McPeters v. Edwards et al Doc. 56

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN McPETERS, Individually, and on behalf of those individuals, persons, and entities who are similarly situated,	§	
Plaintiff,	§	
VS.	§	**CIVIL ACTION NO. 4:10–CV–1103**
THE HONORABLE FREDERICK E. EDWARDS; BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS; and REED ELSEVIER, INC. d/b/a LexisNexis,	§	
Defendants.	§	

DEFENDANT THE HONORABLE FREDERICK E. EDWARDS'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT UNDER RULES 12(b)(6), 12(b)(1), AND 9(b)

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July 14, 2010

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Table Of Contents

Table Of Contents i

Index Of Authorities iii

Statement Of The Case/Nature And Stage Of The Proceeding 1

Background 3

Summary Of The Argument 6

Issues To Be Ruled On/Standard Of Review 7

- A. Rule 12(b)(6). 7
- B. Rule 12(b)(1). 8
- C. Rule 9(b). 8

Argument 9

- A. McPeters's Claims Have No Basis In Law Or Fact Because Alternatives To E-Filing Were And Are Always Available To Her. 9
- B. Judge Edwards Is Entitled To Absolute Immunity From McPeters's Claims. 11
  - (i) The Law. 11
  - (ii) The Law Applied To The Facts. 12
- C. Under Rules 12(b)(6) And 9(b) The Court Should Dismiss McPeters's RICO Claim. 14
  - (i) The Law. 14
  - (ii) The Law Applied To The Facts. 17
- D. McPeters's Fraud and Conspiracy Claims Against Judge Edwards Fail. 22
- E. McPeters Has Not Properly Plead A Claim For Injunctive Relief Under § 1983 24
- F. All Claims Against Judge Edwards, Including McPeters's Texas Theft Liability Act Claim, Should Be Dismissed Under 11th Amendment Immunity. 27
  - (i) The Law. 27
  - (ii) The Law Applied To The Facts. 29
- G. McPeters's Various "Constitutional" Claims Lack Merit and Warrant 12(b)(6) Dismissal. 29
- H. McPeters Is Not Entitled To Declaratory Relief. 32

I. McPeters Lacks Standing To Sue For Others. 32
Conclusion 34
Certificate Of Service 35

Index Of Authorities

CASES

ABN-AMRO Mortgage Group, Inc. v. Emerson Manufactured Homes, Ltd.,
No. Civ. A. H–01–1787, 2005 WL 1949601
(S.D. Tex. Aug. 15, 2005) 17

Adams v. McIlhaney,
764 F.2d 294 (5th Cir. 1985) 26

Archuleta v. McShan,
897 F.B. 495 (10th Cir. 1990) 32, 33

Arsenaux v. Roberts,
726 F.2d 1022 (5th Cir. 1982) 23

Ashcroft v. Iqbal,
129 S.Ct. 1937, 167 L.Ed. 2d 929 (2007) 8, 11

AT&T Communications v. BellSouth Telecommunications Inc.,
238 F.3d 636 (5th Cir. 2001) 29

Atkinson v. Anadarko Bank and Trust Co.,
808 F.2d 438 (5th Cir.), *cert. denied*,
483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987) 16

Ballard v. Wall,
413 F.3d 510 (5th Cir. 2005) 12, 13, 14

Bauer v. Texas,
341 F.3d 352 (5th Cir. 2003) 26, 27

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) 8, 11

Benchmark Electronics, Inc. v. J.M. Huber Corp.,
343 F.3d 719 (5th Cir. 2003) 9, 23

Benton v. U.S.,
960 F.2d 19 (5th Cir. 1992) 8

Boyd v. Biggers,
31 F.3d 279 (5th Cir. 1994) 30

Burzynski, In re, 989 F.2d 733 (5th Cir.1993) 15, 19

Castillo v. First City Bank Corp. of Texas, Inc.,
43 F.3d 953 (5th Cir. 1994) 23

Chauhan v. Formosa Plastics Corp.,
212 F.3d 595 (5th Cir. 2000) 3

City of Beaumont v. Bouillon,
896 S.W.2d 143 (Tex. 1995) 30

City of Los Angeles v. Lyons,
461 U.S. 95, 103 S. Ct. 1660,
1665, 75 L. Ed. 2d 675 (1983) 26, 27

Coon v. Ledbetter,
780 F.2d 1158 (5th Cir. 1986) 33

Crowe v. Henry,
43 F.3d 198 (5th Cir. 1995) 14, 15, 16, 17, 18, 19

Davis v. Tarrant County,
565 F.3d 214 (5th Cir. 2009) 12, 14

Delta Truck & Tractor, Inc. v. J.I. Case Co.,
855 F.2d 241 (5th Cir.), *cert. denied*, 489 U.S. 1079,
109 S.Ct. 1531, 103 L.Ed.2d 836 (1989) 15, 16

Dockeray v. Francis,
No. 3:03-CV-2862-K,
2004 WL 2187118 (N.D. Tex. Sept. 28, 2004) 25

Doe v. Beaumont Indep. Sch. Dist.,
240 F.3d 462 (5th Cir. 2001) 32

Elliott v. Foufas,
867 F.2d 877 (5th Cir. 1989) 21

Fed. Sign v. Tex. S. Univ.,
951 S.W.2d 401 (Tex. 1997), superseded by statute on other grounds 30

Goren v. New Vision Int'l, Inc.,
156 F.3d 721 (7th Cir. 1988) 17

Guidry v. Bank of LaPlace,
954 F.2d 278 (5th Cir. 1992) 8, 9

H.J. Inc. v. Nw. Bell Tel. Co.,
492 U.S. 229, 109 S.Ct. 2893,
106 L.Ed.2d 195 (1989) 15, 16, 18

Hainze v. Richards,
207 F.3d 795 (5th Cir. 2000), *cert. denied*
531 U.S. 959, 121 S. Ct. 384
148 L. Ed. 2d 296 (2000) 26, 27, 32

Heden v. Hill,
937 F.Supp. 1230 (S.D. Tex. 1996) 17

Hernandez v. Ciba-Geigy Corp. USA,
200 F.R.D. 285 (S.D. Tex. 2001) 23

Hoepfl v. Varlow,
906 F. Supp. 317 (E.D. Va. 1995) 25, 26

Holloway v. Walker,
765 F.2d 517 (5th Cir.),
cert. denied, 474 U.S. 1037,
106 S.Ct. 605, 88 L.Ed.2d 583 (1985) 28

In re Mastercard Int'l, Inc.,
313 F.3d 257 (5th Cir. 2002) 21

Kane Enters. v. MacGregor (USA) Inc.,
322 F.3d 371 (5th Cir. 2003) 8, 25

Kentucky v. Graham,
473 U.S. 159, 105 S. Ct. 3099
87 L. Ed. 2d 114 (1985) 28, 29

Landry v. Air Line Pilots Ass'n,
901 F.2d 404 (5th Cir.), *cert. denied*,
111 S.Ct. 244 (1990) 21

Liptak v. Banner,
No. Civ.A.301CV0953M
2002 WL 378454 (N.D.Tex. Mar. 7, 2002) 23

Malina v. Gonzales,
994 F.2d 1121 (5th Cir. 1993) 13, 14

Manax v. McNamara,
842 F.2d 808 (5th Cir. 1988) 16, 19

Mastercard International Inc., Internet Gambling Litigation, In re,
132 F.Supp.2d 468 (E.D. La. 2001) 17, 20

McAlester v. Brown,
469 F.2d 1280 (5th Cir. 1972) 12

Mellinger v. City of Houston,
68 Tex. 37, 3 S.W. 249 (1887) 31

Minix v. Gonzales,
162 S.W.3d 635 (Tex. App.—Houston [14th Dist.] 2005, no pet.) 29

Mireles v. Waco,
502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) 12, 13

Monell v. New York City Department of Social Services,
436 U.S. 658, 98 S. Ct. 2018
56 L. Ed. 2d 611 (1978) 28

Neinast v. Texas,
217 F.3d 275 (5th Cir. 2000),
cert. denied, 121 S.Ct. 1188 (2001) 27

