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 KAREN McPETERS' RESPONSE TO DEFENDANT REED ELSEVIER'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Pending Motions

This Response is filed in response to Defendant Reed Elsevier, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (adopting Defendant's initial Motion to Dismiss and Brief in Support).

This response will address the motions and issues in the order set forth above. 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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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, 167 L.Ed.2d 929 (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, 173 L.Ed.2d 868 (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). 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).
>
> *Clancey v. City of College Station*, 2010 WL 1268083 at *2 (S.D. Tex. 2010)

The Fifth Circuit has flatly held that "[m]otions 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 at *3 (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).

> [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 served discovery or taken a single deposition. The Defendants has not furnished any documents in compliance with Rule 26(f) other than the ostensibly favorable exhibits already filed in support of their motions 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, and charges $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 they 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 liability, immunity and damages are set forth below.

1. Correspondence between Montgomery County and Reed Elsevier on fee collection and setting of fees. Exhibit "B," p. 17.

2. The amount of money paid by Reed Elsevier to Montgomery County and the allocation of those funds. Exhibit "B," p. 7.

3. The availability and utility of the access terminal in the office of the Montgomery District Clerk. Exhibit "A," p. 2, and Exhibit "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. Exhibit "A," p. 1.

6. Minutes of meetings of the Montgomery County Commissioners Court that establish whether the involvement of Judge Edwards in the mandate of E-filing was administrative or judicial.

7. Instructions and memoranda to and from 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. Exhibit "A," p. 2, and Exhibit "C."

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

9. Memoranda to or from Reed Elsevier 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 judicial or legislative 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 randomly 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 civil filing fees and other charges prior to the use of E-filing.

15. Filing fees and transaction charges of E-filing providers in 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.

18. The correct contract between LexisNexis and Montgomery County because LexisNexis denies Exhibit "B" is the effective agreement between the parties. *See* LexisNexis' initial motion to dismiss, p. 3, fn. 4 [Doc 22, p. 13, fn. 4]

19. 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. The procedure followed by the District Clerk in assigning and filing the 2003 Order in any case pending in the District Courts of Montgomery County.

21. 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."

22. Information on the reason for the different versions of the 2003 Order in Cause No. 09-11-11474-CV. *See* Exhibit "A," pp. 1-2 and Exhibit "G," pp. 4-5.

Defendant Reed Elsevier

Defendant's second motion discusses subject matter jurisdiction and the RICO allegations of enterprise, including association-in-fact. Defendant's initial motion discusses these and other issues. The subject matter jurisdiction issue and RICO allegations will be considered first.

Subject Matter Jurisdiction

The district court has original subject matter jurisdiction of all civil actions arising under the Constitution or laws of the United States. *See* 28 U.S.C. §1331. The district court also has original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right privilege or immunity secured by the Constitution of the United States providing for equal rights of citizens. *See* 28 U.S.C. §1343(a)(3). This court therefore has original jurisdiction of Plaintiff's claims under 18 U.S.C. §1961 *et. seq.*, ("RICO"), 42 U.S.C. §1981 *et. seq.*("1983"), and under the United States Constitution (separation of powers, equal protection).

Accordingly, this court also has jurisdiction of any claim arising out of a violation of the Texas Constitution when that violation is actionable under the 14th Amendment to the U.S. Constitution. Defendants, jointly and severally, violated a **fundamental right** of Karen McPeters by raising unlawful financial barriers to her right to open courts. Karen McPeters' has a substantive due process claim under the 14th Amendment.

Additionally, because this court has original jurisdiction of the federal law claims as set forth above, the court also has supplemental jurisdiction over all other claims that are so related to claims in the action within the court's original jurisdiction and part of the same cause or controversy. *See* 28 U.S.C. §1367(b).

RICO: Enterprise and Association-In-Fact

Defendant argues that Defendants are not an enterprise because they are not a continuing unit and not an association-in-fact; Defendant seeks summary dismissal because "Plaintiff's allegations of hierarchy and the presence of a decision-making structure are fabricated." *See* Defendant's second motion, p. 6. At the outset, therefore, the Defendant acknowledges that the Second Amended Complaint states facts demonstrating a continuing unit and association-in-fact, but argues that the claim should be dismissed because the statements are false ("fabricated").

