

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

KAREN MCPETERS, individually, and on)
 Behalf of those individuals, persons and)
 entities who are similarly situated,)
 Plaintiff,)

V.)

CIVIL ACTION NO. 4:10cv1103

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

**DEFENDANT REED ELSEVIER, INC.’S MOTION TO DISMISS PLAINTIFF’S
SECOND AMENDED COMPLAINT**

In response to Plaintiff’s Second Amended Complaint, Defendant LexisNexis,¹ a division of Reed Elsevier Inc., (“LexisNexis”) respectfully renews its Motion to Dismiss filed on June 7, 2010 and submits its Motion to Dismiss Plaintiff’s Second Amended Complaint.

I. Nature and Stage of the Proceeding

Plaintiff is a Montgomery County civil litigant who is filing her Second Amended Complaint regarding the E-filing system that Montgomery County began implementing in 1997, which requires litigants in designated E-filing cases to pay for filing pleadings with the County’s District Courts and the County Courts at Law having concurrent jurisdiction with the District Courts.² Plaintiff sues Montgomery County, Texas itself, along with the Honorable Frederick E. Edwards, District Judge, 9th District Court, Montgomery County, Texas; Barbara Gladden

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

Adamick, District Court Clerk of Montgomery County, Texas; and LexisNexis, the company who administers the E-filing system (collectively, the “Defendants”).

Plaintiff contends Defendants have refused paper filings and charged litigants and/or their counsel fees in excess of those authorized by Texas statute, allegedly in violation of rights secured by the United States Constitution. (Plaintiff’s Second Amended Complaint, ¶¶ 180-204). Plaintiff also claims the E-filing requirements violate the Texas Constitution, Texas statutes, and RICO. (Plaintiff’s Second Amended Complaint, ¶¶ 103-169, 205-222, 264-268). In addition to these claims, Plaintiff brings causes of action for fraud, conspiracy and violation of the Texas Theft Liability Act. (Plaintiff’s Second Amended Complaint, ¶¶ 223-263). Plaintiff seeks the return of all out-of-pocket filing fees, service charges and taxes as well as statutory damages, injunctive relief, punitive damages and attorneys’ fees. (Plaintiff’s Second Amended Complaint, ¶¶ 269-301).

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

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

A. Subject Matter Jurisdiction

A federal court should dismiss a plaintiff’s claim for lack of subject matter jurisdiction when Plaintiff has failed to establish diversity of citizenship or federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. Plaintiff seeks jurisdiction under 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (jurisdiction over § 1983 claims). Pursuant to 28 U.S.C.

² Plaintiffs who choose not to E-file have the option of requesting leave from the court to submit paper filings, or use the Public Access Terminal.

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

B. Failure to State a Claim

When ruling on a motion to dismiss for failure to state a claim, a two-step analysis is required. First, a court must consider only the factual allegations of the complaint — neither its legal conclusions nor its bare recitation of the elements of a claim — in determining whether the plaintiff has made a plain statement of the grounds of her entitlement to relief. Fed R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”). *See also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (following *Iqbal* and *Twombly* in affirming dismissal of claims under Texas law when factual allegations failed to support legal allegations in the complaint.). Second, if the plaintiff has alleged sufficient facts to bear out the elements of the claim, the court must then consider whether the adequately pleaded facts state a “plausible,” rather than a merely “possible,” claim.

Iqbal, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 555. When determining whether a plaintiff has stated a claim upon which relief can be granted, a court need not accept as true unpled or conclusory allegations. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995); *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993).

III. Plaintiff’s Second Amended Complaint still fails because Plaintiff has not adequately alleged “enterprise” under RICO.

Plaintiff’s Second Amended Complaint is virtually identical to her First Amended Complaint.³ Thus, Defendant LexisNexis’ Motion to Dismiss is still responsive in its entirety and it is hereby incorporated by reference. For the sake of brevity, Defendant will not repeat those arguments already set forth in its original Motion to Dismiss.

To the extent Plaintiff’s Second Amended Complaint differs, it is with respect to the RICO allegations. For example, Plaintiff attempts to clarify her blatantly confusing RICO claims by outlining the elements of RICO and attempting to apply her version of the facts to the elements. (See Second Amended Complaint at ¶¶ 103-106, cf. First Amended Complaint at ¶¶ 102-103). This time, instead of merely alleging facts and leaving Defendants and this Court to determine which facts apply to which elements in RICO, Plaintiff creates sub-headings entitled “Association in Fact” (i.e. Enterprise) and “Pattern of Racketeering” to separately address the elements.⁴ (See Second Amended Complaint at ¶¶ 104-106). Plaintiff’s amended allegations are nevertheless insufficient to state a claim under RICO.