Nordlinger v. Hahn,
505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) 31

Papasan v. Allain,
478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) 23

Peeler v. Hughes & Luce,
909 S.W.2d 494 (Tex. 1995) 30

Plumley v. Landmark Chevrolet,
122 F.3d 308 (5th Cir. 1997) 25, 26, 32

Slotnik v. Staviskey,
560 F.2d 31 (1st Cir. 1977) 23

Soc'y Of Separationists, Inc. v. Herman,
959 F.2d 1283 (5th Cir. 1982) 26

Stump v. Sparkman,
435 U.S. 349, 98 S.Ct. 1099,
55 L.Ed. 2d 331 (1978) 12

Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.,
975 F.2d 1134 (5th Cir. 1992) 9, 17, 18

TransAmerican Nat'l Gas Corp. v. Powell,
811 S.W.2d 913 (Tex. 1991) 6

U.S. v. Bruno,
809 F.2d 1097 (5th Cir. 1987) 21

United States ex rel Williams v. Bell Helicopter Textron, Inc.,
417 F.3d 450 (5th Cir. 2005) 9

United States ex rel. Thompson v. Columbia/HCA Healthcare Corp,
125 F.3d 899 (5th Cir. 1997) 9, 21, 22, 23, 24

Univ. of Tex. Med. Sch. at Houston v. Than,
901 S.W.2d 926 (Tex. 1995) 31

Vance v. Bradley,
440 U.S. 93, 99 S.Ct.939, 59 L.Ed. 2d 171 (1979) 31

Wagstaff v. U.S. Dep't of Educ.,
509 F.3d 661 (5th Cir. 2007) 8

Walsh v. America's Tele-Network Corp.,
195 F.Supp.2d 840 (E.D. Tex. 2002) 17

Ward v. Santa Fe Indep. Sch. Dist.,
393 F.3d 599 (5th Cir. 2004) 32

Warnock v. Pecos County,
88 F.3d 341 (5th Cir. 1996) 28, 29

Warth v. Seldin,
422 U.S. 490 (1975) 32

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 28, 29

Williams v. WMX Technologies, Inc.,112 F.3d 175 (5th Cir. 1997) 17

Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer,
90 F.3d 118 (5th Cir. 1996) 14, 18

STATUTES

18 U.S.C. § 1341 *et seq.* 20

18 U.S.C. § 1951 20

18 U.S.C. § 1961 *et seq.* 3, 14, 15, 20

18 U.S.C. § 1961(3) 15

28 U.S.C. § 1367 31

TEX. CIV. PRAC. & REM. CODE § 101.057 29

TEX. CIV. PRAC. & REM. CODE § 101.106(e) 29

TEX. CIV. PRAC. & REM. CODE § 15.015 4

TEX. GOV'T CODE § 51.303 10

RULES

FED. R. CIV. P. 12(b)(1) 1, 3, 6, 8, 27, 29, 31, 32, 33, 34

FED. R. CIV. P. 12(b)(6) 1, 3, 6, 7, 8, 14, 16, 20, 23, 25, 27, 29, 32, 33, 34

FED. R. CIV. P. 8 11

FED. R. CIV. P. 9(b) 1, 3, 7, 8, 14, 17, 20, 22, 23, 24

FED. R. EVID. 201 3

TEX. R. APP. P. 53.7(a) 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN McPETERS, Individually, and on behalf of those individuals, persons, and entities who are similarly situated,	§ § § §	
Plaintiff,	§ §	
VS.	§ §	**CIVIL ACTION NO. 4:10–CV–1103**
THE HONORABLE FREDERICK E. EDWARDS; BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS; and REED ELSEVIER, INC. d/b/a LexisNexis,	§ § § § § §	
Defendants.	§ §	

DEFENDANT THE HONORABLE FREDERICK E. EDWARDS'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT UNDER RULES 12(b)(6), 12(b)(1), AND 9(b)

Statement Of The Case/Nature And Stage Of The Proceeding

1. Under Rules 12(b)(6), 12(b)(1), and 9(b) of the Federal Rules of Civil Procedure, defendant the Honorable Frederick E. Edwards ("Judge Edwards") moves for dismissal of Plaintiff Karen McPeters's ("McPeters") Second Amended Original Complaint (the "Complaint").

2. McPeters filed her Original Complaint on April 6, 2010 against Judge Edwards; Reed Elsevier, Inc. ("LexisNexis");[1] Montgomery County, Texas; and Barbara Gladden

[1] Originally improperly-named by McPeters, LexisNexis is a division of Reed Elsevier, Inc.

Adamick, District Clerk of Montgomery County, Texas (individually, "Adamick" and collectively with Montgomery County, Texas, "Montgomery County"). *Docket No. 1*.

3. Montgomery County, having been served on April 16, 2010, timely moved to dismiss the Original Complaint on multiple grounds on May 7, 2010. *Docket Nos. 5, 6, and 8*. On May 17, 2010, before Judge Edwards was served and prior to the time that LexisNexis was required to answer or move in response to the Original Complaint, McPeters amended her original complaint. *Docket Nos. 9, 11*. Two days later, on May 19, 2010, McPeters served Judge Edwards with the Original Complaint. *Docket No. 35*.

4. Without leave of court or consent from the defendants, after Montgomery County filed its amended motion to dismiss, and immediately prior to the time that LexisNexis filed its first motion to dismiss, McPeters amended her complaint a second time, filing the Complaint on June 6, 2010. *Docket Nos. 13, 19, 22*. McPeters *then* filed a motion seeking permission to amend, which all defendants opposed, on June 9, 2010. *See Docket Nos. 36, 40, 42, 46.* After an oral hearing on McPeters's motion to amend, the Court granted McPeters permission to amend her complaint. *See Minute Entry for June 30, 2010*.

5. McPeters, a civil litigant in Judge Edwards's court, complains in this suit that all defendants conspired against her and somehow violated her constitutional rights with respect to Judge Edwards's and Montgomery County's use of the LexisNexis File and Serve electronic filing system ("LNFAS") to electronically file and serve documents in Judge Edwards's Montgomery County, Texas state district court. *See, generally, Docket No. 1*.

6. In the Complaint, McPeters purports to assert causes of action against Judge Edwards for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.

§§ 1961–1968 ("RICO" or "the Act"); due process rights under 42 U.S.C. § 1983 and the United States Constitution; violations of rights to equal protection and the open courts provisions of the Texas Constitution; violations of the Texas Theft Liability Act; fraud; and conspiracy. *Docket No. 19, ¶¶ 103–263.* In addition to seeking money damages, McPeters purports to seek injunctive relief; declaratory relief; class action certification; expert witness fees; exemplary damages; and attorneys' fees. *Id., ¶¶ 267–302*.

7. The entirety of McPeters's claims against Judge Edwards are frivolous and meritless. More specifically, none of McPeters's claims states a claim against Judge Edwards upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). Further, certain of McPeters's claims warrant dismissal for lack of standing under Rule 12(b)(1) and for failure to comply with Rule 9(b). *See* FED. R. CIV. P. 9(b), 12(b)(1). Because of this, Judge Edwards moves to dismiss the Second Amended Complaint in its entirety.

Background

8. Judge Edwards is the presiding judge of the 9th District Court of Montgomery County, Texas. *Docket No. 1, ¶ 6*. In 2003, acting pursuant to the Local Rules of Montgomery County, Texas, Judge Edwards signed an order (the "Order") stating that all civil cases filed in the 9th District Court will be electronically filed and governed by the Local Rules Regarding Electronic Filing. *See Exhibit 1.*[2] These Local Rules, which the Texas Supreme Court specifically approved on September 16, 1997, provide as follows:

[2] Because federal courts are permitted to consider matters of public record when deciding a Rule 12(b)(6) motion to dismiss, the Court may take judicial notice of the records from McPeters's civil state court cases attached as *Exhibits 1, 3, 4, 5, and 7*. *See* FED. R. EVID. 201; *Chauhan v. Formosa Plastics Corp*., 212 F.3d 595, 595 (5th Cir. 2000). The Court is further permitted to consider, as part of McPeters's pleadings in this case, any other documents and/or records that are part of the record in this case, including *Exhibits 1, 2*, *and 6*, because those documents and/or records are referenced in the Complaint and are central to McPeters's claims. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000)).