This is not the type of argument that allows outright dismissal under Rule 12(b)(6). Otherwise, any defendant who denies factual allegations in a complaint would claim a right to dismissal without engaging in discovery or disclosures under Rule 26.

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 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 1341 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 1343 is satisfied if a defendant uses electronic (wire) communications.

Defendants' alleged fraudulent conduct and participation in the fraud of others is stated in detail at pages 44-47 of the Second Amended Complaint.

The term "enterprise" is defined to include a group of individuals associated in fact although not a legal entity. A governmental entity may constitute an "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, 128 L.Ed.2d 378, certiorari denied 114 S.Ct. 2177, 511 U.S. 1147, 128 L.Ed.2d 896. Even the Office of 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 ongoing enterprise conclusion is appropriate because Defendants maintain they are not doing anything wrong. *Strain v. Kaufman County District Attorney's Office*, 23 F.Supp. 2d 685 (N.D. Tex. 1998); *Pan American Maritime, Inc. v. Esco Marine, Inc.*, 2005 WL 1155149 (S.D. Tex 2005).

A helpful statement of the law described above has been provided by the United States Supreme Court.

> 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.
> *Boyle v. United States*, ___ U.S. ____, 129 S.Ct. 2237, 2245, 173 L.Ed.2d 1265 (S.Ct. 2009).

In *Boyle*, the Supreme Court clearly explained that the separation of the enterprise from the racketeering activity does *not* mean that that separate collaborations must be shown. One need only separately prove an enterprise and a pattern of racketeering activity because these defined terms have different elements.

Boyle 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 we 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* at 2245.

Any combination that constitutes both an enterprise and a pattern of racketeering activity is a RICO entity. The fact that the evidence may overlap or appear to coalesce does not defeat a RICO claim. "We recognized in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise "may in particular cases coalesce." *Id.*

The Defendant relies upon this Court's opinion in *Rivera v. AT&T Corp.*, 141 F.Supp. 2d 719 (S.D. Tex. 2001), a case in which the Plaintiff failed to plead the collection of an "unlawful debt" and failed to allege usury under Texas law. *Rivera* at 725. The Plaintiff also failed adequately to plead "enterprise" and, on this element, the Court wrote:

> Plaintiffs' general allegation of an enterprise wholly fails the strict pleading requirements under RICO. *See* ***726** *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989) (asserting that "[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise"). Plaintiffs have alleged absolutely no specific facts to establish the existence of any RICO enterprise and the facts that have been alleged demonstrate that Defendants are not engaged in a RICO enterprise. *Id.*

More specifically, the Court noted that:

> All that Plaintiffs have alleged is the following, which appears twice in their complaint: At all relevant times Tele-Communications, Inc., AT & T Corporation, and Time Warner, Inc., each constituted an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a). Each enterprise is an ongoing organization. Each enterprise has engaged in, and its activities have affected interstate and foreign commerce. *Id.*

The Second Amended Complaint contains specific factual allegations, labeled by category, and not mere conclusory statements.

In *Rivera* this Court also observed that a RICO enterprise must be "an entity separate and apart from the pattern of activity in which it engages," citing *Atkinson v. Anadarko Bank & Trust, Co.*, 808 F.2d 438, 441 (5th Cir.1987). The Court found that "Plaintiffs have alleged no facts to suggest that Tele-Communications, Inc., AT & T Corporation, or Time Warner, Inc. exist as an entity apart from their business of providing cable services." *Rivera* at 726.

The explanation offered in the cited case is dispositive of the Defendant's motion to dismiss the Second Amended Complaint. The Fifth Circuit wrote in *Atkinson* that,

> The record here contains no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank. Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. *Atkinson* at 441.

In the Second Amended Complaint, Plaintiff has certainly established the existence of a "separate entity" (Reed Elsevier/LexisNexis) apart from the "bank" (Montgomery County). *Boyle, supra*, has further clarified the separate entity requirement. Moreover, the parties engage in numerous activities apart from the alleged enterprise on the part of each constituent entity.

As an example, LexisNexis provides continuing legal education and books for sale, such as tax planning for retirees. Montgomery County provides law enforcement services and collects taxes from its residents. Barbara Adamick issues citations, abstracts of judgment and writs of execution. Judge Edwards conducts hearings and trials.

