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	§	
vs.	§	CIVIL ACTION NO. 4:10-CV-01103
	§	**JURY**
THE HONORABLE FREDERICK E. EDWARDS; **BARBARA GLADDEN ADAMICK**, **DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC. d/b/a LexisNexis** Defendants	§	

PLAINTIFF'S RESPONSE TO DEFENDANT THE HONORABLE FREDERICK E. EDWARDS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE KEITH P. ELLISON, U.S. DISTRICT JUDGE:

Pending Motion

This amended response is filed in response to Defendant Judge Edwards' Motion to Dismiss Plaintiff's Second Amended Complaint.

This response will address the issues in the order presented by the Defendant. Unless otherwise noted, all rules are from the Federal Rules of Civil Procedure. Exhibits refer to Document 70-1 herein for Exhibits A-I and Document 70-2 for Exhibits J-R.

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Limited Response to Defendant Judge Edwards's Motion

Each legal issue in Defendant's motion will be addressed. Plaintiff will not address the disparaging personal references.

Rule 12(b)(6) Standards

This Court has correctly stated the standards for review of a motion to dismiss under 12(b)(6) as follows:

> When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007), citation omitted. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U. S. ----, 129 S.Ct. 1937, 1949, (2009) (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556).
>
> *Clancey v. City of College Station*, 2010 WL 1268083 at *2 (S.D. Tex. 2010)

> The plausibility standard is not akin to a "probability requirement," but asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555).

The Fifth Circuit has flatly held that motions to dismiss under Rule 12(b)(6) "are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 231 (5th Cir. 2009), citation omitted. Were it otherwise, litigants could face dismissal based upon speculation as to what the evidence might be without being afforded the opportunity to take discovery and offer any evidence at all. Accordingly,

both the Fifth Circuit and the United States Supreme Court have stated that "[t]o survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead enough facts to state a claim to relief that is plausible on its face." *Miller v. Nationwide Life Ins. Co.*, 2008 WL 3086783 (5th Cir. 2008), citing *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007).

Rule 56 Standards

"The judgment sought should be rendered if the pleadings, the *discovery* and *disclosure* materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as matter of law." *Fed. R. Civ. P.* 56(c)(2), emphasis added.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S 317, 322 (1986).

The parties in this case have not yet served discovery or taken a single deposition. The Defendant has declined to furnish any documents in compliance with Rule 26(f) other than certain selected exhibits already filed in support of its motion to dismiss.

In the event the Court elects to consider the motions and exhibits under a Rule 56 standard, Plaintiff urges consideration of the affidavit, Exhibit "M," prepared by attorney David Person, which verifies that:

1. He has been forced to become a LexisNexis subscriber rather than follow the Texas Rules of Civil Procedure.

2. His paper pleadings filed under the Texas Rules of Civil Procedure have been rejected by the Montgomery County District Clerk.

3. He attempted to use the public terminal in the office of the Montgomery County District Clerk but still had to become a LexisNexis subscriber.

4. He has not seen the 2003 Order on file in any of his cases venued in Montgomery County.

5. He had to spend approximately $350 to file documents through LexisNexis and has not had to pay that much in any other case.

6. LexisNexis charges approximately $7 per filed pleading and $8 as a service charge, as well as charging $10 to send an invoice.

7. The charges set forth above are not authorized in the Texas Government Code.

8. Parties required by Montgomery County to use e-filing have no choice other than to use LexisNexis and pay whatever LexisNexis decides to charge.

Under Rule 56, the Plaintiff respectfully asserts that numerous fact issues must be resolved through disclosure and discovery in order to fairly consider the legal arguments presented by the Defendant. Examples of remaining fact issues on the issues of liability and immunity are set forth below.

1. Memoranda between Defendant Montgomery County and Defendant Judge Edwards on fee collection and setting of fees in e-filing cases.

2. The amount of money paid by Reed Elsevier to Montgomery County and the allocation of those funds. At page 5, footnote 3 of its amended motion, defendant admits that it has not received *any* payments from LexisNexis pursuant to the contract; the contract, Exhibit "B," recites that LexisNexis will pay money to Defendant.

3. The actual availability and utility of the access terminal in the office of the Montgomery District Clerk. *See* Exhibits "A," p. 2, and "M."

4. The reason(s) why certain district courts in Montgomery County have *declined* to mandate the use of E-filing.

5. The number of civil litigants who have sought relief in the 9th District Court from mandatory E-filing and have been denied that relief. *See* Exhibit "A," p. 1.

6. Minutes of meetings of the Montgomery County Commissioners Court that establish whether the involvement of Defendant Judge Edwards in the mandate of E-filing was administrative or judicial; to decide to use LexisNexis; to review fees charged by that private corporation; to discuss delegation of important duties of the District Clerk to a private corporation.