> <u>DESIGNATION OF ELECTRONIC FILING CASES</u> A District Court in Montgomery County. . .may, from time to time, by written order, select and designate those cases which shall be assigned to the electronic filing system, as created and contemplated by the April 21, 1997, Service Agreement between LAWPlus™ and Montgomery County, Texas, or any successor system. . ..

Exhibit 2, p. 3.[3]

9. Although the Order requires e-filing through LNFAS for civil actions other than adoption actions, actions brought by the State of Texas or Child Protective Services, and new divorce or annulment cases that are resolved within 90 days, the order expressly provides alternatives to e-filing. *Exhibit 1*. Specifically, the Order states that parties may either: 1) file documents conventionally with leave of court; or 2) file documents electronically through the public use terminal if they choose not to subscribe to LNFAS. *See id*.

10. On May 18, 2007, McPeters invoked the judicial machinery and subjected herself to the jurisdiction of the civil court system of the State of Texas by filing an employment discrimination suit ultimately styled as Cause No. 07–09–09142, *Karen McPeters v. Montgomery County, Texas* ("*McPeters I*"). *See Exhibit 3*. After the case was properly transferred from Travis County to Montgomery County, *McPeters I* was assigned to the 9th District Court. *See id*.; *see also* TEX. CIV. PRAC. & REM. CODE § 15.015 ("An action against a county shall be brought in that county."). *McPeters I* was designated as an e-filing case, and counsel for McPeters was notified of this *at the very latest* on January 27, 2009. *Exhibit 1*; *Exhibit 3*. Counsel for McPeters refused to e-file, yet never requested leave to file documents

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[3] LexisNexis is the successor system of the LAWPlus electronic filing system previously utilized by Montgomery County. Further, despite McPeters's contentions to the contrary, Montgomery County has never received any payments from LexisNexis pursuant to the contract between LexisNexis and Montgomery County.

conventionally. *See id.* Nor does the record reflect that he ever attempted to use the public access terminal made available at the District Clerk's office. *See id.*

11. In addition to refusing to e-file, counsel for McPeters also refused to appear for trial of *McPeters I* despite being informed by court staff that his appearance was required at trial. *See Exhibit 7, p. 3*. Judge Edwards dismissed *McPeters I* when McPeters and her counsel failed to appear at trial. *See id.* The dismissal of *McPeters I* had absolutely nothing to do with e-filing or LNFAS; instead, it had everything to do with McPeters's counsel's willful failure to appear at trial. *See id.; see also, generally, Complaint.* McPeters then e-filed her notice of appeal after prompting from the District Clerk to do so. *See Exhibit 3. Again, McPeters never requested leave to file documents conventionally. See id.*

12. Shortly thereafter, on November 11, 2009, McPeters filed a document entitled "Petition to Investigate Potential Claims Pursuant to Tex. R. Civ. P. 202" ("*McPeters II*"), naming Adamick as the respondent and requesting to investigate many of the same claims McPeters purports to pursue in this case. *Exhibit 4*. The petition was filed by the District Clerk's office at the time, and remains on file to this day. *See id.* Although McPeters now claims that the filing was somehow voided, Judge Bob Wortham heard argument on—and denied—the relief sought in *McPeters II* on March 26, 2010. *Exhibit 5*. Eleven days later, McPeters filed this case. *Docket No. 1*.

13. During this time, the dismissal of *McPeters I* was fully briefed in the Court of Appeals for the Ninth District of Texas in Beaumont, Texas and was submitted to the court via oral argument on April 15, 2010. *Exhibit 7, p. 1*. The basis of McPeters's appeal of the dismissal of *McPeters I* was that, under Texas law, McPeters's failure to appear was excused and

"otherwise reasonably explained" by McPeters's attorney's mistaken belief regarding Judge Edwards's ability to act in *McPeters I*. *See id., p. 4*. The Ninth Court of Appeals agreed, finding that McPeters should not be held responsible for her attorney's erroneous—if not sanctionable—conduct: "[t]he record before us provides nothing to indicate that McPeters was personally responsible for or even aware about Mays's decision not to appear for trial on September 14[, 2009]. The trial court's action in dismissing McPeters's case on the same date it was reinstated cannot be affirmed on this record as a just sanction for McPeters's failure to appear because 'a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation.'" *Id*. (citing *TransAmerican Nat'l Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)).[4]

14. The majority of McPeters's complaints against Judge Edwards in this case arises out of McPeters's attorney's apparent resistance to using LNFAS to electronically file documents and are based on a *single act* by Judge Edwards: signing the Order. *See, generally, Complaint*. Yet McPeters never once took advantage of the alternatives to subscribing to LNFAS. For this and for all of the reasons that we discuss next, McPeters's Complaint against Judge Edwards should be dismissed.

Summary Of The Argument

15. Under Rules 12(b)(6) and/or 12(b)(1), McPeters's Complaint against Judge Edwards should be dismissed for each of the following reasons:

- McPeters has no cause of action against Judge Edwards at all because she never took advantage of available alternatives to e-filing;

[4] The time period for Montgomery County, Texas to appeal the Beaumont Court's ruling to the Texas Supreme Court has not yet expired. *See* TEX. R. APP. P. 53.7(a).

- Judge Edwards is entitled to absolute immunity under the judicial immunity doctrine. As such, McPeters's entire Complaint against him should be dismissed;
- McPeters has failed to state a valid RICO claim for failure to, *inter alia,* properly assert the existence of an enterprise or a pattern of racketeering activity;
- injunctive relief is not available to McPeters as she has not properly alleged such a claim; neither has she properly alleged that a real and immediate threat exists that she will be wronged in the future;
- as a state district judge, Judge Edwards is an agent of the State of Texas, and the State of Texas is protected from suit by Eleventh Amendment immunity;
- McPeters's purported state and federal constitutional claims lack merit;
- this Court should decline to exercise pendant jurisdiction over McPeters's state law claims;
- McPeters is not entitled to declaratory relief; and
- McPeters lacks standing to sue for others.

16. Further, McPeters has not plead her fraud and conspiracy allegations with the particularity required by Rule 9(b). Judge Edwards requests the Court to dismiss McPeters's Complaint against him in its entirety. *Id.*

<u>Issues To Be Ruled On/Standard Of Review</u>

A. <u>Rule 12(b)(6).</u>

17. Judge Edwards requests the Court to determine:

  - whether under Rule 12(b)(6) a complaint states a claim upon which relief can be granted when it is barred by the doctrine of judicial immunity as well as other governmental immunities; when the plaintiff lacks standing to sue for injunctive or declaratory relief or for relief on others' behalf; and when the complaint fails to allege facts necessary to support the purported causes of action.

18. A court should dismiss a complaint under Rule 12(b)(6) if it appears that the plaintiff cannot prove a plausible set of facts in support of his claim that would entitle her to

relief. *See* FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1955, 167 L.Ed. 2d 929 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To avoid dismissal for failure to state a claim under Rule 12(b)(6), a plaintiff must plead specific facts, not mere conclusory allegations. *See Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003). An appellate court reviews *de novo* a district court's dismissal under Rule 12(b)(6). *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

B. <u>Rule 12(b)(1)</u>.

19. Judge Edwards requests the Court to determine:

- whether under Rule 12(b)(1) a complaint states a claim upon which relief can be granted when the complaint is barred by Eleventh Amendment immunity and when the plaintiff lacks standing to bring claims on behalf of others.

20. The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is the same as that for a Rule 12(b)(6) motion. *See Benton v. U.S.*, 960 F.2d 19, 21 (5th Cir. 1992). An appellate court reviews *de novo* a district court's dismissal under Rule 12(b)(1). *See Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661 (5th Cir. 2007).

C. <u>Rule 9(b)</u>.

21. Judge Edwards asks the Court to determine:

- whether under Rule 9(b) a complaint states a claim upon which relief can be granted when the pleading alleging violations of RICO, fraud, conspiracy, and breach of fiduciary duty fails to specify the who, what, when, where, and how of the alleged fraudulent acts.

