

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.	§	

DEFENDANTS', MONTGOMERY COUNTY, TEXAS AND BARBARA GLADDEN
 ADAMICK, RESPONSE TO PLAINTIFF'S OPPOSED MOTION FOR LEAVE TO
 AMEND COMPLAINT

TO THE HONORABLE DISTRICT COURT:

Defendants, Montgomery County, Texas, and Barbara Gladden Adamick file this Response to Plaintiff's Opposed Motion for Leave to Amend Complaint and request the Court deny the motion.

INTRODUCTION

1. Plaintiff is Karen McPeters.
2. Defendants are Honorable Frederick E. Edwards, Montgomery County, Texas, Barbara Gladden Adamick, the Montgomery County District Clerk ("Adamick"), and LexisNexis, a division of ReedElsevier, Inc.
3. Plaintiff filed her Original Complaint on April 6, 2010 (Document 1). In it, she brought claims pursuant to 18 U.S.C. §§1961-1968, the Racketeering Influenced Corrupt Organizations Act (RICO), with the predicate acts being mail fraud, wire fraud, violations of the Hobbs Act and

violations of 42 U.S.C. § 1983; 42 U.S.C. § 1983 for alleged violations of her rights to equal protection, procedural due process and substantive due process; the Texas Constitution for alleged violations of the Texas Constitution Open Courts, equal protection, and due course of law provisions; and, against Adamick only, a claim under Texas Civil Practice & Remedies Code § 7.001 for alleged violation of statutory duties. *See Original Complaint.*

4. Defendants Montgomery County and Adamick (hereinafter “Defendants”) filed their Motion to Dismiss the Original Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on May 4, 2010 (Document 8).

5. On May 17, 2010, Plaintiff filed her 57-page First Amended Complaint, along with 50 pages of exhibits (Documents 11 and 11-1). In addition to the claims brought in the Original Complaint¹, Plaintiff added more factual allegations to support the RICO element of “pattern of racketeering” (specifically related to her Hobbs Act allegations) and a claim for RICO conspiracy under 18 U.S.C. § 1962(d); a claim under the Texas Constitution for violation of the Separation of Powers provision; and state law claims under the Texas Theft Liability Act, Texas Civil Practice & Remedies Code, Chapter 134 and for fraud.

6. Defendants filed their Amended Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on June 1, 2010 (Document 13). Defendants requested leave to file excess pages for the Amended Motion to Dismiss, which was agreed to by Plaintiff’s counsel and granted by the Court (Document 18). In their Amended Motion to Dismiss, Defendants responded to the claims brought in Plaintiff’s Original Complaint and also the new claims brought in the First Amended Complaint. *Defendants’ Amended Motion to Dismiss (Document 13.)*

¹ Plaintiff did delete her assertion that Defendants’ alleged of 42 U.S.C. § 1983 served as RICO predicate acts.

8. On Sunday, June 6, 2010, Plaintiff filed her 60-page Second Amended Complaint, along with 50 pages of Exhibits (Documents 19 and 19-1). As with the First Amended Complaint, Plaintiff included a great deal of briefing in response to the Motion to Dismiss. She also filed a 4-page Response to Defendants' Amended Motion to Dismiss to "offer further limited comments and authority concerning the motion to dismiss." *Plaintiff's Response to Amended Motion to Dismiss*, (Document 20).

9. Defendant LexisNexis filed its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on June 7, 2010 (Document 22). LexisNexis's Motion to Dismiss is directed to the First Amended Complaint.

10. By agreement of the parties and the Order of the Court, Defendant Judge Edwards has until June 23, 2010, to move to dismiss or answer the complaint (Document 16.)

11. On June 9, 2010, after being notified by the undersigned counsel that she needed either the Defendants' consent or the Court's permission to file the Second Amended Complaint, Plaintiff filed the pending Motion for Leave to Amend. The motion is opposed by all defendants.