7. Instructions and memoranda from Defendant Judge Edwards to the Montgomery County District Clerk regarding the refusal to file paper documents submitted under the Texas Rules of Civil Procedure and regarding the return of filed documents. *See* Exhibits "A," p. 2 and "C."

8. Information on the services performed by the Montgomery County District Clerk for which transaction fees and charges are collected by LexisNexis in E-filing cases.

9. Memoranda to or from Defendant Judge Edwards regarding its setting of filing and transaction fees and right to increase those fees without approval of any governmental official.

10. Information on any other attempted delegation of authority by Montgomery County to Reed Elsevier.

11. The amount of money collected and retained by Reed Elsevier under its contract with Montgomery County.

12. The process by which the Montgomery County District Clerk assigns civil cases to district courts, including those courts that do not mandate the use of E-filing.

13. The number of referrals for disciplinary action by Reed Elsevier of attorneys who incur charges and decline to pay them (as threatened in billing invoices).

14. Montgomery County's civil filing fees and other charges prior to the use of E-filing.

15. Filing fees and transaction charges of former E-filing providers for Montgomery County prior to the arrival in 2007 of Reed Elsevier.

16. All civil transaction charges and filing fees levied and collected by Reed Elsevier as compared with the statutory charges and fees established by the Texas Government Code.

17. All administrative and judicial responses to complaints by litigants and their attorneys regarding mandatory e-filing and the charges levied by LexisNexis. The

number of show cause orders and sanctions levied by Judge Edwards for failure to use E-Filing. *See* Exhibit "O," p. 2.

18. The agency relationship between LexisNexis and Judge Edwards. Compare LexisNexis' first motion to dismiss [Doc 22, p. 13, fn. 5 – LexisNexis acts as an agent of the court] with Exhibit "B," p. 12, para. 13.7 – LexisNexis is an independent contractor and there is to be no agency relationship between the parties.

20. Information on the reason for filing a motion requesting leave to supplement the record to include a copy of the 2003 Order in Cause No. 09-11-11474-CV, "McPeters v. Adamick," 9th District Court, Montgomery County, Texas. Exhibit "G."

Corrections to Defendant's Statement of Background

The Defendant states at page 4 of his motion that "[c]ounsel for McPeters refused to e-file." Actually, the opposite is true. *See* Exhibit "L."

The Defendant then states at page 6 that the Defendant's order dismissing Plaintiff's state court lawsuit was reversed by the Beaumont Court of Appeals in spite of an opinion reciting findings of "McPeter's attorney's mistaken belief" and "her attorney's erroneous—if not sanctionable—conduct." The opinion, when read in its entirety, is not as accusatory as the Defendant suggests. The opinion actually discusses the power of a trial court to set aside an interlocutory order of dismissal, even if used to reinstate and then immediately dismiss an erroneously dismissed lawsuit, as in Plaintiff's case. The Court of Appeals actually quoted Defendant Judge Edwards from the reporter's record:

> So you've done this to yourself. Either you overthought this or you think you know more than anybody else about how things should be done. You were aware of the trial setting. I am not reinstating this case. This matter is over with.
> *McPeters v. Montgomery County*, 2010 WL 2171664 at *2.

Neither the Court of Appeals nor the Plaintiff can explain the animosity apparent in the comments of the trial court and in the Motion to Dismiss. Rather than belabor the

point, it is sufficient to suggest that animosity of a state trial court is not a reason to grant or deny a motion to dismiss under Rule 12(b)(6) or Rule 9(b).

Plaintiff's Claims Are Based Upon Law and Fact

The Defendant first argues that, because the Plaintiff could have sought relief from the 2003 Order and did not do so, the Plaintiff is estopped from asserting the claims set forth in the Plaintiff's Second Amended Complaint.

First, it should be apparent from the corrections set forth above that a motion for leave from the 2003 Order of Defendant Judge Edwards would not have been well received. As no discovery has been undertaken, the Plaintiff cannot yet discuss the frequency of such motions or their fate in the 9th District Court, Montgomery County.

Second, the 2003 Order is not on file and not known to litigants mandated to use LexisNexis. See Plaintiff's Second Amended Complaint, paragraphs 29, 31, 55 and 57, and Exhibit "M," p. 2, para. 7. A party cannot be expected to seek relief from an unfiled order.

Third, Defendant Judge Edwards cites no authority, and Plaintiff knows of none, which requires a party to rely upon the discretion of a judge to obtain the fundamental rights of equal protection and unobstructed access to open courts in Texas. No motion, hearing and order is a constitutional prerequisite to these rights which have been upheld by the Fifth Circuit as worthy of protection in the federal courts under the authority of the 14th Amendment to the United States Constitution. Please see page 24-25 below.

Defendant Judge Edwards is Not Entitled to Absolute Immunity

The Defendant correctly observes that judges are entitled to absolute immunity for judicial acts that they perform in judicial proceedings before them.