22. Federal Rule of Civil Procedure 9(b) requires pleading with particularity in cases alleging fraud. *See* FED. R. CIV. P. 9(b). What constitutes particularity will necessarily differ with the facts of each case; however, at a minimum, the rule requires that the allegations are

particular as to the time, the place, and the contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained as a result. *See Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 723–24 (5th Cir. 2003) (quoting *Guidry*, 954 F.2d at 288 and *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992)). At the very least, this heightened pleading requirement "requires that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp*, 125 F.3d 899, 903 (5th Cir. 1997). Even with respect to allegations based on information and belief, a complaint must still "set forth a factual basis for such belief" in order to comply with Rule 9(b). *Id.*; *see also United States ex rel Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 454 (5th Cir. 2005).

23. Review of a dismissal for failure to comply with Rule 9(b) is *de novo*. *See Benchmark Electronics*, 343 F.3d at 724.

Argument

A. McPeters's Claims Have No Basis In Law Or Fact Because Alternatives To E-Filing Were And Are Always Available To Her.

24. The allegations in McPeters's needlessly lengthy and often incoherent Complaint can be boiled down to one simple accusation: that McPeters's constitutional rights were violated as a result of her being forced to participate in LNFAS. Yet McPeters's own evidence clearly shows this is not true: the Order explicitly provides that parties may file conventionally with leave of court or utilize the public use terminal. *See Exhibit A to Docket No. 19*.

25. McPeters makes various allegations that Judge Edwards, *inter alia*, exceeded his authority and unconstitutionally increased filing fees, but the simple fact remains that McPeters never—not once—requested permission to exempt herself from being required to e-file. *See*

generally, Complaint. McPeters's assertion that because Judge Edwards dismissed her case he automatically would have denied any motion seeking leave to file conventionally is purely speculative, as is her wholly unsupported contention that the public use terminal *might* be too busy for individual litigants to use. *See Complaint, ¶¶ 78–80, 146.*

26. McPeters also alleges that a statement Judge Edwards made in a 2001 presentation at a Court Technology Conference in Baltimore, Maryland constituted a threat; however, even assuming *arguendo* that the statement constituted a threat, and it does not, it is ridiculous for McPeters to claim she somehow relied upon it since it is vague, non-specific, and was made six years before McPeters ever invoked the judicial machinery in *McPeters I*. *See Complaint, ¶ 115*; *Exhibit 6.*

27. Further, McPeters's claim that the Order was never e-filed rings hollow for at least two reasons: 1) Adamick, not LexisNexis, is charged with maintaining and safeguarding the court's records, and such records were always available to McPeters for inspection and copying at the District Clerk's office; and 2) counsel for McPeters was aware of the existence of the Order by January 27, 2009 at the very latest. *See* TEX. GOV'T CODE § 51.303; *Exhibit 3*. Thus, the Order cannot be secret since it is not only a matter of public record, but also since once parties fail to e-file without leave of court to do so, they are promptly notified. *See, e.g., Complaint, ¶ 136*.

28. The absurdity of McPeters's allegations that the Order (or any other action by Judge Edwards) constitutes an improper increase in filing fees is highlighted by a simple comparison. Assuming that McPeters elected to file and serve her documents though, for example, the United States Postal Service, such filing and service would require the payment of

money for paper, document reproduction, envelopes, certified and/or regular postage, and perhaps labels. Or, had she chosen to file and serve her documents through messenger service, such filing and service would necessitate costs for paper, document reproduction, envelopes, labels, and delivery fees. Here, LexisNexis is simply the method by which filings are transmitted to the district clerk, and the increased use of e-filing by state and federal courts unquestionably benefits the public by reducing and conserving the amount of paper filings generated and circulated, allowing for increased access to information, and providing rapid, often 24-hour access to documents and filings. *See, e.g., Exhibit 6, § F*.[5]

29. McPeters's allegations here are at best baseless, and at worst frivolous, wasteful, and harassing. Because McPeters had options other than e-filing available to her, yet failed to make use of them, there is no plausible set of facts which would entitle her to relief. *See, e.g., Twombly*, 550 U.S. at 555, 127 S.Ct. 1955, 167 L.Ed.2d 929. McPeters's entire Complaint therefore runs afoul of the requirements of Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure, and warrants dismissal in its entirety. *See* FED. R. CIV. P. 8a, 12(b)(6); *Iqbal*, 129 S.Ct. at 1949 (recognizing that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation").

B. Judge Edwards Is Entitled To Absolute Immunity From McPeters's Claims.

(i) The Law.

30. State and federal judges are entitled to absolute immunity from damages for judicial acts that they perform in judicial proceedings before them. *See Stump v. Sparkman*, 435

[5] "The lawyer does not incur postage costs, delivery costs or personal filings by staff. All filings are immediately noticed to the clerk's office, the judge's office, the opposing parties, and any other person or entity requested, which usually is a party that wishes to be kept aware of the case progress. . . .E-filing eliminates the cost of postage, hand deliveries, certified mail, and personal filings. For a few cents, filings are made efficiently, effectively and swiftly."

U.S. 349, 356, 98 S.Ct. 1099, 55 L.Ed. 2d 331 (1978). Judicial immunity is absolute because it is immunity from suit, not just the ultimate assessment of damages. *See Davis v. Tarrant County*, 565 F.3d 214, 221 (5th Cir. 2009) (citing *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991)).

31. **Judicial immunity applies to bar civil suits against judges even when actions taken by judges are erroneous, malicious, or in excess of their authority**. *See Stump, 435* U.S. at 356–57. When determining whether judicial immunity applies, a court considers the following four factors:

(i) whether the precise act complained of is a normal judicial function;

(ii) whether the acts occurred in a courtroom or appropriate adjunct spaces such as the judge's chambers;

(iii) whether the controversy centered around a case pending before the court; and

(iv) whether the acts arose directly out of a visit to the judge in his official capacity.

Ballard v. Wall, 413 F.3d 510, 515 (5th Cir. 2005); *see also McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972).

(ii) <u>The Law Applied To The Facts</u>.

32. McPeters alleges no facts in her Complaint that suggest that Judge Edwards acted without jurisdiction with respect to her claims, and McPeters cannot overcome the significant hurdle of showing that Judge Edwards is not entitled to immunity for his purely judicial actions. *See id.* Judge Edwards is entitled to judicial immunity for these complained-of acts because: (1) the entirety of Judge Edwards's acts and/or omissions made the basis of the Complaint—namely, issuing the Order and causing it to be entered in *McPeters I* and *McPeters II*—are all

normal judicial functions; (2) the entirety of Judge Edwards's acts and/or omissions made the basis of the Complaint occurred in a courtroom or appropriate adjunct spaces such as the judge's chambers, and McPeters does not allege otherwise; (3) the entirety of Judge Edwards's acts and/or omissions made the basis of the Complaint center around cases then pending before Judge Edwards, namely *McPeters I* and *McPeters II*; and (4) the entirety of Judge Edwards's acts and/or omissions made the basis of the Complaint arose directly out of a visit to and/or McPeters's dealings with Judge Edwards in his official capacity **only**. *See Ballard*, 413 F.3d at 515.

33. As presiding judge of *McPeters I* and, for a time, *McPeters II*, Judge Edwards acted within his jurisdiction with regard to the issues that McPeters now brings before this Court. *See id.* at 516–17. But even if Judge Edwards's actions were erroneous, malicious, or in excess of his authority or jurisdiction, as McPeters claims here—and they were not—Judge Edwards would still be entitled to immunity for those acts. *See Mireles*, 502 U.S. at 10; *Ballard*, 413 F.3d at 516–17.

34. In a rare instance in which the Fifth Circuit found that a judge's acts were not protected by the judicial immunity doctrine, the judge undertook actions clearly not performed by judges. *See Malina v. Gonzales*, 994 F.2d 1121, 1123, 1124-25 (5th Cir. 1993). After a "road rage" incident with a motorist, the judge personally conducted a private traffic stop using a store-bought red flashing light, personally charged the motorist, and privately used a police officer to issue a summons to the motorist. *Id.* ("Peace officers, not judges, stop motorists on the highway, and prosecutors, not judges, set the judicial machinery in motion by charging someone with a crime. It is well settled that charging a defendant is a prosecutorial function, not a judicial

function."). The Fifth Circuit found that these acts were not protected by the doctrine of judicial immunity. *Id*. The Fifth Circuit also found, however, that the judge was immune from damages for his actions in issuing orders, *i.e*., holding the defendant in contempt and sentencing him to jail. *See id*. ("Malina's appearance in court, despite the Judge's highly irregular 'summons,' was a visit to the Judge in his 'official capacity' as a judge."); *see also Davis*, 565 F.3d at 226 (finding judicial immunity barred the plaintiff's claims when the complained-of actions involved judges' orders that applied to multiple cases).