Under *Boyle*, *Rivera* and *Atkinson* the Second Amended Complaint plainly alleges a continuing enterprise composed of entities with an existence and activities apart from the enterprise. As explained by the United States Supreme Court:

> That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government. *U.S. v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524 (1981).

The Second Amended Complaint specifically and factually alleges both the enterprise and racketeering elements of the RICO cause of action.

Supplemental Jurisdiction
Theft Liability Act, Fraud

Defendants violated the Theft Liability Act, *Tex. Civ. Prac. & Rem. Code* §134.001, *et. seq.* They deprived Karen McPeters of property by the unlawful appropriation of property without her effective consent. There was no effective consent because payments to LexisNexis were induced by deception or coercion. Exhibits "A," "B," "C," "K," and "L."

Judge Edwards unlawfully misrepresented his authority to issue the 2003 Order on E-filing, because the 2003 Order was, in effect, an invalid legislative act increasing filing fees already specified by the Legislature. Judge Edwards thus had no authority to issue his 2003 E-filing order, the effect of which was to mandate payment by litigants of the charges billed by LexisNexis.

Barbara Gladden Adamick stated that the E-filing order existed, and that Karen McPeters was mandated to use E-filing and pay the E-filing charges as statutory filing fees. Karen McPeters objected, but relied upon that misrepresentation in paying, through her agent and attorney, the illegal fees and charges of LexisNexis. *See* Document 13-9, p. 1, date 1/27/09. The misrepresentation was both a factual and proximate cause of Karen McPeters paying the bills from LexisNexis. *See* Exhibit "L."

The Montgomery County District Clerk further misrepresented E-filing by not E-filing a copy of Judge Edward's 2003 Order in Cause Number 07-09-09142. *See* document 13-2 filed herein. Barbara Gladden Adamick further misrepresented the law by refusing to file a document tendered to her in person; returning **unfiled** any document tendered to her by mail for filing, and returning a document **tendered to, and filed by, the District Clerk**, with a purported cancellation of the District Clerk file mark, and a letter directing the preparer of the document to file the document through LexisNexis. *See* Exhibits "C" and "D."

LexisNexis unlawfully billed Karen McPeters for E-filing and had no authority to do so because lawful charges are set out in the *Texas Government Code*. Defendant owed the duty to disclose the facts, including the 2003 Order, the unlawful charges planned by

LexisNexis and the amount of LexisNexis' charges. It concealed the information from Plaintiff, thereby violating its duty. *See* Exhibit "R."

> 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.

Equal Protection, Due Process and Open Courts

These constitutional issues must be analyzed together because they are intertwined in this case as a basis for liability under 42 U.S.C. §1983. In its initial motion to dismiss, Defendant advances several arguments which are circular, overly broad statements of constitutional review, or legally incorrect.

First, Defendant argues that the 2003 Order, Exhibit "A," signed by Defendant Judge Edwards creates different treatment of individuals. The different treatment disproves the "alike in all relevant respects" test for equal protection, so the Order is therefore valid. Such a circular argument validates *any* state action that wrongfully creates differences in treatment. In this case Karen McPeters belongs to the class of individuals seeking access to the courts.

Second, Defendant notes that the general rule applied in the review of equal protection claims is that a classification which does not target a suspect class need only be rationally related to a legitimate state interest. A "general rule" standard is often so

broad that it is no standard at all. The rationally related test is not reached when one violates a fundamental right, because the correct standard is strict judicial scrutiny.

As an example, since we acknowledge a legitimate state interest in public education, may we order the summary dismissal from the school system of the slowest 1/3 of all students (not a "suspect class") in order to lower class sizes, improve average test scores, reduce costs and encourage scholarship? This policy, when challenged, would fail, because it violates a fundamental right.

The general rule advanced as the correct test in this case is too general to be of use and, as is shown below, is incorrect because it is incomplete.

Third, Defendant's "general rule" argument misstates the law. Defendant repeatedly asserts that if a classification scheme does not involve a suspect class, the scheme is *prima facia* lawful if it is merely related to a legitimate state interest. Of course, this is an easy standard to meet.