However, the Defendant's motion contains a statement at page 3 that removes all doubt as to whether or not the 2003 Order was a judicial action, or an administrative action with no judicial immunity:

> 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.

The 2003 Order, pursuant to and a supplement to the existing local rules, was administrative and not judicial.

Administrative vs. Judicial Functions

Not all acts performed by judges, even those that are essential to the operation of the courts, are protected by judicial immunity. *Forrester v. White*, 484 U.S. 219, 228 (1988). Ministerial or administrative tasks performed by judges are not protected by immunity because they are not sufficiently judicial in nature. *Forrester*, 484 U.S. at 227-228. When it appears certain that no one invoked the judicial machinery for any purpose, then the judge's actions are not judicial acts. *Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir. 1981).

Mandating e-filing is administrative. No case has been cited for the proposition that management of district clerk filing practices or the local rules of a county is a judicial act.

In order to determine "whether particular actions of government officials fit within a common law tradition of absolute immunity, or only the more general standard of qualified immunity, [courts] have applied a 'functional approach,' ... which looks to 'the nature of the function performed, not the identity of the actor who performed it.' " *Mays v. Sudderth***,** 97 F.3d 107, 110 (5th Cir. 1996), citations omitted.

"We do not hold that a state officer may never be held liable for the unquestioning execution of a judicial directive. There are limits to how unlawful an order can be and still immunize the officer executing it." *Turney v. O'Toole*, 898 F.2d 1470, 1474 (10th Cir.1990). As the officer's immunity derives from that of the issuing judge, the order must be one for which the judge is absolutely immune from suit. *Id.* Thus, we do not find that a state official would be absolutely immune from suit based on compliance with an order issued by a judge acting "in the clear absence of all jurisdiction." *Mays* at 110.

Defendant cites 5th Circuit authority for tests which determine whether acts are judicial in nature: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.

Applied to Defendant's claim of absolute judicial immunity, mandating electronic filing is not a normal judicial function, does not occur in a courtroom or chambers, is not surrounding a case pending before the court, and does not arise out of a visit to the judge in his official capacity.

> "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester* at 227.
>
> **"**The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.*
>
> "Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Forrester* at 228.
>
> "In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts-like many others involved in supervising court employees and overseeing the efficient operation of a court-may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." *Forrester* at 229.

Local Rules in Texas are an Administrative Function

Texas statutory law regarding local rules of state district courts erases all doubt as to whether a local rule, including the 2003 Order supplementing the Local Rules Regarding Electronic Filing adopted in 1997, Exhibit "J," is an administrative (not judicial) entity. Sec. 74.091(a)(b) of the *Texas Government Code* requires that "[i]n a county with two or more district courts the judges of those courts shall elect a district judge as local administrative district judge." The administrative function is separated. Sec. 74.092(1) of the Code provides that the local administrative judge shall "implement and execute the local rules of administration." Implementation and execution of the local rules of *administration* is an *administrative* function. No absolute

judicial immunity can attach to this function because it is administrative, not judicial. There is no judicial immunity. *Mays* at 114.

Further, judicial immunity, even if it existed, does not bar claims for injunctive relief, or for attorney's fees for injunctive relief under 42 U.S.C. § 1983. *Pulliam v. Allen*, 466 U.S. 522, 541, 543 (1984).

The Plaintiff Does Not Claim RICO Liability as to Defendant Judge Edwards

Defendant Edwards has engaged in a course of conduct. As to Plaintiff McPeters alone, the Defendant describes, at page 12 of his own motion, "issuing the Order and causing it to be entered in *McPeters I and McPeters II."* Although the Order was "entered" after the fact by the District Clerk, the Defendant accepts responsibility for applying the 2003 Order to McPeters and others on multiple occasions, satisfying the Defendant's own definition of course of conduct by a RICO person. *See* Defendant's Motion to Dismiss, page 15. Defendant aided the E-file Enterprise and still does so. However, only LexisNexis will be named as a RICO defendat from whom RICO damages will be sought.

Second, the Defendant has participated in the E-filing Enterprise in addition to the foregoing conduct. As for a relevant time period, Plaintiff notes that the 2003 Order has been in place for approximately seven years and the contract between Defendant Montgomery County and Defendant Reed Elsevier has been in place for approximately three years. *See* Exhibits "B," and "R."

Third, Judge Edwards has threatened counsel for Plaintiff McPeters with a "show cause order," as recently as July 26, 2010. See Exhibit "O," p. 2.

Fact issues exist regarding the number of times the 2003 Order has been utilized to mandate the use of LexisNexis by civil litigants in the 9th District Court of Montgomery County, Texas and the memoranda, relevant to the mandate, involving Defendant Judge Edwards in his administrative capacity.