ARGUMENT AND AUTHORITIES

Fed. R. Civ. P. 15

12. Plaintiff is entitled to amend her complaint once as a matter of course pursuant to Rule 15(a)(1). She has already used this amendment by filing her First Amended Complaint. Otherwise, she must have the consent of the opposing parties or leave of court. FED. R. CIV. P. 15(a)(2). Plaintiff has now asked for motion for leave pursuant to Fed. R. Civ. P. 15(a)(2). She believes she is actually entitled to amend pursuant to Fed. R. Civ. P. 15(a)(3). *Plaintiff's Motion for Leave to Amend*, ¶ 8. However, Rule 15(a)(3), entitled "Time to Respond," only sets out the

timeframe for required responses to amended pleadings. FED. R. CIV. P. 15(a)(3). It does not create any rights to amend.

Leave to Amend Standard

13. Montgomery County and Adamick recognize the general rule that leave to amend a complaint should be freely granted under Rule 15 when justice so requires. However, the District Court need not allow an amendment if there are any of the following factors: (1) undue delay; (2) bad faith or dilatory motive on the part of the movant; (3) repeated failures to cure deficiencies by amendments previously allowed; (d) undue prejudice to the opposing party; and (3) futility of amendment. *In re Southmark Corp.*, 88 F.3d 311, 314-15 (5th Cir. 1995)(citing *Foman v. Davis*, 371 U.S. 178, 182 (1982)(emphasis added)).

Undue Delay and Prejudice

14. In exercising its discretion to deny leave to amend a complaint, a trial court may properly considered (1) an “unexplained delay” following an original complaint, and (2) whether the facts underlying the amended complaint were known to the party when the original complaint was filed. *In Re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1995)(citing *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1098 (5th Cir. 1979), *cert. denied*, 446 U.S. 939 (1980)). Although Rule 15(a) does not impose a time limit “for permissive amendment, ‘at some point, time delay on the part of a plaintiff can be procedurally fatal.’” *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004)(citing *Whitaker v. City of Houston*, 963 F.2d 831, 836 (5th Cir. 1992)).

15. The primary and most substantive difference between the First Amended Complaint and the Second Amended Complaint involves Plaintiff’s allegation regarding the RICO element of enterprise. In the Original Complaint, Plaintiff alleged the following:

61. Defendants, jointly and severally, have engaged in actions with a common purpose (“Plan”). The Plan constitutes an enterprise with a common purpose –

requiring Karen McPeters, and similarly situated litigants, to pay filing fees, service charges and taxes that are not authorized by statute, and that exceed the amounts required by statute.

Plaintiff's Original Complaint, ¶ 61 (Document 1.)

16. Defendants moved to dismiss the RICO allegations for a number of reasons, including that this “enterprise” allegation was insufficient because Plaintiff failed to allege the existence of an enterprise “separate and apart” from the alleged racketeering activity. “The enterprise is not a pattern of racketeering activity, but must exist separate and apart from the pattern of racketeering activity in which it engages.” *Whelan v. Winchester Production Company*, 319 F.2d 225, 229 (5th Cir. 2003)(citing *Atkinson*, 808 F.2d at 441).

17. Plaintiff’s First Amended Complaint changed this slightly, but not in a curative way:

102. Defendants, jointly and severally, have engaged in actions with a common purpose (“Plan”). The Plan constitutes an enterprise with a common purpose – mandating that Karen McPeters, and similarly situated litigants, and their attorneys, participate in E-filing in Montgomery County, Texas. E-filing causes additional costs for litigants.

103. The Plan results in the factual and proximate causation of litigants being forced to pay illegal filing fees, service charges and taxes, not authorized by statute, and exceeding the amounts required by statute. Filing fees are statutorily required when one files a lawsuit. Upon information and belief, no other Texas county mandates filing fees for motions and other civil filings, except for Montgomery County and Jefferson County. Both counties use LexisNexis.

18. Defendants again moved for dismissal because of the failure of the Plaintiff to sufficiently allege “enterprise.” *Defendants’ Amended Motion to Dismiss, ¶¶ 27-28 (Document 13)*.

19. Plaintiff was on notice after the first motion to dismiss, filed in response to the Original Complaint, that there was a problem with her allegation of the existence of an “enterprise.” However, she chose to not amend this part of her complaint in her First Amended Complaint, and instead waited to *attempt* to make this allegation when she filed her Second Amended

Complaint. This was her choice. There is no adequate explanation for the delay. Plaintiff does not state that she only found out the alleged facts behind the allegations of “enterprise” after filing her First Amended Complaint – and she cannot. She really offers no factual allegations and instead merely recites the elements of an “association in fact” enterprise.