However, equal protection and strict scrutiny applies to classifications affecting a suspect class *or* a fundamental right. The application of equal protection to fundamental rights is established by Defendant's cited Supreme Court authority.

> Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right **or** categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
> *Nordlinger v. Hahn, 505 U.S. 1, 10* (1992), citations omitted, emphasis added.

The Supreme Court has affirmed the application of equal protection to fundamental rights on numerous occasions.

> Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" **or** discriminates against a "suspect class," it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.
> *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457, 108 S.Ct. 2481 (1988), citations omitted, emphasis added.

> We have repeatedly held that "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.
> *Central State University v. American Ass'n of University Professors*, 526 U.S. 124, 127-28, 119 S.Ct. 1162 (1999), citations omitted.

> The Texas Court of Criminal Appeals has applied the same standard:

> A statute is evaluated under "strict scrutiny" if it interferes with a "fundamental right" **or** discriminates against a "suspect class." Otherwise, the challenged classification in a statute need only be "rationally related to a legitimate governmental purpose" to survive the equal protection challenge (the "rational basis" test).
> *Cannady v. State***,** 11 S.W.3d 205, 215 (Tex. Crim. App. 2000), emphasis added.

> Our first relevant inquiry thus becomes 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 339, internal citation omitted.

Our second inquiry is whether or not extra-statutory filing fees violate the rights to equal protection and open courts. Unlike the charges levied by the Defendant (a private corporation) in this case, *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 levied and collected by Defendant Reed Elsevier, a private corporation, and retained by it, in whole or in substantial part. Exhibit "B," "K" and "L."

Defendant has cited no case, and Plaintiff has found none, authorizing a private entity to set and collect fees and charges normally set by the Legislature or holding that such fees and charges do not squarely implicate a fundamental right. Accordingly, we do not reach the issue of "suspect class," rationality, or legitimate state interest.

In fact, this issue was litigated in Texas after *LeCroy* and with the same result. In *Dallas County v. Sweitzer***,** 881 S.W.2d 757 (Tex. App.-Dallas 1994, writ denied), a litigant sued the County alleging it overcharged and collected fees at filing not authorized by law. The court of appeals correctly followed *LeCroy*.

> It [the fee] is unreasonable and arbitrary because it is a general revenue tax on the right to litigate. The money collected can go to programs other than the judiciary. It is immaterial that the State spends money from the general revenue fund on the judiciary. *Dallas County* at 765, internal citations omitted.
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> The Fifth Circuit has also held that the right to open courts is a fundamental right.
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> 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.

Defendants cannot discriminate against Karen McPeters and similarly situated civil litigants by requiring them to E-file and pay money, while others need not E-file, abridging the fundamental right of access to open courts. Note also that existing case law concerning equal rights (equal protection) relates to either the application of legislative enactments, or administrative agency actions.

Rational Basis

Because the right of access to open courts is a fundamental right, a violation is determinative of entitlement to remedy under 42 USC §1983. The court need not proceed to the rational basis argument. Thus, *Allred's Produce v. U.S. Dept. of Agriculture*, 178 F.3d 743, 748 (5th Cir. 1999), *Romer v. Evans*, 517 U.S. 620, 631 (1996); *M.L.B. v. S.L.J.*, 519 U.S. 102, 115-116 (1996); and *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326 (1992), cited by Defendants, are not on point. Even if one examines the rational basis test, Judge Edwards' actions fail because there was no legislative delegation of administrative authority to Judge Edwards.

Allred's Produce was the review of an administrative agency's choice of sanctions. Allred's Produce claimed selective (discriminatory) enforcement under the Perishable Agricultural Commodities Act (for failure to make prompt payment).

In *Romer*, the specific quotation at 517 U.S. at 631, is: "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (citations omitted)

In *M.L.B. v. S.L.J.*, the equal protection scrutiny applied to the $25.00 filing fee (enacted by the Oregon legislature). The court found the applicable equal protection standard "is that of rational justification," a requirement we found satisfied by Oregon's need for revenue to offset the expenses its court system." *M.L.B.* at 115-116. The focus is on the legislative enactment or a delegation of its authority.

Defendant Judge Edwards may not classify any person, such as divorce actions to be resolved within 90 days or adoption actions. The judiciary may simply determine whether or not a classification impermissibly violates equal protection. One may not determine the classification (legislation) and then rule on its validity (judicial).