The Plaintiff has properly raised the issue of enterprise participation under the Defendant's own definition of that term. Further, "The continuity requirement [of a RICO pattern] is … satisfied where it is shown that predicates are regular way of conducting defendant's ongoing legitimate business …, or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243, 109 S.Ct. 2893 (1989)

Fourth, the Defendant need not assert that Defendant Judge Edwards has personally engaged in each activity of the enterprise, including use of the wires or mail. Defendant's denial of this non-existent element is not a basis for dismissal.

Judge Edwards claims no ongoing involvement in an enterprise because all he did was enter an order in 2003. When one compares that assertion with his web site link and fraudulent information on pricing (by concealment), Exhibit "N," one can easily determine that he is acting in concert with Reed Elsevier.

Judge Edwards' web site, shown in Exhibit "N," links his home page, page N-1, to page N-2 – "LexisNexis File & Serve eFile Pricing." The "url" link to LexisNexis brings up page N-10. One can only locate price information **after** becoming a LexisNexis subscriber.

Judge Edwards claims that the LexisNexis charges are not mandatory because any litigant can file a motion to avoid e-filing. This claims contrasts with the version of the 2003 Order attached to the July 26, 2010 Order on Failure to E-File:

> In short, parties will be presented with two options. They may either: 1) become a subscriber through the Internet to the e-file system or 2) bring their filings in the form of 3-1/2" IBM (or compatible) formatted disc to the public terminal located in the District Clerk's Office and upload the pleadings at no charge. [Exhibit "O," p. 6]

This paragraph is on the second page. On the first page [Exhibit "O," p. 5], under the bold letter heading of "**What Must be Filed Electronically,"** one finds the following

No pleadings or party-generated documents may be filed in paper form, but must be filed electronically through the e-file system, unless a document meets one of the exceptions named below.

The "leave of court" exception applies to particular documents, not to an exemption from e-filing. Only actions brought by the State are "exempt from e-filing."

As for the charges involved, Judge Edwards represents in the 2003 Order that "a minimal fee is assessed for each filing and service delivery made through the system." *See* Exhibit "A," p. 2. While the term "minimal" means different things to different people, this representation is fraudulent. The charges are not minimal under any standard. *See* Exhibit "L."

In fact, a "person" cannot be an "enterprise" which, in turn, is not the same as "racketeering activity." The Supreme Court explained the phrase "*Beyond that inherent in the pattern of racketeering activity."*

> This phrase may be interpreted in least two different ways, and its correctness depends on the particular sense in which the phrase is used. If the phrase is interpreted to mean that the existence of an enterprise is a separate element that

> must be proved, it is of course correct. As was explained in *Turkette*, the existence of an enterprise is an element distinct from the pattern of racketeering activity and "proof of one does not necessarily establish the other."
>
> *Boyle v. United States*, ____ U.S. _____, 129 S.Ct. 2237, 2245-46 (2009).

Boyle also states:

> We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette*, an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods-by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.
>
> *Boyle v. United States*, ____ U.S. _____, 129 S.Ct. 2237, 2245-46 (2009).

The Supreme Court further emphasized that association with an enterprise is sufficient under the RICO statute. "RICO makes it 'unlawful for any person employed by or *associated with any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.'" 18 U.S.C. § 1962(c) (emphasis added). *Boyle* at 2243, emphasis in original.

Additionally, a RICO person need not personally participate in all stages of activity of the enterprise in order for continuity to be found. "Requirement of continuity of personnel for enterprise under this chapter is not absolute; requirement may be met

even where some changes in personnel occur and where different individuals manage the affairs of the enterprise at different times and different places; the determinative factor is whether the associational ties of those charged with a violation of this chapter amount to an organizational pattern or system of authority." *U. S. v. Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982), certiorari denied 103 S.Ct. 739, 459 U.S. 1110.

As for particular predicate acts, the Plaintiff notes that Defendant has sought immunity on the basis of his entry of the 2003 Order, and related orders, on the electronic e-file system, thus using the wires. If this is true in multiple cases (and this certainly appears to be so, though an administrative function), Defendant has participated in predicate acts as an individual associated with an enterprise which, with LexisNexis, was then engaged in a pattern of racketeering activity. Dismissal of the Plaintiff's claims is hardly the correct remedy.

It is **illegal** for Judge Edwards to order Barbara Adamick to reject pleadings, which is her statutory duty to accept.

The Plaintiff Has Properly Alleged Enterprise, Racketeering Activity and Fraud

Defendant argues that Defendants are not an enterprise because they are not a continuing unit, not an association-in-fact, not a continuing enterprise, and that the Plaintiff offers only conclusory statements on these elements.

The Second Amended Complaint specifically states facts within the categories of "pattern of racketeering," "continuity," and "legal injury." *See* Second Amended Complaint, pages 18-21. Defendant is certainly entitled to deny the allegations and, under Rule 56, file a motion for summary judgment, after adequate time for discovery,

that includes admissible evidence leaving no genuine issue of material fact. However, the claim that the Plaintiff has not stated any claim under which relief can be granted is incorrect.