20. In fact, the only explanation that Plaintiff gives for her request for leave to amend is as follows:

The amendment to the complaint is appropriate, because Montgomery County added additional extrinsic material to its Amended Motion to Dismiss, and raised other objections to Plaintiff McPeters First Amended Complaint.

Plaintiff’s Motion for Leave to Amend, ¶ 8 (Document 36.)

21. Defendants, however, did not offer any additional extrinsic material or other objections to Plaintiff’s claim regarding Plaintiff’s allegation of the existence of a RICO “enterprise.” Thus, Plaintiff has no explanation for why she should be allowed to amend her allegations of a RICO “enterprise” at this juncture.²

22. Defendants are concerned that Plaintiff will use further amended complaints to attempt to cure problems known to her since the first motion to dismiss, all problems which she could have attempted to cure in her First Amended Complaint. Defendants will face further delays and expenditure of time and resources responding to Plaintiff’s amendments, which could have easily been part of the original complaint to begin with.

² Defendants’ “additional extrinsic evidence” consisted of the Local Rules of Travis County and Harris County and e-file orders in each of those counties, offered to counter Plaintiff’s assertion that no other Texas counties, except Montgomery and Jefferson (both of whom use LexisNexis), mandated filing fees for motions and other civil filings by way of mandating e-filing. The only other “additional extrinsic evidence” offered by the Defendants were the District Clerk Notes showing Plaintiff’s counsel was aware since January 27, 2009, that *McPeters I* was subject to e-filing, offered to counter her allegation of reliance, a necessary element of RICO mail and wire fraud, and to counter her claim she was denied procedural due process. None of the additional evidence was offered for the “enterprise” issue.

Plaintiff is correct, Defendants raised objections to her new claims for violations of the Texas Constitution’s Separation of Powers provision, and for her claims under the Texas Theft Liability Act and for common law fraud. .

Futility of Amendment

23. Defendants further request that the motion for leave to amend be denied because the amendment is futile. Plaintiff still has not adequately alleged a RICO “enterprise.”

24. The district court does not abuse its discretion in denying leave to amend if allowing amendment of the complaint would be futile. *Landavazo v. Toro Co.*, 301 Fed.Appx. 333, 337 (5th Cir. 2008); *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985)(“The liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures.”); *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003). Therefore, courts review the proposed amended complaint under “the same standard of legal sufficiency as applies under Rule 12(b)(6).” *Landavazo*, 301 Fed. Appx. At 337 (citing *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000)).

25. “To survive a Rule 12(b)(6) motion, the plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’ ” *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,570 (2007)). While a complaint need not contain detailed factual allegations, it must set forth “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citation omitted). The “[f]actual allegations of [a complaint] must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* (quotation marks, citations, and footnote omitted). Plaintiff has failed to do this.

26. “In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise.” *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). When a plaintiff alleges an “association-in-fact”

enterprise, she must show evidence of an “ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure.” *Id.* (citation omitted). Further, Plaintiff must plead specific facts which establish that the association exists for purposes other than to simply commit the predicate acts.” *Id.* (citation omitted). “If the association has as its *raison d’etre* a single, discrete goal toward which all its energies are directed, the association is not a RICO enterprise.” *In Re Mastercard Int’l, Inc.*, 132 F.Supp.2d 468, 484 (E.D. La. 2001)(citation omitted). Plaintiff must additionally show the enterprise has an existence separate and apart from the pattern of racketeering. *Whelan v. Winchester Production Company*, 319 F.2d 225, 229 (5th Cir. 2003)(citing *Atkinson v. Anardko Bank & Trust Co.*, 808 F.2d 438, 441 (1987)).

27. In her Second Amended Complaint, Plaintiff attempts to cure her failures in pleading “enterprise.” She now asserts all of the Defendants – Judge Edwards, Adamick, the County and LexisNexis, formed an “association-in-fact” enterprise, which she labels the “E-File Racket.” *Plaintiff’s Second Amended Complaint*, ¶ 104. This is her apparent attempt to show the enterprise exists separately and apart from the pattern of racketeering.

