents or for failure to transmit or deliver any item when any designated recipient's electronic or facsimile transmission lines or equipment are busy or inoperative.

20. Confidentiality

LAWPLUS™ has no control over the contents of any transmission made on the LAWPLUS™ system. Accordingly, LAWPLUS™ is not responsible for any claimed loss of privilege or other claimed injury due to disclosure of allegedly confidential or privileged information or Documents to the County, LAWPLUS™ Subscribers, or third parties.

21. Limitations on Liability

In no event will LAWPLUS™ be responsible for any losses or damage allegedly resulting in whole or in part from: (i) any problems relating to telephone lines or other transmission or receiving devices or equipment not entirely within LAWPLUS™ exclusive control; (ii) unavailability of telephone lines or other electronic transmission lines or equipment (including but not limited to all LAWPLUS™ telephone or electronic transmission lines being in use) that results in the inability to reach LAWPLUS™ for the purpose of document transmission or receipt; (iii) transmission errors, whether or not resulting from the purported negligence, gross negligence or wilful act of LAWPLUS™; (iv) any alteration or destruction of material transmitted through the LAWPLUS™ system; or (v) alteration or destruction of information on the County's computer system or elsewhere resulting from the transmission of computer "viruses" or other damaging or destructive software or software components through the LAWPLUS™ network.

22. Arbitration

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") as such rules may be modified herein or as otherwise agreed by the parties in such controversy, and judgment upon the award rendered by the arbitrator may be entered in any Court having jurisdiction thereof. The forum for arbitration shall be Houston, Texas and the governing law for such arbitration shall be the laws of the State of Texas. Following thirty (30) days' notice by any party of intention to invoke arbitration, any dispute arising under this Agreement and not mutually resolved within such thirty (30) day period shall be determined by a single arbitrator upon which the parties agree, or, if the parties cannot agree on a single arbitrator within five (5) business days following such thirty (30) day period, then by a single arbitrator selected by the AAA as provided below, which arbitrator shall be selected for each such controversy so arising hereunder. In the event it is necessary to proceed with an arbitrator selected by the AAA in order to resolve any controversy arising hereunder, then either party to the arbitration proceeding may apply to the AAA for the appointment of arbitrators to be selected by the parties to the arbitration from a list of ten (10) qualified potential arbitrators supplied by AAA, which shall include a resume of qualifications, background and experience. Each arbitrator must have had at least five (5) years experience in the area of the issue proposed for arbitration. For a period of fifteen (15) days after the AAA's list is delivered to a party, such party shall have the right to strike four (4) names from the list of arbitrators and the

AAA shall pick one (1) arbitrator from the names not stricken, who shall be the arbitrator hereunder. Any party who is unable or unwilling to so strike a name timely shall forfeit his right to participate in the selection process. If a selected arbitrator is unable or unwilling to act, or if for any other reason an appointment of the arbitrator cannot be made from the list submitted to the parties by the AAA, the AAA may be requested to submit another list of potential arbitrators and the same procedures shall apply. If the arbitrator is not appointed from the second list submitted by AAA, then any party, on behalf of all the parties, may request such appointment by the United States District Judge for the Federal District which includes Houston, Texas, who is then senior in service (acting as an individual and not in his judicial capacity). In the event of any subsequent withdrawal, by death, incapacity or resignation, of an arbitrator, the AAA may be requested to supply a list of three qualified arbitrators and each party shall have the right to strike one name from the list and the arbitrator not stricken shall be the replacement arbitrator; if, for any reason, more than one arbitrator's name remains on the list, the replacement arbitrator shall be chosen by AAA. The arbitrator or arbitrators shall be guided, but not bound, by the Federal Rules of Evidence and by the discovery rules of the Federal Rules of Civil Procedure. Any discovery shall be limited to information directly relevant to the controversy or claim in arbitration. Such arbitrator shall determine the matters submitted to it pursuant to the provisions of this Agreement and render a decision thereon no later than sixty (60) days after such arbitrator has been appointed. The action of the arbitrator shall govern and his decisions in writing shall be final, nonappealable, and binding on the parties hereto. Each party shall pay costs of the arbitration as allocated by the arbitrator in his decision.

23. Force Majeure

LAWPLUS™ performance hereunder is subject to interruption and delay due to causes beyond its reasonable and sole control such as acts of God, acts of any government, war or other hostility, civil disorder, the elements, fire, explosion, power failure, equipment failure, transmission line or communications failure or unavailability, industrial or labor dispute, inability to obtain necessary supplies and the like.

24. Notices

Except as otherwise provided herein, all notices hereunder may be given to the County either online or in writing addressed to the attention of: the Honorable _____, and to LAWPLUS™ in writing at 4335 Laurel, Beaumont, Texas 77707, Attention: James L. Hayes, II, President.

25. ENTIRE AGREEMENT

IT IS EXPRESSLY AGREED BY THE COUNTY, AS A MATERIAL CONSIDERATION FOR THE EXECUTION OF THIS AGREEMENT, THAT THIS AGREEMENT IS THE ENTIRE AGREEMENT OF THE PARTIES; AND THAT

THERE ARE AND WERE NO VERBAL REPRESENTATIONS, WARRANTIES, UNDERSTANDINGS, STIPULATIONS, AGREEMENTS, OR PROMISES PERTAINING TO THIS AGREEMENT THAT HAVE NOT BEEN EXPRESSLY INCORPORATED IN WRITING INTO THIS AGREEMENT. THIS AGREEMENT MAY NOT BE ALTERED OR AMENDED EXCEPT BY WRITTEN INSTRUMENT SIGNED BY ALL PARTIES HERETO.

26. Other Provisions

Neither this Agreement nor any part or portion hereof shall be assigned, sublicensed or otherwise transferred by the County without LAWPLUS™ prior written consent. Any provision in any purchase order, voucher, letter or other document that is inconsistent with or adds to the provisions of this Agreement is null and void. Should any provision of this Agreement be held to be void, invalid, unenforceable or illegal by a Court, the validity and enforceability of the other provisions shall not be affected thereby. Failure of any party to enforce any provision of this Agreement shall not constitute or be construed as a waiver of such provision or of the right to subsequently enforce such provision. The headings and captions contained in this Agreement are inserted for convenience only and shall not constitute a part hereof.

IN WITNESS WHEREOF, the parties hereto have signed this document below.

MONTGOMERY COUNTY, TEXAS

By: _____

Name: Alan B. Sadler
Title: County Judge

LAWPLUS, L.L.C.
a Texas Limited Liability Company

By: _____

Name: James L. Hayes, II
Title: President

TAB 2

LEXSEE 2002 U.S. DIST. LEXIS 12367

ENERGY INVESTMENT PARTNERSHIP NO. 1, a Texas partnership, ET AL., Plaintiffs, VS. SPROULE ASSOCIATES, INC. and RYDER SCOTT COMPANY, Defendants.

CIVIL ACTION NO. 3:00-CV-1252-G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2002 U.S. Dist. LEXIS 12367

July 8, 2002, Decided
July 8, 2002, Filed; July 9, 2002, Entered

DISPOSITION: [*1] Claims against Defendants Sproule and Ryder Scott dismissed without prejudice to the plaintiffs' refiling them in state court.

COUNSEL: For ENERGY INVESTMENT PARTNERSHIP NO 1, THOMAS O HICKS, JOHN R MUSE, CHARLES W TATE, JACK D FURST, LAWRENCE D STUART, JR, MICHAEL J LEVITT, DAVID B DENIGER, DAN H BLANKS, plaintiffs: Gary J Cruciani, Attorney at Law, McKool Smith, Dallas, TX USA.

For SPROULE ASSOCIATES INC, defendant: Gary E Smith, Attorney at Law, Graham Bright & Smith, Dallas, TX USA.

For RYDER SCOTT COMPANY, defendant: Jeffrey R Elkin, Attorney at Law, Porter & Hedges, Houston, TX USA.

JUDGES: A. JOE FISH, CHIEF JUDGE.

OPINION BY: A. JOE FISH

OPINION

MEMORANDUM ORDER

On June 9, 2000, the plaintiffs filed this lawsuit against Jeffrey Clarke ("Clarke"), Larry L. Keller ("Keller"), Eddie M. LeBlanc III ("LeBlanc"), Anne Marie O'Gorman ("O'Gorman"), R.M. "Rick" Pearce ("Pearce"), and Patrick S. Wright ("Wright"). The plaintiffs alleged that these defendants violated the federal securities laws and also that they committed common law fraud and negligent misrepresentation. On July 12, 2001, the plaintiffs amended their complaint and added Sproule [*2] Associates, Inc. ("Sproule") and Ryder Scott Company ("Ryder Scott") as defendants. On July 3, 2002, this court granted a joint motion to dismiss with prejudice the plaintiffs' claims against the individual defendants. Thus, the only claims remaining in this case are for common law fraud, negligent misrepresentation, and conspiracy against Sproule and Ryder Scott. All of these claims arise under state law. *See* Plaintiffs' First Amended Complaint at 26-29, particularly paragraphs 62, 65, 68, and 71.

Federal court jurisdiction exists over an entire action, including state law claims, when the federal and state law claims "'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349,

98 L. Ed. 2d 720, 108 S. Ct. 614 (1988) (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)). Yet a federal court's exercise of supplemental jurisdiction over state law claims is a "doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726. **[*3]** Consequently, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Carnegie-Mellon*, 484 U.S. at 350.

When the federal claims are dismissed before trial and only state law claims remain, the balance of factors to be considered under the supplemental jurisdiction doctrine weigh heavily in favor of declining jurisdiction; therefore, the federal court should usually decline the exercise of jurisdiction over the remaining claims. *Id.* at n.7. According to the Fifth Circuit, "our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed." *Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) (citing *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989)).

In the case before the court, the federal claims against the individual defendants have been dismissed and only state law claims against the corporate defendants remain. Because **[*4]** the federal claims were dismissed before trial, the factors of judicial economy, convenience, fairness, and comity suggest that this court ought to decline jurisdiction over the remaining state law claims against Sproule and Ryder Scott. *See* 28 U.S.C. § 1367(c)(3). Accordingly, the claims against Sproule and Ryder Scott, all of which are governed exclusively by state law, are **DISMISSED** without prejudice to the plaintiffs' refiling them in state court.

SO ORDERED.

July 8, 2002.

A. JOE FISH

CHIEF JUDGE

JUDGMENT

This judgment is entered pursuant to F.R. CIV. P. 58 and the memorandum order of this date. For the reasons stated in that memorandum order, it is **ORDERED** that this case is **DISMISSED** without prejudice to the state law claims remaining being prosecuted in a state court.

July 8, 2002.

A. JOE FISH

CHIEF JUDGE

TAB 3

LEXSEE 1994 DEL. LEXIS 95

IN THE MATTER OF THE PETITION OF THE WHITE LUNG ASSOCIATION; LELA BONNEY; RICHARD WHITTINGTON; ELLA GEORGE, Guardian for CHRISTINA WARD, a minor, and WELDON PIANKA; FOR A WRIT OF PROHIBITION.