The Defendant supplies general and misleading argument as to the need for separation of the enterprise and pattern of racketeering activity, inferring that two separate *entities* must be shown. This argument would exclude from RICO any combination of existing entities formed for the purpose of engaging in exactly the activity that RICO was enacted to address. Actually, the separation is simply a matter of the elements which must be alleged. A Plaintiff must allege the existence of an enterprise by stating facts consistent with the definition of enterprise, and must (separately) do the same regarding pattern of racketeering activity. The Plaintiff has done so.

The term "racketeering activity" is defined to include any act which is indictable under 28 U.S.C. §1343 (relating to wire fraud) or §1341 (relating to mail fraud). *See* 18 U.S.C. §1961(1)(B). Section 1343 is satisfied if a defendant has devised a scheme or artifice to defraud, or for obtaining money by means of false or fraudulent pretenses or representations and uses the Postal Service for that purpose. Section 1341 is satisfied if a defendant uses electronic (wire) communication. LexisNexis has directly engaged in racketeering.

Defendant's conduct and participation in the fraud of others is stated in detail at pages 44-47 of the Second Amended Complaint, satisfying Rule 9(b), and is discussed more fully below.

The term "enterprise" is defined to include a group of individuals associated in fact although not a legal entity. A governmental entity may constitute "enterprise" within meaning of Racketeer Influenced and Corrupt Organizations Act (RICO). *U.S. v. Freeman*, 6 F.3d 586 (9th Cir. 1993), certiorari denied 114 S.Ct. 1661, 511 U.S. 1077, certiorari denied 114 S.Ct. 2177, 511 U.S. 1147, 128 L.Ed. 896.

Ironically, even the Office of the Judge of Seventh Judicial Circuit has been held to be an "enterprise" for RICO purposes. *U.S. v. Grubb*, 11 F.3d 426 (4th Cir. 1993), habeas corpus denied 859 F.Supp. 227, affirmed as modified 65 F.3d 167.

The Plaintiff Has Properly Alleged Conspiracy and Fraud

The allegedly fraudulent acts of the enterprise are set forth in the Second Amended Complaint at pages 44-47. Allegations specific to Defendant Judge Edwards are found at paragraphs 227-229 and 239-242. Defendant Edwards has concealed the 2003 Order and LexisNexis charges to litigants. See Exhibit "N." He had a duty to disclose both.

> A duty to speak arises by operation of law when (1) a confidential or fiduciary relationship exists between the parties; or (2) one party learns later that his previous affirmative statement was false or misleading; or (3) one party knows that the other party is relying on a concealed fact, provided that the concealing party also knows that the relying party is ignorant of the concealed fact and does not have an equal opportunity to discover the truth; or (4) one party voluntarily discloses some but less than all material facts, so that he must disclose the whole truth, i.e., all material facts, lest his partial disclosure convey a false impression.
> *Union Pacific Resources Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001), citation omitted.

The elements of conspiracy are set forth with specificity at pages 48-51 of the Second Amended Complaint. Allegations specific to Defendant Judge Edwards are

found at paragraphs 248-251. Judge Edwards is not liable in fraud, but has participated with LexisNexis.

The Defendant's repeated assertions that the Plaintiff has failed to provide a factual basis for allegations, or has failed to satisfactorily explain allegations, are assaults upon the evidence, not the complaint. Such arguments are correctly resolved under Rule 56 after adequate time for discovery, not by summary dismissal based upon the denial of the allegations without documentary disclosure or any discovery at all.

For example, the Defendant argues at page 24 of his motion that the Plaintiff has yet to "describe how or when Judge Edwards met with the other co-conspirators." Discovery would be very helpful in this regard.

Injunctive Relief Under 42 U.S.C. §1983

The Defendant correctly cites the RICO statute for the proposition that injunctive relief shall not be granted unless declaratory relief is unavailable. The Plaintiff has requested a declaratory judgment at paragraph 281 of the Second Amended Complaint, in the alternative. The unlawful features of the 2003 Order and unilateral governmental practices of a private corporation, Defendant Reed Elsevier, would be the subject of the declaratory relief.

As for imminent harm and merely "speculative" future encounters with a judge (*see* Defendant's motion, pages 25-26), the Plaintiff respectfully notes that her state court lawsuit has been remanded by the Beaumont Court of Appeals to the 9th District Court, Montgomery County, Texas for further proceedings. *See McPeters, supra,* at *4. *See also* the July 26, 2010 Order of Judge Edwards, Exhibit "O," p.2.

Defendant Judge Edwards's Claims of 11th Amendment Immunity

The Defendant's 11th Amendment claims are based upon sovereign immunity and official capacity.