Finally, in *Nordlinger*, 505 U.S. at 15, the Supreme Court actually wrote:

> To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S., at 179, 101 S.Ct., at 461. See also *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969) (legitimate state purpose may be ascertained even when the legislative or administrative history is silent). Nevertheless, this Court's review does require that a purpose may conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decision maker.

> *Allied Stores of Ohio, Inc. v. Bowers*,16 358 U.S. 522, 528-529, 79 S.Ct. 437, 442, 3 L.Ed.2d 480 (1959). See also ***2335** *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 1083, 67 L.Ed.2d 186 (1981) (classificatory scheme must "rationally advanc[e] a reasonable and *identifiable* governmental objective" (emphasis added)).

Ironically, the *Nordlinger* opinion emphasizes McPeter's argument as to separation of powers.

> As a general rule, legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Nordlinger* at 10.

The denial of equal protection in this case was not by an act of the legislature, but by an administrative act coupled with unilateral delegation of purported power to a non-governmental entity to set and collect unlawful charges.

Karen McPeters has found no case, and knows of no case, in which the rational relationship test for classification is discussed in anything other than the context of a legislative enactment. The courts indeed may consider whether or not an administrative enactment is actionable. But, Judge Edwards' 2003 Order is not a legislative enactment, does not set any fee, and is not directed to Defendant Reed Elsevier.

Due Process

The Defendant's own authority is once again dispositive in favor of the Plaintiff's position. The initial motion to dismiss cites authority at page 7, fn. 9 for the proposition that a due process claim must be premised upon the violation of a fundamental right. The

right to unimpeded access to open courts is a fundamental right. LexisNexis requires litigants to pay charges – violating their unimpeded access to open courts.

Open Courts

In applying the Texas Constitution, Texas courts have held that even the legislature may not restrict access to the courts. Co-Defendant Montgomery County misquotes *Federal Sign*. In *Cronen v. Davis*, 2007 WL 765453 at *3 (Tex. App.-Corpus Christi 2007) the court stated:

> The Open Courts provision provides that "[a]ll courts shall be open, and every person for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* The Texas Supreme Court has held that the Open Courts provision affords individuals three distinct protections. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex.1997).
> First, courts must actually be open and operating. *Id.* (citing *Runge & Co. v. Wyatt*, 25 Tex. 291, 294 (1860)).
> Second, citizens must have access to the courts unimpeded by unreasonable financial barriers. *Id.* (citing *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex.1986)).
> Third, the law must afford meaningful legal remedies to our citizens, so the Legislature may not abrogate the right to assert a well-established common law cause of action. *Id.* (citing *Tex. Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex.1993); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-57 (Tex.1990)). In addition, the Texas Supreme Court has held that the Open Courts provision "applies only to statutory restrictions of a cognizable common law cause of action." *Id.* (quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex.1995); *Moreno*, 787 S.W.2d at 355-56).

The claims in this case are based on the second distinct protection, not the third that Defendant Montgomery County discusses.

Increases to filing fees have previously been limited under Article I, Sect. 13 of the Texas Constitution. *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). Citizens must have access to those courts unimpeded by unreasonable financial barriers, so that the legislature cannot impose a litigation tax in the form of increased filing fees to

enhance the state's general revenue. *Tex. Assoc. of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993). The prepayment requirement … like the filing fees … constitutes an unreasonable interference with access to the courts. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 (Tex. 1993).

The "All Relevant Aspects Alike" Requirement

According to the Supreme Court, the Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger* at 10. The imposition of charges and fees by LexisNexis violates equal protection within Montgomery County in two respects.

First, not all district courts require litigants to use the expensive E-filing process required by Judge Edwards in the 9th District Court under the terms of the 2003 Order. *See* Exhibit "A." Those subjected to the E-filing expenses are determined by a random assignment by the office of the District Clerk of cases to 2 of the 7 district courts in Montgomery County – Judges Mayes and Edwards.

Second, lawsuits filed under the Texas Family Code are treated differently than lawsuits filed under other statutes or common law. The 2003 Order results in an arbitrary discriminatory classification of litigants who are in all *relevant* aspects alike because all seek access to the courts.