No. 21, 1994

SUPREME COURT OF DELAWARE

1994 Del. LEXIS 95

February 28, 1994, Submitted
March 16, 1994, Decided

SUBSEQUENT HISTORY: [*1] Certified Copy April 5, 1994. Released for Publication April 7, 1994.

DISPOSITION: DENIED.

JUDGES: Before MOORE, WALSH, and HOLLAND, Justices.

OPINION BY: BY THE COURT; JOSEPH T. WALSH

OPINION

ORDER

This 16th day of March, 1994, it appears that:

(1) Pending before the Court is a petition for a Writ of Prohibition. The individual petitioners are plaintiffs in various asbestos personal injury cases ("the asbestos cases") pending in the Superior Court. The corporate petitioner, White Lung Association, Inc. ("White Lung"), is a non-profit charitable corporation which claims to operate "to educate the general public in the hazards of asbestos." The petition is directed against Superior Court President Judge Henry duPont Ridgely, Superior Court Judge Richard S. Gebelein and Sharon Agnew, the Prothonotary for New Castle County. Petitioners seek to prevent the implementation of an order entered on January 7, 1994, by Judge Gebelein, who is presently assigned the responsibility for trial of the asbestos cases in the Superior Court. That order requires that pleadings and other documents in the asbestos cases be filed electronically using the Complex Litigation Automated [*2] Docket ("CLAD") system. CLAD is a computer-driven automated system of docketing designed and operated by Mead Data Central ("Mead") under contract with the Superior Court. The CLAD system has been in use in the Superior Court since July 1, 1991, when it was first utilized in certain complex cases involving insurance coverage for toxic torts.

(2) Petitioners contend that the respondents in extending CLAD to the asbestos cases have exceeded their authority in the following respects: (1) Judge Gebelein's single judge order violates 10 *Del. C.* § 561, which requires all Superior Court judges to participate in rule adoption; (2) payment of CLAD users fees to Mead, rather than to the State Treasury, violates 29 *Del. C.* § 9007A; (3) members of the public, including White Lung, will be denied access to public records unless a special fee is paid to Mead, (4) the CLAD contract awarded to Mead violated the State competitive bidding statute, 29 *Del. C.* § 6903; and, (5) requiring a member of the Bar to purchase specific computer hardware to access CLAD improperly restricts the practice of law.

(3) Respondents have answered the petition and deny that the CLAD implementation in the asbestos [*3] cases is improper or unauthorized. They also contend that the petition should be dismissed since the jurisdiction of the Court to enter the January 7 order has not been seriously questioned. Respondents have submitted affidavits of Judge Gebelein, Sharon Agnew, and Thomas Ralston, the Superior Court Administrator, setting forth the circumstances under which CLAD has been implemented in the asbestos cases. Essentially, the affiants deny that the implementation was unauthorized or arbitrary.

(4) Under the Delaware Constitution, this Court is authorized to issue extraordinary writs, including writs of prohibition, as an exercise of its original jurisdiction. Del. Const. art. IV, § 11(6); Supreme Court Rule 43. A writ of prohibition, when directed to a lower court, is designed to prevent a tribunal from exceeding its jurisdiction. *Petition of Hovey,* Del. Supr., 545 A.2d 626, 628 (1988). The writ will not issue unless it is manifest on the record presented that the respondent court or judicial officer lacks jurisdiction or authority to proceed in the course of action under review. *Matushefske v. Herlihy,* Del. Supr., 59 Del. 117, 214 A.2d 883 (1965).

[*4] (5) The CLAD system was adopted in the Superior Court pursuant to Superior Court Civil Rule 79.1 as a pilot program on an interim basis. The rule, effective July 1, 1991, embraced only certain designated civil actions involving insurance coverage claims. The rule imposes a series of user charges, including a one-time assessment of $ 200 for each case assigned and a $ 20 charge for passwords to enter the system. Under Judge Gebelein's order of January 7, 1994, these charges were waived for the asbestos cases. However, the parties are required to pay to Mead the standard CLAD charges of a $ 4.00 fee for uploading documents and $ .55 per page for downloading documents to a hard drive or printer. In order to access the CLAD system, a party, or its counsel, must use a computer, hard drive, modem and printer.

Rule 79.1(5) provides that when the President Judge of the Superior Court "determines that it is appropriate . . . for any other civil case to commence participation in CLAD, he shall direct the Judge assigned to the case to issue [an appropriate] order." Although it appears that President Judge Ridgely did not enter his authorizing order until January 13, 1994, six days after Judge [*5] Gebelein's order, we view the January 13, 1994, order as sufficient notification of the CLAD designation. Even if Judge Gebelein's January 7, 1994, order be deemed premature, it clearly had been authorized by the time petitioners filed their petition in this Court on January 28, 1994.

It thus appears that the January 7, 1994, order assigning the asbestos cases to CLAD is an authorized judicial act directed to a matter over which a court "admittedly has cognizance." *Petition of Hovey,* 545 A.2d at 628. Accordingly, there is no basis for this Court to issue a writ of prohibition to restrict the Superior Court from proceeding to implement CLAD in the further processing of asbestos cases.

(6) Although it appears on the face of the record that the actions of the Superior Court under review are clearly within its jurisdictional authority, petitioners seek to invalidate the assignment by alleging certain deficiencies in the assignment process. These claims do not affect the Superior Court's jurisdiction, however, and are not reviewable within the scope of a prohibition proceeding. In fairness to the respondents, however, we note the lack of merit in these contentions. [*6] Members of the public are permitted access to all court records on CLAD by the Prothonotary without charge. Since the contract awarded to Mead was under $ 5,000, it did not violate State bidding laws. Further, payments to Mead for use of its facilities are not required to be paid to the State Treasurer. Finally, we do not view designation of CLAD as a restriction on the practice of law. 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.

NOW, THEREFORE, IT IS ORDERED that the petition for Writ of Prohibition be, and the same hereby is,

DENIED.

BY THE COURT:

Joseph T. Walsh

Justice

TAB 4

Not Reported in F.Supp.2d, 2005 WL 1155149 (S.D.Tex.)
(Cite as: 2005 WL 1155149 (S.D.Tex.))

United States District Court,
S.D. Texas, Brownsville Division.
PAN AMERICAN MARITIME, INC., Plaintiff,
v.
ESCO MARINE, INC., et al. Defendants.
No. C.A. B-04-188.

May 10, 2005.

Lynne C. Rentfro, Dallas, TX, for Plaintiff.

Jose Rolando Olvera, Jr., Brownsville, TX, for Defendants.

OPINION AND ORDER

TAGLE, J.

*1 BE IT REMEMBERED that on May 10, 2005, the Court GRANTED Defendant's Motion to Dismiss [Dkt. No. 14]; and DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

I. Factual Background

Plaintiff brings this civil action under 18 U.S.C. § 1962(a) and (c) [FN1] of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See* 18 U.S.C. § 1961, *et seq.* The sole basis for federal jurisdiction rests with Plaintiff's RICO claims, *see* 18 U.S.C. § 1964(a), and neither diversity jurisdiction nor any other form of jurisdiction exists that would grant this Court authority to hear this action. Plaintiff additionally brings state causes of action for conversion and tortious interference with contracts. *See* Pl's Cmplt. ¶¶ 48-57. Accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, *see Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996), the Court provides the following factual-recitation. [FN2] Plaintiff Pan American Maritime, Inc. ("Plaintiff" or "Pan American"), is a Texas corporation that leases and uses land at the Port of Brownsville ("the Port") for the salvaging and breaking-up of barges and other vessels. Pan American subleases the land from Gulmar, Inc. Gulmar, in turn, leases the land from the Brownsville Navigational District ("BND"). Defendant Esco Marine, Inc. ("Defendant" or "Esco") is also a Texas corporation. Esco leases from the BND the land adjacent to Pan American's land. Defendants Richard Jaross, Andrew Jaross, and Emilio Sanchez are employees of Esco.

FN1. Plaintiff's complaint references 18 U.S.C. §§ 1964(a) and (c). Section 1964(a) grants this Court jurisdiction to entertain violations of section 1962, and 1964(c) enumerates the remedies available for violations of RICO and grants any injured person the right to bring a private cause of action against the alleged offender(s).

FN2. Plaintiff mentions in its response that Defendants provide an alternative factual recitation. In this opinion, the Court only considers Plaintiff's allegations contained in its complaint and attached letter exhibits.

Plaintiff alleges that in mid 2004, Esco began to deposit substantial amounts of soil on its land, which it subleased from Gulmar. Plaintiff contends Defendant Andrew Jaross trespassed on Gulmar's land in an attempt to threaten Gulmar and Plaintiff. This alleged trespass was apparently part of Defendants' efforts to warn Plaintiff against interfering with Esco's business and expansion onto the land leased by Gulmar and subleased by Pan American. According to Plaintiff, Defendants sent surveyors onto its land who placed markers delineating the land boundaries. Andrew Jaross informed Gulmar that Esco owned light poles, two buildings that were living quarters, and other materials located on the land occupied by Gulmar and Pan American.

Plaintiff attaches three fax letters as exhibits to its complaint. In essence, these letters outline a dispute between the parties concerning both the land boundaries between the tenants and the ownership of personal property located on the disputed land. According to these fax letters, Esco took over the 8.56 acres

of land adjoining the western section of Plaintiff's land. The letters attached to Plaintiff's complaint explain Esco's position on the land dispute and state Esco expanded onto Plaintiff's land after the Port of Brownsville provided notification to Plaintiff or Gulmar and after the Board of Directors approved the expansion. *See* Ex. A. Esco indicated in its second fax letter that BND had previously asked Plaintiff, or Gulmar, to remove certain items from the property. These items, according to Esco, were never removed, and Esco understood that everything on the property would convey to them. Esco indicated that several items, such as pieces of iron, were removed from Esco's property and placed on Pan American's property, and conversely that pieces of fiber glass and other waste were moved from Pan American's side of the property and placed on Esco's property. Esco indicated in the letters that it would allow Plaintiff to remove two modules [FN3] if Plaintiff removed them within 10 days, gave Esco the option to buy the modules at $15,000.00 each, with the offer remaining open for 12 months, and removed all other materials and debris from Esco's property. In a final fax letter, Esco requested that Plaintiff immediately stop removing the light towers located on the 8.56 acres of land adjoining Plaintiff's property. Esco stated the towers are fixed improvements that cannot be removed under the terms of Gulmar's former lease with the Port of Brownsville. Esco understood that when Gulmar abandoned the property, the land and all the improvements reverted to the Port of Brownsville, and Esco is now the legal tenant of both the land and the property affixed to it.

> FN3. The Court presumes these two modules are the same modules referenced in Plaintiff's complaint as living quarters valued at $100,000.00. *See* Pl's Cmplt. ¶¶ 2(i) and (ii).