35. By contrast, McPeters does not and cannot allege that Judge Edwards undertook *any* action with respect to McPeters that was not a judicial function or that was not in his official capacity as a judge. *See id*. Judge Edwards is entitled to absolute judicial immunity for McPeters's claims against him, and thus is entitled to dismissal of the entire Complaint under Rule 12(b)(6). *See* FED. R. CIV. P. 12(b)(6); *Ballard*, 413 F.3d at 517.

C. Under Rules 12(b)(6) And 9(b) The Court Should Dismiss McPeters's RICO Claim.

(i) The Law.

36. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 ("RICO" or "the Act"), imposes criminal and civil liability on individuals engaging in a pattern of "racketeering activity connected to the acquisition, establishment, conduct or control of an enterprise." 18 U.S.C. § 1962; *see also Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). A RICO cause of action requires proof of "1) a person who engages in 2) a pattern of racketeering activity 3) which is connected to the acquisition, establishment, conduct or control of an enterprise." *Crowe v. Henry*, 43 F.3d 198, 294 (5th Cir. 1995).

37. A RICO person is the defendant. *See id.* at 204; *In re Burzynski*, 989 F.2d 733, 742 (5th Cir.1993). 18 U.S.C. § 1961(3) defines a RICO person as "any individual or entity capable of holding a legal or beneficial interest in property." Although the statute provides a very broad definition of the RICO person, the Fifth Circuit has added to that definition, requiring that "the RICO person must be one that either poses or has posed a continuous threat of engaging in the acts of racketeering." *Crowe*, 43 F.3d at 204 (5th Cir.1995) (quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir.), *cert. denied*, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989)). The court in *Crowe* went on to explain that "[t]he continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts." *Id.*

38. "Racketeering activity" consists of two or more predicate offenses, which are defined by the Act to include acts violating the federal wire fraud and mail fraud statutes and the federal statute prohibiting engaging in monetary transactions in property derived from specified unlawful activity. 18 U.S.C. § 1961. To establish a pattern of racketeering activity, the United States Supreme Court explained that a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (emphasis added).

39. Continuity is established by a plaintiff's proving "continuity of racketeering activity, or its threat." *Id.* at 241, 109 S.Ct. at 2902. This can be shown by either: (i) a closed period of repeated conduct; or (ii) an open-ended period of conduct that "by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S.Ct. at 2902. A closed period of conduct may be demonstrated "by proving a series of related predicates extending over a

substantial period of time." *Id*. at 242, 109 S.Ct. at 2902. An open period of conduct involves the establishment of "a threat of continued racketeering activity." *Id*. This may be shown when there exists a "specific threat of repetition extending indefinitely into the future," or when "it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business." *Id*. at 242–43; 109 S.Ct. at 2903. The Supreme Court recognized that, by its enactment of RICO, Congress was concerned with "long-term criminal conduct." *Id*. at 242; 109 S.Ct. at 2902 (emphasis added).

40. A plaintiff asserting a claim under RICO must allege the existence of an enterprise, which can be either a legal entity or an association-in-fact. *Crowe*, 43 F.3d at 204. To establish an association-in-fact enterprise, a plaintiff must "show 'evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit.'" *Id*. at 205 (quoting *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 440 (5th Cir.), *cert. denied*, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987). Therefore, under the law of this circuit, an "'association-in-fact enterprise 1) must have an existence separate and apart from the pattern of racketeering, 2) must be an ongoing organization and 3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure.'" *Id*. (quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co*., 855 F.2d 241, 243 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989).

41. In RICO claims, plaintiffs are required to "plead specific facts, not mere conclusory allegations which establish the enterprise." *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir. 1988). RICO plaintiffs are also required to plead specified facts as to each defendant; Rule 12(b)(6) cannot be avoided by "lumping" the defendants together. *In re Mastercard*

International Inc., Internet Gambling Litigation, 132 F.Supp.2d 468, 476 (E.D. La. 2001) (quoting *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 730 (7th Cir. 1988)).

42. The pleading of claims under RICO, which are based on predicate acts of fraud, are subject to Rule 9(b)'s heightened pleading requirements. *See* FED. R. CIV. P. 9(b); *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997); *see also ABN-AMRO Mortgage Group, Inc. v. Emerson Manufactured Homes, Ltd.*, No. Civ. A. H–01–1787, 2005 WL 1949601, at *3 (S.D. Tex. Aug. 15, 2005) (*citing Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138–39 (5th Cir. 1992); *Walsh v. America's Tele-Network Corp.*, 195 F.Supp.2d 840, 846 (E.D. Tex. 2002); *and Heden v. Hill*, 937 F.Supp. 1230, 1243 (S.D. Tex. 1996)). In the civil RICO context, Rule 9(b) also "requires that the plaintiff specifically allege how *each* act of fraud furthered the fraudulent scheme, and how *each* defendant participated in the fraud." *ABN-AMRO*, 2005 WL 1949601, at *3 (citations omitted) (emphasis in original). **A plaintiff may not vaguely attribute the alleged fraudulent activity to the defendants collectively**. *Id.*

(ii) The Law Applied To The Facts.

- *Judge Edwards Is Not A Proper RICO person*

43. McPeters has not properly plead that Judge Edwards is a RICO person. In *In re Mastercard International Inc., Internet Gambling Litigation*, the Eastern District of Louisiana found that because the plaintiffs had alleged "that the defendants have engaged in the predicate acts for at least a year and that they continue to engage in the same course of conduct," they had "adequately alleged the existence of RICO persons." 132 F.Supp.2d 468, 477 (E.D. La. 2001). Here, however, there is no course of conduct by Judge Edwards – there is only the signing of the Order. Further, McPeters has not properly alleged that Judge Edwards poses or has posed "a continuous threat of engaging in the acts of racketeering." *See Crowe*, 43 F.3d at 204. McPeters

has therefore fallen short in her attempt to properly or adequately plead that Judge Edwards is a RICO person or persons. *See id.*

- *McPeters Has Failed To Properly Plead A Pattern Of Racketeering Activity.*

44. McPeters has failed to show that any set of facts exists that would show a pattern of "racketeering activity" by Judge Edwards for two reasons. First, the Complaint neither specifies an exact time period in which the predicate RICO offenses allegedly occurred, nor does it allege that the purported enterprise continues to this day or is in any way ongoing. *See Complaint, ¶¶ 103–56.* Instead, the Complaint is based on a single allegedly illegal act by Judge Edwards, i.e., signing the Order, that allegedly occurred within an isolated period time and that does not constitute either (1) a closed period of conduct by being "a series of related predicates extending over a substantial period of time" (2) or an open period of conduct which is conduct which has a "specific threat of repetition extending indefinitely into the future," or which consists of "a regular way of conducting . . . ongoing legitimate business." *See id.*; *see also H.J. Inc*., 492 U.S. at 242–43, 109 S.Ct. at 2902–03. Because the alleged improper action or actions of Judge Edwards are isolated in the Complaint to the limited time frame surrounding the signing of the Order, McPeters has failed to properly allege that Judge Edwards engaged in *any* pattern of racketeering activity at all. *See id.*; *see also Word of Faith World Outreach Ctr. Church*, 90 F.3d at 122–23.