The threshold inquiry in a qualified-immunity analysis is whether Karen McPeters' allegations, if true, establish a constitutional violation. *Scott v. Harris*, 550 U.S. 372, 377, 127 S.Ct. 1769, 1774 (2004). The second inquiry is whether the constitutional right was clearly established, that is, whether it would be clear to a reasonable officer that her conduct was unlawful in the situation she confronted. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Defendants Edwards, Adamick, Montgomery County and LexisNexis knew, or should have known, that court filing fees are set by the state legislature. *Tex. Gov't Code* §51.317, § 51.318 and *Tex. Gov't Code* §101.061-101.0617.

Violation of Well Established Duties

The purpose of filing documents is to place them in the court's record of the lawsuit. *Todd v. Nello L. Teer Co.*, 308 F.2d 397, 400 (5th Cir. 1962). Therefore, it would be clear to a reasonable officer [Judge Edwards] that his direction to Barbara Adamick [to refuse all filings under the Texas Rules of Civil Procedure] was unlawful in the situation she confronted. *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Scott v. Harris*, 550 U.S. 372, 377, 127 S.Ct. 1769, 1774 (2007). "It goes without saying that every person is presumed to know the law." *Arsement v. Spinnaker Exploration Co., LLC*, 400 F.3d 238, 247 (5th Cir.

2005). This presumption certainly applies more forcefully to Judge Edwards than all other persons. The presumption that a government official knows the law will overcome the claims of ignorance or reliance upon the advice of others.

> Despite their insistence to the contrary, acceptance of defendants' contentions would constitute recognition of an ignorance or mistake of law defense to Federal and Texas Wiretap Act liability. As the district court noted, our court, at least implicitly, rejected such a defense in *Forsyth* ; and it has been rejected by numerous other courts. *E.g.*, *Reynolds v. Spears*, 93 F.3d 428, 435-36 (8th Cir.1996) (defendant's reliance on incorrect advice from law enforcement officer *not* defense to liability under Federal Act); *Williams v. Poulos*, 11 F.3d 271, 285 (1st Cir.1993) (rejecting good faith defense where defendant mistakenly believed use and disclosure authorized by statute); *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir.1992) ("defendant may be presumed to know the law"); ***179** *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir.1991) (rejecting "good faith" defense to Federal Act liability based upon mistake of law), *cert. denied*, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *United States v. McIntyre*, 582 F.2d 1221, 1224-25 (9th Cir.1978) (rejecting contention interception *not* "willful" because defendants believed in good faith, based on advice from a law enforcement communications technician, that their conduct was legitimate).
> *Peavy v. WFAA-TV, Inc*. 221 F.3d 158, 178-79 (5th Cir. 2000).

Defendant Edwards is presumed to have known that local rules may not conflict with the *Texas Rules of Civil Procedure*. *Texas Rule of Civil Procedure* 3a, addressing local rules, expressly provides that "any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located." Decisional law is consistent with this rule of procedure. "Rule 3a(1) requires that conflicts between local rules and the Rules of Civil Procedure be resolved in favor of the Rules of Civil Procedure." *Approximately $14,980.00 v. State*, 261 S.W.3d 182, 189 (Tex.App.-Houston [14 Dist.] 2008, no pet.)

The 2003 Order was administrative. It was a supplementation of the 1997 Local Rule (Exhibit "J") as to the 9th District Court and not specific to any particular person or

party. The 1997 local rule/order was expressly signed by Defendant Judge Edwards as *Administrative* Judge. *See* signature block, Exhibit "J," p. 5.

The 2003 Order was and is invalid and unlawful in numerous relevant respects. The Order says that "[n]o pleadings or party-generated documents may be filed in paper form," that "[a]nswers filed in paper form will not be accepted," and that "[t]he District Clerk shall not accept any pleading in paper form." The Order then provides that "[t]he District Clerk shall not accept any pleadings in paper form, and shall not use imaging technology to convert documents from paper to electronic form for the parties. Any documents submitted in paper form will be rejected by the District Clerk without further notice to submitting counsel. *Documents so rejected will be regarded as 'unfiled,' even if the clerk, in error, file-stamps the incorrectly filed documents."* (2003 Order, Exhibit "A," p. 2, italics in original)

Needless to say, this local rule has not been approved by the Texas Supreme Court. The Texas Government Code allows courts to adopt local rules governing electronic filing, but specifically requires that "[t]he rules **shall** be submitted to the supreme court for review and adoption as a part of the overall plan or procedure for the electronic filing of documents." *Tex. Govt. Code*, Sec. 51.087, emphasis added. The 2003 Order has not been submitted for review. Only the 1997 version has been submitted. *See* Exhibit "J."

As a *mandatory* administrative rule, the 2003 Order would likely be rejected based upon mandatory violation of the *Texas Rules of Civil Procedure*. *Texas Rule of Civil Procedure* 21 provides that "[e]very pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented

during a hearing or trial, **shall be filed with the clerk of the court in writing**…," emphasis added. *Texas Rule of Civil Procedure* 21b subjects an attorney to sanctions for not complying with Rule 21, above.

