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 AMENDED RESPONSE TO DEFENDANT MONTGOMERY COUNTY'S AMENDED MOTION TO DISMISS

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

Pending Motion

This amended response is filed in response to Defendant Montgomery County's Amended Motion to Dismiss Plaintiff's Amended Complaint. The Defendant's Amended Motion does not address the sufficiency of Plaintiff's Second Amended Complaint, filed on June 6, 2010, pursuant to leave of court granted on June 30, 2010.

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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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). 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 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 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 it 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 served discovery or taken a single deposition. The Defendant has not furnished 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. 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. 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," which recites that LexisNexis will pay money to Defendant. Exhibit "B," p. 7.

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

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-- to decide to use LexisNexis, to review fees charged by that private corporation, and to discuss delegation of important duties of the District Clerk to a private corporation.

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 by LexisNexis 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 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.

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 also* Exhibit "A," pp. 1-2 and Exhibit "G," pp. 4-5.

Defendant Montgomery County and RICO Participation

Defendant Montgomery County first argues that RICO actions do not run against government entities, that there is no allegation of "enterprise," and that there is no allegation of "racketeering activity." Plaintiff's allegations of enterprise activity are found at pages 17-27 of the Second Amended Complaint.

While a government entity cannot, independently of its representatives, form the requisite intent to create liability, 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, certiorari denied 114 S.Ct. 2177, 511 U.S. 1147. The term "enterprise" includes governmental agencies or offices. *U. S. v. Clark*, 646 F.2d 1259 (8th Cir. 1981). The term "enterprise" includes public as well as private entities. *U. S. v. Brown*, 555 F.2d 407 (5th Cir. 1977), certiorari denied 98 S.Ct. 1448, 435 U.S. 904. A state or local government

office or organization may properly be charged as a RICO "enterprise." *U.S. v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), certiorari denied 106 S.Ct. 1499, 475 U.S. 1098.

County offices are within the definition of a RICO "enterprise." The county prosecutor's office was an "enterprise" within meaning of this chapter. *U. S. v. Altomare*, 625 F.2d 5 (4th Cir. 1980). A county board of tax appeals was an "enterprise" for purposes of RICO, including those defendants who were not actually employees of the board were nonetheless "associated with" the enterprise. *U. S. v. Lavin*, 504 F.Supp. 1356 (N.D. Ill. 1981).

The same is true of municipal entities. Municipal entities could be part of associated-in-fact enterprise charged under Racketeer Influenced and Corrupt Organizations Act (RICO); the city itself was not alleged to have formed an unlawful intent, and instead common purpose was imputed to the city by way of the individual defendants' control, influence, and manipulation of city for their illicit ends. *U.S. v. Cianci*, 378 F.3d 71 (1st Cir. 2004).

As an enterprise, Montgomery County engaged with Defendant Reed Elsevier who is perpetuating racketeering activity under the RICO statute. A corporation may conspire, even with its own officers, to conduct another enterprise's affairs through a pattern of racketeering activity and may, on that basis, be liable under RICO. *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989).

Thus, while Montgomery County is not a liable "person," it is an enterprise which may engage in racketeering activity with others, as in this case. The corporate defendant in this case is subject to a civil action under RICO.

Defendant Adamick and RICO Participation

Defendant next asserts that Plaintiff has failed to allege the elements of a RICO claim as to Defendant Barbara Gladden Adamick, the Montgomery County District Clerk. However, Plaintiff's Second Amended Complaint sets forth factual allegations demonstrating that Defendant Adamick participated in conducting the activities of an enterprise that is also engaged with a corporation (Reed Elsevier) in a pattern of racketeering activity. *See* paragraphs 20, 21, 22, 35, 38, 53, 55, 60, 70, 71, 73, 105, 116, 126, 127, 149, 230, 231, 252, 253, and 255 of the Second Amended Complaint.

At this stage of the case, Plaintiff has not even received any discovery responses or deposition testimony. Defendant Montgomery County's motion as to Defendant Adamick attacks the failure of proof more than a failure of factual allegations, thus seeking to summarily dispose of the case without providing documentary disclosure or discovery. Plaintiff's evidence is currently limited to public information and the exhibits which the Defendants have selected as evidence favorable to their motions to dismiss. The Plaintiff therefore respectfully urges the Court to deny dismissal without prejudice to a Rule 56 motion, after adequate time for discovery.

Section 1983 Claims and Defendant Adamick

Defendant Montgomery County next alleges that Defendant Adamick is protected by absolute immunity because she was only following the 2003 Order, Exhibit "A," entered by Defendant Judge Edwards. The Defendant does not allege qualified immunity, only derivative judicial immunity.

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).

For example, Defendant's own authority reveals the distinction. "Since the judge had used his discretion in setting the bail and Allen merely followed the judge's wishes, Allen derives absolute immunity from the judicial function of the act." *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001), citation omitted. Setting bail is plainly a judicial function. Mandating E-filing is administrative. No case has been cited for the proposition that management of district clerk filing practices 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 111.

Defendant cites recent 5th Circuit authority for the tests which determine whether acts are judicial in nature.

> This circuit has adopted a four-factor test for determining whether a judge's actions were 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.
> *Davis v. Tarrant County*, 565 F.3d 214, 222 (5th Cir. 2009).

As to Defendant's judicial immunity claim, 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 v. White*, 484 U.S. 219, 228, 108 S.Ct. 538 (1988).

> 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.
> *Id*. 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. *Id*. 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).