*2 In response to the above described controversy, Pan American filed suit alleging five causes of action under the RICO statute. Plaintiff cites seven predicate acts as the basis of its RICO suit: (1) theft of the living quarter modules and light poles in violation of Texas Penal Code §§ 31.03(e)(6) and (e)(5); (2) the intentional and knowing operation of heavy equipment dangerously close to an occupied building warehouse, which caused damages of $1,000,000.00 in violation of Texas Penal Code § 28.03; (3) the knowing and intentional digging in an area known to have water lines and intentional destruction of water lines on the property in violation of Texas Penal Code § 28.03; (4) the attempted assault of Plaintiff's employee by using a bulldozer as a deadly weapon in an attempt to kill, maim, or seriously injure the employee in violation of Texas Penal Code § 15.01(b)(d); (5) the knowing and intentional flooding of Plaintiff's land by elevating Esco's land, causing damage in the amount of $2,000,000.00 in violation of Texas Penal code § 28.03; (6) the intentional acting in concert and conspiring to carry on criminal activities in violation of Texas Penal Code § 71.01(a)(b); and (7) the intentional acting in concert and conspiring to engage in deadly conduct by attempting assault on Plaintiff's employee with a bulldozer in violation of Texas Penal Code § 71.02(a)(1). *See* Pl's Cmplt. ¶¶ 2-8.

II. Rule 12(b)(6) and 12(b)(1) Standards

A motion to dismiss for failure to state a claim is "viewed with disfavor and is rarely granted." *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir.2000); *Lowrey v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir.1997), quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982). Fifth Circuit law dictates that a district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000). A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *See also Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986). The Fifth Circuit has held, however, that dismissal is appropriate "if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995) (citation omitted).

The standard governing a motion to dismiss under Rule 12(b)(1) is similar to that of 12(b)(6). Pursuant to 12(b)(1), district courts have "the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the

complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). *See also Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir.2001); *Kelly v. Syria Shell Petroleum Development*, 213 F.3d 841, 845 (5th Cir.2000) (citations omitted); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996).

III. Parties' Arguments-Failure to State a Claim and Lack of Subject Matter

Jurisdiction

***3** Defendant asserts this Court lacks subject matter jurisdiction because Plaintiff fails to allege facts that constitute racketeering activity, nor has Plaintiff pled facts listed as offenses in 18 U.S.C. § 1961. Additionally, Defendant argues Plaintiff's causes of action are centered on disputes related to real and personal property to which Plaintiff believes it is entitled because it is a sublessee of a prior tenant. Moreover, Defendant argues the Plaintiff lacks standing because its failure to allege conduct constituting racketeering activity means Plaintiff also cannot allege an injury stemming from a violation of RICO. Alternatively, Defendant argues Plaintiff failed to state a claim for which relief may be granted because it has not alleged facts supporting the elements of a RICO claim. Furthermore, any statements made in the complaint alleging racketeering activity are legally conclusory, and do not sufficiently allege a pattern of racketeering.

Plaintiff's response addresses Defendant's arguments in a cursory manner. Rather than respond to Defendant's arguments, Plaintiff simply states 18 U.S.C. § 1964(c) provides district courts jurisdiction to hear civil RICO actions. Plaintiff does not, for example, address whether the predicate acts it alleges qualify as underlying state offenses for the purpose of a RICO claim. Plaintiff merely cites to various sections of its complaint for support that Defendant's alleged illegal actions have damaged its business. Plaintiff neglects, however, to address whether based on the factual allegations made, its claims fail as a matter of law. For example, if the predicate acts alleged do not constitute criminal offenses for the purpose of a RICO claim, the complaint must be dismissed.

IV. Standard for Alleging a RICO Claim

Congress enacted RICO to eliminate the infiltration of organized crime and racketeering activities into legitimate business. *See Beck v. Prupis*, 529 U.S. 494, 496, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) ("Congress enacted ... RICO ... for the purpose of seek[ing] the eradication of organized crime in the United States.") (internal quotations omitted); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C.Cir.1990) (providing legislative history). "[E]very act of corruption or petty crime committed in a business setting" does not give rise to a claim under RICO. *Yellow Bus Lines*, 913 F.2d at 954. Instead, the RICO statute was intended to address criminal activity that is repetitive and long-term such as the use of force, threats, enforcement of illegal debts, and corruption in the operation of business. *Id.*

Plaintiff asserts violations of §§ 1962(a), (c), and (d) of RICO. The Fifth Circuit "reduced th[ese] subsections to their simplest terms:"

> (a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;
>
> ...
>
> (c) a person who is employed by or associated with an enterprise cannot conduct the affairs of the enterprise through a pattern of racketeering activity; and
>
> ***4** (d) a person cannot conspire to violate subsections (a), (b), or (c).

St. Paul, 224 F.3d at 439 (citing *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.1995)).

RICO imposes civil and criminal liability on persons who use or invest income derived from, acquire or maintain control of, or engage in the conduct of an enterprise through a pattern of racketeering activity, or who conspire to do any of these acts. *See* 18 U.S.C. § 1962. "To state a civil RICO claim under section 1962, a Plaintiff must allege: (1) the conduct (2) of an enterprise (3) through a pattern (4) of rack-

eteering activity." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir.1998) (citing *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)).

Preliminarily, however, a Plaintiff must establish standing by alleging a violation of the RICO statute, an injury to its business or property and a causal connection to the injury by the violation of section 1962. *See* 18 U.S.C. § 1964(c); *See also Price*, 138 F.3d at 606 (citing *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5th Cir.1995) ("The standing provision of civil RICO provides that '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains." '). Only persons injured "by reason of" the commission of certain predicate acts have standing to bring suit. *See Sedima*, 473 U.S. at 496. Additionally, in the Fifth Circuit, a person is considered injured "by reason of" a RICO violation if the predicate acts constitute factual (but for) causation and legal (proximate) causation of the alleged injury. *See Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir.1989).

"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 offenses that qualifying as predicate acts to a RICO claim: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene material, or drug offenses. *See* 18 U.S.C. § 1961(1). Thus, only crimes prohibited in state statutes and listed in section 1961(1) can serve as predicate offenses for the purpose of a RICO claim. *See Ennis v. Edwards*, 2003 WL 1560113, at *4 n. 16 (E.D.La. Mar.25, 2003). Moreover, " '[a] pattern of racketeering activity requires two or more predicate acts and 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).

V. Analysis

*5 Plaintiff's complaint fails for two main reasons. First, the predicate acts alleged do not involve one of the predicate acts listed in the RICO statute. *See S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (holding that standing to sue under RICO only exists if Plaintiff's business or property has been injured by specified predicate acts, and Plaintiff may only recover to the extent he has been injured by the conduct constituting the violation). Second, Plaintiff does not adequately allege a pattern of racketeering activity.

A. Racketeering Activity-Predicate Acts

Plaintiff alleges various violations of state law as predicate offenses to its RICO claim: theft of living quarters modules and light poles, *see* Tex. Penal Code §§ 31.03(e)(5) & (e)(6); criminal mischief for the damage, destruction, and tampering of property, *see* Tex. Penal Code § 28.03; criminal attempt to commit an aggravated offense, *see* Tex. Penal Code § 15.01(b); and conspiracy to commit a criminal offense, *see* Tex. Penal Code § 71.01(b). Defendant argues that none of these offenses constitute predicate acts under RICO, and thus Plaintiff has failed to state a claim upon which relief may be granted. The Court agrees.

Predicate acts for racketeering purposes must involve certain specified crimes. As previously mentioned, section 1961(1) enumerates the various state offenses that can serve as predicate offenses for the purpose of a RICO claim. A racketeering activity means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or drug offenses. *See* 18 U.S.C. § 1961(1). Plaintiff provides no response to Defendant's argument that the alleged acts do not qualify as racketeering activity, except to state "[t]he two or more criminal acts that constitute a pattern of racketeering activity within the meaning of RICO are outlined in ¶¶ 2-8 of the Original Complaint." Pl's Response, at p. 4 [Dkt. No. 17].

Courts have consistently held that "acts that constitute theft under state law are not predicate acts for racketeering activity." *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1002 (S.D.Tex.1995) (citing *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F.Supp. 1114, 1136 (E.D.N.Y.1992)); *Jordan v. Berman*, 758 F.Supp.

269, 274 (E.D.Pa.1991); *see also Toms v. Pizzo*, 4 F.Supp.2d 178, 183 (W.D.N.Y.1998) ("[s]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *United States v. Napoli*, 54 F.3d 63, 68 (2d Cir.1995). Plaintiff's other allegations of criminal mischief, attempted assault, and conspiracy to commit these acts also do not constitute predicate offenses for the purpose of establishing racketeering activity. Nor do Plaintiff's allegations involve bribery or extortion. "A Plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering activity related to an enterprise." *Bonton*, 889 F.Supp. at 1002 (citing *King v. Lasher*, 572 F.Supp. 1377, 1382 (S.D.N.Y.1983). Without any predicate acts, Plaintiff cannot establish a pattern of racketeering activity.

B. Pattern of Racketeering Activity

*6 Notwithstanding the fact that Plaintiff has failed to allege any qualifying predicate acts to support its RICO claim, the Court discusses whether Plaintiff has adequately alleged a pattern of racketeering activity. As stated, a "pattern of racketeering activity" requires the Plaintiff to establish at least two predicate acts of racketeering that are related and pose a threat of continued criminal activity. *See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Although two predicate acts are the minimum number of acts required to demonstrate a pattern of racketeering activity, two acts may not be sufficient. *See Sedima*, 473 U.S. at 496 n. 14. Additionally, "[t]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *HJ*, 492 U.S. at 239.

Of the two requirements, relatedness and continuity, the former is the least cumbersome. A Plaintiff must simply show that predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. The continuity requirement is more difficult to define.

In *H.J., Inc. v. Northwestern Bell Telephone*, the Supreme Court held the Plaintiff sufficiently stated a RICO claim when it alleged Northwest Bell sought to influence, in the performance of their duties, members of a state board responsible for determining the rates Northwestern Bell could charge. Plaintiff alleged that over a period of six years, Northwestern Bell in fact caused the commissioners on the board to approve rates for the company in excess of a fair and reasonable amount by making cash payments, and paying for parties, meals, tickets to sporting events, etc. Plaintiff alleged these actions constituted predicate acts under the state's anti-bribery statute and state common law. *See H.J., Inc.*, 492 U.S. at 250. The Supreme Court held the alleged acts, if proven, could satisfy the relationship and continuity requirements of a RICO claim. The Court elaborated:

> The acts of bribery alleged are said to be related by a common purpose, to influence commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise....

Id. at 250.

Thus, continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. " 'The term 'pattern' itself requires the showing of a relationship' between the predicates, ... and of 'the threat of continuing activity.' ' *H.J., Inc.*, 492 U.S. at 240 (citations omitted). " 'it is this factor of *continuity plus relationship* which combines to produce a pattern.' ' *Id.* (citations omitted). As illustrated in the quoted excerpt above, at least three examples of activity that would establish a threat of continued racketeering are: (1) predicate acts inherently involving a distinct threat of long-term criminal activity; (2) an entity that exists for the purpose of engaging in the criminal activity; or (3) predicate acts that constitute the regular way of conducting an on-

going legitimate business. *Id.* at 242-43.