Section 1983 Conspiracy

The Defendant correctly notes, at page 9 of its initial motion, that a conspiracy claim cannot independently support a cause of action under Section 1983 and the Plaintiff must assert that the Defendants deprived her of rights secured by the Constitution while

agreeing to perform an illegal act. The Second Amended Complaint demonstrates that Defendant made an agreement, in writing, with Montgomery County, some four years after Judge Edwards's February 10, 2003 Order. *See* Exhibit "B," dated Nov. 5, 2007.

The agreement did not allow Defendant LexisNexis to set, charge, collect and retain any fees, much less those greater than those set forth for district court clerks in the Texas Government Code. Specific acts satisfying the elements of a conspiracy, as set forth at 18 U.S.C. §1962(d), are listed at pages 48-51 of the Second Amended Complaint.

Defendant may not contend that the Plaintiff has failed to state a claim simply because Defendant denies some or all of the allegations in a complaint. Plaintiff's allegations are neither global nor conclusory. Defendant is free to deny that the allegations are correct, but cannot deny that the allegations exist in the complaint such that dismissal is an available remedy.

Links Between LexisNexis and Constitutional Violations

Defendant LexisNexis sets and collects fees and charges in violation of the Texas Government Code and levies transaction charges which directly violate the right to unimpeded access to open courts. The 2003 Order does not set *any* of the filing fees or transaction charges. The Order does not require LexisNexis to do anything. It was entered four years before LexisNexis' 2007 agreement with Montgomery County. *See* Exhibit "B."

District court filing fees and transaction fees are set by the Legislature and appear 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. *See* Exhibit "K," and "L."

As for fees not expressly mandated by statute, the Legislature has provided in Chapter 51 of the 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." *Tex. Gov't Code, Section 51.319(3).*

The charges by LexisNexis are not charged or collected by the district clerk. Defendant is not a deputy district clerk and has not taken the oath required to perform that function. *Texas Gov't Code* §51.309(a). Its invoices are not signed by a deputy district clerk. *Texas Gov't Code* §51.320. Its charges are not reviewed or set by any governmental actor.

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.

The Local Government Code contains no such provision and does not authorize a private corporation to set or collect any fee whatsoever. It is important to note that no fees may be set by implication. 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).

The 2003 Order has been used by the Montgomery County Commissioners to make an extra-statutory, unconstitutional delegation of governmental authority and allow LexisNexis to create unconstitutional barriers for certain litigants to open courts in Montgomery County. In fact, Defendant LexisNexis actually claims governmental immunity, at page 11 of its initial motion, on the ground of its "governmental function as the electronic clerk for Montgomery County." **While unlawfully performing this governmental function (a direct link, to say the least), LexisNexis sets fees and charges in a fashion declared unconstitutional by the Texas Supreme Court in *LeCroy*.**

Defendant then retains the funds—they are not even deposited into the general fund for judicial use. Exhibit "B," p. 7. Further, similarly situated litigants in other counties are not subjected to the gatekeeper function performed by LexisNexis.

E-filing is mandatory. *See* Exhibit "M," Person affidavit. Plaintiff McPeters has been injured. *See* para. 45, Plaintiff's Second Amended Complaint and Exhibit "L."

Defendant LexisNexis is directly linked to the conduct that subjects Defendants to liability under Section 1983.

Defendant's Claim of Immunity

While claiming not to be linked to unconstitutional denial of open courts and equal protection, Defendant argues for absolute immunity under the quasi-judicial doctrine, citing as authority an unpublished memorandum opinion of a magistrate. *Vernon v. Rollins-Threats*, 2005 WL 3742821 (N.D. Tex., 2005) A lengthy footnote in its initial motion demonstrates that judges and court personnel have immunity for acts committed in their official capacities, as do others compelled to act by court orders.

Vernon does not support the Defendant's position. Instead, the following passage is found. "Derived judicial immunity extends only to those officials whose "judgments are 'functionally comparable' to those of judges" and who "'exercise a discretionary judgment' as part of their function." *Vernon* at *4, citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, 432 n. 3, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993).

None of the authority cited by the Defendant suggests that it may unilaterally set and collect statutory fees and transaction charges. No document or exhibit shows that Reed Elsevier was ordered to set any fee or charge. Exhibit "A," the 2003 Order, does not order LexisNexis to do anything.