Defendant Adamick has no derivative judicial immunity because persons with derived judicial immunity are only protected by judicial immunity for performing judicial acts. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002).

For derivative judicial immunity to apply in this context, the order being enforced or executed must be one for which the judge is absolutely immune from suit. This is not the case here, because the District Clerk's obligation to file pleadings is not discretionary and the District Clerk is not the subject of a judicial order.

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 that her conduct [refusing 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 a District Clerk 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 Adamick 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 "A," 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."

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," 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 Adamick 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. Exhibit "M," Person affidavit.

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." *Texas Gov't Code* § 51.319(3). The charges by LexisNexis are not billed 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.

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 has long prohibited such a practice.

> 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 is not a basis upon which the Montgomery County District Clerk may participate in 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 to dismiss, on the ground of its "governmental function as the electronic clerk for Montgomery County." While unlawfully performing this governmental function, LexisNexis sets fees and charges in a fashion declared unconstitutional by the Texas Supreme Court in *LeCroy v. Hanlon,* 713

S.W.2d 335, 339 (Tex. 1986). Defendant LexisNexis then retains the funds—they are not even deposited into the general fund for judicial use. *See* Exhibit "L."

No such delegation or unsupervised private fee collection is authorized by the *Texas Government Code.*

Defendant Judge Edwards as a Policymaker

Defendant alleges that Judge Edwards is not a policymaker for Montgomery County but is an independent agent of the State of Texas. However, Defendant has also contended, at page 17 of its amended motion, that "[t]he decision as to which cases are designated as E-file can only be made by a judge" and "[o]nly a judge can make that decision, not the County and not the District Clerk."

Defendant Adamick claims derived immunity on the ground that Defendant Judge Edwards set policy for Montgomery County, specifically for the District Clerk, in the 2003 Order. Defendant Adamick claims to be following that policy or order. 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.

Who in Montgomery County decides which cases are subjected to the expenses of E-filing? Who decides which cases are assigned to the two judges who mandate E-filing for most civil litigants? 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.

Montgomery County and Equal Rights, Open Courts, and Due Process

Defendant first contends that this case does not involve a classification scheme that burdens a fundamental right. The test is correct but the conclusion is mistaken.

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 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 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 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. Exhibit "M," Person affidavit.

Interestingly, the contract between Montgomery County and Defendant Reed Elsevier expressly disclaims agency. Exhibit "B," p. 12, para. 13.7. The 2003 Order, which provides for agency in the local rule on electronic filing, was signed four years before the contract was created and was superseded by the new document. If Defendant Reed Elsevier is not agent of Montgomery County, to whom is the mandatory E-filing process being assigned? It appears from the documents provided by the parties that certain civil litigants are being charged "fees" by an entity which, according to the parties' own contract, is *not* an agent of the county. No Texas statute allows this process or this result.

The statutes cited by the Plaintiff are expressly to the contrary, with all charges and collections referenced only to the district clerk or clerk of the court. Litigants' rights of equal protection and open courts are directly impacted by the purported delegation of authority by Montgomery County in contravention of the Texas Government Code.

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.

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

Thus, Defendant's cited authority -- *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)) is not on point, because the issue in this case is not legislative delegation of authority to Judge Edwards.

Defendant Judge Edwards may not classify any persons. 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).

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) Judge Edwards' 2003 Order is not a legislative classification, does not set any fee, and is not directed to Defendant Reed Elsevier.

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. Again, 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 (legislative) 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 governmental power to a non-governmental entity to set and also collect unlawful charges from civil litigants in two of Montgomery County's seven district courts.

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 – a statute. Judge Edwards' 2003 Order is not a legislative enactment.

Due Process

The Defendant also argues that due course of law is not an issue because no deprivation of life, liberty, or property is involved in this case. However, the issue is one of due process. Reed Elsevier's 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.

Open Courts

In applying the Texas constitution, Texas courts have held that even the legislature may not restrict access to the courts. 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).

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. Defendant Montgomery County does not argue that the civil litigants at issue are not similarly situated or not alike in all relevant aspects.

Montgomery County and Separation of Powers

> 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 to 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. *See* Exhibit "L." Further, similarly situated litigants in other counties are not subjected to the gatekeeper function performed by LexisNexis.

Violation of Statutory Duties

Defendant Montgomery County correctly sets forth the provisions of the Texas Civil Practice and Remedies Code violated by Defendant Adamick. According to Section 7.001(a) of the Code, a clerk who neglects or refuses to perform a duty required under the Texas Rules of Civil Procedure is liable for actual damages. As explained previously, Defendant Adamick neglected or refused to comply with Texas Rules of Civil Procedure 21, 74 and 75 by refusing to accept and maintain filings by litigants under those rules.

Class Certification

The Plaintiff will timely file a separate motion for class certification under Fed. R. Civ. P. 23 if provided adequate time for discovery. The Defendants have thus far declined to provide disclosure of documents other than the exhibits they have selected for filing in support of their motions to dismiss.

Punitive Damages

Plaintiff McPeters has set forth the basis for punitive damages, if any, in her Third Amended Complaint.

Motion for More Definite Statement

The Plaintiff will promptly comply with any order of the Court and respectfully seeks disclosure of documents for this purpose. Further, the Plaintiff respectfully directs the parties to the Second Amended Complaint, already filed with leave of this Court.

Relief Requested

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

WHEREFORE, PREMISES CONSIDERED, Plaintiff McPeters requests that Defendant Montgomery County and Barbara Adamick's 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 _13th_ day of August, 2010.

Robert L. Mays, Jr.