*7 In the present case, Plaintiff mentions in a conclusory manner that the relevant time frame for this action is "on or about 2003 through on or about October 26, 2004." Pl's Cmplt. ¶ 16. Plaintiff does not, however, specify when the predicate acts occurred during that time. Plaintiff has alleged only predicate acts or offenses that were discrete acts or isolated events related to a specific property dispute with no threat of continuity. Nor does Plaintiff present any facts that allude to continued, repeated conduct forming the basis for its RICO claim. In fact, the three fax letters Plaintiff attaches to its complaint only reference the property disputes between the parties in October 2004. Nor does Plaintiff allege the predicate acts repeatedly occurred during a closed period of time. The alleged theft of the living quarter modules and light poles occurred once, and the alleged act was completed. As for the other predicate acts, Plaintiff has not adequately alleged they occurred over the course of a period of time or that they are sufficiently related to one another to constitute a pattern of racketeering. "Short-term criminal conduct is not the concern of RICO." Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1464 (5th Cir.1991); *see also, e.g.,* H.J., 492 U.S. at 241 ("Predicate acts extending over a few weeks or months do not satisfy [the continuity] requirement."); Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1139-40 (5th Cir.1992).

Thus, even assuming Plaintiff has sufficiently alleged "racketeering activity," it has failed to allege the second essential element of a RICO claim-a *pattern* of racketeering activity. The Court finds Plaintiff's allegations of a pattern of racketeering activity, all of which involve Defendants' actions surrounding their alleged taking of certain personal property and assaults, to lack the element of continuity and threat of future criminal activity.

C. Fraud

Plaintiff alleges a scheme to defraud separate from the predicate acts discussed in this opinion and divorced from the causes of action listed in the complaint. In essence, Plaintiff alleges Defendants devised and participated in "a scheme and artifice to defraud and to steal, and for obtaining property by means of false and fraudulent pretenses, representations, and theft, and to conceal thefts by false and fraudulent pretenses, representations, false declarations, obstructions or justice and perjury." Pl's Cmplt. ¶ 17.

If Plaintiff intends to assert a generic fraud claim as a predicate act to its RICO claim, it has failed: "[i]n all averments of fraud, or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). Rule 9(b)'s particularity requirement applies with equal force to a predicate act in a RICO claim. *See* Tel-Phonic Servs., 975 F.2d at 1138; Elliot, 867 F.2d at 880. Plaintiff must allege at a minimum the " 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby." ' Tel-Phonic Servs., 975 F.2d at 1139 (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1297, at 590 (1990)).

***8** Plaintiff's allegations utterly fail to meet the particularity requirements of Rule 9(b).

D. Conspiracy

Plaintiff alleges in its first and second causes of action that Defendants violated 18 U.S.C. § 1962(d), which is a conspiracy violation of RICO. A conspiracy to violate RICO has three elements: "(1) knowledge by the defendant of the essential nature of the conspiracy; (2) the defendant's objective manifestations of an agreement to participate in the conduct of the affairs of an enterprise; and (3) an overt act, which need not be a crime, in furtherance of the conspiracy." Bonton, 889 F.Supp. at 1005 (citing United States v. Sutherland, 656 F.2d 1181, 1187 n. 4 (5th Cir.1981)).

Plaintiff has failed to adequately allege a violation of 18 U.S.C. § 1962(c), which makes it unlawful for "a person ... employed by or associated with an enterprise [to] conduct the affairs of the enterprise through a pattern of racketeering activity." "[I]njury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO ... is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)." Beck v. Prupis, 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). Plaintiff's failure to allege a violation of § 1962(c) is fatal to Plaintiff's conspiracy claim under section 1962(d). Moreover, Plaintiff fails to allege there was an agreement to commit the predicate acts, which is a

core element of a RICO civil conspiracy claim. *See Tel-Phonic Servs.*, 975 F.2d at 1140 (citations omitted).

VI. Lack of Subject Matter Jurisdiction-Standing

Standing is generally a threshold consideration for the court to consider before addressing the merits of a motion to dismiss. As some courts have discussed, however, the RICO standing provision is unique because a "civil plaintiff has standing to assert a civil cause of action only if a violation of § 1962 proximately caused his injuries." *In re Mastercard Int'l, Inc.*, 132 F.Supp.2d 468, 495 (E.D.La.2001). Section 1964(c) lays out the civil Rico standing requirement and provides that only persons who have been injured "by reason of" the commission of predicate acts have standing to bring suit. *See Sedima*, 473 U.S. at 496. In the Fifth Circuit, an injury "by reason of" a RICO violation can only exist if the predicate act constitutes a factual (but for) causation of the alleged injury and the legal (proximate) causation of the alleged injury. *See Price*, 138 F.3d at 607 (holding plaintiffs failed adequately to allege the causation element of RICO standing because "[s]ection 1964(c) requires that a compensable injury be 'by reason of' the defendant's substantive violations ..."); *Ocean Energy II*, 868 F.2d at 744; *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir.1992) ("a plaintiff has statutory standing to bring a claim so long as the defendants' predicate acts constitute both a factual and proximate cause of the plaintiff's alleged injury.").

*9 Normally, whether the Court has subject matter jurisdiction and whether the Plaintiff has failed to state a claim upon which relieve may be granted are separate and distinct matters for the Court to decide. *See, e.g., Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 759 (5th Cir.1989). Moreover, where the Plaintiff has clearly presented claims based in federal law and the allegations are not "clearly concocted for the sole purpose of obtaining federal jurisdiction" or "wholly insubstantial and frivolous," the Court has subject matter jurisdiction over the claims, even if the Court dismisses the claims for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). Many courts, however, have determined that "lack of RICO standing does not divest the district court of jurisdiction over the action, because RICO standing, unlike other standing doctrines, is sufficiently intertwined with the merits of the RICO claim that such a rule would turn the underlying merits questions into jurisdictional issues." *Lerner v. Fleet Bank*, 318 F.3d 113, 116-17 (2d Cir.2003) (affirming "the district court's dismissal of plaintiffs' civil RICO claim because the alleged pattern of racketeering activity was not the proximate cause of plaintiffs' injuries," but doing so "not under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction, ... but rather under Fed.R.Civ.P. 12(b)(6), for failure to state a claim.").

In light of the above standard, it was more expeditious for the Court to first determine whether a § 1962 violation occurred. Plaintiff failed to state a cause of action under §§ 1962(a), (c), and (d) because it did not allege predicate acts supporting an injury "by reason of" a RICO violation. Without such predicate acts leading to an injury, Plaintiff lacks standing to bring this RICO claim. Although this deficiency would normally lead the Court to determine it lacks subject matter jurisdiction to entertain the claim, the Court will instead dismiss the RICO claim under Federal Rule of Civil Procedure 12(b)(6).

VII. Supplemental Jurisdiction

Judicial economy, convenience, fairness to litigants, federalism, and comity are all factors the district court must consider in determining whether it should exercise supplemental jurisdiction over remaining state claims. *See Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir.1992) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (citations omitted). Dismissing state claims after federal claims are dismissed is the general rule. *See id.* at 585.

In *Parker & Parsley Petroleum Co. v. Dresser Indus.*, the Fifth Circuit held a district court abused its discretion when it dismissed federal RICO claims, but refused to surrender jurisdiction over supplemental state claims. 972 F.2d 580 (5th Cir.1992). There, the district court reasoned that "dismissal would be a tremendous financial drain to all the parties as well as a waste of judicial resources." *Id.* at 584. Despite substantial development in the case, the district

court's ruling on a number of discovery matters, and a trial that was only weeks away, the Fifth Circuit determined the district court should not have exercised supplemental jurisdiction because discovery had not been completed, they were not on the eve of trial, and the parties were not ready for trial. *Parker & Parsley Petroleum Co.*, 972 F.2d at 587. The Fifth Circuit noted that "when the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has a 'powerful reason to choose not to continue to exercise jurisdiction.' " *Parker & Parsley Petroleum Co.*, 972 F.2d at 585 (citing *Carnegie-Mellon*, 484 U.S. at 351).

***10** In *Newport Ltd. v. Sears, Roebuck, and Co.*, the Fifth Circuit determined a district court abused its discretion in not retaining jurisdiction after the federal Rico claims were dismissed. In that case, "after four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and according to counsel nearly two hundred thousand pages of discovery production, the declining to hear [that] case on the eve of trial constituted an abuse of discretion." 941 F.2d 302, 307-08 (5th Cir.1991).

In the present case, the Court is dismissing Plaintiff's only federal claim, and no diversity jurisdiction exists. At such an early stage of the proceedings-the Court has not held an initial pretrial conference, nor has it entered a scheduling order-the Court should dismiss without prejudice the state law claims, and thus not exercise its supplemental jurisdiction over the state law claims.

VIII. Conclusion

Plaintiff has failed to sufficiently plead the requisite predicate acts or a pattern of racketeering activity as a basis of its RICO claim. Moreover, Plaintiff failed to plead a conspiracy claim under the RICO statute. As a result, the Court DISMISSES Plaintiff's claims under 18 U.S.C. §§ 1962(a), (c), & (d), and thus GRANTS Defendant's Motion to Dismiss [Dkt. No. 14]. Additionally, the Court DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

S.D.Tex.,2005.

END OF DOCUMENT

TAB 5

LEXSEE 2006 US DIST LEXIS 51406

KATHY PEREZ, Plaintiff, VS. JIM HOGG COUNTY, et al., Defendant.

CIVIL ACTION NO. L-05-00019

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION

2006 U.S. Dist. LEXIS 51406

July 26, 2006, Decided
July 26, 2006, Filed

COUNSEL: **[*1]** Kathy Perez, Plaintiff, Pro se, Hebbronville, TX.

For Jim Hogg County, Defendant: Eileen M Leeds, Willette Guerra LLP, Brownsville, TX.

For Commissioner Rick Alaniz, Defendant: Eileen M Leeds, Willette Guerra LLP, Brownsville, TX; Vanessa Ann Gonzalez, Allison Bass et al, Austin, TX.

JUDGES: Micaela Alvarez, United States District Judge.

OPINION BY: Micaela Alvarez

OPINION

OPINION AND ORDER

Pending before the Court is Defendant Jim Hogg County's Motion for Summary Judgment as to Plaintiff Kathy Perez's § 1983 civil rights and state tort claims. [Doc. No. 29]. After due consideration of the record and governing law the Court GRANTS in part Defendant's Motion for Summary Judgment, and DISMISSES the remainder of Plaintiffs claims for lack of subject matter jurisdiction under 28 U.S.C. § 1331.

I. Procedural Background and Relevant Facts

Plaintiff Kathy Perez was an employee of Defendant Jim Hogg County-specifically, an employee of the county Food Pantry-when the acts giving rise to this cause of action took place. [Doc. 22-3, P 8]. In her complaint, Perez alleges that on June 11, 2003, at the Jim Hogg County Food Pantry, Defendant Ricky Alaniz, **[*2]** a Hogg County Commissioner, intentionally and with willful disregard of Perez's wishes "put his hand on Perez's waist and then slid it down and held his hand onto [sic] her buttocks." [Doc. No. 25]. In her original complaint, Perez included the sworn statements of three witnesses to the conduct in question. [Doc. No. 1].