Texas Rule of Civil Procedure 74 provides that "[t]he filing of pleadings, other papers and exhibits **shall** be made by filing them with the clerk of the court…," emphasis added. Texas Rule of Civil Procedure 75 requires that all filed pleadings **shall** remain at all times in the clerk's office or in the custody of the court or in custody of the clerk…," emphasis added.

As explained by the statutory and decisional authority cited previously, a local rule may *not* conflict with the *Texas Rules of Civil Procedure* without approval of the Texas Supreme Court.

Further, Defendant Judge Edwards is presumed to know that only the district clerk may collect fees and charges from litigants and is presumed to know the provisions of the Texas Government Code regarding fees paid by civil litigants.

District court filing fees and transaction fees are set by the Legislature and set forth in three places within the Texas statutes. The fees are found in Chapters 51 and 101 of the Government Code and in Chapter 133 of the Local Government Code. At least twenty types of filings and post-filing transactions are enumerated. Defendant LexisNexis cannot set a fee when the Legislature has already done so. [Person affidavit, Exhibit "M."]

As for fees not expressly mandated by statute, the Legislature has provided in Chapter 51 of the *Texas Government Code* that "The district clerk shall collect the

following fees for services performed by the clerk…for performing any other service prescribed and authorized by law for which no fee is set by law, a reasonable fee." Section 51.319(3). The charges by LexisNexis are not charged or collected by the district clerk.

Similarly, Chapter 101 provides that "[t]he clerk of a district court shall collect fees and costs under the Government Code as follows:…for performing a service prescribed or authorized by law but for which no fee is set (Sec. 51.319, Government Code)…a reasonable fee." Sec. 101.0611(16)(D). As explained above, LexisNexis is not authorized to set or collect a filing or transaction fee.

However, there can be no fees by implication (such as delegating unfettered discretion to a private corporation to set and collect fees from civil litigants). The Texas Supreme Court disposed of this notion over sixty years ago.

> That the fixing of official fees is a matter of general legislation, and is a "subject" of general legislation within the meaning of Article III, Section 35, above, cannot be questioned. There are many such enactments in our statutes. These statutes have been strictly construed against allowing a fee by implication, as regards both the fixing of the fee and the officer entitled thereto.
> *Moore v. Sheppard*, 192 S.W.2d 559, 541 (Tex. 1946).

See also Person affidavit, Exhibit "M."

Defendant Judge Edwards as a Policymaker

Defendant Judge Edwards is a policymaker for Montgomery County and not just an independent agent of the State of Texas. Judge Edwards set policy for Montgomery County in his administrative capacity in 1997 **(Exhibit "J")** and more specifically in the

2003 Order **(Exhibit "A")**. Defendant Adamick claims to be following that policy or order. (Exhibit "O," p. 2.)

Defendant Judge Edwards is an administrative policymaker for purposes of this case. As a policymaker, Defendant Judge Edwards subjects Defendant Montgomery County to a policy which is actionable under 42 U.S.C. § 1983.

> The law is well-established that a municipality such as the County can be held liable for its policies and customs that engender constitutional deprivation, but that it cannot be held liable for the actions of its non-policy-making employees under a theory of *respondeat superior*. In *Webster v. City of Houston*, we concluded that an official policy consists of, among other things, "[a] policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." We have also held that sheriffs in Texas are final policymakers in the area of law enforcement. Therefore, it is clear that the County can be held liable for Harris's intentional conduct, to the extent it constitutes the "moving force" behind the alleged injury.
> *Williams v. Kaufman County*, 352 F.3d 994, 1013-14 (2003).

> As a result, Harris's actions as policymaker were undeniably the moving force behind, and the direct cause of, the violation of plaintiffs' constitutional rights, thereby establishing the County's municipal liability.
> *Williams* at 1014**,** citation omitted.

> It is well established that governmental liability under § 1983 must be premised on a government policy or custom that causes the alleged constitutional deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018 (1978). A policy may be a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the government's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir.2003). A custom is shown by evidence of a persistent, widespread practice of government officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents government policy. *Williams* at 1014.

It would be instructive to review the memoranda passing between the Defendants on this (and other) issues but the Defendants wish to substitute dismissal for disclosure.

Plaintiff's Constitutional Claims

Our first relevant inquiry is whether or not access to open courts is a fundamental right. The Texas Supreme Court has answered this question.

> The provision's [Article I, sec. 13] wording and history demonstrate the importance of the right of access to the courts. The provision's wording indicates the high value the drafters and ratifiers placed on the right of access to the courts. First, the language is mandatory: " *shall* be open" and " *shall* have remedy by due course of law." Further, it is all-inclusive: *all* courts" are to be open; "for *every* person"; for *all* interests, "lands" (real property), "goods" (personal property), "person" (body and mind), and "reputation" (good name); *at all times*, since there is no emergency exception. This all-inclusive language contrasts with the qualifying language used in other sections.
>
> *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex.1986), citations omitted, emphasis in original.