45. Second, McPeters has failed to allege properly that Judge Edwards committed the underlying predicate acts of mail fraud or wire fraud. *See Tel-Phonic Svcs., Inc*., 975 F.2d at 1139. Judge Edwards's alleged signing or issuance of the Order cannot make up the predicate acts because McPeters does not allege that the Order was actually fraudulent or even was mailed

or sent through the wires.[6] *See Burzynski*, 989 F.2d at 742. Therefore, McPeters has failed to plead that Judge Edwards used the mail or wires for monetary transactions to properly plead an alleged predicate act of racketeering activity. *Id.*

- *McPeters Has Failed To Properly Plead An Enterprise.*

46. McPeters has failed to plead specific facts to establish an enterprise as required by the law of this circuit. *See Manax*, 842 F.2d at 811. Specifically, McPeters has not laid out facts in her complaint which demonstrate that: the alleged association-in-fact enterprise had any sort of existence apart from the pattern of racketeering; the enterprise was any sort of ongoing organization; and/or the enterprise's members functioned "as a continuing unit as shown by a hierarchical or consensual decision making structure." *See Crowe*, 43 F.3d at 204 (emphasis added). In *Manax*, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's RICO complaint for her failure to properly plead an enterprise:

> This association . . . lacks the continuity required of RICO enterprises. The association as alleged has one short-term goal—the destruction of Manax's medical practice—and presumably will disband upon the attainment of that goal. **There is, as a result, nothing linking the members of the association to one another except the commission of the predicate criminal acts**.

842 F.2d at 811 (emphasis added). Here, as was the case in *Manax*, McPeters's Complaint fails to show that any association-in-fact enterprise between Judge Edwards and any of the other defendants has any sort of existence apart from the alleged pattern of racketeering, nor has she alleged anything linking the enterprise's members to one another separate and apart from the commission of the alleged wrongful acts. *See id*; *see also Complaint, ¶¶ 103–56*. Further, McPeters's Complaint improperly "lumps" all defendants together. *See In re Mastercard Int'l*,

[6] *See* elements of mail and wire fraud, ¶ 48, *infra*.

132 F.Supp.2d at 476. Therefore, because the Complaint reveals no set of facts which can demonstrate that McPeters has any sort of right of recovery against Judge Edwards on her RICO claim, the claim against Judge Edwards should be dismissed. *See* FED. R. CIV. P. 12(b)(6).

- *McPeters Did Not Comply With Rule 9(b).*

47. McPeters's RICO claim also fails because its pleading of fraud cannot meet the standards of Rule 9(b) of the Federal Rules of Civil Procedure, which requires pleading with particularity in cases alleging fraud. *See* FED. R. CIV. P. 9(b). Section 1961 of the Act lists the state and federal criminal offenses that qualify as predicate RICO offenses, including mail and wire fraud, and only these crimes can serve as predicate RICO acts. *See* 18 U.S.C. §§ 1961(1), 1962.

48. In the Complaint, McPeters alleges violations of sections 1341, 1343, 1349, and 1951 of Title 18 of the United States Code as the predicate acts purportedly committed by the defendants. *See* 18 U.S.C. §§ 1341, 1343, 1349, 1951[7]; *see also Complaint, ¶¶ 247–63.* Sections 1341 and 1343 are mail and wire fraud, respectively and are included in the predicate RICO acts enumerated by Section 1961(1) of the Act; however, section 1349, conspiracy under RICO, is not included in the section as a separate predicate offense. *See* 18 U.S.C. §§ 1961(1).

49. The elements of mail and wire fraud are as follows:

> (1) a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representation or promises; (2) Interstate or intrastate use of the (mails or interstate wire communications facilities) for the purpose of furthering or executing the scheme or artifice to defraud; (3) The use of the (mails or interstate wire

[7], Section 1951 of Title 18 of the United States Code, also known as the Hobbs Act, prohibits the use of robbery, extortion, physical violence, or threats of physical violence to obstruct interstate commerce. *See* 18 U.S.C. § 1951. McPeters's allegations against Judge Edwards in this regard apparently include Judge Edwards's 2001 statements made in Baltimore, Maryland. *See Complaint, ¶ 115*; *Exhibit 6*. Again, these statements are hardly threats; instead, they are vague, broad, and were made years prior to the filing of *McPeters I*. *See id*.

> communications facilities) by the defendant connected with the scheme to defraud; and (4) Actual injury to the business or property of the plaintiff.

See Landry v. Air Line Pilots Ass'n, 901 F.2d 404, 428 (5th Cir.), *cert. denied*, 111 S.Ct. 244 (1990).[8] When mail and/or wire fraud are alleged as predicate acts under RICO, law of this circuit requires a showing of reliance as well. *In re Mastercard Int'l, Inc.*, 313 F.3d 257, 263 (5th Cir. 2002).

50. McPeters has failed to properly allege how the defendants made or attempted to make false or fraudulent misrepresentations, or how the bills sent to her by LexisNexis (*not* by Judge Edwards) "advanced the alleged scheme of defendants to defraud her." *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, although McPeters alleges that fraudulent bills were sent to her, she fails to specify: *who* (specifically, *which* individuals or defendants) sent the bills; specifically *what* was sent aside from "billings,"; *when* these items were allegedly sent; *where* the items were sent to or from; *how* the bills were in and of themselves fraudulent; or *how* the sending of the bills was accomplished for the purpose of furthering or executing the scheme to defraud. *See id.; Columbia/HCA Healthcare Corp.*, 125 F.3d at 903. The Complaint also neglects to specify how Judge Edwards allegedly assisted in the commission of these illegal acts, or how McPeters allegedly relied on any purported misrepresentations by Judge Edwards, especially since, by her own admission, LexisNexis alone was independently responsible for assessing e-filing fees under LNFAS. *Complaint at ¶¶ 103–56, 19; see also In re Mastercard Int'l*, *Inc.*, 313 F.3d at 263.

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[8] *See U.S. v. Bruno*, 809 F.2d 1097, 1104 (5th Cir. 1987) ("Because the requisite elements of 'scheme to defraud' under the wire fraud statute, 18 U.S.C. section 1343 and the mail fraud statute are identical, cases construing the mail fraud statute apply to the wire fraud statute as well.").

51. Because McPeters's RICO claim against Judge Edwards fails to meet the specificity requirements of Rule 9(b), and due to all of the reasons articulated above, her RICO claim should therefore be dismissed. *See* FED. R. CIV. P. 9(b).

D. <u>McPeters's Fraud and Conspiracy Claims Against Judge Edwards Fail</u>.

52. As described above, Rule 9(b) of the Federal Rules of Civil Procedure requires a plaintiff to plead her fraud claim with heightened particularity. *See* FED. R. CIV. P. 9(b), *§ C, supra*. Yet McPeters's Complaint never truly identifies with requisite particularity *who* made any allegedly false misrepresentation, or how the Order itself is a misrepresentation. *See Complaint, ¶¶ 227–46.* Nor does she ever identify how any individual ever benefited from the alleged fraud or coherently explain why Judge Edwards was motivated to perpetrate a fraud against McPeters. *See id*. McPeters also contradicts herself by in one breath claiming that the Order an improper misrepresentation that was made to her, yet in the other breath claiming that she never received it. And, despite the fact that McPeters claims that Montgomery County received money from LexisNexis, this allegation is not only untrue, but even if it were true, the allegation does not ever allege how or why Judge Edwards himself personally benefited from this purported misconduct. *See id.*

53. Furthermore, McPeters is required under the law to provide a factual basis for her beliefs. *Columbia/HCA Healthcare Corp.*, 125 F.3d at 903. Instead of providing any sort of factual basis, McPeters merely relies on her claims by making such conclusory statements as "Judge Edwards knew that his representations about the 2003 Order and the requirement to pay LexisNexis were false when made or made them recklessly and as a positive assertion without any knowledge of the truth." *Complaint, ¶ 227.* These statements amount to nothing more than

speculation and hardly suffice to provide a factual basis for the McPeters's meritless, conclusory allegations. *See id*.

54. McPeters's conclusory and speculative complaint is insufficient to comply with the heightened pleading requirements of Rule 9(b); the fraud claim against Judge Edwards should therefore be dismissed. *See* FED. R. CIV. P. 9(b); *see also Benchmark Electronics*, 343 F.3d at 723–24.

55. Further, and in the same vein, mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a 12(b)(6) motion to dismiss. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982), quoting *Slotnik v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977); *see also Liptak v. Banner*, No. Civ.A.301CV0953M, 2002 WL 378454, at * 2 (N.D.Tex. Mar. 7, 2002). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of her "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 Twombly*, 127 S.Ct. at 1964–65 (citing, *inter alia*, *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")).