In her Second Amended Original Complaint filed on August 8, 2005, Plaintiff sued both Defendants Jim Hogg County and Ricky Alaniz, both in his official and individual capacities, for the state torts of assault and intentional infliction of emotional distress. [Doc. No. 22-3, PP 32-34]. Additionally, Perez sued Defendant Jim Hogg County under 42 U.S.C. § 1983, claiming that Jim Hogg County, under the color of state law, deprived her of her substantive due process and equal protection rights under the Fourteenth Amendment to the U.S. Constitution, [Doc. No. 22-3, PP 26-31]. Plaintiff also sued Jim Hogg County for sexual harassment under Chapter 21 of the Texas Labor Code § 21.001, [Doc. No. 22-3, P 20].

Defendant Jim Hogg County moved for summary judgment on December 8, 2005. [Doc. No. 29-1]. Perez failed **[*3]** to file a response to Defendant's summary

judgment motion within 20 days as required under local rules 7.3 and 7.4. Therefore, for the purposes of disposing of this motion, the Court will look only to Plaintiff's Second Amended Original Complaint, filed on August 8, 2005, and all other evidence properly before the Court, to determine if Jim Hogg County has met its burden for summary judgment. [1] This Court has jurisdiction over the cause under 28 U.S.C. § 1331.

> 1 As the federal courts have made clear, Rule 56 "does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996). When evidence "exists in the summary judgment record but the non-movant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004).

[*4] II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides for summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 263, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party." *Id.* at 261. The Court reviews the record by drawing all inferences most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)). Once a moving party has met its burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth **[*5]** specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

Assuming no genuine issue exists as to the material facts, the Court will then decide whether the moving party shall prevail solely as a matter of law. *Id.* The moving party is entitled to judgment as a matter of law if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

III. Discussion

Perez sued Defendant Jim Hogg County under 42 U.S.C. § 1983, which provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, shall be liable to the party injured in an action at law. . . .

Therefore, in order to recover under § 1983, a plaintiff must show, first, that some person has deprived **[*6]** her of a federal right and, second, that the person who deprived her of that right acted under the color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). Additionally, when seeking to hold a municipality liable for the alleged constitutional deprivation in question, a plaintiff must also show a "direct causal connection between the municipal action and the deprivation of federal rights." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The U.S. Court of Appeals for the Fifth Circuit has interpreted *Monell* to mean that a plaintiff must show "(1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose moving force is the policy or custom." *Piotrowski v. Houston*, 237 F.3d 567, 578 (5th Cir. 2001). One way in which a plaintiff may establish the required nexus between the unconstitutional conduct and municipal policy is by demonstrating a "custom which, even if not formally approved by an appropriate decision maker, may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." [2] *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). **[*7]**

> The Supreme Court recently reiterated that counties, like municipalities, do not enjoy sovereign immunity under the Eleventh Amendment. *Northern Ins. Co. v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689, 1693-94, 164 L. Ed. 2d 367 (2006). Therefore, the Court herein applies the same analysis to Perez's claim of county liability as would be appropriate in cases of alleged "municipal" liability.

A. Municipal Liability

Assuming for the moment that Plaintiff can point to a specific constitutional deprivation, she nevertheless fails to identify any cognizable basis for municipal liability. However, the Court will assume, based on her accusation that the County was made aware of the incident in question, that Perez alleges a "custom" that was the proximate cause of her constitutional injury. Thus, Perez must establish "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Canton v Harris*, 489 US 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Notwithstanding the Court's willingness **[*8]** to read the allegation of custom into her complaint, Perez provides no evidence whatsoever on which a reasonable fact finder may premise Jim Hogg County's liability. Indeed, as established by the Supreme Court in *Adickes v. S. H. Kress & Co.*, a "custom" for the purposes of 42 U.S.C. § 1983 liability must have "the force of law by virtue of the *persistent* practices of state officials." 398 U.S. 144, 167, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (emphasis added). Perez does not allege "persistent practices," or even a *pattern* of culpable conduct on the part of Jim Hogg County, but rather a seemingly spontaneous incident in which an employee of Jim Hogg County allegedly inappropriately touched her. Perez does claim that "Defendant knew or should have known about the harassment and failed to take prompt remedial action." [Doc. No. 4]. However, she has failed to present any evidence that suggests that Jim Hogg County was aware of any sexual harassment *before* the injurious incident took place. Such evidence is inherently necessary to establish municipal liability because, without it, a Plaintiff simply cannot show that the municipality's failure to act was the proximate **[*9]** cause of her constitutional injury. Perez cannot satisfy her summary judgment evidentiary burden because she has not presented a scintilla of evidence of the County's tacit approval of, or indifference toward, improper behavior on the part of its employees. [3] Furthermore, Plaintiff's allegation of a single instance of impropriety, without anything more, precludes her as a matter of law from demonstrating the existence of "persistent practices of state officials" that have "the force of law." As the U.S. Court of Appeals for the Fifth Circuit has made clear, "[a] customary municipal policy cannot ordinarily be inferred from [a] single constitutional violation." *Piotrowski*, 237 F.3d at 578.

> 3 In her complaint, Plaintiff directs the Court to exhibits 3, 4, 5, and 6, filed with Perez's Original Complaint, which purportedly evidence the County's knowledge of Alaniz's conduct. [Doc. 22-3, P 18]. These exhibits are merely statements made by witnesses to the incident in question. The Court fails to see how a reasonable fact finder based on this evidence could infer the County's persistent awareness of improper behavior on the part of its employees.

[*10] B. Substantive Due Process and Equal Protection

Even if Perez were able to establish the existence of a custom on the part of Jim Hogg County, she must also be able to specify a cognizable right secured to her by the "Constitution and laws" of the United States of which Defendants deprived her. After all, § 1983 is not itself a source of substantive rights, but rather a method for vindicating rights elsewhere conferred by the Constitution and federal statutes. *Baker v. McCollan*, 443 US 137, 145, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). In her complaint, Perez fails to specify any right secured by federal law or the Constitution, the violation of which may serve as a basis for recovery. Rather, she alleges facts that sound in traditional tort and seemingly expects it to follow that such allegedly injurious conduct gives rise to the deprivation of an abstract liberty interest. However, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law . . . a [r]emedy for the latter type of injury must be sought in state court under traditional tort law principles." *Id.* at 146.

This deficiency **[*11]** in Perez's complaint is especially relevant within the context of a substantive due process claim. Substantive due process, as opposed to procedural due process, is the theory that the Fourteenth Amendment to the U.S. Constitution protects certain

"fundamental liberty interests" from deprivation by the government, regardless of the procedures provided. *Chavez v. Martinez*, 538 U.S. 760, 775, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). *See also Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (right to marry); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (right to direct the education and upbringing of one's children); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right to marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (right to use contraception); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (right to have an abortion via the right to privacy). As suggested by these examples of established substantive due process rights, in order to state a cognizable substantive due process violation, Perez must provide a "careful description" of the asserted fundamental liberty interest allegedly violated. *Id.* "Vague generalities . . . will not suffice". **[*12]** *Id.* at 776. Again, Perez has failed to point to any liberty interest in her complaint. She merely makes the conclusory claim, almost as an afterthought, that the facts alleged in her complaint, if true, demonstrate a substantive due process violation. This does not satisfy a non-movant's obligation to "identify specific evidence in the record, and articulate the precise manner in which that evidence support[s] [her] claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) (citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992)). Certainly, the facts alleged in the complaint, if true, may give rise to a legitimate legal claim and perhaps warrant a swift legal remedy. However, "[o]nly fundamental rights and liberties which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' qualify" for the protection afforded by substantive due process. *Id.* at 775 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)).

For the reasons stated above, Perez's equal protection claim suffers from the same infirmities as her substantive due process claim. Indeed, in order **[*13]** to show an equal protection violation under § 1983, a plaintiff, in addition to satisfying the basic requirements discussed above, must prove that the state action in question was motivated by a "discriminatory purpose." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194-95, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003). Perez has failed to provide any evidence that Jim Hogg County intended to discriminate against her on the basis of her sex, or any other basis for that matter. No reasonable fact finder could conclude based on the facts alleged that Jim Hogg County intended to discriminate against Perez on account of her sex.

Therefore, because Perez has failed to provide minimal evidence which can serve as the basis for a verdict in her favor, and because Defendant Jim Hogg County is entitled to judgment as a matter of law, Defendant's Motion for Summary Judgment as to Perez's substantive due process and equal protection claims is **GRANTED**.

Perez's § 1983 claims served as the sole basis for pendent jurisdiction in this case. As the Supreme Court made clear in *United Mine Workers v. Gibbs*, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). **[*14]** Unnecessary adjudication of state legal issues "should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* Since this Court grants Jim Hogg County's Motion for Summary Judgment as to all of Perez's federal claims, it dismisses her state claims for lack of subject matter jurisdiction. Therefore, Perez's sexual harassment claim under Chapter 21 of the Texas Labor Code, as well as her tort claims of assault and intentional infliction of emotional distress, are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

DONE this 26th day of July, 2006, in Laredo, Texas.

Micaela Alvarez

United States District Judge

TAB 6

LEXSEE 2010 US DIST LEXIS 22433

EDUARDO TREVINO, TDCJ-CID # 926058 v. CANDACE MOORE

C.A. NO. C-09-155

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

2010 U.S. Dist. LEXIS 22433

March 10, 2010, Decided
March 10, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by Trevino v. Moore, 2010 U.S. Dist. LEXIS 28051 (S.D. Tex., Mar. 24, 2010)

PRIOR HISTORY: Trevino v. Moore, 2009 U.S. Dist. LEXIS 94056 (S.D. Tex., Oct. 8, 2009)

COUNSEL: [*1] Eduardo A Trevino, Plaintiff, Pro se, Beeville, Tx.

For Law Librarian Candace R Moore, Defendant: Ana Marie Jordan, LEAD ATTORNEY, Office of Atty General, Austin, TX.

JUDGES: BRIAN L. OWSLEY, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: BRIAN L. OWSLEY

OPINION

OPINION DENYING PLAINTIFF'S MOTIONS TO AMEND OR ALTER THE JUDGMENT AND FOR A NEW TRIAL

This is a civil rights action filed by a state prisoner pursuant to 42 U.S.C. § 1983. Pending are Plaintiff's motions to amend or alter the judgment, (D.E. 136), and for a new trial. [1] (D.E. 137). Pending also is Plaintiff's motion for leave to amend the motion for a new trial. (D.E. 138). For the reasons stated herein, Plaintiff's motions are hereby DENIED.

1 This case never reached trial, and Plaintiff states that his motion for a new trial "must be taken as a '*Motion to Reconsideration*' [sic]." (D.E. 137, at 1) (emphasis in original). Accordingly, Plaintiff's motion for a new trial, *id.*, is construed as a brief in addendum to his motion to amend or alter. (D.E. 136).

I. BACKGROUND

On June 22, 2009, Plaintiff filed this action raising civil rights claims against prison officials at the McConnell Unit in Beeville, Texas. (D.E. 1). On August 5, 2009, an Order was entered to dismiss [*2] certain claims and retain the case. (D.E. 23). The only claim retained was a retaliation claim against Defendant Candace Moore, the prison law librarian. *Id.* (D.E. 25). He claimed that Defendant had retaliated against him by not allowing him in the prison law library after he filed a lawsuit and grievances against her. (D.E. 1).