In Exhibit "B," the LexisNexis - Montgomery County agreement, LexisNexis only states (at para. 6.2): "LNFS [LexisNexis File & Serve] may terminate or suspend access rights for users of the File & Serve System who fail to pay all amounts owed to LNFS in a timely manner."

Exhibit "B," the contract referenced by Defendant, was between LexisNexis and the Montgomery County Commissioners. Defendant LexisNexis was never under a court order. Defendant has no derivative quasi-judicial immunity.

The Voluntary Payment Doctrine

Defendant next asserts that the voluntary payment of fees and charges by litigants provides a complete defense warranting dismissal. Once again, the authority offered by the Defendant destroys the argument the authority was offered to support.

First, the doctrine applies in cases arising under the theory of unjust enrichment. "The rule is a defense to claims asserting unjust enrichment; that is, when a plaintiff sues for restitution claiming a payment constitutes unjust enrichment, a defendant may respond with the voluntary-payment rule as a defense." *BMG Direct Marketing, Inc. v. Peake***,** 178 S.W.3d 763, 768 (Tex. 2005). The Plaintiff has not suggested that unjust enrichment forms a ground of recovery in this case.

Second, "[M]oney voluntarily paid on a claim of right, with full knowledge of all the facts, **in the absence of fraud, deception, duress, or compulsion**, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." *Id.*, citing *Pennell v. United Ins. Co.,* 150 Tex. 541, 243 S.W.2d 572, 576 (1951), emphasis added. The Plaintiff has alleged fraud, deception, duress and compulsion in the Second Amended Complaint.

Separation of Powers

Defendant LexisNexis relies upon *State v. Rhine*, 297 S.W. 3d 301 (Tex. Crim. App. 2009) as authority that judges have the power to appoint traditional judicial functions to others.

First, no judge appointed Reed Elsevier or LexisNexis to do anything. The 2003 Order mandates E-filing, not the provider or the fees to be collected by them. No judge set the fees and transaction charges that form an unconstitutional impediment under the open courts or equal protection provisions discussed herein.

Second, *Rhine* vitiates the very argument for which it is cited. "The legislature may delegate some of its powers to another branch, but only if those powers are not more properly attached to the legislature." *Rhine* at 306.

Filing fees in Texas are set by the Legislature in the Government Code. The Code sections and provisions are recited in the Second Amended Complaint. Fees and transaction charges are either set by the Legislature or, in limited cases, delegated to the office of the district clerk. The Legislature has not delegated any authority to LexisNexis, much less authorized its setting and collect of statutory filing and transaction fees as already codified by the Legislature.

State v. Rhine, 297 S.W.3d 301, 305 (Tex. Ct. Crim. App. 2009) discusses separation of powers.

As in *Rhine*, Judge Edwards unconstitutionally usurped the powers of the legislative branch of the Texas Constitution. The unconstitutional assumption of power

by Judge Edwards implicates Article II, § 1, of the Texas Constitution. That article provides that

> [t]he powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. McPeters agrees that this section permits the delegation of authority from the legislature to an executive-branch agency. McPeters' view is in accord with the precedent of the Court of Criminal Appeals and also that of the Texas Supreme Court.

> *See, e.g.*, *Ex parte Ferguson*, 112 Tex.Crim. 152, 15 S.W.2d 650 (Tex.Crim.App.1929); *Land v. State*, 581 S.W.2d 672 (Tex.Crim.App.1979); *Ex parte Leslie*, 87 Tex.Crim. 476, 223 S.W. 227 (Tex.Crim.App.1920). *See also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex.1997). As [the] Court stated in *Land v. State*, "[t]here are many powers which the Legislature may delegate to other bodies ... where the Legislature cannot itself practically or efficiently perform the functions required." *Land*, 581 S.W.2d at 673 (quoting *Texas National Guard Armory Board v. McCraw*, 132 Tex. 613, 126 S.W.2d 627, 635 (1939).)
>
> In *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex.Crim.App.1990), th[e] Court provided a test for determining when the separation of powers is violated. We have held repeatedly that the separation of powers provision may be violated in either of two ways. First, it is violated when one branch of government assumes, or is delegated, *to whatever degree*, a power that is more 'properly attached' to another branch. The provision is also violated when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers.
>
> *Id.* at 239 (emphasis in original; internal citations omitted).