28. Plaintiff has failed to plead that the “E-File Racket” exists for purposes other than to commit the predicate acts. The test for determining this is whether “the enterprise would still exist were the predicate acts removed from the equation.” *In Re Mastercard Int’l, Inc.*, 132 F.Supp.2d at 485.

29. The association, the “E-File Racket” has one goal: mandating that Plaintiff and others participate in e-filing in Montgomery County. *Plaintiff’s Second Amended Complaint*, ¶ 103. The Plaintiff fails to allege – and cannot show – that the “E-File Racket” would be in existence without the predicate acts. She specifically states that Judge Edwards is the head of the decision-

making structure, because he enters the order designating a case as an e-file case. *See Plaintiff's Second Amended Complaint, ¶ 104-105.* She also states that "E-File Racket" "enforcers" are Adamick (for rejecting filings and voiding filed pleadings to force e-filing) and Montgomery County (for entering into a contract with LexisNexis to mandate attorney compliance through Barbara Adamick) and LexisNexis is its "collector" (for providing E-filing services, with mandatory cost, to Montgomery County civil litigants in furtherance of the Plan). *Plaintiff's Second Amended Complaint, ¶ 104-105.* There are no alleged facts to demonstrate that the "E-File Racket" exists beyond the "Plan" to mandate e-filing. The association exists solely for one purpose, to mandate e-filing. Thus, Plaintiff has failed to demonstrate that the "association-in-fact" enterprise exists separate and apart from the pattern of racketeering activity. There is no need to allow Plaintiff to amend her pleadings: she still cannot meet the pleading requirements of RICO and Defendants are entitled to dismissal of these claims.

PRAYER

Considering the foregoing, Defendants pray the Court denies Plaintiff's Motion for Leave to Amend and for all other relief to which they may be entitled.

Respectfully submitted,

DAVID K. WALKER
MONTGOMERY COUNTY ATTORNEY

By: /s/ Sara M. Forlano
Sara M. Forlano
Assistant Montgomery County Attorney
Texas Bar No. 00796565
Federal Bar No. 29050
sara.forlano@mctx.org
207 W. Phillips, Suite 100
Conroe, Texas 77301
(936) 539-7828
(936) 760-6920 fax

ATTORNEY FOR DEFENDANTS,
MONTGOMERY COUNTY AND
BARBARA GLADDEN ADAMICK

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been forwarded to the following counsel of record in accordance with the District's ECF service rules on June 14, 2010 and/or certified mail, return receipt requested.

Robert L. Mays, Jr.
8626 Tesoro Drive, Suite 820
San Antonio, Texas 78217
210-657-7772
210-657-7780 fax
mays7772@gmail.com
ATTORNEY FOR PLAINTIFF,
KAREN MCPETERS

Allison Standish Miller
Texas Bar No. 24046440
Federal I.D. No. 602411
amiller@sschlaw.com
Billy Shepherd
Texas Bar No. 18219700
Federal I.D. No. 10666
bshepherd@sschlaw.com
SHEPHERD, SCOTT, CLAWATER & HOUSTON, L.L.P.
2777 Allen Parkway, 7th Floor
Houston, Texas 77019
Telephone No. (713) 650-6600
Telecopier No. (713) 650-1720
ATTORNEY FOR DEFENDANT,
JUDGE FREDERICK E. EDWARDS

MIRANDA R. TOLAR
Texas Bar No. 24029843
S.D. Tex. ID No. 28896
600 Travis Street, Suite 2800
Houston, Texas 77002-3095
mtolar@lockelord.com
Telephone: (713) 226-1618
Facsimile: (713) 223-3717
ATTORNEY-IN-CHARGE FOR
DEFENDANT REED ELSEVIER, INC.

John G Parker
johnparker@paulhastings.com
Emily Shoemaker
emilyshoemaker@paulhastings.com
J. Allen Maines
allenmaines@paulhastings.com
S. Tameka Phillips
tamekaphillips@paulhastings.com
Paul Hastings, Janofsky and Walker, L.L.P.
600 Peachtree St NE, Ste 2400
Atlanta, GA 30308
ATTORNEY FOR DEFENDANT,
REED ELSEVIER, INC.
Telephone: (404) 815-2222
Facsimile: (404) 685-5222

/s/ Sara M. Forlano
Sara M. Forlano