In June 2009, Defendant began enforcing a rule at the prison law library requiring prisoners to fill out their I-60 lay-in requests, which were used to gain access to the law library, with their job assignments as they appeared on the library's UCR screen. (D.E. 107, Ex. A at

1-2). This enforcement was done to prevent prisoners from submitting fraudulent requests under other prisoners' names, which posed a security threat to prisoners and library safety, and caused delays. *Id.*

Beginning with a request for a lay-in on June 9, 2009, the prison law library began denying Plaintiff's requests for listing what Defendant viewed as an incorrect work assignment. (D.E. 110, Ex. C at 32). In total, from June 9, 2009 through July 2, 2009, Defendant denied twenty-one of Plaintiff's requests, all of which specified his work assignment as "1st Garment," or some variation thereof. **[*3]** *Id.* at 32, 35; (D.E. 1, at 7-16, 21-22); (D.E. 18, at 20-26, 36-47, 52). According to information listed on Defendant's UCR screen, Plaintiff's work assignment was actually "production tech 1st." (D.E. 107, Ex. A at 2). At least one other inmate, Tony Chavez, was also denied access to the law library around the same time because he listed a work assignment other than one listed for him on Defendant's UCR screen. (D.E. 79, at 5).

When Plaintiff received his denied requests, some had instructions written on them by someone in the prison law library. The June 10, 2010 form had his work assignment circled and written next to it was "Incorrect job information" and "Resubmit." (D.E. 1, at 21). The June 11, 2009 form also had his work assignment circled and written beneath it was "offender's work assignment is production tech 1st" and "unable to process not correct info." (D.E. 110, Ex. C at 32). The June 28, 2009, June 30, 2009, and July 2, 2009 requests explained that requests with incorrect information would be denied, and to resubmit his request with his correct job assignment. (D.E. 18, at 20, 24, 26). The July 2, 2009 request was also marked with "Production Tech 1st," which was circled. **[*4]** Id. at 20. Conversely, Plaintiff submitted one request during that time period -- for June 12, 2009 -- that was approved even though it included his incorrect work assignment. (D.E. 110, Ex. C at 33, Ex. D at 7). Additionally, he twice submitted requests during that period -- for July 12 and 13, 2009 -- on which he listed his work assignment as "production tech 1st." (D.E. 1, at 17-20). Both were approved and Plaintiff was admitted to the law library those days. *Id.*

In response to a grievance Plaintiff filed on June 12, 2009 complaining that Defendant was wrongly denying his admission requests, Warden Jackson instructed Defendant no later than July 2, 2009 to accept Plaintiff's law library requests with whatever work assignment he had been using. (D.E. 110, Ex. C at 29, 42-43). Subsequently, in the month of July 2009, Plaintiff's requests for the 3rd, 9th, 10th, and 24th were approved while ones for the 7th, 8th, and 11th were not. (D.E. 17, at 1); (D.E. 18, at 5, 7-11, 13-14, 17-19, 28-29); (D.E. 110, Ex. D at 13). In August 2009, he was admitted on the 11th, 12th, 14th, and 15th, but denied on the 13th. (D.E. 110, Ex. C at 73, 80-85). In September 2009, he was admitted on the 3rd, **[*5]** 4th, 5th, 9th, 10th, and 11th, but denied on the 29th. *Id.* at 14-21; (D.E. 18, at 32-33). The reasons for the denials in July, August, and September are unknown. Additionally, he was admitted on January 29, 2010. (D.E. 126, at 4).

Besides Plaintiff's June 12, 2009 grievance, he has filed one state civil suit and over thirty prison grievances against Defendant. (D.E. 79, at 4-5). It is unclear when the lawsuit was originally filed, but Plaintiff's appeal in the case was dismissed on July 29, 2008. (D.E. 21, at 8-9). Defendant was unaware of the lawsuit, but did know about the grievances. (D.E. 107, Ex. A at 2).

In addition to denying Plaintiff access to the law library, and in response to Plaintiff's requests for materials submitted between January 2, 2010 and January 8, 2010 while the McConnell Unit was on lock-down, Defendant delivered the wrong library materials to Plaintiff and removed the correct materials before a full twenty-four hours transpired. (D.E. 124, at 6-8). He further alleges that on January 6, 2010, Major Jesus Ambriz confiscated his typewriter and typing supplies. (D.E. 123, at 3). He also claims that Defendant denied him copies of decisions when the McConnell Unit **[*6]** was on lock-down starting December 25, 2009. (D.E. 124, at 1-2).

On November 4, 2009, Plaintiff filed a motion for summary judgment, (D.E. 79), and Defendant filed a response and cross-motion for summary judgment on January 4, 2010. (D.E. 107). On February 11, 2010, Plaintiff's motion was denied, Defendant's motion was granted, (D.E. 128), and final judgment was entered. (D.E. 129).

II. DISCUSSION

In the pending motions, Plaintiff asserts that summary judgment should not have been granted for Defendant because there is a genuine issue of material fact regarding the penological interest behind Defendant's

rule. (D.E. 136, at 2-3). Furthermore, he asserts that there is no genuine penological interest, which should preclude Defendant from asserting qualified immunity. Id. at 3-6. Additionally, he claims new instances of retaliation, and that he has exhausted his administrative remedies. *Id.* at 6-7; (D.E. 137, at 9).

Simultaneously, Plaintiff requests that the Court find that an issue of fact does exist and reject its earlier grant of summary judgment for Defendant, or, alternatively, grant his motion for summary judgment. *Id.* at 1. Moreover, he requests a hearing to address this issue of [*7] fact. *Id.* at 7.

A. Plaintiff's Motion Is Timely.

A motion to alter or amend a judgment is timely "filed no later than 28 days after entry of the judgment." Fed. R. Civ. P. 59(e). Final judgment was entered on February 11, 2010. (D.E. 129). Plaintiff's motion was filed with this Court on February 25, 2010, (D.E. 136), and, thus, was timely filed.

B. Legal Standard For Relief Pursuant To Rule 59.

Rule 59(e) motions "serve the narrow purpose of allowing a party 'to correct manifest errors of law or fact or to present newly discovered evidence.'" *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citations omitted); *accord Kossie v. Crain*, 602 F. Supp. 2d 786, 793 (S.D. Tex. 2009) (citation omitted). Rule 59(e) cannot be used to introduce evidence that was available prior to the entry of judgment, nor should it be employed to relitigate old issues, advance new theories, or secure a rehearing on the merits. *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (citation omitted); *accord Kossie*, 602 F. Supp. 2d at 793 (citation omitted). To prevail on a Rule 59(e) motion, the moving party must demonstrate the existence of the need to correct a clear error of law, or present [*8] newly discovered evidence. *Id.* at 479.

C. Defendant Had A Valid Penological Interest In Denying Plaintiff's Lay-In Requests.

Plaintiff attacks the decision to grant Defendant's motion for summary judgment and argues that summary judgment never should have been granted because there was a genuine issue of fact regarding the penological motive behind Defendant's rules for lay-in requests. In making this motion, Plaintiff has only rehashed the same facts and arguments that were presented when Defendant's summary judgment motion was granted. Those facts established that Defendant did not act with retaliatory intent in denying Plaintiff access to the law library, and even if she did, it would not have been the "but for" cause in denying Plaintiff access. (D.E. 128, at 13); *see also McDonald v. Stewart*, 132 F.3d 225, 231 (5th Cir. 1998) ("Causation requires a showing that 'but for the retaliatory motive the complained of incident ... would not have occurred.'") (citation omitted).

Defendant required lay-in requests to be filled out correctly to reduce fraudulent requests, which in turn would ensure prisoner safety and improve administration of the law library. (D.E. 107, Ex. A at 1-2). Plaintiff [*9] asserts that this reasoning has no penological interest, and that anytime he was denied access to the law library because of Defendant's rule was an impingement upon his constitutional rights. He further asserts that without evidence of past fraudulent requests, Defendant's interest is invalid. Defendant did not have to establish proof of past frauds as Plaintiff contends. Instead "[p]rison officials should be accorded the widest possible deference in the application of policies and practices designed to maintain security and preserve internal order." *Wilkerson v. Stalder*, 329 F.3d 431, 436 (5th Cir. 2003) (citation omitted). Furthermore, Plaintiff has advanced no new set of facts or arguments, or shown that the Court was in clear error of law in granting summary judgment. Accordingly, Defendant had a valid penological interest in requiring prisoners to fill out lay-in requests correctly, and denying Plaintiff access when he did not comply.

D. Defendant Was Entitled To Qualified Immunity.

Plaintiff also attacks the finding that Defendant was entitled to qualified immunity. However, Defendant's immunity was presumed once she asserted it, and it was Plaintiff's burden to establish that [*10] she was not entitled to it. *See McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam) (citation omitted). He failed in that respect because he never established that a constitutional violation had occurred, which would have been necessary to attack Defendant's immunity defense. *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005); *Pearson*, 555 U.S. at ___, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565

(receding from *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Furthermore, Plaintiff has advanced no new set of facts or arguments, or shown that the Court was in clear error of law in upholding qualified immunity. Accordingly, Defendant was entitled to qualified immunity.

E. Plaintiff's "Other Acts Of Retaliation" Are Not Reviewable Through This Motion.

Plaintiff chose to rehash in this motion multiple facts or instances of retaliation he had already raised before this case was dismissed on summary judgment. *See* (D.E. 136, at 6-7), (D.E. 137, at 7); *see also* (D.E. 79, Ex. B), (D.E. 101, at 12, 16), (D.E. 110, Ex. C at 24-26), (D.E. 123, at 3). Specifically, these include (1) Major Ambriz confiscating his typewriter, (2) an e-mail from Defendant, which he alleges shows that he **[*11]** always filled out his lay-in requests correctly, and (3) claims of retaliation against prisoners Tony Chavez, Charles Sullivan, and Gregory Green. Because this evidence was reviewed by the Court before summary judgment was granted, review pursuant to Rule 59(e) is unavailable.

Additionally, Plaintiff makes two new claims of retaliation: (1) that Defendant schedules him for library access on Fridays during his work hours, and (2) that Defendant has friends turn off certain lights in the law library, preventing Plaintiff from using the largest tables in the law library. (D.E. 136, at 6-7). These claims do not relate directly to his underlying claims, and are, therefore, not reviewable through Rule 59(e). Furthermore, these instances do not constitute retaliation because Plaintiff has not suffered an injury. The right of access is not a "freestanding right," and a plaintiff must demonstrate actual injury resulting from an alleged denial of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); *Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999) (per curiam). "Actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet **[*12]** a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348. Without a showing of an actual injury, a plaintiff lacks standing to pursue a claim of denial of access to the courts. *Id.* at 349.

All Plaintiff has shown is that he has been scheduled library access on an unknown number of Fridays when he was already scheduled to work, and that certain lighting in the library situated near the largest tables does not function. Presumably, Plaintiff has not encountered scheduling problems on days other than Fridays, and he indicates that he is still able to use smaller tables in the library. He does not allege any missed deadlines, or being prevented from presenting a claim. Rather, he complains of mere discomfort and a few inconveniences.