Thus, if a state agency has been delegated a power that is more properly attached to the legislature, then the statute is unconstitutional. Likewise, there can be no constitutional delegation of powers by the legislature to the judiciary concerning filing

fees. The legislature has already set the amounts. And, in this case, the legislature did not even attempt to delegate its powers to Judge Edwards. He "assumed" the powers.

As soon as Judge Edwards mandated that almost every attorney in litigation in Montgomery County must use and pay for LexisNexis, he mandated that they (and their clients) pay additional filing fees. He mandated service charges; he mandated other costs for LexisNexis. This he may not do.

Powers Properly Attached to the Legislature

> The Texas Constitution vests law-making power in the legislature. TEX. CONST. art. III, § 1. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App.1991); *Copeland v. State*, 92 Tex.Crim. 554, 244 S.W. 818, 819 (Tex.Crim.App.1922). *See also Russell v. Farquhar*, 55 Tex. 355, 359 (1881). Only the legislature can exercise that power, subject to restrictions imposed by the constitution. TEX. CONST. art. II, § 1. These restrictions must be express or clearly implied. *Jones v. State*, 803 S.W.2d 712, 716 (Tex.Crim.App.1991) (citing *Gov't Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex.1963)).
> *Rhine* at 305.
>
> The legislature also declares the public policy of the state and may depart from established public policy, reshape it, or reform it. *State v. Dallas*, 319 S.W.2d 767, 774 (Tex.Civ.App.-Austin 1958) (citing *McCain v. Yost*, 155 Tex. 174, 284 S.W.2d 898, 900 (1955)); *Reed v. Waco*, 223 S.W.2d 247, 253 (Tex.Civ.App.-Waco 1949). It may do this as long as constitutional guarantees are not abridged. *Reed*, 223 S.W.2d at 253. The legislature may enact laws that enhance the general welfare of the state and resolve political questions, such as the boundaries of political subdivisions, subject to constitutional limits. *Carter v. Hamlin Hosp. Dist.*, 538 S.W.2d 671, 673 (Tex.Civ.App.-Eastland 1976); *see Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79, 28 S.Ct. 40, 52 L.Ed. 151 (1907).
> *Rhine* at 305-306.
>
> The legislature may delegate some of its powers to another branch, but only if those powers are not more properly attached to the legislature. For example, legislative power cannot be delegated to the executive [judicial] branch, either directly or to an executive agency [private company – Reed Elsevier]. The issue becomes a question of the point at which delegation becomes unconstitutional. The Texas Supreme Court has described the problem: "the debate over unconstitutional delegation becomes a debate not over a point of principle but over

a question of degree." *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d at 466. The Court, in *Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App.1978), stated that sufficient standards are necessary to keep the degree of delegated discretion below the level of legislating.

Rhine at 306.

Pleading Fraud With Particularity

Defendant asserts that the Plaintiff has not set forth a cause of action for fraud with sufficient particularity to satisfy the requirements of Rule 9(b). However, the Second Amended Complaint addressed this initial objection by providing particularity at pages 44-47 of the Second Amended Complaint. In the event that the court believes that fraud must be more specifically pled, without having an opportunity for discovery, plaintiff asks the court for permission to amend its complaint. *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1107-08 (9th Cir. 2003)(leave to amend should be granted if it appears that Plaintiff can correct the defect).

Summary

LexisNexis billings refer to filing fees and court fees. Their collection notices refer to statutory fees. Judge Edwards (on his web site) says that statutory filing fees are not included. According to Montgomery County, in Exhibit "P," LexisNexis charges are not taxable costs. Montgomery County says they are "convenience charges," by analogy. Only a District Clerk may charge and collect such a charge, and they must be reasonable. The E-filing Enterprise fails on both criteria. See Exhibit "Q," Comparison of District Clerk and LexisNexis Charges.

Relief Requested

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

WHEREFORE, PREMISES CONSIDERED, Plaintiff Karen McPeters requests that Defendant Reed Elsevier's motions 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 _13th_ day of August, 2010.

Robert L. Mays, Jr.