56. The Fifth Circuit has held that a conspiracy claim to commit a tort that sounds in fraud must be pleaded with the particularity sufficient to satisfy Rule 9(b). *See Castillo v. First City Bank Corp. of Texas, Inc.*, 43 F.3d 953, 960 (5th Cir. 1994); *Hernandez v. Ciba-Geigy Corp. USA*, 200 F.R.D. 285, 291 (S.D. Tex. 2001).

57. Here, McPeter's conspiracy claim is utterly devoid of the specificity required by Rule 9(b) with respect to Judge Edwards. *See* FED. R. CIV. P. 9(b); *Complaint, ¶¶ 248–63*. For

example, the following paragraph consists entirely of conclusory allegations: "Judge Edwards agreed to participate in the conspiracy between LexisNexis and Montgomery County by issuing the 2003 Order, his initial overt act which was the objective manifestation of an agreement to participate in the conduct of the affairs of the enterprise, the Plan. He knew that his order would be applied to litigants in his court on a continuing basis. Each new 2003 Order was an overt act. He knew each order would generate revenues for LexisNexis. He knew that Montgomery County would receive payments from LexisNexis and, without the payments to Montgomery County, he would not issue the order." *Id. at ¶ 250.* This is prohibited under the law. *See Twombly*, 127 S.Ct. at 1964–65. Moreover, the statement neither provides the required 'who, what, when, where, and how' of the conspiracy to defraud, nor does it provide any factual basis for McPeters's claims. *See Columbia/HCA Healthcare Corp.*, 125 F.3d at 903. For instance, nowhere in the text of the Complaint does McPeters detail which specific individuals participated in the alleged scheme; describe how or when Judge Edwards met with the other co-conspirators, or how Judge Edwards orchestrated the alleged scheme to McPeters of her rights. *See Liptak*, 2002 WL 378454, at *2.

58. As described above, McPeters's fraud and conspiracy claims fail to comply with Rule 9(b) and, accordingly, should be dismissed. *See* FED. R. CIV. P. 9(b).

E. McPeters Has Not Properly Plead A Claim For Injunctive Relief Under § 1983.

59. Section 1983 of the United States Code Article 42 reads in pertinent part as follows:

> . . .in any action brought [under this section] against a judicial officer for an act or omission taken in such officer's judicial capacity, **injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable**.

42 U.S.C. § 1983 (emphasis added).

60. McPeters does not properly plead facts that would show that a declaratory decree was violated or that declaratory relief was unavailable. *See Complaint, ¶ 269–83*. Without more, her claims for injunctive relief are mere conclusory allegations that cannot survive Rule 12(b) scrutiny. *See Kane Enters.*, 322 F.3d at 374; *see also, e.g., Dockeray v. Francis*, No. 3:03-CV-2862-K, 2004 WL 2187118, *4 (N.D. Tex. Sept. 28, 2004).[9] As such, and in accordance with the strictures of § 1983, McPeters is not entitled to injunctive relief. *See* 42 U.S.C. § 1983. McPeters's claim for injunctive relief should be dismissed under Rule 12(b)(6). *See* FED. R. CIV. P. 12(b)(6).

61. Even assuming *arguendo* that McPeters properly plead that declaratory relief was unavailable to her, McPeters makes absolutely no cognizable claim that she faces a high probability of real and immediate harm in the future as is required by law. *See Complaint, ¶¶ 269–83*. McPeters therefore lacks standing to seek injunctive relief against Judge Edwards.

62. This is because, for a plaintiff to have standing to seek federal injunctive relief, she is required to show that there is reason to believe that she would directly benefit from the equitable relief sought. *Plumley v. Landmark Chevrolet*, 122 F.3d 308, 312 (5th Cir. 1997) (citing *Hoepfl v. Varlow*, 906 F. Supp. 317, 320-21 (E.D. Va. 1995) (citation omitted)). This standing requirement is borne out of the United States Supreme Court's statement that "It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or

[9] "In this instance, plaintiff alleges no facts which suggest that a prior declaratory decree has been violated or that declaratory relief is unavailable. Moreover, the record does not show that a declaratory decree was violated or that declaratory relief was unavailable. Consequently, the three named judges are thus immune to injunctive relief." *Id.* at *4.

controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983). Thus, "[i]n suits involving injunctive relief, this mandate of a live dispute translates into the requirement that a plaintiff face a threat of present or future harm." *Hoepfl*, 906 F. Supp. at 320. A plaintiff seeking injunctive relief based upon an alleged past wrong, therefore, must show that a "real or immediate threat" exists that she will be wronged again. *Plumley*, 122 F.3d at 312 (citing *Lyons*, 461 U.S. at 111, 103 S. Ct. at 1669)[10]; *see also Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000), *cert. denied*, 531 U.S. 959, 121 S. Ct. 384, 148 L. Ed. 2d 296 (2000) and *Hoepfl*, 906 F. Supp. at 320 ("established standing rules preclude a plaintiff from obtaining injunctive relief based on only events that occurred in the past, even if the past events amounted to a violation of federal law."). The Fifth Circuit Court of Appeals "has often held that **plaintiffs lack standing to seek prospective relief against judges where the likelihood of future encounters is speculative**." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (citing *Adams v. McIlhaney*, 764 F.2d 294, 299 (5th Cir. 1985); *Soc'y Of Separationists, Inc. v. Herman*, 959 F.2d 1283 (5th Cir. 1982)) (emphasis added).

63. The Complaint is devoid of facts showing that there is a real or immediate threat that McPeters will be wronged again, especially since: 1) *McPeters II* has already concluded; and 2) if *McPeters I*, which is still on appeal, is ultimately remanded to the 9th District Court after the conclusion of the appellate process, Judge Edwards could possibly recuse himself from the case. *See* TEX. R. CIV. P. 18b. There is no further guarantee or certainty that McPeters will ever find herself in Judge Edwards's court again.

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[10] "Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.*

64. As just part of showing a real or immediate threat that she will be wronged, McPeters must allege the opposite—that she will somehow once again find herself a litigant in Judge Edward's court and be subject to use of LNFAS. *See Lyons*, 461 U.S. at 105–06[11]; *Bauer*, 341 F.2d at 358.[12] McPeters makes no such allegation because she cannot. *Complaint at ¶¶ 269–83*.

65. Moreover, McPeters's alleged past injuries are due to her own acts or omissions in failing to utilize the alternatives to e-filing. *See, generally, id.*; *see also Hainze*, 207 F.3d at 802 ("Hainze's injuries were caused by his own criminal actions, not Williamson County's failure to perform a self-evaluation."). McPeters is not entitled to injunctive relief against Judge Edwards. *See id.* She lacks standing to sue for that relief, and her claims for injunctive relief should therefore be dismissed under Rules 12(b)(1) and 12(b)(6). *See id.*; FED. R. CIV. P. 12(b)(6).

F. <u>All Claims Against Judge Edwards, Including McPeters's Texas Theft Liability Act Claim, Should Be Dismissed Under 11th Amendment Immunity</u>.

(i) <u>The Law</u>.

66. The Eleventh Amendment "secures the states' immunity from private suits for monetary damages filed in federal court." *Neinast v. Texas*, 217 F.3d 275, 280 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1188 (2001). Furthermore, the United States Supreme Court holds that,

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[11] "That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer of officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.*

[12] "Given that Bauer acknowledges there are currently no state guardianship proceedings relating to her, that there have been no such proceedings since November 2001, and that this matter was transferred from Judge Olsen to Judge Wood, there does not exist a 'substantial likelihood' and a 'real and immediate' threat that Bauer will face injury from Olsen in the future." *Id.*

due to the protections afforded them by the Eleventh Amendment, States are not persons subject to suit under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

67. "Texas judges are entitled to Eleventh Amendment immunity for claims asserted against them in their official capacity."[13] *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996) (citing *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), *cert. denied*, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985)). This is because state district judges are agents of the State of Texas. *See, e.g., id.* at 343. And the United States Supreme Court holds that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985). The Supreme Court in *Graham* noted that "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . .[i]t is not a suit against the official personally, for the real party in interest is the entity." *Id.* at 166, 105 S. Ct. at 3105. The Supreme Court concluded, therefore, that a plaintiff seeking relief against an individual in his official capacity must "look back to the government entity itself." *Id.* The Supreme Court held that, since its 1978 ruling in *Monell v. New York City Department of Social Services* in which it found that government units could be sued for damages or injunctive or declaratory relief, suits against government officers in their official capacities are not necessary. *Id.* (citing *Monell*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035, 56 L. Ed. 2d 611 (1978)).