F. Exhaustion Of Plaintiff's Claims Was Never Considered By This Court.

Plaintiff asserts that his claims were properly exhausted when they reached this Court. (D.E. 137, at 9). However, exhaustion is an affirmative defense that must be asserted by a defendant before it must be proven. *Jones v. Bock*, 549 U.S. 199, 216, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). Defendant never claimed this defense. Furthermore, Plaintiff's claims were not dismissed on exhaustion grounds. Accordingly, this **[*13]** argument is not proper for Rule 59(e) review.

G. Plaintiff's Motion For Leave To Amend Is Without Merit.

Plaintiff seeks to amend his motion for a new trial based on an allegation of retaliation by inmate David Douglas against Defendant. (D.E. 138). Specifically, he alleges that an investigation of Defendant has been initiated in an action filed by Mr. Douglas. *See Douglas v. Thaler*, C-09cv131. That action is a habeas petition challenging a disciplinary proceeding in which his claims were dismissed for failure to state a claim and final judgment was entered. It has no bearing on Plaintiff's action. Accordingly, Plaintiff's motion for leave to amend is meritless.

III. CONCLUSION

Based on the foregoing, Plaintiff's motion to amend or alter the judgment, (D.E. 136), and motion for a new trial, (D.E. 137), are denied. Plaintiff's motion for leave to amend the motion for a new trial, (D.E. 138), is also denied.

Ordered this 10th day of March 2010.

/s/ Brian L. Owsley

BRIAN L. OWSLEY

UNITED STATES MAGISTRATE JUDGE

TAB 7

LEXSEE 2005 US DIST LEXIS 41789

MARCY JACKSON VERNON, Plaintiff, v. LINDA ROLLINS-THREATS, Defendant.

Civil Action No. 3:04-CV-1482-BF (P)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2005 U.S. Dist. LEXIS 41789

November 2, 2005, Decided
November 2, 2005, Filed

PRIOR HISTORY: Vernon v. Rollins-Threats, 2005 U.S. Dist. LEXIS 13255 (N.D. Tex., June 30, 2005)

COUNSEL: [*1] For Marcy Jackson Vernon, Plaintiff: Paul Craig Laird, II, Ashley & Laird, Irving, TX.

For Linda Rollins-Threats, Defendant: Mark C Roberts, II, Henslee Fowler Hepworth & Schwartz -- Dallas, Dallas, TX.

For Linda Rollins-Threats, Counter Claimant: Mark C Roberts, II, Henslee Fowler Hepworth & Schwartz -- Dallas, Dallas, TX.

JUDGES: PAUL D. STICKNEY, United States Magistrate Judge.

OPINION BY: PAUL D. STICKNEY

OPINION

MEMORANDUM OPINION AND ORDER

This is a consent case before the United States Magistrate Judge. Defendant Linda Rollins-Threats's ("Defendant") Motion for Summary Judgment, and supporting brief, filed April 14, 2005; Plaintiff Marcy Jackson Vernon's ("Plaintiff") Response to Defendant's Motion for Summary Judgment, and supporting brief, filed September 1, 2005; and Defendant's Reply Brief, filed September 22, 2005, are before the Court for consideration.

This Court previously granted Plaintiff's motion for new trial and vacated a memorandum opinion and judgment that were previously entered. The Court has considered *de novo* the entire record and grants Defendant's motion for summary judgment for the reasons that follow.

Background

Plaintiff brings [*2] this action pursuant to 42 U.S.C. § 1983 and the Health Insurance Portability and Accountability Act ("HIPPA"), found at Social Security Act § 1173, as amended 42 U.S.C. § 1320d-2. She claims Defendant violated her rights to due process and to the privacy of her health records under color of state law. (Compl. at 1.) She also brings pendant state law claims of malpractice, negligence, gross negligence, breach of contract, breach of fiduciary duty, fraud, and violations of the Texas Deceptive Trade Practices Act, V.T.C.A., Bus. & C. § 17.46(b).

This case arises from a 1999 divorce and child custody proceeding between Plaintiff and her former husband, Perry Jackson ("Perry"). Plaintiff requested that

the state court order a psychological examination of Plaintiff, Perry, and their two children. (Pl.'s App. 3A.) Pursuant to Plaintiff's request and her written agreement, the 330th District Court ordered Defendant to conduct psychological evaluations of Plaintiff, Perry, and the couple's two children and to provide a recommendation to the court about the custody and living arrangements for Plaintiff and Perry's minor children. (Pl.'s **[*3]** App. 3B, 3C.) Plaintiff was represented by an attorney, Bob O'Donnell. (Def.'s App. 5.) Defendant, who is a licensed social worker, marriage and family therapist, and Advanced Clinical Practitioner, was subpoenaed to testify at trial. (Def.'s App. 4, RR, Vol. 3 at 125.) [1] Defendant was not licensed by the State of Texas as a psychologist. [2] (*Id.* at 125-36, Ex. 44.) Plaintiff's counsel conducted a voir dire examination of Defendant to determine whether she qualified to testify as a mental health expert witness. (*Id.* at 128-29.) Plaintiff did not attempt to exclude Plaintiff as unqualified, nor did she ever object to the admission of Defendant's Psychological Report ("Report"). (Def.'s App. 4, RR, Vol. 3 at 120.) Further, Defendant did not seek a court order to protect the privacy of the Report.

1 The transcript of the divorce proceeding is referred to as "RR" with the corresponding volume and page.

2 Defendant's resume revealed that she was not a licensed psychologist.

Defendant testified based **[*4]** upon the psychological evaluations and Report. (*Id.* at 130-190.) Plaintiff never objected to or attempted to strike Defendant's testimony. Further, Plaintiff did not offer any expert testimony that Defendant's psychological evaluation was done improperly, nor did she at any time object to the fact that Defendant was not licensed by the State of Texas as a psychologist. The Court in the Divorce Decree awarded joint managing conservatorship of the children to Plaintiff and Perry. (Def.'s App. 7 at 2.)

Plaintiff filed a Motion for New Trial, claiming that substantial evidence did not support the joint conservatorship award. (*Id.* at 8.) Plaintiff did not mention Defendant in the motion. When the trial court overruled the new trial motion, Plaintiff appealed to the Fifth District Court of Appeals of Texas. (Def.'s App. at 9.) The issues on appeal did not involve Defendant. (*Id.*) Plaintiff's appeal was denied, and the Court of Appeals issued an appellate opinion stating that the 330th District Court did not abuse its discretion in awarding joint managing conservatorship to Plaintiff and Perry. (*Id.* at 11.) Plaintiff did not seek further review of the custody decision.

[*5] Plaintiff explains her case as follows:

> Plaintiff's claims are to request and prove the fraud on the [state court] and the Plaintiff by [Defendant]. The Plaintiff litigated and complied with all orders of the [state court] concerning all Family Law matters. This case deals with the fact that the Defendant, acting through a Court Order appointing her to perform a "Psychological" evaluation in the [child custody] case, did a psychological Report when the Defendant was not and has never been a psychologist through education, training, and/or licensure in the State of Texas, or in any other State (Appendix Tab 3D-1, 3D-2, 3E-2). The Defendant, acting through the Court Order committed a fraud on the [state court] and on the Plaintiff. The only way this fraud by the Defendant was committed on the Plaintiff was through the Defendant being a willful participant to the fraud by writing a report that was a psychological evaluation of the Plaintiff through Court Order violating the Civil Right (Appendix Tab 4-41). The action of the Defendant [was] to commit the fraud of accepting an appointment to conduct and perform a psychological evaluation of the Defendant. The willful **[*6]** action of the Defendant against the Plaintiff could not have occurred except as a joint action with the State. The State, the Plaintiff admits, was defrauded by the hiding of the fact that the Defendant was not and has never been a Psychologist. However, the Plaintiff would never have been defrauded it the State had not appointed the Defendant as a Psychologist. The facts of the case are that no one found out about the fraudulent conduct of the Defendant until after the Family Law Court lost authority and jurisdiction to sanction the Defendant for the fraudulent activity. The Plaintiff filed a malpractice

> case originally against the Defendant in State Court and then brought this the § 1983 claims and HIPPA and the other Federal Claims. The Plaintiff, because of an Order appointing an individual who knew of her ineligibility to be appointed as a Psychologist to the Family Law Case, obtained privileged and secret information on the health and mental records of the Plaintiff. Through fraud and deceit and only by the Defendant's being appointed through Court Order. This also violated the Civil Rights of the Plaintiff and HIPPA rights.

(Resp. at 1-2.)

Plaintiff seeks actual, exemplary, **[*7]** treble, and mental anguish damages and attorney fees. (Pl.'s Compl. at 6-7) Defendant counterclaims for her attorney fees, alleging that Plaintiff's suit is frivolous.

Defendant seeks summary judgment on the grounds that: (1) Defendant is cloaked with derived judicial immunity; (2) the trial court did not state that its ruling was based on Defendant's testimony; (3) Plaintiff waived any right to complain by failing to object at trial in the underlying divorce; and (4) the doctrines of collateral estoppel and res judicata bar Plaintiff's recovery.

Standard of Review

Summary judgment is appropriate if the pleadings and summary judgment evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence **[*8]** of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Props. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998) (citing *Celotex*, 477 U.S. at 322-25).

The moving party may meet its initial burden "by showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. If the movant fails to meet its initial burden, the motion must be denied, irrespective of the non-movant's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the movant meets its burden, the non-movant must go beyond the pleadings and designate specific facts showing that a genuine issue of material fact exists for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 431 (5th Cir. 1998). A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings that are unsupported by specific facts presented in affidavits **[*9]** opposing the motion for summary judgment. *See* FED. R. CIV. P. 56(e); *Lujan*, 497 U.S. at 888; *Hightower v. Texas Hosp. Ass'n*, 65 F.3d 443, 447 (5th Cir. 1995).

Analysis

Plaintiff alleges that this Court has jurisdiction pursuant to Defendant's alleged violations of 42 U.S.C. § 1983 and HIPPA. She claims Defendant denied her due process and the right to privacy of her medical records under color of law. All of Defendant's acts occurred during Plaintiff's divorce and child custody case. [3] The state court appointed Defendant as an expert witness to examine Plaintiff, her husband, and their two children, to file a report, and to provide a recommendation to the court about the custody and living arrangements for Plaintiff and Perry's minor children.

> 3 Plaintiff also claims that Defendant violated HIPPA by filing the same medical records that had been filed without objection in state court in Plaintiff's Appendix in support of her motion for summary judgment.

[*10] Plaintiff contends that she is not attacking the state court proceedings, attempting to overturn them, or seeking a new custody award. She claims that she was damaged by Defendant's obtaining privileged and secret information on her health and mental records by permitting the trial court and the parties to the divorce to believe that she was a licensed psychologist. Additionally, she claims that she was damaged by the publication of the Report in the state court proceedings and its republication in this case. It is undisputed that Plaintiff was not licensed by the State of Texas as a psychologist when she examined Plaintiff pursuant to the

state court order. Taking the facts most favorably to Plaintiff, the Court assumes without deciding that Defendant was not qualified to conduct psychological evaluations and give a report and recommendation to the divorce court about child custody.

