

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

KAREN MCPETERS, individually, and on	§	
Behalf of those individuals, persons and	§	
entities who are similarly situated,	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. 4:10cv1103
	§	
THE HONORABLE FREDERICK E.	§	
EDWARDS, BARBARA GLADDEN	§	
ADAMICK, DISTRICT CLERK;	§	
MONTGOMERY COUNTY, TEXAS, and	§	
REED ELSEVIER, INC., d/b/a	§	
LexisNexis,	§	
Defendants.	§	

DEFENDANTS', MONTGOMERY COUNTY AND BARBARA GLADDEN ADAMICK,  
REPLY TO PLAINTIFF'S AMENDED RESPONSE TO DEFENDANT MONTGOMERY  
COUNTY'S AMENDED MOTION TO DISMISS

TO THE HONORABLE DISTRICT COURT:

Defendants, Montgomery County and Barbara Gladden Adamick (“Defendants”), file this Reply to Plaintiff Karen McPeters’s Response to their Motion to Dismiss.

1. McPeters responds to Defendant Montgomery County’s Amended Motion to Dismiss Plaintiff’s Amended Complaint. She states that, “[t]he 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.” Plaintiff’s Amended Response at 1. Defendants’ “Amended Motion to Dismiss” was filed on June 1, 2010, and designated as Document 13.

2. Apparently, McPeters believes that the Defendants did not file a motion to dismiss her Second Amended Complaint. McPeters is wrong. Montgomery County and Adamick filed their “Motion to Dismiss Plaintiff’s Second Amended Complaint for Failure to State a Claim and for

Lack of Subject Matter Jurisdiction and Brief in Support” on July 13, 2010 (Document 51). In fact, the motion to dismiss that McPeters responds to was terminated as moot by this Court on July 14, 2010, specifically because Defendants had filed another motion to dismiss in light of McPeters’s Second Amended Complaint. (See Document 57.) The July 14<sup>th</sup> Order also addressed LexisNexis’s first motion to dismiss (Document 22), but for some reason, Plaintiff managed to understand LexisNexis filed another motion to dismiss after the Second Amended complaint, and she responded to Defendants, LexisNexis’s and Judge Edwards’s motions to dismiss her Second Amended Complaint. *See* Plaintiff’s Responses, Documents 72 and 73. Thus, McPeters has failed to respond to Defendants’ Motion to Dismiss by August 15, 2010, as she was allowed to do in the Court’s Order of July 21, 2010 (Document 62) .

3. Nonetheless, Defendants file this reply to McPeters’s response.

4. McPeters admits that Montgomery County cannot be held liable under RICO, but she continues to argue that Montgomery County (and Adamick) is part of a RICO “enterprise.” *See* Plaintiff’s Response at 6-7 (Document 74). However, she still cannot show that an enterprise exists.

5. All of the Defendants, Montgomery County, Adamick, Judge Edwards and LexisNexis, have argued that McPeters has failed to sufficiently plead the existence of a RICO enterprise specifically because she has failed to plead “specific facts which establish that the association exists for purposes *other* than to simply commit the predicate acts.” *Elliott v. Foufas*, 867 F.2d 881 (5<sup>th</sup> Cir. 1989)(emphasis added). “If the association has as its *raison d’etre* a single, discrete goal toward which all its energies are directed, the association is not a RICO enterprise.” *In Re Mastercard Int’l, Inc.*, 132 F.Supp.2d 468, 484 (E.D. La. 2001)(citation omitted).

6. In her response to LexisNexis's motion to dismiss, McPeters addresses this argument by saying that she has, in fact, "established the existence of a separate entity" and, as support, goes on to describe *wholly* different functions each Defendant undertakes separate from their association-in-fact enterprise. *See* Plaintiff's Response to Defendant ReedElsevier's Motion to Dismiss Second Amended Complaint at 12 (Document 73).

7. McPeters has completely misunderstood the requirement of a separate existence. A RICO plaintiff must show that the association-in-fact exists separate and apart from the predicate acts, not that each unit functions separately from the other. *Whelan v. Winchester*, 319 F.3d 225, 229 (5<sup>th</sup> Cir. 2003). McPeters has merely alleged that each unit – Montgomery County, Adamick, Judge Edwards and LexisNexis – exist separately from the other units. She has not shown that the four defendants function as an association separate and apart from the predicate acts. Without such a showing, or even allegation, McPeters cannot show "enterprise" and her RICO claim fails to state a claim upon which relief could be granted. *See Whelan*, 319 F.3d at 229(allegation that RICO defendants had been in "several deals together" was speculative and not sufficient to support separate existence of association-in-fact beyond predicate acts); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5<sup>th</sup> Cir. 1987)(no evidence of any activity on part of enterprise other than mailing of allegedly false loan statements, the predicate mail fraud act); *Rivera v. AT&T Corp.*, 141 F.Supp.2d 719, 725-726 (S.D.Tex. 2001)(no facts to suggest defendants existed as an entity apart from their business of providing cable services). McPeters has failed to plead the existence of an "enterprise" and Defendants are entitled to dismissal of this claim.