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[13] Even though McPeters has also sued Judge Edwards in his individual capacity, Judge Edwards is entitled to absolute judicial immunity from those claims. *See § B, supra*.

(ii) The Law Applied To The Facts.

68. McPeters asserts claims against Judge Edwards in his official capacity, and claims against a government actor in his official capacity are essentially claims against that governmental entity. *See Kentucky v. Graham*, 473 U.S. at 166, 105 S. Ct. at 3105. Thus, McPeters's claims against Judge Edwards are effectively a suit against the State of Texas because Judge Edwards is an agent of the State of Texas. *See Warnock*, 88 F.3d at 343. The State of Texas is immune from suit under the Eleventh Amendment, and the State has not waived its immunity by consenting to suit here. *See AT&T Communications v. BellSouth Telecommunications Inc*., 238 F.3d 636, 643 (5th Cir. 2001). Further, sovereign immunity is not waived for intentional acts such as McPeters's fraud, conspiracy, and Texas Theft Liability Act claims. *See, e.g*., *Minix v. Gonzales,* 162 S.W.3d 635, 638 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE §§ 101.057, 101.106(e).

69. Finally, the State of Texas is not a person subject to suit under 42 U.S.C. § 1983. *See Will*, 491 U.S. at 71. Because McPeters cannot maintain her suit against the State of Texas, this Court is without jurisdiction to hear her claims, including her Texas Theft Liability Act claim, against Judge Edwards. *See id.* Thus, McPeters's Complaint against Judge Edwards should be dismissed under Rules 12(b)(1) and 12(b)(6). *See id.*; *Warnock*, 88 F.3d at 343; *see also* FED. R. CIV. P. 12(b)(6).

G. McPeters's Various "Constitutional" Claims Lack Merit and Warrant 12(b)(6) Dismissal.

70. McPeters brings various claims against Judge Edwards and the other defendants for purported violations of supposed rights afforded her under the Texas and/or the United States Constitution. *See Complaint, ¶¶ 157–79* ("Violation of Separation of Powers Doctrine Under

Article II, § 1 of the Texas Constitution"); *¶¶ 180–204* ("Violation of Procedural and Substantive Due Process Rights Under 42 U.S.C. § 1983 and the U.S. Constitution"); *¶¶ 205–22* ("Violation of Equal Protection, Open Courts, and Due Course of Law Under Article 1, Sections 1, 3, 19, and 29 of the Texas Constitution"). As detailed herein, Judge Edwards is absolutely immune from all of these claims, including McPeters's due process and 42 U.S.C. § 1983 claims, and McPeters has not properly plead a claim for injunctive relief under § 1983. *See §§ B, E, F*; *see also Boyd v. Biggers*, 31 F.3d 279, 284–85 (5th Cir. 1994) (dismissing complaint brought by probationer against judge and stating that "**If a defendant is dismissed on absolute immunity grounds, it becomes clear that the § 1983 plaintiff will never have a claim against that defendant based on the particular facts alleged**. . ..") (emphasis added). However, even if these immunities did not apply to bar entirely McPeters's claims against Judge Edwards, the claims are subject to 12(b)(6) dismissal for multiple other reasons.

71. First, as to McPeters's various claims purportedly brought under the Texas constitution, no such private claim for monetary damages exist under Texas law. *See, e.g., City of Beaumont v. Bouillon*, 896 S.W.2d 143, 147 (Tex. 1995). And the Open Courts provision of the Texas Constitution applies only to statutory restrictions upon a legitimate common law cause of action. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997), superseded by statute on other grounds, citing *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995). There are no such statutory restrictions at issue here; accordingly, McPeters is without any right to relief under this purported cause of action. *See id.*

72. Second, McPeters's United States constitutional claims are similarly without merit. McPeters's equal protection claims fail because there clearly exists a rational basis for

Judge Edwards's Order requiring e-filing: among other things, e-filing reduces and conserves the amount of paper filings generated and circulated, allows for increased access to information, and provides parties with rapid, often 24-hour access to documents and filings. *See, e.g., Exhibit 6, § F*; *Nordlinger v. Hahn*, 505 U.S. 1, 15, 17–18, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (finding a rational basis for the complained-of actions and recognizing that "[t]ime and again,. . .this Court has made clear in the rational-basis context that the 'Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'") (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct.939, 59 L.Ed. 2d 171 (1979)).

73. Third, McPeters's purported "due process" claims, which are evaluated under federal law regardless of whether they are state or federal claims, are meritless since she is unable to articulate how she was deprived of any due course or process of law. *See Complaint, ¶¶ 180–204*; *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995), citing *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887). At all times, McPeters had available to her options other than participating in LNFAS. *See § A, supra.* Her claims are therefore baseless and should be dismissed.

74. Finally, because dismissal of McPeters's purported claims arising under federal law is proper as detailed above, this Court may properly decline to exercise jurisdiction over McPeters's remaining state law claims, including her claims that Judge Edwards allegedly violated certain provisions of the Texas Constitution. *See* FED. R. CIV. P. 12(b)(1); 28 U.S.C. § 1367(c)(3).

75. McPeters's claims against Judge Edwards are therefore meritless and should be dismissed under Rules 12(b)(6) and 12(b)(1). *See* FED. R. CIV. P. 12(b)(1), (6).

H. <u>McPeters Is Not Entitled To Declaratory Relief</u>.

76. McPeters seeks declaratory relief without specifying the basis therefor. *Complaint at ¶ 86*. As stated previously, Judge Edwards is immune from suit, and McPeters has failed to otherwise state any claim against Judge Edwards upon which relief can be granted. *See Hainze*, 207 F.3d at 802; *Plumley*, 122 F.3d at 312. Therefore, for the reasons previously discussed in this motion, McPeters's claims for declaratory relief should be dismissed under Rule 12(b)(6). For these reasons, and all of the reasons previously discussed in this motion, the Court should dismiss McPeters's declaratory judgment action under Rule 12(b)(6). *See* FED. R. CIV. P. 12(b)(6).

I. <u>McPeters Lacks Standing To Sue For Others</u>.

77. In order for litigants to invoke the power of the federal courts, Article III of the United States Constitution requires them to have standing, which necessitates an actual or imminent personal injury. *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 606 (5th Cir. 2004) (citing *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)). "[T]he United States Supreme Court has developed prudential limitations on standing, including a requirement that a litigant generally must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights and interests of third parties." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Further, section 1983 plaintiffs cannot assert claims on behalf of others as they have no standing to do so. *See, e.g., Archuleta v. McShan*, 897 F.B. 495, 497 (10th Cir. 1990) (citations omitted) ("[A] section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else."); *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61

(5th Cir. 1986) (citations omitted) ("[L]ike all persons who claim a deprivation of constitutional rights"... [plaintiff is] "required to prove some violation of [his] personal rights.").

78. The entirety of McPeters's claims, including her § 1983 claim, must be based upon a violation of her own personal rights, and not the rights of someone else. *See Archuleta*, 897 F.2d at 497; *Coon*, 780 F.2d at 1160–61. She cannot assert claims or seek any relief on behalf of others, and it is inappropriate for her to do so. *See id.*; *see also Complaint, ¶¶ 267–83.* Further, although McPeters seeks class action certification of her claims, she cannot under any circumstances show that certification would be appropriate since the alternatives to e-filing are equally available to any purported class members as they are to her. *See § A, supra*. Any of McPeters's claims purporting to seek relief on behalf of any other individuals should consequently be dismissed for lack of standing under Rules 12(b)(1) and 12(b)(6). *See* FED. R. CIV. P. 12(b)(1), 12(b)(6).

Conclusion

79. Judge Edwards requests the Court to grant this motion and to dismiss McPeters's Second Amended Complaint against him under Rules 12(b)(6), 12(b)(1), and/or 9(b) of the Federal Rules of Civil Procedure. Judge Edwards also requests any other, further, or alternative relief to which he is legally or equitably entitled.

Respectfully submitted,

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