A. Plaintiff fails to allege that an enterprise exists between Defendants separate and apart from the alleged racketeering activity.

³ Most of Plaintiff’s changes in her Second Amended Complaint are minor or stylistic. (¶¶ 123, 176, 270, 302). Plaintiff also modified the allegations under the statutory claims against Barbara Adamick, which are inapplicable to LexisNexis and do not raise newly discovered factual issues. (¶¶ 264-266).

⁴ Memorandum in Support of Defendant Reed Elsevier, Inc.’s Motion to Dismiss at 20-21.

Plaintiff alleges an “association-in-fact” enterprise, but continues to fail in her attempts to allege any association distinct from the racketeering activity under RICO. In fact, Plaintiff concedes the association is by virtue of the alleged racketeering activity when she states, “Defendants are an association-in-fact using money derived from a pattern of racketeering activity to conduct the enterprise through a pattern of racketeering activity.” (Plaintiff’s Second Amended Complaint, ¶ 105). Plaintiff consistently misunderstands the RICO requirement that Defendants associate for purposes other than the alleged racketeering activity. *See Rivera v. AT&T Corp.*, 141 F. Supp. 2d 719, 726 (S.D. Tex. 2001) (finding no RICO violation when Plaintiffs failed to allege “facts to suggest that Tele-Communications, Inc., AT&T Corp., or Time Warner, Inc. exist as an entity apart from their business of providing cable services”) (J. Ellison). If Defendants are not an illegal entity or organization, Plaintiff must establish more than merely the fact that the predicate acts were committed in the course of the entity’s business. *Elliot v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). LexisNexis bills litigants and collects E-filing fees in the course of its business with the other Defendants. This process of billing and collecting for E-filing, according to Plaintiff, forms the basis of the predicate acts of racketeering activity under RICO. LexisNexis’ association with the other Defendants is for the sole purpose of carrying out the alleged predicate acts. Plaintiff does not allege any association between Defendants separate and apart from these alleged predicate acts, which are committed in the course of business. Thus, Plaintiff fails to adequately allege an “enterprise” as required under RICO.

B. Plaintiff fails to allege that Defendants function as a continuing unit, as required for an “association-in-fact” enterprise.

Allegations of an association-in-fact enterprise must show that the various associates “function as a continuing unit.” (Defendant LexisNexis’ Motion to Dismiss, 17). The

Defendants do not function as a continuing unit. LexisNexis is not involved with Montgomery County, Judge Edwards, or Barbara Adamick except as their interactions relate to E-filing. Plaintiff does not allege that LexisNexis and the remaining Defendants conduct regular meetings or have regular contact with one another, as a continuing unit would. Plaintiff alleges Defendants comprise an “ongoing organization” and “activity occurs daily.” (Plaintiff’s Second Amended Complaint, ¶ 105). Plaintiff says the hierarchical nature of the organization and/or the decision-making structure prove it is a continuing unit. Plaintiff fails to state how these qualities prove Defendants comprise a continuing unit. In fact, these qualities prove nothing. Defendants are entities contracting with each other for a single purpose. They are not an organization in any sense of the term. They do not have official titles in relation to each other and there is certainly no hierarchy, at least not with respect to LexisNexis and the other Defendants. LexisNexis could terminate the E-filing contract with Montgomery County (and by default its officials) just as Montgomery County could terminate the E-filing contract with LexisNexis. Neither party has more decision making power than the other. Thus, Plaintiff’s allegations of hierarchy and the presence of a decision-making structure are fabricated. Finally, Plaintiff alleges Defendants comprise a continuing unit because E-filing has existed for more than ten years. (Plaintiff’s Second Amended Complaint, ¶ 107). Plaintiff neglects to show how the existence of E-filing proves Defendants comprised a unit which operated continuously separate and apart from the alleged predicate acts of racketeering activity. Thus, Plaintiff fails to adequately allege an “association-in-fact” enterprise.

IV. Conclusion

Looking beyond the rhetoric, it is apparent that Plaintiff’s RICO allegations fail for the same reasons they did in the previous complaints – Plaintiff cannot allege Defendants function as a continuing unit or that Defendants otherwise comprise an enterprise distinct from the alleged

predicate acts of racketeering activity. For all of the foregoing reasons in this brief and the reasons set forth in its Motion to Dismiss, LexisNexis respectfully requests that the Court grant its Motion to Dismiss Plaintiff's Second Amended Complaint with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2010, I electronically filed the foregoing **Defendant Reed Elsevier, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint** 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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