> The right to open courts is fundamental.

> The open courts provision's history also reflects its significance. It originates from Chapter 40 of Magna Carta, the great charter of English liberties obtained from King John in 1215: "To none will we sell, to none deny or delay, right or justice."
>
> *LeCroy* at 339, citation omitted.

> This right is a substantial state constitutional right. Because a substantial right is involved, the legislature cannot arbitrarily or unreasonably interfere with a litigant's right of access to the courts. Thus, the general open courts provision test balances the legislature's actual purpose in enacting a law against that law's interference with the individual's right of access to the courts. The government has the burden to show that the legislative purpose outweighs the interference with the individual's right of access. *LeCroy* at 341, internal citations omitted.

The right to open courts has never been abridged. "Every Texas Constitution has contained an open courts provision with the identical wording. Other Bill of Rights sections, in contrast, have been amended over the years." *LeCroy* at 341, internal citation omitted.

The Fifth Circuit has also held that the right to open courts is a fundamental right.

> Nevertheless, it is now a fundamental principle of due process and equal protection that once avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.
>
> *Miracle v. Estelle***,** 592 F.2d 1269, 1272, n. 6 (5th Cir. 1979), citations omitted.

Our second inquiry is whether or not mandatory extra-statutory filing fees violate the rights to equal protection and open courts. Unlike the mandatory charges set and levied by a private corporation in this case, with the approval of Defendant Judge Edwards and Defendants Montgomery County and its District Clerk, *LeCroy* involved a district court filing fee that was set by the Legislature. The fee at issue was held to violate the fundamental right of access to open courts because part of the fee did not go to the judiciary but to the general revenue fund (surely a legitimate state interest).

> The question here is whether a filing fee that goes to state general revenues is an arbitrary and unreasonable interference with the right of access to the court. Section 32's purpose in allocating $40 of the $75 filing fee to the state general revenue fund is "to generate revenue and to help finance state services."
>
> *LeCroy* at 341, internal citation omitted.

> The holding was unequivocal.

> The major defect with the filing fee is that it is a general revenue tax on the right to litigate: the money goes to other statewide programs besides the judiciary. Nearly all states with similar open courts provisions have held that filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional. *LeCroy* at 341, citations omitted.

The explanation was also unequivocal.

> The state argues that a tax on individual litigants is reasonable as long as the amount raised for general revenues is less than the amount spent from general revenues on the judiciary. This argument, however, uses the wrong perspective: a

> societal perspective. When individual rights guaranteed by the state constitution are involved, an individual rights perspective is used. From that perspective, litigants must pay a tax for general welfare programs as a condition to being allowed their right of access to the courts. This the open courts provision prohibits. *LeCroy* at 342.

In *LeCroy*, not even a legislative enactment, collection by a district clerk, and sharing of the revenues with the state general revenue fund could save the fees and charges from a successful open courts challenge. In the instant case, there is no legislative enactment, collection by a district clerk or sharing of revenues with the state.

The charges in question are set, levied and collected by Defendant Reed Elsevier, a private corporation, and retained by it, in whole or in substantial part, and made mandatory as to certain civil litigants by the Montgomery County District Clerk, who claims authority under the Defendant Judge Edwards's 2003 Order. Exhibits "L," and "M," Person affidavit.

The Constitutional violations described above and in the Plaintiff's Second Amended Complaint are actionable under 42 U.S.C. §1983 against Defendant Judge Edwards. No private cause of action will be asserted or required.

Plaintiff's Entitlement to Declaratory Relief

In the alternative to a RICO cause of action, Karen McPeters is entitled to declaratory judgment relief.

Plaintiff's Standing to Sue for Others

Plaintiff Karen McPeters has suffered financial injury (Karen McPeters paid LexisNexis $444.71 for her Montgomery County litigation – McPeters I and II, and the charges are on-going) typical of her class, those seeking access to courts in Montgomery

County. See Exhibit "L." There are more than ten thousand similarly situated individuals and entities, based on the number of cases filed in the 9th District Court since the inception of the 1997 E-filing requirement, and joinder of all members is impracticable; there are questions of law or fact common to the class, namely how much was each litigant required to pay for on-line E-filing; and Karen McPeters will fairly and adequately protect the interests of the class.

Relief Requested

For the foregoing reasons and with the authority cited in support thereof, Karen McPeters requests that Judge Edwards' Amended Motion to Dismiss be denied.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Karen McPeters requests that Defendant Edwards' motion to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that each defendant is to receive a true and correct copy of this Response to Motion to Dismiss through the U.S. District Clerk's on-line filing system in accordance with Fed. R. Civ. P. 5(b)(2)(E) on this 13 day of August, 2010.

Robert L. Mays, Jr.