8. In order to get around the unmistakable conclusion that Judge Edwards, and therefore, Adamick, are entitled to judicial/absolute immunity, McPeters now attempts to characterize

Judge Edwards' 2003 Order as a "Local Rule," to be implemented by the Local Administrative judge under Texas Government Code § 74.091(a) and (b). *See* Plaintiff's Response at 14 (Document 74). The basis of her assertion lies entirely on the fact that when the 1997 Local Rules were signed and adopted, they were signed as Judge Edwards as "Administrative Judge" of the Montgomery County Courts. *See* Plaintiff's Response at 13 (Document 74). However, the 2003 E-File Order – which applies only to cases filed in the 9<sup>th</sup> District Court – was signed by Judge Edwards as "Judge Presiding" in the 9<sup>th</sup> District Court. *See* Exhibit 2 to Defendants' Motion to Dismiss Plaintiffs Second Amended Complaint (Document 51-2). McPeters alleges no other facts to support her assertion, and offers even less support in her proposed Third Amended Complaint. *See* Proposed Third Amended Complaint, ¶ 182 (Document 70). Judge Edwards' action in issuing the 2003 E-File Order was not taken as the Administrative Judge, but simply as the presiding 9<sup>th</sup> District Court Judge. McPeters cannot allege facts to support her claim that the issuance of the E-File Order was an administrative task performed by Judge Edwards. Through three complaints, and now a proposed fourth, McPeters has failed to allege facts to overcome Judge Edwards's, and Adamick's, judicial immunity.

9. McPeters makes the conclusory assertion that judicial immunity does not bar claims for injunctive relief under 42 U.S.C. 1983 and cites to *Pulliam v. Allen*, 466 U.S. 522 (1984). Congress responded to *Pulliam* in 1996 and amended Section 1983 to specifically prohibit injunctive relief against judges unless a declaratory decree was violated or declaratory relief was unavailable. Federal Court Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3846 (Oct. 19, 1996); *LeClerc v. Webb*, 270 F.Supp.2d 779, 792-793 (E.D.La. 2003). McPeters failed to offer any allegations that a declaratory decree was violated or that declaratory relief was

unavailable. In her response to Defendants' motion to dismiss, McPeters fails to make any further response than citing to *Pulliam*.

10. Ignoring the clear precedent that a judge is not a policymaker for a county, McPeters makes the conclusory allegation that Edwards is an "administrative policymaker for purposes of this case." Plaintiff's Response at 17 (Document 74). She goes on to quote the law on how a governmental entity can be liable for a policymaker's actions. But, she cites no case law – and cannot – for the proposition that a Judge Edwards, a State District Court Judge, is a policymaker for Montgomery County for actions taken in his courtroom. Instead, she criticizes Defendants for seeking dismissal of this case. The law is clear: Judge Edwards does not make policy for Montgomery County.

11. The remainder of McPeters's rambling response addresses her claims under the Texas Constitution. Defendants reiterate their arguments made in their motion to dismiss. McPeters is clearly not entitled to damages for claims made under the Texas Constitution. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147 (Tex. 1995). As for her claims for injunctive relief, they are based on the 2003 E-File Order and the alleged unconstitutional classification of litigants made in that order. The decisions made by Judge Edwards that are reflected in that Order were his and his alone. None of those decisions were made by Montgomery County or Adamick.

12. Defendants are concerned by McPeters's counsel's actions in this case. Instead of filing a response to Defendants' currently pending motion to dismiss, which the Court noted had been filed, he filed a response to the previous motion to dismiss. Thus, Defendants are concerned that he will ask for leave to respond to the pending motion to dismiss, even though the Court already gave him more than ample time to respond and he managed to respond to LexisNexis's and Judge Edwards's pending motions. McPeters's counsel has filed yet another motion to amend

the complaint, an amended complaint he apparently started working on it not soon after his Second Amended Complaint was granted. *See* Exhibit 1, Plaintiff's Initial Disclosures, p. 19 of 40. Thus, Defendants respectfully request the Court not allow Plaintiff anymore time to respond to the Motions to Dismiss.

### CONCLUSION

13. McPeters has wholly failed to state any claims against the County and Adamick, federal or state, upon which this Court can grant relief. Thus, the Court should grant the County's and Adamick's Rule 12(b)(6) Motion and dismiss all of McPeters's claims against them.

Respectfully submitted,

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**Certificate Of Service**

I hereby certify that on Monday, August 23, 2010, a true and correct copy of the foregoing instrument was forwarded via electronic delivery pursuant to local rules, *to-wit*:

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