Defendant's Defense of Derived Judicial Immunity

A litigant may not recover damages pursuant to 42 U.S.C. § 1983 from judges, prosecutors, and other persons acting "under color of law" who perform official functions in the judicial process. *See Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). **[*11]** Absolute immunity is necessary to preserve judicial independence. *See Imbler v. Pachtman*, 424 U.S. 409, 422-24, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). The doctrine assures that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978).

When judges delegate their authority or appoint others to perform services for the court, the judge's absolute judicial immunity may extend to his or her delegate or appointee. *Delcourt v. Silverman*, 919 S.W.2d 777, 781 (Tex. App -- Houston March 7, 1996, reh'g denied). This is known as "derived judicial immunity." *Dallas County v. Halsey*, 87 S.W.3d 552, 554, 46 Tex. Sup. Ct. J. 51 (Tex. 2002). Derived judicial immunity extends only to those officials whose "judgments are functionally comparable' to those of judges" and who "'exercise a discretionary judgment' as part of their function." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, 432 n. 3, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993).

In *Delcourt*, the loser in a child-custody modification sued the court-appointed psychologist for various torts arising from her participation in the proceeding. *Delcourt*, 919 S.W.2d at 782-83. **[*12]** The psychologist asserted the defense of derived judicial immunity. *Id.* The trial court granted the psychologist's motion for summary judgment, and the appeals court affirmed the decision. *Id.* The appellate court found that mental-health professionals who are appointed by the trial court to examine the child and parents in a custody proceeding are acting as a factfinder for the trial court. *Id.* It explained that "[the] court relies on the professional to provide information essential to the decision-making process. Without the protection of absolute immunity, such professionals would be, at the very least, reluctant to accept these appointments. This would in turn inhibit judges from performing their duties." *Id.* It concluded that the psychologist acted as a "functionary" of the court. *Id.*

Courts in other jurisdictions have granted derived judicial immunity to persons performing duties similar to those that Defendant performed in this case. [4] A decision of the Supreme Court of Alaska is illustrative because, like the Plaintiff in this case, the litigant claimed a psychologist who testified in a child custody action did not meet the state's minimum professional **[*13]** standards for psychologists. *See Lythgoe v. Guinn*, 884 P.2d 1085, 1086 (Alaska 1994). The loser in a custody dispute sued a court-appointed psychologist for, *inter alia*, negligent investigation, misrepresentation, and failure to perform to the state's minimum professional standards for psychologists. *Id.* The trial court granted the psychologist's motion to dismiss for failure to state a claim upon which relief may be granted, finding that the psychologist's actions were within the scope of derived judicial immunity. *Id.* The Supreme Court of Alaska affirmed the trial court's decision, holding that the psychologist "served as an arm of the court' and performed a function integral to the judicial process.'" *Id.* at 1088 (quoting *Seibel*, 631 P.2d at 179).

4 *See*, e.g., *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir. 1987), *abrogated on other grounds, Burns v. Reed*, 500 U.S. 478, 496, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (court appointed social worker/therapist who was not a licensed "physician, psychiatrist, or psychologist" who provided therapy and an examination of a minor child in child sexual abuse case); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987) (court-appointed physician who evaluated a person's mental condition); *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970) (same); *Bartlett v. Weimer*, 268 F.2d 860, 862 (7th Cir. 1959) (same); *Parker v. Dodgion*, 971 P.2d 496, 499 (Utah 1998) (psychologist appointed as evaluator in custody dispute entitled to immunity from suit); *Duff v. Lewis*, 114 Nev. 564, 958 P.2d 82, 86-87 (Nev. 1998) (psychiatrist appointed to perform child assessments in custody dispute performed "integral function in assisting courts" entitling him to absolute quasi-judicial immunity); *Lavit v. Superior Court*, 173 Ariz. 96, 839 P.2d 1141, 1144-45 (Ariz. Ct. App. 1992) (psychologist who

performed child-custody evaluation exercised judicial function requiring absolute immunity); *Howard v. Drapkin*, 222 Cal. App. 3d 843, 271 Cal.Rptr. 893, 902 (Cal. Ct. App. 1990) (psychologist who performed neutral evaluation in custody dispute entitled to same immunity given others who function as neutrals in resolving disputes); *S.T.J. v. P.M.*, 556 So.2d 244, 247 (La. Ct. App. 1990) (psychologists appointed to aid in resolving custody dispute performed quasi-judicial function entitling them to absolute immunity); *LaLonde v. Eissner*, 405 Mass. 207, 539 N.E.2d 538, 541-42 (Mass. 1989) (psychiatrist who performed independent evaluation in visitation dispute "entitled to immunity because of the function he performed and its essential connection to the judicial process"); *Williams v. Rappeport*, 699 F.Supp. 501, 508 (D. Md. 1988) (court-appointed psychologist and psychiatrist in custody action); *Doe v. Hennepin County*, 623 F. Supp. 982, 986 (D. Minn. 1985) (psychologist selected by parents to assist court in custody action); *Seibel v. Kemble*, 63 Haw. 516, 631 P.2d 173, 177 (Haw. 1981) (psychiatrists who rendered opinion regarding defendant's mental condition functioned as "arm of court" entitling them to absolute judicial immunity); *Linder v. Foster*, 209 Minn. 43, 295 N.W. 299, 301 (Minn. 1940) (court-appointed physicians and surgeons evaluating a person's mental condition).

[*14] An important aspect of derived judicial immunity is the fact that the adversarial process includes the rights to depose a court-appointed mental health expert and to challenge the expert's qualifications. Additionally, the process includes the right of cross-examination and the opportunity "to bring to the judge's attention any alleged deficiencies in the evaluation." *Lythgoe*, 884 P.2d at 1091. Moreover, "the complaining party is free to seek appellate review or . . . request a modification of the [trial court's] order.'" *Id.* (quoting *LaLonde v. Eissner*, 539 N.E.2d at 542). Finally, the court is able to insure that expert witnesses will be accountable for their conduct and actions by the imposition of sanctions. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917, 34 Tex. Sup. Ct. J. 701 (Tex. 1991).

In this case, Plaintiff claims that Defendant is not protected by derived judicial immunity because her actions in not being a licensed, competent, qualified Psychologist mean that she acted beyond the scope of her appointment by the state court and defrauded it. [5] Plaintiff's arguments are without merit. "A judge will not be deprived **[*15]** of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-357, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Judicial immunity (and hence, derived judicial immunity) applies however erroneous the act and however evil the motive. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir. 1989) (citing *Stump*, 435 U.S. at 356-57; *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); *Holloway v. Walker*, 765 F.2d 517, 522-25 (5th Cir. 1985); *Adams v. McIlhany*, 764 F.2d 294, 297-99 (5th Cir. 1985)). Nothing in the record suggests that the trial court was without jurisdiction to appoint Defendant as an expert witness or that Defendant acted in excess of the authority conveyed to her by the order of appointment which Plaintiff approved.

5 Plaintiff relies upon dicta in *Daniels v. Stovall*, 660 F. Supp. 301, 303 (S.D. Tex 1987), comparing herself to the litigant who was deprived of her liberty for two weeks pursuant to a mental health commitment order. The District Court in *Stovall* hypothesized that the judge would not have been entitled to direct judicial immunity because he acted outside his legal authority by allowing the clerk to use his rubber stamped signature on the commitment order outside his presence. Court functionaries such as clerks are not entitled to judicial immunity because their duties are ministerial, not discretionary, in nature. *Barnes v. Dorsey*, 480 F.2d 1057, 1060 (8th Cir. 1973). *Stovall* is not dispositive or even instructive here. In the only other case Plaintiff relies on, the complaint was dismissed as frivolous for failure to state any factual basis to support a conspiracy charge between a judge and private parties. *See Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986). Plaintiff's reliance upon *Hale* is inapposite.

[*16] Plaintiff also claims that she did not learn of Defendant's lack of qualifications until after the appeal was decided. Plaintiff includes letters from the licensing

agency showing that Defendant was not licensed. She provides no explanation for why such letters could not have been obtained during the state court proceedings.

Plaintiff had access to the full procedural safeguards of the adversarial process during the state court proceeding. Defendant did not conceal either her credentials or any lack of credentials. Before trial, Plaintiff neither deposed Defendant nor challenged her qualifications. At trial, Plaintiff's counsel examined Defendant regarding her qualifications and failed to lodge an objection. Defendant submitted her resume which was introduced into evidence without objection. Similarly, Defendant's Report was admitted without objection. Plaintiff did not seek to protect her privacy by requesting a protective order for the Report. In her motion for new trial and on appeal, Plaintiff did not contest Defendant's actions.

Defendant performed a function integral to the judicial process because, at least to some extent, her evaluations and recommendations aided the trial **[*17]** court in determining child custody. Her services were performed pursuant to a court order, making her "an arm of the court." Defendant is entitled to absolute derived judicial immunity from suit on all of Plaintiff's claims. [6]

> 6 Defendant is immune from suit on any claim that arose from her services as a court-appointed mental health expert. Accordingly, the Court need not address Defendant's other grounds in support of summary judgment.

With respect to Plaintiff's HIPPA claims, Congress did not mandate that health care providers comply with HIPPA's privacy regulations until April 14, 2003. *See* 45 C.F.R. § 164.534. Defendant's Report is dated June 23, 2000, and was introduced into evidence during the trial which commenced on March 8, 2002, before compliance with HIPPA was required. Moreover, the regulations provide that health care providers may disclose protected health information without patient consent in response to a court order, provided that only the information specified in the court order is **[*18]** disclosed. 45 C.F.R. § 164.512(e). In this case, the trial court ordered the psychological evaluation, and Plaintiff indicated her written agreement with his order. (Def.'s App. 2.) When Defendant published the Report in this case in defense of Plaintiff's complaint, it was already a public record. Further, Plaintiff waived any privacy rights in the Report by not seeking a protective order for the Report in the custody case. In this case, Plaintiff requested that the copy of the Report she provided be placed under seal, however, she further waived any privacy rights by not seeking a protective order for the copy of the Report in Defendant's Appendix. In sum, Plaintiff fails to state a claim for a HIPPA violation.

Conclusion

Defendant is entitled to derived judicial immunity from suit on all of Plaintiff's claims. Additionally, Plaintiff does not state a claim for violation of HIPPA. Further, Plaintiff's complaint is frivolous in light of the settled law that court-appointed mental health experts who perform a function integral to the judicial process and act as an arm of the court are entitled to derived judicial immunity from suit. Additionally, Plaintiff's HIPPA claims **[*19]** are frivolous because she sued for violations of regulations that were not in effect at the time of the alleged violation and had waived any privacy rights in the Report before this action was filed. The Court grants Defendant's Motion for Summary Judgment, Defendant's counterclaim, and Defendant's request for attorney fees and costs. [7]

> 7 The amount of the attorney fees will be determined by separate order based upon the pleadings previously submitted.

Signed November 2, 2005.

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

JUDGMENT

This case came on for consideration on Defendant's motion for summary judgment, and the Court granted judgment for Defendant.

IT IS ORDERED and ADJUDGED

that Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant recover of Plaintiff her costs of action and attorney fees.

SO ORDERED, November 2, 2005.

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010, I electronically filed the foregoing **Appendix to 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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